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FINANCIAL REMEDIES JOURNAL

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Mr Justice Peel

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The Other Half
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Contents

169 Chair's Column
HHJ Edward Hess

170 The Financial Remedies Court: A Year in Review
The Hon. Mr Justice Peel

174 'An ascent so steep as to make a meteor blush' – The valedictory for the Honourable Mr Justice Mostyn, 3 October 2023
Samantha Hillas KC

176 Financial Remedies: The Law Commission's Scoping Project
Professor Nicholas Hopkins, Christine Gentry and Beth Payne

179 *Hasan* – The *Barder* Conundrum – A Final Word (We Promise)
Joseph Rainer and Jennifer Lee

185 Are We Clear? Transparency and the TIG Financial Remedies Sub-Group Report
Samantha Hillas KC and Emily Ward

188 Just Deserts? Unjust Enrichment for Family Lawyers
Charlotte John

192 The Jurisdiction of the Family Court to Determine Property Disputes in Favour of Third Parties
HHJ Jane Evans-Gordon, Nicholas Allen KC and Rhys Taylor

199 To Advise or Not to Advise – An Abundance of Caution? What Limitations Can Be Imposed and What are the Parameters of a Family Law Solicitor's Duty?
Timothy Evans and Olivia Longrigg

203 The *Thwaite* Jurisdiction – A Stay of Execution?
Nicholas Allen KC and Philip Tait

208 Remarriage: Avoiding the Elephant Trap
Cordelia Williams and Claire Howard

212 The Pensions Ombudsman for Family Lawyers
Rhys Taylor

217 Child Maintenance in Cases of Equal Shared Care
Stuart McGhee and Mark Ablett

221 Non-disclosure, Occupation Orders and Transfers of Tenancy
Gwynfor Evans

227 Spousal Maintenance By Formula: The Canadian Experience
Michael Allum and Cléa Amundsen

231 The Other Half
Andrew Hogan

234 *AS v CS*: What are the Consequences if the Court Has *Not* Mandated a Private FDR?
Nicholas Allen KC

236 DR Corner: FPR Part 3 – Out-of-Court Dispute Resolution Options – Perils and Possibilities
Karen Barham

239 Tech Corner: NeedsMet
Alex Woolley

241 Money Corner: Welcome Change to Capital Gains Tax Rules on Divorce
Simon Denton

243 Book Review: *Dictionary of TLATA and Inheritance Act Claims*
Byron James

245 Financial Remedies Case Round-Up
Polly Morgan

248 The Summary of the Summaries
Henry Pritchard

252 The *Financial Remedies Journal* 2024 Undergraduate Essay Competition – Watch this Space!

253 Interview with David Hodson
Rhys Taylor

Chair's Column

HHJ Edward Hess

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

Once again, I am very pleased to commend to you another issue of the *Financial Remedies Journal* packed with compelling and engaging material. Peel J looks back on his first year in charge of the Financial Remedies Court (FRC), finding it for the most part in good health, and looks forward to the challenges and opportunities which lie ahead. Firmly in the in tray for him (and for me and many others) is the development of the FRC contested cases portal, which is a learning curve for all of us, but in many ways so much better to work with than the old paper-based court filing system. Improvements continue to be made – the ability to involve intervenors has just been introduced and the better presentation of the documents in what is to be called 'case file view' will follow early next year. With the 'transparency' agenda firmly still with us, the article by Samantha Hillas KC and Emily Ward, who were both members of the TIG committee ably led by HHJ Stuart Farquhar, gives a really good account of how the committee's work was done and how they reached their recommendations. Watch out for some imminent announcements of pilot schemes to try out the TIG committee's recommendations as trailed in the President's *View from the President's Chambers: July 2023*. And for those who were captured by the great *Hasan* debate on the fate of litigation where a party dies before its end, the contribution by Joseph Rainer and Jennifer Lee helpfully explains the conundrum which the Supreme Court had to address, deciding that it was for Parliament rather than judges to solve the injustices which might arise in a small number of cases.

Formulaic versus discretionary solutions

One theme which emerges from a number of this issue's contributions is what Peel J has described as:

> 'a legitimate debate … between: (1) the familiar discretionary exercise which enables the court to alight upon a bespoke solution, but carries with it a degree of uncertainty and, as a result, anxiety, delay and costs; and (2) the desirability of a fixed regime, such as is commonplace on the Continent, which is less flexible but respects autonomy and reduces the nature and scope of litigation.'

This debate, which of course has many gradations, is perhaps at the heart of the work which the Law Commission will be doing in the months and years ahead, illustrated by the article produced by Professor Nicholas Hopkins and Beth Payne. On the same theme, readers interested in this subject can learn from Michael Allum and Clea Amundsen how a largely formulaic maintenance system was developed and works in Canada. The development of formulaic, or even algorithmic, solutions does of course require a large collection of mathematical data. It is disappointing to report that, notwithstanding the now 2-year use of the updated Form D81 – which was designed with the harvesting of data specifically in mind – little progress has been made in putting in place a reliable data harvesting IT project.

TLATA and inheritance cases in the Family Court

As a result of an oversight in the 2014 legislation, the ability to pursue family-style TLATA and Inheritance Act cases in the Family Court was not authorised. Munby P and McFarlane P have both powerfully argued in writing for the correction of the oversight – a step which would require a one-line statutory amendment – yet the issue has not yet excited the interest of any post-2014 government. Until that happens, the Family Court system will have to continue to use sometimes unsatisfactory workarounds. When the problem does arise, judges and practitioners would be wise to read the detailed thoughts of HHJ Evans-Gordon, Nicholas Allen KC and Rhys Taylor on the use of these workarounds.

The Mostyn J valedictory event

The *Financial Remedies Journal* has already devoted significant amounts of page space to the remarkable legal and judicial career of Mostyn J, which has now sadly reached its end, but I cannot resist drawing the reader's attention to the account below by Samantha Hillas KC of the magnificent valedictory event which took place on 3 October in the Lord Chief Justice's court in the Royal Courts of Justice. Present in the court room were almost every major contributor (practitioners and judges alike) to financial remedies law of the past, present and (probably) future. The room was buzzing with a series of brilliant speeches, seamlessly combining substance and humour. A jewel of a memory for all who were present.

The Financial Remedies Court: A Year in Review

The Hon. Mr Justice Peel

National Lead Judge,
Financial Remedies Court

On 28 July of this year, Mr Justice Mostyn sat for the very last time. Many words have already been said or written about him. I particularly enjoyed the appreciation of him by Sir James Munby, which was published in the summer edition of the *Financial Remedies Journal*.[1] Few would argue with his description of Mostyn J as 'a great lawyer and a great judge'. A valedictory awaits, as well as a round of dinners and other events marking his extraordinary contribution at the Bar and on the Bench to family law, and financial remedies in particular. I would like to add my personal appreciation. When I took over from him as National Lead Judge of the Financial Remedies Court and Judge in Charge of Standard Orders, Mostyn J stepped back and eschewed any interference as I attempted to learn the ropes. But whenever I had a query, he responded instantly, usually with a detailed explanation and copious references to law, procedure and guidance. He is a human version of ChatGPT, a walking encyclopaedia of statute, case-law and rules. I am enormously grateful to him for the support he has given me.

I believe that, in no small measure because of Mostyn J's indefatigability, the Financial Remedies Court is generally in very good order and, in my view, is a flagship of the family law world. The only real cloud is the ongoing struggle with the contested portal, to which I will return.

In out-of-court settlements, financial remedies take the lead. At present, about 85–90% of all financial remedy cases settle before a contested final hearing, due in no small part to the forward thinking and creative approach to settlement among practitioners. The FDR, enshrined in the procedural rules, has proved to be an outstanding success. So too the widespread use of Private FDRs. Judges need little persuasion to permit parties to attend a Private FDR and return to court thereafter for, as the case may be, a mention hearing to endorse the consent order, or a directions hearing to timetable to trial. The use of Private FDRs has in turn relieved pressure on the courts. Despite these successes, I believe the settlement rate could, and should, be even higher than it is at present, and I applaud fresh initiatives designed to explore ways of reducing litigation. The Single Lawyer Model, for example, has attracted much interest. The aim is to enable parties to engage jointly one lawyer whose instructions are to gather the relevant facts and disclosure, and make a considered recommendation. The advantages are two-fold: (1) it ordinarily takes place at a very early stage of proceedings, or even before issue; and (2) the joint instruction of a single lawyer removes the parties from the adversarial world of separately instructed legal representation. I am delighted that Resolution launched a model along these lines last summer, known as 'Resolution Together'. It is one of a number of areas upon which the Ministry of Justice and the Family Procedure Rule Committee consulted earlier this year as part of an ongoing push to promote ADR. Other areas included enabling judges to mandate attendance at ADR (subject to exceptions such as where there is evidence of domestic abuse) and a change to the rules to include failure to attend ADR as a relevant factor when making costs orders.

The *Statement of Efficient Conduct for Cases below High Court level* continues to be effective and successful. I have been impressed by the way in which practitioners have largely embraced its requirements, and have repeated both in and out of the courtroom that compliance is mandatory, not optional. As is often the way, one wonders why an idea as good as this was not thought of before; composite documents, including the asset schedule, and page limits on narrative statements and skeleton arguments are essential for the hard-pressed judge. Other areas of family law could, in my view, consider a similar rigorous approach to case management.

Similarly, I have repeated the mantra that judges should not be afraid to make costs orders where justified, particularly if one or other party does not litigate reasonably, and/or does not make reasonable open offers. A number of High Court judges have had no qualms about making costs orders in such circumstances; for example *WC v HC* [2022] EWFC 40. I appreciate that it is more difficult to do so when the assets are barely enough to meet needs, but even in those cases a judge is entitled to consider whether to make a costs award, however modest, to mark the court's displeasure at the litigation conduct of the miscreant party. I am told that judges around the country (not just at High Court level) are increasingly following this approach. Practitioners should be aware that neither they, nor their lay clients, can assume that the No Order as to Costs starting point will automatically prevail, and they should warn their clients accordingly. No longer should parties take for granted that they will not be required to pay any part of their former spouse's costs; the days of 'free hit' litigation, with no risk of adverse costs orders, are – if not over – abating.

In an article I did last year for the *Financial Remedies*

Journal, I said this: 'It has sometimes seemed to me that many cases could be fairly disposed of with no oral evidence.'[2] My point was that as part of a drive for efficiency, cases could be swiftly dispatched without oral testimony where the factual and financial landscape is reasonably clear, and it would not be proportionate to explore relatively minor factual issues in the witness box. I suspect that will be the majority of cases, although where there is a material factual dispute (for example allegations of non-disclosure) fuller inquiry will inevitably be needed. In most cases, I strongly suspect that parties would willingly tolerate a judicial decision based on a relatively summary appraisal of the circumstances in return for a swifter, and cheaper, court process. At the time of writing that article, final determinations without oral evidence seemed a long way off. But there may be tentative moves in that direction. In a private law children's case, *Mother v Father* [2022] EWHC 3107 (Fam), Lieven J upheld on appeal the decision of a magistrates' court bench to determine child arrangements with oral evidence only from the Cafcass officer; the parties were not permitted to give evidence, or to be cross examined by the other's legal representative. Lieven J emphasised FPR 22.1 (the ability of the court to limit cross examination) and 22.6 (the ability of the court to prevent a witness being called). At stake was whether the child should live with the mother or the father, hardly an inconsequential matter. Making substantive final orders without hearing oral evidence is routine in many areas of law. Administrative law is a stand-out example, but in family law the court often determines 1980 Hague Convention cases with no, or limited, oral evidence. Of course, interim orders are almost invariably made on the basis of submissions only. Similarly, judges give FDR indications without hearing evidence, and on the basis of relatively brief submissions. The time may be fast approaching where the court should consider conducting final hearings in financial remedy case without oral evidence, and justice may be served better in the round if cases are thus heard more swiftly and efficiently.

It is well known that in my view the law of financial remedies is reasonably settled. In the vast majority of cases there should be little or no issue as to the applicable legal principles. In *WC v HC* [2022] EWFC 22 at [21], I attempted to distil the general law in a series of bullet points, to which Mostyn J added a further bullet point in *Clarke v Clarke* [2022] EWHC 2698 (Fam) at [36]. I take no credit for this synopsis. It is an encapsulation of law which has developed over many years, largely thanks to the many judgments of Mostyn J which have brought discipline to the legal process while remaining faithful to s 25.

One aspect of financial remedies which has caused me concern for some time is the undisciplined and unfocussed approach to conduct. Too often parties simply say in their Form E that they reserve their position on conduct, or they list numerous pejorative complaints which do not come close to meeting the requisite threshold, or they attempt to introduce conduct through the back door by relying upon prejudicial matters as part of the overall circumstances without specifically relying upon conduct. I suggested in *Tsvetkov v Khayrova* [2023] EWFC 130 that the courts should exercise case management powers to exclude a purported conduct claim which clearly does not meet the threshold, or is unlikely to make any material difference to the outcome. If the court permits conduct to be advanced, the particularised allegations, and their relevance, should clearly be set out so that the alleged wrongdoer can know what case they are expected to meet. Although I did not explicitly say so, it seems to me that old cases which cast doubt on the ability of the court to case mange in this way, such as *Walker-Arnott v Walker-Arnott* (1983) 4 FLR 1, but which pre-date the Family Procedure Rules, should now be viewed as obsolete and no longer followed. Nor do I regard robust case management of this sort as akin to a strike out of a financial remedies claim of the sort regarded as impermissible by the Supreme Court in *Wyatt v Vince* [2015] UKSC 14; it is robust identification of relevant issues so as to enable the court to exercise its s 25 discretion in a focussed and proportionate way.

Readers of this article will be aware that the Law Commission is undertaking exploratory work in respect of financial remedies law. I welcome this initiative. In my view, the time is right to consider whether s 25 remains fit for purpose. Society has changed beyond all recognition in the past 50 years, and there is a legitimate debate to be had about the balance between: (1) the familiar discretionary exercise which enables the court to alight upon a bespoke solution, but carries with it a degree of uncertainty and, as a result, anxiety, delay and costs; and (2) the desirability of a fixed regime, such as is commonplace on the Continent, which is less flexible but respects autonomy and reduces the nature and scope of litigation. It is to my mind notable that the common law approach in England and Wales has moved the s 25 discretionary model much closer to the fixed regime than was conceivable back in 1973; thus, joint lives spousal periodical payment orders are almost unheard of now, a clean break tends to be the default position, the division between matrimonial and non-matrimonial assets is well recognised, and pre-/post-marital agreements are upheld absent good reason to the contrary. There is undoubtedly a case for, at the very least, shifting the dial towards statutory acknowledgment of these factors which are now received wisdom.

I said at the outset of this article that the Financial Remedies Court is generally in good health. Practitioners and judges alike enjoy the work, which is varied and stimulating. It is now a Judicial College requirement that every judge (full time or part time) who seeks to sit in the Financial Remedies Court must undertake a 3-day bespoke training course. Two such courses, each for some 70 candidates, are laid on each year by the College and, so far, they have all been sell outs, which is testament to the enduring popularity of financial remedies law within the family justice system.

One increasing area of concern, not by any means unique to financial remedies, is the growing number of litigants in person. There are, I suspect, two reasons for this trend. First, the sheer cost of legal representation which is unaffordable to many in an era where public funding is not available (a scandalous state of affairs), and off putting even to those who are able to afford it. And, secondly, the accessibility online of information about financial remedies law and procedure encourages some litigants to decide to attempt to navigate the system themselves. In the first half of this calendar year, in approximately 44% of all newly issued contested financial remedies cases at least one of the parties was unrepresented. This is a startlingly, and depressingly, high percentage. The burden on judges of

dealing with litigants in person is enormous. It is hard to see the numbers reducing unless and until the government addresses this iniquitous state of affairs.

The other area of concern is the digital portal. It works well for uncontested cases (which, happily, is a high proportion of the overall case load) but is not working satisfactorily for contested cases. To say that judges are dissatisfied with it would be a considerable understatement. The intention behind it is laudable. The entire case file should be available online via the portal, with documents set out appropriately in separate dividers or 'tabs', and orders generated electronically. It is easy to forget that the previous system of large paper bundles, in broken lever arch files, accompanied by reams of miscellaneous loose documentation, delivered to the wrong court or judge, was in itself an antiquated system in need of repair. I am well aware, however, that the portal has not met expectations and in many cases has increased the work of judges and court staff alike. Digital roll out in other areas of family law has had similar problems. The Financial Remedies Court lead judges around the country earlier this year provided detailed feedback on the workings of the portal. With intervention from the President and Mr Justice Cobb, the lead judge of the Reform Programme, HM Courts & Tribunals Service (HMCTS) has acknowledged the need to address the failings in the portal as a priority. A new service provider is now in place, and I am hopeful that improvements will be seen before too long. One of the particular issues identified by judges is that documents are frequently uploaded by practitioners into the wrong tabs. I urge all practitioners to ensure that they follow the issued guidance, and upload documents as prescribed. In so doing, they will assist the judge and ensure that their cases, and their clients, will receive the service they deserve.

And so to the question of transparency in financial remedies. When Mostyn J gave judgment in *Xanthopoulos v Rakshina* [2022] EWFC 30, his view about reportability in the field of financial remedies, which had been presaged in earlier judgments, took definitive shape. Going against the long-established practices of confidentiality and anonymity in financial remedies, he turned the starting point on its head. As he put it 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?"'

One of my first acts as the newly appointed National Lead Judge was to issue, together with HHJ Hess, a Notice dated 13 May 2022 inviting any judge confronted with a transparency issue arising out of *Xanthopoulos*, to refer any such issue to me for consideration. In fact, nothing has come my way. Nor has any High Court judge as yet followed the approach taken by Mostyn J. In my case, that is largely because it has not been debated before me with submissions for and against. In a recent decision of *Tsvetkov v Khayrova* [2023] EWFC 130, I said that unless and until it is comprehensively argued in front of me, I propose to follow the *dicta* of the Court of Appeal on this subject. 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. In taking that approach, I did not, and do not, express a view as to whether Mostyn J is right or not. As it happens, I decided to publish my judgment with the parties named because of a number of features which, to my mind, whatever the starting point in law, justified the spotlight of publicity. As for the future, the Farquhar Group presented a comprehensive report in April 2023 which did not opine on Mostyn J's legal thesis, but suggested that whichever is the correct question posited above by Mostyn J, the answer is to permit reporting while at the same time preserving anonymity. Although one or two voices would question the lawfulness of that proposed approach, it is a proposal which is consistent with the views expressed by the majority of consultees, and which have been expressed to me by court users and judges over the last year or so; very few have expressed enthusiasm for going further.

As it happens, I suspect that the debate about transparency will only affect a handful of cases on the ground, probably at High Court level. In some ways, a better way to secure transparency is to obtain data about all financial remedies cases so that we can see prevailing trends. That would better enable the public, and the media, to understand the totality of the financial remedies system, rather than draw conclusions from a tiny minority of High Court cases which are invariably exceptional in terms of facts and finances. That in turn would better inform society, and our lawmakers. Currently, we know how many cases are issued (about 40,000–50,000 each year), and (approximately) how many are completed without proceeding to final hearing (85–90% thereof). We have some idea of how many parties are unrepresented. But we know next to nothing, beyond anecdotally, about: (1) the quantum of assets and income across the board; (2) the number of children and their ages; (3) whether parties have new partners; (4) the level of costs incurred; (5) whether a clean break is ordered, and so on. Armed with this information, I am confident that detailed analysis would confirm or explode preconceptions which we all have about the financial remedies system. To take one example: if we knew the costs incurred in every case, we would be better placed to evaluate whether the excessive and disproportionate costs seen in the High Court, and criticised by judges at that level, is as much an issue in the courts below. With this sort of information, Parliament, rule makers, judges and HMCTS alike would be better placed to make informed decisions about policy, law and practice. Happily, there is a way for this to be done, if the will can be found. HMCTS has confirmed that it is able, from a technical perspective, to harvest the wealth of valuable information on the Form D81 (lodged for every consent order). What is needed is commitment and funding to make it happen. I am confident that data of this sort, properly analysed, would in the long run reap considerable savings, and I hope that this valuable project will receive the support it needs.

Much else is going on in the Financial Remedies Court. By a change in the rules, nominated FRC judges are now able to dismiss by way of paper exercise applications for Permission to Appeal on a totally without merit basis, such that the application cannot be renewed orally. A new form has been promulgated on enforcement applications, which requires the debtor to fill in a Form E1 before the enforcement hearing. The fast-track project (for cases below

£250,000) which would provide for all such cases to be completed within 26 weeks after two hearings (the first hearing being an FDR, and the second being the final hearing) continues to be evaluated. These are just a few examples. As always, I am enormously grateful to the sterling efforts of all those (judges, practitioners, HMCTS and others) who are doing their level best to move the Financial Remedies Court, and financial remedies, forward.

Notes

1 Sir James Munby, 'Mr Justice Mostyn – An Appreciation on His Forthcoming Retirement', [2023] 2 FRJ 77.

2 'The Financial Remedies Court: The Road Ahead', [2022] 2 FRJ 76 at 77.

‘An ascent so steep as to make a meteor blush’ – The valedictory for the Honourable Mr Justice Mostyn, 3 October 2023

Samantha Hillas KC

St John’s Buildings

On Monday, 2 October 2023 history was made in Court 4 of the Royal Courts of Justice, with the swearing in of the first ever Lady Chief Justice of England and Wales. Just a day later, in the very same, similarly packed-out court room, Lady Carr crossed the rope to open at the valedictory of the honourable and inimitable Mr Justice Mostyn.

The combined numbers of those crammed into Court 4 as well as those observing online must have neared four figures. Every Judge in the building appeared to be in attendance, as well as legions of members of staff and judicial assistants, lawyers from every discipline, media celebrities as well as Sir Nicholas’ family and close friends. It is a mark of the man that this last group clearly included so many from across that wide field.

First in a superlative top order of speakers (all of which can be read in full on the FRJ blog), Lady Carr paid a touching tribute to Sir Nicholas’ scholarship and contribution to the law, her gravitas cut with the humour we were hoping for, notwithstanding how busy Sir Nicholas had kept the umpires in the Court of Appeal. The President of the Family Division, Sir Andrew McFarlane followed. His description of the ‘bitter-sweet’ nature of the occasion summed up eloquently the emotions of those in attendance: sadness at the ‘abdication’ of the self-appointed ‘monarch of the mountainous Principality of Court 50’, tempered with a deep appreciation of the lasting legacy Sir Nicholas leaves behind.

And what a legacy that is. Described by Tim Bishop KC in his speech as ‘barrister, judge, reformer, author, lecturer, computer expert and international ambassador’, Sir Nicholas’ contribution to family law and in particular to the development of the Financial Remedies Court is nothing short of stellar. He led the charge to create the Financial Remedies Court. Without his drive, there would be no suites of standard orders, no *Statements on Efficient Conduct*, no *At A Glance* … the list is long. Other judges would be written about, but perhaps not in this publication. Without Sir Nicholas’ establishment of Class Legal as the leading publisher for financial remedies, it is unlikely this publication would have ever existed. However, for balance and as Tim Bishop KC opined, it is true to say there would be no ES2 either.

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The subject of Sir Nicholas' judgments was, given its frequent mention in his most recent interviews and speeches, a running theme. Sir Andrew anticipated that Sir Nicholas would declare his precise number and he did – 321. Tim Bishop KC rightly referred to those as judgments 'which clarify and modernise virtually every aspect of law and practice in relation to financial remedies', echoing Sir Andrew's reference that they are 'the output of a mind that is constantly fascinated by the law and keen to develop it to meet the needs of justice in an ever more complicated world.'

Lady Ward was last to approach the crease. She spoke from the heart, describing her long friendship with Sir Nicholas, from their first meeting as Sir Peter Singer's insouciant but brilliant pupil, balancing precariously on two chair legs and disinterestedly reading the newspaper, to the deep and loyal friendship they enjoy today.

It was evident from his response that Sir Nicholas was moved by the warm and affectionate tributes. He spoke, as did others, about a life of love and laughter with Liz and his family; of his plans to continue his work with the *Movers and Shakers* podcast and in raising awareness of and funds for research into treatment for his fellow 'Parkys'.

Although a moving speech which brought a tear to many an eye, it was as funny and clever as we have come to expect from Sir Nicholas. Described in his 1971 school report as a boy who 'covets to excess the role of entertainer', no less the man. He kept the gallery in stitches as he paid tribute to the Court of Appeal ('the dark side'), his fellow High Court Judges, his neurologist, his usher Maureen and his clerk Tony. Only the prospect of wine, canapés and a chance of a word with the man himself at the reception in the Costume Gallery afterwards brought an end to the unprecedented and prolonged standing ovation which followed Sir Nicholas' valedictory speech. It may the end of his innings in the Principality of Court 50, but Sir Nicholas leaves carrying his bat.

The title of this article is drawn from Tim Bishop KC's speech. So is its conclusion. It is simply unimprovable.

'On behalf of us all, thank you. Thank you for everything you have contributed. Thank you for all you have done. It was magnificent.'

The speeches at the valedictory given by the Lady Chief Justice, The President of the Family Division, Tim Bishop KC on behalf of the Bar, and Lady Helen Ward on behalf of solicitors, as well as Sir Nicholas's own parting words can be read in the FRJ blog here: https://financialremediesjournal.com/valediction-1016.s

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Financial Remedies: The Law Commission's Scoping Project

Professor Nicholas Hopkins
Law Commissioner for Family Law,
Law Commission of England and Wales

Christine Gentry
Lawyer,
Law Commission of England and Wales

Beth Payne
Research Assistant,
Law Commission of England and Wales

On 4 April 2023, the Law Commission announced that it would be undertaking a project to review the current law governing financial remedies on divorce or dissolution of civil partnership.[1] The purpose of the project is to determine whether there are problems with the current law that require reform, and what the options for reform might look like. Since that announcement, we have been laying the groundwork for our scoping report, which we expect to publish in September 2024.

This article sets out an explanation of our scoping exercise and the work we will be carrying out. It also highlights, in broad terms, a few issues that have been raised with us to date. At this early stage, we cannot provide any indication of our likely conclusions, but hope to provide an update when we publish our report next year.

What is a scoping exercise?

The financial remedies project is a scoping exercise – it will not result in a consultation paper, nor in the publication of recommendations for reform. Instead, the Law Commission will publish a scoping report: a standalone publication focused on exploring the issue(s) at hand to assess whether an area of law may need reform, and the questions that any future project of reform will need to address. We have carried out scoping projects before, including the scoping paper on weddings law, 'Getting Married' which was published in 2015;[2] we engaged in a scoping project before public consultation because the law of marriage raised complex legal, social and religious issues. Our scoping work enabled us to identify the key problems and concerns and analyse the legal issues that would arise in devising suitable solutions. We think that a similar context applies here.

In the case of the financial remedies project, our scoping report will evaluate the law on financial remedies in England and Wales, and will identify:

(1) issues with the law and whether there is a case for reform;
(2) possible models on which any future reform could be based upon, or draw inspiration from;
(3) the necessary parameters for further legal and policy work relating to financial remedies law;
(4) questions that should be considered during any future consultation phase; and
(5) policy choices that would need to be made by government prior to devising a new scheme for financial relief.[3]

As such, we are not making recommendations for reform of the law at this stage. The contents of the scoping paper may best be viewed as a toolkit for government to use when considering future law reform. The scoping report will enable government to decide whether the law governing financial remedies is in need of reform and, if so, what that reform should seek to achieve including, for example, whether the law should adopt a different model to that provided by s 25 Matrimonial Causes Act 1973. The scoping report could, therefore, lay the foundations for future reform, whether any further work is conducted by the Law Commission or by government.

So, in one sense this scoping exercise is narrower than a full project. In another sense, however, it is very broad indeed. As part of our analysis of financial remedies law, our scoping exercise considers whether the conclusions we reached about three significant areas covered by the Commission's 2014 Report on *Matrimonial Property, Needs and Agreements* (2014 Report)[4] (financial needs, matrimonial and non-matrimonial property, and nuptial agreements) need to be reviewed beyond the recommendations we made in our 2014 Report.[5] We will not be repeating the substantive work we carried out in considering those issues in 2014. However, the conclusions of the 2014 Report were made within a context of limited, targeted reform that did not seek to disturb the overall statutory framework.[6] The point of the current work is to approach that framework with an open mind as to whether it needs to be replaced, and what that replacement might look like. It is therefore possible that any possible models for reform which we identify might have a knock-on effect on the conclusions to the 2014 Report.

Our reference from government

The Law Commission takes on work in two ways – some projects are suggested to us by individuals or organisations responding to consultations on our Programmes of Law

Reform, in which we invite suggestions for reform. Others, such as the financial remedies project, are directly referred to us by government, when it wishes us to consider reform of a particular area of law.

Our Terms of Reference (which have already been considered in detail in this publication[7]) are available on our website, and set out the scope of the work that we have agreed with government that we will carry out. The Terms of Reference identify the matters on which we will provide government with an independent view.

Engaging with stakeholders

The Law Commission's work would not be possible without consulting stakeholders, those with an interest in and affected by the area of law under consideration. Engaging with stakeholders from all backgrounds is critical, particularly because – as we note below – reported financial remedies cases do not reflect the reality experienced by most divorcing couples.

The Terms of Reference provide that we should 'consult with key stakeholders', including 'specialist lawyers and judges (including the senior family law judiciary) and academics, civil society and legal representative organisations, and other Government departments'.

The Terms of Reference do not provide for a formal public consultation, because of the short timeframe for the project and its scoping nature. We understand, however, that there is considerable public interest in the area.[8] We want to ensure that we can, in so far as is possible, take on board the views of members of the public, and listen to their experiences of the law. Not least because this may assist us in understanding what the 'typical' case is, and what problems – if any – arise with the law as applied to 'typical' cases.

To this end, we will be organising an online event to engage with members of the public (in addition to those who have already contacted us directly). We will publish more information about this event in due course. In the meantime, our project inbox,[9] is open to any and all submissions that stakeholders – members of the public or otherwise – wish to make.

Evidence available to us

Our Terms of Reference provide that we will 'consider the current legal and socio-economic research on the operation of the existing law'. This will include the Nuffield Foundation's 'Fair shares? Sorting out money and property on divorce' project, due to be completed in November 2023, which investigates how divorcing couples negotiate their financial arrangements.[10] The Nuffield Foundation's work will provide valuable insight into the operation of the current law in practice, providing evidence of how it operates in the average case.

Our Terms of Reference note that the project will consider 'the treatment of pensions on the division of parties' assets on divorce'. To address this complex aspect of financial remedies law, we are engaging with the Pension Advisory Group and, in particular, anticipate the publication of its second report in January 2024.

We are grateful to have available to us respected research that has already been conducted.

A further key source of evidence available to us is the experience of what happens in other jurisdictions such as in Scotland, other common law jurisdictions (such as Australia, New Zealand, Canada and the United States), as well as civil law jurisdictions which operate choice of matrimonial property regimes.[11] This will involve consideration of how those laws operate in practice, being mindful of the different socio-economic contexts in which they operate.

Issues raised with us

The focus on 'ultra-high net worth' reported cases

Since the project was announced, we have heard from a range of stakeholders, including legal practitioners, members of the public, academics and others. These discussions have highlighted the disconnect between reported cases – typically falling into the high or ultra-high net worth category – and those low-to-average money cases which are not often reported (or even litigated). Particularly prominent in the former category of cases is the presence of high legal costs. Judicial criticism has been levelled at 'apocalyptic' levels of costs,[12] consisting of a substantial proportion of the assets.[13] The lack of many reported cases involving more normal levels of assets means it is not immediately clear if disproportionate spending on costs is a problem confined to the extremely wealthy, although a rare recent reported example of such a case[14] suggests that the issue may be universal.

Costs aside, reported ultra-high net worth cases are unrepresentative of the way the law operates. We want to ascertain whether reform is required, ensuring we understand how the law works in typical cases where there may not be enough to go around and the parties' basic needs are not met. In an ultra-high net worth case, once needs are met principles such as 'sharing' and 'compensation' familiar from case-law will come into play. Couples with substantial assets will be more likely than those of modest means to enter into nuptial agreements, and to be able to afford to litigate over the effect of those agreements.

A focus on ultra-high net worth couples in the case-law has given rise to another point raised with us by stakeholders – the extent to which 'needs' have been broadly interpreted in the light of the parties' standard of living, with 'needs' for housing and other items set at an extremely high level.

Codification of case-law

Financial remedies law has developed through case-law. This means that principles have been established in those judgments, such as sharing and compensation, which are not mentioned in the Matrimonial Causes Act 1973. One suggestion that has been made by stakeholders is that the statute should, as a minimum, set out the law as it now stands.

Nuptial agreements

Stakeholders have also made reference to the Nuptial Agreements Bill included with our 2014 Report, and there have been suggestions from those in favour of reform that the Bill could be introduced in advance of our scoping report. The Bill introduced qualifying nuptial agreements, which would, subject to certain procedural safeguards, be enforceable, but could not be used to avoid meeting the

financial needs of either party or any children. As noted above, our Terms of Reference provide for us to consider whether our recommendations in the 2014 Report need to be reviewed. In particular, any reform that moved away from the current role of financial needs would necessarily require our recommendations on qualifying nuptial agreements to be amended to integrate with a new law.

Conclusion

We hope that this article provides some insight into the nature and extent of the work we will be undertaking, and look forward to engaging with members of the legal profession and other stakeholders over the next year.

Notes

1 Paragraph 1.11(3) of the financial remedies project's Terms of Reference provides that terminology that applies to divorce also applies to the dissolution of civil partnerships.
2 Law Commission, *Getting Married: A Scoping Paper* (17 December 2015). Available at www.lawcom.gov.uk/document/getting-married-scoping-report/
3 Terms of Reference, para 1.9.
4 *Matrimonial Property, Needs and Agreements* (2014) Law Commission Report No 343.
5 Terms of Reference, para 1.3.
6 We acknowledged in our 2014 Report, at para 1.13, that '… there are significant disadvantages to examining discrete elements of the law relating to financial orders rather than the whole. Some of the difficulties that we have encountered in the course of the project stem from the fact that we have not been able to consider the system in the round.'
7 See HHJ Hess's recent article on the subject in this publication: HHJ Hess, 'Reflections on the Recent Announcement by the Law Commission of a Review of Financial Remedies Law', [2023] 2 FRJ 104.
8 By way of comparison, the recent Weddings project received over 1,600 responses, the majority appearing to be from interested members of the public.
9 financialremedies@lawcommission.gov.uk
10 Conducted by Professor Emma Hitchings, Professor Gillian Douglas, Dr Susan Purdon and Caroline Bryson. See www.nuffieldfoundation.org/project/fair-shares-sorting-out-money-and-property-on-divorce
11 Terms of Reference, para 1.6.
12 *Xanthopoulos v Rakshina* [2022] EWFC 30.
13 For a review of such cases, see Professor David Hodson, 'The Scandal of Costs in Financial Remedies Proceedings in English Family Law', [2022] 3 FRJ 186, and the appendix to Harry Gates and Samantha Woodham, 'Someone! Do Something about Costs! The Single Lawyer Solution', [2022] 3 FRJ 181.
14 *JD v RMD* [2023] EWFC 125.

Hasan – The *Barder* Conundrum – A Final Word (We Promise)

Joseph Rainer
QEB

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The Supreme Court's judgment in *Hasan* was handed down on 28 June 2023. Most readers will by now be at least peripherally aware of what the case was about. This article is to some extent a continuation of a blog post written by one of the authors for this publication in July 2023.[1] That blog post addressed the *Barder* conundrum:[2] the vexed question of what exactly the court is doing when determining *Barder* set aside applications if a matrimonial claim 'abates' with the death of a party. If the claim has abated, where is the jurisdiction to set it aside? For the sake of concision, this article assumes the reader has read the blog post referred to above and is familiar with the basic facts of the *Hasan* appeal. A summary of the Supreme Court decision prepared by one of the authors can be found on the FRJ website.[3]

This article, which considers the *Barder* conundrum, is broken into two chunks. First, we investigate the statutory basis for whatever the court is doing during a *Barder* set aside after a party has died. Secondly, we look at the scope of the conundrum, and consider quite how wide its application may be.

Recap – the basics of set aside applications

Two questions: whether and what next?

By way of a brief recap, set aside applications pose two overarching questions: (1) '*whether*' to re-open, i.e. do the facts relied upon make out a ground justifying the setting aside of the order? If so, (2) '*what next*'; what procedure should the court adopt, and how should it re-exercise its evaluative and discretionary sinews to reach a new fair conclusion?

The law in relation to the first question ('whether' to re-open) is well-trodden and highly fact specific. In the context of this article,[4] orders will only be re-opened where one of the following tightly defined grounds can be established: fraudulent non-disclosure, material non-fraudulent non-disclosure and mistake. As to the second question ('what next'), the procedural element has recently been reviewed by the Court of Appeal in *Goddard Watts v Goddard Watts* [2023] EWCA Civ 115, which confirmed the court's discretionary approach: there is 'enormous flexibility' and case management directions should be bespoke. The substantive component (what orders should be made) will similarly be case-specific.

However, in *Hasan*, the appellants identified a trend in *Barder* cases involving a party's death:[5] where the deceased had received a needs-based award, the court might set aside under *Barder*, whereas if the award was premised on sharing, the order would not be disturbed. The appellants argued that this demonstrated the court's recognition that a sharing award arose by way of entitlement rather than a 'purely personal' claim.

Procedural basis

The applicable procedural rules are at Family Procedure Rules 2010 (SI 2010/2955) (FPR) 9.9A, inserted by a rule change in 2016. FPR 9.9A permits challenges to orders where no error of the court is alleged to be made by way of the set aside procedure, by the issue of a Part 18 application, listed before the first instance court. A *Barder* application can also, at least theoretically, be advanced by way of an application for leave to appeal out of time – FPR 9.9A(2) is drafted permissively (a party may apply under this rule). In practice, however, a *Barder* challenge is invariably pursued as a set aside.

The court's statutory power to set aside depends on where the original order was made. Where the order was made in the Family Court, the applicable provision is s 31F(6) Matrimonial and Family Proceedings Act 1984 (the 1984 Act), as inserted by s 17(3) Crime and Courts Act 2013 (which established the Family Court). If the order was made in the High Court, the statutory provision is s 17(2) Senior Courts Act 1981 (the 1981 Act).

Conundrum 1 – what power is the court exercising in a post-death *Barder* appeal?

In *Hasan*, the Supreme Court determined that a contextual and textual interpretation of the relevant statutory provisions clearly established that Parliament did not intend for an undetermined Part III claim (and by association a conventional matrimonial claim under the Matrimonial Causes Act 1973 (MCA 1973)) to survive a party's death.

What, then, is happening in a post-death *Barder* determination? In *Hasan v Ul-Hasan (Deceased) & Anor* [2021] EWHC 1791 (Fam) (the first instance decision), Mostyn J pointed out that in *Barder*, Lord Brandon held that having set aside an order, the court was not obliged to restore the parties to their earlier proprietary interests, but could vary the original order and make alternative dispositions.

Mostyn J posed two questions: (1) what power was the appeal court applying when it did so; and (2) what discretionary power was it wielding when re-determining a case post-death? After a review of the authorities, Mostyn J concluded that the only explanation for this was that the cause of action had survived the party's death, which 'triggers the ss. 23–25 powers and discretion'.

In *Barder* Lord Brandon commented, '… the real question in such cases is whether, where one of the parties to a divorce suit has died, further proceedings in the suit can or cannot be taken'. That would depend on three further questions being considered in sequence, i.e.:

(1) The nature of the further proceedings. In *Barder*, this was an appeal out of time to a judge of a divorce county court against an order made in a divorce suit by a registrar of that court.
(2) The true construction of the relevant statutory provision or provisions, or of a particular order made under them, or both. On the facts of *Barder*, Lord Brandon determined that the right to appeal out of time was a statutory one, and that the relevant provisions were Matrimonial Causes Rules 1977 (SI 1977/344), r 124(1), made under s 50 MCA 1973, together with County Court Rules 1981 (SI 1981/1687) (CCR 1981), Ord 13, r 4(1) and (2). Lord Brandon held that on the true construction of those provisions, the jurisdiction of a judge to entertain an appeal out of time by one party to a divorce against an order or decision made by a registrar did not lapse on the death of the other party.
(3) The applicability of s 1(1) Law Reform (Miscellaneous Provisions) Act 1934 and whether, pursuant to that section, a cause of action arises which would survive the death of a party. In *Barder* given the determination of the two antecedent questions (as above), the question of the applicability of the 1934 Act did not arise. This was because the determination of the first two questions led to the conclusion that the statutory provisions underpinning appeals out of time in this context permitted such an application after the death of a party. There was no need to separately consider application of the 1934 Act.

As summarised in the blog post, the appellant's core submission on this point in *Hasan* was that there is no difference between a determination and a re-determination. They submitted that once the court broke the seal and began to re-determine *Barder* cases post-death, it was demonstrative of a party's death not precluding the continuation of that claim.

The respondents submitted that this was a mischaracterisation and that *Barder* in fact involved a retrospective adjustment of orders that had already been made: in cases such as *Smith v Smith (Smith & Ors Intervening)* [1992] Fam 69, *Reid v Reid* [2003] EWHC 2878 (Fam) and *Barber v Barber* [1993] 1 FLR 476, the court notionally travelled back to the date of the first instance decision and put itself in the 'hypothetical position' of a trial judge with knowledge of one party's imminent death. It did not exercise discretion afresh in favour of or against a dead party, but applied statutory powers (MCA 1973 or Part III 1984 Act), within the context of a permissible appeal which preserved those powers beyond the death of a party. All of this was taking place within the strict confines of the appellate jurisdiction.

