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

2024
ISSUE 2 SUMMER

FINANCIAL REMEDIES JOURNAL

CLASS LEGAL

FRJ Financial Remedies Journal

www.financialremediesjournal.com
PUBLISHED BY CLASS LEGAL

2024
ISSUE
2
SUMMER

FINANCIAL REMEDIES JOURNAL

CLASS LEGAL

FRJ Financial Remedies Journal

𝕏 @fr_journal

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

For any queries regarding the Journal, email frjeditor@classlegal.com

Contents

Chair's Column

HHJ Edward Hess

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

The FRJ website

I am delighted to see from a perusal of the latest statistics on the use of the range of FRC-related resources on the FRJ website (www.financialremediesjournal.com) that the vision of providing the 'go to' place for financial remedies practitioners has become a reality, with 408,847 views of the website in 2023 and, based on the first 5 months, heading towards in excess of 500,000 in 2024. There are also now 6,375 X (formerly Twitter) followers. Amongst the website views are of course a large number of views and downloads of the journal itself, and I am pleased to commend the summer issue as containing some very important contributions on a wide range of topics.

The future of MCA 1973, s 25

All financial remedies lawyers await with interest the report, or 'scoping paper', from the Law Commission – due in the months ahead – on the possible reform of s 25, shorthand for the possible reform of the entire way that the court is enjoined to approach the distribution of assets and income on divorce. The Law Commission exercise, from my observation being conducted with great care and skill by Professor Nicholas Hopkins and his team, will no doubt wish to consider the strong and contrary views expressed on this subject in this edition by Baroness Deech ('Reform of Financial Provision on Divorce') and Sam Hillas KC ('A Reply to Baroness Deech's Argument for Reform'). Does our current structure promote unpredictable exercises of discretion which unacceptably drive up costs to the benefit only of the lawyers involved and thus require urgent and radical reform *or* have the developments in judge-made case law in recent decades ensured that the law is reasonably settled to enable the vast majority of cases to be dispatched by specialist judges relatively swiftly? This issue includes an excellent interview with Baroness Hale, in which she describes herself as a 'very good friend' of Baroness Deech, but expresses real concern about her proposals in this area: 'it is likely that the people who would be most adversely affected by a much more cut and dried, rigid approach to things would be those people – usually women – who have compromised their place in the [external] workplace … in order to do what on the whole is in everybody's interests: to look after their homes, their families, to have children, to help to bring them up'. It will be interesting to see what the Law Commission makes of all this, but it will ultimately be a matter for politicians in the autumn and beyond.

Pensions on divorce

The Galbraith Tables, the brainchild of Jonathan Galbraith, the CEO of Mathieson Consulting, were launched some two years ago and made their appearance in the very first issue of the FRJ. The subsequent period has seen their adoption into *At A Glance* and a gradual familiarisation with what they set out to do. A policy decision was made not to attempt to update the tables every month or every quarter, but they have to accommodate significant long-term financial changes such as the now well-established increased interest rates which have followed events in autumn 2022. Hence the production of the second version of the Galbraith Tables. Those interested in this subject are recommended to look at the article in this issue by Jonathan Galbraith and Chris Goodwin, 'Galbraith Tables v2: Why they Have Changed'.

The PRFD

I must declare an interest as a former DJ (PRFD), but the history of this institution, its rise and its fall, is very much interwoven with the developments and changes in family law over the decades and thus should be of interest to historians of family law. This issue's contribution from Sir James Munby and Sir Nicholas Mostyn, 'The Origin, History and Present Status of the Principal Registry of the Family Division', charts the developments from 1857 to the present day, explaining and exploring what happened to it when the Family Court was established in 2014. The statutory changes which took effect in 2014 contrived to leave in theoretical place the roles of DJ (PRFD) and the Senior District Judge of the PFRD, such that the FPR continue to include many references to them, even though these species are extinct, apart from a number of holders of the title DDJ (PRFD). This article explains where the vestigial remains of this institution exist in the present day and what has happened in practice to the various records and registers once entrusted to the institution – divided between the RCJ and the CFC. The article intriguingly identifies the

ongoing obligation on the PRFD (under FPR 12.38) to maintain a register of wards of court – but, if there ever was such a register kept, nobody seems to know who kept it or where it was kept and certainly nobody is keeping it now. If any reader has any information on what happened to it, please let me know!

Congratulations

Many congratulations to Sam Hillas KC, FRJ Editorial Board member and regular contributor to the FRJ, for her award as Pro Bono King's Counsel of the Year at the recent Advocate Pro Bono Awards. The judges commented: 'Your willingness to do whatever is necessary to give pro bono clients the best possible outcome is truly inspiring'. I think we can all agree with this sentiment and note her magnificent contribution in this area. In an era and an area of law where legal aid is fairly non-existent, this is absolutely vital work. Not everybody is prepared to do the work, so it is important to celebrate those who are.

Reform of Financial Provision on Divorce

Baroness Deech

What's the problem?

After much hesitation and delay, both from the government and the profession, it seems that at last the Law Commission will set to reforming the law of financial provision on divorce. The significant problems of this area were addressed, but not completely resolved, in the Law Commission report *Matrimonial Property Needs & Agreements*.[1] The report covered the difficulties, stress, uncertainty and expense of the English/Welsh law relating to the division of assets and ongoing maintenance awards on divorce. The current law is s 25 Matrimonial Causes Act 1973, which has not been reviewed by Parliament for nearly fifty years despite radical changes in society and families. It has been the subject of calls for reform from the Law Commission, Resolution[2] and the Centre for Social Justice.[3] Reform is urgent because the law is uncertain. It has become largely judge-made law, which bears little resemblance to the statute. Judicial discretion has led to unpredictability and conflicting decisions, which make it hard for parties to negotiate and lead to disproportionate costs. Legal aid has been removed and parties of modest means are left unrepresented with little guidance as to the right outcome.

One could say that it goes so far as to contravene the rule of law. Lord Bingham's definition was that the law must be accessible and, so far as possible, intelligible, clear and predictable.[4] The English law of financial provision is none of these. The outcome varies from judge to judge and era to era. The result is unpredictable. The principles change every time the Supreme Court has the opportunity to give judgment in – usually – a case concerning wealth. Even the most experienced of solicitors and barristers cannot predict the award. The uncertainty pushes couples to settle for fear of what a judge might unpredictably order, and that is not in accordance with the rule of law. The law is occasionally altered with retrospective effect, such as when many years after the divorce the claimant spouse returns to court for a fresh or increased order based on new situations. Valid contracts, that is pre-nuptial agreements, are set aside on grounds that may not seem fair or justifiable. Section 25 Matrimonial Causes Act 1973 has been interpreted out of all recognition and s 25A of that Act (clean break) is frequently ignored. It is also unsatisfactory that there should be such a difference between the law of England/Wales and of Scotland, and England/Wales and the rest of the western world especially when there are so many international marriages.

Our Private Member's Bill

Now that there is hardly any legal aid and, indeed, even when it was available, costs associated with uncertainty are a deplorable waste of resources that ought to be preserved. The vested interests of barristers who act for the very few extremely wealthy couples, and who have opposed all reform, should not be permitted to block reform for the average and the many.[5] I have been arguing for reform since 1977,[6] shortly after I started teaching family law. Once Baroness Shackleton, with her wealth of experience in practice, joined in calling for reform, things moved quickly and in April 2023 the Ministry of Justice asked the Law Commission to review the law. I fear that it will be a long drawn-out process over years – will it happen in my lifetime? – and that even if the Law Commission reports that thorough reform is needed, there is no guarantee that the government of the day will implement its recommendations. Before we even get to that stage, there is more delay caused by the Law Commission's decision to carry out a scoping review, reporting later this year. This is really unnecessary given that so much is known about the law and its problems[7] and about other countries that have managed to reform it with little difficulty, Scotland being the best example.

Baroness Shackleton and I have introduced in the Lords in successive years the Divorce (Financial Provision) Bill[8] which would implement provisions very similar to those pertaining in Scottish law, and in the laws of most European and North American states. It would introduce as a fair starting point the equal division of all the property and pensions acquired by the couple *after* marriage; provision for short-term maintenance for an ex-spouse and longer maintenance for children; flexibility to allow the home to be retained for the carer and children; and binding pre-nuptial agreements. This is intended to facilitate mediation, reduce litigation and costs, and recognise equal partnership in marriage. We have born in mind the likely move to more

technology in family law settlements, necessitating a law that works with online and AI use. This is the model we hope the Law Commission will recommend.

Reform pre-nups at the very least

The 2014 report by the Law Commission contained a draft bill on pre-nuptial agreements. While one could suggest that it contained too many discretionary provisions that might thwart certainty, nevertheless it would have been an improvement had it been brought into law. Pre-nuptial agreements have become more acceptable and common since then, especially in international marriages, but the uncertainty as to whether they are enforceable has given rise to very costly litigation to determine whether or not they are valid.[9] This defeats the purpose, even though more than ten years have passed since the groundbreaking *Radmacher* judgment.[10] There seems to be a gradual move to more acceptance of them. Certainly, if there is any more delay in reforming financial provision law, immediate introduction of a pre-nuptial agreements bill would remove much of the trouble because it would enable couples to make their own arrangements and bypass the law to a significant extent. The argument put forward by the government that one cannot reform family law piecemeal and that therefore pre-nuptial agreements have to wait is simply untenable.[11] At the very least the Law Commission should reiterate its pre-nuptial agreements proposal.

No-fault divorce was introduced in 2022.[12] There is no point in bringing in no-fault divorce with the aim of removing the bitterness and deception alleged in fault-based divorce when the same elements, writ large, dominate financial provision law. Increasing numbers are turning to arbitration and mediation in order to avoid the courts.

The kids aren't alright

The position of the children involved in divorce is not sufficiently considered in the law. Baroness Shackleton and I want maintenance for children to continue to the age of 21, given that so many continue into higher education, and to shift the focus of financial settlement towards the support and housing of children. The enormous legal costs attaching to disputed financial cases sometimes dissipate the very assets that should be preserved for the children. Examples include a monthly award of £177 for a child which racked up £150,000 in costs.[13] There are many accounts of cases where nearly all the assets are wasted on the costs of litigation.[14] In *M* v *M* each spouse emerged with £5,000 of liquid assets having incurred nearly £600,000 of costs.[15] In *ND* v *GD* costs of £483,000 exceeded the amount in dispute between the couple and represented 18% of their wealth.[16] The eponymous case of *A Wife v A Husband*[17] was a small money case which involved 7 years of litigation and £1.5m in costs. There are many more accounts of disproportionate costs and expressions of judicial disapproval of them. While some couples do litigate unreasonably, the judicially created uncertainty escalates costs. One judge at a financial dispute resolution hearing might estimate the award to a wife to be £Xm, and shortly thereafter another would estimate £2Xm, and the varying approaches of different judges are well known. Issues that should have been resolved years ago recur: the effect of premarital cohabitation; conduct; childlessness; future earnings; extraordinary contribution; length of marriage and others.

Full marks for Scotland

Scottish law has received an excellent review from an inquiry into its 30-year history, *Built to Last*.[18] I hope the Law Commission will take on board the Scottish provisions. The principles it should aim for are: s 25(2) Matrimonial Causes Act 1973 should be replaced; only matrimonial property including pensions should be available for sharing at the end of a marriage; pre- and post-nuptial agreements should be binding with certain conditions; as a starting point property should be shared equally; limited term periodical payments; and support for children up to the age of 21.

If a more formulaic approach of the sort proposed were adopted it would lend itself more readily to online use, as trialled in Australia;[19] and would be of assistance to couples who have no legal representation. They amount to about 40%, a proportion that is rising.[20] It would save costs, leaving fewer issues over which to negotiate or litigate, and would provide a useful starting point for mediation. It would be fairer, being based on equal division and on equality of the sexes as former partners. It might dispel the widespread feeling of unfairness generated by existing law.[21]

There is no European state with a law as discretionary and stereotyped as English/Welsh law. They often have community of property systems and no or short-term maintenance, as well as binding pre-nuptial agreements. The comparable laws of New Zealand, Australia and the USA resemble the Scottish model, not the English.[22]

Will the Law Commission grasp the nettle?

I hope the Law Commission will look at the matter of principle addressed by other countries, namely, ending the status of the ex-wife (usually) as a supplicant asking for her needs to be met by her ex-husband, and turn instead to treating her as an equal partner in the venture of marriage. The default position of many judges and academics seems to be that women are less employable once married. This is at odds with government calls for women to take up to half the positions on boards, in the judiciary, universities and so on. It contrasts with the attitude of other western countries. It has been argued that maintenance has to be long lasting and generous in England/Wales because social support for women is insufficient. Yet the Global Gender Gap Index has the UK at above average, and ahead of many states that have financial provision laws resembling those recommended here.[23] The complex affairs of the very wealthy will no doubt always present difficulties and require the services of lawyers, but others should be assisted by this new approach. Judgments and recent academic writings[24] place great emphasis on the contribution made by a wife as the rationale for ongoing maintenance – styled compensation – after the end of the marriage. This takes one back to the arguments of more than 50 years ago when 'irretrievable breakdown' became the sole ground for dissolution, sweeping away with it in theory any reason for ongoing spousal support. This much was admitted by Leo Abse MP, a driver of reform, and incidentally a relative of mine.[25] The resistance to divorce

reform in the late 1960s was on ideological grounds (the 'innocent' wife losing her status) but also, when it was clear that that position was not sufficiently convincing, the arguments switched to the inadequacy of support for the wife after divorce. That dichotomy is revived today: on the one hand, family law should reflect the independence and autonomy of spouses and the equality of women within marriage; on the other hand, the assumption that she has always to be protected financially through a man's resources. The economic position of women and the opportunities available to them have changed significantly over those 50 years and it is alarming to see the neo-feminists of today chipping away unthinkingly at the grounds of women's equal standing.

The contribution made by ex-wives as a rationale for maintenance is based not only on an untested model but is also associated both with the ideas that a woman should expect to rely on providing womanly services as a *quid pro quo* and with the commodification of men's role in marriage. He is only good for financial support, it seems. The use of stereotypes in this debate reflects their use in court. Taken at face value, the typical wife's contribution through housework and childcare in marriage indeed attracted compensation, there and then, through the support provided by the typical husband throughout their joint lives, the housing, clothing, support, holidays and every affordable need of the wife and children. She is paid, if that is how it is to be regarded, every day. Sadly, however, the message being given out by those who are too young to remember the many waves of feminism before the current one, is that the best that a woman can do is attach herself to a man and count on him for support for all time. Moreover the rewards are regressive. The better off the husband the less burden the wife may have taken on and the more she will already have been compensated by way of being provided with necessaries and more. It is in the poorer families that the wife cannot afford the luxury of staying at home and has to have a job, but is unlikely to receive any award of significance on dissolution. Universal Credit will be reduced pound for pound by the maintenance award. Even the benefits system requires women to be available for work when the children are quite young. It is noteworthy that the departure from this stereotype often occurs where a wife who is wealthier than her ex-husband might find herself giving a great deal to him, an outcome the judges seem reluctant to contemplate very often.[26] Unless the principle is addressed, the status of a wife will remain as that of a needy supplicant, not a partner in the financial dissolution. Moreover, in our law there continues to be no support for the many women, and men, who truly deserve support because they have given lifelong care, the sisters, the daughter-carers of parents, who usually have no claim. It is hard to understand why a sexual relationship, even brief and childless, is taken as the passport to financial claims throughout family law and state provisions, but not the caring relationship. Significantly, academic writers' focus on the need to support ex-wives is blind to the needs of single women in jobs where they are paid less than men, or have smaller pensions, and the single mothers where the father is not supporting the child. This pressure for lifelong support for divorced women is hardly feminist at all in its focus only on women who attached themselves to a man.[27]

English exceptionalism

In relation to theoretical hardship resulting from reform, no answer from opponents has ever been given to the question why England/Wales is alone in the western, Antipodean and North American world in its treatment of spousal dependency and unequal division.[28] The proposed Scottish-style reforms would offer an off-the-peg solution. They would end the attitude of some barristers that, since we all look better in Savile Row suits, there must be no Marks & Spencer ready-made. By legislating for equal partnership it would also bring an end to the demeaning situation that continues to be adopted in English law and society, namely that the status of the woman is forever determined by the man she marries. Simone de Beauvoir captured this in 1949 when she wrote that 'man defines woman not in herself but as relative to him … she is defined and differentiated with reference to men … women live … attached through residence, housework, economic condition and social standing to certain men'.[29] I hope the Law Commission will be brave.

Notes

1 Law Com 343 (2014); D Hodson 'The Law Commission proposals: a wasted opportunity' *Family Law* (2014), www.familylaw.co.uk/articles/the-law-commission-proposals-a-wasted-opportunity-passing-the-reform-buck-and-continued-unpredictability-for-future-settlements
2 https://resolution.org.uk/news/call-for-early-legal-advice-to-soften-blow-of-divorce/
3 *Every Family Matters* (Centre for Social Justice, 2nd edn, 2010).
4 Tom Bingham, *The Rule of Law* (Penguin, 2010).
5 www.bbc.co.uk/programmes/m000zt7b. I have been dismayed at the bitter and sometimes personal hostility displayed by lawyers when I urge reform.
6 Ruth Deech, 'The Principles of Maintenance' (1977) 7 *Family Law* 229.
7 The Nuffield Foundation Bristol University *Fair Shares* project, www.bristol.ac.uk/media-library/sites/law/news/2023/Fair%20Shares%20report%20-%20final.pdf showed that couples of modest means muddled through their financial settlements and are in need of legal advice.
8 https://bills.parliament.uk/bills/2564/publications
9 *S v H* [2020] EWFC B16; *Ipekci v McConnell* [2019] EWFC 19; *Brack v Brack* [2018] EWCA Civ 2862, and many more.
10 *Radmacher v Granatino* [2020] UKSC 42.
11 *Hansard*, HL Deb, 25 April 2023, vol 829, col 1098.
12 The Divorce Dissolution and Separation Act 2020.
13 *JM v KK* [2021] EWFC 54.
14 The litigation costs of £7m–£8m were described as 'apocalyptic' in *Xanthopoulos v Rakshina* [2022] EWFC 30; in *ABX c SBX* [2018] EWFC 81 the assets were under £2m, costs £1.1m; in *HRH Prince Louis of Luxembourg v HRH Princess Tessy of Luxembourg* [2018] EWFC 77 the majority of the liquid assets were spent on costs of £500,000 and the child maintenance award was £4,000 pa; there was no money in *AJ v DM* [2019] EWHC 702 (Fam) and an enormous amount of legal costs; *Piglowska v Piglowska* [1999] 2 FLR 7643, HL where the assets were £127,400 and costs £128,000; *WG v HG* [2018] EWFC (Fam) 84, award to wife £4.05m, her costs £900,000; *MB v EB (No 2)* [2019] EWHC 3676 (Fam), award to husband £485,000, his costs £650,000, wife's £600,000; *WC v HC* [2022] EWFC 40, costs were 13% of the total assets.
15 *M v M* [2020] EWFC 41.
16 *ND v GD* [2021] EWFC 53.

17 [2023] EWFC 200.

18 J Mair, E Mordaunt and F Wasoff, *Built to Last: The Family Law (Scotland) Act 1985* (Nuffield Foundation, 2016).

19 See P Parkinson (n22 below).

20 www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2023/family-court-statistics-quarterly-july-to-september-2023

21 See the typical comments by *Guardian* and *Daily Mail* readers here: www.theguardian.com/lifeandstyle/2019/mar/16/five-lessons-having-an-amicable-divorce; www.theguardian.com/lifeandstyle/2017/mar/19/divorce-women-risk-poverty-children-relationship; www.theguardian.com/law/2015/mar/11/woman-wins-right-seek-money-ex-husband-30-years-after-break-up-dale-vince; www.theguardian.com/uk-news/2015/feb/24/judge-ex-wife-millionaire-work; www.dailymail.co.uk/news/article-4204214/Court-order-makes-man-pay-ex-wife-s-mistakes.html#comments; www.dailymail.co.uk/news/article-10531601/Men-raw-deal-divorce-cases-according-women-splitting-from.html#comments; www.dailymail.co.uk/tvshowbiz/article-4097646/CBB-s-Jamie-O-Hara-reveals-s-struggling-pay-ex-wife-Danielle-Lloyd-s-15-000-month-maintenance.html#comments

22 For comparative material, see J Scherpe, 'A comparative overview of the treatment of non-matrimonial assets, indexation and value increases' (2013) 25 CFLQ 61; J Scherpe, 'Marital Agreements and Marital Property' (2012) 42 *Family Law* 865; J Scherpe, *Marital Agreements, Private Autonomy in Comparative Perspective* (Hart, 2012); J Scherpe, 'Towards a Matrimonial Property Regime for England and Wales', in *Fifty Years in Family Law* (eds R Probert and C Barton; Intersentia, 2012); New Zealand's Property (Relationships) Act 1976 contains a presumption of equal division limited to the 'relationship property'. This has recently been reviewed by the New Zealand Law Commission in the *Review of the Property (Relationships) Act 1976* (2016) whose recommendations if implemented would bring New Zealand law even closer to the provisions of the Divorce (Financial Provision) Bill 2021. Australia has modernised an online approach www.familyproperty.com.au/ explained by P Parkinson, 'Family Property division and the new technologies' [2020] *Ex Curia* 25. *Your Europe* an official website of the European Union, summarises the various laws of the EU states, europa.eu/youreurope/citizens/family/couple/divorce-separation/index_en.htm. US states laws are handily summarised at www.maritallaws.com/laws/alimony. Some states have community of property, many have alimony calculators, with less judicial discretion, only six allow for permanent alimony and some are moving in the direction of the Divorce (Financial Provision) Bill. Florida is an interesting example, and the history of the reform movement is set out at www.myfloridalaw.com/alimony/florida-alimony-reform/

23 www.statista.com/statistics/244387/the-global-gender-gap-index/#:~:text=The%20Global%20Gender%20Gap%20Index%2C%20is%20a%20framework%20for%20capturing,14%20indicators%20from%20these%20categories. The cost of childcare in England is far too high but financial provision law tends to apply similarly to women with or without children, caring for the children themselves or with help, in or out of work.

24 Invariably by women who themselves are pursuing a career.

25 E.g. *Hansard*, HC Deb, 24 January 1969, col 819; 12 June 1969, col 2017.

26 E.g. *Stack v Dowden* [2007] UKHL 17; *Radmacher v Granatino* [2010] UKSC 42; *Kianoosh Azarmi-Movafagh v SorourBassiri-Dezfouli* [2021] EWCA Civ 1184.

27 As Baroness Hale said at the launch of Cambridge Women in Law on 27 September 2019, few women can make it on their own and her most important advice was to pick the right partner www.thetimes.co.uk/article/lady-hale-pick-the-right-partner-to-be-supreme-at-law-bg0nk699v

28 It reminds me of the old joke: mother watches the passing-out parade and comments 'look at my son, the only one in step!'

29 Simone de Beauvoir, 'Introduction', in *The Second Sex* (Penguin, 1949).

A Reply to Baroness Deech's Argument for Reform

Samantha Hillas KC

St John's Buildings

Conceived as a companion piece to Baroness Deech's article calling for reform of s 25(2) MCA 1973,[1] it soon became clear that writing this was a harder task than I envisaged. That is not because the article is not well written, researched or persuasive. My difficulties were two-fold and circular. Given that I am probably one of those self-interested barristers so denounced in the article,[2] my first problem was whether my *bona fides* would hold up. Secondly, in my opinion, there is little substance to the case for reform advanced. But then I would say that, wouldn't I? My problem was therefore how to convey that without a line-by-line take down of a 3,000-word article, which would likely be both dull to the reader and considered impolite.

Problem 1 – my *bona fides*

Do I have self-interest in separating parties' instructing lawyers to resolve financial issues at the end of their relationship? Yes, I do. That is my job.

But do I have self-interest in preserving a system which, according to the article, is unfair and arguably contravenes the rule of law? Of course not. Like every other barrister I know, I became a barrister because I want fairness and justice to prevail. If change is required to achieve fairness and justice then sign me up.

The reality is that my professional interests would in fact best be served by a radical overhaul of the entire legal basis of the area of law in which I practise, as is proposed. That would keep my younger colleagues in chambers busy well beyond my own retirement and, just as the law was settling down, statute would have to be changed again to reflect the societal norms then prevailing (which, according to the article, is the purpose of the reforms proposed now).

I now have almost 30 years' experience of financial remedies work, be it in one capacity or another. I work for very rich people who have paid me very well and I work free of charge for people with no money at all.[3] My practice has encompassed legal aid and private work both as a solicitor and a barrister, over a wide geographical area, at every level of court from the magistrates to the Supreme Court and involving assets from the few to the plenty.

Hoping all of this resolves the first problem, let us now turn to the theory.

Problem 2 – the theory

The ill to be cured

The ill that Baroness Deech seeks to cure is the asserted unpredictability of outcome in financial remedy cases. It is said this arises from the exercise of judicial discretion which 'has led to unpredictability and conflicting decisions' and 'which bears little resemblance to the statute'. The consequence of that, the theory goes, is increased fees for those who can afford to pay lawyers and confusion for those of modest means who would have previously qualified for legal aid but are now forced to act in person.

The cure

It is argued that the remedy to cure this ill is statutory change: to repeal the statutory criteria set out in s 25(2) MCA 1973 and replace them with another set of statutory criteria as set out in the seven sections of the proposed Divorce (Financial Provision) Bill referenced in the article[4] ('the Bill').

The intended consequences of reform

It would appear from the article that there are three main intended consequences of reform: predictability of outcome; a consequential reduction in costs spent in financial remedy cases; and a necessary feminist repositioning of women as equal partners to a marriage. Let us look at each of those in turn.

(1) Predictability

There is of course a world of difference between what is described as 'unpredictability' and *flexibility* and it would be a mistake to confuse the two. In *GW v RW*[5] Nicholas Mostyn QC (as he then was) said 'the law in this area is not moribund but must move to reflect changing social values'. The important developments in the law relating to financial provision – *White*[6] (outlawing gender discrimination); *Miller; McFarlane*[7] (sharing, needs, compensation); *Radmacher*[8] (pre-nuptial agreements); *GW v RW* (cohabitation moving seamlessly to marriage) – have all been decided to reflect changing societal norms and against the backdrop of s 25(2) MCA 1973.

'We are the original common law jurisdiction based on discretion, fairness criteria and flexible judge led law'.[9] If

judicial discretion is the enemy of predictability – as argued in the article – it is not clear to me how the Bill intends to circumvent this.

In fact, what is clear on my reading of the Bill is that the new statutory criteria would require judges to continue to make all sorts of decisions in the event of a dispute. This would include deciding what is 'matrimonial property' for sharing purposes; deciding the extent to which mingling affects the sharing of otherwise non-matrimonial assets; deciding whether the cost of determining those issues is proportionate; deciding whether there are any relevant factors relating to conduct or contributions or the needs of children under the age of 21 which would affect the outcome; deciding the validity and enforceability of any nuptial agreement; et cetera, et cetera, et cetera.

All of which sounds very familiar.

In any event and by way of challenge to the essential premise, is it right to say that outcomes in financial remedy cases are presently unpredictable?

In his 'The Financial Remedies Court: The Road Ahead',[10] Peel J said that:

> '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.'

In my experience, specialist financial remedy practitioners may from time to time be disappointed with the outcome of a contested financial remedy matter, but cases in which the outcome is not one which could have been *predicted* are, in reality, few and far between.

That is exactly why financial dispute resolution hearings are so successful. Whether via a private FDR conducted by a specialist financial remedy practitioner or a court-led FDR conducted by a financial remedies judge, parties to a financial remedy case will, in the ordinary course of events, receive a clear, objective indication of likely outcome and how settlement might be achieved.

(2) Costs

In any jurisdiction, there will always be people who want to litigate cases and spend a lot of money doing so. It is unfair to blame the lawyers for this.

I can do no better than to quote from Baroness Hale in the interview published in this issue of the *Financial Remedies Journal*[11] about resolving financial remedies cases:

> 'of course it does need both goodwill and common sense on *both* sides. And the thing about family cases is that people's emotions are involved, people's self-esteem is involved. And they also have their own ideas about what's fair … which are governed by all sorts of things in their personalities and backgrounds. And that makes it hard for some people to accept what one hopes is sensible advice about how the case should be settled. There used to be a perception that family lawyers wanted to fight cases and I think there are probably people who still think that's the case but most of the research that goes into what solicitors do suggests that they are very settlement focused.'

I respectfully suggest that a change in statute law would have little or no effect on those litigants who want to fight. We will be simply creating another set of rules for them to fight over.

Furthermore, I struggle to see how creating another set of statutory rules for litigants in person to follow will ease the burden on them trying to navigate the system. Unless the government of the day reverses its decades-long trend of dismantling legal aid, the legal profession will no doubt continue to step up and do its best to serve those who cannot afford legal fees. We will continue to support Advocate, the pro bono charity, we will continue to volunteer at law centres, we will continue to train others to volunteer, we will continue do our best to educate through writing papers, speaking at conferences, recording podcasts. At the other end of the spectrum, however, we will continue to be settlement-focussed, ensuring that only the most complex cases litigate.

(3) A feminist repositioning of women as equal partners

The theory goes that, in England and Wales, we are entirely out of step in failing to address the 'principle addressed by other countries, namely, ending the status of the ex-wife (usually) as a supplicant asking for her needs to be met by her ex-husband, and turn instead to treating her as an equal partner in the venture of marriage'.

As a consequence, the clear message being sent by our lawmakers is 'that the best that a woman can do is attach herself to a man and count on him for support for all time.'

If that is the message being sent, then no one is paying attention because that it is not something I recognise from my own practice. Spousal periodical payments orders are becoming rare (joint lives orders rarer still) and will be ordered only in those cases where needs require it (as would be the case in the new Bill), where there is insufficient capital from which to meet those needs (ditto) and anything other than a term order has to be justified (ditto). This is clear from the Nuffield Foundation's *Fair Shares* Report,[12] which debunks a number of myths about the prevalence of orders for spousal periodical payments. All the new Bill adds is an arbitrary cut off after 5 years, and even that is extendable.

Further, I am afraid the 'Bill as feminist revolution' theory rather falls down for me when the article suggests that ongoing, post-separation PPs are unnecessary because wives are 'rewarded' enough every day of the marriage for their contribution towards housework and childcare, with their husbands paying for their housing, clothing and holidays. Moreover, it is argued, the 'rewards' are regressive: the wife of a rich man probably does even less around the house or by way of looking after children, but will receive more 'reward' during the marriage than the wife of a poor man.

For the avoidance of any doubt, I reject as illogical the argument that, in objecting to that transactional and utterly outdated view of marital partnerships I am, according to the article, a 'neo-feminist … chipping away unthinkingly at the grounds of women's equal standing'. On the contrary, I subscribe to the view that there is no room for gender discrimination when resolving financial remedy claims and that (as set out below) if *either* spouse is disadvantaged financially by choices made during a marriage, there ought to be sufficient flexibility built into the system to ensure a levelling up when that marriage comes to an end.

Is reform necessary at all?

I await with interest the scoping report which is currently being drafted by the Law Commission and which is due for publication this November. I have been impressed by the diligence with which those involved in that project have sought the views of those working on the front line and have confidence that, if they consider reform is necessary, the basis for that conclusion will be more than rhetoric and soundbites.

My views are probably clear. I do not agree that repealing s 25(2) MCA 1973 and replacing it with the Bill would do anything other than create confusion for everyone involved in financial remedies work and substantially more work for lawyers.

Life is not straightforward. Relationships are painted not by numbers, but by what happens to us and the choices we make during the currency of those relationships. We have children, we look after dependent relatives. We work part time or perhaps give up paid work altogether to look after the family and support a partner's goals. We become ill. We are made redundant. Our current law has sufficient flexibility to allow for these circumstances to be reflected in the final outcome.

It is also sufficiently flexible to change with the times, for example to reflect our increasing awareness of coercive control and the impact of domestic abuse upon victims and their families.

However, I do believe we can tinker with the process. It is recognised by those of us involved in financial remedy work that most divorcing couples want to resolve their finances upon separation swiftly and with the confidence that they are getting a fair deal. The natural and judicial evolution of procedural rules have been welcome steps in the right direction.

Using the accelerated procedure for First Appointments gets a case to an FDR sooner; a private FDR might get parties there sooner still, and on a date they choose. The current MOJ proposal to pilot a fast track FDR system for low value cases will further assist those without the means to pay for lawyers to obtain an indication from a financial remedies judge of the Family Court at an earlier opportunity. An increasing and impressive number of financial remedies judgments which explain how judges make their decisions are now being reported, from courts of all levels involving a wide range of values, and are accessible to the public online and free of charge on The National Archives.

In my opinion, supporting these kinds of initiatives, as well as encouraging the use of non-court dispute resolution, would be much more useful than suggesting we rip everything up and start again.

Notes

1 Baroness Deech, 'Reform of Financial Provision on Divorce' [2024] 2 FRJ 107.
2 Bitter; hostile; with an attitude that 'since we all look better in Savile Row suits, there must be no Marks & Spencer ready-made'.
3 Note from the Editor: Sam will be too modest to mention it, but she has recently won Advocate's *Pro Bono KC* of the Year award.
4 https://bills.parliament.uk/bills/2564/publications
5 *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam).
6 *White v White* [2000] UKHL 54.
7 *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.
8 *Radmacher v Granatino* [2010] UKSC 42.
9 Taken from Law Com 343 (2014); David Hodson, 'The Law Commission proposals: a wasted opportunity' *Family Law* (2014), www.familylaw.co.uk/articles/the-law-commission-proposals-a-wasted-opportunity-passing-the-reform-buck-and-continued-unpredictability-for-future-settlements, which is referenced in the article.
10 [2022] 2 FRJ 76.
11 Samantha Hillas KC, 'Interview with Baroness Hale' [2024] 2 FRJ 183.
12 www.nuffieldfoundation.org/wp-content/uploads/2021/03/Fair-Shares-report-final.pdf. See in particular Chapter 9: Ongoing support for spouses and children. The conclusion is that spousal maintenance arrangements are relatively uncommon, are generally for a fixed period and are usually connected to having children or having an illness or disability.

Source not Title: Some First Reflections on *Standish*

Calum Smith

1 Hare Court

On 15 and 16 November 2023, *Standish v Standish* came before a Court of Appeal comprising King, Moylan and Phillips LJJ.

189 days later, Moylan LJ delivered the court's unanimous decision: Mrs Standish's ('W') appeal was dismissed, and Mr Standish's ('H') appeal allowed, subject to the matter being remitted for a needs-based assessment of W's claims.[1]

The decision reaffirms the broad discretion conferred upon judges in pursuit of fairness by application of Matrimonial Causes Act 1973, s 25. Title matters not. The source of funds is critical. And matrimonialisation is here to stay.

This case supplements the collection of appellate court decisions on the application of the sharing principle, but is the first since *K v L (Ancillary Relief: Inherited Wealth)* [2011] EWCA Civ 550 in which the concept of matrimonialisation has come under such close scrutiny. The decision illuminates the evidential burden required to prove an asset has been matrimonialised; emphasises with some force the importance of identifying the source of an asset rather than relying on title; and reformulates, at [163], the much-cited observations of Wilson LJ (as he then was) in *K v L.*

W's £45m award was slashed by 44% to £25m to reflect more appropriately the 'significant' unmatched non-matrimonial contribution made by H to the family resources. The decision leaves H with £107m. It may, in fact, be the greatest reduction of a financial remedies award ever made on appeal.

The case at first instance: *ARQ v YAQ* [2022] EWFC 128

The first instance decision of Moor J was reported as *ARQ v YAQ* [2022] EWFC 128. It was a second marriage for both parties. They started their relationship, as determined by Moor J, in 2003 before moving from Australia to Switzerland in 2004. They returned to Australia when H retired in 2007, but purchased their future family home, Moundsmere Manor, England, in 2008. In 2010, the family (H, W, the parties' two children and W's three children from her first marriage) moved from Australia to England where they have remained.

H is British but moved to Australia in 1976. It is there that he made his fortune in finance. He sold his company in the mid-1980s and made A$127m. He became the CEO of that company, owning 20% of it, which was then acquired by UBS, at which point he was earning A$1m per annum. By 1999, H was the Chairman and CEO of the regional division of UBS. By 2002 he was on the executive board, earning A$11m pa from 2002. That year, H purchased a large cattle and sheep farm in Australia called Ardenside Station. With livestock and equipment, this cost c A$12m. The business operating from that land was called Ardenside Angus.

When his relationship started with W in 2003, H was worth c £57m. He was a man of exceptional ability and wealth. W's assets were comparatively modest. She owned a property, the mortgage on which H repaid – which sold in 2011 for A$5.6m – and some inherited funds (c A$600,000).

There were 'two financial events' within the parties' marriage at the centre of this case. The first was the transfer from H's sole name into W's sole name of investment funds then worth approximately £77m ('the 2017 Assets'). The second was W being issued shares in Ardenside Angus.

The transfer to W of the 2017 Assets was an attempt to avoid punitive inheritance tax upon H becoming domiciled in England. The intention was to transfer the funds to W, who was non-domiciled, before placing the assets in trust for the benefit of the children.

The transfer to W of shares in Ardenside Angus was also the consequence of an ingenious scheme to avoid tax.

The 2017 Assets were never settled into trust. Subsequently, W wrote H out of her will, without telling him. The Forms E disclosed net wealth in W's name of £83m, and c £23m in H's name. The total pot was later found to be worth £132m, with £95.7m being held by W and £36.9m by H.

ARQ v YAQ: the decision

Moor J ultimately concluded that, by reason of the transfer from H to W, 'the only possibility is that [the 2017 Assets] became matrimonial' and were thus matrimonialised. Many will have agreed with the learned judge and thought that the transfer *must* have transformed the character of the

property, at least in some way. Similarly, the placing of shares in Ardenside Angus in W's name also matrimonialised those shares. However, in both instances, whilst W was entitled to share in those assets as a result of their matrimonialisation, there was a departure from equality in H's favour (60:40) to reflect their non-matrimonial source.

The appeal

Both parties appealed. Each contended, for different reasons, that the 2017 Assets were non-matrimonial property. W argued that, upon transfer into her sole name, H's non-matrimonial property became her 'separate property';[2] that the source was irrelevant in a 'partnership marriage', and the court should respect the parties' autonomy to regulate their finances and how they chose to hold their assets. H argued that the 2017 Assets were, and remained, non-matrimonial. He sought to persuade the court that the source of the 2017 Assets and Ardenside (i.e. his 32 years of pre-marital endeavour) was the magnetic feature of the case and one which had not been given sufficient weight by Moor J in his distribution of the assets.

Both appeals, therefore, flowed from Moor J's first instance conclusion at [75] that, by virtue of the transfer, 'the only possibility is that [the 2017 Assets] became matrimonial property'. This was a proposition with which the Court of Appeal ultimately disagreed.

W's second ground of appeal concerned the court's treatment of Ardenside. Moor J could not have been clearer that Ardenside Station was not matrimonial. It was the product of pre-marital endeavour and that did not change during the marriage, despite W's attempts to persuade the judge that holidaying at that property during the marriage rendered it a matrimonial asset.

Standish therefore presented an opportunity to re-affirm the foundations on which the sharing principle has been built and, if it was necessary, the definition of matrimonial and non-matrimonial property. As Moylan LJ observed on appeal at [162], sharing applies to matrimonial property, but not non-matrimonial property. A party's entitlement is to share in the fruits of the marriage borne from common endeavour, not the fruits of personal pre-marital effort.

On the other hand, there remains confusion as to the difference between 'reflecting' a non-matrimonial source within a matrimonialised asset, and seeking to identify, with such particularity or generality as may be appropriate in the case, the non-matrimonial element and dividing the residual matrimonial property equally. It is argued that the latter is more intellectually rigorous, avoids generic or conventional departures from equality and should clearly be favoured. It would also promote certainty if it were to confirm matrimonial property should always shared equally, save for arguments relating to needs, compensation, special contribution or nuptial agreements. There is certainly an understanding that matrimonial (rather than matrimonial*ised*) property can be shared unequally, but as will be seen, the authority supporting that proposition in the context of assets other than the family home is less firm than one might think. Given the family home is 'in a category of its own' ([163]), this is significant.

Although Moylan LJ seems to have endorsed the latter approach, he explicitly preserved the former for reasons explored below.

Paragraphs [108]–[147] of the judgment traverse the development of appellate jurisprudence concerning matrimonial and non-matrimonial property from *White v White* [2000] UKHL 54, through *Miller v Miller; McFarlane v McFarlane* [2004] UKHL 24, *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246, *Granantino v Radmacher* [2010] UKSC 42, [2011] 1 AC 534, *Jones v Jones* [2011] EWCA Civ 41, [2012] Fam 1, *K v L (Non-Matrimonial Property: Special Contribution)* [2011] EWCA Civ 550, [2012] 1 WLR 306, *Gray v Work* [2017] EWCA Civ 270, [2018] Fam 35, *Hart v Hart* [2018] EWHC 548 (Fam), [2018] 2 FLR 506, and *XW v XH (Financial Remedy: Non-matrimonial Assets)* [2019] EWCA Civ 2262, [2020] 4 WLR 22.

The Court of Appeal added little, if anything, to the established understanding that matrimonial property is the financial product of the parties' common endeavour (*Miller*) and/or the fruits of the matrimonial partnership (*Charman*) and such property should, ordinarily, be shared equally.

Dismissing W's appeal

The Court of Appeal was critical of W's case. Moylan LJ described it as running 'counter to the principles established since *White*' and 'undermin[ing] the attainment of a fair outcome' ([151]). To give determinative weight to title would be, as Moor J said, 'both discriminatory and unfair', placing 'undue weight on legal and beneficial title' which may not 'reflect whether the wealth has been generated during the marriage' when 'such wealth will often be largely or significantly in the name of the "money-maker"' ([152]).

W's argument about autonomy and her portrayal of the transfer of the 2017 Assets as a binding agreement was 'without substantive merit' and would require a 'very significant' extension of the principles identified in *Radmacher* ([153]). It could not be said that a decision made *during the marriage* governing the parties' finances *while married*, even if made autonomously, could have been made with a 'full appreciation of its implications' such that it would regulate their finances *on divorce*.

Reinforcing *Sharp v Sharp* [2017] EWCA Civ 408 and agreeing with Moor J at first instance, the absence of a pre-nuptial agreement was irrelevant and did not imply a willingness to share ([156]).

With similar ease, Moylan LJ at [172]–[173] despatched the issue of Ardenside Station. Arguments about Ardenside Angus featured little in the appeal and the information about the financial history of the business was 'scant'. In that regard, the court observed that the outcome may have been generous to W but there was insufficient evidence to say that the decision was wrong. It was matrimonial, but Moor J found that 'much of [the value of the shares] may have generated during the marital partnership'. Moylan LJ concluded that 20% was non-matrimonial; the rest was shareable.

Outcome

Although the Court of Appeal agreed with much that Moor J decided, they disagreed that the 'only possibility' was that the 2017 Assets had become matrimonial property. This was because 'the conclusion was based, and solely based, on the fact that those assets were transferred by H into W's

name … making title the determinative factor when deciding how the wealth is to be characterised rather than the source' ([169]).

