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Chair's Column

HHJ Edward Hess

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

I am delighted to commend to you the third issue of the *Financial Remedies Journal* (FRJ) which, without doubt, sustains the standards set in the earlier issues for providing information and debate on the big subjects topical in the financial remedies world. Amongst other riches, readers will enjoy a thoughtful piece on *Daniels v Walker* by Nicholas Allen KC,[1] a helpful guide to the sometimes impenetrable world of cryptocurrencies by Ben Fearnley[2] and a powerful retort by Baroness Deech[3] to the thoughts on menopause issues articulated in the second issue.[4]

The single lawyer solution

Recent judicial pronouncements by both Peel J and Mostyn J have articulated the dismay felt by many judges, and many other observers of the financial remedies world, at the ongoing and perceptively worsening prevalence of both very high legal costs figures and the hostile and adversarial conduct of cases. These two features are very likely to be linked and are both significantly damaging to the welfare of the litigants involved and, of course, their children. Whether or not this is the fault of the parties themselves or their lawyers, or a mixture of the two, the effect is the same and it is destructive. In the words of Peel J in *Crowther v Crowther & Ors* [2021] EWFC 88 at [9]:

> 'These proceedings have been intensely acrimonious. They, and their lawyers, have adopted a bitterly fought adversarial approach. I asked myself on a number of occasions whether the aggressive approach adopted by each side has achieved anything; it seems to me that it has led to vast costs and reduced scope for settlement. The toll on each party is incalculable … and, from what I have heard, the impact on the children has been highly detrimental.'

The problem of high costs levels is expertly discussed in this issue of the FRJ by Professor David Hodson in his article, 'The scandal of costs in financial remedy proceedings in English family law'.[5] So what is to be done to reverse these unattractive developments? Step forward the single lawyer solution. This is offered by a number of practitioners already, and Resolution has announced a scheme under the title 'Resolution Together',[6] but this issue of the FRJ contains a major contribution to this subject ('Someone! Do something about costs! The Single Lawyer Solution') by Harry Gates and Samantha Woodham,[7] the admirable leaders of The Divorce Surgery, which is leading the way in this area, and this piece deserves careful consideration. This does seem to be an idea whose time has come. It has received specific support from the President, Sir Andrew McFarlane, in his recent John Cornwell Lecture to the Family Mediators Association Conference[8] and we are pleased to give space to an excellent articulation of an idea which, if suitably developed, might simultaneously reduce costs, prevent adversarial conduct and divert cases away from the courts into the non-court dispute resolution arena.

PAG 2 – the ongoing work of the Pension Advisory Group (PAG)

This issue carries a reminder from Francis J and myself (as co-chairs of PAG) of the work of PAG2.[9] The results of a survey run recently, in the context of PAG2, suggest that PAG1 (for which we all owe a huge debt of gratitude to its 'chief executive' Hilary Woodward) has had a substantial and welcome impact on the fairness of the distribution of pensions on divorce. PAG2 is not intended to make radical changes to the guidance and information contained in PAG1, rather to revise and update it. Hard work is well under way, with results likely to emerge some time next year and I am sure the FRJ will continue to cover these important developments. One of the pressing matters to be discussed and covered in PAG2 is the emergence of the 'Galbraith Tables', seen by many to have gained some good traction in the field of off-setting. I am delighted to recall that the tables were, of course, originally unveiled in the first issue of the FRJ.[10]

Financial Remedies Court Valete

In this issue the financial remedies world says farewell to Jo Miles, the Cambridge University academic who has played so very significant a role in this area of law for the past

decade or so. Jo has decided to leave the world of academic law and re-focus her energy and dynamism on the world of horticulture. That world's gain is most definitely our loss, but we wish her all the best in her new career and I commend the interview she gave to us in the summer, which appears in this issue of the FRJ.[11]

Notes

1 [2022] 3 FRJ 175.
2 [2022] 3 FRJ 199.
3 [2022] 3 FRJ 210.
4 Farhana Shahzady, 'Menopause – turning the clock back for women?', [2022] 2 FRJ 148.
5 [2022] 3 FRJ 186.
6 https://resolution.org.uk/resolution-together/
7 [2022] 3 FRJ 181.
8 'Sustaining the Momentum', FMA Annual Conference, 28 and 29 September 2022, King's College London.
9 [2022] 3 FRJ 173.
10 Jonathan Galbraith, Chris Goodwin and Rhys Taylor, 'The Galbraith Tables: a new chapter for pension offsetting on divorce?', [2022] 1 FRJ 26.
11 [2022] 3 FRJ 223.