The Supreme Court did not expressly endorse either party's analysis. It responded briefly to the parties' voluminous submissions on this jurisdictional conundrum at [100], describing *Barder* applications following a party's death as a:

> 'discrete but limited exception to the general rule that the 1973 Act creates personal rights and obligations which end with the death of a party to the marriage … I consider that this limited exception is not a sufficient basis on which to undertake a radical change to the construction of matrimonial legislation.'

However, post-October 2016 *Barder* challenges are normally pursued by way of set aside (FPR 9.9A, PD 9A) rather than applying for leave to appeal out of time (FPR 30.7). This means that *Barder* challenges are now underpinned by a completely different statute. No court since *Barder* has explicitly addressed Lord Brandon's second question (the true construction of the relevant statutory provisions) to the different statute that underpins the power to set aside (s 31F(6) 1984 Act). Does a true construction of that provision permit proceedings to continue after the death of a party?

Set aside and appealing

If an application to set aside is no different from an appeal, Lord Brandon's second question would be answered the same way for both. So is a set aside substantively equivalent to an appeal?

The intertwined relationship between the appellate and review powers of the High Court and Court of Appeal was considered by Ward J in *BT v BT* [1990] 2 FLR 1. Whilst 'appeals' and 'motions for a new trial' (i.e. applications to set aside) started as separate concepts, they became enmeshed over the years. Section 30 Supreme Court of Judicature (Consolidation) Act 1925 mandated that all appeals and motions for a new trial should be made to the Court of Appeal, excepting where no error of the court was alleged (Matrimonial Causes Rules 1924, r 46) in which case a Divisional Court could rehear the case (in effect, equivalent to a set aside application under FPR 9.9A). The above provisions were repealed by s 17(1) Supreme Courts Act 1981 (now re-branded as the Senior Courts Act 1981), which required applications for set aside to be made to the Court of Appeal, saving s 17(2) which provided for the High Court to hear a set aside application by judge alone where no error of the court was alleged. Section 17(2) is restrictively rather than permissively drafted: '*shall* be heard and determined by the High Court'.

Consider a thought experiment. *Barder* was determined in 1988, when the 1981 Act had been in force for 7 years. Would Lord Brandon's answer to his second question have been different if the challenge in *Barder* was pursued by way of a motion to the High Court under s 17(2) 1981 Act, rather than an application for leave to appeal out of time, subsequently appealed to the House of Lords? The same substantive relief could have been sought. The only point of distinction would be the fact that an application under s 17(2) did not allege error of the court. But that would make no substantive difference: it was not asserted that the trial judge had fallen into error in *Barder*. We tentatively suggest that if the same relief was pursued in *Barder* under

s 17(2) rather than Matrimonial Causes Rules 1977 (SI 1977/344), r 123(1), Lord Brandon would probably have reached the same conclusion.

With this in mind, we return to Lord Brandon's test and a construction of the relevant legislative provisions:

(a) *The nature of the further proceedings sought to be taken.*

This would be a *Barder* challenge by way of a set aside application (post the rule changes in October 2016). FPR PD 9A makes clear that *Barder* event cases are now in the same category as fraud, non-disclosure, mistake and the like, and should be pursued by way of a set aside application. If an error of the court is alleged, an application for permission to appeal under Part 30 should be made.

(b) *The true construction of the relevant statutory provision or provisions, or of a particular order made under them, or both.*

This relevant statutory provisions would be s 31F(6) 1984 Act (for the Family Court) and s 17(2) 1981 Act (for the High Court).

Section 31F(6) 1984 Act provides:

> 'The family court has power to vary, suspend, rescind or revive any order made by it, including—
>
> (a) power to rescind an order and re-list the application on which it was made,
>
> (b) power to replace an order which for any reason appears to be invalid by another which the court has power to make, and
>
> (c) power to vary an order with effect from when it was originally made.'

Section 17(2) 1981 Act provides:

> '17 Applications for new trial.
>
> (1) Where any cause or matter, or any issue in any cause or matter, has been tried in the High Court, any application for a new trial thereof, or to set aside a verdict, finding or judgment therein, shall be heard and determined by the Court of Appeal except where rules of court made in pursuance of subsection (2) provide otherwise.
>
> (2) As regards cases where the trial was by a judge alone and no error of the court at the trial is alleged, or any prescribed class of such cases, rules of court may provide that any such application as is mentioned in subsection (1) shall be heard and determined by the High Court.'

There is nothing in the wording of these statutory provisions which would appear to prevent an application to set aside an order being pursued notwithstanding the death of one of the parties.

Prior to 22 April 2014 (as explained by Mostyn J in *CB v EB* [2020] EWFC 72), the procedural rules would have depended on whether the original order was made in the county court (see CCR 1981, Ord 37, r 1(1), as modified by the Family Proceedings Rules 1991) or in the High Court,[6] provided that in any proceedings tried without a jury the judge shall have the power on an application to order a rehearing when no error of the court at the hearing is alleged. As noted by Mostyn J in *CB v EB*, this was so even in *Barder* cases, 'notwithstanding that the ratio of the House of Lords in that famous case essentially concerned the principles for granting leave to appeal out of time following a supervening event …' (at [22]).

Set aside applications continued to involve CCR 1981, Ord 37, r 1(1) until 6 April 2011 when the FPR came into effect. FPR 4.1(6) contained the provision that: 'a power of the court under these Rules to make an order includes a power to vary or revoke the order'.

As part of the legislation that brought the Family Court into effect, s 31F(6) 1984 Act gave the Family Court wide powers to vary, suspend, rescind or revive any order made by it. The language used is in fact more expansive than the language of CCR 1981, Ord 37, r 1(1). However, as noted by Mostyn J in *CB v EB*, the 'effect is the same'. The historical excursus demonstrates that:

> 'the set aside power in s 31F(6) was not a brand new break with the past. It did not usher in a brave new world. It was no more than a banal replication of a power vested in the divorce county courts from the moment of their creation in 1968. That power had been confined by the law to the traditional grounds for decades. Interpreting s 31F(6) purposively and with regard to its historical antecedents leads me to conclude clearly that in the field of financial remedies its lawful scope, or reach, starts and ends with the traditional grounds.' (at [55])

Therefore, does it matter, if a *Barder* application is brought by way of set aside rather than appeal? Section 31F(6) was not meant to signal a brand new break with the past, but was a (banal) replication of the powers vested in the divorce county courts. Under the old CCR 1981, *Barder* challenges proceeded in the county courts as applications to set aside an order under Ord 37, r 1(1), where no error of the court was alleged.

The authors are inclined to state, very tentatively, that on the true construction of s 31F(6) 1984 Act: (1) insofar as *Barder* challenges by way of an application to set aside pursuant to FPR 9.9A are concerned, that they would survive the death of a party; and (2) a set aside application in the context of a *Barder* challenge is interchangeable with an appeal.

Would the answer to these questions be different if one were considering the power of the High Court to set aside a financial remedy order under the 1981 Act (set asides in the High Court)? The authors do not consider that they would. The same procedural rules apply to a set aside application whether made under the 1984 Act or the 1981 Act. FPR 9.9A makes this abundantly clear, as does PD 9A, para 13.7. Indeed, the rule changes were meant to unify the applicable procedure in respect of set aside applications whether they be pursued pursuant to the powers of the Family Court or the High Court.[7]

In *Gohil v Gohil* [2015] UKSC 61, decided before FPR 9.9A came into force, the Supreme Court observed (emphasis added):

> '(c) There is therefore need for definitive confirmation, whether by a rule made pursuant to section 17(2) of the 1981 Act or otherwise, of the jurisdiction of the High Court to set aside a financial

> order made in that court … It is nowadays rare, however, for a financial order to be made in the High Court: it is normally made in the family court and, when made there by a High Court judge, he or she sits in that court as a judge of High Court level. *It seems highly convenient that an application to set aside a financial order of the family court on the ground of non-disclosure should, again, be made to that court and indeed at the level at which the order was made; and this convenient solution seems already to have been achieved by the provision of the Matrimonial and Family Proceedings Act 1984 recently inserted as section 31F(6), under which the family court has power to rescind any order made by it*.
>
> (d) The minutes of the meeting of the (Family Procedure Rule) committee on 20 April 2015 have been placed before this court. The committee's conclusion, which in my view this court should indorse, is that its "Setting Aside Working Party" should proceed on the basis that:
>
> (i) *there is power for the High Court and the family court to set aside its own orders where no error of the court is alleged and for rules to prescribe a procedure*;
>
> (ii) the rule should be limited so as to apply to all types of financial remedy only;
>
> (iii) …;
>
> (iv) applications to set aside should be made to the level of judge (including magistrates) that made the original order; and
>
> (iv) *if an application to set aside can be made, any application for permission to appeal be refused*.'

The FPR rule changes were, as indicated above, meant to unify the procedure for set aside applications. Furthermore, as far as the authors can see, there appears to be no discernible difference between the courts approach in cases where an application to set aside has been pursued under the 1984 Act, and in those where an application has been made under the 1981 Act.

We do not consider it necessary to explore the third question posed by Lord Brandon in *Barder* (the applicability of the 1934 Act) in light of our conclusions in respect of the two antecedent questions.

Conundrum 2 – what is the extent of the 'discrete and limited exception'?

The Supreme Court determined that *Barder* challenges after a party's death are a 'discrete and limited exception' to the general principle that matrimonial claims do not survive death. No further detail was given on the scope of this exception. It will obviously apply in a 'pure' *Barder* death scenario (i.e. where the supervening event is the party's death), as it did before the Supreme Court's judgment in *Hasan*. What of other scenarios where a different supervening event is relied upon, but where, separately, a party dies before the determination of the application? In their blog post,[8] Michael Horton, Greg Williams and Shrishti Suresh set out the following three hypothetical scenarios, which we quote verbatim:

- *Scenario 1*: 'A obtains a significant sum based on the sharing principle but fails to disclose substantial sums in their own name which should have been shared. If A dies, and then B finds out about the non-disclosure after A's death, why should B not be able to apply to set aside?'
- *Scenario 2*: 'A brings a claim relying relying on the sharing principle but B fails to disclose his true wealth. A consent order shares the disclosed wealth equally. B then dies, and A discovers B's non-disclosure. Can A apply to set aside even though B is dead (after all a claim under the 1975 Act is unlikely to be of any use)?'
- *Scenario 3*: 'A and B agree an order and A later applies to set aside for non-disclosure. The court finds that B had failed to give full and frank disclosure, and gives directions for a limited re-adjudication of A's claims. B then dies. Can A continue her claim against his estate?'

Scenarios 1 and 2 are conceptually similar. The fact that an order is made by consent makes no difference to its susceptibility to be set aside if it is found to be undermined by non-disclosure (*Sharland v Sharland* [2015] UKSC 60). In both scenarios, the ground relied upon to justify the setting aside of the consent order is A or B's non-disclosure, *not* the non-discloser's subsequent death. There is no *Barder* supervening event. There has not been a *subsequent* event that has unravelled the basis on which the order was agreed or made – the non-disclosure left the order vulnerable to set aside from the point at which it was made (*Livesey v Jenkins* [1985] AC 424). In both scenarios, the application to set aside is not made prior to the non-discloser's death, so there are no extant proceedings at the point of death. Scenario 3 is slightly different. As before, the ground for the set aside is non-disclosure, not a *Barder* supervening event. However, here, set aside proceedings have already been commenced, and the court has determined the 'whether' question in the affirmative.

Michael, Greg and Shrishti are right to highlight these hypothetical scenarios. They demonstrate how the *Barder* conundrum is not as niche as first appears. Many practitioners will have been involved in cases where one of these three scenarios (or an analogous one) has arisen. While there is no time limit on a set aside action, Lord Brandon in *Barder* regarded it as extremely unlikely that it could be as much as a year, and that in most cases it would be no more than a few months. This condition does not directly transfer to set aside applications founded on allegations of fraudulent non-disclosure, albeit it is well established that the court generally deplores delay, will look critically at the reasons for any delay, and may reflect the delay in bringing a claim in its ultimate award (*Wyatt v Vince* [2015] UKSC 14). But the point is simple: ambiguity over these three scenarios leaves open a possibility that set aside applications could be brought where non-disclosure is discovered *after* a party's death.

We agree with Michael, Greg and Shrishti that the Supreme Court's judgment does not answer the questions posed in their three scenarios, but we have nonetheless reached tentative conclusions on each. Analysis of the scenarios requires reconsideration of two key cases: *Barder* itself (unsurprisingly), and *Richardson v Richardson* [2011] EWCA Civ 79.

First, *Barder*. As noted above, Lord Brandon framed the

analysis narrowly by posing three questions. Lord Brandon answered the second question in the negative. It is worth looking at his logic carefully (at [38] A–B):

> 'I can see no good reason for putting such a limited construction on the statutory provisions and rules of court concerned. The purpose of the statutory right of appeal is to enable decisions of a county court which are unjust to be set aside or varied by the Court of Appeal. The fulfilment of that purpose is not made any the less necessary or desirable by the death of one of the parties to the cause in which the decision was made. In a case other than a matrimonial cause I do not think that it would even be suggested that the statutory right of appeal would lapse because of the death of one of the parties to it. I cannot see why a matrimonial cause should be different in this respect.'

That was it. All Lord Brandon determined was that it would be irrational to construe the relevant provisions to conclude that the death of a party precluded a statutory right of appeal.

This is the troubling part. Would it be less irrational to construe the relevant provisions which apply to set aside applications to conclude that the death of a party precluded that statutory right to set aside just because of the death of one of the parties? *If* we are to accept the appellants' argument that despite their different statutory footings, appeals and set aside applications have the same intrinsic nature, then one can simply substitute the word 'appeal' for 'set aside' in Lord Brandon's paragraph above, so the last two sentences would read:

> 'I do not think it would even be suggested that the statutory right of appeal *set aside* would lapse because of the death of one of the parties to it. I cannot see why a matrimonial cause should be different in this respect.'

That does *not* mean that only the death of a party can constitute a *Barder* event via a set aside application. It means that the death of a party would not preclude a set aside application made *on any ground*. Death does not have to be the ground for set aside.

This potentially far-reaching interpretation finds some support in *Richardson*. A potted summary of the facts and outcome of *Richardson*:

- Long marriage of 46 years, parties ran a hotel business as partners.
- The assets at the point of resolving finances on divorce were recorded as £10.9m but the asset schedule omitted allowance for a potential litigation liability arising from a catastrophic accident suffered by a child at the hotel. Both parties omitted to mention it because they believed the claim would be covered by insurance.
- Order made dividing assets almost equally, with a slight departure from equality to reflect qualitative differences between the assets each would get (a la *Wells*). W to resign from partnership and H to indemnify her against all partnership liabilities.
- W died unexpectedly 6 weeks after the final order.
- The child's damages claim was progressing through the courts, £3m was being sought. The hotel insurance policy was limited to £2m in any event. 12 weeks after the final order, H became aware that the insurer had voided the insurance policy. H's agents had been aware of this since before the financial remedy claim was determined but did not tell him.
- H sought leave to appeal out of time on the basis that both W's death *and* the uninsured negligence claim amounted to supervening events.
- The court of appeal rejected H's case that W's death was a *Barder* event here because hers was a sharing award, so her death did not invalidate the fundamental basis of the order.
- The Court of Appeal allowed H's appeal on the issue of the uninsured claim on a narrow basis. It concluded that his discovery of the fact that the insurance cover limit was £2m (against a claim of £3m) was neither a mistake nor a *Barder* event – it was a known unknown which H declined to investigate.
- However, his discovery of the insurer's avoidance of the policy was an 'unknown unknown', and a matter which he was entitled to rely upon. The Court of Appeal determined it to be a vitiating mistake rather than a *Barder* event (because it falsified the tacit assumption upon which the parties proceeded).

Two points in *Richardson* should be noted in the context of the second *Barder* conundrum. First, redetermination was sought on the ground of mistake. This ground of challenge is nowadays properly made as a set aside application (because no error of the court is alleged). Today, the husband in *Richardson* would have brought his challenge as a set aside application, and not an application for leave to appeal out of time. This supports the appellants' argument that there is no intrinsic difference between a contemporary set aside application, and applications for leave to appeal out of time made in the pre-2016 *Barder* era.

Secondly, and more importantly, *Richardson* is the only reported case where an appeal out of time has been allowed after the death of a party where that party's untimely death *did not constitute the supervening event*. In a sense there is nothing particularly surprising about this: as discussed above, Lord Brandon's ratio in *Barder* was simply that a party's death would not automatically terminate the statutory right of appeal. He did not suggest that the death itself had to be the subject matter of the appeal.

In another sense, it is quite uncomfortable. As already mentioned, in the other *Barder* death cases (*Smith, Reid* and *Barber*), the court had conducted the appeal from the imaginary standpoint of the first instance judge possessed with the knowledge of the applicable party's imminent death. This approach originated in Butler Sloss LJ's speech in *Smith*:

> 'In my judgment, the correct approach is to start again from the beginning and consider what order should be made on the facts before the judge. The way in which the registrar actually approached the case, correctly at the time, is now irrelevant. The issue now is as to the right order to be made between the spouses where the wife is known to have only six months or so to live.'

In *Reid*, Wilson J (as he then was) followed the decision in *Smith* by distilling his appellate task into this question:

> 'what would have been the appropriate order in October 2002 if it had been known that the wife had only 2 further months of life?'

In their written and oral submissions, the respondents in

Hasan characterised this process as a narrow exercise of the corrective appellate jurisdiction rather than an exercise of discretion on a blank slate after the death of a party. As touched on earlier in this article, the respondents' counsel characterised the approach as a 'fiction': the conducting of an appellate process from the imaginary standpoint of a first instance judge with clairvoyant knowledge of a party's death. Lord Leggatt expressed scepticism with the respondents' argument that the court was obliged to ignore other changes in circumstances that may have happened since, pointing out what the court had done in *Richardson*, and remarking that to wilfully ignore other relevant changes in circumstances would 'taking fictions to a pretty extreme length'. The exchange ended with Lord Leggatt putting this question to the respondents:

> 'I am suggesting that one approach might be that there is a limited exception to the rule (if it be the rule) that claims cannot continue after death but it doesn't spill over as it were into every case where somebody dies?'

This suggested approach became paragraph [100] of the court's judgment.

In *Hasan*, the court heard extensive written and oral argument on what the court was doing in determining set aside applications after the death of a party. *Richardson* was discussed at the hearing, and Lord Leggatt pointed to it as support for the notion that the court was not limited to the very narrow 'fiction' proposed by the respondents, namely notional time travel to the position of the trial judge with the impossible knowledge of a party's impending death in mind. Weighing the court's interventions during the hearing alongside the content of the judgment itself, it seems likely that the court considered that: (1) the court *is* entitled to consider other changes in circumstance when faced with a post-death set aside application; and (2) *Richardson* was not wrongly decided. If that is right, and the court's judgment in *Hasan* is tacit approval of the *Richardson* outcome, then we can now revisit Michael, Greg and Shrishti's three proposed scenarios:

- *Scenario 1*: 'A obtains a significant sum based on the sharing principle but fails to disclose substantial sums in their own name which should have been shared. If A dies, and then B finds out about the non-disclosure after A's death, why should B not be able to apply to set aside?'

  Yes, B can. If set aside is interchangeable with appeal in Lord Brandon's *Barder* ratio, then there is no reason why B cannot pursue an application to set aside, although the court will presumably look critically at any forensic delay in bringing such an application.

- *Scenario 2*: 'A brings a claim relying relying on the sharing principle but B fails to disclose his true wealth. A consent order shares the disclosed wealth equally. B then dies, and A discovers B's non-disclosure. Can A apply to set aside even though B is dead (after all a claim under the 1975 Act is unlikely to be of any use)?'

  Yes, A can, for the same reason as above.

- *Scenario 3*: 'A and B agree an order and A later applies to set aside for non-disclosure. The court finds that B had failed to give full and frank disclosure, and gives directions for a limited re-adjudication of A's claims. B then dies. Can A continue her claim against his estate?'

  Yes. As above.

Some may find our conclusions to these three scenarios surprising. We certainly did. If the above analysis is correct, the exception is not so discrete and limited as appeared at first blush. In practice, it would mean that whilst a financial remedy claim cannot be continued after the death of a party, there is very wide scope to set a financial remedy order aside post-death that extends beyond a 'pure' *Barder* scenario.

Notes

1 Joe Rainer, 'Hasan, Statutory Construction, and the Barder Conundrum', https://financialremediesjournal.com/hasan-0701.s

2 Michael Horton, Greg Williams and Shrishti Suresh refer to it in their own blog post as the *Barder* 'headache'. Both terms are probably appropriate. See 'The Death of a Financial Remedy Claim: the Supreme Court Decision', https://financialremediesjournal.com/death-0628.s

3 See case summary by Jennifer Lee: https://financialremediesjournal.com/unger-0628.s

4 Which excludes consideration of variation, conventional appeals, release and modification of undertakings, and the so-called *Thwaite* jurisdiction to re-visit executory orders.

5 *Smith v Smith (Smith & Ors Intervening)* [1992] Fam 69, *Barber v Barber* [1993] 1 FLR 476, *Reid v Reid* [2003] EWHC 2878 (Fam) and *Richardson v Richardson* [2011] EWCA Civ 79.

6 Before 1991, the Matrimonial Causes Rules 1968 (SI 1968/219) and 1977 (SI 1977/344) had applied the County Court Rules 1936 to financial remedy cases.

7 See the illuminating comments made by Sir James Munby in *CS v ACS (Consent Order: Non-disclosure: Correct Procedure)* [2016] 1 FLR 131.

8 'The Death of a Financial Remedy Claim: the Supreme Court Decision', https://financialremediesjournal.com/death-0628.s

Are We Clear? Transparency and the TIG Financial Remedies Sub-Group Report

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Many meetings, much discussion and a fish 'n' chips (working) lunch later, the conclusions of the Financial Remedies Sub-Group (the Sub-Group) of the Transparency Implementation Group (TIG) were published in April 2023. Established by the President of Family Division and led by HHJ Stuart Farquhar, a group of 13 – judges, lawyers, a legal blogger and a journalist, based around the country – spent countless hours over several months tackling the often misunderstood and controversial topic of transparency in the Financial Remedies Court (FRC). The result: a comprehensive, 164-page report (the Report).

To be transparent (pardon the pun), the authors of this article were members of that Sub-Group. It was a pleasure for us to work with a wide cast of professionals and an honour to contribute to such an important piece of work in the financial remedies world.

The issue of transparency has been the subject of much recent debate in the FRC. There have been a number of lengthy judgments on the issue, mainly from Mostyn J, not least *Xanthopoulos v Rakshina* [2022] EWFC 30 and *Gallagher v Gallagher (No 1) (Reporting Restrictions)* [2022] EWFC 52. Happily, the Sub-Group did not have to stand in the shoes of the Court of Appeal by deciding whether Mostyn J is right in his exposition of the law or not, but nevertheless the Report covers the main authorities and highlights the apparent divergence within the judiciary, particularly at High Court level.

Equally, the merits or otherwise of the recommendations contained within the Report are outwith the remit of this article (not least as we would feel like we were marking our own work), but what we hope to cover are the key elements of the Report. It is for others to pass comment[1] on what is ultimately recommended.

It is impossible to capture in a relatively short article the masses of content of the Report and there is no real substitute for reading the Report in full. However, this article is a good starting point in terms of an overview of the Sub-Group's recommendations.

The approach

Keen to ensure there was a broad base of knowledge to assist in the task, at an early stage a decision was taken to gather as much evidence as possible from a wide range of sources. These included:

- Papers from specialist silks practising in the Chancery and King's Bench Divisions and in the Court of Protection.
- Information provided by practitioners from Scotland, Ireland, the USA, Canada, Australia and New Zealand about how the issue of transparency is approached in their respective jurisdictions (sadly, but perhaps unsurprisingly, our request for a fact-finding field trip did not find favour).
- A wide-ranging online survey, which sought the views of those with an interest in FRC cases. We had 585 responses from an array of participants.
- Consideration of a number of authorities: the High Court kept us busy with multiple published decisions in fairly short succession during the currency of the Sub-Group's work.

Our remit

Our terms of reference were wide: 'To consider all aspects of Transparency as far as it concerns the work of the Financial Remedies Court and to report as to suggested ways forward'. We were required to consider the following questions and issues:

- Should FRC cases be heard in private or in open court?
- Should the parties remain anonymous?
- What documents, if any, should be made available to the press/legal bloggers?
- How should highly confidential information (including that which is commercially sensitive) be considered?
- Contents of published judgments.
- How to ensure a greater number of judgments in cases involving a lower level of assets can be published, which are generally heard by the District Bench.

The recommendations 'at a glance'

Helpfully, the recommendations of the Sub-Group are set out in a colour-coded table, which identifies the issue, the present position, and the Sub-Group's recommendation, followed by the impact upon transparency, before turning

to possible methods of implementation. It is difficult to improve upon HHJ Farquhar's 'Executive Summary' at Chapter 2 of the Report.

Listing

As readers are aware, below High Court level the names of parties (e.g. *Hillas v Ward*) generally appear on the publicly available court lists on Courtserve and on the printed lists outside courtrooms. Hearings allocated to be heard at High Court level and in the Royal Courts of Justice are usually listed anonymously. Not only is the distinction difficult to justify, but it also means that Reporters (by which we mean accredited journalists and legal bloggers) are unable to find out which cases are being heard and when. The Sub-Group's recommendation is that all cases, irrespective of the level of judiciary to which the case is allocated, should be named in the published lists, using the names of the parties, together with a short description of the type of hearing that is taking place.

Attendance at hearings

As they are heard in private, the only individuals permitted to attend FRC hearings are the parties, their representatives and Reporters (save where the contrary is ordered by the court). It was notable that this was misunderstood by a large number of those who completed the survey, as analysed in the Report. No change is recommended by the Sub-Group. However, moving forward, it is clear that education is key. Appended to the Report is an extremely helpful paper prepared by the Transparency Project to assist those involved in financial remedies cases if a Reporter attends a hearing. It has been prepared by a member of the Sub-Group, Lucy Reed KC, and is an excellent document.

Provision of documents to Reporters

Even though a Reporter is entitled to attend an FRC hearing, they are presently unable to view any case documents as of right, without the permission of the court. An absence of documentation can make it extremely difficult for a Reporter to understand the background and the issues involved. What then to disclose? There is a tension between, on the one hand, providing sufficient information to enable a proper understanding of what is taking place in the hearing and, on the other hand, the disclosure of documents that may lead to exposure of highly confidential information, such as financial, health or other information of a personal nature. As the default position, the Sub-Group recommends a Reporting Order is made in every case at which a Reporter attends, which sets out the documents to be provided to the Reporter. It is the Sub-Group's recommendation that this should include at least the ES1 and the position statements of the parties/their representatives. Any objection to disclosure should be the subject of a judicial determination.

Anonymity

This was referred to in the Executive Summary as the issue of greatest controversy. The Report's lengthy Chapter 12 grapples with competing issues and acknowledges that in every case where publication of the judgment is considered, the court is required to consider the *Re S* balancing exercise.[2] The Sub-Group recommends, on balance, that the default position should be one of anonymity in first instance cases. This was considered as likely in the majority of cases to strike the correct balance between the competing interests. However, the Sub-Group acknowledged that in some cases, the outcome of the balancing exercise would fall the other way, for example, in cases where there has been poor litigation conduct, or conduct outwith the proceedings where the public interest in permitting identification outweighs privacy. Unsurprisingly, the Sub-Group is of the view that this should be decided on a case-by-case basis and is a matter for the individual judge.

Reporting orders

The Report is clear that consideration should be given to a standard form of Reporting Order (or, more properly named, a Reporting Restriction Order), which could be made at the first hearing setting out what can and cannot be made public by Reporters. This is intended to provide protection from intrusive and personal identification, whilst also permitting Reporters access to information which will allow them to better understand the case. The Report appends an example of such an order.

Publication of judgments

The Report notes an emphasis on 'big-money' cases being reported on the National Archives, in comparison to judgments of Circuit Judges and District Judges in the FRC. More thoroughly considered by the TIG Sub-Group on Anonymity chaired by HHJ Madeleine Reardon, the Report lends its support to all that is set out within that paper in order to encourage an increase in publicised judgments at cases below High Court level.

Implementation of recommendations

The Sub-Group does not decide which recommendations, if any, will be implemented by the President, but the Report grapples with *how* recommendations could be implemented. It is the view of the Sub-Group that the vast majority of the recommendations would be capable of being implemented without any need for a change of the Rules or of the substantive law. This is not necessarily the case when it comes to the issue of anonymity. The Report offers the conclusion that if the law is as set out by Mostyn J, a change in statute would appear to be required to permit FRC judgments to be anonymised routinely. However, if the countervailing view is correct, then no change in law would be required.

Transparency: the future?

The financial remedies world awaits with bated breath the President's response to the Report and the approach to be adopted generally on issues of transparency. In terms of the response from the FRC, we note the issue was considered recently by Peel J, the National Lead Judge for the FRC, in his article 'The Financial Remedies Court: A Year in Review' published on 27 September 2023.[3] Whilst acknowledging that the Sub-Group's recommendations, in particular with regard to anonymity, ran contrary to the view expressed by Mostyn J, he nevertheless commented that 'it is consistent with the views expressed by the majority of consultees, and which have been expressed to me by court users and judges over the last year or so; very few have expressed enthusiasm for going further', and that '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.'

The authors of this article adopt wholeheartedly the view expressed by Peel J that, in reality, the debate about transparency is likely to affect only a handful of cases and that a better way of informing the public, the media and our lawmakers about the operation of financial remedies cases is to obtain data – for example by harvesting and properly analysing the wealth of information now contained in the D81 – which would show prevailing trends in terms of outcome. Until there is the funding and a commitment to put this into effect, no doubt the debate about transparency will continue to rumble on.

Notes

1 See e.g. 'Groundhog Day: a Response to the Report of the Financial Remedies Sub-Group of the Transparency Implementation Group' by Sir James Munby published on 6 July 2023, at https://financialremediesjournal.com/groundhog-0706.s

2 *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47 at [17].

3 See https://financialremediesjournal.com/frc-0927.s

Just Deserts? Unjust Enrichment for Family Lawyers

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In the aftermath of many family relationship breakdowns, second only to complaints about bad behaviour, a pervasive sentiment arises: one party believes they have invested or contributed disproportionately to the family economy, family assets or businesses, leading to perceived unfairness.

Whilst statute provides a framework within which such considerations can be evaluated and reflected in the division of the family assets at the end of a marriage or civil partnership, for cohabiting couples or other familial relations, the only potential avenues for recourse lie in civil law. The law of constructive trusts and proprietary estoppel will come to mind as the most obvious territory for claims on relationship breakdown. The objective of this article is to explore the scope for unjust enrichment to offer an alternative foundation for redress.

Unjust enrichment – overview

The essential aim of restitution for unjust enrichment is to provide redress in circumstances where one party has received a benefit from another in circumstances where it would be unjust for the recipient to retain the benefit. Whilst unjust enrichment has been recognised as a distinct pillar of English law,[1] unjust enrichment is best thought of not as a single unified doctrine but as a body of law that encompasses a variety of different causes of action, each concerned with achieving the essential aim of combating unjust enrichment but with distinct rules and nuances.

Consistent with the last point, it must be understood that there is no general rule giving a claimant a right of recovery from a defendant who has been unjustly enriched at the claimant's expense, and judges do not have a general discretionary power to order repayment whenever it seems just and equitable to do so.[2] Whilst the categories of unjust enrichment are not closed, a claimant must be able to point to a ground of recovery that falls within or is sufficiently analogous to the established categories of claim. The categories of claim are numerous;[3] the main categories of potential interest to family lawyers include restitution for payments made on a mistaken basis, the discharge of debts on behalf of another at the other's request, work done (*quantum meruit* claims) or goods provided (*quantum valebat* claims) in circumstances where there was no contract.

Unjust enrichment – establishing the claim

There are four key questions that need to be addressed in an unjust enrichment claim:

(1) Has the defendant been enriched?
(2) Was the enrichment at the claimant's expense?
(3) Was the enrichment unjust?
(4) Are there any defences available to the defendant?[4]

It has been emphasised that these questions serve as signposts towards the relevant areas of enquiries and are not themselves legal tests to be treated as if the words have the force of statute.[5]

Enrichment

Enrichment may take many forms. An addition to the recipient's wealth is enrichment of an obvious kind, but enrichment may also be found where there has been the transfer of a right, or the saving of an expense that would otherwise have been incurred or the payment of a debt that would otherwise have to be discharged by the benefiting party, or where the claimant has forgone a claim of some description or supplied a service which results in a benefit to the defendant.

Where there has been free acceptance or acquiescence on the part of the defendant, the defendant is considered to be enriched if they have received a benefit or services from the claimant even if the service does not add to the defendant's wealth where, for example, work is done in anticipation of some event that does not subsequently materialise.[6]

What is essential, however, is that the 'enrichment' must take the form of a benefit that has financial value. A person is not enriched in the sense required to found an unjust enrichment claim by the provision of love and affection or companionship that might enrich their wellbeing merely in an emotional sense.

At the claimant's expense

It may be that the claimant has incurred expenditure, but the claimant need not suffer a loss in the same sense as in the law of damages. Restitution is not a compensatory remedy. Unpaid labour may amount to the provision of a benefit at the expense of the claimant, where the claimant has provided services which would otherwise have been

provided for reward, and has done so without the intention of donation.[7]

Unjust enrichment

The defendant's acceptance of the benefit must be unjust. The defendant must be given sufficient notice of the impending benefit, know or ought to have known that the claimant expected to be paid for the services, and must have had the opportunity to reject the benefit.[8]

Defences

Depending on the circumstances, the defendant may be able to raise a defence capable of defeating the claim. For example, where a change of position on the part of the defendant renders restitution inequitable,[9] or where counter restitution (i.e. the return of any benefit received by the claimant) has become impossible,[10] on the grounds of illegality, or where a limitation or laches defence applies.

Valuing the claim

If the claim is made out, the remedy will be an order that the defendant pays money representing the value of the benefit received at the claimant's expense. The leading case on the valuation of benefit in the context of claims concerning the provision of services is the decision of the Supreme Court in *Benedetti v Sawiris & Ors* [2013] UKSC 50.

In summary, when assessing the value of the remedy:

(1) The enrichment has to be valued at the time it was received.
(2) The claimant is entitled to damages equivalent to the objective market value of the services performed; this means the price which a reasonable person in the defendant's position would have had to pay for the services.
(3) Where a defendant would have had to pay for the services by way of commission-based payment, that is the correct approach to valuing their services.
(4) Except where it is appropriate to value the service on a commission basis by reference to the defendant's gains, the value of any subsequent profit made by the defendant is otherwise immaterial.

This last point is a particularly important one. The objective is not to strip the defendant of the gain they receive, neither is it to compensate the claimant for loss. Rather, the focus of the exercise is on reversing the transfer of value between the claimant and the defendant. The point is well illustrated in *Yeoman's Row Management Ltd & Anor v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752, in which Lord Scott observed [41]:

> 'But what is the extent of the unjust enrichment? It is not, in my opinion, the difference in market value between the property without the planning permission and the property with it. The planning permission did not create the development potential of the property; it unlocked it. The defendant company was unjustly enriched because it obtained the value of [the claimant's] services without having to pay for them. An analogy might be drawn with the case of a locked cabinet which is believed to contain valuable treasures but to which there is no key. The Cabinet has a high intrinsic value and its owner is unwilling to destroy it in order to ascertain its contents. Instead a locksmith agrees to try to fashion a key. He does so successfully and the cabinet is unlocked. As had been hoped, it is found to contain valuable treasures. The locksmith had hoped to be awarded a share of their value but no agreement to that effect had been concluded and the owner proposes to reward him with no more than sincere gratitude. The owner has been enriched by his work and, many would think, unjustly enriched. For why should a craftsman work for nothing? But surely the extent of the enrichment is no more than the value of the locksmith's services in fashioning the key. Everything else the owner of the cabinet already owned.'

As *Yeoman's Row Management Ltd & Anor v Cobbe* demonstrates, unjust enrichment may afford a remedy where a claimant is unable to establish all of the elements for a successful proprietary estoppel or constructive trust claim. Unjust enrichment may provide a basis for securing a monetary award where the proprietary claim fails, where, for example the claimant is able to prove that they have acted in a way that has benefited the defendant, which they rely upon as detrimental reliance, but is unable to prove that there was a promise or understanding that they were to acquire an interest in the land. Thus, in *Yeoman's Row Management Ltd & Anor v Cobbe*, the claimant failed to establish that a proprietary estoppel or constructive had been created by the defendant company's actions in withdrawing from negotiations after the claimant had spent a considerable time and effort in bringing obtaining planning permission for the redevelopment of the company's property. However, the claimant was entitled to succeed in his claim for unjust enrichment, which was valued on a *quantum meruit* basis, not by reference to the enhanced value of the defendant's land, but rather by reference to the market value of the service rendered.

Unjust enrichment in the family context: examples from the case-law

Steele v Steele

In *Steele v Steele* [2001] All ER (D) 50 (Oct), a wife sought to raise an unjust enrichment claim against her husband where payments had been made out of a joint account totalling £50,000 which she contended had been for the benefit of the husband, including the discharge of his liabilities to educate and maintain his sons. The wife had brought assets into the relationship, but the husband, other than his income, had not. Over the course of the relationship, those assets had been largely dissipated. It may be inferred from those facts that a financial remedy claim was likely to yield little benefit to the wife. The wife claimed that the funds in the joint account belonged beneficially to her and that the husband had been unjustly enriched by those payments. The wife's arguments were rejected. Where a husband and wife open a joint account at a bank on terms that permit either of them to draw on the account, in the absence of facts or circumstances which indicate that the account was intended, or was kept, for some specific or limited purpose, each spouse can draw upon it not only for the benefit of both spouses but also for his or her own benefit without being liable to account to the other. There was no basis for disapplying that principle, in circumstances where the facts

showed that the funds in the joint account represented a pooling of assets. Ferris J concluded at [75]:

> 'I appreciate that the claimant is bitter that not only did her marriage collapse but while it lasted she experienced increasing financial stringency and the dissipation of the proceeds of sale of her house. She is also resentful of the fact that significant sums had to be paid out for the education and maintenance of the defendant's sons by his first marriage. She has managed to convince herself that all this was done at her expense. I do not consider that this was truly the case, but even if the claimant has borne an unfair share of the overspending which took place between 1988 and 1991 this does not, in my judgment, give rise to the claim in restitution which she seeks to maintain in these proceedings.'

Walsh v Singh

Walsh v Singh [2009] EWHC 3219 (Ch) concerned a claim following the breakdown of the parties' relationship. The parties had been engaged to be married and in the course of the relationship, Mr Singh purchased a property for which he had paid the entire purchase price. The parties planned to set up an equine centre on the land. Ms Walsh gave up her career at the Bar in order to help develop the business and had undertaken other activities such as researching the planning history of the property and assisting with and supervising renovation works. Ms Walsh sought to claim a beneficial interest in the property on the grounds of constructive trust or proprietary estoppel based on alleged promises on the part of Mr Singh of a half share in the property, coupled with detrimental reliance based on her activities at the property and giving up her career at the Bar. Alternatively, she sought a *quantum meruit* payment, based on unjust enrichment, to reflect the value of her contributions to the project. Mr Singh for his part also sought redress on the grounds of unjust enrichment in seeking to recover maintenance payments that he had made to Ms Walsh following the separation on the grounds that he claimed to have been misled by her into believing that she had a legal claim against him when she did not.

Mr Singh's claim failed on the facts. HHJ Purle QC found that the maintenance payments were made voluntarily and out of a sense of moral obligation following the separation.

Ms Walsh's constructive trust and proprietary estoppel claims were dismissed because, whilst her activities would have amounted to detrimental reliance if the necessary common intention could be established, the judge concluded that there had been no relevant assurance of an interest and that her contributions were referrable to her commitment to the relationship and not the belief that she had or would one day acquire a beneficial interest in the property.

Ms Walsh's unjust enrichment claim also failed. The court distinguished *Yeoman's Row Management Ltd & Anor v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752 on the grounds that, on the facts as found, Ms Walsh had never intended to charge for her services whether directly or indirectly by obtaining a share of any property. Her contributions were made voluntarily and not in the expectation of reward. The judge further noted the difficulties in this sort of case in evaluating the extent of the enrichment (the sole evidence of which comprised Ms Walsh's own evaluation of her worth) and there would be a need to look at how much benefit had passed the other way and the considerable financial support provided by Mr Singh. The principal planning permissions obtained were mainly attributable to his efforts. HHJ Purle QC concluded at [67]:

> 'If Miss Walsh's claim was otherwise good in principle, therefore, it would probably fail for want of proof. However, I prefer to rest my decision on the proposition that the claim is bad in principle, as Miss Walsh never intended to act for reward. If dashed expectations of a long-term domestic relationship open the door to unjust enrichment claims, a wide range of claims which the concept of unjust enrichment was never meant, and is ill equipped, to deal with will come marching through.'

