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FINANCIAL REMEDIES JOURNAL

Report of the Duxbury Working Party
The Duxbury Working Party

Financial Remedies – Next Steps on the Road to Reform?
Professor Nick Hopkins, Professor Thérèse Callus and Christine Gentry

Reflections on the Law Commission Scoping Report
His Honour Judge Edward Hess

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Her Honour Judge Isobel Plumstead (1947–2024) – An Obituary

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Chair's Column

HHJ Edward Hess

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

The Law Commission Scoping Report

This is the first issue of the FRJ since the Law Commission's 'scoping report' was published in December 2024. The essence of a scoping report is that it steps back and paints an overview. It presents options (to the government or to Parliament); but does not seek to recommend or even identify a clear way forward. The downside of this exercise is that it doesn't really solve anything. Whilst some of the weaknesses of the present system are identified, it also identifies the weaknesses of other alternatives and provides no answers. The usefulness of the exercise, in contrast, is that it draws attention to possible ways forward which can then be further debated in anticipation of a future decision by the government or by Parliament. This issue therefore includes several contributions in this spirit as well as a covering article from the Law Commissioners themselves: 'Financial Remedies – Next Steps on the Road to Reform?' by Professor Nicholas Hopkins and other members of his team. Amongst the issues discussed are whether there is a case for leaving things as they are, whether or not 'conduct', in particular domestic abuse-type conduct, should be elevated as a factor (see 'Principles vs Resources: Conduct and the Law Commission Scoping Report' by Sam Hillas KC et al) and what amendments to the statute would promote the fairer sharing of pensions (see 'Reflections on the Law Commission's Scoping Report so far as it Relates to Pension Sharing' by Jack Rundall). No doubt these debates will continue; but what will the government or Parliament ultimately do (if anything)? We shall have to wait and see, probably for many months.

Arbitral awards

The public policy of encouraging divorcing couples to resolve their differences away from the courts has many strategies. One of them is to promote arbitration – successive Presidents have strongly encouraged its use. The article by Michael Allum – 'Will Delays in Converting Arbitral Awards into Court Orders Deter the Use of Arbitration?' – highlights some difficulties that have arisen in the court process since the inception of arbitration which appear to have interfered with the attraction of the process. Munby P in *S v S* [2014] EWHC 7 (Fam) sought to encourage the court's rapid approval of arbitral awards. 'The judge will not need to play the detective unless something leaps off the page to indicate that something has gone so seriously wrong in the arbitral process as fundamentally to vitiate the arbitral award … it can only be in the rarest of cases that it will be appropriate for the judge to do other than approve the order'. Through a series of reported cases – *Haley v Haley* [2020] EWCA Civ 1369, *A v A* [2021] EWHC 1889 (Fam), *LT v ZU* [2023] EWFC 179 (B) and *ON v ON* [2024] EWFC 379 – the accelerated pathway envisaged by Munby P a decade ago seems not to have been what was hoped. Michael Allum's thoughts represent an interesting reflection on the problem and how it might be solved or improved and deserve proper attention.

Duxbury

The final report of the Duxbury Working Party was published in November 2024, just after the print deadline for the Winter issue of the FRJ. The final report therefore appears in full in this issue. The recommendations represent a significant move forward in how these issues are likely to be treated by financial remedies courts in the future and deserve a careful reading by all practitioners in this area.

Obituaries

This issue carries obituaries of two individuals who in their own ways lit up the world of financial remedies – both were engaging company up to their all too early recent deaths and both will be much missed by all who knew them. Issy Plumstead was one of the many individuals who cut their judicial teeth as a District Judge of the Principal Registry of the Family Division and, in many later roles, including as a Circuit Judge, she remained a strong and agreeable presence at many a function and event up to and beyond her retirement. To financial remedies practitioners she can legitimately claim to be the 'grandmother of pension sharing' as the first instance judge in *Brooks*. Likewise, James Turner KC was a considerable and admirable presence for many years right up to his death. He lived and breathed the promotion of justice and fairness, remaining on the front line at the Bar until the very end. I had the honour of hearing what I think may have been his last financial remedies case when, though readily acknowledging his illness, he gave absolutely no quarter in either inventiveness or spirit or hard work in making out his case. The family law world is mourning two of its veteran stars.

Report of the Duxbury Working Party (Final) November 2024

The Duxbury Working Party

A provisional version of this report was published on 2 October 2024 and invited representations for consideration by the Working Party ahead of publication of this final report. Such representations as were received are summarised in Appendix 6, and in a few instances in alterations to the text of the report. The main recommendations of the Working Party have not changed following consideration of those representations. The figures in the illustrative tables in Appendix 5 have been revised to reflect increases in the rate of Capital Gains Tax announced and implemented in the October 2024 budget.

Executive summary

1. Duxbury calculations, whether presented as a printed table or by specialist software, have for nearly four decades been the tool of choice in the family courts for the assessment of lump sums necessary fairly to provide for a clean break in a case where there would otherwise have been a periodical payments order.

2. The underlying assumptions have been the subject of criticism in articles in legal journals, generally on the basis that the sums arrived at are not sufficient to provide the level of spending power intended for the lifetime of the recipient.

3. Those underlying assumptions have not been the subject of any general review for many years. This report is by an ad hoc and self-selected group of interested professionals to undertake that review, including, in the light of the criticisms, the methodology. The Working Party has no status to make any decisions about how the courts should approach Duxbury calculations. It proffers the proposals in this report to banish outdated concepts and generally to modernise the approach. It will be a matter for the courts whether to adopt the recommendations.

4. Our main conclusions are, in summary:

4.1. The existing underlying assumptions as to income yield (3%), capital growth (3.75%) and inflation (3%), remain essentially sound.

4.2. The calculation should also include an allowance for the management charges (1% for funds up to £1m, 0.5% for funds above £1m) likely to be suffered on the investment of the fund.

4.3. The calculation should no longer default to the life expectancy of the recipient (although there will be cases in which that is appropriate), rather the court should consider the likely duration of the periodical payments order which is being capitalised, and apply that period to the quantum of the periodical payments that is being capitalised.

4.4. The computation should not default to the inclusion of the State Pension, although the fact of such entitlement may impact on the quantum of the periodical payments being capitalised.

4.5. It is neither necessary nor appropriate (where the appropriate duration for the calculation is a term of years and as State Pension age is now the same for men and women) to have separate tables for male and female recipients.

4.6. Where whole-of-life is determined to be the appropriate duration for the calculation extreme caution should be exercised in undertaking a Duxbury calculation for any payee whose life expectancy is less than about 15 years, although we think that these will be very rare cases.

4.7. Legal advisers to parties who are receiving Duxbury based awards, or awards with a Duxbury component, should ensure that their clients have a proper understanding of the basis of the calculation and disabuse them of the erroneous belief that it ensures a particular level of expenditure for a particular period.

5. While our recommendations in relation to management charges and State Pension will tend to increase awards, we anticipate that in practice this will be mitigated, and sometimes outweighed, by the adoption of our recommendation for a lesser duration than life expectancy in most cases.

Terminology

6. In this report we use the following terms:

6.1. 'Financial remedy' to encompass all financial awards made by agreement or court adjudication following relationship breakdown (generally divorce, but including dissolution of a civil partnership), notwithstanding that much of the jurisprudence deploys now antiquated terminology such as ancillary relief.

6.2. 'Periodical payments' for what is sometimes referred to as maintenance or alimony, being regular payments made to another person (usually a spouse, ex-spouse or co-parent) as a financial remedy.

6.3. 'Joint lives' to mean an award of periodical payments with no term specified which endures until the death of either party unless varied or discharged by a subsequent order, or until the remarriage of the payee.

6.4. 'Payee' to mean the recipient of a financial remedy award.

6.5. 'Payer' to mean the party against whom a financial remedy award is made.

Background

7. The Duxbury calculation originates from the work of accountant Tim Lawrence then of Coopers & Lybrand, instructed as an expert witness on behalf of Mrs Duxbury during the course of her financial remedy proceedings consequent upon the breakdown of her marriage to Mr Duxbury in 1984.

8. Mr Lawrence had devised a spreadsheet which worked out by trial and error the lump sum which in his opinion

might fairly enable Mrs Duxbury to meet her 'needs' pursuant to the then newly implemented obligation imposed on the court to achieve a clean break. The calculation was of the capital payment in the form of a lump sum (a 'Duxbury fund') which, if depleted at a steady rate in real (inflation adjusted) terms, allowing for assumed income yield and capital growth while invested, and allowing for the depredations of tax on income and on realised capital gains, would theoretically be exhausted on the date of Mrs Duxbury's actuarially anticipated death. Lord Nicholls of Birkenhead gave a graphic description of the concept in *White v White* [2000] UKHL 54 at [39]: 'The Duxbury fund calculation involves using income and ultimately exhausting the capital at the theoretical point when the wife would down her last glass of champagne and expire as predicted by the life tables.'

9. Mr Lawrence's modelling was accepted by the court (Reeve J at first instance, and a Court of Appeal comprising Ackner, Stephen Brown and Parker LJJ). Although the judgment of the Court of Appeal was given in November 1985, it was not reported until 1987 (*Duxbury v Duxbury* [1987] 1 FLR 7) and the report itself says nothing about this method of calculation. However, the existence of Mr Lawrence's calculation became known, and the thoughts of professionals turned to creating, in what was then the relatively new medium of the spreadsheet,[1] an iterative program which would work out the discounted lump sum payment to be made in lieu of what would otherwise be a series of periodical payments. Nicholas Mostyn believes he wrote the first such program in 1989.[2] Other such programs followed.

10. The program asked the user to input the claimant's annual spending requirement and age and then made a 'guess' as to the required capital sum, with the calculation being conducted repeatedly (iteratively), refining the 'guess', until the remaining figure at the terminal date was zero.

11. The arithmetic involved a number of 'assumptions' including that:

11.1. The claimant, Mrs Duxbury, would die on, and neither before nor after, her actuarially estimated date of death, but without regard to any individual characteristics that she might have which would tend to either shorten or lengthen her life as compared to her standardised or actuarial life expectancy based solely on her date of birth.

11.2. Inflation would remain at a constant level throughout the period of her life.

11.3. The income yield ('yield') would remain at a constant level throughout her life.

11.4. The gross capital appreciation ('growth') of her investments would remain at a constant level throughout her life.

11.5. Taxation of both income and gains would be met from the fund, with only the allowances and bands altering (in line with the assumed constant rate of inflation), and without Mrs Duxbury or her advisers taking any steps to invest in ways which would reduce that tax burden.

11.6. The claimant would be entitled to a full State Pension at the then applicable commencement date.

11.7. Income would be spent first, then capital drawn as required, including the relevant proportion of gains comprised in the capital (attracting tax where applicable) but also – and initially largely – the original capital (which would be tax free). The proportion of gains would increase as the original capital was gradually depleted.

11.8. Additional realisations would take place annually, equal to a fixed percentage (3%) of the remaining funds, for reasons of proper management of the fund and/or because of market forces requiring such realisations (this was called 'churn'), which might also give rise to a liability to tax to be paid as it arose.

11.9. No consideration was given to the possibility that the claimant might remarry – indeed, Mr Duxbury's appeal against the order on the basis that this possibility should have been factored in to reduce the award was dismissed by the Court of Appeal.

12. The calculation was not wholly unlike a discounted cash flow model, or the kind of computations then used to calculate lump sum awards in personal injury or medical negligence cases, which generally operated on the basis of a 'discount' for the advance payment of a fixed sum to be depleted over a period of years.

13. For a few years an industry arose where accountants would be instructed in individual cases to put forward bespoke computations adopting some or all of the assumptions put forward by Mr Lawrence, supplemented with their own variations, particularly as to investment yield, capital growth and inflation (to which we shall refer as the 'key assumptions'), but sometimes also in relation to life expectancy. It soon became apparent that costs, common sense and appropriate allocation of court resources favoured a standardisation of the arithmetic and 'assumptions' rather than evidence being given, submissions being made, and judgments delivered in every case.

14. By 1991 the concept of a Duxbury calculation had received judicial endorsement. In *B v B* [1990] 1 FLR 20 Ward J said 'if this calculation is accepted as no more than a tool for the judge's use, then it is a very valuable help to him [sic] in many cases'. in *Gojkovic v Gojkovic* [1990] 3 WLR 261 Butler-Sloss LJ stated that 'a Duxbury calculation … produces a figure to which the judge is entitled to have regard in deciding what is the right answer'.

15. In 1991 a group comprising Nicholas Mostyn, Peter Singer QC, James Holman QC and Valentine Le Grice worked on the production of the first edition of the Family Law Bar Association's flagship annual publication *At A Glance*, which came out in 1992. It was decided that it should contain a table giving guideline Duxbury figures based on just two variables: the age of the payee (specifically, until 2001/02 only for women[3]) and the target amount of the revenue 'need' in the first and all subsequent years. From inception to date those tables have proceeded on a 'whole life' basis – i.e. that the inflation adjusted spending requirement would continue for the remaining actuarial life expectancy of the recipient.

16. This table was updated annually to reflect changes in life expectancies (as predicted by the Government Actuary and the Office for National Statistics) and changes in the applicable rates of tax, including future changes which had been announced even if not yet implemented. There also became available commercial software to undertake ever more bespoke computations,[4] most notably and popularly, Capitalise by Class Legal, first produced in 2000.

17. The aggregation of the key assumptions gives a real rate of return (RRR): income yield + capital growth – inflation = RRR. That was initially set at 5%. In 'Reflections on

Duxbury' in the 1995 edition of *At A Glance* the editors stated:

> 'In the introductory material to *Actuarial Tables for use In Personal Injury and Fatal Accident Cases* (HMSO, 2nd edition 1984) the Ogden Committee point out that for a payee to be certain to receive an inflation-proof income for the period to which the loss relates it would be necessary to invest in Index-Linked Government Stock. The return upon these has historically ranged between 2.5% and 4.5% gross. The rate applicable on 30 January 1995 was 3.89% before tax (source: Financial Times). By contrast the gross real return on equities has over the 25 years to 1993 averaged 5.8% (source: The BZW Equity-Gilt Study Investment in the London Stock Market since 1918). …
>
> The lower the percentage real rate of return selected, the higher the capital fund required. So the choice made for these Duxbury tables of 4.25% should be regarded as fair to each spouse, and designed to cover such considerations as any professional expense in managing the award, once made.
>
> Whereas therefore the previous editions of *At A Glance* have suggested that it was a matter for evidence and argument in each case what assumptions should be adopted, it may now be that such a laissez-faire approach is outmoded. It would be better to accept that (for the illustrative purpose which is all that the calculation can provide) an industry-standard of 4.25% should be adopted as the real rate of return in current and foreseeable financial circumstances.'

18. This was followed by *F v F (Duxbury Calculation: Rate of Return)* [1996] 1 FLR 833 where Holman J stated:

> 'Although I am a member of the editorial committee of *At A Glance* (FLBA) I was not the author of "*Reflections on Duxbury*" to be found at the beginning of the 1995 edition. But I agree with its reasoning and its conclusions. In my view it is important that there should indeed be "an industry standard" for the purpose of the Duxbury approach and in my experience that standard has already settled at around 4.25%'

19. In 1998 the original Duxbury Working Party came into existence. It was a self-selected group of (male) lawyers, accountants and actuaries who shared an interest in the topic and had sufficient understanding of both the underlying object of the calculation and the workings of it, as well (at least for some members) the expertise to identify appropriate figures for the key assumptions. They had no status or standing other than their willingness to discuss and publish the outcome of their discussions in the commentary to the annually updated Duxbury table published in *At A Glance* . It produced its first report quickly '*Duxbury – The Future*': [1998] Fam Law 741 proposing a RRR of 4.25%. Unsurprisingly, that was adopted by the editors of *At A Glance*. From 1998 until 2006 there were occasional, but by no means annual, adjustments made to the key assumptions, in line with the collective or majority views of the then members of the original Duxbury Working Party, of which the authors of this report are a reconstitution.[5]

20. In practice the adjustments, if any, tended to be *de minimis*, since the view of all members of the Working Party was that even seemingly dramatic events in the financial landscape (for example Black Monday in 1992 when the FTSE 100 fell by over 11% in a single day, while the Dow Jones fell 20%) would usually be 'blips' in an otherwise historically clearly identifiable trend. Views about what had happened in the last 15 months were not determinative when considering an investment horizon measured in many decades.

21. In January 2002, the Duxbury Working Party reconvened and recommended that from April 2002 calculations should be done using a RRR of 3.75%. This led to two tables being published in the 2002–2003 edition of *At A Glance* one using a RRR of 4.25%, the other a RRR of 3.75%. That rate of 3.75% was approved by the court in *GW v RW* [2003] EWHC 611 (Fam), [2003] 2 FLR 108 at [57] where N Mostyn QC stated:

> 'It might seem hubristic of me to approve in my capacity as a deputy High Court judge a rate recommended by me (among others) in my capacity as a member of the working party. But it is blindingly obvious that as between 4.25% and 3.75%, the lower figure is right. Indeed, present market conditions might suggest that 3.75% is distinctly optimistic. If by making this statement I can help to avoid some needless controversy about rates of return in some future case then I consider it will have been justified.'

22. In the 2009–2010 edition it was explained that the assumed income yields for years 1 and 2 had been reduced in the light of the global financial crisis and that the advice of the Duxbury Working Party was awaited. The Duxbury Working Party duly met again in 2009 and recommended a reduction in the assumed income yield in the first year to 1.5% which was adopted, and which remains in place.

23. These minor variants aside the key assumptions (income yield 3%, capital growth 3.75%, inflation 3%) have remained essentially undisturbed since the 2003–2004 edition (20 annual editions). In 2015, they received detailed judicial consideration and approbation in *JL v SL (No 3*) [2015] EWHC 555 (Fam) which also approved the underling algorithmic architecture. While it has always been open to individual litigants to argue against the adoption of the standard assumptions, in practice it would require a good argument or an unusual factual scenario for such an argument to succeed. There is, so far as we can tell, no recent authority in which such arguments have been successful.

24. That the calculation – and the assumptions underpinning it – were only a 'guide' or 'tool' and not 'the rule' in any particular case was repeatedly emphasised in the authorities, although inevitably, deviations from the guide were the exception rather than the norm. Generally, where the court was persuaded to make an order on a basis different from the result thrown up by a Duxbury calculation, the order was more generous to the claimant. That has not been because of a departure from the assumptions, but because of the specific factual matrix against which the calculation was being utilised.

25. A table giving the key assumptions and the RRR in each annual edition of *At A Glance* is at Appendix 2.

Criticisms

26. The Duxbury calculation – but in particular the key assumptions deployed in it – have been the subject of criticism by practitioners, financial advisers and academics alike in articles appearing in both legal and academic journals. A list of the articles which we have considered appears in Appendix 3.

27. Most of those criticisms centre around the unlikelihood, in reality, of a recipient of a Duxbury fund as an element of their financial remedy award, actually being able to invest their fund so as to enable them confidently to spend at the rate assumed as the starting point of the computation of the capital sum, without risking running out of money during their life. The common theme of the criticisms was, directly or indirectly, that the calculation was unduly mean and that claimants were being short-changed.

28. Amongst the objections have been that:

28.1. there is no protection for the payee if they turn out to be long-lived and therefore potentially surviving beyond the exhaustion of their fund even if it had otherwise performed as anticipated in the calculation,

28.2. the investment returns assumed could only be achieved (if at all) with a relatively risky investment strategy, and

28.3. the payees are likely to be more cautious than adventurous investors, and would generally not be financially sophisticated.

29. This has been argued, in effect, to place unfair risk on the payees – predominantly women – for the benefit of the payers – predominantly men. The payees were left, according to the critics, faced with either reducing their expenditure immediately or later in life when the funds were likely to be dwindling, or hoping to remarry, rather than being able confidently to continue with the lifestyle judged to be appropriate at the time of the establishing of the quantum of their Duxbury fund.

30. Defenders of the status quo focussed not so much on the likelihood that in practice the fund could be prudently invested so as to enable spending to continue at the initially assumed rate, but rather on the balance of fairness between divorcing spouses and the true aim of the calculation being to establish the fair sum to be paid immediately to compensate the payee for forgoing what would otherwise be their right to receive maintenance by way of periodical payments.

31. This has been explained in the text accompanying the Duxbury Tables since the 2010–2011 edition. In that edition it was stated:

> 'the assumptions must be such as strive to achieve fairness between the parties. An ancillary relief award is a "nil gain sum" – so any benefit to one party is necessarily a detriment to the other. The capitalisation of a periodical payments award should therefore aim to achieve as fair a balance as possible between ensuring that the payer does not pay too much and that the payee receives enough but no less. Standardisation inevitably leads to anomalies and occasionally unfair results in individual cases. A payee who capitalises her periodical payments for a lump sum calculated on Duxbury assumptions is a net winner if she soon remarries (or cohabits in circumstances which would have led to a reduction in her periodical payments) or, more paradoxically, if she dies young. On the other hand, she will be a net loser if she lives singly for longer than her average contemporary. The likelihood of re-marriage by the payee, or a payer's inability to continue to make periodical payments long into old age, are factors which would tend to favour the recipient.'

32. In the 2024–2025 edition the explanation was put this way:

> 'The calculation is not, and never has been, to work out the sum which is the equivalent of a guaranteed index-linked annuity for the life of the recipient.
>
> Rather, it is an attempt to identify a fair net present value of a periodical payments award (where the applicant's right to claim under the Inheritance (Provision for Family and Dependants) Act 1975 remains open) i.e. a maintenance award that endures until the death of the claimant.
>
> The latter is likely to be materially less than the former for many reasons including the variability of a periodical payments order and its automatic cessation on remarriage.'

33. This reconstituted Duxbury Working Party has been established to consider and discuss the competing arguments and to make recommendations for the retention or adjustment of any of the underlying assumptions, but particularly those identified as the 'key assumptions'.

34. In the course of discussion all of the members expressed disquiet about the implicit steer towards 'whole-of-life' provision in the Duxbury calculation by the publication of tables which provide a 'guide' as to the sum targeted at the actuarial life expectancy of the payee, which runs counter to the modern practice of achieving financial independence rather than lifelong dependence following marital breakdown, and counter to the statutory directive to consider financial provision by way of periodical payments 'only for such term as would … enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party'.[6] While that provision does not apply directly to lump sum payments if, as discussed below, the proper rationale for the Duxbury calculation is of the fair sum to pay in compensation for not receiving a periodical payments order, it appears to us to be illogical, if not irrational, to assume in that calculation that the periodical payments would endure for the whole of the payee's life.

35. The members now[7] comprise five men and two women, two barristers, three solicitors, a chartered financial planner and one retired High Court Judge.

The legal framework

36. Prior to 1984 the family courts were enjoined to exercise their powers under Part II Matrimonial Causes Act 1973 so as to put the parties, as near as was practicable, in the position in which they would have been had the marriage not broken down – the so-called 'minimal loss objective'.

37. The 'usual' order was provision for a home and for maintenance by way of periodical payments. Periodical payments were, and still are, always susceptible to variation (in either direction) including termination. Such payments are automatically terminated by remarriage of the payee. However, before 1984 such periodical payments orders were often, even usually, expressed as being 'during joint lives'.

38. Such an order would end automatically on the death of the payee and, unless secured, also on the death of the payer – although recourse might then be had in an appropriate case to an application under the Inheritance (Provision for Family and Dependants) Act 1975 to obtain relief against the deceased's estate, so long as the payer had died domiciled in England or Wales.

39. A periodical payments order might also be made for a limited period (a 'term' order). In the absence of a specific bar (under s 28(1A) Matrimonial Causes Act 1973 introduced in 1984) the payee could apply for such a term to be extended (under s 31).

40. But also newly introduced in October 1984 was what has become to be understood as the prioritisation of the clean break. Sections 25A and 31(7) Matrimonial Causes Act 1973, both inserted in 1984, required the court when considering an application for the first time (s 25A) or for variation of an existing periodical payments order (s 31) to 'consider whether it would be appropriate' to exercise its powers[8] so as to bring about a clean break 'without undue hardship' to the claimant.

41. Duxbury (heard at first instance and on appeal in 1985) was one of the earliest cases in which the court considered how fairly to arrive at a figure for a lump sum in place of what would previously have been periodical payments, and usually on 'joint lives' terms, albeit supposedly in the shadow of the then new s 25A.

42. Mr Duxbury appealed to the Court of Appeal against the making of such an award having regard to the fact that Mrs Duxbury was, and had been at the time of the hearing at first instance, cohabiting with another man and was, he argued, likely to remarry. His appeal was dismissed, the Court of Appeal considering that her cohabitation was 'irrelevant'.[9]

43. This is the context in which the computation of the Duxbury lump sum figure has to be viewed. It is in substitution for a stream of periodical payments with all of the variability and uncertainty that come with such a stream. The lump sum payment serves to liberate both the payee and the payer from the continuing financial interconnection of a periodical payments order but should in other respects be financially neutral for them both. That this is the essential premise of the calculation has been made clear in 13 consecutive editions of *At A Glance* since 2010–2011.[10]

44. Between 1987 and 2000, the Duxbury calculation dominated the computation of awards in cases in which a clean break was plausibly achievable. Thus, in *Harris v Harris* [2001] 1 FCR 68 Thorpe LJ observed that the table had an 'obvious utility' offering the judge a starting point. But, in reality only a very small proportion of separating couples had anything like the resources necessary to enable a Duxbury calculation to be relevant to the computation of an award – this was essentially the province of the wealthy and the comfortable professional classes. It required the parties to have available to them sufficient capital to provide homes for them both and have sufficient surplus capital to render the capitalisation of any needs-based revenue claim feasible.

45. The legal landscape in that period meant that in moderately large and very large money finance cases, the applicant's award was usually computed as the sum of their housing requirement (usually the purchase price and ancillary expenses) and the sum necessary to compensate for the clean break imposed by reason of s 25A and the dismissal of what would otherwise have been their claim to periodical payments (as mentioned, at that time, frequently on a joint lives basis).

46. That all changed in October 2000 when the House of Lords in the case of *White v White* [2000] UKHL 54, ruled that the general rule should be that the ancillary relief award should be measured against the 'yardstick of equality'. That in turn led in 2006 to the identification by the Supreme Court, in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 of the 'sharing principle'.

47. In larger cases, in which there were significant capital assets to be divided, 'needs' – usually characterised as 'reasonable requirements' – no longer provided a limit to the quantum of claims against the wealthier spouse's resources. Duxbury was to a large extent relegated to cases in which – for whatever reason – the sharing principle was not engaged. Examples of cases in which the sharing principle was less likely to curtail the relevance of needs/periodical payments and therefore Duxbury calculations were those in which:

47.1. the overall wealth was largely non-matrimonial having been inherited or brought into the marriage by one spouse (e.g. from a previous marriage or a pre-existing business);

47.2. the capital claims had already been dealt with and the current application was for the capitalisation of an existing periodical payments award; or

47.3. (after 2010 and the decision of the Supreme Court in *Radmacher v Granatino* [2010] UKSC 42) there was a prenuptial or postnuptial agreement to which effect was to be given, under which the sharing principle had been disapplied by agreement, but which left the needs of the claimant spouse at large.

48. Duxbury calculations were also frequently carried out in sharing cases as a means of cross-checking whether an applicant's sharing award would meet their needs in moderately large to large money cases. The common practice, which remains in place today, is to identify the appropriate portion of an award necessary to meet an applicant's capital need (often housing), and then use Duxbury, or a bespoke calculation adopting the Duxbury assumptions, to check whether the remainder of the award is sufficient to meet the applicant's income need. This analysis sometimes precipitates argument about the fair assumptions to be adopted in the bespoke Duxbury calculation – most often when, and the extent to which, an applicant should be expected to amortise their 'free' capital fund to meet their annual income needs in circumstances where the other party is able to better preserve their capital share by meeting their needs from earned income.

49. The Court of Appeal has declined to endorse a default approach and considers that it is a fact specific evaluation to be carried out in each case (*Waggott v Waggott* [2018] EWCA Civ 727). In contrast, in *CB v KB* [2019] EWFC 78 at [53] Mostyn J was in no doubt that a recipient of a Duxbury fund should almost invariably be expected to amortise it.[11] Of course, a conventional Duxbury calculation presumes complete amortisation of the capital fund.

50. Another trend in the law, or at least in the application of the law, over the period from 1985 to the present day, has been the almost total disappearance of the previously ubiquitous 'joint lives' periodical payments order. While such orders are still made from time to time, they are of increasing rarity.[12] This has been a consequence of a combination of socio-economic and legal developments. The strengthened status of women in the workplace, the increased proportion of women, but in particular mothers, who continue in employment after marriage and the increasing expectation that even those who do not stay in

employment remain potentially employable following a divorce, no doubt all played into the decline in joint lives order. On the legal side it was the combination of the greater embracing by the court of the desirability of the clean break, the introduction of pension sharing as well as the sharing principle, which have all contributed to the near extinction of the 'joint lives' periodical payments order. This is exemplified by the decision in *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam),[13] following which joint lives maintenance orders have become an endangered species, and secured joint lives periodical payments for a claimant in middle-age virtually extinct.

51. One potentially significant reason for the decline in the making of joint lives periodical payments orders is, of course, the availability of the power to make a lump sum order, typically quantified on the basis of a Duxbury calculation. However, even allowing for this the advent of the pension sharing order (with effect from 1 December 2000) would surely have greatly reduced the number of cases in which periodical payments would ever be ordered to continue beyond the normal retirement age of the payer.

52. Nonetheless, the published Duxbury methodology has continued to provide figures – at least in the print versions – exclusively on the basis of a whole-of-life entitlement of the payee, by fixing the duration of the dependency to be capitalised to the actuarial life expectancy of the payee. This might be thought to be of marginal relevance in the general run of cases and to cater only for a minority clique.

53. That is the background against which the Working Party has focussed its discussions leading to the recommendations in this provisional report.

The issues

54. Central to the discussions amongst the members of the Working Party have been the following questions:

54.1. What is – and what should be – the proper rationale and basis of a Duxbury calculation?

54.2. Is the overall algorithmic model apt or inapt for such calculations?

54.3. If inapt, what recommendations might we make for its replacement?

54.4. What is a realistic long-term average rate to assume for inflation, or otherwise factor into the calculation?

54.5. What are realistic income yield and capital returns to assume on an investment portfolio representing a Duxbury award to achieve the appropriate objectives?

54.6. How, in answering that question and if at all, should the annual costs of investing, including fund management, platform costs and adviser fees (which we shall refer to collectively as management costs), be taken into consideration and at what stage?

54.7. Should the courts be encouraged or discouraged from abandoning reliance on published tables and seeking bespoke evidence in individual cases?

54.8. Should the individual characteristics and proclivities of the payee be taken into account in such an exercise (for example real or claimed reluctance to take investment risk, or considerations of familial longevity or the opposite)?

54.9. Does the practice of publishing tables of Duxbury figures based only on 'whole-of-life' provision lead to a disproportionate number of awards or settlements being based on the false premise that the alternative would have been a 'joint lives' order?

54.10. With what 'health warnings' should Duxbury calculations be endorsed better to educate both lawyers and, more importantly, lay parties about the differences between such a fund and a guaranteed income for life as if from an annuity?

The rationale for a Duxbury calculation

55. Jurisprudentially it is beyond doubt that the Duxbury calculation has been deployed, or should have been deployed, in substitution for what – in the absence of sufficient capital to make a lump sum order – would otherwise have been a periodical payments order.

56. This was undoubtedly its function in the case of Duxbury itself, although precious little consideration appears to have been given to the implausibility or unlikelihood of a joint lives periodical payments order actually subsisting during joint lives in that case, bearing in mind that Mrs Duxbury was already cohabiting with a new partner. As already mentioned above, the Court of Appeal considered that fact to be 'irrelevant'.

57. *Pearce v Pearce* [2003] EWCA Civ 1054 was a case which concerned the capitalisation under s 31(7B) Matrimonial Causes Act of what was undoubtedly a joint lives order, in which there were also undertakings by the husband as to the continuation of payments to the wife in the event of his death before hers effectively rendering the periodical payments order 'secured'. Thorpe LJ was quite clear, at [20], that in such an exercise:[14]

> 'What the judge is endeavouring to do is to express as a capital sum what is a fair capital sum in the circumstances in substitution for the periodical payments which would otherwise have been appropriate.'

58. This was not an original thought. Thorpe LJ was there quoting with approval what Pill LJ had previously said in *Harris v Harris* [2001] 1 FCR 68 at [44].

59. No one has contradicted or improved upon that concise summary of the objective of the Duxbury calculation in the intervening 23 years.

60. This simply stated objective belies the numerous considerations which might impact on the 'fair capital sum in the circumstances'.

61. The bare Duxbury model itself, as epitomised by the table appearing annually in *At A Glance*, considers only two case specific circumstances viz the age and (latterly) sex of the payee. All other factors are, necessarily in that particular exposition, overlooked in the arithmetic.

62. More sophisticated modelling tools, such as Capitalise, can factor in a variety of other circumstances, most obviously whether or not the recipient will be entitled to the full State Pension assumed in the printed tables, but also any other anticipated capital or income receipts and whether the annual spending power might fairly be adjusted (usually by way of reduction) at some stage in the future. It can also be used to calculate capitalisation figures based on anticipated dependency shorter or, theoretically, longer than actuarial life expectancy.

63. Whilst those considerations must plainly exclude entirely subjective criteria such as re-marriageability, we do

consider that the model should properly err on the side of under- rather than over-generosity in the computational phase, to reflect the much greater likelihood that 'circumstances' would in practice lead to a termination or reduction of the hypothetical underlying periodical payments order rather than to an increase or extension. The law now – much more than it did in 1985 – encourages financial independence rather than life-long financial support. It will not be in every case, even when the payer has abundant resources, that the 'start on the road to independent living'[15] would require that the traveller is armed with a fund liberating them from all financial responsibility and risk for the rest of their life.

64. We have already commented that genuinely joint lives periodical payments orders, and a fortiori joint lives secured periodical payments, have reduced in popularity and prevalence, perhaps almost to the point of becoming an endangered species. Why then, we have wondered, has the default computation of a Duxbury award remained stubbornly based on the actuarial life expectancy of the payee and even that based solely upon their date of birth?

65. We venture to posit that were the Duxbury case to be reheard now, regardless of the revolutions to financial remedy proceedings wrought by the decisions in *White* and *Miller*, but in the light also of the changed approach to independent living, it might well have resulted in a different outcome. Mrs Duxbury was only 45, the parties' youngest child already 20 following a 22-year marriage. As already mentioned, she was living with a new (and much younger) partner. It is hard to imagine in 2024 the starting point for Mrs Duxbury's provision being a secured periodical payments order for the rest of her life. Of course, the difference, in the modern era, is that Mrs Duxbury would very likely have received a substantial sharing award which might have obviated the need for the additional consideration of her needs.

66. In our proposals for change we canvass a new presentation of the capitalising algorithm which is no longer based on the assumptions of (i) a full State Pension nor, more importantly, (ii) whole-of-life provision.

67. Rather, we propose that the judge should consider what is an appropriate duration to assume for continuing financial support from the payer, which may not be 'whole-of-life', and select the guideline figure from a new table based on that duration rather than the specific age of the payee.

The algorithm – what it isn't

68. Before discussing what the Duxbury algorithm is, and how it works, we want to emphasise what it is not.

69. The Duxbury methodology is sometimes mistaken for an estimate of the cost of something with the qualities of an annuity to produce a guaranteed net income for life. Certainly, there are at least anecdotes of recipients of such funds visiting financial advisers and demanding an investment portfolio designed to achieve the same outcome as such an annuity. One can only assume that such recipients had not been advised by their lawyers that the fund would not be able to achieve the equivalent of an annuity return, at least not without considerable risk.

70. Even the most copper-bottomed of purchased annuities (e.g. using a SIPP fund) are only of a guaranteed gross annuity – sometimes, but not always, indexed or otherwise increasing to mitigate the effects of inflation – and so will always remain subject to the vagaries of the tax system even if the gross income is guaranteed.

71. An annuity is the purchase of a guaranteed, usually annual or monthly, receipt of money from an annuity provider, almost always an insurance company. The annuity purchaser pays a cash lump sum (these days almost always from a pension fund and known as a 'compulsory purchase annuity' even though the previous compulsion no longer exists) in return for lifelong, guaranteed, fixed, regular payments until their death.

72. There are variations on the annuity theme including:

72.1. joint annuities where the payments will continue (sometimes at the same rate, sometimes at a reduced rate) after the death of the first annuitant and until the death of the second annuitant, typically a spouse or civil partner;

72.2. index-linking, or flat rate (typically 3.0% p.a.) increases in the regular payments intended to off-set the effect of inflation; and

72.3. guarantees, typically of five years, so that even if the annuitant dies during the guaranteed period, the payments will continue to their estate or nominated payee until the end of the guarantee period.

73. Each of those variations comes, of course, at a cost resulting in initially lower regular payments from the same capital purchase price for an annuity. Index linking might, for example, reduce the gross payments of an annuity purchased at age 55 by around 45%, at age 65 by around 36% and at age 75 by around 27%, so only those annuitants who live a substantial period after the purchase of the annuity would recover enough from the beneficial effect of the index linking (particularly in periods of low inflation) to make up for the much lower payments received initially. Other factors, such as tax, might nonetheless make deferral or index-linking financially astute even in low inflationary times.

74. Although there was once a thriving market in open market purchased life annuities (i.e. cash purchased annuities where the purchase price does not emanate from a pension pot), at the current time and for many years past, the only widely available annuities in the UK are those purchased using pension funds.

75. When an annuity is bought with a pension fund the entirety of the regular payments are taxed as income in the hands of the recipient even though, in reality, the bulk of the payments in fact comprise a return of the capital used to purchase the annuity. This is because the payments into the pension to accumulate the fund were (almost invariably) of untaxed income as a result of the income tax relief available on pension contributions whether made personally or by an employer.

76. Purchased Life Annuities (for which there are presently only two active providers in the UK market), are subject to a different tax regime which is much more onerous on the annuity provider (which may partly account for their scarcity) but much more beneficial for the annuity purchaser. The annuity provider has to provide the annuitant with a figure each year for the part of the regular payment which is return of capital (on which there is no tax) and the part which is income (or yield) on which the annuitant is to pay income tax. The part that is original capital will – for a long-lived annuitant[16] – eventually be exhausted, so

that the annuitant would end up suffering tax on effectively the whole of the annuity payments in their later years (as with a pension annuity), having suffered almost no tax in the early years. The administrative costs for the providers are correspondingly higher and customer satisfaction presumably correspondingly lower.

77. The Annuities Table in *At A Glance* (page 66 of the 2024–2025 edition) shows that typical Purchase Life Annuities are seemingly less good value than Pension Annuities, paying out around 17% less if purchased at age 55, 11% less at age 65 and 3% less at age 75 than the corresponding Pension Annuities which could be purchased at those ages, possibly in many instances negating the tax advantage of receiving the tax free return of capital.

78. The annuity market depends on the fact that a significant proportion of annuitants will die before they have received even the return of their original purchase capital. Others (another sizeable minority and together with the earliest casualties, a majority) will die before receiving the whole of the income and capital growth that the annuity provider earns from their original purchase capital. The early mortality 'profits' (from the annuity provider's perspective) have to be sufficient to meet their obligations to the long-lived annuitants amongst their customers, as well as to fund their corporate operations and provide a commercially viable profit for their shareholders.

79. Thus, annuities depend on a collective market, where the profits from the short-lived fund the continuing payments for the long-lived.

80. This is not the case in relation to financial remedy orders, where there is no such collectivity. Rather, in each case, the fairness has to be as between the payer spouse and the payee spouse – two individuals engaged in a nil-sum game. In fairness, there must be anticipated to be as many winner payees (who receive too much) as there are loser payees (who receive too little), so that the same balance is struck for the payers.

81. The crucial fact in relation to annuities is that once they have been purchased the capital purchase price is gone. Subject to any guarantee period, on the death of the annuitant the payments cease, and the purchase price cannot be recovered from the insurers. Naturally, some annuitants will die very soon after buying their annuity leaving their estates much smaller than had they died without purchasing the annuity. It is perhaps for this reason, as well as others discussed shortly below, that annuities have never been the mechanism of choice in the family court for providing for the income needs of a claimant for financial remedies.

82. Other reasons for eschewing annuities as the mechanism for providing for the needs of a claimant in financial remedy proceeding include at least the following:

82.1. income provision on divorce has always been, by its nature, subject to variation in the event of changes in circumstances. Such changes might include changes to the situation and economy of the payee or those of the payer;

82.2. the most obvious of such changes include the death or remarriage of the payee, either of which would, under the Statute, end a periodical payments order, even a secured periodical payments order. Neither of those things can be regarded as unusual or unexpected, indeed the first is inevitable save only as to timing and the latter a common occurrence;[17] and

82.3. while there will be those cases in which the position and financial standing of the payer might be so secure that it is inconceivable that they would ever be able to secure a variation based on a diminution of their capacity to pay, in the overwhelming majority of cases the payer will be subject to the vicissitudes of life including as to their health, earning capacity, investment outcomes and the macro-economic environment.

83. Having regard to those matters the family court has been understandably reluctant to impose on payers the obligation to fund the purchase of a copper-bottomed revenue stream by way of an annuity or of a sum calculated to achieve the same net effect as such an annuity. Rather, and as already mentioned, the Duxbury mechanism amounts to a discount for advance payment of what would otherwise be a continuing obligation serviced over time.

84. It is perhaps fair, however, to regard the cost of a net annuity equivalent to the initial spending requirement as an absolute ceiling on the assessed capital equivalent of a periodical payments order. A formula or approach which gave rise to a higher figure would be self-evidently too generous, since the payee could purchase the annuity and pocket the change, assured in their position for the rest of their life be it long or short.

85. Establishing figures for that ceiling is problematic because we have not been able to track down any providers of index-linked or otherwise inflation proofed Purchased Life Annuities and, even if such were available, the progressive increase in the (variable) portion that is subject to tax would render the arithmetic beyond the competence of our working party.

86. Thus, we now turn to consider and explain the workings of the Duxbury model as now properly understood and adopted by the courts.

The algorithm – what it is

87. As already mentioned, we consider that the Duxbury calculation is properly viewed as a rationalisation for the discounting of a lump sum payment to reflect the benefit(s) to the payee of having the money paid upfront rather than over a period of years.

88. The essential algorithm underlying the Duxbury calculation has been a constant since inception. It has experienced some very modest refinements but has proved durable and easily adaptable. It is also, perhaps something of a mystery to many users.

89. It is neither reasonable nor fair to assume that even all family law practitioners, let alone parties to litigation, could glean even a basic understanding of the methodology from the widely available material.

90. The text in *At A Glance* has for some years contained this explanation:

> 'Duxbury relies on an iterative computation, seeking the amount which if invested to achieve capital growth and income yield (both at assumed rates and after tax on the yield and realised gains) could theoretically be drawn down in equal inflation-proofed instalments over a period (usually the recipient's actuarial life expectancy) but would be completely exhausted at the end of the period.'[18]

91. The underlying 'assumptions' are summarised in *At A Glance* as follows:

91.1. a uniform income yield of 3% p.a. (1.5% in the first year),

91.2. a uniform rate of capital growth of 3.75% p.a.,

91.3. a uniform rate of inflation at 3% p.a.,

91.4. a consistent regime of taxation – with bands/allowances increasing in line with inflation save that allowances are assumed to be frozen until 2027–28,

91.5. a constant level of drawdown in real terms,

91.6. a consistent rate of 'churn' (the realisation of capital gains other than to fund expenditure),

and that the recipient will:

91.7. survive for precisely the expected average of their contemporaries, and

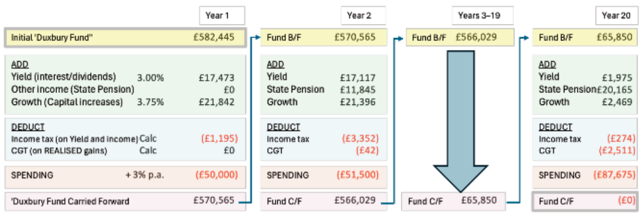
91.8. be or become entitled to a 'full' State Pension, and

91.9. that pension will increase at the assumed rate of inflation (rather than the probably higher rates of wages in general or 2.5% as guaranteed under the 'triple lock'), and

91.10. the age from which the State Pension is payable will not alter in the meantime.

92. A moment's reflection about those assumptions would quickly lead to the conclusion that few, if any, of them will hold true over even a short period, let alone the typical 15–50 years of a Duxbury calculation. They are, at best, approximations or guesses at what might on average happen over such a period and stand as a proxy for the unknowable future figures. Some of the assumptions have been the subject of challenge by authors of articles published in various legal journals and blogs over the years.

93. While so far as it goes, that is an accurate – if very simplified – summary, even a well-educated and reasonably numerate new-comer might have difficulty envisaging precisely how it works. This infographic is an attempt to de-mystify the algorithm:



94. This very inexact example shows the first, second and final years of a calculation based on a spending requirement of £50,000 p.a. assuming that a State Pension becomes available in the second year. The tax calculations in this example are illustrative only. The amount carried forward at the end of each year is brought forward to the start of the next. At the end of the chosen period (by default the life expectancy of the payee) the fund is exhausted.

95. The tax calculations are necessarily estimates, based on the current and already announced future rates and allowances, save that beyond any already announced period of freezing such allowances, they are assumed to begin increasing in line with inflation (at 3% p.a.), as is the State Pension. The calculation of Capital Gains Tax (CGT) on realised gains is also necessarily approximated, but under the model all gains made are eventually subject to tax, subject only to the (now much reduced) personal CGT annual allowance.

96. The calculation is always undertaken by starting with a 'guess' for the figure at the top left (£582,445 in this example), and the guess is repeatedly refined ('iterated') until the figure in the bottom right is, as in this example, £0.

The algorithm – is it fit for purpose?

97. In a wide range of accounting and statistical applications derivative iterative calculations haven proven their worth as an aid to understanding values. For example, in Discounted Cash Flow valuations with which many family law practitioners will be familiar in the context of private companies, and projecting or calculating returns on investments more generally, including calculating Internal Rates of Return on investments and projecting potential 'carried interest' or other performance related returns.

98. Such calculations, albeit using different underlying assumptions reflecting the difference between an injured person's empirical need for continuing care and a divorced spouse's subjectively assessed reasonable requirements to maintain a given lifestyle, also underlie the Ogden Tables used in personal injury cases.

99. The members of the Working Party are unanimous in our view that the essential algorithm underlying the Duxbury calculation is arithmetically sound, subject to (a) the appropriateness of the underlying assumptions and (b) a proper understanding of what the Duxbury calculation aims to achieve.

Are the assumptions appropriate?

Real returns and inflation

100. It is convenient to take the first three 'key assumptions' together. By way of recap they are:

100.1. a uniform income yield of 3% p.a. (1.5% in the first year);

100.2. a uniform rate of capital growth of 3.75% p.a.;

100.3. a uniform rate of inflation at 3% p.a.

101. Together those produce a 'real' or 'inflation adjusted' assumption of investment return of around 3.75% p.a. over the period of the calculation. The concessionary yield rate of 1.5% in the first year is intended to reflect the inevitable delay in compiling an overall balanced portfolio. This is a crude and somewhat simplistic approach which could be open to criticism as being either too 'generous' or too 'mean' but it has the virtue of simplicity and only a modest impact on overall outcomes.

102. We have obtained data and analysis from Dimensional Fund Advisors[19] for the period 1 January 1990 to 30 November 2023, examining all periods of 15, 20, 25 and 30 years during that 34-year period (i.e. covering returns affected by supposedly 'black swan' events of the recent past including the Global Financial Crisis of 2008, the Brexit Referendum in 2016, Covid-19 in 2020/21 and the 'mini-budget' of the Truss-Kwarteng administration). The analysis is summarised in this table, which shows 'real' rates of return based on an assumed investment portfolio of either 50:50 equities and bonds, or 60:40 equities and bonds:

	15 years	20 years	25 years	30 years
50% Portfolio	3.492%	2.94%	2.57%	3.49%
60% Portfolio	4.41%	3.56%	2.90%	3.81%

103. Those figures show that over the relatively recent past, some investors would have achieved more than the 3.75% assumed real return, while others would have achieved somewhat less. Timing is everything with investment, and a claimant who received a Duxbury based award in (say) 1999 – immediately prior to the bursting of the so-called dot.com bubble – would have achieved relatively disappointing returns compared to someone who received their award in say 2010 – immediately after the worst impacts of the Global Financial Crisis had been absorbed. This is a natural and well-understood phenomenon in the investment world. Equally obviously these figures are of average returns and individual investors will have achieved better or worse outcomes depending on the investment choices that they made, and the timing of those choices.

104. In contrast, a comparison with average returns for the same periods from 1915 to 2022 (which includes two World Wars, the Three-Day-Week of 1973/74, the miners' strike of 1984/85 and numerous other market distorting events) show that the more recent returns referred to above have been modern-historically anomalous:[20]

	15 years	20 years	25 years	30 years
50% Portfolio	5.32%	5.27%	5.26%	5.26%
60% Portfolio	5.69%	5.66%	5.67%	5.69%

105. This in turn begs a question, which we cannot answer, which is whether the most recent investment experience represents a 'new norm' or a deviation from the longer-term realities of the markets which will in due course be corrected.[21]

106. We acknowledge and agree that most Duxbury recipients will have little or no prior investment experience, and their instincts will usually be for security rather than return maximisation, so their actual risk profile will be cautious to very cautious. However, security and caution come at a cost, and the issue is whether that cost should be borne by the payee or the payer in the Duxbury assumptions. To some extent this 'issue' is one of education and explanation by financial advisers, who need to be able to justify their investment advice (and the cost of it) in a way which makes it acceptable to the Duxbury fund recipient.

107. We have considered whether it is fair and reasonable to assume that the recipient of a Duxbury based award would or should invest that fund in a mixed portfolio of equities and bonds, and in what proportions, and concluded that the above figures represent a fair band, even if the reality is that such funds are perhaps more likely to be invested more cautiously, and therefore with potentially lower returns. The individual risk profile of the payee – i.e. seeking more rather than less security, in return for the likelihood of lesser rather than greater investment returns – should, we think, not be relevant to the computation of the fair sum to compensate for the forgoing of a periodical payments order. It is not unreasonable to assume that in many potential 'Duxbury' cases the ability of the payer to satisfy such an award has depended on their willingness to take entrepreneurial risks and have their own exposure to the vagaries of the markets. We do not consider it appropriate to regard a cautious (or very cautious) investment strategy in an individual case as a reason to adopt lower than reasonably achievable investment returns.

108. That does leave a question about the weighting appropriate as between the more recent figures and those achievable historically. Plainly the more recent figures deserve greater weight as a guide to what might happen in the immediate future, but not in our view to the exclusion of any weight being attributed to the longer-term history. Thus, notwithstanding the shortfall that will have been experienced, on average, by Duxbury fund payees who received their awards more than 15 but less than 25 years ago, we consider that the overall weight of the data supports the continued reasonableness of assumed average real returns of at least the 3.75% p.a. currently assumed, and arguably somewhat higher returns.

109. While those figures broadly support the status quo in terms of overall real investment return assumed there are two important caveats:

109.1. the above figures do not take account of investment management costs, whereas the original assumptions made by Mr Lawrence in 1985 were for returns net of the (then lower) cost of managing the funds; and

109.2. because inflation also affects the other parts of the calculation, including taxation reliefs and allowances and, most importantly, spending, it is necessary also to consider inflation separately as well as part of the real rate of return.

Inflation

110. It would be unusual for a Duxbury fund recipient also to be responsible for funding a mortgage,[22] which means that the more appropriate measure of inflation for the purposes of these calculations is the Consumer Prices Index (CPI) rather than the mortgage inclusive Retail Prices Index (RPI).

111. The CPI in July 2024 stood at 171.3:

111.1. 15 years earlier in July 2009 it stood at 110.9 – an overall difference over 15 years of 54.46%, or 2.94% p.a. almost exactly the 3% figure assumed in Duxbury.

111.2. Over 20 years, 25 years and 30 years the CPI measure of inflation has been 2.84%, 2.52% and 2.42% respectively – all of which are lower than the figure assumed in the Duxbury calculation.

112. That inflation (as measured by the CPI) has consistently undershot the assumption made in Duxbury of 3% is a factor which has been favourable to payees, since the assumption has included that their spending requirement would increase annually at a rate greater than inflation. Conversely, but much less significantly, it has also assumed that tax bands and allowances would increase more than they have in fact done.

113. Broadly, therefore, it can be seen that subject to management charges (discussed below) average real returns of a balanced portfolio have approached (and in some cases exceeded) the assumptions, and – at least as measured by the CPI – inflation in relation to expenditure has lagged behind the assumed rate. Overall, although the assumptions may have been marginally more favourable to

payees rather than payers, they continue in our view to represent a fair estimate, insofar as such can be made based on historic figures, for deployment in future calculations.

Taxation

114. The next assumption is that of a consistent regime of taxation – with bands/allowances increasing in line with inflation (save that allowances are assumed to be frozen until April 2026 as announced in 2021 by then Chancellor Rishi Sunak and not altered by any of the several successive Chancellors).

115. This assumption is both necessarily simplistic and knowingly wrong. Rates of taxation, and the overall tax 'take' vary considerably over time and in both directions. In the most recent past the trend has been unmistakeably upwards overall, the headline rates for income tax (including on dividends) and CGT have been relatively stable in the recent past.[23]

116. Changes to National Insurance, Corporation Tax and VAT have little, and usually no, impact on the Duxbury calculation, and most other indirect taxes are captured in the computation of the CPI measure of inflation.

117. However, the freezing of bands and allowances leading to so-called 'fiscal drag' has resulted in a higher overall tax burden on recipients of Duxbury based awards than assumed at the time they were computed.

118. Although the freezing of the bands and allowances for income tax will have had some impact on the real-life working out of the tax for Duxbury fund recipients, it is the reduction in the tax-free allowance for Capital Gains and the reduction in the tax-free allowance for Dividend income,[24] which will have had most impact in practice. Those changes are, of course, accounted for in the Duxbury model looking forward, but the assumptions made in earlier calculations have been falsified to the detriment of the cohort of payees.

119. There was, at the time of writing of the provisional report, considerable media speculation that the new Labour Government was likely to increase the headline rate of taxation on Capital Gains – perhaps to as much as the corresponding rates of income tax as previous Labour Governments have done. If implemented, such a change would have been taken into account for future Duxbury calculations, but those whose awards were computed at a time of a more benign regime will have lost out, just as those who had awards calculated at higher rates prevailing under previous Governments benefited when rates of taxation were later reduced. In fact, the increase in the rate of CGT was much more modest.

120. The uncertainty as to the impact of tax is to some extent, and in some cases no doubt completely, off-set by the absence in the Duxbury calculation of any assumptions that recipient investors will take steps to mitigate tax on their investment returns. If nothing else, even the most inadequate of financial advisers would recommend that the maximum subscription be made each year to ISAs, removing all yield and capital gain from the ambit of tax. The assumptions include that a significant proportion of the fund will be invested in equities, the income from which is taxed at preferential dividend rates, significantly lower than earned income or interest income, but the tax calculation in Duxbury has never descended to the level of precision by seeking to allow for this beneficial rate of tax. Other strategies, for example in relation to Capital Gains on Government Bonds, could serve to shelter other returns. In short, subject to the caveats above about the constantly shifting burden of tax, Duxbury has historically taken a pessimistic view of tax, and in that regard has significantly favoured payees.

121. Taking that rough with the smooth, while at the same time seeking not to over-complicate what is already a multi-faceted computation, we consider that the present approach of adopting the current bands and allowances, and inflating them by the same inflation factor as is used for expenditure save where there has been a pre-announced freeze or other change (in which case the announcement is assumed to end up being implemented) is a fair and reasonable assumption to continue to make, albeit one acknowledged to favour payees.

A constant level of drawdown in real terms

122. It is the essence of the Duxbury calculation when presented in tabular form (i.e. as per the Table in *At A Glance*) that the assumed rate of required funding remains constant, in real terms, for the whole of the recipient's remaining life expectancy.

123. Leaving aside the question to which we turn below about the appropriateness of the whole-of-life expectancy assumption, it is more or less obvious that no one will ever, in practice, have a constant and unaltered spending requirement for the rest of their lives or, indeed, over any appreciable period. Life does not work like that. What may appear to be desirable or even necessary items of expenditure for a person in their 50s or 60s, may be quite undesirable and certainly unnecessary when they are in their 70s let alone their 80s. Of course, as items fall away they may well, indeed almost certainly will, be replaced by other items of expenditure the cost of which need bear no relation at all to the items of expenditure which they replace.

124. Certainly since 1995 and the decision of Thorpe J in *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45 there has been awareness, at least in 'big money' cases, that levels of expenditure are likely, in real terms, to reduce rather than increase in what he described as 'the years of dower' beyond the period of the 'flood' of an expensive lifestyle.

125. It is a societal norm – and not only in the UK – that older people, and certainly those beyond retirement age, will tend to have less available to spend than younger people at the height of their earning power (in the case of bread winners) and usually the height of their domestic obligations (in the case of home makers). Accordingly, retirement income and expenditure are normally expected to be lower than pre-retirement income and expenditure. To some extent this is facilitated by the reliefs and 'concessions' available to older people, and – of course – the receipt of State Benefits in the form of pensions on an entitlement rather than means-tested basis.

126. More sophisticated Duxbury calculators (such as Capitalise by Class Legal) allow for the tailoring of expenditure requirements, in both directions, but in a two-dimensional tabular form as in *At A Glance*, the assumption of a constant real rate of drawing is in our view favourable to recipients/payees in the majority of cases.

Churn

127. The calculation assumes a consistent rate of 'churn' (the realisation of capital gains other than to fund expenditure) equal to 3% p.a. This is a sophistication to the calculation to reflect the 'real world' fact that sometimes gains will be realised other than to fund expenditure, which will serve to increase by bringing it forward, the taxation of such gains.

128. We have not considered it necessary to examine whether this assumption, which has never been the subject of criticism or even discussion in any of the many articles written about Duxbury over the years, should be revisited.

Life expectancy

129. Duxbury, certainly as published hitherto in *At A Glance*, has always assumed that the recipient will survive for precisely the expected average of their contemporaries.

130. Life expectancy is the age by which 50% of the population of a particular age can be expected to have died.

131. On one level this is a necessary and knowing simplification. It would plainly be impracticable for even bespoke Duxbury calculations fairly to be undertaken on a case-by-case individualised assessment of life expectancy. Even taking account of family history, personal medical history and more or less hazardous lifestyle choices, the art of predicting how long an individual is likely to live, other than by reference to their statistical and actuarial life expectancy is a fool's errand – rightly eschewed even in the small number of cases where it could be confidently asserted that a life expectancy was greater or, more usually, lesser than the actuarial table would dictate.

132. Moreover, there is no such thing as a single 'life expectancy'. Rather there are various different projections from various bodies, most notably (in the UK) by the Government Actuaries Department based on data from the Office for National Statistics (ONS). At any one time there will be several different tables available of estimated life expectancies of different cohorts based on social class, membership of pension schemes and a variety of other factors. The variance between such datasets may be great or small for a person of a specific age.

133. Were it not for our main conclusion (as discussed below) relating to the inappropriateness of the assumption of whole-of-life computations, we might have sought outside assistance from the Government Actuary as to whether the current selection of the ONS20 whole UK national projections, as used in the computations in *At A Glance*, is appropriate, although we have no reason to consider that it is not. A choice has to be made which is of general application to the population as a whole, and ONS20 seems to us to be as rational a choice as any other.

134. However, we are unanimous in our view that while whole-of-life is a permissible, and in some cases appropriate, basis for a Duxbury calculation, it should not, in the light of societal changes and in particular the near extinction of the whole-of-life periodical payments order, be as hitherto the default.

135. Rather, we are of the view that the process should become one of two stages – as it presently is in a continuing periodical payments case:

135.1. What is the appropriate level of financial support to be made for the benefit of the payee by the payer?; and

135.2. What is the appropriate duration for such support to be provided?

136. Considering those two stages separately will throw up a figure based on the number of years in the second stage, which may be quite different from the actuarial life expectancy. The figure may be affordable by the payer (in which case there can be a clean break on payment of the appropriate figure) or it may not be affordable in which case either a hybrid award (periodical payments for a period followed by a smaller lump sum) or a continuing periodical payments award would follow.

137. In considering the quantum and/or duration of the required support the court would be able to take into account whether the recipient was entitled to a State Pension (rather than the current default that such entitlement exists), and the impact of any pension sharing award or pre-existing pension held by the recipient. Pension sharing was not available in 1985 when Duxbury was decided.