PAG2 – the Continuing Work of the Pension Advisory Group

The Hon. Mr Justice Francis

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

In July 2019, the Pension Advisory Group (PAG) was pleased to publish its report *A Guide to the Treatment of Pensions on Divorce*, partially funded by the Nuffield Foundation.[1] This publication was expressly endorsed in the Foreword by the President of the Family Division and had the professional sponsorship of the Family Justice Council.

The 2019 guide was the culmination of over 2 years of intense inter-disciplinary work by a committee which comprised members of the judiciary, experts, academics, solicitors and barristers. Interim reports which had been the subject of wide consultation elicited a range of feedback. Focus groups were also held, with a view to trying to obtain a more in-depth understanding of how pensions on divorce were operating.

The 2019 guide has been downloaded over 9,000 times. It has become a currency and reference point for judges and practitioners alike, engaged in questions concerning pensions on divorce. It has been cited in correspondence and in and by courts, argued over and followed in countless instances. It has been the subject of academic citation and debate with a range of responses. The PAG report is referenced in the *Financial Remedies Court Primary Principles* document, which was published in January 2022, alongside the *Statement on the Efficient Conduct of Financial Remedy Hearings proceeding in the Financial Remedies Court below High Court Judge level*.

In 2021, Law for Life, with the PAG and the University of Cambridge Faculty of Law, with funding from the Nuffield Foundation and support from the Family Justice Council, launched *A Survival Guide to Pensions on Divorce*, which made good on the promise that there would be a litigant in person version of the PAG guide. This has had over 25,000 individual page views.

There is little doubt that the PAG has made a significant impact on the manner in which courts and practitioners alike approach pensions on divorce.

The PAG guide has received a lot of feedback ranging from high praise and constructive suggestions for improvement to downright hostility. Some of the feedback has been of a carefully considered nature, and some might have been assisted by a more careful reading of what the PAG document actually says.

In April 2022, Jonathan Galbraith and Christopher Goodwin launched the 'Galbraith Tables', which is a tool to assist parties in the calculation of the gross present value of defined benefit pensions as part of an offsetting analysis. The tables were an express reply to the challenge in Appendix U of the PAG report that such a tool be developed.

The PAG is now therefore in receipt of a significant amount of written and anecdotal feedback on the success or otherwise of the guide. As chairs of the PAG, we came to the conclusion that it would now be helpful to review and update the 2019 guide. This will enable the guide to retain its potency and usefulness and to reflect on what might be improved.

Further to this conclusion, we have reconvened the PAG working groups with a newly constituted committee. Many of the original members have agreed to serve again, but some have retired or gone to pastures new. This has given the opportunity to invite new members, fresh ideas and some of our friendly critics, to assist us, in refining the PAG guide.

The idea for PAG2 is to provide an update and review, not a fundamental rewrite. Although bound by the Chatham House Rule, it would be fair to say that some areas of the original PAG guide were debated fiercely, in coming to a text which all were prepared to stand by. PAG2 is not an opportunity to re-open old wounds. It is not a ground zero re-set. Rather, it is an opportunity to refine, improve, update and build upon what is already there.

The working groups have already set to, in picking over the correspondence the PAG has received since the guide's original publication in 2019. We shall endeavour to reflect upon the material questions in our thinking as to how the guide may be improved.

We invited judges, practitioners and others who take an interest in pensions on divorce and/or personal finance to answer our short online questionnaire. This was your opportunity to give feedback on your experience of how useful or otherwise both guides have been and whether there are other aspects on which you might seek more guidance. This consultation closed on 30 September 2022. Responses have been pseudonymised and will only be seen by members of PAG2. An aggregated summary of the responses will be sent to participants on request and published without attributing any responses to named individuals.