Ledger-Beadell v Peach

In *Ledger-Beadell v Peach* [2006] EWHC 2940 (Ch), the parents of Mr Ledger-Beadell had provided the sum of £200,000 towards the purchase of a property which was acquired in the sole name of his fiancé, Miss Peach. The reason for the property being acquired that way was because Mr Ledger-Beadell was trying to conceal the fact of his cohabitation and his intended acquisition of a property from the court dealing with the financial remedy proceedings following his divorce. A letter from Mr Ledger-Beadell's parents to Miss Peach stated that the money was not a gift to her and that 'some form of trust or contract' was to be agreed between the parties as to the terms on which the moneys had been advanced. The relationship between Mr Ledger-Beadell and Miss Peach subsequently broke down. The property had been sold by the date of trial, but the proceeds of sale amounted only to £100,000. The parents asserted that the advance was a loan to Miss Peach. Miss Peach contended that the money advanced had belonged to Mr Ledger-Beadell and had been a gift to her in contemplation of marriage, but alternatively that there was a constructive trust over the proceeds of sale (that being a better result for her than a finding that she was liable to return the full sum of the advance).

It was held that a constructive trust had arisen and that the parents were entitled to a share of the proceeds of sale. However, Nicholas Strauss QC further held (having raised the point himself, to the surprise it appears of both counsel) that if a constructive trust had not arisen, the parents would have had a restitutionary claim on the basis that Miss Peach had been unjustly enriched. The circumstances were sufficiently analogous with prior authority in which a right to restitution had been recognised in the context of ineffective transactions pursuant to which one party had acquired a benefit at the expense of the other, such as *Way v Latilla* [1937] 3 All ER 759. The facts in *Way v Latilla* were far removed from a domestic cohabitation context, concerning the provision of information by Mr Way to Mr Latilla relating to gold mining prospects in West Africa. In return, Mr Way was promised a share of some description in the acquired concessions or Mr Latilla's company but the parties never reached concluded contractual terms. Mr Way was nonetheless entitled to a *quantum meruit* payment for his services. On the facts of the instant case, had a constructive trust not been found, Miss Peach would have obtained an unjust benefit from the parents on the basis of an agreement which had been void for uncertainty, similar to the 'agreement to agree' in *Way*.

Mate v Mate & Ors

In the recent case of *Mate v Mate & Ors* [2023] EWHC 238 (Ch), the claimant, Julie Mate, pursued claims based on proprietary estoppel and, in the alternative, unjust enrichment against her mother and two brothers. The case centred around the claimant's efforts to remove a Green Belt restriction from part of the family farm, which, following the death of her father had been left to Julie's mother and brothers. Although Julie claimed that her mother and brothers made promises to the effect that she would be entitled to a share of the proceeds from its sale, the judge found that there had been no promise or assurance sufficient to found a proprietary estoppel claim, and no equity therefore arose.

However, Julie's unjust enrichment claim succeeded. Her work was significant in unlocking the development potential of the land and the defendants had therefore been enriched. The enrichment had been at Julie's expense as she had invested hundreds of hours in the project. Further, the enrichment was unjust. The defendants had asked Julie to assist. Although no promise had been made to her of an interest in the land, the defendants had been aware that Julie had not intended to act gratuitously and that she expected to benefit from her efforts. She was deemed to be entitled to be paid for her services on a *quantum meruit* basis calculated on an equivalent basis to a land promoter's fee but discounted to reflect the fact that she was not in fact a professional land promoter and she had not played any role in the later stages of the planning process which ultimately resulted in the grant of planning permission. Taking into consideration the uplift in the market value of the land, the judge determined that the claimant was entitled to be paid £652,500, which corresponded to a commission fee of 7.5% (as compared to professional fees of between 15% and 20%) of the £8.7m uplift in the market value of the land.

Conclusions and learning points for family practitioners

Unjust enrichment undoubtedly has potential as a means of obtaining redress where one party has derived benefits at the expense of another in the course of a relationship or in a domestic or family setting. In the family context, the sorts of circumstances that may conceivably give rise to an unjust enrichment claim are multifarious but may include one party paying off a debt belonging to another, including paying an increased share of a joint liability, or advancing money in circumstances where a gift was not intended but the terms of the advance are otherwise unclear, or providing services of some description where there was an expectation of some sort of reward.

To date, there appears to have been greater success for claimants, such as Julie in *Mate v Mate & Ors* and the parents in *Ledger-Beadell v Peach* who stand in a more remote relationship to the benefiting party, as compared to parties who have lived together as a couple, as in *Steele v Steele* and *Walsh v Singh*. This reflects the fact that unjust enrichment has not yet shaken its commercial roots and that, generally, parties to a romantic relationship do not expect to micro-account for expenditure or to be paid for what they do for one another. In *Walsh*, the problem was that the court rejected the suggestion that Ms Walsh had any expectation of reward for her labours, coupled with the fact that there had been a relatively generous flow of benefits in her direction from Mr Singh. In *Steele*, it was not enough that Mrs Steele might have shouldered an unfair share of the parties' expenditure, the essence of the decision is that she too had effectively consented to this in putting funds into the joint account.

Unjust enrichment is a comparatively youthful field of English law. There is certainly scope for further development and extension of the recognised categories of claim. As the judgment in *Ledger-Beadell* and *Mate* show, principles developed in the context of claims between parties in a commercial relationship may be applied to claims between family members. However, just as with claims based on proprietary estoppel and constructive trusts, unjust enrichment is not an opportunity for a judge to whip out the portable palm tree and do what seems 'fair' where one party has disproportionately contributed in the course of a relationship.

Notes

1 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 578, in which Lord Goff formally recognised the existence of unjust enrichment as an independent field of English law (in practice the co-author of the ground-breaking text, *Goff & Jones on the Law of Restitution*, first published in 1966 and subsequently retitled *Goff & Jones on Unjust Enrichment*).

2 See further *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 196–197; *Kleinwort Benson Ltd v Birmingham CC* [1997] QB 380 at 386; *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch) at [16]–[18] per Mann J.

3 For a comprehensive treatment, see *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 10th edn, 2022). See further the helpful summary of the law of unjust enrichment in Brian Sloan, *Informal Carers and Private Law* (Hart Publishing, 2013).

4 *Benedetti v Sawiris & Ors* [2013] UKSC 50, [2014] AC 938 at [10].

5 *Investment Trust Companies v Revenue and Customs Cmmrs* [2017] UKSC 29, [2018] AC 275 at [41]–[42].

6 See e.g. *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428 where work was done to premises in anticipation of entering into a lease, which did not then proceed.

7 *Investment Trust Companies v Revenue and Customs Cmmrs* [2017] UKSC 29, [2018] AC 275 at [45].

8 See *Mate v Mate & Ors* [2023] EWHC 238 (Ch), citing the statements of principle in *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th edn, 2016) at §§17-09, 17-11, 17-13.

9 See e.g. *Lipkin Gorman v Karpnale* [1992] 4 All ER 512.

10 For discussion of the relevance of the counter restitution principle, see *School Facility Management Ltd & Ors v Governing Body of Christ the King College* [2021] EWCA Civ 1053 per Popplewell LJ.

The Jurisdiction of the Family Court to Determine Property Disputes in Favour of Third Parties

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Introduction

The Family Court does not have Trusts of Land and Appointment of Trustees Act 1996 (TLATA)[1] jurisdiction.[2] This creates a particular problem for proceedings in a Family Court which is not also a county court, most obviously the Central Family Court (CFC) in London. This article, although not limited to proceedings in the CFC, includes some specific discussion about how the problem can be dealt with there.

TLATA claims therefore must be issued in either a county court or the High Court; the two courts have concurrent jurisdiction.[3] Such claims cannot be issued in the CFC given that it is not also a county court. The same applies to the Family Court at East London.[4] This contrasts with the Principal Registry of the Family Division (PRFD; the predecessor of the CFC) which, being part of the High Court, had TLATA jurisdiction.

If a TLATA claim is to be heard together with a Matrimonial Causes Act 1973 (MCA 1973)[5] or a Children Act 1989 Sch 1 (CA 1989) claim, both claims need to be heard at a combined county court and Family Court centre or in the High Court.

Fact-finding/declaratory jurisdiction

It is, however, suggested that the determination of what is (or what is not) within the court's dispositive powers as 'property/financial resources' under the MCA 1973 *is* within the jurisdiction of the Family Court, given the express reference to the same under the statutory checklist. In determining what property or resources are available, the Family Court applies constructive/resulting/implied trust or estoppel principles, such principles being universally applicable when determining property rights. This is so whether the issue is dealt with as a preliminary issue in accordance with the guidance in *TL v ML & Ors (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263 in advance of the final hearing[6] or otherwise.

By virtue of MFPA 1984, s 31E(1) in any proceedings in the Family Court the court may make an order which could be made by the High Court or the county court if the proceedings were in that court. This includes the power to make a declaration.[7]

On this basis the Family Court has the power to make a declaration as to beneficial interests (as that is determining 'property/financial resources') *without* the jurisdictional issues above arising as the Family Court is not exercising TLATA jurisdiction.[8]

Having determined the beneficial ownership of a property the declaratory relief will be binding against the whole world, not just the parties and intervenors to the claim.

Support for this proposition is drawn from *Tebbutt v Haynes & Anor* [1981] 2 All ER 238 per Lord Denning MR at 242:

> 'The wife's claim before Hollings J was a claim under s24 of the Matrimonial Causes Act 1973. It was for a transfer of property as between husband and wife. Nevertheless in this case, unlike most other cases, there was an intervenor. Mrs Tebbutt claimed that *"160 Hoppers Road is a house in which I have a considerable interest"*. Because she made that claim, she was quite rightly brought in as an intervenor. It seems to me that, under s24 of the 1973 Act, if an intervenor comes in making a claim for the property, then it is within the jurisdiction of the judge to decide on the validity of the intervenor's claim. The judge ought to decide what are the rights and interests of all the parties, not only of the intervenor, but of the husband and wife respectively in the property. He can only make an order for the transfer, to the wife, of property which is the husband's property. He cannot make an order for the transfer to the wife of someone else's interest. So, in order to make an order under s24, it must be within the jurisdiction of the judge to determine what are the various rights and interests in the property not only of husband and wife but also of any other persons who claim an interest.'

And per Brightman LJ at 245:

> 'It was canvassed before us that the Family Division had no jurisdiction to decide property rights under s 24 … I cannot think it is right. It is fundamental to the s24 jurisdiction that the judge should know over what property he is entitled to exercise his discretion. If there is a dispute between a respondent spouse and a third party as to the ownership of a particular item of property which stands in the respondent spouse's name, that dispute must be resolved before the judge can make an effective final order under s24. There are only two ways of resolving such a dispute. Either the Family Division proceedings must be adjourned pending the trial of the claim in other proceedings, or the dispute must be decided in the s24 proceedings by allowing the third party to intervene. The latter course was adopted in the instant case. It has not been suggested, and I do not think it would be right to suggest, that the court had no jurisdiction to permit Mrs Tebbutt to intervene. There could be no purpose in her intervention except to decide the dispute. I think that in a case like the present the Family Division has jurisdiction under s24 to decide property rights.'

Obviously, Brightman LJ refers to the 'Family Division' but on this logic the same applies to the Family Court as it carries out the same s 24 exercise and may make the same orders as the High Court.

In *TL v ML & Ors (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263, Nicholas Mostyn QC (sitting as a Deputy High Court Judge) stated:

> '[33] It is well established that a dispute between a spouse and a third party as to the beneficial ownership of property can be adjudicated in ancillary relief proceedings: see *Tebbutt v Haynes* [1981] 2 All ER 238, per Lord Denning MR at 241 …
>
> [34] It is to be emphasised, however, that the task of the judge determining a dispute as to ownership between a spouse and a third party is, of course, completely different in nature from the familiar discretionary exercise between spouses. A dispute with a third party must be approached on exactly the same legal basis as if it were being determined in the Chancery Division.'

Further support for this proposition is found in *Baker v Rowe* [2009] EWCA Civ 1162, [2010] 1 FLR 761 per Wilson LJ (as he then was):

> '[23] … Ever since the decision of this court in *Tebbutt v Haynes* [1981] 2 All ER 238, it has been recognised as convenient that a third person who asserts a beneficial interest in property which is the subject of an application for ancillary relief following divorce should either be permitted as an intervenor, or ordered as a further respondent, to make his assertion within, and thus as a party to, the application, rather than that the existence or otherwise of his alleged interest be determined in separate proceedings in a separate court at a separate time, with the consequential risk of inconsistent decisions …'

In *Goldstone v Goldstone & Ors* [2011] EWCA Civ 39, [2011] 1 FLR 1926, Thorpe LJ emphasised that in exercising such fact-finding/declaratory jurisdiction although the substantive law may be property law, the procedural rules to be used are the FPR rather than the CPR:

> '[39] Of course, the ultimate trial required the family division judge to apply the law of property and the law of sham just as his brother judge would do in the Chancery Division. Careful preparation for that trial was necessary. However, these impeccable directions do not require or permit the import of the CPR. In its essence the claim remains a claim by the wife against the husband. Ultimately it is a claim for discretionary relief. In this, as in many cases, there must be a preliminary issue trial to establish the extent of the assets over which the discretion is ultimately exercised. Here, as in many cases, the preliminary issue trial determines the claims and the rights of third parties. The preliminary issue trial is pendent on the originating application. It has no independent existence.'[9]

A similar view was expressed by Hughes LJ:

> '[66] It is certainly true that the law to be applied to the issue between the wife and the Jeeves respondents differs importantly from the law to be applied between husband and wife. On the ancillary relief claim, as between wife and husband, the court is required to perform an essentially inquisitorial and then discretionary exercise, pursuant to ss 23–26 of the Matrimonial Causes Act 1973. When determining the issue between the Jeeves respondents and the wife as to who owns what and what if any control the husband retains over the assets in question, the court is not performing a discretionary exercise but is determining issues of property law and associated fact. It is salutary for family practitioners to keep the distinction clearly in mind. … the issues between the wife and the Jeeves respondents … will have to be determined according to ordinary principles of property law in exactly the same way as they would be determined if they arose in free-standing Chancery proceedings. But to say that is not at all the same thing as to say that they must be separated from the family proceedings to which they are directly critical. The latter proposition would tend towards a reversion to the forms of action and to the days before the court unification accomplished by the Judicature Act 1875. If the interests of justice are served by it, the same judge can and should determine both of them, and the rules of court are designed to enable him to do so.'

In *Edgerton v Edgerton and Zaffirili Shaikh* [2012] EWCA Civ 181, [2012] 2 FLR 273, the guidance given in *TL v ML & Ors (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263 was endorsed by Lord Neuberger of Abbotsbury MR (in a judgment with which Rafferty LJ and Sir Mark Potter P agreed). He stated as follows:

> '[52] … while there will, of course, be cases where the Family Court judge will direct that a preliminary issue as to ownership of assets, involving a third party, be heard in another Division as a preliminary issue, the better course is normally for the Family court to determine the issue – see *TL v ML* [2006] 1 FLR 1263, paras 33 – 36; *A v A* [2007] 2 FLR 467, and *Goldstone v Goldstone* [2011] 1 FLR 1926. Continuity of judicial involvement is desirable both for efficiency and for consistency of decision-making. There will be cases where it may be appropriate to hive off some issues and send them to another Division of the High Court, but it should only be when relatively technical issues, outside the familiar family law territory, are likely to be raised and to play an important part.'

There is also relevant comment in *Behbehani v Behbehani & Ors* [2019] EWCA Civ 2301 per Baker LJ:

> '[68] The principal point in dispute in *Goldstone* was whether an issue between one of the parties to matrimonial finance proceedings and a third party as to the beneficial ownership of an asset subject to a claim for a property adjustment order within the matrimonial proceedings should be determined as a preliminary issue within those proceedings or in a separate civil claim. This court endorsed the procedure identified in *TL v ML*, supra, for the determination of third party claims within the family proceedings.
>
> [69] I do not, however, read the decision in *Goldstone* as endorsing the proposition that whenever an issue arises in matrimonial proceedings as to whether a party is entitled to an asset it is always necessary to join every other person who asserts title. It all depends on the circumstances. If a spouse is seeking the transfer of a particular asset from the other spouse and it is asserted that the asset is the property of a third party, then it would usually be appropriate to join third party for that issue to be determined at or before the financial remedies hearing. That is what happened in *Goldstone* itself. But there are many cases when the claimant spouse, usually the wife, is not seeking a property adjustment order but another form of financial relief, for example a lump sum, on the basis of an assertion of the value of the husband's wealth which he disputes on the grounds that assets which she ascribes to him are in fact the property of a third party. As a glance of the law reports shows, it frequently happens, particularly in so-called big-money cases, that the court is faced with a number of issues as to the ownership of assets with a variety of third parties identified as the beneficial owners. It would be wholly disproportionate to insist that, even where the wife is not seeking the transfer of the assets, all such persons should be joined to the proceedings and the issue of ownership determined before any financial remedies order can be made. There may be cases where joinder is appropriate in those circumstances, but it should certainly not be the rule.'

On the above basis, *all* judges sitting in the Family Court (including the CFC/FRC) can exercise this fact-finding/declaratory jurisdiction and therefore third-party interventions (by, say, family members seeking a declaration as to a beneficial interest in properties) can be heard and determined.

Procedural issues

Procedurally such claims are often 'intervenor' claims. For example, a third party appears at (say) a first appointment claiming a beneficial interest in respect of a property and seeks to be joined as a party or the husband or wife assert a beneficial interest on behalf of a third party at a first appointment. In both cases the court will consider whether it is desirable to notify the third party and/or to join them as an intervenor. It will usually direct service of the Form A, etc upon the third party and then, if appropriate and proportionate, join them as intervenor/second respondent, etc, having given them an opportunity to be heard (see *Behbehani* above).[10]

If, however, the third party has commenced their intervention by way of a free-standing TLATA claim in a county court (i.e. by the issue of a CPR Part 7 or Part 8 claim form), the position is procedurally more complex. Such a claim *cannot* be transferred to the CFC/FRC to be heard with the MCA 1973 proceedings given this court's lack of jurisdiction. In practice, an application ought to be made by the parties to the county court for its proceedings to be stayed pending the determination of the beneficial interest intervention in the CFC/FRC. The county court proceedings can then either be dismissed on the grounds of *res judicata*/issue estoppel or restored for the purpose of enforcement by way of order for sale (see further below). The CFC/FRC judge can direct that the pleadings and evidence (if any) in the county court claim stand in its proceedings.[11] In the unlikely situation that the parties refuse to seek a stay of the county court claim then a *Hemain*[12] injunction restraining the relevant party from pursing the same could be granted.

Non-declaratory orders

Assuming the above analysis is correct then there remains the separate issue as to the position if the Family Court needs to make a further order beyond a declaration as to property ownership in respect of property partially beneficially owned by a third party (e.g. an order for sale).

The power to order a sale under MCA 1973, s 24A(6) only arises when the court makes an order under s 22ZA or, under s 23 or s 24, a secured periodical payments order, an order for the payment of a lump sum or a property adjustment order. Such an order can only: (a) be made in favour of a party to the marriage; and (b) relate to property in which or in the proceeds of sale of which either or both of the parties to the marriage has or have a beneficial interest, either in possession or reversion).[13] If the third party is the sole beneficial owner of the relevant property, the Family Court has no power to order a sale or to require the occupants to give up possession as it is not property over which the Family Court can exercise jurisdiction. Arguably, the court cannot (or at least should not) order the sale of a property if neither of the parties to the marriage wants a sale and/or no orders are being made which require a sale.

If the court makes an order for sale in favour of a party to the marriage then the third party's interest will obviously be realised. However, in the (probably rare) circumstances where either the court does not make an order to which the order for sale power arises and/or the declaration is that neither party to the marriage has an interest in the relevant property then a free-standing application may need to be made pursuant to TLATA, s 14. Such an application cannot be issued by the FRC at the CFC (nor can such an order be made by it) and would need to be issued and heard by the relevant county court (unless one of the 'workarounds' set out at paragraph 22 below is adopted). If there are stayed proceedings in the county court, this will be a relatively straightforward process as the declaration made by the Family Court as to beneficial interests will be binding on the whole world (*supra*).

Pure TLATA claims

If given the nature of the claim (or the issue raised at paragraph 21 above arises) the CFC/FRC is required to exercise 'pure' (as opposed to fact-finding/declaratory) TLATA jurisdiction, there are several potential ways around this in practice:

(a) there are CJs (with s 9(1) authorisation – CJs Evans-Gordon, Harris, Hess and Oliver) or DHCJs (s 9(4) appointments). The case can be transferred to the High Court and allocated to such a judge sitting in the PRFD at First Avenue House;[14]
(b) in November 2020 the President of the Family Division appointed all the then full-time CFC DJs – DJs Cronshaw, Hudd, Jenkins and Mulkis – as Deputy DJs (PRFD).[15] The case can be allocated to such a judge, again sitting in the PRFD at First Avenue House; and
(c) there remain a few remaining 'legacy' PRFD judges from the time of their original appointments, such as DDJs Hodson, Morris, O'Leary and Todd. Again, the case can be allocated to such a judge.

CA 1989, Schedule 1

It would be logical for the same analysis to apply to CA 1989, Sch 1 proceedings as has been set out above in relation to MCA 1973 proceedings. The authors are unaware of any case law to similar effect to *Tebbutt v Haynes & Anor* [1981] 2 All ER 238. However, query why it should not apply by analogy given that Sch 1, para 4(1) refers to the 'property and other financial resources which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future' which (in effect) is in identical terms to s 25(2)(a) – although of course the computation/distribution exercise is different under the two statutes. In any event there is no analogous 'order for sale' provision in CA 1989, Sch 1.[16]

Extending the jurisdiction

The issues and anomalies in this article would not arise if the Family Court were to have TLATA jurisdiction.

Similarly, claims brought under the Inheritance (Provision for Family and Dependants) Act 1975 must be issued in: (a) the Chancery Division or the Family Division (CPR 57.15(1)); or (b) county courts where there is a Chancery District Registry (CPR PD 57.2). The Family Court does not have jurisdiction (whereas, again, the PRFD does).

Extension of the jurisdiction of the Family Court in these two ways has been advocated on a number of occasions.

In the *Civil Court Structure Review: Final Report* dated July 2016[17] by Briggs LJ (as he then was), he said as follows:

> 'Civil and Family
>
> 11.4. In IR 11.2–7 I provisionally recommended that the Family Court be given Inheritance Act and TOLATA jurisdiction, so as to put right what appeared to have been an omission at the time of the creation of that court. I recommended it as a shared rather than exclusive jurisdiction because, in relation to both those types of claim, there is a broad spectrum between claims closely allied to the mainstream of the work of the Family Court, and claims much more closely allied with traditional Chancery jurisdiction in relation to disputes about wills and probate.
>
> 11.5. These provisional recommendations provoked no significant response during Stage 2, either by way of approval or disapproval. I am content to assume that there was nothing inherently wrong in my provisional recommendations. The only theoretically contentious aspect is whether jurisdiction in relation to TOLATA and Inheritance Act claims should be assigned exclusively either to the family or civil courts. For the reasons already given, which mirror those which underlie the similar proposal in relation to the Property Tribunal (see below), I consider that the preservation of shared jurisdiction, in a way which ensures that the whole of any particular dispute can be fully dealt with in one set of proceedings in one court or the other, is preferable to attempts to carve out exclusive jurisdiction in relation to a subject which, by its nature, straddles the two.
>
> Recommendations
>
> 12.15 58. The Family Court should be given a shared jurisdiction (with the Chancery Division and the County Court) for dealing with Inheritance Act and TOLATA disputes: (11.4–5).'

In his *17th View from the President's Chambers: Divorce and money: where are we and where are we going?*[18] Sir James Munby P said as follows:

> 'I leave to last a particular problem which surely demands a solution.
>
> There is, as most family practitioners are all too aware, an obstacle to the bringing of 1975 Act claims or TOLATA claims in the Family Court. Section 25 of the 1975 Act and section 23 of TOLATA confine the two jurisdictions to the High Court (which of course includes the Family Division) and the County Court (which is now, of course, an entity quite distinct from the new Family Court). These claims do not, usually, require to be dealt with in the Family Division; the Family Court is their natural home. Practitioners are driven to the stratagem of issuing in the County Court and then inviting the District or Circuit Judge to sit for this purpose in the County Court whilst at the same time sitting in the Family Court to deal with any related family money claims, e.g. for ancillary relief. This nonsense is exacerbated in places – the Central Family Court being the most prominent example – where the County Court and the Family Court and their associated court offices are in different buildings. I cannot believe that this was intended; my assumption is that the point was overlooked by the draftsman of Schedule 11 to the Crime and Courts Act 2013.
>
> The remedy could not be simpler. Section 25(1) of the 1975 Act requires that the definition of *"the court"* be amended by adding after the words *"the High Court,"* the words *"or the family court,"*. Section 23(3) of TOLATA likewise requires that the definition of "the court" be amended by adding after the words *"the High Court, or (b)"* the words *"or the family court, or (c)"*. This simple solution was identified and recommended by Sir Michael Briggs in his report on civil justice reform. It was rejected, without any adequate explanation by Government for reasons which are unfathomable. Is it really too late for Government to reconsider? Or does the inconvenience of litigants and the administrative burden on HMCTS count for nothing?'

The current President, Sir Andrew McFarlane, in his *Message from the President of the Family Division: the Financial Remedies Courts*[19] said as follows:

> 'I am hopeful that in due course legislation will be passed which will allow the FRCs to hear applications under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) and the Inheritance (Provision for Family and Dependants) Act 1975.'

Most recently in *Kaur v Singh (Deceased) & Ors* [2023] EWHC 304 (Fam), Peel J stated:

> '[7] Within a family law context, it is only the Family Division which may hear an Inheritance Act claim. The Family Court does not have equivalent jurisdiction. That is a function of the CPR provisions to which I have referred, as confirmed by the President's Guidance of 24 May 2021 *"Jurisdiction of the Family Court: Allocation of Cases Within the Family Court to High Court Judge level and transfer of cases from the Family Court to the High Court"*. The consequence is that such cases, when heard in the Family Division, must be before a judge of High Court level. That is the case whatever the value of the estate. Thus, in *Paul v Paul* [2022] Fam 1638, Moor J heard an Inheritance Act claim brought by a widowed spouse where the Grant of Probate put the net value of the estate at £429,963, although on the judge's findings the actual monies available, on one view, were as little as £98,688 before legal costs. By contrast, a financial remedies dispute generally requires assets of not less than £15m to justify allocation to High Court level within the Family Court (see paragraph 3 of the 2016 Statement on the Efficient Conduct of Financial Remedy Hearings allocated to a High Court Judge whether sitting at the Royal Courts of Justice or elsewhere).
>
> [8] It is anomalous that all Inheritance Act claims proceeding in the Family Division must be heard by a judge of High Court level, no matter how modest the assets, whereas a financial remedies claim will ordinarily only be heard by a High Court Judge if the £15m threshold is met. Historically, District Judges of the Principal Registry of the Family Division (the long standing forerunner of the Central Family Court) held such jurisdiction; thus, in *Ilott v Mitson* [2017] UKSC 17, the first instance decision was made by District Judge Million in the Principal Registry. Arguably, Inheritance Act claims should be capable of being issued in the Family Court, not the Family Division, such that they can be allocated to the appropriate judicial level. A simple means of achieving this would be an amendment to s25(1) of the Inheritance Act 1975 so that the definition therein of "the court" should have added to it the words "or the family court" after "High Court", coupled with an amendment to CPR 57.15(1) to add "the family court" at a new sub paragraph (c). That, however, is a matter for lawmakers.'

Procedural issues following joinder

If there has been joinder of a third party then, subject to important considerations as to costs and proportionality mentioned below, a process akin to a civil action which is commenced by pleadings (conventionally called points of claim in a family case) will follow in accordance with the guidance first given in *TL v ML & Ors (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263 by Nicholas Mostyn QC (sitting as a Deputy High Court Judge) at [36]. Whilst this process is akin to procedure under the CPR, the process remains one governed by the FPR (save for those instances where the CPR are expressly grafted onto the FPR).[20]

The determination of an intervener claim is generally started by points of claim from the person who asserts that the beneficial interest in a property is different to the legal title.[21]

Family lawyers sometimes appear to misunderstand the nature of a pleading. It is not a witness statement, and it is not a skeleton argument. It should assert in neutral language only those facts and bald legal principles which are necessary to set out the legal basis of the claim. It should not include evidence. It should not have exhibits. Case-law should not be cited and there should not be extensive narrative on general background information unless key to the determination of the dispute. Points of claim should identify the documents relied upon but not set out extracts from documents unless they are short and directly relevant. Points of claim is not a place to provide commentary upon the other party's claim.

The points of defence should reply in like fashion, accepting, denying or, as the case may be, not admitting and requiring to be proved the facts and legal principles asserted in the points of claim.

It is sometimes appropriate to allow for a reply.

Once the pleadings have 'closed' then all parties can see what the others are asserting as a matter of fact and law. In light of the pleaded dispute a case management decision will have to then be made as to what disclosure (i.e. stating what documents exist) should be provided for.

It is common in these circumstances to borrow the idea of 'standard disclosure' from civil proceedings. This will require the parties in the first instance to state what documents they have on a list (Form N265 may be a helpful template that the parties can be ordered to comply with in these circumstances).

Importantly, part of the standard disclosure process is a confirmation by way of statement of truth that documents tending to support *and* undermine all parties' cases have been searched for, whether in a party's possession or control (e.g. with an accountant or financial adviser).

If standard disclosure is given by list then there follows a process known as 'inspection' when the documents called for on the list are provided.

It is common in family proceedings for disclosure and inspection to be merged with the list, acting as something of an informal index to documents which are being shared and the documents being provided at the same time.

It is not a given that standard disclosure by list must be the procedure in an intervenor case. It may be proportionate to make another order, for example by the service of questionnaires and requests for documents. The principle of standard disclosure may be applied in a more informal sense without the requirement of a list but retaining the requirement that each party signs a statement of truth that all relevant documents have been disclosed.

Family lawyers sometimes misunderstand the relationship between pleadings and disclosure and seek an order that they be provided at the same time. It is suggested that it is hard to know what documents to search for until you have seen how each party factually and legally pleads their case.

Likewise, orders are sometimes sought (and made) in the Family Court which require pleadings, and statements of evidence 'attaching all documents in support' to happen at the same time. It is suggested that this is not usually an appropriate order as witness statements can really only be prepared once the disclosure (which is turn depends on the pleaded cases) has been shared and analysed. Attaching documents in support will also fail to capture the require-

ment under 'standard disclosure' for parties to disclose documents adverse to their case. The 'all cards on the table' should be the approach.

Once pleadings and disclosure have been undertaken the parties are then in a position to file their witness statements bearing in mind the requirements of the *President's Memorandum: Witness Statements* dated 10 November 2021. The provisions of FPR 2010, PD 22A, para 3.3, PD 27A para 5.2, paragraph 22 of the *Efficiency Statement* of 11 January 2022, and any case-specific case management directions also need to be adhered to.

The foregoing processes and the hearing of an intervenor dispute can be ruinously expensive for families already suffering relationship breakdown. The so-called 'clean sheet' costs rules apply (FPR 2010, r 28.2) and so costs are at large.[22] The above sequential procedure for pleadings, disclosure and witness statements represents something of a gold standard and therefore in accordance with the overriding objective the position 'on the ground' is sometimes rightly less prescriptive (a view that Munby J (as he then was) expressed in *A v A (St George Trustees Ltd, Interveners*) [2007] EWHC 99 (Fam), [2007] 2 FLR 467 at [23][23] and which Mostyn J acknowledged in *Fisher Meredith v JH and PH (Financial Remedy: Appeal: Wasted Costs)* [2012] EWHC 408 (Fam), [2012] 2 FLR 536 at [41] stating, 'It is fair to say that while this discipline is, generally speaking, the right way of proceeding, it is by no means a mandatory prescription'). For example, provision for pleadings and then disclosure without the further cost of statements being drafted may provide 'good enough' information for the parties to consider a court-based or private FDR or indeed a civil/hybrid style mediation (lawyers present) where matters can hopefully be resolved without the necessity for a subsequent formal adjudication. Subject to the nature of the dispute, it may in some instances be appropriate to move immediately to some form of dispute resolution with only pleadings.

Finally, if a case is being heard concurrently in the county court and the Family Court, practitioners and judges should ensure that orders are made in the appropriate court. For example, if 'pure' TLATA jurisdiction is being exercised by way of an order for sale, the consequent order should be titled 'In the [Name] County Court' and any such order made by a Judge sitting in the PRFD must be titled 'In the High Court of Justice …'.

Notes

1 In accordance with OSCOLA (*Oxford University Standard for the Citation of Legal Authorities*) (Hart, 4th edn, 2012) para 2.4.1, 'TLATA' is used rather than 'TOLATA'.

2 The Family Court was created by Crime and Courts Act 2013, s 17(3) which, together with Sch 10, Part 1 inserted a new Part 4A, ss 31A–31P into the Matrimonial and Family Proceedings Act 1984 (MFPA 1984). The jurisdiction of the Family Court is to be found at MFPA 1984, s 31A(1) which provides a jurisdiction 'by or under this or any other Act.' The list of statutes amended so as to give the Family Court jurisdiction are set out in Sch 11, Part 1 to the 2013 Act headed 'Transfer of jurisdiction to family court'. As para 13 of the President's Guidance of 24 May 2021 *Jurisdiction of the Family Court: Allocation of Cases Within the Family Court to High Court Judge level and transfer of cases from the Family Court to the High Court* observes, 'Although the list of statutes amended by Schedule 11 is lengthy, it is not all-embracing. There are important statutes which were not amended in this way and where, in consequence, the family court does not have jurisdiction: these include the Inheritance (Provision for Family and Dependants) Act 1975, the Child Abduction and Custody Act 1985 and the Trusts of Land and Appointment of Trustees Act 1996.' MFPA 1984, s 31E does not assist as this provides that once proceedings are properly underway in the Family Court, the powers of the Family Court in those proceedings are the same as if those proceedings were being heard in the High Court or county court. It does not extend the Family Court's jurisdiction into civil claims.

3 TLATA, s 23(3) and CPR 1998, PD 7A, paras 2.3 and 2.5.

4 For ease of reference only, both courts will be referred to as 'CFC/FRC' in this article. The same would also apply to the Family Court at West London but it does not in practice exercise MCA 1973 or CA 1989, Sch 1 jurisdiction.

5 Or a claim under the Civil Partnership Act 2004.

6 See para [36] (iv) of the judgment of Nicholas Mostyn QC (sitting as a Deputy High Court Judge).

7 However, the jurisdiction of the Family Court and that of the High Court remain distinct: in other words, a High Court (or Deputy High Court/s 9) judge sitting in the Family Court *cannot* exercise those powers specifically reserved to judges sitting in the High Court. See the President's Guidance of 24 May 2021 *Jurisdiction of the Family Court: Allocation of Cases Within the Family Court to High Court Judge level and transfer of cases from the Family Court to the High Court* and in particular paragraph 2, 'A transfer of a case to the High Court to be heard by a judge of that court is not the same thing as an allocation of a case within the family court to a judge of High Court judge level. This is a crucial distinction which still too often appears to be overlooked.'

8 The authors therefore respectfully disagree with the authors of the Lexis PSL *Joinder of third parties in financial proceedings* Practice Note which states, 'The court will treat the preliminary issue as if it were an application under the relevant legal provision appropriate to the nature and subject matter of the dispute, for example section 14 of the Trusts of Land and Appointment of Trustees Act 1996' and the *Special considerations for third-party interests* Practice Note which states, 'The court will treat the preliminary issue as if it were an application under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA 1996).'

9 A similar view was expressed *Baker v Rowe* [2009] EWCA Civ 1162, [2010] 1 FLR 761 per Wilson LJ (as he then was) at [9], 'The nature of [the third party] claims did not cause the proceedings at any time to cease to be family proceedings; nor to become partly family proceedings and partly non-family proceedings.'

10 A similar view to that in *Behbehani*, namely that the third party does not always need to be joined, was expressed by Nicholas Mostyn QC (sitting as a Deputy High Court Judge) in *Rossi v Rossi & Anor* [2006] EWHC 1482 (Fam), [2007] 1 FLR 790 at [50]–[52].

11 Any order made in the Family Court could contain a recital inviting the county court to stay its proceedings in favour of the Family Court and give permission for the order to be disclosed to the county court.

12 *Hemain v Hemain* [1988] 2 FLR 388.

13 There is currently a difference of opinion as to whether an interim order for sale may be made under FPR 2010, 20.2(1)(c)(v). See, on the one hand, the view of Cobb J in *WS v HS (Sale of Matrimonial Home)* [2018] EWFC 11, [2018] 2 FLR 528 that there is no such power; and, on the other hand, the view of Mostyn J in *BR v VT (Financial Remedies: Interim)* [2015] EWHC 2727 (Fam), [2016] 2 FLR 519 and *SR v HR (Property Adjustment Orders)* [2018] EWHC 606 (Fam), [2018] 2 FLR 843 that there is such a power. Until the matter

is resolved by a higher court, Mostyn J suggested that applications should be made under MWPA 1882, s 17 in short form under the FPR 2010, Part 18 procedure: see FPR 2010, 8.13 and 8.14.

14 The Family Division of the High Court retains a jurisdiction to deal with both family and civil matters (Senior Courts Act 1981, ss 4(3), 61(6), 64(1) and 65(1)). Any transfer to the High Court will need to be referred to the London FRC Lead Judge (HHJ Hess) who will seek approval on a case-by-case basis from Peel J.

15 The Principal Registry lives on pursuant to Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014/840), r 2(1) and as a physical location. First Avenue House is named as the PRFD on the MoJ website. Until very recently, it was used for probate business. The appointment of the CFC full-time DJs as deputies of the PRFD would also suggest that First Avenue House is still formally designated as such. DJ (now CJ) Duddridge was also so appointed but now sits in Chelmsford.

16 This is a view seemingly shared by The Family Law Bar Association which in its July 2021 response to the call for evidence by the Women and Equalities Committee regarding the rights of cohabiting partners said, '150. We take the view that it would, in fact, be possible for the Family Court exercising its jurisdiction under Schedule 1, when considering paragraph 4(1)(a) to determine what "property" each party actually owns. This would mirror the similar exercise that takes places under Matrimonial Causes Act 1973 when, for example, an intervener asserts that property in matrimonial finance proceedings is in fact owned by neither spouse but by the intervener. However, to our knowledge this is not ever done, and we can find no reported case supporting this approach. If we are correct that paragraph 4(1)(a) could be so deployed, there is still the difficulty caused by the absence of any analogous "order for sale" provisions in Schedule 1. That leaves a gap in the legislation that can only be plugged by a claim in the county or High courts under the provisions of TOLATA.'

17 The Interim Report was published in January 2016.

18 (June 2017) [2017] Fam Law 607.

19 (April 2021) [2021] Fam Law 469.

20 *Goldstone v Goldstone & Ors* [2011] EWCA Civ 39, [2011] 1 FLR 1926.

21 In *Fisher Meredith v JH and PH (Financial Remedy: Appeal: Wasted Costs)* [2012] EWHC 408 (Fam), [2012] 2 FLR 536, Mostyn J addressed the question upon whom should fall the obligation to take steps to achieve the joinder drawing a clear distinction between where a claimant is saying that a property held in the name of a third party is the property of the respondent; and the situation where a respondent says that property to which he has legal title is beneficially owned by a third party.

22 *Baker v Rowe* [2009] EWCA Civ 1162, [2010] 1 FLR 761 per Wilson LJ (as he then was) at [23]–[24] and per Ward LJ at [35].

23 '[23] The deputy judge … went on to suggest, at para [36], how such issues should in future be handled by way of appropriate case management. I am sympathetic to the approach being suggested by the deputy judge, though I would not wish to be quite so prescriptive as he appears to be. Vigorous judicial case management in such cases is vital, but the appropriate directions to be given in any particular case must reflect the case managing judge's appraisal of how, given the forensic realities of the particular case, the issues can best be resolved in the most just, effective and expeditious manner.'

To Advise or Not to Advise – An Abundance of Caution? What Limitations Can Be Imposed and What are the Parameters of a Family Law Solicitor's Duty?

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'I did not have the money, and she did not have the time' said Joanne Lewis, during her evidence before HHJ Coe KC at a final hearing in November 2022 (with judgment handed down on 31 March 2023) to determine Mrs Lewis' professional negligence claim against her matrimonial solicitors, Cunningtons (*Lewis v Cunningtons Solicitors* [2023] EWHC 822 (KB)).

Mrs Lewis' words will ring true for both clients and practitioners alike (in particular, solicitors). It is this age-old issue about fees which has given rise to the (using King LJ's words[1]) 'bespoke or "unpacked" services whereby [solicitors] will undertake to act for a litigant in person in relation to a discrete part of a case which is particularly challenging to a lay person'.

Defining one's scope of services as a practitioner has always been extremely important but this becomes increasingly so when instructed by a client to carry out a bespoke service (such as drafting the consent order to reflect the terms of an already agreed settlement).

Lewis v Cunningtons provides some insight into limited retainers and the use of waiver letters and disclaimers. The case also restates the jurisprudence surrounding a solicitor's duty to their client and raises some important questions as to procedural best practice in respect of pensions at an early stage of the retainer, or in proceedings.

Background

Mrs Lewis married her husband, Paul Mayne, in 1993. Mr Mayne was in the police and had been since 1988. At the time of the divorce, Mrs Lewis was a visiting benefits officer for Braintree District Council, a job she had held since 2003. The marriage broke down in 2012. Taking into account a few years of cohabitation, this was a marriage of 20 or so years, which on any analysis is a long marriage. At the time of the breakdown of the marriage, Mrs Lewis was 47 and Mr Mayne was 55.

Mrs Lewis had an initial consultation with Cunningtons in May 2012. After a further meeting in May 2013, Cunningtons were officially retained. By the time of the written retainer, it was clear that, notwithstanding the absence of disclosure, Mrs Lewis and Cunningtons had a general awareness of Mr Mayne's financial position.