138. There will, of course, continue to be cases in which whole-of-life provision is appropriate, but we cannot see why it should be the default assumption. That assumption was perhaps fairly made under the old, pre-White, regime of paternalistic protection by the court of otherwise financially disadvantaged claimants. But in the modern era, and regardless of proposed reform to the law of financial remedies limiting periodical payments to a relatively short time-frame, it appears to us to be an anachronistic legacy inconsistent with the development of the law more generally.

139. To put it another way, if in a case where capital has been shared, but where (per *Waggott v Waggott* [2018] EWCA Civ 727) income is not to be shared but is to be allocated by way of needs-based provision as periodical payments subject to the enjoinder for the court to consider 'whether it would be appropriate to require those payment to be made … only for such term as would … be sufficient to enable the party in whose favour the order is made to adjust without undue hardship …' then why should a payment in substitution for such a periodical payments order be calculated on a whole-of-life basis by default?

140. We therefore propose a new presentation of the now familiar Duxbury calculation table, based on a number of years for a fixed annual spend. The table would be age and gender neutral, and not include the hitherto built-in discount for an assumed full State Pension. The existence or not of such an entitlement would be factored into the duration of the provision (or perhaps the quantum) rather than hard-baked into the calculation. The differences in life expectancies between men and women could be, but does not have to be in every case, reflected in the selection of the duration element of the award. This feeds directly into the next assumption to be discussed.

The full State Pension

141. The Duxbury calculation has always assumed that the recipient is or will become entitled to a 'full' State Pension at their current pension age.

142. As the Women Against State Pension Inequality (WASPI) campaign has made widely known, that assumption – even in the case of those women who had built up the necessary entitlement to receive such a pension – has not necessarily held good as the pension age has progres-

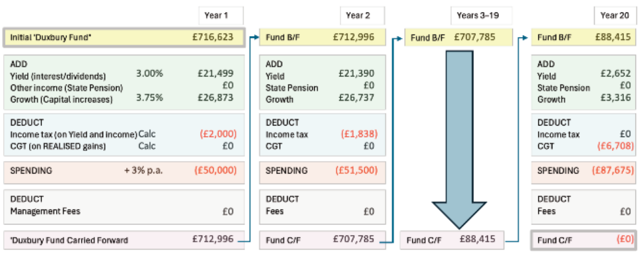
sively moved backwards from 60 to a presently fixed, but likely to be further extended, age of 68.

143. Moreover, while in 1985 almost all divorcing wives would have been entitled to a State Pension based on their husband's National Insurance contributions, such entitlement now accrues only based on their own contributions.

144. Although it is also true that a large proportion of the adult population, including married women and mothers, are now in employment outside the home and likely to be making the necessary National Insurance contributions for at least the majority of the necessary contribution period, there will still be a sizeable number of claimants in financial remedy proceedings who do not have any State Pension entitlement, or less than the full amount.

145. We consider that it is relatively easy when considering the duration of a proposed periodical payments or capitalised (Duxbury) award to take account of the existence or not of such entitlement, and particularly so when coupled with a pension sharing award or pre-existing pension entitlement, to arrive at a fair outcome. On the other hand, we consider that it was and is more difficult for a court or legal adviser to consider what increase should be made to a conventionally ascertained Duxbury award, based on a two-dimensional table of the kind appearing in *At A Glance*, to reflect any shortfall in the individual's State Pension entitlement. It is one thing to know that it should increase the award, but quite another to work out by how much.

146. Removing the State Pension element from the illustration at paragraph 93 above results in an increase (for a calculation undertaken over 20 years) in the fund required from £582,445 to £716,623, an increase of about £134,000 or about 23%. This divergence is towards the top of the range previously identified in *At A Glance* for the adjustment necessary when a State Pension is not, in fact, going to be received:



Pension inflation

147. The Duxbury assumption has been that the State Pension will increase at the assumed rate of inflation (rather than the probably higher rates of wages in general or 2.5% as guaranteed under the 'triple lock').

148. Given our conclusion as to the appropriate mechanism as discussed in the previous section, this assumption is rather less significant under our proposed model than under the existing model.

149. It is an assumption which has been extremely favourable to payees (except a small class of the WASPI age-group), to the cost of payers. State Pension inflation has outstripped inflation over the last 15, 20, 25 or 30 years – even allowing for the later date of commencement for some recipients. Particularly for those entitled to the 'new' State Pension (i.e. men born after 5 April 1951 and women born after 5 April 1953) pension inflation has been substantial.

150. The effect of the 'triple lock' is that in reality pension inflation will continue to outstrip general inflation.

Pension age

151. As already mentioned, the assumption made in Duxbury has traditionally been that the age from which the State Pension is payable will not alter in the meantime. Like all of the assumptions, this is a knowingly false assumption, made because some assumption has to be made.

152. Pre-announced changes are already built into the calculation.

153. Insofar as, contrary to our proposal, pension entitlement continues to be part of the algorithm, we consider that it is fair to assume that the existing and pre-announced changes to pension ages will apply to the individual under consideration. Naturally, the younger the individual the more likely it is that this assumption, and any or all of the others, will be falsified by events unfolding over the ensuing decades.

154. To the extent that old Duxbury awards were based on an assumed State Pension age which has been falsified by the progressive increases in that age, that will have been to the detriment of payees and the benefit of payers. In practice, such changes were announced and taken into account by the Duxbury calculation many years (and in some cases decades) earlier, so whatever may have been the state of ignorance of the WASPI complainants, any Duxbury payees in that rank will probably not have been disadvantaged.

Conclusion on the assumptions

155. Subject only to the questions of (i) fund management charges (ii) the continued reliance on a default of whole-of-life support and (iii) the default inclusion of a full State Pension, we therefore conclude that the 'assumptions' continue to represent a reasonable basis for the undertaking of capitalisation calculations.

156. While there will be those cases – we anticipate very much a minority – in which the facts, including for example the security of the paying party's financial position (the super-rich) or the age of the claimant (already at or close to retirement age) might justify the court adopting a whole life approach to capitalisation, we are collectively somewhat mystified that this has been the tacit default in almost all reported 'Duxbury' cases over the last three decades.

Management charges

157. Our enquiries have revealed that charges, including both fees for advice and management and the costs associated with dealings, might typically be in the order of 1.5% p.a. on a medium sized portfolio, but somewhat less on a larger portfolio.

158. There appears to be very considerable variance in relation to fees including at least the following factors:

158.1. some fees are calculated on the basis of the funds under management or in respect of which advice is given, while others or other providers, charge fixed or pre-agreed fees;

158.2. some providers have published stepped rates, with a lower percentage charge for larger portfolios, while others publish only flat rates;

158.3. some providers are amenable to individual negotiation on fees, perhaps particularly for larger portfolios and will 'compete on price';

158.4. some investors (payees) will be willing to engage in negotiation and/or be prepared to change providers in search of a better deal, while others, through inertia, or loyalty, or lack of knowledge, will remain with the same advisers and the same platforms regardless of price; and

158.5. in periods of high returns, as have been enjoyed in the immediate past, investors are willing to tolerate levels of fees which might be less palatable during periods of lower returns.

159. Those charges are not in general allowable against tax on yield or capital gains.

160. Historically, as stated in 'Reflections on Duxbury' in the 1995 edition of *At A Glance* (see paragraph 17 above), and as recently accepted by Moor J in his judgment in *MN v AN* [2023] EWHC 613 (Fam), the 'assumptions' in Duxbury have been inclusive of management charges. We are concerned that the data does not necessarily support the average achievability of such returns after charges.

161. The impact of such charges (say 1.5%) on the real rates of return illustrated at paragraphs 102 and 104 above is obvious and potentially significant.

162. The average real rate of return of the 50:50 (equities to bonds) portfolio would be reduced to about 1.62%, and for the 60:40 portfolio to about 2.17% if relying on the historic data only since 1990.

163. Taking the longer view relying on data over the period since 1915 would reveal long-term real returns net of charges of 1.5% p.a. to be 3.77% (50:50 portfolio) or 4.18% (60:40 portfolio).

164. The former – and arguably the more relevant data being the most recent – shows a sharp divergence from the assumptions presently adopted in the Duxbury calculation, whereas the latter tends to show that the present assumptions may be conservative.

165. We have not found it easy to reach any firm conclusions on how, if at all, the Duxbury calculation should be adjusted to reflect the impact of management charges and fees.

166. A purist approach – seeking to attribute arithmetical justification for every variable and to further complicate the computation – holds a certain appeal, and we have considered whether an additional allowance should be introduced into the algorithm to deduct such charges after computation of the annual tax charge.

167. Some of us have concluded that the overall algorithm is already quite materially slanted in favour of the majority of claimants/recipients for the reasons which we have explained above relating to the exclusion of the factors would which be likely to have led to a reduction or termination of the periodical payments order had such an order been made rather than capitalised. This is true whether the current default of whole-of-life is retained or replaced, as we recommend, with the two-stage approach in which the amount and duration are assessed separately as part of the capitalisation calculation, although perhaps less so if the reforms we propose were to be adopted.

168. We acknowledge that this would result – as Duxbury always has – in winners and losers amongst the recipients. Those who are long lived and remain single will, as now, be at risk of being underpaid by reference to the fund necessary to enable them to live at the given rate for the rest of their lives. They are the losers. Those who are either short-lived (dying before their fund is exhausted despite being drawn as anticipated) or who remarry or otherwise adjust their living arrangements so as to end their entitlement to dependence on the payer are the 'winners'. To the winners must also be added the payees in those cases in which the fortunes (including health) of the payer take a downward turn so that the periodical payments order, had one been made and not capitalised, would have been reduced or terminated as a result of the change in their circumstances.

169. Some of us consider that the potential investment return shortfall, if indeed there is such a shortfall, whether as a result of macro-economic factors, investment decisions or fund management charges, is a fair risk for the cohort of recipients to be required to assume to balance the advantage that the same cohort has by reason of the non-variability of the capitalised award.

170. However, others of us consider that the impact of management charges is a separate 'assumption' which should be baked into the computation. If the computation is to be based on investment returns which can realistically only be achieved with the assistance of professional fund managers, allowance must be made for the deductions from the fund to meet their costs.

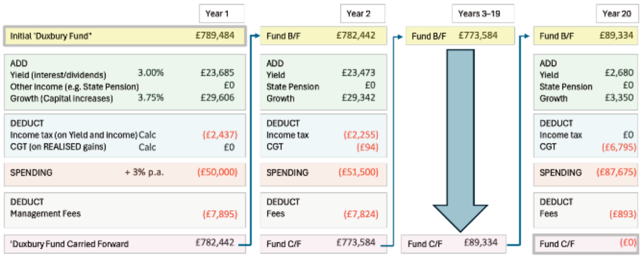
171. Establishing what those costs are likely to be is problematic for the reasons just given. Different platforms and different advisers have different charging rates. We have obtained anecdotal and informal soundings from various potential managers and advisers, and the range is wide and the pattern inconsistent.

172. Aware that this is something of a compromise our conclusion has coalesced around making some allowance in the basic computation, by allowing for a deduction while leaving the other underlying assumptions unchanged. We have opted for a graduated charge, with funds under £1m suffering 1% p.a., and funds over £1m suffering 1% on £1m and 0.5% on the value of the funds in excess of £1m. Thus, a fund of £3m would suffer annual charges of £1m x 1% + £2m x 0.5% = £20,000 or 0.67% overall. We propose that as with tax allowances, the £1m band is 'inflated' each year in accordance with the general rate of inflation adopted. By the end of any fund the rate will be 1% as the amount in the fund dwindles below the inflated first ceiling of £1m in real terms. We consider that this compromise effectively allocates some of the likely actual charges to the payee and some to the payer. In any individual case that is likely to strike a fair balance. Requiring the payee to shoulder some of the charges is an additional counterbalance to a powerful but unquantifiable imponderable operating in their favour namely that they do not have to repay any part of the Duxbury fund if they remarry or re-partner before the expiration of the assumed term or if the payer dies in that period.

173. There may be individual cases in which a party might be able successfully to argue for a bespoke calculation based on different assumptions, including in relation to management charges, but for the purposes of the vast majority of cases in which a two-dimensional Duxbury table is utilised as the guideline for the appropriate figure, we commend the compromise in the previous paragraph.

174. Reworking the calculation illustrated at paragraph 146 above by allowing an additional deduction for manage-

ment charges increases the initial fund required to £789,484 (an increase of c. £207,000 (or +35.5%) on the original requirement calculated in accordance with the current assumptions illustrated at paragraph 93 above):



175. However, we would not envisage that the 'new' Duxbury Calculation for a payee would be undertaken without regard to whether the payee did in fact have an entitlement to a State Pension.

176. The example we have been using is based on a female payee aged 66 or 67 at the commencement of the period. For reasons we have explained above, we anticipate that a court approaching such a case would assess the spending need first, and in doing so would be able to consider to what extent that might be met by a pension if the payee had any such pension (whether State Pension or as the result of a pension sharing order or from an occupational or otherwise self-funded pension) before fixing the amount of spending to be met from the capitalised part of the award. The court would then consider over what period that financial support should be provided – which might be based on life expectancy but, more usually we suggest, some lesser period.

177. In our example, if the court was aware that the payee would soon become entitled to a full State Pension of (say) £11,500 p.a. it might assess the spending requirement at perhaps £50,000 less 80% of £11,500 (to allow for the tax on the pension) = £40,800. It might also assess that the appropriate duration of the award was – in view of the payee's age and despite our overall recommendation to move away from whole of life awards, to be taken as their life expectancy of 20 years. It would thereby arrive at a figure of about £638,000 – or around £56,000 (10%) more than under the current assumptions. This is the effect of allowing separately for the management charges.

178. But for a much younger payee, say in their late 40s or early 50s, the court might entirely disregard any entitlement to a State Pension, allow for a full 'budget', and management charges but at the second stage limit the term of the financial provision to, perhaps the number of years of the payer's remaining working life prior to their State Pension age. That would, for younger payees, potentially significantly reduce the overall term over which the sum was calculated, eliminating or mitigating the so-called Duxbury paradox (the younger the claimant the higher the award and vice versa). We discuss this further in the section 'The whole-of-life assumption' below.

Bespoke calculations

179. Consistency and predictability militate strongly against encouraging or even permitting bespoke calculations in relation to 'assumptions' in individual cases in the absence of some special factor taking the case out of the usual run. Obviously bespoke calculations dealing with earnings, changes in spending requirement, capital injections and things of that sort, which do not depend on adjusting the 'assumptions' are often required and helpful.

180. It would be time and costs wasteful to have, or encourage, bespoke calculations in standard cases, and the easy availability of published tables from which guideline figures can be ascertained should, in our view, be sufficient in nearly all cases.

181. While the previously published tables – including, and most notably, those in *At A Glance* – have stood the test of time, as we have mentioned above we consider that the time has come for a revised presentation to be made available for use in our proposed two-stage computation abandoning the whole-of-life default.

182. Even if bespoke calculations were to be permitted in an individual case, we consider that a judge accepting evidence based on the subjective characteristics of the proposed payee (for example the longevity of their parents) would be entering dangerous and uncharted waters. For one thing the admission of such evidence would be difficult to distinguish from the admission of evidence tending to show that the payee had a shorter than statistically average life expectancy, by reason of a pre-existing condition or habit (such as alcoholism or smoking) or family history. For another, such evidence would have to be scientifically robust[25] and would amount to expert evidence requiring the court's permission to adduce and meeting the necessity threshold test. It is also difficult to see how a judge would be able to avoid case specific evidence about prospects for remarriage or cohabitation. We perceive this to be a slippery slope towards unpredictability and inconsistency which should be discouraged.

The whole-of-life assumption

183. At the risk of unwelcome repetition, we return to our main conclusion which is that while the algorithm as a whole, and the underlying assumptions taken as a whole, remain viable and reasonable, we are troubled by the default of whole-of-life provision.

184. Duxbury has for many years come with a warning against its deployment in cases where, by reason of the advanced age of the payee, the life expectancy is less than about 15 years. This is for the very obvious reason that once life expectancy is that short it becomes possible to outlive it by a very substantial margin in proportionate terms. A woman of 78 years with a life expectancy of 11.5 years, might well live to 101 – more than double her expectancy. A woman of 58 with a life expectancy of 29 years has almost no chance of living to 116.

185. We consider, in the surely very rare case where an assessment of the needs of a claimant over (about) 75 is undertaken, the consequences of the unfolding facts differing from the initial assumptions could be so severe, that a Duxbury capitalisation would not be appropriate. In such a case the purchase of an annuity, or the fixing of the award by reference to the cost of doing so, may well be apt. An alternative may be to adopt a Duxbury calculation utilising a longer-than-life-expectancy basis, perhaps with the 'balance' held on trust to revert to the payer on the payee's death provided the payer was the survivor, or to their estate

if they were not. Such outlier cases should not lead to the tail wagging the dog of the great majority of cases.

186. The problem of the whole-of-life default is particularly acute in relation to younger payees – i.e. those with an actuarial life expectancy of more than about 30 years – i.e. men under about 54 and women under about 58 years of age, and spectacularly so for those with a life expectancy greater than 40 years (men under 45 and women under 47), since the practical likelihood a periodical payments order remaining in payment for such periods is self-evidently slim to non-existent.

187. It is not for us to devise new defaults, and any proposal for which would need to be fully argued and the subject of consultation if not judicial determination. It may be that future legislative reform in relation to periodical payments will render this discussion moot, but for the moment we recommend that parties and courts might consider arguably more generous quantum, perhaps (in an appropriate case where pension assets are insufficient to meet relationship-generated retirement need and resources are sufficient to render a stockpiling element fair) to include an element of 'stock piling'[26] coupled with less than whole-of-life durations, taking into account factors such as the anticipated working life of the payer, the presence or absence and duration of the remaining domestic contributions of the payee and the length of the relationship relative to ages of the parties, as factors which might lengthen or curtail the duration. This would enable the known or anticipated pension position of the payee to be taken into account in assessing both quantum and duration of the dependency to be capitalised.

188. To this end we have created and placed in Appendix 5 a 'new' Duxbury table which, with interpolation, enables the easy computation of a capitalisation award for a wide variety of plausible amounts and durations, but would force the separate consideration of the latter without the default of whole-of-life.

Education and 'health' warnings

189. As we have adverted to above, we perceive that a good deal of the disquiet in relation to past Duxbury awards has arisen from a misunderstanding of what the computation aims to do, and the necessary balance to be struck between payees and payers.

190. In this report we have first addressed the inconsistency that while a joint lives maintenance order is a now an exceedingly rare bird, the whole-of-life Duxbury award has been the court's almost invariable approach. We have sought to resolve that inconsistency by devising a revised Duxbury table which gives capitalisation figures for various terms (which, of course, could correspond, as before, to the subject's life expectancy). The figures in the revised table have been calculated using, for the first time, management charges as an additional discrete key assumption.

191. The following points should be included in advice to clients:

191.1. A Duxbury calculation is not designed to identify (and will not achieve) a sum necessary to guarantee a particular level of expenditure and precision of calculation is never achievable. It must be clearly distinguished from a pension which will pay out indefinitely.

191.2. The calculation is based on a range of assumptions as to life expectancy (if that is the term being used); inflation, management charges; rates of income yield and inflation; and tax rates. It may also allow for receipt by the subject of a full State Pension. None of these may be fully accurate for that individual. This should be clearly pointed out to clients.

191.3. Financial planners/advisers often make the point that a cautious investor payee will not have the appetite for risk that will achieve the illustrated income. In contrast, the payer, perhaps a more adventurous investor, may argue that a higher return could be achieved. This is the key point with Duxbury. It is a tried and tested, judicially accepted and endorsed, illustration giving a capital figure for the sum required to meet the recipient's income needs over a specified term. But, like Heather Mills,[27] the recipient might remarry within that term. Had the payee been in receipt of periodical payments they would have terminated automatically. So, in that scenario the payee has 'beaten' Duxbury. Similarly, the payer could lose their job and successfully apply for a downwards variation or discharge of a joint-lives maintenance order. In that case the payee of a Duxbury fund has beaten it again. Conversely, the payee may invest more cautiously, or use more expensive advisors, or live for longer than the actuarial age. In those scenarios the Duxbury sum will not be enough, and it will be exhausted before the expiration of the utilised term, or more likely the payee will have had to rein in their expenditure to prevent that from happening. The mathematical initial number will not turn out to be the right number in the events that unfold – that is the only guarantee. As Ward J stated in *B v B* [1990] 1 FLR 20 'The only certainty is that it will not happen as we have predicted'. And Baroness Hale in *Simon v Helmot* [2012] UKPC 5 at [72]:

> 'However, Duxbury calculations do suffer from the uncertainties of prediction. Nothing will in fact turn out exactly as it is predicted to turn out, whether in family law or in personal injuries law.'

191.4. Financial advice could be sought before making proposals or reaching an agreement, so that the payee might have a financial adviser's perspective (but which is still only an estimate) on what income the payee might expect to receive from a given capital sum using different assumptions. But the payee should be made aware that it is unlikely that arguments proposing the use of different assumptions (let alone a different method of calculation) will be accepted. Clients should be told that while the calculation is a 'tool not a rule', experience shows that it is tends to be closer to the latter than the former.

The Duxbury Working Party

Michael Allum
Simon Bruce
Sarah Hoskinson
Lewis Marks KC (Chair)
Sir Nicholas Mostyn
Joseph Rainer
Mary Waring

Appendix 1: Short biographies of the members of the reconstituted Duxbury Working Party

Michael Allum

Michael is a solicitor at The International Family Law Group LLP. He specialises in financial issues which arise on relationship breakdown, with a particular focus on cross border and international cases. He is also a member of the *Financial Remedies Journal* editorial board.

Simon Bruce

Simon Bruce is a solicitor and Partner at Dawson Cornwell LLP. He is also a pro bono lawyer at law clinics in London. Simon has practised for over 41 years.

He's on this Duxbury Committee as he had the cheek to write a critique on Duxbury more than a decade ago. Simon writes the 'Thought Leader' in *Family Law*. He comes from Lancashire.

Sarah Hoskinson

With over 20 years' experience in complex financial remedy cases, Sarah is a Partner and Head of Burges Salmon's Family & Divorce practice. She sits on a number of financial remedy and other technical groups, including the Family Justice Council Financial Remedy Working Party, FJC Working Party on Needs, the Pension Advisory Group (PAG and PAG2) and the IAFL Pensions Committee, which she chairs.

However, it is through her membership of Resolution's Financial Remedies, Tax and Pensions Committee that she became involved in the Duxbury Working Party in 2023. Her approach to all of the work she has done in these groups, the Duxbury Working Party included, is to focus on relevant and practical education for family lawyers on the technical issues, and how they apply in practice.

Lewis Marks KC (Chair)

Lewis has been a barrister for over 40 years, a QC (now KC) since 2002 and has specialised in financial remedy cases for most of that time. He has appeared in many of the leading cases (including as junior counsel in *White* in the House of Lords, as leading counsel in the Court of Appeal in *Miller* and dozens of influential cases at first instance in the High Court and on appeal to the Court of Appeal).

He has been an editor of *At A Glance* since 1999, and is also a founder editor of the *Financial Remedies Practice*.

He was an original member of the Duxbury Working Party in 1998 and has authored a number of papers on the subject of Duxbury calculations. He has acted a Chair and convenor of the reconstituted Duxbury Working party. He has no judicial aspirations.

Sir Nicholas Mostyn

Nicholas was a barrister for 30 years specialising in matrimonial finance cases, appearing as a QC in the foundational decisions of the House of Lords in *White v White* (2000) and *Miller v Miller* (2006) and of the Supreme Court in *Granatino v Radmacher* (2010).

He became a High Court judge in 2010 and sat in the Family Division, where he gave many judgments of importance in the financial remedy field.

He was a founder editor of *At A Glance* in 1992 (now in its 33rd edition) and of Financial Remedies Practice in 2011 (now in its 13th edition) and continues as editor-in-chief of both publications.

He was also a judge of the Court of Protection and of the Administrative Court of the King's Bench Division of the High Court where he heard many judicial reviews of government decisions. Renowned for his independent, outspoken style, he frequently challenged the received wisdom of the law in favour of justice.

He retired from the Bench in July 2023, three years after being diagnosed with Parkinson's Disease, since when he has become an acclaimed podcaster. In July 2024 he was awarded a Doctorate of Laws honoris causa by his alma mater Bristol University.

Joe Rainer

Joe is a barrister who specialises in financial remedy cases. He is a (relatively new) editor of *At A Glance*, a co-author of the fourth edition of Pensions On Divorce: A Practitioner's Handbook, and a member of the *Financial Remedies Journal* editorial board and the Pension Advisory Group.

Mary Waring

Mary is a chartered financial planner, chartered accountant and Resolution Accredited Specialist.

She is the founder of Wealth for Women, an award-winning company, specialising in financial advice to women going through divorce, especially those who haven't been responsible for the finances during their marriage. She supports clients through this particularly challenging time who need trustworthy expertise and guidance. She works with her clients, so they understand the options available to them based on their financial situation and know how to improve their future.

Mary was interested in joining the Duxbury Working Party since her clients are typically non-earning spouses and have been for maybe 25+ years. They are therefore unlikely to become major income earners post-divorce.

Appendix 2: Key assumptions adopted in *At A Glance* 1992–2025

Edition	Income yield %	Capital growth %	Inflation %	Real rate of return %	
1992	6.00	6.00	7.00	5.00	
1993	5.00	4.00	4.00	5.00	
1994	4.50	2.00	2.00	4.50	
1995	4.25	2.00	2.00	4.25	
1996	4.25	3.00	3.00	4.25	
1997	4.25	3.00	3.00	4.25	
1998–1999	4.25	3.00	3.00	4.25	
1999–2000	3.25	4.00	3.00	4.25	
2000–2001	3.25	4.00	3.00	4.25	
2001–2002	3.25	4.00	3.00	4.25	
2002–2003	3.25	4.00	3.00	4.25	Note 1
2002–2003	3.00	3.75	3/00	3.75	Note 1
2003–2004	3.00	3.75	3.00	3.75	
2004–2005	3.00	3.75	3.00	3.75	

Edition	Income yield %	Capital growth %	Inflation %	Real rate of return %	
2006–2007	3.00	3.75	3.00	3.75	
2007–2008	3.00	3.75	3.00	3.75	
2008–2009	3.00	3.75	3.00	3.75	
2009–2010	3.00	3.75	3.00	3.75	Note 2
2010–2011	3/00	3.75	3.00	3.75	Note 3
2011–2012	3.00	3.75	3.00	3.75	Note 3
2012–2013	3.00	3.75	3.00	3.75	Note 3
2013–2014	3.00	3.75	3.00	3.75	Note 3
2014–2015	3.00	3.75	3.00	3.75	Note 3
2015–2016	3.00	3.75	3.00	3.75	Note 3
2016–2017	3.00	3.75	3.00	3.75	Note 3
2017–2018	3.00	3.75	3.00	3.75	Note 3
2019–2020	3.00	3.75	3.00	3.75	Note 3
2020–2021	3.00	3.75	3.00	3.75	Note 3
2021–2022	3.00	3.75	3.00	3.75	Note 3
2022–2023	3.00	3.75	3.00	3.75	Note 3
2024–2025	3.00	3.75	3.00	3.75	Note 3

Note 1 – two tables were published: one with a 4.25% RRR, the other with a 3.75% RRR.

Note 2 – income yield for year 1 set at 0% and for year 2 at 1.5%.

Note 3 – income yield in year 1 set at 1.5%.

Appendix 3: A list of the articles which we have considered

- Singer and others, 'Duxbury – The Future' [1998] Fam Law 741. (Paper of the Duxbury Working Party: Singer J, Nicholas Mostyn QC, Lewis Marks, Peter Lobbenberg, Timothy Lawrence, Adrian Gallop, Dominic Wreford and Nicola van Lennep)
- Woelke, 'Is Duxbury the Answer?' [1999] Fam Law 766
- Mostyn, 'Is Duxbury the Answer? Yes is the Answer' [2000] Fam Law 52
- Merron, Baxter and Bates, 'Is Duxbury Misleading? Yes It Is' [2001] Fam Law 747
- Marks, 'Duxbury – The Future? Episode II' [2002] Fam Law 408
- Gold, 'Civil way' 159 NLJ 1030, 17 July 2009
- Phillpotts and Bruce, 'An Alternative View of Duxbury' [2010] Fam Law 161
- Marks, 'An alternative view of Duxbury: A Reply' [2010] Fam Law 614
- Hitchings, 'Reconsidering the Duxbury default' [2021] 33 CFLQ 275
- Allum, Jenkins and Gilbert, 'Looking back at Duxbury 30 Years On' [2023] FRJ 11
- The *commentary on Duxbury* in each edition of *At A Glance* as listed in Appendix 2

Appendix 4

The indices used to generate the figures in paragraphs 102 and 104 were as follows.

Dimensional used the Bloomberg Aggregate Bond Index for the bond element in each example. The bond element was reduced by 2% held as cash as most platforms require a cash balance to cover upcoming fees. The MSCI All Country World Index was used for the equity element.

For their analysis, Timeline used the Morningstar Global All Cap Target Market Exposure Index for the equity element and the Global Aggregate Bonds Unhedged – Morningstar Global Core Bond index for the bond element.

Appendix 5: Capitalisation in whole thousands of pounds to three significant figures

Quantum £ p.a.

Duration (years)	£ 10,000	£ 15,000	£ 20,000	£ 25,000	£ 30,000	£ 40,000	£ 50,000	£ 60,000	£ 75,000	£ 100,000	£ 125,000	£ 150,000	£ 175,000	£ 200,000	£ 250,000	£ 300,000	Duration (years)
3	28	42	56	70	84	112	141	169	211	282	353	424	494	565	707	848	3
4	37	55	74	92	111	148	186	223	279	372	466	559	653	746	934	1,120	4
5	46	68	91	114	137	183	229	276	345	461	576	692	808	924	1,160	1,390	5
6	54	81	108	135	163	218	272	327	410	547	684	822	961	1,100	1,380	1,650	6
7	62	93	125	156	188	251	314	378	473	631	790	950	1,110	1,270	1,590	1,910	7
8	70	105	141	177	212	284	356	427	535	714	895	1,080	1,260	1,440	1,800	2,170	8
9	78	117	157	196	236	316	396	476	595	796	998	1,200	1,400	1,610	2,010	2,420	9
10	85	129	172	216	260	347	435	523	654	876	1,100	1,320	1,540	1,770	2,220	2,670	10
11	93	140	187	235	283	378	473	569	713	955	1,200	1,440	1,680	1,930	2,420	2,920	11
12	100	151	202	254	305	408	511	614	770	1,030	1,290	1,560	1,820	2,090	2,620	3,160	12
13	107	162	217	272	327	437	548	658	826	1,110	1,390	1,670	1,960	2,240	2,820	3,400	13
14	114	172	231	289	348	466	584	702	882	1,180	1,480	1,790	2,090	2,400	3,010	3,630	14
15	121	182	245	307	369	494	619	745	936	1,250	1,570	1,900	2,220	2,550	3,210	3,870	15
16	127	192	258	324	389	521	653	787	989	1,320	1,660	2,010	2,350	2,700	3,390	4,100	16
17	134	202	271	340	409	548	687	828	1,040	1,390	1,750	2,110	2,480	2,840	3,580	4,330	17
18	140	212	284	356	429	574	720	869	1,090	1,460	1,840	2,220	2,600	2,990	3,770	4,560	18
19	146	221	297	372	448	599	753	908	1,140	1,530	1,920	2,320	2,730	3,130	3,950	4,780	19
20	152	230	309	387	466	624	785	948	1,190	1,590	2,010	2,430	2,850	3,270	4,130	5,010	20
21	158	239	321	402	484	648	816	986	1,240	1,660	2,090	2,530	2,970	3,410	4,320	5,220	21
22	164	248	332	417	502	672	847	1,020	1,280	1,720	2,170	2,630	3,080	3,550	4,490	5,440	22
23	169	256	344	431	519	696	877	1,060	1,330	1,780	2,250	2,730	3,200	3,680	4,670	5,650	23
24	175	264	355	445	536	719	907	1,100	1,370	1,850	2,330	2,820	3,310	3,820	4,840	5,850	24
25	180	273	366	459	552	742	937	1,130	1,410	1,910	2,410	2,920	3,430	3,950	5,010	6,060	25
26	185	280	376	472	568	764	965	1,160	1,460	1,960	2,480	3,010	3,540	4,080	5,170	6,260	26
27	190	288	386	485	584	786	994	1,190	1,500	2,020	2,560	3,100	3,650	4,220	5,340	6,460	27
28	195	295	397	498	599	808	1,020	1,230	1,540	2,080	2,630	3,190	3,760	4,340	5,500	6,650	28
29	200	303	406	510	614	829	1,050	1,260	1,580	2,140	2,700	3,280	3,870	4,470	5,660	6,850	29
30	204	310	416	522	628	850	1,070	1,290	1,620	2,190	2,780	3,370	3,980	4,590	5,820	7,040	30

% discount factors

Quantum £k p.a.

Duration (years)	£ 10	£ 15	£ 20	£ 25	£ 30	£ 40	£ 50	£ 60	£ 75	£ 100	£ 125	£ 150	£ 175	£ 200	£ 250	£ 300	Duration (years)
3	93.3	93.6	93.5	93.5	93.6	93.3	94.0	93.9	93.8	94.0	94.1	94.2	94.1	94.2	94.3	94.2	3
4	92.3	92.2	92.3	92.4	92.5	92.5	93.0	92.9	93.0	93.0	93.2	93.2	93.3	93.3	93.4	93.3	4
5	91.0	91.1	91.2	91.2	91.3	91.5	91.6	92.0	92.0	92.2	92.2	92.3	92.3	92.4	92.8	92.7	5
6	89.8	89.9	90.0	90.0	90.6	90.8	90.7	90.8	91.1	91.2	91.2	91.3	91.5	91.7	92.0	91.7	6
7	88.7	88.9	89.3	89.1	89.5	89.6	89.7	90.0	90.1	90.1	90.3	90.5	90.6	90.7	90.9	91.0	7
8	87.6	87.5	88.1	88.5	88.3	88.8	89.0	89.0	89.2	89.3	89.5	90.0	90.0	90.0	90.0	90.4	8
9	86.6	86.7	87.2	87.1	87.4	87.8	88.0	88.1	88.1	88.4	88.7	88.9	88.9	89.4	89.3	89.6	9
10	85.4	86.0	86.0	86.4	86.7	86.8	87.0	87.2	87.2	87.6	88.0	88.0	88.0	88.5	88.8	89.0	10
11	84.4	84.8	85.0	85.5	85.8	85.9	86.0	86.2	86.4	86.8	87.3	87.3	87.3	87.7	88.0	88.5	11
12	83.3	83.9	84.2	84.7	84.7	85.0	85.2	85.3	85.6	85.8	86.0	86.7	86.7	87.1	87.3	87.8	12
13	82.3	83.1	83.5	83.7	83.8	84.0	84.3	84.4	84.7	85.4	85.5	85.6	86.2	86.2	86.8	87.2	13
14	81.4	81.9	82.5	82.6	82.9	83.2	83.4	83.6	84.0	84.3	84.6	85.2	85.3	85.7	86.0	86.4	14
15	80.7	80.9	81.7	81.9	82.0	$\boxed{82.3}$	82.5	82.8	83.2	83.3	83.7	84.4	84.6	85.0	85.6	86.0	15
16	79.4	80.0	80.6	81.0	81.0	81.4	81.6	82.0	82.4	82.5	83.0	83.8	83.9	84.4	84.8	85.4	16
17	78.8	79.2	79.7	80.0	80.2	80.6	80.8	81.2	81.6	81.8	82.4	82.7	83.4	83.5	84.2	84.9	17
18	77.8	78.5	78.9	79.1	79.4	79.7	80.0	80.5	80.7	81.1	81.8	82.2	82.5	83.1	83.8	84.4	18
19	76.8	77.5	78.2	78.3	78.6	78.8	79.3	79.6	80.0	80.5	80.8	81.4	82.1	82.4	83.2	83.9	19
20	76.0	76.7	77.3	77.4	77.7	78.0	78.5	79.0	79.3	79.5	80.4	81.0	81.4	81.8	82.6	83.5	20
21	75.2	75.9	76.4	76.6	76.8	77.1	77.7	78.3	78.7	79.0	79.6	80.3	80.8	81.2	82.3	82.9	21
22	74.5	75.2	75.5	75.8	76.1	76.4	77.0	77.3	77.6	78.2	78.9	79.7	80.0	80.7	81.6	82.4	22
23	73.5	74.2	74.8	75.0	75.2	75.7	76.3	76.8	77.1	77.4	78.3	79.1	79.5	80.0	81.2	81.9	23
24	72.9	73.3	74.0	74.2	74.4	74.9	75.6	76.4	76.1	77.1	77.7	78.3	78.8	79.6	80.7	81.3	24
25	72.0	72.8	73.2	73.4	73.6	74.2	75.0	75.3	75.2	76.4	77.1	77.9	78.4	79.0	80.2	80.8	25
26	71.2	71.8	72.3	72.6	72.8	73.5	74.2	74.4	74.9	75.4	76.3	77.2	77.8	78.5	79.5	80.3	26
27	70.4	71.1	71.5	71.9	72.1	72.8	73.6	73.5	74.1	74.8	75.9	76.5	77.2	78.1	79.1	79.8	27
28	69.6	70.2	70.9	71.1	71.3	72.1	72.9	73.2	73.3	74.3	75.1	76.0	76.7	77.5	78.6	79.2	28
29	69.0	69.7	70.0	70.3	70.6	71.5	72.4	72.4	72.6	73.8	74.5	75.4	76.3	77.1	78.1	78.7	29
30	68.0	68.9	69.3	69.6	69.8	70.8	71.3	71.7	72.0	73.0	74.1	74.9	75.8	76.5	77.6	78.2	30

- This version allows for easy interpolation of any number of years or quantum. The figures shown are the overall discount on simply multiplying the quantum by the duration in years.
- For example, £40k x 15 years (bare multiplication gives £600,000).
- The discount factor (shown boxed) is 82.3%.
- 82.3% x £600,000 = £493,800.
- Compare with £494,000 on the detailed table.
- Thus one could interpolate for £45,000 for 15 years by

taking an average of 82.3% and 82.5% = 82.4% x £45,000 x 15 = £556,200, say £556,000.

Appendix 6: Representations and Responses to Consultation

1. The Working Party received nine separate responses during the consultation period, from groups and individuals. We have decided not to publish the responses themselves, even in anonymised form. Instead, this appendix contains a summary of the key issues raised, and our responses to the same.

2. Only one respondent expressed opposition to the largest change recommended by the Working Party: the reformatting of the tables to enable capitalisation of term orders rather than those set to endure for joint lives. Most of the other responses expressed positive approval of this recommendation.

3. However, two headline criticisms in respect of the formula emerged from the responses:

3.1. the blended management costs added to the algorithm (1% for funds under £1m, 0.5% for funds above £1m) were a welcome addition, but set too low; and

3.2. the real rate of return (RRR: 3.75%) was and always has been too bullish.

4. We are grateful to all who provided feedback, which provoked further debate in the group. Nonetheless, we were not persuaded, individually or collectively, to modify our recommendations in respect of the Duxbury assumptions. By a majority the group resolved to leave our recommendations unaltered; one member would have increased the figures for management charges by 0.5%. The group has reworked the tables in Appendix 5 of the original report in the light of the changes to the rates of CGT announced in the Budget.

Summary of feedback

5. Several respondents criticised the accuracy of the assumed management costs and RRR and argued that they tilted the formula too steeply against payees. Interestingly, very few respondents criticised other assumptions that operate in favour of payees, which the Working Party has acknowledged to be unrealistic but recommended their retention as necessary to balance risk fairly. The two most obvious are:

a. the unrealistic taxation assumptions which predicate that the payee will receive no dividend income from the fund and will not undertake even the simplest tax mitigation; and

b. the rate of assumed inflation, set at 3%.

6. One respondent pointed out that the Duxbury inflation figure was 1% higher than the Bank of England's medium-term inflation target, and another noted that the idea that individuals increase their spending in line with inflation was unrealistic and out of line with real world data. Not a single respondent argued that the Duxbury tax and inflation assumptions were unfair to payers and needed to be 'fixed' as a consequence.

7. Respondents proposed a range of alternative management charges. One proposed that the rates proposed by the Working Party be upped to 1.5% on funds up to £1m, and 1% over £1m. Another suggested a more realistic range was 1.25% to 2.6%, but did not comment on how charges should be stepped according to fund size. Another respondent suggested any arbitrarily fixed management charge was wrong, and a bespoke approach should be applied in each individual case, although stopped short of explaining how this would work in practice, or how tables for publication in *At A Glance* might be prepared. This underscores the point we made at paragraph 158 of our report, namely that 'there appears to be very considerable variance in relation to fees …'.

8. Six respondents suggested (with varying degrees of assertiveness) that the RRR was too high, and that the Working Party had missed an opportunity to reduce it. Specific criticisms included the following.

a. It was out of line with FCA guidance.

b. To achieve such returns in practice would require a significantly more aggressive investment strategy than that contemplated by the Working Party, which would not be recommended to Duxbury payees by wealth managers.

c. The blanket application of the same RRR to funds of all durations and sizes did not properly recognise the greater market and drawdown risks inherent in shorter-term funds, nor the greater ability of wealthy payees to weather financial turbulence.

d. The blanket application of the RRR failed to recognise changes in the composition of an investment portfolio over time to reflect decreasing risk tolerance nearing retirement.[28]

e. Data of historical returns was not a sound basis for stress-testing the robustness a present day RRR.

f. The historic return data used was in any event from index-based investment strategies rather than average multi-asset funds.

g. The median end values returned by stochastic modelling of Duxbury funds demonstrated that the risk of payees running out of funds before the end of a term was greater than the deterministic Duxbury model would suggest.

Response to feedback

9. Prior criticisms of the RRR were already recognised at paragraph 27 of the report, and we addressed the rationale behind our assumed management costs at paragraph 171. Just as with the RRR, we explained that our proposed management cost rates were not supposed to reflect an average real-world blended charge. Rather they were a compromise that made a specific allowance in the computational inputs of the calculation in circumstances where some members of the Working Party thought they should simply be subsumed within the shortfall risk borne by payees.

10. The majority view of the Working Party was that the 'new' criticisms of the RRR and assumed rates for management costs fell into the same category: the 'unlikelihood, in reality, of a payee of a Duxbury fund … actually being able to invest their fund so as to enable them confidently to spend at the rate assumed as the starting point of the computation of the capital sum, without risking running out of money during their life'. As stated above, one member

would have increased the figures for management charges by 0.5%.

11. We addressed the conceptual problem with these criticisms under the subheadings 'The algorithm – what it isn't' at paragraph 68, and 'The algorithm – what it is' at paragraph 87. It is not an estimate of the cost of something with the qualities of an annuity to produce a guaranteed net income for life. It is and has never been anything more than a 'rationalisation for the discounting of a lump sum payment to reflect the benefit(s) to the payee of having the money paid upfront rather than over a period of years'.

12. It is perhaps worth putting these points in even starker terms:

a. A Duxbury fund is not intended to produce, on the balance of probabilities, the target level of inflated income for the duration of a payee's life expectancy.
b. A Duxbury fund is intended to incorporate a discount for early receipt beyond that already inherent in an adjustment for the time value of money. This additional discount is priced into the underlying assumptions, which are necessarily tilted on average towards payers, although there are individual winners and losers.

13. These are two sides of the same coin. If a Duxbury fund were calculated more conservatively so that on balance, the fund was more likely than not to produce the target income for the intended fund term, there would be no financial benefit to offset the risk assumed by the payer in giving that capital sum to the payee up front.

14. The Duxbury formula is intended to reflect the risks inherent in the trading of a periodical payments order for a capital sum. Almost all those risks (remarriage/cohabitation of the payee, premature death of the payee, premature death of the payer, the worsening of the payer's economic position and the improving of the payee's economic situation) fall on the payer. Realistically, capitalisation entails only two risks for the receiving party. The first is a change in their circumstances for the worse that might warrant upward variation or extension of a maintenance order. To persuade a court on a variation application to increase the payee's reliance on the payer in the face of the statutory steer towards a clean break would require the payee to prove that absent such a variation they would suffer 'undue hardship'. The second is a payee significantly outliving their life expectancy, but the comparative rarity of joint lives order and the presentational transition of the tables to reflect term funds mitigates this factor.

15. If the Duxbury formula were calculated to all but guarantee the level of target income for the intended term, it would fail to reflect the significantly greater risk to the payer inherent in capitalisation.

16. One needs only to turn to the Ogden Tables for an illustration. Those tables are intended to place the victim of a tort in the position that they would be in but for the injury inflicted. The current Ogden discount rate is set to give the victim a copper-bottomed guaranteed income akin to that of an annuitant. To that end it is set at minus 0.25%. Applying the Ogden rate as the RRR in a simplified Duxbury calculation, the sum required to produce £50,000 for 5 years is £251,886 (i.e. £1,886 more than £50,000 x 5). Doing the same simplified Duxbury calculation using a RRR of 2.75% (i.e. 3.75% less 1% for management charges as proposed), the required sum is £230,629. The difference between those two sums is £21,257, amounting to an 8% discount of the near-annuitant Ogden figure, which we consider eminently reasonable.

17. Two respondents suggested (with different degrees of specificity) that the risk discount should be removed entirely from the underlying assumptions and considered on a case-by-case basis by the court, primarily to reflect chances of remarriage and cohabitation. The Working Party unanimously considered this to be problematic[29] and practically undesirable. But in any event, we think that discounts for early receipt in the Duxbury range are well within the parameters the court would apply if it were required to decide an applicable rate on a case-by-case basis.

18. The Duxbury tables exist to create a starting point for use in most cases where capitalisation arises. They exist to meet the need for legal certainty and to have a workable rule. The Working Party considers that it would be contrary to the public interest for the tables to be abandoned in favour of an unpredictable exercise by the court of fact - specific evaluative decision making, in every case.

19. Looking sideways to other relatable areas, Duxbury discounts are generally well within the bounds of the so-called 'utility discounts' recommended by the Pension Advisory Group for application during pension offsetting (0–25%), to reflect one party receiving cash now versus pension later. They are low by comparison to the accountancy and court discounts frequently applied where one party is to receive cash in lieu of an interest in a private company. If anything, the discount to be applied to capitalised maintenance (an entitlement to receive variable periodic sums) should generally be higher than the discount applied to cash received in lieu of an illiquid asset and/or risky asset to which the receiving party has a solid, quantifiable sharing entitlement.

20. As a matter of arithmetic, the size of the discount increases with the term of the fund. Returning to the example above – the Ogden sum for an equivalent 10-year term would be £506,944 versus a 2.75% RRR Duxbury sum of £432,003: the capital discount between the two grows to 15%. But (1) such a discount is still undoubtedly within reasonable range, and (2) as multiple respondents have pointed out, payees of shorter-term funds are more exposed to market and drawdown risk, so an organic expansion of the risk delta with the term of the fund is reasonable.

21. The Working Party acknowledges, but does not accept, the criticisms that it is insufficiently representative. Three women and two financial planners were originally members of the group, but one member (a female financial planner) unfortunately withdrew. While there was an imbalance between the sexes in the composition of the group the female members take the opportunity of stating here that throughout its deliberations, they were able to make their contributions emphatically, clearly and convincingly, and that they suffered no disadvantage in the debates whatever by virtue of that factor. The group is satisfied that its composition did not prevent it from taking all considerations properly and fairly into account.

22. Whilst grateful for the high-quality responses received, the Working Party has not been persuaded to amend its initial recommendations.

Notes

1 Lotus 1-2-3 was introduced for the IBM PC DOS in November 1982.

2 In the office suite called Framework II released by Ashton Tate in 1986 – see https://winworldpc.com/product/framework/ii

3 The inclusion of separate figures for men was introduced in the 2001–2002 edition of *At A Glance*, with the somewhat elliptical explanation that because Lord Nicholls in *White* had observed that the equal division of the parties' resources in excess of those required to meet their respective needs this warranted the inclusion of the calculations for both men and women.

4 Including calculations: over periods different from actuarial life expectancy; incorporating the introduction of additional capital (for example from the sale of a home or some other anticipated receipt of funds after the start date of the computation); allowing for changes – usually reductions – in spending power, during the lifetime of the fund; allowing for earning or other income of the payee, including pension income other than that received from state pensions; excluding state pensions; where the original sum was not amortised (either in absolute terms or even in 'real' terms).

5 The current membership includes both Lewis Marks KC and Sir Nicholas Mostyn both of whom were members of the earlier membership. Short Biographies of the members of the reconstituted Duxbury Working Party are at Appendix 1.

6 Matrimonial Causes Act 1973, s 25A(2).

7 The membership of the Working Party has changed during the process. As originally constituted it comprised four men and three women, and two financial advisers and two solicitors. During the discussion phase one member of the Working Party (a female financial adviser) became unable to continue to participate and was replaced by a male solicitor who had been a co-author with her of a published Duxbury-critical article.

8 It was not until 1998, with the coming into force of the Family Law Act 1996 that ss 31(7A)–(7F) were inserted, finally giving the court power on a variation application in respect of a periodical payments order to impose on the payer the obligation to make a (further) lump sum payment upon discharging the periodical payments order. Prior to 1998 only the payer could obtain such an outcome, which was effected by the device of the court extracting from the payer an undertaking to make a payment upon the payment of which the court would discharge the periodical payments order. The payee had no such opportunity to seek a capitalisation of their periodical payments, absent the agreement of the payer.

9 We suspect that the case might not have been resolved in those terms were it to have come to the Court of Appeal in 2024 rather than in 1985.

10 This objective of a Duxbury calculation was accepted by Baroness Hale in the Privy Council case of *Simon v Helmot* [2012] UKPC 5 at [70].

11 He stated at [53]: 'It is pre-eminently reasonable that the wife should be required to amortise – that is to say, to spend – her Duxbury fund. Indeed, I struggle to conceive of any case where in the assessment of a claimant's needs it could be tenably argued that it was reasonable for her not to have to spend her own money in meeting them. After all, that is what money is for. The endgame of the contrary argument is that it would be reasonable for a respondent to have to fund a claimant's testamentary ambitions. I cannot conceive of any case where that could be said to be reasonable.'

12 Research by Joanna Miles and Emma Hitchings from the Universities of Cambridge and Bristol respectively, revealed that such orders are now almost exclusively made, and, even then, only in a minority of cases, in the most affluent part of the country, and almost never outside those most affluent parts. This was based on analysis at four court centres examining all financial orders made over a period from 2010 to 2012, finding that only about 5.5% included a joint lives periodical payments order (fewer than 20% of cases included periodical payments at all). The figure would surely be somewhat lower now.

13 See also *Quan v Bray* [2018] EWHC 3558 (Fam) at [48] and *Clarke v Clarke* [2022] EWHC 2698 (Fam) at [36].

14 Absent power to deal with the pension funds by way of sharing, which had not been available at the time of the first instance proceedings.

15 Baroness Hale in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [144].

16 I.e. an annuitant who lives beyond the actuarial life expectancy on which the calculation of the tax-exempt proportion reflecting return on capital is based.

17 Amongst the representations received following publication of the provision report were at least two which suggested, based on anecdotal experience, that the likelihood of remarriage (or relevant cohabitation) was low and that our approach of considering that prospect to be relevant to the balance between payers and payees was therefore unnecessarily exaggerated. While noting those representations we remain of the view that one of the several factors in the Duxbury calculation which favours payees is that there is no repayment in the event of remarriage or relevant cohabitation even if that particular factor is realised in only a minority of cases.

18 This text was cited by Baroness Hale in *Simon v Helmot* at [68].

19 Dimensional Fund Advisors is a Nobel Prize-winning fund manager. Its funds are based on c. 40 years of academic research and experience with the aim of generating a non-speculative market return: 'rely on science not speculation': https://www.dimensional.com/gb-en/individual

20 These figures, covering the date range 1915 to 2022, have been provided by Timeline, a service for financial advisers and planning firms that offers integrated tools, evidence-based model portfolios, and visual planning: https://www.timeline.co/. The figures are not directly comparable with those provided by Dimensional Fund Advisors, since Timeline uses annual rebalancing and Dimensional monthly rebalancing, which itself has an impact on the average outcomes reported.

21 The indices used to provide these figures are set out in Appendix 4. By definition they are an estimate of how bond/equity markets have performed over the periods. Other indices used will produce different figures, but there is no reason to believe the indices used are materially inaccurate.

22 It would be even more unusual, indeed almost unheard of, for the payee to be in rented accommodation, so we have rejected the CPI(H) which includes rental costs.

23 The recently announced increase in the rate of CGT is reflected in the revised illustrative tables in Appendix 5. The impact on required sums ranges from zero to about +2.5%.

24 A beneficial tax regime which is available to Duxbury recipients but not factored into the Duxbury calculation.

25 We doubt very much whether the Family Court would wish to embroil itself in complicated scientific analysis of the extent to which genetic and environmental factors influence a party's life expectancy in any given case.

26 Stockpiling in a periodical payments order case is where the amount of the periodical payments is greater than the annual spending requirement of the payee, the surplus being for them to preserve against the likelihood that they will have continuing needs after the ability of the payer to make such payments is exhausted. This is particularly useful in those cases where the payer has an atypically truncated

remaining working life, for example payers engaged in professional sports.

27 Who had, at age 40, her court-assessed income needs of £600,000 per annum capitalised on a whole-of-life basis (47–48 years) at £14m (*McCartney v McCartney* [2008] EWHC 401 (Fam)), and she is reported to have remarried just 13 years later in 2021 (in other reports 2019 or 2023).

28 The Galbraith Tables are premised on such an assumption, described as a 'Lifestyling' investment strategy.

29 To attempt to form a robust probabilistic assessment of an individual's prospects of cohabitation and/or remarriage would be a perilous task with pitfalls of discrimination and illegality awaiting at every turn.

Financial Remedies – Next Steps on the Road to Reform?

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1.1 On 18 December 2024 the Law Commission published its Scoping Report on financial remedies on divorce and dissolution.[1] The Scoping Report sets out our findings that the current law does not provide a cohesive framework in which couples going through a divorce can expect fair and sufficiently certain outcomes. Consequently, we conclude that the law is in need of reform. As our report is a Scoping Report, we do not make recommendations for how the law might be changed. Instead, the Scoping Report sets out four potential models on which any future reform of the law could be based. It is for Government to consider whether any of the models present a desirable route for reform. The Scoping Report also addresses whether there is scope for reform in relation to specific issues such as nuptial agreements, potential limits on spousal maintenance, and the treatment of conduct in financial remedies cases.

1.2 Our Scoping Report can be seen as a step on the road to reform, rather than the eventual destination. In this article, we consider in broad terms what the next steps on the road to reform might be. This will, of course, depend on the direction Government chooses to take in pursuing reform, assuming that it accepts our conclusion that reform is needed.

The direction reform might take

1.3 We set out below a brief summary of the four models we propose in our Scoping Report: codification, 'codification-plus', guided discretion and a default regime. We note the issues which would need to be considered were any particular model to be selected. Should Government select a model which would require more extensive reform, such as a default regime, the general questions any future project of law reform would need to ask, and the choices to be made, would be very different to those raised in a less extensive model, such as codification. We then look at the potential direction for reform of the specific issues which we consider in our Scoping Report (such as nuptial agreements or conduct).

Codification and codification-plus

1.4 Codification of existing principles would require a single policy decision to explicitly incorporate established case-law into the existing statutory framework of the Matrimonial Causes Act 1973. Consequently, it is not the substance of the law which is the focus of reform, but rather its presentation in a 'cohesive framework'[2] and more easily accessible format. Codification-plus to some extent has the same aim, but additionally enables law reform to be undertaken in specific areas.

1.5 Given that one of the criticisms of the current law is that it is not clear from the face of the statute how a court will exercise its discretion in interpreting the factors which are listed under s 25, codification would give greater clarity and transparency to the law. This would be particularly helpful for couples who do not obtain any legal advice, but it would also help to reduce the uncertainty and therefore potentially protracted litigation and associated costs of those who do seek legal advice. As we note in the impact section of our Scoping Report, any reform which makes the law more certain and reduces the likelihood of litigation benefits everyone.[3]

1.6 Codification of settled case-law would not by itself reduce the discretion that exists in the current law: the range of available orders coupled with the existing principles would maintain judicial flexibility to provide the most appropriate remedies for the couple before the court. Equally, however, it does nothing to resolve the uncertainty in the law that is currently difficult for couples to navigate (even with legal advice) and that provides a barrier to settlement.

1.7 Codifying the existing settled case-law would be the simplest approach to reform. The principles of fairness, needs and sharing could be embodied in any reformed statute. Sharing would be limited to matrimonial property as understood through the existing case-law. Non-matrimonial property would remain the property of the spouse who owned it unless it was required to meet the other spouse's needs. The duration of the marriage would be deemed to include the preceding period of 'seamless' cohabitation; a point that would be relevant for determining the extent of the matrimonial property. Indeed, consideration of seamless cohabitation is an element of the current law which at present is not widely known to couples as it is a pure creature of the common law.

1.8 'Codification-plus' has the similar aim of clarifying the current law, but in addition, it enables substantive reform which goes further than the existing case-law. For example, if the principle of meeting needs as currently understood through the case-law is codified, codification-plus would entail consideration of whether 'needs' should be defined on the face of the statute. Codification-plus would ultimately offer greater clarity on how the existing principles apply so that couples would be better equipped to negotiate a settlement.

1.9 In addition, codification-plus could introduce reform on specific, discrete issues which we considered in our Scoping Report. For example, binding nuptial agreements, spousal maintenance, provision for children aged 18 and over and the effect of domestic abuse in financial remedies outcomes could all be considered in the course of developing a codification-plus model. We return to these discrete issues below in more detail.

Guided discretion

1.10 By guided discretion, we mean the introduction of a set of underpinning principles and objectives which guide the exercise of the court's discretion. This approach goes one step further than codification or codification-plus as it does not depend on s 25 MCA 1973 as a reference point. Under a guided discretion model, legislation sets out the purpose of financial remedies law and the principles which must guide the application of the law. It is intended to provide sufficient clarity in the legislation to help couples come to their own arrangements in the shadow of the law. It can nevertheless retain, to a greater or lesser extent, some judicial discretion, which can then be exercised on a case-by-case basis.

1.11 If Government decides to adopt a model of guided discretion, any future reform work would need to establish what the rules or principles underpinning any such model should be and identify the matters on which judicial discretion should remain. In our Scoping Report, we looked at existing examples of guided discretion models, such as those in operation in New Zealand and Scotland. We also considered the Divorce (Financial Provision) Bill to represent a guided discretion model. As we indicated in our Scoping Report, a guided discretion model can be devised to meet particular policy objectives. Hence if Government adopts this model, the approach taken need not reflect any of the existing examples of this approach. The substance of the model – the principles that guide the discretion – must reflect the socio-economic context and needs of the society which it serves. Equally, criticisms of the details of any examples of this model should not be seen as criticisms of the model itself.

1.12 As under a codification-plus model, Government could decide that a model of guided discretion should incorporate some of the specific, discrete issues which we considered in our Scoping Report, and to which we return below.

Default matrimonial property regime

1.13 In our Scoping Report, we also considered the adoption of a default matrimonial property regime model as an alternative reform option. Under this model, the law prescribes explicit rules which regulate the financial consequences of divorce from the date of the marriage. A matrimonial property regime will usually regulate the disposition and distribution of property both during the marriage and upon divorce. It is normally accompanied by a further set of rules (or 'pillars') which relate specifically to the question of spousal maintenance and to certain assets, such as the family home and pensions. Under a default matrimonial property regime there is less opportunity for the exercise of judicial discretion because the law sets out which property is to be divided, and on what basis. There is therefore generally greater certainty and much less need for couples to go to court to resolve their finances upon divorce. Importantly, in countries which operate default regimes, couples are able to 'opt-out' by concluding their own binding nuptial agreement.

1.14 If Government decides to introduce a default matrimonial property regime, such a regime could be developed to take into account the specific socio-economic context of England and Wales; it would not be simply a case of transplanting an existing regime from elsewhere.

1.15 Any future project of law reform to introduce a default regime would need to reach a conclusion as to whether:

(1) marriage should have an immediate effect on property rights by the creation of a 'community of property'; or
(2) property should remain separate during the marriage but upon divorce should, at least in relation to certain types of property, be shared equally – a 'deferred community of property'.

1.16 On either approach the question also arises as to whether any community property should be equally shared in all circumstances, or whether any reformed law should set out specified circumstances in which equal sharing should or could be departed from.

1.17 As part of our scoping work, and following publication, we heard views from stakeholders and commentators on the different models we identified. Some suggested that they thought the most likely choice for Government is between codification-plus and guided discretion.[4] However, we also heard both support and opposition for each of the models and we believe that all four models offer viable alternatives to the current system. The choice will ultimately be dictated by any objectives and policy imperatives that Government identifies as core to a fair and accessible financial remedies law.