A lot of water has gone under the bridge since 2019 in all of our lives. The advent of the remote meeting within legal consciousness will hopefully make our task a little easier in convening practitioners and judges from around England

and Wales. There will thankfully be less chance of committee members becoming ensnared in faulty lifts, which are sadly found too commonly on the court estate.

We hope to complete our work, which will include an update to the Law for Life guide, by the end of October 2023.

None of this endeavour would be possible without funding given by the Nuffield Foundation, which supports the contribution to this project of the charity, Law for Life, and some funding to the University for the academic member, who would otherwise not be able to take part. Nuffield is also supplying support for design and administrative assistance for what is a complex undertaking. The rest of the committee are giving of their time and expertise on a pro bono basis. We salute them. We pay special thanks to our Chief Executive, Hilary Woodward, who volunteers significant pro bono amounts of her own precious retirement in trying to ensure that the family justice system gets pensions right for others.

Note

1 This project has been funded by the Nuffield Foundation, but the views expressed are those of the authors and not necessarily the Foundation. Visit www.nuffieldfoundation.org.

'For Reasons Which Are Not Fanciful' – *Daniels v Walker* Applications in Financial Remedy Cases

Nicholas Allen KC

29 Bedford Row

More than 22 years after it was decided, there remains no reported decision in a financial remedies case in which a court has provided guidance in relation to whether or not to grant a so-called *Daniels v Walker* [2000] EWCA Civ 508, [2000] 1 WLR 1382 application for the instruction of a second expert when one party is dissatisfied or otherwise unhappy with the report of a single joint expert.

Likewise, the Family Procedure Rules 2010 (SI 2010/2955) (FPR) do not make specific provision for the instruction a new expert. Where the FPR are silent the court may have regard to the Civil Procedure Rules 1998 (SI 1998/3132) (CPR) and case-law decided thereunder although this is only by analogy and the court is not bound by that authority.[1]

Daniels v Walker was a personal injury case where quantum alone was in issue. The relevant procedural framework was said by Lord Woolf MR to be CPR Part 1 (the overriding objective), CPR 35.1 (the duty of the court to restrict expert evidence), CPR 35.6 (the ability of the parties to put questions to experts) and CPR 35.7 (the power to direct that evidence is to be given by a single joint expert). All have their FPR equivalents. Lord Woolf continued as follows:

> '[27] … Where a party sensibly agrees to a joint report and the report is obtained as a result of joint instructions in the manner which I have indicated, the fact that a party has agreed to adopt that course does not prevent that party being allowed facilities to obtain a report from another expert, or, if appropriate, to rely on the evidence of another expert.
>
> [28] In a substantial case such as this, the correct approach is to regard the instruction of an expert jointly by the parties as the first step in obtaining expert evidence on a particular issue. It is to be hoped that in the majority of cases it will not only be the first step but the last step. If, having obtained a joint expert's report, a party, for reasons which are not fanciful, wishes to obtain further information before making a decision as to whether or not there is a particular part (or indeed the whole) of the expert's report which he or she may wish to challenge, then they should, subject to the discretion of the court, be permitted to obtain that evidence.
>
> [29] In the majority of cases, the sensible approach will not be to ask the court straight away to allow the dissatisfied party to call a second expert. In many cases it would be wrong to make a decision until one is in a position to consider the position in the round. You cannot make generalisations, but in a case where there is a modest sum involved a court may take a more rigorous approach. It may be said in a case where there is a modest amount involved that it would be disproportionate to obtain a second report in any circumstances. At most what should be allowed is merely to put a question to the expert who has already prepared a report.'

As to the Human Rights Act 1998 argument raised on appeal – European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 – Lord Woolf MR stated:

> '[24] Article 6 could not possibly have anything to add to the issue on this appeal. The provisions of the CPR, to which I have referred, make it clear that the obligation on the court is to deal with cases *justly*. If, having agreed to a joint expert's report a party subsequently wishes to call evidence, and it would be unjust having regard to the overriding objective of the CPR not to allow that party to call that evidence, they must be allowed to call it.' (original emphasis)

In *Cosgrove & Anor v Pattison* [2001] CPLR 177 – a neighbour dispute – Neuberger J (as he then was) identified the following non-exhaustive list of factors to be taken into account when considering an application to permit a further expert to be called:

'• The nature of the issue or issues.