The retainer letter referred to Mr Mayne's salary of £47,000 gross per year, his side business involving the development of websites, and 'a private pension of high value such that he would receive a lump sum of approximately £120,000 in 2014, a further lump sum of £67,000 three years thereafter and then a further lump sum, together with an annual pension of £22,000'.[2] They had lived in police accommodation since the start of the marriage and it was clear that Mr Mayne's pension was therefore by far the most valuable asset.

The retainer letter also included seemingly generic details about the way in which financial disputes might be settled, which included, *inter alia*, direct agreement between the parties themselves. The letter also included reference to a derisory offer from Mr Mayne of £2,000 in full and final settlement of Mrs Lewis' claims. Mrs Lewis' solicitor, Ms Perks, rightly recognised that she could advise Mrs Lewis not to accept that offer, even without having seen Mr Mayne's disclosure.

Mrs Lewis chose to seek an agreement through direct discussions with Mr Mayne. Cunningtons wrote to her in November 2013 stating that she could agree a settlement directly with Mr Mayne, but that if she did so, they would not be able to advise her as to whether the terms of the settlement were fair or reasonable.

In February 2014, Mrs Lewis informed her solicitor that she and Mr Mayne had agreed a settlement whereby Mr Mayne would pay Mrs Lewis a lump sum of £62,000 (less £11,500 already paid by him) and that in return Mrs Lewis would agree to transfer a jointly held endowment policy

worth c. £15,000, which had a maturity value of £31,000 in 3 years' time.

In March 2014, Cunningtons responded by saying that they could not comment on whether such an agreement was fair or reasonable in the absence of disclosure. Disclosure had been requested of Mr Mayne, but he had not complied.[3]

At that point, Mrs Lewis was asked to sign and return a disclaimer, which she did on 11 March 2014. The disclaimer was worded as follows:

> 'I … confirm that I have been advised that there should be an exchange of full and frank financial disclosure before my solicitors can give me any advice in relation to suitable financial settlement options.
>
> I have instructed my solicitor that I do not wish for there to be an exchange of full and frank financial disclosure and I accept that I have not been given any advice in relation to possible settlement options …
>
> I understand that I am going against my solicitor's advice and confirm that I wish to proceed in the absence of full financial disclosure.'

In April 2014, Ms Perks left Cunningtons and Ms Wiggins took over Mrs Lewis' matter.[4] Prior to a consent order being drawn up, Forms D81 were exchanged in which Mr Mayne's assets were listed at £590,712. £540,712 of this was attributable to the cash equivalent (CE) value of his police pension. Mrs Lewis' D81 had assets of £-4,525. The consent order reflecting the agreed terms was sealed in August 2014.

Mrs Lewis' case against Cunningtons was as follows:

(1) that irrespective of the lack of disclosure, the settlement she reached with Mr Mayne was obviously unfair;
(2) that accordingly Cunningtons were negligent and wrong to say they could not advise her;
(3) that at the time she should have been advised to apply for a pension sharing order and that Form P should have been sent to Mr Mayne/his pension provider; and
(4) that had she applied for a pension sharing order, the court would have awarded her 50%, and that she therefore suffered a loss of c. £500,000, based on the applied actuarial calculations.

A key part of Mrs Lewis' claim was also that she was an unsophisticated client and that she was vulnerable at the time because she was suffering from depression and stress. She stated that she was intimidated by and scared of Mr Mayne, who had been bullying her and pressuring her into a settlement. Cunningtons disputed that Mrs Lewis was vulnerable or unsophisticated and disputed that they knew or ought to have known that she was subject to pressure, let alone bullying or intimidation.

Cunningtons' case[5] essentially had two strands to it. Their primary position was as follows:

(1) Cunningtons were not negligent because Mrs Lewis agreed to the settlement with Mr Mayne without Cunningtons' involvement and without full and frank disclosure, which led them to tell Mrs Lewis they could not advise on the fairness and reasonableness of the settlement; and
(2) Mrs Lewis signed the waiver.

Accordingly, their argument was that there was no breach of duty to advise on the settlement. Cunningtons' secondary position however was as follows:

(1) that they advised Mrs Lewis as to the total capital position and that the starting point for division of assets on divorce was 50/50;
(2) that they advised that a pension sharing order could be considered and was something the court could order; and
(3) that they advised the proposed settlement was unlikely to be a good deal for Mrs Lewis.

And that therefore, to the extent they did owe a duty, they had discharged that duty.

The judge referred to *Minkin v Landsberg* [2015] EWCA Civ 1152, [2016] 1 WLR 1489 (which was ultimately distinguished on the facts), where Jackson LJ summarised the relevant principles in relation to a solicitor's duty of care and the scope of that duty (emphasis added):

> 'i) A solicitor's duty is to carry out the tasks that they have agreed to undertake and that the client has instructed them to do;
>
> ii) it is *implicit* in the retainer that the solicitor will give advice which is *reasonably incidental* to the work being carried out;
>
> iii) that "reasonably incidental" depends on the circumstances of the case, including the *character and experience of the client*;
>
> iv) that the solicitor and client may by agreement limit the duties which would otherwise be part of the solicitor retainer.'

Donaldson LJ, in *Carradine Properties Ltd v DJ Freeman & Co (A Firm)* [1999] Lloyd's Rep P N 483, stated that whilst 'the scope of [the] retainer is undoubtedly important … it is not decisive'.[6] Donaldson LJ went on to say that an 'inexperienced client will need and will be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client'.

In *Duncan v Cuelenaere, Beaubier, Walters, Kendall & Fisher* [1987] 2 WLR 379, the court also considered the 'experience and training of the solicitor' to be an important factor (although the authors suggest it is doubtful that this would ever stand as a sufficiently mitigating excuse).

In *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1978] 3 WLR 167, Oliver J said:

> 'no doubt the duties owed by a solicitor are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but … the court must be wary of imposing upon solicitors … duties which go beyond the scope of what they are requested and undertake to do … The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession …'

In *Credit Lyonnais SA v Russell Jones & Walker* [2002] EWHC 1310 (Ch), Laddie J said 'A solicitor is not a general insurer against his client's legal problems … However, if, in the course of doing that which he is retained, he becomes aware of a risk or a potential risk to the client, it is his duty to inform the client'.

As ever, any finding as to whether a solicitor gave inade-

quate advice will depend on the circumstances of the particular case.

Decision

A primary question for the judge to answer, therefore, was whether Cunningtons had limited their retainer. Importantly, for the purposes of distinguishing this case, *Minkin* concerned a financially sophisticated accountant who had already taken advice on the merits of an agreed settlement from a previous firm of solicitors, and who had instructed her subsequent solicitors to draft an order in the terms of the agreement. Cunningtons relied on their initial retainer letter, which explained the usual routes to settlement. The judge stated, however, that just because Mrs Lewis had pursued a direct settlement approach with Mr Mayne, this did not mean that the advice given to her should be in some way limited. It is of note that the retainer was headed 'in relation to your divorce and financial matters', as they often are at the inception phase of a new instruction.

The facts in the present case were different from *Minkin*, not least because there was a long period of time after initially being instructed where Cunningtons' role was not merely to draft a consent order. Accordingly, for a significant period the scope of their duty 'was the usual broad scope of duty when advising a client in respect of divorce and financial matters'.[7] The court also rejected Cunningtons' argument that whilst that period of time existed, there came a time when Mrs Lewis accepted the direct settlement route and signed the waiver, and it was at that point the retainer became limited.

The judge stated that Cunningtons had enough information to advise, 'even if in general terms (i.e. not down to the last penny)'[8] and should have made it clear well before Mrs Lewis' discussions with Mr Mayne that she could expect the court to make a pension sharing order, with a starting point of equal division. The judge stated:

> 'the situation between [Cunningtons] and Mrs Lewis at this point required that the reasonably incidental duties would have required it to set out at least for Mrs Lewis, a comparison between what she would receive through the proposed settlement and what she would reasonably receive if she pursued the matter to court. In short, she should have been advised that she was foregoing the opportunity to be awarded several hundreds of thousands of pounds.'[9]

Furthermore, Ms Wiggins (who took over Mrs Lewis' file from Ms Perks) also had a duty to 'positively ... advise Mrs Lewis and in any event not to refuse to advise her'.[10] At that point, Ms Wiggins had also had sight of Mr Mayne's D81. The judge stated:

> 'I find that any reasonably competent solicitor would have advised the claimant that the proposed settlement order was obviously and exorbitantly one-sided in the husband's favour, giving the claimant less than 15% of the disclosed matrimonial assets and leaving her with an inadequate financial provision in the future, and particularly in retirement. I find that she should have been told that the court would make a pension sharing order in this case and that the starting point would be 50%. The circumstances in which the court would not have made such a pension sharing order in this case are very difficult to envisage indeed.'[11]

The judge accepted Mrs Lewis' evidence as to her vulnerability and rejected Cunningtons' assertions on that point to the contrary. Mrs Lewis' vulnerability at the time only served to extend the duty owed by her solicitors. The judge accepted Mrs Lewis' evidence that she felt she had to sign the disclaimer letter in order to proceed further with the divorce process.

The judge also found that Cunningtons should have served a Form P (as per *Martin-Dye v Martin-Dye* [2006] EWCA Civ 681, [2006] 1 WLR 3448) and that Mrs Lewis should expect that a court would make a pension sharing order and that such an order would be of an equal split of capital.

The judge ultimately awarded Mrs Lewis £400,000. This figure took into account the expert's figure in respect of the pension value, less the monies already received by Mrs Lewis from Mr Mayne, less costs had the case proceeded to trial. The judge also factored in the likelihood that Mr Mayne would ultimately have made an offer of 80% of the value of Mrs Lewis' entitlement, which she would have accepted. In any event, it seems the court went with the more generous figure posited by the experts, which suggested the Family Court *would* have ordered an equal split of capital.

Commentary

On the one hand, practitioners reading this may think it an obvious determination in circumstances where, even from the beginning of their retainer, Cunningtons had enough knowledge (absent full and frank disclosure) to know of the importance of and therefore advise upon Mr Mayne's pension. It is also of note that Uniformed Forces pensions are famously valuable and that the CE value may understate their true value. The need to advise was even more pronounced at the point where Forms D81 were exchanged. This could have been different if Mrs Lewis had no knowledge of Mr Mayne's pension and he had continued to refuse to engage with the disclosure process, although as above, the fact that he was in the police (and the parties lived in police accommodation) should have indicated that there was likely to be a significant pension.

Notwithstanding parts of the evidence given under cross-examination by the solicitors,[12] practitioners may have some *limited* sympathy towards Cunningtons. There is reference to an attendance note of Ms Perks which reads that Mrs Lewis was 'unlikely to be getting a good deal' and that they were ultimately instructed to prepare a consent order and not pursue an exchange of financial disclosure. There was also, as ever, Mrs Lewis' apprehension and inability about being able to pay for a longer legal process and her wanting to 'get rid' of Mr Mayne. It is not uncommon for clients to be at their lowest ebb in the early stages of consulting a solicitor and to want a quick resolution. This can particularly be the case when the alternative is an expensive and drawn-out process with a bullying and non-disclosing spouse. Solicitors will be familiar with clients instructing them to not incur any more time on their matter, or to limit any future costs. Some practitioners may argue that this makes it difficult to expect solicitors to remain alert

to any potential risks to the client. It is also of note that the clearly needs-based cases, where there is simply less to go around (and arguably the stakes are higher), are often those cases where one or both parties are unable or unwilling to pay for extensive legal advice.

The judge provided some guidance as to what would have been reasonable non-negligent advice (again, emphasis added). According to the judge, Mrs Lewis 'should have been told about her options *in clear terms* and by *reference to sums of money*. The advice could certainly have been prefaced by "on the basis of the information we have so far"'.[13] Such advice does not need to be lengthy and is of such importance that it should, in any event, take priority over concerns as to whether a client is able to pay for the time spent.

The judge also made clear that a 'one-size fits all' disclaimer was not appropriate. It is clear that waiver letters should not only be carefully crafted, but also should not be used as a general insurance policy to avoid or mitigate against poor advice in the first place.

In respect of Mrs Lewis' vulnerability, such presentation is arguably a common occurrence in family law and practitioners should be wary that the court may make such findings more often than not.

The judgment does not provide extensive information as to how the (police) pension came to be valued but it is noticeable that, in its 2019 report (although such report post-dates Cunningtons' negligence), the Pension Advisory Group (PAG) flags that 'uniformed service public sector Defined Benefit schemes' are one such scheme where an expert's input is likely required. A public sector defined benefit scheme is one which should therefore be a red flag for practitioners, as the attributable CE value is likely to be much less (almost half in this instance) than the pension's true worth'.

The judgment is noticeable for family practitioners in respect of the judge's frequent reference to the requirement to serve Form P and that this should have been done in this case. The PAG report notes that 'Although it is regarded as best practice to obtain a Form P in relation to every pension under consideration, and that Form P may be very useful in some cases, this best practice is widely ignored by practitioners and courts'.[14]

There is also a query as to whether Form P is fit for purpose in any event and this case may encourage discussion in this regard. The PAG suggests information that pension experts would like to see in Form P (which is not included in the form currently) in addition to member-specific information which would assist the pension scheme administrators.

It is arguable however whether Form P would have made a difference in the present case, or whether it serves much of a purpose to enable solicitors, or instructed counsel, to advise upon the financial aspects of a case, particularly in the case of a defined benefit scheme where the CE value may be so much lower than the true value.

Pensions remain one of the main potential sources of negligence litigation against solicitors. They remain an overlooked part of the divorce process, in part because of their complexity, in part because some clients do not want to engage with them and, sometimes, because in high net worth cases the pensions are dwarfed by other assets. Pensions must however be better understood. Practitioners would be wise, therefore, to place considerable focus and allocation of their professional development time on this (potentially very expensive) asset class.

Notes

1 *Minkin v Landsberg* [2015] EWCA Civ 1152, [2016] 1 WLR 1489 at [75].
2 *Lewis v Cunningtons Solicitors* [2023] EWHC 822 (KB) at [5].
3 Interestingly, Cunningtons did question the merits of Mrs Lewis receiving a lump sum only to transfer over a rather valuable endowment policy in return. This ultimately formed part of the decision against the solicitor. They had shown they *were* able to query the merits of the settlement based on limited information and so it was unclear why they could not advise in clearer terms in respect of the probable pension sharing order.
4 There was some ambiguity as to whether a clear handover note was left by Ms Perks to Ms Wiggins, which is an ever-present pitfall when solicitors leave firms. It was also noticeable that, at the time, Ms Wiggins was a fairly junior fee earner (2 years PQE) taking over a matter at a significant stage – there was no reference in the judgment to the extent to which she was being supervised.
5 *Lewis v Cunningtons Solicitors* [2023] EWHC 822 (KB) at [17].
6 Carradine provides the example of a solicitor instructed to prepare the documentation needed to purchase a house. If in the course of his work they come across an unusual covenant then they are duty bound to advise upon the risks of purchase, but not something unrelated, such as a claim by the client for unfair dismissal.
7 *Lewis v Cunningtons Solicitors* [2023] EWHC 822 (KB) at [220].
8 *Lewis v Cunningtons Solicitors* [2023] EWHC 822 (KB) at [242].
9 *Lewis v Cunningtons Solicitors* [2023] EWHC 822 (KB) at [224].
10 *Lewis v Cunningtons Solicitors* [2023] EWHC 822 (KB) at [227].
11 *Lewis v Cunningtons Solicitors* [2023] EWHC 822 (KB) at [228].
12 Some of Ms Perks' comments undermined her evidence, including dogmatically referring to a 20+ year marriage as 'medium-term', and also her analysis that a 'substantial part' of Mr Mayne's pension was pre-marital, which it was not, and in any event would not have been a decisive factor in a clearly needs-based claim.
13 *Lewis v Cunningtons Solicitors* [2023] EWHC 822 (KB) at [258].
14 Pension Advisory Group, *A Guide to the Treatment of Pensions on Divorce*, July 2019, para V.29, page 153.

The *Thwaite* Jurisdiction – A Stay of Execution?

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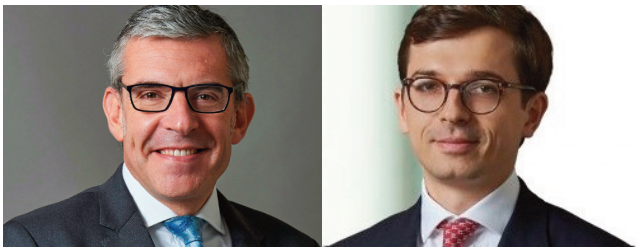

The very existence of the *Thwaite* jurisdiction is controversial.

Thwaite, Benson and *L v L*

Its origins are (unsurprisingly) found in *Thwaite v Thwaite* [1981] 2 FLR 280. A consent order was made for the transfer of the matrimonial home in England to the wife on the basis that she would be returning from Australia to live in it with the children. Having returned to England, shortly thereafter she removed the children from England and returned with them to Australia. The husband declined to complete the transfer of his interest in the home on the ground that he had agreed to its transfer on the basis that the wife would make a home here for the children. He applied to the court for a variation of the consent order. The wife countered with an application to enforce the order for the transfer of the husband's interest in the home. The registrar dismissed the husband's application, who appealed: (1) the registrar's decision; and (2) the consent order (out of time), to the Court of Appeal.

At p 284 Ormrod LJ commented that:

> 'Where the order is still executory, as in the present case, and one of the parties applies to the court to enforce the order, the court may refuse if, in the circumstances prevailing at the time of the application, it would be inequitable to do so: *Mullins v. Howell* (1879) 11 Ch D. 763 and *Purcell v. F. C. Trigell Ltd*. [1961] 1 Q.B. 358 at pp. 367 and 368. Where the consent order derives its legal effect from the contract, this is equivalent to refusing a decree of specific performance; where the legal effect derives from the order itself the court has jurisdiction over its own orders per Sir George Jessel MR in *Mullins v Howell* (1879) 11 ChD 763 at p. 766.'

The Court of Appeal held: (1) it was manifestly inequitable to enforce the unexecuted transfer of property order against the husband; and (2) the judge had been entitled, in his discretion, to make a new order for ancillary relief in favour of the wife, notwithstanding the refusal of the wife to consent to his doing so. His jurisdiction arose from the fact that the wife's original application for ancillary relief was still before the court and awaiting adjudication.

It is the latter aspect of the jurisdiction that has proved the more controversial.

In *Benson v Benson (Deceased)* [1996] 1 FLR 692, Bracewell J described (at p 696) the *Thwaite* principle as being:

> 'the judge has an inherent jurisdiction to make a fresh order for ancillary relief where the original order remains executory if the basis upon which it was made has fundamentally altered.'

In *L v L* [2006] EWHC 956 (Fam), [2008] 1 FLR 26 Munby J (as he then was) agreed with Bracewell J and went on to state (original emphasis):

> '[67] Merely because an order is still executory the court does not have, any more than it has in relation to an undertaking, any general and unfettered power to adjust a final order – let alone a final consent order – merely because it thinks it just to do so. The essence of the jurisdiction is that it is just to do – it would be inequitable not to do so – *because of* or *in the light of* some significant change in the circumstances since the order was made.'

Bezeliansky

The existence and exercise of the jurisdiction has not returned to the Court of Appeal save for *Bezeliansky v Belianskaya* [2016] EWCA Civ 76, where permission was refused to appeal the first instance decision of Moor J. As such, it cannot be relied upon as authority given *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001 at para 6.2 and FPR PD 27A, para 4.3A.2, a point made by Recorder Allen QC in *G v C* [2020] EWFC B35 at [41]. *Bezeliansky* was, however, cited in *US v SR (No 4) (Executory Mainframe Distribution Order: Change in Circumstances: Extent of the Court's Ability to Revisit Terms)* [2018] EWHC 3207 (Fam) per Roberts J and in *Kicinski v Pardi* [2021] EWHC 499 (Fam) per Lieven J (the successful appeal from *G v C*) in which she observed at [29] that as a fully reasoned decision of three members of the Court of Appeal, including the current President, it was a decision that 'carries the very greatest weight'.

In *Bezeliansky* the parties had married in 2000 and divorced in 2009. Holman J approved a consent order concluding the financial remedy proceedings in early 2013. The consent order provided *inter alia* that the husband would: (1) transfer properties in Monaco and Moscow to the wife; (2) retain a property in Paris (held by a company); and (3) pay the wife child maintenance of £270,000 pa. In the 2 years that followed, none of the properties had been transferred to the wife and arrears of child maintenance of £253,000 had accrued. The wife also discovered the husband had taken out a loan (without her knowledge) against the Moscow property and subsequently entered into an agreement to sell the same property to a business associate.

The wife applied to vary the capital provision elements of the consent order. Moor J ordered in 2015 that: (1) the husband would retain the Moscow property; (2) the shares in the company which owned the Paris property would be transferred to the wife and the property owned by the company would then be sold on the open market; and (3) the arrears of child maintenance would be paid to the wife from the proceeds of sale of the Paris property.

The Court of Appeal was concerned *inter alia* with the husband's application for permission to appeal against the order that had varied the capital provision of the consent order on the basis that Moor J was wrong to hold that he had jurisdiction to vary the terms of the original consent order. It was submitted that *Thwaite* dealt solely with the court's jurisdiction to opt to refuse to enforce a consent order and was not authority in relation to there being any jurisdiction to set the original order aside. The wife submitted that Moor J did have jurisdiction and that where an order remains executory as a result of a party frustrating implementation those circumstances will likely justify intervention.

Refusing the husband's application for permission to appeal, McFarlane LJ concluded that Moor J had been correct in finding he had the power to vary the terms of the consent order under the *Thwaite* jurisdiction. At [37] he observed:

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

He continued as follows:

> '[39] … With respect to cases where there is an undertaking or an order that is still executory the approach to determining whether or not to set aside or vary the order is, as the appellant submits, based upon it being inequitable to hold to the terms of the original order in the light of a significant change of circumstances. Given that this is a case about an executory order, it is not necessary to engage any further with the appellant's wider submission regarding the test where the jurisdiction may arise in other circumstances. In any event I agree with Mr. Chamberlayne that the circumstances justifying intervention are likely to be met where an order remain executory as a result of one party frustrating its implementation.'

Bezeliansky therefore confirmed that *Thwaite* not only provides authority for a court to opt to refuse to enforce an executory order – i.e. that it acts as a 'shield' rather than a 'sword' – but also extended to being able to set aside or vary the order and hence permits the substantive amendment of an executory order. *Bezeliansky* was the first time the court's power to vary rather than merely refuse to enforce an executory order was confirmed after argument on the point (albeit on a permission application where only one party was represented by counsel).

Subsequently, the *Thwaite* jurisdiction has been considered in a number of reported decisions at High Court and Circuit Judge level.

SR v HR, US v SR and Kicinski v Pardi

SR v HR (Property Adjustment Orders) [2018] EWHC 606 (Fam), [2018] 2 FLR 843 was a decision of Mostyn J allowing an appeal against a decision of HHJ Sharpe. A consent order was approved concluding the financial remedy proceedings in 2012 and later varied by consent in 2013. The consent order included property adjustment orders in respect of three properties which were not subsequently implemented. In October 2017, HHJ Sharpe made an order which made significant changes to the original consent order on the basis that the order remained executory. The husband appealed. Mostyn J allowed the appeal stating *inter alia* that: (1) *Thwaite* (together with the authorities cited in *Thwaite* itself in support of the existence of the jurisdiction) gave 'no support to the notion that if the court, exercising its equitable jurisdiction, refuses to enforce an order it gains the power to make a completely new one' (at [12]); and (2) 'any application under the principle in *Thwaite* should be approached extremely cautiously and conservatively' (at [13]).

US v SR (No 4) (Executory Mainframe Distribution Order: Change in Circumstances: Extent of the Court's Ability to Revisit Terms) [2018] EWHC 3207 (Fam) was a decision of Roberts J. At the final hearing in 2014, the wife expressed her intention to remain living in the United Kingdom, but returned to Russia shortly after the hearing. The final order, which was not made until May 2015, reflected the substantive nature of the judgment, but took into account the wife's later move. The Russian property market subsequently collapsed and therefore the value of the Russian properties was significantly lower than had been anticipated.

Roberts J noted that in *SR v HR* Mostyn J did not appear to have been referred to *Bezeliansky* or the earlier case of *L v L* and neither authority is referenced in his judgment. In any event, she expressed confidence that the approach of Munby J (as he then was) to the *Thwaite* jurisdiction in *L v L* (as approved in *Bezeliansky*) did represent the 'cautious' and 'conservative' approach advocated for by Mostyn J. She considered at [56] that any revision of a final order 'must be contained and, so far as possible, should reflect the underlying intention' of the original order.

Kicinski v Pardi [2021] EWHC 499 (Fam), [2022] 1 FLR 474 was a decision of Lieven J. The issue was whether the order (a *Rose* order) should be varied to write into it an indemnity from the husband in the wife's favour in respect of financial claims made against the wife by the husband's aunt and uncle. At [47] she stated:

> 'On my analysis of the caselaw, the first question in deciding whether to exercise the *Thwaite* jurisdiction is whether there has been a significant (and necessarily relevant) change of circumstances since the order was entered into; and the second question is whether, if there has been such a change, it would be inequitable not to vary the order. For myself, I do not find the words "cautious" and "careful" particularly helpful. There are two requirements to the use of the jurisdiction and their application will ensure that the *Thwaite* jurisdiction is used with care. There is no additional test or hurdle set out by the Court of Appeal in *Bezeliansky* which is the case that binds me.'

In *L v L* Munby J had previously considered whether the

Thwaite test required only a 'significant change in circumstances' or the higher threshold of a *Barder* event (*Barder v Barder (Caluori Intervening)* [1987] 2 FLR 480) – i.e. a new event since the order which 'invalidates the basis or fundamental assumption upon which the order was made'. He declined to determine this, saying at [67] that this was a 'refinement which there is no need for me to explore here'. In *G v C* Recorder Allen QC expressed the view that the acceptance by the Court of Appeal in *Bezeliansky* (at [39]) of Munby J's analysis in *L v L* could probably be taken as tacit assent that it is not necessary for the change in circumstances to amount to a *Barder* event in order for the *Thwaite* test to be satisfied. In *Kicinski* at [47] Lieven J agreed with this stating that it was not necessary to show anything more than a significant change of circumstances.

Lieven J also said at [51] that it was not necessary to show that the change of circumstances had been wholly unforeseen and that it would not make sense for such an additional requirement to be imposed. She continued:

> 'It may be, particularly in this area of litigation, that it is foreseeable that one party to the agreed order will seek to renege upon it before it is executed. That does not mean that the change that then occurs is not significant even if to some degree foreseeable. It might well on the facts have been not wholly unexpected that Mrs Thwaite or Mr Bezeliansky would have reneged on part of their respective agreements. The courts have not sought to delve into that issue before applying the *Thwaite* jurisdiction.'

On the facts, Lieven J found that a change of circumstances had occurred and that it would be inequitable not to vary the order as sought. The husband was therefore ordered to give the indemnity.

BT v CU

The challenge to the existence of the jurisdiction has been led by Mostyn J in *BT v CU* [2021] EWFC 87, [2022] 2 FLR 26. This was a COVID-19 case where the husband sought to revisit a final but executory order made in October 2019, on the basis that his business had suffered as a result of the COVID-19 lockdowns and hence forms part of the oft asked question as to whether COVID-19 was capable of being a *Barder* event. Mostyn J refused the application.

Considering whether the husband had an alternative remedy available to him under *Thwaite*, Mostyn J held that *Thwaite* had been superseded by and had not survived *Barder*. He stated at [46]:

> 'it must be strongly emphasised that in *Barder* itself, Lord Brandon observed … that the order under appeal was executory. Yet, fully aware of the decision in *Thwaite*, the Committee did not decide the case by reference to that doctrine. I agree with Ms. Kisser that the Committee must be taken as having impliedly rejected this route as a legitimate source of relief.'

At [48]–[50] Mostyn J referred to the two cases cited by Ormrod LJ in *Thwaite*. *Mullins v Howell* (1879) 11 Ch D 763 concerned the release of a party from an undertaking to remove some buttresses projecting from an archway mistakenly given by counsel at an interlocutory hearing. Mostyn J noted that there is a general power vested in the court to discharge an undertaking and that the case said nothing about a supposed power to vary a substantive final order which happens to be executory. *Purcell v FC Trigell Ltd* [1971] 1 QB 358 concerned a personal injury action where a defence had been struck out for failure to comply with a consent order which required a full reply to interrogatories. That strike-out was upheld in the Court of Appeal; the court refused to discharge the earlier interlocutory order requiring answers to interrogatories. Lord Denning MR stated that even though the order cannot be set aside, there is still a question whether it should be enforced as the court may in its discretion vary or alter them even though made originally by consent. Mostyn J observed that this case said nothing about the existence of a power to vary a substantive final order which happens to be executory. Both cases therefore merely said that the court has power to control its interlocutory orders *inter alia* by not enforcing them.

This analysis led Mostyn J at [51] to state that *Thwaite* goes no further than to confirm the existence of an equitable jurisdiction to refuse to enforce an executory order if, in the circumstances prevailing at the time of the application, it would be inequitable to do so. Although the cases relied on by Ormrod LJ related only to interlocutory orders, he pushed back the boundary of that power so as to cover final orders. But the reasoning in *Thwaite* did not, on any view, support the idea that there exists some kind of equitable power, not merely to refuse to enforce an executory order, but to make in its stead a completely different one.

It was for this reason that Mostyn J said that in *SR v HR (Property Adjustment Orders)* he had stated that any application under *Thwaite* should be approached 'extremely cautiously and conservatively'. He said that this 'was coded language expressing my doubt that the jurisdiction to rewrite (as opposed to mere refusal to enforce) existed at all.'

At [52] he stated that there did exist a power to extend time to comply with an executory order or to stay its execution for a limited period, provided that the extension did not strike at the heart of the order (citing in respect of the former *Masefield v Alexander* [1995] 1 FLR 100 and *Hamilton v Hamilton* [2013] EWCA Civ 13, [2014] 1 FLR 55 per Baron J).

Mostyn J then noted from [56] the four cases after *SR v HR* which had rejected his doubts and which had held that the court has the power not merely to stay enforcement of an executory order, but to rewrite an executory final to provide for something completely different to that which it originally stated namely *US v SR* (where the test was satisfied), *Akhmedova v Akhmedov & Ors (No 6)* [2020] EWHC 2235 (Fam), [2021] 1 FLR 667 per Gwynneth Knowles J (in which *Thwaite* was not explicitly referred to but *L v L* and *US v SR* were and where the test was not satisfied), *G v C* (again where the test was not satisfied) and *Kicinski v Pardi* (*G v C* on appeal).

At [63] Mostyn J stated that he did not agree with these decisions as they were 'in conflict with the binding precedent of *Barder*.' He continued as follows:

> '[64] There is nothing within the terms of s31 of the Matrimonial Causes Act 1973 to suggest that its strict curtailment of the power of variation and discharge is confined only to orders which have been performed. An application to set aside an executory order under the *Barder* doctrine is explicable as an exercise of

> appellate powers, now replaced by a specific rule permitting the power to be exercised at first instance. An application to set aside an executory order based on fraud, or mistake, can be explained as a separate cause of action. These are surely the only legitimate exceptions to the statutory prohibition on variation of the amount of capital settlements.
>
> [65] In the nature of things the variation powers in s31 will apply predominantly to unexecuted orders. Some are variable; most are not. It is a carefully devised scheme which was proposed by the Law Commission (see below) and democratically enacted by Parliament. The *Thwaite* exception, as developed in *L v L* and the later cases, in my opinion drives a coach and horses through the statutory scheme.
>
> [66] If this route were available, then it means that many *Barder* cases, including *Barder* itself, will have been tried, and in most cases dismissed, applying a set of principles far more rigorous than those required under the executory order doctrine. This is because most *Barder* cases, including *Barder* itself, concern orders which are executory. It would therefore seem, if the proponents of the executory order doctrine are correct, that the entire litigation in *Barder* itself, all the way to the House of Lords, was conducted on a completely wrong footing.'

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

In light of *BT v CU*, most commentors thought that the *Thwaite* jurisdiction had been all but extinguished on the basis that it was itself an example of a *Barder* application rather than a separate and less stringent form of relief.

Thwaite redux? *AFW v RFH* and *H v W*

However, reports of its death may have been exaggerated as two recent cases have confirmed its existence.

In AFW v RFH [2023] EWFC 119 (20 July 2023) Recorder Laura Moys was concerned *inter alia* with an order for sale which remained executory. At [68] she accepted she had a residual power to vary the order under *Thwaite* if satisfied that there has been both a significant change in circumstances since the final order was made and it would be inequitable not to vary the order. On the facts she refused the application on grounds *inter alia* that even if the value of the family home had fallen since the making of the final order, fluctuations in the property price (and uncertainty about what a property will ultimately sell for) do not constitute a significant change in circumstances that would justify the exercise of the *Thwaite* jurisdiction.

In *H v W* [2023] EWFC 120 (14 July 2023) HHJ Reardon considered Mostyn J's challenge to the very existence of the *Thwaite* jurisdiction in *BT v CU*. At [53] she accepted that one significant difference between *BT v CU* and the cases in which the *Thwaite* jurisdiction has been exercised was that for the most part, the latter cases involved circumstances where there has been an element of deliberate frustration of the implementation of an unexecuted order by the actions of a party (*Bezeliansky*) or third parties (*Kicinski*). She said that one answer to Mostyn J's argument in *BT v CU* – i.e. that *Thwaite* was superseded by *Barder* – is that many 'deliberate frustration' cases might well fail the first limb of *Barder* on the basis that the events in question were foreseeable, especially if the responsible party has a history of obstructive behaviour. As Lieven J had observed in *Kicinski* at [51] '[i]t might well on the facts have been not wholly unexpected that Mrs. Thwaite or Mr. Bezeliansky would have reneged on part of their respective agreements'.

This difference led HHJ Reardon to state at [54] that it would be strange if the Family Court offered no remedy for the disadvantaged spouse in cases in that category. At [55] she then observed that *BT v CU* was a paradigm *Barder* case (notwithstanding that the application failed). The fact that the order remained executory was incidental. The impact of the COVID-19 school closures on the husband's school meals business had nothing to do with the wife. She agreed with Mostyn J that in such a case an applicant should not be able to fall back on the 'less stringent' *Thwaite* jurisdiction as an alternative remedy to *Barder*, simply because the order happens to remain executory.

At [56] she observed that in contrast in the *Thwaite* cases there is usually a close link between the executory nature of the order and the disaffected spouse's ability to frustrate it. This was particularly obvious in property sale or transfer cases, where, however tightly-drafted the order, the owner of the property was likely to have a number of opportunities to obstruct and delay the sale or transfer, or otherwise to diminish the value of the asset, in the pre-implementation period. The *Thwaite* jurisdiction would appear to be the only remedy available in such cases, where the change in circumstances has been brought about by a foreseeably disaffected spouse, rather than an unforeseeable event.

For these reasons HHJ Reardon at [57] expressed the view that the *Thwaite* jurisdiction did exist as a separate remedy to *Barder* and that its use may be particularly apt where:

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

At [58] the court stated that the essence of the *Thwaite* jurisdiction was fairness. However, in exercising the jurisdiction, the court is not approaching the situation with fresh eyes. *Thwaite* itself, *Bezeliansky* and *L v L* all refer to making an adjustment from the terms of the final order not because it is fair to do so, but because in the light of events since the order it would be inequitable *not* to do so. This was a subtle but important distinction.

Conclusion

So the jury is still out. Is *Thwaite* solely an equitable jurisdiction to refuse to enforce an executory order if, in the circumstances prevailing, it would be inequitable to do so *or* a power that extends to making a different order albeit

(perhaps) one restricted to cases where there has been an element of deliberate frustration of the implementation of an unexecuted order by the actions of a party or third parties and where the case might fail the first limb of *Barder* on the basis that the events in question were foreseeable?

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

Remarriage: Avoiding the Elephant Trap

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This article is a practical guide to the legal consequences of a second (/third/fourth/fifth, etc) marriage, to assist when advising clients how to avoid falling into the 'elephant trap' of premature remarriage – a term coined by the late Singer J. It can be a messy topic, and it is surprisingly common to avoid finalising financial arrangements after the demise of a marriage. The importance of giving accurate advice to clients, particularly those keen to remarry, is obvious.

The law

As we know, upon a divorce application ('divorce petition' in old language) being issued, either spouse may make a financial remedy claim against the other under the Matrimonial Causes Act 1973 (MCA 1973). There is no time limit within which an application must be made, even following lengthy delay; *Wyatt v Vince* [2015] UKSC 14.

However, in circumstances of a remarriage, s 28(3) MCA 1973 can bite. If a spouse has remarried they lose their entitlement to apply for a financial provision order or a property adjustment order in their favour.

Section 28(3) MCA 1973 states:

> 'If after the grant or making of a decree or order dissolving or annulling a marriage either party to that marriage remarries whether at any time before or after the commencement of this Act or forms a civil partnership, that party shall not be entitled to apply, by reference to the grant or making of that decree or order, for a financial provision order in his or her favour, or for a property adjustment order, against the other party to that marriage.'

The parallel provision[1] is set out in Sch 5, para 48 Civil Partnership Act 2004:

> 'If after the making of a dissolution or nullity order one of the civil partners forms a subsequent civil partnership or marriage, that civil partner is not entitled to apply, by reference to the dissolution or nullity order, for:
>
> (a) an order under Part 1 in that civil partner's favour, or
>
> (b) a property adjustment order,
>
> against the other civil partner in the dissolved or annulled civil partnership.'

The applications caught by the above provisions are those for:

(1) financial provision (s 23 MCA 1973) for periodical payments, secured periodical payments and lump sum provisions; and
(2) property adjustment orders (s 24(1) MCA 1973) for transfer of property, settlement of property, and variation of a nuptial settlement for the benefit of one/both of the parties.

The bite of the s 28(3) provisions does *not* however extend to pension sharing orders. An application for a pension sharing order can still be made following the applicant's remarriage. Indeed, it can be a resourceful idea to focus on such a pension sharing order application if your client is in the 'elephant trap' of not being entitled to apply for financial provision/property adjustment orders. NB Pension attachment orders are different and classed as financial provision orders.

Another consequence of remarriage to remember is s 28(1)(a) MCA 1973 – periodical payments cannot be ordered to extend beyond the remarriage of the recipient party.

When do parties fall into the 'elephant trap'? Timing is everything. If the applicant remarries *after* applying for financial remedies, even if the application has not yet been heard, the application may proceed. So the crucial question is whether a valid application for financial remedies has been made *before* the remarried spouse waltzes down the aisle. 'Marry in haste, repent at leisure.'

If one spouse remarries, that does not terminate the right of the other spouse who remains unmarried to bring their own financial claims.

In *E v E* [2008] 1 FLR 220, Singer J related 'a truly cautionary tale' (at [1]). The wife's divorce petition had included a claim for all forms of ancillary relief. The husband (respondent to the wife's divorce petition) had made no application for financial remedies. After decree absolute, the parties negotiated a financial settlement through their solicitors, and drafted and signed a consent order. After the consent order drafting was finalised, but *before* any application to the court had been made, the husband remarried in Bali at 'a ceremony which, certainly the date if not the place of which, he now no doubt deeply regrets' (at [1]).

The 'brutal outcome' for the husband was that he fell into the 'elephant trap of premature remarriage' (at [14]). Singer J determined: 'the court was never seised and the court's jurisdiction was never invoked until after the husband had remarried and put it beyond the court's power

to contemplate and deal with his application' (at [14]). 'I cannot make bricks without any straw, and s.28(3) of the 1973 Act burns the straw. There is no jurisdiction. I refuse the husband's application' (at [17]).

Given that the only order sought was for the wife to pay the husband a lump sum, Singer J considered the divorce petitioner wife could not apply for such an order against herself, even if she were minded to do so: 'It would be absurd if you could make an order in favour of a remarried spouse because the other spouse was asking you to, but you could not if that spouse him or herself were asking for the same relief' (at [13]).

Income

Turning first to income claims, the remarried party cannot pursue a periodical payment claim but the party who has not remarried may do so, assuming it is in their interests. This is in line with the maintenance bar under s 28(1)(a) MCA 1973 pursuant to which payments cease following the receiving party's remarriage. NB This is not to be confused with a s 28(1A) bar on the extension of the maintenance term.

Capital

The capital position can be tricky. There could be circumstances, for example, where one spouse allowed the other to remain in the family home with the children upon divorce but they failed to formalise the arrangements. Following the non-resident spouse's remarriage, they cannot pursue an application for a transfer of the family home, or settlement of the family home (e.g. a *Mesher* order) under the MCA 1973, and therefore the arrangement could continue indefinitely given it may not be in the resident party's interests to issue a financial remedies application. It is likely in that scenario the non-resident party would try to find grounds to pursue alternative claims.

What are the alternatives when in the 'elephant trap'?

If there is owned property, and the facts merit it, a remarried party can make a claim under the Trusts of Land and Appointment of Trustees Act 1996 (TLATA), or an application under the Married Women's Property Act 1882.

Note that using TLATA as an alternative remedy is available only where there is no jurisdiction under the MCA 1973 (i.e. there is no MCA 1973 application from either party before the court); *Tee v Tee and Hillman* [1999] 2 FLR 613.

Is there a valid maintenance agreement in accordance with s 34 MCA 1973? Even after remarriage, the court retains the power to enforce a maintenance agreement; *T v R (Maintenance after Remarriage: Agreement)* (Rev 1) [2016] EWFC 26.

Another option worth exploring is a Sch 1 Children Act 1989 claim for financial provision for the benefit of a child, albeit there are limited circumstances where this will be relevant.