Moor J made various findings regarding the 2017 Assets. At [75] he said that 'at least *in significant part*, this is money that was generated before the marriage'; at [81], he said '*to a significant extent*, this money was pre-marital' and referred to 'the pre-marital origin of *most of this sum*'; at [82], he said that '*an element* of the sum of £80m is not pre-marital' because 'at least a part of this figure was generated during the parties' relationship'; at [83], that it was 'almost impossible to say what proportion of the £80m was earned' during the marriage; and, at [177], that all 'I can do is say that I find a part of the sum of £80m is money that was earned during marriage' (emphases in the original).

Those findings 'did not support the actual division of the 2017 Assets … namely … by awarding [W] £29m or 36% of their value' ([178]), nor did the division 'adhere to the approach set out in *Jones* and *Hart*, namely to award W such percentage "as makes fair allowance for [it] in part comprising or reflecting the product of non-marital endeavour".' The Court of Appeal held that the 'source of this wealth had not changed as a result of the transfer' and that, as a consequence, Moor J should have concluded 'at least 75% was non-marital' ([178]).

For those reasons, £20m of the £80m was added to the matrimonial pot totalling £50.48m, of which W was entitled to half.

Matrimonialisation: to exclude and share, or matrimonialise and reflect?

Matrimonialisation is the process by which non-matrimonial property acquires a matrimonial quality because of the way property has been used or treated. The consequence being that the matrimonialised property falls to be shared, but not necessarily equally. It represents a derogation from the principle that sharing applies to matrimonial property and not to non-matrimonial property. It must, therefore, be applied narrowly.

This concept is addressed between [160] and [166]. Those paragraphs are essential reading for practitioners. Despite W inviting the court to 'remove [matrimonialisation] from the lexicon of the law of financial remedies' ([71]) and H suggesting that 'the court might consider whether this concept merits being maintained at all' ([93]), it seems it is here to stay.

Central to the discussion on matrimonialisation are the common law techniques developed to assist judges to identify non-matrimonial property which has been mixed or mingled with matrimonial property: see *Jones v Jones* [2011] EWCA Civ 41 (historic value uprated for passive growth and springboard); *Robertson v Robertson* [2016] EWHC 613 (Fam) (half of a half); *FZ v SZ* [2010] EWHC 1630 (Fam), [2011] 1 FLR 64 (historic value only); and *Martin v Martin* [2018] EWCA Civ 2866 (straight line apportionment). These were described by Moor J in *ARQ v YAQ* as constituting a 'detailed assessment' compared to the 'broad-brush' approach approved in *Hart*.

Of note, in each of these cases, the matrimonial element once identified was divided equally, supporting the proposition this article advances: the sharing principle applies equally to all *matrimonial* assets; whereas *matrimonialised* assets should fall into a different category in which the non-matrimonial source may more generally be *reflected* by a departure from equality.

In support of her argument that once an asset becomes matrimonialised it *must* be shared equally (slightly different to that argued above), W submitted that that the cases relied upon by H, and by Moor J at first instance, purporting to demonstrate a departure from equality within the sharing principle are, in fact, 'simply means to assessing what is matrimonial and non-matrimonial' ([75]).

In *S v AG* [2011] EWHC 2637 (Fam), Mostyn J divided the matrimonial home unequally to reflect the non-matrimonial and unmatched contribution made by W. In so doing, the judge relied on the decision of Burton J in *S v S* [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496 who said:

> 'there is room for recognition of a substantial financial contribution, derived from pre-marriage sources, by a man who had previously worked successfully for 30 years, and not just in relation to a very short marriage such as in *Miller*, as can also be seen from the approval by Lord Mance, in para 171 of *Miller*, of the words of Mr Mostyn QC as a deputy High Court Judge in *GW v RW* [2003] 2 FLR 108 at para 51.'

Paragraph [51] of *GW v RW* [2003] EWHC 611 (Fam), [2003] 2 FLR 108 reads:

> 'H also brought to the marriage a developed career, existing high earnings and an established earning capacity. I cannot see why this should not be treated as much as a non-marital asset as the provision of hard cash. In argument I suggested that H here was in terms of his career "fledged" at the time of the marriage, rather than being the fledgling, which is so often the case. Mr Marks QC stated that his client was far more than fledged: he was fully airborne. I tend to agree, and in this aspect also I find that H made a contribution unmatched by any comparable contribution by W.'

Although *GW v RW* was subsequently overruled by the Court of Appeal in *Jones* for trying to capitalise an earning capacity, and *that* was the basis for a departure from equality, the fact remains that both Nicholas Mostyn QC and Burton J were seeking to give effect to an unmatched non-matrimonial contribution as justifying a departure from equality. The correct approach now, it is argued, would have been to identify, quantify and exclude the non-matrimonial property and share the rest equally, rather than seeking to depart from equality within the sharing principle to reflect a non-matrimonial contribution.

In *Vaughan v Vaughan* [2007] EWCA Civ 1085 at [49], Wilson LJ observed that 'the husband's prior ownership of the home carried somewhat greater significance than either the district or circuit judge appears to have ascribed to it' but a departure from equality was ultimately justified to achieve a clean break. Again, this is not evidence of the sharing principle being *applied* unequally. Had fairness enabled Wilson LJ to depart from equality to reflect the non-matrimonial source, although pre-dating *K v L*, this would have been appropriate because the family home had been matrimonialised (*K v L* at [18(c)]).

In *FB v PS* [2015] EWHC 2797 (Fam) the husband owned the family home prior to the marriage and had, in fact, grown up in the property. Again, a departure from equality was justified to reflect the non-marital contribution to a

now matrimonialised family home and does not support the proposition that purely matrimonial property can be shared unequally.

It is important to clarify the difference between: (1) 'reflecting' the non-matrimonial element of a matrimonialised asset (often) with a modest but conventional departure from equality; and (2) attempting 'with the degree of particularity or generality appropriate in the case' to identify and quantify the non-matrimonial element, applying either a specific methodology or by adopting a broad brush, and sharing the residue equally. It is argued that these are two distinct circumstances: the former is, or should be, the product of matrimonialisation; the latter is simply the application of the sharing principle to mingled assets. Mingling does not automatically result in matrimonialisation. The argument is more nuanced.

A 'reflection' of a non-marital source lacks intellectual rigor: a criticism made on H's behalf of Moor J's 60:40 split at first instance. It should, it is argued, be invoked only where it would be unfair to give full reflection to the non-matrimonial source of an asset. One example would be the matrimonial home, where to apply one of the 'detailed assessment' techniques identified above would lead to unfairness because the property has become 'part of the economic life of [the] marriage … utilised, converted, sustained and enjoyed during the contribution period'.[3] Moylan LJ clearly felt that he had the evidence (in the form of findings made by Moor J) to identify, quantify and exclude the non-matrimonial assets, without having to resort to the concept of matrimonialisation to achieve a fair outcome.

The character of a property truly transforms once it becomes the home for a married family; its status is unique and the role it plays in the family economy, central. In all other cases involving the mingling of matrimonial and non-matrimonial assets, the court should seek to identify the non-matrimonial property with 'with the degree of particularity or generality appropriate in the case'[4] – there may be a sharp dividing line; there may be a complicated continuum[5] – then share the matrimonial property equally. The effect of which would be an award to one party of a lesser percentage than 50% (satisfying *Jones*), and will reflect the non-matrimonial source, but would be the product of a more intellectually rigorous, and therefore fair, assessment of the facts of the given case. It is advanced that matrimonialisation should only be invoked where to give full weight to the source of an asset would result in an unfair outcome. Those circumstances are set out at [18] of *K v L*, reformulated at [163] of *Standish* and should be applied narrowly.

Arguably, this issue has not been articulated by the Court of Appeal with sufficient clarity. It would be easy to interpret *Standish* as a decision about, or promoting, matrimonialisation; Moylan LJ retains the concept, but chose not to apply it. It may be no more than a stay of execution, only time will tell. His Lordship stated at [162]:

> '[I]t would be wrong to state, as a matter of principle, property which has a non-marital source can never be subject to the sharing principle. There may well be situations when, as referred to above, fairness justifies this. However because, as Mr Bishop submitted, it is a derogation from the principle that sharing applies to matrimonial property and does not apply to non-matrimonial property, it should be applied narrowly. This is so that it is not used by parties in a way which would undermine the clarity of the sharing principle, namely that it is the sharing of property generated by the parties' endeavours during the marriage.'

There is no doubt that the scope for invoking the concept has been narrowed significantly.

Reformulation of *K v L*

Moylan LJ reformulated [18] of *K v L* to reflect subsequent developments in the jurisprudence. His Lordship set out three scenarios:

> '(a) The percentage of the parties' assets (or of an asset), which were or which might be said to comprise or reflect the product of non-marital endeavour, is not sufficiently significant to justify an evidential investigation and/or anything other than equal division of the wealth;
>
> (b) The extent to which and the manner in which non-matrimonial property has been mixed with matrimonial property mean that, in fairness, it should be included within the sharing principle; and
>
> (c) Non-marital property has been used in the purchase of the former matrimonial home, an asset which typically stands in a category of its own.'

Although well-established, (a) is most aptly rooted in the facts of *White* where Mr White's father made the parties an £11,000 loan to purchase the family farm. Thirty-two years later, when the matter came before Holman J in 1996, the farm was worth £3.5m. Applying Moylan LJ's reformulation of *K v L* [18(a)], although the non-marital contribution had been dwarfed by the subsequent marital acquest, when uprated for RPI the £11,000 would have been worth £123,000 at the time of the trial and the 'evidential investigation' would have been minimal. It is unlikely that the importance of the source of those funds would be given any weight, even post-*Standish*, but if there was *no* matrimonialisation in *Standish* it is foreseeable that parties will seek to place determinative weight on the importance of the source of an asset.

Of note in (b) is that property which does not fall into category (a), and is not the family home ((c)), cannot be matrimonialised absent mingling. It does not account for broader circumstances where the court may infer an acceptance that the property has become matrimonial because of how the parties used, treated and dealt with the property. That is despite, at [99], Moylan LJ suggesting they are two separate issues:

> '[t]he 2017 Assets had not been appreciable "mixed" with matrimonial property *and* there was no evidence to suggest that the husband had accepted that they should be treated as matrimonial property' (emphasis added)

Although the trio of scenarios in *K v L* feels exhaustive, they were never intended to be so. It would be wrong to circumscribe the circumstances in which matrimonialisation may occur. The list provides a useful guide and may indicate the cases in which the argument is more likely meritorious, but it cannot be exhaustive. There will be circumstances where

an acceptance of matrimonialisation may be inferred from the parties' conduct, absent mingling, as was envisaged by Roberts J in *WX v HX* [2021] EWHC 241 (Fam) at [117]:

> 'There are other more complex situations which fall into sub-categories (a) and (b) above where the court will need to analyse carefully whether the evidence will support a finding that property which was originally non-matrimonial has been treated, or dealt with, in such a way as to bring it within a sharing claim made by the other spouse. *If the evidence leads the court to conclude that one of the parties has indeed through words, actions or deeds manifested an acceptance that it should be treated as such, it must then go on to determine the extent to which that property falls to be shared as between them*.' (emphasis added)

As a result of this decision, litigants will be keen to emphasise the non-matrimonial source of their property; to proclaim that it is unconnected to common endeavour and remains the fruit of work undertaken before they ever met their spouse. In some cases, those arguments will find more favour than they would have done previously. The preservation of matrimonialisation, despite not being applied by Moylan LJ, is to keep the court equipped with the tools necessary to effect a fair outcome where a slavish following and unwavering recognition of the non-marital source would be otherwise. However, with flexibility comes uncertainty. The decision could be subject to criticism by those advocating for more certainty in this area of law. The issue with the decision in *Standish* is that this was not a short marriage (it was found to be 15 years and 9 months) and the transfer of the 2017 Assets was a significant event but failed in any way to warrant *some* matrimonialisation.

Departing thoughts

It is likely most will consider that the Court of Appeal's decision to be thorough, detailed, but nonetheless foreseeable. It is unusual to see such trite and established law repeated in decision of such authority. 'Why … should a spouse be worse off simply by virtue of being married?' was a point made on W's behalf. A submission which, if made on behalf of a husband trying to protect wealth held in his sole name, would, quite rightly, be despatched out of hand. It would be discriminatory, set a dangerous precedent and leave (mostly) wives vulnerable and disadvantaged. It is difficult to see how that argument was ever going to find favour with the court.

W's case ran contrary to post-*White* jurisprudence. It was novel, but totally without authority. For that reason, *Standish* reaffirms principles already established. It raises the bar for successfully establishing that the character of an asset has changed, or at least emphasises the evidential burden on parties taking that course, but otherwise changes little.

This decision could not be clearer as to the broad discretion afforded to financial remedy judges in pursuit of fairness. But has the pendulum swung too far? Is the family court paternalistic? Is the purpose of s 25 to rescue parties from their own, autonomous but 'monumental folly'[6] in circumstances where the parties' needs would have been met comfortably? It is certainly arguable that the transfer should have matrimonialised the asset, even if only to a modest extent.

Had the intention been for W to hold the assets but apply them for the benefit of the family, it may be that the outcome would have been different. But if fairness is the ultimate aim, it could be argued that such a strict interpretation of matrimonial and non-matrimonial property is unfair, especially when the very endorsement of matrimonialisation as a concept demonstrates an ability to depart from judge-made principles in the pursuit of a fair outcome. Some may feel that for the transfer to have had no effect on the outcome of the case is also unfair, paternalistic and unduly generous to H. The outcome being that H has been able to retrieve an asset it was found, and he accepted, would never return to him.

It may be that this is an issue with which the Supreme Court, unfurnished with a family practitioner, will have to grapple. As the law stands, the decision in *Standish* is sound and helpful. It reaffirms the importance of the source of the generation of an asset when assessing a party's entitlement. Parties *must* be entitled to the fruits of their partnership, without discrimination, but marriage does not, and should not, entitle a spouse to share in the fruits of endeavours far removed from the partnership. These debates are relevant only to cases in which there is a surplus to needs. If needs are met, non-matrimonial endeavour must be respected and the wealth arising therefrom protected.

Notes

1 *Standish v Standish* [2024] EWCA Civ 567.
2 Defined by Richard Todd KC on behalf of W as property which is 'legally and beneficially owned by one party' and a term he used synonymously with 'non-marital property'; property which has been 'kept out of the parties' common endeavour and is not included in the partnership' ([72]). But at times Mr Todd KC 'appeared to link [his definition of separate property] with Lady Hale's observations in *Miller* [regarding unilateral assets]' ([159]).
3 *S v AG* [2011] EWHC 2637 (Fam) at [8].
4 Per Lord Nicholls in *Miller v Miller; McFarlane v McFarlane* [2004] UKHL 24.
5 *Hart v Hart* [2018] EWHC 548 (Fam), [2018] 2 FLR 506 at [90].
6 *ARQ v YAQ* [2022] EWFC 128 at [61].

Your House, My Mortgage: The Decision in *Re A and B*

Michael Horton KC

Coram Chambers

Can the Family Court order a party to take out and pay a mortgage in order to meet the other party's housing needs? This is my framing of the question raised by the appeal in *Re A and B (Schedule 1: Arbitral Award: Appeal)* [2024] EWHC 778 (Fam). Cobb J answered 'yes' to the question. HHJ Evans-Gordon, from whose decision the appeal had been brought, had said 'no' (see *LT v ZU* [2023] EWFC 179). HHJ Hess, in *SP v QR* [2024] EWFC 57 (B), had agreed with her. Of course, the decisions of the circuit judge(s) cannot be cited as authority, whereas that of Cobb J can.

This article argues that the decision of Cobb J was wrong, and that the circuit judges were right. In particular, I argue that the reasoning is based on a number of misconceptions, and misplaced reliance on the content of the Family Court 'standard orders'. It also appears to be a case that took a number of wrong turns – the most important of which was to decide an issue of principle which on the facts of the case appears to be entirely academic, as the father was unemployed and very likely had little or no mortgage capacity which he could be ordered to deploy, even if the answer to the question is indeed 'yes'.

The facts

The issue arose in Sch 1 proceedings. The parties submitted this application to arbitration. There was a shared care arrangement – the children divided their time between the two households equally, so that the Child Maintenance Service (CMS) made a 'nil assessment' (see [13] – pursuant to reg 50 Child Maintenance Calculation Regulations 2012 (SI 2012/2677) – though query in such a case there is simply no assessment at all). F owned two properties in London which were heavily mortgaged. Following the separation, M lived in one, F lived in the other. M's application for internal relocation to Kent was refused – partly based on F's confidence at that time that M would be able to rehouse in London near the current home. In those proceedings he put forward a proposed budget for M's London housing needs, and his leading counsel stated that F 'provides his assurance that the housing fund is protected from any financial liabilities he holds.'

In the arbitration, the parties obtained single joint expert evidence of mortgage capacities and made open offers. F's open offer was that he would continue to pay the mortgage on the home in which M lived, that M could move to a new property, and that this new property would be bought with a new mortgage that he would take out and pay. We are not told whether F's offer was a 'take it or leave it' style offer. F could have said – 'I am not obliged to do this and no court or arbitrator could force me to do it. I am willing to do this in order to reach a practical solution to house the children when they are with their mother. But if my offer is not accepted, I reserve the right to withdraw my offer to structure the settlement in this way.' We must assume he did not do so. Before the arbitrator, it was agreed that:

(i) M and the children would be permitted to remain at their current home for the time being;
(ii) M would be able to move to a replacement property;
(iii) M would allow F to extend the mortgage on their current home (in his name but presumably the lender would want M, as an adult occupier, to consent to the postponement of any rights, etc she might have behind their priority as a condition of any new lending) to allow him to pay a pressing tax bill; and
(iv) F would pay the mortgage on M's current and replacement home.

Indeed, in his open offer, F sought a provision that M would continue to afford access to mortgage valuers so that he would be able to obtain fresh fixed rate mortgages. M's open offer stated that she would also be willing to contribute her own mortgage capacity if she could afford to do so. It appears that the actual net capital resources were only £272,000.

Standing back, the only way it would seem that this was going to work was that, once M's current home could be sold, the new home would be bought in joint names, and a joint mortgage taken out based on their combined incomes and mortgage capacity. It seems that the dispute before the arbitrator was how much M should have as a housing fund for a replacement property, and how this was to be

balanced against F's housing needs and other capital and income needs. By the end of the hearing, the parties had agreed:

(i) the current property would be sold;
(ii) the *gross* value of that property would be placed towards the new property.

That is a somewhat unusual form of agreement. Of course, F did not own the gross value of the current home. On sale, costs of sale and possibly some capital gains tax would need to be paid, and of course the mortgage would need to be redeemed. The only way I can understand this 'agreement' is that F agreed that M's need for a housing fund was equal to the gross sale price of her current home, and that he was willing to take out a mortgage, on his own or jointly with M, for at least the amount required for her to top up the net sale proceeds to the amount of the gross sale price.

The arbitral award and F's challenge

The arbitrator decided:

(i) the housing needs of M and the children were £1.1m to £1.13m inclusive of costs of purchase, removal and redecoration;
(ii) the parties should obtain a joint mortgage of £870,000 to achieve this;
(iii) the property would be bought in their joint names;
(iv) the choice of property and of mortgage product was to be agreed;
(v) F would pay the mortgage instalments.

The table at [115] of the judgment of Cobb J showed that the arbitrator required F to contribute £240,000 to the 'deposit' part of the purchase of M's new home (as opposed to £227,795 which F had proposed), and required a joint mortgage of £686,000 (as opposed to the £679,000 F had proposed).

F challenged the arbitral award. His first ground was that the arbitrator had no power to make an award requiring him to borrow money by way of a mortgage on a joint purchase with the mother. There was no power to require him to borrow money in order to satisfy the award in excess of that which he conceded. This ground was referred to in the judgment of HHJ Evans-Gordon in slightly different forms in different places, although the differences would not appear to matter. There were 11 other grounds of challenge which were more akin to grounds of appeal against factual determinations by the arbitrator. A final challenge was that F's financial circumstances had worsened and the award was now unfair.

One response to F's challenge would have been to say: what was the point of the arbitration if you were not going to accept the outcome? If you were not willing to take part in a process that could lead to you borrowing more than your offer, what was the point of the arbitration? In that case, the outcome would simply be to set aside the arbitration and order F to pay the entire costs of the arbitration process.

The circuit judge's decision

HHJ Evans-Gordon held that the power to order a settlement of property under Sch 1 – as with the power to order a property adjustment order under s 24 Matrimonial Causes Act 1973 (1973 Act) – extended only to property to which either parent was entitled in possession or reversion. Where the new home was purchased on mortgage, the settlement could not be of the entire value of the property, but only the equity held by the relevant parent. The court could not order a parent to borrow money or provide property they do not have for the purposes of a settlement. The subject of a settlement of property order must exist at the time the order is made, and the order cannot extend to property to which the parent might become entitled in the future as a result of a loan. The court could not order the parent to borrow money – whether anyone would lend was outside their control.

She therefore held that the *Haley* challenge to the arbitral award was made good and the whole award therefore fell away. She also held that F's challenges based on the change of circumstances (including the rise in mortgage interest rates) was made out.

M's appeal to the High Court

M's notice of appeal sought an order giving effect to the arbitral award, subject to only minor or updated undertakings. In particular, she argued that the judge had been wrong to hold there was no power to settle property for the benefit of a child which required mortgage borrowing for its funding, and that the judge has been wrong to conclude that a foreseeable change of circumstances was a ground for not making an order to give effect to the arbitral award. M referred to para 58(h)(iii) of the Family Court Standard Orders, which dealt with the ability for a replacement property to be purchased where there was a settlement of property. She also argued that, unless there was power to require a respondent to fund a settlement of property by way of mortgage, the Sch 1 jurisdiction would be unfairly discriminating against mothers where the father was capital poor but income rich.

The decision of Cobb J

Cobb J:

(i) recited the relevant statutory provisions, including the fact that the court is obliged (under s 25(2)(a) 1973 Act and Sch 1, para 4(1)(a)) to have regard to the *resources* of both parties;
(ii) noted that the terms 'property' and 'settlement' have always been given a very wide meaning in family law cases (referring, e.g. to *Brooks v Brooks* [1996] AC 375 at 391);
(iii) cited both Lord Sumption and Lady Hale in *Prest v Petrodel* [2013] UKSC 34, [2013] AC 415, both of whom stated that the subject of a property adjustment order under s 24 1973 Act was something over which the party had a proprietary right, recognised by the law of property: the court had no power to order a spouse to transfer property to which he was not in law entitled.

The building blocks of his decision were (my numbering):

(1) funds that a party can borrow, including borrowing capacity by way of mortgage, were plainly a resource

within s 25(2)(a) and para 4(1)(a). The judge had been wrong to say that resources were limited to assets to which the party was entitled [93];

(2) relying on s 54 Family Law Act 1996 (1996 Act), he considered 'beneficial entitlement to property extends beyond the equity and, most pertinently here, includes occupation of the whole' [95];

(3) a settlement of property under the 1973 Act, such as a *Mesher* order, can include property which is subject to mortgage, and so can such an order under Sch 1 [93];

(4) following Mostyn J's 'decision' in *CH v WH* [2017] EWHC 2379 (Fam), [2017] 4 WLR 178, the Family Court has the power to order the release of parties from a mortgage and to indemnify the other against liability. It can also order a party to pay a mortgage [98];

(5) because the court's powers were not 'confined to the four corners of the statute' [100], the court had the power to order a sale of property under Sch 1, and to direct that a new property be purchased on trust, despite the lack of an express provision in Sch 1 conferring such powers [102];

(6) building on the decision of Cohen J in *MT v OT (Schedule 1 Order)* [2018] EWHC 868 (Fam), [2019] 1 FLR 93, it was possible for a settlement to include provision for a replacement property without offending the principle in *Phillips v Peace* that there could only be one settlement of property order [102];

(7) provision of housing under a Sch 1 settlement can include provision raised by way of mortgage, as happened in *DE v AB* [2011] EWHC 3792 (Fam), [2012] 2 FLR 1396. In that case Baron J ordered the father to settle the sum of £250,000 towards the mother and children's housing needs, and noted that the mother could, if she wished, make a contribution to those housing needs by way of mortgage not exceeding £250,000 [104];

(8) in proceedings of this kind, a parent can be compelled into a joint property purchase, into an insurance contract, and to discharge or indemnify a debt for which they are not contractually responsible. These are essential ancillary powers for carrying out property adjustment into effect, even though none are expressly set out within the statute [105].

He summarised these and drew the threads together at [122]. Cobb J allowed the appeal, but did not simply make an order to give effect to the award. He considered the arbitrator had had the power to make an award in the terms he had, and the court had the power to make an order to give effect to that award. However, he considered that where there was a significant change in circumstances between the date of the award and the time the court is asked to make an order to give effect to the award, the court could decline to make the award into an order, so long as the change was something out of the ordinary [117]. The case would be remitted for a judge to consider whether F's circumstances had indeed changed and that the change was out of the ordinary [127].

Analysis

It would be surprising if the court's power to settle property under Sch 1 was wider than the court's powers of property adjustment under the 1973 Act. Until this decision I had not seen a single case in nearly 30 years of practice at the Bar where a respondent was ordered to take out fresh mortgage borrowing as part of a property adjustment or settlement order. I have settled several cases on that basis, but only where the respondent was willing to commit to take out a fresh mortgage (and usually by way of undertaking to use his or her best endeavours to obtain mortgage finance).

There can be no quibble with items (1), (3) and (7) of the reasoning above. As to (1), the court must take resources into account, and resources can of course include mortgage capacity. Resources also include assets held in trust or by a company. The fact that the court must have regard to them under the checklist does not mean that the court has the power to make orders acting directly on them – for example, properties held in companies which are both legally and beneficially owned by a company cannot be the subject of a property adjustment order. The court might well make a lump sum order on the basis that the respondent can borrow money to raise the funds needed to pay the lump sum, especially where the respondent wishes to retain a capital asset which might otherwise be sold. But even here the court cannot order the respondent to borrow money to fund the lump sum: it simply makes an order based on the ability to borrow and includes a default provision if he does not or cannot borrow.

In addition, *Mesher* orders and other orders involving deferred interests are invariably made where there is insufficient capital for both parties to house mortgage free. It can be no surprise, therefore, that a *Mesher* order can be made in respect of a property subject to mortgage. However, the usual form of such settlement is where:

(i) B transfers his legal title to A.

(ii) A does her best to get B off the mortgage and indemnifies him in relation to the mortgage.

(iii) The property is held with B having a deferred interest either by holding as tenants in common with B's interest not realisable until the trigger events, or by way of B having a deferred charge.

(iv) A will have the ability to move house and take all the *net* sale proceeds with her to her new home (subject to B's deferred interest), but at that point, unless B specifically agrees (and they very rarely do so), A will have to get a mortgage on her own.

The fact that the property being settled is subject to mortgage does not mean that the court can order a person to take out a fresh mortgage either at the time of the settlement or later on.

As for (7) and *DE v AB*, in Sch 1 cases involving modest means, it is often the case that the applicant cannot be housed outright. The housing needs of the applicant and children will often be met from two sources: the settlement of the respondent's capital, and the applicant herself raising or sustaining a mortgage. This can be by her retaining use of a jointly owned property, having the equity settled on her and then paying the existing mortgage. Alternatively, the respondent can provide cash which will be invested in a property to be purchased in the applicant's name, with the applicant topping up as required by way of her own mortgage. The mere fact that the applicant can contribute to her own housing needs by way of paying a mortgage does not mean that the court can order the respondent to pay the

mortgage or take out a new one. Of course, if the court had jurisdiction to make a periodical payments order for the benefit of the children (i.e. it is not just a CMS case), the court could make a maintenance order for the respondent to contribute to those mortgage costs. Conceivably, the court could make a lump sum order payable by instalments to cover the mortgage payments (as Wilson J did in *R v R (Lump Sum Repayments)* [2003] EWHC 3197 (Fam), [2004] 1 FLR 928). But these are orders for payments, not orders that a respondent obtain fresh mortgage finance.

Turning to the more contentious aspects of the reasoning. First, building block (2) above seems irrelevant. Section 54 1996 Act is a provision which says that, when determining whether a person has a right to occupy a property for the purposes of Part IV of the Act (and thus, for instance, under which section a person can apply for an occupation order), you ignore any right to possession of a mortgagee. So, if A owns a house subject to a mortgage, one of the old-fashioned forms of mortgage is the grant of a long lease under s 85 Law of Property Act 1925 – this might affect A's right to occupy by virtue of his estate for the purposes of s 30 1996 Act. If A has defaulted on the loan and the mortgagee has obtained a possession order, again this would affect A's right to occupy by virtue of the legal estate. All s 54 1996 Act does is to tell the court to ignore any right to possession that a mortgagee has in deciding whether or not A is an entitled applicant for the purposes of ss 30 and 33. It seems a bit of a stretch to use this provision to hold that the court has the power to order a party to take out a mortgage under s 24 1973 Act or Sch 1, para 1(2)(d) or (e).

CH v WH

As for *CH v WH* and the Family Court Standard Orders, *CH v WH* is not a decision by Mostyn J, so much as a press release. There was no argument from any counsel. It is an attempt to create a judicial precedent for the views expressed by the Financial Remedies Working Group. The fear was that, with the removal of legal aid from financial remedy work, there would be whole swathes of litigants in person who would not be willing to give undertakings to indemnify the transferor of the jointly owned family home or to use their best endeavours to procure the release of the transferor from the mortgage. So a view was taken that the court did in fact have the power to make these orders.

I largely disagree. The court has no power under s 23 1973 Act or Sch 1, para 1(2)(a), (b) or (c) to order payments to be made to a third party as opposed to the applicant. Schedule 1 only allows payments to be ordered to the applicant for the benefit of the child, or to the child himself. Section 23(1)(a) and (c) allows the court to order periodical payments or lump sums to the other party to the marriage. This is in contrast to periodical payments for the benefit of a child under s 23(1)(d) which can be made payable to 'such person as may be specified in the order' and which can therefore include school fees, etc being paid direct to the school.

It was said in *CH v WH* that the power to make payment to B plainly includes the power to make payments on behalf of B. The powers to order payments in respect of mortgages under s 40 1996 Act had to be spelt out because the court had no power to order direct payment in those proceedings.

This reasoning is, with respect, suspect. First, the terms of the statute are clear, and the contrast between s 23(1)(a) and (d) is instructive. Secondly, the innovation in the 1996 Act was to take the power that had been present in matrimonial cases, under the Matrimonial Homes Act 1983, to order payment of outgoings, and extend it to all cases where an occupation order was made where at least one party was 'entitled', i.e. one made under s 33, s 36 or s 37. No one had used the power under the 1983 Act for two reasons – one, if the parties were married, an order could be made for maintenance pending suit in the divorce suit in any event, and two, as was predicted at the time of the 1996 Act and as it came to pass, the orders were likely to be unenforceable. An order for A to pay money to B creates a judgment debt. It is enforceable as such. If it is within the definition in Sch 8 Administration of Justice Act 1970 (1970 Act), it can also be enforced by way of judgment summons. But the orders under s 40 do not create a judgment debt – it is an obligation not to pay the other party but a third party. Nor was Sch 8 1970 Act amended to include orders under s 40 1996 Act. Accordingly, the Court of Appeal confirmed in *Ngwobe v Ngwobe* [2000] 2 FLR 744 that most orders under s 40 1996 Act are unenforceable. Thirdly, there is the analogy of *Burton v Burton* [1986] 2 FLR 419 – the court in making an order for sale has no power to direct payments to third parties out of the net proceeds of sale.

The apparent power to grant an indemnity is said to be derived from the power of the Court of Chancery to order or decree an indemnity, being the relief initially ordered in *Salomon v A Salomon and Co Ltd* [1897] AC 22. In fact, there is no free-standing power to order an indemnity in any court. The court ordered an indemnity in *Salomon* because the company's liquidator expressly pleaded that the company was the mere agent of Mr Salomon, *and as such he was obliged to indemnify the company*. The relation of principal and agent raises by implication a contract on the part of the principal to reimburse the agent in respect of all expenses, and to indemnify the agent against all liabilities, incurred in the reasonable performance of the agency. The judgment against Mr Salomon for nearly £8,000 entered by the trial judge was set aside because the House of Lords held that the company was not the mere alias or agent of Mr Salomon. *Salomon* therefore does not help anyone decide what the powers of the Family Court might be. In fact:

(a) an order for an indemnity is in effect a shorthand for a declaration that A is obliged to indemnify B and judgment against A in the amount of the sum covered by the indemnity;
(b) such an order for an indemnity can only arise where the relationship between the parties is such that, under the general law, the obligation to indemnify arises;
(c) accordingly, there is no general power for the High Court or any other court to order one party to proceedings to indemnify the other.

Before we leave indemnities, it is permissible for the Family Court to order an indemnity in two distinct ways:

(i) where A and B jointly own a property and B is ordered

to transfer his beneficial interest in the property to A, but remains on the title because the mortgagee will not allow B to be released. In those circumstances A and B are now trustees and hold on trust for A. A, as the beneficiary, is obliged to indemnify the trustee for any liability the trustee incurs in connection with his role as a trustee. Because under the general law the obligation to indemnify arises, the Family Court has the power to order an indemnity in this set of circumstances;

(ii) an order can be made which has the effect of an indemnity. If A is to indemnify B in relation to any matter, the Family Court could make an order that provided that A must pay to B the amounts if any which B is obliged to pay in respect of the matter to any third party forthwith on demand by B to be reimbursed. There is no inherent difficulty with a contingent lump sum, nor an unliquidated lump sum where the amount to be paid depends on future events. However, in a matrimonial case, the court can only make a lump sum order on one occasion (see *Coleman v Coleman* [1973] Fam 10). Accordingly, if a lump sum order has already been made, or claims for lump sum orders have been dismissed, no 'indemnity' lump sum order can be made. This is not a difficulty in Sch 1 cases because the court can make a lump sum order under para 1(2)(c) on more than one occasion: see para 1(5)(a).

The reference to being able to refer the matter to the conveyancing counsel of the court under s 30 1973 Act or Sch 1, para 13 does not appear to take matters further. The content of the instrument to be executed by the parties is determined by what the court can lawfully order. The mere fact that parties might agree to include provision in the instrument where they have agreed the terms of a consent order (including undertakings) does not enlarge the court's powers.

As for orders to procure release from a debt, it is trite law that the Family Court has the power to transfer property, including the right to sue for a debt, but it cannot transfer responsibility for a debt. The practice had always been to offer an undertaking to use reasonable endeavours or best endeavours to procure the other party's release from the mortgage. This was effected by way of undertaking precisely because there was no power for the court to order the transfer of the obligation to pay the debt.

Standard Orders

The next element of reasoning is that the court must be able to include this provision in the order, because the provision is contained in the Family Court Standard Orders. The Standard Orders are a helpful precedent, but they no more define the court's powers or state the law than does a Practice Direction. The court can declare a Practice Direction which incorrectly states the law to be ultra vires – see *S v S* [2015] EWHC 1005 (Fam), [2015] 1 WLR 4592, where Munby P struck down FPR PD 30A, para 14.1 (which at that time stated that the only way to challenge a consent order was by appeal).

The Standard Orders contain provisions for:

(a) order 2.1: para 71 – order to resign as director/company secretary;
(b) order 2.1: para 64 – order to procure release from mortgage;
(c) order 2.1: para 65 – order to pay outgoings on property.

None of these have any legal basis and are based on nothing more than wishful thinking. Anyone who has had the misfortune of appearing in front of me when I sit as a DDJ will know that I do not accept consent orders with these terms included as orders and not as undertakings. When we draft consent orders, we take on the role of transactional lawyers. Why would any sensible transactional lawyer, needing to include a particular provision, chose to reject the provision in a way that everyone knows will work, and decide instead to include it in a way which is open to doubt?

There are other parts of the Standard Orders, including some referred to by Cobb J, which are less clear cut:

(i) order 2.2: para 57(c) – order directing either party to be responsible for the mortgage on a settled property;
(ii) order 2.2: para 57(e) – order directing either party to be responsible for insuring the property;
(iii) order 2.2: para 57(g)(iii) – on the applicant moving home and a replacement property being purchased within the settlement, the trustees shall have full power as if they were beneficial owners thereof to execute such mortgage deed as may be necessary to enable the purchase to be completed.

As for (i) and (ii), if property is settled for A's use, the court could certainly provide that A pay the mortgage as a condition of the settlement, and indemnify B if he remains liable on the mortgage and is therefore a trustee (see above). However, in the light of the reasoning above, this is not a solid basis for saying that B can be ordered to pay the mortgage. In relation to insurance, if the respondent B is an owner or trustee of the property, one of his obligations as trustee will be to insure the property for the benefit of both A and himself – as capital will in due course revert to him. I can see the argument that A in occupation should have to pay the insurance and thereby indemnify her trustee, but it is less clear cut how B could be ordered to insure the property. It might be said that, unlike having a mortgage, insurance is such a necessary part of being a property owner that it is inherent in the court's powers of settling property that someone in the position of owner can be required to insure it.

As for (iii), this provision allows the trustees on purchase of the replacement property to take out a mortgage to complete the purchase. It does not require them to do so. In so far as the template appears to suggest that a respondent can be ordered to take out a fresh mortgage, I say this is wrong, and the inclusion of the provision in the template cannot change the court's statutory powers.

Interestingly, whilst the court has the power to order security in respect of a lump sum payable by instalments, and can order secured periodical payments, it is generally accepted that the court cannot order the payer to take out a life assurance policy to protect the future stream of maintenance payments. The Standard Orders include life assurance as undertakings. Yet, if the decision in *Re A and B* is

correct, might it be argued that a respondent can be ordered to make this kind of provision against his or her will? What are the limits of the powers of 'the essential ancillary powers for carrying property adjustment into effect' which are not contained in the statute?

One or two property settlement orders?

One of the arguments in *Re A and B* was whether a settlement which required settlement of existing capital and then the provision of funding from a mortgage amounted to an impermissible 'second' settlement. It has been settled law for some time that Sch 1 allows a settlement of property order to be made on only one occasion, which cannot be subsequently varied: *Phillips v Peace* [2004] EWHC 3180 (Fam), [2005] 2 FLR 1212. An applicant cannot supplement her housing needs after the existing settlement has been made by asking for another bite at the housing cherry. Cohen J rode into this debate in *MT v OT* in 2018 by holding that it was possible to make an order allowing the applicant mother to move house some 10 years after a property settlement order had been made. That decision is difficult to follow – if at the time a property settlement order is made, it includes provision for the applicant to move and for the settlement to move to another property, there is no further settlement or variation of the existing settlement. But if the original order did not contain that provision, it is difficult to see how a later order allowing for deferral of the respondent's interest beyond sale is not an impermissible further property settlement order or variation of the existing settlement. Ultimately, the two settlements argument did not feature to any great extent in the judgment – the issue was the extent of the court's powers in making one settlement of property order, not how many settlement orders were being made.

Practical issues

In *Re A and B*, the arbitrator's award included provision that £870,000 be raised by way of a joint mortgage, with both parties to provide all documents required by the mortgagee promptly, and to execute all documents required to give effect to the mortgage application within 48 hours of being requested to do so. The mortgage product was to be chosen by agreement of the parties. F was to pay the mortgage either until sale or until he was bought out.

An IFLA arbitrator has the same powers as the Family Court, so it is safe to assume, on the reasoning of Cobb J, that the court had power to make orders in these terms. The practical issues include:

(i) Who selects the broker? Does the court nominate one if they cannot agree?
(ii) Does the mortgage application only get made once the parties have disclosed their financial information to the broker?
(iii) What if one party mistakenly or deliberately gives incorrect information such that the lender is not willing to offer the mortgage as ordered by the judge?
(iv) What if the lender will not offer that level of loan even if everyone does everything they should?
(v) If one party will not sign the loan application form, can the court make an order that someone else sign the application in place of that party? How would that work in the age of docusign and other electronic methods of signature? Would the lender accept someone else's signature on behalf of the recalcitrant party?
(vi) Would the lender be willing to lend to someone who does not want to borrow the money?

Conclusion

Generations of family lawyers have understood that the court cannot directly order a person to take out a mortgage or obtain finance as part of the court's property adjustment powers. This decision would overturn this conventional wisdom. We were told by Lord Brandon in *Jenkins v Livesey* [1985] AC 424 at 444F–H that the terms of the order must come clearly within the court's powers under ss 23 and 24 1973 Act. Directing one party to be responsible for mortgages and loans was 'not within those powers'. The proper way to do it was by way of undertakings.

This is still good law, and this is what makes this decision wrong. Indeed, much of the building blocks in the judge's reasoning are highly questionable. The main reason why Sch 1 is underused in low value cases is because the Child Support Act 1991 deprives the court of the ability to make periodic provision. It would be jolly useful if the court could order a party to be relieved of debt or order a party to obtain a mortgage for the benefit of the other. But the court's powers are clearly set out in the statute. The creeping extension of these powers, however well-intentioned, is simply wrong. This is not a sterile or technical objection. It goes to the heart of what we do as financial remedy practitioners. The statutes have given the courts specific powers. In contested cases, the court must use those powers. Where the parties agree, they can fashion settlements which are more flexible, and which go beyond the court's powers. If it is felt that the court's powers should be extended, it is preferable for the Law Commission/Parliament to act. The danger with an incrementalist extension is that at some point a higher court may come along and say that none of these orders are properly made and so cannot be enforced. Unpicking that situation would likely be even worse than the predicament of the parties in this case.

Child Maintenance by the Back Door? Mortgages and Schedule 1 Children Act 1989

Dominic Brazil
FOURTEEN

Anu Lal
FOURTEEN

Mortgages and Sch 1 Children Act 1989 applications

Following the successful appeal of the arbitral award in *LT v ZU* [2023] EWFC 179, the decision has been reversed in the further appeal to the High Court ([2024] EWHC 778 (Fam)).

LT v ZU is significant for two reasons as it provides authority to permit a court to require a party to: (1) take out a mortgaged loan to provide housing pursuant to Sch 1; and (2) pay the monthly mortgage instalments in cases where the court has no jurisdiction to make periodical payments.

The father is seeking permission to appeal the decision to the Court of Appeal so this may not be the end of the story.

Quick re-cap of the facts

The mother and father were both in their early forties by time of the second appeal. They met in 2007, had a relationship for a few years and then resumed their relationship and cohabitation in 2015. They had two children (a boy and a girl) born in 2016 and 2018, respectively. The parties finally separated in 2019.

Following separation in January 2022, HHJ Roberts made child arrangements orders providing for the children to spend exactly equal time with both parents. As a consequence, the Child Maintenance Service made a nil assessment of the father (pursuant to reg 50(1)/(2) Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677)); this was made on 23 November 2022 and was backdated to 17 January 2022.

The mother's Sch 1 application was first determined by arbitration in June 2022. At that time, she remained in the former family home, a two-bedroom apartment described as 'Thames House'. This property was owned by the father. The father was housed nearby in a four-bedroom house. Both properties were heavily mortgaged.

Prior to the arbitration the parties submitted an agreed statement of issues to the arbitrator. This recorded, *inter alia*, the following:

(1) the mother and children would be permitted to make their home at the Thames House apartment;
(2) the mother and children would be permitted to move to a replacement property in substitution for the Thames House apartment;
(3) subject to provisos sought by the mother, the father could extend the mortgage on Thames House for the purpose of extracting up to £70,000 specifically to meet tax due in July 2022; and
(4) the father would be responsible for meeting the mortgage payments, whether interest-only or repayment, on the mother's and children's home at Thames House or its replacement.