- The number of issues between the parties.
- The reason the new expert is wanted.
- The amount at stake and, if it is not purely money,

the nature of the issues at stake and their importance.

- The effect of permitting one party to call further expert evidence on the conduct of the trial.
- The delay, if any, in making the application.
- Any delay that the instructing and calling of the new expert will cause.
- Any other special features of the case.
- The overall justice to the parties in the context of the litigation [an "all-embracing" factor].'

On the facts, the appeal against the first instance refusal of the second expert was allowed. It was said that the issues, although not very substantial, were properly matters for expert evidence and the amount at stake was not insignificant. Moreover, the new expert report called into question some of the joint expert's conclusions and if a new expert held a contrary view to that of the joint expert, there could be sufficient justification for permitting the new expert to be called, particularly where there were grounds for thinking that the joint expert might be wrong. Accordingly, it was right to allow the appeal but only on terms that the costs order in the court below was not interfered with.

In *Peet v Mid-Kent Healthcare NHS Trust* [2001] EWCA Civ 1703 – a personal injury case which gave rise to the issue of whether or not a conference could be conducted by the claimant in the presence of the joint experts without the consent of the defendants – Lord Woolf MR stated as follows:

> '[28] … where parties agree that there should be a single joint expert, and a single joint expert produces a report, it is possible for the court still to permit a party to instruct his or her own expert and for that expert to be called at the hearing. However, there must be good reason for that course to be adopted. Normally, where the issue is of the sort that is covered by non-medical evidence, as in this case, the court should be slow to allow a second expert to be instructed.
>
> [29] … the fact that the sums at stake may be substantial does not justify the departure from the general approach in relation to single experts which I have just sought to indicate. If there is an issue which requires cross-examination, or requires additional evidence, that is one thing. But the court should seek to avoid that situation arising, otherwise the objectives of having a single expert will in many situations be defeated.'

In *Kay v West Midlands Strategic Health Authority* (4 July 2007, unreported) – a claim which arose out of the neonatal treatment of the claimant shortly after birth – HHJ MacDuff QC (as he then was) sitting as a Deputy High Court Judge said as follows:

> 'Where a party requests a departure from the norm and makes what one can term a *Daniels v Walker* application, all relevant circumstances are to be taken into account but principally the court must have its eye on the overall justice to the parties. This includes what I have called the balance of grievance test. The application will only succeed in circumstances which are seen to be exceptional and to justify such a departure from the norm.'

In *Bulic v Harwoods & Ors* [2012] EWHC 3657 (QB), the parties had originally instructed a single joint expert to opine on the reasons why an engine had failed. The claimant alleged it was caused by inadequate servicing and an inherent defect in the vehicle. The defendants argued it was due to an unknown third party over-filling the engine oil. The claimant lost confidence in the single joint expert and, a week before trial, applied to appoint his own expert. The application failed at first instance but succeeded on appeal. Eady J reviewed authorities including those referred to above before stating as follows:

- 'What represents justice between the parties will very much depend upon the facts of each case' [16].
- 'the saving of time and money is likely to assume greater significance in inverse proportion to the centrality of the issues' [16].
- 'Where the court is concerned with a relatively "peripheral" issue as in *Kay*, it is likely to be only in unusual circumstances that the services of a single joint expert will be dispensed with' [16].
- 'the court is less likely to be ready to dispense with a single joint expert where the evidence is of a non-technical nature' [17].

On the facts, the issue to which the expert evidence went was far from peripheral. It was fundamental to the resolution of the main issue between the parties. It was also technical, and the court was likely to obtain more assistance from comparing two experts on technical matters than where the issue involves matters of 'personal judgment, discretion and general impression based on experience' [21]. Further, bearing in mind the 'balance of grievance' test in *Kay*, the claimant's sense of grievance would be quite understandable if he had to go through a trial of the critical issue on liability while being barred from introducing and having the criticisms properly evaluated [24]. In addition, where the expert evidence was of a technical nature and far from peripheral, care had to be exercised when refusing to permit the appointment of a further expert on the basis that the case was not sufficiently 'substantial' [29] and whether or not litigation is 'substantial' cannot be solely determined by reference to the amount claimed [28].