Reform of specific areas

1.18 As well as setting out the four models on which reform could be based, our Scoping Report considered whether reform is needed in relation to specific areas:

(1) Nuptial agreements.
(2) Spousal maintenance.
(3) Provision for children aged 18 and over.
(4) Conduct.
(5) Pensions.

1.19 Reform of these areas could form part of a model based on codification-plus, guided discretion or creation of a default regime. The treatment of these issues will inevitably be but one part of overall reform and how they are dealt with will depend on any objectives identified in the new model.

Nuptial contracts

1.20 Readers will be aware of our Report on *Matrimonial*

Property, Needs and Agreements (MPNA) from 2014. The MPNA Report included recommendations for the introduction of 'qualifying nuptial agreements'[5] (QNAs). Under our recommendations, QNAs would be binding contracts which would be used to determine how the couple's assets are divided on divorce, in place of using the law contained in the MCA 1973. However, our recommendations did not allow couples to contract out of meeting financial needs as then understood; it would still be open to a spouse to make a claim in this regard. Our recommendations set out various procedural safeguards to be complied with in order for an agreement to be a QNA.

1.21 Law reform to provide for enforceable nuptial agreements could take place under any of the models we put forward except a simple codification. Our recommendations in the MPNA Report provide a solid basis for reform, although we note that current developments in the understanding and application of needs through the case-law would require further consideration before being implemented. In particular, there would need to be consideration of whether and how needs may be differently interpreted in a nuptial agreement context, than they would otherwise be in a financial remedies application on divorce.

1.22 Should Government decide to adopt a default regime or guided discretion model, a law reform project would need to consider how nuptial agreements could be included as part of a reformed financial remedies law. Our analysis of the different models shows that nuptial agreements are a central feature in both,[6] and the approach to their incorporation would be developed within the framework of the chosen model.

Spousal maintenance

1.23 The Terms of Reference for our scoping project included the express consideration of whether the law should provide a maximum duration for spousal maintenance. We explain in the Scoping Report that currently spousal maintenance orders generally tend to be time limited and that the court is likely to avoid the making of such an order if a capitalised lump sum can be paid instead. However, for the majority of couples, there will often not be sufficient capital assets to enable this and spousal maintenance may be the only way to achieve a fair outcome.

1.24 On a codification-plus model, consideration could be given to imposing a time limit on maintenance orders, whether in the form of a set period of time or upon the occurrence of an identified event.[7] Any limit could be subject to an overriding consideration of meeting needs and/or contain exceptions. Under the guided discretion model or a default regime, the question of spousal maintenance will need to be dealt with according to the model's objective.

1.25 Existing models and the Divorce (Financial Provision) Bill offer a variety of approaches and justifications. Whilst Scots law and the Divorce (Financial Provision) Bill suggest a maximum time limit (of 3 and 5 years, respectively), the New Zealand legislation does not. However, in practice, in New Zealand, maintenance orders tend to be for a relatively short period of time.[8] Importantly, the justification and the interaction of maintenance with other provisions all differ between the jurisdictions, as does the level of discretion which can be exercised.

Provision for children aged 18 and over

1.26 Unlike in many other jurisdictions, the law in England and Wales does not provide for an upper age limit for financial support for children aged 18 and over, when made in the course of financial remedies claims.[9] However, we found that there is inconsistency in how such children are provided for in court orders, and it is not clear what arrangements are made by couples themselves for their financially dependent adult children. Stakeholders raised with us the difficulties faced by the parent with whom the child lives, most often the more financially vulnerable parent. Where the resident parent is a victim-survivor of domestic abuse, we heard that it is less likely for the former spouses to agree ongoing financial support for children aged 18 and over.

1.27 Under the proposed models (except codification), consideration would need to be given as to whether explicit provision should be made for children aged 18 and over. Consideration would need to be given to whether, and if so on what basis, a financial remedies order for the spouse with whom the child continues to live into adulthood (assuming the child's primary home remains with one parent) should be available, or whether an order should be made for the child directly. In addition, reform should address whether financial provision for children aged 18 and over should end when the child reaches a certain age, when a particular event occurs (such as completion of tertiary education), or until the child becomes financially independent. Such choices should result in more certain financial support for this cohort of children.

Conduct

1.28 Whilst our Scoping Report considers all forms of conduct that arise in financial remedies cases (including litigation misconduct, non-disclosure and 'add-backs') the area about which we heard most from stakeholders was personal misconduct. Recently, greater awareness and visibility of the effect of domestic abuse on spouses and their financial situation has bolstered calls for reform of the law to include consideration of domestic abuse in financial remedies outcomes.[10] We heard from stakeholders that victim-survivors of abuse (who are predominantly female) suffer poor financial outcomes following divorce and that the financial consequences of domestic abuse should instead properly fall on the perpetrators. Whilst the current law enables consideration of the financial consequences of abuse through an assessment of the victim-survivor's needs, there is a growing momentum for better support and better outcomes for such victim-survivors. Our Scoping Report identifies areas with which we believe any future law reform project should engage.

1.29 We suggest that law reform could provide greater clarity on the following issues:

(1) what forms of behaviour will be considered conduct (whether that be personal misconduct or litigation misconduct);
(2) the impact that conduct will have on a claim for financial remedies; and
(3) the process to be adopted when making an allegation of conduct.

1.30 Interestingly, in jurisdictions which operate a default regime, although there is some divergence between them on when conduct may be relevant for the grant of the divorce itself, most consider non-financial conduct irrelevant for the purposes of property division and entitlement to maintenance. However, misconduct which directly impacts the property available for division is often dealt with by express legislative provisions which detail the consequences of deliberate mismanagement or dissipation of community property.

Pensions

1.31 We know that pensions are considered by most as complicated and opaque, and their value is not fully recognised, or in some cases even acknowledged when couples divorce. There is a general consensus from stakeholders that any reform of financial remedies law should examine how pensions are currently treated on divorce.

1.32 The impact of inadequate pension consideration is felt principally by women who generally have lower pension savings, due to time out of the workplace often because they are the primary carers of young children. We have seen that this gender imbalance is particularly marked for women over the age of 50. Where pensions are considered, there is a tendency to 'off-set' the perceived value of the pension, often against a greater share of the equity in the family home. However, valuing a pension is complex, especially if it is a defined benefit scheme, and (in most cases) requires a professional expert report which can be costly. If spouses do not obtain a pension report, the value of the off-set may be underestimated and result in longer-term disadvantage into retirement. This approach therefore does not necessarily produce a fair outcome.

1.33 It is clear from those with whom we have spoken that proper re-evaluation of the current law and procedures is imperative, to ensure that pension division becomes easier for divorcing couples to understand and engage with. The key issue is whether pension sharing should become the default statutory position or at least, if s 25 is retained, whether there should be explicit mention of pensions in s 25 as one of the factors for consideration. If a default statutory position were to be adopted, should *equal* sharing of pensions be the starting point? We have seen in our scoping work that many jurisdictions provide specific legislation on pension sharing, or are planning to introduce such legislation. However, the accessibility and affordability of expert pension reports remains a crucial element in any reform.

Implications of any reform

1.34 As we note in our Scoping Report, some stakeholders with whom we engaged took the view that the current law, as developed by the courts, is sufficiently clear, and that lawyers are able to advise those going through divorce on the likely range of outcomes. However, as our scoping work and other research (notably the *Fair Shares* report[11]) has revealed, the majority of divorcing couples do not obtain legal advice and very few cases are resolved in front of a judge. Furthermore, evidence shows that the financial outcomes following divorce are much poorer for women, and especially mothers, under the current law.[12]

1.35 We are also aware of suggestions that any replacement of s 25 could result in increased litigation as divorcing couples seek to test the limits of any new legislation and that, at least for a time, the law would therefore be less certain.[13] We suspect that, as at present, some cases will need to be decided by the courts. This may be because, for whatever reason, the couple simply cannot reach agreement, or there are disagreements over valuations. It may also be because the level of assets involved make it worthwhile to incur the risks of litigation, or because one party is litigating unreasonably, or for some other reason. If an aim of reform is to make the law more certain and to make it easier for the majority of couples to resolve the consequences of divorce without litigation where that is possible (bearing in mind that at present the majority do not go to court, or even consult a lawyer),[14] that reform should not be abandoned because a minority will choose or find it necessary to litigate.

1.36 There may also be a short period where litigants seek to identify the limits of any new legislation – such as was seen in the cases exploring the concept of 'exceptional' or 'stellar' contributions in the years immediately following the House of Lords' decision in *White v White* [2000] UKHL 54.[15] However, we do not think that a possible short-term increase in litigation during a 'settling in' period for any new legislation can be a reason not to reform the law, where reform is required – such an argument could be raised in relation to any new legislation. To continue the analogy we used in the introduction to this article, it would be an unavoidable bump in the road, but not, in our view, sufficient to mean that road should not be taken. Insofar as challenges to the limits of any legislation are unavoidable and predictable, this underscores the need for more clarity in legislative drafting compared to the current position.

Next steps

1.37 Under the terms of the Law Commission's Protocol agreed with the Lord Chancellor,[16] the Minister for the relevant Department (in this case the Ministry of Justice) will provide an interim response as soon as possible, but within 6 months from the publication of our Scoping Report (June 2025). A full response must follow within 12 months of the report. Upon publication, Baroness Deech posed a written parliamentary question enquiring about Government's plans to consider it.[17] The response provided by Lord Ponsonby on 6 January indicated that Government 'will carefully consider the details and will provide a response in due course'.[18]

1.38 We cannot speculate on whether, and if so when, Government will wish to pursue financial remedies reform. Changing the law governing the financial consequences arising from personal relationships can be controversial; previous law reform proposals, for example on the financial consequences of cohabitation breakdown and on nuptial contracts, have not, to date, been taken further.[19] But problems with the law do not just go away: they need to be solved. And as we explain in our Scoping Report, the current state of the law on financial remedies has reached the stage where it may be argued to be contrary to the rule of law given the gulf between what the statute says and how the law is applied.

1.39 If Government agrees with our conclusion that reform is required, it could take that task forward itself. The Law Commission would, however, be well placed to carry out a future law reform project and it may be helpful if we offer here some indication of the process that we would follow if asked by Government to do so.

1.40 Any future work by the Law Commission would involve a public consultation; although this project engaged to an extent with the public, the scoping nature of our work meant that we were not able to hear from members of the general public to the same extent that is possible through a full consultation. It is important that any reform of the law is informed by the experiences of individuals who have been personally affected by the law.[20] A public consultation enables us to test provisional proposals for law reform with a wide range of stakeholders to provide the strongest evidence base for any recommendations we might make.

1.41 Once Terms of Reference for a project are agreed, we would publish a consultation paper and would then normally consult for a period of 3 months. Following consultation, we would publish a final report which could include a draft bill to give effect to our recommendations.

1.42 Our Scoping Report sets out in broad and non-exhaustive terms the key issues that would need to be addressed for each of the four models we have identified. The scoping work encompasses, insofar as we could set them out at this stage, the policy choices, parameters and questions that those tasked with any future reform will need to consider. We look forward to Government's response.

Notes

1 *Financial remedies on divorce and dissolution: a scoping report* (Law Com No 417, HC 460, 17 December 2024).
2 Terms of Reference, para 1.2.
3 Scoping Report, para 12.57.
4 For example, J Rozenberg, 'Reviewing the Law', 18 December 2024. Available online at https://rozenberg.substack.com/p/reviewing-the-law
5 MPNA Report, Recommendation 9.7, para 5.40.
6 See Chapters 5 and 6 of our Scoping Report.
7 For example, the youngest child of the family reaching the age of 18.
8 The New Zealand Law Commission has proposed reform to spousal maintenance which we discuss in our Scoping Report at paras 8.78–8.79.
9 As in England and Wales, most jurisdictions operate a separate child maintenance service for minor children. We are concerned here with provision for children aged 18 and over.
10 In particular the recent reports from Resolution, *Domestic abuse in financial remedy proceedings* (October 2024); and the work of members of the *Fair Shares* team on cases involving domestic abuse – E Hitchings and C Bryson, *Dividing property and finances on divorce: what happens in cases involving domestic abuse?* (2024).
11 E Hitchings, C Bryson, G Douglas, S Purdon and J Birchall, *Fair Shares? Sorting out money and property on divorce* (2023).
12 See para 12.27 of our Scoping Report.
13 See for example comments made by HHJ Hess at the recent Westminster Legal Policy Forum 'Next steps for family justice in England and Wales' in December 2024.
14 Only approximately 40% of all divorce applications include an application for a financial remedies order: Family Court Statistics Quarterly, April to June 2024, Table 13. Available online at https://www.gov.uk/government/statistics/family-court-statistics-quarterly-april-to-june-2024. The *Fair Shares* report found that just over half of their divorced respondents had obtained any legal advice: *Fair Shares*, Chapter 4.
15 See paras 2.59–2.61 of our Scoping Report.
16 *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (Law Com No 321, 2010). Available online at https://lawcom.gov.uk/document/protocol-between-the-lord-chancellor-on-behalf-of-the-government-and-the-law-commission/
17 Written Question from Baroness Deech to the Ministry of Justice, tabled on 18 December 2024, House of Lords (UIN HL3596, tabled on 18 December 2024).
18 Answered on 6 January 2025 by Lord Ponsoby of Shulbrede.
19 However, the Labour Government manifesto indicated that it intended to 'strengthen the rights and protections available to women in co-habiting couples': *Change*, Labour Party Manifesto 2024, p 68.
20 Whilst this is a general point, we expressed particular concern in Chapter 9 of our Scoping Report, which considered conduct, about the need to hear directly from victim-survivors of domestic abuse about the challenges facing them under the current law, and in navigating the current court system.

Reflections on the Law Commission Paper *Financial remedies on divorce and dissolution: a scoping report* published on 18 December 2024

HHJ Edward Hess

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Whilst the figures do vary from year to year, a broad perusal of the official statistics suggests that each year in England and Wales approximately 250,000 couples get married and approximately 100,000 applications for a divorce (formerly divorce petitions) are made. Almost all divorce applications conclude with a final divorce order (formerly decree absolute). Of these divorced couples, a surprisingly low figure of approximately 45,000 (less than half) obtain a financial remedies order which governs their financial relationship after the divorce. Of those 45,000 financial remedies orders, approximately 32,000 are compromised before they reach the court and the court's involvement is solely to approve a consent order. The remaining approximately 13,000 couples commence contested proceedings. Of those 13,000 couples, approximately 3,000 (between 20% and 25%) take their dispute to a contested final hearing, more than 75% compromising their dispute along the way, most commonly at the FDR stage (whether at a private or court-based FDR).

It can reasonably be supposed that to a substantial portion of the 45,000 couples seeking a financial remedies order, what the law entitles them to receive in terms of money and property is a matter of great importance at what must often be a difficult and painful moment in their lives. Given that these will be a different cohort of 45,000 couples each year, it can readily be seen that these issues are likely to be very important to a great number of people at some point in their respective lives. The principles which underpin their legal entitlements are therefore a matter of great public importance. In the circumstances, it was entirely appropriate for all those involved in the work of the world of financial remedies, judges and practitioners alike, to welcome the announcement on 3 April 2023 that the Law Commission had been invited 'to review the laws which determine how finances are divided among couples after divorce' with the target of producing a 'scoping report'.

In the year and a half which has followed, the Law Commission team, very ably led by Professor Nicholas Hopkins, has carried out a major investigation with a huge amount of consultation, discussion and thought. The specialist financial remedies judiciary, led by Peel J, have fully participated in this investigation and there have been numerous meetings in which members of the judiciary have been fully engaged and consulted, alongside similar exercises with many other interested parties. This work has culminated in the production on 18 December 2024 of the promised 'scoping report'. The diligence and expertise of the Law Commission team has been hugely impressive to witness and their appetite to explore in a great deal of detail, and with a wholly open mind, and with great insight and accuracy, many areas of financial remedies law and practice, cannot be faulted. Running to 373 pages, 324 of which represent substantive and heavily footnoted narrative analysis, HM Government can have no complaint about how the task has been performed.

In an earlier article written shortly after this announcement and published in the *Financial Remedies Journal*, 'Reflections on the Recent Announcement by the Law Commission of a Review of Financial Remedies Law' [2023] 2 FRJ 104, I set out some of my thoughts on the task which had then been given to the Law Commission and welcomed the exercise. This article is intended to be read alongside my 2023 article and to represent my reflections on the scoping report.

The real question now is where all this hard work and investigation will take us. The Protocol between the Government and the Law Commission requires the responsible minister to provide an interim response within 6 months and a final response within 12 months; but experience suggests that the giving of a governmental response to a Law Commission Report (in this area of law anyway) does not necessarily equate with decisive action. The three most recent Law Commission Reports in the area of family law, all substantive and worthy (*Cohabitation: the Financial Consequences of Relationship Breakdown* (2007) Law Com No 307,[1] *Matrimonial Property, Needs and Agreements* (2014) Law Com No 343 and *Enforcement of Family Financial Orders* (2016) Law Com No 370), have largely gathered dust since their respective publications. It appears to be the case that the politicians (of all colours) in government since 2007 have decided that it was expedient not to pursue the reforms suggested by the Law Commission or, at least, they were not regarded by them as a sufficient priority in the context of their other tasks – doing nothing has seemed a better option.

What has happened in practice is that the statutory provisions have barely changed since 1970;[2] but the way they have been utilised and interpreted by judges to promote fairness has constantly been changed and updated to reflect the very significant social changes that have occurred since the 1970s, including but not limited to the huge developments in gender equality over the period. My comment in my earlier reflections article that 'a judge in 2023 interpreting the words of the 1973 Act, s 25 is likely to be thinking very differently from a 1973 counterpart – even though the words themselves have hardly changed (and not at all since 1984)' is cited and acknowledged in the scoping report.[3] Most obvious in this context are the judge-made changes introduced by the House of Lords in *White v White* [2000] UKHL 54 and *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, heralding the outlawing of discrimination between earner and home-maker and the arrival of the equal sharing principle; but there are many other significant changes which can be observed in the same light, many of which can be identified in the life works of Mostyn J and his observation that 'the law in this area is not moribund but must move to reflect changing social values'.[4] It is to be observed that none of these changes required any statutory amendments to drive them.

If these judicial interventions had not happened – for example if the statutory provisions had been expressed with greater inflexibility preventing or severely limiting judicial interpretational development – then one can imagine that the calls for reform would have become irresistible long ago. In the end, though, judges are not politicians and, if politicians are not content with the measures instigated by the judges, then they can perfectly properly overrule them by targeted statutory change.

The difficulty for politicians wishing to improve things in this area is, however, well illustrated by the structure and observations of, and the breadth of options in, the scoping report. It concludes that the law *does* require reform, but what that reform might be 'is a matter for Government to decide', cautioning that the aim should be 'to increase certainty without losing the benefits of fairness and flexibility'. In practice, the facts of particular cases can render unfair an outcome dictated by too inflexible and uncertain a general principle and the balance is thus a difficult one to strike.

The scoping report reaches the conclusion that the law requires reform, criticising the 'do nothing' option on the basis that the Matrimonial Causes Act 1973:

> 'does not reflect the significant developments to financial remedies arising out of judicial decisions. Combined with the wide-ranging discretion contained in the current law, this means that it is not possible for an individual going through divorce to understand, by reading the statute, how their case will be decided. The law lacks certainty and accessibility to an extent that it could be argued to be inconsistent with the rule of law.'[5]

In support of the observation that the current law is 'inconsistent with the rule of law', the scoping report cites the strong and persuasive authority of some extra-judicial observations by Lord Bingham in this context:

> 'the law must be accessible and so far as possible intelligible, clear and predictable … if everyone is bound by the law they must be able without undue difficulty to find out what it is, even if means taking advice (as it usually will), and the answer when given should be sufficiently clear that a course of action can be based on it.'[6]

Nobody would sensibly disagree with Lord Bingham's proposition, but it is perhaps over-representing it to suggest that the necessary accessibility and clarity is to be achieved merely by reading the statute.[7] Thus, the argument that the current system may be 'inconsistent with the rule of law' is far from pellucid (and, in fairness, the scoping report does not say that it is anything more than a possible argument). As Peel J has said:

> 'I firmly believe that financial remedies law is not, or should not be, as complex as sometimes it is made out to be. Dare I suggest that the law, centred on familiar principles of sharing and (most commonly) needs, within the overarching section 25 matrix, is reasonably settled. The vast majority of cases, dealt with by specialist judges, can be dispatched relatively swiftly.'[8]

If the law is 'reasonably settled', it is surely difficult to argue that it is simultaneously 'inconsistent with the rule of law'.

The mathematical analysis set out above – with only approximately 3,000 cases per year reaching a final hearing out of approximately 45,000 financial remedies orders per year provides some mathematical support for Peel J's view – approximately 42,000 couples (93% of the 45,000) were able to find a consensus solution to their dispute. There is little forensic evidence supporting the proposition that the residual cases fight to the bitter end because of the uncertainty of the law as opposed to, for example, one party giving dishonest disclosure requiring forensic unpicking. If aphorisms are to be exchanged, then Baroness Deech's contribution that 'Most people prefer the certainty of misery to the misery of uncertainty'[9] could be met by the response 'Better the devil you know (than the devil you don't)'.

The scoping report observes that any politician deciding to 'do something' has a very wide range of options. Each staging point on the range represents a different compromise of the balance between 'certainty' and 'discretion'. Whilst the range of options is in reality a continuum with an infinite number of choices on it, the scoping report gathers the 'do something' options into four basic categories:

- *Codification*. This would involve accepting the current state of settled law and drafting a new statute, or a new Matrimonial Causes Act 1973, s 25, based on it, without including any provisions deliberately targeted at changing the current law. It is not clear that any government would regard this as a particularly useful exercise.[10]
- *Codification-plus*. This would involve the same exercise as codification but would include one or more targeted changes to the current law. The scoping report suggests that the targeted changes might include one or more of the following possible changes: its recommendations in the Law Commission's earlier draft Nuptial Agreements Bill, some limitations on the duration of spousal maintenance, an extension of obligations to children over 18, an extension or otherwise of conduct and domestic abuse as a factor for the court, some automatic provisions on pension division and/or the introduction of time limitations between marital breakdown and financial remedies applications. These individual changes, all of which have powerful arguments both in support of them and against them, could of course be introduced separately on their own merits without necessarily being part of a general codification.
- *Guided discretion.* This would involve leaving an amended statute as a broadly expressed document but being accompanied by supplemental guidance enabling the government to give a formal steer on the principles guiding the way in which discretion is to be used. This model would presumably give greater scope for ongoing changes in the future (no formal statutory amendments being required) but there would be same choices as to what might be in the discretion – would it simply choose to adopt the current law as the discretionary guidance or would it choose to implement specific targeted changes such as the ones referred to above under codification-plus or otherwise? Guided discretion could be very general (in which case might not be very different from the current system) or might be very specific (in which case might be unfair on the facts of some cases).
- *Default regime.* This would or could be the most significant change – the reform of the statute to implement a default matrimonial property regime in relation to the division of capital. The default regime typically applies to all couples unless they have specifically opted out – for example to a private nuptial agreement. Within this overall category are a wide range of options as to what the default regime might be (for example, there is a choice between a deferred community of property regime and an immediate community of property regime and there are options as to what property may be held outside the community property regime), but all of them have the characteristic that the court's discretion is limited or possibly even non-existent. Each has a different regime for spousal and child maintenance but characteristically these provisions are limited in the extent of discretion involved. The scoping report includes some interesting analysis as to how default regimes are constructed in countries such as France, Germany, Sweden, Belgium, Denmark, the Netherlands, the USA, Canada, South Africa, Australia, New Zealand and Norway,[11] and notes that any system introduced needs to take into account the level of protection offered by state benefits in the country concerned to protect financially vulnerable spouses from hardship. The scoping report observes:

> 'Financial remedies law is ultimately the result of deliberate choices made by individual governments in the light of their particular socio-economic contexts. The content of any default regime will be informed by the political and social imperatives of each society … stakeholders with whom we discussed the different models questioned whether the adoption of a default regime would require a greater role for maintenance. For civil society groups, this was seen as potentially problematic because of the inability to achieve a clean break, and the risk that inadequate property provision without maintenance could leave spouses vulnerable.'

The scoping report (appropriately given its terms of reference) does not seek to express any views on the best way of progressing any reform. What it does do is to highlight that each of the 'do something' options is likely to have its strong supporters and its strong detractors – the report observes the competing arguments in each opposing direction. Any reform is unlikely to be easy or comfortable. A decision to pursue something at the codification end of the scale would receive opposition from those who strongly favour a strong move towards clarity and certainty. A decision to pursue something at the default regime end of the scale would receive opposition from those who think that judicial discretion and fairness run hand in hand together. It will be interesting to see how the government responds to this; but it would perhaps not be altogether surprising if the decision is in the end to 'let sleeping dogs lie'. In this context it should be noted that the review which produced the scoping report was prompted by the decisions and possible social objectives of the previous government and not the current government, whose public pronouncements suggest they may have greater interest in the reform of the law for cohabitants than for divorcing couples.[12]

It occurs to me that one difficulty for anybody contemplating acting in this area is a shortage of proper research information in two key areas.

First, there is a common anecdotal perception that couples going through this process, particularly those who never compromise and go through to a final contested hearing, incur substantial and sometimes ruinous cost bills, often at a level which is not proportionate to the amounts really in dispute. This suggestion is repeated many times in the scoping paper and, to some, this provides definite evidence that there is too much judicial discretion and too little statutory certainty and ample justification for reform. The incurring of depressingly large costs bills is undoubtedly exactly what happens in some cases, and many of these examples appear in reported cases, and I have had cause to comment on it in a number of my own judgments; but would a different substantive regime for the outcome of cases really change this? Is there a danger here of an application of the rule of thumb often attributed to the late Joseph Jackson QC to the effect that each new statute represents another 10 years' work for the family bar? The position is much more nuanced in reality. Lawyers' fees do vary hugely (geographically, in charging rates and in a willingness to self-impose a discipline of proportionality). A litigant-in-person may carry a case through to its end without incurring huge costs. Further, sometimes costs bills are front-ended so that large costs bills are incurred before a compromise is reached, perhaps at a private FDR, perhaps before the parties have been anywhere near a court. Would any of this really change if there was a different outcome regime? Are there different costs procedures – for example the introduction of a fixed costs regime – which would make this better? There is a paucity of information about the actual incidence of costs bills and the reason for it.[13] There is also little research on the stage at which these costs are incurred and the reasons why they are sometimes very high – is this really anything to do with the level of discretion available in the current substantive law? Linked to this is the fact that there is not enough proper information about what methodology of dispute resolution is the most cost-effective. How many cases settle and at what point via the different methods of dispute resolution – mediation, single lawyering, private FDRs, court-based FDRs – and at what cost? Are private FDRs more successful and better value than court-based FDRs? The analysis in The Nuffield Foundation's *Fair Shares Project*[14] found that a significant number of divorcing couples spent surprisingly little on their financial disputes, but does it follow from this that these people had a better or worse experience of the substantive law or does this really point to the desirability of making legal aid available to those who need it?

Secondly, there is an inadequate level of research on the subject of what couples are actually agreeing in their consent orders. The Form D81 introduced in 2022 was specifically designed so that data could be 'harvested' so that with sophisticated AI analysis of the data, it would be possible to find out how couples are, in real life, structuring their agreements. Academics in this area have suggested that, with enough data analysed, a suitably designed AI programme could be designed so that it could independently suggest a 'fair' outcome on the facts of a particular case. Since the new Form D81 was introduced, more than 100,000 consent orders have been lodged and approved on the consent order portal, but no way has yet been found to harvest this data. The reason is that no funding has been found for such a project, despite the active support of the former Chair of the Law Commission (Green LJ) and Mostyn J and Peel J (as National Lead FRC Judges).

It may be that, before any wholesale reform of substantive financial remedies law is attempted, funding could be found for research in these areas. Such research should cast more light than is currently available on the bewilderingly large range of choices which the government now has in responding to the Law Commission's scoping report. Like all financial remedies judges, I will be watching how the government responds to the Law Commission scoping report with great interest.

Notes

1 The scoping report notes that the Law Commission received many representations to the effect that, in terms of law reform, a greater priority should perhaps be afforded to the rights of the approximately 3,400,000 couples choosing to cohabit without being married, though the Law Commission terms of reference for the scoping report specifically precluded further consideration of this group, notwithstanding the obvious financial vulnerability of people in the group, particularly the women.

2 With the exception of the 1984 amendments giving the provisions a steer towards an aspiration of financial independence.

3 Scoping report, p 307.

4 *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam).

5 Scoping report, p 13.

6 Lord Bingham, 'Rule of Law' (2007) 66 *The Cambridge Law Journal* 67; Scoping report, p 76.

7 For example, it would be similarly difficult to ascertain the meaning of Art 8 European Convention on Human Rights simply by reading the text of the Article. A perusal of the related case-law would be necessary, a fact which most people would not regard as placing Art 8 in the category of 'inconsistent with the rule of law'.

8 'The Financial Remedies Court: The Road Ahead' [2022] 2 FRJ 76.

9 *Hansard*, HL Deb, 27 January 2017, vol 778; Scoping report, p 76.

10 In the podcast 'Law and Disorder', 21 December 2024, Sir Nicholas Mostyn expressed the view that this was unlikely to be an option favoured by the government and also doubted that the default regime option was likely to find favour.

11 Scoping report, Chapter 5.

12 The Labour Party's 2024 Manifesto stated: 'We will strengthen the rights and protections available to women in cohabiting couples', though this has not yet translated into any published legislative plan.

13 One change which could be introduced fairly simply would be for the Form D81 to be changed to include a box to state the costs incurred and HMCTS is currently considering this.

14 E Hitchings et al, *Fair Shares? Sorting Out Money and Property on Divorce* (University of Bristol, 2023).

Principles vs Resources: Conduct and the Law Commission Scoping Report

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The Law Commission's long awaited scoping report[1] on financial remedies was published on 18 December 2024. It concludes that the law relating to financial remedy should be reformed. We asked the Law Commission to clarify whether their concerns in respect of the *fairness* of the outcomes was restricted to litigants who had experienced domestic abuse in their marriage. The Law Commission subsequently confirmed their 'criticism of lack of fairness in outcomes is not confined to conduct … The operation of the conduct provisions (which is the only s25 factor we were specifically directed to look at) means there is an additional source of potential unfairness for victim-survivors of domestic abuse, which other divorcing individuals are less likely to experience'.[2]

The Law Commission's report follows the conclusion in the Resolution report 'that the current approach of the courts to s25(2)(g) of the Matrimonial Causes Act 1973 i.e. conduct leads to unfair outcomes for some victim-survivors of domestic abuse'.[3] That was followed by the *Fair Shares* analysis which concluded that 'a question can be raised as to the extent to which the strict position in relation to the lack of express consideration of domestic abuse remains appropriate, given that the overall picture demonstrated in this report is one of relative financial disadvantage for female survivors of domestic abuse during marriage and in the years following divorce compared with other female divorcees. Not only do female domestic abuse survivors exit marriage with a range of financial vulnerabilities, but these financial disadvantages continue into the longer-term'.[4]

The Law Commission also found that the law around conduct needs to be more certain, and that it would be beneficial for the law to state clearly: (1) what forms of behaviour will be considered conduct (whether that be personal misconduct or litigation misconduct); and (2) the impact that this will or may have on a claim for financial remedies.

This criticism echoes Resolution's conclusion that:

> 'Currently, litigants and lawyers are not clear about what domestic abuse would cross the threshold of inequitable to disregard, and how to quantify the impact if it does cross the threshold. There have been references to the need for clarification and guidance since *S v S (Non-Matrimonial Property: Conduct)*[5] and *K v L*.[6] This has hitherto been resisted to allow the court wide discretion, but this discretion is now creating uncertainty'.

This call for clarification is reinforced in the *Fair Shares* report.

In this article we consider how the law could be fairer and more certain pending statutory reform.

Principles vs resources

The Law Commission's consultation gave rise to two dominant themes when it came to domestic abuse as conduct in financial remedy proceedings.[7]

The first was the view expressed by those 'who considered that there should be a greater recognition of domestic abuse as conduct, whether by defining conduct (for example in an amended section 25(2)(g)) as specifically including domestic abuse, or otherwise'. The authors of this article suggest that the majority of stakeholders adopting that position are likely to be practitioners and, in particular, solicitors. It reflects the majority view of respondents to the Resolution survey, by far the largest category of which were solicitors (57.4%). This is hardly surprising; solicitors working at the coal face of family law observe at close quarters the impact of domestic abuse on their clients before, during and after proceedings.

The alternative view was that the Law Commission found almost all members of the judiciary they spoke to were opposed to greater recognition of conduct in financial remedies cases. The report explains that those who do not agree with reform are primarily concerned 'with the practical problems this would raise in terms of stretched court resources, delays, costs, increased animosity between the parties and reduced chance of settlement'.[8] Put another way, the judiciary are concerned about the impact to justice for the many, if they spend more time dispensing justice to the few. Again, this is not surprising. The consequences of a routinely under-resourced justice system, including staff shortages and fewer judicial sitting days, are creating unhappy delays to justice. Our judges do not want there to be a shift in the law if they believe (rightly or wrongly) that such a shift would increase pressure on the family justice system further.

Thus, the tension between finding fairness for the litigants in one case, at the cost of the availability of resources for others, appears now to be the biggest determinant of the quality of justice in financial remedy cases involving domestic abuse.

Resources

The delays in private law children's cases are usually cited as a cautionary tale. The argument goes that the culture shift in the way in which domestic abuse is dealt with in private law cases has led to a big expansion of finding of fact hearings that threaten to overrun the system. The fear is that if we allow for greater consideration of domestic abuse in financial remedy cases, the system will become overwhelmed. The authors of this article disagree with that position for a number of reasons as set out below.

First, it is respectfully suggested that there is at present insufficient data to properly evaluate the 'floodgates' argument. Further, the data that *does* exist does not support the floodgates claims. There are varying figures in the research, but there is consensus that more than 50% of private law cases involve allegations of domestic abuse. Despite that, most cases are still resolved by consent.

Secondly, as set out above, despite the consensus that over 50% of private law cases involve allegations of domestic abuse, it is worth noting that only a small percentage of private law cases require a separate fact-finding hearing. Professor Rosemary Hunter KC kindly directed us to some of the latest research:

- *Domestic abuse and private law children cases: A literature review* (MoJ, 2020) – Adrienne Barnett found the research to 2020 indicated that fact-finding hearings were held in fewer than 10% of private law children cases.[9]
- 'The gap between facts and norms: contact, harm and futility'[10] – Kieran Walsh examined the claim that fact-finding hearings are said to be a rarity. He conducted a case file analysis of 102 cases with a 'risk of harm' flag, across three courts (72% of which included allegations of domestic abuse). Out of those 102 cases only *one* had a completed fact-finding hearing, with one other being scheduled but not yet held and two others having had fact-finds in earlier linked proceedings (p 38). Walsh concluded that 'fact-findings can be said to have been ordered in 3.9 percent of cases encountered in this sample group but were only completed in 0.9 percent of all cases. Fact-findings were, indeed, rarer than gold dust'.

Thirdly, whilst we understand that the comparison with finding of fact hearings in private law hearings may seem a natural one to draw, it works on the assumption that, in most cases in which domestic abuse is alleged as a feature of conduct, a preliminary fact finding hearing would be required. However, the most common purpose of a preliminary fact finding hearing in a financial remedy case is to establish third party interests which have a direct impact on *computation*. The sorts of findings necessary in a contested case to inform judicial discretion in terms of *distribution* (sharing, needs, compensation, etc) will ordinarily be considered at the final hearing.

Fourthly, the *Fair Shares* research tells us that whilst victim-survivors are less likely to achieve *any* kind of settlement in relation to their finances, if they do find themselves parties to financial remedy proceedings, they are far more likely to need a judge to determine the outcome – 17% of financial remedy cases involving domestic abuse will ultimately have their claims determined by a judge, compared to only 4% of financial remedy cases that do not involve domestic abuse.[11] Therefore victim-survivors are far more likely to end up in a final hearing (often for reasons beyond their control) in any event: why should they not be permitted to raise conduct as a feature when they do? They are in a lose/lose situation: they are forced to a final hearing due to ongoing abuse but are then prevented from giving evidence to the judge about the abuse they have suffered.

Whilst it is imperative that we find ways to reduce burdens on the court and the consequent delays to justice,[12] it is hard to reconcile the figures and observations above with the claim that any change to the current approach to conduct in financial remedies cases will 'open the floodgates'.

Principle

The *Fair Shares* research provides a clear evidential picture of the financial outcomes for victim-survivors and the difficulties they face in reaching a fair settlement, or indeed any settlement, where an abusive dynamic exists. The picture painted is one of relative financial disadvantage for female survivors of domestic abuse at the end of their marriage:

- Although female domestic abuse survivors were less likely than other women to make financial arrangements, they were more likely to require the use of lawyers.[13]
- Female domestic abuse survivors were more likely (70% compared to 63%) than other women to have incurred legal and mediation costs in attempting to reach a financial arrangement. Despite this, only 4% of arrangements made by female survivors had been made via mediation compared to one in five (19%) of arrangements made by other women.[14]
- Female domestic abuse survivors with dependent children were more likely to have their children living with them than other mothers (89% compared to 74%) at the time of divorce, and their children had less contact with their other parent (e.g. 21% reported that their children never saw the other parent, compared to 6% of other mothers).[15]
- Up to 5 years after their divorce, female domestic abuse survivors continued to be more likely than other women to be in financially precarious situations.[16]

Thus, victim-survivors are more likely to have children in their care, have spent more on mediation and legal fees, and be more financially vulnerable, both at the time of divorce and 5 years on. If the aim is to give both parties an equal start on the road to independent living, this is a bleak picture indeed.

Certainty – definition of conduct

The Law Commission reported that a 'definition of conduct, or guidance on what would be considered conduct, would be helpful for divorcing individuals'.[17] Given the number of litigants in the system without legal representation, greater clarity is now essential.

Parliament has already provided the legal definition of domestic abuse in the Domestic Abuse Act 2021.[18] Offences commonly committed during abusive marriages include, but are not limited to, assault, sexual assault, rape, harassment, coercive and controlling behaviour, stalking, making threats to kill, theft and criminal damage: all conduct which, if found to have happened by a criminal court, would lead to a conviction.

The Law Commission reported that 'a representative of a civil society organisation primarily representing men stated that an allegation of domestic abuse should only be considered as conduct by the financial remedies court where there has been a criminal conviction for that abuse' .[19] Given the very low conviction rates,[20] and the higher burden of proof required in the criminal court, it is plain that a domestic abuse related *conviction* cannot be the test for whether the alleged domestic abuse crosses the threshold into s 25(2)(g) conduct. However, at present, the fact of a conviction may make no difference *at all*. A judge in financial remedy proceedings is highly likely to rule that domestic abuse which crosses the threshold of criminal behaviour, *even where there is a conviction*, is excluded either because it is not *exceptional*, or is not relevant because an adverse financial consequence of the abuse cannot be proved.

Using the criminal statutory *definitions* as a point of reference when determining what crosses the line for conduct that is inequitable to disregard would provide clarity and accessibility for judges and litigants alike. Such an approach would not only ensure that the family justice system reflects public opinion and government views on what is serious misconduct, but it would also generate consistency within the Financial Remedies Court, and between the Financial Remedies Court and the different limbs of the justice system.

It would also alleviate an issue identified by the Law Commission, that 'the frequency with which judges deal with allegations of domestic abuse may result in abusive behaviour being less likely to cause a "gasp" than it otherwise might'.[21] The clear implication is that serious domestic abuse which, if found in the criminal court would lead to a conviction and possibly even pass the custody threshold, is such a common feature in family cases that judges have become immune to it and, by extension, too dismissive of it. We would respectfully suggest that there is some support for this in the use of language adopted when dealing with such cases. To refer to an abusive marriage as an 'unhappy' one, referring to raising domestic abuse as 'rummaging through the attic', or to refer to the relationship between an abuser and victim-survivor as 'acrimonious' minimises victim-survivors' experiences. It gives the impression that these issues are insufficiently serious to warrant proper reflection in the overall award.

Given the strides towards greater transparency in the Financial Remedies Court, it will be interesting to see what the press and the public will think of judges telling (usually) wives whose husbands have been convicted of domestic abuse, or have committed acts which would pass the threshold of conviction, that such abuse is not considered sufficiently exceptional to be taken into account when it comes to dividing their finances.

Certainty – quantification

The principled argument against allowing domestic abuse to be taken into account in financial remedy cases is that there is no clear way to quantify the impact of that conduct, especially in a sharing case.

Judges have reached different conclusions about quantification:

- *Al-Khatib v Masry*:[22] Munby J (as he then was) seemed to accept the proposition that conduct could drive him to 'the very top end of the applicable discretionary bracket applicable to the case';
- *H v H (Financial Relief: Attempted Murder as Conduct)*:[23] Coleridge J identified that 'the court should not be punitive or confiscatory for its own sake' but that the conduct is 'a potentially magnifying factor when considering the wife's position under the other subsections and criteria. It is the glass through which the other factors are considered';
- *FRB v DCA (No 2)*:[24] Cohen J set off wife's conduct (not informing H that in fact he was not the father of their child) against H's non-disclosure: 'I am quite confident that he has access to/ownership of assets which he has not disclosed as well as his interest in Company V (in particular) which I cannot quantify. I consider in the circumstances that whilst I cannot and should not try to put a monetary figure on undisclosed assets, I should likewise not reduce W's award by giving her a lower percentage of the disclosed assets'. Interestingly, therefore, only the husband in that case knows the size of the penalty paid by wife;
- *Goddard-Watts v Goddard-Watts*:[25] Macur LJ: 'I take the view that the husband's fraud is "conduct" for the purpose of subsection 2(g) in that it provides "the glass" through which to address the unnecessary delay in achieving finality of the wife's overall claim, including her unanticipated contribution to the welfare of the family post 2010'.

If, as is suggested, personal misconduct is capable of aggravating claims based on the other s 25(2) subsections, this undermines the current legal position: that domestic abuse, if it can be quantified at all, must be quantified only with reference to the causal needs it generates.

The Law Commission noted:

> 'One stakeholder suggested that, rather than taking its current approach to conduct focusing on the impact on the victim-survivor (for example, assessing their ability to earn), the court should deal with conduct on a compensatory basis. This would avoid placing pressure on the victim-survivor to have reacted in a particular way to the abuse. Where extreme bad behaviour had occurred in a short marriage but had not affected earning capacity, meaning that the victim-survivor would receive nothing using the current treatment of conduct, a compensatory payment could be appropriate.'[26]

Might the answer be to reflect s 25(2)(g) conduct as a species of *compensation?*

In *Miller/McFarlane*,[27] Baroness Hale said:

> 'A second rationale, which is closely related to need, is compensation for relationship-generated disadvantage. Indeed, some consider the provision for need is compensation for relationship-generated disadvantage. But the economic disadvantage generated by the relationship may go beyond need, however generously interpreted.'

The few compensation cases following *Miller/McFarlane* have, typically, focussed on the claims of wives who sacrificed a lucrative career, allowing room for her spouse's career to flourish whilst she focussed on the children and domestic matters.

Taking two successful claims as examples, in *RC v JC*[28]and *TM v KM*,[29] Moor J and HHJ Hess, respectively, took the view that by giving up a well-paid job for the benefit of the family, as a matter of logic, the wife had suffered relationship-generated disadvantage which, in those cases, required compensation over and above any award that might be made in her favour on the basis of need alone. The quantification of the compensation due was highly discretionary and broad brush, acknowledging the impossibility in such cases of identifying with any precision the actual loss a wife in those circumstances might be said to have suffered.

There are, arguably, parallels between these types of compensation cases and conduct cases involving domestic abuse. Once the fact of domestic abuse has been established, the research could not be clearer: a victim-survivor almost certainly *will* suffer disadvantage as a result of the domestic abuse, in a myriad of ways, both measurable and immeasurable, at the time of the divorce and for years beyond. Just as in the typical compensation case, it is likely to be an impossible task to identify with any precision the actual loss a wife in those circumstances might have suffered. Yet the victim-survivor's claims are bound by needs, without the discretionary top up afforded to wives who succeed in a typical compensation claim.

The unfairness of that distinction is compounded by the fact that some spouses who give up high-earning careers *may* have been 'active enthusiastic voluntary participant[s] in the events that give rise to the claim'.[30] Whilst that may be a generalisation, the wives in the cited authorities presumably had some agency in the decision to give up work. In contrast, most victim-survivors of domestic abuse have no agency at all.

A similarly broad brush, compensation-based approach may well lead to a fairer approach for victim-survivors. The abuse could be reflected by a standalone award, unconnected to need. This would resolve the question of whether conduct is relevant in sharing cases and would reflect what Lord Nichols said in *Miller/McFarlane*, that 'Compensation and financial needs often overlap in practice, so double-counting has to be avoided. But they are distinct concepts, and they are far from co-terminous'.

An alternative approach to quantification might be drawn from the Australian model which assesses the impact of domestic abuse in terms of *contributions*: the victim-survivor's share of the assets is enhanced to take account of the fact their contributions were made 'significantly more arduous than they ought to have been'[31] as a result of the domestic abuse. This line of jurisprudence has now been recognised in statute in Australia with the passing of the Family Law Amendment (No 2) Act 2024, which received Royal Assent on 10 December 2024. Relevant for these purposes are the amendments to the definition of 'family violence' (clear parallels with the Domestic Abuse Act 2021) and the amendments to s 79(4)(c) and s 90SM(4)(c) Family Law Act 1975: family violence considerations relating to contributions.[32]

Conclusion

All professionals working in family justice will understand and share the expressed concerns that any changes to the court's approach to domestic abuse might increase delays and put further pressure on resources. We all see the impact of those delays on our clients, and it is only right that the potential negative impact of any change to the law, practice or procedure on the issue of conduct must be weighed in the balance.

However, as Mostyn J has said 'the law … is not moribund but must move to reflect changing social values'.[33] Our 'awareness of the incidence of domestic abuse, and its harmful and pernicious effects'[34] is steadily increasing. In the absence of statutory reform, it is respectfully suggested by the authors of this article that the Financial Remedies Court must now shift its approach to properly reflect those harmful and pernicious effects in court processes and awards which are fairer to victim-survivors.

There is scope within the existing statutory framework to adopt a 'compensation' or 'contributions' approach to court-led awards in conduct cases and to apply those concepts with equal force whether it is a needs or a sharing case.

The court would need to recognise – perhaps to even elevate into a presumption – that domestic abuse gives rise in almost every case to financial and social costs which will be felt by the victim-survivor and their children many years after the relationship has ended. Further, that it is impossible to measure those costs with any precision in the vast majority of cases. That would not be an unreasonable position to adopt bearing in mind the conclusions of the *Fair Shares* report.

It is acknowledged that recognising domestic abuse via compensation or contributions models in the ways set out above would mean the court adopting a broad brush to assess the additional award a victim-survivor should receive. However, the court is well versed in taking a broad brush approach where necessary. For example, when determining the extent to which a 'mingled' asset retains its non-matrimonial nature for the purpose of (not) sharing, a judge will often stand back and make an adjustment which feels 'fair' in all the circumstances.[35]

Similarly, it would be open to the court to consider if it is fair for a victim-survivor to receive an award which is greater – perhaps 5% or 10% greater – than they would otherwise receive on a strict application of the needs or sharing principles. That is the approach which has been adopted in the more traditional compensation cases and, whilst there is judicial inconsistency in the application of the compensation principle, it remains one of the three strands of distribution identified by the House of Lords in *Miller/McFarlane*.

Would adopting such an approach lead to delays, costs, increased animosity between the parties and reduced chance of settlement? It may do in the short term, but not necessarily. Once the law is settled, that is the basis on which parties will resolve their cases. Abusers who drive cases to a final hearing in an attempt to avoid an increased award to their victim-survivor spouse will be penalised in costs.

On the 31 January 2025, the National Audit Office released its report into *Tackling violence against women and girls*.[36] It calculated that the annual economic and social cost of domestic abuse is £84 billion. In the absence of statutory reform, the Financial Remedies Court could, perfectly properly and in line with established jurisprudence, ensure that: (1) abusers take on some of the financial responsibility for the damage they cause; and (2) victim-survivors are given extra resources to ameliorate the disadvantage they will continue to suffer long after the marriage has ended.

Notes

1 https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2024/12/Financial-Remedies-scoping-report-Dec-24-1.pdf
2 We are grateful to the Law Commission for providing this clarification.
3 https://resolution.org.uk/wp-content/uploads/2024/10/Resolution_DAFRP_Report_ONLINE.pdf
4 https://www.bristol.ac.uk/media-library/sites/law/documents/2024/Final%20DA%20Briefing%20Paper.pdf
5 *S v S (Non-Matrimonial Property: Conduct)* [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496.
6 *K v L* [2010] EWCA Civ 125.
7 Scoping Report, para 9.31.
8 Scoping Report, para 9.115.
9 https://bura.brunel.ac.uk/bitstream/2438/21153/1/FullText.pdf (section 9.4 and Table 9.1, pp 91–92).
10 (2023) 35(1) *Child and Family Law Quarterly* 27.
11 *Fair Shares*, page 19.
12 For example, the proposed Express Financial Remedies Procedure pilot being introduced later this year and which aims to reduce both the number of hearings required and the duration of cases overall.
13 *Fair Shares*, page 19.
14 It might be argued that either of the statistics referred to in this paragraph could be a consequence of public funding being available, in principle, for victim-survivors. However, this does not take account of the stringent means test and low number of lawyers undertaking legally aided financial remedy work, which means that many victim-survivors are unable to access legal aid.
15 *Fair Shares*, page 50.
16 *Fair Shares*, page 56.
17 Scoping Report, para 9.91.
18 It is supported by the statutory guidance from the Home Office https://assets.publishing.service.gov.uk/media/626cffcbd3bf7f0e7947f3a4/MASTER_ENGLISH_-Draft_Controlling_or_Coercive_Behaviour_Statutory_Guidance.pdf
19 Scoping Report, para 9.75.
20 *Tackling violence against women and girls* report by the National Audit Office published January 2025 – Figure 3 – convictions per prosecutions for sexual assault were lower than every other offence. On average it takes the police 158 days to refer a rape case to the Crown Prosecution Service (CPS) as compared with 46 days for all other offences. In addition, the Office for National Statistics reported in 2024 that 1.4m domestic abuse reports to the police each year are recorded. The police categorise 800,000 of those as crimes (550,000 as incidents). Of the 800,000 'crimes' only 73,000 were referred to the CPS leading to 39,000 criminal convictions.
21 Scoping Report, para 9.93.
22 *Al-Khatib v Masry* [2002] EWHC 108 (Fam), [2002] 1 FLR 1053.
23 *H v H (Financial Relief: Attempted Murder as Conduct)* [2005] EWHC 2911 (Fam).
24 *FRB v DCA (No 2)* [2020] EWHC 754 (Fam).
25 *Goddard-Watts v Goddard-Watts* [2023] EWCA Civ 115.
26 Scoping Report, para 9.101.
27 *Miller/McFarlane* [2006] UKHL 24.
28 *RC v JC* [2020] EWHC 466 (Fam).
29 *TM v KM* [2022] EWFC 155.
30 *SA v PA (Pre-Marital Agreement: Compensation)* [2014] EWHC 392 (Fam).
31 *Kennon & Kennon* (1997) FLC 92-757.
32 For a full analysis and comparison of developments in Australia see the article by Michael Allum (The International Family Law Group LLP, England), Eleanor Lau and Byron Leong (Lander & Rogers, Australia) *International Family Law Journal*, which is due to be published shortly.
33 *GW v RW* [2003] EWHC 611 (Fam) (18 March 2003) – Mostyn J's comment related to recognising pre-martial cohabitation as akin to marriage.
34 *N v J* [2024] EWFC 184.
35 Moylan LJ in *Hart v Hart* [2017] EWCA Civ 1306.
36 https://www.nao.org.uk/wp-content/uploads/2025/01/tackling-violence-against-women-and-girls.pdf

Reflections on the Law Commission Scoping Report in Relation to Pensions on Divorce

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Chapter 10 of the Law Commission's Scoping Report is devoted solely to pensions, an issue to which its terms of reference specifically refer. The report makes for concerning reading; it notes that many divorcing couples separate without a pension sharing arrangement in place and that some do not even consider their spouse's pensions in negotiations. The Law Commission concludes that there is a 'general consensus from stakeholders that any reform of financial remedies law should examine how pensions are currently treated on divorce'.[1] This article considers the problems with the existing law highlighted by the Scoping Report as well as some potential solutions which the authors suggest the government may wish to consider in due course.

The issue in a nutshell

The Scoping Report notes various areas where there is an apparent disconnect between the law, on the one hand, and the kind of settlements which many divorcing couples negotiate on the other, which often either ignore pensions altogether or are based on an offsetting arrangement. Frequent reference is made by the Law Commission in this chapter to the recent *Fair Shares* report.[2] *Fair Shares* concluded that the law in this area is 'complicated and opaque'[3] and reported that only 11% of divorcing couples who were not yet drawing their pensions implemented a sharing arrangement.[4] The likely impact is significant given that 42% of wealth in the UK is held in private pensions[5] which often represent a divorcing couples' most valuable, or at least their second most valuable, asset.

The problems with the current law

The issues begin with a widespread lack of knowledge about pensions. *Fair Shares* found that 24% of divorcing individuals did not know if their spouse has a pension, let alone its value.[6] 23% of those with occupational pensions (which make up 90% of all pensions) did not know whether these schemes were defined benefit or defined contribution arrangements.[7] A lack of awareness of pensions is more common amongst women than men (28% of women did not know if their spouse had a pension vs 21% of men).[8] This stems, the Law Commission suggests, from the complexity of pensions, as well as a widespread failure on the part of divorcing couples to appreciate that under the existing law pensions are subject to the same principles as other assets such as the family home. Consequently, the report found that divorcing couples who agree arrangements without legal assistance 'tend to view a pension as belonging to the spouse who has accrued the pension entitlement by way of contribution or services'.[9] This, the authors acknowledge, is contrary to the existing law where 'no asset is considered off limits to meet needs, whether it is matrimonial or non-matrimonial in source'[10] (subject perhaps to consideration of the length of the marriage). Given that most divorcing individuals do not receive any legal assistance it is easy to understand how pensions are so often ignored.

This widespread lack of knowledge is compounded by difficulties encountered by divorcing individuals obtaining the necessary disclosure to reveal the existence and key terms of their spouse's pension(s). Many litigants in person will not, for example, be aware that they could, and in many cases should, expect their spouse to complete a Form P. Even after disclosure has been obtained the value and key benefits of the pension may not be readily apparent without expert advice and few unrepresented litigants will be aware of the circumstances in which the input of a pension on divorce expert (PODE) is required, let alone able to fund this.

Finally, the impossibility of sharing a pension by agreement without a formal court order means that those couples who separate without formalising their agreements in this way cannot by default share in their spouse's pensions. The Scoping Report quotes statistics from the Family Court which show that in 2023 there were 44,564 financial remedy applications against 112,135 applications for divorce or dissolution, meaning that only 40% of divorcing couples applied for financial orders.[11] No form of pension sharing (other than offsetting) was therefore available to the other 60%.

The impact of these issues

Both the Scoping Report and *Fair Shares* conclude that it is likely that many divorcing individuals are in danger of reaching an age where they can no longer work without sufficient income to meet their needs in retirement. This will particularly impact women given that they typically have lower pension savings than men having had lower average earnings across their working lives, thanks often to choices made during marriages such as time spent away from the workplace or undertaking part-time work. Many practitioners will also be familiar with the situation where a wife's income has typically been used for a family's day-to-day spending leaving the husband's to pay for longer-term costs, such as mortgage payments and contributions to pensions. The Scoping Report quotes a 2023 study commissioned by Legal & General into the gender pension gap which found that, at the time of divorce, women typically had pensions funds totalling £23,000 whereas men had accumulated £60,000.[12] The same research highlights that a woman in her 50s will typically retire with a pension worth £39,654 compared to a man of the same age who will typically retire with funds worth £84,205.[13]

The Law Commission also found that it is common for divorcing couples to offset their pension claims against an increased share of their spouse's non-pension assets. Indeed, this is referred to in the conclusions as 'the dominant practice'.[14] The authors note that offsetting is broadly considered by practitioners and the judiciary as having the potential to lead to an unfair outcome, and refer to the judgments of Thorpe LJ in *Martin-Dye v Martin Dye*[15] and His Honour Judge Hess in *SP v AL*,[16] which both express the 'orthodox view' that pension and non-pension assets should be treated separately and, where possible, offsetting avoided. Similarly, the Pension Advisory Group's second report (PAG2)[17] warns that offsetting is a complex process which can result in 'potentially irrational or unfair outcomes'. The reasons that underpin this warning are well known: offsetting risks prioritising short- or medium-term considerations of practicality over and above a longer-term need for income in retirement. In addition, it is often impossible to achieve an outcome when offsetting which properly reflects the value which the non-pension owning spouse is giving up, partly because there is often insufficient value in the pension-owning spouse's share of the non-pension assets to fairly offset the true value of their pension(s), and partly because offsetting involves valuing two very different types of assets (described as a classic case of comparing 'apples and pears' by Rhys Taylor and Hilary Woodward[18]).

It may be worth sounding a slight note of caution about the potential limitations of some of the data quoted in the Scoping Report. For example, the authors refer to a 2014 study carried out by the Nuffield Foundation, *Pensions on Divorce*, which involved an analysis of court files, and which found that pensions were disclosed in some 80% of cases but only 14% contained a pension order.[19] Practitioners may agree that there has been something of a sea change in the courts' attitudes to offsetting since the first report of the Pension Advisory Group in July 2019 and the ensuing judgment of HHJ Hess in *W v H (divorce financial remedies)*[20] which may mean that these statistics would look rather different in a more up-to-date survey. Similarly, whilst the report records that only 11% of divorcing couples implemented a pension sharing award it would be helpful to know the typical value of the pensions which were not shared as it may be that, in many cases, the time and expense involved in dividing them was considered disproportionate.

What might reform to deal with these issues look like?

Nonetheless, it is hard to argue against the overall conclusion reached by the Scoping Report that 'simplification of pension treatment on divorce would be welcome and is necessary to ensure that divorcing couples are fully aware of the value of pension assets and are able to split those assets in a way that is both fair and easy to manage'.[21] The Law Commission does not provide explicit recommendations about how this could be achieved, that being outside the remit of the Scoping Repot save that it is explicit that 'there needs to be a recognition of the gender imbalance … and consideration of how this and the gender pension savings gap could be addressed to ensure that women are not financially disadvantaged in retirement'.[22]

Readers may, however, be aware that the Scoping Report recommends that the government consider four models upon which reform of financial remedies could be based: Codification, Codification Plus, Guided Discretion and the implementation of a default matrimonial property regime. If the existing law were simply codified, this might include amending the statute to highlight the importance of pensions and that they constitute matrimonial property.[23] This approach would at least highlight to divorcing couples that pensions should not be treated differently to other classes of assets and lead people to give them closer consideration.

In the Law Commission's summary of the issues which might be included in reforms based on a Codification Plus model the authors suggest consideration of whether the Matrimonial Causes Act 1973 is amended to mention pensions as one of the factors for consideration or whether 'pension sharing should be a default position of any financial remedies law (and, if so, whether this should be equal sharing)'.[24] Whilst mandatory pension sharing would reduce the risk of divorced spouses experiencing financial hardship in retirement, this may come at the expense of meeting more immediate needs for housing unless there is a significant increase in the use of *Mesher*-type orders. It may then be difficult to square that with the statutory steer towards a clean break set out at s 24A Matrimonial Causes Act 1973, not to mention satisfying the desire of many clients to obtain finality. Equally, if compulsory pension sharing orders prevent couples from offsetting their pension claims it is likely that the cases in which the family home must be sold will increase which will sometimes make it very difficult to meet the housing needs of children, which in turn calls into question whether the courts could then discharge their statutory obligation to prioritise these. Further, mandatory pension sharing would reduce the ability of separating couples to tailor their arrangements as they wish. Many couples actively choose to prioritise retaining a home for their children over the longer-term financial security that a pension share might bring. Some may question whether the law should limit people's autonomy to do this.