During the arbitration, it was agreed that Thames House would be sold and that the father agreed that the equity in the property (found to be c £256,000) could be invested in a new property for the mother and the children. The father also agreed that the existing mortgage on Thames House (c £680,000) could be utilised for this purpose. The mother agreed to put her resources towards the new property as well as her own mortgage capacity of £184,000. The arbitrator directed that there should be a joint mortgage of £870,000 to purchase the new property and that the father should meet the mortgage payments in relation to that substantially higher mortgage. The parties had instructed a single joint expert to advise on the mortgage capacities of each party. That expert advised that the parties could borrow collectively in excess of the £870,000 directed. The issue of the jurisdiction of the arbitrator to make an order which forced the father to raise a greater mortgage than he had offered (i.e. c £680,000) and forced him to pay the instalments on that mortgage was not raised.

The father appealed the arbitral award. His complaint was that the court had no jurisdiction to make him borrow more than 'he had conceded' although the issue before the judge who heard the first appeal appears to have been framed as to whether 'the Arbitrator had … power to require the applicant to borrow monies for the purposes of making a settlement of property under paragraph 1(2)(d) of Schedule 1'.

The father appealed on a number of other grounds that were fact specific and because his financial situation had

changed dramatically for the worse. Those grounds are not considered here.

The appeal succeeded primarily because HHJ Evans-Gordon found that, as a matter of law, the ability to borrow money was not property to which the borrower 'is entitled in possession or reversion'.

The judge also found that the staged process by which capital was provided for a property from existing capital, then supplemented by borrowing and finally a property was settled, offended against the principle enunciated in *Philips v Peace* [2004] EWHC 3180 (Fam), [2005] 2 FLR 1212 that the court 'having previously made an order for settlement of property, it could not make a subsequent order for a transfer of property'.

The judge was clear that she did not regard it as relevant that the father had 'offered to borrow monies' by way of mortgage ([35]) to purchase a new home for the mother and children. Her essential view was that it would not be:

> 'right to order a parent to borrow money when whether or not anyone will lend money is not in that parent's control.' ([34])

The mother appealed and sought an order upholding the arbitral award. The appeal was heard by Cobb J in February 2024. The appeal was successful in relation to the jurisdictional issues highlighted above although the court declined to make an order in the terms of the arbitral award because the father's situation had altered radically since the arbitration (e.g. he was no longer employed).

Jurisdiction to order a party to settle a property with a mortgage

The court resolved the jurisdictional issue as to whether a court has the power to settle property for the benefit of a child of unmarried parents pursuant to Sch 1, which requires (in part) mortgage borrowing for its funding in the mother's favour for the following reasons:

(1) 'The parties' respective mortgage capacities were a "likely" 'resource' available to them to be considered by the court (Schedule 1 sub-paragraph 1(4));' [122]

(2) '"Property" can include a beneficial interest in a property subject to a mortgage;' [122]

> 'As I have illustrated above, "property" is broadly defined in both statute and caselaw. It can be mere "property rights" (section 24 MCA 1973), or the interest in property to which a mortgage can attach (see the MC(PM)A 1958). It can include "proprietary rights" both legal and equitable (*Prest*, at §89 above) and/or beneficial interests (ibid.). Beneficial entitlement to property extends beyond the equity and, most pertinently here, includes occupation of the whole.' [95]

(3) 'Settlements of property' under Sch 1 CA 1989 can be made subject to mortgage as is evident from the fact that, for example, the courts have the power 'to release parties from a mortgage and/or to indemnify the other against liability' (see *CH v WH* [2017] EWHC 2379 (Fam)), [98]–[99].

(4) The court is not 'confined to the four corners of the Matrimonial Causes Act', [100]; so, by a parity of reasoning:

> 'No express power within Schedule 1(1) to order a sale of property (i.e., to assemble the sum to settle); nor is there express power to direct that a new property be purchased on trust. But that is overwhelmingly the way in which Schedule 1 housing provision is interpreted and routinely carried into effect – that is to say, a sum of money is paid over from one party to the other (usually in one tranche) to purchase a property on trust terms; after the property is purchased – at the point when the payer is then "entitled" to the property "in possession or reversion" – it is settled on Schedule 1 terms.' [102]

(5) 'The terms "in possession or reversion" do not necessarily contemplate that there is an existing property to "settle", nor do the terms contraindicate a prospective property purchased with the assistance of a newly obtained mortgage; a reversionary interest is just that: a non-current, future form of interest;' [122]

(6) The fact that there is no specific statutory power in Sch 1 for a party to raise funds by way of mortgage in order to make one of the defined forms of financial provision for the benefit of children does not exclude this approach; it is to be noted that other essential ancillary powers for carrying property adjustment into effect are routinely exercised by the court (i.e. the taking out of insurance, or discharging a debt for which the party is not contractually liable), even though these are not expressly set out within the statute.

(7) 'The family court has not only the jurisdiction but also the *duty to consider any proper applications relating to the fulfilment of its order and to give whatever directions appeared appropriate to give effect to it*;' (original emphasis) [103]

(8) The Family Court, like the High Court, has wide powers to make orders to give effect to its decision (orders must be made 'to the satisfaction of the court'); Sch 1, para 13 can come to the aid of the court if there is any difficulty in executing relevant documents to secure the mortgage (as per *CH v WH* at [98] *above*).

Did the order offend against the prohibition in *Philips v Peace*?

The answer to the above question was 'no'. The court determined that a 'two-step process to achieve the settlement of property (payment of the lump sum, then identification of the property and settlement of the trust) does not offend against the prohibition on a second payment (Schedule 1 sub-paragraph 1(5)(b)) and does not cut across what Singer J had said in *Phillips v Peace*; the steps taken to achieve the settlement is a matter of form not substance; the statutory language contemplates a future settlement: "settlement to be made"' [102].

Mortgage payments

The father 'emphasised that the nil assessment of the father by the Child Maintenance Service had denied the court the power to make any "top up" award of maintenance to take account of mortgage repayments: see section 8(6) Child Support Act 1991. Therefore, in the absence of agreement as to child support, there was no mechanism for

facilitating the mortgage payments by the parties, or either of them, or at all' [80].

The court determined that it did have jurisdiction to order the father to make the monthly mortgage payments. The reasoning of the court in this respect is particularly interesting:

(a) 'The payment of the instalments of capital/interest to the mortgagee in this case was founded on the father's undertakings/agreement; the contract of borrowing (mortgagor/mortgagee) is and would always have been between the father (or father and mother) and the lender; the standard template orders (Order 2.2 …) plainly contemplate that the court can make orders to regulate this;' [122]

(b) 'The Standard Orders template (Order 2.2), approved by the President of the Family Division, contains the appropriate form of wording for the settlement of property subject to mortgage; it specifically includes the formula for direction for one or other party to make all payments of capital and interest on the mortgage. In short, there is an extensive menu of suggested formulae from which the parties may draw, in particular undertakings … and orders …' [122].

The judgment makes specific reference to the Standard Family Orders template 2.2 paras 57(c)/(g)(ii) and (iii) and 58(c)/(h)(iii). These read:

'**57 Provision of Family Home on Trust**

(c) the [respondent] / [applicant] shall from [the date of this order] / [*date*] be [solely] / [jointly] / [*insert other*] responsible for all payments of capital and interest on the mortgage;

(g) [in the event of the [applicant] / [respondent] wishing to move to another property during the subsistence of this trust with the agreement of the [respondent] / [applicant] such agreement not to be unreasonably withheld:

i. the [applicant] / [respondent] shall be entitled to direct the trustees to sell the property and to apply the proceeds in the purchase of such other freehold or leasehold property ("the new home") for [his] / [her] occupation and for the occupation of the child[ren] as [[she] / [he] may choose, provided it is a reasonable investment for the [respondent] / [applicant]] / [may be agreed between the parties or in default of agreement determined by the court];

ii. the costs of the sale and purchase shall be borne by the [applicant] / [respondent] / [*other*];

iii. the new home shall be held upon the same trusts, terms and conditions as the property and the trustees shall have full power as if they were beneficial owners thereof to execute such mortgage deed as may be necessary to enable the purchase thereof to be completed;

58 Provision of New Home – New Home on Trust

(c) the [respondent] / [applicant] shall from [the date of this order] / [*date*] be [solely] / [jointly] / [*other*] responsible for all payments of capital and interest on the mortgage;

(h) in the event of the [applicant] / [respondent] wishing to move to another property during the subsistence of this trust with the agreement of the [respondent] / [applicant] such agreement not to be unreasonably withheld:

i. the [applicant] / [respondent] shall be entitled to direct the trustees to sell the property and to apply the proceeds in the purchase of such other freehold or leasehold property ("the new home") for [his] / [her] occupation and for the occupation of the child[ren] as [[she] / [he] may choose, provided it is a reasonable investment for the [respondent] / [applicant]] / [may be agreed between the parties or in default of agreement determined by the court];

ii. the costs of the sale and purchase shall be borne by the [applicant] / [respondent] / [*other*];

iii. the new home shall be held upon the same trusts, terms and conditions as the property and the trustees shall have full power as if they were beneficial owners thereof to execute such mortgage deed as may be necessary to enable the purchase thereof to be completed; …'

Conclusion

Cobb J expresses surprise in his judgment that the issues of jurisdiction outlined above have not been determined before. In relation to the payment of mortgage instalments it may well be that there was an assumption held previously that the court did not have jurisdiction. Indeed, the judgment refers to a decision of HHJ Hess in the case of *SP v QR* [2024] EWFC 57 (B), which was decided only a fortnight before the final hearing in this case, where the court determined that the court did not have jurisdiction to order the father to make monthly mortgage payments. HHJ Hess relied on the cases of *Dickson v Rennie* [2015] 2 FLR 978 and *Green v Adams* [2017] EWFC 24, [2017] 2 FLR 1413 which 'both support this conclusion'.

If there is to be an appeal, then no doubt the jurisdictional inter-relationship between the Child Support Act 1991 and the Standard Family Orders will be explored further. It will also be interesting to note whether, in the future, this case will be distinguished because the father agreed to make mortgage payments, albeit at a much lower level than that determined by the Arbitrator.

It seems also likely that an appeal court would be asked to consider whether funds that were to be borrowed by the father in this case comprise property to which he is entitled 'in possession or reversion'.

Impact of Conduct on Needs

Nicholas Allen KC
29 Bedford Row

Jennifer Lee
Pump Court Chambers


Introduction

In exercising its powers in financial remedy proceedings, the court is required to have regard to the 'conduct of each of the parties if that conduct is such that it would in the opinion of the court be inequitable to disregard it': s 25(2)(g) Matrimonial Causes Act 1973 (MCA 1973).

In order to be taken into account, however, conduct must of course be of sufficient gravity. It must pass a very high threshold. It must be 'obvious and gross'.[1] Where assets exceed the aggregate needs of the family, taking such conduct into account poses no real problem. However the court chooses to reflect the same, the guilty party will still be able to meet both their housing and income needs. But can an order be made to reflect that conduct if the financial effect of doing so impacts on a needs-based award particularly where those needs are inextricably intertwined with those of minor children?

This article seeks to explore these questions. In doing so, the authors will traverse a number of authorities at first instance and at appellate level (in chronological order). The authors will also consider the costs provisions in the Family Procedure Rules 2010 (FPR), in particular FPR PD 28A and FPR 28.3(7)(f), which require the court to consider 'the financial effect on the parties of any costs order'.

The authorities

First instance decisions

M v M (Financial Provision: Party Incurring Excessive Costs) [1995] 3 FCR 321 (20 March 1995)

The wife filed an application for ancillary relief for herself and the two children. The husband, a litigant obsessed with the litigation, had made numerous applications to the court, which were usually either adjourned or dismissed with costs. The court held that the husband's strategy was so gross and extreme that it amounted to conduct that would be inequitable to disregard. Per Thorpe J (as he then was):

> 'Ordinarily speaking, it seems to me that the manner in which proceedings are misconducted is to be reflected in orders for costs rather than directly in the scale of the awarded sum. However, this seems to me to be a quite exceptional case where the husband's strategy has been so gross and so extreme that it would be inequitable to disregard it. It seems to me that it is appropriate to look to the quantification of the wife's share not of what remains today but of what would remain today had that policy of waste and destruction not been pursued.'

Thorpe J also made an order for costs against the husband, which would be immediately enforceable despite the husband being legally aided. He had conducted the proceedings in an obsessional fashion and had failed to negotiate reasonably. In rejecting the submission that it would be unjust to make such a costs order as it would reduce the husband's award (£330,000) to nil, after payment of costs and other debts, Thorpe J observed:

> 'It seems to me that the husband should have contemplated that realistic possibility after the transfer of these proceedings to this court and after the grant of his certificate …'

B v B (Financial Provision: Welfare of Children and Conduct) [2002] 1 FLR 555 (15 October 2001)

Shortly after decree absolute, the husband abducted the parties' young child and was subsequently convicted of child abduction. He was sentenced to 18 months' imprisonment. The only asset within the jurisdiction was the matrimonial home, with a net equity of £124,000. The other relevant asset was a building society account, which the husband had failed to disclose, and from which he had removed £37,000 (transferring the funds to his mother in Sicily). The district judge awarded the wife the whole of the equity in the family home. The husband appealed, arguing that the district judge ought to have given the husband some of the equity, either immediately or on a deferred basis.

Connell J dismissed the appeal. As summarised in the headnote:

> 'the award to the wife of the entire net value of the matrimonial home was justified by the need to house the child of the marriage to a reasonable standard. A *Mesher* order was not appropriate, taking into account not only the contributions of the parties, particularly the wife's ongoing contribution to the care of the child, but also the parties' conduct … The husband's conduct was particularly relevant when considering the court's duty to give first consideration to the welfare of the child. Although it was appropriate for the court to look at the question of equality, and to depart from equality only if there was good reason for doing so, the court's overriding duty was to reach a solution which, in all the circumstances, was fair. Applying the s 25 criteria to the facts, the conduct and contributions of the parties, together with the desirability of a clean break order, provided good reasons for departing from equality.'

J v J [2014] EWHC 3654 (Fam) (6 November 2014)

FPR 28.3(7)(f) provides that in deciding what order (if any) to make in relation to costs, the court must have regard to 'the financial effect on the parties of any costs order'. This was considered in *J v J*, in which a symbolic order for costs only was made against the husband despite his litigation conduct (£50,000 instead of over £276,000 as sought by the wife). Per Mostyn J:

> '[55] Subparagraph (f) is highly important. This requires the court to ensure that its primary disposition, which will usually be strongly influenced by considerations of need, is not undone and subverted by a costs order. It was for this reason that the *Calderbank* principle was abolished … Some quarters are calling for the *Calderbank* principle to be reintroduced … For my part I will fight its reintroduction to the last ditch. In my opinion it would be retrograde and unconscionable to allow a carefully crafted disposition to be turned upside down by virtue of a without prejudice letter produced after judgment has been given.
>
> [57] In my judgment, having regard to subparagraph (f), I cannot reflect the husband's misconduct other than symbolically …'

R v B and Capita Trustees [2017] EWFC 33 (17 March 2017)

In addition to costs orders, conduct may result in a departure from equality to ensure that the innocent or non-miscreant party's needs can still be met at a level that would have been possible but for the miscreant party's conduct (as demonstrated in *M v M* (*Financial Provision: Party Incurring Excessive Costs)*), or lead the court to assess the miscreant party's needs at a more modest level.

In *R v B and Capita Trustees*, the husband had hidden two loans amounting to £7m from the wife and her family, not declared a penny of income to HMRC, took money whenever he needed it from wherever he could find it regardless of the ownership structure of assets, pursued ruinous litigation, and repeatedly lied to the court. Financial catastrophe had been brought to bear on the family as a result of his conduct. Per Moor J:

> '[85] Mr Howard argued that conduct can only be relevant in a sharing case and that it cannot reduce a party's needs. I am not persuaded by that argument. Conduct features in section 25(2) without a gloss. The conduct may be so serious that it prevents the court from satisfying both parties' needs. If so, the court must be entitled to prioritise the party who has not been guilty of such conduct. A court can undoubtedly reduce the award from reasonable requirements generously assessed to something less. Indeed, that is exactly what happened in *Clark v Clark* [1999] 2 FLR 498. It may be that, unless there is no alternative, a court should not reduce a party to a "predicament of real need" (see *Radmacher v Granatino* [2010] 2 FLR 1900) but that is not suggested in this case.'

In rejecting the husband's argument that his significant liabilities (which largely related to the ruinous litigation) should be included as part of his needs, Moor J said this:

> '[161] … I have come to the clear conclusion that I should not provide additional finance for Mr R to clear all these liabilities. He took them on and he must sort them out. There is no such thing as free litigation. Mr Howard submits to me that these debts form part of his needs and I cannot make an order that does not satisfy his needs. I have already indicated that I do not agree. To do so would be to give a licence to anybody to litigate entirely unreasonably …'

WG v HG [2018] EWFC 84 (30 July 2018)

Failure to negotiate reasonably may also require a party's costs be met from their needs-based award.[2] In *WG v HG*, the wife sought £915,000 for her litigation loan and unpaid legal fees, the rationale being that her costs were a debt that needed to be paid and that, in a needs case, her needs had to be met.

The court found the wife had presented an unreasonable case and that her costs were excessive. However, if no provision were made for her costs, a large part of her *Duxbury* fund would be depleted. Per Francis J:

> '[91] Against that, people cannot litigate on the basis that they are bound to be reimbursed for their costs. The wife has chosen to instruct one of the highest regarded and consequently one of the most expensive firms of solicitors in the country. Whilst I have no doubt that the representation has, at all times, been of the highest quality, no one enters litigation simply expecting a blank cheque. A judge, in a position as I am now in, is facing the invidious position of seeing his or her order undermined by the extent of litigation loan or costs liability. If, here, I make no provision for the wife's costs or litigation loan, then half of the *Duxbury* fund will be wiped out and she will be left with insufficient money to manage, according to my assessment. Doing the best that I can to recognise that her costs are excessive, to recognise that she has presented an unreasonable case in financial remedy proceedings but to recognise that her Duxbury fund cannot be completely undermined and that the husband's offer was too low, I am going to add to the lump sum, already referred to above, an additional £400,000 which is a little bit less than half of the total sum due.
>
> [93] The wife will, therefore, have to find some £500,000 in order to fund that part of the costs which I am not ordering the husband to pay. I recognise that this will deplete her *Duxbury* fund. I have very carefully considered whether this is fair. It might be said that I have assessed her needs at a given figure. If I have done that, then how can I leave her with a lower sum which, by definition, does not meet her needs? This conundrum happens in so many cases. People who engage in litigation need to know that it has a cost. The wife may choose to sell the property at some point in the future converting part of the value of it into a *Duxbury* fund. She may decide to use the property to generate some income rather than simply installing her own staff into it. She will have to make the sort of decisions about budget managing that other people have to make day in day out, but I am satisfied that people who adopt unreasonable positions in litigation cannot simply do so confident that there will be an indemnity for the costs of the litigation behaviour, however unreasonable it may have been'.

The wife would be left with a *Duxbury* fund not of the £2m that was intended, but of £1.5m, which would generate a little less than £75,000 a year net, for life.

MB v EB (No 2) [2019] EWHC 3676 (Fam) (19 December 2019)

The husband had conducted his case in an irresponsible and unreasonable manner. Cohen J rejected the submission by the husband's counsel that it should make an award that would cover the whole of the husband's costs, and that (at

[28]) 'in a needs-based case, it is inevitably the payer who ends up having to pay the costs, because otherwise the needs cannot be met'.

The wife's contribution to the husband's costs was capped at £150,000. Per Cohen J:

> '[36] Whatever the husband's difficulties are, and I accept that he does have difficulties, they are not to be funded by the wife. The wife has paid £236,000 towards the husband's costs. Inclusive of costs of £150,000, the award that the husband receives in total will be £485,000 … It will, of course, leave the husband in debt to his solicitors with a substantial sum owing to them. That is a matter between him and them. But, in my judgment, it is not for the wife to bankroll this litigation which I find to have been unreasonably conducted by the husband.'

Kliers v Kliers [2020] EWHC 1026 (Fam) (7 April 2020)

In *Kliers*, Nicholas Cusworth QC (sitting as a deputy High Court judge) declined to reflect the husband's misconduct in the award, in light of the limited assets and, in particular, the welfare of the minor child (who lived with the father). The court noted that the ultimate conflict was between the parties' housing needs, and on the husband's side, the child's welfare.

M v M (Financial Remedies) [2020] EWFC 41 (20 May 2020)

Following a long marriage and three children, the parties embarked on what was described as 'ruinous and recriminatory' financial remedy proceedings, emerging with only about £5,000 each of liquid assets, having incurred nearly £600,000 in costs. Neither party was entirely free from blame in the conduct of the litigation. However, in the Court's view, the husband was more blameworthy.

Robert Peel QC (sitting as a deputy High Court judge) said:

> '[93] … To my mind, of particular significance in this case is 28.3(7)(f) which requires me to consider "the financial effect upon the parties of any costs order".'

A modest costs order was made against the husband of £15,000, to be set off against an earlier costs order against the wife.

Traharne v Limb [2022] EWFC 27 (31 March 2022)

The husband, having paid almost all the expert fees, had incurred costs of £257,255. The wife, without that expenditure, had incurred costs of £403,150. Sir Jonathan Cohen found: (1) the wife's costs to be disproportionate between the parties but also when compared with the value of the assets; and (2) the wife's approach in the case had been misconceived.

The court will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs, even in a needs case, as provided for in FPR PD 28A, para 4.4. The wife had set her sights far too high and the husband's offer was far closer to the mark. The husband having already paid £211,000 under legal services payment orders, Sir Jonathan Cohen awarded the wife a further sum of £80,000 on account of her costs, leaving her with a liability to her solicitors of £70,000–£80,000. In the words of the court (at [99]), 'that the wife was left with a costs bill to pay was entirely the result of her prodigal expenditure on costs and her approach to the litigation'.[3]

WC v HC [2022] EWFC 40 (11 May 2022)

W exited the marriage with £7.45m, a needs-based award. The husband applied for his costs. Peel J summarised the applicable legal principles (see [4], [5], [7] and [8]) and held that:

> '[13] There is a risk in needs-based awards, such as the one I have made, of requiring the payer to act as the ultimate insurer of the payee's costs with little or no incentive on the payee to negotiate reasonably. An applicant for a financial remedies award can, and frequently does, seek a sum which, *inter alia*, clears all indebtedness including costs. Thus, however high the level of costs incurred by the payee, he/she will frequently seek what amounts to an indemnity for any costs outstanding so as to be able to exit the marriage debt free. Similarly, if and insofar as the payee has already spent large sums on legal fees which have been provided by the payer (either voluntarily or by way of a court imposed legal services funding order), he/she will argue that to be required to reimburse the payer will lead him/her into debt. It is, in my view, important for parties to be aware that even in needs-based claims no litigant is automatically insulated from costs penalties, notwithstanding the possible impact on the intended needs award.
>
> [14] … I shall order W to pay £150,000 by way of costs … Strictly speaking, my costs decision reduces W's overall award below the total needs-based calculation which I have alighted upon although …
>
> c. The authorities make it clear that the fact of an award being based on needs does not prevent the court from making a costs award which reduces the claimant below the level of assessed needs. If that were not the case, no court could ever make a costs award in a needs case (and needs cases account for the vast bulk of litigation in this field). That cannot be right. Otherwise, the payer runs the risk of, directly or indirectly, being responsible for all costs on each side even if the payee has litigated unreasonably.'

VV v VV [2022] EWFC 46 (17 May 2022)

The wife had been guilty of misconduct in causing the husband financial loss amounting to c $76m. She was ordered to pay £100,000 in costs, which would invade her needs-based award. Per Peel J:

> '[12] I am satisfied that it is appropriate for W to make a contribution towards H's costs. It does not seem to me to be unfair to invade her needs-based award to an extent. She should not be entirely protected from costs consequences … How she trims her needs to take account of this costs order will be a matter for her.'

HD v WB [2023] EWFC 2 (13 January 2023)

Peel J had cause to revisit this issue in *HD v WB,* reiterating that:

> '[119] In *TT v CDS* [2021] 1 FLR 996, the Court of Appeal held it was not unfair for the party who is guilty of misconduct to receive ultimately a sum less than his/her needs would otherwise demand. Examples of first instance decisions where the judge made a costs order notwithstanding that such order would cause the payee to dip into (and thereby reduce) the needs-based award include Sir Jonathan Cohen in *Traharne v Limb*

> [2022] EWFC 27, Francis J in *WG v HG* [2018] EWFC 84 and my own decisions in *WC v HC* [2022] EWFC 40 and *VV v VV (No 2)* [2023] 1 FLR 194.'

The husband was ordered to pay £120,000 in costs, to be netted off against his lump sum provision. Peel J held at [122] that, 'it was reasonable and proportionate to invade, to that extent, the needs-based award made by me in his favour. He cannot be insulated from the consequences of litigation …'.

HO v TL [2023] EWFC 216 (1 December 2023)

The wife was awarded £7.75m based on her needs, a net figure after payment of her debts. She was nevertheless ordered to pay £100,000 in costs, such sum to be deducted from her award. Again, per Peel J:

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

Appellate decisions

Clark v Clark [1999] 2 FLR 498 (6 May 1999)

A court can undoubtedly reduce the award from reasonable requirements generously assessed to something less. In *Clark v Clark*, a case involving an extraordinary marital history, the Court of Appeal held that (emphasis added):

> '[509] *Even allowing for the wife's phobias, I do not consider that on the quite extraordinary facts of this case to have left the wife with nothing would have exceeded the wide ambit of judicial discretion*. For in addition to all the wife's misconduct there is the fact that at the outset of the relationship the wife not only brought in nothing but required bailing out of debt to the extent of £30,000. The only conclusion to which I can come is that the judge fell into manifest error in treating the wife as generously as he did. His principal errors were in failing to reflect the full rigour of his findings in quantifying the wife's award and in assuming that the husband would, in his heart of hearts, welcome the order.'

TT v CDS [2020] EWCA Civ 1215 (18 September 2020)

Cohen J awarded the wife the business minus net debts, leaving her with £1.73m.[4] The husband would have net assets of £634,000. The judge concluded that the significant departure from equality was necessary to meet the children's needs and to meet the wife's debts, which the husband had created in significant part.[5] The Court of Appeal dismissed the husband's appeal. Per Moylan LJ:

> '[79] I would also refer to what was said by Cairns LJ in *Martin v Martin* [1976] Fam 335, [1976] 3 WLR 580, at 342H and 586 respectively:
>
> "A spouse cannot be allowed to fritter away the assets by extravagant living or reckless speculation and then to claim as great a share of what was left as he would have been entitled to if he had behaved reasonably."
>
> This applies to litigation conduct which falls within the scope of s 25(2)(g) of the 1973 Act and can apply to conduct both within the financial remedy proceedings and in respect of other litigation.
>
> [80] In *Vaughan v Vaughan* [2008] 1 FLR 1108, at para [14], Wilson LJ after setting out the above quotation from *Martin v Martin* added:
>
> "The only obvious caveats are that a notional reattribution has to be conducted very cautiously, by reference only to clear evidence of dissipation (in which there is a wanton element) and that the fiction does not extend to treatment of the sums reattributed to a spouse as cash which he can deploy in meeting his needs, for example in the purchase of accommodation."
>
> However, in saying this, he did not mean that the financial effect of litigation conduct cannot impact on a needs-based award. I agree with Moor J in *R v B* when he said that, if required to achieve a fair outcome, the court "must be entitled to prioritise the [needs of the] party who has not been guilty of such conduct". It is clear from the outcomes in *M v M* and *B v B*, as referred to above, that the financial consequences of the litigation misconduct, perhaps combined with other factors, might be such that it is fair that the innocent party is awarded all the matrimonial assets. In this respect, I also agree with Moor J's observation that an order can be made which does not meet needs because to exclude that option "would be to give a licence … to litigate entirely unreasonably".'

Azarmi-Movafagh v Bassiri-Dezfouli [2021] EWCA Civ 1184 (30 July 2021)

It appears that judges ultimately have a wide discretion as to the extent to which an enhanced lump sum should be awarded to meet a party's needs to satisfy outstanding costs. The Court of Appeal summarised the approach to costs in need cases and held, per Moylan LJ (emphasis added):

> '53. All these cases turn on their own individual facts and in my judgment the most significant principle to be drawn from them, either individually or collectively, *is that the judge at first instance has a wide discretion as to the extent to which it is appropriate to order an enhanced lump sum to a party in receipt of a needs award designed wholly or in part to satisfy their outstanding costs bills*.
>
> 59. *Significantly, in none of these cases would the recipients' security of accommodation have been jeopardised as a result of the order made by the court… of more assistance in considering the approach taken to this issue in the few reported cases is the fact that in WG v HG and MB v EB, notwithstanding the fact that the recipient had acted unreasonably and run up wholly unjustified costs, the court nevertheless awarded an additional sum in order to ameliorate the impact of costs on their needs award and in neither case were the housing needs of the receiving party put at risk*.

Changes to FPR PD 28?

On 27 May 2019 FPR PD 28A, para 4.4, was expanded, such that it now reads (with the additional words underlined):

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

The rule changes clearly envisage that the court is not precluded from making an adverse costs order even in a 'needs' case. If there was any doubt about this, the Court of Appeal dispelled it in *TT v CDS* (also known as *Rothschild v de Souza*) when stating at [80]:

> 'It is clear … that the financial consequences of the litigation misconduct, perhaps combined with other factors, might be such that it is fair that the innocent party is awarded all the matrimonial assets…an order can be made which does not meet needs because to exclude that option "would be to give a licence … to litigate entirely unreasonably".'

How does this square with FPR 28.3(7)(f), which requires the court to have regard to the financial effect on the parties of making a costs order? In the cases considered above, this factor features expressly in only two decisions.[6] It is certainly arguable that the amendments to FPR PD 28A, para 4.4 have reduced the weight that courts now give to this sub-rule.

Having said that, whilst there are several decisions in which costs orders have been made reducing the receiving party's award below their assessed needs, those cases have still mainly involved relatively high asset values (e.g. *WC v HC* and *VV v VV*), in which needs would have to be, and could be, trimmed. This is the point made by Moylan LJ in *Azarmi-Movafagh v Bassiri-Dezfouli* at [59] referred to above. Indeed, in *TT v CDS* (*Rothschild v de Souza*) the court, whilst accepting that conduct could result in a party receiving less than their needs, qualified this on the basis that it would depend on the circumstances of the case and must be justified having regard to all the s 25 factors. Of course, first consideration must be given to the welfare of the children. We therefore await, as the Court of Appeal observed in *Azarmi-Movafagh v Bassiri-Dezfouli*, whether a case might arise where the recipient's security of accommodation is jeopardised as a result of a costs order.

Notes

1 Behaviour which does not meet the statutory definition should not be taken into account indirectly: per Lord Nicholls in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 at [65]: 'Parliament has drawn the line. It is not for the courts to re-draw the line elsewhere under the guise of having regard to all the circumstances of the case.'

2 See also *AA v AB (Costs)* [2021] EWFC B16, a decision by Recorder Salter, where a costs order of £10,000 was made against the wife due to her litigation conduct, including her failure to negotiate reasonably. The court had regard in particular to FPR PD 28A, para 4.4. The court observed, 'whilst this may cause the wife some hardship, which is an inevitable consequence of her conduct'.

3 See also the judgment of HHJ Hess in *YC v ZC* [2022] EWFC 137, in which the court made clear that in the right circumstances a party could expect to receive an award which meets their needs at a lower level than might otherwise have been the case as a result of overspending on legal costs.

4 Also known as *Rothschild v de Souza*.

5 Cohen J's judgment is reported as *TT v CDS (Financial Remedies)* [2019] EWHC 3572 (Fam).

6 In *J v J* (a decision of Mostyn J in 2014) and in *M v M (Financial Remedies)* (a decision of Robert Peel QC, sitting as a deputy High Court Judge).

Proving Foreign Law in Financial Remedy Proceedings

Roxane Reiser

1 Hare Court

Foreign law often rears its head in financial remedy proceedings with an international element. Issues of foreign law need not cause panic or confusion provided they are identified and appropriately case managed early in the proceedings. The trouble is, often they are not.

Many practitioners will have experienced being sent a 'legal opinion' or other purportedly learned composition written by the other side's foreign lawyer with pages of obscure foreign legislation and a dubious online translation the day before a hearing. Inevitably, much of the time of said hearing is spent debating the admissibility and probative value of such documents. Typically, no Part 25 application will have been made. No one at the hearing, save for the incandescent spouses, speak the language of the pseudo expert, and each conveys conflicting interpretations to their respective legal representatives.

This article provides an *aide mémoire* of the legal principles governing proof of foreign law and suggests practical solutions for dealing with such issues quickly and cost-effectively in financial remedy proceedings.

Foreign law must be pleaded and proved as a fact

The central principle is that foreign law must be pleaded and proved as a fact.[1] In the context of financial remedy proceedings (whether under the Matrimonial Causes Act 1973, Sch 1 Children Act 1989 or Part III Matrimonial and Family Proceedings Act 1984) where formal pleadings are alien, the correct practice is for the party wishing to rely on foreign law to seek appropriate directions at the First Appointment. It is at that stage that the court *must* give directions, where appropriate, about obtaining expert evidence, if required, and the evidence to be adduced by each party generally (FPR 9.15(3)(b)–(c)).

English courts cannot take judicial notice of foreign law.[2] Consequently, it must be proved. As with any other issue of fact the burden of proving foreign law lies on the party who bases its claim or defence on it.[3] This means that if it is for the party seeking to rely on foreign law to state: (1) what proposition of foreign law they assert; and (2) what evidence they seek to adduce in support of it. If that party fails to adduce evidence of foreign law or if the evidence provided is insufficient to prove the content of foreign law asserted, the evidential burden is not discharged and the asserted proposition of foreign law cannot form part of the factual matrix underlying the court's decision.

In other contexts, where it is asserted that foreign law is applicable as a matter of international private law but there is no evidence or insufficient evidence of the content of the foreign law, a 'presumption of similarity' arises such that the foreign law will in general be presumed to be the same as English law (*FS Cairo (Nile Plaza) LLC v Brownlie* [2021] UKSC 45). This presumption has no applicability in financial remedy proceedings for the simple reason that English law always applies to such proceedings. The case of *Brownlie* is however of some assistance when deciding whether expert evidence should be obtained to prove foreign law or whether other evidence may be sufficient (as to which see below).

Foreign law need not be proved if it is admitted.[4] Where both parties agree the content of foreign law on a particular point (e.g. as to whether a foreign court will recognise and enforce an English pension sharing order) the court can accept this agreement as an agreed fact upon which its decision can be based, without the need for any further evidence.

Modes of proof

The orthodoxy is that foreign law should be proved by expert evidence and not by the production of the books or other material in which it is contained.[5] This rule dates back to the 19th century.[6] It is, with respect, outdated. Its rigid application often leads to disproportionate costs, particularly in financial remedy proceedings where an issue of foreign law is important, but peripheral.

Two recent authorities of the Court of Appeal and of the Supreme Court have challenged the orthodoxy. In *R (KV) v Secretary of State for the Home Department* [2018] EWCA Civ 2483, Leggatt LJ (as he then was) stated that two main reasons generally given for the rule that foreign law should be proved by expert evidence were that:

(1) the court is not competent to interpret such materials; and
(2) without expert evidence the court cannot be satisfied

that the most relevant and up to date foreign law materials have been identified.

As to (1), he remarked that this is not always true. For instance, an English judge does not generally need expert assistance in order to understand and interpret an enactment or decision of a court of another English-speaking country whose law forms part of the common law. As to (2), he commented as follows:

> '34. No doubt this may sometimes be a wise approach to adopt. But in law as in so many other areas of life, technological advance and the expansion of the internet have in recent years revolutionised the ability to gain access to information. No longer is it generally necessary to consult books in a library in order to conduct legal research. A vast amount of legislation and case law in many jurisdictions is readily available online. Where, for example, the answer to a question of foreign law is to be found in a provision of an enactment which is published in its current version in English on an official government website, I can see no reason why a court should not look at the provision without the aid of an expert witness. In such a situation there is no material risk that the provision has been abrogated by subsequent legislation.
>
> 35. In making these observations, I am not encouraging the use of sources such as Wikipedia (which was relied on by the appellant's lawyers in the FTT in this case) as evidence of foreign law. But it should, in my view, be a matter for the judgment of the court or tribunal to decide what material to accept in any particular case as evidence of foreign law. In deciding whether expert evidence is needed, it is relevant to consider not only the nature of the question of foreign law raised, the nature of the foreign legal system and the nature of the materials relied on, but also the importance of dealing with cases at proportionate cost. With this as with other matters of evidence, a more informal approach may be justified in tribunal proceedings than in court proceedings.'

Lord Leggatt made similar comments, *obiter*, in *Brownlie*:

> '148. […] The old notion that foreign legal materials can only ever be brought before the court as part of the evidence of an expert witness is outdated. Whether the court will require evidence from an expert witness should depend on the nature of the issue and of the relevant foreign law. In an age when so much information is readily available through the internet, there may be no need to consult a foreign lawyer in order to find the text of a relevant foreign law. On some occasions the text may require skilled exegesis of a kind which only a lawyer expert in the foreign system of law can provide. But in other cases it may be sufficient to know what the text says.'[7]

Those remarks are particularly apposite in financial remedy cases. To be clear, much will depend on the facts – and the dynamics – of each case. For instance, a single joint expert report will be preferable to a battle of partisan legal opinions from the parties' respective foreign lawyers. But even in cases where such battles arise, it will be worth investigating whether the foreign lawyers in fact do agree on what foreign law says, but simply disagree as to how it applies in the instant case. If that is so, there is no evidential dispute as to the content of the foreign law, only as to its application. That is an issue which falls to be determined by the court.

Previous decisions and judicial research

Foreign law cannot be deduced from previous English decisions in which the same rule of foreign law has been before the court (*Lazard Brothers & Co v Midland Bank Ltd* [1933] AC 289 at 297–298) although such decisions may be admissible in evidence for the purpose of proving foreign law (s 4(2) Civil Evidence Act 1972).[8] Whether or not one should seek to rely on previous authorities will largely depend on the time which has elapsed since the decision was made, and how pertinent the decision is.

Although the English court will scrutinise the evidence adduced, it will not undertake its own research into questions of law, any more than it will into other evidence.[9] The court is limited to the evidence adduced by the parties.

Practical solutions

Evidential issues of foreign law should be identified and case managed at the earliest opportunity.

One way of dealing with such issues swiftly is simply to set out in open correspondence prior to the First Appointment the point(s) of foreign law, which one seeks to rely on, ideally with documentary evidence in support (for instance, copy of the relevant foreign legal provision with a translation), and ask the other side whether the position is agreed. This can be particularly effective when the issue of foreign law has a clear 'yes' or 'no' answer and is relatively narrow. If the position is agreed, this can be recorded in a schedule appended to the First Appointment order. If it is not agreed, appropriate directions can be sought at the First Appointment.

Other creative solutions include holding a collaborative call with an agreed, suitably qualified, foreign lawyer ahead of the First Appointment to identify the issues of foreign law requiring investigation. In a recent matter in which this author was involved, on the eve of a directions hearing, the judge invited the legal representatives on both sides to hold a remote joint discussion with an IAFL fellow to seek clarity on points of foreign law so that the court could better assess the scope of the necessary expert evidence. A one-hour Teams discussion with a foreign lawyer ensued. An agreed list of questions was put to the foreign lawyer. The answers were recorded in an attendance note sent to the judge prior to the hearing. The issues were significantly narrowed as a result.

Lastly, there will be cases where proof of foreign law – whether expert evidence or not – will be futile. For instance, in cases involving parallel proceedings, there is little use in obtaining expert evidence of foreign law on an issue which is falls to be determined imminently by the foreign court (see *Bentinck v Bentinck* [2007] EWCA Civ 175 at [44] per Collins LJ and *Giusti v Ferragamo* [2019] EWCA Civ 691 at [54]–[65] per Moylan LJ).

Ultimately, the significance of the point of foreign law advanced in the litigation will inform the evidential route adopted. Much like a family holiday, the important thing is to know where one is going, how one gets there, and how much it will cost.

Notes

1 Dicey, Morris & Collins, *The Conflicts of Laws*, 16th edn, §3R-001.
2 Dicey, §3-004.
3 Dicey, §3-003; *Phipson on Evidence*, 20th edn, §33-92.
4 Dicey, §3-003; *Phipson*, §33-92.
5 Dicey §3-008; *Moulis v Owen* [1907] 1 KB 746 (CA).
6 Dicey §3-011; *Phipson*, §33-92.
7 See e.g. *Baron de Bode's Case* [1845] 8 QB 208 at 246–267; *Nelson v Bridport* [1845] 8 Beav 527 at 536; *The Earldom of Perth* [1846] 2 HLC 865 at 873 and *Sussex Peerage Case* [1844] 11 Cl & F 85, 115, to name a few.
8 *FS Cairo (Nile Plaza) LLC v Brownlie* [2021] UKSC 45 at [148].
9 Dicey, §3-004.

Shariah Law – Marriage, Divorce and Financial Aspects

Aysha Chouhdary

Senior Associate, Geldards LLP

Introduction

This article focuses on the different types of Islamic/*Shariah* divorce, the overlap with civil law and the relevant financial implications. Many Muslim clients experience marital breakdown in this jurisdiction, so it is useful to gain a better understanding of the issues they face and the holistic advice that is needed. The cultural aspects have not been considered within the article, but should also be borne in mind when advising Muslim clients.

Islamic marriage

An Islamic marriage which has complied with the necessary customs and practices in a state which recognises it to be legal may also be recognised as a lawful marriage in the jurisdiction of England and Wales, under the *lex loci celebrationis* principle. An Islamic marriage is conducted by way of a *Nikah* ceremony. The ceremony differs between cultures. Generally speaking, the ceremony requires the bride's father or male relative, two adult Muslim witnesses and an Imam or Muslim officiant. Usually, a *Nikah* contract is signed along with the witnesses.

Islamic divorce

There are various types of Islamic divorce, as follows:

(1) *Talaq* – the ending of the marital relationship by the instigation of the husband (by his choice and his consent), and this involves specific, well-known phrases. There are different types of *Talaq*, and these are addressed in more detail below.
(2) *Khula* – where the wife initiates divorce proceedings, but the husband and wife both agree on the terms of the divorce, usually regarding the repayment of *Mahr* (financial consideration given to the wife by the husband upon marriage).
(3) *Faskh*-e-*Nikah* – this is the dissolution of the Islamic marriage, pronounced by a *Shariah* court, upon the wife's application. *Faskh* is not uttered by the husband nor is it conditional upon his consent or choice. *Faskh* can only occur when there is a reason that makes it necessary or permissible, e.g. financial difficulty on the part of the husband, presence of a defect preventing intimacy, etc. If the ruling is in the wife's favour, then she does not have to return the *Mahr.*
(4) *Tafweed-e-Talaq* – when the right of a woman to divorce is included in the marriage contract (i.e. delegated to her or a third party). This can be with or without stipulating conditions. It is important to, therefore, consider such matters at the point of the *Nikah* contract being drafted.