As stated above, an application for a pension sharing order remains an option regardless of remarriage. The Welfare Reform and Pensions Act 1999 did not amend s 28(3) MCA 1973 to include a pension sharing order as a form of financial relief, so remarriage does not prevent such a claim. Most commentators assume this was an oversight and consider s 28(3) MCA 1973 should have been amended on the introduction of pension sharing.

The application

Obviously, remarriage obstructs important financial applications for the remarrying spouse. Some claims are preserved when a financial remedies application is issued before the spouse's remarriage, even if other claims cannot be pursued thereafter (e.g. income claims by the remarried receiving party).

What then is a valid application for financial remedies? An application can be made in an application for a divorce in Form D8 (divorce petition in old language) or a request for a financial order in Form A/A1. The latter triggers the timetable to be set out for contested court proceedings. But financial claims can be also protected at the outset by the divorce application.

Both the old divorce petition and the new divorce application forms conclude with 'the prayer' in which a request is usually made for an order for financial provision to be made by the court. If the 'yes' box is/was ticked, the applicant's ability to pursue financial order claims is preserved. Similarly, this is the case in a cross application from the other party to the divorce application, or a joint divorce application, should that be relevant.

It is important to note the respondent's bare acknowledgement of the divorce petition is not enough to preserve their own financial claims. In *Hargood (formerly Jenkins) v Jenkins* [1978] Fam 148, a 'mere answer given in an acknowledgment of service' to a divorce petition, indicating an intention to bring financial remedy proceedings, was not sufficient to constitute an application, and it could not circumvent the s 28(3) MCA 1973 bar when the wife had remarried.

The new answer form to a divorce application does not contain the same tick box for the respondent to indicate that they seek to bring a financial remedy claim, save that it may be serviced by ticking 'other' and filling in the relevant detail under 'orders requested'. This has not been tested, and in light of the strict approach in *Hargood (formerly Jenkins) v Jenkins*, it should be approached cautiously.

Prudent advice may therefore be that either an appropriately completed divorce application, cross-divorce application, or Form A is required to count as an application for a financial remedies order.

When is issuing Form A/Form A1 necessary? The answer will differ depending on whether the remarrying spouse is the applicant or respondent in the divorce application. If they are the divorce applicant it is clearly helpful if they ticked the financial claims box in the divorce application. If they then wish to pursue a financial remedy claim, a Form A/Form A1 may be issued at their chosen time, including after their remarriage.

If the remarrying party is the respondent in divorce proceedings (and/or were the divorce applicant but failed to tick the financial claims box), then a Form A/Form A1 application would need to be issued *before* their remarriage.

Often it will be sensible for proceedings to be issued promptly via Form A/Form A1 prior to the party's remarriage to preserve as many financial claims as possible. Any client keen to tie the knot again must give serious thought as to whether to apply for financial provision first.

Piggyback claims

The clear wording of the MCA 1973 statute precludes any application being made by an elephant trapped spouse: 'that party shall not be entitled to apply … for a financial provision order in his or her favour, or for a property adjustment order, against the other party to that marriage' (s 28(3) MCA 1973).

Is remarriage a bar to provision being made in the remarried elephant trapped party's favour when the court is determining the *other spouse's* financial remedies application? Can a remarried spouse piggyback their claims on their former spouse's application?

Debate on this issue spans 40 years of jurisprudence. According to *Robin v Robin* [1983] 4 FLR 632, cited by Thorpe LJ in *Whitehouse-Piper v Stokes* [2008] EWCA Civ 1049, a remarried spouse cannot rely on the other spouse making an MCA 1973 application on which to piggyback their claims. In *Whitehouse-Piper*, Thorpe LJ said:

> '[5] The case of *Robin v Robin* is now antique, and any decision on the application of section 28(3) can only be drawn from the judgment of Dunn LJ, who at that point spoke *obiter*. However, in his *obiter dictum* he was very plain that if the court's jurisdiction rests solely on an application by one spouse, the other spouse cannot as it were find his jurisdictional base within that application. A respondent to a divorce petition had to issue some application, either by way of prayer within an answer or by issue of application thereafter, in order to found jurisdiction.
>
> [6] The judge surmounted the difficulty which he had himself observed by reference to a much later decision of this court in *Tee v Tee and Hillman* [1999] 2 FLR 613, where the court had particularly disapproved of parties engaging in TOLATA proceedings when their fundamental dispute related to a property and nothing else but a property where the court in doing justice was not restricted to proprietary law but could have regard to all the circumstances imported by the court's section 25 jurisdiction. And that is how the judge overcame the jurisdictional problem.'

However, notwithstanding the above, it is interesting to note that in *Whitehouse-Piper*, neither the District Judge at first instance, the Circuit Judge on appeal, nor the Court of Appeal on the second appeal considered there was any jurisdictional obstacle to the court making a property adjustment order in favour of the remarried husband, despite the fact only the (jurisdictionally-sound) wife's Form A was before the court.

It may be argued that too much gloss has been put on a purist reading of the statute wording. Section 28(3) bars entitlement to make *an application*: 'shall not be entitled to apply'. This differs from the wording used in s 28(1)(a) for periodical payments – where the order simply cannot extend beyond the remarriage of the payee: 'the term … shall be so defined as not to extend beyond … the remarriage'.

Section 28(3) itself does not explicitly impede the court making financial provision/property adjustment orders in favour of the remarried spouse. Sections 23 and 24 MCA 1973 refer to the court's powers to order financial provision by one party in favour of 'the other party'. Does the combined effect of these provisions mean that the statutory prohibition is limited to *applications*?

It remains to be seen how the higher courts would determine this debate. In *CB v EB* [2020] EWFC 72, Mostyn J referred to a similar issue as a 'problematic question', albeit one he did not need to resolve in that case (at [70]). Mostyn J did comment he was 'not convinced' by the argument that 'the bar on the [remarried] husband issuing an application does not prevent the court from varying the orders in his favour' (at [68]), but that if the matter (on the facts of that case) needed determination by a higher court in the future then the question of whether the remarried husband was statutorily barred from having his application determined would have 'to be looked at very carefully' (at [70]).

Notably, it was a recommendation of the Financial Remedies Working Group in 2014 (chaired by Mostyn J and Cobb J) that the Form A should be amended, so that once Form A is issued by *one* party to the marriage, all possible financial order applications by *both* parties should be deemed to have been made, and may be granted or dismissed by the court without further application.[2]

A recent Isle of Man appeal decision, *Hyslop v Hyslop* 2DS 2022/13 and 2DS 2023/03, offers detailed analysis of the England and Wales remarriage authorities and reaches some interesting conclusions. It is mentioned in passing that the Isle of Man appeal tribunal included Michael Horton KC (from Coram Chambers) sitting as an Acting Deemster. The Isle of Man court observed this same point about *Whitehouse-Piper* (at [172]):

> 'what this case does show is that even where the [remarried] husband, the net recipient of capital under the order, had not made an application, it was open to the court on the wife's application to make an order in his favour, provided that that had been made clear as part of the proceedings'

The Isle of Man court also commented (at [156]):

> 'While Dunn LJ [in *Robin v Robin*] expressed himself in strong terms that the court could not make an order for ancillary relief in favour of A unless A had made an application for such an order, Eveleigh LJ refrained from deciding the case on that basis. As such, in our judgment, the ratio of *Robin* says nothing about the remarriage trap.'

The Isle of Man court's determinations in *Hyslop* on piggybacking are emphatic and provide interesting reading, albeit they explicitly fell short of suggesting: 'once one party makes an application for ancillary relief, all matters were before the court' (at [182]). At [181] the court concluded:

> '(1) although it was suggested in *Robin v Robin* that it is not open to make, for instance, a property adjustment order in favour of a party who has not themselves made an application for it, in our view that is wrong. It is open for Party A to apply for orders against themselves. On such an application, an order could therefore be made in favour of Party B.
>
> (2) where no application is made by Party A for orders against himself or herself, and Party B has remarried before making any application, and Party A has all the assets, the court cannot make any order in favour of Party B: *E v E*. …
>
> (5) given that lump sum provision and property adjustment provision is seen as equivalent, we consider that a court is not precluded from making one or other order in favour of a person who is caught by the remar-

riage trap provided that such a person is not the net recipient of capital under the overall order. For instance, take a straightforward case where the only significant asset is the matrimonial home held in joint names. The wife applies for financial provision and the husband makes no such application, and then subsequently remarries before the wife's application is determined. On her application, the wife seeks an outright transfer of the home into her sole name. The husband's response is to accept a transfer from the wife from the joint names of the parties into the wife's sole name, but with a charge back on *Mesher* terms, deferring the sale or realisation of the husband's interest until the children had grown up. There is no reason why the court could not make that order even though the husband was caught by the remarriage trap, provided that the husband's deferred interest did not exceed 50% (i.e. he was not the net recipient of ancillary relief). Such an order could be done in a number of ways, but could include effectively a lump sum order in favour of the husband with a deferred entitlement to the lump sum, and the wife undertaking to provide security for the payment of that lump sum as a condition of the transfer to her of the former matrimonial home. Such an order is perfectly permissible notwithstanding his remarriage.'

Conclusions

One of the origins of s 28(3) MCA 1973 was a report by the Law Commission dated July 1969.[3] The Law Commission said:

> 'A wife who has gone through a form of marriage with a second "husband" should not, in our view, be entitled to revive her rights against her first husband by having her second "marriage" annulled. If the annulment is in England, the English courts have power to order financial provision from the second "husband". If it is in a foreign country, the courts of that country may not have that power, and she may be left without rights against either husband. But in our view, the principle must be that once another marriage has been contracted, that destroys any claim against a former spouse.'[4]

The report uses gender assumptions and stereotypes throughout its recommendations on this topic. Perhaps this adds weight to the argument that s 28(3) MCA 1973 was more relevant in the days when a remarried wife was seen as her new husband's responsibility. Arguably, the sharing principle is completely undermined when the s 28(3) provision bites.

It will be interesting to see how this subject develops.

Notes

1 When we refer to remarriage, this also applies to a subsequent civil partnership.
2 *Final Report of the Financial Remedies Working Group*, 15 December 2014, p 2.
3 The Law Commission, Law Com No 25, *Report on Financial Provision in Matrimonial Proceedings*, 24 July 1969.
4 Law Com No 25, *Report on Financial Provision in Matrimonial Proceedings*, para 14.

The Pensions Ombudsman for Family Lawyers

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Status of the Pensions Ombudsman

The Pensions Ombudsman (TPO) is constituted under the Pension Schemes Act 1993 (PSA 1993).

TPO may investigate and determine any complaint made to them in writing by or on behalf of an authorised complainant who alleges that they have sustained injustice in consequence of maladministration in connection with any act or omission of the trustees or managers of an occupational pension scheme or personal pension scheme.

TPO may also investigate and determine any dispute of fact or law referred to them in writing by or on behalf of an authorised complainant which arises in relation to such a scheme between the trustees or managers of the scheme and an authorised complainant.

TPO also operates as the Pensions Protection Fund Ombudsman (constituted under the Finance Act 2004) which has a similar role in relation to issues relating to the Pensions Protection Fund.

TPO investigates more than 1,000 complaints per year, making detailed findings which are publicised, and which are open to appeal to a High Court Judge. The website of TPO (www.pensions-ombudsman.org.uk) exhibits full transcripts of all these decisions.

When might a family lawyer want to use TPO rather than apply back to court?

Once a properly executed pension sharing order (PSO) has taken effect, subject to any appeal out of time under s 40A Matrimonial Causes Act 1973 or a set aside application under FPR 9.9A, the task of the Family Court is usually complete.

Complaints relating to defective orders and pension sharing annexes or improperly served legal documents would be a matter for the Family Court to deal with. The Family Procedure Rules 2010 (SI 2010/2955) (FPR) 9.36(2), (4) and (7) set out the requirements for the Family Court or such party as directed by the court to serve the court order, Pension Sharing Annex and Decree Absolute/Final Order on the pension arrangements(s).

The implementation period is commenced by the parties submitting prescribed information to the pension arrangement and payment of any fee, if required. The implementation period cannot begin until the person responsible for the pension arrangement has received all its requirements in terms of information and payment of any fee.[1] Most commonly, they would include completed discharge forms and receiving scheme warranties (paper or online), together with payment of charges by both parties (where appropriate). Once all the requirements are received the implementation period begins and this can last up to 4 months, unless there are grounds to delay or extend this period.[2] The details of the scheme's obligations are set out in Part IV Welfare Reform and Pensions Act 1999 and is supplemented by the Pension Sharing (Implementation and Discharge of Liability) Regulations 2000 (SI 2000/1053).

Assuming the correct legal documents have been served on the pension scheme, and those documents are properly drafted, it is the responsibility of the trustees of the pension scheme to implement the PSO once it is in receipt of all its requirements, through its appointed administrators. This can often be where delays occur because they will require notification from the transferee or their adviser of the scheme details to which the transfer is to be made, unless the option of an internal pension credit transfer is the only option (i.e. most public service schemes). Even then, forms often have to be completed to enable the implementation.

Thereafter, any concerns about the manner or timing of the implementation of the PSO would normally be raised with TPO, once the scheme's own resolution processes have been exhausted. However, where a financial adviser is involved, they could first try to contact The Pensions Regulator, which may intervene more quickly and also has powers to impose fines on pension schemes for breaches. If

the latter fails to resolve the problem, then it is most definitely a matter for TPO. In effect, complaints as to the manner and timing of implementation cease to be 'family law' matters and have become pure 'pension law' matters.

TPO is a free service for informal and formal dispute resolution decided according to legal principles. (Many other ombudsman services or other consumer-focused resolution services make decisions by reference to what is fair and reasonable, rather than legal principles.)

TPO's power to determine disputes of fact and law is based in statute, primarily in s 146 PSA 1993. The scope of that power has been clarified over the years by the courts. It has been consistently held that, where a complaint or dispute has been referred to TPO, there should not be a different answer as to the substance of the dispute according to whether the dispute was decided by a court or by TPO: *Wakelin & Ors v Read & Anor* [2000] EWCA Civ 82.

TPO also has no power to direct remedial steps to be taken that are not steps that a court of law could properly have directed to be taken: *Edge v Pensions Ombudsman* [1998] Ch 512, *Legal & General Assurance Society Ltd v CCA Stationery Ltd* [2003] EWHC 2989 (Ch). Mr Justice Lewison, reviewing the previous authorities in *Arjo Wiggins Ltd v Ralph* [2009] EWHC 3198 (Ch) at [13], held that: 'It is now well settled that, in principle, the Pensions Ombudsman must decide disputes in accordance with established legal principles rather than by reference to what he himself considers to be fair and reasonable'.

Following this line of authority TPO determines referred disputes impartially in accordance with legal principles. However, TPO powers differ in one key aspect. Since pure maladministration and consequential injustice (without infringement of legal rights) is not actionable in court, TPO is able to grant a measure of relief which the court could not. Typically, this is a modest sum directed as compensation for distress and inconvenience, and there is a factsheet describing these awards in more detail.[3]

A key distinguishing feature between TPO and the courts is that TPO is free to use. TPO generally does not award costs against the complainant, so can provide a low cost or cost-free impartial forum to resolve disputes. This can be achieved formally through adjudication, which can result in a legally binding determination on the parties, or informally through what is known as TPO 'Early Resolution Service'. The vast majority of TPO complaints are fully dealt with on the papers.

What does a complainant need to do before they contact TPO?

In all cases, a party or their representative will need to have at least contacted the respondent pension arrangements first, setting out their complaint.

Before a complaint can be formally investigated via TPO adjudication, a complainant will need to have completed the pension arrangement's Internal Dispute Resolution Process (IDRP), which registered pension arrangements must have. TPO has a factsheet which explains what must be done before it is prepared to become involved.[4]

What is the procedure before TPO?

Under s 149(4) PSA 1993, TPO's procedure for conducting an investigation is such that it considers appropriate in the circumstances of the case.

Complaints need to be brought within 3 years.[5]

Broadly, a typical complaint procedure will be as follows, though a complaint may go through different stages as appropriate, and TPO's procedures are subject to change:

- The complaint will be assessed within TPO to ensure that it has been brought within time and is within TPO's jurisdiction. See TPO online guide for further information.[6]
- If the complaint is accepted, it may be recommended for the informal Early Resolution Service (if suitable) or for formal adjudication.
- If recommended for early resolution, a resolution specialist will work with both parties to try to reach informal agreement. If an agreement cannot be reached, or if a party does not wish to continue with early resolution, the complaint may then be investigated formally by an adjudicator.
- If recommended for investigation by an adjudicator (under delegated authority from TPO), the adjudicator will usually issue an Opinion setting out their view on the merits of the complaint and, if upheld, what steps should be taken by the respondent to put matters right.
- If both parties accept the adjudicator's Opinion or informal resolution, the complaint is closed.
- If one or more parties do not accept the Opinion, the adjudicator will refer the complaint to TPO to consider and issue a binding decision. Under s 145(4C) PSA 1993, only TPO can determine a complaint. A final decision (known as Determination) by TPO is binding on the parties and can include directions and costs against the respondent.

What powers does TPO have?

These are set out principally in:

- Part X PSA 1993;
- the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995 (SI 1995/1053) (1995 Procedure Rules); and
- the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (SI 1996/2475).

Broadly, these include investigating and determining disputes of fact and law, and complaints of maladministration, in relation to occupational or personal pension schemes, which arise between a person responsible for the management of the scheme, and a beneficiary. TPO has the power to summon witnesses and order disclosure of documents in the same way as a court would be able to do.

Substantively, TPO has the very wide power to order pension arrangements to take or refrain from taking particular steps.[7] Awards of damages for financial loss can be made. TPO can also make awards in recognition of non-financial injustice, which is set out in more detail in a TPO factsheet.[8]

How does a determination come about – is there ever a hearing or is it all on papers?

The vast majority of cases can be fully dealt with on the papers. As part of a formal investigation, any party to a complaint can ask TPO to hold an oral hearing. However, it is TPO's decision whether to hold one, and he may also decide to hold an oral hearing even if one is not requested. TPO may call an oral hearing at any time. The circumstances in which a hearing may be appropriate include:

- Where there are differing accounts of a particular event and the credibility of witnesses needs to be tested.
- Where the integrity or honesty of one of the parties has been questioned, and that person has asked for an oral hearing.
- Where there is a dispute about basic facts that cannot be uncovered by the investigation on the papers.

If TPO does decide to hold an oral hearing, rr 10–15A 1995 Procedure Rules govern the conduct of these hearings.

What is the status of TPO decisions – do they create precedents in a legal sense or do they tend to get followed informally?

Determinations are binding on the parties. They are not binding on third parties and do not create precedents that bind future Determinations by the same or future TPO. Given that Determinations are made in accordance with legal principles, and by TPO with the support of TPO office, it is expected that there will generally be consistency across different Determinations.

Can you appeal TPO decisions?

Under s 150 PSA 1993, a party in England and Wales may appeal a Determination on a point of law to the High Court. A party based in Scotland may appeal a Determination on a point of law by way of case stated to the Court of Session and a party based in Northern Ireland to the Court of Appeal in Northern Ireland. The appeal route for other decisions by TPO or those delegated to their staff (e.g. of jurisdiction decisions or discontinuance notices) is by way of judicial review.

What kinds of decisions does TPO make about pensions on divorce

All TPO decisions are published on the website of TPO.[9] There follows a chronological schedule of all known decisions made by TPO which relate to pensions on divorce.[10]

There are several recurring themes to be found in the reported decisions. Points which tend to crop up regularly include:

- Claw backs made by a pension arrangement for benefits paid to the pension holder, when the pension is in payment, after the PSO has taken effect but before the share has been implemented. Family lawyers should ensure that they understand this point and alert their clients to its ramifications. Good examples of this are the cases of *Shepherd* (case 1, below) and *Cleworth* (case 19, below).
- Transfers made out of pension prior to implementation. Good examples of this are the cases of *Morton* (case 9, below) and *Mr S* (case 56, below).
- Scheme administration errors, for which see *Mr A* (case 45, below).
- Revaluation of a pension debit for active members of defined benefit pension schemes, for which see *Mr N* (case 49. below).
- What benefits will be deemed to be within a public sector scheme at point of implementation for members close to retirement, for which see *Culverwell* (case 17, below).[11]
- Moving Target Syndrome (MTS) or uncertainty over the cash equivalent transfer value (CE), for which see *Mr R* (case 57, below).

The family practitioner wanting to understand better the workings of TPO so far as it relates to family law would do well to consider the above cited cases as leading examples.

The Pensions Ombudsman divorce case decisions[12]

	Case	Month/ Year	Case number	Nature of complaint
1	*Shepherd v Air Products Pension Plan*	9/2006	Q00278	Clawback
2	*Cowland v Capita SIPP*	4/2007	Q00244	Incorrect CE and split basis
3	*Pike v Teachers Pension Scheme*	3/2008	26355	Clawback
4	*Crabtree v BAE Systems EPS*	5/2008	S00522	Valuation (MTS)
5	*Slattery v AFPS*	8/2008	27870/1	Revaluation of pension debit and what it applies to
6	*Kerbel v Southwark Council*	1/2009	72577/1	Retirement date
7	*Mr S J McGurk v Royal Mail*	7/2009	74946/2	Death benefit distribution
8	*Boughton v Punter Southall & Bell and Clements Group Pension*	9/2009	74851/1	Speed of implementation
9	*Morton v MJF Associates Private Pension Scheme*	7/2010	77828/2	Lump sum death benefits

	Case	Month/ Year	Case number	Nature of complaint
10	*Kemp v Axle Group Directors & Executives Pension Scheme*	9/2010	76194/1	Lump sum death benefits
11	*Mrs A Ioannou v Aviva Life Services*	12/2010	75645/2	Estate reduction
12	*Symons v Astra Zeneca Pension Trustees Ltd*	7/2011	83880/2	Lump sum death benefits
13	*Davis v Windsor Life Assurance*	3/2012	80998/1	Valuation (MTS) – incorrect judgment?
14	*Hendry v The Tarmac UK Pension Scheme*	3/2012	85218/1	Lump sum death benefits
15	*Staley v Marlborough Investment Mgt Ltd Retirement Scheme*	7/2012	81482/2	Valuation (MTS)
16	*Ms S v Alliance Trust Pensions SIPP*	7/2012	83083/2	Transfer delay
17	*Culverwell v Teachers Pension Scheme*	11/2012	82981/3	Valuation (what is included)
18	*Miss Stocks v Hornbuckle Mitchell*	11/2012	84269/1	Non-implementation
19	*Cleworth v Teachers Pension Scheme*	12/2012	87725/2	Clawback
20	*Collinson v NHS Pension Scheme*	3/2013	PO-128	Clawback
21	*McNicholas v Scottish Widows*	4/2013	PO-408	Repayment of overpaid CE
22	*Payne v AON and Anglo UK Pension Trustees*	5/2013	PO-107	Incorrect ret. calcs. post-PSO
23	*Adams v Innovene Trustees*	9/2013	PO-823	Incorrect CE
24	*Morton v Royal London (Scottish Life)*	8/2013	PO-378	Scheme transferred before implementation
25	*Mr Emson v Teachers Pension Scheme*	9/2013	PO-168	Clawback
26	*Mrs Gordon-Smith v Veterans UK*	11/2014	PO-3618	Benefit valuation
27	*Mr H v Veterans UK*	6/2016	PO-7888	Clawback
28	*Ms O v BT Pension Scheme Trustees*	6/2016	PO-6385	Incorrect information
29	*Ms D v NHS Pensions*	7/2016	PO-9150	Incorrect normal retirement date quoted
30	*Mrs N v Lloyds Bank Pension Scheme*	1/2017	PO-6972	Delays and reduced CE
31	*Mrs N v BAE Pension Scheme*	2/2017	PO-7696	Death benefits pre-divorce
32	*Mrs Y v USS*	3/2017	PO-15209	Wrong info + valuation (MTS)
33	*Mrs T v Rowanmoor*	6/2017	PO-8797	Scheme asset failings
34	*Mr N v HSBC (UK)*	6/2017	PO-16288	Implementation charges
35	*Mr N v PCSPS*	8/2017	PO-16419	Clawback
36	*Mr S v PCSPS*	9/2017	PO-3942	Clawback
37	*Mrs R v Teachers Pension Scheme*	12/2017	PO-15686	Costs incurred by delayed CE
38	*Mr D v Hertfordshire CC (LGPS)*	01/2018	PO-16922	Clawback
39	*Ms Y v Alexander Chapel Associates*	03/2018	PO-1196	Failure to implement PSO
40	*Mrs N v Mr Y*	07/2018	PO-7505	Failure to implement PSO
41	*Mr Y v Friends Life*	07/2018	PO-5645	PSO incorrectly implemented
42	*Mrs s v JLT (Indesit Company UK)*	10/2018	PO-15486	Overstated CE
43	*Mr N v Mercer (MMC UK Pension)*	11/2018	PO-18613	Wrong PSO calculation (minor)
44	*Mr E v Teachers Pensions*	11/2018	PO-21001	Clawback
45	*Mr A v KPMG (Rettig UK Pension)*	11/2018	PO-19073	Wrong interpretation of annex
46	*Mr Y v RPMI (Railways)*	03/2019	PO-22071	Attachment maladministration
47	*Mrs N v Aviva*	03/2019	PO-22362	Change in valuation (MTS) + maladministration
48	*Ms S v Trinity RBS*	03/2019	PO-22064	Change in valuation (MTS)
49	*Mr N v Veterans UK (AFPS)*	10/2019	PO-23859	Revaluation of pension debit
50	*Ms N v MyCSP*	10/2019	PO-23696	Retirement benefits and timing of PSO
51	*Mr R v JLT (The Stena UK 2016 RBS)*	10/2019	PO-21046	Attachment Orders (effect of 2006 A Day changes to rules)
52	*Mr Y v Police Pension Scheme*	06/2020	PO-21875	Clawback with compensation

	Case	Month/ Year	Case number	Nature of complaint
53	*Mr H v London Clubs Ltd Pension Scheme*	12/2020	PO-28860	Scheme errors
54	*Dr N v Teachers' Pension Scheme*	03/2021	PO-23533	Clawback
55	*Mr S v Aviva Pension Plan*	04/2021	CAS-42431-G2M7	Misinterpretation of Consent Order – incorrect entitlement
56	*Mr S v The Ryland Group PS*	03/2022	CAS-31053-J5J5	Scheme transferred before implementation
57	*Mr R v Compass Group Pension Plan*	06/2022	CAS-43151-ROL7	Change in valuation (MTS)
58	*Mr E v [H] Computer Systems*	07/2022	CAS-44039-Y6Q2	Implementation delays – H&W remained small self-administered scheme managing trustees

Notes

1 Pensions on Divorce etc (Provision of Information) Regulations 2000 (SI 2000/1048), reg 5. Pensions on Divorce etc (Charging) Regulations 2000 (SI 2000/1049), reg 9.
2 The Pension Sharing (Implementation and Discharge of Liability) Regulations 2000 (SI 2000/1053).
3 *Redress for non-financial injustice*, available at www.pensions-ombudsman.org.uk/sites/default/files/publication/files/Updated-Non-financial-injustice-September-2018-2_0.pdf
4 *Complaining to the party/parties at fault*, available at www.pensions-ombudsman.org.uk/sites/default/files/publication/files/Complaining%20to%20the%20parties%20at%20fault_0.pdf#:~:text=You%20can%20make%20a%20complaint%20to%20The%20Pensions,eight%20weeks%20if%20there%20are%20no%20time%20limits%29.
5 Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (SI 1996/2475), reg 5(1).
6 www.pensions-ombudsman.org.uk/can-i-complain
7 PSA 1993, s 151(2).
8 *Redress for non-financial injustice*, available at www.pensions-ombudsman.org.uk/sites/default/files/publication/files/Updated-Non-financial-injustice-September-2018-2_0.pdf
9 www.pensions-ombudsman.org.uk/decisions (last viewed 23 January 2023).
10 The author is extremely grateful to Mr Paul Cobley of Oak Barn Financial Planning for giving permission to reproduce his table.
11 Please note that a different decision to *Culverwell* was made in the case of *Ms N v MyCSP* (case 50). The *Culverwell* decision may be considered to be better decided.
12 Last updated 14 January 2023.

Child Maintenance in Cases of Equal Shared Care

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The situation: two parents share childcare seemingly equally but there is a significant income imbalance.

The issue: how is child maintenance determined? Does the Child Maintenance Service have jurisdiction? Does the Family Court have jurisdiction? Do neither?

This article aims to address these questions, albeit in circumstances where the relevant commentary in the Red Book states that a case deciding this point is awaited.[1]

Basic principles

The first chapter of the Child Support Act 1991 (CSA 1991) is entitled 'The basic principles' and this is our starting point. Section 1 CSA 1991 sets out that each parent of a qualifying child is responsible for maintaining that child. It further sets out that a non-resident parent shall be taken to have met their responsibility to maintain by making periodical payments as may be determined in accordance with the CSA 1991. It does *not* say how a parent who is not a non-resident parent would satisfy this duty to maintain.

A parent is defined in s 3 CSA 1991 as being a non-resident parent if:

> '(a) that parent is not living in the same household with the child; and
>
> (b) the child has his home with a person who is, in relation to him, a person with care.'

A person (NB not necessarily 'parent') is defined as being a person with care if they are a person:

(1) With whom the child has their home;
(2) Who usually provides day to day care of the child (whether exclusively or in conjunction with any other person); and
(3) Who does not fall within a prescribed category of person (i.e. local authorities and foster parents with whom a child is placed when looked after by the local authority).

Readers will be familiar with the various agencies established to deal with child maintenance, with the current service, the Child Maintenance Service (CMS), having reigned since 2012. The operation of the CMS is governed by the Child Support Maintenance Calculation Regulations 2012 (2012/2677) (the 2012 Regulations).

In the vast majority of cases, there is a person with care and a non-resident parent. Absent the exceptions set out in s 8 CSA 1991, the CMS' jurisdiction will be incontestable. A mathematical equation is applied to gross weekly income (after deduction of pension contributions) and a monthly payment is assessed. This monthly payment is subject to various adjustments, including number of children and a shared care deduction, with nights per year the relevant metric.

The complicating factor

The CMS' functionality is all very well when cases fit neatly into the criteria set out in the 2012 Regulations. Such functionality is less clear when cases do not fit so neatly. The 2012 Regulations set out various special cases and for the purposes of this article, we turn to reg 50. This reads as follows:

> '(1) Where the circumstances of a case are that –
>
> (a) an application is made by a person with care under section 4 of the 1991 Act; and
>
> (b) the person named in that application as the non-resident parent of the qualifying child also provides a home for that child (in a different household from the applicant) and shares the day to day care of that child with the applicant,
>
> the case is to be treated as a special case for the purposes of the 1991 Act.
>
> (2) For the purposes of this special case, the person mentioned in paragraph (1)(b) is to be treated as the non-resident parent if, and only if, that person provides day to day care to a lesser extent than the applicant.
>
> (3) Where the applicant is receiving child benefit in respect of the qualifying child the applicant is assumed, in the absence of evidence to the contrary, to be providing day to day care to a greater extent than any other person.'

This is a new addition; it is only under these 2012 Regulations that it has been possible for neither parent to be a non-resident parent. It was not the case under the previous 2000 Regulations.[2]

The interpretation of this Regulation is significant to the question of jurisdiction. The Red Book commentary referenced above interprets this Regulation as meaning where care is equal, there is no non-resident parent and as such there can be no CMS award. This is supported by *MR v*

Secretary of State for Work and Pensions and LM [2018] UKUT 340 (AAC), where Upper Tribunal Judge Jacobs held:

> '2. The basic structure of the Child Support Act 1991 assumes that a child is cared for by one parent. That parent is the parent with care; the other is the non-resident parent. If the child doesn't have a non-resident parent, the scheme doesn't apply: that is the effect of section 3(1) of the Act.'

Section 3(1) CSA 1991 defines a qualifying child as being a qualifying child if one or both of their parents are non-resident parents, hence if no non-resident parent then no qualifying child and no application of the CSA 1991. As Judge Jacobs noted in *MR*, that definition of qualifying child puts the cart before the horse because it assumes there is a non-resident parent. This is perhaps the legacy of the possibility of there being no non-resident parent only being introduced in 2012, versus an Act brought into effect in 1991.

Does this mean that where there is equal shared care, the CMS should decline jurisdiction resulting in no assessment, or does it mean the CMS may make an assessment and that assessment is nil? Unhelpfully (and contradictorily), the writers have seen both letters where the CMS says it cannot continue with the application owing to equal shared care and also a nil assessment in a shared care case.

Scrupulous readers will also note that there is a presumption that the recipient of child benefit is the person with care and thus the non-recipient parent is a non-resident parent. This is a rebuttable presumption; such rebuttal could, for example, be as simple as noting that one parent may be above the income threshold for child benefit, thus not able to receive it.

Does the Family Court have jurisdiction?

Whilst the Red Book states a test case is awaited, one case has briefly addressed this issue; the decision of Recorder Salter in *W v H* [2021] EWFC B63. This decision is not the test case needed, if nothing else because the legal analysis is (respectfully) limited. This may be down to the fact that in support of the court having jurisdiction in circumstances of equal shared care, the judge was (seemingly) simply taken to the relevant passage of Rayden and Jackson.[3] There is no consideration of the interplay with the CSA 1991, for example. The judge's reasoning behind jurisdiction is brief; he refers back to Rayden and Jackson and held he had no hesitation in finding that he had jurisdiction for child periodical payments, because there was no non-resident parent.

Considering the statute in more detail, s 8 CSA 1991 prohibits the Family Court making orders where the CMS has jurisdiction, absent exceptions. Section 8(2) applies that prohibition 'even though the circumstances of the case are such that the Secretary of State would not make a calculation if it were applied for.' Therefore, where within the jurisdiction of the CSA 1991, the simple fact that a calculation would not be made does not oust the jurisdiction of the 1991 Act.

That being said, the discussion comes back to the fact that if there is no non-resident parent then following s 3(1) CSA 1991, the entire scheme does not apply. The prohibition in s 8(1) applies to a 'qualifying child'. If there is no qualifying child there is no prohibition and the extension in s 8(2) CSA 1991 falls away also.

Absent the prohibition in the CSA 1991, the Family Court must gain jurisdiction.

If a court considered that the CSA 1991 was not disapplied despite there being no non-resident parent, where are litigants left? If one parent has a gross income exceeding the maintenance cap of £156k pa, would a top up order be possible?

Top up orders are made under s 8(6) CSA 1991 and require three ingredients:

(1) a maintenance calculation is in force with respect to the child;
(2) the non-resident parent's gross weekly income exceeds the cap; and
(3) the court is satisfied it is appropriate to make a top up order.

The statute does not say that the maintenance calculation must be a maximum assessment. It simply says there must be a calculation. It was held by Holman J in *Dickson v Rennie* [2014] EWHC 4306 (Fam) at [31] that a top up order can only be made where there is a maximum (earnings) assessment. That is not strictly what the statute says, but given the likely approach of the court is to follow the CMS guidance on an income below the threshold, any application where there is less than £156k pa is likely to be pointless.

If the CMS makes an assessment for nil liability on the basis of applying reg 50, and one of the parents has an income in excess of £156k pa, could you argue that s 8(6) CSA 1991 is engaged subject to the court considering it appropriate? In the writers' view such an argument has to fail because s 8(6) CSA 1991 clearly applies to a 'non-resident parent' and if the argument is there is equal shared care then it comes back to the overarching issue that there is no non-resident parent.

If the Family Court has jurisdiction, what orders should it make?

There is an apparent contradiction in approaches under the Family Court versus the CMS. The CMS' approach appears to be one of no liability (or is it no jurisdiction?). Yet, in Mostyn J's adjusted formula in *James v Seymour* [2023] EWHC 844 (Fam) for calculating top up orders, he included calculations for equal shared care. Thus, following Mostyn J's approach, a parent earning £156k with one child and with equal shared care is still liable to pay child periodical payments of £7,300 per annum.

The tables which set out Mostyn J's calculations are part of the appendix to his judgment and it does not appear that the issue of whether equal shared care should still give rise to a liability was mentioned; it certainly was not adjudicated. It is also worth noting that Mostyn J's calculation of equal shared care relied on a simple application of number of nights; reg 50, as discussed below, goes beyond this and considers equally sharing 'day to day care'. Nevertheless, it is a curious contradiction.

There is a debate here; if both parents are doing equal amounts of work in relation to the children, providing equal amounts of housing for example, why should the Family Court make any orders at all?

There is a risk that in Matrimonial Causes Act 1973 cases it becomes an attempt to obtain spousal periodical payments by the backdoor. There is a risk in Sch 1 Children Act 1989 cases that it potentially unfairly inflates an otherwise non-existent income claim, with inevitable scrutiny on how much of a claim amounts to a carer's allowance. If both parents are able to work the same amount of time, there is no career detriment through childcare (distinct from relationship-generated need during a marriage). It comes down to the court potentially being asked to compensate for one parent being in a better paid sector than the other, which is surely not the purpose of child maintenance. At the same time, carer's allowance is well-recognised and Mostyn J's formula in *James v Seymour* was specifically not applicable to HECSA (Household Expenditure Child Support Award) cases.

At the same time, if one parent earns more, then there is an argument that shared costs such as extra-curricular activities should be paid by that one parent, if the risk otherwise is that the children would miss out. In a sense this is analogous to the school fees exception at s 8(7) CSA 1991. Should childcare be paid by one parent, however, even if it is during the other parent's time with the children? One could argue these remain payments for the child, not the parent.

This hypothesising could continue virtually indefinitely but our word limit does not. It is clear that even if jurisdiction can be established, it is far from certain that the Family Court should be making orders, but of course every case is fact specific.

In the aforementioned *W v H*, Recorder Salter ordered payment of £350pm with reference to a CMS calculation produced by the paying husband, on the basis the wife was parent with care as she received child benefit. It is assumed the husband's calculation was the product of his income with the maximum shared care deduction applied through the CMS calculator. It is perhaps noteworthy context for the weight to be attached to the decision in *W v H* that the husband's offer at the start of the hearing was to pay £337.60pm child maintenance, with the ultimate order only slightly higher.

What about the CMS?

If the CMS does not have jurisdiction on the basis of s 3(1) CSA 1991, then provided this can be proved (see below), it has to be right that the Family Court gains jurisdiction. An analogous situation would be where the CMS cannot make an assessment for want of jurisdiction where the non-resident parent lives abroad. In such a scenario the Family Court gains jurisdiction regardless of the non-resident parent's income.

However, if the CMS makes an assessment for nil liability based upon equal care, strictly the Family Court's hands must be tied by the existence of an assessment. The Family Court would not then have a free-standing jurisdiction to order child periodical payments. The issue would then arise as to whether the CMS should have made an assessment, or whether there was any real 'assessment'; both of which would need to be challenged through the CMS appeals procedure or eventual judicial review.

Practicality over theory

Theory is one thing, practicality is another. This article has operated on the assumption that there are cases where equal shared care is established. The decision of *W v H* above was made on the basis that the parents agreed that care was shared equally, so Recorder Salter considered reg 50 applied and was not persuaded by the child benefit presumption. The reality is that a precisely equal split of time is almost impossible, with the question frequently litigated in the First-tier Tribunal.

In *DW v Secretary of State for Work and Pensions & Anor* [2023] UKUT 19 (AAC), the Upper Tribunal was faced with an appeal from a decision by the First-tier Tribunal in relation to the application of the 2012 Regulations, reg 50. The first instance decision (upheld on appeal) was that although there was a court order for shared care, the father (who was the appellant) still had a child maintenance liability.

Of interest to readers from this case is principally how the tribunal addressed the question of whether there was precise shared care. The question of what constitutes 'day to day care' is a question of fact and any temptation to add a gloss to the statute has been so far resisted. The court simply considers the evidence before it and applies it. Overnight care is not a trump card, it is one factor (thus 'day to day care' is distinct from the formulaic calculation made by the CMS): *JS v SSWP & Anor* [2017] UKUT 296 (AAC).

In *MR v SSWP and LM* (above), Judge Jacobs agreed with *JS*. The judge confirmed that the tribunal 'has to apply the language of day to day care and not substitute some other phrase by way of definition.' However, he went on to consider what day to day care involves from [17] onwards, in particular:

(1) The test is providing care, not love or finance.
(2) A tribunal must look for a pattern or distribution of care by taking account of the evidence as a whole.
(3) The longer a parent spends with their child, the greater the chances to provide care.
(4) Unless the facts make the decision clear cut, resolving disputes must involve a broad and impressionistic evaluation.

Bringing together the authorities in *DW*, at [41] Judge Sutherland Williams non-exhaustively set out some considerations as to how to approach the issue of division of day to dare care:

> 'Considerations may include, but are not limited to, a responsibility for the wellbeing of the child and a responsibility for routine everyday things, like making sure the child is healthy and safe, that they get to appointments, school or social events, and that they are clothed and fed. Such activities may also include care that is provided on one or more specified days or parts of days in any given period, subject to the findings of the tribunal.'

There is no definitive test; every case is fact specific and will turn on the evidence. Above all else, it is difficult to see that many cases would genuinely fit the criteria of a precisely equal split of day to day care; although orders of 1 week on, 1 week off are not unusual. This would render the otherwise interesting debate about jurisdiction in light of reg 50 meaningless.

Following on from this, and as a final complicating

remark, even if the Family Court gains jurisdiction where reg 50 applies, it must be right that a litigant would first have to satisfy the CMS that reg 50 does apply. Before the Family Court can make any orders, the CMS must surely either make an assessment of nil liability or formally decline jurisdiction; an application made to the court without some form of position from the CMS would not be a wise move.