Under models based on Codification Plus, Guided Discretion or the implementation of an entirely new regime, consideration might also be given to prescribing the circumstances in which pensions are divided on the basis of income or capital, to whether or not pensions (and other assets) acquired post-separation should be subject to sharing and/or needs-based claims and to the situations in which a PODE report must be obtained or in which, for example, it might be appropriate to rely on the Galbraith Tables instead. The authors acknowledge that making pension sharing mandatory raises an additional question about how obtaining valuation reports could be funded and note that 'the government should consider how this process could be made more affordable to all couples'.[25]

The authors also note the reforms already recommended at Appendix V of PAG2[26] which involve amendments to primary and secondary legislation and court forms as well as repeating the recommendations already made by the Law Commission in its earlier report, *Enforcement of Family Financial Orders*.[27] These include recommendations that the court should be able to obtain information about pensions directly from the Department for Work and Pensions and from pension providers themselves, rather than via a sometimes recalcitrant litigant. They also recommend that it should become possible to enforce financial remedy orders against a debtor's pension assets and that a new ground of jurisdiction be introduced under the Matrimonial and Family Proceedings Act 1984 to allow claims (limited to a pension sharing order) to be brought following an overseas divorce where the respondent holds a pension located in England and Wales.

The Scoping Report also suggest several changes which could be made to the way in which pension sharing orders are implemented. For example, the requirement to obtain a court order could be removed and the four-month period in which pension providers must implement a sharing order could be reduced, or at least amended so that it starts to run when the provider receives an application rather than all the information which they may request.

Conclusions

The Scoping Report uncovers widespread support for the principle that 'any reform of financial remedies law should examine how pensions are treated on divorce'.[28] The lack of widespread knowledge about pensions themselves, about the law in relation to pensions and the inability to obtain a pension share without a court order are all arguably incompatible with the aim to ensure that financial remedies law should be straightforward and easy to understand without the need for parties to spend large sums of money on legal fees.

There is predicably less consensus about how reform could be achieved and there are competing views about the extent to which the focus should be on recognising individual autonomy, prioritising the needs of children and/or on protecting divorcing individuals from experiencing hardship in later life. The report acknowledges these tensions and the difficulty in 'squaring the circle between financial – and, most importantly and practically, housing – security at the time of divorce which offsetting may offer, and the long-term financial security which pension sharing may provide'.[29] These are all issues which the Law Commission will need to consider further if the government shows an appetite for reform.

Notes

1 *Financial remedies on divorce and dissolution: a scoping report*, published on 18 December 2024 (Scoping Report), paragraph 10.83, p 297.
2 E Hitchings, C Bryson, G Douglas, S Purdon and J Birchall, *Fair Shares? Sorting money and property on divorce* (2023).
3 Scoping Report, paragraph 10.83, p 297.
4 *Fair Shares* (2023), p 193.
5 Office for National Statistics: *Household total wealth in Great Britain; April 2018 to March 2020 (January 2022)*.
6 Scoping Report, paragraph 10.33, p 288.
7 Scoping Report, paragraph 10.35, p 288.
8 Scoping Report, paragraph 10.33, p 288.
9 Scoping Report, paragraph 4.26, p 119.
10 Scoping Report, paragraph 10.42, p 389.
11 Scoping Report, paragraph 12.13, p 311.
12 Scoping Report, paragraph 10.37, p 289.
13 Scoping Report, paragraph 10.37, p 289.
14 Scoping Report, paragraph 10.87, p 289.
15 *Martin-Dye v Martin Dye* [2006] EWCA Civ 681.
16 *SP v AL* [2024] EWFC 72(B).
17 *A Guide to the Treatment of Pensions on Divorce: The Report of the Pension Advisory Group* (Nuffield Foundation, 2nd edition, 2024) (PAG2).
18 R Taylor and H Woodward, 'Apples or Pears? Pension offsetting on divorce' [2015] Fam Law 1485.
19 Scoping Report, paragraph 10.3, p 283.
20 *W v H (divorce financial remedies)* [2020] EWFC B10.
21 Scoping Report, paragraph 10.76, p 296.
22 Scoping Report, paragraph 10.87, p 298.
23 Scoping Report, paragraph 4.27, p 119.
24 Scoping Report, paragraph 1.74, p 17.
25 Scoping Report, paragraph 4.28, p 119.
26 See PAG2, p 159.
27 https://lawcom.gov.uk/project/enforcement-of-family-financial-orders/
28 Paragraph 10.83, p297.
29 Paragraph 1023, p 287.

Trusts in Financial Remedy Proceedings

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'Yet once more, O ye Laurels, and once more

Ye Myrtles brown with Ivy never sere

I come to pluck your berries harsh and crude

And with forc'd fingers rude.'

When studying for my A level in English literature I never quite worked out who Myrtle Brown was, nor whether Laurel was her sister or Ivy Neversere a friend of theirs. In History I studied the period when Milton was writing[1] but I never found their names mentioned in the history books either. These days you'd just Google them, of course, but the world wide web wasn't a Thing back then. What I always took from those opening lines of *Lycidas*, however, was that feeling of returning to a particular theme for the *N*th time.[2] And maybe the specifics aren't important anyway. Poetry is emotion recollected in tranquility, as Wordsworth nearly said.

So when I received an email asking if I would mind returning to the thorny issue of the treatment of trusts in financial remedy proceedings, willing as I was in principle to put pen to paper[3] I did think 'why? What can I say about trusts that hasn't already been said?'

To which the answer, after a moment's further reflection, seemed obvious. Vast tracts have been devoted to the ways in which an applicant can access the resources held within a trust. The answer, for the sake of completeness, is that a trust may be taken into account as a resource available to the parties,[4] it may be a nuptial settlement that can be varied under s 24(1)(c) Matrimonial Causes Act 1973,[5] and occasionally what looks like a trust isn't actually a trust at all and the 'trust' assets can be dealt with in the usual way.[6]

But whilst many nice points arise in financial remedy cases featuring trusts[7] there is a logically anterior question to that of *how* the court can distribute the wealth contained within a trust, which is *why* it should. To my surprise, reviewing the literature, comparatively little has been said about this: so here goes.

What is a trust?

I start with the basic definition of a trust:

> 'A trust is a legal relationship in which the owner of property, or any transferable right, *gives it to another* to manage and use solely for the benefit of a designated person. In the English common law, the party who entrusts the property is known as the "settlor" (S), the party to whom it is entrusted is known as the "trustee" (T), the party for whose benefit the property is entrusted is known as the "beneficiary" (B), and the entrusted property is known as the "corpus" or "trust property".'[8]

I've emphasised that phrase 'gives it to another' because it's a zinger. It gives rise to an issue the full significance of which is sometimes not understood when trusts feature in financial remedy proceedings.

Why should trust assets be taken into account at all?

Back to basics. The three bases upon which the court can properly exercise its powers under Part 2 MCA 1973 are of course needs, sharing and compensation, which I'm going to ignore.[9] A trust *ex hypothesi* involves dealing with assets that belong to someone other than the spouses. So *why* should the court be able to take money that S has settled on T for the benefit of B1 and B2[10] and apply it instead for the benefit of W? Why, in other words, is it legitimate to take money that doesn't belong to the spouses and use it for the benefit of those spouses? They would not be entitled to plunder that trust fund in any other circumstances, so why should the fact that they are getting divorced give the court a power to benefit them from money that belongs to someone else and was intended to benefit someone else?

The answer is actually quite simple: because Parliament has conferred that power on the court, to use in appropriate cases. One only needs to glance briefly at *Miller*[11] to see why: provided the relevant settlement falls within the scope of the section, an order under s 24(1)(c) can be justified in a 'needs' case.

But, as Munby J (as he then was) said in *Ben Hashem v Shayif* [2008] EWHC 2380 (Fam) the power to vary a nuptial settlement is a 'jurisdiction to "vary", not a jurisdiction to confiscate'.[12] Like any power contained in Part 2 MCA 1973 it must be exercised in accordance with the factors set out in s 25, which of course includes an obligation to take into account all the circumstances of the case. Thus the court is compelled to take into account the position and interests of those who were actually intended to benefit from the trust. So the task facing the court, where it is asked to vary a trust that on the face of it does not benefit an applicant spouse at the expense of those it actually does benefit, is to balance those competing interests and arrive at a solution that is fair in all the circumstances. There may be a suspicion in some such cases that the nature of the litigation before it inclines the court to be rather too sympathetic to the needs of the applicant spouse and insufficiently sympathetic to the position of the non-spouse, but that, if it is anything more than a suspicion, is frankly one of the risks of litigation of this nature. The power to vary a settlement is the only form of order that permits the court to make financial provision in favour of spouses at the expense of non-spouses. It is a power that should be exercised cautiously, as Munby J's seminal judgment makes clear, but it would not be on the statute books if Parliament thought it should not be exercised at all.

Sharing claims and trust assets

The more difficult question is should assets held in trust be included as part of a *sharing* claim? Returning to *Miller*, at [137] Baroness Hale made the point that the need for some rationale before the court's powers are exercised flows from the fact that English law starts with a regime of each spouse holding their own property and that it is unprincipled for the court to deprive a spouse of their lawful property simply because it can. The argument in the higher-value cases is, of course, that each spouse is entitled to a fair share of the fruits of the marital partnership.

How do trusts fit into that framework? 'It depends on the trust', is the glib answer, but also the correct one. Plainly, each case will need to be considered, and analysed, on its own merits, but in broad terms cases of this nature can be divided into two categories: those where the assets held in trust are *not* the fruits of the labours of the spouses (or either of them) and those where they are.

What of the first? Suppose the class of beneficiaries under a settlement includes a husband whose father settled the proceeds of sale of the business that he (the father) built up during his lifetime. Suppose also that the settlement fits snugly within s 24(1)(c). It is easy to see why the court might vary that settlement on a 'needs' basis, but what is the rationale for dealing with it on a 'sharing' basis? It is worth bearing in mind Baroness Hale's qualification at [137] of *Miller*: she was not dealing there with the totality of resources in the sense of anything that might fall within the wide ambit of s 25(2)(a), she was dealing specifically with assets actually belonging to the parties.

What, then, is the basis for the argument that assets whose provenance is outside the marriage form part of the fruits of the marital partnership? This is not fruit that has been nurtured and harvested by the spouses themselves, it is a windfall. It is no more 'matrimonial' in nature than an inheritance or a pre-death gift intended to avoid inheritance tax.[13] The whole point of a trust is that the class of beneficiaries, even if that includes the spouses, are *not* the owners or even the controllers of the trust assets.

Marital home held in trust

Perhaps the most difficult *spes* of property in this context is the matrimonial home. Imagine a case where a family trust makes available a property for a young couple to live in at some nominal rent. The mere act of providing this property can itself constitute a nuptial settlement[14] but how should the court exercise its' discretion over that settlement? Should it simply award something in the nature of a licence to occupy, as in *Ben Hashem* itself, or should it go further and deal with the fee simple in that property?

The high water-mark argument for saying the spouses should be awarded the property outright comes from *White* and *Miller*, in particular those well-known passages about the importance of the matrimonial home. At [22] of *Miller* Lord Nicholls said:

> 'The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.'

Thus, the argument goes, a property that is made available to the spouses other than on arm's-length terms can, where the jurisdiction exists, be treated as matrimonial property and subject to the sharing principle, even if this deprives other beneficiaries of the potential to benefit from that asset.[15]

The risk is that this argument takes Lord Nicholls' observations out of context. First, he said 'normally', not 'always', but more importantly he was plainly referring in *Miller* to the situation where one or other spouse actually owns the matrimonial home. In Scottish law, for instance, 'matrimonial property' has a specific statutory definition and function[16] which requires the court to differentiate between 'property *belonging to the parties or either of them*[17] at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party)' and any other property. In English law 'matrimonial property' has the same essential meaning but not the same function. Under English law, whether property is properly regarded as 'matrimonial' is a factor that informs the exercise of discretion, not a statutory factor that mandates the particular treatment of such property. So how, the counter-argument goes, can property, not owned by either of the spouses, even if it is the home where they live, be regarded nonetheless as their 'matrimonial property'? It is not their property at all.

Financial fruits of the marriage held in trust

Let us consider the second possibility, where the parties themselves have generated the value held within the trust, and have settled it (typically for tax, dynastic or asset-protection reasons) into a trust. In a number of such cases the settlor[18] gives a good impression of seeking to have the best of both worlds, that is to retain all the access and control over the trust property that an absolute owner would enjoy, yet retain the benefits of ownership within a trust structure.

Plainly, each case in this category will be fact-dependent. But let us start with an arm's-length trust where the parents, say, have specifically settled 90% of their fortune on trust for the next generation with the intention that this will avoid (or at least minimise) inheritance tax. Some years later they get divorced. W says 'I had no part in that decision, H was simply trading with my as-yet-unascertained share of the matrimonial property'.[19]

The problem with that is that it is difficult to see any legitimate basis upon which a claim can be made to property that was once owned by one spouse but subsequently disposed of in arm's-length circumstances. A sum of money donated to charity, for instance, could not be said to still be part of the parties' matrimonial property, albeit one *might* be able to argue that an add-back should be made.[20] So how can a party validly claim, following a legitimate piece of estate-planning, that assets transferred into a trust should still be regarded as 'matrimonial property'? As Mostyn J observed in *BJ v MJ* the court should hesitate 'before overriding a decision or agreement made during a marriage to isolate funds in a separate legal structure for the formal benefit not only of the spouses but also of their children and remoter issue'.[21]

Plainly all will depend on the circumstances. If, under the trust instrument in question the parties retain an entitlement to benefit, it might be possible to regard some proportion of the trust fund as having being notionally ringfenced for their ongoing benefit, and thus subject to the sharing principle. But what if the whole trust fund benefits only the next and subsequent generations? It may be, if the evidence justifies it, that an attack on the creation of such a trust could be mounted under s 37 MCA 1973 or ss 423–425 Insolvency Act 1986. That apart, it is difficult to see how property that might formerly have been regarded as wholly matrimonial but is now held in a validly settled trust, could possibly remain subject to the sharing principle after the parties, or one of them, decided to give it away. Returning to [137] of Baroness Hale's speech in *Miller*, it is a feature of English law's system of separate ownership of property by spouses that each of them is free to do what they will with their property, even during a marriage, subject of course to the safeguards and modes of redress Parliament and the courts have been willing to put in place to remedy situations where that freedom is abused. But where those *ex-post facto* adjustments are not available, the question again arises of how property not owned by the parties can be said to be matrimonial property at all?

Sham trusts

The spouse who wants the best of both worlds obviously creates difficulties, at least conceptually. Again, the outcome is always fact-specific. Curiously, there are still no reported cases of the argument even being run in the context of a divorce that a trust deed contains so many reservations and limitations on the trustees' powers that it is not in truth a valid trust at all. Arguments that a trust is a sham are evidentially difficult because much depends on the necessary shamming intention being shared by settlor and trustee alike, which will frequently be difficult to prove – especially if the trustees are professional trustees who may be subject to local regulatory requirements.[22] Many cases involve trustees taking a somewhat lax approach to the proper discharge of their duties in a way that always seems to benefit the settlor in particular, but whilst that may be a breach of trust, it does not render a validly established trust a sham and it does not convert a trust fund into matrimonial property.

None of this is to say that in any given case, on its own particular facts, assets held in a trust fund cannot properly be regarded as matrimonial property and subjected to the sharing principle. But considerable care must be taken before the court can safely arrive at such a conclusion.

Notes

1 *Lycidas* was written in 1637 as a lament for a friend of Milton's who drowned in a shipwreck in the Irish sea.
2 Where *N* is a number in excess of that which can actually be recalled without assistance from technology.
3 Well, I've started with metaphors and the alliterative qualities of 'putting finger to keyboard' still need some refinement.
4 See e.g. *Charman v Charman* [2007] EWCA Civ 503.
5 That is, 'any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage'.
6 See e.g. *Mezhprom Bank v Pugachev* [2017] EWHC 2426 (Ch).
7 In *Quan v Bray & Ors* [2017] EWCA Civ 405 for instance one of the issues that the court had to grapple with was whether a trust that was not a nuptial settlement at its inception could subsequently become a nuptial settlement within the meaning of the Act.
8 That's from Wikipedia. Yes, Wikipedia. Anyone who wishes to enter into protracted correspondence about why this is not on all fours with the definitions in *Snell*, *Lewin*, *Halsbury* or anywhere else should contact rtaylor@36family.co.uk.
9 Sorry, but the word limit is strictly enforced in these articles.
10 When my children were growing up they enjoyed an Australian kids' TV show called *Bananas In Pyjamas* in which the principal characters – fully grown men dressed as bananas – were known as B1 and B2. So whenever in a dry chancery-type law book there is a reference to S creating a trust for the benefit of B1 and B2 my mind often returns to those nocturnally-attired antipodean plantains and wonders how many settlements they actually benefit from.
11 *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.
12 *Ben Hashem v Shayif* [2008] EWHC 2380 (Fam) at [297].
13 Even there, the property transferred might subsequently become matrimonialised depending on the use to which it is subsequently put; and, yes, I am conscious of the irony of using the word 'matrimonialised' – if it even is one – in an article I began by quoting Milton.
14 See e.g. *N v N & F Trust* [2005] EWHC 2908 (Fam).
15 See e.g. per Mostyn J, *BJ v MJ & Ors* [2011] EWHC 2708 (Fam) at [10].
16 See Family Law (Scotland) Act 1985, s 10.
17 Emphasis added.
18 Let's maintain the ubiquitous and sexist assumption that it's always the husband who is the economically stronger party.
19 *Rossi v Rossi* [2006] EWHC 1482 (Fam) per Nicholas Mostyn QC.
20 See e.g. *Vaughan v Vaughan* [2007] EWCA Civ 1085.
21 *BJ v MJ* at [11].
22 See e.g. *A v A & St George Trustee* [2007] EWHC 99 (Fam) at [54] per Munby J (as he then was).

Dealing with Private Equity Investments in Financial Remedies Cases

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Investments in private equity funds are a feature of some 'big money' divorce cases. In some cases, investments have been made in private equity funds and those investments, or profit sharing entitlements deriving from them, form part of the matrimonial or non-matrimonial property of the parties. The main difficulty in this type of litigation is that the value of such investments is often difficult to ascertain reliably, and, in any event, they are often highly illiquid and realisable only at some future point. Those are not difficulties which are unique to private equity investments, and they are often capable of resolution by way of a *Wells v Wells*[1] sharing of the value when it is ultimately realised. Greater complexities tend to arise where one of the parties to the marriage is also professionally involved in the ongoing management of a private equity fund, particularly where that involvement continues in the period following the separation of the parties until the private equity investments mature at some point in the future. There is a limited body of reported case law in which these issues have been discussed.

Private equity in context

The private equity finance sector serves both investors and businesses. It enables wealthy investors (both individuals and institutions) to have access to investments which require a commitment of significant capital for a period of several years, with the prospect of potentially high returns, but with a consequently high degree of risk. On the other side of the equation, it enables new businesses to raise capital necessary for their development and growth, or for more mature businesses to be bought out or have capital injected in order to increase their value. Generally speaking, venture capital funds tend to invest in new businesses and startups, while private equity funds tend to invest in more mature companies, usually by acquiring such businesses and either increasing their value or otherwise extracting their value before exiting the investment a few years after acquisition. Both venture capital and private equity funds, as well as some other very specialist types of investment funds, share many common features and we use the term 'private equity' in this article in this broader sense.

The UK private equity market continues to be buoyant – it is estimated to have reached £4.6 billion in 2024.[2] Private equity-backed companies are believed to account for c.5% of UK private sector revenue every year and c.15% of UK corporate debt. Private equity deals reached a peak of 1,900 in 2021, with an estimated £152 billion being spent within 12 months, according to data from Pitchbook. City AM has reported that a trillion pounds has been spent in UK private equity deals since 2014.[3] Whilst the US represents the largest market for private equity investments globally, the UK is increasingly seen as the European hub. Aside from the direct fiscal impact of these large financial institutions in managing investments and assets, private equity also has a broader impact on the economy. It is estimated that private-equity-backed businesses generated £286 billion in GDP in 2023, accounting for 6% of the UK's total.[4]

London is the home to many large private equity funds, usually structured as partnerships or LLPs, with a significant number of people working in the sector.

It is against this backdrop that practitioners need to be aware of the features of this asset class, particularly as regards remuneration structures for those working within such funds. This will often involve significant capital interests in the fund(s), usually including potential future capital distributions. In some cases, analysis of a party's remuneration package and the fund terms may require involvement from a transactional funds lawyer. This article aims to serve two purposes: to provide a primer on private equity for those less familiar, before turning to how private equity interests and receipts/remuneration have been treated in recent case law.

The fundamentals of private equity

On the one hand there are 'traditional' investments, which include cash, bonds, and holdings in public companies. On the other, there are 'alternative' investments, which include complex and private investments focussing on typically illiquid holdings. The latter asset classes include private equity, infrastructure, real estate, and private credit.

Private equity is simply defined as equity (or equivalent) investments in private companies or assets (i.e. not listed on a public stock exchange). Originating from the 1980s, private equity as we currently know it has been traditionally associated with family offices and institutional investors that meet specific requirements for income, wealth, or financial acumen, i.e. qualified purchasers that can participate in relatively long-term illiquid investments. More recently, private equity investing has become more widely accessible. Investors can access private equity in the three ways. First, by direct purchase of an equity interest in a privately owned asset/company. This offers good upside prospects if the investor chooses well. The limitation intrinsic to this route is one of access, which may not be easy, as well as the risk of concentrating monies in one private equity investment. Secondly, an investor can access private equity through a fund (i.e. by investing in a fund which itself is invested in private equity). Sometimes these are listed investment funds which carry tax advantages for those investing in them, such as Venture Capital Trusts or Enterprise Investment Schemes. However, larger investments tend to be in a pooled investment vehicle where a private equity manager, or general partner (GP), is professionally engaged to identify, assess, acquire, and manage investments using capital from investors, known as limited partners (LPs). The terminology refers to the fact that most investment vehicles are structured so that the GP controls the partnership vehicle operationally (often a 'fund' comprises multiple legal entities, often in more than one jurisdiction). The GP will have a general liability for the actions of the fund, whilst the LPs are limited to the capital that they have committed by way of investment. This is the traditional private equity business model, and oftentimes when the phrase 'private equity' is used it is referring to this arrangement.

The various private equity fund phases are summarised below, but in short, the fund manager will draw down on the capital committed to invest in companies as and when appealing opportunities are identified. The investment in such opportunities is typically planned to remain in place over the course of many years before there is an exit event, most usually a sale of the underlying business which was invested in. The intention is to substantially increase the value of the fund's stake in a business and realise profit when the time comes to exit through a liquidity event (e.g. a sale or public offering). As exits occur, the fruits of the investment are returned to the investors until, ultimately, the final investment is realised, and the fund itself is liquidated. Clearly, there is substantial risk that the investment may not realise a profit and the investors will therefore receive back less than they invested.

The third way that an investor can access private equity is via a multi-manager fund. This is similar structurally to a private equity fund, save that instead of investing in individual companies, the umbrella fund will invest in other private equity funds (a fund of funds). This is seen as providing broader diversification, but not necessarily eliminating the risk of loss, by allowing the investor to simultaneously access diverse asset classes, sectors, managers, and investment strategies.

Key private equity strategies

There are three or four general private equity strategies, depending on whether distressed assets are included. They each target a different phase of the business lifecycle. All of the strategies require the construction and management of portfolios of investments in companies and businesses that are selected in return for a direct capital investment (primary investment) or as payment to an existing equity holder to buy the shares or interest in the business held by that equity holder (secondary investment). Rather than simple loans to the business, the private equity or venture capital fund will take shares in the underlying business, or at least convertible loan notes by which a loan can be converted to shares at the fund's election.

Venture capital

Typically, these are new businesses that require funds to develop. They turn to private equity funds to finance activities such as R&D, the manufacturing of products, and hiring personnel. They are often in the technology sectors where an initial piece of design or technical development requires a large capital investment to put it into production or use. These investments in early-stage ventures target businesses that have the potential to grow fast. They rely on successive rounds of funding in order to achieve that growth. In other words, the fund manager is effectively adding cash to the balance sheet of the nascent business in exchange for equity, frequently as part of a syndicate of investors.

Growth

This refers to businesses that are already established. Monies are typically invested for the purpose of restructuring operations and facilitating acquisitions. The ownership stakes can range from a minority to a majority interest.

Buyout

This is the largest sector of private equity investment. A buyout usually involves the purchase of a controlling stake in a mature private company via a secondary investment. The purpose is to provide liquidity to the remaining initial investors and to invest funds to meet other ancillary purposes, such as improving efficiency, facilitating access to new markets, etc. These strategies look to longer-term value creation.

Distressed

A distressed private equity strategy looks to the end of the business's typical lifespan. They target enterprises that need radical financial investment and, usually, restructuring and an overhaul of internal operations. This strategy sometimes involves a change in management with a view to achieving a turnaround.

Phases of private equity fund activity

Private equity funds have three broad phases, sometimes described as portfolio construction, value creation, and harvest (or analogous terms).[5] The first involves finding investments that align with the fund's investment strategy. Investors' funds are committed to purchase those investments. The second phase is determined by the strategy pursued. In a broad sense it usually involves making operational, strategic, and sometimes structural changes to the businesses (i.e. measures to increase the value of the portfolio). The work undertaken by the fund managers, the GP, in each of the first two stages is time-consuming and complex. Typically, the fund will appoint directors to be involved in the management of the business it has invested in. The GP will be remunerated for the work done in managing the investments (see below). It is possible that during this second phase LPs may receive distributions resulting from the sale of portfolio interests. Finally, the 'harvest phase' is where the fund exits the various positions, either by IPOs or private sales, with profits being distributed to the investors.

Private equity in matrimonial finance

As noted by Mostyn J in *A v M*,[6] the nature and structure of a typical private equity fund was described with helpful clarity by Coleridge J in *B v B*.[7] This case featured 'M', a 'prominent private equity house in the UK':

> '25. M's *modus operandi* is the *de facto* standard private equity model:
>
> i) (exclusively institutional) investors are invited to commit monies to an investment fund;
>
> ii) once the commitments have been received the fund managers, typically led by the husband, then seek out existing and established businesses to acquire normally a controlling ownership interest;
>
> iii) having acquired a business M inserts board members, typically a chairman and typically the husband, and runs the newly acquired business with the primary strategy of adding value to the business;
>
> iv) at an opportune moment in the cycle of the market but, more importantly, the business itself, the business is sold and the investment in it liquidated hopefully at a profit. Sometimes there may be a partial sale and, obviously in such a high-risk enterprise, occasional disasters.
>
> 26. M has raised a number of funds since its inception. As each fund nears full investment (i.e. the commitments to the fund have been almost exhausted in acquiring businesses), a new fund is "opened" seeking investors to make fresh commitments. The current funds in existence are designated A, B and C. All earlier funds have been fully realised and the proceeds distributed to the investors and to M.'

Coleridge J went on (at [27]) to explain how the fund and its managers are rewarded for the work done by them:

> 'i) the fund is debited with fees (generally 1.5% p.a. reducing to 1% p.a. after a fixed period, typically 5 years), paid to M, which fund the overheads including remuneration for the partners and staff for running the fund by way of salary and bonuses – these fees are not directly performance related;
>
> ii) the individual investment executives, including partners, are required to "**coinvest**" with the outside investors into each business into which the fund invests, so that they have "skin in the game", and the values of those coinvestments will vary proportionately with the success or failure of the businesses into which the investment has been made; and
>
> iii) for the purpose of this case most significantly, the investment executives are entitled to a "carried interest" (or "**carry**") in the fund overall, so that provided that the monies returned to the outside investors include a positive return exceeding the contractual "hurdle" rate, they will retain 20% of the profits made. If that "carry" has been earned by the clearing of the hurdle, it is divided in predetermined proportions between the individual partners, including the husband.'

Although the fees charged and the hurdle rate will vary from fund to fund and private investment to private investment, the business model described above is common in the private equity sector.

The focus of the comparatively small pool of cases dealing with private equity funds is that of remuneration and receipts, which may be historic or anticipated, and in particular the way in which co-investment capital and carried interests should be categorised and dealt with on divorce. Coleridge J neatly described the three streams of return for an individual operating as the GP of a private equity fund as follows:

> '28. So it is that the husband's potential future receipts from M comprise (or, at least, depending upon the success of the underlying businesses, may comprise):
>
> i) **salary** and **bonuses** (it is not suggested by the wife that these will be shared going forward) which are paid from M fund management profits;
>
> ii) any realisations of **existing co-investments** (whether made during the marriage or since the separation);
>
> iiii) any "**carry**" received by the husband (whether from investments in businesses made by the funds before or after the separation, or in the future, and whether or not the "success" of those businesses is achieved before or after the separation or in the future).'

In view of the clear explanation of the law as to post-separation earnings by the Court of Appeal in *Waggott v Waggott*[8] the wife's concession in *B v B* that she was not entitled to share in the salary and bonuses earned by the husband after the separation was clearly correctly made, and this element of remuneration from a private equity fund for the day-to-day work done in managing it presents little controversy or difficulty.

Likewise, capital contributed to a private equity fund to form the co-investment is also unlikely to present difficulty in most cases. It will usually be regarded as a capital asset like other capital assets. Where matrimonial capital has been used to make the co-investment the value of the co-investment is likely to be shared equally. In *B v B* it was conceded by the husband that the wife was entitled to share equally in the fruits of the co-investments made within the marriage, but he disputed her right to share in co-investments made to a new fund where the funds for those investments came from the husband's post-separation accrual. Coleridge J decided that the wife was entitled to 50% of those post-separation investments as well on the basis that 'the respondent's [post-separation] efforts are merely a seamless continuum of similar pre-separation activity and there is no obvious delay in the proceedings'.[9] It can be questioned whether such an analysis could be applied now in the light of the Court of Appeal's more recent decisions in *Waggott v Waggott*[10] and *Standish v Standish*.[11] In *A v M*, Mostyn J also shared equally the co-investments which had been made during the marriage. However, to keep the *Wells* sharing 'as limited as much as possible in its size and range' he allocated the whole of the wife's share in the co-investments to only one of the two funds so that the wife would be a shadow partner in only one rather than two funds.[12]

Complications may arise in relation to the sharing of co-investments where the terms of the private equity fund provide for future capital to be committed to the fund. Solutions to this might be that both parties should contribute in proportion to their ultimate shares in the co-investment, or if only one party will contribute this should result in an adjustment of the sharing of the co-investment which takes into account the further contribution being made by only one party.

The area of great difficulty is the carried interest. In *B v B*, Coleridge J took the view that the carried interest 'is in the nature of a bonus for effort earned for generating a super profit and is only ascertainable as the very end of the investment management process'.[13] He awarded the wife 50% of the carry in fund A (where the carry hurdle had already been crossed before the parties separated), 20% of the carry in fund B where the hurdle had not yet been met, and nothing from the carry on fund C where pretty much all the investments in the fund post-dated the separation.

In *A v M*, there was some debate as to whether carried interest constituted a return on capital investment or an earned bonus. Mostyn J was not bound by the first-instance decision of Coleridge J in *B v B* and did not even cite Coleridge J's characterisation of the carried interest as 'in the nature of a bonus'. Mostyn J held the view (at [10]) that it was neither exclusively a return on capital nor an earned bonus, but rather a hybrid resource with the characteristics of both. Various points of interest arise out of that authority:

- Firstly, the marital acquest was to be calculated at the date of trial, as Coleridge J did in *B v B*. Mostyn J observed that this should be the general rule save in circumstances where there has been needless delay in bringing the case to trial (the reasons for his view are set out in his decision in *E v L*[14]). In *A v M*, Mostyn J elaborated (at [14]):

> 'it is normally the right date because the economic features of the parties' marital partnership will have remained alive and entangled up to that point. The fruits of the partnership will not have been divided and distributed. The share of one party in the partnership assets is likely to have been unilaterally traded with by the other. I accept that a different view might be taken in respect of a completely new asset brought into being during the interregnum between separation and trial. But that is not the case here. Here we are concerned with assets acquired pre-separation but worked on during the period up to trial.'

- In that case, Mostyn J decided that the marital, and therefore shareable, element of the carried interest should be calculated linearly over time by reference to a formula. The formula applied was A ÷ B = C, where: (i) 'A' is the period (measured in months) from the establishment of the fund to the date of trial; (ii) 'B' is the number of months from establishment to first close plus, in that case, 180 months, being 9 years from first close, which Mostyn J had determined on the evidence (at [12]) to be the term of the fund; and (iii) 'C' is the marital fraction of the recipient party's carry, expressed as a percentage.[15] The projected value of the carry is then multiplied by C to give the marital carry which is to be shared.
- In that case, the marital carry was to be shared equally, a decision which Mostyn J found to resonate with fairness based on the facts of the case.[16]
- Mostyn J dismissed 'briefly but emphatically' the submission that the wife should be entitled to share in carry generated by the husband following the date of trial by virtue of her 'contributions to the family' (caring for the parties' 12-year-old daughter, who was at boarding school). He found that the argument was completely untenable (at [17]):

> 'The concept of the sharing of the acquest is predicated on the parties being in an economic partnership. The decision of the judge at trial is to dissolve the partnership and to distribute fairly, which means normally equally, the partnership assets. The idea that a valid claim can be made to share assets which have already been divided and distributed, or to share earnings or profits which have been generated after the dissolution of the partnership, is completely unprincipled. It would be a good thing if this argument were finally to bite the dust.'

- It was observed that *Wells* sharing (discussed further below) should be as limited as possible both in its size and in its range. Acknowledging the husband's dissatisfaction with a scenario where the wife would be a shadow carry partner of both funds, Mostyn J reallocated the wife's share of the husband's carry in Fund 2 to his carry in Fund 1. Co-investments were allocated in the same way.[17]
- The wife was to receive her share of the carry and co-investment by means of contingent lump sum orders against the husband. It would be 'unreasonable and unrealistic for her to seek to be granted a formal transfer of part of the husband's proprietary interests in the funds' (at [29]). Mostyn J was satisfied on the balance of probability that the wife would in 4.5 years' time receive the sums calculated (and that the husband would receive the sums calculated in respect of his interests in 4.5 and 6.5 years' time). It was acknowledged that they would not get those exact sums, but it was more likely than not that amounts of that order would be received. The authority refers in that regard to the standard of civil judging (balance of probabilities) and the decision of Lord Diplock in *Mallett v McMonagle*:[18] 'In determining what did happen in the past the court decides on the balance of probabilities. Anything that is more probable than not it treats as certain'. This binary rule, it was said, ought to apply to judicial findings about the likelihood of future events, and in the context of s 25 Matrimonial Causes Act 1973, the court should be entitled to take into account both the probability of a future event occurring, and also the probability of it not occurring and another event happening. Mostyn J commented that the risk that the wife would receive nothing was negligible.
- Although, the decision was reached 'with the assistance of mathematics', it retained at its heart a broad evaluation of fairness.[19]

Although not explicitly explained in the judgment, the rationale to Mostyn J's linear formulaic approach to sharing a carried interest explained in *A v M* is to treat the overall fruits of the carry as a capital sum which is then identified as being matrimonial or non-matrimonial in direct proportion to the number of years of work performed by the husband on the fund during the marital partnership and after the marital partnership ended. In other words, each year of work on the fund during the carry period is deemed to be equal in terms of its effect on the ultimate value of the carry. The carry is essentially assumed to start with a nil value and the value is then allocated to every year thereafter in an equal way. It was really just an application of the so-called 'straight line' apportionment method that Mostyn J had deployed in *WM v HM*[20] in relation to a business asset. This contrasts to the approach of Coleridge J in *B v B* (above) where he gave considerable weight to the time when the hurdle rate was met. Where it was met before separation with carry was shared equally but where it was not yet met, the share was reduced. While having simplicity and consistency to commend it, it might be questioned whether Mostyn J's linear approach is fair in the event that the evidence indicates that the carry hurdle was met before the separation, or if there was something exceptional about the work done in either the marital period or the post-separation period which had a disproportionate effect on the value of the fund.

The parties in *A v M* have had two further outings resulting in reported decisions. In *A v M (No 2)*, a dispute was ventilated as to the construction of Mostyn J's order in circumstances where part of the husband's investments in Fund 1 were transferred into a continuation fund rather than being realised.[21] The wife complained that she had not been given the opportunity to participate in the continuation fund and was instead forcibly cashed out against what would have been her will if she had known that the husband was to remain invested. Sir Jonathan Cohen identified his sole task as being to construe the final order, specifically considering whether it provided the wife with the option to elect to carry over to the continuation fund or whether it required the husband to pay lump sums calculated in accordance with the percentages determined by Mostyn J (in respect of the husband's interests in Fund 1).

The parties' substantive positions are summarised at [29]. In short, the wife asserted that the whole rationale of the order was to give the husband the time with his colleagues to build up the value of Fund 1's assets. She argued *inter alia* that no consideration was given to the possibility of any part of the investments in Fund 1 being transferred to a continuation fund, and further, that the wife should not be deprived of the opportunity of sharing in the growth of the husband's assets (which on his interpretation, he alone would benefit from), and nor should she be worse off for being a shadow partner rather than a shareholder. For his part, the husband argued that the order was a contingent lump sum order, rather than an order providing the wife with an interest in any of the underlying assets. In the event of breach of the mandatory obligation to pay the lump sums, the wife could enforce payment. Among other arguments, it was also said that had the husband rolled over the wife's proportion of what he had invested in the continuation fund, rather than paying her its value, he would be in breach.

The judgement cites the decision of *Barnard v Brandon*, the agreed applicable law on the construction of court orders.[22] Sir Jonathan Cohen concluded (at [32]) that the order was clear insofar as the husband's obligation was to pay the appropriate percentage of the proceeds due to or received by him from respectively the co-invest or carry funds net of tax and transactional costs, and that was exactly what the husband had done. The wife received full value for her interest. Having paid the wife, the fact that the husband invested, as a matter of obligation, some of the proceeds into the continuation fund did not lead to any requirement for him to give the wife the same opportunity. Whilst what happened was unforeseen, it did not follow that if Mostyn J had been asked to consider this possibility he would have given the wife the opportunity to roll over her interest into the continuation fund. Moreover, whilst the event was unforeseen, that was not a ground for going behind the words of the order, which were clear ([38]). Sir Jonathan Cohen concluded that he saw no unfairness arising from how things had turned out.

The difficulties arising on *A v M (No 2)* could have been avoided by the final order making specific provision for the wife to have the right to elect to rollover her share of the carry into the continuation fund. However, whether it would be fair to include such a provision in an order is another question. It will be recalled that in his original decision in *A v M*, Mostyn J deliberately placed the entirety of the wife's deferred *Wells v Wells* share of the co-investments and the carried interests against only one of the two funds in order to limit the parties' ties to each other. The purpose of a *Wells v Wells* sharing is to fairly share the value of a difficult to value asset whose value is illiquid until a future time. It is not intended as a means by which divorced parties should be compelled to enter into further joint investments in the future once the liquidity issues are resolved.

This litigation is ongoing. The wife applied to set aside the final order made by Mostyn J on the grounds of misrepresentation as to the period over which the carried interest was to be earned. In *A v M (No 3)*, an interim decision, Sir Jonathan Cohen declined to strike out the wife's application to set aside.[23] The rationale for that decision, essentially dealing with matters of procedure and alleged abuse of process, is beyond the scope of this article.

A final noteworthy authority where the Family Court considered private equity fund interests and remuneration was *ES v SS*, a 2023 decision, again from Sir Jonathan Cohen.[24] That case highlighted the fragility of expert valuations and the solution offered by *Wells* sharing. It featured a fund, 'XYZ', which had arranged five investment opportunities that were funded and controlled by a single external investor. The husband would receive certain payments on sale of those investments. The value of those investments was estimated by forensic accountants. The speculative nature of those valuations was apparent when one investment, E Co, was sold and resulted in a payment that was 10x the amount attributed to it:

> '23. The sale of E Co in February 2023 has been a significant focus of the litigation. This is easily explained: as the proceedings developed, there was in the normal way a private FDR. It took place on 29 September 2022 and produced an agreement under which W was to receive £9m in liquid assets out of an agreed total of approx. £24.5m. This amounted to about 36.7% of the

> presumed assets, albeit that H took on the burden of a potential tax liability which had only just emerged in an uncertain, albeit anticipated not very large, amount. However, before the order was drawn up and within some 6 weeks after the agreement, W's solicitors picked up on reports that there had been a sale of E Co for a very substantial sum.
>
> 24. W's solicitors applied for disclosure, which was given in part voluntarily and in part following my orders, and it eventually emerged that H's share of the receipts was no less than €49.9m gross, of which €1.1m was retained as working capital.
>
> 25. This needs to be seen in the context of the valuation that had been given of H's interest at some £4m, on which W relied at the FDR; that is about 10% of what was actually received. The total amount obtained for the disposal of E Co was some 5 times the value attributed to it in XYZ's financial models.'

The result was that the husband rapidly accepted that the agreement struck at FDR should be set aside. The authority deals with various issues but of particular interest is the analysis of the efficacy of *Wells* sharing. Sir Jonathan Cohen set out the relevant principles at [43]–[45], quoting King LJ in *Versteegh v Versteegh* at [151]: 'I fully accept that the making of a *Wells* Order is something that should be approached with caution by the court and against the back-drop of a full consideration by the court of its duty to consider whether it would be appropriate (per Section 25a of the MCA 1973) to make an order which would achieve a clean break between the parties'.[25] In the same case, Lewison LJ quoted Mostyn J in *WH v HM (Financial Remedies: special contribution)* at [24]: 'Generally speaking a *Wells* sharing arrangement … should be a matter of last resort, as it is antithetical to the clean break. It is strongly counter intuitive, in circumstances where one is dissolving the marital bond and severing as many financial ties as possible, one should be thinking about inserting the wife as a shareholder into the husband's company …'.[26] Sir Jonathan Cohen also quoted [135] of the judgment where it was said that any other course might lead to 'considerable unfairness'.[27]

The learned judge ultimately concluded that there is clear scope for events, whether foreseeable or not, to lead to a valuation being significantly out, with the risk of injustice to one or other party. The husband argued that the *Wells* approach was contrary to the clean break principle and suggested that that outcome had a potential for continued argument and ill-feeling between the parties. Sir Jonathan Cohen did not accept that argument: 'H will provide W with the annual statement that he receives in receipt of the value of those companies and full information of the terms of any exit. This is not an onerous burden'.[28]

As suggested above, the body of case-law focussing on private equity funds and past or anticipated receipts is small. Despite cases featuring them being common enough, the key authorities discussed above are all first instance decisions. Whilst they provide helpful guidance, they are not binding. The approach taken by the court in these cases was what was deemed fair and appropriate in highly fact-specific scenarios. There is arguably plenty of scope to distinguish them in future cases.

Notes

1 *Wells v Wells* [2002] EWCA Civ 476.
2 https://www.ibisworld.com/united-kingdom/industry/private-equity/3689/
3 https://www.cityam.com/how-private-equity-swallowed-up-the-uk-and-why-its-unsettling-regulators/
4 https://www.statista.com/topics/9613/private-equity-in-the-uk/
5 See, e.g. https://www.morganstanley.com/im/en-us/individual-investor/insights/articles/introduction-to-private-equity-basics.html
6 *A v M* [2021] EWFC 89 at [9].
7 *B v B* [2013] EWHC 1232 (Fam).
8 *Waggott v Waggott* [2018] EWCA Civ 727.
9 *B v B* at [53(ii)].
10 *Waggott v Waggott* [2018] EWCA Civ 727.
11 *Standish v Standish* [2024] EWCA Civ 567.
12 See *A v M* [21] and [26].
13 *B v B* at [53(iv)].
14 *E v L* [2021] EWFC 60 at [71]–[73].
15 *A v M* at [15].
16 *A v M* at [16].
17 *A v M* at [21]–[28].
18 *Mallett v McMonagle* [1970] AC 166 at [176], as reiterated by Lord Hoffman in *Re B (Children)* [2008] UKHL 35, [2009] 1 AC 11 at [2].
19 Reference was made to Moylan LJ's statement in *Martin v Martin* [2018] EWCA Civ 2866 at [127]: 'It may be too frequent a refrain in this judgment but the court is engaged on a broad analysis of fairness'.
20 *WM v HM* [2017] EWFC 25.
21 *A v M (No 2)* [2024] EWFC 214.
22 *Barnard v Brandon* [2023] EWHC 3043 (Ch).
23 *A v M (No 3)* [2024] EWFC 299.
24 *ES v SS* [2023] EWFC 177.
25 *Versteegh v Versteegh* [2018] EWCA Civ 1050.
26 *ES v SS*.
27 *ES v SS*.
28 *ES v SS* at [58].

Betting the Farm

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> 'The beleaguered Judge looked from farming case to financial remedy case, and from financial remedy case to farming case, and from farming case to financial remedy case again; but already it was impossible to say which was which.'

In an area of law that has many dedicated sub-genres, few are perceived as being as abstruse and esoteric as the idea of the 'farming case'. The term is rolled out with such precision and certainty that one could be forgiven for expecting a separate section of the Matrimonial Causes Act 1973 to have been dedicated to its operation.

The first time the term is heard in practice, one has visions of some senior member of chambers being thawed out from cryostasis, already armed with a hard hat and hi-vis vest ready for a site visit.

Alas, the reality is not so exotic. Rather, 'farming cases' engage similar issues to cases more commonly encountered, albeit with the scope for difficulty being more pronounced due to: (1) their tendency to involve third parties (often with emotive and legitimate reasons to have an interest in the outcome); (2) an unclear process of valuation; (3) complicated issues of liquidity and tax; and (4) the range of routes to achieving a fair outcome being wider than one might entertain in other cases.

The difficulty is that the cases in which farms are dealt with are relatively few.

An option a judge will often need to consider is whether it is fair to force the sale of a farming enterprise (and/or related property) or whether it is possible to sell individual elements to fund a party's financial remedy award. The latter form of outcome is of particular note in the light of the highly publicised changes in the Autumn 2024 Budget to Business Property Relief and Agricultural Property Relief and its consequent impact on inheritance tax planning for farmers.[1]

This article looks to deal with the issues encountered in 'farming cases' with reference to reported examples whilst setting them against general developments in the wider law since.

For a variety of reasons, the crux of the issue in these difficult cases tends to boil down to one central problem: how can the non-farming spouse's award be met without causing irreparable damage to the wider farming enterprise?

Expert evidence

Instructing an appropriately experienced and locally knowledgeable expert at an early stage can assist the parties and their advisors to identify solutions that may not appear obvious at first blush. There are a small number of firms nationally who specialise in this work. An appropriate expert will be alive to the need to:

(1) establish the scope of the farming enterprise and its constituent parts (i.e. the basis of its ownership and whether there are parts of the enterprise (for instance particular dwellings or separate parcels of land) that can be separated and sold);
(2) value the operation with a particular eye on any contention that the value of different arms of the enterprise are interrelated;
(3) look at the best means of marketing land in the event of a sale (e.g. lotting for sale at auction; fencing off particular areas to create separation between the farming activity and dwellings that could be separately lived in; attracting interest from neighbouring residents that may pay a premium);
(4) assess any development or 'hope' value;
(5) identify any alternative commercial use of the land to which (part of) the farming enterprise may be put;
(6) advise as regards to financial support potentially available (for instance from the Rural Payments Agency); and
(7) identify obstacles to liquidity (for instance the detail of any tenancies).

Care must be taken in the drafting of any letter of instruction to a proposed expert, particularly as regards issues of liquidity (some may even go so far as to include possible routes to liquidity for the expert to consider, more on which below).

That expert should, in the ordinary course of events, be jointly instructed per Peel J in *BR v BR* [2024] 2 FLR 217 (and the judge's list of *prima facie* reasons why at [18] are often intensely engaged in farming cases).

Computation and categorisation

Farming cases typically engage consideration of matrimonial and non-matrimonial property. The fact that the legal estate is vested in the name of one or other (or both) spouses, as explored in both *White v White* [2000] UKHL 54, [2000] 2 FLR 981 and *Miller/McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186, must be viewed carefully in the context of the Court of Appeal's decision in *Standish v Standish* [2024] EWCA Civ 567, [2024] 2 FLR 966 and the view expressed therein that 'the source of an asset is the critical factor and not title'.[2]

In other words, the origin of the farm is a feature of importance, whether it is held in the parties' joint names or otherwise.

Pre-acquired assets (a *specie* of non-matrimonial property) may, depending on the circumstances of the case, be treated differently from assets that were acquired during the marriage by the spouses' joint efforts. In *P v P (Inherited Property)* [2004] EWHC 1364 (Fam), [2005] 1 FLR 576, which concerned a farm inherited by the husband,[3] Munby J (as he then was) considered the different forms that inherited wealth could take:[4]

> '[37] There is inherited property and inherited property. Sometimes, as in *White v White* itself, the fact that certain property was inherited will count for little: see the observations of Lord Nicholls of Birkenhead at 611 and 995 respectively and of Lord Cooke of Thorndon at 615 and 998 respectively. On other occasions the fact may be of the greatest significance. Fairness may require quite a different approach if the inheritance is a pecuniary legacy that accrues during the marriage than if the inheritance is a landed estate that has been within one spouse's family for generations and has been brought into the marriage with an expectation that it will be retained in *specie* for future generations.'

In *Robson v Robson* [2010] EWCA Civ 1171, [2011] 1 FLR 751 Ward LJ expanded on this distinction:

> '[43] How then does the court approach the "big money" case where the wealth is inherited? At the risk of over-simplification, I would proffer this guidance: …
>
> (7) … The fact that wealth is inherited and not earned justifies it being treated differently from wealth accruing as the so-called "marital acquest" from the joint efforts (often by one in the work place and the other at home). It is not only the source of the wealth which is relevant but the nature of the inheritance. Thus the ancestral castle may (note that I say "may" not "must") deserve different treatment from a farm inherited from the party's father who had acquired it in his lifetime, just as a valuable heirloom intended to be retained in *specie* is of a different character from an inherited portfolio of stocks and shares. The nature and source of the asset may well be a good reason for departing from equality within the sharing principle.'

The provenance of the assets may prove to be determinative of outcome, as happened in *P v P (Inherited Property)* where the retention of the farm for future generations was an important factor which justified the wife being confined to an award that met her accommodation and income needs:

> '[44] … in the particular circumstances of this case, the proper approach is to make an award based on the wife's reasonable needs for accommodation and income. I do that, applying the approach adopted by Bennett J in *Norris v Norris* [2003] 1 FLR 1142, not … because of any principle that this is the approach to be adopted in farming cases, but because in the particular circumstances of this case that is the approach which most closely accords with the over-arching requirement of fairness, having regard to all the circumstances but in particular to:
>
> (i) the fact that the bulk of the family's assets represent a farm which has been in the husband's family for generations and which was brought into the marriage with an expectation that it would be retained in *specie*;
>
> (ii) the fact that although the farm business was put into the parties' joint names, the land and the other tangible assets were retained in the husband's sole name;
>
> (iii) the fact that any other approach will compel a sale of the farm, with implications little short of devastating for the husband; and
>
> (iv) the fact that this approach will meet the wife's reasonable needs.
>
> In short, because to give this wife more than she reasonably needs for accommodation and income would tip the balance unfairly in her favour and unfairly against the husband.'

However, in *D v D* [2010] EWHC 138 (Fam), which concerned a gifted/inherited farming company that had been passed on through generations in the husband's family,[5] Charles J considered that to calculate the award to the wife solely on the basis of her needs would be wrong, notwithstanding the fact that it would be met from the husband's interest in the farming company. He stated:

> '[154] At the heart of the husband's case is the proposition, that as a matter of principle in the application of the sharing principle (that he accepts applies to all of the assets of the parties) his interest in the Company should for good reason be left *wholly* out of account because it is a gifted or inherited farming company. So, he says that as a matter of principle the award is to be based on, and *only on* the application of the need principle applying the s25 criteria to it (and so acknowledges that the departure from equality in respect of his interest in the Company that he argues for on the application of the sharing principle is subject to him meeting the wife's claim based on need generously assessed).
>
> [155] In my view this is wrong.
>
> [156] A theme of the husband's argument in support of this proposition was that as this was a "farming case" the principle to be applied in assessing the fair result is only the need principle or, put another way, the departure from equality in applying the sharing principle to the husband's shares in the Company should be one that gives the husband 100% (and should be left out of account subject to the satisfaction of an award based on need).
>
> [157] In my judgment, no such principle or approach can be founded on existing authority. Although, I accept that:
>
> (i) a fair departure from equality for "good reason" in the application of the sharing principle can amount to a result that gives one party 100% of the value of the relevant assets, and
>
> (ii) inherited or gifted land (and perhaps in particular estates and farms) that have been in a family for generations (or for less time) may found arguments that there should be such an approach,
>
> in my view the cases do not show that simply because the relevant assets are, or derive from, gifted or inherited farms or farming assets (or estates) they are to be so treated with the result that there is no need to look further at the circumstances of the case to see what

impact (if any) the sharing principle is to have on the ascertainment of the fair award.'

In *R v R* [2009] EWHC 1267 (Fam) Charles J had previously stated:

'[162] … in the case of inherited or pre-acquired assets both the source and the nature of assets (e.g. whether it is the matrimonial home) are circumstances to be taken into account as are the length of the marriage and thus the period that inherited or pre-acquired assets have been enjoyed by the parties during their relationship (albeit that the sharing principle applies to short marriages, see Lord Nicholls in *Miller* paragraphs 17 and 22). They also show that the weight to be given to such matters is fact sensitive (see for example *Vaughan v Vaughan* [2008] 1 FLR 1108 at paragraph 49 and *C v C* [[2009] 1 FLR 8] at para [36]) and thus that the way in which such property has been treated, enhanced, damaged and regarded are all factors that can be taken into account.

[163] In my judgment, on that approach the points that property has not passed through generations, or is not a product of dynastic wealth, or after it was inherited it was used as the matrimonial home (particularly if before the marriage it was used as the home of the family of one of the parties to the marriage), do not mean that the fact that it is inherited property is irrelevant.'

Liquidity

Cases that involve an interest in an asset that is capable of being valued (such as company, a partnership or a farm), but which is not easily realisable either because it provides the means by which a person earns their livelihood, or there is no ready market, invariably pose problems of (il)liquidity.

When present, illiquidity can go to the quantification of the award as well as to the implementation of the order. In *WM v HM (Financial Remedies: Sharing Principle: Special Contribution)* [2017] EWFC 25, [2018] 1 FLR 313 Mostyn J stated:

'[29] I am aware that in *Chai v Peng and Others* Bodey J divided the "kitty" 60:40 in favour of the husband because the wife's award would be largely cash or easily realisable assets: at para [140]. I do not adopt that approach. A valuation of an asset is the estimate of what it will sell for now. If it is perceived as being hard to realise then its value will be discounted to reflect that difficulty. It does seem to me to use discounted figures and then to move away from equality is to take into account realisation difficulties twice. Whatever the asset the only difference between it and its cash proceeds is, as Thorpe LJ once memorably said, the sound of the auctioneer's hammer.'

On appeal, in *Martin v Martin* [2018] EWCA Civ 2866, [2019] 2 FLR 291 Moylan LJ disagreed:

'[87] … I propose to consider this in more detail, in particular because of the judge's conclusion that there was no effective difference between the valuation of Dextra and its "cash proceeds" on a sale. The judge based his conclusion on the "auctioneer's hammer" analogy and because he considered that the valuation was "the estimate of what it will sell for now" adding that, if "it is perceived as being hard to realise then its value will be discounted to reflect that difficulty" (at para [29]).

[88] I deal, first, with the judge's reference to the "auctioneer's hammer". As Mr Marks demonstrated during the hearing, the judge's reliance on what Thorpe LJ had said was misplaced and taken out of context. Thorpe LJ had not been referring to *all* assets but to a specific class of assets, namely "prime agricultural land". The case was the Court of Appeal decision in *White v White* [1998] 2 FLR 310; he said, at 319:

"As to the difference between the paper value of an interest in farmland and cash in hand (for which the judge cited *P v P (Financial Provision: Lump Sum)* [1978] 1 WLR 483 and *Preston v Preston* (1981) 2 FLR 331) I would only say that the difference between a paper value of an interest in a farm partnership and cash in hand is dependent only upon the judgment of the valuer and future market fluctuations. Of course real value can only be established by signing a contract for the sale of the land and by the fall of hammer on the last lot of the farm sale. Of course there are substantial costs in turning farming assets into cash, although that factor was allowed for in the judge's calculations. But there are few assets more stable, more predictably realisable and more proof against inflation than prime agricultural land."

It can be seen that Thorpe LJ's focus was on, and only on, "prime agricultural land". He expressly identified why he considered that, whilst acknowledging that it depended on "the judgment of the valuer and future market fluctuations", the valuation of this type [of] asset could be treated as being robust. As I have said, it was not a general observation about all assets and all valuations. …

[93] How is this to be applied in practice? As referred to by both King LJ and Lewison LJ [in *Versteegh v Versteegh* [2018] 2 FLR 1417] the broad choices are (i) "fix" a value; (ii) order the asset to be sold; and (iii) divide the asset in *specie*: at paras [134] and [195]. However, to repeat, even when the court is able to fix a value this does not mean that that value has the same weight as the value of other assets such as, say, the matrimonial home. The court has to assess the weight which can be placed on the value even when using a fixed value for the purposes of determining what award to make. This applies both to the amount and to the structure of the award, issues which are interconnected, so that the overall allocation of the parties' assets by application of the sharing principle also effects a fair balance of risk and illiquidity between the parties. Again, I emphasise, this is not to mandate a particular structure but to draw attention to the need to address this issue when the court is deciding how to exercise its discretionary powers so as to achieve an outcome that is fair to both parties. I would also add that the assessment of the weight which can be placed on a valuation is not a mathematical exercise but a broad evaluative exercise to be undertaken by the judge.

[94] I would also add that this is not, as Mostyn J suggested, to take realisation difficulties into account twice. Nor, as submitted by Mr Pointer, will perceived risk always be reflected in the valuation. The need for this approach derives from the fact that, as said by Lewison LJ, there is a "difference in quality" between a

value attributed to a private company and other assets. This is a relevant factor when the court is determining how to distribute the assets between the parties to achieve a fair outcome.'

In *F v F (Clean Break: Balance of Fairness)* [2003] 1 FLR 847 when considering the fairness of imposing a clean break in a case where company assets were illiquid, Singer J stated at [86]:

> 'Liquidity, the ability to pay, finds no express reference amongst the s 25(2) "matters" to which the court is in particular directed to have regard, although clearly it is an element which can and often must be taken into account as one amongst "all the circumstances of the case". I do not for a moment suggest other than that it is a highly relevant consideration, nor indeed the ease or difficulty with which any particular asset or class of asset can be realised should be disregarded when surveying the financial resources available to the parties. Liquidity can constitute an important element not only at the stage when the court considers the time for implementation of the order, but also at the earlier stage of arriving at a fair (albeit maybe only provisional) conclusion as to how the order should if practicable be fashioned.'

In *Murphy v Murphy* [2011] 1 FLR 537 the Court of Appeal allowed the appeal because of the failure to properly categorise an illiquid asset (a deferred compensation payment scheme) as such.

In *N v N (Financial Provision: Sale of Company)* [2001] 2 FLR 69 Coleridge J at [71] acknowledged that illiquidity was a reason for departure from equality of division:

> 'I am sure the House of Lords [in *White*] did not intend courts to exercise their far-reaching powers to achieve equality on paper if in doing so they, Samson-like, brought down or crippled the whole family's financial edifice to the ultimate detriment of the children (whose interests, of course, remain the top priority in this and every case). More than ever in the new climate, especially where the facts are similar to the present (where the award is likely to be larger than before *White*), the court, in my judgment, must be creative and sensitive to achieve an orderly redistribution of wealth, particularly where this involves the realisation of assets owned by either of the parties …'

In a situation where the value of the business is based on its future profitability, and the business is the only source from which the receiving party's maintenance can be paid in the future, if that party received a lump sum representing a share of the business in addition to maintenance, they would be benefiting twice from the same asset and the court should avoid double counting.[6]

It is useful to recall that the evidential burden is (albeit loosely) on the person with assets to demonstrate an inability to borrow on the security of them (*Newton v Newton* [1990] 1 FLR 33).[7]

These differences of approach were helpfully drawn together and summarised by Peel J in *HO v TL* [2024] 2 FLR 200 at [20]–[27] inclusive (albeit not a case involving a farm, one can see how the judge's observations might apply in such a case) and in particular:

> '[23] Third, I suggest that the reliability of a valuation will depend on a number of factors such as: (i) whether there are applicable comparables, (ii) how "niche" the business is, (iii) whether the business is to be valued on a net asset basis (for example a property company) or one of the recognised income approaches (such as EBITDA or DCF), (iv) the extent of the parties' interests, and accordingly their level of control, (v) the extent of third party interests, (vi) the relevance of any shareholders' agreements, (vii) whether there is a realistic market for sale, (viii) the volatility or otherwise of the figures, (ix) the reliability of forecasts, and (x) whether the assumptions underpinning the valuation are seriously in dispute.
>
> [24] Fourth, in practice the choices for the court will be, per Moylan LJ in *Martin v Martin* [2018] EWCA Civ 2866 at para 93: (i) "fix" a value; (ii) order the asset to be sold; and, (iii) divide the asset in specie. The latter option (divide the asset in specie) is commonly referred to as Wells sharing (*Wells v Wells* [2002] EWCA Civ 476).
>
> [25] Fifth, whether a business should be retained by one party, or sold, or divided in specie will depend on the facts of each case. Relevant features will include whether the business was founded during the marriage or pre-owned, whether it has its origins in one party's non-marital wealth, whether the parties were both involved in its strategy and operation, the ownership structure of the business, whether *Wells* sharing is practical or realistic given that it will usually continue to tie the parties together to some extent, and how to ensure a fair allocation of all the resources in any given case.'