Talaq, the most common type of Islamic divorce, can be divided into two categories:

(1) Revocable *Talaq* – the husband divorces his wife for the first or second time (this can be by uttering specific phrases or by way of written divorce on both occasions), without her offering him any compensation for that (sometimes, the return of gifts or *Mahr* is advised by the *Shariah* Council as per *Shariah* principles). Here, it is permissible for him to take her back before her *Iddah* (the stipulated waiting period is usually three lunar months for divorced women) ends. The choice to reconcile in these circumstances exists only before the expiry of the *Iddah* period.
(2) Irrevocable *Talaq*:
    - major irrevocable divorce is when a husband issues a third (and final) divorce to his wife. In this case, it is not permissible for her to go back to him until after she has married someone else, in a valid and genuine marriage (i.e. after consummating the marriage), and the new husband leaves her (known as the practice of *Halala*). The parties cannot reconcile under *Shariah* law without *Halala* taking place which is why the *Shariah* Council advocates the use of relationship counselling/mediation for parties contemplating a divorce.
    - minor irrevocable divorce is when the man divorces his wife for the first or second time, then her *Iddah* ends, or he divorces his wife in return for compensation, or he divorces her before consummating the marriage with her. In this case, it is permissible for him to take her back, but it must be with a new marriage contract and a new *Mahr*.

Talaq can be immediate or subject to conditions, as detailed below:

(1) *Talaq* with immediate effect – e.g. when the husband says to his wife, 'You are divorced' or other implicit words with the intention of divorce, without making the divorce conditional upon anything.
(2) *Talaq* which depends upon a condition – tied to a clear oath or clear condition, e.g. 'When the sun sets, you are divorced.'

Civil law overlap and financial aspects

Besides navigating the complexities of *Shariah* family law, it is also important to bear in mind that, if the couple have a valid marriage (under the jurisdiction of England and Wales), they should also consider a civil divorce, the arising matrimonial financial matters and the arrangements for any children.

An Islamic divorce which takes place in the jurisdiction of England and Wales is not recognised to be legal and therefore does not end the civil marriage. Generally, for a foreign divorce to be recognised in England and Wales, it must meet the following criteria:

(1) the order must be effective in the law of the country in which it was obtained; and
(2) at the date at which the order is sought, either party to the marriage will need to be habitually resident, domiciled or a national of the country in which the order was obtained.

Accordingly, if either party was to obtain an Islamic divorce in a Muslim state/country which recognises the marriage to be valid and effective, the divorce may also end the civil marriage in the jurisdiction of England and Wales. Parties may also choose to obtain a declaration of the divorce by way of an application to the High Court or Family Court, which is compliant with Part III Family Law Act 1986.

Transnational divorce

Many Muslim couples conduct their personal affairs (especially relationships) in more than one jurisdiction as they have ties to other countries. This could involve international marriages, divorces or offshore assets. It is vital to keep this in mind when looking at an Islamic marriage or divorce as usually the laws of the various jurisdictions involved may not align.

The case of *Hussain v Parveen* [2021] EWFC 73 raised an issue with regards to the validity of a divorce (the wife's first divorce in this case) which was commenced and concluded in two different jurisdictions. The petitioner in the case was the respondent's 'second' husband who contended that when the respondent married him in Pakistan, she remained married to her 'first' husband. This was on the basis that her divorce from the 'second' husband was transnational in nature and could not be recognised in this jurisdiction. On that basis, the petitioner sought for his marriage to be annulled.

The 'first' husband pronounced *Talaq* (by way of a letter which was later converted into a divorce certificate by a mosque in England) in accordance with the Muslim Family Laws Ordinance Act 1961 which governs marriage and divorce in Pakistan. This was later registered by the wife with the Union Council in Pakistan, to validate the divorce in Pakistan.

Sections 2 and 3 Recognition of Divorces and Legal Separations Act 1971 was considered in this matter, namely the requirement for the divorce proceedings to be commenced and finalised in the same jurisdiction by way of a 'single act'. The court held in this case that the divorce between the wife and the 'first' husband could not be recognised in the English courts as the divorce was not obtained in a single act, instead, there had been a series of events in two different jurisdictions.

Legal precedent had been set in the case of *R v Secretary of State for the Home Department ex parte Ghulam Fatima* [1986] AC 527 where it was held that a *Talaq* obtained/declared in England was not a valid divorce within the definition of ss 2 and 3(1) Recognition of Divorces and Legal Separations Act 1971. Lord Ackner's comments in this case were particularly relevant:

> 'In my view the word "obtained" connotes a process rather than a single act. To obtain a divorce a party must go through a process, in the same way that a person obtains a university degree or any other qualification. If that process is part of a judicial process (proceedings) and therefore linked to one judicial authority, it seems to me that there is logic and sense in saying that the proceedings must begin and end in the same place. Accordingly, the mere fact that the divorce is "obtained" in the sense of "finalised" or "pronounced" in one country cannot in my judgment dissociate the process of "obtaining" it from the proceedings in which it was obtained.'

Mahr

Mahr is an obligatory, usually financial, gift (according to *Shariah* principles) provided by a husband to his wife at the time of an Islamic marriage. There is no set amount prescribed, however, the husband's means and the parties' agreement are relevant in determining the amount or item (could be jewellery, etc).

The obligation of payment of *Mahr* in *Shariah* law derives from the *Qu'ran* and is referred to in *Surat 4* as follows:

> 'And give to the women (whom you marry) their Mahr (obligatory bridal money given by the husband to his wife at the time of marriage) with a good heart, but if they, of their own good pleasure, remit any part of it to you, take it, and enjoy it without fear of any harm (as Allâh has made it lawful).'

Mahr can be paid immediately at the time of the *Nikah* (*muajjal*) or deferred (*muakkar*) to a later date. It can also be divided (some to be paid immediately and some deferred to a later date or determining event). Usually, if partial or whole *Mahr* is deferred, it must be considered and dealt with upon the parties' Islamic divorce.

There are specific *Shariah* laws and principles regarding *Mahr*. Each matter is fact-specific and specialist guidance from the *Shariah* Council should be sought, alongside assistance from a *Shariah* family law expert. Generally, however, if the divorce takes place prior to consummation of the marriage, the wife is entitled to half of the *Mahr* amount if already specified. If the husband pronounces the divorce, the wife is entitled to retain the *Mahr* in full. If any amount is outstanding, the husband will be liable for the

outstanding balance, but this is difficult to pursue in the jurisdiction of England and Wales unless there are financial remedy proceedings or the husband is a God-fearing man (*Shariah* Council involvement).

It is to be noted that the terms of the *Nikah* contract itself, including the provision for *Mahr*, are not automatically recognised within financial remedy proceedings and, therefore, they will need to be factored in as a matrimonial asset (be it cash or property/land, etc). In the event there is no recourse to the Family Court (civil divorce/financial remedy proceedings), then civil proceedings regarding the contractual (*Nikah*) dispute would need to be considered (proportionality and costs implications to be factored in).

In the case of *Shanaz v Rizwan* [1964] 2 All ER 993, the parties married in India in 1955 and the terms of *Mahr* were included in the *Nikah* contract. The husband divorced the wife in 1959 and the wife brought a financial claim in England, where the parties resided. The wife sought remedy in the civil courts for breach of (*Nikah*) contract and was successful in retrieving the outstanding *Mahr* amount.

Similarly, in the case of *Uddin v Choudhury* [2009] EWCA Civ 1205, the court recognised and upheld the terms of the *Nikah* contract.

Issues arise when the *Nikah* contract is verbal only or when the written contact cannot be obtained. If there is no valid marriage, the parties would be treated as a cohabiting couple. In this instance, addressing the financial matters would be confined to TOLATA and Schedule 1 claims.

Precautionary steps

Precaution is always best when dealing with a Muslim couple.

Accordingly, having a *Nikah* contract properly drafted by a *Shariah* family lawyer alongside a prescriptive pre-nuptial agreement, should assist when dealing with the financial aspects arising from an Islamic divorce. It is to be noted that whilst a post-nuptial agreement can be executed if precautionary steps have not been taken prior to the marriage, there is nothing similar available under *Shariah* law.

For whatever reason, if the appropriate precautionary steps have not been taken, it is vital that the assistance of an expert family lawyer, who also specialises in Islamic/*Shariah* law, is sought in the event of marital breakdown. Special consideration would have to be given to the religious and cultural nuances alongside the legal options available before formulating the best strategy for the client.

Lastly, it would also be best for specialist advice from lawyers and/or the *Shariah* Council in the other jurisdiction to be consulted to ensure that complete legal advice has been provided (which would avoid issues/difficulties in the future, as was the case in *Hussain v Parveen* [2021] EWFC 73).

Tousi v Gaydukova – Must Parties to a Void Marriage First Seek a Nullity Order before Obtaining an Order for the Transfer of a Tenancy?

Christopher Hames KC
4 Paper Buildings

Katherine Gittins
3 Dr Johnson's Buildings

The distinction between void, voidable and non-qualifying ceremonies can be difficult to discern. The case law is voluminous and often turns on very specific factual scenarios. The case of *Tousi v Gaydukova* [2024] EWCA Civ 203 entered a further level of complexity by relating to a foreign 'marriage' in the terms of an application for a transfer of tenancy under the Family Law Act 1996 (FLA). The case became embroiled with fascinating issues relating to private international law, the question of whether the parties' purported marriage was a void or non-qualifying ceremony, and which jurisdiction should determine the nature of the marriage ceremony and the relief or 'ramifications' that flow. However, as the Court of Appeal held, this was an unnecessary distraction to the key issues in this case. On peeling back the layers of complexity, the issues at the heart of this case were two-fold:

(1) Did the court have jurisdiction to make a transfer of tenancy order under s 53 and Sch 7 FLA where the parties had a void marriage?
(2) Does the definition of a 'cohabitant' in Sch 7, para 3 FLA include parties to a void marriage?

This article aims to make clear the answers to these questions, the differences between void and non-qualifying ceremonies, and to highlight the precedent created by the Court of Appeal that parties to void marriages need not seek a nullity to pursue a transfer of tenancy.

Readers will no doubt be aware of the distinction between Sch 7, para 2 and Sch 7, para 3 FLA. Paragraph 2 allows an order for a transfer of tenancy to be made on the application of a spouse or civil partner on the making of a divorce, nullity or judicial separation order. Paragraph 3 allows the order to be made when cohabitants cease to cohabit.

The facts

The appellant was an Iranian national and the respondent was a Ukrainian national. They participated in a ceremony of marriage at the Iranian Embassy in Kyiv, Ukraine in December 1997. The parties took no further steps to register the marriage in Ukraine although the respondent stated she had attempted to get the appellant to register the marriage, but to no avail.

Following the ceremony, the parties lived as husband and wife. In 2000/2001 they moved to the United Kingdom and relied on being spouses for the respondent to obtain a visa. For all intents and purposes they believed they were validly married.

In 2010, the parties were granted a joint tenancy of a housing association property. The property had three bedrooms and was shared by the parties and their two children. In 2020, the relationship broke down and the respondent and the younger child left the property and were re-housed in temporary local authority accommodation. The elder child joined the respondent soon after, and they later moved to larger but ultimately inadequate and overcrowded temporary accommodation. The appellant remained living alone in the family home.

The respondent had attempted to seek a decree of divorce on two separate occasions, but had not been able to because she was unable to afford the fees and, subsequently, she was not able to provide a marriage certificate.

The respondent initially made an application for a non-molestation order and an occupation order. Although the occupation order was refused, the trial judge highlighted it remained open for the respondent to seek a transfer of tenancy.

In 2021, the respondent applied for a transfer of tenancy application. There were then no extant proceedings relating to divorce or nullity. Recorder Allen QC determined the application in favour of the respondent and ordered the applicant to leave the property. However, following judgment, the appellant raised the issue of whether the parties were married and queried the court's jurisdiction to make such an order without a decree of divorce. Recorder Allen QC ultimately determined that it was not necessary for him

to decide the issue as if the parties were married, he could make an order under Sch 7, para 2, and if they were former cohabitants, he could make the order under Sch 7, para 3. The appellant appealed.

High Court appeal – *Tousi v Gaydukova* [2023] EWHC 404 (Fam)

At the first appeal, it was agreed by all parties that the trial judge should have first determined whether the parties were married. This determined the jurisdiction of the court on making an order for a transfer of tenancy and when it is to come into effect. It was considered important whether the marriage is void or a non-qualifying ceremony, as it would determine whether the trial judge had jurisdiction to make the order for the transfer of tenancy.

The first appeal was, as Moylan LJ put it, 'side tracked by other legal points which … are not relevant to that core issue' ([3][1]). The appeal required an expert in Ukrainian law to provide three reports. Although, in the High Court judgment, Mostyn J provided a masterful analysis of the history of marriage going back to Gratian, the case law relating to nullity of marriage and the relevance of foreign law to the remedy available under English law in respect of an invalid overseas marriage, this was ultimately simply not needed. Thus the first lesson to be learned from this case is perhaps a fundamental but forgotten one: to trudge through complexity and get to the heart of the issues, and not to overcomplicate unnecessarily.

The expert report clearly set out that the formation of the marriage was not valid according to the *lex loci celebrationis* and would not give rise to either party to seek a remedy in Ukraine ([30][2]). This was accepted by both parties. In dismissing the appeal, Mostyn J found that the scope of the foreign law should not merely determine the validity of the ceremony but should extend to the 'ramifications' and relief flowing from that invalidity, provided 'it is not obviously contrary to justice'.[3] In applying this test, he determined that the ceremony was 'analogous to a domestic non-qualifying ceremony granting no right to the grant of a nullity decree'[4] and thereby determined that the relief available under the foreign law should determine the relief available under English law as he held it was not obviously contrary to justice. Although it is clear what Mostyn J sought to accomplish with this new test, it was not, as the Court of Appeal went on to hold, in conformity with previous precedents: the test would also beg the question 'what classifies as "obviously contrary to justice"?' It would also unduly fetter the powers of the English court if it were obliged to follow the 'ramifications' of the foreign law. The Court of Appeal therefore rejected the proposed test of Mostyn J in so far as the 'ramifications' under the foreign law on the question of validity were relevant to the English court's determination of what remedies were available under English law.

By implication, Mostyn J must have decided that Sch 7, para 3 therefore applied ([10][5]). As a result, the transfer of tenancy application was made correctly and remained in place.

The difficulty the parties got into here relates to the ramifications of an invalid marriage. Thus lesson two is to avoid being derailed by what may be a usual course for determining relief on divorce or nullity, but which does not apply to a transfer of tenancy.

Court of Appeal – *Tousi v Gaydukova* [2024] EWCA Civ 203

In the second appeal brought by the appellant, he raised that the parties' marital status required determination to decide whether the court order could take effect, that the judge had been wrong to find the foreign law should determine the relief of the English law and that the parties' marriage was void and therefore needed nullity proceedings which brought them into the scope of Sch 7, para 2.[6]

The respondent put in a Respondent's Notice and presented a case which was somewhat simpler. She submitted that the only question for the court to determine was whether the parties were or were not married, as if they were not, it was argued they fell into the category of 'cohabitant' which is defined in s 62 FLA as 'two persons who are neither married to each other nor civil partners of each other but are living together as if they were a married couple or civil partners'. In response to this, the appellant argued that Sch 7, paras 2 and 3 were mutually exclusive and that a party to a void marriage could never be a 'cohabitant'.

Across both judgments, the court had to consider the implications of void marriages and non-qualifying ceremonies. As set out in *De Renville v De Renville* [1948] P 100 'a void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it.' Thus the court highlighted that a decree of nullity (now a nullity order) is not a formal requirement to end a void marriage. However, a party to a void marriage is entitled to seek a nullity order if they wish and will be obliged to seek a nullity order if they wish to seek financial remedies under the Matrimonial Causes Act 1973.

In comparison, a non-qualifying ceremony is a ceremony that was so deficient, with non-compliance with formal requirements as stipulated in the Marriage Act 1949, that it is no marriage at all and no order is required. As set out in the High Court judgment, it is 'a union the voidness of which is so extreme it falls outside the Nullity of Marriage Act 1971 (now s 11 of the Matrimonial Causes Act 1973) and will not attract a nullity'.[7] An example of this can be seen in *Hudson v Leigh* [2009] EWCA 1306 (Fam), in which the English court found the ceremony amounted to a non-marriage as the ceremony had not been intended to create a valid marriage under local law and key words were left out.

The third lesson in this case is therefore to remember that non-qualifying ceremony cases remain relatively rare, look to the formation of the marriage, and turn on the specific facts of the case.

The only real distinction between void marriages and non-qualifying ceremonies is the question of relief sought. To that question the Court of Appeal made clear that the authority of *Burns v Burns* [2007] EWHC 2492 (Fam) remains good law that 'once the foreign law has determined whether it is or is not a valid marriage, it is for the lex fori to decide its implications and what remedies are avail-

able'.[8] Only the formal validity of the marriage is determined by the law in the place where it was celebrated. To extend this any further, the court determined, would cause less clarity and certainty.[9]

On the Court of Appeal findings, the crux of *Tousi* did not turn on any distinction between void marriages and non-qualifying ceremonies, but simply on whether parties were validly married or not. The case turned on the definition of 'cohabitants'. As set out by Moylan LJ, there are two parts to satisfying the statutory definition. The first is that the parties must not be married or be civil partners. Referring to *De Renville*, if a marriage is deemed as having never taken place, it cannot be a marriage. The second question is one of evidence; whether the parties were actually living together as if they were married or civil partners. In this case, that evidential hurdle was clearly met.[10]

To determine whether these paragraphs were mutually exclusive the court had to consider the statutory interpretation and whether there was any reason why a void marriage would not fall within the definition of cohabitant for both policy reasons and through the usual canons of statutory interpretation.

The changes made to Sch 7 FLA built on the statutory schemes introduced by the Matrimonial Homes Act 1967 and the Matrimonial Homes Act 1983. The original statutes introduced a scheme for the transfer of tenancies between spouses on divorce and subsequently on judicial separation and on making of a decree of nullity. The FLA extended the power to cohabitees pursuant to a 1992 Law Commission report. Moylan LJ noted[11] that there was nothing in the report which considered the relationship between the extended power for cohabitants and the existing power for spouses, particularly the position of parties to a marriage. He observed[12] that the scheme was intended to be a prompt remedy, particular for former cohabitants.

Applying Lord Hodge's observations[13] about statutory interpretation in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255, he concluded[14] that there was no reason in general law why parties to a void marriage could not fall within the statutory definition of cohabitants and that there was nothing to support the appellant's submission that interpreting Sch 7, paras 2 and 3 FLA required a party to bring nullity proceedings and therefore excluded them from para 3, although he confirmed that both void and voidable marriages fall into Sch 7, para 2. The court found 'it makes evident good sense' for parties to a void marriage, who do not need a nullity order, to be included within the extension to make a transfer of tenancy to cohabitants.[15]

Thus returning to the overarching theme of focusing solely on the issues which required determination, Moylan LJ was clear that as soon as the High Court found that the marriage was not valid, it did not need to trouble itself further as to whether this was a void or non-qualifying ceremony as the court had the jurisdiction to make an order under para 3.[16] Nevertheless, the court felt obliged to conclude, probably *obiter*, that this was a void marriage.[17]

What are the broader implications of this judgment?

The judgment of the Court of Appeal sets a very clear precedent: parties to a void marriage, so long as they meet the evidential burden, can come within the definition of cohabitants and thereby within the jurisdiction of Sch 7, para 3 FLA in order to obtain a transfer of tenancy upon the cessation of cohabitation.

This confirms the principle that for a transfer of tenancy application, a nullity order is not required. To individuals, this will make a significant difference procedurally. It reduces the costs that parties must face to apply for a transfer of tenancy by not having to make two applications, one of nullity and one for transfer of tenancy. It reduces the time delay in the court dealing with an application as they need only deal with the transfer of tenancy issue. This in turn provides better access to justice. In this case, the respondent did not seek financial remedies under the Matrimonial Causes Act 1973, but for other parties to a void marriage, the decision leaves the door open to apply for financial remedy proceedings on the making of a nullity order. In the wider circumstances, it could reduce the number of applications for a nullity order, and by implication the number of applications before the court at any one time.

In summary, this case is the first of its kind and confirms that parties to a void marriage may well have a more streamlined process to a transfer of tenancy, provided they meet the evidential burden. Thus to answer the questions in the introduction: the court did have the power to make a transfer of tenancy order, and, given that a void marriage can come within the meaning of 'cohabitants', this can be done under Sch 7, para 3 FLA.

Notes

1 *Tousi v Gaydukova* [2024] EWCA Civ 203.
2 *Tousi v Gaydukova* [2023] EWHC 404 (Fam).
3 *Tousi v Gaydukova* [2023] EWHC 404 (Fam) at [69].
4 *Tousi v Gaydukova* [2023] EWHC 404 (Fam) at [31].
5 *Tousi v Gaydukova* [2024] EWCA Civ 203.
6 *Tousi v Gaydukova* [2024] EWCA Civ 203 at [32].
7 *Tousi v Gaydukova* [2023] EWHC 404 (Fam) at [36].
8 *Tousi v Gaydukova* [2024] EWCA Civ 203, as affirmed in *Asaad v Kurter* [2013] EWHC 3852 (Fam), [2014] 2 FLR 833 at [60].
9 *Tousi v Gaydukova* [2024] EWCA Civ 203 at [76].
10 *Tousi v Gaydukova* [2024] EWCA Civ 203 at [66].
11 *Tousi v Gaydukova* [2024] EWCA Civ 203 at [47]–[50].
12 *Tousi v Gaydukova* [2024] EWCA Civ 203 at [3].
13 *Tousi v Gaydukova* [2024] EWCA Civ 203 at [51].
14 *Tousi v Gaydukova* [2024] EWCA Civ 203 at [66]–[67].
15 *Tousi v Gaydukova* [2024] EWCA Civ 203 at [68].
16 *Tousi v Gaydukova* [2024] EWCA Civ 203 at [69].
17 *Tousi v Gaydukova* [2024] EWCA Civ 203 at [70].

Where there's a *Wells* there's a Way

Richard Kershaw
Partner, Hunters Law

Anna Roiser
Senior Knowledge Lawyer, Hunters Law

The 2018 Court of Appeal judgments in *Versteegh v Versteegh* [2018] EWCA Civ 1050 and *Martin v Martin* [2018] EWCA Civ 2866 appeared to signal that *Wells* sharing was falling out of favour. More recently, however, judges seem more open to it, perhaps reflecting the economic turbulence of recent years. Consideration of *Wells* sharing in several significant judgments in 2023[1] (the year *Wells* turned 21) suggests this as an opportune moment to reflect on current law.

As is well known, *Wells* sharing derives from Thorpe LJ's judgment in *Wells v Wells* [2002] EWCA Civ 476 where he identified that continued co-ownership of assets (in that case a shareholding) may help achieve the court's objective of fairness. The tension, of course, is with the clean break principle in s 25A MCA 1973 under which the court must consider whether it is possible to end the parties' financial obligations towards each other. The courts have thus sought to navigate this tension and identify when fairness requires the clean break principle to make way for *Wells* sharing.

When will *Wells* sharing be considered?

Often, the asset-holder will resist *Wells* sharing, preferring to retain the future fruits of their asset and avoid the other party's ongoing involvement in their affairs, but this will not always be the case: if the asset is in difficulty, or raising funds to buy the other out would be difficult, they may prefer a *Wells* approach.

There are broadly three circumstances when *Wells* sharing will be considered.

The asset cannot be reliably valued

This was the situation in *Wells*. Mr Wells' previously successful business had declined, rendering it unsellable and thus impossible to value. Wilson J (as he then was) awarded W most of the liquid assets whilst H retained the business. Thorpe LJ, giving the lead judgment on appeal, held:

> 'we were at once struck by the security of the result that the wife had achieved in contrast to the risks confronting the husband's economy … sharing is achieved by a fair division of both the copper-bottomed assets and the illiquid and risk laden assets.'

Whilst Thorpe LJ considered that sharing H's business would have produced a fair result, neither party wanted this. Thorpe LJ accepted that as an appeal judge he could not impose it and so increased H's share of the liquid assets. However, in subsequent cases judges have ordered *in specie* division where business valuation posed a challenge, with Charles J in *D v D & Anor* [2007] EWHC 278 (Fam) describing private companies as a 'classic example' of the type of asset where the uncertainty of valuations may render a clean break unfair. In *Versteegh* the Court of Appeal found the trial judge had been justified in concluding that he could not make even a conservative estimate of the value of H's business and *Wells* sharing was appropriate. In *CG v DL* [2023] EWFC 82 where, as in *Wells*, a previously successful business was in decline such that it was unsellable and thus could not be valued, Sir Jonathan Cohen took a *Wells* approach. However, not every private company is difficult to value. In *Cooper-Hohn v Hohn* [2014] EWHC 4122 (Fam), Roberts J found that as H's business has no value beyond its underlying assets its value was clear and W's claim for *Wells* sharing failed. Generally, the value of a business will fall somewhere between 'clear' and 'unknowable'; where along the spectrum it lies will be relevant to whether *Wells* sharing is appropriate (discussed below).

Where the court's inability to value a business is due to non-disclosure, *Wells* sharing is unlikely, not least due to probable challenges with enforcement. Rather, adverse inferences may be drawn and the other party awarded more liquid assets (as in *AP v ALP* [2018] EWHC 2758 (Fam) and *Ditchfield v Ditchfield* [2023] EWHC 2303 (Fam)).

Deferred assets whose future value depends on currently unknowable information also pose valuation challenges. Carried interest is a classic example: private equity fund managers receive a percentage of the profits generated for investors if the profits exceed a 'hurdle rate', typically 8%. If it is not met the carried interest has no value; if it is, receipts depend on the return on each underlying investment. *Wells* sharing was applied to carried interest in *B v B* [2013] EWHC 1232 (Fam), *A v M* [2021] EWFC 89 and *ES v SS* [2023] EWFC 177.[2] It was also the approach adopted in *B v B* [2015] EWHC 210 (Fam), where H's non-transferrable shares in a venture capital company were likely to realise significantly more than their current value, and in *GW v RW* [2003] EWHC 611 (Fam) where H held deferred stock and options.

Insufficient liquidity

Where a business' value can be satisfactorily assessed, but there are insufficient other resources to achieve a fair division without dividing the business, the main options are *Wells* sharing or a deferred lump sum (or a sale of the business, which is rarely desirable). The preferred approach will depend on the circumstances: in *Versteegh*, *Wells* sharing was preferred as raising liquidity would harm the business;

in *X v X* [2016] EWHC 1995 (Fam), Bodey J described deferred lump sums as the 'tidier' option, and took that route given H's ability to raise funds within 12–18 months. In *Martin v Martin* [2018] EWCA Civ 2866 the approaches were combined, with W awarded both a deferred lump sum and shares.

A genuinely joint asset such that fairness suggests both parties should retain an interest

In some cases, even where neither valuation nor liquidity poses a problem, fairness may require a *Wells* approach. For example, in *C v C* [2003] EWHC 1222 (Fam), the parties had jointly set up a pharmaceutical company which would likely sell within the next 5 years for significantly more than its current value. Whilst H had been its driving force, W had been actively involved and wished to remain so, and Coleridge J considered fairness required that she be able to do so – albeit that she was awarded a smaller shareholding than H. By contrast, in *AP v ALP* [2018] EWHC 2758 (Fam), W's lack of involvement with H's (uncertain) business ventures weighed against *Wells* sharing being a fair outcome.

The importance of the clean break

Where any of the above circumstances arise, the need to do fairness will be balanced against the desirability of a clean break. Lord Scarman's 'classic justification'[3] for a clean break in *Minton v Minton* [1979] AC 593 was 'the public interest that spouses, to the extent that their means permit, should provide for themselves' and to encourage former spouses 'to avoid bitterness … and to settle their money and property problems … to put the past behind them'. However, where there is to be no clean break in any event, this will be a less significant factor in determining whether *Wells* sharing is appropriate (see e.g. *B v B* [2015] EWHC 210 (Fam)).

The weight to be given to the desirability of a clean break has waxed and waned, a trajectory which can be neatly traced in the judgments of Sir Nicholas Mostyn. One year after *Wells*, he suggested in *GW v RW* that *Wells* sharing 'should become standard fare where a case has a significant element of deferred or risk-laden assets. For why should one party receive most of the plums leaving the other with most of the duff?'. Some years later in *BJ v MJ (Financial Remedy: Overseas Trusts)* [2011] EWHC 2708 (Fam), he similarly held that 'Fairness is not to be sacrificed on the altar of finality'.

By 2017, in *WM v HM* [2017] EWFC 25 (the first instance decision in *Martin*), his view was that 'a *Wells* sharing arrangement should be a matter of last resort, as it is antithetical to the clean break'. The following year, King LJ took a similar approach in *Versteegh*, saying that *Wells* sharing should be 'approached with caution', though in the circumstances of the case, where H's business could not be valued, it was 'hard to know' what else could be done. Lewison LJ in his concurring judgment indicated that *Wells* sharing should only be used when it was 'the only option left'. A few months later, Moylan LJ in *Martin* endorsed King LJ's approach. Mostyn J continued this line in *A v M* [2021] EWFC 89, holding that 'if there is to be *Wells* sharing it should be limited as much as possible'.

There is a sense among the profession, however, there may be more willingness to make *Wells* orders in appropriate cases than these pronouncements suggest. It is perhaps notable that in *HO v TL* [2023] EWFC 215, Peel J, in summarising the law on business assets and *Wells* sharing, did not suggest that it should be a 'last resort':

> '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.'

What factors will be considered when deciding whether to make a *Wells* order?

The fragility of the valuation

As Moylan LJ set out in *Martin*, 'even when the court is able to fix a value [of a private company] this does not mean that that value has the same weight as the value of other assets. The court has to assess the weight which can be placed on the value … for the purposes of determining … both … the amount and … the structure of the award'. The less reliable the valuation, the greater the argument for *Wells* sharing. In some cases, fragility will stem from the nature of the business (e.g. a lack of comparables; a period of transition in the relevant market), in others it may relate to wider circumstances. In *G v T* [2020] EWHC 1613 (Fam), Nicholas Cusworth QC (sitting as a deputy High Court Judge) considered that H's criticism of W for running a *Wells* argument 'is misplaced. Particularly at a time of extreme economic turbulence, whether for the company, as in the latter half of 2018, or for the global economy as of now, an outcome in a case such as this where there are fundamental issues about the true value of a private company, its liquidity and the paying party's available exit strategy may in not a few cases be met with an acceptable solution of the sort discussed in *Wells*'.

Where previous valuations, or previous projections on which the valuation relies, have proved unreliable, the case for *Wells* sharing will be bolstered. This was the situation in *ES v SS*, where H was a private equity fund manager whose reward on the sale of various investments depended on the sale prices achieved. During proceedings, one such investment – E Co – was sold, realising a payment to the husband of €49.9m, ten times more than the value ascribed to his interest by the single joint expert accountant based on the management company's valuation. H nevertheless argued against *Wells* sharing of his interests in the remaining investments as contrary to the clean break principle, arguing that 'unforeseen external forces' were responsible for the situation which had arisen with E Co. As Cohen J commented, 'that H received so much more for his interest in E Co than the accounts of XYZ suggested was probable feeds directly into the issue of whether W should be entitled to a *Wells* sharing order in respect of the outstanding [investments], and how much weight I can put on the valuations currently given to them'. He concluded that it would be 'wrong … to ignore the history of the E Co exit … where

W is entitled to a share in the assets and where any exit is likely to take place within a relatively modest timescale, [*Wells* sharing] is the best – indeed the only – way of doing fairness'. Similar approaches had been taken by Moylan J (as he then was) in *P v P* [2010] 1 FLR 1126 where between judgment and final order an offer to purchase shares was made for several times the value attributed to them in proceedings; and in *Versteegh* where it was noted that previous business forecasts had proved 'wildly inaccurate'.

Practicality

Wells sharing is unlikely to be appropriate where implementation or enforcement would pose particular challenges. As Mostyn J put it in *FZ v SZ (Rev 1)* [2010] EWHC 1630 (Fam), 'sometimes pure theory must yield to pragmatism', in that case due to the assets' interconnectedness with potential liabilities. Conditions attached to shares may also render *Wells* sharing impractical: in *G v T* Nicholas Cusworth QC noted that W had not pursued *Wells* sharing due to the 'stringent restrictions on share sales and the evident hostility of the directors'. The level of antagonism between the parties can also render continued financial links especially undesirable, as in *IR v OR* [2022] EWFC 20 where Moor J noted that a dispute during the proceedings 'shows just how much scope [*Wells* sharing] would give for further dispute'.

A *Wells* approach might be contra-indicated if the realisation of the future share is identified as being too far hence, particularly where realisation is contingent on active endeavour (as distinct from passive growth) over a protracted period.

Wells sharing will also be avoided where the complexity of the structures plus the asset-holder's attitude mean the other party would be unlikely to realise their interest: in *Barclay v Barclay* [2021] EWFC 117 Cohen J held: 'So complex are the structures that H has set up and so open to possible avoidance of an order are they, that any *Wells* type order could easily be avoided'; in *Chai v Peng* [2017] EWHC 792 (Fam) Bodey J considered that a *Wells* approach might leave W 'facing the difficult and expensive task of having to chase shareholdings halfway round the world'.

By contrast, the fact that implementation would be straightforward and 'not an onerous burden' on H supported *Wells* sharing in *ES v SS*.

Need

How needs are to be met may determine whether *Wells* sharing is appropriate. In *P v P* [2007] EWHC 2877 (Fam) Moylan J declined to order *Wells* sharing as doing so would risk leaving W unable to meet her needs. By contrast, in *Versteegh*, the fact that the liquid element of W's award would exceed her needs weighed in favour of *Wells* sharing. In a similar vein Mostyn J in *WM v HM* held that *Wells* sharing was 'not so objectionable' where it applied only to a small proportion of the applicant's award.

Nuptial agreement

In *Versteegh*, the existence of a pre-nuptial agreement was considered relevant to whether there should be *Wells* sharing as it had included provisions protecting H's business assets. For this reason – and others – H was not required to release cash from his business, potentially undermining its viability, to meet W's claim.

Wells sharing and future endeavours

Issues of future endeavour often arise alongside *Wells* sharing as typically one party retains an interest in an asset on which the other will continue to work. This can be recognised through discounting or capping the sums shared. The competing issues were explored by Recorder Nicholas Allen KC in *FT v JT* [2023] EWFC 250, where W argued that the amount payable to H on realisation of her business interests should be capped by reference to their current value:

> 'It is difficult to resolve because, on the one hand, if (as I have found) part of W's business is matrimonial property to which the sharing principle applies then logically H should (in the fullness of time) receive his sharing entitlement. On the other hand it can be said that if this share has an ascertainable value now then this should be the upper limit (or cap) of H's entitlement and any growth beyond this figure should be W's and W's alone. The contrary argument to this of course is that W is trading with H's share and that she is being renumerated for her work … I have not found this issue easy to determine.'

Ultimately, he declined to impose a cap given that W would be trading with H's share. He did, however, impose a sliding percentage, such that H would receive 17.5% of receipts (the marital element of the business having been assessed at 35%) until 2038 and 10% thereafter. The reduction was justified by reference both to W's future endeavour and H's need (the youngest child would turn 18 in 2038).

The approach will depend on the circumstances. In *ES v SS*, Sir Jonathan Cohen awarded W 50% of H's payment on the sale of E Co, realised between separation and trial, and 40% and 20% of interests yet to be realised according to the proportion of the investment period which remained in the future. In *CG v DL*, where it was anticipated H would transfer his business, whose only value was in its future profits, in around 4 years' time, Sir Jonathan Cohen held that due to H's future endeavours only 35% of the business was matrimonial and W was awarded 17.5% of future profits for 4 years.

Conclusion

Twenty-one years after Thorpe LJ's judgment, *Wells* sharing remains an important tool for achieving fairness in financial remedy claims, notwithstanding the tensions with the clean break principle. Thanks to the intervening years of jurisprudence, we now have some clarity on when this tool will likely be deployed.

Notes

1 Sir Jonathan Cohen in *ES v SS* [2023] EWFC 177 and *CG v DL* [2023] EWFC 82; Peel J in *HO v TL* [2023] EWFC 215 and *Ditchfield v Ditchfield* [2023] EWHC 2303 (Fam); and Recorder Nicholas Allen KC in *FT v JT* [2023] EWFC 250.
2 The author acted for the applicants in *B v B* and *ES v SS*.
3 *Robson v Robson* [2010] EWCA Civ 1171 per Ward LJ.

Galbraith Tables v2: Why they Have Changed

Jonathan Galbraith
Chief Executive Officer,
Mathieson Consulting

Chris Goodwin
Head of Report Writing and Chief Actuary,
Mathieson Consulting

Some two years have now passed since the First Edition of the Galbraith Tables were published. Much has happened within this intervening period. We, the authors, felt the need to produce a revised edition. This article discusses what has changed and why it has proved necessary for the new version to be produced, with the new full version of the Galbraith Tables being available at https://mcact.co.uk/galbraith-tables/. A simplified version of the Second Edition is shown alongside this article.

It is perhaps something of a cliché to note both that 'permanence is the illusion of every age' and that 'nothing dates faster than a vision of the future'. Alas this is very much the case when it comes to placing a value upon future unknown cashflows such as pensions.

The Galbraith Tables seek to provide the family law practitioner with a means by which an approximate value may be placed upon future pension rights, some of which may be in payment some 30+ years hence, and it follows that the thinking on such matters will change over time. But how often should one seek to update such tables?

We were very much of the opinion that producing a new set of Galbraith Tables every month or every quarter would suit no one: there would be endless competing sets of tables in existence and it might prove just a little time-consuming for us!

However, since the publication of the First Edition, we have seen an inflationary spike that has led to tighter monetary policy being adopted by the Bank of England: in short, interest rates are higher now than the c. 2008–2021 *status quo ante*. Most economists suggest that it is unlikely that we shall see the return of near-zero interest rates – upon which the First Edition relied – in the foreseeable future and, in turn, we took the view that the time had come to increase the 'discount rate' used in our model.

This means that the Second Edition of the Galbraith Tables seeks to place a *lower* value on future pension rights than did the First Edition. Such a change is in keeping with the reductions that have been seen in the Cash Equivalents of private sector defined benefit pensions since early 2022: the use of higher discount rates means that less monies need now be set aside today to cover the cost of meeting future benefit obligations. (The Second Edition also reflects updates in life expectancies, with post-COVID-19 pandemic data now being available, but such changes make little difference to the overall results.)

This reduction in defined benefit pension Cash Equivalents can be observed from, for example, the 'Transfer Value Tracker' produced by actuarial consultancy XPS (www.xpsgroup.com/what-we-do/technology-and-trackers/xps-transfer-watch/xps-transfer-value-tracker/). The chart as at March 2024 shows that Cash Equivalents reduced considerably over 2022 and have remained at a level much lower than was previously the case.

To give an example of how the Galbraith Tables have changed, the First Edition valued a £10,000 per annum pension, payable at age 60 to a man now aged 45, at c. £262k, while the Second Edition tables value the same benefit at just c. £143k. The reduction is both a function of higher expected investment returns assumed over: (1) the 15-year period to age 60; and (2) the period in which the income is in payment.

With regard to this latter point, the Galbraith Tables use an income drawdown model, rather than explicitly seeking to model annuity purchase, but this change is commensurate with the improvements in annuity rates that have been observed in the last c. 18 months, i.e. a £100k notional fund goes further than it used to in providing a fixed income in retirement.

As regards the 'longevity' of this Second Edition of the Galbraith Tables, it is to be hoped that the market realignment of late 2022 might be regarded as some form of paradigm shift, rather than being but temporary noise that then gives rise to something else. Such is the challenge in seeking to produce such fixed tables: it is impossible to predict whether they will remain in kilter with the real world for which they are intended to serve as an approximation.

Since the publication of the First Edition, the Galbraith Tables have been featured here in the *Financial Remedies Journal*, appeared in *At A Glance 2023–24*, and have also been acknowledged, with a cautious welcome as a useful starting point, within the revised edition of *A Guide to the Treatment of Pensions on Divorce*, known as the PAG2 guide. We are grateful for the recognition that the tables have received. We hope that this updated edition will continue to prove useful to family law practitioners in the future.

The Second Edition of the Galbraith Tables

Lump sum valuation factors

To be used to value a £1 lump sum (expressed in today's money terms) that is payable at the assumed retirement age.

A factor of 1.000 is assumed for all lump sums that are to be taken immediately.

Age at date of calculation	Assumed retirement age														
	55	**56**	**57**	**58**	**59**	**60**	**61**	**62**	**63**	**64**	**65**	**66**	**67**	**68**	**69**
40	0.620	0.598	0.576	0.555	0.535	0.516	0.497	0.480	0.462	0.446	0.430	0.414	0.399	0.385	0.371
41	0.643	0.620	0.598	0.576	0.555	0.535	0.516	0.497	0.480	0.462	0.446	0.430	0.414	0.399	0.385
42	0.667	0.643	0.620	0.598	0.576	0.555	0.535	0.516	0.497	0.480	0.462	0.446	0.430	0.414	0.399
43	0.692	0.667	0.643	0.620	0.598	0.576	0.555	0.535	0.516	0.497	0.480	0.462	0.446	0.430	0.414
44	0.718	0.692	0.667	0.643	0.620	0.598	0.576	0.555	0.535	0.516	0.497	0.480	0.462	0.446	0.430
45	0.745	0.718	0.692	0.667	0.643	0.620	0.598	0.576	0.555	0.535	0.516	0.497	0.480	0.462	0.446
46	0.772	0.745	0.718	0.692	0.667	0.643	0.620	0.598	0.576	0.555	0.535	0.516	0.497	0.480	0.462
47	0.799	0.772	0.745	0.718	0.692	0.667	0.643	0.620	0.598	0.576	0.555	0.535	0.516	0.497	0.480
48	0.827	0.799	0.772	0.745	0.718	0.692	0.667	0.643	0.620	0.598	0.576	0.555	0.535	0.516	0.497
49	0.856	0.827	0.799	0.772	0.745	0.718	0.692	0.667	0.643	0.620	0.598	0.576	0.555	0.535	0.516
50	0.886	0.856	0.827	0.799	0.772	0.745	0.718	0.692	0.667	0.643	0.620	0.598	0.576	0.555	0.535
51	0.918	0.886	0.856	0.827	0.799	0.772	0.745	0.718	0.692	0.667	0.643	0.620	0.598	0.576	0.555
52	0.948	0.918	0.886	0.856	0.827	0.799	0.772	0.745	0.718	0.692	0.667	0.643	0.620	0.598	0.576
53	0.975	0.948	0.918	0.886	0.856	0.827	0.799	0.772	0.745	0.718	0.692	0.667	0.643	0.620	0.598
54	0.999	0.975	0.948	0.918	0.886	0.856	0.827	0.799	0.772	0.745	0.718	0.692	0.667	0.643	0.620
55	1.000	0.999	0.975	0.948	0.918	0.886	0.856	0.827	0.799	0.772	0.745	0.718	0.692	0.667	0.643
56		1.000	0.999	0.975	0.948	0.918	0.886	0.856	0.827	0.799	0.772	0.745	0.718	0.692	0.667
57			1.000	0.999	0.975	0.948	0.918	0.886	0.856	0.827	0.799	0.772	0.745	0.718	0.692
58				1.000	0.999	0.975	0.948	0.918	0.886	0.856	0.827	0.799	0.772	0.745	0.718
59					1.000	0.999	0.975	0.948	0.918	0.886	0.856	0.827	0.799	0.772	0.745
60						1.000	0.999	0.975	0.948	0.918	0.886	0.856	0.827	0.799	0.772
61							1.000	0.999	0.975	0.948	0.918	0.886	0.856	0.827	0.799
62								1.000	0.999	0.975	0.948	0.918	0.886	0.856	0.827
63									1.000	0.999	0.975	0.948	0.918	0.886	0.856
64										1.000	0.999	0.975	0.948	0.918	0.886
65											1.000	0.999	0.975	0.948	0.918
66												1.000	0.999	0.975	0.948
67													1.000	0.999	0.975
68														1.000	0.999
69															1.000

Assumptions made (percentages in per annum terms)	
Investment returns	**Time-dependent distribution over period to retirement**
Rate of assumed price inflation	**2.0%**
No allowance for any pre-retirement mortality	

Pension valuation factors: male

To be used to value an index-linked £1 p.a. pension (expressed in today's money terms) that is payable to a male from the assumed retirement age.