Most recently in *Hinson v Hare Realizations Ltd (2)* [2020] EWHC 2386 (QB) – a noise-induced hearing loss claim – Martin Spencer J upheld the Recorder's refusal to allow the claimant's application to adjourn a trial and to rely on an expert acoustic engineering report in place of a single joint expert report. He concluded that the correct approach had been elucidated by Lord Woolf in *Daniels v Walker*, who stated that permission to obtain the desired new expert evidence could be permitted for 'reasons which are not fanciful … subject to the discretion of the court' [21]. The words 'subject to the discretion of the court' were deemed to be 'important' in this context given that, as Eady J said in *Bulic*, the Court of Appeal 'did not intend to apply any straitjackets to the court' [21]. The judge further emphasised that as Eady J had pointed out what represents justice between the parties will be very fact-sensitive, so that it may be distracting to focus too analytically on the reasoning in other cases, however authoritative, where the facts were not truly comparable [22].

Martin Spencer J said that the Recorder had approached this discretionary exercise ('balancing the interests of the parties, taking into account not only the overriding objec-

tive but also the interests of justice generally in seeing that cases are decided expeditiously, at proportionate cost and without undue inconvenience to other parties') in an 'impeccable' fashion, having demonstrated awareness that:

- the evidence of the single joint expert was central to the issues in the case;
- the evidence of the single joint expert was technical;
- the claimant had good reason for wishing no longer to rely upon that report;
- the application was being made at a late stage in proceedings;
- but for the non-availability of a judge, the case would have been decided in November 2019 without any such application being made;
- the single joint expert had been chosen by the claimant;
- the claimant had raised questions of the single joint expert on two occasions;
- if the claimant's application was acceded to, what would otherwise would have been fast-track trial would become a multi-track trial with a significant increase in costs; and
- the application had been made at a late stage and, if allowed, would involve the breaking of a fixture with potential waste of court time and inconvenience to other parties.

In addition to the above civil cases there are several reported *Daniels v Walker* applications in the context of Children Act 1989 applications. It must always be remembered when considering such cases that whereas expert evidence in proceedings other than children proceedings is governed by FPR 25.4, provision relating to the control of expert evidence in children proceedings is now contained in Children and Families Act 2014, s 13,[2] which states *inter alia* as follows:

> '(1) A person may not without the permission of the court instruct a person to provide expert evidence for use in children proceedings. ...
>
> (5) In children proceedings, a person may not without the permission of the court put expert evidence (in any form) before the court.
>
> (6) The court may give permission as mentioned in subsection (1), (3) or (5) only if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings justly. ... '

In *W v Oldham Metropolitan Borough Council* [2005] EWCA Civ 1247, [2006] 1 FLR 543,[3] Wall LJ (as he then was) stated as follows:

> '[35] We were provided with a bundle of authorities by the parties. In my judgment, the only decision which is directly on the point is the decision of this court in *Daniels v Walker* [2000] 1 WLR 1382. This decision must, in my judgment, be viewed with a modicum of caution from a family perspective, since experts in family proceedings (particularly in the field of paediatric neuroradiology) are a precious and scarce resource, whereas in civil proceedings experts in less arcane fields are not only more numerous, but also more willing to undertake forensic work.
>
> [36] With that important proviso, the question for this court in *Daniels v Walker* was what approach judges should adopt when a single expert who has been jointly instructed makes a report, and one side or other is unhappy with the report. … Giving the leading judgment, the Lord Chief Justice, Lord Woolf, neatly encapsulated the point in the following two paragraphs:
>
> "27 …
>
> 28. … " ...
>
> [39] The proviso which I have identified finds appropriate expression, in my judgment, in the submission made by counsel for the parents … They rightly recognise that it would be both unrealistic and unnecessary for the court to permit parents to obtain a second opinion in every discipline. Such a second opinion, accordingly, should in my judgment normally only be permitted where the question to be addressed by the chosen expert goes to an issue of critical importance for the judge's decision in the case. For the reasons I have already given, the instruction of experts in family cases needs to be stringently controlled by the court, but in the circumstances described by Messrs Hayden, Rowley and Hayer in the extract I have cited, they are in my judgment right to submit that the court should be slow to decline an application for a second expert.
>
> [40] It is, I think, also important to remember that a second opinion does not necessarily mean additional litigation and substantial additional litigation costs. If the second opinion confirms the first, my experience is that the issues in the case addressed by the two experts are likely to be radically reduced if not eliminated. However, as is self-evident, any medical consensus must be a true medical consensus – that is with each medical discipline making its proper contribution … '