A theoretical application of reg 50 without factual consideration of the evidence would not be appropriate, because of course if there is even a slight imbalance of day to day care then reg 50 will not apply, the CMS will retain jurisdiction and absent the s 8 CSA 1991 exceptions, the Family Court will not have jurisdiction.

Notes

1 *The Family Court Practice 2023* (LexisNexis, 2023), section 2.184, commentary to section 1 Child Support Act 1991.
2 Child Support (Maintenance Calculations and Special Cases) Regulations 2000 (SI 2000/155).
3 *Rayden and Jackson on Relationship Breakdown, Finances and Children* (LexisNexis, 2023), para 18.289.

Non-disclosure, Occupation Orders and Transfers of Tenancy

Gwynfor Evans

36 Family

When a couple separates, either party may be able to apply for one or both of two powerful property-focused remedies. The first is an occupation order. This regulates occupation of a family home, permitting (perhaps with conditions) occupation by one or both parties and restricting, prohibiting and perhaps terminating occupation by the other. The second is a transfer of tenancy order. This functions so as to vest in the applicant a joint statutory tenancy or a statutory tenancy held solely by the respondent. Given the historical and irreplicable nature of some such tenancies (e.g. protected or statutory tenancies within the meaning of the Rent Act 1977), the length of waiting lists for others (e.g. secure tenancies within the meaning of s 79 Housing Act 1985), and the potential duration of the tenancy itself (possibly unlimited), transfer of tenancy orders, particularly in 'low-money' cases are powerful remedies.

Orders for transfers of tenancy are available upon pronouncement of final decree to spouses, civil partners, former spouses and former civil partners, assuming that there has been in each case no remarriage or formation of a subsequent civil partnership (Sch 7, paras 4, 12 and 13). They are also available to cohabitants and former cohabitants upon the ceasing of cohabitation (Sch 7, para 3).

Occupation orders are much more widely available, including to 'associated persons' (within the lengthy meaning of the same – which includes 'relatives' and 'intimate personal relationship[s] … of significant duration' – in s 62(3) Family Law Act 1995). An explanation of the applicability of the wide variety of occupation orders at ss 33 and 35–38 Family Law Act 1996 (FLA 1996), together with their respective idiosyncrasies, is best left for another occasion, but applications for occupation orders share with applications for transfers of tenancy a somewhat astonishing feature: an absence of an explicit disclosure requirement. For occupation orders, Family Procedure Rules 2010 (SI 2010/2955) (FPR) Part 10 simply requires that an application for an occupation order is supported by a witness statement, and, in the case of ss 33, 35 and 36, that it is served on any mortgagee or landlord. For transfers of tenancy the only specific guidance to be found in the rules is at FPR 8.33 and it is with respect to the possibility of obtaining non-party disclosure pursuant to FPR 21.2.

Information required by court

In reaching a decision, the court is required for each category of occupation order, and when considering the additional financial/practical provisions of s 40 FLA 1996, to have regard to the matters set out in the table (slightly simplified for ease of reading). There is also a column in the table referring to the information to which the court is to have regard for transfers of tenancy.

Section	**33**	**35**	**36**	**37**	**38**	**53/Sch 7**	**40***
Factor							*33, 35, 36
'Balance of Harm' test	Yes – s 33(7)	Yes – s 35(8)	Yes (but no 'duty', court just required to consider questions in s 36(8))	Yes – s 33(7) applied by s 37(4)	Yes (but no 'duty', just one factor)	–	–
all the circumstances	Yes	Yes	Yes	Yes	Yes	Yes	Yes
housing needs and housing resources of each of the parties and of any relevant child	Yes	Yes	Yes	Yes	Yes	Yes	–

Section	33	35	36	37	38	53/Sch 7	40*
financial resources of each of the parties;	Yes	Yes	Yes	Yes	Yes	Yes	Yes
financial obligations which they have, or are likely to have in the foreseeable future, including financial obligations to each other and to any relevant child	–	–	–	–	–	–	Yes
likely effect of any order, or of any decision by the court not to exercise its powers … on the health, safety or well-being of the parties and of any relevant child;	Yes	Yes	Yes	Yes	Yes	Yes	–
conduct of the parties in relation to each other and otherwise;	Yes	Yes	Yes	Yes	Yes	–	–
nature of the parties' relationship and in particular the level of commitment involved in it;	–	–	Yes	–	–	Yes**	–
The length of time …;	–	Yes: 'elapsed since the parties ceased to live together' and 'elapsed since the marriage or civil partnership was dissolved or annulled'	Yes: 'during which they have cohabited' and 'elapsed since the parties ceased to live together'	–	–	Yes** 'during which they have cohabited' and 'elapsed since the parties ceased to live together'	–
whether there are or have been any children who are children of both parties or for whom both parties have or have had parental responsibility;	–	–	Yes	–	–	Yes**	–
the existence of any pending proceedings between the parties …	–	MCA 1973/ Sch 5, Pt II CPA 2004 Sch 1, para 1(2)(d) or (e) CA 1989 [TLATA 1996, etc]	… Sch 1, para 1(2)(d) or (e) CA 1989 [TLATA 1996, etc]	–	–	–	–
Duration	Potentially for life of applicant (subject to s 33(5)/(9)(b)/(10))	6m, extendable once for further 6m (or death of either party if earlier)	6m, extendable once for further 6m (or death of either party if earlier)	6m, extendable more than once for further 6m (death?)	6m, extendable once for further 6m (death?)	Permanent	Same as concomitant occupation order
And …						*See below*	

Note: ** If only *one* party entitled to occupy by virtue of the relevant tenancy

In addition, when considering a transfer of tenancy, the court is required to have regard to 'the circumstances in which the tenancy was granted to either or both of the spouses, civil partners or cohabitants or, as the case requires, the circumstances in which either or both of them became tenant under the tenancy' and 'the suitability of the parties as tenants' (Sch 7, para 5(a) and (c) FLA 1996).

Each column of the table demonstrates the need (with a caveat, in the note below the table) for evidence of:

(1) all the circumstances of the case;
(2) housing needs and housing resources of each of the parties and of any relevant child;
(3) financial resources of each of the parties; and
(4) the likely effect of any order, or of any decision by the court not to exercise its powers … on the health, safety or well-being of the parties and of any relevant child.

The occupation order regimes each require the court to have regard to 'conduct', too. The caveat is that orders under s 33(7), s 35(8) and s 37(4) may be made in the more 'extreme situation[s]' (*Chalmers v Johns* [1999] 1 FLR 392 (referring to s 33)) if the balance of harm test so requires, and hence, at least for orders under s 33, s 35 and s 37, the disclosure at (2)–(3) above could be argued to be unnecessary in certain cases.

Additional/supplementary provisions in Family Law Act 1996 orders

The court's powers under s 40 FLA 1996 (for occupation orders) and Sch 7, paras 10–11 (for transfers of tenancy) to make certain financial orders provides yet another reason for the court to be fully apprised of the parties' financial positions.

In occupation order proceedings, the provisions of s 40 FLA 1996 empower the court to impose on either party obligations for repair, maintenance and the rent/mortgage/outgoings relating to the property. Periodical payments relating to the occupation may also be directed, together with various orders regarding furniture or contents of the property. However, it is worth noting that Butler-Sloss P observed in *Nwogbe v Nwogbe* [2000] 2 FLR 744 that s 40 orders were 'unenforceable' and 'of no value' (at [27]), and Thorpe LJ agreed, referring to this as a 'statutory lacuna of real significance' (at [23]).

In transfer of tenancy proceedings the court may also order a payment of a sum of money from the transferee to the transferor, which may be deferred or paid by instalments, but which requires a balancing of financial hardship caused to each party (Sch 7, para 10(5) FLA 1996) and consideration of the factors at Sch 7, para 10(4) FLA 1996 (being potential financial loss arising, parties' financial needs and resources, and the parties' financial obligations – including to any relevant child – now or in the foreseeable future).

The court may also direct joint and several liability for discharge or performance of obligations with respect to liabilities and obligations in respect of the dwelling-house (whether arising under the tenancy or otherwise) up to the date the order takes effect (Sch 7, para 11 FLA 1996).

It might be expected, therefore, that either the applicant would be prompted to supply the appropriate documentary evidence of the information needed by the court, or that there would be a set of rules providing for disclosure in a certain form (perhaps akin to Form E) – not necessarily immediately, but certainly prior to the court finally determining the occupation order/transfer of tenancy. However, the application forms themselves do not tee the applications up effectively enough in that respect.

Occupation order applications

As far as Part IV FLA 1996 orders are concerned, the application form, being the revised FL401 from February 2023, asks at para 7.18 'Is there anything else you want to happen with the family home?' and has tick boxes labelled 'I need the respondent to pay for or contribute to repairs or maintenance to the home'/'I need the respondent to pay for or contribute to the rent or mortgage'/'I need the use of the furniture or other household contents'.

Paragraph 7.19 invites the applicant to 'include details of any hardship you might face if you are not able to stay in your home or return to it' and it adds 'If you can also demonstrate that the respondent is able to live elsewhere and is not entirely dependent upon the home, this may support your application'. These paragraphs point clearly towards the need for documentary evidence of financial and housing resources.

Further still, a new template witness statement is available in the form FL401T. The preamble to the form states that it is 'designed to help you provide *all* the information that is needed from a supporting statement by the court' (my emphasis) and adds that:

> '[t]he last page in this document is a template cover-sheet for any exhibits you submit. An exhibit is another document that you would like the court to see as part of your evidence. This could be: medical reports, social services reports or letters, print outs of text messages, emails.'

Yet there is no mention of the possibility of *financial* documentation being exhibited. This is despite the refence to 'all the information that is needed' (as italicised above), the highlighting in para 1.5 of the need to provide 'details about the ownership and/or tenancy arrangements' (without suggesting documentary evidence in support), and the seven tick-boxes at para 7.1 setting out the parties' responsibility for mortgages and tenancy agreements.

The applicant is first invited on the FL401T to set out 'examples of [the respondent's] abusive behaviour'. This is described in Note 2.5 as follows:

> 'You should tick as many of these behaviours as you think are appropriate.
>
> Economic or financial abuse could include preventing you from working or blocking access to a bank account.
>
> Coercive control is behaviour that can be humiliating, isolating or controlling and leave you feeling like you have no freedom or sense of self.
>
> Online abuse could be: sending you threatening messages by text or email; controlling access to your phone, email or going online; intercepting your emails or text messages.
>
> For examples of different forms of domestic abuse, go

> to GOV.UK and search for "domestic abuse: recognise the signs".'

The applicant is then prompted to describe the 'most recent', 'first' and 'worst' incidents, and then to describe 'patterns of abuse or other incidents' and the impact on health, safety and wellbeing, before listing any witnesses.

For specifically occupation order (as opposed to non-molestation order) applications, the applicant is prompted at para 7.2 to describe their housing needs:

> 'Describe what you need from your housing, including:
>
> - information about travelling to and from work
> - the needs of any children you are responsible for, such as number of bedrooms and proximity to their school
> - financial factors – for example, if you have a low income, cannot afford to move or you have a favourable rental agreement with your landlord'

Paragraph 7.3 asks the applicant to set out the respondent's housing needs:

> 'Describe as best as possible what the respondent's housing needs are, including:
>
> - information about travelling to and from work
> - any other places the respondent could stay that you are aware of, such as a family member
> - if you believe they are able afford to rent elsewhere and why, such as they have a high paid job
> - housing needs of any children for which they are responsible'

The two sections differ: the applicant is not asked about whether they have any other places they could stay, nothing is asked about the respondent's responsibility for children, or the proximity to the children's school(s) of any other place to stay, and the applicant is not specifically asked whether they can afford to rent elsewhere. Neither section prompts for any *documentary evidence* of what is being asserted.

Further, the prompts at paras 7.2 and 7.3 are leading (as with the notes throughout the form, e.g. the note at para 6.1 prompts '[t]his could include ongoing controlling behaviours'). The prompts differ significantly, lack neutrality and lack parity: it is suggested to the applicant that they might have a low income and be unable to afford to move. It is further suggested that a respondent may be able to afford to rent elsewhere and might also have a 'high paid job'.

No prompt is given for provision of documentary evidence of any assertions in the statement, and no reference is made to any duty of disclosure, ongoing or otherwise.

Transfer of tenancy applications

The application form for transfer of tenancy is the much simpler D50B. This contains nothing that matches the detailed requirements of the new (or even old) FL401.

Legal framework for disclosure in Family Law Act 1996 applications

FPR 4.1(3)(b) empowers the court, except where rules provide otherwise, to make such order for disclosure and inspection, including specific disclosure, as it thinks fit.

FPR PD 21A expands upon this and states at para 2.1 that:

> '[i]n family proceedings other than proceedings for a financial remedy, where the court orders disclosure, the normal order will be for disclosure by each party setting out, in a list or questionnaire, the documents material to the proceedings, of the existence of which that party is aware and which are or have been in that party's control. This process is known as "standard disclosure".'

FPR PD 21A, para 2.4 provides that a court may also order 'specific disclosure', namely disclosure of documents/classes of documents or the carrying out of particular searches with disclosure of the search outcome.

In financial remedy proceedings there are various forms, the most prolific being Form E, which mandates the parties 35 days prior to the first appointment to provide a financial statement with (considerable) supporting documentation (FPR 9.14(1)). The absence of such a form for Part IV FLA 1996 applications leads to the risk of an applicant successfully persuading a court to determine their application without provision of all the available relevant evidence.

The approach of Moylan J in *Tchenguiz-Imerman v Imerman* [2012] EWHC 4047 (Fam), [2014] 1 FLR 232 was to consider the CPR 1998 (specifically Part 31) where there was no specific guidance in the FPR (see [10]). On 27 February 2023, in *Re P, H-L (Children) (Mobile Phone Extraction)* [2023] EWCA Civ 206, [2023] 2 FLR 528 the Court of Appeal referred with approval to this approach at [54]:

> 'It is well established that, where there is a gap in the FPR 2010, recourse is to be had where appropriate, to the CPR (see for example *Tchenguiz-Imerman v Imerman* [2012] EWHC 4047 (Fam), [2014] 1 FLR 232 where Moylan J pointed out that the common law as now encapsulated in the CPR sets out a more detailed code than the FPR 2010 for the disclosure and inspection of documents.'

The authors of *The Family Court Practice 2023* suggest[1] that parties 'should work on common law principles best summarised in CPR 1998 Pt 31'.

Lastly, it is clear from the decision of the Court of Appeal in *Vernon v Bosley (No 2)* [1998] 1 FLR 304 at 314–318 that there is a continuing obligation to give disclosure. CPR 31.11 concurs and summarises what the authors of *The Family Court Practice* 2023 describe[2] as the 'common law' position: 'that common law applies equally to family, as to any other, civil proceedings'. CPR 31.11(2) further clarifies that '[i]f documents to which that duty extends come to a party's notice at any time during the proceedings, he must immediately notify every other party.'

Clearly, whilst FPR 4.1(3)(b) refers to the court's power to make order for disclosure, the common-law disclosure obligations referenced in *Vernon v Bosley (No 2)* (above) are neither made explicit in the FLA 1996, nor referenced in the FPR. They are also not apparent from the relevant application forms. Worse still, the new FL401 and FL401T invite

assertions to be made about financial resources and housing needs with no documentary evidence in support.

Points for practitioners

(1) It is understandable that a party to a Part IV FLA 1996 claim, whether unrepresented or represented by a lawyer unversed in the elusive minutiae of the disclosure obligations alluded to in *Tchenguiz-Imerman v Imerman* (above) and *Re P, H-L (Children) (Mobile Phone Extraction)* (above), may as things stand, not realise that they have disclosure obligations. This may lead to a lack of diligence in checking references to financial resources, or, worse, to exaggeration or perhaps (even deliberate) incorrect assertions as to their own or the other party's financial circumstances.

(2) The court is required 'to deal with cases justly, having regard to any welfare issues involved' and that includes 'so far as is practicable' ensuring that they are 'dealt with expeditiously' and 'ensuring that the parties are on an equal footing' (FPR 1.1(1), (2)(a) and (c)). There is a real risk, if disclosure requirements are not set out clearly in Part IV FLA 1996 cases, that the court will make significant decisions about the parties' housing and finances in the absence of key evidence (perhaps because a party is deliberately not presenting the full financial picture) and without the parties being on an equal footing (particularly as regards an absence of obtainable disclosure). This is particularly the case where one party is pressing a court to determine the application as early as possible, and on the basis of their evidence alone: such swift determination may be in tension with potential disclosure directions and may amount to rough justice.

(3) Domestic abuse is central to (although not a pre-condition of) many occupation order applications. Many applications are urgent because of that. That urgency inevitably means that decisions may have to be made weighing the timing of an order in light of the severity of the allegations, the quality and (possibly deficient substantive financial) content of the application. Reference is made on the FL401 and FL401T to the provisions of the Domestic Abuse Act 2021. The courts are alive to domestic abuse, which includes financial abuse and coercive control, and so there may be good reasons for financial documentation to be redacted in part (or possibly in full): boxes 3.6, 4.5 and 5.6 each state, after giving examples of 'relevant evidence' as being police reports, medical reports and photos, in bold text, 'Do not include any information that you do not want the respondent to see'. Consequently, the court procedure should involve a court specifically being directed to consider – as in financial remedy applications – disclosure and the merits of appropriate redaction at the first hearing. The more 'extreme situation[s]' identified in *Chalmers v Johns* (above) would in any event likely lead to a court relying on the balance of harm test in s 33(7), s 35(8) and s 37(4), but that would not assist applicants consigned to ss 36 and 38.

(4) Despite the fact that transfers of tenancy are less likely to be accompanied by allegations of domestic abuse (the parties may have separated amicably, but do not wish voluntarily to make themselves homeless), the value of the tenancies concerned to the parties in all such cases should be such as to warrant routine financial disclosure directions from the court. A party may have had a relevant tenancy for many years and accrued other assets, knowledge of which should feed into the court's decision-making process to lead to a fair outcome.

Further, it is clear from *Guerroudj v Rymarczyk* [2015] EWCA Civ 743, a case in which the Court of Appeal said that 'the judge in this case had (just) enough to go on', that, as the authors of *The Family Court Practice 2023* summarise[3] '[i]t is good practice to seek to furnish the court with evidence of the private and local authority housing options for each party, particularly if one party's vulnerability by virtue of a disability may justify [their] being in priority need of housing pursuant to Housing Act 1996'.

(5) In transfer of tenancy cases, without appropriate financial disclosure, a court is not in a position to carry out the discretionary exercise set out in Sch 7, para 10 FLA 1996, and would only have limited information (regarding identification of, and quantification of, liabilities and obligations, and regarding need/ability to pay, etc) with respect to the liabilities and obligations relating to the dwelling-house, that would inform any decision made pursuant to Sch 7, para 11 FLA 1996.

(6) Relationship with MCA 1973: for married/civil-partnered couples, transfers of tenancy do not give the 'clean break' that is offered by an application under the MCA 1973. Also, it may be, if the financial picture is murky, and pension information is sought, that an application by way of Form A is more appropriate. Further, although a council tenancy is 'property' (see *Jones v Jones* [1997] 1 FLR 27, CA)[4] upon which s 24 MCA 1973 can bite, Sch 7 enables the effecting of a transfer without the need for a separate transfer document, so it may be best in such cases to issue both applications and conjoin them, so as to retain the more powerful technical provisions in Sch 7 FLA 1996.

(7) The volume of applications for non-molestation and occupation orders has almost doubled since 2011:[5] there were 8,275 applications in January to March 2023, of which 16% were for occupation orders; 5% of the 9,516 'domestic violence remedy' orders (i.e. c. 476) made in the same quarter were occupation orders. Occupation orders were therefore made affecting c. 1,000 people (excluding children). The number of people involved in applications for occupation orders is arguably significant enough to warrant consideration being given to amending the disclosure rules, so as to avoid the risks of injustice.[6] This is a task for the Rules Committee.

(8) The FL401 could benefit at box 7.19 from an update referencing alternative housing resources available to the applicant and suggesting that documentary evidence is supplied in support, where available.

(9) The FL401T could benefit from being re-written in more neutral language and from the inclusion of references to the need for financial documentary evidence and evidence of other accommodation for *both* parties.

(10) In the meantime, conscientious practitioners may wish

to remind the court of the parties' disclosure obligations, and to invite the court at the first hearing to direct appropriate disclosure, either by incorporating the civil form N265, or by directing disclosure using the wording of the relevant boxes of Form E/Form E1 as appropriate.

Notes

1 (LexisNexis, 2023), para 3.894, being the introductory note to Part 21.
2 Also at para 3.894, being the introductory note to Part 21.
3 Paragraph 2.693[5], being the notes to Sch 7, para 5 FLA 1996.
4 And notes to s 24 MCA 1973 in *The Family Court Practice 2023* at para 2.1030[1], but contrast with the notes to Sch 7, para 7 at para 2.697[7] which assert that 'By virtue of MCA 1973, s 24, the court can transfer a tenancy but not a statutory tenancy, as it is not property'.
5 Source: www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2023/family-court-statistics-quarterly-january-to-march-2023
6 I enquired of the Family Court Statistics department at the Ministry of Justice as to whether there were statistics for s 53/Sch 7 FLA 1996 orders, and was informed by email on 19 September 2023 that unfortunately such statistics are not available centrally.

Spousal Maintenance By Formula: The Canadian Experience

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Introduction

The recent announcement by the Law Commission that it is conducting a review into the laws which determine how finances are divided on divorce has re-ignited the discussion as to whether the law on financial remedy provision in England and Wales should be reformed. One of the areas which is often discussed in this context is the issue of spousal maintenance. Owing to the discretionary and fact-specific nature of how spousal maintenance orders are approached at present, it is often one of the hardest areas for practitioners to advise on. It is also one of the areas where the provision in England and Wales is most at odds with many other developed countries.

One approach which is sometimes discussed is the possibility of formulae to give a range of likely outcomes depending on the circumstances of the case. Such an approach has been increasingly adopted in Canada since 2006 and was promoted by concerns in Canada over the lack of predictability of spousal support orders without any advisory guidelines. This article discusses the background to the Canadian *Spousal Support Advisory Guidelines*, reviews how they operate in practice and looks at a case study to analyse how they might compare with the current discretionary approach in England and Wales.

The Canadian system

In 1997, the Canadian federal government legislated the Federal *Child Support Guidelines*. Before this legislation, there was little consistency in child support orders, which required judges to consider not only the parties' incomes but also their budgets. The *Child Support Guidelines* are legally binding and courts are only permitted to deviate from set schedules in limited circumstances, such as when the payor earns more than C$150,000 per annum or when the parties have shared or split parenting arrangements. Absent this, there are tables that vary slightly by province and territory (because of different tax rates) that set out exactly how much child support is payable. Additional expenses, such as for extracurricular activities or tuition, are shared between the parents, either equally or in proportion to their incomes. Child support has priority over spousal support.

There are, however, no mandatory guidelines for spousal support. Traditionally, spousal support was also discretionary and based on the parties' incomes and budgets, to be determined after child support had been decided. In January 2005, the federal government funded the development by two law professors, Carol Rogerson and Rollie Thompson, of advisory guidelines for spousal support, called the *Spousal Support Advisory Guidelines* (the SSAG). The aim of the SSAG is to increase predictability of support agreements and orders. Although it is not mandatory, there has been wide adoption by the courts and family law practitioners in all provinces and territories such that it is routine to consider the SSAG and to draft spousal support that falls within those parameters.

There is variation across provinces and territories. The Canadian system is a federal one in which some matters are solely a federal concern (e.g. divorce) while others are within the jurisdiction of the provinces (e.g. property division). Other aspects, such as parenting issues, child support and spousal support are under both federal and provincial jurisdiction. There is a federal Divorce Act that applies across Canada, but each province also has legislation governing those matters that fall within its jurisdiction. As a result, there is some variation across Canada in how the SSAG have been adopted by the courts, with some, for example, defaulting to the mid-range and others taking a more nuanced approach.

The SSAG are a complex set of formulae requiring a computer program to calculate the outcome. In very general terms, duration of support is presumed to be between half the length of the relationship up to the full length of the relationship (including any period of marriage-like relationship before marriage), unless the relationship is more than 20 years in which case it is of indefinite duration. So, for example, a 10-year marriage-like relationship would generate a spousal support duration range of between 5 and 10 years. The formulae do, however, take into account situations where this might not be appropriate, for example, short relationships with young children where the range could be higher, or situations where the parties are near retirement.

The quantum of support is also a range from low,

medium to high. It is based on the payor's income, the recipient's income, as well as any child support that is payable. As child support has priority over spousal support, it is not included in the recipient's income but it will affect the quantum of their spousal support payments.

There are two main formulae: the 'Without Child Support Formula' and the 'With Child Support Formula'. The computer program used to calculate spousal support automatically uses the correct formula so long as the user correctly inputs the children's information.

Child support is neither taxable nor tax deductible. Periodic spousal support, though, is taxable to the recipient and tax-deductible to the payor. Spousal support can also be paid entirely or partly as a lump sum, in which case it is not taxable. For this reason, the SSAG can also calculate lump sum payments that take into account actuarial considerations as well as the tax consequences. As such, it is always less than simply adding together the monthly amounts that would otherwise be payable.

Professors Rogerson and Thompson developed and then revised the *Spousal Support Advisory Guidelines: The Revised User's Guide*, published in April 2016. It is a 110-page document that details how to use the SSAG, common pitfalls, as well as its application to various situations.

It is important to note that the SSAG do not deal with entitlement. Before using the SSAG, it is necessary to either have a finding or an agreement on entitlement, either on a compensatory or a non-compensatory or contractual basis. Once entitlement has been determined, it will be possible to use the SSAG formulas to determine quantum and duration.

Case study

The parties are both 40. They cohabited for 5 years followed by a 7-year marriage giving a total marital period of 12 years. They have three children aged 11, 9 and 7. They have assets of approximately £1.8m plus £1.5m in pensions. The husband earns approximately £300,000 (C$520,000) gross per annum plus bonus. The wife has always cared for the children and has not worked outside the home since the parties married. The parties have agreed to divide the non-pension assets two-thirds/one-third in the wife's favour to meet the housing needs of the wife and the children. The pension assets are to be divided equally. The parties cannot agree the quantum and duration of the maintenance payments.

English law

Under English law the court would be required to take all the circumstances of the case into account. The welfare of any minor children of the family would be the court's first consideration and the court would have particular regard to the list of factors contained in s 25(2) MCA 1973. The English court would also be required to achieve a clean break as soon as just and reasonable: s 25A MCA 1973. Subject to these considerations the court would have broad discretion to achieve an outcome it considers as fair as possible in the circumstances of the case.

Subject to this broad discretion, a typical outcome under English law may be that the husband pays the children's school fees, child maintenance at a rate of £7,500 per child per annum (apportioned 50% to the child direct when at university), £30,000 per annum by way of spousal maintenance for 11 years until the youngest child of the family turns 18 and 20% of the husband's net bonus for 7 years until the eldest children turns 18 capped at £25,000 per annum.

Canadian law

Under Canadian law, the first step would be to determine whether or not the wife is entitled to support. Based on the facts presented in this case, she would be entitled to both a compensatory (based on giving up economic opportunities for the sake of the family) and a non-compensatory (based on need) basis.

Child support would be calculated first, based solely on the parenting responsibilities (assumed to be primarily with the wife) and on the parties' incomes. Based on that, the husband would owe C$8,574 (£4,950) per month in child maintenance. As the husband earns over C$150,000, there would be some discretion available to the judge to order more or less than these amounts, although in practice judges do tend to default to the guidelines. Regarding extra expenses such as the children's school fees, the presumption is that the husband would pay 100%, although the parties can also agree to share.

Spousal support calculations are related to the division of assets. As the wife is receiving two-thirds of the parties' assets, it might be assumed that she is receiving all or part of her support as a lump sum. The presumption under Canadian law is to equally divide the increase in the value of assets since the beginning of the marriage-like relationship and then to pay monthly support. Therefore, given the division of assets in this case, there is a chance that the presumption would be that the wife has already received a lump sum payment in lieu of any spousal maintenance.

If, however, the wife is to receive monthly spousal support, the duration would be between 6 and 12 years. The duration is discretionary within this range, although the wife would likely receive towards the longer end of the range because of a number of factors, including that she has a strong compensatory claim (since she gave up a career to raise the family), the husband is unlikely to retire during the next 12 years, and the youngest child will not finish high school for 11 years. That said, the wife will be expected to try to become economically self-sufficient and it is not unlikely that regular reviews as to quantum and duration are included in any order or agreement.

The quantum would be between C$8,138 (£4,700) and C$10,432 (£6,020) per month. It is quite common to simply default to the mid-range, although that is not what was intended by the SSAG. In this case, an argument could be made to pay either on the low end of the range (because the wife has received two-thirds of the assets) or, conversely, on the high end (because of her strong compensatory claim, the fact that she remains the primary caregiver for the children, and the husband's income earning capacity). Again, regular reviews are likely.

Lastly, it is also possible to agree to have part of the support paid as a lump sum and part on a monthly basis. In this case, it is likely that a portion of the lump sum will be paid as part of the asset division and any monthly amount will then be on or below the low end of duration and/or quantum.

A print-out of the calculations is set out as an appendix at the end of this article.

Conclusion

The particularly eagle-eyed reader may have spotted that the facts of the case study are very similar to those in the case of *SS v NS* [2014] EWHC 4183 (Fam), where Mostyn J gave his famous exposition of the law on spousal maintenance in England. Since that decision in 2014, Mostyn J has suggested an adjusted formula for child maintenance where the paying parent earns between £156,000 and £650,000 gross per annum, but it is suggested that the global outcome in *SS v NS* still falls very much within the ballpark of likely outcomes.

In *SS v NS* the wife received £22,500 per annum in child support for three children, £30,000 per annum in spousal maintenance for 11 years and up to a further £25,000 per annum from the husband's bonus for 7 years, giving a total of £77,500 per annum. Under the Canadian guidelines the wife would have received £59,600 in child support plus between £56,400 and £72,240 per annum in spousal maintenance for between 6 and 12 years giving a total of between £116,000 and £131,840 per annum.

It may come as a surprise to some readers that the outcome in England and Wales – which is often perceived to be one of the most generous around the world in terms of maintenance orders – appears, on the surface, to be significantly less than the outcome using the Canadian guidelines. It does however need to be remembered that in Canada a spousal maintenance order would be taxable. This means that the wife would have to pay tax of between C$6,636 (£3,830) and C$8,104 (£4,675) per month, which equates to between £45,960 and £56,100 per annum.[1] This would in turn reduce the total amount the wife would receive from all sources from between £116,000 and £131,840 per annum to between £70,040 and £75,740, which is remarkably close to the outcome in *SS v NS*.

There are of course limits as to what can be drawn from the comparison of one middle money case. Time and word limits have not permitted a greater analysis in this article. Attempts were made to compare lower and bigger money cases, but the former are rarely reported in England and the latter tend to be resolved on the basis of a clean break. But when the Law Commission is reviewing how spousal maintenance could be reformed in England and Wales, it should certainly consider the Canadian experience. If it is possible to create a formula which gives a range of fair outcomes based on the particular circumstances of a case, it could have a huge positive impact on the way in which spousal maintenance orders are negotiated and determined in England.

Notes

1 The husband would also receive a reduction to his taxable income of between C$3,784 and C$4,851 per month.

DIVORCEMATE SOFTWARE

Tools Cloud 2023

General Matters: Paper - $520,000

Calculation Input *Annual $*

Husband	*40, Resident of BC*
Income	
Employment income	520,000

Wife	*40, Resident of BC*
No items.	

Children	*Age*	*Lives with*	*Table*	*Claimed*
Child 1	11	Wife	Yes	Wife
Child 2	9	Wife	Yes	Wife
Child 3	7	Wife	Yes	Wife

Dependant credit claimed by Wife.

Youngest child finishes high school 11 years from the date of separation.

Special Expenses	*Husband paid/claimed*	*Wife paid/claimed*
No Special Expenses.		

Relationship Dates	
Date of marriage/cohabitation	Aug 1, 2011
Date of separation	Aug 1, 2023

Cautions and Overrides

⚠ **Child Support (Table)** Husband's income over $150,000; CSG Table Amount may be inappropriate

⚠ **SSAG** Husband's income over $350,000; SSAG may not apply

Child Support Guidelines (CSG) *Monthly*

	Husband	Wife
Annual Guidelines Income	520,000	0
CSG Table Amount (Current)	8,574	0
Child Support (Table)	**8,574**	**0**

Spousal Support Advisory Guidelines *Monthly*

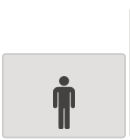
Length of marriage/cohabitation: 12 years
Recipient's age at separation: 40 years

"With Child Support" Formula

Low	Mid	High
8,138	**9,250**	**10,432**

The formula results in a range for spousal support of $8,138 to $10,432 per month for an indefinite (unspecified) duration, subject to variation and possibly review, with a minimum duration of 6 years and a maximum duration of 12 years from the date of separation.

SSAG Considerations: The results of the SSAG formula must be interpreted with regard to: Entitlement; Location within the Ranges; Restructuring; Ceilings and Floors; and Exceptions.

Support Scenarios *Monthly $*	**SSAG Low**		**SSAG Mid**		**SSAG High**	
	Husband	**Wife**	**Husband**	**Wife**	**Husband**	**Wife**
Gross Income	43,333	0	43,333	0	43,333	0
Taxes and Deductions	(15,189)	(1,496)	(14,594)	(1,870)	(13,962)	(2,322)
Benefits and Credits	0	979	0	853	0	719
Cash Flow Adjustments	0	0	0	0	0	0
Spousal Support	**(8,138)**	**8,138**	**(9,250)**	**9,250**	**(10,432)**	**10,432**
Child Support (Table)	**(8,574)**	**8,574**	**(8,574)**	**8,574**	**(8,574)**	**8,574**
Net Disposable Income (NDI)	11,432	16,195	10,915	16,807	10,365	17,403
adult in household child in household shared/summer child						
Percent of NDI	**41.4%**	**58.6%**	**39.4%**	**60.6%**	**37.3%**	**62.7%**
CSG Special Expenses Apportioning %	81.2%	18.8%	78.7%	21.3%	75.9%	24.1%
After-tax Cost/Benefit of Spousal Support	(3,784)	6,636	(4,301)	7,374	(4,851)	8,104
Spousal Support Lump Sum (NPV)						
Husband's after-tax cost	0	385,474	0	438,140	0	494,168
Wife's after-tax benefit	0	676,005	0	751,185	0	825,549
Midpoint	0	530,740	0	594,662	0	659,858

Net Present Value (NPV) Assumptions: spousal support duration is 9 years, 0 months (midpoint of SSAG range); spousal support payments not discounted for Wife's life expectancy; discount rate of 1.3% applied (Indexed - based on the risk-free rate of return currently available from a Long-Term Government of Canada Real Return Bond, which rate effectively indexes support payments for currently anticipated inflation in the CPI over the next 20-30 years); support payments and taxation rates remain constant throughout duration; NPV based on the after tax cost/benefit of spousal support to the parties; lump sum payment of spousal support assumed to be non-deductible/non-taxable to the Payor/Recipient respectively.

The Other Half

Andrew Hogan

Kings Chambers

Solicitors acting for clients in divorce and financial proceedings have a symbiotic relationship with those clients. They provide the solicitors with fees, which are the lifeblood of any law firm, and in turn the solicitors provide the clients with advice and legal representation at one of the most fraught periods of their life.

The relationship between solicitor and client can become extremely close. When it breaks down, its bitterness can mirror the original proceedings. A common cause of the breakdown of the solicitor-client relationship is a dispute about fees.

This can lead in turn to proceedings under s 70 Solicitors Act 1974 for an assessment of the solicitors' statutory bills of costs, usually heard and determined by a Costs Judge within the Senior Courts Costs Office. The Costs Judge will be tasked with determining their reasonableness and whether the fees are payable by the client.

In contentious proceedings, costs between a solicitor and client are assessed on an indemnity basis. The test is whether costs have been reasonably incurred and are reasonable in amount. A number of rebuttable presumptions are applied by the Costs Judge when assessing costs, as set out in CPR 46.9(3):

> '(3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed –
>
> (a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;
>
> (b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;
>
> (c) to have been unreasonably incurred if –
>
> (i) they are of an unusual nature or amount; and
>
> (ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.'

It is difficult to overestimate the importance of the presumptions. If a solicitor regularly informs their client about the level of fees and expenses that have been incurred and are going to be incurred, so as to be able to argue that the solicitor has obtained their client's express or implied approval to spend that time, then there may be little scope for the solicitor's bills to be discounted due to the operation of the presumptions. Indeed, when a breakdown of costs is served as part of the assessment by the solicitor, Points of Dispute will be served by the client setting out why the fees are said to be unreasonable in incurrence or amount. Replies to Points of Dispute should expressly plead the application of the presumptions: if it can be shown that the client expressly or impliedly consented to the incurrence of the costs, that argument may be conclusive on the part of the solicitor.

Although every detailed assessment is its own case, and turns on its own facts, some arguments about the reasonableness of fees arise repeatedly. A recent example of a solicitor-client assessment which demonstrates some of these issues is that of *Yvia Pulford v Hughes Fowler Carruthers Ltd* [2023] EWHC 1429 (SCCO).

In this case which came before Costs Judge Leonard, a dispute arose between the client (the claimant) and her former solicitors (the defendant). The claimant instructed the defendant to initiate divorce proceedings and to deal with the ancillary relief and other matters that arose in consequence.

A series of bills were raised in the sum of £300,569.04 between November 2018 and 7 December 2020. By consent an order was made in February 2022 for the assessment of all the bills rendered by the defendant. The court listed the case for a hearing of preliminary issues concerning matters arising in the Points of Dispute.

The issues concerned the absence and relevance of a costs estimate, the suggestion that the defendant had given an assurance that the claimant would not be responsible for its fees, whether the defendant was entitled to increase its hourly rates and use two partners on the case, and whether the claimant was bound to pay counsel's fees.

Of these issues, the principal one related to the lack of an effective estimate of the fees and expenses the solicitor intended to incur. The claimant's evidence, which was not accepted, was that the solicitor had given an estimate that the costs would not exceed £80,000.

Surprisingly, the solicitor's evidence was that no costs estimate was given at the start of the case, due to the difficulty of hypothesising how matters would unfold.

This is a surprising position to take as advice on costs can always be caveated, and assumptions underlying the figures made clear, but the Code of Conduct has imposed a duty for many years to give a client 'best possible' costs advice, throughout the matter.

The question expressly before the Costs Judge was the effect of either an estimate which had been significantly exceeded (the claimant's case) or the lack of an estimate at all (the defendant's case). The lack of an estimate had

certainly been remedied by the time a Form H was prepared in February 2020, which gave incurred costs of £77,642.60.

The Costs Judge directed himself in these terms:

> '[47] A solicitor undertaking work for a client has a professional obligation, incorporated in the Solicitors Regulation Authority's Code of Conduct, to provide the client with an estimate of costs and to keep that estimate of costs up to date. (The specific provisions of the Code of Conduct changed during the course of the retainer between the Claimant and the Defendant, but not, for present purposes, in any material way.)
>
> [48] If a solicitor is also contractually obliged to provide a client with estimates of future costs, it does not follow that costs not anticipated by estimates will, on assessment between the solicitor and the client, be irrecoverable. At paragraph 110 of his judgment Morgan J observed:
>
> > "The breach of contract would not necessarily disentitle the solicitor from recovering a reasonable fee. A breach of contract would have the normal consequence that the client could sue for damages caused by the breach of contract. That would require the client to prove on the balance of probabilities that it would have been in a better position if an estimate had been provided ..."
>
> [49] If however on the assessment of costs between a solicitor and a client, it is found (a) that the solicitor has never provided the client with an estimate of the costs and disbursements that the client was likely to pay, or that an estimate given was inadequate, and (b) that if a proper estimate had been given, the client would have paid less than the solicitor is claiming, it may be appropriate to limit the amount payable by the client to the solicitor to an amount that it is reasonable, in all the circumstances, to expect the client to pay. That may be less than would otherwise be payable for work reasonably done by the solicitor at a reasonable rate.
>
> [50] In order to demonstrate that it is right to limit the solicitor's recoverable costs in that way, it is not necessary for the client to prove on the balance of probabilities that they would, if adequately advised, have acted in a different way which would have turned out more advantageous for the client. It may be sufficient that the failure to provide adequate advice deprived the client of an opportunity of acting differently, though that is likely to carry less weight, particularly where it is not possible to do more than speculate as to the way in which the client might have acted, if properly advised.
>
> [51] The ultimate aim will always be to identify the sum that, in all the circumstances, it is reasonable for the client to pay.'

As he disbelieved the claimant as to the giving of an estimate of £80,000, that point fell away. However, he had to go on to consider the effect of the absence of an estimate at all. In this respect the claimant's intended course of action would have been crucial. But the Costs Judge noted:

> '[94] What the Claimant does not say is that, had she anticipated the full level of costs attendant on recovering the Defendant to conduct divorce proceedings, she would have found alternative solicitors or changed her mind about the divorce.'