Age at date of calculation	Assumed retirement age														
	55	**56**	**57**	**58**	**59**	**60**	**61**	**62**	**63**	**64**	**65**	**66**	**67**	**68**	**69**
40	16.290	15.364	14.481	13.639	12.836	12.070	11.340	10.644	9.983	9.353	8.754	8.185	7.645	7.132	6.645
41	16.864	15.905	14.990	14.117	13.284	12.490	11.733	11.013	10.327	9.674	9.053	8.464	7.904	7.373	6.868
42	17.460	16.466	15.517	14.612	13.748	12.925	12.141	11.394	10.683	10.007	9.364	8.753	8.172	7.622	7.100
43	18.078	17.047	16.063	15.125	14.230	13.377	12.564	11.789	11.052	10.351	9.685	9.052	8.450	7.880	7.339
44	18.719	17.650	16.630	15.657	14.729	13.845	13.002	12.199	11.435	10.708	10.018	9.361	8.738	8.147	7.587
45	19.383	18.275	17.217	16.209	15.247	14.330	13.456	12.624	11.832	11.079	10.363	9.683	9.037	8.424	7.843
46	20.051	18.923	17.827	16.781	15.784	14.833	13.927	13.065	12.243	11.463	10.720	10.015	9.346	8.711	8.109
47	20.721	19.575	18.459	17.375	16.341	15.355	14.416	13.521	12.670	11.861	11.091	10.361	9.667	9.009	8.385
48	21.415	20.229	19.094	17.990	16.918	15.896	14.923	13.995	13.113	12.274	11.476	10.719	10.000	9.318	8.671
49	22.133	20.905	19.731	18.609	17.517	16.458	15.448	14.487	13.572	12.702	11.875	11.090	10.345	9.638	8.968
50	22.875	21.605	20.391	19.229	18.119	17.040	15.993	14.996	14.048	13.146	12.289	11.475	10.702	9.969	9.275
51	23.643	22.329	21.072	19.871	18.722	17.624	16.558	15.524	14.541	13.606	12.717	11.874	11.073	10.313	9.593
52	24.386	23.078	21.777	20.534	19.345	18.209	17.124	16.071	15.052	14.083	13.162	12.287	11.457	10.670	9.923
53	25.049	23.802	22.506	21.220	19.990	18.815	17.692	16.620	15.581	14.576	13.622	12.715	11.854	11.038	10.265
54	25.622	24.448	23.211	21.929	20.656	19.440	18.279	17.170	16.112	15.088	14.098	13.158	12.266	11.420	10.619
55	25.607	25.005	23.840	22.614	21.345	20.087	18.885	17.738	16.644	15.600	14.591	13.617	12.692	11.816	10.985
56		24.989	24.381	23.224	22.010	20.755	19.512	18.325	17.193	16.113	15.085	14.091	13.133	12.224	11.364
57			24.363	23.750	22.602	21.400	20.158	18.931	17.759	16.643	15.579	14.567	13.589	12.647	11.755
58				23.731	23.112	21.974	20.783	19.556	18.345	17.190	16.090	15.042	14.046	13.085	12.160
59					23.091	22.467	21.339	20.160	18.949	17.755	16.617	15.533	14.502	13.523	12.579
60						22.446	21.816	20.698	19.533	18.338	17.161	16.040	14.974	13.961	12.998
61							21.793	21.159	20.052	18.901	17.723	16.564	15.461	14.413	13.417
62								21.135	20.497	19.401	18.265	17.104	15.964	14.880	13.850
63									20.472	19.830	18.747	17.626	16.484	15.363	14.298
64										19.805	19.160	18.090	16.985	15.861	14.760
65											19.134	18.487	17.431	16.342	15.238
66												18.460	17.812	16.769	15.698
67													17.784	17.135	16.107
68														17.106	16.456
69															16.427

Factors to value benefits in payment	
70	15.747
71	15.066
72	14.386
73	13.707
74	13.032
75	12.361
76	11.697
77	11.043
78	10.399
79	9.767
80	9.150
81	8.547
82	7.961
83	7.391
84	6.838
85	6.303
86	5.788
87	5.293
88	4.822

Assumptions made (percentages in per annum terms)	
Investment returns to retirement	**Time-dependent distribution over period to retirement**
Rate of assumed price inflation	**2.0%**
Investment return during drawdown	**4.0%**
Increases in drawdown income	**2.5%**
Scaling to apply to life expectancies	**1.1×**
No allowance for any pre-retirement mortality; life expectancy post retirement based upon CMI_2021_M [1.5%]: 100% S3PMA mortality tables	

Pension valuation factors: female

To be used to value an index-linked £1 p.a. pension (expressed in today's money terms) that is payable to a female from the assumed retirement age.

Age at date of calculation	Assumed retirement age														
	55	**56**	**57**	**58**	**59**	**60**	**61**	**62**	**63**	**64**	**65**	**66**	**67**	**68**	**69**
40	17.276	16.319	15.405	14.533	13.699	12.903	12.143	11.418	10.726	10.066	9.437	8.838	8.267	7.723	7.206
41	17.891	16.900	15.953	15.048	14.184	13.359	12.572	11.820	11.103	10.419	9.768	9.146	8.555	7.992	7.456
42	18.529	17.502	16.520	15.582	14.687	13.832	13.016	12.237	11.494	10.785	10.110	9.466	8.853	8.269	7.714
43	19.190	18.125	17.107	16.135	15.207	14.321	13.475	12.668	11.898	11.164	10.464	9.797	9.162	8.557	7.982
44	19.875	18.771	17.716	16.708	15.746	14.828	13.951	13.114	12.316	11.555	10.830	10.139	9.481	8.854	8.258
45	20.584	19.439	18.346	17.302	16.305	15.353	14.444	13.577	12.750	11.961	11.209	10.493	9.811	9.162	8.545
46	21.295	20.132	18.998	17.916	16.883	15.896	14.954	14.055	13.198	12.381	11.602	10.860	10.153	9.481	8.841
47	22.008	20.827	19.674	18.552	17.481	16.459	15.482	14.551	13.663	12.816	12.008	11.239	10.507	9.810	9.148
48	22.745	21.523	20.353	19.211	18.101	17.041	16.029	15.064	14.143	13.266	12.429	11.632	10.874	10.151	9.465
49	23.506	22.242	21.032	19.873	18.743	17.644	16.596	15.595	14.641	13.732	12.865	12.039	11.253	10.504	9.793
50	24.293	22.985	21.733	20.535	19.387	18.269	17.182	16.145	15.156	14.214	13.315	12.460	11.645	10.870	10.132
51	25.105	23.753	22.458	21.218	20.031	18.895	17.789	16.715	15.690	14.713	13.782	12.895	12.051	11.248	10.484
52	25.891	24.546	23.207	21.925	20.697	19.522	18.398	17.304	16.242	15.229	14.264	13.346	12.471	11.639	10.847
53	26.591	25.313	23.980	22.654	21.385	20.170	19.007	17.894	16.813	15.764	14.764	13.812	12.905	12.043	11.223
54	27.196	25.996	24.728	23.407	22.095	20.838	19.636	18.485	17.385	16.317	15.281	14.294	13.355	12.461	11.612
55	27.179	26.586	25.394	24.135	22.828	21.529	20.285	19.096	17.958	16.871	15.816	14.793	13.820	12.894	12.014
56		26.568	25.968	24.784	23.536	22.241	20.956	19.726	18.550	17.426	16.351	15.310	14.301	13.342	12.430
57			25.949	25.343	24.167	22.930	21.648	20.376	19.160	17.998	16.887	15.827	14.799	13.805	12.860
58				25.323	24.711	23.543	22.317	21.048	19.791	18.589	17.441	16.344	15.298	14.284	13.305
59					24.690	24.071	22.912	21.697	20.442	19.199	18.012	16.878	15.796	14.764	13.766
60						24.049	23.424	22.274	21.070	19.829	18.602	17.430	16.311	15.244	14.227
61							23.401	22.770	21.629	20.437	19.211	17.999	16.843	15.740	14.688
62								22.747	22.110	20.978	19.799	18.587	17.392	16.252	15.165
63									22.086	21.443	20.321	19.154	17.958	16.780	15.656
64										21.418	20.770	19.659	18.505	17.325	16.164
65											20.745	20.092	18.991	17.851	16.688
66												20.065	19.408	18.318	17.193
67													19.381	18.718	17.641
68														18.691	18.025
69															17.996

Factors to value benefits in payment	
70	17.297
71	16.594
72	15.889
73	15.182
74	14.474
75	13.768
76	13.065
77	12.366
78	11.673
79	10.988
80	10.313
81	9.649
82	8.999
83	8.363
84	7.744
85	7.144
86	6.566
87	6.013
88	5.487

Assumptions made (percentages in per annum terms)	
Investment returns to retirement	**Time-dependent distribution over period to retirement**
Rate of assumed price inflation	**2.0%**
Investment return during drawdown	**4.0%**
Increases in drawdown income	**2.5%**
Scaling to apply to life expectancies	**1.1×**
No allowance for any pre-retirement mortality; life expectancy post retirement based upon CMI_2021_F [1.25%]: 100% S3PFA mortality tables	

Judicial Immunity: An Extraordinary Case and a Worrying Warning from Australia

Prof David Hodson OBE KC(Hons) MCIArb

Special Counsel, The International Family Law Group LLP

Executive summary

An extraordinary decision in August 2023 of the Federal Court of Australia has highlighted for English judges the risks of being sued for damages and the potential inadequacy of the defence of judicial immunity.[1] In the case the judge's actions were found to be an affront to justice. A litigant in person was sentenced to 12 months' imprisonment for contempt for breach of disclosure orders, spent 6 days in custody, sued the judge and the judicial authorities, was cleared and received substantial damages. The colossal judgment, 852 paragraphs, goes back through hundreds of years of case law to examine this complex subject. This article looks at the headlines, drawing attention to safe and good practice then gives a warning for all Family Court judges. Should English first instance judges be worried?

The judgment

The case is *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020[2] with a judicial summary by Justice Michael Wigney.[3]

The judgment is 852 paragraphs. The list of legislation, cases and references takes up 7 pages with the oldest being from 1600 with many others in the 17th- and 18th-centuries; this is very much a case for legal historians and constitutional law experts.

Although legislation has now been passed to cover the situation hereafter, there are believed to be presently cases against Australian Family Court judges in respect of their actions and potential damages claims. But in essence the Federal Court was clear: judges who exceed their jurisdiction, their power in law,[4] are at risk. Where the boundaries of judicial power can be complex with technical rules, the risk of being sued is not insignificant, even if it is a long way from the excessive facts of this case.

Short background to facts and first instance decision

For many judges, having two litigants in person, especially in the context where one party may be wilfully refusing to comply with orders, is the worst possible situation. The judge naturally wants to bring about a just and fair outcome. But help in getting to that outcome is just not there. An interventionist approach is invariably necessary and yet how far does the judge go? Not as far as this judge!

In April 2017, Mr Stradford, a pseudonym, brought financial remedy proceedings in the Australian circuit court. Specific directions were given in court orders, supplementing the Family Court rules which under Australian law include comprehensive disclosure as would also be expected under English law. The final hearing was supposed to be on 10 August 2018 with both parties unrepresented. The husband had not disclosed his financial circumstances. This raised the ire of Judge Vader.[5] He said he would have no hesitation in sending him to prison if he did not comply with further disclosure orders. In one of several quotes which does not show the judge in a particularly good light, he said:

> 'And, you know, believe me, if there isn't the full disclosure there will be consequences, because that's what I do. *If people don't comply with my orders there's only [one] place they go.* Okay. And I don't have any hesitation in jailing people for not complying with my orders …' (emphasis shown and added here and throughout)

In a further exchange, when the judge indicated he would order further disclosure, he said to the husband:

> 'And if that isn't given to her – *if it is that she comes here, and she complains that she has asked for things and you have not given them to her, bring your toothbrush.* Okay. So you have a think about it.'

Directions were made for further disclosure. It was adjourned for a mention on 26 November 2018 on the basis that if the court was the opinion that there had not been full and frank disclosure, the husband would be dealt with for contempt on 5 December 2018. It came before another judge, Judge Turner, who listened to the husband and adjourned the case to 6 December for the hearing of the contempt application. This judge did not make any findings

of non-disclosure or breach of orders nor had any contempt application been filed. It came back before the original judge. He seems to have been of the opinion that Judge Turner had determined that the husband had not complied with the disclosure obligations and was in contempt. This was a mistake. Even so, the wife had not filed a contempt application or even submitted the husband should be found in contempt. Moreover, the husband was saying, perhaps predictably, that he had now complied with the orders and given satisfactory disclosure.

Nevertheless, the judge said that he would deal with the contempt. The wife made it very clear she did not want the husband to go to jail unnecessarily. She just wanted disclosure. The judge adjourned the case briefly for them to discuss whether they could reach an amicable settlement, failing which he said he would deal with the contempt.

On resuming with no settlement, the judge said that he would deal with the matter later in the morning and expressed the hope that the husband had brought his toothbrush! The wife protested that she did not want imprisonment. The judge made it very clear that the decision was his and his alone and not that of the wife. It would be the judge sending the husband to prison, not the wife.

When the hearing fully resumed just before midday, the judge repeated what he thought the previous judge had said about the husband being in contempt. The husband said he had disclosed all he was able to disclose but the judge dismissed the protestations. There was no questioning of the husband about his disclosure since the August hearing. He gave a short judgment finding the husband in contempt and ordered 12 months' imprisonment, starting immediately with 6 months inside and 6 months suspended. In his *ex-tempore* judgment, set out at para 37 of the reported decision, he made clear it was for him to assess criminality of contempt, the husband could have made disclosure and had chosen not to do so. He went on that there were few weapons at judicial disposal to ensure orders were complied with[6] and the court must show all litigants and the whole community there will be serious consequences and give condign (appropriate) punishment to those who flouted the orders of the court.

Two security guards, employed by a private company with the Court Service, took the husband and escorted him through the public concourse to a holding cell. The Queensland police arrived, and he was handcuffed and taken in a police van to a nearby police station. In fact, the police had already been alerted before the judge reconvened the hearing at which he was purporting to deal with the contempt. The following day the husband was transferred to the Brisbane Correctional Centre, the local jail.

On 12 December, 6 days later, with the husband now represented and an appeal lodged, the same judge stayed the imprisonment, conceded that he had been wrong in finding that the husband was in contempt and wrong to sentence him to prison, and accepted that he had incorrectly assumed the previous judge had found that he was in contempt. The husband was released forthwith.

Judicial action occurred swiftly. On 15 February 2019, 2 months later, the Full Court, the equivalent of the English High Court, delivered judgment unanimously allowing the appeal. They said as follows:

> 'We are driven to conclude that the processes employed by the primary judge were so devoid of procedural fairness to the husband, and the reasons for judgment so lacking in engagement with the issues of fact and law to be applied, that to permit the declaration and order for imprisonment to stand would be an affront to justice …' (para 56)

They found in summary, paras 58–66:

(1) The judge proceeded in apparent ignorance or disregard for the legislative provisions which deal with punishment for contempt and the imposition of sanctions.
(2) The judge had resolved or predetermined in advance of any finding that the husband had breached disclosure orders and irrespective of any application by the wife he would of his own motion treat his non-compliance as contempt and not, for example, failure to comply with orders.
(3) The procedure adopted was fundamentally flawed on a number of levels including pre-determining the breach, acting as prosecutor and judge and not affording an opportunity for the husband to be heard.
(4) In performing the role of prosecutor, witness and judge, he had failed to follow the mandated procedure in the court rules. He did not follow any procedure remotely resembling the required process.
(5) He had proceeded on the erroneous premise of the determination by the previous judge even though it could not possibly be inferred that any such determination had been made.
(6) Even putting to one side failures as above, the conduct of the judge constituted a clear denial of procedural fairness as set out in para 64.
(7) The judge's conclusion that the husband had failed to comply with his August orders was without any evidential foundation. There had been no determination of whether there had been the disclosure. This constituted a profound denial of procedural fairness.

The contempt decision and the order for imprisonment were found to be a gross miscarriage of justice.

The court then went through the errors made by the judge, paras 67–74 in summary, then expanded in detail in paras 76–149. These are not repeated here and are mainly obvious from the summary above. However, they are on any basis staggering in their extent. They are salutary reading by family court judges worldwide in circumstances where one party has clearly or probably not complied with necessary court orders but the judge has to decide appropriately what is then the best course of action.

Clearly one error was the failure by the judge fully to understand what had happened at the hearing before the previous judge. This risk arises not infrequently. Sometimes orders do not physically reach the court file quickly. Having a digital portal on which all orders and other court documents lie assists in overcoming this problem – as long as all orders are filed on it! There is always a danger in relying on reports of what a previous judge may or may not have done, particularly with litigants in person who may not be able to update accurately the court on previous developments. Caution and good practice are always to have the relevant order. But this is fundamental in the realm of enforcement of any form.

Where Draconian steps are being taken, which include

contempt and of course imprisonment, strict adherence with the rules and process is even more important and is paramount, as is repeated many times in English Family Court cases, as below. This saga from Australia merely emphasises to us in England how crucial this is when in the arena of contempt.

The errors by the judge were compounded by the fact that in the particular circumstances of this case he may not have had the power to make the order. It can seem frustrating at times, particularly at District Judge level, that there are unnecessary levels of judiciary in the Family Court. In fact, it should act as a comfort and a cautionary brake in the knowledge that although non-compliance orders can be made, the contempt and consequential enforcement is before another judge, a new judge to the case, with the objectivity which can sometimes be difficult after dealing with parties in person over several hearings.

However difficult both parties or just one party may be, judicial conduct must be above reproach, respectful, civilised and fair. In this case, the judge was described as acting in a thoroughly unsatisfactory and unjudicial manner. He repeatedly interrupted, hectored, berated and bullied the husband. He also prejudged the outcome. For example, he had requested the attendance of the police before going into a hearing to consider the contempt; the Queensland police were told that the judge would be issuing a warrant for the husband to be held in custody before the hearing commenced which was, in theory at least, intended to consider what, or whether, this should happen in the case.

One unsatisfactory element is that before the hearing at about noon when he made the imprisonment order, he had adjourned for a short time for the parties, both in person, to consider a settlement of the entire financial claims, making it clear that in doing so the husband would avoid imprisonment. It was clear this was a lever to force the husband to capitulate and agree a settlement acceptable to the wife. The judge alleged he was merely giving the opportunity but the appeal court was satisfied it was thoroughly unjustified. They quoted from the transcript:

> '*So I'm going to adjourn just for five minutes and then I will let you talk to Mr Stradford. And it will be only for five minutes. Then you can come back and you can tell me what you want to do. If it is that there's not going to be a resolution, I'm going to proceed with the contempt hearing.* It's as simple as that. Okay. Thank you. Okay. All right.' (para 139)

Given that they had failed to settle over more than a year, it was not surprising they didn't settle in 5 minutes even with the likelihood of imprisonment in default of settling. It was found this was thoroughly unacceptable judicial approach and pressure although, despite misgivings by the appeal court, the allegation the judge acted for an improper purpose was rejected.

The court then had to go on to consider torts of false imprisonment and collateral abuse of process. This part of the judgment, paras 150 onwards, is distinctively based in Australian process but crucial to the outcome, because the judge, along with the Court Service, had claimed immunity from suit, paras 199 onwards. The judge said that even if the case against him succeeded, he was nevertheless entitled to the protection of judicial immunity available to lower-level judges, known in Australia as inferior courts[7] as distinct from higher courts. This was despite such errors being made. He said this immunity was the same as available to higher court judges and was not lost where the judge acted in bad faith or knowingly without jurisdiction. This argument in law took up a significant amount of the judgment. It was found that the position was not clear in Australian law or in common law. The court reached back to many English authorities of the 17th- and 18th-centuries, the oldest being from 1600. It is impossible for this article to do any justice to those arguments, nor probably are they of distinctive relevance in England in the Family Courts subject to what is the present position here.

It is paras 342–346 of the judgment, setting out the principles perceived in the case law, which have been most discussed within Australia.

Committal cases equivalent in England

In *Sanchez v Oboz*,[8] Cobb J in the English High Court set out some very useful guidance of factors to take into account in committal cases:

> 'i) Whether the respondents have been served with the relevant documents, including notice of this hearing;
>
> ii) Whether the respondents have had sufficient notice to enable them to prepare for the hearing;
>
> iii) Whether any reason has been advanced for their non-appearance;
>
> iv) Whether by reference to the nature and circumstances of the respondents' behaviour, they have waived their right to be present;
>
> v) Whether an adjournment would be likely to secure the attendance of the respondent or facilitate their representation;
>
> vi) The extent of the disadvantage to the respondents in not being able to present their account of events;
>
> vii) Whether undue prejudice would be caused to the applicant by any delay;
>
> viii) Whether undue prejudice would be caused to the forensic process if the application was to proceed in the absence of the respondents; and
>
> ix) The terms of the "overriding objective" [under] rule 1.1. FPR 2010 …' ([5])

Hammerton[9] held that proceedings for committal must not be heard at the same time as any other application because of the absolute right of a person accused of contempt to remain silent. Being heard at the same time as other matters about which the alleged contemnor needs to give evidence places him in a position where he is effectively deprived to the right of silence, a serious procedural error.

Re G (A Child) (Contempt: Committal Order)[10] had some similarities with the Australian case in that the first instance judge was held to have committed several procedural flaws in the process leading to the committal order on his own initiative. The Court of Appeal held that although circumstances varied widely, a committal order was a last resort normally reserved for serious, intentional and in most cases repeated contempt of court which had been established by due process. Where a party might be in contempt of court

by virtue of a breach of the general rules of confidentiality, but there had been no breach of a specific court order, there might be more than one method available for the court to deal with it. Committal on the court's own initiative was an exceptional course, particularly in family cases where time should normally be taken for reflection. The instant case was not an exceptional one of clear contempt which could not wait to be addressed. The errors included non-compliance with the relevant Practice Direction. The father was not represented nor given the opportunity of an adjournment to enable his representation and preparation of a defence, thus he was not afforded the minimum rights to which he was entitled.[11] The father was not informed that he was not obliged to give evidence for the purpose of a finding of contempt, nor was he given the formal opportunity to submit that what was alleged did not constitute contempt. Therefore, the process which led to the suspended committal order was seriously flawed and substantially unfair. For those reasons alone the suspended committal order had to be set aside, though in addition the order was defective as it failed in detailing the acts found to have constituted the contempt.[12]

Re LW (Children) (Enforcement and Committal: Contact); CPL v CH-W[13] has helpful information on the law of committal.

Family Procedure Rules 2010 (SI 2010/2955) (FPR) Part 37 sets out the steps to be taken in committal proceedings.

See also the exemplary way in which a not dissimilar situation was addressed by Moor J recently in *Williams*.[14] The judge sentenced the party, found to have knowingly failed to comply with disclosure orders including those with a penal notice, to a total of 56 days in prison, suspended for 14 days to allow one last opportunity for filing the Form E. See also immediate committal order by the same judge in *Hersman v De Verchere*.[15]

Although not a committal case, the author as a Deputy District Judge at the Central Family Court (CFC) found himself in similar difficulties to the judge in the Australian case in trying to make progress in the consistent absence of disclosure. In that matter, listed as a final hearing in the expectation that disclosure would have been granted, the hearing was adjourned with one last chance at specific disclosure but with an indication of what was likely to happen, including inferences, if the disclosure was not given.[16]

Outcome in the Australian case on appeal

Although the court found the husband had not shown a case for collateral abuse of process, he had made out his case for false imprisonment. The order for the imprisonment was infected by a number of serious and fundamental flaws on the part of the judge. The individual and cumulative effect was that the order was invalid and had no legal effect from the outset. It provided no lawful justification for the imprisonment.

The judge was not protected by any immunity given to inferior court judges at common law. Any such protection may be lost where the judge acted without or in excess of jurisdiction.[17] Although the judge may have had jurisdiction here to deal with the financial case, he acted without or in excess of jurisdiction in the imprisonment arising from contempt. He had found the contempt without looking at the facts of the breach. The judge was also guilty of a gross and obvious irregularity of procedure and denied the applicant any modicum of procedural fairness or natural justice.

The court was also not satisfied that the Commonwealth and Queensland, to include here the Court Service, had judicial immunity. Whilst at common law some court officers such as sheriffs may be able to justify their tortious actions by obedience of the court order, that defence did not apply to police and prison officers who were not officers of the court.[18]

The applicant was entitled to a not insubstantial award of damages but was refused an award of aggravated and exemplary damages. The amount was about $309,000, about £150,000.

Subsequent developments in Australia

The outcome of a lack of judicial immunity for many first instance (lower level) judges rang inevitable and loud alarm bells and more through the Australian judicial system. Judges reportedly went on strike. They were openly angry and simultaneously anxious. Whilst the actions of the judge in this case were excessive, the court had framed the liability of the judges in quite wide terms, including any judicial actions beyond the powers and jurisdiction of the judge in question.

The problem is that with a significant amount of domestic court rules, in Australia even more so than England, it is very easy for a judge inadvertently to trip over jurisdictional boundaries, to make orders in circumstances where the judge in question may not have power. The Australian first instance judiciary were immensely unhappy at this risk.

The Australian government acted under pressure although not as quickly as many judges wanted. It introduced legislation[19] to give judicial immunity. But only for the future; it couldn't be retrospective. It is believed that in some cases appellants changed their grounds to include issues of jurisdiction and therefore leave open the possibility of seeking damages from judges and the court system.

The judge in question has appealed the decision as has the Queensland government and the federal government. The appeals were lodged on 27 September 2023. In February 2024 the case was transferred (leapfrog process missing out the equivalent of the Court of Appeal) to the High Court[20] with directions. The AG for South Australia has already applied to intervene. More can be expected before it reaches final appeal hearing. In the meantime, the judge is continuing in daily family court work.[21]

The Australian federal government when elected, May 2022, had promised to establish a Commission to investigate complaints about the ability and conduct of judicial officers, including judges. New South Wales already has a Judicial Commission which over watches the state judges, but nothing federal, intra Australian, is yet happening.

What about judicial immunity in England?

It cannot be said that the position in England is significantly clearer or much more satisfactory, although there has been judicial guidance.

The starting point is an October 2007 document, 'The Accountability of the Judiciary',[22] which followed changes in

the constitution from the Constitutional Reform Act 2005. It says the following (page 8):

> 'Judges of the High Court and the Court of Appeal court are also absolutely immune from personal civil liability in respect of any judicial act done in the bona fide exercise of their office as a judge of that court. The position of circuit and district judges who sit in courts of limited jurisdiction is different. They may be in certain circumstances liable in tort for acts beyond their jurisdiction and to judicial review proceedings. The immunity extends to judicial acts undertaken by officers of the courts but not to administrative acts by HMCS. The reason for a judge's immunity from civil suit is "so that he should be able to do his duty with complete independence and free from fear". It is not because the judge has any privilege to make mistakes or to do wrong. The appeal system deals with such matters, and the criminal courts deal with criminal wrongdoing.'[23]

Sirros v Moore[24] talks about the distinction between immunity of judges of the superior and inferior courts, although it is a 1975 decision. But at least not from the 1600s!

Aamir Mazhar v The Lord Chancellor[25] is a claim against the Lord Chancellor alleging breach of the Human Rights Act 1988 arising out of a judicial act, namely an order by Mostyn J (as he then was) under the High Court's inherent jurisdiction in relation to vulnerable adults. In fact, the court held it didn't have the power to make a declaration against the Crown in respect of a judicial act, which should be pursued by way of an appeal instead.

Information on the Courts and Tribunal's Judiciary website on the question of 'Independence'[26] is realistic about the cynicism with which the public may treat judicial immunity:

> 'While an independent and impartial judiciary is one of the cornerstones of a democracy, the practical ways in which this is given effect are often treated with suspicion. For example, judges are given immunity from prosecution for any acts they carry out in performance of their judicial function. They also benefit from immunity from being sued for defamation for the things they say about parties or witnesses in the course of hearing cases. These principles have led some people to suggest that judges are somehow "above the law".'

However, judges are not above the law. Judges are subject to the law in the same way as any other citizen. The Lord Chief Justice or Lord Chancellor may refer a judge to the Judicial Complaints Investigations Office in order to establish whether it would be appropriate to remove them from office in circumstances where they have been found to have committed a criminal offence.

From all of this, English Family Court judges at first instance, the so-called inferior level, may decide that they may have more up-to-date guidance but not much more – or any more – protection.

What can be learned in England?

The inevitable response is to hope that this would never happen in England: the number of judges with whom to discuss difficult matters within the larger court centres, court orders found on the portal, judges coming out of the specialist family solicitors' firms or specialist family barristers' chambers who have been brought up on codes of practice which emphasise respect, integrity and settlement orientation, specialist enforcement courts, for example at the CFC, which deal with enforcement even though other judges have made initial orders, the different layers of judiciary with a specific higher-level required for contempt and imprisonment.

Yet much or all of this can be said equally of Australia. They have even more extensive rules than the English FPR. They have equally vigorous measures when dealing with Draconian steps. They have equally specialist Family Court judges coming out of the specialist family lawyer profession. So however much England may like to think it couldn't happen here, or indeed in any other country, it could.

This is the primary purpose of this article: a salutary warning to all judges, full time and part time, specialist Family Court or with a combined ticket, first instance or appeal.

One of the recent benefits of the family justice system in England is the greater use of reservation of cases to a particular judge for continuity of approach. But it has its problems. Sometimes one party can cause a judge to adopt an approach which they wouldn't on a one-off, first appearance, fresh hearing case. There is certainly an argument that after a certain number of hearings, a reservation to a judge may have played its part and it is then time to pass to another.

The judge in the Australian case had said that he used contempt and imprisonment because there were few weapons available in the face of non-compliance with disclosure orders. Australia has many weapons, using his terminology, as does England. Perhaps distinctively England will use the power of inference, the opportunity to infer a level of assets or income from lifestyle or what disclosure documents are available. Used often in big-money cases, it is also used from time to time and resourcefully in all cases before the Family Court in England. Perhaps this might have been a better remedy for the judge.

Even with access of the press, media, or even in Australia the public with the guarantee of anonymity, the reality is that the vast majority of Family Court cases are conducted with only the parties themselves present.[27] Nevertheless, perhaps as with other aspects of life, it is a useful warning for any judge to ask how they would feel if the hearing they are presently conducting was being beamed live to a television audience. If they would consequently change their behaviour, then almost certainly they should.

It is often said by lawyers later in their careers that the dramatic, colourful, extravagant personalities and characters once common place in the law have been driven out by regulation, red tape and codes of behaviour. It is far more monochrome and vanilla. The drama has gone. Whichever the truth, irascibility, bad temper, bullying and unacceptable behaviour by some judges in years gone by have no place in any modern family justice system. Whether against some litigants in person, in respect of gender or background. or other reasons. None are acceptable.

The risk of being sued as a judge is not perceived as a real and present danger in England. Very probably most judges, full time and part time, have not put their minds to the risk. They should now. Some may be anxious about the real width of risk in exceeding jurisdiction and power, as it is all too easy to occur unintentionally. Some will want to be clearer of the extent of judicial immunity under English law

for first instance, non-High Court, judges, and perhaps more guidance and clarity should be given. Not least, now this claim has happened in Australia, it may be only a matter of time before the same is considered by unhappy litigants in England.

Notes

1 The author is grateful for the assistance of Georgina Huse, dual qualified English and Australian solicitor of The International Family Law Group. He has also had the benefit of a number of informal conversations with judges and lawyers in Australia concerning the outcome and practical consequences of this case.
2 www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2023/2023fca1020
3 www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2023/2023fca1020/summary/2023fca1020-summary
4 The issue in the case was not whether the judge had jurisdiction in general terms but whether what occurred in that particular hearing was of such a nature that it was outside that jurisdiction and, consequently, whether that level of judge had general judicial immunity. The answer was 'no'.
5 A federal circuit court (Div 2) judge, probably equivalent to a DJ or HHJ.
6 Whether this is a true statement must be open to some doubt as Australia, like England, has many various opportunities to secure disclosure.
7 Technically, Division 2 judges whose jurisdiction is in s 132 Federal Circuit and Family Court of Australia Act 2021 (FCFCOA). Division 2, formerly the Federal Circuit Court, is the single point of entry, but complex matters including Hague Convention, etc would be transferred up to the Division 1 level of judges. Not too dissimilar to the English gatekeeping process between DJ and High Court first instance.
8 *Sanchez v Oboz* [2015] EWHC 235 (Fam).
9 *Hammerton v Hammerton* [2007] EWCA Civ 248.
10 *Re G (A Child) (Contempt: Committal Order)* [2003] EWCA Civ 489, [2003] 2 FLR 58.
11 Art 6(3) European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 Human Rights Act 1998).
12 *Danchevsky v Danchevsky* [1974] 3 All ER 934, *Ansah v Ansah* [1977] 2 All ER 638 and *Re M (Minors) (Breach of Contact Order: Committal)* [1999] 1 FCR 683 applied.
13 *Re LW (Children) (Enforcement and Committal: Contact); CPL v CH-W* [2010] EWCA Civ 1253.
14 *Williams v Williams* [2023] EWHC 3479 (Fam).
15 *Hersman v De Verchere* [2023] EWHC 3481 (Fam).
16 *TYB v CAR (Non Disclosure)* [2023] EWFC 261 (B).
17 Either general or specific within the case itself for the particular application.
18 This outcome seems particularly harsh as the police and prison officers were only following instructions from the judge.
19 Federal Courts Legislation Amendment (Judicial Immunity) Bill 2023. There has also been a proposal to establish a federal judicial commission to investigate complaints against judges.
20 Equivalent to a Supreme Court, including hearing appeals from State Supreme Courts. More at: www.hcourt.gov.au/cases/case_c3-2024
21 He apparently had a very successful career at the criminal Bar, being appointed to the criminal bench then moving across to the family bench.
22 www.judiciary.uk/wp-content/uploads/JCO/Documents/Consultations/accountability.pdf
23 *Sirros v Moore* [1975] 1 QB 118 at 133, 148. See also *Re McC* [1985] AC 528.
24 *Sirros v Moore* [1975] 1 QB 118.
25 *Aamir Mazhar v The Lord Chancellor* [2017] EWHC 2536 (Fam).
26 www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/independence/#:~:text=For%20example%2C%20judges%20are%20given,the%20course%20of%20hearing%20cases
27 Contempt applications are normally listed and held in public and there are strict guidelines if they are not.

The Origin, History and Present Status of the Principal Registry of the Family Division

Sir James Munby and
Sir Nicholas Mostyn

Everyone knows that Baroness Butler-Sloss ascended from the rank of Registrar at Somerset House to President of the Family Division via the High Court and the Court of Appeal. *Wikipedia* states, 'She was appointed a Registrar at the Principal Registry of the Family Division in 1970'. We will show that this is not quite right. In 1970 the Principal Registry of the Family Division (PRFD) did not exist. Baroness Butler-Sloss was appointed a Registrar of the Principal Probate Registry, which was known as the 'Divorce Registry' for the purposes of matrimonial proceedings governed by the Matrimonial Causes Rules 1968.

In 'The Jurisdiction of the Family Court to Determine Property Disputes in Favour of Third Parties' [2023] FRJ 192, HHJ Evans-Gordon, Nicholas Allen KC and Rhys Taylor say:

> 'In November 2020 the President of the Family Division appointed all the then full-time CFC DJs – DJs Cronshaw, Hudd, Jenkins and Mulkis – as Deputy DJs (PRFD). [*Continuing in note 15*] The Principal Registry lives on pursuant to Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014/840), r 2(1) and as a physical location. First Avenue House is named as the PRFD on the MoJ website. Until very recently, it was used for probate business. The appointment of the CFC full-time DJs as deputies of the PRFD would also suggest that First Avenue House is still formally designated as such. DJ (now CJ) Duddridge was also so appointed but now sits in Chelmsford.'

We think this is largely correct although the continued existence of the PRFD does not derive from the rules mentioned, and we doubt that it is correct to say that its physical location is First Avenue House (FAH) in High Holborn. However, the observations have led us to engage in some interesting legal archaeology.

The antecedent of the PRFD is the Principal Registry of the Court of Probate which was created by the Court of Probate Act 1857. This provided:

> '4. *Testamentary Jurisdiction to be exercised by a Court of Probate*.
>
> The voluntary and contentious Jurisdiction and Authority in relation to the granting or revoking Probate of Wills and Letters of Administration of the Effects of deceased Persons now vested in or which can be exercised by any Court or Person in England, together with full Authority to hear and determine all Questions relating to Matters and Causes Testamentary, shall belong to and be vested in Her Majesty, and shall, except as hereinafter is mentioned, be exercised in the Name of Her Majesty in a Court to be called the Court of Probate, and to hold its ordinary Sittings and to have its Principal Registry at such Place or Places in London or Middlesex as Her Majesty in Council shall from Time to Time appoint.
>
> 14. *Appointment of Officers of the Court of Probate.*
>
> There shall be Three Registrars, Two Record Keepers, and One Sealer for the Principal Registry of the Court of Probate, and there shall be One District Registrar for each District Registry herein-after referred to as the District Registrar …
>
> 30. *Rules and Orders to be made for regulating the Procedure of the Court*.
>
> And to the Intent and End that the Procedure and Practice of the Court may be of the most simple and expeditious Character, it shall be lawful for the Lord Chancellor, at any Time after the passing of this Act, with the Advice and Assistance of the Lord Chief Justice of the Court of Queen's Bench, or any One of the Judges of the Superior Courts of Law to be by such Chief Justice named in that Behalf, and of the Judge of the said Prerogative Court, to make Rules and Orders, to take effect when this Act shall come into operation, for regulating the Procedure and Practice of the Court, and the Duties of the Registrars, District Registrars, and other Officers thereof, and for determining what, shall be deemed contentious and what shall be deemed non-contentious Business, and, subject to the express Provisions of this Act, for fixing and regulating the Time and Manner of appealing from the Decisions of the said Court, and generally for carrying the Provisions of this Act into effect …'

In the same year the Matrimonial Causes Act 1857 was passed. This provided:

> '14 *Officers of the Court.*
>
> The Registrars and other Officers of the Principal Registry of the Court of Probate shall attend the Sittings of the Court for Divorce and Matrimonial Causes, and assist in the Proceedings thereof, as shall be directed by the Rules and Orders under this Act.'

So, the Registrars of the Principal Registry of the Court of Probate attended the sittings of the new divorce court and assisted in the proceedings. We will show that this arrangement whereby the Registrars sat in the new divorce court, and after 1873 in the Probate Divorce and Admiralty Division of the High Court, continued almost unchanged until county courts were given divorce jurisdiction in 1968.

The Principal Registry of the Court of Probate was sited in Somerset House in 1859. It remained there until 1998. Older practitioners will well recall having to walk through the stored files of wills and grants of probate on the ground floor before ascending to the smoke-filled corridor on the first floor where the Registrars had their chambers. It was in that corridor, which had one public telephone and no conference rooms, that countless cases were thrashed out and settled, the culture then being that the first time serious negotiations to settle took place was at the door of the court.[1]

In 1873 all the Westminster Courts, including the Court of Probate and the Divorce Court were 'united and consolidated together' by the Supreme Court of Judicature Act 1873, s 3. By s 31(5) these courts formed part of the new Probate Divorce and Admiralty Division of the High Court.

By the Supreme Court of Judicature Act 1875, s 16 the Rules of Court set out in the First Schedule to the Act came into operation.

Order LIV, para 2 provided:

> 'in the Probate, Divorce, and Admiralty Division a registrar, may transact all such business and exercise all such authority and jurisdiction in respect of the same as under the Act, or the Schedule thereto, or these Rules, may be transacted or exercised by a Judge at chambers except in respect of the following proceedings and matters; that is to say.'

In 1925 the various Judicature Acts 1873–1920 were consolidated in the Supreme Court of Judicature (Consolidation) Act 1925.

This provided in s 107:

> '*Principal probate registry*.
>
> The principal registry of the High Court for the purpose of the exercise of the probate jurisdiction (in this Act referred to as "the principal probate registry") shall be at such place in the County of London as His Majesty may by Order in Council from time to time appoint.'

Under that Act there are extensive provisions as to the powers of Registrars in the Principal Probate Registry and the District Registries within the probate jurisdiction. But there is no reference to the office or function of Registrar in Part VIII – Matrimonial Causes and Matters. There was no need to because, as we shall see, these matters were, and always had been, largely governed by rules rather than primary legislation.

In 1968, by virtue of the Matrimonial Causes Act 1967, county courts acquired divorce jurisdiction. Those county courts designated by the Lord Chancellor to do divorce work were called 'divorce county courts'.

The rules

From 1858 until the coming into force of the Administration of Justice Act 1970, the rules as to the fundamentals remained constant throughout all their successive iterations. Proceedings (unless issued in a District Registry after that eventually became possible following the enactment of the Administration of Justice Act 1920)[2] were issued out of 'the Registry', or 'the Divorce Registry', and by that was meant 'the Principal Probate Registry.' And the 'Registrars' of the Divorce Registry were those individuals who were the Registrars of the Principal Probate Registry.

Thus, the original Rules and Orders for the Court for Divorce and Matrimonial Causes provided:

> '**55** The registry of the Court for Divorce and Matrimonial Causes, and the clerks employed therein, shall be subject to and under the control of the registrars of the principal registry of the Court of Probate, in the same way and to the same extent as the principal registry of the Court of Probate and clerks therein is and are.
>
> **56** The record keepers, the clerk of papers, the sealer, the ushers, and other officers belonging to the Court of Probate, shall discharge the same duties in the Court for Divorce and Matrimonial Causes, and in the registry thereof, as they discharge in the Court of Probate and the principal registry thereof.'

New Rules and Regulations came into force on 11 January 1866 (rr 1–174), with additions (rr 175–220) on various dates between 30 January 1869 and 20 August 1904. Rules 172 and 173 reproduced the substance of the previous rr 55 and 56. There was additional provision:

> '**118** The registrars of the principal registry of the Court of Probate are to have the custody of all pleadings and other documents now or hereafter to be brought in or filed, and of all entries of orders and decrees made in any matter or suit depending in the Court for Divorce and Matrimonial Causes …'

With effect from 1 March 1924 the 1866 Rules and Regulations were replaced by the Matrimonial Causes Rules 1924 providing for the filing of documents in 'the Registry'. Rule 80 carried forward the previous r 118, and r 95 the previous r 172 (originally r 55):

> '**80** The Registrars of the Principal Registry are to have the custody subject to direction by the President of the Probate Divorce and Admiralty Division of all pleadings and other documents brought in or filed and of all orders and decrees made in any matter or suit.'
>
> '**95** The Registry of the Court and the Clerks employed therein shall be subject to and under the control of the Registrars of the Principal Probate Registry.'