Distribution

Orders for sale

The extent to which the court will meet the problem posed by illiquid assets with an order for sale assumed greater significance in the light of the awards post-*White* and the introduction of the (equal) sharing principle. Prior to *White*, a submission that a working farm should be sold to meet a clean break award would in all likelihood have failed, yet Lord Nicholls in *White* contemplated that Mr White might have to sell the farms in order to meet the award, and he made no reference in his speech to illiquidity.

In *N v N (Financial Provision: Sale of Company)* [2001] 2 FLR 69 Coleridge J stated at p 80:

> 'There is no doubt that had this case been heard before the *White* decision last year, the court would have strained to prevent a disruption of the husband's business and professional activities except to the minimum extent necessary to meet the wife's needs.
>
> However, I think it must now be taken that those old taboos against selling the goose that lays the golden egg have largely been laid to rest; some would say not before time. Nowadays the goose may well have to go to market for sale, but if it is necessary to sell her it is essential that her condition be such that her egg laying abilities are damaged as little as possible in the process. Otherwise there is a danger that the full value of the goose will not be achieved and the underlying basis of any order will turn out to be flawed.'

This approach was echoed by Munby J (as he then was) in *P v P (Inherited Property)* [2004] EWHC 1364 (Fam), [2005] 1 FLR 576 where he observed at [38]:

> 'That said, the reluctance to realise landed property must be kept within limits. After all, there is, sentiment apart, little economic difference between a spouse's

inherited wealth tied up in the long-established family company and a spouse's inherited wealth tied up in the long-held family estates.'

A sale of small, outlying parcels of land, particularly any with development potential, may provide a means of creating liquidity without destroying viability and may qualify for business asset disposal relief from capital gains tax under the part-disposal rules.

Alternatives to a sale

To avoid the uninviting prospect of a sale of a company or a farm, creative ingenuity may on occasions be necessary if a fair and just result is to be achieved.

(1) Payment of the lump sum over a period of time

In *R v R (Lump Sum Repayments)* [2004] 1 FLR 928[8] (a case where the vast bulk of the capital was represented by shares which had come to the husband by gift and inheritance but were tied up in a family farming company with capital illiquidity in which he had a substantial minority holding[9]), Wilson J (as he then was) ordered the payment by the husband of a lump sum by 240 monthly instalments over a period of 20 years in a sum equivalent to the mortgagor wife's obligations under a mortgage (totalling £225,000), and for the sums to be secured on the husband's shares in the family farming business. The order was variable[10] but would endure beyond the wife's death or remarriage and be binding upon the husband's estate.

The court therefore accepted the husband's contention that the majority of his capital was tied up and could not be realised to raise a lump sum immediately. The solution arose from the husband's income from the farm which, once his other benefits were taken into account, left sufficient surplus to pay the wife both periodical payments and a series of lump sums which would eventually ensure that she owned her own property outright.

The *R v R* solution requires sufficient income on the part of the payer to enable such payments to be made (from the farm partnership income or, in a company case, from the salary and dividends of the farming party). In such a case, practical matters to consider include the following:

(a) the need for mortgage quotes for the payee;
(b) the need for approval in principle from the mortgagee;
(c) a focus on the viable income potential of the farm/other income of the payer;
(d) the possible need for an additional undertaking of the payer to act as guarantor; and
(e) the need to draft security for the lump sum instalment payments (with a legal charge drafted and appended to any financial remedy order).

(2) Variation of a nuptial settlement

MCA 1973, s 24(1)(c) provides that the court may make an order 'varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement … made on the parties to the marriage'.

Detailed consideration of this jurisdiction is outwith the scope of this article. However, it should be noted that the court's power to vary a nuptial settlement only applies to property held to be within that settlement and hence the court's first task is to discern what that property is. For example, if a marital farmhouse has been settled on trust, the trust may extend to the whole beneficial interest in the property or merely to a right to either or both parties to occupy (effectively, a licence). The trust deed itself will be the primary document to establish the assets of the settlement. If there is no trust deed in existence, the court will look to any further evidence relevant to the settlor's intentions and the parties' conduct (see, for example, *D v D and the I Trust* [2011] 2 FLR 29 per Baron J). Even if there is a trust deed, interpretation of its terms may be required to determine what property and assets are held by the trust.

If the court is satisfied that the farming enterprise is a nuptial settlement it has jurisdiction over it. The next stage of the enquiry is then whether or not it should exercise its discretion and, if so, in what manner.

The principles underpinning a variation were summarised in *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam), [2009] 1 FLR 115 per Munby J (as he then was):

> '[290] Surveying all this learning, identifying what is of enduring significance whilst ruthlessly jettisoning what has become more or less irrelevant in modern conditions, I can perhaps summarise matters as follows:
>
> i. The court's discretion under section 24(1)(c) is both unfettered and, in theory, unlimited. As Miss Parker put it, no limit on the extent of the power to vary or on the form any variation can take is specified, so it is within the court's powers to vary (at one end of the scale) by wholly excluding a beneficiary from a settlement, to (at the other end) transferring some asset or other to a non-beneficiary free from all trusts. […].
>
> ii. That said, the starting point is section 25 of the 1973 Act, so the court must, in the usual way, have regard to all the circumstances of the case and, in particular, to the matters listed in section 25(2)(a)–(h).
>
> iii. The objective to be achieved is a result which, as far as it is possible to make it, is one fair to both sides, looking to the effect of the order considered as a whole.
>
> iv. The settlement ought not to be interfered with further than is necessary to achieve that purpose, in other words to do justice between the parties.
>
> v. Specifically, the court ought to be very slow to deprive innocent third parties of their rights under the settlement. If their interests are to be adversely affected then the court, looking at the wider picture, will normally seek to ensure that they receive some benefit which, even if not pecuniary, is approximately equivalent, so that they do not suffer substantial injury. […]
>
> [291] Miss Parker submitted that the central theme which permeates these authorities is that it is permissible for the court to invade third party interests within the confines of the trust structure, but only to the extent that fairness so requires. It is acknowledged that in the generality of cases, the court should indeed be slow to do so. Broadly speaking, I accept that submission.'

In farming cases, variation applications may be of importance, for example:

(a) the family home may be a farmhouse, occupied by the parties but held on trust, perhaps for the ultimate benefit of the children of the family. If this trust is a nuptial settlement, it may be open to variation to provide, at its extreme, access to the capital (the property equity) or otherwise, to provide property security for life, or some other term;

(b) if the farmland is held on trust (and is a nuptial settlement), and the trust structure itself is being relied on as an impediment to sale, variation may 'free up' the land from the restrictions of the trust; and/or

(c) if other assets of the marriage are held within a trust which amounts to a nuptial settlement, a variation application may release assets so as to enable the farm to be retained *in specie*.

In *D v D & Ors and the I Trust* [2011] 2 FLR 29 Baron J held that the parties' main asset – the substantial matrimonial home (a working farm), which at the time of the marriage had been held in the husband's sole name and which had been placed in a Jersey trust (through the intermediary of two BVI companies) before the separation – was a nuptial settlement given that (at [132]) the husband and the wife each derived a benefit from the whole of the farm because: (a) it provided a home for the parties; and (b) for the husband throughout; and (c) the parties lived off and, therefore, derived a benefit from the income which the whole of the farming (in its loosest sense) enterprise engendered.

AB v CB (Financial Remedy: Variation of Trust) [2015] 2 FLR 25 was not a classic 'farming case'. The husband was a copywriter and the wife a journalist. However, the husband's parents were wealthy and he was also involved in the family business. The husband's parents initially owned the farmhouse in which the parties lived but during the course of the marriage the husband's father set up a trust fund of which the primary property was the farmhouse, and the principal beneficiary was the husband.[11] The husband had no significant capital assets of his own, albeit Mostyn J found that he enjoyed financial security by reason of his family's wealth. The equity in the farmhouse was circa £314,000.

Mostyn J considered that, ignoring the trust complications, the starting point would have been that the wife was entitled to 50%. He determined that she should receive £7,500 from the husband and £23,000 outright from the trust. Additionally, he directed that £134,000 be extracted from the trust fund, to be held by independent trustees, and appointed to the wife on the terms of a life tenancy, with no power of advancement so that the sum would revert to the fund upon her death. The combination of the wife's own resources and the sums provided outright and by way of a life tenancy would be sufficient to meet her housing needs. Together with the absolute lump sum, this corresponded to half the value of the farmhouse held within the trust and enabled her to rehouse.

The trustees appealed to the Court of Appeal.[12] *P v P (Variation of Post-Nuptial Settlement)* [2016] 1 FLR 437 provides both a clear exposition of the principles applicable to an application for an order varying a settlement under MCA 1973, s 24(1)(c) and a note of caution not to overstate the impact of any variation on other beneficiaries of a settlement. The following factors were important: (a) had the parties remained married, the wife would have had the continued benefit of living in the farmhouse; (b) the children beneficiaries were not overly prejudiced as the entire trust property (the farmhouse) would have provided a home to the parents during their marriage; and (c) the trust powers entitled the trustees to transfer the entire trust property to the husband absolutely. The trustees' argument that the farmhouse was integral to the activities of the farming business was undermined by the intention underlying the trust that it would provide a permanent home for the husband. Furthermore, the order did not compel a sale of the farmhouse if the husband's family could make the sum due to the wife available from other sources.

As to procedure, an application for a variation of a nuptial settlement engages FPR 9.13. This requires service of the application on the trustees and thereafter entitles the trustees to request a copy of the applicant's Form E prior to deciding how to respond to the application by filing a statement in answer. This was described by Mostyn J in *DR v GR & Ors (Financial Remedy: Variation of Overseas Trust)* (at [32]) as their 'obvious right'.

There is disagreement between Mostyn J and Moor J as to whether FPR 9.13 *requires* joinder of the trustees pursuant to FPR 9.26B.[13] Mostyn J is of the view that this is not required as he makes clear in *DR v GR & Ors (Financial Remedy: Variation of Overseas Trust)*. Moor J reached a different conclusion in *TM v AH* [2016] EWHC 572 (Fam).

(3) Traditional capital and income

In *D v D* [2010] EWHC 138 (Fam) Charles J considered that the award to the wife should be constructed upon the 'building blocks' of the husband being allowed to retain the company, and her being awarded the family home. In order to meet the wife's capital and income needs on a clean break basis, he considered that she would need circa £2.2m, in addition to the house. This would require a dividend from the company of circa £3m, which was not realistic.

In the circumstances, a clean break could only be achieved by either limiting the wife to an award that was below what was fair or requiring the husband to take a very high risk to raise money that the company could not afford. Neither option was attractive, and so the clean break had to be sacrificed. Charles J ordered transfer of the family home to the wife, that the husband pay a substantial but affordable lump sum (£1.5m) and that the balance of the wife's income needs be met by periodical payments.

In *P v P (Inherited Property)* Munby J (as he then was) determined that the wife's award should be based upon an assessment of her reasonable needs and rejected the husband's attempts to limit that to his free capital. She was awarded a lump sum of £575,000, which amounted to approximately 25% of the assets, the majority of which husband had inherited. The husband's objections that such an award would necessitate the sale of the farm were given short shrift.[14]

(4) Other solutions

Other potential solutions include:

(a) awarding substantial periodical payments in return for a smaller lump sum;[15]

(b) letting relations assist in raising capital, if they have an incentive to do so (e.g. to gain vacant possession);[16]

(c) selling part of the farm. This has featured in a number of decided cases.[17] If the farm is tenanted rather than owned, the question of a part sale will be more problematic, but it may be possible to sell, say, animals without unduly damaging the holding;

(d) selling part of the land to the applicant and letting him/her lease it back to the farm.[18] Alternatively, identify parts that may have potential for development, or use for (say) stabling and livery, and allowing the applicant to develop this as an independent business;[19]

(e) transferring illiquid assets to the other party, so that both parties have a stake in illiquid assets;

(f) adjourning the application for a lump sum;[20]

(g) imposing a deferred charge on the farmland in case there is a later sale, whether of the whole or part, by the occupying spouse;[21]

(h) approaching the Agricultural Mortgage Corporation Plc (the AMC) – which specialises in long-term mortgages and loans for farms and rural businesses – for a loan. Provided it has suitable security, the AMC will usually lend on a good loan-to-value ratio, and at competitive rates, over the lifetime of the borrowers and even into the next generation;

(i) looking at any potential for assigning tenancies at a premium; and

(j) considering with accountants how rollover and business asset disposal relief can best be employed to limit exposure to capital gains tax (CGT).

Tax issues

As announced in the Autumn 2024 Budget, Business Asset Disposal Relief (one of the main reliefs from CGT and known as Entrepreneurs' Relief before 6 April 2020) will remain at the current 10% rate on a lifetime limit of £1m of qualifying capital gains for the remaining 2024/25 tax year, but will increase to 14% for disposals made on or after 6 April 2025, and to 18% for disposals made on or after 6 April 2026. These changes will almost double the current rate of CGT for individuals disposing of business assets (including farming assets) within the lifetime limit. Existing valuations of farms by an expert may therefore need to be updated to reflect the increase in tax, with consideration given as to whether to impute the 14% or 18% rates.

These changes are in addition to the immediate increase in the main rates of CGT, with the lower rate rising from 10% to 18% for non and basic rate taxpayers, and from 20% to 24% for higher rate taxpayers, on disposals made on or after 30 October 2024. The changes, which brings all asset classes into the same band (residential property gains already being taxed at 18% and 24%), does particularly target non or basic rate taxpayers. This will be pertinent in cases in which the lower rate income taxpayer holds most of the assets that are heavy with gains. Careful consideration will need to be given to whether any of this tax liability can be mitigated, who will be responsible for its payment, and whether indemnities for payment will be required.[22]

Notes

1 For a summary of the key tax reforms, see the FRJ Blog, 'The Autumn 2024 Budget: A Summary of the Key Reforms for Financial Remedy Practitioners', by Jennifer Lee and Roger Isaacs: https://financialremediesjournal.com/content/the-autumn-2024-budget-a-summary-of-the-key-reforms-for-financial-remedy-practitioners.fe347faf99df440cb77958cd4949a656.htm

2 At [149] though the full ratio [148]–[166] is significant.

3 The farm had been in the husband's family for four generations. The land, which was vested in the husband's sole name, was worth circa £1.75m, which included the farmhouse. The parties operated the farm business as a partnership, and the partnership assets (distinct from the land) were worth circa £325,000. There was limited cash. The farming business was not lucrative and profits were modest during the marriage.

4 In *Miller/McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186 Lord Nicholls of Birkenhead stated '[20] … In all cases the nature and source of the parties' property are matter [sic] to be taken into account when determining the requirements of fairness. The decision of Munby J in *P v P (Inherited Property)* [2005] 1 FLR 576 regarding a family farm is an instance. …'.

5 The parties owned the family home, a farmhouse worth £975,000. In addition, the husband held 85.65% of the shares in the family farming company, the remainder being held by his mother. The company's assets were worth circa £12m, the majority of which consisted of land and property. The judge concluded that the husband's company would be unable to raise sufficient capital to pay an appropriate amount to the wife for a clean break and that it would not be fair to force the husband to sell his shares or liquidate the business. The wife was therefore awarded the matrimonial home, a lump sum of £1.5m (which the husband could raise), and periodical payments of £44,000 pa to make up the remainder of her needs.

6 *V v V* [2005] 2 FLR 697 per Coleridge J.

7 Cited in *R v R (Lump Sum Repayments)* [2004] 1 FLR 928 per Wilson J (as he then was) at [33] 'There is good authority for saying that, where the husband has assets of whatever nature, the onus is upon him to establish that he cannot borrow upon the security of them: *Newton v Newton* [1990] 1 FLR 33 and *Thomas v Thomas* [1995] 2 FLR 668 …'. See also *MG v GM (MPS: LSPO)* [2022] EWFC 8, [2023] 1 FLR 253 per Peel J at [48] 'Wilson LJ (as he then was) in *Behzadi v Behzadi* [2009] 2 FLR 649 (at para [21) said "it is for the owner of property to establish, if such be the case and unless it is self-evident, that its value cannot be realised (which includes being borrowed against: *Newton v Newton* [1990] 1 FLR 33 at 44) or, if realised, that its proceeds cannot be transferred to the place at which it is suggested that they can be deployed"'.

8 Sometimes referred to in non-anonymised form as *Russell v Russell*.

9 The farming business was operated through a company. The husband held a 6.18% shareholding outright and had an interest in remainder of a further 33.3%. The assets of the company, including the farmland, were valued at £3.8m (with the husband's shareholding worth as a minimum of c. £450,000). Apart from the husband's share in the company, the parties had few assets. The husband had a realistic earning capacity of c. £60,000 pa by virtue of his shareholding and work.

10 Note the distinction between a series of lump sums and a lump sum order by instalments in this regard (*Hamilton v Hamilton* [2013] EWCA Civ 13, [2014] 1 FLR 55).

11 The settlor was the husband's parents, and he was the principal beneficiary. Essentially, the trust provided that the husband could occupy the farmhouse during his lifetime, whereupon it would pass to other members of the settlor's family.

12 Black LJ (as she then was) with whom both Jackson LJ and Sir David Keene agreed.

13 This rule was considered in detail in in *Lauren Belinda Simon v Paul Mark Simon and Integro Funding Limited ('Level')* [2022] EWFC 29 per Nicholas Cusworth QC (sitting as a

Deputy High Court Judge). On appeal (*Paul Mark Simon v Lauren Belinda Simon & Anor* [2023] EWCA Civ 1048) it was accepted on the husband's behalf that the initial decision to join Level as a party for the purpose of being heard on the issue as to whether the draft consent order should be approved and made into an order of the court was correct.

14 *P v P (Inherited Property)* was expressly approved in *Miller/McFarlane* at [20] per Lord Nicholls and at [148] per Baroness Hale.

15 *P v P (Financial Provision: Lump Sum)* [1978] 1 WLR 483 at 491 per Ormrod LJ.

16 *Thomas v Thomas* [1995] 2 FLR 668. See also: (1) *TL v ML & Ors (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263 per Nicholas Mostyn QC (sitting as a Deputy High Court Judge) where (at [86]) he drew a 'clear distinction' between where the person being encouraged is a member of the payer's family and where he is a trustee in a fiduciary relationship with the payer; and (2) *M v T* [2020] 2 FLR 1048 per Robert Peel QC (sitting as a Deputy High Court Judge) where at [66] a further distinction was drawn in the former case between: (a) where a spouse has an interest in an asset together with third parties (e.g. other family members but where there are liquidity difficulties and the court frames its order so as to 'judiciously encourage' the other family members to assist in extraction by the spouse of value referable to his or her interest; and (b) where family members, who are gratuitous donors, may be willing to make funds available by gift or loan to the relevant spouse. In relation to the first category of cases identified (i.e. where a spouse has an interest in a resource with third parties), Peel J suggested the adoption of a two-stage evidential framework in *HD v WB* [2023] EWFC 2 at [36].

17 For example, *S v S* (1980) 10 Fam Law 240 (H owned 672 acres spread over several farms. Balcombe J considered that three of the smaller farms could be sold off without undue disruption to the farming business and with the least harmful consequences in terms of redundancies); *Dixon v Dixon* (1974) 5 Fam Law 58 (6 acres out of 37 sold; nowadays, court would probably order outright sale); *B v B (Financial Provision)* [1990] 1 FCR 105 per Ward J (as he then was) (valuable Queen Anne house sold to raise cash, rejecting contentions of the wife to contrary).

18 A course suggested by Charles J in *D v D* [2010] EWHC 138 (Fam) at [133], although he acknowledged that the extraction costs would be high.

19 *D v D* at [135]–[136].

20 *Davies v Davies* [1986] 1 FLR 497 – the (very) likely sale of a failing farm business.

21 *Webber v Webber* (1982) Fam Law 179 (quarter share to W after certain deductions, to vest on H's 65th birthday, plus lump sum). Cf. *Parra v Parra* [2002] 2 FLR 1075 per Charles J (deferred charge on land with development potential), affirmed on this point at [2003] 1 FLR 942.

22 Reforms to inheritance tax, affecting business property relief and agricultural property relief, have also attracted much comment and will require a review of strategy for many farming businesses. Valuable estate planning tools remain (the ability to gift assets in the hope of surviving 7 years, taking out life insurance to offset inheritance tax, to name a few). This aspect is beyond the scope of this article.

The Express Financial Remedy Procedure Pilot

Samantha Hillas KC

St John's Buildings

Between the first[1] and third[2] Farquhar reports, the members of the FRC Recovery Group – initially set up by Mr Justice Mostyn and chaired throughout by His Honour Judge Stuart Farquhar – were put to good use.

A second report, *A Paper to consider changes to the Practices and Procedures in the Financial Remedies Court*, was published in September 2021. Its purpose was to recommend changes to the practices and procedures in the Financial Remedies Court (FRC) with a view to promoting greater efficiency.

The second report (the Report) was, itself, a model of efficiency. Although completed within just 3 months, the basis for the Group's recommendations was sound. Views were drawn from the range of family law judges, practitioners and other Family Court users who responded to the wider survey which informed the recommendations of the first report. Those views were supplemented by a further survey of FRC judges in August 2021. The Family Court statisticians provided data which was analysed and discussed at length by the Group's 11 members, themselves representing a broad spread in terms of geography, seniority and, in the case of the practitioners in the Group, the value of their typical case.

Amongst its other achievements, the Report gave rise to the *Statement of Efficient Conduct of Financial Hearings* at every level below the High Court. This followed the format of the existing High Court version (February 2016),[3] adapted where necessary, and was implemented relatively swiftly in January 2022.

However, a large part of the Report's focus was the proposed fast track procedure set out in Chapter 5. Work on this aspect of the Report was informed in part by the research conducted by the Centre for Child and Family Law Reform (CCFLR) and the conclusions set out in their May 2020 report *Fast-Tracking Low-Value Financial Claims in the Family Court*.[4]

In over a third of cases surveyed for the CCFLR report, both parties were litigants in person (LIPs).[5] It was acknowledged that LIPs, as a category, were more able to agree an 'early' (i.e. pre-FDR) settlement than their represented counterparts.[6] However, the general trend, in those cases concluding in a consent order (over 81% of all cases), was for agreement to be reached towards the end of the financial remedy process – after the FDR but before the final hearing.

The duration of cases concluding in a consent order (245 days)[7] was considered disproportionate to the average value of the assets involved. Including pensions but excluding the family home, this was put at £381,455.[8] The figure was even lower in cases where both parties were LIPs: £248,865.[9]

Further, the impact of delay was recognised. It not only *causes substantial emotional distress upon the parties and any children of the family*, but also puts *huge pressure on the lists within the FRC*.[10] Further, it was observed that lengthy delay causes unfairness to a party who is dependent upon a lump sum order or the sale of the former matrimonial home and the division of the proceeds in order to be able to move on.

The CCFLR report opined that two factors seemed to be primarily responsible for this unsatisfactory situation: the first was the underutilisation of the first hearing as an opportunity for either dispute resolution or, alternatively, to signpost parties to non-court dispute resolution. The second was that LIPs were not given sufficient assistance to understand or manage the formalities of court procedure. This has two main consequences: (1) parties fear committing to an early solution during what they understand will be a multi-stage court process; and (2) it can lead to non-compliance with court orders.

It was suggested that – for cases dealing with assets below a particular financial threshold – an early, neutral and without prejudice evaluation would help manage parties' expectations and steer them towards early settlement.

As to what the financial threshold might be, the Group acknowledged both the very small sample size (69 cases) analysed in the CCFLR report and the lack of statistical evidence collected in respect of the value of cases in the FRC. Further work was undertaken to establish the optimum financial threshold if a pilot was to be introduced. A questionnaire was sent to every judge approved to sit in the FRC with a request to record the value of cases that they dealt with over a 2-week period in August 2021. It was accepted that this method would not necessarily stand up to a rigorous statistical analysis, but it was thought to be a beneficial exercise for providing a rough guide to the level of work being carried out.

Of the 531 cases analysed by financial remedy judges as part of their questionnaire responses, almost two-thirds of cases (63.1%) involved net assets including pensions of less than £500,000. Over 40% involved assets including pensions of less than £250,000. The Group considered that any new procedure should apply to cases involving combined net assets of £250,000 and that the figure should not include pensions. The exclusion of pensions in the calculation was deliberate. An applicant is unlikely to know the value of both parties' pensions at the time Form A is issued. This would cause confusion as to whether the case met the fast track criteria, whatever threshold was adopted. Further, it was considered unlikely that, in cases involving total net assets of less than £250,000, pensions would feature significantly.

Taking into account the existing research, the statistical data and the survey views, the Group concluded that there would be significant advantages in piloting a scheme which enabled parties in lower value cases, who were statistically more likely to be LIPs, to attend the first hearing having provided in advance the information a judge would need to give them an early neutral evaluation as to the likely outcome.

This chimed with the collective experience of the judicial members of the Group who were frequently faced with LIPs who simply wanted to be told 'the answer'.

Whilst our existing procedure already permits a First Appointment to be treated as an FDR,[11] the take up of that facility is poor. The reality is that First appointments are not listed to allow sufficient time for an early neutral evaluation, and the standard disclosure process means neither the parties nor the court are likely to have the information necessary to assess a fair outcome at the First Appointment stage.

A working party, comprising judges, practitioners, representatives from the MOJ and HMCTS, and chaired by Mr Justice Peel, was established in 2023 as a sub-committee of the Family Procedure Rule Committee. Its purpose was to oversee the development of a pilot to test a fast-track financial remedies procedure, backed by an alternative procedural code set out in Part 9 FPR 2010.

The pilot for that procedure, known as the express financial remedy procedure, has now been developed and is hoped to start in April 2025. It will apply to all cases involving combined net assets of less than £250,000 (excluding pensions) where the Form A is issued in any of the pilot courts.[12]

The Form A is being amended to include a box which will be ticked where the applicant considers the combined net assets involved in the case (excluding pensions) is less than £250,000. All cases in the pilot courts where that criteria is met will be automatically entered into the pilot and a modified Form C will be issued. It will be open to parties to apply (on D11) to exit the pilot if eligibility for the pilot changes or the express procedure is otherwise considered unsuitable.

The case will be timetabled through to an hour's first hearing between 16 and 20 weeks after Form A is issued and, where possible, a one day final hearing will be listed simultaneously to take place between 26 and 30 weeks after the issue of Form A. It is envisaged that those final hearings may, in some courts, be subject to block listing.

The first hearing will be conducted by the judge as an FDR. To enable the court to assess the case and indicate the likely outcome, disclosure will be 'front loaded'. Forms E, property and other asset valuations, mortgage-raising capacity, particulars of suitable properties, replies to questionnaire (which may be answered subject to just exception) and settlement offers will all be made available to the court in advance of the first hearing.

If the parties reach an agreement at the first hearing, they will be invited to file a consent order and the final hearing (if already listed) will be vacated. If agreement is not reached, the court will give suitable directions to ensure that the final hearing – ordinarily listed 10 weeks later – will be effective.

The objectives of the pilot are clear: to drive early settlement within a swifter, simpler process for those cases where the low asset value signifies that a significant proportion of litigants will be self-representing. The express procedure will be of obvious benefit to those litigants involved in the pilot. The front-loaded disclosure requirements will be subject to a clear but accelerated timetable which will require litigants to focus on the steps necessary for an effective first hearing and avoid drift. There will be fewer court hearings overall and, at the first hearing, parties will be given clear judicial guidance as to the likely outcome and other financial consequences if the matter continues to be litigated. If the parties cannot be guided to reach agreement at the first hearing, any contested cases should be concluded within 6 months of issue.

The pilot materials – guidance notes for litigants, practitioners and judges, the relevant practice directions and amendments to the procedure rules – will be published shortly.

Notes

1 *A Paper to consider the future use of Remote Hearings in the FRC*, May 2021.
2 *Transparency in the Financial Remedies Court*, May 2023.
3 https://www.judiciary.uk/guidance-and-resources/notice-from-the-financial-remedies-court-4/
4 Report on a Research Project undertaken by the Centre for Child and Family Law Reform, Frances Burton and Carmen Draghici, May 2020.
5 Burton and Draghici at Section 3.1.5.
6 Burton and Draghici at Section 3.2.2.
7 Burton and Draghici at Section 5.
8 Burton and Draghici at Section 3.1.7.
9 Burton and Draghici at Section 3.2.5.
10 Executive Summary at 2.12.
11 FPR 2010 9.14(5)(d).
12 **Cheshire and Merseyside**: Birkenhead, Chester, Crewe, Liverpool, St Helens; **Cleveland, Newcastle and Durham**: Bedlington, Berwick, Darlington, Durham, Gateshead, Middlesbrough, Newcastle Upon Tyne, North Shields, South Shields, Sunderland; **Greater Manchester**: Manchester, Wigan; **Lancashire and Cumbria**: Barrow in Furness, Blackburn, Blackpool, Carlisle, Lancaster, Leyland, Preston, Reedley, West Cumbria; **North and West Yorkshire**: Bradford, Harrogate, Huddersfield, Leeds, Scarborough, Skipton, Wakefield, York; **West Midlands**: Birmingham.

Standardising Financial Disclosure for Out-of-Court Resolution: Can We Trust the D81?

Caroline Bowden

Family Mediator (Solicitor and Consultant), Anthony Gold

The principal forms we use for capturing financial data were drafted by different groups of people, at different times and with different purposes: and it shows.

As technology and non-court dispute resolution (NCDR) continue expanding, now might be the time to consider if these forms are, first, fit for purpose and, secondly, whether they can be standardised to talk to one another.

Has the revised D81 been primarily redesigned to harvest outcome data to train AI programs? Its first focus should be to provide clarity for those who complete it and give sufficient information to the district judges considering the merits of a proposed consent order.

The need for standardisation

Our financial remedy processes have largely been built up with the court model in mind. The solicitor or barrister presents their client's case with spreadsheets of data and the judge crafts an order (now based on standard precedent clauses) at the end.

Yet this is now a minority practice. In 2021, the government consultation document considering compulsory mediation set out statistics showing that there were 48,666 applications for financial orders. Of those, only 12,438 were contested, meaning that around three-quarters of cases were finalised by sending a draft consent order to court, together with the 'D81 Statement of information for a consent order in relation to a financial remedy' ('D81').

Before the D81 stage, there are other forms being used that capture the same or similar data, but broken down into more detail. The court-based forms, Form E and ES2, are not compatible with the summary boxes required to be completed in D81. In addition, many solicitors and NCDR professionals use their own versions of an asset and income schedule, in Word or Excel format, or via separate programs.

There are problems with having so many ways of capturing financial data which are not aligned or compatible:

(1) In capturing certain information on a more detailed earlier form, will it all be included in the D81 (for good reason or by mistake)? It is possible that one D81, completed by a family law professional from their resources, could end up being different from a second, completed by another person using a different way of capturing financial information, yet on identical facts?
(2) Will the D81 accurately reflect the other, more detailed schedule, upon which the settlement is reached? This can create confusion and inefficiency, as the transfer of data from one to the other is not seamless. It can also lead to secondary disputes, which is particularly disappointing when the end is so near and may then result in parties filing separate D81s rather than a joint one.
(3) Does the D81 contain sufficient information for the judge to truly understand the circumstances? There has not, to my knowledge, been any complaint from the judiciary, but could that just be because the subject never comes up? Any measure that has the potential to reduce judicial time is worth looking at.
(4) We are all aware of how artificial intelligence (AI) is going to be involved in every area of our lives, like it or not. Even if a revised D81 was created partially with the capture of big data in mind, is it fit for that purpose? Are the handful of fields where asset types are added too crude for trying to provide a learning tool for how matters could be resolved in the future?

There are hints that the work of standardisation and capture of data may soon be picked up by the Online Procedure Rule Committee (OPRC). Its work straddles both the civil and family spheres. The minutes of its meeting on 11 November 2024, para 9, mention that part of the work of a subcommittee will be to look at the 'pre-action space model (including financial remedies)'.

What will this involve? The FPRC has recently examined the non-court space, resulting in the changes to Part 3 rules which came into force in April 2024. It is speculation, but perhaps the OPRC will want to consider how to harvest outcome information, in order to later teach AI programs how to 'solve' financial remedy cases in the future. A less 'brave new world' ambition could be to ensure that the financial data captured for clients can seamlessly travel from a solicitor's office to a mediator's or arbitrator's office, to a barrister's chambers and to the judge who will consider the draft consent order. Perhaps it might also look at a unified tool to capture disclosure, with couples then free to choose a forum to negotiate thereafter.

Some aspects of that portability will undoubtedly delve into the world of technical IT compatibility. However that will not be possible, or at least made a lot harder, if there are variations in the formats and the way professionals present the data in the first place.

As an aside, there may be many of us wary about whether Mr and Mrs Blogs can sit down in front of a screen in a few years' time, enter their data and be told, by the computer algorithm, how they should separate their assets. Maybe the algorithm would just be advisory, but of course where it lands would always favour one over the other, who would then want to stick to that and 'not waste money' getting proper tailored professional guidance and support.

However, AI is coming down the family law tracks. We just don't yet know what form it will take and how many of our jobs will disappear. As trippy as this is, the tail can't wag the dog. First and foremost we need to have data capture that helps couples to separate more easily and efficiently, preferably in the non-court space, where it is safe to do so. That should be the main priority in the quest for standardisation of data capture, with the need to feed and teach computers being very much a secondary factor.

How can the data be standardised?

The place to start to examine standardisation is at the end. Regardless of what route is taken to achieve a consent proposal, the end point in the process, at least for married couples and civil partners, is the same. The draft consent order is uploaded to court (or sent by post by the self-represented) along with the D81, which should set the scene adequately for why the proposal has been crafted and merits court approval.

So we must start with D81, as it exists now, and ask what changes are required to make it an exact summary of the tables completed in other formats that have been used whilst the negotiating stage is ongoing.

Focusing mainly on assets rather than income, the D81 asset table comprises a mere four category boxes which are:

A Property

B Other capital

D Liabilities

F&G Pensions and Pension Protection Fund (PPF) compensation (I have put these together as they are so similar and considered as one in Form E).

The missing letters from the list above just comprise the maths applied to those entries: C = A + B, E = C - D, and H = E + F&G.

Using D81 alone is therefore insufficient in the negotiating stage to provide good enough financial disclosure in anything other than the simplest cases. It is surprising that it is useful enough, without the other table that fed into it, for a district judge considering the consent application. The judge's role, as Sir James Munby memorably put it in *S v S* [2014] EWHC 7 (Fam), is not to be a rubber stamp though not a detective, bloodhound or ferret either. So they need sufficient enough data to tread that middle ground. There is a huge contrast between what is supplied in D81 and what a judge sees at an FDR hearing: one might wonder if that makes their consent-approval role lean more in the direction of the rubber stamp than the bloodhound.

I would argue that D81 needs some expansion and clarification, but not a major overhaul. It must still remain a 'top-level' summary.

It should be a summary of another document: a single, unified, detailed financial schedule, which could be used across the various means of non-court resolution and different professional activities, even perhaps including litigation. We have standard consent order clauses, so why not a standard financial schedule that can be deployed in all contexts?

Such a document, which I have called a 'comprehensive financial table' could have a template which is as wide-ranging as it needs to be, just like the options of around 100 clauses to choose from for the consent order. ES2 is the obvious place to start: in fact it may need very little tweaking. In the example below, I have mocked up a table based on ES2, but merged with the standard D81 entries also.

Example of a comprehensive financial table

Just like the consent order, there will be the core, most frequently used parts and then the 'exotic outliers' that are used once in a blue moon (which I have not added to the example table). Like the consent order precedents, they would have to be freely available on, say, the gov.uk website and would no doubt be replicated with interactive versions that would be created for and by the market. Currently, Form E and D81 are owned by the Ministry of Justice (MOJ) and ES2 by HM Courts and Tribunals Service (HMCTS). The ownership of standardised documents will need to have just the one home.

This then streamlines the process for all concerned, making it easier to capture, compare and process financial data accurately. It may be that, initially and for those without representation, this data is manually re-entered onto the D81, but at least the information is the same and has a traceable root. In future, a couple of clicks on a program or an MOJ/HMCTS-curated online tool will enable the transfer of all the necessary data. It would thus make no difference if there were one professional filling in the comprehensive financial table and then another preparing the D81.

The current challenges with the D81

It is all very well having a merged ES2/D81 document which will be used before settlement is reached, but is the current D81 a good enough document, both for those completing it and then also for the judge?

The current incompatibility is itself a problem, with potential for arguments between solicitors and this problem also broadens out when there is more than one professional involved with the process. When parties are represented by solicitors and go through court-based negotiations, Form E (used in financial settlements) is typically completed by a solicitor, while ES2 could be completed by a solicitor or a barrister. When a case is resolved via NCDR the mediator, or other professional such as an arbitrator, would be likely to use their own financial schedule and then D81 is completed after that by a solicitor. A litigant in person may have to complete all these various forms and still stay sane.

Therefore, as mentioned earlier, there is a risk that D81 is completed in different ways by different people using different feeder forms. The four summary boxes are so 'top line' and lacking in clarity, that this inevitably invites confusion, inconsistencies and disputes.

Also, as mentioned previously, are those four asset boxes really enough information for a district judge? If data is entered on D81 in a different way from the schedules upon which a settlement was considered, then the net effect table will be a distortion of what the parties intended.

Even if D81 is not redrafted, it would help if a judge, who in looking at the documents considers that they need to know more, could request sight of the fully compatible comprehensive financial table that has fed into it. They could then have sight of the broken-down data that was summarised into D81, to understand the assets and liabilities more fully and beyond any explanations provided, particularly competing explanations, in the narrative paragraphs.

In looking at D81 and comparing it with ES2 in particular, there are examples of D81's limitations and potential for inconsistency. The list below (which is not comprehensive) provides more granular reasons why standardisation would be useful:

Asset schedule

Joint assets

Most asset schedules, such as ES2, have a column for joint assets. D81 does not. It therefore requires a redrafting exercise so that joint assets are split 50:50, making the D81 table look different from the tables upon which the settlement was based. This oversimplification is not helpful and may cause confusion. It is almost always helpful to see clearly what assets are joint and what are held in a sole name.

Property valuation

ES2 asks for the property value after deducting the costs of the mortgage, costs of sale, early repayment penalties (ERP) and capital gains tax (CGT). However, D81 only asks for the property value 'after deducting any mortgage', leading to potentially inconsistent reporting. Some of the self-represented or others may, for example, leave out costs of sale in coming to the net valuation, whilst others include them. The ERP is irrelevant where a sale is very unlikely within that period, but of possible importance if not. It would be always dangerous to leave out CGT, where relevant. Yet D81 is silent on what makes up the 'property value' figure.

Chattels

Another issue is the treatment of chattels, or personal property, in D81. In the absence of being anywhere else, chattels must be listed under 'Other Capital', which only specifies 'bank accounts, savings, and investments'.

Not all chattels are created equally. One party may have estimated that they own £50,000 worth of depreciating home contents and vehicles. Contrast that with a painting valued at £50,000 from an up-and-coming artist. There is also often a recognition that contents, jewellery and cars are primarily of functional use and cannot be compared with assets of similar value comprising 'bank accounts, savings, and investments'.

There is therefore probably a wide inconsistency amongst professionals and possibly even from solicitors in the same case, as to whether certain chattels are included in the detailed asset schedule or left out. Even if added initially, they may be discounted subsequently and so not factored into the maths (including the net effect) that has led to the settlement.

Liabilities

Looking at the calculation boxes in the asset table, the liabilities are deducted from non-pension assets and thus will always be deducted from the pot of total net assets. Whilst that may be mathematically correct, the liabilities are rarely 'owned' in the same way as the assets. They are often not joint, or at least not jointly built up.

Even if the liabilities are of similar amounts between the couple, not all liabilities are created equally either: contrast a £50,000 personal loan to install a new kitchen with a £50,000 loan to fund an addiction.

It may be the practice of many, as it is mine, to have liabilities in a separate section to the main asset schedule, especially when looking at the net effect. I have done this in the example. There is then a conversation as to whether the liabilities should be factored into an overall settlement.

Do some people complete D81 leaving out some of the liabilities for that reason? If not, does a district judge question the departure from equality on the net effect table more often when there is a high level of personal debt on just one person's side which may not have been explained?

In my view it would be more useful to have a secondary total on D81, which includes all the assets, including pension, but without liabilities. It would probably be more useful for big data capture also.

Income schedule

Pension contributions

The income table in D81 is more detailed than the asset table, especially as sources of income have less variation. Yet it does not indicate where or whether to deduct pension contributions from income. It seems unlikely that pension contributions would fall under 'compulsory deductions', yet, if not, they are left out entirely. Whilst perhaps not needed for the district judge, it is often essential that parties know how much disposable income they have available after their pension is deducted, at source or otherwise. This information is almost always in the detailed schedule that then feeds into D81.

Rental income

D81 does not specifically mention rental income, leaving it to be included under 'other sources of income', which may not be intuitive for all users. Again, this lack of clear guidance means that essential information could be left out or misrepresented.

Recommending good practice for regulated mediators

The work of mediators and other NCDR practitioners is

	ASSET TABLE	**JOINT All listed & divided 50:50 when filling in form D81**	**NAME**	**NAME**	**NOTES (separate column if finances for child(ren)**
	REALISABLE ASSETS				
A	**Property Value:** Title No.: Working valuation: £ Less: mortgage: £ and costs of sale @ 2%: £ Any CGT or early repayment penalties?				
A	**Total Property** [If second or more properties]				
	Savings and investments				
	Contents				
	Other significant property				
B	**Capital, not including property such as money in bank accounts, savings, investments, ISAs etc.**				
C	**Gross Capital (A + B)**				
D	Liabilities (excluding mortgage(s) deducted at A) e.g. loans, overdrafts and credit card debts *[as separately listed below]*				
E	**Net capital total (excluding pensions and PPF compensation) (C minus D)**				
	Pensions				
F	Total pension valuations (cash equivalent)				
G	PPF compensation valuation				
H	**Total capital and pensions (E + F + G)**				
	TOTAL ALL ASSETS Future expectations, inheritances etc				

LIABILITIES (loans/overdrafts/credit card debts etc – to decide what to carry across to the main table)				
	Joint	**Name**	**Name**	**Notes**
TOTALS				

almost always linked to involvement with other professionals. In the case of the increasingly popular solicitor-assisted or hybrid model, they work together at exactly the same time. If each professional used the same comprehensive financial table, which travels throughout the clients' journey to settlement, this hugely reduces the chance of a proposal falling through the cracks.

Now may be the time for the mediation community to look in more detail at their financial remedy habits and practices in mediation. The profession has grown alongside the development of the forms and the standardisation of the consent order precedents. All mediators should have good knowledge of the standard orders, whether or not they offer a drafting service within their without prejudice outcome documents (to travel on afterwards for solicitors to approve). Getting consistency and rigour in the process of disclosure is a key factor, or the proposals will fail later down the line.

The mediation community has not yet had a conversation about whether there are better processes and practices than others in tackling the managing and capture of disclosure. Without being rigid or didactic, there could be good practice guidance on this, perhaps crafted by mediators who have the most experience and handled the most challenges. What comes out, perhaps even with varied opinions, could lead to a more efficient, transparent and

Notes: If necessary, set out here any explanations relating to the above table.

	MONTHLY INCOME (add a separate column if there is income for a child)			
		Name	**Name**	Notes
	Earnings – net or gross			
	Tax			
	N.I.			
	Student loan repayments or any other compulsory deductions			
	Self employed earnings			
A	**Earned income after tax and NI and other compulsory deductions**			
	Child Benefit			
	Universal Credit			
	Disability Payments – ESA, DLA, AA and PIP			
B	**State Benefits (including child benefit)**			
	Private pension received			
	State pension received			
C	**Pension received (and Pension Protection Fund compensation payments)**			
D	**Interest from Bank accounts**			
	Investment income			
	Rental income			
E	**Other sources of income (e.g. trust fund income, investment income)**			
F	**Sub-Total (A + B + C + D + E)**			
G	Child support/child maintenance received/[paid] -/+			
H	Spousal maintenance received/[paid] -/+			
I	**Sub-Total (G + H)**			
J	Child support/child maintenance received from third party			
K	Child support/child maintenance/spousal maintenance paid to third party			
L	**Sub-total (J + K)**			
M	**Grand Total (F + I + L)**			
	Pension contributions made (either from source or otherwise)			
	Net income after pension payments			

accessible financial mediation process, particularly when it comes to the forms and financial schedules used.

If there was already a standardised comprehensive financial table that mediators could use alongside the consent order precedents, this would make this endeavour very much easier.

Conclusion

D81 suffers from inconsistencies and incompatibility with other forms like ES2, making data transfer inefficient. Standardisation could streamline the process, ensuring clarity and reducing confusion, disputes and the submission of separate D81s.

A unified comprehensive financial table which feeds into D81 could improve data accuracy and consistency and promote a better and clearer route to settlement.

D81 would benefit from being looked at again and revised, to ensure that the right information is captured in a clear way. This clarity may later have a secondary role in being better able to inform us of the big data patterns of settlement.

Family Proceedings and Litigation Capacity

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Introduction

An integral yet little discussed part of our role as family law professionals is to ensure that our clients, and other parties and witnesses, are able to fully engage in the proceedings.[1] This can relate to vulnerable parties, such as parties who are victims of domestic abuse or parties with a disability (Family Procedure Rules 2010 (SI 2010/2955) (FPR) Part 3A[2]), or this can relate to protected parties, who lack the requisite capacity to give instructions within proceedings or to conduct proceedings generally (FPR Part 15[3]). In respect of the former, vulnerable parties may be supported via 'participation directions' to facilitate their involvement. In respect of the latter, where a party lacks litigation capacity, FPR Part 15 sets out the duties of the relevant legal representatives and the steps the court must take before any proceedings can progress.

This article aims to provide a practical overview of how litigation capacity is assessed within family proceedings and the steps we, as family law professionals, must follow if a party or intended party lacks litigation capacity.

Definition

Mental capacity means the ability to understand information and make decisions about one's life.

Litigation capacity is defined as the ability of a litigant in proceedings to conduct the proceedings, and the ability to partake in and follow the proceedings. The legal presumption is that an adult party or intended party to proceedings has the capacity to conduct those proceedings. A lack of capacity must be evidenced.

A person may lack capacity for various reasons, for example:

- disability;
- intellectual impairment;
- permanent or temporary neurological impairment;
- mental health reasons (severe depression or anxiety).

It is important to remember that just because someone falls within one of the above groups, that does not automatically mean that they will lack capacity.

Sections 2 and 3 Mental Capacity Act 2005 (MCA 2005) explain what is meant by a lack of capacity:

> '**2 People who lack capacity**
>
> (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
>
> (2) It does not matter whether the impairment or disturbance is permanent or temporary.
>
> (3) A lack of capacity cannot be established merely by reference to –
>
> (a) a person's age or appearance, or
>
> (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
>
> (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities. …
>
> **3 Inability to make decisions**
>
> (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable –
>
> (a) to understand the information relevant to the decision,
>
> (b) to retain that information
>
> (c) to use or weigh that information as part of the process of making the decision, or
>
> (d) to communicate his decision (whether by talking, using sign language or any other means)
>
> (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is unable to understand an explanation of it given to him in a way that is inappropriate to his circumstances (using simple language, visual aids or any other means).
>
> (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
>
> (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of –

(a) deciding one way or another, or

(b) failing to make the decision.'

There are a number of different aspects to a party's litigation capacity. A party may have the capacity to make a certain decision or deal with a certain application but not another. Capacity is decision- and time-specific.

A party who does not have litigation capacity (this having been evidenced) is referred to as a 'protected party'.

A litigation friend is the collective label given to a person appointed to assist a protected party with their litigation. This includes the Official Solicitor, but can be a friend or relative.

Should the litigation friend be a relative/friend or should it be the Official Solicitor?

Where a person lacks the capacity to litigate, it is necessary for someone to be appointed to stand in that party's shoes as their litigation friend, who will conduct proceedings and give instructions on their behalf. As we will come onto later, this is not an informal process but requires either notification to or an order of the court. This is the case whether the matter is in court or is being dealt with via non-court dispute resolution (NCDR). We have set out below the process for appointing a litigation friend. Where proceedings have commenced but the parties are engaging in a form of NCDR, the FPR applies and governs the appointment of a litigation friend insofar as the proceedings are concerned. If proceedings have not commenced and the parties are engaging in NCDR entirely outside the court process, there are no specific rules governing the appointment of a litigation friend. However, it would not be possible to act for a client where there is a concern that they may lack capacity, and so practitioners should still follow the process set out below, including obtaining medical evidence to satisfy themselves as to whether a party has the capacity to litigate, which if proceedings are commenced, could later be relied on for the completion and serving of a Certificate of Suitability.

Role of a litigation friend

A litigation friend can be a friend or family member of the protected party. They may be someone who has separately been appointed as a deputy by the Court of Protection, or someone whom the protected party has given power of attorney. However, these are distinct roles and a litigation friend could be someone completely different.

A litigation friend must be over 18 years old, and be able to fairly and competently conduct proceedings on behalf of a protected party. In order to act, a litigation friend must be satisfied that they do not have any interests in the proceedings adverse to that of the protected party. For example, if they had an interest in a property owned by the protected party and which is the subject of financial remedy proceedings, this could potentially lead to a conflict of interest.

Once appointed, a litigation friend will be responsible for the following:

- signing any legal documents;
- attending court hearings;
- approving documents (e.g. statements, barristers' notes, case summaries, etc);
- making decisions about the case, such as whether to accept offers made by the other side;
- talking to the protected party's solicitor about developments in the case, receiving advice and giving instructions on their behalf (including in respect of potential offers); and
- paying any costs ordered by the court.

It is important to remember that a protected party may be able to communicate their views on certain aspects of the case. In so far as it is possible, the litigation friend should therefore try to talk to the protected party about the case, in order to ascertain their wishes and feelings. However, where this is not possible, the litigation friend must still make decisions on behalf of the protected party, ensuring in every case that those decisions are made in the protected party's best interests.

It is not uncommon for people to significantly under-estimate the role of a litigation friend. There is a lot of work involved, especially in the run-up to a hearing. Acting as a litigation friend will require a serious commitment of time and energy. It is not a decision that people should take lightly. As this is not a professional appointment, there is no remuneration for the litigation friend. They would, however, typically be reimbursed for any expenses they have had to incur on behalf of the protected party, for example, travel costs or copying costs.

Practitioners should also be aware that litigation friends are subject to the same cost rules as other parties, and the court can make costs orders against them directly, should it be determined that they have litigated poorly.[4]

The role of the Official Solicitor

The Official Solicitor is an officer of the Supreme Court appointed by the Lord Chancellor. The appointment of the Official Solicitor as a litigation friend is a last resort,[5] and is appropriate only in cases where there is no other suitable person who is able and willing to act as a litigation friend for the protected party.

In order for the Official Solicitor to consent to act as a litigation friend, the following criteria must be met:

- the party or intended party is a protected party;
- there is security for the costs of legal representation for the protected party which the Official Solicitor considers satisfactory; and
- the appointment is a last resort.

If it becomes necessary from the outset of the solicitor–client relationship for the Official Solicitor to be appointed, the solicitor should write to the Office of the Official Solicitor setting out the background to the case and explaining the basis for the above criteria being met. If a client loses capacity during formal court proceedings, an order should be made inviting the Official Solicitor to act.

Once the Official Solicitor is satisfied that they can act, the case will be allocated to a case manager within 5 working days (2 working days in public law children cases). The Official Solicitor should then be provided with the following:[6]

(1) the sealed court order inviting them to act as a litigation friend;
(2) the letter of instruction and capacity assessment which

concludes that the protected party lacks litigation capacity;

(3) a full explanation of how the protected party's legal fees will be met;

(4) confirmation that there is no other person suitable and willing to act as a litigation friend; and

(5) a copy of the court bundle (if there is one).

How to appoint a litigation friend

The issue of litigation capacity can arise at any stage within the solicitor–client relationship. It may be that you are approached from the outset of proceedings by a party (or a prospective litigation friend) and it is apparent that there may be issues about that party's litigation capacity. On other occasions, a client could lose capacity during the course of the proceedings. In such cases, a party's solicitor will often be the first person to identify that their client lacks capacity. Where there are concerns as to an individual's capacity to litigate, no steps can be taken within proceedings (expect for the filing of an application form or applying for the appointment of a litigation friend[7]) without the court's permission until a litigation friend has been appointed. At whatever stage this occurs, it is therefore important to take the following steps as quickly as possible:

(1) *Medical evidence*. Where you have reason to believe that a party may lack litigation capacity, it will be necessary to ensure there is corroborative evidence which either confirms that a party does have litigation capacity *or* confirms that they do not. If the party is already under the care of a medical professional, it is possible to rely on a letter or report from them. However, where the question of capacity has the potential to be controversial, it may be sensible to instruct a medico-legal expert to conduct a full capacity assessment. There will usually be an additional cost for this report which will need to be met by the party themselves, unless the report has been obtained from a single joint expert (with an order that the costs be shared).

(2) *Identify a suitable litigation friend*. It may be that someone has already volunteered to be a litigation friend, but before proceeding, it is imperative that they fully understand the role and what is being asked of them. The litigation friend must have no interest in the proceedings adverse to that of the protected party. Consideration should also be given to the proposed litigation friend's own life and work commitments.

(3) *Complete and sign the Certificate of Suitability*. Once a litigation friend has been identified, they will need to complete and sign a Certificate of Suitability.[8] This is not required if the litigation friend is an appointed deputy. In this case, the deputy must file an official copy of the document which confers their authority to act.

(4) *File and serve the Certificate of Suitability and Certificate of Service*. The Certificate of Suitability needs to be sent to the court and the other parties. Where the protected party is an adult, it must be sent to anyone who has been appointed as a deputy, attorney under a registered enduring power of attorney, or donee of a lasting power of attorney, and in the absence of any such person, to any adult with whom the protected party resides or in whose care the protected party is.[9] A Certificate of Service will need to be completed and filed at court. [10]

(5) *If needed, submit a court application*. Whilst not always necessary, for a 'belt and braces' approach, you may want to formally apply to the court for a litigation friend to be appointed. The benefit of formally applying is that you then have a court document which confers authority onto the litigation friend, and you can request permission for the medical report to be admitted as evidence at the same time. It will also provide an opportunity for any directions to be re-timetabled. A formal application can be useful in cases where the need for a litigation friend is contested (or not accepted) by the other party. Where a court application is being made, this should be made on Form FP2 and in accordance with Part 18. A supporting statement is required, which should enclose the medical evidence relied upon and the Certificate of Suitability.

Once a litigation friend has been appointed, the protected party shall be referred to on any formal court documents as '*[Protected Party's Name] (by their litigation friend)*'.

Capacity assessment

If at any point during the solicitor–client relationship, there is a concern that a party lacks capacity, that party's solicitor must take the lead in any expert instruction for the purpose of a capacity assessment.[11] An assessment of a party's capacity must be dealt with swiftly as no instructions can be taken from that party, and no further steps can be taken in the proceedings, without the permission of the court (except for filing an application form or applying for the appointment of a litigation friend), until an assessment has concluded and, if necessary, a litigation friend is appointed.

The solicitor should consider who is best placed to carry out the assessment. This could be the client's current treating clinician or an independent expert. Contrary to the usual rules, there is no requirement for the instruction of this kind of evidence to be given on a single joint expert basis.[12]

In *A Local Authority v JB* [2021] UKSC 52 the Supreme Court held that there are two questions to consider when assessing capacity. These questions must be considered in the following order:

(1) Whether the person is unable to make a decision for himself in relation to the matter.

If so:

(2) Whether that inability to make the decision is **because of** an impairment of, or a disturbance in, the functioning of the mind or brain.

These questions, along with ss 2 and 3 MCA 2005, should form the basis of the expert's assessment.

Any assessment is to be carried out on the basis of the *specific* proceedings, not the proceedings in general (i.e. the specific assets/facts of the case and decisions the party must make, rather than financial remedy proceedings in general) or in relation to the protected party's general capacity to make decisions. If following the assessment, the expert considers the protected party does have litigation capacity, they do not need to give grounds as to why this is their view.[13] However, if they consider that the individual does not have capacity they must provide grounds for that opinion.

As mentioned above, capacity can fluctuate and can relate to certain aspects of a matter and not another. Ongoing consideration must therefore be given as to whether things have changed on the ground or whether there is a need for an updated assessment or review of capacity.

Key things to look out for

It can sometimes be difficult to notice changes in a client's behaviour and raising concerns about a client's litigation capacity can also, of course, be a difficult conversation to have within a solicitor–client relationship. However, in order to ensure a client is receiving the best representation, it is something one must bear in mind.

Set out below are some things to look out for in clients:

- decision paralysis;
- repetitive questions in respect of the court process or more simple legal principles
- underlying diagnoses (anxiety, depression, ADHD);
- change in demeanour/body language;
- general disengagement in the court process;
- a change in understanding about something which they previously seemed to understand;
- forgetfulness/spotty memory;
- a sudden or ongoing state of confusion;

Conclusion

As this article has demonstrated, the issue of litigation capacity in family law proceedings is a complex one. It is an issue which must be taken seriously with the correct procedure being followed. As practitioners will know, family law proceedings are generally difficult for all of our clients. However, for a client who lacks litigation capacity, it is essential that we as their representatives do what we can to protect them, their futures, and their ability to participate within these proceedings. The above is, hopefully, a good starting point when one is approached with this issue in practice.

Notes

1 When we refer to proceedings in this context, it is important to note that this incorporates both the court process and any voluntary process.

2 https://www.justice.gov.uk/courts/procedure-rules/family/parts/part-3a-vulnerable-persons-participation-in-proceedings-and-giving-evidence

3 https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_15

4 See HHJ Hess's decision in *Y v Z* [2023] EWFC 205 in which the litigation friend was ordered to meet 100% of the costs order made due to their failure to discharge their duties as a litigation friend.

5 FPR PD 15B, para 1.1.

6 Practice Note (January 2017) – The Official Solicitor to the Senior Courts: Appointment in Family Proceedings and Proceedings Under the Inherent Jurisdiction in Relation to adults, para 23, https://www.gov.uk/government/publications/appointment-of-official-solicitor-in-family-proceedings-practice-note

7 FPR 15.3.

8 Form FP9.

9 FPR 15.5(5) and 6.14.

10 Form FP6.

11 FPR PD 15B, para 2.1.

12 FPR PD 15B, para 5.1.

13 See Official Solicitor, 'Certificate: Capacity to Conduct Proceedings', para 5 (updated 17 February 2023), https://assets.publishing.service.gov.uk/media/63e3b03ad3bf7f172ccae151/capacity-to-conduct-proceedings-certificate.pdf

When the Wife Becomes a Widow: The Effect of Death on Financial Provision Claims

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'In this world, nothing can be certain except death and taxes.' So Benjamin Franklin is said to have written to Jean-Baptiste Le Roy. Taxes and their impact are usually closer to the front of the minds of those going through divorce or a dissolution of a civil partnership, but occasionally death can rear its head, and cause significant disruption to those anticipating or venturing into a new structure to their lives following the breakdown of their family.

This article considers the legal and financial implications that arise in England and Wales when a divorcing or recently-divorced party to a marriage dies.

At what stage are proceedings?

As readers are likely to be aware, financial remedy proceedings are usually initiated upon divorce. Only orders under s 27 Matrimonial Causes Act 1973 or Sch 5, clause 39 Civil Partnership Act 2004 allow for financial provision for a married party in the case of the other party neglecting to maintain the applicant or a child of the family. Such applications are very rarely issued and they will not be considered in this article. Pursuant to FPR 9.4 applications for financial orders can be made in an application for divorce or dissolution of a civil partnership or at any time after the final order in those proceedings has been made (assuming the application is not barred under s 28(3) Matrimonial Causes Act 1973 or Sch 5, clause 48 Civil Partnership Act 2004).

If a party dies before financial remedy proceedings are issued, then the adviser must consider at what stage the divorce was at.