This meant in turn:

> '[106] Even if there had been any material failure on the part of the Defendant to provide the Claimant with adequate estimates of costs for her divorce proceedings, I do not accept that it would have had any material effect upon the Claimant's choices. Notably the great majority of the future costs estimated in the form H of 24 November 2020 (which the Claimant accepts she saw) were counsel's fees; £221,400 of the total figure of £356,520. That reflected the Claimant's choice of counsel.
>
> [107] The Claimant evidently believed that Mr Pulford was concealing his assets from her, and she was prepared to spend whatever was necessary to obtain a satisfactory divorce settlement. As is evident from correspondence with the Defendant (to which I will refer in more detail, when considering the Claimant's assertion to the effect that she was given to understand that she would never have to pay the Defendant's fees) she did not want to pay for that herself, and thought that her husband should have to do so. Nonetheless, as Ms Hughes stated in evidence and as the Defendant's file reflects, the Claimant did have sufficient assets at her disposal to raise the required funding if necessary.
>
> [108] All that aside, it is not possible to reconcile any of the Claimant's various statements about what she might have done if she had had a better idea of future costs, with her assertion that she thought that she was ultimately not going to have to pay anything, or at least anything that would not be refunded in full. If that were the case, she would not have been concerned about accruing or future costs. For reasons I shall give, I do not accept that she did think that, but the point is that it is not possible to rely on any of her assertions about what she might have done if the Defendant had been in a position to, and had, provided more advance costs information.
>
> [109] For those reasons, I do not think that it would be right to find that the overall amount payable by the Claimant to the Defendant for its services should be limited on the basis that inadequate costs information was provided.'

Conclusions

The principal point of dispute by the claimant failed, but had the claimant been believed on the estimate and had she given evidence that if she knew the costs would have been circa £300,000, she would not have pursued the divorce, or instructed cheaper solicitors, then it might have been a different story. The Costs Judge could have moved to sharply reduce the costs sought from the client.

In the event, the Costs Judge found against her on virtually every issue: there was no estoppel, waiver or cap given by the defendant which displaced the claimant's obligation to pay. She was found to have signed the retainer and therefore was bound by its terms, including those providing for increases. She was found liable for counsels' fees, as she had approved the instruction of her preferred counsel.

But coming back to the estimate, or lack of one in this case; the limited role and weight to be given to inaccurate estimates of costs, or a failure to give an estimate at all, points to a clear lacuna in the consumer protection regime that might apply.

In relation to a solicitor's client, there is a clear obligation in the Code of Conduct at rule 8.7 to do the following:

> 'You ensure that clients receive the best possible infor-

> mation about how their matter will be priced and, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of the matter and any costs incurred.'

Yet breach of this requirement is common, and rarely do consequences follow. The contrast with the position *inter partes* in civil litigation is stark: in substantial litigation, costs are now either fixed or subject to a stringent regime of costs budgeting to protect the paying party from having to pay unreasonable fees.

In effect, costs are now primarily set prospectively rather than being assessed retrospectively. Given that solicitors continue to exercise a quasi-monopoly on the conduct of litigation, it seems bizarre that their own clients are more vulnerable to their charges than their opponents in litigation. It might be pointed out that a solicitor's client has freedom of contract to control the charges they face, whereas their opponent does not.

But that is to miss the point that most clients in the context of divorce and financial proceedings are not serial litigants, they may have varying degrees of sophistication and the notion that the majority of these individuals can use freedom of contract effectively to control their liability for costs is more likely to be illusory than real.

AS v CS: What are the Consequences if the Court Has *Not* Mandated a Private FDR?

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The duty of the court to direct that a financial remedies application must be referred to an FDR appointment is set out in Family Procedure Rules 2010 (SI 2010/2955) (FPR) 9.15(4). Pursuant to this rule the court *must* direct such a hearing unless: (1) the first appointment, or part of it, has been treated as an FDR appointment which has been effective; or (2) there are exceptional reasons which make a referral to an FDR appointment inappropriate.

As the authors of the Family Justice Council's *Financial Dispute Resolution Appointments: Best Practice Guidance* (Reviewed and Updated November 2021) observe that, 'Most judges will accept that attendance at a Private FDR constitutes an exceptional reason for dispensing with the court FDR (*AS v CS* [2021] EWFC 34).'[1]

In *AS v CS*, Mostyn J noted (at [7]) that while there is no specific power in FPR Part 9 for the court to order the parties to attend a private FDR, there is an 'unquestionable power' to disapply FPR 9.15(4) and the court was empowered by the court's general case management powers (FPR 4.1(4)(a)) to make any order of the court subject to conditions.

In *AS v CS*, an order had been made *requiring* the parties to attend a private FDR. Mostyn J found that this direction should be seen as a condition attaching to the order disapplying the standard in-court procedure, and that such a condition could itself be expressed as an order. On that basis, the parties were fully bound to comply with the requirement to attend the private FDR.

As a consequence if a party feels that a private FDR needs to be adjourned (whether for further disclosure to take place or otherwise), then it is incumbent on them to apply to the court for an adjournment in the absence of agreement. If the parties do agree, then a joint application should be made to the court and, as Mostyn J observed, the court is highly likely to approve that agreement.

Mostyn J said (at [20]) that where an agreement was reached that a private FDR would be held, then an order ought to be made by the court (which the editors of *The Family Court Practice 2023* assume would be made pursuant to FPR 4.1(3)(o)) which: (1) disapplied the in-court FDR process; (2) required the parties to attend a private FDR on a specified date; and (3) provided that the date could only be altered by an order of the court (which could be made by consent).

Subsequent to *AS v CS*, provision was made in the *Statement on the Efficient Conduct of Financial Remedy Hearings in the Financial Remedies Court below High Court Judge Level* (11 January 2022) as to the interaction between the court process and a private FDR. In accordance with paragraph 15 of the Statement, if the parties propose a private FDR, and the court agrees, the court order permitting this course will: (1) identify the private FDR evaluator; (2) dispense with the in-court FDR appointment; (3) state that the private FDR, once fixed, may only be adjourned by agreement or pursuant to an order of the court; and (4) provide that the matter shall be listed for a mention shortly after the private FDR, with this hearing to be vacated if a consent order is filed and approved by a judge in advance of the hearing.

But what is the position if the court has *not* made a mandatory order that a private FDR is to take place (whether in the form set out in *AS v CS* at [20] or otherwise)? If the parties have simply *agreed* to attend such a hearing (whether because no financial proceedings have been issued or for whatever reason an order in the specified form was not made), is attendance voluntary meaning that a party can still unilaterally withdraw?

It is certainly arguable that the answer to this question is 'yes'. The rationale in *AS v CS* is predicated on the basis that an order had been made to attend a private FDR which put the parties in the same position as if an order had been made to attend a court-based FDR. However, the position may be made more complicated depending on the terms of the parties' agreement to attend the private FDR wherever that is recorded. For example, what was said in the non-*AS v CS*-compliant recitals and/or the *inter partes* correspondence? Can this be enough for a court to consider the attendance to be mandatory?

The answer to this question may turn at least in part on Mostyn J's observation in *AS v CS* at [15] that 'the private FDR system must not be abused'. Is it an 'abuse' to withdraw from a private FDR that has been voluntarily listed? Or is it only an abuse to do so if it has been listed pursuant to a court order, meaning (as Mostyn J said) that a party is seeking to be in a better position via the private option than if they had remained in the court system where they would not be allowed unilaterally to pull out of an FDR – even if they felt that there was a deficiency of disclosure – and it would be incumbent on them to apply to the court for an adjournment.

Is it also relevant that *AS v CS* was a judgment on the papers? In this regard it is similar to Munby P's decision about arbitration in *S v S (Financial Remedies: Arbitral Award)* [2014] EWHC 7 (Fam), [2014] 1 FLR 1257 which of course has been superseded by *Haley v Haley* [2020] EWCA Civ 1369, [2021] 1 FLR 1429.

Whatever is the correct legal position, as Alexander Chandler KC has observed,[2] it is plainly necessary that some common sense has to be applied. Where one party legitimately requires further information, there might be little point in seeking to compel the listing of a private FDR before this information is available. As he says, when it comes to negotiation you can lead a horse to water, etc. This of course echoes the case-law on the much-emphasised duty to negotiate openly and reasonably which only arises when the financial landscape is clear.

In this context Mostyn J's observation at [18], that:

> 'it is possible to have reasonable negotiations even where there is not a perfect fullness of disclosure. Thorpe LJ once famously said that there is no case that is so conflicted that it cannot be mediated.[3] That was said in the context of a vicious dispute about children. A fortiori, the sentiment applies where the dispute is about the sufficiency of disclosure in a money case. If nothing else, the parties can identify issues of principle and receive Sir David [Bodey]'s early neutral evaluation of them, so that they will know where the land lies when it comes to filling in the gaps in the disclosure later'

may be somewhat optimistic.

On a separate – but related – note, the editors of the *Financial Remedies Practice 2023/24* (which of course include Mostyn J) state at paragraph 9.36 that '[a] question undecided at present is whether a party at a private FDR who has received a neutral evaluation outcome with which he or she does not agree, is entitled to leave the hearing and to refuse to negotiate further.' The tentative conclusion of the editors is that 'good practice requires both parties to adhere to the private FDR judge's directions as to continued attendance and engagement in negotiation following the indication of outcome.'

It will be interesting to see this question decided in due course.

Notes

1 www.judiciary.uk/wp-content/uploads/2021/11/FJC-Financial-Dispute-Resolution.pdf

2 'Private FDRs reviewed in *AS v CS* [2021] EWFC 34', https://familybrief.org/2021/04/19/private-fdrs-reviewed-in-as-v-cs-2021-ewfc-34/

3 In his interview in the *Financial Remedies Journal* ([2023] 1 FRJ 68), Sir Mathew Thorpe was asked about this observation made by him in *Al-Khatib v Masry* [2004] EWCA Civ 1353, [2005] 1 FLR 381, that from the Court of Appeal's point of view there is no case, however conflicted, which is not potentially open to successful mediation. His response was, 'Well, I think it's a bit of an exaggeration, but my heart is with the sentiment', https://financialremediesjournal.com/download/76d8bc41777442cca647faaca1fce03c

DR Corner: FPR Part 3 – Out-of-Court Dispute Resolution Options – Perils and Possibilities

Karen Barham

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Opportunities for resolution away from the court have never been greater – mediation, early neutral evaluation, private FDRs, arbitration – and practitioners continue to take up training in these disciplines. However, although the use of out-of-court resolution continues to increase, too many cases remain within the overburdened court system, cases for which non-court dispute resolution (NCDR) are or may be suitable.

A reminder of FPR Part 3

'THE COURT'S DUTY AND POWERS GENERALLY

Scope of this Chapter

3.2

This Chapter contains the court's duty and powers to encourage and facilitate the use of non-court dispute resolution.

The court's duty to consider non-court dispute resolution

3.3

(1) *The court must consider, at every stage in proceedings, whether non-court dispute resolution is appropriate.*

(2) In considering whether non-court dispute resolution is appropriate in proceedings which were commenced by a relevant family application, the court must take into account –

(a) whether a MIAM took place;

(b) whether a valid MIAM exemption was claimed or mediator's exemption was confirmed; and

(c) *whether the parties attempted mediation or another form of non-court dispute resolution and the outcome of that process.*

When the court will adjourn proceedings or a hearing in proceedings

3.4

(1) *If the court considers that non-court dispute resolution is appropriate, it may direct that the proceedings, or a hearing in the proceedings, be adjourned for such specified period as it considers appropriate –*

(a) to enable the parties to obtain information and advice about, and consider using, non-court dispute resolution; and

(b) where the parties agree, to enable non-court dispute resolution to take place.

(2) The court may give directions under this rule on an application or of its own initiative.

(3) Where the court directs an adjournment under this rule, it will give directions about the timing and method by which the parties must tell the court if any of the issues in the proceedings have been resolved.

(4) If the parties do not tell the court if any of the issues have been resolved as directed under paragraph (3), the court will give such directions as to the management of the case as it considers appropriate.

(5) The court or court officer will –

(a) record the making of an order under this rule; and

(b) arrange for a copy of the order to be served as soon as practicable on the parties.

(6) Where the court proposes to exercise its powers of its own initiative, the procedure set out in rule 4.3(2) to (6) applies.' (emphasis added)

The Family Solutions Initiative represented a concerted effort to refocus attention on Part 3 thereby requiring the Court, lawyers and the parties to consider NCDR at all times.[1] Where it is safe and appropriate, the increased use of out-of-court processes should improve the experience of separating and divorcing families, leading to improved

outcomes (particularly for children), at the same time as easing the burden upon the court system.

Lawyers should consider with their clients the appropriateness of all forms of NCDR at all times. This should be not only at the commencement of their instructions, but also throughout the conduct of the matter. They should consider inviting the other person to a suitable NCDR process/es setting out their rationale. The recipient of such invitation is expected to set out a considered response. The Part 3 chain of correspondence should be open, written and received in the expectation that it may be seen by the court in relation to the conduct of the matter generally and in respect of costs.

In *WL v HL* [2021] EWFC B10,[2] Mr Recorder Allen QC (as he then was) used his FPR Part 3 powers to case-manage by maintaining a supervisory role over the progress of the inter-solicitor negotiations, adjourning to enable mediation to take place. The lawyers were required to keep him informed of the dates at which without prejudice offers were made but he was not appraised of the detail thereof.

> If the court considers that NCDR may be appropriate it may adjourn to enable the parties to 'obtain information and advice about, and consider using, NCDR'. The court may adjourn of its own motion or when requested to do so by one of the parties which anecdotally is on the increase.

The recent Ministry of Justice consultations invited responses on a number of issues including MIAM compliance, mandatory mediation, and costs orders. In financial remedy matters, the court has demonstrated its willingness to make costs orders for failure to use an appropriate out-of-court process.

In *JB v DB* [2020] EWHC 2301 (Fam) at [28]–[32], Mostyn J made a £15,000 costs order against the husband for 'wilfully' refusing to engage in a settlement meeting withdrawing the day before a scheduled mediation meeting.

In *CM v CM* [2019] EWFC 16, Moor J ordered the applicant to meet the respondent's costs stating (at [10]):

> 'High Court Judges are exceptionally busy. They do not have time to draft letters of instruction or even to determine disputes as to the wording of such letters. In a future case, if there is a genuine issue as to drafting, I consider it would be exactly the sort of matter that should be referred to an arbitrator who is accredited by ILFA'.

In *Re B (A Child) (Unnecessary Private Law Applications)* [2020] EWFC B44,[3] HHJ Wildblood QC (as he then was) could not have been clearer about the risk of sanctions for failing to engage in appropriate NCDR (at [9]):

> 'Therefore, the message in this judgment to parties and lawyers is this, as far as I am concerned. Do not bring your private law litigation to the Family Court here unless it is genuinely necessary for you to do so. You should settle your differences (or those of your clients) away from court, except where that is not possible. If you do bring unnecessary cases to this court, you will be criticised, and sanctions may be imposed upon you. There are many other ways to settle disagreements, such as mediation.'

Although the court has existing powers to make costs orders for an unreasonable refusal to negotiate (Mostyn J in *OG v AG* [2020] EWFC 52), the Family Procedure Rule Committee has been invited to consider a proposed rule change at FPR 28.3(7) with the addition of a new paragraph (g):

> 'In deciding what order (if any) to make under paragraph (6), the court must have regard to *(g) a party's unreasonable refusal to engage in non-court dispute resolution.*'

Some form of new 'NCDR certificate' is also being considered; at various touchpoints with the court the parties/their solicitors could be required to explain why the matter is not proceeding through an out-of-court channel.

Mediation continues to be the most used NCDR process. Hybrid (aka integrated) mediation enables the mediator to hold confidences in the negotiations (akin to the civil and commercial model) and encourages attendance by lawyers or other professionals.[4]

Private FDRs report considerable success, with matters settling on the day or shortly thereafter. However, it is disappointing that arbitration has not taken off as hoped or expected. The number of Institute of Family Law Arbitrators (IFLA) registered arbitrations is considered to be lower than the actual number that have taken place, particularly for financial cases. Accordingly, arbitrators are now asked to register their arbitration with IFLA.

> **Total number of arbitrations registered with IFLA to September 2023**
>
> Finance scheme (commenced 2012) – 571
>
> Children scheme (commenced 2016) – 76
>
> A reminder – arbitrators should now register their arbitration with IFLA

The emergence of the 'One Lawyer One Couple' model is proving popular with clients and lawyers. The single professional's role is to *facilitate* the couple's negotiations and advise them on whether the outcome of their negotiations has fallen within the parameters of their advice. It is inappropriate for a single lawyer to be involved in substantive negotiations and it follows that if there is a continuing 'dispute' the single lawyer should withdraw. At that stage, the matter could proceed to an NCDR process. More details about Resolution's model 'Resolution Together' can be found on the Resolution website.[5]

See also The Divorce Surgery website founded by barristers Samantha Woodham and Harry Gates.[6]

Recognising that many couples require 'certainty of conclusion' but without litigation, The Certainty Project combines a seamless beginning-to-end service bringing together lawyers, mediators and arbitrators – a comprehensive NCDR package with an arbitral determination if required.[7]

A judicial request to collate on 'no more than two pages' a users' summary of Out of Family Court Resolution Helpful Links can be found on the *Financial Remedies Journal* website.[8] At the request of Peel J and HHJ Hess, this document should now accompany the court's notice of hearing and be sent to both applicants and respondents.

For only £20 those considering or already within court proceedings would do well to acquire Jo O'Sullivan's excellent book, (*Almost) Anything but Family Court*,[9] which

provides an in-depth explanation of the various out-of-court options. The resource has received glowing endorsement by the President.

Over the last decade or so, Alan Larkin has been developing a free AI-powered tool for those going through separation or divorce which provides an online analysis and recommendation regarding their suitability or otherwise for NCDR in its various forms.[10]

Summary

Lawyers are expected to have a good knowledge of all forms of NCDR both locally and nationally. They are expected to have discussed with their client the suitability or otherwise of all out-of-court processes, keeping them under constant review as the matter progresses. They should consider inviting the other person to an appropriate NCDR process/es setting out their rationale. Such invitations and replies should be open and capable of being put before the court in relation to the conduct of the matter generally and the question of costs. Expect the court to increasingly exercise its Part 3 duties and powers.

Consider when approaching a hearing, particularly a final hearing, moving a matter into arbitration should the matter get bumped due to judicial unavailability. Know which arbitrators might be available and invite the other person to agree to arbitration in the event of such circumstances (include proposals for meeting the arbitrator's fee, etc). Such correspondence might well have the effect of moving the matter into arbitration; if it does not, it may be considered by the court on the question of costs at some later date.

Watch the direction of travel, particularly with regard to costs orders for unreasonable refusal to engage in NCDR and any changes to the Family Procedure Rules.

Notes

* This article adopts the language of the Family Procedure Rules although it is universally accepted our language should aim to move away from 'parties' and 'disputes' towards constructive problem-solving language. See www.familysolutionsgroup.co.uk/language-matters/. It is refreshing to see NCDR practitioners recognised for their work away from the court, for example the new Legal 500 category for Private FDR Judges and arbitrators, see www.legal500.com/c/london-bar/family-private-fdr-judges-and-arbitrators/

1 See www.familylaw.co.uk/news_and_comment/the-family-solutions-initiative-a-response-to-a-system-in-crisis
2 See www.bailii.org/ew/cases/EWFC/OJ/2021/B10.html
3 See www.bailii.org/ew/cases/EWFC/OJ/2020/B44.html
4 See https://resolution.org.uk/looking-for-help/splitting-up/your-process-options-for-divorce-and-dissolution/hybrid-mediation/
5 See https://resolution.org.uk/resolution-together/
6 See www.thedivorcesurgery.co.uk/
7 See www.thecertaintyproject.co.uk
8 See https://financialremediesjournal.com/content/out-of-family-court-resolution-helpful-links.8269c4399d8940c5ade9516f28a374cc.htm
9 See www.familyseparation.shop/
10 See https://novalaw.co.uk/

Tech Corner: NeedsMet

Alex Woolley

Co-Founder, NeedsMet

Whether we like it or not, the age of 'do-it-yourself' divorce is here.

In 2022 there were 80,443 divorces and dissolutions finalised in England and Wales (latest HMCTS figures).

In the same 12-month period there were just 31,277 financial remedy disposals (HMCTS terminology for, in essence, a final order).

That means in the period 1 January 2022 to 31 December 2022, 98,332 people (i.e. 49,166 marriages/civil partnerships) ended their marriage or civil partnership without conclusively sorting out their finances with a court order. If one works on the basis that people tend to finalise their divorce/dissolution and their finances at the same time, it can be said that in 2022 only 39% of divorces/dissolutions had a connected financial order made.

Those percentages have stayed broadly the same for at least the past 4 years (if not longer) and looking at the most recently published HMCTS figures for the first 6 months of no-fault (and online) divorce, things are only getting worse; in Q1 of 2023 there were 29,622 divorces/dissolutions but in only 32% (9,505) of those divorces/dissolutions were financial orders made.

To put it another way, so far this year 68% of people who have finalised their divorce/dissolution in England and Wales have done so *without* also making use of the legal system (even by consent) to resolve or ratify their financial arrangements.

It is worth noting here that of those same 29,622 'new law' divorces finalised in Q1 of 2023, in 72% *neither* party were legally represented (at least in terms of a solicitor being on the record via the new online portal). The correlation between both parties being unrepresented in the divorce/dissolution and not having a financial order made is striking.

We simply do not know whether the c. 100,000 people each year who divorce without a financial order in place are reaching agreements about their finances, even if they are not getting such agreements approved by the court. Presumably at least some of them must be. But, if they are, we have little idea how or what agreements they are reaching. We don't know if the resulting 'deal' is fair, we don't know if there has been adequate (or any) disclosure, we don't know whether any power dynamics are being taken advantage of and we don't know if the outcome reached is one that allows both parties to meet their needs. These questions are currently the subject of a Nuffield Family Justice Observatory research project led by Professor Emma Hitchings, Professor Gillian Douglas, Dr Susan Purdon and Caroline Bryson. The profession, and to a lesser extent the government, focuses much attention on helping divorcing parties to avoid court – but what about those who never go near a court, a lawyer or even, perhaps, a mediator's office?

One can, I think, safely presume that at least some of those c. 100,000 divorcing people each year who are leaving their finances 'unresolved' (legally) will have assets that need to be dealt with. These assets may not be the company, second homes/property-portfolios, inherited assets or such that lawyers are exposed to day to day, but they may well stretch to a house, a car and a couple of bank accounts.

NeedsMet.uk is a legal-tech solution that is being developed to help just those sorts of parties.

Rather than a platform that enables divorcing parties to reach an agreement online, it is a simple, low-cost 'expectation management' tool that will guide at least one of the parties towards a potential solution that would enable each party to meet their housing needs. It will provide *a* solution, not *the* solution.

Following the simple logic flow that is carried out in law firms throughout England and Wales every single day, NeedsMet will use technology to allow a person to:

- input the assets, liabilities and income that each party has;
- identify which assets they consider should/might be treated as 'matrimonial' and 'non-matrimonial';
- identify what each party's housing need might be by reference to actual available properties that meet their search criteria (i.e. location and number of bedrooms) and then produce a short list of potential properties that would meet each party's housing needs;
- identify whether each party could purchase the houses on those shortlists from an equal division of the matrimonial property plus their respective non-matrimonial property;
- if not, identify whether it might be possible to do so with the assistance of a mortgage;
- if not, suggest, a potential unequal division of assets if this would be needed to enable both parties to meet their housing needs at the level sought;
- produce a short bullet point summary showing the proposed outcome and what information was used to

reach it, such that, if appropriate, it can be used as the start of the discussion; and
- provide information on potential next steps – whether that be mediation, legal advice or the preparation of a consent order.

NeedsMet will not be a panacea and it is not being developed to be one. It will not, for example, be able to assist in cases where parties have complex assets (including, for example, businesses), or where there are issues of non-disclosure. But most cases do not have complex assets or issues and, if they do, those are the cases that would usually find their way to a lawyer or a mediator in any event. It will also not provide any guidance in respect of pensions, save to make clear (very prominently) in any case where pensions are disclosed that both parties should take advice on the division of pensions. It will not deal with spousal maintenance but it will direct parties to the Child Maintenance Service.

NeedsMet will, however, serve to manage expectations from the beginning of the process and give people the best possible chance of beginning their discussions from a starting point grounded in reality. We cannot continue to turn a blind eye to the c. 100,000 people per year who are seemingly dividing their assets on the basis of, one might presume, the advice of family, friends, Google or Mumsnet.

Money Corner: Welcome Change to Capital Gains Tax Rules on Divorce

Simon Denton

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For many years, capital gains tax (CGT) has often been a major stumbling block in financial settlements. Transferring assets around could give rise to tax liabilities in the hands of the transferring spouse who is usually not receiving any sales proceeds with which to pay what is known as a dry tax charge.

In the summer of 2019, matters took a turn for the worse when HM Revenue & Customs (HMRC) amended its guidance to reverse its previous view that CGT holdover relief for business assets could apply to transfers on divorce. As always with guidance of this nature, it did not have any particular weight in law unless or until this guidance was backed up by case-law. As we awaited a test case on the matter, tax practitioners had to amend their advice to take account of this.

Fast forward to July 2020, the Office of Tax Simplification (OTS) issued a 'call for evidence' on the topic of CGT. Amongst the evidence submitted to the OTS by tax practitioners and also by Resolution were representations that the changes should be made to reduce the CGT burden that often arose on divorce. Whilst we didn't get the general exemption that we called for, the announcements that were first made in November 2021 are, in many ways, the next best thing.

2022 was a political rollercoaster which featured four different Chancellors and more U-turns than a driving instructor, many of them on tax. Thankfully, this announcement made its way into the Finance (No 2) Act 2023 which received Royal Assent in July this year.

New rules

These new rules all apply to disposals on or after 6 April 2023.

Extension of no gain, no loss disposal period

The main change is the extension of the period during which a transfer between spouses continues to qualify for the no gain, no loss (NGNL) treatment.

Previously, the period that this treatment applied to could be very short as it only lasted from the date of separation until the end of the tax year of separation. So, for example, a couple who separated on 10 January would have less than 4 months to make a transfer under the NGNL provisions.

Under these new rules, in the first instance, the NGNL treatment will apply to transfers that take place before the earlier of:

- the last day of the third tax year after the year in which the couple ceased to live together; or
- the day on which the court grants an order or decree for the couple's divorce, dissolution or annulment of their marriage or civil partnership.

Consequently, a couple who separates on 30 September 2023, could have up until 5 April 2027 to transfer assets under the NGNL rules.

The NGNL treatment period is extended indefinitely for assets that separating spouses or civil partners transfer between themselves as part of a formal divorce or dissolution agreement.

Implications for financial settlements

The extension of the NGNL treatment should be seen as a deferral of CGT rather than an exemption.

Where an asset is transferred under the NGNL treatment, the recipient spouse takes on the original base cost of the asset. This means that, when that asset is disposed of the recipient spouse will have a higher CGT liability than would otherwise be the case. It is therefore essential that that recipient spouse understands this when considering the financial settlement.

Example

This is best illustrated by the following example:

> Consider an investment property initially owned solely by the husband and transferred to the wife under an NGNL transfer on 30 April 2023.
>
> Purchase price in 2015 – £200,000.
>
> Market value as at 30 April 2023 – £350,000.

Disposed of by wife in 2026 for £600,000.

The CGT base cost is the original purchase price of £200,000.

The CGT liability is therefore based on a gain of £400,000 (being £600,000 less £200,000) rather than the gain in value during the wife's period of ownership of £250,000 (being £600,000 less £350,000).

Specific provisions applying to the former matrimonial home

Before these changes, CGT main residence relief was only extended to incorporate a transfer of a property from the absent spouse to the recipient spouse so long as that spouse continues to occupy the property as their main residence. This relief was also conditional on the absent spouse not having nominated a new dwelling as their main residence.

Under the new rules, the main residence relief rules are extended indefinitely to the absent spouse on a disposal of the property to a third party. Once again, this relief is conditional on the absent spouse not having nominated a new property as their main residence.

It is important to consider the position of the absent spouse, if they have acquired a new residence, as opposed to to renting one. It is important to quantify the potential loss of CGT main residence relief on the new home as it is possible that this will be of greater value that the tax liability being saved on the former matrimonial home.

Deferred disposal

From a legal perspective, court orders can provide for the former matrimonial home to be initially retained for the use of one spouse in such a way that the absent spouse retains a financial interest in the future disposal of the property.

This could be achieved by way of a *Mesher* order or a deferred charge order.

For both mechanisms, these arrangements are treated as having two disposals for tax purposes.

Under a *Mesher* Order, both spouses dispose (disposal 1) of their interests in the former matrimonial home into a trust for sale. The terms of the trust being that that the remaining spouse and the children are able to continue living in the home rent free until a specific future event, such as the youngest child reaching 18 or ceasing in full-time education. Once the event occurs, the property is sold (disposal 2).

Under a deferred charge order, the absent spouse transfers their share of the former matrimonial property to the remaining spouse (disposal 1). This disposal provides that the absent spouse will receive a future sum of a fixed share of the sales proceeds received when the property is sold in the future. The future sale is usually triggered by a specific event again, such as the youngest child reaching 18 or ceasing in full-time education. Disposal 2 occurs when the property is then sold.

Before the new rules, a *Mesher* order had a different tax analysis to a deferred charge order. Depending upon the value of the property, often a *Mesher* order gave a better tax outcome. This is because main residence relief could also apply to disposal 2 whereas it does not apply to disposal 2 under a deferred charge order.

However, the trust created under a *Mesher* order can cause inheritance tax charges to apply if the value of the property is high enough.

Under the new rules, main residence relief can also be claimed on disposal 2 under a deferred charge order.

Conclusion

These changes are a positive step. They will mean that moving assets between spouses as part of a financial settlement can be done more easily by avoiding dry tax charges.

The extension of main residence relief also means that structures can be put in place to provide accommodation for the children of a divorcing couple without penalising the absent spouse with tax liabilities.

Where a clean break settlement is not desirable, deferred charge orders have become more attractive from a tax perspective because of an extension to main residence relief.

Whilst these changes make tax liabilities arising on transfers less likely, there are still ongoing tax implications that arise from matters such as reduced CGT base costs or the possible impact of losing main residence relief on another property. These make it important that tax advice is still obtained before a financial settlement is agreed.

Book Review: *Dictionary of TLATA and Inheritance Act Claims*

Alexander Chandler KC, Charlotte John, Lucia Crimp, Cameron Stocks and Max Turnell (Class Publishing, 2023)

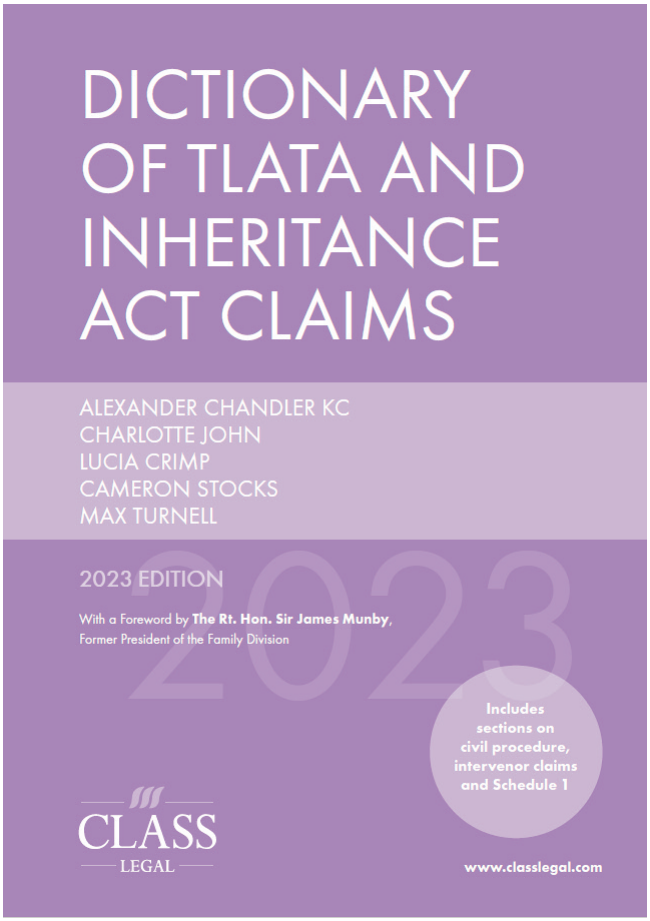
Byron James

Partner, Expatriate Law

In the world of legal writing, where clarity and precision matter most, the *Dictionary of TLATA and Inheritance Act Claims* shines as a valuable source of knowledge. It helps lawyers understand the complex connections between family law and the laws related to trusts and property. Written by an impressive group of experienced experts, this book fills a significant gap by providing a comprehensive guide to the tricky concepts, important cases, and the practical steps needed in this oft overlooked and regularly misunderstood area of law.

This book is organised in a simple A-to-Z format, with detailed footnotes provided for each topic. Each entry acts like a helpful note for lawyers, explaining the important legal rules, key cases, and practical tips needed to handle these issues with ease. Whether you are an experienced lawyer or just starting out, this resource equips you with the knowledge to handle these complex issues effectively.

In addition to the substantive legal content, the book also includes a guide on how to navigate the legal procedures and tables listing important cases and laws. This comprehensive approach ensures that lawyers have both the theoretical knowledge and practical tools they need to understand and work with TLATA and Inheritance Act claims. This is especially important for those more akin to dealing with family law cases, where the Family Procedure Rules can often be misleadingly similar to the Civil Procedure Rules and lawyers consequently misled into error by the same. Family lawyers are often less likely to be well versed or experienced in standard civil day-to-day items such as tracking, costs budgeting, and Part 36 offers. This book will help you navigate these and give you the resources to approach these with confidence.



The well-known and extremely impressive authors of this book – Alexander Chandler KC, Charlotte John, Lucia Crimp, Cameron Stocks and Max Turnell – bring a wealth of experience and knowledge to the work. They have deep expertise in various aspects of both family law and property law, which enriches the know-how found in this book. Notably, Alexander Chandler KC is a formidable presence in the family law world, particularly where it coincides with aspects of chancery. Alexander is known for being one of the best technical lawyers of his generation, and a recent appointment as a Deputy High Court Judge is presumably reward for his string of recent judgments as a Recorder in which he dealt eruditely with some extremely difficult points. That the authors of this book are led by someone so distinguished and so relevant is almost reason alone to purchase the book. I know many practitioners who when-

ever they come across a complex point of law will immediately ask 'What does Alexander Chandler KC think?' and this book allows you to have that resource available on your desk (or reading device) at any time.

Those who will benefit from the book are lawyers who practise mainly in family law but also handle claims involving cohabiting couples, intervenors or estate claims under the 1975 Act. It is a useful resource for all levels of seniority, in fact one imagines this is sort of book that members of the judiciary would also find useful to have to hand – especially those whose background is more family law than civil.

Given the accessibility of the book, which is so easy to access and navigate, I would suggest that it would also be a helpful tool for both mediators (and other professionals assisting with alternative methods of dispute resolution) and litigants in person who might find themselves whether within extant financial remedy proceedings or in separate specific litigation embroiled in a dispute that involves these more chancery-related matters.

The accessibility of the book does not take away at all from the book's excellent handling of some of the more challenging, complex and often less-explored areas of practice and law. Given the particular expertise of the authors (especially, if I may so, the always brilliant Charlotte John), the book is a real examination of the harder aspects of TLATA. It shines a helpful light on some areas which even those long in practice and on the bench still struggle with.

The *Dictionary of TLATA and Inheritance Act Claims* is as helpful as it is essential for those looking to work on the bridge between two entirely foreign areas of law (family and chancery). It is written in such a way that it can be used just as easily to hand during court hearings as it is at your desk in chambers. One can easily imagine a judge mid-hearing turning round to the bookshelf behind them to reach for this book when looking to resolve a point in dispute or a well-thumbed copy living in counsel's court bag (yes – *À la recherche du temps perdu* – I know most books are probably accessed digitally these days!). With its commitment to annual updates and forward-thinking approach, this book will remain a reliable and essential reference in the ever-changing field of TLATA and Inheritance Act claims.

Financial Remedies Case Round-Up

Mid-April to mid-September 2023

Polly Morgan

Case Editor, Associate Professor and Director of UEA Law Clinic, University of East Anglia

A spate of proprietary estoppel cases

In the previous issue, I wrote about the increasing number of reported nuptial agreement cases. In the time period covered by this issue, the tendency has been towards proprietary estoppel cases. Certainly, published judgments can appear rather like buses, several at once and then nothing for a while. Nevertheless, a sudden spate was not expected of proprietary estoppel, which has been the dodgy rural bus service of the family law world for a long time. Not all of the cases involve many years of labour on a family farm, but a surprising number still do. Could this be the effect of litigants reading about *Guest v Guest* [2022] UKSC 27 in the news and wondering about their own situation?

In *Hughes v Pritchard* [2023] EWHC 1382 (Ch), a farming case, both the promisor and the promisee had died, and the issue was between those who inherited from each. The Court of Appeal did not allow the issue of whether estoppel survived the death of the promisee to be argued as it was raised too late, but it appeared common ground between the parties that death was not in principle a bar to relief but may be relevant to unconscionability and remedy. The promisee's death meant that he could not suffer the 'soul-destroying, gut-wrenching realisation of being deprived of which Lord Briggs spoke in *Guest*' and was one of several reasons why unconscionability was not found in this case.

We note with considerable dismay that the wife in reported farming case *Teasdale v Carter*, has recently been charged with the attempted murder of the husband. Mr and Mrs Teasdale took different sides in a proprietary estoppel case brought by their daughter and heard by HHJ Shelton, whose decision was upheld by Moor J when the wife appealed (reported at [2023] EWHC 490 (Fam)). In his judgment, Moor J referred to it as 'one of the most regrettable pieces of litigation that I have ever come across.' Pamela Teasdale is due to stand trial in March 2024 and denies the charge.

Spencer v Spencer [2023] EWHC 2050 (Ch) is yet another farming case. The father had promised the son would inherit the farm which they both worked. These promises were intended to mollify the son, with whom he had a fractious relationship. Detriment was found but the interesting element is the approach to remedy post-*Guest*. The court gave effect to the promise, but as the promise related to the inheritance of farming land, the court did not award the son a further portion of land which was non-agricultural and whose value lay in mineral extraction.

Death and money in the Supreme Court

The death of a party was also an issue in the Supreme Court in *Unger & Anor (in substitution for Hasan) v Ul-Hasan (Deceased) & Anor* [2023] UKSC 22. This was a leapfrog appeal from a decision by Mostyn J that the wife's un-adjudicated claim under Part III Matrimonial and Family Proceedings Act 1984 did not survive the death of the husband and could not therefore be continued against his estate. Mostyn had considered himself to be bound by an earlier decision of Lord Denning MR, but disagreed with it. It was, therefore, a rare case of a judge wanting to be overturned on appeal. The Supreme Court dismissed the appeal. As an issue of statutory interpretation, the 1984 Act, read with the Matrimonial Causes Act, rendered the rights to apply for financial relief personal rights and obligations only capable of being adjudicated between living parties. *Barder v Caluori* [1988] AC 20 provided only a very limited exception to this. Jennifer Lee of Pump Court Chambers summarised this case for the *Financial Remedies Journal* website; and the site also hosts expert blog posts from counsel representing each party.[1]

Modest asset cases

We are pleased to see more modest asset cases being reported although these are still few in number. *Ditchfield v Ditchfield* [2023] EWHC 2303 (Fam) was an unsuccessful appeal heard by Peel J involving net assets of £339,000 and litigation misconduct by the husband. *BF v LE* [2023] EWHC 2009 (Fam) also involved modest assets, but here the issue before Lieven J was whether a lack of special measures and participatory directions leads to an automatic conclusion that a decision should have been set aside. Lieven J held that it depended on whether the failure to provide special

measures amounted to a breach of natural justice. In *JD v RMD* [2023] EWFC 125 (DDJ Hodson), the parties had equity of £20,000, debts of £30,000 and legal costs of £26,000, a tragedy all round. *Li v Simons* [2023] EWHC 1626 (Fam), heard by Moor J, involved arrears of periodical payments, with the husband's legal fees equating to 5 years' of those payments. All four judges are of course regular publishers of their decisions. To this we add three judgments of HHJ Shelton in the case of *AB v CD* at [2022] EWFC 197, [2022] EWFC 198 and [2023] EWFC 103, respectively. This concerned the maintenance for a disabled adult child and her maternal carer under the Matrimonial Causes Act 1973, and cases on this area of law are not often reported.

The Mostyn Award: the use and abuse of disclaimers

In each issue we give the Mostyn Award to the case which is a must-read for the practitioner. This issue that award goes to the decision of HHJ Coe KC in *Joanne Lewis v Cunningtons Solicitors* [2023] EWHC 822 (KB), a solicitor negligence case in which a solicitor was found negligent despite the client signing a boilerplate disclaimer acknowledging that the solicitors felt they could not advise on an appropriate financial settlement absent financial disclosure.

HHJ Coe KC held that the solicitors had sufficient information to know that the husband's police pension was extremely valuable, indeed was the only asset of any value, and that after a lengthy marriage it was virtually certain that a court would give her a substantial pension share, likely equal division. The disclaimer did not alleviate the solicitors of their duty to inform the client of a risk or potential risk that arose in the course of doing that for which they were retained, or which was reasonably incidental to it. What is reasonably incidental depends upon 'all the circumstances of the case, including the character and experience of the client' (*Minkin v Landsberg* [2015] EWCA Civ 1152, [2016] 1 WLR 1489). Ms Lewis was a vulnerable and unsophisticated client. The solicitors had to pay compensation of £400,000 with the certainty of the award meaning that there was no deduction for loss of chance, and the vulnerability of the client meaning there was no contributory negligence.

The message from this case is that disclaimers are still useful, but they are not a get-out-of-gaol-free card. They need to be tailored to the circumstances so that the client knows what they are giving up. Here, Ms Lewis should have been advised in the clearest possible terms to pursue a pension share and how much financial difference this would make to her.