In due course the rules began to have specific definition provisions. Thus, in the Matrimonial Causes Rules 1944, r 3(2) of which required proceedings (unless issued in a District Registry) to be 'issued out of the Divorce Registry', r 1(3) defined 'the divorce registry' as meaning 'the Principal Probate Registry'.

The final rules in force prior to the enactment of the Administration of Justice Act 1970 were the Matrimonial Causes Rules 1968, r 2(2) of which likewise defined the 'divorce registry' as meaning 'the principal probate registry'.

The Matrimonial Causes Rules 1968 were also the first rules to give effect to the important changes introduced by the Matrimonial Causes Act 1967. They provided:

> '*Interpretation*
>
> 2(2) …
>
> "divorce county court" means a county court so designated by the Lord Chancellor pursuant to section 1(1) of the Act of 1967
>
> "divorce registry" means the principal probate registry
>
> *Application of other rules*
>
> 3 Subject to the provisions of these rules and of any

> enactment, the County Court Rules 1936 and the Rules of the Supreme Court 1965 shall apply with the necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in matrimonial proceedings pending in, a divorce county court and the High Court respectively.
>
> *County court proceedings in divorce registry*
>
> 4(1) Subject to the provisions of these rules, matrimonial proceedings pending at any time in the divorce registry which, if they had been begun in a divorce county court, would be pending at that time in such a court shall be treated, for the purposes of these rules and of any provision of the County Court Rules 1936 and the County Courts Act 1959, as pending in a divorce county court and not in the High Court. …
>
> (2) Unless the context otherwise requires, any reference to a divorce county court in any provision of these rules, or of the County Court Rules 1936 as applied by these rules, which relates to the commencement or prosecution of proceedings in a divorce county court, or the transfer of proceedings to or from such a court, includes a reference to the divorce registry.
>
> *Cause to be begun by petition*
>
> 9(1) Every cause other than an application under section 2 of the Act of 1965 shall be begun by petition.
>
> *Presentation of petition*
>
> 12(1) A petition may be presented to any divorce county court.'

Prior to 1971, the work of the Registrar of the Principal Probate Registry comprised matrimonial causes, some ancillary relief,[3] some children's work (but not wardship), and probate proceedings.

The Family Division of the High Court

In 1971 the Family Division came into being.

The Administration of Justice Act 1970, s 1 provided:

> '(1) The Probate, Divorce and Admiralty Division of the High Court shall be re-named the Family Division; and the principal probate registry shall be re-named the principal registry of the Family Division.
>
> (2) There shall be assigned to the Family Division all causes and matters involving the exercise of the High Court's jurisdiction in proceedings specified in Schedule 1 to this Act.
>
> (3) Causes and matters involving the exercise of the High Court's Admiralty jurisdiction, or its jurisdiction as a prize court, shall be assigned to the Queen's Bench Division.
>
> (4) As respects the exercise of the High Court's probate jurisdiction –
>
> (a) non-contentious or common form probate business shall continue to be assigned to the Family Divisional; and
>
> (b) all other probate business shall be assigned to the Chancery Division.'

Schedule 1 assigned to the Family Division all matrimonial causes, proceedings under the Married Women's Property Act 1882, all proceedings concerning a person's matrimonial status, and all proceedings concerning children including wardship proceedings (but interestingly not proceedings under the inherent jurisdiction concerning adults – but that is another story).

This took effect on 1 October 1971 by virtue of the Administration of Justice Act 1970 (Commencement No 5) Order 1971.

This change, together with passage of the Divorce Reform Act 1969, the Matrimonial Proceedings and Property Act 1970 and their consolidation in the Matrimonial Causes Act 1973 led to iterations of the Matrimonial Causes Rules being issued in 1971, 1973 and 1977, all of which allowed matrimonial and ancillary relief proceedings to be issued and conducted in the PRFD 'as in a divorce county court', and which referred to the PRFD as 'the divorce registry' See, for example, the Matrimonial Causes Rules 1977, r 2 (interpretation) which stated:

> '"divorce registry" means the principal registry of the Family Division.

The successor to the Supreme Court of Judicature (Consolidation) Act 1925, namely the Supreme Court Act 1981, provided (as originally enacted) in s 89 and Sch 2, for the appointment of what were described as 'the registrars of the Principal Registry of the Family Division' and 'the Senior Registrar of that Division.'

The Matrimonial and Family Proceedings Act 1984, s 42 repeated that rules of court may be made permitting matrimonial proceedings, as well as ancillary or related proceedings, to be commenced and conducted in the PRFD as in a divorce county court. Accordingly, the Family Proceedings Rules 1991 and the Family Procedure Rules 2010 duly allowed matrimonial and ancillary relief proceedings to be issued on that basis in the PRFD.

However, the Family Proceedings Rules 1991, in contrast to its predecessors, did not refer to the PRFD as 'the divorce registry' thus ending that nomenclature with which many pleadings, orders and forms had been habitually headed and endorsed. Indeed, the signage above the entrance to the South Wing of Somerset House, which had stated in gold lettering 'THE DIVORCE REGISTRY' for decades[4] was changed in 1991 to say 'THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION.' Thus, that familiar name – the Divorce Registry – slipped quietly into history.

On 1 January 1991 Registrars became District Judges by virtue of the Courts and Legal Services Act 1990, s 74(1), which provided:

> 'The offices of
>
> (a) registrar, assistant registrar and deputy registrar for each county court district; and
>
> (b) district registrar, assistant district registrar and deputy district registrar for each district registry of the High Court,
>
> shall become the offices of district judge, assistant district judge and deputy district judge respectively.'[5]

Section 74(7) expanded the Matrimonial and Family Proceedings Act 1984, s 42 and provided that where a district judge of the PRFD was exercising jurisdiction in any matrimonial cause or matter which could be exercised by a District Judge of a county court, he shall have the same powers in relation to those proceedings as if they were a

District Judge of a county court and the proceedings were in a county court.

This was repealed in 2014 on the establishment of the Family Court.

By virtue of the Constitutional Reform Act 2005, the Supreme Court Act 1981 was amended and renamed as the Senior Courts Act 1981. Section 89 and Sch 2 were amended to allow appointment to the offices of a 'District Judge of the Principal Registry of the Family Division' and the 'Senior District Judge of the Family Division.'

In 1998 the PRFD moved to FAH ending a 139-year tenure at Somerset House.

It can therefore be seen that prior to the establishment of the Family Court the PRFD had a very substantial role. Its offices, handling both the non-contentious probate work (contentious probate cases having been transferred to the Chancery Division in 1971) and a mass of matrimonial and other family cases, were at FAH. Its judges sat at FAH and routinely tried there numerous ancillary relief and other family cases, as well as dealing with such non-contentious probate work as required judicial intervention.

The Family Court

By virtue of the Crime and Courts Act 2013, s 17 and Schs 10 and 11 the Family Court was established. A primary consequence was that the county courts lost their divorce jurisdiction. This great change took effect on 22 April 2014. The Family Procedure Rules 2010 were amended to remove all references to divorce county courts and to the PRFD being treated as such a court. The great bulk of the work done by the judges of the PRFD, including all matrimonial causes and ancillary relief, was transferred to the new Family Court, now sitting at FAH as the Central Family Court (CFC).

A residue of High Court work was not transferred to the new Family Court. This was laid out with clarity in Part A of the Schedule to the *President's Guidance: Jurisdiction of the Family Court: Allocation of cases within the Family Court to High Court Judge Level and Transfer of cases from the Family Court to the High Court* (28 February 2018).[6]

Only those judges authorised to sit in the High Court can deal with this residue. At District Judge level this cohort includes those full time District Judges of the Family Court who are authorised to sit as District Judges in High Court civil proceedings (the former District Registrars) and those full time District Judges at the CFC who have been appointed Deputy District Judges of the PRFD. Also included, obviously, are those former High Court judges authorised under the Public Service Pensions and Judicial Offices Act 2022, ss 123 and 124 and Sch 3, and those Deputy High Court judges authorised under the Senior Courts Act 1981, s 9(4).

Amendments to the Family Procedure Rules 2010, consequential to the creation of the Family Court, dealt with appeals from District Judges of the PRFD. FPR PD 30A, paras 1.1, 2.1 and 2.2 provide that where a District Judge of the PRFD (including a Deputy, but not including the Senior District Judge hearing a financial case) has made a decision when sitting in the Family Court then the appeal lies to a judge of circuit judge level, but with power to elevate the appeal to High Court judge level where the appeal raises an important point of principle or practice or where efficient use of local judicial responses so requires. Where a District Judge of the PRFD has made a decision in the High Court the appeal lies to a High Court judge.

As a consequence of these reforms, there was a necessary change in the arrangements of the various court offices. The PRFD was divided into two parts. The part of the office dealing with probate remained for the time being at FAH. The part of the office dealing with High Court family work was relocated (together with all the files) to the office of the Clerk of the Rules in the Queen's Building at the Royal Courts of Justice (RCJ). At the same time the CFC acquired, in common with all such courts, an office dealing with its work as part of the Family Court. The result of this was that, for the first time ever, the work of the PRFD was now split between two sites. Originally, it had all been at Somerset House. Since 1998 it had all been at FAH. Now it was split between FAH and the RCJ.

It should be noted that as part of these reforms, and the consequential re-organisation of the courts in London, the magistrates who had previously sat in the Family Proceedings Court at Wells Street now moved to FAH and sat in the CFC. FAH also became the home of the Court of Protection. These changes were reflected in a change to the signage displayed outside FAH. Previously it had read 'Principal Registry of the Family Division / High Court / High Holborn' and 'Principal Registry of the Family Division / First Avenue House'. Now it was changed to read 'Central Family Court / The Court of Protection'.

With the creation of the new Family Court, and the consequential re-organisation of family courts in London and, in particular, the division of the work previously carried on at FAH between the new CFC sitting at FAH and the new West London and East London Family Courts, the position of the District Judges of the PRFD and the Senior District Judge of the Family Division became increasingly anomalous. There was an issue (not resolved at the time) as to whether the District Judges of the PRFD were able or could be required to sit anywhere other than at FAH; a state of affairs incompatible with the effective arrangements for the new Family Court in London. And the continuance in office of the Senior District Judge of the Family Division sitting as a judge at the CFC was problematic given the structure and arrangements appropriate there, as elsewhere, in the new Family Court.

Accordingly, no new appointments to these offices were made and when the existing office holders retired or (as in many cases) were promoted they were replaced not by District Judges of the PRFD but by District Judges of the Family Court.

There are now no District Judges of the PRFD and no Senior District Judge, all having now retired or been promoted. There remained, and still remain, in post, a small number of Deputy District Judges of the PRFD who had been appointed prior to the creation of the Family Court. Further, as mentioned above, in November 2020 the President appointed all the full-time District Judges working in the CFC at FAH as Deputy District Judges of the PRFD, thereby enabling them to do all the work laid out in the *President's Guidance* that must (or can) be done in the High Court. In this way the problem whereby a district judge at the CFC could not simultaneously hear cases under the Children Act 1989, Sch 1 and TOLATA 1996, was resolved.

With effect from 2 November 2020, by virtue of the Non-

Contentious Probate (Amendment) Rules 2020 the non-contentious probate jurisdiction became entirely digital and online, and at that time the probate office at FAH was closed.

The PRFD now

Thus the PRFD lives on, albeit in a much-diminished form when compared to its heyday. As mentioned above, it is referred to as such in the Senior Courts Act 1981,[7] in the Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014/840), and in no fewer than 23 individual rules in the (amended) Family Procedure Rules 2010.[8]

The PRFD has an office at the Queen's Building where proceedings that can or must be issued in the High Court are processed. It has a dedicated judiciary – the Deputy District Judges of the PRFD. Its work at District Judge level is currently done at FAH.

In addition to acting as the court office for the Family Division in London, the PRFD has the obligation to maintain:

(1) the central index of decrees absolute (r 7.35);
(2) the register of wards of court (r 12.38);
(3) the central index of decisions registered under the Child Abduction and Custody Act 1985, s 16 (r 12.56);
(4) the register of all applications and requests for transfer of jurisdiction to or from another Hague 1996 Contracting State (r 12.61); and
(5) the central index of judgments recognising orders made under the 1996 Hague Convention (r 31.3).

Number 1 is maintained by and at the CFC on behalf, and subject to the control, of the PRFD, but not always infallibly – see *Power v Vidal* [2019] EWHC 2101 (Fam) where the office copy of the decree absolute had been lost by the court and there was no trace of it on the index.

Numbers 4 and 5 are maintained in electronic format at the office of the Clerk of the Rules in the RCJ.

Number 3 relates to the registration of decisions made pursuant to the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children signed in Luxembourg on 20 May 1980. This Convention is now totally obsolete having been superseded by the 1996 Hague Convention. It is not believed that any order has been made under the European Convention for over 25 years. One assumes that the index has therefore fallen into desuetude.

As for Number 2 each author has made many orders both warding and de-warding children but neither is aware of any such order having been recorded in the register of wards of court. The Clerk of the Rules is not aware of the existence of any such register. It too has likely fallen into desuetude.

In colloquial usage, a Deputy District Judge of the Principal Registry sitting in the Family Division of the High Court at FAH is still sometimes described as 'sitting in the PRFD', although it may be noted that a High Court Judge sitting in the Family Division is not, and never has been, so described. Whether that means that FAH is properly described today (after the departure of Probate) as the PRFD, is however, a different matter. In our view it is no longer properly so described. No part of the offices of the PRFD is any longer to be found at FAH. So far as concerns family work, the offices of the PRFD are at the RCJ. The only court offices at FAH are the offices of the Family Court (quite distinct from the offices of the PRFD) and the offices of the Court of Protection. Inveterate usage may perhaps be explained (though it cannot be justified) by the old ambiguity about what is meant by a court: is it an office, is it the judge, is it the place where the judge sits?

Moreover, the point is not devoid of practical significance. In our view a Deputy District Judge of the PRFD is not confined to sitting at FAH. So, for example, if it became convenient to try TOLATA 1996 cases at either the East London or the West London Family Court, there would, we believe, be no obstacle to the appointment of one or more of the District Judges of the Family Court sitting there to be, as in the case of the District Judges at FAH, in addition a Deputy District Judge of the PRFD.

Notes

1 See *The Pilot Scheme Silver Jubilee: The story behind the 1996 ancillary relief pilot scheme* (Class Legal, 2021).

2 See Stephen Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press, 2003), 277–281. Initially, cases tried on circuit still had to be issued at the Divorce Registry in London. Eventually, it became possible to issue in the one of the District Registries listed in the rules, for hearing in one of the listed 'Assize Towns': see for example the Matrimonial Causes Rules 1944, rr 1(3), 32, Appendix I, the relevant forms in Annexe II, and Annexe IV. The intermediate position is well illustrated by the divorce of Wallis Simpson, the King's mistress, famously tried on 27 October 1936 before Hawke J at Ipswich Assizes. As can be seen from the court file preserved in the National Archives (TNA J 162/1), Mrs Simpson filed her petition in London on 28 July 1936. On 18 September 1936, a Registrar sitting in London ordered that 'this cause be heard at Ipswich', but there was no order transferring the case to the District Registry. The decree nisi made by Hawke J on 27 October 1936 was headed 'In the High Court of Justice / Probate, Divorce and Admiralty Division / (Divorce)' and contained a recital that Hawke J was 'sitting at Ipswich.' On 28 October 1936 the District Registrar of the Ipswich District Registry wrote to 'The Chief Clerk / Divorce Registry / Somerset House / WC2' saying 'I enclose the files of papers of the two Matrimonial Causes set down for hearing at the Ipswich Assizes, the Minutes and Decrees …'.

3 Registrars of the Principal Probate Registry had exercised some determinative judicial functions (as opposed to investigating a case and making a report to the judge) from the time of the Matrimonial Causes Rules 1924, as described in *Xanthopoulos v Rakshina* [2022] EWFC 30 at [78]–[88].

4 It so stated in October 1971 when James Munby commenced pupillage.

5 Curiously, this provision does not refer to the office of a District Judge of the PRFD, but no one has ever doubted that they too were the subject of this name-change.

6 www.judiciary.uk/wp-content/uploads/2018/02/pfd-guidance-2018-jurisdiction.pdf. The Guidance was amended on 24 May 2021. The current in-force version is at www.judiciary.uk/wp-content/uploads/2022/07/PFD-Guidance-Jurisdiction-of-the-Family-Court-May-2021.pdf

7 See ss 89, 105, 107, 108, 110, 111, 124, 125.

8 See rr 2.3, 2.5, 7.35. 12.38, 12.45, 12.56, 12.61, 12.65, 12.71, 13.21, 14.26, 25.20, 30.1, 31.3, 31.4, 31.13, 32.3, 32.7, 32.24, 33.10, 33.24, 34.9, 34.10.

Implications of the Changing Non-domicile Regime

Sofia Thomas
Chartered Tax Adviser and Partner,
Juno Tax

Josephine Kensah
Chartered Tax Adviser and Partner,
JAMK Services

On 6 March 2024, the Government announced a major overhaul of the regime for the taxation of non-doms in the United Kingdom (UK). These changes will impact all high net worth UK residents whose domicile for tax purposes is outside the UK ('non-doms') but may have a particularly significant impact on non-doms divorcing in the UK.

Some of the previously well accepted planning for non-doms on divorce will no longer be available after the introduction of these changes.

There are two major changes:

(1) From 2025/26 non-doms will no longer benefit from being able to shelter their income and gains from taxation in the UK.
(2) Offshore trusts settled by non-doms will no longer be protected from income tax and capital gains tax.

Essentially, almost all of the tax incentives presently available for non-doms will be removed.

These rules will be effective from 6 April 2025, however transitional rules will apply, which may provide some benefit for those who are planning remitting funds into the UK over the next few years.

This article will:

- review the current rules;
- detail the proposed new rules; and
- run through a case study.

Please note that there is no actual legislation at this time, so this article is based on the following information:

- Spring Budget 2024 and Spring Budget 2024: Policy Costings.
- HMRC: Spring Budget 2024: Overview of tax legislation and rates (OOTLAR).
- HMRC Technical note: Changes to the taxation of non-UK domiciled individuals Updated 7 March 2024.

As there is a lack of technical detail available, this article offers a general overview of the changes and some things to be aware of.

What is the current non-dom regime and how does it benefit divorcing couples?

Briefly, the current non-dom regime allows people who are living in the UK, but non-UK domiciled, to exclude their non-UK income and gains from UK taxation – this is called the remittance basis. The overseas income is not subject to tax in the UK, providing the money is not bought (remitted to) the UK.

Non-doms can benefit from this regime for the first 15 years that they are living in the UK. Once a person has been living here for 7 years, there is a charge to claim the remittance basis.

If a couple are divorcing and one or both of them are non-doms, there is a way to structure the settlement so that funds can be remitted to the UK without incurring a tax charge.

Illustration

Elias and Ava are married Swedish nationals living in the UK. They are both non-UK dom. They have been living in the UK for 10 years. Elias claims the remittance basis.

The divorce settlement required Elias to transfer £5m to Ava. This £5m is made up of income and gains that Elias has earned whilst UK resident.

If Elias brings ('remits') that money into the UK, he will pay tax on the income at 45%. The £5m would therefore be £2.75m once the relevant taxes have been paid.

A remittance is one that benefits the individual or a relevant person to the individual (including family members). If the money remains offshore there is no remittance. If the money does not benefit the individual or their family members there is no remittance.

Under the current regime Elias can transfer the £5m from his offshore account to Ava's offshore account and Ava can remit this money to the UK once the divorce is finalised (i.e. once the decree absolute or (for divorce applications post-dating 6 April 2022) the Final Order has been issued). Once the divorce has been finalised, Ava is no longer a relevant person to Elias and therefore a remittance by Ava does not count as a remittance for Elias.

There are certain caveats to this and full advice should be taken. However, this is one structure that non-doms divorcing in the UK utilise to structure their settlements. Note that HMRC have stated that this structure is under review by them. However, there has been no consultation

or change in legislation.[1] At note 1 there are also details of the HMRC letter approving the structure from 2012.

What is the proposed regime?

The changes are due to take effect from 6 April 2025, when a new regime will abolish non-dom status for income and gains. Individuals will then be subject to tax on all their worldwide income and gains regardless of their domicile status. This does not mean an immediate tax charge on all non-doms; it means that from 6 April 2025 any income and gains earned from that point on will be subject to tax in the UK if the individual is resident in the UK.

There will be a new foreign income and gains (FIG) regime. This is for new residents in the UK. It allows them to exempt any foreign income and gains from taxation for the first 4 years that they are living in the UK. There is no requirement that this money is kept offshore.

What are the transitional rules?

There will be a one-off relief for the tax years 2025–26 and 2026–27. This is called the temporary repatriation facility (TRF). This relief is a 12% rate of tax for remittances of certain foreign income and gains made in 2025–26 and 2026–27.

Non-doms who move from the remittance basis to the arising basis on 6 April 2025 (and not eligible for the 4-year FIG rules) will only pay tax on 50% of their foreign income for 2025–26.

For disposal of assets, after 2025–26, capital gains tax rebasing will apply. This means that sales of overseas assets will be calculated using the value of the asset at April 2019 as the base cost if the following conditions are met:

(1) the individual has claimed the remittance basis;
(2) the individual was non-dom at 5 April 2025;
(3) the individual disposes of the asset post-April 2025;
(4) the individual owned the asset at 5 April 2019.

How will this impact divorcing couples?

It will have no impact for couples who are UK domiciled. For couples where one or both of the parties are non-doms these changes may impact how settlements are structured in a tax-efficient way.

The timing of the settlements will directly impact which set of rules the individuals are under.

Previously, if funds were held offshore and the individual claimed the remittance basis the income and gains were not taxed in the UK. These rules will change that. It does not mean that the tax will always apply as some of the income or gains may be exempt to tax or given foreign tax credits under certain double tax treaties.

The non-dom remittance regime was quite clear cut: not in the UK, not taxable. Under the new rules, any income or gains earned whilst resident in the UK could be taxed in the UK regardless of if the funds are brought into the UK or not. It's going to be more complicated for non-doms to estimate their tax position in the UK – at least for the first few years.

Further, previously some assets overseas could be ignored for capital gains tax purposes, in the UK, if the individual would keep the funds outside the UK, there would be no tax charge in the UK. From 6 April 2025, assets sold overseas will be subject to capital gains tax in the UK if the individual is living in the UK.

Timeline and rules

The timing for remittances is different for capital gains and transfers of assets. In some cases, the tax point for the transfer of the asset is the date of the court order rather than the date that the assets have been legally transferred. For a transfer of cash, the individual will be subject to the tax rules in place at the point of the transfer or remittance. If an Order states that X will transfer £5m to Y and this is dated March 2025 (current rules) but the transfer takes place in May 2025 (new rules), X will be taxed according to the rules in place in 2025–26.

For the transferring spouse this means there is a tax risk if the transfer is delayed. However, it would not be wise to rush the transfer as the structuring outlined above only works because the two parties are no longer connected (which is only the case after the Final Order).

Present to 5 April 2025

Rules regarding non-doms remain as they have always been.

6 April 2025 to 5 April 2027

If the individual qualifies for the 4-year FIG regime there is no tax on funds brought into the UK.

If the individual is a former non-dom, they may be able to remit certain income and gains and pay a tax rate of 12% on the money remitted.

From 6 April 2027 onwards

If the individual qualifies for the 4-year FIG regime there is no tax on funds brought into the UK.

For individuals who have been living in the UK for over 4 years they will be subject to tax on their worldwide income (regardless of where the money is kept).

Will there be more uses of trusts?

Trusts have often been used in the past to protect foreign sourced income and gains. However, from 6 April 2025 the protection from tax on income and gains in offshore trusts will no longer be tax protected.

There will also be changes to the inheritance tax regime. Inheritance tax will be payable by an individual who has been resident in the UK for 10 years and if they have left the UK and have not reached 10 years non-residence.

Some of the transitional rules include that trusts that are settled by a non-UK dom settlor prior to 6 April 2025 will be exempt from UK inheritance tax (IHT). There may be an increase in these trust structures for IHT planning.

Practically speaking what might the non-doms do?

Residence will become a major tax planning tool for high net worth (HNW) and ultra high net worth (UHNW). With the right planning and reduced ties to the UK, some individuals will be able to spend up to 6 months in the UK without triggering UK residency. As a non-resident, individuals are only taxed on their UK-sourced income.

Some HNWs and UHNW will leave the UK – the actual impact of this is unknown, however, if your clients are going through a divorce it will be an important question to ask.

The tax position for UK residents versus non-residents is very different and therefore for a tax report to be accurate the adviser will need to know the residency position of both parties.

What are the unknowns?

A lot. These changes were announced by a Conservative Government. A general election is being held on 4 July 2024. Labour have announced that they would keep most of the changes announced with some changes. However, even for these changes, we have no draft legislation yet. Per the latest publication by the Government, regarding these rules 'further updates and draft legislation will be published later in the year for technical comments'.

Takeaways

The single biggest takeaway from these changes is that the landscape for non-doms is changing. Settlement structuring to benefit from the remittance basis will no longer be available from 6 April 2027. It may still be possible to utilise it in the transitional years.

As a result, for the tax years 2025–26 and 2026–27, non-doms may seek to bring significant sums into the UK, to benefit from the 12% rate.

Some individuals may leave the UK and this will drastically change their tax position here.

Timing matters. If you are advising clients who are non-dom, and they require a tax report to consider when a potential settlement could be made, consider asking the following questions:

- What will the tax position be if the settlement is affected on or before 5 April 2025?
- What will the tax position be if the settlement is affected between 6 April 2025 and 5 April 2027?
- If seeking a capital gains tax report for a non-dom, will the report need to set out the position of a sale pre 5-April 2025 and post-5 April 2025?

Tax uncertainty may create certain challenges for HNW and UHNWs. It may also encourage some individuals to come to the UK since the new regime is more attractive for wealthy foreigners who will be able to benefit from a tax exemption and use the money in the UK.

The tax landscape for wealthy individuals will change over the next 3 years which may create additional layers of complexity when advising on divorce. Seeking advice or utilising the tax adviser of the party will be important to ensure that tax liabilities are not understated.

Notes

1 www.tax.org.uk/hmrc-to-review-their-position-on-remittances

Pre-nuptial Agreements – A Good Route to Autonomy?

Dr Sharon Thompson

Reader in Law, Cardiff University

Every family lawyer knows that the validity of pre-nuptial agreements (pre-nups) is at the mercy of the judge's discretion, yet a freely entered agreement that is not unfair will be given decisive weight.[1] This authority stems from the landmark case of *Radmacher v Granatino* [2010] UKSC 42, where the Supreme Court ended longstanding ambivalence over the enforcement of such agreements, holding that nuptial agreements are to be given effect by the court out of 'respect for individual autonomy'.[2] This article considers whether the current legal status of pre-nups does indeed promote autonomy. It is argued, first, that the court frequently avoids the question of whether autonomy has been exercised. The second part of this article explores research evidencing why this is problematic. Autonomy is a nebulous concept, and when it is simplified, neutralised, individualised and de-gendered, it is often assumed. The concept of neo-liberal autonomy has been a powerful influence on policies surrounding family breakdown in recent years.[3] This version of autonomy focuses on the individual, who is expected to seek the best deal for themselves.[4] Yet, if the reality of how individuals make decisions is to be appreciated then it is important to challenge the idea that, in contracts, autonomy simply means a rational and voluntary choice. Particularly in the complex realm of intimate family law agreements, it would be fair to ask whether individuals ever make completely voluntary, rational choices. While neo-liberal notions of autonomy are built on assumptions that decision makers are independent, self-interested and rational actors, relational autonomy asserts that '[t]o be autonomous is not to be isolated and free of responsibility, but to be in a network of relationships, with their dependent responsibilities'.[5] Our autonomy when making these decisions is inherently impacted by relationships with others, and the relationships with those we are entering into agreements with.[6]

As a result, this article urges circumspection regarding autonomy in the neo-liberal sense. In the context of nuptial agreements, blind respect for this type of autonomy favours the party with greater bargaining power, often at the expense of the interests of the non-moneyed spouse, because the power struggles in the relationship are not adequately recognised.[7] Such defects in the exercise of autonomy are not fully appreciated when agreements are set aside primarily to meet needs.[8] Thus, in the final sections, it is suggested that if nuptial agreements are to be made binding in England and Wales, the American Law Institute's proposals provide an example of how legislation could go some way towards explicitly recognising the issues of power affecting such agreements.

The current legal landscape

Rather curiously, the steps currently required for a nuptial agreement to be given effect by the court could be viewed as simultaneously protecting and overriding autonomy. The first step is obviously tied to respect for individual autonomy, because it requires an agreement to have been freely entered into by the parties.[9] But the second step is more complicated, whereby an agreement will not be upheld if the court determines that it would not be fair to do so.[10] As a result, while the rationale for enforcing agreements is based on autonomy, *an absence of autonomy* does not tend to be used by the judiciary to justify an agreement being set aside. Rather, it is an absence of fairness that is important. And, problematically, fairness and autonomy can be treated as conflicting values.

The Supreme Court has described circumstances in which it would be unfair for an agreement to be given effect as follows:

> 'The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to

> an agreement that entitles the latter to retain all that he or she has earned.'[11]

As a result, the court typically refuses to give effect to an agreement because the judge does not consider sufficient provision to have been made for the parties' needs (generously interpreted).[12] This focus upon needs has prevailed even when the parties have sought to have a pre-nup set aside because their autonomy was defective. In *KA v MA (Prenuptial Agreement: Needs)* [2018] EWHC 499 (Fam), for example, the wife's solicitors registered their concern that she had been under pressure to sign the nuptial agreement (the husband allegedly threatened to cancel the wedding unless it was signed), but the court's rationale for it ultimately being set aside was that it did not provide for her needs.[13]

This inevitably sets up a tension between needs and autonomy. When giving effect to an agreement is equated to giving effect to individual autonomy, the corollary of this is that varying or disregarding a pre-nup because of needs is viewed as a threat to autonomy. This artificial choice of needs or autonomy means that to avoid accusations of paternalism,[14] the scope of needs is in danger of being narrowly constrained by the court. *Cummings v Fawn* [2023] EWHC 830 (Fam) is one illustration of this:[15]

> 'Imagine that the discretionary range is a line of books on a shelf bracketed left and right by book-ends. The book-ends may be quite far apart. The right book-end represents a comfortable, perhaps even luxurious, lifestyle. The left book-end represents a spartan lifestyle catering for not much more than essentials. The space in between is the discretionary range. When the Supreme Court says that it may not be fair to uphold an agreement which leaves the applicant in a predicament of real need, it is clearly saying that if the result of the agreement would place the applicant in a standard of living to the left of the left-hand bookend, then that would be unfair. It is also saying that to make the agreement fair it should be augmented by no more than is necessary to move the applicant's lifestyle just to the right of that left-hand bookend.'[16]

This case concerned a *Xydhias*[17] agreement rather than a nuptial agreement, but these *obiter* comments relate to Mostyn J's assessment of what constitutes a fair agreement more generally. His focus upon basic provision of need in this case – which decontextualised the Supreme Court's statement concerning one party being left in a predicament of real need – also overshadowed the wife's contention in this case that there was material non-disclosure; a factor that is of direct relevance to her exercise of autonomy.

In summary, while autonomy is used to justify the current legal status of nuptial agreements more generally, it does not factor much in the way they are adjudicated in practice. Yet if nuptial agreements are to provide a good route to autonomy, then the legal framework must also provide for when autonomy has *not* been exercised by one of the parties. Research suggests the current legal landscape has produced an overly simplistic and inaccurate picture of what autonomy actually means.[18] This is because defects with autonomy are not properly acknowledged when autonomy is presumed. Moreover, it is misleading for fairness and autonomy to be treated as opposing concepts – whereby upholding fairness is viewed as undermining autonomy – since a nuptial agreement may well be unfair *because of* defective autonomy.

Defects in the exercise of autonomy

Even if we accept that autonomy should be the starting point, in practice this is problematic because the concept of autonomy is often illusory. When the court refuses to ask questions about the exercise of autonomy because there has been adequate disclosure and legal advice, and because the rather high thresholds of duress and undue influence have not been met, it is, in effect, upholding a fictional version of autonomy in many situations. Indeed, practitioners who deal routinely with nuptial agreements will be aware of how changing circumstances, bounded rationality/optimism bias, and unequal bargaining power all affect the autonomy of one or both spouses, while undermining the presumption that giving effect to an agreement necessarily means respecting the autonomy of the parties.

Changing circumstances

Various studies have documented the perennial problem with pre-nups: the circumstances in which the agreement is negotiated before the wedding are likely to be different from the circumstances prevailing when the agreement is brought into effect. This is especially likely in long marriages. In *Radmacher*, Lady Hale gave three examples to illustrate this:

> 'A couple who always thought that one would be the breadwinner and one would be the homemaker may be astonished to find that the homemaker has become a successful businesswoman who is supporting her homemaker husband rather than the other way about.
>
> A couple who assumed that each would run their own independent professional life and keep their finances entirely separate may find this quite impossible when they have children, especially if they have more than one or one of them has special needs.
>
> An older couple who marry a second time round may think it fair at the time to preserve their assets for the sake of the children of their first marriages, but may find that one has to become a carer for the other and will be left homeless and in reduced circumstances if the grown-up children take priority even though they are now well-established in life and have no pressing need of their inheritance.'[19]

Thus, pre-nups are complex because of the many unforeseeable ways in which the marital relationship may develop over time, and the impact of changing circumstances upon the parties at the time of enforcement is well documented across jurisdictions.[20]

Bounded rationality/optimism bias

Bounded rationality and optimism bias are further complicating factors connected to the fact that nuptial agreements are created within the circumstances of the parties' relationship before the wedding. These cognitive limitations affect the negotiation process, since at this time divorce seems to be a distant and unlikely prospect and as Melvin Eisenberg's work has found, parties to an agreement are likely to be 'unduly optimistic about the fate of their marriage'.[21] Bounded rationality affects the parties' ability to think clearly about protecting themselves financially on

divorce in the early stages of a relationship, which are often marked by altruism and commitment. As Brian Bix has put it: 'most people are poor at thinking well about events in the distant future, especially if it involves contingencies contrary to our optimistic assumptions'.[22] Lynn Baker and Robert Emery's research has also established this in relation to the closely-related phenomenon of optimism bias.[23] When surveying individuals' ability to assess the likelihood of their relationship breaking down, the median response was that the probability of other couples divorcing was 50%, but the probability that they personally would divorce was 0%. These cognitive limitations were acknowledged by the Law Commission in its 2014 report on marital property agreements:

> 'Those who marry or form civil partnerships are adults and can take their own decisions, but it is a matter of experience that most people are willing to agree, when they are in love, to things that they would not otherwise contemplate.'[24]

Thus, negotiations may be affected if the parties themselves do not believe that the agreement will ever need to be enforced. They may be unable to make decisions when entering agreements that properly represent what is in their best interests. And they are also unlikely to be able to predict the future effect of their agreement, particularly if circumstances change during the marriage, which were not foreseen by the couple.

Unequal bargaining power

A third problem with the current law's blinkered focus upon needs-based provision is that there is limited scope to appreciate how unequal bargaining power can suppress a party's exercise of autonomy. Research has shown repeatedly that pre-nups are often one-sided, and that the spouse with more leverage is generally the spouse with property to protect.[25] In these cases, the spouse at the short end of the power imbalance must show that she was either subject to duress, undue influence or improper pressure, or that she did not know or could not have understood the impact of what she was doing.[26] The Supreme Court did not set a clear threshold for the type of pressure the court will consider, but it did point out that 'unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage', could reduce or eliminate the weight to be attached to an agreement.[27] While this can provide space for negotiation at FDR hearings, case law suggests that pressure and coercion can be difficult to establish in the courtroom.[28] Thus, autonomy is often assumed when the courts are satisfied that the parties are appropriately informed and neither party has unlawfully been pressured into signing the agreement. This risks side-lining contextual factors, including how and why the agreement was made and changes in the power dynamic that occur during the relationship.[29] But if autonomy is to be respected, this sort of assessment can help uncover whether both parties have been able to negotiate a nuptial agreement on a level playing field.

Under the current law, rather than focusing upon how the intentions and autonomy of the parties have changed over time, or how optimism bias or unequal bargaining power have rendered the parties' exercise of autonomy defective, the court is concerned predominantly with whether proper provision has been made for the potentially economically vulnerable spouse. This is also reflected in the Law Commission's 2014 Nuptial Agreements Bill, which according to Elizabeth Cooke, the Law Commissioner who led the project on marital property agreements, 'builds on existing law and practice'.[30] The Bill stipulates that an agreement could be set aside if the needs of the parties were not provided for, thereby replacing the Supreme Court's test of attributing decisive weight unless 'unfair'. But renewed calls to make nuptial agreements binding under legislation present a valuable opportunity to consider a different approach that departs from the current law. This can be found in the American Law Institute's proposals.

American Law Institute proposals

The American Law Institute (ALI) is an independent organisation that reviews the law of the US and produces proposals recommending reform.[31] It is therefore analogous to the Law Commission of England and Wales. When proposing reform of pre-nups, the ALI emphasised respect for the autonomy of the parties, while recognising broader contextual factors influencing the balance of power between the parties.[32]

One of the most pertinent ways in which it sought to do this was to propose giving the court a 'second look'[33] at a nuptial agreement in limited circumstances. If changes during the marriage mean the agreement 'would work a substantial injustice',[34] the court would have discretion to set it aside, but in a way that does not disregard the parties' autonomy.

This 'substantial injustice' safeguard ostensibly is not far removed from England and Wales, where an agreement can be varied or set aside if unfair. But there is a crucial distinction between these proposals and the law in this jurisdiction: not all cases would be eligible for consideration. Before the court could consider whether there has been substantial injustice, the party resisting enforcement must show that one or more of the following has occurred since the agreement was created:[35]

(1) more than a fixed number of years have passed (the ALI leaves this to be determined by the adopting jurisdiction, but gave a period of 10 years as an example, since the rationale is that the agreement's terms are more likely to become redundant over the course of a longer marriage);
(2) a child was born to, or adopted by, the parties, who at the time of execution had no children in common;
(3) there has been a change in circumstances that has a substantial impact on the parties or their children, but when they executed the agreement, the parties probably did not anticipate either the change, or its impact.

By requiring one of these situations – which are tied to unanticipated change in circumstances – there is recognition that parties' intentions can evolve and that the autonomy of one of the parties is likely to change with their different circumstances. In other words, these are situations that might have affected the parties' exercise of autonomy had they known about them when they signed the nuptial agreement. Once one of these situations is proven to have occurred, the judge must consider whether enforcing the agreement in question would lead to substantial injustice.

As 'substantial injustice' is a vague term, the ALI set out the following guide to matters to be taken into account, so that the judge's discretion would be more principled:

(1) the magnitude of the disparity between the outcome under the agreement and the outcome under otherwise prevailing legal principles;
(2) for those marriages of limited duration in which it is practical to ascertain, the difference between the circumstances of the objecting party if the agreement is enforced, and that party's likely circumstances had the marriage never taken place;
(3) whether the purpose of the agreement was to benefit or protect the interests of third parties (such as children from a prior relationship), whether that purpose is still relevant, and whether the agreement's terms were reasonably designed to serve it;
(4) the impact of the agreement's enforcement upon the children of the parties.[36]

The ALI's rationale for these provisions is that it recognises the 'special difficulties' associated with pre-nups, as well as providing greater scope to consider fairness and changed circumstances according to a standard of 'substantial injustice'.[37] Instead of presuming that autonomy has been exercised by the parties, these proposals provide scope to inspect the purpose and broader context of the agreement, and whether autonomy has been rendered defective.

This does not require the court to examine all nuptial agreements on divorce. Rather, the ALI has stated, it is 'only a subset in which … difficulties are particularly likely' that will attract attention.[38] As a result, the ALI has asserted that its recommendations retain 'considerable deference to contractual freedom'.[39] Vitiation of a nuptial agreement must be justified by cognitive difficulties or changed circumstances, in other words, occurrences that render autonomy defective. In doing so, the ALI's proposals are not a panacea for these problems. However, by placing the limitations of autonomy at the heart of its reform considerations,[40] these proposals proffer an approach that differs in emphasis from the discretionary approach in England and Wales. In short, instead of being guided by general considerations of needs and fairness, the ALI proposals are linked directly to problems in the exercise of autonomy.

Looking to reform

Misconceptions about pre-nups and autonomy are rife. Research has shown that many potential spouses and civil partners do not understand precisely what a pre-nup is and how it operates.[41] Those who do may be affected in other ways, including optimism bias, power imbalances and changes in circumstances, priorities and needs over the course of the marriage. These factors all impact how autonomy is exercised in the pre-nuptial and post-nuptial context.

If there is to be reform making nuptial agreements binding under legislation in England and Wales, now is the time to consider what respect for autonomy really looks like, and how it can best be facilitated in practice.[42] While the ALI proposals are not a world away from the current approach in England and Wales (which the Law Commission's Nuptial Agreements Bill would largely codify), the safeguards of the former focus less on needs-based provision and more on defects in the exercise of autonomy. Therefore, reform influenced by the ALI proposals could circumvent the artificial binary of needs and autonomy currently being grappled with by the court, whereby it risks accusations of paternalism and undermining autonomy when a nuptial agreement is not given effect on divorce.[43]

There is a further danger with codifying the court's current approach in line with the Nuptial Agreements Bill. If nuptial agreements are binding unless needs are not provided for, the meaning of needs risks narrow interpretation, as seen in Mostyn's comments in *Cummings v Fawn* in the first part of this article.[44] It would be wholly undesirable to be left with a public welfare exception to the enforcement of nuptial agreements – one that looks only to absolute need and ignores parts of our system of financial remedies that are vital to ensuring fairness, such as redressing relationship generated disadvantage or recognising the impact of an abusive relationship upon needs.[45]

While the reform proposed under the Divorce (Financial Provision) Bill would make nuptial agreements more inflexible in the event of divorce,[46] this would not promote autonomy. Clause 3 of this Bill provides that a nuptial agreement will be binding provided it complies with tick-box requirements, such as a 21-day cooling off period, proper disclosure, adequate opportunity to receive independent legal advice, and compliance with general contractual rules. These safeguards might help to facilitate the exercise of autonomy in some cases, but the Bill leaves no scope to recognise the defects that can occur with autonomy. If implemented, this Bill would create ironclad nuptial agreements that would uphold only an illusory version of autonomy. This risks ousting the promotion of other values within family law inextricably linked to fairness and equality on divorce.

And so, it is vitally important not to fall into the trap of equating a valid agreement with upholding the individual autonomy of the parties. Reform that takes on board the ALI's recommendations could be one way of managing this tension that exists in our current law.