If the divorce petition had not been issued and all the way up to pronouncement of a final order of divorce/decree absolute, then the parties remained married. If there was a valid will executed by the deceased prior to death, his estate devolves under that will, subject to any claims that may be brought under the Inheritance (Provision for Family and Dependants) Act 1975 against its division where it does not provide for reasonable financial provision for his spouse, or otherwise reasonable financial provision for any of the other potential categories of claimant. If there was no valid will, then the deceased's estate devolves under the intestacy rules set out in s 46 Administration of Estates Act 1925 and Sch 1A to that Act. The surviving spouse currently receives the entirety of the deceased's estate if the deceased has no issue, or otherwise, if he has issue (children and/or grandchildren), then:

(1) all the personal chattels of the deceased,[1] namely all tangible movable property, other than any such property which consists of money or securities for money, or was used at the death of the intestate solely or mainly for business purposes, or was held at the death of the intestate solely as an investment;
(2) a fixed sum £322,000[2] free of tax and costs, together with simple interest on it at the Bank of England rate that had effect at the end of the day on which the intestate died[3] from the date of death until paid or appropriated; and
(3) thereafter as to one half of the residuary estate (what remains) in trust for the surviving spouse, and as to the other half on statutory trusts for the issue of the intestate.

On a death resulting in intestacy prior to divorce, where the former matrimonial home or any other real property or assets were held beneficially as joint tenants between the spouses, then the right of survivorship applies, and the deceased's interest in that property or assets passes to the survivor outside the deceased's estate. It would not fall within the division provided for in the intestacy rules. If there is a beneficial joint tenancy in relation to property or assets between the deceased and a third party, likewise the said property transfers absolutely to that third party outside the deceased's estate. This can cause difficulties for a surviving spouse with no beneficial interest in the former matrimonial home and she may have to take steps towards a claim under the 1975 Act to protect herself.

Where the former matrimonial home and/or other property and assets were held by the intestate deceased and the surviving spouse as beneficial tenants in common, then the survivor retains her share and the intestacy rules apply to the deceased's estate, with that estate having within it only his share of the property provided for under the trust and from which the survivor's share on intestacy will derive.

By virtue of s 5 Intestates' Estate Act 1952, the surviving spouse has the right to acquire the matrimonial home in which she resides from the deceased in accordance with the provisions of the Second Schedule to that Act by requiring the deceased's personal representative to exercise his power under s 41 Administration of Estates Act 1925 to have the deceased's interest in that property appropriated to her as part of her absolute entitlement (i.e. in relation to the fixed monetary sum and/or chattels). In order to do this, she must exercise that right within 12 months of the date of the Grant of Letters of Administration to the personal representative[4] and in advance of exercising that right she may require the personal representative to have the interest in the home valued in accordance with s 41 Administration of Estates Act 1925 and to inform her of that value before she decides whether to exercise the right (bearing in mind that she is, in effect, paying for that interest).[5] If the issue arises towards the end of that time limit, the court may extend the time, or alternatively the personal representative may consent to an appropriation outside the time limit.

If financial remedy proceedings had been issued prior to the death and the parties have reached an agreement on the outcome or otherwise the court has given a judgment providing for the outcome, but the final order of divorce has not yet occurred, what then? Under ss 23(5) and 24(3) Matrimonial Causes Act 1973 no order for financial provision for a spouse nor for a property adjustment order takes effect until there has been a final order on the divorce itself. Note that orders for financial provision for children under s 23(1)(d)–(f) are not excluded by s 23(5) and so they must be assumed to take effect upon their making, whether or not the divorce is made final.

Where a final financial remedy order has been made, whether by agreement or by the court after a contested hearing, if one party to that order dies before the making of the final order of divorce, then the survivor finds herself in difficulty. She may wish to ensure that the financial remedy order can take effect and seek to finalise the divorce, but she cannot do so, as once death has ended a marriage, it cannot be dissolved by divorce.[6] The financial remedy proceedings end as there is no jurisdiction to hear an application for ancillary relief after the death of one of the parties.[7] This also applies in cases for financial relief claims in England and Wales after a foreign divorce under Part III Matrimonial and Family Proceedings Act 1984.[8] In the case of the deceased dying domiciled in England and Wales, as above, the survivor remains married and has a claim, if necessary, against the estate of the deceased under the Inheritance (Provision for Family and Dependants) Act 1975. If, however, as in *Unger v Ul-Hasan*,[9] the deceased died domiciled abroad, then there is no ability of the survivor to bring a claim in the English Courts for any kind of discretionary financial provision. There may be the prospect of a claim being brought in the foreign jurisdiction, if necessary (e.g. because there is no or minimal provision for the survivor in any valid will or otherwise because forced heirship provisions make insufficient provision).

If the divorce had been made final and the financial remedy judgment had been delivered to the parties or otherwise a compromise had been approved by the court, but the order consequent upon that judgment or agreement had not yet been sealed, the order arising therefrom would remain enforceable.[10] Black J, as she then was, said in *McMinn v McMinn*:[11]

> 'It is clear that it is not a necessary prerequisite for an order either that the order has been formally typed up, stamped and/or issued by the Court or that every last detail of the arrangements should have been resolved by the Court.'
>
> 'In summary, therefore, s.25(5) apart, I consider that the district judge made an order for ancillary relief on [date].'

Where a party dies before the final divorce order is made, one of the concerning issues for the survivor is that the costs of both sides are by then wasted. There is no possibility of enforcing anything other than previously-made costs orders. However, if the final divorce order has been pronounced prior to the death, then the court can determine costs applications even after the death of a party. Again, Black J (as she then was) in *McMinn* said:[12]

> 'I do not consider that the absence of provision as to costs in the district judge's written judgment prevented it from being an order, particularly given that he made provision for a means by which any costs issue that there might be could be resolved.'

I've got my final order on divorce but my ex has died. Can I do anything about it?

Most final financial remedy orders provide for an asset and income clean break. There are usually orders made within those orders under s 15 Inheritance (Provision for Family and Dependants) Act 1975 providing that the survivor cannot apply for an order out of the deceased's estate after divorce. Again, s 15 1975 Act orders only take effect upon the final order of divorce, although the orders can be made after the conditional order of divorce is pronounced.[13] Orders under s 15(1) 1975 Act barring applications for claims under estates also apply to judicial separations where the judicial separation order is in force and the separation is continuing.[14] Sections 15(ZA), 15A and 15B apply in the same terms to civil partnerships, and applications for financial relief after foreign divorce or foreign dissolution of civil partnership.

If, prior to the death, there had been no financial remedy proceedings reaching their conclusion, even though there was a final divorce order, then, if the deceased died within 12 months of the making of the final order of divorce/dissolution, the survivor has a claim available to her under s 2 1975 Act as a spouse.[15] Where there is no reasonable financial provision made for her under the deceased's will, the law of intestacy or a combination of the two, then she can claim for such financial provision as it would be reasonable in all the circumstances of the case for her to receive, whether or not that provision is required for her maintenance.[16] If the deceased dies more than 12 months afterwards, then the survivor is able to bring a claim under the 1975 Act for such financial provision as it would be reasonable in all the circumstances of the case for her to receive for her maintenance.[17]

Where there was a final order for divorce and a final financial remedy order made prior to the death, but that final financial remedy order has no or a delayed s 15 1975 Act bar, e.g. because there is a joint lives maintenance order and no income clean break has occurred, then claims by the survivor can be brought under s 14 or s 14A together with s 1 1975 Act to deal with a continuation or variation of that provision. Sections 16–18A 1975 Act deal with claims for variation and discharge of secured periodical payments orders under the Matrimonial Causes Act 1973 and of maintenance agreements, including providing for the ability to replace them with other orders contained in s 2 1975 Act (periodical payments, lump sums, transfers of property, creation and variation of settlements/trusts).

If there was a final order for divorce and a final financial remedy judgment or order prior to the death, including a clean break and a s 15 1975 Act bar, what then? The final financial remedy order was made in circumstances where two adults had to have provision made for them, and now there is only one survivor who has continuing needs. Is it fair to hold the survivor and the deceased's estate to the terms of the final financial remedy order?

That depends on whether the survivor can establish:

(1) that the death was a *Barder* event or there was another vitiating factor undermining the financial remedy order; and
(2) that the original order was not based on a sharing claim, but was a division of assets on a needs basis. The case law shows that where sharing awards were made, the original order would not be disturbed, but where the question was one of meeting needs from insufficient assets generally, then there is scope for a revision of the terms of the final order, since the deceased no longer needs as much of the assets, and the survivor might need them still.

In *Barder v Barder (Caluori Intervening)*[18] shortly after making a final order for ancillary relief the wife killed the parties' children before taking her own life. The financial settlement had been based on the fundamental assumption that she and the children had housing needs. Their deaths invalidated the basis for the order. The effect was that her administrator (her mother – Ms Caluori) did not take Mrs Barder's share of the matrimonial assets as Mr Barder needed them. That case established that a surviving ex-spouse could apply for leave to appeal out of time and the court might properly exercise its discretion to allow that appeal on the ground of new events provided that:

(1) they invalidated the fundamental assumption on which the order was made, so that if leave were given, the appeal would be certain or very likely to succeed;
(2) the new events occurred within a relatively short time, probably less than a year, of the order being made;
(3) the application for leave to appeal out of time had been made promptly; and
(4) the application does not prejudice third parties who had acquired, in good faith, and for valuable consideration, interests in property which was the subject matter of the relevant order.

The ratio in *Barder* was followed in:

- *Smith v Smith (Smith & Ors Intervening)*.[19] In that case H and W had been married in December 1955 and decree absolute was pronounced in 1988. W applied for ancillary relief when she was 52 and H was 62. The registrar considered that an equal division of the assets was the only just conclusion and made an order for a £54,000 lump sum to W. 6 months later W died by suicide and left her estate, including the lump sum, to her daughter. H appealed. On H's appeal the judge assessed W's needs as those of the estate, i.e. her debts, but otherwise they were non-existent. The order was varied to require the estate to repay H the lump sum, save for a sum to repay W's debts. W's daughter appealed the appeal court's decision. The Court of Appeal allowed her appeal. The question was, 'what was the right order to be made between H and W where W was known to have 6 months or so to live?' W's needs were limited to a brief period. A clean break would have been unlikely. Needs were not the only criteria for consideration. All the s 25(2) Matrimonial Causes Act 1973 criteria had to be considered. W had made an equal contribution to the marriage over 30 years and had a right to recognition of that contribution. The registrar's order was varied so that W received £25,000, which would then pass under her estate. It was stated that the eventual destination of W's estate was irrelevant. She could leave it in any manner she wished. The argument that an order should not be made for the purpose of benefiting an adult child did not arise.
- In *Barber v Barber*[20] W became ill with liver disease after receipt of decree nisi. The medical evidence at final hearing was that she could hope to live at least another 5 years. H had the children living with him. The judge at first instance ordered that the family home be sold and W receive £125,000 to buy a home and periodical payments to meet income needs. W died less than 3 months later, and after decree absolute had been pronounced. H appealed, arguing that W was to have sufficient capital to rehouse in a property where the children could stay/live with her and this need was no longer there. W's estate had passed to her children on statutory trusts on her intestacy. H sought to avoid the sale of the family home, into which he and the children had returned to live. The court held the correct approach is to consider what order would be made where there was knowledge that W would have only 3 months to live. W would have stayed in the family home, H would have maintained her, she would retain her 50% share, and there would have been no capital order made in her favour. She had made a substantial marital contribution. Her share of the family home had effectively passed to her sons. The order would be varied so that the children would retain a 40% share of the family home to take account of H having to bring them up and the property would not be sold without H's consent pending the youngest reaching his majority.
- In *Reid v Reid*[21] there had been a 40-year marriage. A consent order was made dismissing all claims and reciting an agreement between H and W that the FMH be sold and the net proceeds of sale divided 40% to W, 60% to H. H needed to rehouse. W did not. Two months after the date of order and 15 days after decree absolute, W died of a heart attack, aged 74. W had disclosed in proceedings that she was registered blind, had high blood pressure, had high cholesterol, and was diabetic. W's actuarial life expectancy in

proceedings was 13 years. H appealed, arguing that the net proceeds of sale should be divided 75%/25% in his favour. W's executors countered that:

(1) the early death of a 74-year-old woman was foreseeable and could not qualify as a new event;
(2) post *White* W was entitled to an award based on contributions rather than needs;
(3) W could choose what she did with her share, including bequeathing it by will;
(4) W had received less than half the value of the property to meet H's needs and a further reduction of her share was not justified.

It was held that W's death 2 months after the order amounted to a new event which had not been reasonably foreseeable. Had it been known that she only had 2 further months to live, what then was the appropriate order? The length of W's future needs would be the subject of a severe contraction. H needed an increase in his liquid capital as he had small pension income. The recited agreement of the parties would not be disturbed, but the mechanism to alter the division would be an order for W to pay a lump sum to H.

- In *Richardson v Richardson*[22] H and W had a 46-year marriage. During the marriage they had run a hotel business together as equal partners. The net value of the assets on divorce was circa £11m. No allowance had been made by them for a potential claim arising from an accident some years earlier where a child fell from the hotel window and suffered injury. Both parties believed any claim would be covered by insurance. W received 47.5% assets (hers were more liquid than H's). She was to resign from their partnership and H would indemnify her against all partnership liabilities. This occurred shortly after the order was made. Six weeks after the order was made, W died suddenly of a heart attack. The parties' son was sole executor and beneficiary of the estate. Twelve weeks after the final order (5 years after the child's accident) H became aware the insurer had avoided the insurance policy. His insurance broker and accounts manager had been aware it was likely, but H had not been. H appealed the order out of time on the basis of a *Barder* event (W's death) and alternatively on the basis of vitiating mistake (that the parties were initially under-insured and, indeed, not insured). Held that W's death was not a *Barder* event as, although her death was unforeseen, the basis upon which the order was made – equal sharing in the fruits of the marriage as a result of W's equal contribution by being an active business partner – still stood and was not invalidated. The order was not referable to her needs or her future expectation of life. H's failure to note that the original insurance cover was likely to be less than that required to meet any claim for damages was not a vitiating factor, but H's (and W's) lack of knowledge that they were, indeed, uninsured *was* a vitiating factor and the appeal was allowed. In that case Thorpe LJ (with whom the other judges (Munby and Rimer LJJ) agreed, stated:

  > 'Cases in which a *Barder* event, as opposed to a vitiating factor, can be successfully argued are extremely rare, should be regarded by the specialist profession as exceedingly rare, and should not be thought to be extendable by ingenuity or the lowering of the judicially created bar.'

- In *WA v Executors of the Estate of HA (Deceased)*[23] H and W married in 1997. They had three children under the age of 14 upon separation. Neither party worked during the marriage but their contributions to the marriage were significant. H was awarded £17.34m by agreement, to be paid in two tranches. The first tranche was paid. Twenty-two days later H died by suicide. H left his estate to his three adult siblings. W applied for permission to appeal out of time in reliance on *Barder*. W argued that the lump sum was awarded to H to meet his needs, which basis had been invalidated by his death. H's estate argued his death was not unforeseeable (as he had taken the separation very badly) and also that his award was not only needs based, but that he was also entitled to a share of W's resources. W's appeal was allowed, reducing the lump sum to H to £5m. W had succeeded in meeting the *Barder* test as the fundamental assumption was that H had needs for housing and income in the long-term, which had been invalidated by his very early death. If his death had been foreseen, a nil award would have been wrong. The court would have considered sharing and need leading to an award where H had a month to live. H should have received an award of one-third of the value of the matrimonial property (which came entirely from W), namely £5m, taking into account H's contribution as husband and father. H's original award had been mostly needs-based, however, and was susceptible to being set aside pursuant to *Barder*.
- *Critchell v Critchell*[24] concerned the death of a third party as a *Barder* event. In that case the only asset of the marriage was the FMH worth £175,000. A consent order transferring the FMH to W subject to 45% charge in favour of H realisable on *Mesher* terms was made. Within a month of the consent order, H's father died leaving him a sum of money. W appealed alleging the receipt of the inheritance was a *Barder* event undermining the basis of the consent order. The Court of Appeal held that H's receipt of an inheritance so soon after the hearing represented a change in the basis, or fundamental assumption, upon which the consent order had been made. The *Mesher* order was no longer necessary. The appeal court highlighted that original order was needs-based and if more resources were available, needs could be provided for more fully and there would be no need for a *Mesher*.

All of the above decided cases setting out the parameters in which a final financial order might be revised after the death of a spouse or of a third party were appeal out-of-time cases. Since the amendment of FRP 2010, PD 9A, para 13, an application for set aside or variation of the original order should instead be made to the first instance judge, and not to the appeal court.

What about pension provision?

The final issue this article considers is what should happen to pension sharing orders made and finalised prior to the death of one of the parties. The standard form order provides as a consequential direction to a pension sharing order:

i. It being agreed between the parties that in the event that the [applicant] / [respondent] non-member spouse predeceases the [respondent] / [applicant] member spouse after this order has taken effect but before its implementation the [respondent] / [applicant] member spouse shall [in order to prevent a loss of pension rights to the family overall] have the consent of the personal representatives of the [applicant] / [respondent] non-member spouse to apply to appeal out of time against the order under the Matrimonial Causes Act 1973, s 40A or s 40B (there being no requirement to obtain permission to apply to set aside an order under FPR 2010 r.9.9A).

The question of when and how pension provision can be altered was considered in two recent cases:

- First by HHJ Farquhar in *Goodyear v Executors of Goodyear (Deceased)*[25] when H applied to set aside a pension sharing order following W's death, with the application opposed by W's executor. The issue was whether W's death was a *Barder* event. The court determined that the purpose of the pension sharing order was to ensure that the parties had sufficient income during retirement and that had it been known that W would not live more than 6 months after the order was made then the pension sharing order would not have been agreed. The judge found that the *Barder* criteria were satisfied and that the order would be set aside, but that it would not have been fair to W if no pension share had been made, as the parties had significantly different pension provision and a long marriage. She had a sharing claim, which was satisfied by her receiving 25% of H's pension to reflect her entitlement. This case bears careful reading as to what can go wrong between the understanding of pension trustees as to their duties and the effect of pensions legislation on pension sharing orders and their implementation after the death of the recipient.
- Secondly by Christopher Hames KC (sitting as a recorder) in *SY v Personal Representatives of the Estate of DY*.[26] The matter was listed for directions before the Judge but the costs were already becoming disproportionate to the issues and the parties agreed that the judge should deal with the substantive issues between them at that hearing. In that case a final financial remedy order had been made in September 2022. In March 2023 W died. As part of the final financial remedy order H had been required to share his NHS pensions with W. H appealed out of time on the basis of a *Barder* event rather than apply to set aside in order to avoid the implementation of the pension sharing order. The personal representatives of W conceded he should be granted permission to appeal and that the pension sharing order should be set aside. The question was whether that set aside should be conditional on H making payment of a lump sum to the estate, that being the lump sum W would have received from the NHS pension. H resisted this, stating that he needed the funds in order to bring up the parties' three children and that the pension sharing order had been made to provide W with an income in retirement which, as a result of her early death, she no longer needed. The court considered that that the *Barder* criteria had been satisfied and set aside the pension sharing order, but only on the condition that H pay W's estate the circa £50,000 lump sum. He held that the pension sharing order went also to an element of sharing and entitlement, not merely to meet needs. Accordingly, W's estate should benefit so as to recognise W's sharing claim and entitlement.

Conclusion

As is clear from the above, the death of one of the parties to the marriage may not be the end, but may instead be the start of harrowing legal negotiations and litigation if the surviving parties cannot reach an accord with the personal representatives of the deceased. It is vital in these difficult circumstances that early legal advice is taken and the survivors act pragmatically to ensure a fair outcome to all concerned. If they do not, the courts will ensure that occurs, with inevitable costs consequences following on.

Notes

1 As defined in Administration of Estates Act 1925, s 55(1)(x).
2 Administration of Estates Act 1925 (Fixed Net Sum) Order 2023 (SI 2023/758), which came into force on 26 July 2023.
3 Administration of Estates Act 1925, s 46(1A).
4 Intestates' Estate Act 1952, Second Schedule, clause 3(1).
5 Intestates' Estate Act 1952, Second Schedule, clause 3(2).
6 *Stanhope v Stanhope* (1886) 11 PD 103.
7 *D'Este v D'Este* [1973] Fam 55.
8 *Unger & Anor (in substitution for Hasan) v Ul-Hasan (deceased)* [2023] UKSC 22.
9 *Unger v Ul-Hasan* [2023] UKSC 22.
10 *McMinn v McMinn (Ancillary Relief: Death of a Party to Proceedings)* [2002] EWHC 1194 (Fam), [2003] 2 FLR 823.
11 *McMinn v McMinn* at [36].
12 *McMinn v McMinn* at [38].
13 Inheritance (Provision for Family and Dependants) Act 1975, s 15(2).
14 Inheritance (Provision for Family and Dependants) Act 1975, s 15(4).
15 Inheritance (Provision for Family and Dependants) Act 1975, s 14(a). Section 14A for civil partners.
16 Inheritance (Provision for Family and Dependants) Act 1975, s 1(2)(a) and (aa).
17 Inheritance (Provision for Family and Dependants) Act 1975, s 1(b) and 2(b).
18 *Barder v Barder (Caluori Intervening)* [1988] AC 20, [1987] 2 FLR 480, HL.
19 *Smith v Smith (Smith & Ors Intervening)* [1991] 2 FLR 432, CA.
20 *Barber v Barber* [1993] 1 FLR 476.
21 *Reid v Reid* [2004] 1 FLR 736.
22 *Richardson v Richardson* [2011] EWCA Civ 79, [2011] 2 FLR 244.
23 *WA v Executors of the Estate of HA (Deceased)* [2015] EWHC 2233 (Fam), [2016] 1 FLR 1360.
24 *Critchell v Critchell* [2016] 1 FLR 400.
25 *Goodyear v Executors of Goodyear (Deceased)* [2022] EWFC 96.
26 *SY v Personal Representatives of the Estate of DY* [2023] EWFC 280 (B).

Will Delays in Converting Arbitral Awards into Court Orders Deter the Use of Arbitration?

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> 'There is a common misconception that the use of arbitration, as an alternative to the court process in financial remedy cases, is the purview only of the rich who seek privacy, away from the courts and the eyes of the media. If that was ever the position, it is no more. The court was told during the course of argument, that it is widely anticipated that parties in modest asset cases (including litigants in person) will increasingly use the arbitration process in the aftermath of the Covid-19 crisis as the courts cope with the backlog of cases, which is the inevitable consequence of "lockdown".
>
> It goes without saying that it is of the utmost importance that potential users of the arbitration process are not deterred from using this valuable service; either, on the one hand, because the outcome is not seen as sufficiently certain or, on the other, because arbitration is regarded as providing no adequate remedy in circumstances where one of the parties believes there to have been an unjust outcome.'[1]

Since the Court of Appeal's judgment in *Haley* in 2020 there have been numerous attempts to encourage litigants and legal representatives to use arbitration to resolve family law disputes. These attempts include the guidance given by Mostyn J in *A v A* [2021] EWHC 1889 (Fam), the amendments to FPR Part 3 and Part 28 that came into effect on 29 April 2024, and the new pre-action protocol annexed to FPR PD 9A. Although the use of arbitration has increased in recent years it arguably remains the most under-utilised of the usual non-court dispute resolution options.

The recent case of *ON v ON* [2024] EWFC 379 will probably generate publicity in relation to the view expressed by HHJ Booth (sitting as a High Court Judge) that the duty of disclosure continues between the date of an arbitral award and subsequent court order. But the case also illustrates the difficulties which can arise when there is a change of circumstances between an arbitral award being delivered and reflected in a court order, particularly when the asset base includes resources such as business interests which can legitimately fluctuate quite substantially in a short period of time.[2]

The brief facts of *ON v ON* are as follows. The parties separated in 2020 after a 24-year marriage. They were both in their early 50s by the time of the hearing. They had four children, three of whom were over 18 years of age and largely independent. Divorce proceedings commenced in November 2020 followed by Form A in February 2021. The parties subsequently agreed to arbitrate the financial remedy proceedings with a 4-day hearing taking place before Nicholas Allen KC in May 2022.

The arbitrator found the total net assets to be approximately £4.8m. This included business interests owned by the husband which had been subject to a single joint expert (SJE) valuation which the arbitrator accepted and therefore valued at £1.3m on an earnings basis. The arbitrator shared the assets broadly equally between the parties, with the wife to retain the proceeds of sale of the family home and the husband retaining his business interests. The husband was also to pay periodical payments to the wife until her 67th birthday and support their youngest child who lived with the wife.

A draft award was circulated in July 2022. There was then a delay in converting the arbitral award into a court order. Both parties raised points of clarification and asked for other issues to be decided. The arbitrator decided those issues in an addendum to his award in January 2023. The parties then sought to agree the terms of a draft order without success. In June 2023 the wife applied to the court for directions about the terms of the order but, before that application was even listed, applied in August 2023 to set aside the award on the basis of the husband's alleged non-disclosure, seeking to receive substantially more. The husband cross-applied seeking to be relieved of his obligations under the award and to pay less.

The judgment of HHJ Booth is dated 11 December 2024. He heard oral evidence from both parties. The hearing lasted longer than the original arbitration final hearing.

The principal issue before HHJ Booth was the increase in the value of husband's business interests after the arbitration hearing. The SJE and arbitrator had relied on accounts from 2021 and projected figures for 2022. When the 2022 accounts were filed with Companies House in January 2023 (shortly after the final arbitral award had been made) they showed an improved position. One of the main reasons was because the husband's business had been able to re-negotiate contracts to charge more for materials. Another reason was a substantial tax rebate.

The difference this change made to the accounts was substantial. The business which had been projected to make a loss in 2022 ended up making a profit. The SJE was asked to update his report and opined that the new figures would result in the value of the businesses increasing by £3.65m, although by the time of the hearing before HHJ Booth the 2023 accounts had also been filed which showed a more modest increase in value of £2.36m.

There had inevitably been other changes too. The family home (from which the wife was to receive the bulk of her settlement) was valued at a little under £3m net at the date of the arbitration hearing. However, by the time of the hearing before HHJ Booth it had been on the market for sale for more than 2 years and there had been no offers. The judge therefore assumed that it was worth less significantly less than thought and considered a realistic value would produce £2.5m for the wife. Tens of thousands of pounds had also been spent servicing interest payments on mortgages which had increased significantly upon the expiry of fixed terms. Interest on the wife's litigation loan was continuing to accrue. And both parties had spent substantial further costs on legal fees.

HHJ Booth found that the husband had breached his duty of disclosure which continued beyond the making of the award until the making of the court order. The husband should have disclosed the re-negotiated contracts and the impact they could have on the value of his business but had failed to do so. The failure was found to be a deliberate and fraudulent one.

There had therefore been a substantial change to the value of the main assets in the case in favour of one party and to the detriment of the other. What was the court to do in these circumstances? It would clearly be very unsatisfactory to re-litigate the financial remedy proceedings afresh.

The judge decided to adjust the arbitral award. He increased the value of the husband's business interest in line with the 2023 accounts and awarded the wife half, namely an extra £1.16m. He also ordered the husband to pay £200,000 towards the wife's legal costs. The judge also took the view the husband should be entitled to recover £250,000 from the wife towards his legal costs, although decided not to make an enforceable costs order because of the decrease in value of the family home.

Whilst it is easy to understand what led the judge to this decision, it does illustrate one of the risks associated with arbitration, namely the prospect that one or both parties may seek to challenge an award owing to a subsequent change in circumstances after its delivery. This is particularly relevant in cases involving business interests which are notoriously fragile and can change quite substantially in a short space of time for a variety of (wholly legitimate) reasons.

It can also be difficult to determine where to stop once a decision has been made to adjust an award. It is clear from the addendum to HHJ Booth's judgment that the wife complained that the revised outcome did not achieve a 50/50 split as the judge had updated some values but not others. In addition, there could be arguments as to post-separation accrual where there has been an increase in the value of an asset 3 or 4 years post-separation. Or arguments about the fair allocation of copper bottomed and risk laden/illiquid assets between the parties.

Another example of the risks associated with delays recording arbitral awards into court orders can be found in *LT v ZU* [2023] EWFC 179 (B) where HHJ Evans-Gordon allowed a challenge to an arbitral award because (among other more primary grounds) there had been a significant increase in borrowing rates after the arbitral award had been delivered. In that case HHJ Evans-Gordon felt unable to adjust the award meaning it would need to be litigated afresh.[3]

What can be done to mitigate the chance of these risks deterring the use of arbitration? Might one option, I suggest, to the almost audible groans of arbitrators across the country, be to include in the ARB1FS a request for the arbitrator to draft an order recording their award? Perhaps an expedited route to court so that arbitral awards can be converted into court orders with agreement, or directions can be given when an award is being challenged, without any undue delay?[4] After all, this is what was originally meant to happen with IFLA arbitration: per Munby J in *S v S* [2014] EWHC 7 (Fam) at [21]:

> 'Where the consent order which the judge is being asked to approve is founded on an arbitral award under the IFLA Scheme … The judge will not need to play the detective unless something leaps off the page to indicate that something has gone so seriously wrong in the arbitral process as fundamentally to vitiate the arbitral award. Although recognising that the judge is not a rubber stamp, the combination of (a) the fact that the parties have agreed to be bound by the arbitral award, (b) the fact of the arbitral award (which the judge will of course be able to study) and (c) the fact that the parties are putting the matter before the court *by consent*, means that it can only be in the rarest of cases that it will be appropriate for the judge to do other than approve the order. With a process as sophisticated as that embodied in the IFLA Scheme it is difficult to contemplate such a case.'

Or perhaps more rigorous adherence to the guidance given by Mostyn J in *A v A* including applications to implement or challenge arbitral awards being made within 21 days of the award?

As King LJ said in *Haley*, it is of utmost importance that people are not deterred from using arbitration because the outcome is not seen as sufficiently certain. Whilst there are *so* many benefits of arbitration, it is arguable that the current law and procedure in relation to converting arbitral awards into court orders – particularly in cases involving assets such as business interests which can legitimately fluctuate quite substantially in a short period of time – potentially risk deterring some from using arbitration.

Notes

1 *Haley v Haley* [2020] EWCA Civ 1369 at [5] and [6] per King LJ.

2 As Lewison LJ said in *Versteegh v Versteegh* [2018] EWCA Civ 1050 at [85]: 'The valuation of private companies is a matter

of no little difficulty … The reasons for this are many. In the first place there is likely to be no obvious market for a private company. Second, even where valuers use the same method of valuation they are likely to produce widely differing results. Third, the profitability of private companies may be volatile, such that a snap-shot valuation at a particular date may give an unfair picture. Fourth, the difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious. Fifth, the acid test of any valuation is exposure to the real market, which is simply not possible in the case of a private company where no one suggests that it should be sold.'

3 The judgment of HHJ Evans-Gordon was overturned on appeal by Cobb J in *Re A and B (Schedule 1: Arbitral Award: Appeal)* [2024] EWHC 778 (Fam) on other grounds (i.e. not in relation to the decision to allow the arbitral award to be challenged because of a change of circumstances). It is understood the Court of Appeal had given permission to appeal the decision of Cobb J, but the parties have since reached a negotiated settlement.

4 A similar suggestion was recently made by Resolution in their report *Domestic Abuse in Financial Remedy Proceedings* (Resolution, October 2024).

Domestic Abuse, Nuptial Agreements and Financial Remedies: A Cultural Shift?

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As family practitioners will know, the dynamics involved in negotiating nuptial agreements are no less nuanced than those in other parts of our work. There can be power imbalances, cultural clashes and differing perceptions of fairness.

As we become more alive to the prevalence and forms of domestic abuse and the ways in which the law and procedures don't adequately support victims, it's important that we apply that awareness to our work on nuptial agreements. The *Fair Shares* research identified that 29% of divorcees cited their partner's domestic abuse or controlling behaviour as a reason for the breakdown of the marriage, with a recent follow-up report examining the impact on financial remedy outcomes.[1] Resolution has also made recommendations for a 'cultural shift from all family justice professionals to better meet the needs of victim-survivors of domestic abuse.'[2] These findings raise the possibility that with the weight being given to nuptial agreements and the manner in which they are currently drafted, they are further disadvantaging victim-survivors of domestic abuse and may in some circumstances be an extension of coercive and controlling behaviour.

In this article, we consider options as to what a 'cultural shift' to better meet the needs of victim-survivors could look like in the context of nuptial agreements.

Option 1: More recognition of domestic abuse as a factor rendering nuptial agreements invalid or unenforceable under the current law

Domestic abuse at the time the agreement is entered

As the law stands, domestic abuse (including coercive and controlling behaviour) at the time an agreement is entered *may* be sufficient to meet the test of 'undue pressure' or 'undue influence' which would persuade the court to disregard a nuptial agreement. However, there is a lack of judicial consideration of the ways in which the doctrine of undue influence – as it has been developed in a property and commercial law context – may apply in the context of nuptial agreements. Given the history of undue influence as a vitiating factor to commercial guarantees in cases where wives have guaranteed their husbands' debts,[3] it is perhaps surprising that there has not been more cross-pollination. Considerations of whether one party has 'acquired a measure of influence, or ascendancy' over another, causing the other to place trust in that party to look after their affairs and interests (which trust is then abused), may be apt in nuptial agreement cases where there is a pattern of control, rather than specific incidents, which influences the decision to enter into the agreement.[4]

Recent case-law sees a narrow approach being applied to the vitiating factors which – either as a principle of contract law or upon the reasoning applied in *Radmacher v Granatino*[5] – invalidate a nuptial agreement. If an agreement is not set aside, its provisions may be mitigated by the court adjusting the provision made to avoid unfairness. However, that will not assist parties in cases where the provision in the agreement is not unfair enough for the court to depart from it, but where a party entering it did so with no real autonomy or understanding of the decision (as may well be the case within the dynamic of a coercive or controlling relationship). Examples of this include:

(1) *HD v WB* made it clear that taking independent legal advice is not mandatory and its absence is not a vitiating factor, citing *V v V*, and *Versteegh v Versteegh*.[6]

(2) In *BI v EN*, Cusworth J gave a relatively narrow meaning to the parties needing to have a 'full understanding of the implications' of an agreement,[7] holding that a *contrat de mariage* entered in France, where such agreements are routine, was fully understood by the wife despite her clearly not being in a position to have considered the possibility that she would later divorce in a jurisdiction with a discretionary system and no default property regimes. In *HD v WB*, Peel J found that the husband understood that 'the purpose of the PNA was to protect assets and he knew that W's assets all emanated from her family', which was sufficient understanding for the agreement to be upheld. In *Helliwell v Entwhistle*, Francis J referred to the agreement as a 'plain English document' (despite having

been drafted by solicitors) and the 'broad gist' being easy to appreciate.[8]

It seems not to be considered that a 'full understanding of the implications' of an agreement includes understanding the claims one is waiving, and the outcomes which may arise from the agreement being implemented in a range of real-life scenarios. 'A full understanding of the implications' has become 'an appreciation of the broad gist'.

(3) Undue pressure was considered in the case of *MN v AN*, where Moor J held that it doesn't mean *any* pressure.[9] It was acknowledged that the wife was under pressure, but it wasn't sufficient to vitiate the agreement (there had been 'the mother of all arguments', in the husband's words).

(4) Judges have a tendency to refer to the parties' academic or employment credentials when considering their level of age and experience. For example in *BI v EN*, Cusworth J referred to both parties as being 'highly intelligent and educated people'. The wife was aware of her grandfather's bankruptcy and the asset protection her mother had had in place in her own marriage, so she was not an 'ill-informed ingenue'. However, little reference was made to the fact the parties were both in their twenties and childless at the time of the agreement. Whilst parties' academic intelligence and experience of financial matters must be relevant to their understanding of the words of an agreement, Lord Phillips in *Radmacher* specifically referred to age and experience as being relevant to the parties' 'emotional state' at the time of signing.

(5) Lastly, the Law Commission's guidance that agreements should be signed at least 28 days before a marriage is re-affirmed in case-law as being no more than guidance.[10] For example, in *HD v WB*, the pre-nup was entered into on the day of the wedding, but this wasn't an issue in terms of the validity of the agreement as no one was in an 'unseemly rush'.[11] In *Helliwell v Entwistle*, the agreement was also signed on the day of the wedding, and was upheld.

These examples demonstrate what Dr Sharon Thompson identifies as a reluctance by the courts to engage in questions of whether autonomy has actually been exercised.[12] There is a tendency to present divergence from a nuptial agreement as being in opposition to autonomy. This encourages judges to limit the application of needs to avoid appearing 'paternalistic'. This concept of autonomy, however, is a narrow, neo-liberal one, which has been 'simplified, neutralised, individualised and de-gendered' (as Dr Thompson puts it). In other words, this version of autonomy assumes that the freedom to decide on the contents of an agreement represents autonomy, without considering how individuals go about making such decisions in practice.

In the context of intimate relationships and the increasing awareness of domestic abuse in the form of coercive and controlling behaviour, it would be more appropriate to adopt a fuller, more relational concept of autonomy. This requires a shift in emphasis away from a narrow list of vitiating factors and towards a more holistic view of what each party's expectation and understanding was at the time of entering an agreement, and how changes in circumstances (of which domestic abuse is one example) may have frustrated those expectations.

Domestic abuse after the agreement is entered into

There is scope for a victim-survivor party to a nuptial agreement to persuade the court that the agreement should not be enforced as a result of domestic abuse taking place after the agreement was entered, on one of the following bases:

(1) It may be possible to set aside a nuptial agreement under the principle that a person shall not benefit from his own wrongdoing, particularly where the domestic abuse falls within the scope of the criminal offence.[13] Joshua Thompson SC argues this principle applies to nuptial agreements as a matter of Australian law.[14] In English law, the same common law principle (that a person shall not benefit from his own wrongdoing) underpins the defence of illegality, which acts a shield to civil claims, including claims for breach of contract.[15] Arguably, the principle should apply where one party (A) commits domestic abuse, such that the other party (B) needs to leave the marriage, and then A seeks to rely on a nuptial agreement to deprive B of resources to which he or she would otherwise be entitled.

However, in an English court, this argument must fall down as nuptial agreements fall to be considered a 'circumstance' of a case under s 25 MCA 1973 (unlike in Australia, where nuptial agreements have a statutory footing). Authorities which are recent and specific to this area must take precedence over the common law defence of illegality, and have made it clear that 'conduct' under s 25(g) is limited to the categories set out in *OG v AG*,[16] imposing a high threshold of exceptional conduct with a causal link to a financial consequence.[17] Widening 'conduct' as a factor to be taken into account in financial remedy cases, including those involving nuptial agreements, would require a change in the law. Whilst evaluating reform of that kind is outside the scope of this article, we observe for these purposes that it would produce consistency between cases where domestic abuse impacts the implementation of an agreement and cases where domestic abuse impacts the implementation of arrangements pursuant to the s 25 exercise. In both cases, the concern is that outcomes do not do enough to mitigate the effects of domestic abuse on its survivors.[18]

(2) Alternatively put, in Australia Joshua Thompson SC and Jacky Campbell argue that courts ought to adopt an implied term in nuptial agreements that they will not be enforceable by a party who has perpetuated domestic abuse.[19] It is implicit that when parties marry they intend to treat each other with dignity and respect. The failure of one party to do so undermines the basis of the legal relationship between them and it must be assumed that the parties would not have intended the agreement to apply in those circumstances. Thompson argues that this implied term is necessary for the efficacy of nuptial agreements as a whole, as it encourages their use by inspiring confidence that they will not be used as a tool to perpetuate abuse.

(3) Jacky Campbell further argues that agreements may be set aside in marriages where there is domestic abuse on the basis of inadequate legal advice.[20] This would

include the absence of advice on the rights attaching to domestic abuse survivors (particularly in the Australian context, where the Family Law Amendment Bill 2024 looks to codify the adjustments to property entitlements which can be made to respond to the effects of family violence).

Perhaps this could be drawn more broadly, in line with what we say about taking a more well-rounded view of autonomy which reflects the relational aspects of decision-making. Agreements might be set aside where the parties have not had advice about the prevalence or patterns of domestic abuse, or had their attention drawn to the 'optimistic bias' which can permeate decisions immediately prior to a wedding (as demonstrated by research cited in the Law Commission's 2014 report[21]).

However, there are difficulties with pinning a party's ability to resile from an agreement in the wake of domestic abuse to the advice they have received. Advice about domestic abuse would likely become standardised, both in order to shore up agreements and also to cover the backs of professional advisors who would understandably be nervous about accusations of negligence. Because of 'optimistic bias', even if advised about the risk of domestic abuse and the steps one would need to take to access rights as a survivor, many people assume it will not happen to them. They could be in a *worse* position for having been advised about the effects domestic abuse would have on the agreement, if the court considers (or assumes, if legal privilege is not waived) that the party seeking to resile has been made aware of the risk and chosen to enter the agreement anyway.

A difficulty with giving greater import to domestic abuse as a factor invalidating nuptial agreements is the potential uncertainty it creates. As the Law Commission's recent Scoping Report highlights,[22] in any areas where there is not settled law which is clear on the face of the statute, there is potential for litigation. With the Family Court system already creaking, who would determine the factual matrix in cases which, at present, require very little fact-finding as arguments about vitiating factors take a back seat compared to arguments about fairness and meeting needs? In how many cases would unresolved disputes about the factual pattern become an obstacle to out-of-court settlement? Critics of a broader approach to vitiating factors may also cite the risk that any party who is dissatisfied with the provisions of a nuptial agreement would be tempted to allege domestic abuse, flooding the court with claims.

However, the development of the law cannot solely be guided by the desire to avoid disputes about factual matters. There are laws of evidence and court procedures to distinguish between truthful and untruthful allegations. Whilst it is sensible to have one eye on the difficulties of operating those procedures in an underfunded system, it would be unjust to build a system which is designed to function without them at all. The consequences for dishonest litigants may also resound in costs.[23]

It is also important not to forget that in some cases the economically stronger party is the *victim* of domestic abuse. Any measure which could prolong the court process may be used as a tool for further control, and fact-finding processes in our adversarial system are not well-suited to supporting survivors of domestic abuse.[24]

Option 2: Changes to best practice in the drafting of pre-nups, to include a 'domestic abuse clause' or other safety nets

For those drafting nuptial agreements, there is an alternative way to mitigate the potential harm of an agreement which would impose a financial outcome in a domestic abuse scenario without taking account of that abuse – we could include clauses in our agreements setting out how domestic abuse should affect their enforceability or interpretation. This could be, for example:

(1) A clause providing that the onus will be on the party who has perpetrated the abuse (with the standard of proof being the balance of probabilities) to demonstrate that the agreement should be upheld.
(2) A clause providing that the agreement will be voidable if either of the parties perpetrates domestic abuse.
(3) A clause providing that the parties will treat each other with dignity and respect throughout the marriage, with specific recognition that abuse can take the form of emotional abuse, economic abuse, and coercive and controlling behaviour.

Of course, any such suggestions would need to take account of the possibility of the perpetrator of the abuse alleged being the financially *weaker* party. It may advantage that party to say that the agreement may not be upheld if abuse takes place. So what is the answer in those cases – that that party will need to show why (even) their needs should be met? That their needs would be interpreted at the less generous end of fairness? That Schedule 1 concepts may be imported where there were none in the agreement?

Thought would also need to be given to how allegations of domestic abuse are verified for the purpose of such clauses. As discussed, this is a potential difficulty with any measure which makes domestic abuse a (more) material factual consideration. As pre-nups are generally intended to reduce the need for protracted litigation, it may not sit well with parties who enter them for the measure of whether domestic abuse has taken place for the purposes of the agreement to be a finding of fact in the Family Court.

However, accepting those deficiencies, there are potential advantages to introducing these clauses. It is an option which puts the 'cultural shift' towards recognising the effects of domestic abuse into the hands of lawyers and their clients. Discussions about pre-nuptial agreements in particular, taking place in the run up to marriages, are an opportunity to open up the conversation about domestic abuse, empowering parties to recognise the signs of domestic abuse so that they can seek help if needed.

The use of 'domestic abuse clauses' is clearly not a panacea. It would only impact upon the small percentage of divorcing couples who have entered into nuptial agreements,[25] in practice more prevalent amongst wealthier couples. Although wealthy couples are not immune from domestic abuse, there is the risk of a '2-tier system', where bespoke agreements respond to domestic abuse but those whose cases are dealt with by the general law are disadvantaged by the abuse they have suffered. A wider consideration of the law on 'conduct' would, as noted above, be more able to create consistency in this area.

Conclusions

Taking all of this together, there is scope for current law and practice around nuptial agreements to go further in protecting survivors of domestic abuse:

(1) A more holistic approach to the factors influencing parties' decisions to enter agreements would create more scope for agreements to be vitiated where they do not represent a true exercise of autonomy (conceived in its fuller, relational sense), including where a controlling pattern or dynamic has influenced the decision to enter an agreement.
(2) There are potential legal bases on which nuptial agreements may be disregarded if domestic abuse has taken place after one was entered into, but these are difficult to apply in an English context because of the precedence of s 25 and the high threshold imposed upon 'conduct' in that context.
(3) Practitioners may use the drafting of nuptial agreements as an opportunity to emphasise the materiality of domestic abuse, or at least to open up the conversation about domestic abuse and ensure clients are aware of the signs and how to access help.

We note that the options we set out may be regarded as controversial and going against the grain of some calls for reform. The Law Commission's recent Scoping Report was clear that there needs to be more certainty in financial outcomes, which would be served by the principle that pre-nups are iron-clad.[26] Stakeholders in the over-burdened court system will say that more cases need to be dealt with outside court and a balance needs to be struck between responding appropriately to domestic abuse and enabling parties to avoid litigation in an area which is already contentious. But as we draft more nuptial agreements, and with domestic abuse sadly rife, these are topics with which we all need to engage.

Notes

1 E Hitchings, C Bryson, G Douglas, S Purdon and J Birchall, *Fair Shares? Sorting out Money and Property on Divorce*, University of Bristol (2023) (*Fair Shares*); E Hitchings and C Bryson, *Dividing property and finances on divorce: what happens in cases involving domestic abuse?*, University of Bristol (2024) (*Fair Shares* domestic abuse report).

2 *Domestic abuse in financial remedy proceedings*, Resolution (2024) (Resolution report).

3 *Barclays Bank Plc v O'Brien* [1994] 1 AC 180; *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44.

4 This is the formulation of one of the categories of undue influence set out in *Royal Bank of Scotland Plc v Etridge (No 2)*, with the other formulation concerned with 'unlawful threats' and more closely linked with the narrower common law principle of duress.

5 *Radmacher v Granatino* [2010] UKSC 42.

6 *HD v WB* [2023] EWFC 2; *V v V* [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315; *Versteegh v Versteegh* [2018] EWCA Civ 1050, [2018] 2 FLR 1417.

7 *BI v EN* [2024] EWFC 200.

8 *Helliwell v Entwhistle* [2024] EWHC 740 (Fam).

9 *MN v AN* [2023] EWHC 613 (Fam).

10 Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014).

11 *Radmacher* at [72] (Lord Phillips).

12 S Thompson, 'Pre-nuptial Agreements – A Good Route to Autonomy?' [2024] 2 FRJ 163.

13 Domestic Abuse Act 2021, s 1.

14 J Thompson, 'The Implication of a Term Preventing Family Violence into a Binding Financial Agreement' (Law Council of Australia, 20th National Family Law Conference, 30 October 2024).

15 *Patel v Mirza* [2016] UKSC 42.

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

17 The need for exceptionality and for a causal financial link was recently reaffirmed by Peel J in *N v J* [2024] EWFC 184.

18 The *Fair Shares* domestic abuse report finds that female domestic abuse survivors continue to be in in more straitened financial circumstances up to 5 years after divorce compared with other female divorcees.

19 J Thompson; J Campbell, 'Family Violence and Financial Agreements' (Law Council of Australia 20th National Family Law Conference, 30 October 2024).

20 J Campbell.

21 Law Commission, Law Com No 343 at [5.27]; N D Weinstein, 'Unrealistic optimism about future events' (1980) 39 *Journal of Personality and Social Psychology* 806.

22 Law Commission, Law Com No 343.

23 For example, in *Helliwell*, a costs order was made against the husband. Although the court adjusted the provision made for him in the pre-nuptial agreement in his favour, a costs order was made as his overall position had been well in excess of the eventual outcome (and even the outcome which might have been ordered absent the agreement).

24 For example, the Resolution report found that victim-survivors consider they have experienced ongoing abuse while trying to divide the family finances.

25 The *Fair Shares* research found that 13% of divorcees in the study had entered into nuptial agreements, albeit they sounded a note of caution about the proportion of these which were legally relevant nuptial agreements, as some participants indicated a level of confusion about the meaning of the term.

26 Law Commission, *Financial remedies on divorce and dissolution: a scoping report* (Law Com No 417, 2024).

Family BarLink: The CFC Pro Bono Duty Scheme

Sophie Clayton
QEB

Cara Donegan
QEB


A new pro bono scheme assisting litigants in person in family proceedings at the Central Family Court – background

As we are all acutely aware, restrictions in the provision of legal aid following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 have resulted in a sharp increase in the number of individuals unable to access legal advice and services in family proceedings. In 2023, over a quarter (26%) of all parties to financial remedy proceedings and two-thirds (66%) of all parties to private children law proceedings were unrepresented, compared to 22% of parties to financial remedy proceedings and 41% of parties to private children law proceedings unrepresented in 2012.[1] With the cost of living continuing to climb sky-high, the number of litigants in person in family proceedings is only set to increase in the coming years.

The public's reduced access to legal services is not only detrimental to the individual, who is forced to navigate stressful and emotionally fraught proceedings alone, but also to:

(1) the represented party, whose costs inevitably increase and yet their chances of reaching a settlement diminish; as well as
(2) the judiciary and court system as a whole, with cases taking longer to resolve and additional work being required of our already-overstretched judges.

Family BarLink, launched in 2024 in conjunction with Advocate, aims to contribute to the alleviation of this situation. We will provide free legal advice and representation to litigants in person (LIPs) appearing in family proceedings at the Central Family Court (CFC), with a view to further expansion across other courts if possible in the future.

We hope that by providing access to legal advice and representation at an early stage of proceedings, we will assist the court to de-escalate and streamline the backlog of cases, facilitate negotiation and agreement between parties, and provide a voice to those who would otherwise face family proceedings unrepresented.

Operation of the scheme

The scheme aims to operate every Thursday dependent on volunteer availability. The CFC will list as many matters with unrepresented parties as possible on Thursdays, to ensure the maximum number of individuals have access to pro bono assistance via Family BarLink.

The scheme only applies to applications listed for 1/1.5 hours or fewer – volunteers will not be expected to provide free legal advice or representation for longer hearings (including final hearings and fact-finding hearings).

It is envisaged that one volunteer barrister will be physically present at the CFC ('the on-duty barrister'), whilst other barristers working with the scheme will be available 'on-call' to assist with further work remotely and/or in person. The on-duty barrister present at the CFC will triage the list and link available on-call volunteers with appropriate cases. They will also take on any direct work they are able to, if time permits.

LIPs will be able to access the scheme via referral from the judge hearing their case. Whilst Family BarLink is aimed at assisting persons who are unable to afford legal representation, no 'means test' will be carried out by Family BarLink and individuals' access to the scheme will be via judicial referral.

Individuals referred to the scheme will be provided with a leaflet by the judge, directing them to a room at the CFC that will be allocated for the scheme's use, to check in with the on-duty barrister.

The on-duty barrister will have an initial discussion with the LIP and allocate them a volunteer on-call barrister who is working with the scheme remotely or in person to provide assistance, if possible. The volunteer on-call barrister allocated to the LIP may provide them with free legal advice and may also represent them at the relevant hearing that day before the judge who referred them to the scheme.

LIPs referred to the scheme are advised that the involvement of the volunteer barrister allocated to them is limited to that day's hearing, and that any further assistance falls outside the scope of the scheme. LIPs will be directed to apply for pro bono representation via Advocate, if required, for future hearings or assistance.

What can I expect as a volunteer?

All barristers with post-pupillage family law experience are invited to volunteer as on-duty or on-call participants with the scheme.

On-duty participants will be required to be physically present at the CFC from 9am to 4pm on the Thursday on which they are volunteering, to meet with LIPs referred to the scheme, provide direct legal assistance and/or to allocate them a volunteer on-call barrister.

On-call participants will be required to be available to provide assistance to the LIPs to whom they are allocated. They may be required to attend the CFC to represent LIPs at their hearing listed that day (either in person or remotely). Whilst on-duty participants will be required to be available all day, on-call participants are able to offer their assistance for specific times during the day, to enable them to meet other commitments in their diary, and specify whether they are available remotely and/or in-person.

At present we are only able to recruit self-employed volunteers who must have their own insurance cover with Bar Mutual. The work will take place under the licensed access auspices of Advocate.

The success of the scheme, of course, depends on our ability to recruit a sufficient number of volunteers. We will begin signing up barristers imminently.

Family BarLink offers a unique opportunity to engage with front-line pro bono work in a way which works around professionals' own commitments. Our efforts will have a direct impact on the experience of LIPs and those working with them, for the betterment of our family justice system as a whole.

How do I register my interest in volunteering?

Family BarLink will soon be hosting an information evening to introduce the scheme and answer questions from prospective volunteers. We will then begin formally recruiting online. Updates about our information evening will be published on Family BarLink's LinkedIn page (https://www.linkedin.com/company/family-barlink/posts/?feedView=all).

For specific queries or further information, please contact Family BarLink's email address at familybarlink@weareadvocate.co.uk.

Family BarLink would like to thank all those who have contributed their time and energy to the launch of this scheme, including the judges and staff at the CFC, Advocate, Samantha Singer at QEB and many others.

Notes

1 Law Commission, *Financial Remedies on Divorce and Dissolution: A Scoping Report* (Law Com No 417, 2024), para 1.15.

Her Honour Judge Isobel Plumstead (1947–2024)

An Obituary

HHJ Lynn Roberts

HHJ Isobel Plumstead was born on 19 July 1947 and died on 30 December 2024. She was one of the best judges of her generation. The memories which have been shared since her death by lawyers who appeared in front of her, or whose careers she assisted, show that her qualities of great intellect, compassion, common sense and generosity were appreciated by many.

When sitting in the family jurisdiction, she had the ability to put litigants at their ease in her court whilst maintaining her authority; she had an unfailing nose for waffle and dissembling, and lawyers soon learned to watch her facial expressions and her pen in court, as she watched and interpreted the body language of their clients.

Isobel Plumstead was born in 1947 in Norwich and read jurisprudence at St Hugh's College, Oxford. At Bar School she met her husband, Nicholas Coleman, who also became a barrister and then a Circuit Judge, sitting mainly in crime. She excelled academically there, and Nick remembers how they bought their first sofa from the proceeds of one of the prizes she won. Isobel practised at Francis Taylor Building in London for 20 years, mainly in family law, whilst raising three children with Nick – Tom, Tory and Flora.

In 1990 she became a Registrar and soon after that a District Judge of the Principal Registry of the Family Division (PRFD) at Somerset House. In those days a large amount of the work was what was then called ancillary relief and it was the practice for courts all over the country to send their more complex and high worth cases to the PRFD; all the PRFD District Judges became specialists in this area, with few cases going to the High Court, and even fewer being heard by the handful of Circuit Judges who sat at the Royal Courts of Justice, no Circuit Judges being assigned to the PRFD until several years after she had left.

The case from which financial remedies practitioners will most remember Isobel Plumstead is *Brooks v Brooks*, which she decided in 1992 as a PRFD District Judge. In this case she varied the husband's pension scheme as a nuptial settlement under Matrimonial Causes Act, s 24(1)(c), a bold and innovative decision at the time. Before this case, the only way courts could take account of a pension was by offsetting its value, which rarely led to fair outcomes. Her decision was appealed in turn to a High Court Judge, the Court of Appeal and to the House of Lords (see *Brooks v Brooks* [1996] AC 375), all of which tribunals upheld the main plank of Isobel Plumstead's judgment, the redistribution of the husband's pension. The mechanism used by her in *Brooks v Brooks* could, however, only be applied to a very small number of cases, in particular where the husband was the sole beneficiary of the pension scheme; but what she achieved (apart from fairness for Mrs Brooks) was to put the issue of pensions on divorce firmly on the agenda for lawyers and lawmakers. In the House of Lords, Lord Nicholls influentially articulated the obvious truth that:

> 'for many married people their two single assets of greatest value are the house in which they live and, as time passes, the accumulating pension provision of the money-earner … this decision should not be seen as a solution to the overall pensions problem … legislation will still be needed.'

The Pensions Act 1995 (a direct consequence of Lord Nicholls' call) represented a tentative step forward, introducing the power to 'earmark' pensions, requiring the pension trustees to divert a portion of pension payments from one spouse to the other and also giving the power to oblige one spouse to nominate the other as beneficiary in the event of death; but (a few years later, but also as a direct consequence of Lord Nicholls' call) the Welfare Reform and Pensions Act 1999 comprehensively reformed the law and introduced the vital power of pension 'sharing' into Matrimonial Causes Act, s 24B, and the fair sharing of pensions on divorce became widely available. Isobel Plumstead can properly be given credit for her significant part in this important social reform which has undoubtedly led to hugely fairer outcomes for many divorcing women.

In 2001 Isobel Plumstead became a Circuit Judge and was posted to East Anglia. She became a Deputy High Court Judge the following year and served as Designated Family

Judge for Cambridge for 6 years. During this period, Her Honour Judge Isobel Plumstead had few opportunities to use her expertise in financial remedy work, as the Children Act work took up most of her time, and she also sat in criminal and civil cases. Another significant contribution she made was to the Council of Circuit Judges, in which she held various posts and was the President in 2013.

Isobel Plumstead was wonderful company and she and Nick enjoyed hosting friends from the legal world in their home in Norfolk. In 2006 she became a Bencher at Middle Temple, and she managed to attend a reunion dinner for her contemporaries from St Hugh's at one of the Inns in November, just weeks before she died. Nick, her three children and all her grandchildren spent Christmas with her, during which she shared some champagne with her loved ones.

James Turner KC (1952–2025)

An Obituary

Alexander Chandler KC

James Turner KC, who has died aged 72, was a titan of the bar. In an increasingly specialised legal world, he had a uniquely broad practice for a family barrister: financial remedies, child abduction, divorce, crime, judicial review, medical disciplinary work and administrative law.

He appeared in over 200 reported cases, including the most seminal in financial remedies: the House of Lords' decisions in *White v White* [2001] 1 AC 596 and *Miller; McFarlane* [2006] 2 AC 618, and the Court of Appeal's decision in *Imerman v Tchenguiz* [2011] Fam 116. A list of James's cases up to 2022 can be found at https://www.1kbw.co.uk/wp-content/uploads/2023/04/James-Turner-KC-reported-cases-ONGOING.pdf. It is a mark of his extraordinary, Stakhanovite work ethic that his illness did not hold him back. He continued to work until the very end. One of his last cases, *XY v XX* [2024] EWFC 387 (B), was heard on 4 November 2024 and judgment was published on 16 January 2025, days before his untimely death.

James Turner was born on 23 November 1952, the son of Peggy and James Gordon Melville Turner GC. During the War, Mr Turner Sr had been awarded the George Cross for his bravery as a merchant shipman on the *Manaar*: he had been ordered to leave the sinking ship but refused until two wounded crewmates got out. In a later naval engagement, he lost a leg and was captured, spending several years in a German prisoner of war camp. Tragically, on 5 November 1967, days before James' 15th birthday, his father was killed in the Hither Green train crash along with 48 other passengers. James's first experience of the law was accompanying his widowed mother to the Temple where counsel advised in relation to settlement of the fatal accident claim. He was fascinated by how the legal system worked. Decades later, he approached Mr Justice Penry-Davey at an Inner Temple Benchers dinner, who had acted for his mother as junior counsel: 'It's your fault I got into law'.

After attending a secondary modern school in Bexhill, James was offered a place through clearing to read law at the University of Hull. He was immensely proud of the 4 years he spent there, alongside several illustrious legal alumni: 'two silks, two law professors, two judges. Lady Justice Eleanor King was a poster-girl … a few years after us'. James served on a student and staff committee where he met Philip Larkin, then the university librarian, and booked several of the leading rock bands of the time to play at the university. From the photographic evidence (see below), James might have been mistaken for one of the booked acts (hints of Bryan Ferry from Roxy Music) who had gamely agreed to pose with the assembled hairies of the student union.

Following his graduation James obtained a scholarship from Inner Temple and was called to the bar in 1976. At that time, there was no formal process of application for pupillage. Without any personal connections to the bar, he was advised by his Inn to approach Anthony Hacking, then a successful senior junior in the common law set at 1 King's Bench Walk, Temple. The two met and evidently hit it off: after 20 minutes, arrangements were made to meet on a train to Lewes Crown Court for what would be the start of James's pupillage and a connection with 1 KBW which lasted almost 50 years. The past, as they say, is a foreign country: they really did do things differently then.