Child maintenance top-ups

The issue of child maintenance top-ups continues. You may recall Mostyn J's view, originally in *GW v RW* [2003] EWHC 611 (Fam), that the starting point should be the formula applied by the Child Maintenance Service. In *CB v KB* [2019] EWFC 78 Mostyn J suggested the CMS formula applicable to incomes up to £650,000 was useful. In *CMX v EJX (French Marriage Contract)* [2022] EWFC 136, however, Moor J noted that this would cause 'an unrealistic disparity' between what a receiving parent will receive for one child, as opposed to four children, when the amount each child 'costs' is not disparate. It also was capable of yielding an amount significantly higher than the court might usually award.

James v Seymour [2023] EWHC 844 (Fam) was an appeal from HHJ Vincent's decision in *A Wife v A Husband* [2022] EWFC 154, with the basis of the appeal being that Her Honour had failed to follow Mostyn J's approach. Mostyn J accepted Moor J's criticism and created what he called the Adjusted Formula Methodology. This involved a starting-point formula which was then adjusted. Mostyn J's judgment contains a number of tables setting out how this works, which can be utilised in other cases (simply by reading across the table), but with the caveat that the outcome, the Child Support Starting Point, is just that – a starting point. Calum Smith summarises this case for the *Financial Remedies Journal* website, with a blog post by Thomas Braithwaite discussing the limitations to his proposals which Mostyn identifies, and Dom Christophers preparing an excel spreadsheet applying the calculation, for readers' convenience.[2]

Capitalisation of maintenance

WK v GC [2023] EWFC 151 is a decision of HHJ Hess about the approach to be taken on an application to capitalise spousal maintenance when some years – here, 19 – have passed since the original order was made. HHJ Hess held that the fact that the court on varying or discharging an income-related order can make a capital order does not mean that capital claims should be re-opened. It is instead about varying the periodical payments (with the payee having the burden of justifying ongoing dependency and consideration of whether they can adjust without undue hardship), and then considering whether they can be capitalised and if so the mathematics of that – the judge made a *Duxbury* calculation. One relevant consideration was the fact that the original decision was prior to the Report of the Pension Advisory Group, *A Guide to the Treatment of Pensions on Divorce* (July 2019), and the 2004 judge's approach of not sharing pensions partly accrued prior to marriage would not now be considered appropriate.

The never-ending stories

This issue's round-up ends with a number of judgments in long-running cases that show no prospect of a quick resolution. *Xanthopoulos v Rakshina* rumbles on. The latest judgment, at [2023] EWFC 158, was the husband's successful application for a legal services payment order to allow him to pursue his appeal. The next stage is that appeal. *Simon v (1) Simon (2) Integro Funding Limited ('Level')* [2023] EWCA Civ 1048 provided that litigation funder Level was to remain a party for the purposes of whether the consent order, previously set aside, should be re-made. That order was structured in such a way as to deprive the wife of liquid capital from which Level could be repaid. *Gohil v Gohil and CPS* [2023] EWHC 1567 (Fam), which went to the Supreme Court in 2015 ([2015] UKSC 61) is now at confiscation proceedings stage. We will report on further developments in a future issue.

Notes

1 For all *Hasan* content, see https://financialremediesjournal.com/search.htm?s=hasan&p=1. For the case summary, see https://financialremediesjournal.com/unger-0628.s. For counsel for the appellants, see https://financialremediesjournal.com/death-0628.s. For counsel for the respondents, see https://financialremediesjournal.com/hasan-0701.s

2 For Callum Smith, see https://financialremediesjournal.com/james-0501.s. For Thomas Braithwaite, see https://financialremediesjournal.com/child-0506.s. For Dom Christophers, see https://financialremediesjournal.com/james-0529.s

The Summary of the Summaries

Henry Pritchard

1 Hare Court

Cummings v Fawn [2023] EWHC 830 (Fam) (Mostyn J)

W's appeal of a judgment, which had seen her held to a *Xydhias* agreement, was allowed on the basis that the first instance judge had not properly considered how W's housing needs and debts could be met, nor that H had not disclosed that he was shortly to receive c. £4m in inheritance. Full rehearing ordered, following *Goddard-Watts*. *Keywords: disclosure; consent orders; costs; setting aside orders (including Barder applications); appeals*

James v Seymour [2023] EWHC 844 (Fam) (Mostyn J)

Mostyn J dismissed an appellant's case that child maintenance ought to be calculated by reference to the formula in *CB v KB*. Mostyn J expanded upon this earlier judgment, setting out a comprehensive methodology for ascertaining a starting point for the quantum of child periodical payments in different categories of case. *Keywords: publicity and confidentiality; Children Act 1989 Schedule 1 applications; child maintenance; child support; variation applications*

Lewis v Cunningtons Solicitors [2023] EWHC 822 (KB) (HHJ Coe KC)

Question: what is the extent of a solicitor's duty to their client on a limited retainer where they are instructed to draft a financial remedy consent order in the absence of full financial disclosure? Answer: it is variable and, where a solicitor becomes aware of a significant risk to their client, they must inform them, as here, where W agreed to take no pension share from H where this was the most valuable asset by far and where she would have received c. 50% had the matter gone to final hearing. *Keywords: pensions on divorce; professional negligence*

DR v UG [2023] EWFC 68 (Moor J)

High asset case in which H argued for a departure from equality on the bases of: (1) a stellar contribution; and (2) post-separation endeavour in circumstances where the company had been sold for a value much higher than its value at separation. Equal division ordered. H's contribution was not wholly exceptional and the increase in value was not driven by a new venture. *Keywords: special contribution; sharing principle; delay; valuations*

RL v NL [2023] EWFC 75 (HHJ Reardon)

Successful strike out of application for the set aside of an order made in 1995. H had been ordered to transfer a property to W and had never done so, instead applying for set aside. H did not put forward legally recognisable arguments as to why set aside ought to be granted. *Keywords: setting aside orders (including Barder applications); delay; striking out applications*

Bogolyubova v Bogolyubov & Anor [2023] EWCA Civ 547 (King, Dingemans, Snowden LLJ)

The Court of Appeal considered the extent of the court's independent duty in approving consent orders where Peel J had refused approval in circumstances against H's and W's wishes where there was a very substantial contingent liability in the form of civil proceedings with a third party in the Chancery Division. *Keywords: joinder of third parties; agreements; stay of proceedings; consent orders*

AR v BR [2023] EWFC 76 (HHJ Lynn Roberts)

Application for a stay of English proceedings on the basis of *forum conveniens* in favour of Dubai dismissed. Although proceedings were in train in Dubai, they had not been finalised. Moreover, neither party spoke Arabic and W retained her domicile in England. *Keywords: forum conveniens; divorce; domicile; jurisdiction*

Rose v Rose & Ors [2022] EWFC 192 (HHJ Booth)

Financial remedy final hearing in which H was found to have acted fraudulently and to have routinely disregarded orders and undertakings in a manner the judge found to be 'flagrant'. Helpful discussion of adverse inferences. *Keywords: variation of settlements; conduct; trusts*

Koukash v Koukash [2022] EWHC 1001 (Fam) (Sir Jonathan Cohen)

The judge allowed an appeal where a without prejudice offer had inadvertently been left in a bundle for final hearing, on which the judge at trial had relied. Held that the original judge was not to blame for having been provided with a 'booby-trapped bundle', but ought to have sought further submissions from the parties as to how to proceed once he had read the without prejudice material. *Keywords: privilege; appeals*

Hughes v Pritchard & Ors [2023] EWHC 1382 (Ch) (HHJ Keyser KC)

Proprietary estoppel case which had been remitted from the Court of Appeal. Consideration of whether estoppel survived the death of the promisee (it was not a bar, but could be relevant to unconscionability and remedy), as well as of detriment and remedy. *Keywords: detrimental reliance; proprietary estoppel; unconscionability*

Backstrom v Wennberg [2023] EWFC 79 (Leslie Samuels KC, sitting as a deputy HCJ)

Final hearing in a notice to show cause application following a pre-nuptial agreement which W sought to enforce. The judge refused H's late adjournment application and continued in H's absence, finding that there were no reasons to depart from the terms of the pre-nuptial agreement, which provided H with, *inter alia*, a reversionary housing fund during the children's minorities and periodical payments for 6 years. *Keywords: disclosure; non-disclosure; agreements*

CG v SG [2023] EWHC 942 (Fam) (HHJ Hess, sitting as a deputy HCJ)

Final hearing at which the main issues were whether success fees received by H post-separation were non-matrimonial (they were), and how H's business should be valued. Held that because the business was so reliant on H (a 'singleton business') it should not be given a market value but should be valued on the basis of distributable profits alone. *Keywords: experts; matrimonial and non-matrimonial property; costs; companies; valuations*

CC v LC [2023] EWFC 52 (HHJ Wildblood KC)

Final hearing in proceedings where H had played no part by his own volition, despite all attempts to compel his engagement. Held that H would receive a lump sum amounting to c. 25% of the value of the former matrimonial home (FMH) in circumstances where it was found that he likely had undisclosed resources, and where the welfare of the children militated against a sale of the FMH. Held that it would not be a suitable case for a *Mesher*/*Martin* order. *Keywords: disclosure; conduct; needs; costs*

AW v AH [2022] EWFC 195 (DDJ Horton KC)

A Part III in unusual circumstances, in that the same judge had previously made a final order under the 1973 Act subject to the parties obtaining decree nisi. H then obtained a decree in China, rendering the original judgment void. The judge made a Part III order in very similar terms to his original decision. *Keywords: publicity and confidentiality; jurisdiction; overseas divorce and the 1984 Act; divorce jurisdiction post-Brexit*

CG v DL [2023] EWFC 82 (Sir Jonathan Cohen)

A case involving assets of c. £27m dealing with post-separation accrual and business valuations. Memorable for the fact that H had gifted W £1m as an apology for having a child with another woman, which he then sought to share. Held that, although it was a matrimonial asset, H ought not to share in it in the circumstances. *Keywords: post-separation assets*

SS v IS [2023] EWHC 1544 (Fam) (Roberts J)

This case concerned wealthy Russian nationals and assets held in international trust structures. H's lack of engagement in the proceedings included only providing his open offer via recently instructed direct access counsel on the morning of trial. Discussion of non-matrimonial property and nuptial settlements. *Keywords: spousal maintenance (quantum); trusts; special contribution; matrimonial and non-matrimonial property*

Unger & Anor v Ul-Hasan & Anor [2023] UKSC 22 (Lords Hodge, Hamblen, Leggatt, Burrows, Stephens)

Leapfrog appeal dismissed in which the Supreme Court found that W's unadjudicated claim under Part III did not survive the death of her former husband and could thus not be continued against his estate. *Keywords: setting aside orders (including Barder applications); maintenance as a cause of action; overseas divorce and the 1984 Act; Barder applications*

RA v KS (Interim Order for Sale) [2023] EWFC 102 (Recorder Allen KC)

Held that there was no jurisdiction for the court to order vacant possession of a property following an application for an interim order for sale under FPR 20.2(1)(c)(v) and s 17 MWPA 1882 in circumstances where both parties were legal and beneficial owners of the property. *Keywords: sale of property; interim order for sale*

Gohil v Gohil & Ors [2023] EWHC 1567 (Fam) (Mostyn J)

In this litigation, which reached the Supreme Court in 2015, H has since been prosecuted in the criminal courts. He had then provided the Family Court with information about a draft judgment in the criminal proceedings. The judge assessed the nature of the embargo on draft judgments as between different courts, noting the need for greater

consistency. *Keywords: criminal confiscation and restraint orders; contempt of court; embargoed judgments*

Li v Simons [2023] EWHC 1626 (Fam) (Moor J)

An appeal from an unsuccessful application for a downward variation of periodical payments in circumstances where the application had followed uncomfortably hard on the heels of the original order. The appeal was nevertheless allowed, since the payer's income was demonstrably lower than it had been assessed as being. *Keywords: spousal maintenance (quantum); costs; appeals; litigation misconduct; variation applications*

Bogolyubova v Bogolyubov [2022] EWFC 199 (Peel J)

Peel J's original judgment (the appeal of which the Court of Appeal dismissed earlier this year – see above) refusing to approve a financial remedies consent order in the shadow of impending third party litigation between PrivatBank and H. *Keywords: joinder of third parties; agreements; stay of proceedings; consent orders*

AB v CD [2022] EWFC 197 (HHJ Shelton)

This case concerned cross-applications to vary periodical a payments order in respect of the parties' severely disabled child in litigation stretching back to 2009. H sought a substantial reduction in payments, which was opposed by W. Determined that there would be a reduction, albeit not to the extent sought by H. A review hearing was listed to consider the position when the parties' child left her specialist school. *Keywords: variation applications; spousal maintenance (quantum); child periodical payments for over 18s; global maintenance orders; needs; child maintenance*

AB v CD [2023] EWFC 103 (HHJ Shelton)

In this judgment the court considered a review hearing of the case immediately above, the child having left her specialist school. A slight increase on the previous periodical payments order was ordered as a final order and the judge refused to discharge the joint lives order in favour of W. *Keywords: needs; spousal maintenance (quantum); global maintenance orders; variation applications; child periodical payments for over 18s; child maintenance*

DH v RH [2023] EWFC 111 (MacDonald J)

The court granted applications for maintenance pending suit and a legal services payment order but declined within to award sums towards historic costs owed by the applicant to her previous solicitors, on the basis it was not clear that her current solicitors would otherwise cease to act. *Keywords: legal services payment orders*

McClean v McClean & Ors [2023] EWHC 1735 (Fam) (Roberts J)

The court heard an appeal from a final hearing at which H had unsuccessfully sought an adjournment on medical grounds. The trial had gone ahead in his absence. H later tried to make good gaps in the evidence prior to handing down of judgment. Appeal allowed on the basis that the judge had not sufficiently interrogated the evidence in light of H's post-hearing submissions. *Keywords: applications to adjourn; adverse inferences; joinder of third parties; companies; appeals; disclosure*

EK v DK & Ors [2023] EWHC 1829 (Fam) (Francis J)

A successful set aside application of a consent order reached during the course of a final hearing. H had claimed under oath that he would struggle to rehouse, given his limited borrowing capacity and general liquidity. It was later revealed that at the time and since he had been able to raise a great deal of money in various ways which amounted, *inter alia*, to material non-disclosure. *Keywords: setting aside orders (including Barder applications); consent orders; variation of settlements; trusts; valuations; joinder of third parties; liquidity*

H v W [2023] EWFC 120 (HHJ Reardon)

The judge dealt with a raft of applications following a financial remedy order. W had intentionally frustrated the original order, leading to substantial losses for H. H sought an adjustment to the capital disposition under the *Thwaite* jurisdiction as compensation for the losses. He was granted an additional lump sum of £100,000. *Keywords: enforcement; costs; delay; setting aside orders (including Barder applications); compensation principle; 'Thwaite jurisdiction'; striking out applications; cross-applications; conduct*

AFW v RFH [2023] EWFC 119 (Recorder Moys)

This case concerned enforcement of a financial remedy order in which the judge considered various avenues of relief where H had sought to frustrate matters at every turn. Helpful discussion of consequential provisions to orders for sale and pension sharing. *Keywords: anonymity; enforcement; valuations; variation applications; costs; sale of property; chattels; variation of an order; delay; non-compliance*

AB v CD [2022] EWFC 198 (HHJ Shelton)

This case was the second judgment in long-running proceedings detailed above at which interim orders were made for periodical payments pending clarity as to the parties' respective positions, as well as that of their disabled daughter. *Keywords: child periodical payments for over 18s; variation applications; global maintenance orders; child maintenance; spousal maintenance (quantum); needs*

JD v RMD [2023] EWFC 125 (DDJ Hodson)

Low-asset financial remedy case in which debts exceeded assets. Helpful discussion of how to deal with debts where whom is to be liable for them is the magnetic factor in the case. *Keywords: costs; debts*

J v A [2023] EWFC 132 (Richard Harrison KC, sitting as a deputy HCJ)

An application for the stay of divorce proceedings where there were competing proceedings in Nigeria. Held that England was the more appropriate forum and dismissed H's application for a stay. *Keywords: divorce; domicile; forum conveniens; jurisdiction*

BF v LE [2023] EWHC 2009 (Fam) (Lieven J)

An unsuccessful appeal against an application to set aside a financial remedy order. The appellant claimed to have lacked capacity and to have been prejudiced by the lack of participation directions. Helpful discussion of Part 3A and the various grounds of set aside. *Keywords: setting aside orders (including Barder applications); special measures; participatory directions; appeals*

Tsvetkov v Khayrova [2023] EWFC 131 (Peel J)

Costs judgment following the financial remedy order judgment below. Following W's extensive litigation misconduct she was ordered to pay 50% of H's costs on the indemnity basis. *Keywords: conduct; costs; chattels; add-backs; tax; publicity and confidentiality*

Tsvetkov v Khayrova [2023] EWFC 130 (Peel J)

Financial remedy judgment in case with c. £50m in assets. W found guilty of s 25(2)(g) conduct, having lied repeatedly about the whereabouts of valuable jewellery. Helpful summary on conduct including a warning to parties to not, with respect to Box 4.4, to: (1) fill it in with comments which do not amount to conduct; or (2) purport to reserve the position on conduct. *Keywords: conduct; costs; chattels; add-backs; tax; publicity and confidentiality*

Spencer v Spencer & Ors [2023] EWHC 2050 (Ch) (Rajah J)

Farming proprietary estoppel case brought by claimant against the estate of his late father on the basis that the latter had promised him that he would inherit farmland. Found that an estoppel did arise on the basis that the claimant had worked on the farm for many years as a quid pro quo. *Keywords: TOLATA; proprietary estoppel*

Baker v Baker [2023] EWFC 136 (Mostyn J)

High value financial remedy judgment where the main issues where whether H ought to be held to the terms of a New York separation agreement and whether he had failed to disclose assets in the region of $35m. W was unable to prove the existence of these assets and received c. 65% of the assessed c. £9m pot. *Keywords: disclosure; conduct; separation agreement; costs*

Augousti v Matharu [2023] EWHC 1900 (Fam) (Mostyn J)

The judge considered refused H permission to appeal a financial remedy order on a raft of grounds. Helpful discussion in particular of the test for adducing fresh evidence and anonymity. *Keywords: needs; publicity and confidentiality; appeals*

Jardaneh v Jardaneh [2022] EWFC 201 (HHJ Evans-Gordon)

Application for committal by way of judgment summons. Held that H had had the means to pay the sums required but had culpably neglected to do so. The judge initially adjourned sentencing so that H could obtain legal advice, eventually sentencing him to 21 days in prison suspended for a period to allow for payment. *Keywords: costs; enforcement; committal applications and judgment summonses; legal services payment orders*

DT v Secretary of State for Work and Pensions & HR [2023] UKUT 175 (AAC) (Deputy Upper Tribunal Judge Rowland)

Appeal allowed following a consent order which was based on an unreasonably high assessment of the appellant's gross income where the Upper Tribunal found that the appellant had not actually conceded as much as the First-Tier Tribunal found that he had. *Keywords: appeals; child support; agreements*

The *Financial Remedies Journal* 2024 Undergraduate Essay Competition – Watch this Space!

The editorial board of the *Financial Remedies Journal* is delighted to announce the launch of a new essay competition which will be open to any undergraduate law or combined law student from a university in England and Wales.

The essay competition has been designed to give undergraduate law students with an interest in family law the opportunity to engage with a current topical family law issue, and to provide winners with the opportunity to obtain a week's work experience in family law practice.

Two winners will be chosen, with each winner having the chance to undertake a 4-day mini-pupillage and a day's marshalling with a member of the judiciary. In addition, both winners will receive a free copy of every Class Legal book and a free online subscription (12 months) to *AAG Cloud* and *Family Orders Online*.

Further details of the competition including the submission email address and the essay title will be announced on the *Financial Remedies Journal* blog and website in January 2024, with a deadline of 22 March 2024 for all competition entries. The winners will be announced in the summer 2024 issue of the *Financial Remedies Journal*.

Competition outline:

- Open to any undergraduate or combined law student from a university in England and Wales.
- The maximum essay length is 1,500 words, including referencing (Harvard or OSCOLA referencing should be used). Entries over the word count will not be considered.
- Any cases of plagiarism or collusion detected will be disqualified immediately.
- No feedback will be given on any essays and there will be no appeal process.
- Prior to formal announcement of the winners and any prizes being taken, competition winners must provide documentary confirmation of their undergraduate status to confirm they are eligible.

Interview with David Hodson

The Life and Career of Professor David Hodson OBE KC(Hons) MCIArb, Solicitor, Mediator, Arbitrator, Australian Solicitor and DDJ

Rhys Taylor

Vice Chair of the Editorial Board,
The 36 Group

David, what was your background?

It was modest. My father won a scholarship to a grammar school in Southampton but like so many, the war interfered with his education and he could not fulfil his potential. He was very bright and it must been frustrating. I passed the 11+ and went to a grammar school. I'm proud to be part of the 93% of the population from state education. In my generation in the law in central London, we were a real minority. I couldn't do my preferred subjects of geography and maths at university so did sociology and law but without any intention of becoming a lawyer. With a degree and with 100% grants, and no idea what else to do, I did the 6 months solicitors' training. And then it made sense to qualify. So, on 1 March 1976, I started my articles, as they then were, in a firm in Southampton. I enjoyed it and seemed to thrive. Then one could be a complete generalist. I did conveyancing, crime, civil and family. After a year I packed up conveyancing but continued as a general litigation lawyer for a number of years. That served me well later. I worry about the narrow specialisation required of newly qualified solicitors now. The broader litigation skills and knowledge are valuable.

After a couple of years qualification, I went to Birmingham to work for a tremendous firm, Anthony Collins and Co. Anthony had set up his own firm a couple of years earlier and was incredibly enthusiastic, innovative and entrepreneurial. I learnt so much from him. After a year, I had what seemed a marvellous opportunity of a London Inns of Court law firm. It came highly recommended. It was a disaster. So backward, so old-fashioned, so hierarchical, with all the worst elements of the profession. I somehow endured 3 years until they mercifully called time. So it was on 2 January 1985 I signed on as unemployed at the Kingston upon Thames Labour Exchange. I remember being rather despondent; 5 years qualified and what now? But I had contacted a locum agency and I received a telephone call that afternoon about a job and I started the following day. Only one day on the dole! I had the most enjoyable 8 months working as a lawyer locum in a variety of firms. I learnt so much about getting to grips quickly with the important elements of a case. In one firm I was given 300 active files to deal with. One learns quickly what is important. Then in the August, there was an advert to join a major City law firm doing family law, the area in which I now wanted to practice. I applied and had the interview. They were keen for somebody to start quickly. I was told that if I could join in a week the job was mine. I was beginning a 3-month contract for the North Vauxhall Law Centre. I remember ringing the agency from a phone box immediately after the interview. They kindly broke the contract. From a Law Centre to the City. Hardly standard career progression. I took a week off at the local university library reading every book I could find on family law.

And then I joined Theodore Goddard.

Was that your big break?

Undoubtedly. They were one of the top firms, with the pedigree of having acted for Mrs Simpson. Most crucially I was working for Mrs Blanche Lucas, one of the top family lawyers of the second half of the 20th century. Incredibly international, multi-lingual, of several nationalities, also much married, she cut her teeth at the Nuremberg trials and had been involved in many big cases over the decades. We were very different but got on very well. I started as an assistant, became an associate, partner and head of the family law department within 4 years. Those were the days of the yuppie culture, long working hours but good pay, the Big Bang in the City. It was hard work but really exciting.

In 1986, with the 1984 legislation on clean breaks, we had a case where we used a calculation (created by Tim Lawrence of Coopers & Lybrand) to amortise income needs. The first case in which it was used. I remember Mathew Thorpe and James Holman as juniors getting to grips with it and negotiating its terms. A year or so later it was used in a reported decision and given a name: *Duxbury*.

We had a client who owed us lots of costs, but we knew we would get a lump sum. We needed security. We approached our commercial department. Easy they said. Assign the right to a lump sum as a chose in action. They drafted the contract. It worked. It was picked up and used

by other law firms. It was tested in court and became known by the law firm then using it in that case: the *Sears Tooth* charge.

Setting out income needs was ad hoc. I was sure we could do better. I created what was probably the first pro forma omnibus income requirements document. Although I've updated it every 5 years or so, I'm still amused when I see forms following the same structure and wording created in the late 1980s.

With no previous experience of public speaking, I was given a trial run of a graveyard slot of 20 minutes at a law training conference on the dull topic of tax on divorce. Four weeks before the conference, the then Chancellor, Nigel Lawson, totally changed the tax treatment of maintenance payments imposing a very short deadline to have tax effective court orders. The delegate list went from 40 to 250 within days. The organisation, CLT, held their nerve and kept me as the speaker but I was now first on and with an hour. It was daunting. From this, speaking at training for lawyers has become frequent and enjoyable, both here and abroad. I have had so many wonderful opportunities to learn in my career that I have wanted to share as much as possible within the profession.

In those days, there was little professional training especially outside of London. There were also very different regional variations on the way the law was being applied. So in 1988 as part of the SFLA, now Resolution, we created the roadshow. An afternoon of lectures delivered around the country to help regional lawyers and produce some standardisation. Four of us gave those original lectures; I remember Roger Bamber was one of the other speakers on that first tour. It continued successfully for many years, and was the catalyst for creating a number of regional groups.

There was pressure in the late 1980s on private client work in City firms. So in 1991 Blanche Lucas and I and our entire family law department at TG (and clients) moved to Frere Cholmoley. It was an ideal match in lots of ways. The firm had offices around Europe and it was really exciting working alongside lawyers abroad. That excitement hasn't gone away.

Practice management was very much in its infancy. But it was obvious that running a family law department successfully needed knowledge and skills beyond being a lawyer. I gave a series of lectures on family law practice management around the country, then writing the first textbook on the subject, *The Business of Family Law*, for Jordans. I'm delighted the book was used by so many setting up and running family law departments over the years.

At the age of 41 I applied and became a Deputy District Judge at what was the Principal Registry of the Family Division. Then it was a mark of prestige and kudos for law firms to have partners who were deputy judges. They were in firms such as Manches, PHB and Dawson Cornwell. It's a great pity that with the pressure on time recording and billing, there are now few senior solicitors in the bigger family law practices sitting as deputies in London. Being a DDJ has been a phenomenal part of my practice, and I am a far better solicitor through my insights on the other side of the bench. I would recommend solicitors to consider it strongly. Sadly, in my view, there is discrimination against solicitors being appointed beyond the District Judge bench. One can only hope it will change soon.

You were 10 years in the City. What then?

I was on the National Committee of Resolution for about 8 years. I remember a meeting in Birmingham. On the train back I fell into conversation with another London lawyer who, like me, was becoming dissatisfied with the litigation direction of practice. She was discussing with others the setting up of an innovative law firm. I was invited to join and on 1 September 1995, the world's first metropolitan practice to combine lawyers, mediators and counsellors opened for business in Covent Garden. We had three lawyers and two non-lawyer mediators and counsellors. It was advertised as a one-stop shop. It received a huge wave of acclaim. ADR, specifically mediation, was big news. We had a huge spread in *The Times*. Within a couple of months, the government introduced no-fault divorce legislation which had a key element of mediation. The Lord Chancellor very publicly visited us to support our concept. We were joined by other innovative lawyers. It was a time of blue sky thinking and enterprise, looking at where we could push boundaries of practice to produce a better holistic service for those involved in family breakdown.

I qualified as a mediator and in a couple of years became vice-chair of the UK College of Family Mediators, the umbrella for the several different mediation organisations. It was in the immediate aftermath of the 1996 legislation and we were looking at the best ways of delivering mediation to the public and the profession. But it was obvious to me that it was then being handicapped by the conflicting interests of the separate mediation organisations. They each sought government funding and priority for their own way of working. There was a purity of mediation philosophy which seemed to work against adaptability for different client needs. (It may have changed now.) I have remained a mediator and it's a great way to resolve disputes. But sadly I'm not too surprised it has not thrived as it should or could.

One of my heroes was John Cornwell, the originator of the SFLA/Resolution code of practice. I have felt throughout my career that the way we do our work and engage with our clients is as important as some of the detail of the outcomes. I was delighted to be asked to be the first chair of the Resolution Good Practice Committee. By now the code was on its second edition but it was rather legalistic in its language; it had been written for lawyers after all. We contacted the Good English Society and with their input converted the code into simpler English. It was directed in the second person to the lawyer as 'you' and made much more personal. It was a success and has been copied ever since. But it was also too long. We stripped out certain elements and created separate Guidances for Good Practice in various aspects of family law, such as disclosure, writing letters, etc. I'm delighted there is now a real package of good practice guidance on aspects of our work.

By the late 1990s, Resolution had many members signed up to the Code. But there were instances of poor-quality work. What use was the Code if the work was not good? The answer seemed to be accreditation. A badge of expertise to go alongside commitment to the Code. By now I had visited Australia several times through family connections. Nobody in Australia after a few years qualified undertook the work unless they were accredited. We wanted the same. I remember importing the Australian accreditation scheme into England working alongside Ellie Chapman and

Grant Howell. It should have been very successful. Sadly, in my view it hasn't proved to be so. Two separate schemes were launched almost simultaneously by the Law Society and Resolution and have remained so ever since. The public was confused. Apart from some legal aid benefits for children lawyers, there is very little in the way of outward advantages compared to the position in Australia. It's been disappointing.

It was during this period that I had another really low point. I found myself the subject of a negligence claim from a former high-profile client. The dispute was played out within the worldwide media and lasted 2 years. I thought it was very unfair because I knew the advice given had been good, including having had counsel involved. It was heartbreaking. It was settled on very good terms, as we perceived it, by our insurance company a week before a very public trial. Although without any liability admission, this could have ended a career. I personally believe it is through God's grace that I came through this and recovered well. It certainly taught me what it was like as a party to go through very long, contested, public litigation and gave me far more sympathy and understanding for my clients.

You spent time in Australia. How did that arise?

After 7 years of really exciting innovation, the practice imploded. Some partners wanted to take a different direction. By now I had had 18 years at the top with very hard work. I wanted a new challenge rather than just slipping into partnership at a competitor firm. But what? I chatted with a good friend in Sydney who said he'd been looking to recruit a lawyer with international experience for some time. He invited me to come and join him for a couple of years. In the days before Zoom, I remember flying out on a Thursday, having an interview on the Friday, spending the weekend with family, having another interview on the Monday morning and flying back on the Monday evening. One wouldn't do it now. But I did and I agreed.

My 2 years in Australia were one of the most enjoyable periods of my life. I had fast track qualification and became a New South Wales solicitor within 7 weeks of arrival. I acquired my NSW practising certificate and have retained it ever since. I relished aspects of Australian life. It was very much a meritocracy; little importance given to school or university or background. The law was similar but with nuances of being very different. I made incredible friends, inside and outside the law. It also gave me a chance to look back at England including English family law from the other side of the world. Sometimes one needs this to get a better awareness and perspective.

I came back after 2 years. It had been like a sabbatical. I felt renewed in energy and commitment. But what now? In Sydney much of my work was international. I had been involved in many international cases in London and was a very early Fellow of the IAFL in 1995. Even before Sydney, I'd had a vision of a practice dedicated distinctively to international clients. On returning, I shared this with Ann Thomas who was doing international children work. We set about putting this vision into reality and on 2 April 2007, we created The International Family Law Group. A law firm specifically geared to the needs of international clients. We knew there would be a demand, notwithstanding that we set up in the teeth of the global financial crisis! But we were swept away by the success, the work and referrals we received. In each of the first 4 years we doubled in size. We took on teams from other firms. We did child abduction work for the government. We were involved in very high-profile international cases, some pro bono. Very hard work but really enjoyable, not least as Ann and I married in 2011. Of course other firms copied and suddenly competitors announced they had an international department or team. New firms set up in direct competition. I have never worried about this. Good firms and lawyers with good ideas will succeed.

It was Edward de Bono who said don't engage in competition but surpetition. In other words, don't engage in the same territory, the same way of marketing, the same manner of client gathering, the same turf as others but go over and above, find the blue water, find the different way and there will be success. It's hard. Anyone can put resources into competing on the same terms as others. But real success comes in finding the innovation, the enterprise and the new way of working. And with it comes real professional satisfaction. LinkedIn is full of events copying other events. Then every so often something new comes along and how refreshing.

My time with iFLG has been one of the most enjoyable of my career with tremendous cases, clients and colleagues. I love travel and there have been opportunities to travel for conferences and client work. We have the most incredibly complicated cases, with fact situations barely believable if set as a law exam question. But that is the life of international families. And the work continues.

You played a key role in originating family arbitration. How did that happen?

In Spring 2001, I felt there was little positive movement to out-of-court resolutions. I was on a plane to the Bahamas on holiday with time to think. At that time I had an excellent assistant whose boyfriend, now husband, was a shipping lawyer and she had told me of his work in arbitrations. So why not in family law? I remember ringing her from a red phone box on one of the outer Bahamas islands to ask her to find out all about arbitration in family law. There wasn't any. So again I borrowed from Australia as they had introduced it a few years earlier. I got in touch with the Institute of Chartered Arbitrators who were very supportive. David McHardy, a fellow DDJ and former Resolution chair, and I did a trial family arbitration in a case being run through mediation. Whilst in Australia I kept in touch with the

Ministry of Justice who were keen. On my return, we set up a group involving Resolution, FLBA, Centre for Child and Family Law Reform and the Chartered Institute of Arbitrators. There was no prospect of primary legislation, so we had to do it ourselves. We set up the rules and I remember writing them based on the Australian version. We set up training and membership. We had huge support from judges. We launched. Of course, it would have been good to have had more cases but it has succeeded as a vital component of out-of-court settlement for some cases. It has been particularly useful during times of judicial shortages. But I think it has had an additional benefit. The in-court FDR process is brilliant in my opinion. But outside the High Court, where they have the luxury of several hours to conduct an FDR, judges have limited time to get to grips with the case and help negotiations. Why not do it out of court? The private FDR. It was happening before the COVID-19 lockdown but the face-to-face restrictions gave it a huge boost. And most of the initial private FDR judges were qualified arbitrators bringing across their skills and experience to a fairly similar out-of-court quasi-judicial process. It has been one of the English success stories.

What else has been happening over recent years?

Soon after my return from Sydney, I was invited by the Resolution chair, Andrew Greensmith, to look into other forms of ADR. One outcome of our report was directive mediation, explicitly based on the Queensland model, where the mediator, invariably also a lawyer, is able to give a neutral steer to help the parties settle, as distinct from the more traditional and passive mediation model. We created distinctive clauses for the mediation agreement. I suspect most lawyer mediators are now working off this model.

I had already written many articles about aspects of family law. I was invited by Jordans, now LEXIS-NEXIS, to write a weekly article on international family law. I did so for about 3 years. It was a real challenge finding something to write each week but from the challenge came the resourcefulness. I learned a lot from doing so and hopefully raised the profile of international work.

We had the Red Book on national law but there was nothing comprehensively on international. I invited LEXIS-NEXIS to agree a textbook, *The International Family Law Practice*. The first edition was mostly a collection of lecture notes and articles, a modest paperback. It proved highly successful. Six editions later, it is now a massive tome. There are a dozen contributory authors, each specialist in their distinctive field, with about 25 chapters and a couple of thousand pages. It is testament to the way in which international work has expanded.

An undoubted highlight of my career was receiving the OBE in 2014 from Her Majesty the late Queen *for services to international family law*. Ann, my father and my best friend from schooldays, Peter, and I had a wonderful day in Windsor Castle. The Queen said that it must be a very difficult area of work and I remember saying it was. Another highlight was being made an honorary silk, now KC, *for contribution to the improvement of English law and practice*, although honorary silks don't dress up! I would never have expected this at the beginning of my career. One doesn't work for these things but it's jolly nice when they happen.

I was delighted to be made an Honorary Professor at both my old University, Leicester, and at the University of Law. I had stayed in touch with each and in recent years had been giving annual lectures as well as helping them make their courses practical and applicable for those intending to enter the solicitors' profession and help the next generation of lawyers.

I have continued sitting as a part-time judge even including coming back to sit when I was in Sydney. I was delighted with the reforms by Sir James Munby in introducing a specialist family court. We had had this in London anyway, but it was well overdue. More important for me was the setting up of the Financial Remedies Unit in London dealing with complex financial cases. I was one of its first judges and I now almost only deal with financial remedy cases. I've enjoyed these last few years much more as a consequence, although deputy judicial sitting has become much busier and far more demanding. Having sat only in central London since 1995 but having during lockdown moved to South Devon from Surrey, when it became obvious that I could run my practice just as well remotely, I have in the last couple of years also been sitting in parallel on the Western circuit in the south-west of England. Of course, the asset base is often much lower than London.

I've been really impressed by the quality, calibre and commitment of the local practitioners. My heart remains however at the CFC, my legal home for decades.

I almost dare not mention Brexit! But I was one of a small group of UK family lawyers working closely with the Ministry of Justice throughout the Brexit process on what would be the laws for that transition period and after departure, representing the family law professions of the UK nations. It was hard work and complicated, dealing with statutory instruments and legislative policy a long way outside normal family law expertise. The outcome for family law could have been better, but without our involvement I'm sure it would undoubtedly have been far worse. In the run-up to the final departure, I wrote a book for practitioners, published by LEXIS-NEXIS, on the transition process and what would be the new law once we left the EU. Some lawyers gave dire warnings about the disastrous state of affairs if we didn't stay within EU family laws; none of these have yet come to pass although I was highly disappointed that the EU would not adopt the same stance as the UK in mutual recognition of international domestic violence protection laws. This is vital and domestic abuse victims should not be pawns in political games.

So what remains?

I still have several projects along with my client work.

I have been frustrated that we have no real international family mediation profession. After pushing for some time, I'm pleased that this year a small group of us around the world, under the auspices of myself and an Irish mediator, Roisin O'Shea, are working on documents which will create an easier opportunity for international families to go into and settle through mediation.

With my green hat on, I've been pleased to co-author a report for the IAFL for more environmental awareness and sustainability for an organisation which holds several worldwide conferences annually with masses of air travel. It will be a real challenge for the future.

Another frustration has been the continued disputes regarding jurisdiction and forum, standing in the way for international families to come to a settlement. A few years ago a very good friend, Professor Patrick Parkinson of Australia, and I set up an international family law arbitration scheme with a number of part-time or recently retired judges and senior lawyers acting as arbitrators, from a country not involved in the dispute, to find the closest connection country and thereby resolve jurisdiction and forum. Sadly it hasn't yet taken off. I'm sure it will happen. In the meantime, I'm keen to find a way for a universal, global family law jurisdiction and forum criteria through means of a hierarchy. The EU had been interested and I hope may yet be willing to go down this road to benefit international families.

I have throughout been very interested in digital technology. I was one of the first family lawyers on the internet. I remember being part with Nicholas Mostyn of a very basic service called LINK in the early 90s. I had a CompuServe email address consisting only of numbers and I acquired my own eponymous domain quickly. I experimented in the late 90s with voice recognition which I have been using consistently since 2005; DragonDictate has probably transformed my practice more than any other feature. More recently I and a couple of iFLG colleagues were able to adapt the Settify model for English law. I have other ideas and there's so more which can be done and must be done. There is no doubt AI will dramatically affect practice. Another of my heroes is Richard Susskin, a real visionary. A few years ago my firm had a couple of away days going through his book: *Tomorrow's Lawyers*. I commend his writings about what will happen within our profession over the next 5 years and more. We must plan now for what will happen then.

I have for many years been keen on financial remedy reform. I was a member of the Resolution financial remedy reform committee in the late 1990s arguing for legislation to bring in equality. Instead, we had *White*, a phenomenal piece of judicial law-making which dramatically changed our law for the better. In 2009 I co-authored a report, *Every Family Matters*, for the Centre for Social Justice on comprehensive reform of family law. In the last few years, I believe the strong adherence by some higher courts to wide discretion has given us a law which is uncertain, unclear and unpredictable. I'm delighted the Law Commission have been asked to look into this and was pleased to meet them a couple months ago. I don't know what will be the outcome but I'm certain that it must be a law which can be adapted to digital technology. It seems to me inconceivable that at the end of this decade, when any reform is likely, members of the public will be expecting to sit down with a solicitor to have an explanation of the law. They will expect it in an app on their phone or tablet. They will want to put in relevant information and have out either the fair outcome or (with narrow discretion) a close range of the outcome. Any reform must include this digital process in my opinion. There's a lot more we can do with our present procedure to make it far more digitally accessible. It's an exciting time.

You are openly a Christian. How has your faith been important in your work?

Thank you for asking. In my late teens I gave my life to Christ and my Christian faith has been the most vital element of my life and career. I've been a member of the Lawyers Christian Fellowship and have had huge encouragement from other Christian lawyers. I have tried to apply my faith to my work. I have tried to find a better way of working for clients and within the justice system. Obviously, I have sought justice as a lawyer and a deputy judge. During particularly low periods, losing my job, a big PI claim, uncertainty about the future, I believe I have received spiritual support to keep going.

I've had huge support from many others. From my former wife, Gillian, and now of course from Ann. From many partners, assistants and colleagues. From many friends outside of the law. I suspect most of us could not succeed as family lawyers without significant support.

Most of all, the career has been the most phenomenal opportunity. One I could never have expected in my initial days in my training contract in Southampton. I hope I have given back as I have received; to my clients, for my colleagues, for the profession and for justice systems here and abroad. Being a family lawyer is a marvellous opportunity to make a real difference, a major benefit, to those at the lowest relationship point of their lives. What a privilege in life.

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