Notes

1 This article is based upon a paper presented at the 'Reforming Financial Remedies on Divorce' workshop hosted by the Family, Regulation and Society Network, University of Exeter, 11 March 2024. I am grateful to Professor Anne Barlow for organising this event, to Professor Russell Sandberg for his feedback on an earlier draft, and to the Leverhulme Trust for funding support. Parts of this article also appear in S Thompson, 'Prenuptial Agreements in Comparative Perspective' in R Probert and S Thompson (eds), *Research Handbook on Marriage, Cohabitation and the Law* (Elgar, 2024), p 418.
2 *Radmacher v Granatino* [2010] UKSC 42 at [78] (Lord Phillips).
3 A Diduck, 'Autonomy and Family Justice' (2016) 28 *Child and Family Law Quarterly* 133. R George Wright, 'Consent and the Pursuit of Autonomy' (2020) 66 *Loyola Law Review* 91; N Kim, *Consentability: Consent and its Limits* (CUP, 2019); S Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (Hart, 2015), p 129.
4 J Mant, 'Neoliberalism, family law and the cost of access to justice' (2017) 39(2) *Journal of Social Welfare and Family Law* 246; A Heenan, 'Neoliberalism, family law, and the devaluation of care' (2021) 48(3) *Journal of Law and Society* 386.

5 J Herring, *Relational Autonomy and Family Law* (Springer, 4th edn, 2014), p 68.
6 S Thompson, 'Feminist Relational Contract Theory: A New Model for Family Property Agreements' (2018) 45 *Journal of Law and Society* 617.
7 V Munro, *Law and Politics at the Perimeter* (Hart, 2007), p 49.
8 As seen in cases such as *KA v MA (Prenuptial Agreement: Needs)* [2018] EWHC 499 (Fam).
9 Standard contractual vitiating factors, such as duress, fraud, and misrepresentation will taint an agreement's validity. While factors such as financial disclosure and independent legal advice might affect the voluntariness of an agreement, such factors are not clear, 'tick-box' procedural requirements for a valid agreement.
10 *Radmacher* (n 2).
11 *Radmacher* (n 2) at [81] (Lord Phillips).
12 *MN v AN* [2023] EWHC 613 (Fam); *Luckwell v Limata* [2014] EWHC 502 (Fam); *Brack v Brack* [2018] EWCA Civ 2862; S Thompson, 'Using Feminist Relational Contract Theory to Build Upon Consentability: A Case Study of Prenups' (2020) 66 *Loyola Law Review* 55; R Probert and T Dodsworth, 'Contracts and Relationships of Love and Trust', in E Peel and R Probert (eds), *Shaping the Law of Obligations: Essays in Honour of Ewan McKendrick* (OUP, 2023).
13 *KA v MA (Prenuptial Agreement: Needs)* [2018] EWHC 499 (Fam).
14 See Lord Phillips in *Radmacher*: 'It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best': *Radmacher* (n 2) at [78].
15 *Cummings v Fawn* [2023] EWHC 830 (Fam).
16 *Cummings* (n 15) at [14].
17 *Xydhias v Xhdhias* [1998] EWCA Civ 1966.
18 E Gordon-Bouvier, 'The open future: analysing the temporality of autonomy in family law' (2020) 32(1) *Child and Family Law Quarterly* 75; A Heenan, *Autonomy, Care and Family Law* (Hart, 2024); Thompson (n 3).
19 *Radmacher* (n 2) at [176].
20 A Barlow and J Smithson, 'Is Modern Marriage a Bargain? Exploring Perceptions of Pre-Nuptial Agreements in England and Wales' (2012) 24 *Child and Family Law Quarterly* 304; B Bix, 'Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage' (1998) 40 *William and Mary Law Review* 145; L-A Buckley, 'Autonomy and Prenuptial Agreements in Ireland: A Relational Analysis' (2010) 38 *Legal Studies* 164; L-A Buckley, 'Relational Theory and Choice of Rhetoric in the Supreme Court of Canada' (2015) 29 *Canadian Journal of Family Law* 251 at 258; M Kaye, L Sarmas, B Fehlberg and B Smyth, 'Prenuptial agreements – What's happening?' (2023) 36(1) *Australian Journal of Family Law* 38; Herring (n 5); J Scherpe (ed), *Marital agreements and private autonomy in comparative perspective* (Hart, 2012); Thompson (n 3).
21 M Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47 *Stanford Law Review* 211 at 213–254.
22 B Bix, 'Private Ordering and Family Law' (2010) 23 *Journal of the American Academy of Matrimonial Lawyers* 249.
23 L Baker and R Emery, 'When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage' (1993) 17 *Law & Human Behaviour* 439.
24 Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014) [5.26].
25 Thompson (n 3); see also Kaye *et al* (n 16) for recent evidence of the impact of power imbalances in the pre-nuptial context in Australia.
26 *GS v L* [2011] EWHC 1759 (Fam); *Kremen v Agrest (No 11)* [2012] EWHC 45 (Fam).
27 *Radmacher* (n 2) at [71].
28 Although a finding of coercive control justified an agreement having no weight in *Traharne v Limb* [2022] EWFC 27, the threshold of undue pressure was not met in *KA v MA* (n 13) where the agreement was signed a short time before the wedding and was a precondition of the marriage.
29 This contrasts with the approach of the High Court of Australia in *Thorne v Kennedy* [2017] HCA 49. For a comparison of the approach in *Thorne* with that in England and Wales, see Thompson (n 6).
30 E Cooke, 'The Law Commission's Report on Matrimonial Property, Needs and Agreements' (2014) 44 *Family Law* 304 at 308.
31 The ALI Principles are applicable to US states and are not mandatory, though states may elect to incorporate them into their legislation.
32 ALI, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, 2002); B Bix, 'The ALI Principles and Agreements: Seeking a Balance between Status and Contract', in R Wilson (ed), *Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution* (CUP, 2006) 408.
33 A term used by I Ellman, 'Marital Agreements and Private Autonomy in the United States', in Scherpe (n 20), p 411.
34 ALI (n 32), s 7.05, 982.
35 ALI (n 32), s 7.05, 983.
36 ALI (n 32), s 7.05, 983
37 ALI (n 32), 987.
38 ALI (n 32), 987.
39 ALI (n 32), 985.
40 This is made clear by the ALI throughout their explanatory notes. See e.g. ALI (n 32), 957 and 984.
41 E Hitchings, C Bryson, G Douglas, S Purdon and J Birchall, *Fair Shares? Sorting out money and property on divorce: Report* (Nuffield, 2023); Barlow and Smithson (n 20).
42 For an update on reform of financial remedies, see N Hopkins, C Gentry and B Payne, 'Financial Remedies: The Law Commission's Scoping Project' [2023] 3 FLJ 176.
43 R Deech, 'Proposal: Reform of Financial Provision on Divorce', in C Bendall and R Parveen, *Family Law Reform Now: Proposals and Critique* (Hart Publishing, forthcoming); N Mostyn, 'Response: Reform of Financial Provision on Divorce' in Bendall and Parveen, ibid.
44 *Cummings* (n 15).
45 Pursuant to s 25(2)(g) MCA 1973. See also *Traharne* (n 28); *DP v EP (Conduct; Economic Abuse; Needs)* [2023] EWFC 6.
46 Deech (n 43).

Evidencing Earning Capacity: Expert Assessments with Potential for both Cooperation and Conflict

Helen Brander

Pump Court Chambers

Embarking on divorce proceedings is not just the end of one chapter of life but the start of a new one. Judges determining applications for financial remedies on divorce or dissolution of civil partnership aim to ensure that the former spouses are each on as stable a financial footing as possible as they enter into that new chapter. One of the most frequent and important questions parties to divorce have is, 'How will I be able to manage my finances without being able to look to anyone else for both financial and practical assistance?' This question is pregnant with anticipation and concern about prospective disaster: What will happen if I haven't worked outside of the home for years or decades? What will happen if I have only ever worked part-time or on a minimum wage? What if I used to earn lucratively in a professional position but my spouse and I decided that I would take a step back to bring up the family or support other dependants? What if I know nothing anymore of how to behave in a workplace environment? How do I even get a job in an age of internet searches and recruiters?

These questions and similar can induce mental stress to the point of paralysis on a divorcing party as familiar routine is thrown into disarray. It can cause those parties to take action, for example, to reduce their current working arrangements so that they appear more dependent on the other party than they were during the marriage. That behaviour in turn may lead to that second party also rearranging their working life so that their income is diminished in an attempt to fend off an income claim. Sometimes this behaviour develops unconsciously via the worry, leading to poor mental stability and illness, negatively impacting a divorcing spouse's ability to be properly present in their working life.

These concerns should be at the forefront of the mind of a matrimonial finance on divorce adviser when considering the earning capacity a party to a marriage has or is likely to have in the foreseeable future, including any increase in that capacity which it would be reasonable for that party to take steps to acquire (that being one of the s 25(2)(a) Matrimonial Causes Act 1973 factors that the court must consider when determining whether the financial provision made for each party is fair and reasonable).

Litigants have historically found that this criterion is addressed in quite brusque fashion, with their being ascribed an earning capacity that many cannot imagine they might have. So how might an adviser prepare the litigant for that event? What tools are available to give a party afraid for the future a realistic plan to help them – a map to financial independence?

In recent times advisers have turned to providers of earning capacity reports to assist. These first appeared in or around 2014, deriving from personal injury and employment litigation where mitigation of loss needed to be established. Keith Carter of Keith Carter & Associates published an article in *Family Law*[1] explaining how their reports had been used in a particular financial remedy case in the High Court. One example given was of evidencing the employability of a husband who had been made redundant at or around the age of 52. A single joint expert was appointed to consider the state of the employment market in the husband's field of work, his marketable skills, and the availability of suitable vacancies. Another was of a wife who wished to move abroad with the parties' child, asserting that she could not gain employment in the United Kingdom. The husband instructed the author's firm as a shadow expert, or consultant, to investigate what might be available to the wife in England and Wales, obtaining her CV from LinkedIn and then analysing the related jobs market, with the court accepting this evidence and the court finding that the wife could work in the United Kingdom.

These reports gained traction, but were expensive and became quite divisive, since they analysed the jobs market in cold, hard fashion, and appeared to fail to take account of a person's vulnerabilities and sensibilities, Their use came to an abrupt halt with the decision of Moor J in *Buehrlen v Buehrlen*[2] in which he considered whether their use amounted to a 'necessity' as required by Family Procedure Rules 2010 (SI 2010/2955) 25.4(3) and in accordance with the definition of 'necessary' in *Re TG*[3] and *Re HL*.[4] He determined that they were not necessary. The information in the report before him included that which was available publicly and opinion which Moor J considered was up to the judge to assess, namely what the likely job the wife was

able to achieve and her potential income, having heard all the evidence and having assessed available job adverts. He said, 'The judge hears the evidence, hears the cross-examination, comes to an assessment of the witness, including the individual characteristics and traits and abilities of the witnesses and decides what is the appropriate earning capacity to ascribe. I do not believe that it is helpful or useful, in the vast majority of cases, to expand financial remedy proceedings to have this sort of expert evidence. I am concerned that it will, in general, lead to more contested hearings, to longer contested hearings and to increased expense to the parties'.[5]

With that, the use of these reports in court cases came to an end, and they are unlikely to be revived, save for in very limited circumstances where the parties agree to obtain one and where one or both parties has never worked/has never entered the labour market, and now needs to develop an earning capacity in order to meet their needs independently of the other party or of any other resource they previously had (such as bounty provided by extended family or trusts). In those circumstances the 'necessary' criterion is likely to be met. Do they still have a use, though, outside court proceedings?

Depending on how they are used, the answer is 'yes'. The author is aware that they are used by couples collaboratively where a divorce is not hostile in order to help the 'jobseeker' to explore options for their future. The report compiler interviews the parties, researches the market, and makes proposals for progression back to work, taking into account their caring obligations, health needs and potential lack of confidence. These reports can also be useful in mediation settings. Where divorcing spouses are able to work co-operatively and communicate well, then these can be useful tools. It may be that such divorces are few and far between and matrimonial finance barristers and judges are the least likely to meet such relatively amicable separating couples, but the author is certain that they are out there.

The other use for such reports might be where one party has found themselves or has put themselves in a disadvantageous position. Examples might be where a city trader has been convicted of dishonesty offences or where a teacher has been convicted of a sex offence. Perhaps a driver has lost their driving licence through totting or other driving-related offence. In those circumstances, the assessment and report would be helpful to assist the affected party to understand how their actions might be taken into account, how the negative impact can be mitigated, and what other legitimate sources of income generation are available to them.

There is an obvious risk, however, that the commissioning and use of these reports could cause entrenchment of positions and hostility. Where one spouse obtains a report about the other spouse's earning capacity without their consent, there are likely to be arguments about use of personal data (as we see sometimes where one party obtains mortgage capacity evidence via the use of documents disclosed within the course of proceedings) and about whether a fair picture has been painted of the 'jobseeker' – whether a fair assessment has been carried out in circumstances where their ability to work is likely to be in dispute. The desire to obtain these earning capacity reports in order to have a weapon to oppress the 'jobseeker' is likely to be strong in many a hostile case. If one party can say to the other, 'Look, it's not just me who says you can work harder or differently. This report I've obtained from someone independent says as much and look, this is what you could do', they are highly likely to be met with resistance and the generation of further hostility, leading to polarisation of positions and, as Moor J noted, a decrease in the likelihood of a settlement.

There are also obvious concerns about the scope of the instructions given to the assessor. The potential maintenance payer will be looking for evidence to show that there is no need to pay maintenance and, in commissioning such reports, may well minimise issues of poor health, caring responsibilities, confidence and the decisions the parties made during the marriage as to whether and how the 'jobseeker' should work. There will be no utility in a report of this nature and the costs incurred in obtaining such a report and responding to it might well, in contested financial remedy litigation, fall back on the party commissioning the report. The author envisages costs orders being made against the commissioner when costs are increased as a result of the use of such reports without agreement. In the light of the decision in *Buehrlen* their proposed use in hostile cases might amount to litigation misconduct, and certainly there would be an argument to say that the costs for commissioning that report should be credited to the commissioner's side of the balance sheet as part of their share of the assets already had and expended, per the suggestions of DDJ Hodson in *P v P*[6] and HHJ Hess in *YC v ZC*.[7]

What does this mean for financial remedy practitioners? The issue of foreseeability of future employment and increases in earning capacity needs to be treated with sensitivity and care when the practitioner or the other party proposes to the 'jobseeker' what they might be able to do. A practitioner might propose the obtaining of such an assessment/report from a suitably qualified person (often recruitment professionals or careers advisers) to their 'jobseeker' client to help them to see what is available to them. Assurance should be given that the assessor will take into account perceived or actual obligations and perceived, anticipated or actual vulnerabilities of the jobseeker. Mediators might propose the obtaining of a report jointly, as might the one-party, one-lawyer form of dispute resolution in order that both parties could see from a neutral third party what might be available. The scope of the letter of instruction can be delineated by agreement. These reports might be useful and desirable to assist in the collaborative process. Arbitrators might commission them by agreement or where they would otherwise find them useful. These reports are useful in other areas of litigation and can be used as a positive tool, rather than just a stick with which to beat the prospective jobseeker into submission.

Notes

1 'Employment evidence in matrimonial cases' [2015] Fam Law 1112.
2 *Buehrlen v Buehrlen* [2017] EWHC 3643 (Fam).
3 *Re TG* [2013] EWCA Civ 5, [2013] 1 FLR 1250.
4 *Re HL* [2013] EWCA Civ 655.
5 *Buehrlen v Buehrlen* [2017] EWHC 3643 (Fam) at [23]–[24].
6 *P v P (Treatment of Costs in Sharing Cases*) [2022] EWFC 158.
7 *YC v ZC* [2022] EWFC 137.

DR Corner: Introducing Assent: Combining Arbitration and Private FDRs in a Streamlined Process based on the FPR Directions

Zoë Bloom

Partner, AFP Bloom LLP

Anyone who has tried to arrange a Private Financial Dispute Resolution (pFDR) will be familiar with that sinking feeling when the process is slipping away. It starts with a low-level dispute over the judge, the date or the location of the hearing. Then a seemingly innocuous question about disclosure. A pouting email follows, barbed with the threat of pulling the hearing if the question isn't addressed 'urgently'. Pleas of proportionality and focus are ignored and the queries multiply. The tone degenerates and costs rise. The client is persuaded to comply with this disclosure request in the hope that the hearing will not be derailed. Another email. Another question. The client becomes dissatisfied. Unhappy with the level of questioning and the threats being received. Alternatives are discussed including arbitration. The request is ignored or refused. With no options left, parties issue. The clock starts ticking from the beginning again – Groundhog Day and round and round we go.

Delay is often in one party's interest following separation. It was rife during COVID-19, when the court took a minute to catch up with everything that was happening (although not many minutes, such was the efficiency of the Family Court during that period). Strategic applications for adjournments based on spurious grounds were commonplace. With COVID-19 past, the agreement to engage in a pFDR provides a perfect opportunity to effect delay.

In the early days of the pFDR, the process was respected. Parties and their advisers genuinely wanted to engage and believed it was the route to achieve settlement. The hearings most often resulted in an agreement, with parties frequently accepting the indication.

Whilst the pFDR remains one of the most attractive options to attain settlement, the process has become frayed around the edges. Advantage can be taken of the lack of court engagement. Failure to settle at the hearing (or shortly thereafter) leaves the parties frustrated about the next process options, which at that stage often require agreement.

Assent is a structured process which mimics the FPR to provide agreed directions to the pFDR, with arbitration layered over the top. The appointment of an arbitrator ensures a decision maker can deal with anything that arises before and after the FDR.

One of the advantages of the process is that unlike many other forms of non-court dispute resolution (NCDR) the parties are represented and can explore any case they choose. It can be flexed to enable statements to be filed to deal with factual issues and for assets to be valued. The parties don't need to meet in the middle, mediate or even be nice to each other. They are protected by their representation so it works for all cases, regardless of the issues which may exist.

Assent is being promoted by 13 founding partners who have come together to develop Assent because they believe in it. The calibre of those partners speaks for itself. But anyone is free to use the process – it is not limited to the founding partners. If parties agree to sign up to Assent, they and their solicitors sign an engagement letter which reflects that agreement and off they go. There are checks and balances to ensure that the process is being adhered to, including the requirement for each party to sign off on the other's conduct during the process. Anyone who fails that final sign off is banned for 6 months.

The kicker to using the process is the fixed fees. Unsurprisingly, this has attracted the most discussion among practitioners and has been the key explanation for those who have been dismissive or sceptical (although there have been amusing reasons put forward, including that some people have never experienced any of the issues which are rife with private FDRs – lucky them, huh). There are three bands of fees, which are envisaged to cover scenarios of varying complexity. There will continue to be cases which are not suited to the process – we all know what those look like – and in those cases Assent will never be considered.

Why fixed fees? Because clients like them. It provides complete transparency and means that they are signing up to something which is organised and they can understand from day 1. It also resolves the issue around the payment of legal fees. One of the rules of Assent is that funding issues are overcome before you start. Whoever has control of the

liquid assets has to make money available for the fees of Assent. It is easier to make that work if the fees are fixed and equal.

Commercially, it makes sense too. The process is based on a very structured and curtailed time period to the pFDR. The firm is 'on risk' for a limited period. The fixing provides an incentive to comply with the directions which, in itself, is positive to any party who wants to engage with Assent. If a solicitor makes a mistake about the band of fees they put the client into, the period of exposure is short (and they won't do it again).

The differing levels of fees has attracted interesting commentary. One firm described them as 'cut price pFDRs'. Another said it was 'pFDRs for rich people'. Seemingly, the bands are just right.

Where does this go? Ideally, it will form part of the available processes for people who need help to reach a financial settlement following separation. It is self-selecting and every practitioner will know whether they have a case which will suit the process or not. Some may not wish to engage on principle, preferring the accumulation of fees on an hourly basis; that is a matter for them.

And what if Assent is proposed at the outset, with the fixed fees and curtailed direction timetable, but refused. Might a judge at a later stage question why Assent was refused, with ensuing penalties on costs. Given the changes implemented by the Family Procedure Rules (Amendment No 2) Rules 2023 (SI 2023/1324), this doesn't seem too far-fetched. Those changes mean that costs orders can be made against one or both parties where NCDR is not properly considered or engaged with. Where Assent has been offered and refused without good reason, the costs consequences are very stark and easy to determine. It is easy to see how an offering like this could become part of a routine way to protect clients from cost orders.

How to start

If a client and their legal representatives decide to use Assent, they should write to the solicitor representing the other party and invite them to engage in the process. Once both parties have mutually agreed to the process, the parties must comply with it.

The fees

Before commencing the Assent process, it must be agreed who will pay for the fees of each party. In the event that one party has insufficient liquidity to meet the fees, and the other party has enough, they must agree to meet the other party's costs.

Assent sets out a fixed fee schedule for solicitors. In addition, the parties shall be responsible for VAT, counsel, pFDR judge, experts and arbitrator.

There are three tiers of fees ranging from £17,500 to £40,000 plus VAT and disbursements.

The Basic Assent process fee shall be paid to the instructed firm of solicitors on account on the commencement date and any additional fees will be paid as they arise.

The firm shall raise invoices post exchange of Form E, post exchange of without prejudice offers and post pFDR, for one-third of the basic assent fee, with other bills on an ad hoc basis as they arise.

The process can be adapted to allow engagement part way through.

Basic timeline

(1) The pFDR shall be scheduled between 8 and 12 weeks of the commencement date ('the pFDR window').
(2) Within 5 days of the commencement date each party shall confirm to the other party who their counsel will be.
(3) Within 7 days of the commencement date each party proposes a list of three available pFDR judges and three proposed arbitrators, of which three must be male and three female. With the proposed judges must come details of their fees and three possible dates within the pFDR window. You may propose a pFDR judge who can also act as an arbitrator for issues which arise prior to the pFDR.
(4) From the list, the parties agree a pFDR judge and an arbitrator. If they cannot agree within 7 days of the commencement date, the matter is returned to Assent to choose.
(5) The other party shall choose the pFDR judge from the list within 7 days and the pFDR shall be fixed. The ARB1 is signed.
(6) The parties agree to an exchange of Forms E (complete with narrative sections) by 4:00 pm on the date 28 days after the commencement date extended by 24 hours to accommodate any bank holidays.
(7) The parties will exchange questionnaires by 4:00 pm on the date 14 days after the exchange of Forms E, limited to three pages. Each party will confirm whether they agree to answer all the questions raised in the questionnaire within 7 days of receipt. Any disputes arising from the questionnaires will be referred to the agreed arbitrator within 14 days of receipt of the Form E who shall reply (on paper) within 7 days. The costs of the arbitrator will be met equally by the parties.
(8) Also, within 14 days of the exchange of Forms E, the parties will propose any directions to the pFDR, including provision for how to manage valuations or the provision of statements on any disputes as to matters of fact of which the parties are apart (statements limited to five pages plus exhibits). Any disputes will be referred to the arbitrator on the terms set out at (4) above.
(9) The parties will exchange replies to questionnaire, mortgage capacity evidence and property particulars 14 days after the receipt of the questionnaire (or determination by the arbitrator).
(10) The parties will exchange without prejudice proposals for settlement 14 days prior to the private FDR.
(11) Any order resultant from a successful pFDR (either on the day or in the 7 days which follow) shall be prepared by the party who provided the names of the three pFDR judges within 7 days of the conclusion of the pFDR.
(12) The Assent process shall come to an end 14 days following the conclusion of the pFDR.
(13) If there is no order within 28 days of the pFDR, the parties will commence arbitration.

Tech Corner: Ethical AI for Family Lawyers

A conversation between Kay Firth-Butterfield and Rhys Taylor

Kay Firth-Butterfield

CEO, Good Tech Advisory

Could you tell me about your current role please?

Currently, I run my own consultancy, education and thought leadership company called Good Tech Advisory through which I give speeches and help companies and countries think about their design, development and deployment of AI and responsible AI. I always say that you can't have a successful AI use without a responsible AI underpinning.

Once upon a time you were a family barrister – how did you transition from being a family barrister into your current role?

Well, I think it worked out quite easily. I was doing a lot of work with children and sitting part-time and I decided that this was not the career I wanted for myself anymore. I didn't want to be a full-time judge and if I didn't want that, then maybe it was time for a change. I was fortunate enough to find a professorship here in Austin, Texas – which is not as odd as it sounds! We already had a home here, because my mother-in-law is Texan. After our move I continued to work on human rights and human trafficking where I was teaching those subjects and working with the government to set up laws around trafficking in particular and also working with trafficking victims as a professor.

In 2011 I was writing a book on human rights and human trafficking at the same time as I was reading a *Time* article about the technological singularity (aka Artificial General of Super Intelligence). I then bought Ray Kurzweil's book *The Singularity is Near* and after reading it became really fascinated, in a time before the *Westworld* series, about whether humans would abuse humanoid robots if such things existed. So, I became very interested in how humanity and machines that were sentient would work together. That set me off on what became the last 10 nearly 15 years thinking about responsible AI.

What should family lawyers today be thinking about in respect of AI?

I think all sorts of things. It's easy to think about AI in the courts – how it's going to be deployed in the courts is an important discussion that lawyers should be having. I think it's important that none of us get so involved in our careers that we don't have time to poke our heads up and say, 'Okay, what's happening? Is it good for society? Is it the way that we want to go?'. I think family lawyers are, in a way, uniquely positioned because their work brings them into societal conversations. I think they have a have a huge role to play in thinking through how AI is deployed in the courts.

There are ways in which AI is currently touching your clients in ways that we should be considering. Let's take children, for example. When children under seven are developing their attitudes, beliefs and values, they are now being exposed to the internet. In fact, some parents are buying their children toys that are AI enabled, but we don't have any idea about where their data is being stored; what they're learning; if the toys are using facial recognition, where that data is going and more. All of those are actually really big issues and I think family lawyers could and should have a view upon them. It could be that it is wrong for parents to bring those items into their homes without having some knowledge of whether their children's data is (a) going to, say, China or (b) being resold, because it doesn't say any of that on the packet. I think the way that children are using AI, particularly the one to sevens, is dangerous, we are beta testing on our children.

I think we're also going to see more cases where children are involved in deep fakes and deep fake pornography – we're already seeing that. We've then got the Online Safety Act that's going to come into force, and I suspect that's an area of interest to people who are doing child care work.

I've been talking to my own chambers about the fact there's administrative law issues – how are public services using AI, and is that of benefit to your clients?

It's also important to keep an eye on the many areas of law which will see an increase of litigation as AI becomes more involved in our lives, for example crime, copyright, tort, and contract to name a few.

You mentioned about the use of AI in judicial decision

making, i.e. 'the robo judge'. Do you have any observations about how AI might come to be used in in the Family Court in that way? I'm thinking in particular perhaps, in this instance, in the context of financial remedies.

I do quite a lot of education for judges on AI and you were at the meeting at the Inner Temple where we talked about this. I think what we have to consider is humanity. It's actually not just a decision about whether judges hear this case or that case, it's a much wider societal decision. It's a societal decision about whether we fly the plane in the future or whether AI does. If you think about our sci-fi fantasies in both *Star Trek* and *Star Wars*, they're still flying the plane, but they do have super intelligent computers to help them.

I see the judicial issue, and AI in the law, rather in that way. Do we want law to still have humanity, or do we want law to be an algorithmic process? At the moment I don't think the algorithm is up to the job, so we're not at that point, anyway. We know that algorithms get things wrong and they are just as biased as we are. It's really hard to make them accountable and explainable, whereas, when we're sitting as judges, we at least write a judgment and can be held accountable and we can explain how we came to our judgment, even if we have biases. So, I don't think that the tool is fit for purpose at the moment. The question is whether family law still has humanity in it, or whether it's just a number crunching exercise. If as a society we decide that it's just a number crunching exercise, then yes, of course, we can use computers. I personally hope that we don't.

Thinking about AI, as it's currently developed. What risks do you think it poses to introduce AI into the family law and how might these be mitigated?

AI has many risks, but let's just take one: if you're thinking of using generative AI, then what we know is that the data used by Large Language Models (LLMs) is appallingly skewed to reflect white men living in the global north, simply because white men living in the global north have been creating more data for many more years than anybody else in the world, including women. If you're thinking of family law moving forwards, then the current AI that we have is not helpful in creating societies that think differently, it needs the human to do that, and then to look for the data that might be helpful. Jane Austen in *Persuasion* has her female character say, and I paraphrase 'I'm not going to use books to back up my argument about women's feelings, because all books are written by men and so we can't know women's feelings from books', and that's true today in that the bulk of the data is not from women or persons of colour.

I think that barristers are in a better position in terms of jobs than perhaps solicitors. Morgan Stanley did research recently that said 44% of all the work solicitors do could be automated today but I don't think that's true for family barristers. If you think about what a barrister's life is – it's going to court and providing the humanity to the client as well as the legal advice to the client.

You mentioned mediation before we started this conversation. I think that mediators are about providing the human that the parties can relate to in order to enable them to relate to one another in some way and solve the case.

Do you have any recommendations for particular sources for people who want to understand where we are with AI at the moment?

Well, obviously, my ongoing column for *The Innovator*! There are also a number of newsletters that I subscribe to and you can get both the good and the bad about what's happening in AI. If you want to make sure you are always alert to the things that might go wrong, you need to be reading Gary Marcus or Timnit Gebru, or Joy Buolamwini. If you want to be thinking more about the understanding of new applications and how AI is being deployed, then that's Benedict Evans. For immediate news then *Politico* does a great newsletter and the *Financial Times* also has some really good writing around AI at the moment.

Can I ask you to look into your crystal ball and imagine how AI will have changed the practice of family law in England and Wales over the next ten years?

Well, as I say, I think it depends upon what we decide we want as a society, in that lawyers do need to be part of that conversation, and frankly leading it, as far as family law is concerned. I think it's unlikely that we will have robot judges in family law in ten years. I think that there will probably be more people coming directly to barristers rather than solicitors, because solicitors are going to see huge turmoil in their practices within the next ten years. It is said that making research easier and taking away the junior role among the solicitors will enable more sole practitioners as solicitors, so it's worth barristers just keeping an eye on that, because that could be a place where solicitors are doing the work that barristers would otherwise be doing.

And finally, if I may, should we fear or should we be embracing AI?

A bit of both, I think! I have always felt AI could do tremendous things for us as human beings. What I think we should be hugely sceptical about is allowing it to take over the jobs that need human interactions. So, for example, there's a tool just announced that Nvidia is working on, called Nurse AI. If I'm in hospital I probably want my nurse to be a human rather than the robot. The other day, my oncologist (I am totally better but have checkups and I wrote about my journey in *The Innovator*) was talking about the fact we could now have AI to talk a patient through their journey with cancer. My response to that was 'well I'd actually rather you, the human being, talk to me about my journey with cancer and let AI help you with your administrative stuff which will give you time to talk to me'. So, I think it's about us having those conversations; going back to who's flying the plane, we need to be having those conversations now. If we have those conversations now and we discover our humanity, and where it fits in the age of AI, then I think we have a great future.

Kay, thank you very much.

It was a pleasure.

Money Corner: Spring (Cleaning) Budget: Out with the LTAs and in with the LSAs

Peter Turnbull

Independent Financial Planner, Enbrook Wealth

When the Chancellor of the Exchequer received his copy of the Spring 2023 edition of the FRJ, I can only imagine how he chuckled when he reached page 19 and found an article titled 'Pensions on Divorce – Lifetime Allowance [LTA] Tax Issues'. That was a 4-page article – submitted by George Mathieson and me – exploring the ways the LTA interacted with pensions on divorce and highlighting key issues for family law advisers to be wary of. That article was submitted to the editorial board of this publication at the end of 2022, it was reviewed and approved in February 2023, and the Chancellor abolished the LTA in March 2023. By the time of publishing, our article was already out of date.

Whilst the Chancellor's announcements were welcomed by pension savers, George and I were a little miffed that he did not warn us of his plans. In an attempt to restore our professional integrity, in this article, I will:

- briefly discuss the LTA as it was;
- introduce the new allowances that have replaced the LTA; and
- highlight issues family lawyers may need to consider.

Warning: soon after the Chancellor announced he would abolish the LTA, both the Leader of the Opposition and the Shadow Chancellor stated they would reintroduce the LTA if their party is called to form the next government. It is not clear if those statements were 'knee-jerk' responses or fully formed policies, but nonetheless their words hang over us. Much like Schrödinger's cat, is the LTA there or is it not?

If you are reading this article in a world without the LTA, please read on. If you are reading this article in a world where the LTA has been reintroduced, please stop and go back to last year's article.

Background

Subject to further legislative change, by the time this article is published, the LTA will have been abolished. The legacy of the LTA, though, lingers within Sch 9 Finance Act 2024 and it is worth briefly outlining the previous regime before we discuss the changes and new allowances.

The LTA was introduced in April 2006 and was a cap on tax-efficient pension savings. Initially, the LTA was set at £1.5m but it was regularly 'adjusted', reaching a high of £1.8m, a low of £1m, and a final resting place of a nice, round £1,073,100.

When pension savings were first accessed (and at various other stages referred to as 'Benefit Crystallisation Events') the value of the pension benefits was tested against the individual's remaining LTA. If, on testing, the LTA value of the pension breached the remaining available LTA, the excess amount above the LTA was subject to a penal tax charge.

Different forms of protection were made available both (a) when the LTA was first introduced (enhanced and primary protection), and (b) every time the limit was reduced (fixed and individual protection). A full explanation of these protections is outside the scope of this article; however, it should suffice to say that if an individual made a successful application for protection (and did nothing subsequently to invalidate said protection) they were able to secure an LTA limit that was higher than the prevailing rate.[1]

For divorce cases involving high-value pensions, the LTA would often add some unhelpful complexities. The more common (at least, of those that found their way to my inbox) were cases where:

(1) The pension credit amount would cause the recipient to breach the LTA.
   (a) For instance, H has a defined contribution pension worth £2.5m and he has registered for enhanced protection. In his hands, the full £2.5m is out of scope of the LTA charge.
   (b) However, a pension sharing order (PSO) of 50% would transfer £1.25m to W (who we assume does not have any form of protection and is subject to the prevailing LTA limit of £1.073m), thus, c £177,000 is now exposed to the LTA.
   (c) Various 'solutions' would be considered: (i) W might have been able to elect for some form of protection in her own right, or (ii) it might have been possible to structure the credit as partly

qualifying and partly disqualifying, or (iii) the parties could have considered pension sharing up to W's LTA and offsetting any difference, or (iv) the parties could simply have 'grossed' up the pension credit to account for the fact that W had a tax charge to pay (which is inherently destructive of value).

(i) Unfortunately, not all pension sharing reports dealing with high-value pensions are created equal. Some experts chose not to engage in LTA tax matters and either told the instructing solicitors as such (good practice) or left it to the instructing solicitors to deduce from the c 40-page report (bad practice).

(2) The pension debit amount would cause a recalculation of the original member's individual or primary protection amount, potentially reducing (or losing altogether) their protected limit.

(a) Less common, but if somebody had, say, Individual Protection 2014 with a protected limit of £1.4m, if the adjusted* value of the pension debit caused the current value of their pension funds to fall below £1.4m, that person's LTA limit would be reduced.

* Adjusted value = pension debit minus 5% (simple) reduction for every complete tax year since 5 April 2014.

(3) The pension credit was deemed to be partly or wholly disqualifying.

(a) This happened when the source of the pension credit was either partly or fully crystallised.

(b) Any pension credit deemed to be paid from crystallised sources is ineligible for tax-free cash, but the recipient could (and should) have applied for an LTA enhancement factor (LAEF) to increase their personal LTA.

(4) In some very rare occasions, some forms of protection might also be lost if the recipient of the pension credit did not have an existing pension arrangement open that was capable of receiving an external credit.

The average pension 'pot' in the United Kingdom is worth a little over £110,000 (per ONS data from March 2020), therefore, for the average retiree the LTA was not something they needed to worry about and its abolition was not a cause to celebrate. For family law advisers dealing with significant pensions, though, the abolition ought to have been a moment for collective rejoice. Street parties and so on. Sadly, that was not the case because in his quest for simplification, the Chancellor replaced the LTA with two new allowances, he replaced 'benefit crystallisation events' with '*relevant* benefit crystallisation events', and (as already mentioned) both the Shadow Chancellor and the Leader of the Opposition almost immediately pledged to reverse all changes and reinstate the LTA. What fun!

The new ~~acronyms~~ allowances

Taking the place of the LTA, we now have the Lump Sum Allowance (LSA) and the Lump Sum and Death Benefit Allowance (LSDBA).

The LSA is a limit on the amount of any pension funds that can be taken tax-free. The limit has been set at £268,275, which is the same limit that applied to most people under the LTA regime, i.e. tax-free cash was capped at 25% of the LTA (£1,073,100) which equals £268,275.

The LSDBA is a limit on the amount of any pension funds that can be left on death in the form of a lump sum. The LSDBA has been set at £1,073,100 and is reduced by certain lump sum payments taken during the individual's lifetime or payable on death. Any lump sum death benefits paid above the LSDBA will be subject to income tax at the recipient's marginal rate.

Individuals with a higher (protected) LTA should have higher LSAs and LSDBAs. For these people, their LSA should be 25% of the protected LTA and their LSDBA will be equal to the protected LTA.

Time will tell, but I anticipate the LSDBA will affect relatively few people. This is because most modern, defined contribution pension contracts offer the facility for nominated beneficiaries to receive the residual funds in the form of a pension, which is not tested against the LSDBA and is often preferable to receiving the funds as a one-off lump sum. Though, of course, personal advice should be sought on this matter.

Some nuances

Transitional tax-free cash certificates

Individuals who have taken a lower amount of tax-free cash than their remaining LTA would suggest are able to apply for a transitional tax-free cash certificate that should increase their LSA.

This might apply, for example, if someone has a defined benefit pension in payment and they did not take a lump sum from that pension. Previously, putting the defined benefit pension into payment would have been deemed a benefit crystallisation event and used part of the individual's LTA, meaning the tax-free cash available from other pensions would be capped at 25% of the remaining LTA. Now, with tax-free cash not linked to the remaining LTA, the individual would still have their full allowance available.

The following table shows the impact of this change for an individual who (a) does not have any form of LTA protection and (b) used 50% of their LTA when taking a defined benefit (DB) pension last year.

Regime	Pre-April 2024	Post-April 2024
Reference LTA	£1,073,100	£1,073,100
LTA used by DB pension	50%	N/A
Maximum potential lump sum	£134,138	£268,275

For those who will benefit from a transitional tax-free cash certificate, they must apply for (and furnish their pension provider with) the certificate before initiating a relevant benefit crystallisation event after April 2024. It is worth noting that once a certificate has been provided, it cannot be revoked, even if the tax-free entitlement it confers is lower than the 'normal' calculation. Again, this is an area that merits personal advice.

Practical tip: for equality of income calculations, some

> Pensions on Divorce Experts (PODEs) will equalise incomes only, and some will equalise both incomes and tax-free cash. It may be worth asking the PODE to clarify their approach and comment (if possible) on any disparity between the parties' available tax-free cash entitlements.
>
> Just as some PODEs chose not to incorporate the LTA within their calculations, I suspect some will choose not to delve into tax-free cash entitlements (which, in fairness, borders on financial advice), so it may be worth asking your friendly, neighbourhood independent financial adviser to cast their eye over any pension sharing reports you receive to confirm whether there is a potential tax-free cash imbalance and what this may mean in practice.

Serious ill-health lump sums (SIHLS)

These are also an area to be mindful of. Previously, SIHLS paid before age 75 were tax-free. Now, only the amount of the SIHLS within the LSDBA is payable tax-free, with any excess being subject to income tax.

In practice, this should affect only very few people, i.e. those under the age of 75, expected to live for less than one year (confirmed by a registered medical professional), and with pensions in excess of their remaining LSDBA.

I expect/hope most family law advisers will never have to contend with SIHLS in the context of pension sharing, but for those few that do, there will be a multitude of financial, tax and practical issues to consider.

Instinctively, you might say 'let's organise the PSO to transfer any excess benefits (above the remaining LSDBA) to the ex-spouse, thereby avoiding an excess charge on the SIHLS paid', but here you may fall into the trap of moving target syndrome and there is a very real risk that the PSO may not be implemented in time. Also, any 'unspent' pension funds taken as an SIHLS might be potentially subject to inheritance tax.

Alternatively, the member in ill-health could calculate what they expect to need throughout the remainder of their shortened life expectancy, with a 100% PSO applied over the balance. This may be very tax-efficient but would leave the member in ill-health in a bad state if – counter intuitively – they make a recovery. What would they then live on?

In theory, this risk could be hedged if said member takes their pension as a SIHLS and applies for a purchased life annuity (subject to an annuity provider accepting the application), but for this to work (a) your ducks would need to be in perfect formation and (b) your waivers would need to be impenetrable.

Lifetime allowance enhancement factors (LAEFs)

These were available to individuals who received a disqualifying pension credit. Existing LAEFs continue to apply and will increase the holder's SIHLS and LSDBA.

Subject to normal deadlines, anyone who became eligible to apply for an LAEF *before* 6 April 2024 has until 6 April 2025 to apply for the enhancement. After that date, the right to apply (as far as we are currently aware) will be taken away.

All change

If the headlines are to be believed, the Labour party may try to revoke the abolition of the LTA, doing away with the recent changes and reinstating the former regime. This would be immensely complex and most industry experts would advise against it. But it may happen.

If the LTA is reintroduced, there would be potentially significant implications for cases settled on the assumption that the LTA is gone for good. I am not a legal adviser, but it would seem difficult to argue this as a *Barder* event given the public statements made by senior politicians.

Potentially, the most affected pension sharing cases would be those where (a) an individual receives disqualifying pension credit funds and is not able to apply for an LAEF (who knows if there would be transitional protections introduced), and (b) cases where one party is above pensionable age and the other is below.

Expanding on (b), if a PSO is made where both parties will have pensions above the LTA and it is announced that the LTA will be reinstated, the individual above pensionable age will likely have a window of opportunity to access their pensions under the new regime and avoid an LTA charge, but the member below pensionable age may not have that luxury, and instead have no option but to suffer an LTA charge.

Unfortunately, here, legal advisers are between a rock and a hard place; the risk of the LTA coming back is something that ought to be flagged to potentially affected clients, but practically speaking there may not be much you can do to mitigate that risk.

Summary

- The abolition of the LTA and introduction of the LSA and LSDBA should not affect low-/middle-money cases.
- For divorces involving high-value pensions, the next few years will be complicated as we aim to advise our clients based on the current rules, while second-guessing and protecting ourselves and clients from the potential reversal.
- The pension community continues to ask questions of HMRC. There were several amendments to the draft legislation following the work of technical teams around the country and we expect some amending Regulations to follow. Indeed, one HMRC newsletter issued in April suggested that certain individuals refrain from taking action until further changes are made.

This article only scratches the surface of the potential complexity of the new LSA and LSDBA for divorce cases. In many ways, the new allowances are relatively straightforward, but for divorce cases with a mix of crystallised and uncrystallised funds, and/or cases involving high-value pensions, I suggest treading very carefully. If in any doubt, please seek guidance from a suitably experienced financial adviser versed in both the technical aspects of pensions advice and financial remedy proceedings.

Notes

1 By way of example, Fixed Protection 2012 was introduced when the LTA limit was lowered from £1.8m to £1.5m. A successful application for Fixed Protection 2012 enabled the pension saver to retain the £1.8m limit, thus benefit from an allowance that was £300,000 higher than the new, prevailing limit.

Financial Remedies Case Round-Up

Mid-January 2024 to end April 2024

Polly Morgan

Case Editor, Associate Professor and Director of UEA Law Clinic, University of East Anglia

Schedule 1 cases

Like buses, cases on particular areas of law come along one after the other after what feels like a large gap of time. In this quarter, there are a number of interesting decisions relating to Sch 1 Children Act 1989.