In *Re SK (Local Authority: Expert Evidence)* [2007] EWHC 3289 (Fam), [2008] 2 FLR 707, Sumner J stated:

> '[53] It is clear that where medical evidence in a care case becomes pivotal and is contained in one report, which by the nature of its expertise is difficult to challenge in the absence of a further expert report, the court should not be slow to decline a second expert. There was, however, a need for stringent control of experts in children cases and a second medical report agreeing with the first one may of itself be of value in reducing or eliminating issues, (see *W v Oldham Metropolitan Borough Council* [2006] 1 FLR 543 and *Re J (Care: Assessment: Fair Trial)* [2007] 1 FLR 77). ...
>
> [54] Amongst the factors to be taken into account are that experts are in short supply and their reports are expensive for whatever body is funding them. There has to be a good reason to justify any further reports once the first one has been obtained.
>
> [55] There is, at the heart of this dispute, a debate about the circumstances in which a report adverse to one party permits that party to obtain a second report. In medical cases the position is relatively clear and is highlighted in the two cases to which I have referred. It can be put in the form of a question: is the report pivotal and can there be effective cross-examination without another report?
>
> [56] In non-medical cases such as this, the position can be set out in this way. (1) The court will look at the report itself and ask the following questions: does it appear either fundamentally flawed or biased in its approach; is it otherwise wrong, unbalanced or unfair? If the answer to any one of these points is yes, then that

> may be by itself, sufficient ground to justify a second report. If the answer is no, then the next question is the role played by the report. Is it pivotal and can it be challenged without the need for a further expert report? The answers to those questions may be determinative. Finally, the impact of a further report on the timetable for the hearing may have to be considered.'

In *R v A Local Authority and Others* [2011] EWCA Civ 1451, [2012] 1 FLR 1302, Wall P summarised the position:

> '[33] Family proceedings relating to children are unique in the control which the judge has over expert evidence. No expert can be instructed without judicial permission. It follows that a judge now decides each application for a second opinion on its merits by reference to the criteria set out in the overriding objective, the Practice Direction[3] and the Family Procedure Rules 2010 (the FPR). In each case it is a matter of judgment, and the critical questions remain: do I need this report in order to enable me to deal justly with the case? What will the additional expert add to the case?
>
> [34] In my judgment, this is essentially what Sumner J was doing in *Re SK (Local Authority: Expert Evidence)*. Speaking for myself, I do not find the division into the medical and the non-medical particularly helpful. The message I take from *Re SK (local authority: expert evidence)* is the judge's statement that "there has to be a good reason to justify any further reports once the first one has been obtained."'

In *NT v LT (Return to Russia)* [2020] EWHC 1903 (Fam), [2021] 1 FLR 773, Cobb J acceded to a father's application to adduce his own expert evidence following the instruction of a single joint expert:[4]

> '[126] Notwithstanding the egregious failure to comply with the requirements of statute, and the rules, my reasons for allowing the admission of this second report are as follows:
>
> (i) The issue of whether the father breached the mother's "rights of custody" is central to the application. It is certainly of sufficient importance to my determination of the application that I would be slow to shut out ostensibly credible evidence relating to it;
>
> (ii) I was satisfied from what I had heard that Ms Pavlova possesses the relevant qualifications to produce a reliable report;
>
> (iii) While accepting that section 13 Children and Families Act 2014 should be applied strictly to control expert evidence, the discretion afforded to the court – in line with the factors listed in section 13(7) – is still broad;
>
> (iv) There was time to obtain the views of the SJE on the report of Ms Pavlova before the case was argued.'