In 1977 James was offered tenancy at 1 KBW and joined a chambers of 17 mainly Oxbridge-educated male barristers and no women (how things change). He later reflected, in an excellent 2021 interview for the Family Law Bar Association's 'Family Affairs', 'even as someone educated at a State school and a non-Oxbridge university, I didn't experience any real problems getting a pupillage or a tenancy – it's far far more difficult for those who want to come to the Bar these days'.

At 1 KBW in the 1980s and 1990s, James was, by his own description, a 'jack of all trades'. 'It was a great training: things weren't as specialised in those days; we had to keep our fingers on the pulse of everything and there was quite a bit of cross-fertilisation between different areas … it was enormous fun, and there was lots of reasonably well paid Legal Aid work'. James became known for his detailed knowledge of the technical elements of criminal law. In one case, his leader Heather Hallett QC (as she then was) coined an affectionate nickname that stuck: 'Technical Turner'.

His growing reputation in crime led to an invitation to be a contributing editor of *Archbold* (1992–2018). Anyone who has edited a legal textbook will recognise James's description of what this incurred: 'a complete nightmare [which] took over my life'. As junior counsel, James was appointed to the Treasury Panel, acting in Government work in fields such as judicial review, extradition and quasi-criminal civil actions, in cases involving such high profile parties as Silvio Berlusconi, Asif Ali Zardari (the husband of Benazir Bhutto) and General Pinochet.

At 20 years call, James took silk in 1998, alongside Sir Andrew McFarlane (as he became) in what, with hindsight, might be described as a pretty good year for chambers.

In silk, James maintained his broad practice in crime, family and other areas of law. One of the many remarkable things about his career is how he managed to fit in his appearance before the House of Lords in *Miller; McFarlane* during a lengthy bonded warehouse fraud trial at Kingston Crown Court where he acted for one of the defendants. 'As a result of *Miller; McFarlane* … I was Lawyer of the Week in the *Times* and the usher in the criminal case told me the jury had that part of the *Times* pinned up on a notice board in their retiring room'.

After 10 years in silk, James concentrated on family law, appearing in such landmark cases as *Miller-Smith*, *Judge v Judge*, *Owens v Owens*, *Gohil*, *Goyal* and *Waggott*. He appeared in the House of Lords or Supreme Court six times in child abduction cases alone: the complete tally of his appearances in the highest court is unknown. In 2016 James was awarded Family Law QC of the Year; if anything, an overdue honour.

I first came across James in the mid-1990s, when I was a pupil at 1 KBW, and he was already an established star at the bar. My recollections from the time: (1) 'Turner' was incredibly busy; (2) he seemed to be in constant physical motion, with his pupil having to hurry to catch up (regrettably I was never his pupil); (3) his room in chambers was dark and so full of files it resembled the closing scene of *Raiders of the Lost Ark*; and (4) he was a strikingly handsome man at the top of his profession, instructed by the best solicitors, appearing in the highest courts, in the most important cases. In a word, Turner was glamorous in a way that barristers generally are not.

It wasn't until several years later, when I joined 1 KBW as a tenant that I found out how generous James was with his time, supportive of juniors, kind, personable, with an unrivalled store of funny legal stories and – remarkably for a man of such talent – not a hint of arrogance. He was absolutely loyal to chambers, and a reliable attender of chambers events and lunches. He was a '1 KBW man' through and through.

James was a brilliant advocate who embodied the professional duty to act fearlessly for his clients. At times, admittedly, he could be tenacious to the point of obstinacy. He was unable to let an ungrammatical document or tweet go by uncorrected. His laser focus on detail could at time draw the occasional muffled groan, such as his interpretation of clauses of the 1 KBW constitution during chambers meetings. However, no one is completely without fault and, as anyone who has appeared against him will know, James was always professional, courteous and civil. He did not descend to robing room tactics.

While James Turner inhabited the law like few people I have ever met and had an unrivalled breadth of knowledge and experience, his life was not encompassed by the law. He was married twice, in 1979 to Sheila Green, and in 2022 to Simone McGrath. James and Sheila had a wonderfully large family: five children and a growing band of grandchildren (one of his last tweets: 'The number of my grandchildren has increased yet again, by another two'). His interests outside the law were wide and eclectic: reading, cinema, soul music and Northern Soul.

To non-lawyers, he might be best known from social media. James had over 32,000 followers on Twitter. His tweets, from which I have drawn in this obituary, are a lasting testimony to his intelligence, wit and willingness to join battle wherever, as he saw it, 'injustice reared his ugly head'.

James is survived by his widow Simone, his children and grandchildren. He will be missed terribly by his colleagues in chambers, his clerks, his opponents at the bar (many of whom are now on the bench), his instructing solicitors, and his army of followers on Twitter and Bluesky.

His death leaves a gap at 1 KBW which cannot be filled, and a room which will take several months to clear. James Turner's was a life well lived on so many counts. We will not look upon his like again.

DR Corner: Is NCDR Appropriate in Financial Remedy Cases where there is Domestic Abuse?

Edward Cooke
Solicitor and Mediator, Edward Cooke Family Law

Karin Walker
Solicitor, Mediator and Arbitrator, KGW Family Law

In October 2024, a Resolution multi-disciplinary working party published a report, *Domestic abuse in financial remedy proceedings*. Described as a 'groundbreaking' consideration of the interplay between domestic abuse and the treatment of finances on separation and divorce, this 18-month project is a powerful call for change from eminent family law professionals who used their collective expertise to place this important topic firmly in the spotlight.

The survey behind the report received 526 full responses, indicating concern that domestic abuse's long-term impact is considered insufficiently in proceedings involving married or civil partners.

Whilst Resolution's report recognised work in this area is only just beginning, it nonetheless made significant recommendations. It is impossible to deal with all of these here. We also do not intend to express our views on all the recommendations, many of which will doubtless be subject to further judicial and other consideration in due course – for example, the suggestion that the court's current approach to conduct under s 25(2)(g) Matrimonial Causes Act 1973 'leads to unfair outcomes for some victim-survivors of domestic abuse'.

We concur with the desire to see cases dealt with 'justly' and the need to ensure parties are safeguarded from domestic abuse. But whether it is necessary to review the court's current approach to conduct (or, for that matter, the legal services payment order (LSPO) rules, which the report suggests also require urgent review) falls beyond this article's scope.

Instead, we focus on the recommendations surrounding the use of non-court dispute resolution (NCDR) and the extent to which NCDR is or is not appropriate where domestic abuse is alleged.

A broken system?

Few would contend that the court system is currently handling financial remedy cases in an efficient or timely manner. It faces horrendous delays, notwithstanding the welcome trend towards private financial dispute resolutions (pFDRs) in many cases or, where adjudication is required, arbitration.

Resolution's report identifies some key themes currently bedevilling the system, including:

- the need to safeguard victims from ongoing domestic abuse – ensuring case management decisions reflect this;
- the fact that some abusers do not comply with disclosure obligations, and how case management powers can be improved to deal with this;
- the need to deal with matters within a reasonable timeframe to prevent the process becoming a further form of abuse; and
- issues of funding.

The report does not, however, explicitly deal with the question of funding for NCDR work. This is a pity. Collaborative practice has been in the UK for the best part of 20 years and yet has never been supported by public funding. By contrast, the government has provided support for mediation, through non-means-tested vouchers in matters involving children. Why should such a scheme not also apply to other forms of NCDR?

Resolution's report is entitled *Domestic abuse in financial remedy proceedings*. We understand the rationale is to shine a light on certain problems within the family justice system. But the fact that its title refers to 'financial remedy proceedings' and only turns in any detail to the question of NCDR on page 25 of 33 is disappointing.

Its findings appear to suggest that, where there are allegations of domestic abuse, encouraging the victim-survivor to take a litigious route can be the appropriate course of action. Indeed, a key recommendation is that, where there are allegations of ongoing domestic abuse, 'the balance may shift away from any form of NCDR continuing'.

NCDR

Resolution's report describes NCDR as an 'evolving voluntary option which requires the engagement of both participants'. It acknowledges NCDR 'can be appropriate in some domestic abuse situations, provided that the victim-survivor can make an informed choice about the different processes with appropriate safeguards and support in place'.

Despite this introduction, almost no information is set out about the various forms of NCDR, or how to tailor them to limit ongoing exposure to financial and other forms of domestic abuse and provide the victim with relief from such abuse at a much earlier stage within a supported and protective process which is both time- and cost-limited.

Measures available through the range of NCDR options to provide security and safety for victim-survivors are a far cry from those in court. How often are special measures (separate entrances and the erection of screens) requested – only to find communication has somehow been lost and they are not present on the day? Such basic safeguarding steps can be safely addressed within the NCDR arena, alongside other far more important precautionary measures aimed at protecting domestic abuse victims (both short and long term).

The COVID-19 pandemic saw a welcome trend towards online court hearings, but a recently growing counter-trend (particularly after the First Appointment) is for in-person hearings. These increase the risk of re-traumatising victim-survivors via attendance at stressful court appointments with basic safeguards not always being in place.

By stark contrast, many financial practitioners will be aware of the range of NCDR options through which even higher-conflict cases can be resolved. Hybrid mediation, often conducted online with the support of solicitors (and indeed counsel), offers a particularly supportive environment for victim-survivors, who can attend remotely from their lawyer's office. This ensures full support without any risk of meeting their perpetrator. Moreover, pFDRs and arbitrations can be conducted remotely, with additional safeguards in place where required.

We agree with the report's conclusion that all family justice professionals need to be aware of the risks and trained to recognise all forms of domestic abuse. However, whilst mediators, collaborative lawyers and lawyers offering one-couple one-lawyer services are required to undertake specific safeguarding and domestic abuse training, there is no such requirement in place for lawyers not currently offering NCDR services.

A range of NCDR options

When the family mediation process first emerged, it was (correctly) believed it would be inappropriate for domestic abuse victims to have to sit with a mediator alongside their abuser and try to discuss future plans. Mediation has come a very long way since then. Shuttle, online and hybrid mediation can all create a safe environment, even in high-conflict cases – provided safeguarding considerations are, of course, carefully considered.

By March 2024, nearly 100 mediators had undertaken Resolution training in hybrid mediation. Hybrid mediators have specific training in dealing with high-conflict individuals and safeguarding considerations where this kind of dynamic is identified.

What options are available and how/why do they benefit domestic abuse victims? Prior to the issue of a court application, the first port of call is an accredited mediator, who conducts a Mediation Information and Assessment Meeting (MIAM). Despite the name, its purpose is to consider the suitability of not only mediation but also all forms of NCDR, including mediation (classic, hybrid and child-inclusive), neutral evaluation, collaborative practice, pFDR and arbitration (children or finance).

A principal objective of the MIAM is to consider safeguarding and assess what, if any, form of protection is required in each particular case. Yet there is no corresponding duty on a family law solicitor representing a litigant to undertake any safeguarding checks when a financial application is made to the court. We argue this should be looked at, given the new Pre-application Protocol for financial remedy proceedings (effective from 31 May 2024) which specifically references that states the needs of any children should be addressed and safeguarded and that 'the procedures which it is appropriate to follow should be conducted with minimum distress to the parties and in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances'.

For someone in an abusive relationship, the speed with which resolution is reached is vitally important. At present, applications can take up to 24 months from issue to adjudication. Is there a requirement that the family law solicitor outlines this to their client at the outset? Do they do so? Given this possible level of delay, is court necessarily the right route for clients, particularly where abuse is taking place?

A common concern is that those subjected to abuse are often not easily able to fund any kind of legal or other cost. Unfortunately, any route towards resolution attracts some cost; the key is to ascertain how matters can be dealt with cost-effectively.

Mediation

Mediation's development, particularly post-pandemic, means parties can attend mediation in person, but in separate rooms (arriving at staggered times and immediately assigned separate rooms) or, indeed, online, attending in separate breakout rooms throughout. They can be supported by lawyers who either remain at their side throughout meetings (remotely or in person) or, if funds are tight, dial-in via phone or remotely, as and when required. Today, the support of lawyers and the mediation process's flexibility also means the mediation is more focused and outcome-driven than ever, invariably reducing the number of sessions required.

In the hybrid model, the mediator can hold confidences: they can be provided with information which does not have to be shared in the 'other room', meaning the victim can safely explain behaviour to which they have been subjected and their fears for the future. This information can be vital to help the mediator, as a neutral facilitator, manage the discussion from a fully-informed position and use their skill set to encourage early resolution. Their role is to ensure the outcome falls within the bracket of what a court would see as fair. As such, checks and balances are built into the mediation process to ensure a fair outcome is achieved, power balances appropriately addressed and parties kept safe at all times.

Concerns over NCDR

The Resolution report identifies concerns that 'those conducting NCDR must be alert and where appropriate should stop the NCDR if there is concern that it is being used as a delaying tactic, or as a means of exerting pressure on victim-survivors to agree unfair settlements'.

It cites examples of perpetrators agreeing to mediation, but refusing the option to have lawyers support the participants at the mediation meetings or not agreeing to the option to bring an independent evaluation (such as an early neutral evaluation) into the process for a specific purpose. It continues to state there is a 'risk of abuse in arbitration and/or private FDRs, to which professionals need to be alert'.

It then states that at an Economic Abuse Summit (June 2024), there was a consensus that:

> 'in any form of NCDR, where:
>
> - there has not been disclosure of a party's finances within a reasonable timeframe; or
> - where a party does not have security that interim maintenance, bills associated with the family home and legal service payments are agreed (in cases where resources allow); or
> - there are allegations by that party of other forms of ongoing domestic abuse;
>
> the balance would shift away from that NCDR continuing, at least without directions from the court to ensure that the disclosure is provided.'

It continues:

> 'Resolution would suggest that point is reached after say four weeks of failure to provide disclosure (absent extenuating circumstances) in most cases, or six weeks in cases where the finances are particularly complicated.'

We agree with the recommendation that, as a matter of law, the duty of full and frank disclosure starts when parties start to engage in NCDR or in negotiations, i.e. that this duty will usually start before any court proceedings.

In mediation, disclosure is critical in establishing what resources there are to divide and this is most likely to mirror the court process (completion of Forms E followed by questionnaires and replies). As Resolution mediators, our mediation agreements already explain the need for both parties to provide complete and accurate disclosure.

Mediators have many tools to encourage parties towards full disclosure, particularly where lawyers are there to support the process – not least, the ability to explain to a recalcitrant, abusive party the cost-consequences of not providing full disclosure should the matter proceed to court.

Arbitration

To us, suggesting a specific timeframe for the balance to shift away from NCDR towards court proceedings (particularly one as short as 4 weeks) seems misplaced. Where one party has been unwilling to disclose, surely a better option is first to consider arbitration? This does require both parties to consent, and some will question whether arbitration can force a reluctant party to comply. Further to April 2024, a party unreasonably refusing arbitration (for example to deal with disclosure issues) will undoubtedly be at real risk of facing a costs order if they refuse to engage.

Notwithstanding the need to pay the arbitrator, arbitration can be cheaper than the court process – largely because of speed. The mere existence of a long-term file will generate a cost. Moreover, an arbitrator can be instructed by LIPs.

The couple build a rapport with the arbitrator, who is available to deal with any issue which may arise – often via email. It can be easier for an arbitrator (or mediator) to explain the need for full and frank disclosure and to ensure requests for information are proportionate. Under the Arbitration Act 1996, the arbitrator has greater power to award costs than the court, if they consider a costs order appropriate, and is more likely to do if they feel that this is appropriate and reflects the correct outcome. They desire a reputation for being fair and diligent as this is the only way to secure repeat work.

If a party resolutely refuses to comply with their obligations in relation to disclosure or otherwise, the arbitrator can ask what is going on and why. If they remain intransigent and the matter goes to court, a costs order may be imposed.

The Certainty Project provides the fusion of mediation and arbitration and can include any other form of NCDR. Collaborative practice can replace mediation, and an early neutral evaluator can be brought in at any stage to break impasse. The idea is to help the couple reach their own decision, or, if they can't, to provide a prompt decision through arbitration. Available for finance and children, arbitration can be tailored to meet the couple's specific needs and finality can be achieved within a 'certain' timeframe.

No magic wands

The court process cannot *make* someone disclose fully if they choose not to. A mediator or arbitrator, with a relationship with each of the couple, may be able to explain far more effectively why disclosure is so important. And, where issues remain unresolved, an arbitrator can adjudicate on contested questionnaires.

By contrast, a party facing non-disclosure through court invariably needs to apply for an order on Form D11 with a penal notice attached, hoping common sense may prevail. How long will that take? Weeks? Months? Meanwhile, what happens to the couple?

The same delay and control issues can apply in interim maintenance/LSPO situations. In our experience, early hybrid mediation and/or arbitration can be highly effective at concluding such issues. Contrastingly, a court application can take weeks or months to bring before the court, whilst the respondent continues throughout to exert financial pressure on the applicant. This may also have an adverse effect upon the applicant's mental health. Here, the court system can actually facilitate the perpetuation of domestic abuse. The victim must hope their lawyer will continue to act, even though, until the determination of the LSPO, there is no means to pay them.

As confirmed above, the newly-amended Pre-application Protocol sets out wider considerations. After separation, notwithstanding domestic abuse, parents need to learn to parent together (even via parallel-parenting in higher-conflict scenarios). Lengthy, unresolved conflict or months-long waits for court hearings is hardly conducive to this, and ongoing court proceedings can shut down avenues for ongoing dialogue or therapeutic work so necessary to achieve longer-term improvements for families.

Court hearings vs private hearings

In the court system, all too often, the judge does not receive the court bundle until minutes before the hearing. Hearings are frequently cancelled the day before due to lack of judicial availability, resulting in wasted brief fees and a new listing set several months ahead – with no one to explain why this happened and what will occur during the intervening period. On the day, other cases are sometimes pushed into the list ahead of a hearing, so the case starts late and everything feels rushed.

Even with screens in place, victims risk bumping into their abuser to or from court. In the NCDR arena, steps can be taken to ensure victims are safely in their car and travelling home before the other party is released from the mediation or arbitration location.

By contrast, previously niche, pre-pandemic, the pFDR has morphed into a commonplace step in most financial remedy applications of any value. We argue this option should be considered in every financial remedy matter where resolution through mediation or another form of NCDR has proved impossible.

The pFDR takes place at a safe and secure venue (or online with screens off, where a party does not want to see their abuser), before a judge who is dedicated to that couple and who has received and read the papers cover-to-cover. This is infinitely preferable to appearing in the court system before an FDR judge, who may have several other cases to deal with and will frequently not have anywhere near the same grasp of the papers.

Fair Shares updating report

Since October's Resolution report, we have seen the updating *Fair Shares* report published, looking specifically at issues of domestic abuse in financial remedy cases on divorce and separation.

Whilst the report relies on the survey data to express caution about NCDR routes for domestic abuse survivors, the limited number of survivors who had attended mediation in the interview sample meant that no findings could be drawn about the experiences of survivors who had gone through various NCDR routes including mediation. Whilst the report referred to one victim-survivor who had a poor experience of mediation, of the 12 victim-survivors interviewed from the sample of 53 divorcees, only one victim-survivor had attended mediation (and another a MIAM).

It is, moreover, interesting to note why it says so few victim-survivors attended mediation at all – these included a 'lack of communication between the parties; mediation not being raised as a possibility, costs, not being ready to mediate, and not having any/sufficient assets to warrant going to mediation'. Mediation was not necessarily inappropriate in such cases. It would seem likely that some parties were not appropriately signposted or supported in exploring mediation or could not obtain funding and legal support to engage in the process.

In the context of researching this article, we spoke to Professor Emma Hitchings, co-author of the report. She said the researchers had not been able to cover the desirability of lawyer-inclusive, shuttle and hybrid mediation models in better supporting victims survivors. This may be something for further research.

Training

We concur with the Resolution report that all family justice professionals should be aware of the risks and trained to recognise domestic abuse in all its forms.

We would not stop there, however. Domestic abuse is clearly something all lawyers should have training in. All family law professionals, not just mediators, should be trained to spot safeguarding issues before a court application is issued. In the same way, given the new regime in place since April 2024 (requiring all parties to demonstrate at every stage of the court process their views on engaging with NCDR), surely there should be a concurrent requirement for all family law practitioners to have training in the various NCDR options. How can practitioners safely navigate the new landscape without understanding both domestic abuse and NCDR?

The decision of *NA v LA* [2024] EWFC 113 – where Nicholas Allen KC sitting as a Deputy High Court Judge rightly in our view stayed the financial remedy proceedings for 3 months even where there had been a background of alleged domestic abuse – illustrates the critical importance for all practitioners of a rounded understanding not only of alleged domestic abuse, but also of the basics of NCDR and other areas recommended as required training by the 2020 Family Solutions Group report, such as around the psychological aspects of divorce and the voice of the child. The recent *Fair Shares* report also points towards the need for better education and training, so that people are made aware of all relevant NCDR options, given some survivors did not even know mediation was an option.

Perhaps it might be suggested NCDR is still seen as an 'alternative'? Not because court is necessarily always better suited to victims, but because court is the option which still feels most familiar to many practitioners. At present, barely more than 25% of Resolution members have any form of specific NCDR training. Surprisingly, there is currently no requirement at all for any training in this field.

In the new post-April 2024 environment, court proceedings are no longer to be issued without proper consideration of NCDR, and then only as a last resort. Indeed, even where domestic abuse is present, there are almost certainly better routes and options to be properly explored first. Where domestic abuse is concerned, the court process will lead to further delay which may cause re-traumatisation. It is no magic bullet.

For individuals who stubbornly refuse to meaningfully participate in any form of NCDR, court may be unavoidable. However, given developments in recent months, there is now an expectation that some form of NCDR is properly explored first. If they do reach court, costs sanctions are likely to be imposed.

Money Corner: New Tax Landscape for High Net Worth Divorces

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The dust has (almost) settled following the Autumn Budget and April 2025 will bring about one of the biggest overhauls of the way the UK taxes foreign individuals in decades.

This piece covers the changes to the non-domicile (non-dom) regime and the other smaller measures announced in the budget that will have an impact on high net worth (HNW) and international divorces.

Old non-dom regime

Starting with the big headline – the abolition of the non-dom regime. The non-dom regime was originally introduced in 1799 to protect those with foreign income from the UK's new wartime taxes. It remained relatively easy for an individual to claim they were non-UK domicile – as demonstrated when UK-born Mr Gulliver who at the time was HSBC's chief executive claimed to be non-UK domicile.[1] There were also cases of multi-generation families living in the UK and claiming non dom status even though they had lived their whole life in the UK.

This practice was bought to an end in 2017 when the laws changed to introduce a new concept of deemed domicile. Individuals would be deemed domicile in the UK if they had been resident in the UK for 15 out of the previous 20 years, and those who are deemed domicile are subject to tax on their worldwide income and gains in the year that they arise.

Previously, non doms living in the UK could earn money overseas and those funds would not be taxable (or reportable) in the UK provided these funds were not remitted (bought) to the UK.

Any money that non doms earnt in the UK whilst living in the UK has always been and will remain taxable.

Non-doms effectively had three pots of money as set out in Table 1.

Table 1: Non dom regime up to April 2025

Pot 1	**Pot 2**	**Pot 3**
Money earned before arriving into the UK[2]	**Money earned overseas whilst living in the UK**	**Money earned in the UK whilst living in the UK**
This money is always free of UK tax. It can be remitted (bought in) to the UK at any time and no taxes will be payable on those funds	This money is not taxable in the UK unless the individual brings it into the UK. When it is remitted (bought) to the UK it is taxable. The rate of tax depends on whether the funds are income or gains. The top rate would be 45%	This money will be taxed in the UK in the year it is earned. There are no further taxes on this money when it is accessed

New Foreign Income and Gains Regime

From 6 April 2025 the non-domiciled regime will be abolished and replaced with the Foreign Income and Gains (FIG) regime. It is simpler to explain this regime in relation to new arrivers to the UK, ignoring non-doms or former non doms for a moment.

The new FIG regime works as follows: when individuals arrive in the UK and become resident here they will only pay UK tax on their UK-sourced income for their first 4 years of residency.[3] Any offshore income or gains that they earn in those 4 years are outside the scope of the UK *and this remains the case even if they bring that money into the UK.* This is set out in Table 2.

Table 2: New FIG regime (for new arrivers to the UK)

Pot 1	**Pot 2**	**Pot 3**
Money earned before arriving into the UK	**Money earned overseas whilst living in the UK**	**Money earned in the UK whilst living in the UK**
This money is always free of UK tax. It can be remitted (bought in) to the UK at any time and no taxes will be payable on those funds	This money is not taxable in the UK for the first 4 years a person is living in the UK. They can bring this money into the UK with no charge to tax	This money will be taxed in the UK in the year it is earned. There are no further taxes on this money when it is accessed

Individuals who have been living in the UK for more than 4 years at 6 April 2025 will be subject to UK tax on their worldwide income and gains regardless of whether they bring that money to the UK or not and regardless of whether they were formerly non dom in the UK.[4]

Note the charge to worldwide income and gains is on that money when it arises (either when the income is earned or if assets are sold). Take Pierre who is a French national and non dom living in the UK. He keeps all of his money in France, it consists of €10,000,000 investments, €2,000,000 in a bank account and he earns dividends of €1,000,000 per annum. At 6 April 2025 Pierre will not suffer an immediate charge to tax on all of his assets. Table 3 shows how his position is different under the old regime and the new regime

Table 3: Comparison of the old and new regimes

Assets	Old (non-dom) regime	New (FIG) regime
Capital. €10,000,000 investments: €7m invested before arriving into the UK €3m in gains	Not taxable in the UK whilst held as investments. As and when he sells the investments the €3m gain would be taxable only if he remitted the gains to the UK	Not taxable in the UK whilst held as investments. As and when he sells the investments the €3m gain will be taxable in the UK
Capital earned before arriving in the UK. €2,000,000 cash	Not taxable in the UK	Not taxable in the UK
Annual income. €1,000,000 dividends	Not taxable in the UK unless remitted to the UK	Taxable in the UK
€6,000,000 of dividends earned whilst living in the UK but kept in France	Not taxable in the UK unless remitted to the UK	Not taxable in the UK unless remitted to the UK

Transitional rules

Transitional rules will be in place for the next 3 tax years from 6 April 2025. These transitional rules are particularly generous and offer former non doms a much-reduced tax rate if they want to bring their funds onshore to the UK.

The transitional rules are only available for individuals who have previously used the remittance basis (these are individuals who have previously been non-dom in the UK and utilised the remittance basis). It is called the Temporary Repatriation Facility (TRF). It does not apply automatically, individuals have to be eligible and they have to make a notification to designate funds and pay the relevant charge under the TRF.

The reduced rate of tax that applies is 12% for 2025–26 and 2026–27 and 15% for 2027–28. Individuals will be able to designate offshore funds, pay the charge and then they can remit those funds into the UK without any further tax payable. Currently the top rate of tax for income earned offshore and remitted to the UK is 45%, therefore this a potential tax rate saving of 33%.

If we revisit Pierre from earlier. Pierre currently has €6m in dividends that he has earned in France whilst living in the UK. If he wanted to bring that money to the UK he would pay tax at 39.35% (being the top rate of tax for dividends in the UK). This would create a tax liability in the UK for Pierre of €2.4m.

Pierre qualifies for the TRF as he was formerly non dom in the UK and had claimed the remittance basis in the past. He could choose to designate the €6m in dividends and pay tax of 12%, being €720k. One he has designated and paid the charge there is no further tax payable when he brings those funds into the UK. Additionally, if Pierre wanted to keep the funds in France he could do so. There is no requirement that the money must be bought to the UK within a certain time frame.

Of course, if Pierre intended to return to France in the future and did not need to bring in funds to the UK for financial reasons, then he would not make the designation and keep the funds offshore.

If the money offshore was not earned dividends but earned income of €6m the savings under the TRF would be just shy of €2m.[5]

It cannot be overstated how valuable the TRF is for individuals who are former non doms and plan to remain in the UK and would like access to their offshore funds.

Individuals must make the designation of the funds on their self-assessment tax returns. The deadline for the tax return is 31 January following the end of the year:

2025–26	TRF rate 12%	Deadline 31 January 2027
2026–27	TRF rate 12%	Deadline 31 January 2028
2027–28	TRF rate 15%	Deadline 31 January 2029

Once the deadline of 31 January 2029 has passed individuals will no longer to be able to make a designation.[6]

From 6 April 2028 onwards

Once the 3 years for the TRF has passed, any former non doms who want to remit money earned offshore whilst they were resident in the UK will pay tax in the UK. The rate of tax payable depends on the type of income or gain – the top rate of income tax is 45% and the top rate of capital gains tax (CGT) is currently 24%.

If the individual has been living in the UK for at least 4 years, all of their income and gains will be taxable in the UK regardless of whether they bring that money to the UK.

We know from studies that the majority of the HNW and UHNW have illiquid assets and keep investments in shares and property. Those investments will not immediately be subject to tax. However, if the former non dom is living in the UK when they sell the asset then they will be subject to tax in the UK on the gain. See Table 4.

Table 4: New FIG regime (for former non doms)

Pot 1	Pot 2	Pot 3	Pot 4
Money earned before arriving into the UK	**Money earned overseas whilst living in the UK (pre-April 2025)**	**Money earned overseas whilst living in the UK (post-April 2025)**	**Money earned in the UK whilst living in the UK**
This money is always free of UK tax. It can be remitted (bought in) to the UK at any time and no taxes will be payable on those funds	This money is not taxable in the UK for the first 4 years a person is living in the UK. They can bring this money into the UK with no charge to tax	This money will be taxed in the UK in the year it is earned. There are no further taxes on this money when it is accessed	This money will be taxed in the UK in the year it is earned. There are no further taxes on this money when it is accessed

Will the offshore-to-offshore divorce structuring still work?

Yes. It will work because if it is structured correctly it is not a remittance of funds to the UK, so it is not within the scope of UK tax regardless of the non-dom rules. The non-dom rules enabled an individual to build up funds offshore and shelter them from UK tax. The changes to these rules do not remove the shelter they just stop people adding anything underneath it.

For those not familiar with the offshore-to-offshore structuring which one judge called a 'remarkable tax loop-hole'[7] I will briefly describe it.

As we have seen throughout this article the non-dom regime is a brilliant regime if individuals want to keep their money out of the UK. If they want to bring their money into the UK it is quite obstructive as there will be high tax charges.

If non-doms are going through a divorce and they require access to offshore funds which would be taxed if bought to the UK, one option is for the settlement to be funded as an offshore settlement. Assuming the non-dom is H these are steps one would follow:

- Step 1: H would transfer the settlement funds from his offshore account to W's offshore account (it **has** to be an offshore account).
- Step 2: The parties receive the Final Order.
- Step 3: After the Final Order, H and W are no longer connected people and therefore, W can bring the funds onshore with no tax implications.

Under this structure the funds end up in the UK but they are not deemed to be a remittance on H. There are obviously some nuances to this and traps for the un-advised. Notably if there are children or grandchildren of H this could be considered a remittance even if the steps are followed. Needless to say, advice should be sought if this is the route your client is seeking.

However, in principle this structure will not be impacted by these changes.

As the rules are changing, the advice to all former non-doms is to ring fence their funds where possible. The best HNW client would have a clear segregation of funds from pre-5 April 2025 and post-6 April 2025. If that hasn't been done, there is still planning that can be achieved but it becomes messier.

Therefore, if you are representing a former non-dom and want to utilise the offshore-to-offshore structure you would only be using funds from Pot 2 (Table 4) to do this. That is money that has been earned offshore by the individual whilst they were resident in the UK which they have kept offshore.

Providing the conditions were met the above structure would enable individuals to remit funds onshore (in the UK) without paying additional tax.

Other changes from the Autumn Budget

CGT increases. The lower and higher rate of CGT will increase to 18% and 24%, respectively, for disposal made on after 30 October 2024. Previously we had two sets of rates (10% and 20% for disposals on shares and non-residential property and 18% and 24% for disposals on residential property). Therefore this has increased the tax payable on the sale of shares, business assets and commercial property by 4%.

Carried interest. The rate of CGT applied to carried interest will increase from 28% to 32% from 6 April 2025. Then from 6 April 2026 the carried interest regime will move into the income tax regime. This will bring the updated tax rate to 47% (being 45% income tax and 2% national insurance). This is a significant change for those working in private equity as a carry makes up part of their total compensation package.

VAT on school fees. Another highly publicised change announced was the introduction of VAT on school fees. This was announced on 29 July 2024 and it came into effect on 1 January 2025. Note that any individuals who prepaid school fees in an attempt to settle the fees before the introduction of VAT will still have a VAT obligation on those fees.[8]

Business Asset Disposal Relief (BADR). The rate for BADR (previously Entrepreneur's Relief) has increased from 10% to 14% from 6 April 2025. It will increase again to 18% from 6 April 2026 and remain at 18%. BADR allows qualifying individuals to pay a reduced rate of CGT on their first £1,000,000 of qualifying gains. From 6 April 2026 the maximum value of this relief will be a tax saving of £60,000.

Late payment charges. From 6 April 2025 the interest rate of unpaid tax liabilities charged by HMRC will increase to 9%. If a client has historical tax liabilities it's important to factor in the tax, the penalties and any interest owed to capture the full liability owed.

HMRC resources. HMRC will be given funding to hire over 5,000 compliance officers and debt management staff.

Pensions. From 6 April 2027 pensions will be inside the scope of inheritance tax (IHT). Under current rules pensions are exempt from IHT – meaning that when a person dies the pension pot is outside their estate and there is no 40% charge on the value. As a result, people with diverse portfolios would usually leave their pensions in the fund as part of IHT planning. That will now change. There is no immediate charge when the change comes in, the change is a reclassification of pensions as an asset now within the scope of IHT.

Stamp Duty Land Tax (SDLT) Additional rate rising to 5%. The former additional rate of SDLT was 3%. Whilst this is a relatively small increase the impact can be significant when applied to the high price of properties in England and Northern Ireland.[9] This change was effective from 31 October 2024.

Notes

1 Mr Gulliver was born and raised in the UK, as an adult he left to work in Hong Kong, at which point he claimed that he had acquired a domicile of choice in Hong Kong. He returned to the UK to continue his career, which led to him being appointed as Group Chief Executive of HSBC but claimed to maintain his non dom status.

2 'arriving into the UK' means before they became UK tax resident.

3 A person is considered a new arriver to the UK provided they have not been resident in the UK in the previous 10 tax years. Someone who is, say, French who left the UK 3 years ago and is now returning would not be able to benefit from this 4-year FIG treatment.

4 This includes income from offshore trusts that previously benefited from protected status.

5 Earned income is charged to tax at 45% when remitted to the UK. €6m at 45% is €2.7m, under the TRF the individual would pay tax at 12% which would be €720k.

6 Individuals have 12 months after the end of the tax return deadline to file an amended return. It is not clear from the current draft legislation whether a person could amend a tax return after the deadline and make the designation and if this would be accepted as valid.

7 *ABX v SBX* [2018] EWFC 81 at [48].

8 The government introduced anti-forestalling provisions which mean that payments made on or after 29 July 2024, which relate to a school term after 1 January 2025, will be subject to VAT at the beginning of that term.

9 Note that England and Northen Ireland have one set of SDLT rates and rules. Wales and Scotland have different rates and rules.

Tech Corner: The Intersection of Technology and Domestic Abuse: Legal Implications in the UK

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In today's digital age, technology has undeniably transformed the way we interact, work, and live. While technological advancements offer numerous benefits, they have also opened new avenues for individuals to exert control, manipulate, and harass their partners and ex-partners in cases of domestic abuse. In this article, we will explore the unfortunate intersection between technology and domestic abuse within the context of England and Wales family law.[1] We will discuss how perpetrators of abuse employ various tactics, such as call spoofing, using Apple AirTags to track their victims, and spyware on mobile phones. In addition, this article will outline how emerging AI technologies, such as voice cloning, are being used to facilitate abuse. Most of these methods fall under s 76 Serious Crimes Act 2015 (SCA 2015) as technology has been weaponised for the purpose of coercion and control alongside other cyber-enabled offences. Likewise, many of these offences will be tied to cyber-enabled Violence Against Women and Girls (VAWG), including new and updated offences under the Online Safety Act 2023 (OSA 2023).[2]

Call spoofing

Call spoofing is a deceptive technique used by abusers to manipulate caller ID information, presenting themselves as someone else when contacting their victims. This technology has seen an alarming increase in its use by perpetrators to maintain control and intimidate their partners and ex-partners. Perpetrators can use various methods and applications to disguise their identity or impersonate individuals known to the victim.

Example: Sarah received a call from her child's school, but upon answering, she found herself speaking to her ex-partner. The abuser had exploited call spoofing to cause confusion and distress.

Call spoofing has become a pervasive issue in the landscape of domestic abuse in England and Wales. With the widespread availability of spoofing apps and services, abusers can manipulate caller ID information to mask their identity. This practice poses serious challenges for both victims and the legal system. Call spoofing involves manipulating the information that appears on the recipient's caller ID display. Abusers can alter the name, phone number, or even display a different area code to make it seem like the call is originating from a different location.

In England and Wales, the current legislation around call spoofing is covered by s 127 Communications Act 2003 and the False Communications Offence in ss 179 and 182 OSA 2023.[3] In line with the OSA 2023, Ofcom has updated regulations in the last year for communication providers by targeting and blocking callers with inaccurate Calling Line Identification (CLI) to protect victims from illegal call spoofing.[4] The framework is set to come into action from 29 January 2025, however the scope does not cover WhatsApp or other internet calling providers which may result in difficulties identifying spoofing this way.[5] These regulations have been designed target scammers rather individuals using the technology as a means to abuse, although, Ofcom is due to publish further guidelines for the OSA 2023 relating to VAWG in the first half of 2025.[6]

For victims, call spoofing can be particularly difficult to evidence, however, WomensLaw.Org give the recommendations for patterns and behaviour that may strengthen the claim.[7] For each of these it will always be beneficial to keep a log with dates and times of each individual event:

- Do the calls and texts from the spoofed numbers come at similar times to previous patterns of this person?
- Does the content within the call/text of the spoofed number seemingly know information that would only be known by those close to the recipient or does it seem familiar? I.e. hidden clues or detectable writing and messaging styles
- Is the timing suspicious? Did the calls start immediately after a breakup or following a certain event?
- Are there external factors that could help demonstrate a pattern?
- Can we access phone records for evidence? (*This will*

vary between providers and for incoming call data you may require a court order due to GDPR regulations.)

If in doubt, the individual should hang up the phone and call the number of the person the caller was claiming to be, call spoofers will not be able to intercept this line. The current recommendation from Ofcom for spoof calling is to report these occasions to Action Fraud.[8]

Tracking devices

Apple AirTags, initially designed to track personal belongings, have been weaponised by abusers in England and Wales to monitor and stalk their victims. These inconspicuous devices can be discreetly hidden within personal items or affixed to a vehicle, enabling perpetrators to track their targets' movements in real-time.

Example: A survivor of domestic abuse, Jane, discovered an AirTag secretly placed in her purse. Her abuser had been using it to monitor her whereabouts, thereby violating her privacy and sense of security.

AirTags have gained popularity as a discreet and effective tracking tool for abusers in England and Wales. Their small size, long battery life, and seamless integration with Apple's ecosystem make them an attractive choice for those seeking to engage in stalking behaviour.

The current legislation around the tracking devices is covered by ss 2–5 Protection from Harassment Act 1997 and is clearly specified as a cyber-enabled VAWG offence.[9]

Apple has built-in detection when it comes to other Apple devices with location sharing, it will alert individuals if they have had another device travelling with them and give them the option to play a sound out of this device. Raising awareness of this capability is a first step in the right direction in preventing harm from these devices. There have been examples of abusers removing the speakers from the devices so that the sound won't play, however this won't prevent the notification to the other Apple device. If the device is not made by Apple or if the victim does not have an Apple phone, these notifications will not flag these devices on their phone. If users suspect a tracking device there are other options for detecting these devices such as by using an app that can be downloaded onto their phone or using a device which can be purchased online. Likewise, looking at coincidences that can only be explained by a party having unsolicited knowledge of the victim's whereabouts may help the detection of these devices as seen in *Re A and B (Children: 'Parental Alienation') (No 5)* [2023] EWHC 1864 (Fam).

Tracking devices may not be obvious and can also be planted on the child or their belongings. Recent cases have included devices being sewn into school uniforms or bags where the child is unaware of it.[10] Devices such as AirPods and other wireless devices can also be used maliciously in this way. When everyday items are flagged up in this way, it may not be obvious that they have been used to track a location, so it is important to be aware of.

Spyware

The proliferation of spyware applications has allowed abusers to surreptitiously invade the privacy of their victims by monitoring their mobile phones. These malicious apps can gain access to text messages, call logs, GPS locations, and even activate the phone's microphone and camera without the victim's knowledge.

Example: John installed spyware on his spouse's smartphone, Lisa, gaining unauthorised access to her messages, calls, and location data. This breach of her privacy allowed him to exercise control and manipulate her actions

Spyware has become a pervasive threat in domestic abuse cases in England and Wales, with abusers using these covert applications to gain unauthorised access to their victims' personal information and communications.

The current legislative arms for spyware offences are ss 1 and 2 Computer Misuse Act 1990 (CMA 1990) and ss 2–5 Protection from Harassment Act 1997 which also pertain to further cyber-enabled VAWG offences.[11]

Like detecting trackers, considering coincidences that can only be explained by a party having unsolicited knowledge of the victims' discussions and whereabouts may help the detection of these devices. Free apps like *Avast One* can scan phones and other devices to detect spyware.[12] Additionally, individuals should be cautious of account sharing in iCloud (or non-Apple equivalents). Some apps designed to help with child safety could also be utilised as spyware where messages and locations from a child's phone or other device may be linked to private and secure details of one of their parents.

If a device is reducing in battery life or data a lot faster than usual or if their phone feels physically warmer, these could be additional indicators that spyware is present as the phone is working twice as hard to copy the activity to another device. Additionally, it is possible to detect spyware by looking for apps on your phone that do not seem familiar or by checking phone privacy settings to see where data is being shared.

If someone is concerned their location or information is being shared through spyware, there are several apps available to detect spyware on a device. For example, *Avast One*, which has worked alongside *Refuge* in recent years to educate on the ways in which everyday technology can be used to perpetrate abuse.[13] It is important to note that purchasing a new device is not always a simple solution, when copying data between devices, the spyware can copy over too. It is safer to reset the device entirely by removing any data and settings. Likewise, it is possible to remove spyware. *Avast One* also offers a free spyware removal tool.

If a location is being shared through spyware, then this will still be active when a device has been turned off, however, using Airplane mode will prevent the sharing of a location. If a victim wanted to report this to the police before removing the spyware, then a safe option would be to enable Airplane mode in a public area like a gym or supermarket before going to report this activity. During that period, it would appear to the perpetrator that they remained in that public area for the duration that they reported the matter to the police, rather than alert the perpetrator of the report.

The emerging role of AI

As artificial intelligence continues to advance, abusers are increasingly exploiting AI-powered technologies to manipulate and intimidate their victims. Voice cloning poses a significant threat. With AI-driven software, abusers can mimic a victim's voice, potentially leading to detrimental consequences.

Example: Lisa's former partner used AI voice cloning to impersonate her during a phone conversation with her employer, causing her to lose her job and financial stability.

Artificial intelligence has opened up new avenues for abusers to perpetrate manipulation and harassment in England and Wales:

(1) *Voice cloning*: AI-based voice cloning technology allows abusers to mimic a victim's voice convincingly, enabling them to impersonate the victim in various situations.
(2) *Deepfake videos*: AI can be used to create realistic deepfake videos that manipulate the appearance and speech of individuals, further enabling manipulation and deception.
(3) *Social engineering attacks*: AI-driven social engineering attacks, including phishing emails and fraudulent phone calls, can be used to manipulate victims into divulging sensitive information.

The above is an example covered by s 77(1) Serious Crime Act 2015 of AI being used to cause reputational damage and loss of earnings.[14] In recent years, consultations for legislating AI have not progressed as quickly as AI has developed and there are not specific offences that clearly deal with AI yet. The OSA 2023 clearly criminalises the use of deepfake technology in creating child pornography[15] and sharing of intimate deepfakes of an adult.[16] For other offences, the following legislative arms can be extended to harms that involve the use of voice cloning or deepfake technology:

- ss 1 and 2 Fraud Act 2006, where a false representation has been made to deceive and cause harm; and
- ss 179 and 182 OSA 2023 regarding a false communications offence.

The following eight questions were published by MIT Media Lab as part of its Detect Deepfake project to help individuals identify if videos are genuine or have been created using deepfake technology:[17]

(1) Pay attention to the face. High-end DeepFake manipulations are almost always facial transformations.
(2) Pay attention to the cheeks and forehead. Does the skin appear too smooth or too wrinkly? Is the agedness of the skin similar to the agedness of the hair and eyes? DeepFakes may be incongruent on some dimensions.
(3) Pay attention to the eyes and eyebrows. Do shadows appear in places that you would expect? DeepFakes may fail to fully represent the natural physics of a scene.
(4) Pay attention to the glasses. Is there any glare? Is there too much glare? Does the angle of the glare change when the person moves? Once again, DeepFakes may fail to fully represent the natural physics of lighting.
(5) Pay attention to the facial hair or lack thereof. Does this facial hair look real? DeepFakes might add or remove a moustache, sideburns, or beard. But, DeepFakes may fail to make facial hair transformations fully natural.
(6) Pay attention to facial moles. Does the mole look real?
(7) Pay attention to blinking. Does the person blink enough or too much?
(8) Pay attention to the lip movements. Some deepfakes are based on lip syncing. Do the lip movements look natural?

Additionally, metadata and other surrounding information could help with identification of a DeepFake. Information such as timestamps, editing history, and GPS coordinates showing inconsistencies within this metadata could point to possible AI manipulation.[18]

If a call sounds exactly like a family member but has come from a line the individual doesn't recognise or at an irregular time, they should think about asking specific questions to the scammer that they would only know the answer to if they were said family member. Likewise, planning ahead by having key words or questions/answers with close friends and family members can help better prepare for this scenario. Like with call spoofing, ending the call and directly calling the person can also help to identify if the caller is ingenuine.

Conclusion

The intersection of technology and domestic abuse poses significant challenges within the framework of family law in England and Wales. Abusers are increasingly employing tools such as call spoofing, Apple AirTags, and mobile phone spyware to stalk, control, and manipulate their victims. Moreover, the emergence of AI technologies, like voice cloning, has further exacerbated these risks.

It is imperative for the legal community in England and Wales to acknowledge and address these threats. Whilst there have been some legislative updates in recent years, campaigning from organisations such as refuge suggest more can be done to create a safer and more secure environment for victims of domestic abuse. Raising awareness of the harms out there and how individuals can better protect themselves is the first step. Likewise, further training for legal professionals and the judiciary to stay updated with emerging technologies where possible can help reduce harms from the insidious misuse of technology. By adapting to the evolving landscape of technological abuse, the legal system in England and Wales can better protect the rights and well-being of those affected by domestic abuse in the digital age.

Notes

1 In the article, we use 'England and Wales', but readers should note that the Online Safety Act 2023 covers the UK as a whole.
2 *Cybercrime – prosecution guidance* (2024) *The Crown Prosecution Service*. Available at https://www.cps.gov.uk/legal-guidance/cybercrime-prosecution-guidance (accessed: 8 January 2025).
3 *Cybercrime – prosecution guidance* (2024).
4 *Statement: Tackling scam calls – expecting providers to block more calls with spoofed numbers* (2024). Available at: https://www.ofcom.org.uk/consultations-and-statements/category

-2/updating-cli-guidance-to-tackle-scam-calls (accessed: 8 January 2025).

5 *Clamping down on scam calls from abroad* (2024). Available at: https://www.ofcom.org.uk/phones-and-broadband/scam-calls-and-messages/clamping-down-on-scam-calls-from-abroad/ (accessed: 8 January 2025).

6 *Ofcom's approach to implementing the Online Safety Act* (2023). Available at: https://www.ofcom.org.uk/online-safety/illegal-and-harmful-content/roadmap-to-regulation/ (accessed: 8 January 2025).

7 *Spoofing* (2024). Available at: https://www.womenslaw.org/about-abuse/abuse-using-technology/ways-survivors-use-and-abusers-misuse-technology/spoofing-0 (accessed: 8 January 2025).

8 *Number spoofing scams* (2023). Available at: https://www.ofcom.org.uk/phones-and-broadband/scam-calls-and-messages/phone-spoof-scam/ (accessed: 8 January 2025).

9 *Cybercrime – prosecution guidance* (2024).

10 *M v F (Covert Recording of Children)* [2016] EWFC 29.

11 *Cybercrime – prosecution guidance* (2024).

12 *Free anti-spyware scanner and remove*r (no date). Available at: https://www.avast.com/c-spyware-removal-tool (accessed: 8 January 2025).

13 *Home tech tool: Refuge tech safety* (2021). Available at: https://refugetechsafety.org/hometech/ (accessed: 8 January 2025).

14 *F v M* [2021] EWFC 4 (15 January 2021).

15 Hannah Al-Othman (2024) 'Man who used AI to create child abuse images jailed for 18 years'. Available at: https://www.theguardian.com/uk-news/2024/oct/28/man-who-used-ai-to-create-child-abuse-images-jailed-for-18-years (accessed: 8 January 2025).

16 'Government cracks down on "deepfakes" creation' (2024). Available at: https://www.gov.uk/government/news/government-cracks-down-on-deepfakes-creation (accessed: 8 January 2025).

17 MIT Media Lab, 'Detect DeepFakes: How to counteract misinformation created by AI' (no date). Available at: https://www.media.mit.edu/projects/detect-fakes/overview/ (accessed: 8 January 2025).

18 *Deepfake detection: Provenance, inference, and synergies between techniques – reality defender* (2024). Available at: https://www.realitydefender.com/blog/provenance-and-inference (accessed: 8 January 2025).

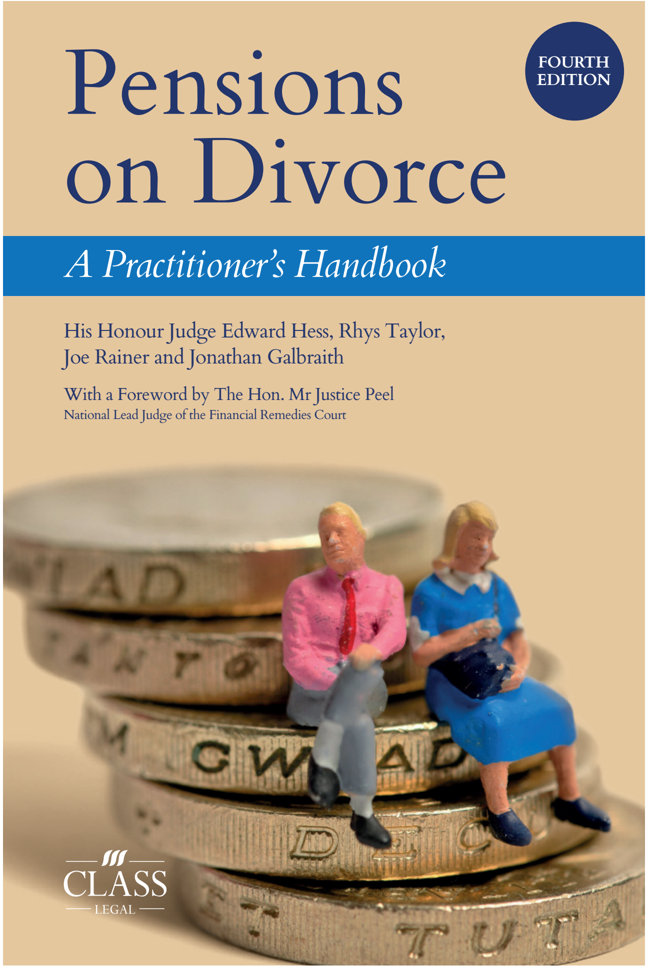
Book Review: *Pensions on Divorce: A Practitioner's Handbook (4th Edition)*

HHJ Edward Hess, Rhys Taylor, Joseph Rainer and Jonathan Galbraith (Class Legal, 2025)

David Salter

Private FDR Evaluator

The 3rd edition of this handbook appeared in 2018, stating the law as at January 2018, and so a new 4th edition is to be heartily welcomed. The 7-year interval has seen two reports from the Pension Advisory Group (in 2019 and 2024), important reforms to pensions taxation legislation and changes to public sector pensions brought about by the *McCloud* litigation. Two members of the previous author team, Fiona Hay and David Lockett, have retired to be replaced by Joe Rainer and Jonathan Galbraith, respectively.



As Mr Justice Peel observes in his enthusiastic foreword, 'the jurisprudence on pensions remains limited'. 'The Court of Appeal has not opined on pensions in any meaningful way since *Martin-Dye* (2006)', one possible exception being *Finch v Baker* (2021). In the main, it has been left to the district and circuit bench to develop the case law, an increasing number of decisions which are now usefully reported. Many of these decisions come from HHJ Edward Hess himself (e.g. *W v H (Divorce: Financial Remedies)* (2020), *T v T (Variation of a Pension Sharing order and Underfunded Schemes)* (2021) and *SP v AL* (2024)). The High Court has largely been silent (one exception being *CMX v EJX* (2022)) because (as 10.4 puts it) in cases allocated to this level 'the pension does not hold the balance of fairness'. Guidance may still be needed from the High Court or above on the three critical issues identified by HHJ Hess in *W v H* and which confront practitioners on a regular basis, namely, whether to divide pensions according to capital or income value; whether to exclude pension assets acquired before marriage (i.e. apportionment or ring-fencing); and whether to treat pensions separately or whether to offset. All of these issues are carefully and lucidly explained, and it is suspected that Chapter 10 will be the most frequent source of reference for many readers.

It must be said that at the outset this handbook remains the foremost single volume work on pensions and divorce. Its target audience is primarily the financial remedy practitioner and the pensions on divorce expert (PODE). Throughout it adopts a welcoming style that renders sometimes complex subject matter easily accessible. Given the target audience, the authors recognise the need to restrict the scope of the work so as to highlight only the basics of pensions law and related taxation, of which the family lawyer should be aware. In identifying where the boundary should lie, the work is largely successful.

The new edition follows, in the main, the logical structure of the previous edition apart from the omission of a discrete chapter on civil partnerships (now sensibly relocated as a comparative table of statutory sources in the Miscellaneous Materials (D2.6)) and the merger of the two chapters dealing with Cash Equivalents. Its four sections cover law and procedure (Section A), the 16 chapters of which contain the bulk of the text, while the Actuarial Section (Section B) gives improved, restructured coverage of the shorter and longer career public sector pension schemes with full discussion of the implications of *McCloud*, as well as extended coverage of certain private sector pension schemes. Section C contains a wealth of the relevant statutory material relating to both family law and pensions law, whilst Section D contains vital Miscellaneous Materials ranging from the newly-added *Galbraith* tables to a state pension age calculator, not to mention relevant Forms and Standard Family Orders. What is particularly helpful is the use of summaries and practice points throughout the text. The work has excellent preliminary tables and is well-indexed.

Inevitably, there might be a few quibbles. Chapter 2 might benefit from some discussion of benefit structure as well as an explanation of the different legal structures for pension schemes, including extended coverage of, or signposting to, SSASs, Unapproved Schemes (both discussed in Chapter 12) and approved international schemes (Chapter 15). Strangely, there is no discussion of Master Trust pension schemes or auto-enrolment/NEST. It might have been helpful to the reader for the discussion of income gap syndrome to be concentrated in a single location rather than dealt with separately in a number of different chapters (4, 12 and 13). There are a number of references to *Blight v Brewster* orders (9.7, 13.30, 15.15, 15.24 and 16.8) without any mention of the fact that this approach is now restricted to personal pensions (and not occupational pension schemes) following the important decision of the Court of Appeal on the interpretation of Pensions Act 1995, s 91 in *Manolete Partners PLC v White* [2024] EWCA Civ 1418. The clear discussion of moving target syndrome would benefit from an analysis of the determination of the Pensions Ombudsman in *Mr S v Fidelity* (2024) (cited in the table of cases at 14.29), which adds more ripples to an already clouded pool. In the discussion on intra-UK pension issues (15.35–15.36), a view on the potential use of Civil Jurisdiction and Judgments Act 1982, s 18 and Sch 6 and CPR 1998, Part 74 would have been welcome. However, all of these are very minor issues when viewed against the very broad canvas covered.

It remains to be seen what reforms may emerge from the Law Commission's Scoping Report: *Financial remedies on divorce* (Law Com No 417, 18 December 2024), which is alluded to briefly at 10.3 and which considers whether pension sharing should be the default position or at least whether there should be explicit mention of pensions as one of the statutory factors for consideration. In the meantime, weighing in at a mighty 610 pages, this is a book no financial remedies practitioner, PODE or Financial Remedies Court judge can afford to be without. It is easily accessible for the inexperienced and reassuringly helpful to the advanced practitioner. It describes itself as a practitioner's handbook and that is exactly what it is: a book you need by the side of you in the office/chambers and which can easily be taken to court. Don't hesitate.

Important Recent Case Developments

October 2024 to mid January 2025

Professor Polly Morgan

Case Editor, Professor of Family Law and Director of UEA Law Clinic, University of East Anglia

These are the noteworthy case-law developments since the last issue went to press in early October 2024.

This period has seen a number of cases involving legal services payment orders (LSPOs), and we draw your attention to one in particular. In addition to this, there are several interesting cases involving international enforcement of maintenance, mistake, the effect of one party having a significant disability in a modest asset cases; and a very useful case on the effect of delays between conditional and final divorce order.

Legal services payment orders

In the world of LSPOs and maintenance pending suit, the case names have been getting memorable: we have both *HA v EN* [2025] EWHC 48 (Fam) and *LI v FT* [2024] EWFC 342 (B). (These are not quite as memorable as *FI v DO* [2024] EWFC 384 (B), in which who should have the dog was an issue so contentious and emotive that it derailed settlement.)

A few notable points arise from *HA v EN*, a decision of Richard Todd KC sitting as a Deputy High Court Judge. Ella Fogg from 1KBW provided the summary of this case for the FRJ website.

The wife (whose application for an LSPO and maintenance pending suit it was) was unable to obtain a sum to discharge her unpaid former lawyers' costs in light of *DH v RH* [2023] EWFC 111 and *Xanthopoulos v Rakshina* [2022] EWFC 30, but was able to obtain funds for past and future costs of her current solicitors, to ensure they continued to represent her. The solicitors for both parties were permitted to secure a charge over the matrimonial home under s 73 Solicitors Act 1974, allowing them to apply for an abridged charging order. (Charging orders in family proceedings are regulated by FPR Part 40.) They were also permitted to take an equitable charge over the final financial remedy award with payment to be made from the proceeds of the matrimonial home: a *Palmer v Carey* [1926] AC 703 charge. In these ways, the situation could be distinguished from the *Simon v Simon (Level Intervening)* litigation (see [2024] EWFC 160) which the judgment records had caused 'considerable disquiet' among law firms.

In the event of a successful appeal against the LSPO, per *Twinsectra Ltd v Yardley* [2002] UKHL 12, the funds would ultimately 'result' back to the paying spouse via the recipient spouse.

In *HA v EN*, Richard Todd adopted the approach of Cobb J in making a deduction to account for a standard basis of assessment, on the basis of CPR Part 44. This approach was *not* taken by Nicholas Allen KC, also sitting as a Deputy High Court Judge in *SM v BA (Legal Services Payment Order)* [2025] EWFC 7, on the basis that CPR Part 44 does not apply to LSPOs as they are not costs orders. Instead, the court should start from a presumption that the costs have been properly incurred and therefore, unless it can be established to the contrary, should be met under the LSPO.

Counsel's fees for reading time

HA v EN also contains a useful comment on counsel's fees for a reading day, again from Richard Todd KC sitting as a Deputy High Court Judge:

> 'It might be helpful here to address one matter which has caused a surprising level of confusion in the profession at large. It is long settled law that counsel is entitled to be paid a full refresher for a day where the Court is listed and counsel still retained. If the matter is not listed, then counsel do not get paid. The authority for this is the long-established case of *Lawson v Tiger* [1953] 1 WLR 503. Thus, Mr Glaser KC (and any other instructed counsel) are entitled to charge a refresher for days which are listed even though the Court might be reading or considering judgment on those days. The logic is compelling; counsel is not available for any other work. Counsel might be called upon even if the Court is provisionally detained in reading or judgment writing. Counsel has contracted to provide that time exclusively (this is the usual position where the agreement is between solicitor and counsel (a "B2B" agreement). The position of counsel is directly akin to a barrister in a criminal court waiting for a jury to return with a verdict; nobody could sensibly say that such a barrister should go unpaid whilst having to wait for the Court to re-assemble.'