Re A v B (Schedule 1: Arbitral Award: Appeal) [2024] EWHC 778 (Fam) is an appeal from HHJ Evans-Gordon's decision (reported as *LT v ZU* [2023] EWFC 179) to decline to convert an arbitral award into an order under Sch 1 CA 1989 and her subsequent replacement of the award with a different sum. The arbitrator's decision required the father to purchase a property for the mother and children to live in during the children's minority, and this required the father to enter a joint mortgage with the mother. HHJ Evans-Gordon had held that none of the authorities suggested that the court had the power to compel a parent to borrow money for the purposes of settling or transferring property in circumstances where the parent was not already entitled to property in the required sum: 'An unidentified mortgagee cannot, in my view, be compared to *Thomas* resource such as an existing trust fund or generous family member.'

By the time judgment was handed down on an appeal from HHJ Evans-Gordon's decision, HHJ Hess had, in a different case, *SP v QR* [2024] EWFC 57 (B), also decided that courts did not have the power to require mortgage borrowing, albeit that in that case borrowing already existed on the property. However, the Court of Appeal in *Re A v B* took a different view. While there was no express power in Sch 1 to order sale or direct that a new property be purchased on trust, this was the way in which housing provision under the Act had been routinely carried out. The statute requires that settlement must be made 'to the satisfaction of the court'. A broad interpretation must be given to the terms 'property' and 'settlement' in order to achieve the essential purpose of Sch 1. Borrowing capacity is a resource and in cases involving parties of more limited financial means, may well be necessary.

In *A Mother v A Father (Re Schedule 1 of the Children Act 1989)* [2024] EWFC 63, HHJ Vincent rejected the mother's claim that the father refund her incurred rent on the grounds that the court lacked jurisdiction. It was not properly a claim for what Her Honour termed 'singular items of a capital nature', but rather periodical payments in disguise, in circumstances where the Child Maintenance Service (CMS) did have jurisdiction (as the father earned below the maximum) and the parties had not entered into a maintenance agreement. While in *Stacey v McNicholas* [2022] EWHC 278 (Fam) the court permitted repayment of incurred rental costs, it was in circumstances in which they were only incurred because of the respondent's failure to comply with an existing order for a capital sum for housing. In the present case, HHJ Vincent ordered a capital housing fund which combined with the mother's existing capital assets would enable the mother to buy a house for herself and the parties' child. The fund would revert to the father when the child reached the age of majority.

Also in this period Recorder Allen KC handed down his decision in *TK v LK* [2024] EWFC 71. This Sch 1 application was brought by the father against the mother, who was serving a long-term prison sentence for offences against the child – offences that had left the child deeply traumatised and dependent on the father to the extent that he was hindered in his ability to work and thus obtain a mortgage. The mother had inherited a sum of money, and the father sought – and was awarded – all of it.

Although the decision of a Recorder, the case is notable because of its helpful survey of the Sch 1 jurisdiction, and its holding that conduct – in the s 25 Matrimonial Causes Act 1973 sense and level – is relevant to Sch 1 claims where it has created long-term dependency and need (citing *UD v DN (Schedule 1, Children Act 1989; Capital Provision)* [2021] EWCA Civ 1947 and finding that there were special circumstances). Recorder Allen KC provided a housing fund outright given that the child's dependency would not cease with adulthood and the mother's actions posed a continuing threat to the child. He also provided a lump sum for therapy for the child in circumstances in which the CMS did have jurisdiction as the mother's income in jail was not above the maximum, but could not award periodical payments for that reason. While the facts of this case were exceptional, this case merits close attention. For that reason, it is our Mostyn Award winner for this issue, being the judgment that we recommend as a 'must read'.

Transfers of tenancy

Tousi v Gaydukova [2024] EWCA Civ 203 is an appeal from Mostyn J's decision at [2023] EWHC 404 (Fam), which was in turn an appeal from a decision of Recorder Allen KC. It concerned an application for a transfer of tenancy by a party to an invalid marriage. The issues were whether the marriage was void or non-qualifying (a 'non-marriage') and whether the parties to such a marriage could apply for a transfer of tenancy. The wife's application to transfer the tenancy was made under s 53 Family Law Act 1996, which relates to those who are married or who had been through a form of marriage capable of being subject to a nullity order. No nullity order is possible where the marriage is non-qualifying as opposed to void or voidable.

Mostyn J had held that the ramifications of invalidity fell to be determined by the laws of the country in which the marriage had been celebrated, if that country distinguished between different categories of invalid marriage (here, Ukraine). On that basis, he held that the ceremony had not given rise to a qualifying marriage. On the issue of the transfer of tenancy he noted that the court had jurisdiction to make a transfer of tenancy between the parties as cohabitants and that whereas an application between parties to a marriage had to wait for a conditional order, cohabitants could apply right away.

The husband appealed. The parties were in a non-marriage, said the Court of Appeal, but it is only the formal validity of a marriage that is determined by the law of the place in which the marriage was celebrated, not the consequences of that. However, Mostyn was right that the parties were cohabitants within the definition of s 62(1) Family Law Act 1996, in that they were 'two persons who are neither married to each other nor civil partners of each other', who were 'living together as if they were a married couple or civil partners'.

Qualified Legal Representatives, or lack thereof

The problems relating to finding a Qualified Legal Representative (QLR), and the professional difficulties the role may cause, have been mentioned in a number of cases. In *AXA v BYB (QLR Financial Remedies)* [2023] EWFC 251 (B) Recorder Taylor found a QLR, based in Manchester, for an in-person financial remedies final hearing at the Central Family Court but sets out clearly the difficulties with the framework. In *T v T* [2023] EWFC 243 no QLR could be found. In the children case *Re A and B (fact-finding hearing – sexual abuse: no QLR available)* [2023] EWFC 232 the court had to consider whether or not a McKenzie Friend could conduct cross-examination in absence of a QLR (answer: 'yes', in the particular circumstances). (For a discussion of these, please see 'Qualified Legal Representatives in Financial Remedy Proceedings' by Adrian Barnett-Thoung-Holland and Alice Thornton on the FRJ blog.[1])

In *Re Z (Prohibition on Cross-examination: No QLR)* [2024] EWFC 22 McFarlane P provided guidance on how the courts should deal with cross-examination in circumstances where no QLR was available (or, one supposes, where the originating application predates 21 July 2022 (see PD 3AB at para 1.5). The court office in this case (Newcastle) had 'undertaken no fewer than 120 different communications by email or telephone in an attempt to find a QLR, yet none could be found who was willing or available to take on the case.'

The President held that while courts had to take account of PD 3AB, para 5.3, which says that cross-examination should not be conducted by the judge, this was 'not black letter law' and was an option albeit that 'When undertaking questioning, the court had to tread a narrow path between ensuring the witness's evidence was adequately tested by the points that the other party wished to raise, while ensuring that the judge did not enter the arena and was not seen in any way to be promoting the case of one side or the other.' This meant that the term 'cross-examination' should be avoided: instead, the court is 'asking questions that the other party wishes to have asked', to reflect the fact that the court is merely acting as a channel of communication and not as an advocate seeking a particular answer or outcome. Key to managing cases involving judicial questioning was fairness and courts must explain to the parties what approach would be adopted step by step.

Non-court dispute resolution

Last November, the Court of Appeal decided, in *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 that courts had the power to compel the parties in civil proceedings to engage in non-court dispute resolution. This power does not exist within the Family Procedure Rules, but readers will be aware of the new FPR 3.4(1A) and PD 3A, which, as from 29 April 2024, allow the Family Court to encourage parties to pursue ADR, provided there is sufficient time in the proceedings. Accompanying amendments to PD 3A empower the court to adjourn proceedings, without the parties' agreement, to promote ADR (FPR 4.1). In financial remedy cases, failure to engage in ADR without good reason may result in departing from the general principle of no orders as to costs (amended FPR 28.3(7)). *Re X (Financial Remedy: Non-Court Dispute Resolution)* [2024] EWHC 538 (Fam) was heard in March – after *Churchill but* before the amendments to the FPR. Knowles J, anticipating the rules change, noted that 'Going forward, parties to financial remedy and private law children proceedings can expect – at each stage of the proceedings – the court to keep under active review whether non-court dispute resolution is suitable in order to resolve the proceedings. Where this can be done safely, the court is very likely to think this process appropriate especially where the parties and their legal representatives have not engaged meaningfully in any form of non-court dispute resolution before issuing proceedings.'

This article draws on the case summaries prepared by our summariser team.

Notes

1 https://financialremediesjournal.com/content/qualified-legal-representatives-in-financial-remedy-proceedings.398462265875475b80fc85234d2ae3a8.htm

The Summary of the Summaries

Liam Kelly

Deans Court Chambers

BR v BR [2024] EWFC 11 (Peel J)

When should a single joint expert (SJE) be instructed rather than two or more separately instructed experts in financial remedy proceedings? The default position is that, wherever possible, an SJE should be directed rather than giving permission for two or more experts to be solely instructed. A high degree of justification is required to persuade the court to depart from this default position. *Keywords: valuations; business assets; experts; first appointments; costs*

PF v QF [2024] EWFC 10 (B) (HHJ Reardon)

Application to strike out W's FR claim resulting from her bigamy (*ex turpi causa*). Application refused. There were good public policy reasons for ensuring a fair division of the matrimonial assets, and the MCA 1973 confers power to the court to make financial orders after a nullity petition in cases such as this where a social and economic partnership existed, and not to do so would create a risk of injustice. *Keywords: void marriage; striking out applications; conduct; ex turpi causa*

Savage v Savage [2024] EWCA Civ 49 (Moylan, Phillips and Snowden LJJ)

An appeal by a minority beneficiary concerning the interpretation of s 15(3) Trusts of Land and Appointment of Trustees Act 1996. The structure and purpose of s 15 is to set out the factors to which the court is obliged to have regard and it is not intended to limit other factors that the court is permitted to consider. *Keywords: TOLATA; TOLATA claims*

TK v AC [2023] EWHC 2958 (Fam) (Sir Jonathan Cohen)

LSPO and periodical payments from debt. H's appeal against orders allowed. It is not inherently wrong for maintenance orders to be paid by debt, particularly if the debt is unlikely to be called in, will likely be covered by a third party, or is expected to be repaid through future financial gains such as property sale, inheritance, gift or business success. *Keywords: appeals; legal services payment orders; variation applications; spousal maintenance (quantum)*

Wife v Husband [2023] EWFC 273 (B) (DJ Masters)

Small money case. Final hearing following H's dissipation of inheritance received during the marriage and mingled with marital property. Whilst H's pension was 'unarguably a pre-marital asset', it would need to be invaded to meet need. *Keywords: needs; conduct*

WC v HC [2022] EWFC 40 (Peel J)

Costs awarded in needs case reducing substantive award. It is not unfair for a party guilty of misconduct to have costs awarded against them and to receive a lesser sum than their needs would otherwise demand. *Keywords: conducts; needs*

L v O [2024] EWFC 6 (Cobb J)

Interlocutory applications prior to substantive *Barder* hearing. Applications for stay and *Hadkinson* order dismissed. Application for security of costs granted owing to residence outside the jurisdiction. *Keywords: agreements; security for costs; setting aside orders (including Barder applications); enforcement; Hadkinson orders; variation applications; international enforcement; foreign assets; costs*

Xanthopolous v Rakshina [2024] EWCA Civ 100 (Bean, King and Moylan LJJ)

Costs judgment following H's successful appeal, during which the court considered applications for costs made by both parties and an LSPO previously made. The fact that one party has been unsuccessful will often properly count as the decisive factor in the exercise of the judge's discretion, notwithstanding that CPR 44.2(2)(a) does not apply. *Keywords: legal services; costs*

Collardeau v Fuchs & Harrison [2024] EWHC 256 (Fam) (Knowles J)

Refusal of W's application for permission to bring contempt proceedings against H and another. Amongst other things,

W was not a proper person to bring committal proceedings, and her intemperate language in correspondence and affidavits undermined submissions she would be capable of acting dispassionately as a quasi-prosecutor. W's key motivation was to obtain a benefit in any future litigation, by demonstrating a statement of truth by H or Harrison could not be relied upon. *Keywords: committal applications and judgment summonses*

KS v VS [2024] EWHC 278 (Fam) (Arbuthnot J)

Costs judgment following a ruling in favour of H on his application for a stay of divorce and financial remedy proceedings in this jurisdiction in favour of proceedings in Monaco. Arbuthnot J considers whether the 'Guide to the Summary Assessment of Costs' should be considered when discussing costs in family cases. *Keywords: costs*

Re Z (Prohibition on Cross-examination: No QLR) [2024] EWFC 22 (Sir Andrew McFarlane, President of the Family Division)

Judgment considering the approach that a judge or magistrate sitting in the Family Court should adopt when the court has directed that a Qualified Legal Representative (QLR) should be appointed for a party in circumstances where no QLR was available. *Keywords: qualified legal representative; case management; domestic abuse*

Xanthopoulos v Rakshina [2024] EWCA Civ 84 (King, Bean and Moylan LJJ)

Epic saga of litigation concludes with the Court of Appeal substituting a final order made in Part III proceedings. *Keywords: housing need; Part III; needs; appeals; costs; conduct*

TYB v CAR (Non-Disclosure) [2023] EWFC 261 (B) (DDJ Hodson)

What does the court do with the non-discloser? Final hearing involving a short marriage with a child almost 4. There are useful observations about Form Es and the assets to be disclosed on the form, what constitutes a bank account, and disclosure obligations. *Keywords: Form E; costs; non-compliance; needs; non-disclosure; adverse inferences; disclosure*

AS v RS (Costs: Clean Sheet/General Rule) [2023] EWFC 284 (B) (District Judge Troy)

Costs in respect of an application for leave pursuant to s 13 Matrimonial and Family Proceedings Act 1984 are subject to 'clean sheet' rules. *Keywords: overseas divorce and the 1984 Act; costs*

SY v Personal Representatives of the Estate of DY (Deceased) [2023] EWFC 280 (B) (Recorder Hames KC)

Appeal against PSO out of time following death of W allowed and substituted by lump sum order to reflect lost benefit to the Estate for the benefit of the children. *Keywords: appeals; pensions on divorce; setting aside orders (including Barder applications)*

VS v KS [2023] EWHC 3475 (Fam) (Arbuthnot J)

H's application for a stay of the financial remedy proceedings in favour of proceedings in Monaco. Monaco was the natural forum for the proceedings because there was never a family home in England and the only asset H had in England was loss-making. *Keywords: jurisdiction*

LMZ v AMZ [2024] EWFC 28 (Moor J)

A striking age difference, 48 years between the parties, gives rise to a strong needs-based claim. *Keywords: life expectancy; housing need; needs; companies; foreign assets; valuations; matrimonial and non-matrimonial property*

Nazir & Nazir v Begum [2024] EWHC 378 (KB) (Freedman J)

A person is not to be regarded as being in adverse possession of an estate when the estate is subject to a trust: see Sch 6, para 12 Land Registration Act 2002. Does this include a situation in which land is held by the personal representatives of a deceased person by virtue of s 33 Administration of Estates Act 1925? *Keywords: Land Registration Act 2002; administration of estates; adverse possession; intestacy*

C v D (No 2) (2007 Hague Convention) [2024] EWFC 36 (MacDonald J)

Underlines the limited circumstances in which the registration of a maintenance order pursuant to the Hague Convention 2007 may be appealed successfully. *Keywords: jurisdiction; child maintenance; child support; international enforcement*

Re Z (No 5) (Enforcement) [2024] EWFC 44 (Cobb J)

Enforcement of Schedule 1 order: freezing order, capitalisation of periodical payments for the benefit of the child, and *Hadkinson* order made against F who resides in the USA. *Keywords: enforcement; freezing injunctions; foreign assets; Duxbury capitalisation; Children Act 1989, Schedule 1 applications; international enforcement; Hadkinson orders; costs*

Tousi v Gaydukova [2024] EWCA Civ 203 (McFarlane P, Moylan and Holroyde LJJ)

Are the parties to a void marriage able to apply for a transfer of tenancy as cohabitants, and does the *lex loci celebrationis* determine the ramifications of invalidity? *Keywords: void marriage; jurisdiction; transfer of tenancy; locus lex celebrationis; non-qualifying ceremony; validity of marriage*

Re X (Financial Remedy: Non-Court Dispute Resolution) [2024] EWHC 538 (Fam) (Knowles J)

Impact of *Churchill* on family proceedings. Incoming changes to FPR from 29 April 2024 will enable court to adjourn proceedings for ADR with potential costs consequences for non-engagement. *Keywords: mediation; family procedure rules; alternative dispute resolution; NCDR*

AW v RH (Preliminary Issue: Third Party Rights) [2024] EWFC 54 (HHJ Willans)

Dispute with third parties regarding the ownership of two properties and whether they should be treated as matrimonial property. *Keywords: third party rights; TOLATA claims; matrimonial and non-matrimonial property; trusts of land*

AS v RS [2023] EWFC 283 (B) (District Judge Troy)

Application by W for leave to bring a claim pursuant to Part III Matrimonial and Family Proceedings Act 1984. Application dismissed. W should not be allowed a second bite at the cherry by way of an appeal through the back door in circumstances where the Malaysian order can neither be said to be unfair nor failing to make adequate provision. *Keywords: overseas divorce and the 1984 Act; Part III; foreign assets*

SP v QR [2024] EWFC 57 (B) (HHJ Hess)

Schedule 1 application with a 'more modest' asset base regarding residence in a property subject to a mortgage and 'top-up' maintenance for a disabled child. *Keywords: 'top-up' maintenance; costs; needs; child's needs; Children Act 1989, Schedule 1 applications; needs of a disabled child; housing need; child maintenance; child support*

Julie Annette Merryman v Alex Raymond Merryman & Ors [2024] EWFC 58 (B) (HHJ Baddeley)

Four stepchildren intervene successfully in financial remedies case in respect of four farming properties. *Keywords: proprietary estoppel*

Williams v Williams [2023] EWHC 2479 (Fam) (Moor J)

H held in contempt for failing to comply with orders; sentenced to 56 days' imprisonment, suspended for 28 days, to allow filing of sworn Form E. *Keywords: costs; legal services payment orders; committal applications and judgment summonses; freezing injunctions*

ES v SS (No 2) [2024] EWFC 59 (Sir Jonathan Cohen)

Determination as to the distribution of trust assets following a final hearing. The court did not consider implementation of the same required use of the *Barrell* jurisdiction, instead, the court's decision was simply to give effect to the spirit of the order and its proper implementation. *Keywords: costs; trusts; tax*

Alvina Collardeau v Michael Fuchs & Anor [2024] EWHC 642 (Fam) (Knowles J)

Costs in relation to: (1) dismissal of W's contempt application against H and the owner of a company that provided management services to H and W; and (2) withdrawal by H of his application to debar W's solicitor from acting for her. *Keywords: costs; conduct; committal applications and judgment summonses*

TK v LK [2024] EWFC 71 (Nicholas Allen KC, sitting as a Deputy High Court Judge)

Enormously helpful review of Schedule 1 authorities re: (1) the jurisdiction to make a Schedule 1 award after a clean break in divorce proceedings; (2) the relevance of parental conduct in Schedule 1 proceedings; (3) dependence and the reversion of capital; and (4) costs. *Keywords: conduct; costs; Children Act 1989, Schedule 1 applications; child maintenance case management*

D v D [2024] EWFC 76 (HHJ Booth, sitting as a Judge of the High Court)

25:75 division in favour of H following breakdown of second marriage and H's substantial assets. Court considered W's needs should be generously interpreted to overcome lack of SJE evidence as to W's ill health. Needs would include W's outstanding costs as summarily assessed by the court. *Keywords: interest; housing need; Duxbury capitalisation; matrimonial and non-matrimonial property; costs; spousal maintenance (quantum); experts*

KFK v DQD [2024] EWFC 78 (B) (Recorder Rhys Taylor)

Modest asset needs case. Issues in the case: add-back, adverse inference, beneficial interests, dishonesty, family loans and resources, nature of business assets (income vs capital resource), non-disclosure, presumption of advancement, treatment of debts, and witness credibility. *Keywords: chattels; costs; disclosure; Family Procedure Rules*

The Incorporated Trustees of Great Calling Ministries Worldwide v (1) A Irabor (2) F Irabor [2024] EWHC 803 (Fam) (Sir Jonathan Cohen)

Appeal by an intervener against a final order which included discharging an interim charging order on the FMH made in the intervenor's favour and a payment of a lump sum which would prevent the recovery of the monies the intervenor alleged were owed to them. *Keywords: joinder of third parties; needs; debts; loans*

Hersman v De Verchere [2023] EWHC 3481 (Fam) (Moor J)

Successful application by H for W's committal to prison for non-compliance with orders from 2019 and 2023. *Keywords: committal applications and judgment summonses; enforcement*

Hersman v De Verchere [2024] EWHC 905 (Fam) (Moor J)

Enforcement proceedings following W's failure to transfer a ski chalet to H. W previously committed to 3 months' imprisonment but has not returned to the United Kingdom. H awarded £2.3m on account of lost rental profit and W's cross application for enforcement of a lump sum dismissed, the court declaring it satisfied as deducted from the total owed to H. *Keywords: executory orders; release from undertakings; enforcement; international enforcement; costs; foreign assets; conduct*

Interview with Baroness Hale

Samantha Hillas KC

St John's Buildings

Whether you know her as 'the Beyoncé of the legal world'[1] or 'call me Brenda' (as she modestly introduces herself), Baroness Hale of Richmond is an exceptional woman and an exceptional lawyer. The first woman from her school to go to Cambridge – at a time when only 2.5% of women went to university at all – and the first to study law. Those facts would be exceptional enough but the stellar career which followed speaks for itself: barrister, law lecturer, professor, author, Law Commissioner, Queen's Counsel, High Court Judge, Court of Appeal Justice, Lord of Appeal Ordinary, President of the Supreme Court – it is a breathtaking *curriculum vitae*.

She may be remembered most by the public at large for the famous prorogation case[2] (which she admits was her most satisfying case as a judge) but her contribution to family law spans almost sixty years. She was first introduced to it in her final year at Cambridge, confessing that it was by no means her favourite subject. Back then: 'the law was not kind to the home making wife if the marriage broke up – there were no financial remedies like the ones we have today. She could only claim a share in the home if she had a property right to it. She could only claim full periodical payments if she was not to blame for the breakdown – if she was judged one third to blame her maintenance might be reduced by one third. In the magistrates' courts she had no claim at all if she was guilty of adultery, no matter how guilty her husband had been, and even long after they had separated.'

After graduating from Cambridge top of her class in 1966, she moved to Manchester and, undertaking the Bar Finals at the College of Law via correspondence course, she coupled academia with practice on the Northern Circuit. Whilst she dealt with some financial cases in practice – often maintenance applications in the magistrates court 'because that's what one did when starting out in the common law bar in Manchester in those days' – the practice of family law was at that time wholly different: '… it hadn't developed as a separate area of practice then, and the law had not developed … the new law only came into force in 1971. I left the Bar in 1972, so I didn't have the opportunity of watching how things developed after that, except as an academic.'

But what a time to be a family law academic: the Divorce Reform Act 1969, the Matrimonial Proceedings and Property Act 1970 and the Law Reform (Miscellaneous Provisions) Act 1970 all came into force on 1 January 1971 and between them they revolutionised family law. She says it was interesting trying to make sense of what the courts made of those Acts in the first few years: 'We were reading all the cases to see what happened and whether it was going to be business as usual or whether there was going to be a bit of a sea change. And there was a bit of a sea change before it went back to business as usual – family lawyers reverted to type after the sharing days of *Wachtel v Wachtel*[3] and the rule was "reasonable requirements" and "the discipline of the budget". Then came *White*[4] and later, *Miller* and *McFarlane*[5] – that again meant a sea change back to what I thought it always ought to have been when we were looking at it in the 1970s.'

Whilst she acknowledges that 'things have changed quite considerably over the intervening many decades since I was actually in practice as a family lawyer', it is fascinating, as a 'modern' financial remedies practitioner to consider the broader view that can only come with observing trends in financial remedies law over more than half a century. What Lady Hale does so well is to pull together strands from different aspects of family law and compare trends and concepts – as she puts it: 'I just draw the parallel. As you'll notice I keep on doing – drawing parallels between different parts of the forest.'

Turning to the start of her time on the bench ('I regard being a family judge as being a family lawyer, but it's from a rather different perspective'), Lady Hale was appointed a Recorder in 1989 and a full-time Judge of the Family Division in 1994. Throughout her judicial career, she enjoyed a steady diet of financial remedies cases, although she explains: 'I tended to get what I thought were the interesting ones … the very big money cases tended to go to the big money boys but they were far less interesting than the ones where there was much less to share out, but much more to argue about'. The Court of Appeal followed in 1999 (only the second woman to be appointed to that court) and, in 2004, she was appointed as the first female Lord of Appeal in Ordinary.

She did not consider herself to be a financial remedies specialist. Despite a judicial career spanning over thirty years, culminating in 2017 with her presidency of the Supreme Court, she is surprised to learn that, in the *At A Glance* authors' list of the 'Leading Cases Top 20' she was a judge in no less than a quarter of them. In addition, her other judgments are frequently relied upon by financial

remedies practitioners including *Foster*[6] (the short marriage 'fair shares' case), *J v C*[7] (Schedule 1 and the child's welfare) and *Cornick*[8] (unforeseen and unforeseeable changes in the value of assets post-final order). There is no doubt that she has helped shape the law in relation to financial remedies, most particularly and significantly in *Miller* and *McFarlane* of which she has recently said that: 'I still think that the principles we established then were sound. We were told at the valedictory for Mr Justice Mostyn, who was counsel for the second Mrs Miller, that he has been telling the world what we really meant by needs, sharing and compensation ever since.'

She is clearly a fan of Sir Nicholas: some of the issues he has spoken of most passionately are a useful jumping off point for our discussions. We consider his comment about 'apocalyptic' costs[9] in financial remedies cases and whether she shares his view that 'steps must be taken' either by way of statute or procedure to limit the scale and rate of costs incurred. She reminds me: 'I go back before the Divorce Reform Act, before the Matrimonial Proceedings and Property Act and so I remember what it was like then. There was a lot of fighting that went on, but we fought about different things – mainly what had gone on in the marriage – and things have changed quite considerably over the intervening and many decades since'. She goes on to say however that 'we mustn't forget that the vast majority of cases do settle. It's very unfortunate if we think about what might be wrong with our law on the basis of the very small proportion of cases that fight. They're not typical of the great majority of cases. And of course the very big money cases are also not typical of the great majority of cases.'

Whilst she agrees with the generally held view, wishing 'it was not so disproportionately expensive in those cases where sensible agreements can't be reached', her first thought is often 'Surely that could have been sorted out with a bit of goodwill and common sense on both sides'. However, she is alive to the reasons why that might be impossible to achieve: 'of course it does need both goodwill and common sense on *both* sides. And the thing about family cases is that people's emotions are involved, people's self-esteem is involved. And they also have their own ideas about what's fair … which are governed by all sorts of things in their personalities and backgrounds. And that makes it hard for some people to accept what one hopes is sensible advice about how the case should be settled. There used to be a perception that family lawyers wanted to fight cases and I think there are probably people who still think that's the case but most of the research that goes into what solicitors do suggests that they are very settlement focused.'

This leads us to an interesting discussion of transparency in the Financial Remedies Court and opening it up to ensure the wider public can be informed by what happens there. She opened a 2016 Supreme Court leading judgment[10] by stating: 'The principle of open justice is one of the most precious in our law … there are two aspects to this principle. The first is that justice should be done in open court, so that the people interested in the case, the wider public and the media can know what is going on … The second is that the names of the people whose cases are being decided, and others involved in the hearing, should be public knowledge.'

Whilst that was not a financial remedies case, the first of those aspects – to enable the wider public an opportunity to see what goes on – is being addressed by the successful moves to publish more judgments in 'ordinary' cases which do not necessarily involve 'big money'. In the context of financial remedies work and in particular the recent pilot, she makes it clear that open justice is the desired end game and that 'these transparency experiments are in the context of the rules that already exist, the fact that journalists are able to attend has been sitting there in the rules and has been since 2009'. She nevertheless sounds a note of caution when it comes to the potential loss of anonymity: 'Parties are not named in children cases. But they are named in financial cases, even where there are children involved. So, none of it has been thought through in the sort of depth that it ought to be thought through. Clearly the principle of open justice in the sense that what goes on in court should be visible, known about and capable of being reported to the wider world, because the wider world has an interest in what goes on in courts and transparency is a discipline for the courts and everybody who's involved in the courts, not just the judge, but for everybody. But at the same time, of course, all the family cases are dealing with very personal, private matters. And how to balance those two considerations is, I think, complicated and difficult. My concern is for the interests of any children. I know there is really huge concern amongst children about mere anonymity not being enough because of the problems of jigsaw identification and the like, especially in certain types of case, and there's also a worry about details of the facts, particularly in child abuse cases, where the judgments that are published might be almost treated as a sort of pornography. There are those considerations that have to be taken into account and treated very seriously.' She also recognises that, the issue of children aside, financial remedies cases bring with them their own specific concerns: 'we want full disclosure. A lot of time and effort is given to getting full disclosure, and if there is too much publicity, getting disclosure will be even more difficult than it already is. So balancing each of those considerations I think is extremely tricky. I think it's got to be done. I'm not sure that there's one-size-fits-all for it'.

Turning to financial remedies law more generally we considered the issue of potential reform of s 25 MCA 1973. The terms of reference for the scoping paper currently being undertaken by the Law Commission includes consideration of whether the discretionary basis of the current law allows for sufficient certainty as to legal outcomes and whether there may be ways to structure the discretionary basis of the current law with a clear set of underpinning principles, in order to create more certainty as to outcomes. Lady Hale's view is that 'our current system is a good one, provided that it is properly exercised by the family lawyers. In other words, tailor made solutions are a good idea for coping with the multitude of different factual situations that you can come up with. The principles of need, sharing and the compensation, for all the reasons that we said in *Miller* and *McFarlane*, are good principles. We shouldn't be so distracted by the few cases that do fight into thinking that the system is in need of radical reform.'

We consider what that 'radical reform' might look like. Is it the Divorce (Financial Provision) Bill presented by Baroness Deech, which would limit capital sharing, enforce pre-nuptial agreements without a 'needs' get out clause and severely limit the ability of the court to make orders for periodical payments? She is keen to 'point out that Baroness Deech is a very good friend of mine. We have

disagreed about many things in family law over the course of now a long friendship, but it doesn't stop us being good friends'.

However, long friendship aside, it is clear that Lady Hale is nevertheless against the kind of radical reform being proposed, citing the gender dimension: 'it is likely that the people who would be most adversely affected by a much more cut and dried, rigid approach to things would be those people – usually women – who have compromised their place in the [external] workplace … in order to do what on the whole is in everybody's interests: to look after their homes, their families, to have children, to help to bring them up, to [look after] elderly relatives … I think there is a public interest in this as well as the private interest in it. The public relies upon the family. I have described the family as its own little social security system, and that's what it is. The public relies on the family to be the first port of call for resourcing the needs of the family members and that ought to be recognised by the law.'

Baroness Hale with Women in the Law UK's Founder and Chairperson, Sally Penni

Again, she is able to offer a balanced view based upon her many years firstly analysing and then deciding the outcomes in financial remedies cases: 'there are a lot of marriages that break up in late middle age … quite often the breadwinner going off with a new partner. And the person who is likely to lose out, who will lose out in any event, but would lose out even more were the law to be changed, is the left behind partner. And I think that would be a retrograde step. It was one of the things that came out well from the changes that came into force in 1971. That those people were better looked after than they had been by the law previously.'

Moving on to consider the plight of the 'left behind partner' in the context of unmarried, cohabiting couples and her position during the decades-long push for reform: 'I've never made any secret of the fact that I think that there should be financial remedies available to unmarried couples. Very few people say there shouldn't be, apart, of course, from the government … it's almost as if because it's so obvious that some such remedy is needed, they don't want to supply it, because they don't want to create more work for the courts'. She considers what reform might look like, referring to the Law Commission report on cohabitation published in July 2007:[11] 'I thought that the Law Commission's recommendations were too complicated, too prescriptive. They were based on the comparative advantage and disadvantage from the relationship, which is, I think, the right principle. But they were very much trying to dot every I, cross every T, which as we know is not really very sensible in this context. You can't be too cut and dried about things.'

I canvass with Lady Hale whether wholesale reform of the law relating to cohabiting couples might mean treating such claims in much the same way as we view financial remedies between married couples. Lady Hale is clear that 'I go along with what has been the Scottish approach and the principle underlying the Law Commission's recommendations, which was comparative advantage and disadvantage resulting from the relationship. That's not automatic sharing … nor necessarily provision for need. It's more compensation. And that means it's a different principle from the marital principle. It's less broad and will be likely to lead to less in the way of settlements. One could suggest that the disadvantage of that is that all the practical everyday knowledge that family lawyers have as to what is the sensible solution in a marital relationship would be lost because they'd have to start working out something which was very different and might result in very little happening. So why not just adopt all the same principles? That would be so unpopular with the press, media, politicians – not sure about the public, who knows? But it would be unpopular and so it's not going to happen and you have to adopt a different principle.'

This leads to a discussion of Schedule 1 Children Act 1989 and whether the judicial interpretation of the statutory provisions is too narrow. She is clear both that 'I don't want to be telling today's judges what they should be doing. I think that's not my business' but also that the purpose of Schedule 1 is to meet the needs of the child, not the parent with care. However, she again draws parallels with topics covered in our earlier discussion: 'it does remind me of the days before *White*, which were dominated by the budget – reasonable requirements – and the view was taken that the recipient, the wife, usually, was not entitled to build up a nest egg to provide for her future; that she wasn't allowed to build up assets so that she could give things to the children or to other people in due course and that's the same attitude. It's not treating that person as being economically equal, sensible, making provision for a future and doing things that anybody else would do.'

It is not just the other aspects of financial remedies law in which she finds parallels, but within other areas of law entirely: 'I think the more interesting question in a way is the view that was taken many years ago that children have no proprietary claims on their parents. That's the reason for

the comparatively narrow interpretation of Schedule 1 … it also works through into the Inheritance (Provision for Family and Dependants) Act as well, where of course, adult children can bring claims under that Act, but nobody has really worked out – as I said in *Ilott*[12] – what the principles are that govern the claims by adult children.' And there are not only parallels within different aspects of the law. This is an issue which, in Lady Hale's view, has yet wider social and practical implications: 'If you were to ask people in continental Europe, they would say that children do have claims on the capital assets of their parents. There are often rights of inheritance which are subject to a life interest from surviving spouses, but there are rights of inheritance … if you think about how much feeling there is in this country about people wanting to preserve the capital they have built up during their lives for their successors, that is part of the problem with funding social care. All the debate there is about how we fund social care has, as its premise, that people shouldn't have to dispose of all their capital paying for their care towards the end of their lives because they want something to hand on to their children. So there are some big issues there that haven't really ever been looked into.'

The discussion of *Ilott* turns us to the role of the appeal court. Of *Ilott* itself, Lady Hale comments: 'It was ridiculous. The whole thing had gone too far. Too many stages and ups and downs and so on. And of course, we in the Supreme Court were never really in a position to rethink the whole thing.' Which leads us back to *White* and the view often voiced by younger practitioners that, if this was meant to be *the* case which developed the yardstick of equality and current thinking about equal sharing, why did Mrs White not receive a full and equal share of the assets? Lady Hale agrees: 'Really the whole thing needed rethinking. Mrs White said that the obvious solution was they had two farms, that one of them should have got one of the farms and the other should have got the other of the farms. That was so obviously the right solution. But by the time it got to the House of Lords, they really couldn't do that. They had to decide whether the general approach of one side or the other was correct. But basically, all the House of Lords could do was either agree with the Court of Appeal or go back to the original monstrous finding at first instance.'

She goes on to explain: 'This is quite often the case in the Supreme Court – you really want to tear it all up and start from scratch … and the same in a way was true with *Miller* and *McFarlane*. *McFarlane* was a bit easier but with *Miller* we simply decided that the figure that she'd been awarded could be upheld. We weren't ourselves thinking "well, how do we apply our own principles to what the second Mrs Miller should get" because that's not what we do. We're a court of appeal.'

No interview with Lady Hale about financial remedies law would be complete without a discussion about her dissenting judgment in *Radmacher*,[13] especially given that so many of the cases coming before the financial remedies court lately involve a pre-nuptial agreement. There is, as she often says, a gender dimension to such cases and that, of *Radmacher* specifically, she 'couldn't win them all'. Interestingly, talk of *Radmacher* arises after I asked Lady Hale whether there are decisions she has made in financial remedy cases which, on reflection, she wishes she had taken an opportunity to push harder to reflect the gender dimension. She responds: 'Or the reverse? What I do now wonder about is the Privy Council case, *MacLeod*.[14] It seems so obvious to say that the marital [post-nuptial] agreement ought not to be contrary to public policy, but of course that then led to the others in *Radmacher* saying, well, why didn't you take it to its logical conclusion? So I think obviously [in *MacLeod*] I set in motion something that seemed sensible at the time, but sometimes beware what you wish for because it could be taken in a direction that you didn't want it to be taken in, as in *Radmacher*.'

She has spoken, most famously in her speech at Girton College in 2019 to celebrate 100 years of women in law, of what was described, upon her elevation to the Supreme Court as the 'Brenda Agenda', which she explained was 'quite simply, the belief that women are equal to men and should enjoy the same rights and freedoms that they do; but that women's lives are necessarily sometimes different from men's and the experience of leading those lives is just as valid and important in shaping the law as is the experience of men's lives.'

This is the 'gender dimension' of which she speaks when considering the issue of pre-nuptial agreements more broadly: 'there is usually a degree of mutuality about it. The facts around *Radmacher* are a very good example of that. They came back from the States because she was unhappy there. He gave up his job to go and do something much more rewarding because he was unhappy with his job. This was all fine until the breakup. It happens with every relationship and it's usually a matter of agreement, or at least, if not active agreement, acquiescence … and that will have its consequences for money-making opportunities for each of the parties. And, of course, who knows what children are going to bring. It's very difficult to imagine before you have children what it's going to be like after you've got them.'

We discuss the view of the High Court that parties are unlikely to have intended that a pre-nuptial agreement would leave a party in a predicament of need: 'judges may be perfectly right to say, "well, the parties cannot have intended to leave somebody whose needs are not properly met" … however [a prenuptial agreement] usually intends to cut down on what the outcome would be if there were no prenup and [the paying party] ends up paying less than they would have if there was no prenuptial agreement.'

She is clear however that she is not against the principle of prenuptial agreements altogether: 'it is also about providing a level of clarity and certainty and somebody might be prepared to settle for that. Although I must admit some of the models I have seen, paying a partner a certain amount per year of marriage … I found that very demeaning, really. But some people might be prepared to settle for that, for the sake of certainty, clarity, because they don't want to make a fuss, because they like the relationship and so on, but it does remain the object that there should be less than there otherwise would be, and of course what that would be is more than or different from simple provision for need, however generously interpreted.'

Of her dissenting judgment in *Radmacher*, she has recently said of her fellow justices 'They were mainly commercial lawyers and could not see that marriage is not like a commercial contract … the point of a pre-nuptial agreement is always to secure that one of the spouses will get less than he or she otherwise would. That is why every common law jurisdiction which has legislated to make them lawful has provided for procedural safeguards – full disclosure and independent legal advice – but my brethren said that they should be enforced without any such safeguards as long as they are not unfair … There is obviously a gender dimension which cannot be ignored.'

I am keen to explore that gender dimension and also what she has said previously, that one of her fellow justices is understood to have said that he did not think Mr Granatino should have made a claim at all. Does she think that a more generous approach to Mr Granatino's claim might have been taken had he been a woman? 'Oh, I think it's very possible. I could put it no more than that. I think I have probably said that one of my brother judges did say that he thought the husband was a cad for making the claim at all. I am of course not going to invite anybody to speculate on who said that, but it was suggested that men should not be making claims on their wives. Whereas I doubt if that would have been said if the roles had been reversed.'

Lady Hale is keen however not to criticise her fellow justices and makes it clear to me that 'in the days when the law was being developed, we wouldn't have had decisions like *White* and *Miller; McFarlane*, if it hadn't been for some really very good men who recognised that it was only right and proper that marriage be treated as an equal partnership, not only emotionally, but also economically.'

This leads us to another financial remedies topic with a clear gender dimension, currently being examined by a Resolution survey to establish whether practitioners consider whether the Financial Remedies Court takes sufficient account of domestic abuse. Does she have a view about that? 'I'm afraid I'd rather not express a view about that because I actually have quite complicated views about the relevance of domestic abuse throughout family law. Because I think it is relevant in lots of different aspects, but the practical problems and the cost involved and the delay involved in taking it seriously in children cases, where it's obviously relevant, should actually give us some pause for concern about its impact on financial remedy cases' adding: 'But as you know, I don't think that these matters should be treated in silos anyway.'

Which leads us neatly, approaching the end of our interview, to her recent proposal to avoid the 'silo' mentality: a 'one-stop family law shop' involving one application form which sets out a short history and the remedies sought across all areas and a 'court triage' to decide the appropriate in-court dispute resolution process, which would include court-led mediation. We discuss the obvious objection there might be to such a scheme from financial remedies practitioners, having only relatively recently benefitted from a specialist financial remedies bench: 'Well, of course there are people who disagree, because there always are people who disagree with the whole idea. I know the reason for having the Financial Remedies Court was to make sure that there were judges dealing with financial remedies who knew the law and knew the score, so to speak. Well, you don't need a separate court to be doing that. You really don't. All you need are properly trained judges and properly experienced judges.'

It was with some trepidation that I asked Lady Hale if I could interview her for the *Financial Remedies Journal*. My delight when she said 'yes' was tempered only slightly when she told me 'but I don't have a lot to say about financial remedies these days'. I have had cause to reflect on that statement whilst writing up this interview. At her valedictory, Lady Hale was described by Dinah Rose KC as 'feminist, frank and fearless'. Those qualities were evident in spades during this interview. It is apparent to me, and I am confident it will be apparent to FRJ readers, that the breadth and longevity of her experience – the perspective that can only be gleaned from a lifetime at the coalface, and her ability to spot the similarities and trends between the different aspects of the family law 'forest' – is as unique as it is valuable. Far from not having a lot to say, we might reflect as financial remedies professionals on what she does have to say, frankly and fearlessly, about the gender dimension. We would be wise to take it on board.

Notes

1 As she was introduced at the Women in Law dinner in Manchester in March 2024.
2 *R (Miller) v The Prime Minister* [2019] UKSC 41.
3 *Wachtel v Wachtel* [1973] Fam 72.
4 *White v White* [2000] UKHL 54, [2001] 1 All ER 1.
5 *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.
6 *Foster v Foster* [2003] EWCA Civ 565, [2003] 2 FLR 299.
7 *J v C* [1999] 1 FLR 152.
8 *Cornick v Cornick* [1994] 2 FLR 530.
9 *Xanthopoulos v Rakshina* [2022] EWFC 30.
10 *R (C) v Secretary of State for Justice* [2016] UKSC 2.
11 *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307).
12 *Ilott v Blue Cross* [2017] UKSC 17.
13 *Radmacher v Granatino* [2010] UKSC 42.
14 *MacLeod v MacLeod* [2008] UKPC 64.

CLASS
LEGAL

Financial
Remedies
Journal