The judge goes onto note that 'The position is less clear where there is a direct access agreement between a "consumer" and a barrister – see the decision involving a direct access agreement in *Glaser and Miller v Atay* [2024] EWCA 1111. But that is not the position here where counsel is retained by a solicitor'.

Mistake

XY v XX [2024] EWFC 387 (B) is the sequel to *XX v XY* [2023] EWFC 334 (B), both decisions of HHJ Hess. A computational error had been made by the husband, which resulted in erroneous figures being used in the 2023 final hearing. Specifically, no allowance was made for capital gains tax (CGT) arising in England on the disposal of the husband's Dubai assets. The husband applied to set aside the final order on the basis of 'mistake'. His application was unsuccessful. This was not an error of the court. The husband had told the court that no CGT would be payable. He had not sought to adduce expert tax evidence. He had been distracted by running a different, dishonestly unsuccessful case. The strong public policy of respecting the finality of sealed orders should carry significant weight in this case, particularly where W had to spend significant sums to identify H's dishonesty. As such, the court should be slow to come to his aid – and in this case it did not.

Albert Gibbon summarised this case for the FRJ website.

Reciprocal enforcement of maintenance

In *AJ v FJ (Appeal Against Registration)* [2024] EWFC 356 the court upheld an appeal against the decision of the Maintenance Enforcement Business Centre (MEBC) to register a Polish interim maintenance order. The wife had abducted the children. The husband argued that recognition was would be incompatible with the public policy of the United Kingdom for the purposes of Art 22(a) 2007 Hague Convention; that he did not have proper notice of the maintenance proceedings as required by Art 22(e); and lack of jurisdiction. He succeeded on Art 22(e), but a useful point is that the abducted children could not be considered habitually resident at the time the application was made, so jurisdiction arose only because their mother was resident in Poland. The argument about registration being contrary to public policy given the abduction depended upon whether or not recognition would perpetuate the harm to the children. Vivien Croly summarised this case for the FRJ website.

Delay in applying for a final divorce order

HHJ Simmonds, the national lead judge for divorce, handed down a judgment in *HK v SS* [2025] EWFC 5 (B) that provided guidance on the approach to delays between conditional divorce orders and applications for a final divorce order. It is of course perfectly normal for there to be an extended delay pending financial settlement, but in this case the delay was sufficient to cause the court to question whether the final order should be made at all.

The wife's divorce petition had been issued on 12 May 2022 and the wife had applied for a conditional order on 30 September 2022. However, she did not apply, and neither did the husband when it became possible for him to do so.

The parties reconciled in March 2023 before finally separating in June 2024. A couple of months after this, the wife applied for her conditional order to be made final.

Until the coming into force of the Divorce, Dissolution and Separation Act 2020, FPR 7.32 had set out specific questions the court should ask if there was a delay in excess of 12 months since decree nisi, including whether or not the parties had lived together or the wife had given birth. The key issue was whether anything had happened which undermined the basis on which the decree nisi had been made. Reconciliation attempts were encouraged; and HHJ Simmonds considered that, as 2 years' separation was then required to show irretrievable breakdown, this indicated that 2 years was also an appropriate time to allow reconciliation to be attempted without it being fatal to the petition.

But of course, the law has changed. Under what is now FPR 7.19(5) the application must include or be accompanied by an explanation in writing stating why the application has not been made earlier, but there are no requirements as to content. HHJ Simmonds nevertheless took a similar approach, holding that under the new law the issue remained whether anything had happened which undermined the basis on which conditional order had been granted. While a reconciliation of more than 2 years may amount to a material change in circumstances (and this is at the court's discretion), within the 2 years the application for final order should be allowed to proceed.

Beth Payne from QEB summarised the case for the FRJ website.

Needs and a disability

Some of the most difficult situations arise where parties have limited assets but significant competing needs. This was the situation in our Mostyn Award winner for the must-read case of the issue, decided by a judge below High Court level. In *V v V* [2024] EWFC 380 (B) HHJ Booth had to decide whether a house, adapted for the husband, who was tetraplegic, should be sold to enable the wife and children to be housed in a purchased property. The husband's disability occurred as a result of a domestic accident during the marriage and insurance paid out sufficient for the parties to purchase the matrimonial home. The wife had modest earnings topped up by universal credit, and the husband received universal credit and personal independence payments. They both had significant debts affecting their ability to borrow. The judge at first instance had ordered deferred sale once the parties had paid off their debts, arranged alternative accommodation, raised mortgages, and in the case of the husband had the property adapted to his needs. The husband appealed.

On appeal, HHJ Booth held that the judge at first instance had fallen into error. In trying to meet both parties' needs, he had met neither. A delay would not enable the parties to pay their debts, and receipt of funds from the house sale would simply eliminate their universal credit. This was a *Butler v Butler* [2023] EWHC 2453 (Fam) situation in which it was not possible to meet both parties' needs. After consideration of the case-law relating to those with serious disabilities (*Wagstaff v Wagstaff* [1992] 1 FLR 333, *C v C (Financial Provision: Personal Damages)* [1995] 2 FLR 171, and *Mansfield v Mansfield* [2012] 1 FLR 117) the judge held that there were examples of the needs of a disabled person taking priority over other needs, but this was not a principle. It was necessary to balance the parties' needs and in this case the husband's disability was so significant that his need to remain in the matrimonial home dominated. There would be a *Mesher* order with sale once the husband no longer needed the family home, either because he had died, or had moved into institutional care. In compensation for the delay the wife would be entitled to 75% of the proceeds.

Albert Gibbon summarised this case for the FRJ website.

This article draws on the case summaries prepared by the FRJ summariser team.

The Summary of the Summaries

Liam Kelly

Deans Court Chambers

WW v XX [2024] EWFC 330 (B) (HHJ Hess)

Final hearing involving valuation and matrimonial nature of business. *Keywords: matrimonial and non-matrimonial property; experts; companies; valuations*

Mainwaring v Bailey [2024] EWHC 2614 (Fam) (Henke J)

Henke J ordered the husband to pay the wife's costs assessed on a standard basis following his 'hopeless appeal'. In response to the husband's plea that he should be treated as a litigant-in-person and he did not understand the Family Procedure Rules, Henke J was emphatic that litigants in person are expected to comply with the procedural rules as much as represented parties. *Keywords: costs; appeals*

FC v WC [2024] EWFC 291 (HHJ Vincent sitting as a s 9 Deputy High Court Judge)

The parties entered a French form of civil partnership when living in France. After returning to live in England in 2022, they were informed that their dissolution was not capable of recognition under s 235(1) CPA 2004 as at the commencement of their dissolution neither party to the dissolution was a French national and was not resident or domiciled in France. *Keywords: experts; civil partnerships*

A v M (No 3) [2024] EWFC 299 (Cohen J)

Application by H to strike out W's application to set aside a final order in financial remedies proceedings on the ground of H's misrepresentation. *Keywords: disclosure; conduct; striking out applications; setting aside orders (including Barder applications)*

T v B [2024] EWHC 3251 (Fam) (Trowell J)

Application by the wife to continue a *Hemain* injunction made at short notice against the husband. H applied to set aside the injunction made. *Keywords: injunctions; jurisdiction; Hemain; foreign divorce*

XY v XX [2024] EWFC 387 (B) (HHJ Hess)

Application by H to set aside on the basis of a 'mutual mistake' of the parties which presented the court with inaccurate computational figures. *Keywords: setting aside orders (including Barder Applications)*

GH v H [2024] EWHC 2869 (Fam) (Mr Simon Colton KC sitting as a deputy High Court Judge)

On W's application, an interim changing order was made final in respect of sums to be paid to a third party/child of the marriage, with interest granted on the unpaid periodical payments. Held: that the fixed costs regime applied to final charging orders made in family proceedings, with consideration as to when that regime could be disapplied. *Keywords: fixed costs; child maintenance; periodical payments; interest, loans; charging orders; costs; third parties; debts; enforcement*

KD v SD [2024] EWFC 334 (B) (District Judge Hatvany)

Final hearing in a needs case concerning a relatively short marriage where the breadwinner and main financial contributor is now also the primary carer for the children. *Keywords: contributions; needs; short marriage*

HKW v CRH [2024] EWFC 358 (B) (DDJ Rose)

Final hearing in modest asset case. Court making findings on the validity of H's purported loans/gifts to the parties' children. Consideration of the *Kimber* factors concerning point of cohabitation. *Keywords: conduct; add-backs*

AJ v FJ (Appeal Against Registration) [2024] EWFC 356 (MacDonald J)

Appeal against the decision of the Maintenance Enforcement Business Centre to register a Polish interim maintenance order obtained by the respondent from the

District Court in Jelenia Gora on 15 December 2022. *Keywords: jurisdiction; child maintenance; appeals; 2007 Hague Convention; enforcement*

Ogbedo v Oghenerume-Taiga [2024] EWHC 3193 (Fam) (Sir Jonathan Cohen)

This is a successful application of NO (herein referred to as 'F') to strike out MT's (herein referred to as 'M') application for nullity pursuant to FPR 4.4 on the basis that it was an abuse of the court's process. The court applied the test in *HMRC v Kishore* [2021] EWCA 1565. *Keywords: nullity; jurisdiction; divorce orders; overseas divorce and the 1984 Act; striking out applications*

V v V [2024] EWFC 380 (B) (HHJ Booth)

Appeal from a final order in a modest asset case, in which the court was tasked with balancing the needs of a party suffering from a serious disability and the needs of the primary carer of the children of the family. *Keywords: housing need; appeals; Mesher orders and deferred charges; needs*

ST v AR [2025] EWFC 4 (HHJ Vincent sitting as a deputy High Court Judge)

Final hearing in a high-value case. Court making findings as to whether H's large inheritance had been matrimonialised, W's entitlement to a second home, and who should be awarded the family home. *Keywords: matrimonial and non-matrimonial property; needs*

SM v BA (Legal Services Payment Order) [2025] EWFC 7 (Nicholas Allen KC sitting as a deputy High Court Judge)

Application for an LSPO in high net worth financial remedy proceedings including an order to pay historic costs *Keywords: Financial Remedies Court (FRC); maintenance pending suit; legal services payment orders*

HK v SS [2025] EWFC 5 (B) (HHJ Simmonds, National Lead Judge for Divorce)

Guidance on when a delay between conditional order being made, and an application for a final order, is delay sufficient to cause the court to question whether a final order should be made. *Keywords: setting aside a decree nisi; divorce orders*

HA v EN [2025] EWHC 48 (Fam) (Deputy High Court Judge Richard Todd KC)

Application by W for MPS and an LSPO in protracted financial remedy proceedings. *Keywords: interim relief; maintenance pending suit; legal services payment orders*

MacQueen v MacQueen [2024] EWFC 400 (B) (District Judge Ashby)

Final hearing on an application for a financial remedy order in proceedings concerning serious findings of non-disclosure resulting in periodical payments throughout children's minority and orders for indemnity costs. *Keywords: non-disclosure; spousal maintenance (quantum); Financial Remedies Court (FRC)*

Interview with Sir Nicholas Francis

Nicholas Allen KC
29 Bedford Row

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

Nicholas Allen KC and HHJ Edward Hess interviewed Sir Nicholas Francis over dinner in December 2024, a few months after he retired from the High Court Bench

If I remember correctly, you didn't originally want to be a family lawyer, you wanted to be a shipping lawyer. Is that right?

I was brought up by the sea and I like sailing, and was offered a job in a prestigious set of chambers, which I think is now called Quadrant Chambers, but was then 2 Essex Court, and I thought it would suit me.

How did you end up at 29 Bedford Row?

I was so bored at the shipping set that I almost decided to leave the Bar. I hated it. I sat in a room looking at a wall 2 feet from me and read charterparties every day for 6 months. I thought it was awful. I was offered a job by one of my pupil master's clients working for a rice trading company in Karachi, and I nearly took that job. I was offered £40,000 a year tax-free which in 1982 was a lot of money. In the end, I decided to leave 2 Essex Court and sent about 12 letters applying for a second-six and waited to see what happened.

Was it 2 Dr Johnson's Buildings that replied?

No, at that point, I hadn't applied to them. I had a lot of replies and I went to a set in Crown Office Row. I enjoyed the pupillage there, but they didn't recruit that year. In fact, one of my co-pupils was Mark Warby, who of course is now in the Court of Appeal. Then I had the task, yet again, of applying, and I wrote many, many, letters (paper and ink in those days). I was eventually offered and accepted a tenancy at Francis Taylor Building. Then Alan Ward QC rang me up. He asked 'Would you please come and see us?' I replied saying I had already accepted a tenancy at Francis Taylor Building to which he said 'Well, come and see us anyway'. I met with him, Ian Davies and Evan Stone, and they basically offered me a tenancy at 2 Dr Johnson's Buildings there and then, but because of the irascible but fabulous JJ Davis, they couldn't call it a tenancy for a couple of months because he would be cross (and anyone who knew him will know that a cross JJ was always to be avoided). I said thank you, but I'm going to Francis Taylor Building, and then the next day Alan Ward rang me back and invited me to the pub where I met with him, Philip Cayford, Neil Sanders, Simon Edwards and a bunch of other people. I think what really persuaded me to accept their offer was that someone called Helen Gilbert came up to me and told me that 2 Dr Johnson's Buildings really was the best place to be. It was about a month later that Helen Gilbert announced her engagement to Alan Ward, and she is of course now Lady Ward.

When you joined those chambers, what work did you then do?

When I started at Dr Johnson's Buildings, I think it's fair to say they did just about everything that wasn't specialist, so they did crime, landlord and tenant, employment, contract disputes, neighbour disputes and family law. It was what you would call a general common law set. I went to industrial tribunals on unfair dismissal and redundancy cases. I did ouster orders in places like Southend and Billericay. I did a great deal of crime as well, both in the magistrates' court and in the crown courts. Bromley Magistrates' Court was the one I most often visited.

Dr Johnson's Buildings then turned into 29 Bedford Row, how did that happen?

I joined Dr Johnson's Buildings in 1982. By 1986, we were bulging out of the place; there was just not enough space. I, together with a few others, tried to persuade everybody that we should move. We ended up moving to 5 Raymond Buildings in 1987 and it was a really good move for us. I remember when we got there, we wanted to have a party but strict rules governing barristers' conduct did not allow them to entertain solicitors. It would have been seen as 'touting for business'. Alan Ward wrote to the General Council of the Bar asking for permission to have a party where we could invite solicitors. They said we could have one event which we did. We then quickly became too big for Raymond Buildings and in 1990, I started looking for somewhere else to move.

By the time I first met you in the early 1990s, you were doing 'big money' work. How early on in your practice did you move from being more of a generalist?

When we moved to Raymond Buildings in 1987, I gave up family law – it may seem a bit weird, but it was how it was. I got fed up with going to Southend and other places and spending all day arguing about whether contact should start at 6 o'clock or 7 o'clock on a Friday evening. I was quite interested in some of the commercial work that other people in chambers were doing, and I decided I wanted to try my hand at that. But then Alan Ward got me in as his junior on a couple of what you might call 'big money' cases. I realised that family law wasn't just about what time contact should start, and I really enjoyed getting involved in, I suppose, ferreting around in people's financial affairs to find out what money they had. I really acquired a liking for that kind of work and Alan was kind enough to bring me into some of his cases and I enjoyed it. I liked the fact that we were dealing with people. If I have any skills, I hope one of them is that I'm quite good with people. I found it quite boring dealing with insurance companies who didn't really care too much about the outcome. I think I probably acquired a reputation as being good at dealing with difficult middle-aged people …

We all know the law changed fundamentally in 2000. Was it easier before 2000 when it was all about needs or reasonable requirements – often a house and a Duxbury fund?

Yes, the change was absolutely staggering. I can remember being in a consultation with Barry Singleton QC when the decision in *White v White* came out. I was his junior and we were dealing with a very rich guy who owned a very large pharmaceutical business. I can remember Barry putting his head in his hands and saying 'Fu*k, this is going to cost you about £20 million'. It's true! The difference was extraordinary because, I can't remember the detail of the numbers, but I don't think that there'd ever been a case where anybody had got more than, say, around £10 million to £12 million on a reasonable needs basis, however generously interpreted. Suddenly, now every pound you found was 50p in your client's pocket, or out of it, and it was a staggering shift. My initial reaction to that was there's no job left because it seemed to me that now it's 50:50, there's no job to be done. In fact, I can remember I'd ordered a new car and I cancelled the order because I thought that I wouldn't have a job; anyone could divide by two.

But then there's always the fertile imagination of family lawyers to find reasons to chip away at the principles that the House of Lords came up with.

I'm sure many people will remember that there was a prize offered in *Family Affairs* for the first barrister who could actually get 50% for a wife. *White* had awarded the wife 40% for reasons that were to do with the husband's inherited wealth and so on. It seemed for a long time that wives were getting 40% in these 'equality' cases. So, 50:50 meant 60:40, which wasn't actually that far from the old one-third rule that I'd been taught at Bar School. I think it might have been my very long-standing friend John Wilson KC who got the prize for securing the first 50% award. Now, of course, that's what happens so often, but at the time it was still quite sexist, I suppose, in that half meant 40%.

I find it now almost extraordinary looking back that this sexist approach governed the way the courts operated for so long, in fact, forever really, until that seminal case. I think now it's shocking to think that wives got what they needed and their husbands got the rest. Even if the husband earned the money, women were giving up their careers to look after the family. It appears now to be an extraordinary reflection of a different world.

What do you say to anybody who would say 'That's not the judge's job, that's the job of Parliament'?

Section 25 is a remarkable creature. It has adapted itself through judicial interpretation from 1973 (in fact its precursor was in a 1969 statute), right through to the current approach in relation to pre-nuptial agreements. Such agreements do not feature at all in the 1973 Act, yet now they are given substantial weight and are increasingly determinative of outcome. I think the draftsman of that probably did rather a good job. I think if we had it all redrafted now, it might be rather less well put. I personally think that it's not our job to change the law, but it is our job to reflect social change, and there is a tension there. It is inevitable that the Court of Appeal and the Supreme Court will define the law by their interpretation of section 25. It often surprises me how many puisne judges find it necessary to set out their own version of the law when it has already been done by the superior courts.

Any debate about family issues so often gets degraded by the tabloid press saying that these things 'devalue marriage'. It ignites debates about religion and morals. I believe that if the courts are dealing with these things tolerably well, parliamentary time can possibly be better used addressing so many other pressing issues.

What do you think the Law Commission paper will say when it comes out shortly? And what should it say as the way forward?

In terms of what it might say, before I retired as a High Court Judge, I was involved with some of the meetings and I don't want to say anything that would breach any of the confidentiality of that. I think if there is going to be a change, I think it should say that effect should be given to pre-nuptial agreements if they meet various conditions but these are already set out in the case-law. I think the courts are doing quite a good job with pre-nuptial agreements so do we actually want it to be changed by statute? Perhaps it would be more democratic if it was legislated on by Parliament but I'm bound to say that at the moment the courts have gone quite a long way towards saying that nuptial agreements that are properly entered into with safeguards will be upheld by the courts. So I'm not sure that it's necessary. I also think Parliament would find it difficult to put into statute Lord Wilson's phrase 'a predicament of real need'. I see that phrase as delightfully adaptable to the circumstances of a given case.

One of the things that I feel very strongly about is the unfair and illogical situation we now have in relation to interim maintenance or maintenance pending suit and legal fees provision. How much court time would be freed up if we didn't have all these endless arguments over interim maintenance and funding of costs? I think we should have the ability to make interim lump sum orders. So often I've had cases where the husband has control of marital assets which are relatively liquid, but he forces the wife, and I don't want to be stereotypical but it often is that way, to go and borrow money at extraordinarily expensive rates, arrangement fees, and very high interest rates, presently around 24%. If you could make an interim lump sum order, why can't you just say to an applicant in a big money case in a long marriage, 'Well, here's £100,000 on account, pay your own fees'. I think it is incredibly patronising (and often stressful) to say to somebody that they've got to borrow the money and keep an account of everything they've spent, in a case where you're likely to get equality of outcome. In fact, what I've done in those cases when they've been in front of me is I've made it very clear that if the husband (I'll just stick with that assumption for a minute) makes the wife borrow money at expensive rates when he has liquid resources that could be used, I will treat all of those costs that she's incurred in borrowing that money as liabilities to come out of his share of the assets. And anybody who's giving these judgments saying, 'Well, they haven't satisfied the conditions', I'm afraid that as soon as they see me and I tell them, 'Well, I'll make them pay the cost of the borrowing if they don't sort it out', then they sort it out. That's obviously only in the bigger money cases, and I appreciate that might not be relevant in many of the smaller cases in family courts around the country, but I'd like to see that change.

There are, I fear, many cases where coercive spouses continue the coercion and the bullying by the control of money post-separation. I detest the idea that a wife must prove that she can't borrow before the husband will be ordered to provide her with litigation funding.

Assuming you're dealing with a relatively big money case where there is a prenup, so needs are met in any normal sense, is it the worst of all worlds where the court gives a significant amount of weight to a prenup but then tinkers at the edges? Do you think it would be better to either say either, 'It's not *Radmacher* compliant, I'm going to completely disregard it' or say, 'Here it is, you did the deal, stick to it'? Are we almost in the worst of both worlds at the moment?

I think that's a good question. I think it's a really, really difficult area. I mean, I've often thought, do I just rip this prenuptial agreement up and pretend it doesn't exist or do I amend it a bit? It seems to me that if people have agreed they were going to do X, Y, and Z, and I just rip it up because I want to change it, I think that's the wrong thing to do. I think I have regard to it, but if I think it's unfair, for example, it leaves somebody with, as said by Lord Wilson in *Radmacher*, 'in a position of real need', then I will meet that position of real need. I don't think I'd rip it up (which, by the way, is a 1982 hit by Orange Juice) and start again.

Is there merit in restricting maintenance obligations to a limited number of years, or would that be unfair?

It could be unfair. Funnily enough, I've just been involved in a case where somebody was going to qualify as a teacher and became a teaching assistant because they had children and one of the children had special needs. Fast forward 20 years, he's got all the money and she's still a teaching assistant earning really quite low wages. She will never be able to achieve a particularly high income and she's got no savings and no pension. I think in that case, where the husband's earning a great deal of money, hundreds of thousands of pounds a year, I think it's incredibly unfair to limit her to a given number of years. What does she do? She's, say, 52, she retires at, say, 65. What's she supposed to do when she gets to 65? What's she going to live on? I think there are cases where lifelong orders are required unless, of course, you can capitalise a maintenance claim at the time of the order. But I would not want to restrict the claim to a specific number of years. I'm not in favour at all of the idea of the 'meal ticket for life' where, as they used to call it, 'ladies that lunch' can just leach off their husbands, but I'm quite sure from almost all the work I've done that there are very few of those. On the whole, women are disadvantaged financially as research evidences, by the choices made during the marriage, and they earn less because of it.

Onto a different subject – the compensation principle. You've recently said something about that. Do you feel that's been under-observed in the authorities?

I did have a case about that recently where the wife was the first female partner at her firm and the highest paid woman ever at that firm. She was in her late 20s and she had to leave because she was having a relationship with, and later married, the boss of that firm. They then had children, but she had huge difficulties with pregnancy and with birth and a lot of ill-health. She had gone from the highest paid first female partner to being a stay-at-home mother for all sorts of reasons. It seemed to me that if she didn't get compensation, then the principle simply meant nothing. I hate the over-used word 'paradigm' case, but if that wasn't a case where compensation should be paid, then the principle has no purpose at all and then I would be ignoring some of the principles set out by the House of Lords in *Miller*/*McFarlane*.

I didn't mean by that to expand the concept of compensation. I agree, of course, that just because somebody might have been a brilliant snooker player at the age of 16, didn't mean to say they were going to go on and win the World Championship. It wasn't meant to be kickstarting another scramble for made-up cases, and I really feel strongly that solicitors and barristers shouldn't just lay it on and run hopeless cases, I hate it when they do that. I have never hesitated to make issue-based costs orders in that situation.

However, the case that I am talking about was hard evidence of somebody going from earning hundreds of thousands of pounds a year with a clear path to progression, to not working outside the home. When they divorced, it seemed to me that I should recognise that she had made that sacrifice and I don't think there was anything remarkable about that at all. I feel profoundly in that case that it was the right thing to do. And whether the parties did also, I don't know, but certainly nobody appealed me.

Compensation isn't dead, it just is very rare. It has no part to play at all when it's low income or no income families struggling to pay the rent or the mortgage. I think we really need to remind ourselves that that's almost all of the cases. But yes, I do think that there are cases where it applies, and I think we need to be able to identify them.

Just building on that, you obviously heard *O'Dwyer* after *Waggott*. Can one read between the lines in *O'Dwyer* that you felt rather constrained by the fact that one can't share future income?

No, I don't think so. I think that *O'Dwyer* was a very unusual case (not least because it was called *O'Dwyer* and it was an appeal from His Honour Judge O'Dwyer). I think I did in that case say that the wife should not have to amortise her capital until the husband had retired so I gave some nod to, if you like, the sharing of income. But they had been joint franchisees of a business and, looking ahead, he was now the sole franchisee. I like to think in that case I achieved a fair outcome. The only problem I had was that I did not have much help about budgets and expenditure, which, by the way, is another thing I have a problem with. I wish the lawyers wouldn't just create an expenditure schedule on a 'here's-one-that-they-did-last-time' basis. But I felt I achieved a fair outcome in that case.

Do you have any sympathy for the broader argument that in a very long marriage, let's say the wife exits with her share of the capital, the husband exits with his equal share of the capital, but he doesn't have to touch that capital because he's got the very high earnings that she's contributed to, but she doesn't get a share of that going forward.

I do have a lot of sympathy with that. I remember in *Parlour* when I was against Nicholas Mostyn, one of the best family lawyers of my generation, and a friend and judicial colleague, he ran the case that Ray Parlour's income was an asset of the marriage that should be shared. I think that an earning capacity isn't a marital asset (and so does he!) but I do think there are cases where, as I said earlier, you've got a couple where, let's just say, the wife has given up her lucrative career at, say, 30 to look after the family, and at that point they were equal earners, and they get divorced when, say, they're 55, and he's earning lots and she's earning nothing, I think it's a real unfairness sometimes that the wife has immediately to start to amortise her capital and the husband doesn't.

But it seems to me the trend has moved away from 'joint lives' orders. That's partly reflective of society, which is understanding that parents need to share the care of their children more and that marriages are more equal in terms of contribution and input. But I think the court should be alive to what has actually happened, the decisions that people have made during the marriage and the unfairness that that can create.

One might say, as a very broad-brush stroke, that we lived through the Thorpe era and then the Mostyn era, and perhaps we're now in the Peel era. How would you assess those three leaders?

Thorpe LJ was in the Court of Appeal and Head of International Family Law. Mostyn J was a delightful and brilliant maverick. He was the guy who could say, 'I don't agree with the Supreme Court, so I need to do this', which is something I think I would not be brave enough to do. Robert Peel was my pupil (how is that possible?), and now he's doing this important job! Robert is brilliant at what he's doing. I don't think that I can say that those individuals have made a particular massive change to things because it's not about the individual, it's about the judiciary.

Nick Mostyn, I think, is on record as saying, 'The person who appeals Nick Mostyn most was Nick Mostyn'.

Also, the person who relies on Nick Mostyn's judgments the most is Nick Mostyn.

For me, if I am talking about people I've been against in the Bar, in terms of opponents the Bar, Nick Mostyn was probably the opponent I most feared because he was so good at cross-examination.

As a judge, would you say he had a monumental effect on this work?

I think the judge in charge of financial remedies does have a huge impact on it, possibly bigger than they should. But yes, Nick Mostyn steered that for a long time, but there were other people doing it as well, and he was appealed, sometimes successfully. I don't think that it's like a dictatorship, I think he ran it, he ran it with his extraordinary style. Robert Peel is doing it very differently. I think Robert Peel is less emphatic. He's a better listener and does it in a very different way. He might also have less impact because of those things, who knows?

If you look back on your time on the Bench, what are you most proud of?

Pride is not a good countenance, as my mother told me, 'Pride before fall, Nicholas'.

I was at the Bar when I did *Vince v Wyatt*, sitting as a Deputy High Court Judge. When you are overturned by the Court of Appeal (with Thorpe LJ calling my decision unprincipled), and then nine Supreme Court judges all reinstate you, that's quite a good moment. I had more professional emails that day than I've ever had on any other day of my life. I think that's probably the case that I'm the happiest with, if that doesn't sound arrogant.

When you were very early in your high court judge career, you were thrown into the case of Charlie Gard, which became a national story. How did that affect you?

It came in to me as a half-hour application for permission to turn off the life support machine. I was just the urgent applications judge that day and I said, 'We need to think about this a bit more carefully', and so listed it for directions. When it next came in front of me, I had the *Daily Mail*, CNN, Fox News, the BBC, *The Guardian* and many more of them in there, and I was quite surprised. The reason that it was in open court was because the parents were crowdfunding through the *Daily Mail* and the *Mail on Sunday*, and they wanted it in open court. Having heard submissions, obviously, I agreed that it could be heard in open court if that was their wish.

People often say to me that that must have been the most emotionally difficult case that I'd ever done. It was emotionally difficult, but it wasn't really more difficult than a number of other cases. I've done, and I have done many other tragic 'end of life' cases. What made it difficult, I suppose, was that it was so public. There was one day when the queue to get into court was all the way down to Ludgate Circus, it was massive. We had two overflow courts but still many who wanted to come into court were unable to. What was hard work was knowing that you were in the eye of the press all of the time; and that the White House and the Vatican had each offered to make Charlie Gard a citizen of their respective states. I think it was the *Daily Mail* who said 'In a single sentence, Mr Justice Francis managed to put down both the Pope and President Trump'. I don't think many people get that accolade or criticism, whichever way you want to put it.

There was a time when the so-called 'Christian' Right in the United States had made death threats against my children online, that was difficult. We ended up having anti-terrorist police outside our house. We had to tell our children things about not talking to the press, and that was quite hard work. But it was a case that I felt, in a sense, privileged to deal with because it was such a profound responsibility.

It was legally not that complicated, in the sense that the legal path had been already set down by other similar cases before it. It ended up going to the Court of Appeal, Supreme Court, and the European Court twice. I don't say this out of any sense of arrogance, it wasn't about me but the need for speedy decisions, but to be upheld by the Court of Appeal, Supreme Court and the European Court twice all in the same 6 months was, I think, quite unusual.

It grew its own momentum, and it was strange having my picture on the front page of the paper almost every day. I remember, when we had our judicial photographs taken when we were sworn in, Lord Thomas, then Master of the Rolls, saying to me, 'Nick, let's have one or two of you looking solemn'. 'We've got to have those in case your picture appears on the front page of the *Daily Mail* on a sombre case'. How right he was. Fortunately, the picture of me that went in the papers was me wearing my ridiculous full bottom wig and red garb, so hopefully it didn't make me too recognisable.

But it was hard work and it was very emotional. I went to see the baby in Charing Cross Hospital, which was obviously difficult. But I actually did a few other of those end-of-life cases as well about children, but they didn't hit the press. I know that other colleagues have had very public cases like that as well, for example Hayden J did the Alfie Evans case. I think until you've done one of those in the glare of the public, you probably don't quite know what it's like. I think we support each other during those times.

After the Charlie Gard case, I had the loveliest letter from Sir Alan Moses, saying that he felt that I had upheld the greatest traditions of the Bench, and that was a very special letter to receive.

But most of the work we do is not really noticed or published. I think I've really enjoyed being able to help people. I think I'm quite good at getting people into the room and saying, 'Look, do you really want to do this? Can we actually not sort it out?' And there's so many cases which nobody knows about, nobody ever will know about, where judges are able to bring parents together to resolve issues or to persuade local authorities just to step back from seeking a care order to see whether the parents can't be given one last chance; and of course persuading couples to step back from the brink in money cases. Those sorts of cases which we can't identify for privacy reasons, are probably the ones I'm most proud of but can't talk about. I think I'm quite good at bringing people together and trying to resolve disputes.

How would you assess your contribution to the world of pensions on divorce?

I think probably my biggest contribution to pensions on divorce is nothing to do with the hideous acronyms PAG and PODE!

Actually it was a case called *Martin-Dye*, which was, I think, very early in my time in silk, where I wanted to establish a rather straightforward proposition that £100,000 worth of pension wasn't the same as £100,000 worth of cash. It was a second appeal. I can't remember who the earlier judges were, but eventually it got to the Court of Appeal where Lord Justice Thorpe, in his usual way, liked to criticise all counsel and say they'd all got it wrong. But anyway, we won that case. I think it was an important landmark in a way, because a lot of people would rather have £100,000 in their bank than £100,000 in their pension fund.

In respect of PAG, I obviously co-chaired that with you, Edward. I think it's fair to say that in the second round of PAG you did far more than I did. In the first round, I like to think that I made an equal contribution (in the section 25 sense!). A lot of very busy people made an enormous contribution to the report. My main role was to chair meetings, which sometimes became a bit scrappy and argumentative, but those debates were an essential part of the process. I think it has laid down guidelines which, in my experience, are now being used in courts across the country. But the credit should go far more to others than to me.

Now that I have retired from the High Court Bench, I of course no longer visit the family courts around the country, but my understanding anecdotally from members of the profession is that the Galbraith Tables, the reports, PAG1 and PAG2 are used a lot, mainly by the District Judges and Circuit Judges, because they are the judges who are doing most of these cases. I don't think many of my High Court colleagues pay much attention to it, not least because pensions are, in the big money cases, usually a smallish part of the overall assets. I know that in a case called *SJ v RA* [[2014] EWHC 4054 (Fam)], when sitting as a deputy, I said that in big money cases it would be unlikely that we will need reports from PODEs (I didn't use that word, I said from pension experts) because if you've got a defined contribution scheme, which is basically a pot of money in an account which happens to be a pension wrapper which can be converted into cash, we don't really need anybody to spend a lot of money on valuing it, and that we should stop spending so much money on these valuations. I believe very strongly that in the big money cases, we don't need to do that.

I also feel very strongly, and I disagree with some of my colleagues on this in PAG1 and PAG2, that there should be no distinction between men and women in relation to the value of pensions. I remember Mostyn J asking in the foreword to the second edition of *Pensions on Divorce: A Practitioner's Handbook*, 'Would you prefer 10 years at £20,000 or 20 years at £10,000?' That's an interesting question, but I think it's wrong as a matter of principle to give somebody more because they are younger or older or female or male. I think too much money is spent and delay caused obtaining pension reports aimed at equality of income in money purchase schemes. It is, of course, very different in defined benefit schemes.

Turning away from the law now. The personalities, the barristers, the judges – who would you remember as the great figures of your day?

For me, in terms of my own mentors, I think Sir Alan Ward was probably the person who was the biggest influence in my professional life. Without him, I wouldn't have joined what was then 2 Dr Johnson's Buildings. In fact, without him getting me a little drunk with his now wife, and her not disclosing that she was about to become his wife, I wouldn't have joined his chambers. I am incredibly grateful to him for his support. I think it ended me up in the world that I think I suited well.

I think the people who taught me the most, in terms of how to be a good advocate, were Barry Singleton, Florence Baron, and Martin Pointer. I was led an enormous amount by both Florence Baron and Barry Singleton. I'll never forget Barry Singleton, one of his lines to me was, 'Don't sweat the small stuff and don't salami slice'. It may sound silly, but that's just so important. Just don't bother about the little stuff. I think Florence Baron's approach was always, 'Just say what you mean'. I tried, particularly in silk, to establish a reputation where I didn't say to the judge or to counsel on the other side that I wanted £20 million when I knew I was only going after £10 million. I think it was a pointless way to negotiate. I can remember once being against somebody who said to me, 'Well, I want £10 million'. I said, 'You know perfectly well that you're not going to get that. You're not going to get more than £6 million'. He said, 'Well, you got to start somewhere'. I said, 'We're not bargaining for carpet'. I feel really strongly that anybody reading this should say what they mean, because if you don't say what you mean, you get a reputation for not saying what you mean. Once somebody drops from £10 million to £6 million in the space of an hour, they lose all credibility.

I was against Martin Pointer an enormous amount. The first time we were against each other, we argued. I later realised that I wasn't the first person to argue with Martin, so I invited him to go and have a glass of wine at El Vino and after, let's just say, a considerable quantity of wine, we became friends and remained friends throughout. I think he was one of the best advocates that I was ever against. I learned an enormous amount about how to be advocate from him. Probably the most important lesson was what not to say rather than what to say. He was a master at not putting very much in his opening note to the court, a master at cross-examining as little as possible and just being incredibly incisive. If I think about advocates who I learnt the most from, yes it's Florence Baron, Barry Singleton and Martin Pointer. I'm so sad that Martin had the accident which has caused him the disabilities from which he now suffers.

Is that what makes a good advocate, less is more?

Lots of things make a good advocate. First of all, I think you have to be prepared to be charming to people. If I've learned anything as I've got older, it's don't get cross, don't fall out with people, be nice to people because you get far more that way.

But yes, it's much better to know what not to say than to know what to say. Be really direct in what you're saying and remember that the judge is really busy and you've been preparing that case for weeks or months or even years, the judge probably started reading that case yesterday (or even this morning!). A 10-page concise note is so much more useful than 25 pages of imprecise narrative. People call things skeleton arguments when they're a thesis. I was a great fan of advocates who really put it in a concise way, which, if you like, told me what they wanted and why they wanted it, rather than rambling on.

I want to say one other thing, which is if the judge asks you a question, answer it. The number of times I've had people who will say, 'Well, I'll come back to that' and then they don't. If the judge asks you something, it's on their mind. Just answer it.

What attracted you to go to the Bench? How do you respond to peers who said 'I came to the Bar to be an advocate'?

I'm old enough to have been in the role of assistant recorder and was promoted within about 4 months, not because of merit, but because the rank of assistant recorder was abolished. But I still do get a little bit of pension from being an assistant recorder! I suppose when I started as a barrister, it was always in my mind, might I become a judge? But it wasn't a burning ambition. I ended up going from being a Recorder to a Deputy High Court Judge in the lunch queue at Cumberland Lodge when Elizabeth Butler-Sloss said to me, 'Nick, isn't it time you started sitting as a High Court Judge?' I said, 'Okay, then' and I did a week later – it's a bit different now. I'm very glad I did that because I found sitting as a Deputy High Court Judge really exciting. It was actually very useful in terms of my practice as a barrister because there's no better way to learn what a judge needs from an advocate than to be a judge. Doing both, I think, was an enormous amount of help to me. I then ended up applying to be a judge and decided I would only apply once and, to my shock, I got the job.

Did you enjoy being a full-time judge?

Dealing with terrible child abuse and murder, end-of-life cases and those difficult decisions in the High Court is not enjoyable but I think I would have regretted it if I hadn't taken an appointment. It was an honour; and an opportunity to give back.

So did you prefer being a Deputy to being a full-time judge?

I think I probably preferred being a barrister and a Deputy High Court Judge to being a High Court Judge. It's not about the money, I'm very glad I was a High Court Judge, but for me, and I think for many of my colleagues, the problem, certainly in the Family Division, with being a judge, is all the stuff you have to do that isn't being a judge. Every one of us has to do a job, for example, being a presider for a region – I loved being the presider for Wales. But, particularly during Covid and since Covid, I think basically it's two jobs – you're doing your judging job, and then almost every morning at 9.00 am or 9.30 am, there's a Teams meeting. Covid brought us the ability to do remote hearings and Teams meetings, but meetings that used to happen three or four times a year were suddenly happening every month just because they can, because people didn't have to get on trains and things. I found that I was doing meetings at 9.00 am, often at 1.00 pm and again at 4.30 pm. When you come out of court at 4.30 pm, you don't just go home, you've got to catch up on your day's work, you've got to start writing the judgment and prepare for tomorrow. I think probably the biggest annoyance of all was the Wellbeing meeting, which was every other Monday between 1.05 pm and 1.55 pm. I was thrilled to be on the Wellbeing Group and I hope I contributed quite a bit to that, but the idea that for the entirety of my lunch break I'm on a Teams meeting, I think is completely absurd. What do I want to do at lunchtime? I want to get out, have a walk around the block, have a cup of coffee, a sandwich, and clear my head for a moment.

Does the pressure in the Family Division come from the

fact that it's the smallest of the three Divisions, or does it come from the nature of the work that it does?

I think that the pressure on us in the Family Division is greater than the other Divisions, largely because there aren't very many of us. Every one of us does what I would regard as a pretty full-time job, whether it's being a presider or in charge of the programme at the Judicial College or whatever it might be. That's one of the reasons why I decided at the age of 66 that it was time to do something else.

I did quite a lot of work on this issue because I was one of the co-authors of the response to the Senior Salaries Review Body in terms of an application for an increase in judicial pay. I estimated that about half of the work that the Family Division judges do now didn't exist 25 years ago. I mean, if you look at the explosion of child abduction work, you look at things like forced marriage, FGM cases, radicalisation cases. There's an enormous increase in the amount of Court of Protection work compared with what they used to be. In relation to that, I would say that if the Assisted Dying Bill goes through, as presently drafted, it's going to involve a High Court Judge, and I imagine that needs to be a full-timer, not a part-timer. There are only 20 of them, one of them being the President who, because of all their other responsibilities, doesn't sit full-time. If they place that burden on the High Court Judges, if that bill goes through, we will have to have more Family Division judges.

When I was a senior junior, I remember that the threshold for getting cases into the High Court was about £1 million. Nowadays, the District Judges and the CFC are doing cases up to £15 million. That's fine, but it means that not much of the work, really, in the Family Division is now money work. The experience that I brought to court was 25 years of work in what we used to call 'ancillary relief' now financial remedy. I probably spent only about a quarter of my time actually doing that as a judge. We desperately need more High Court Judges in the Family Division and I've been arguing that case for quite a long time. I think the President accepted that and I think there may have now been a submission that there should be two more. I think there should be a lot more than that.

When I spoke with my colleagues in the King's Bench Division, I think they are under a lot less pressure than the Family Division judges. When I was doing the SSRB submission, I had some judges from Chancery and King's Bench who said they weren't busy enough – I don't think anybody in the FD would say that! That's not for a second to criticise them, but whether I'm in lodgings with people or chatting to colleagues, they don't have the other heavy administrative responsibilities that we do, nor so many days in court.

But I do also think that the Family Division has suffered for quite a long time from a crisis of administration.

Do you mean by that, the issues in relation to the Clerk of the Rules and how the list office operates?

The Clerk of the Rules office is full of amazingly good people who are fabulous to work with and work incredibly hard, but there aren't enough of them. I fear that because civil servants aren't paid enough money, there's quite a revolving door process going on, which is that the really good people get out into other jobs in the private sector where they can increase their income substantially, and I don't blame them for that. But the admin in the Clerk for the Rules department, I'm afraid, is shocking or has been. The computer system, I described it to the President of the Family Division when I was making submissions about this to him not very long ago, was less sophisticated than the one we put into 29 Bedford Row when we moved there in 1991. Let me give you an example about that. When I was on the circuit, say in Wales, if my clerk wanted to know what I'm doing next week when I'm in London, he couldn't look at it online on an electronic diary. He had to ask a colleague of his to go and queue at the only computer in the Clerk of the Rules department with an electronic diary on it, to look at the system which was called 'Flight'. Then they would have to screenshot each page with their mobile phone and then send it to my clerk.

That is, I think, now changing, but partly it's changed because a number of us complained so much about it. I said to the President I was going to raise the issue at every single meeting we had because I felt so strongly about it, and it was not like that in Chancery or the KB. When he asked why I thought that was I said it was because we didn't shout loud enough.

We have to have a proper admin, and I don't see how we can expect the system to run properly without it. We don't even have a single colour photocopier in the whole of the Queen's Building, so that when documents would come in, my clerk would have to get his highlighter out and highlight in red or blue, whatever the colour was, the bits that needed to be coloured because we didn't have a colour printer. I got my own colour printer, which I paid for myself, fine. But when I raised this to the powers that be, I was told we were having new printers. I thought, 'Whoopie!' and guess what? None of the new printers were colour! Frankly, the new printers were no better than the old printers. That is not the same problem in KB or in Chancery. It is completely absurd that in 2025, there isn't a single colour printer available to the High Court Judges in the Queen's Building, except, I think, for one in the Clerk of the Rules department, so we buy our own. It gets very depressing when you have to work within that system.

Is it a question of leadership?

It's a very hard job being a leader in anything, and it's easy to criticise it. I think that we need leaders who understand people, as well as law. I think that the pressures that are on the Clerk of the Rules probably aren't as fully understood as they should be. When people in important positions in that department are leaving due to stress, we should be asking ourselves why that is happening. A huge amount, I think, has been done recently to improve that, but it seems to me that we are constantly reacting to situations. Sometimes we all sit as what's called an urgent applications judge, or we do what's called 'shorts'. There are many days when I was sitting on shorts, which are applications that go no more than an hour, so you'll get at least five in your day. Well, maybe 50, 60 or 70% of them don't turn up. Why don't they turn up? Because the notice of hearing hasn't been sent out. The cost to the parties of not having their hearing is huge, so is the cost to the HMCTS, the Ministry of Justice, in listing these hearings with no one being there. Of course, to us, we read the papers, we get ready for the case, and then no one's there. It is shocking, and I don't believe this happens as much in the other Divisions. We are under different pressures, and I don't claim to understand all the reasons for that. I would describe the system as, certainly when I left it at the end of May 2024, in a state of crisis.

Is the answer to that in part money?

Money is always part of the problem. I mean, you can say that about the cleaning. The Queen's Building basically doesn't really get cleaned. It's not because we don't pay cleaners, it's because somebody doesn't manage somebody to clean it properly. I really don't know what is paid to HMCTS, and it's beyond my power to say it, but I suspect that it's not just money. I think it's an element of people being encouraged rather than discouraged, people being allowed to stay, people being congratulated for the good work that they do. If you pay people more, of course, it's going to be easier, but it's not just about money.

I don't claim to have all the answers. What I can identify is problems that I believe that we have in the Family Division that they don't in other Divisions. If we do need more money, then we have to campaign for it, but I think there is a real crisis of confidence and a crisis of management. Let's face it, people who are very good judges and who are very intellectual and very good at giving very fine erudite judgments about important things aren't necessarily good managers of people. When we all get appointed to these roles, be it as a presider or whatever other job, we haven't been given any management training. I think many judges, brilliant judges, brilliant academics, are not necessarily good at managing people. When we got the job description of what the presider is, a number of us looked at it and said, 'Well, it's a full-time job, we can't sign up to that'. I think too much is asked of the judges, but I also think that judges should be judges.

When I was a presider, for example, I got one case where a District Judge's parent had a suspected broken neck and I was asked to approve that the judge could have time off work. Why does it need a High Court Judge to deal with that? Why can't there be somebody in HMCTS dealing with that kind of thing? Of course, they could refer to the presider if people are frequently taking days off for various issues, but it seems to me to be ridiculous that judges are troubled with those sorts of things and they happen almost daily as a presider. When I became the presider for London, where the increase in population was about 3.3 million in Wales to about, what, 14 or 15 million inside the M25, with a huge number of courts, every day, often several times a day, you were getting requests like that, or someone wants to be able to move a week's leave carried over to next year. I don't think that we should be dealing with that. I think it's a waste of our time, a waste of the resource of the High Court Judge. It's exhausting.

As a general rule, were you able to switch off on a Friday night?

It's very difficult, isn't it? I mean, if you're dealing with, even if it's a money case, I mean, anyone reading this is probably a lawyer and thinks about their cases when they perhaps shouldn't, but you can't just press a stop button. It's when you are dealing with whether a child should live or die and when you are being called the 'executioner' in the tabloid press, or a 'murderer', it is bound to weigh on your mind. I don't think that it deflected me from the task that I had to do at all, but let's just put it this way, you need something relaxing to do when you've got those decisions to make.

Did you find it more difficult to switch off on the Bench than you did at the Bar, or is it different?

Well, the pressures are really different. At the Bar, I found the few days before a final hearing were pretty heavy. I mean, if you've got a 2-week case starting on a Monday, however well-prepared you are, certainly for me, I would spend the whole of the Saturday and Sunday working. Even if I thought I knew the case, I'd want to keep on doing it.

I think as a judge, the pressure is at the other end of the case. I remember, I often used to think, quoting the line from Monty Python, 'You lucky, lucky bastard', because when you all leave on a Friday and the case is done, you can send the papers back to your solicitors and it's over, but that's when the judge's work really starts.

The pressure of writing a judgment is considerable. If we finish a case, very often I would find cases were underlisted in their time-estimates. It's a lovely concept that in counsel's time-estimate, they'll say closing submissions end at 4.30 pm on a Thursday, and then say judgment at 2 pm on the Friday. You think, 'Well, hang on, I've got half a day to write this judgment' and you probably spent a week at least writing your opening note, preparing the case. What would often happen would be that you'd finish your case on a Friday, you'd have to spend the Sunday reading up for the case that's starting on the Monday, but all the time you've got your judgment hanging over you from the last case. I think the pressure of writing judgments is one of the biggest pressures that we have.

One of the suggestions that I've made about wellbeing is that if anybody goes through a really catastrophic situation, I don't want, particularly, to identify what it might be, it could be someone having cancer or being bereaved, they should be required to have a mentor who will be completely confidential and independent. One of my bleats about wellbeing is there's no suggestion ever of any mentoring or therapy or even checking in on you to ask how you are doing. In the police, if you look at distressing images, you're forced to have counselling in relation to those, or you're not permitted to remain in the job. I remember once somebody coming along to me and saying, 'Oh, we've got this opportunity to have some coaching on counselling'. I said what does that involve and they said, 'An hour a year'. Well, I'm not someone that's really got much into therapy, but I do know that if I had an hour's therapy, I doubt I'd get much beyond my name and address. I think I'm afraid some of my colleagues may look upon it as being a bit 'Moaning Minnie' or 'namby-pamby'. Well, I think we should care about our work, and I think we should do more to support our judges. In my role as a presiding judge, both in Wales and in London, I was very aware that the District and Circuit Judges are under intense pressure. They do a relentless list of often hideous child sex abuse cases. When they complain that they are stressed, there is nothing there for them to support them.

If I could change one thing about the judiciary, it would be the support that they should be offered. This isn't about me and the Charlie Gard case, by the way, it's not that. It's about realising how many of our judges are under such intense pressure. We are about a third of our number of District Judges short in the London region and I have to ask why. I think it's because it's frankly a very hard job and not particularly well paid. It's not badly paid, obviously, in average terms but there is almost no support. Some of my colleagues, without naming anybody, have said things like, 'Oh, well, so and so said to me that they are depressed or overworked, to which I said to them, why don't you man up and grow a pair?' I'm afraid that is an attitude which I detest and I'm appalled by. I think something really must change from the top. It has to be a radical alteration in the way we look at things.

Who should do that? Who should be responsible for implementing that?

Well, I suppose you work from the top down, don't you? It's not for me to say who should do it. What I'm saying is there must be fundamental change and not have those at the top saying things like 'I come from the school of hard knocks' or the situation will continue to deteriorate. I would say we need a complete root and branch reform of the way that we look at things. I feel that the Family Division, that's the only one I really know about, is still being run in the way that it was run back in the 1950s and 1960s and yet I suspect if you were to go back to a High Court Judge at the time when I started the Bar in 1981, and compared the workload then with the workload now, I think that the High Court Judge of 1981 would be shocked by the amount of work that there now is. At the Magistrate, District and Circuit Judge level, it is pressured, although in a different way. I think that the expectation is that you just soldier on. I don't mean that we need to be cosseted in a bubble, we've got a big job to do and we should get on with it, but I do think there needs to be some understanding of the pressure.

My main issue here is actually not about the High Court, it's about looking after the other judges. Let's face it, almost all of the family work in this country is done by magistrates and District Judges. I don't know as much about the magistracy as I would like to. I do know a lot about the District Judges that have been my responsibility as Family Presider, and they work relentlessly hard, with little or no support, appalling administration and crumbling court rooms. They are expected to make life-changing decisions with insufficient time and reliant on evidence that is often produced by other professionals (such as social workers) who are under similar pressures. This is all in the context of a huge rise in the number of parties who are unrepresented with all of the additional work that requires.

Were some of these pressures a motivation to step away from it slightly earlier than you might have otherwise done?

People often ask me why I retired early. I retired in the same month as I became a state pensioner and got my Freedom Pass; I don't think it's particularly early. If I've learned anything from the last few years, it is get out there and enjoy life while you still can. Let's face it, 75 is an age when life may have to slow down for any number of reasons. At 66, I am able to enjoy a whole new phase in my life and that is what I want to do. Also, I did quite want to get back into the world that I know, which is big money cases, which I wasn't doing that much of in the High Court. A very wise friend of mine who is a solicitor said to me, 'If you want to get back into arbitrations and FDRs, don't wait until you're too old. Get out there and do it now'. I think that was good advice and I'm really enjoying getting back into that.

There were significant numbers of other practitioners who wanted to take an appointment and so it wasn't like I was leaving the situation vacant. I've done 8 years, I don't think 8 years is too short. I happen to think that over 70 is probably too old for most people. Yes, it would have been wonderful to have Baroness Hale or Lord Neuberger going on for longer. For every one of those, I suspect there's an awful lot of judges around the country for whom it's probably time for them to move on. I'm very happy that I've retired at 66, I'm doing loads of things, most of them still very much connected with the world of family law, in particular private FDRs and arbitrations and a fair bit of charitable work. I'm also taking some time out to enjoy life with my family and friends.

Would you, therefore, bring the retirement age back down to 70, if you could?

I'm not going to say what I would do, I'm not in Parliament, I'm not legislating. It is ironic, isn't it, the moment the government lost the argument about judicial pensions, they put the retirement age back up to 75? Let's face it, if you retire at 75, you're going to get fewer years of pension, aren't you? I rather hope I'll get more than 2 or 3 years' worth but time will tell!

So no regrets at your retirement?

Well, not yet, but I haven't done it for long yet!

What else would you change?

One of the things I'd most like to change is judicial diversity. When I was a co-author of the SSRB report on pay rises for the judiciary, we had papers from a number of people, including one from a High Court colleague. His paper said that it costs him about £42,000 a year to be a judge in London moving from the regions, as we call them. Now, why is it that when I go to Cardiff, for example, I get my train fare, I get my newspaper, I even get my gin and tonic paid for. But when the fabulous new High Court Judge, Ms Justice Henke, comes from Cardiff to London, she gets no expenses at all.

Let's just suppose you are a really successful legal aid practitioner in one of the big cities out of London, be it Liverpool, Birmingham, Manchester, Cardiff, wherever, and you may well have children. As a legal aid lawyer, you probably haven't been able to save much money. You may have no partner or you may have one who isn't in a particularly well-paid job. But even if you have all of those, you may have children at school. You are not going to get people to apply for the job if it's a London-based job because they do not and cannot uproot their entire family. This assumption is based on the very outdated and frankly discriminatory idea that High Court Judges are from a financially privileged position and have someone at home to look after the children while they go away to work for weeks at a time.

If you want to do a single thing to change the diversity of the judiciary, which I think most people probably support, you need to get rid of this idea that it's a bit like being at boarding school – you go out from London for 18 weeks a year on circuit, you sleep in lodgings and you miss home. I really don't see why each major city can't have a High Court Judge. They can sit in that city, but of course, they can then travel to London and work there as well and get expenses paid for doing so when necessary.

You are otherwise not going to get any sense of diversity, by which I suppose I mean people who aren't rich or relatively well off, to do the job. I was lucky. I was earning enough money at the Bar that I was able to save because I was doing big money work in a big set of chambers, and I saved money, and I was able to take the reduction in salary. But we're not even talking about that, we're talking about moving from outside London to inside London. One of my other colleagues pays £24,000 a year to rent a flat in London, just for himself. He also has to pay the council tax and all the other bills on top of as well. Now, that means he's probably got an outlay, I don't know, of £30,000 a year just to come into London to do the job. If you gross that up, it's about £55,000.

Quite apart from that, of course, we have to leave our children behind when we go away. It's an anachronistic system. When I put this idea to some of my very senior colleagues, they said to me, 'Well, Nick, that's the way it's always been done'. To which my response was, 'Well, there was always slavery in the 1800s. Then we paid women less than men. So should we do that as well?' Of course not. I think that it would change the diversity of the judiciary within a short time if we could make that single change, which is, to me, so obviously sensible. I haven't heard much support for it from anywhere, but I'm very glad I've had the opportunity to say it because actually, in this interview, it is a single most important thing that I want to say. Put bluntly, unless you are rich, if you live a long way from London and need to have a property in London, be it rented or purchased, you can't afford to take the job.

In these interviews we always end on some personal questions away from the law, a bit like Desert Island Discs. If you were on a desert island what film, what play, what book, what song would you have with you?

Well, I would take the record, *Dark Side of the Moon* by Pink Floyd. I would also need to have a really good hi-fi to play it on, if that's allowed.

And your book?

I suppose on a desert island, *The Lord of the Flies* would be quite good, wouldn't it?

One of the things that I want to do with my time is to read more because I read at school and I read at university, but since I've been at the Bar and being a judge, I haven't read enough. I want to read more.

What novels do you have the aspiration to read?

I probably ought to read some Dickens because I haven't read much Dickens, that may sound a bit boring. I have a lot of political biographies gathering dust which I would like to read. I like Wilbur Smith, but that's really embarrassing to admit! I'm the sort of person who looks at airport bookshops and buys the winner of some prize or other for my holiday reading and then doesn't read it!

What is your luxury item? You can't say a decent hi-fi system because that's to play your vinyl.

Moisturiser! A lifetime supply of high quality moisturiser.

You're quite an appreciator of music.

It's probably my biggest thing apart from sailing and my family.

Aren't you also a big fan of music festivals?

I go to at least four festivals a year. I love that opportunity to escape into a parallel universe. In fact, a little anecdote, when I finished the Charlie Gard case, it was Latitude weekend. I went out of the back door of the court by the Queen's Building at the turnstile gate there, in my jeans, Pink Floyd t-shirt, trainers, baseball cap and sunglasses on, hoping I'd be incognito, and the Great Ormond Street legal team were outside and they said, 'Have a good weekend, Judge'. When I got on the train to Suffolk, my picture was on the front page of every copy of the *Evening Standard* which people were reading. Fortunately, I was wearing my silly wig in that photo, so people didn't recognise me.

You've been on the radio a few times?

I've been on 6 Music. I was also Jeremy Vine's legal eagle on Radio 2 for a time as well, and I've done a few sessions on Radio 4's Legal Week. I would love to be the music presenter or radio DJ if I have my life again but that's just a pipe dream, there are too many good people in that world. I think I'm going to do a few podcasts and see how that goes.

Back in the early 90s, I also won a pop quiz on what was then called Greater London Radio, but it's now BBC Radio London. I got a holiday for two to Barbados for two weeks. Yes, that was fun. The question was, by the way, 'What year did The Pretenders' song, *Brass in Pocket*, get to number one?' The next question was, 'How many weeks was it number one?' I got them both right.

The answer to those are?

January 1980 and 2 weeks. It was the first number one of the new decade.

Am I remembering correctly that you rang in to 6 Music? You did a phone-in?

A couple of times, yes. Once was when the question was, 'Which word in the English language would you most like to abolish?' I think the word that won was 'moist', but my suggestion was the word 'me' because I said it would then mean that we couldn't have my children saying to me, 'Me and my brother are going on our bikes'.

Another time was when I was on the way to Caernarfon. I was driving up there to go to court. They had this thing called *The Chain* on the Radcliffe and Maconie show and I pulled over in a lay-by and called them.

Music is probably one of the biggest things in my life. I suppose in terms of my career, the bits I've enjoyed the most, I've acted for a huge number of rock and pop stars. In fact, when I did my welcome speech at Cumberland Lodge, as High Court Judges traditionally do, instead of going on about my boring life and how brilliant I am, I basically did a pop quiz of songs by all the artists I've represented, and that was quite fun. I think John Wilson won the prize (again!).

We know you enjoy sailing. Have you had more time to do that in your retirement?

Not enough yet, no. I'm getting older, when you get to this age going out on a cold Sunday morning and capsizing and wearing a wet suit is just less attractive. I do need to get back into it, but I think I might be possibly graduating into boats that don't capsize quite so often.

Do you still have the rib?

I do still have the rib and I still take it out. I took you out in the rib once Nick, didn't I? I capsized you in the Solent, do you remember?

I remember vividly!

I also ought to tell you, I actually capsized Patrick Chamberlayne, a great, great friend of mine. His two daughters were in the rib with me at the time. His delightful younger daughter, then probably aged about 11, screamed out, 'That's my only daddy!', as he went capsizing into the water. But happily, Patrick survived.

Nicholas. Thank you.

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