In the decisions in Children Act 1989 applications for a second expert report, the scarcity of experts was therefore identified as a factor which may be relevant. However, this issue is unlikely to arise in relation to (say) forensic accountancy evidence in a financial remedies case. Further, in such cases the courts have drawn a distinction between issues which are critical (or pivotal) and issues which are not in determining the admissibility of a second expert report. This distinction usually arises in relation to the number of different medical experts in different specialist fields in order to determine the nature and causation of injury. This distinction is unlikely to be an issue in a financial remedies case when the court is most often concerned with a binary valuation issue. Further, and in any event, both *Re W* and *Re SK* both predate the introduction of the 'necessity' test and *NT v LT* concerned a case where it was contended that the single joint expert had erred on a question of material fact (a review of Russian law).

The reported financial remedy cases which refer to a *Daniels v Walker* application having been made are relatively few.[5] As noted above, none has provided guidance in relation to whether or not to grant the application.

In *R v K (Financial Remedies: Conduct)* [2018] EWFC 59, [2019] 1 FLR 847, Baker J (as he then was) stated:

> '[31] … On 12 January 2018, the wife filed a *Daniels v Walker* application … seeking permission to rely on a report by Mark Gillespie of FTI Consulting in respect of the husband's business interests on the basis that there was a very substantial dispute as to the value of those assets. … At a hearing on 16 January, at which the husband was represented by junior counsel, I allowed the wife's *Daniels v Walker* application and gave consequential directions obligating the husband to provide information to Mr Gillespie and directing an experts' meeting …'

In *FW v FH* [2019] EWHC 1338 (Fam), Cohen J stated:

> '[14] … By agreement, Grant Thornton (GT) were instructed to produce a valuation which came in in October 2018. Both sides were dissatisfied with the conclusion and each applied successfully for permission to instruct their own valuer. W has accordingly instructed Jon Dodge of Walton Dodge and H instructed Faye Hall of Smith and Williamson. … '

Most recently in *E v L* [2021] EWFC 60 Mostyn J stated:

> '[13] The husband took strong exception to the evidence of Mr Isaacs, and I allowed him to adduce his own accountancy evidence from Mr Steve Taylor. In order to maintain equality of arms I allowed the wife to adduce her own accountancy evidence from Ms Fiona Hotston Moore … '

None of these judgments makes it clear why the *Daniels v Walker* application was granted (save that *R v K* refers to a 'very substantial dispute', *FW v FH* refers to the parties being 'dissatisfied' and *E v L* states that H took 'strong exception' to the single joint expert report).

What (if anything) can be drawn from the above authorities when considering a *Daniels v Walker* application in the financial remedies context?

First, what represents justice between the parties is very fact-sensitive and a financial remedy case is by its very nature different from a civil case and, therefore, notwithstanding that both the CPR and FPR rules are similar (if not in places identical), the reasoning in the civil cases is not authoritative. A financial remedies case is also different from a children case even if (most of) the same procedural rules apply. In this context, it is of note that in *Re Webster (No 2), Norfolk County Council v Webster* [2006] EWHC 2898 (Fam), [2007] 2 FLR 415, Munby J (as he then was) stated:

> '[39] … Speaking for myself, I do not find the comparison with civil proceedings particularly helpful, and have come to the conclusion that such an exercise is outwith the scope of this appeal. I do not, accordingly,

> propose to analyse the civil decisions or say anything about them.'

Secondly, and notwithstanding the above caveat, *Bulic* suggests that where one party would feel that justice has not been done because that party was not allowed its own expert in a case where: (1) there are properly arguable grounds for criticising the report of the single joint expert; *and* (2) the technical issue in question is fundamental or central to the case as opposed to being peripheral, an additional expert might well be appropriate.

However, the latter of these two criteria begs the question as to what is 'technical' as opposed to a matter of 'personal judgment, discretion and general impression based on experience' in a single joint expert report particularly one where (say) the valuer has provided an opinion in relation to a private company. In this context it is important to recall *Martin v Martin* [2018] EWCA Civ 2866, [2019] 2 FLR 291, per Moylan LJ:

> '[91] … The conclusion and guidance given [in *Versteegh v Versteegh* [2018] 2 FLR 1417] were that such valuations need to be treated with caution. Although in my view the guidance is clear, given the arguments in the present case I propose to quote at some length from that case which in turn quoted what I had said, sitting at first instance, in *H v H* [2008] 2 FLR 2092. King LJ said:
>
> > "[136] In *H v H* [2008] 2 FLR 2092, Moylan LJ highlighted the fact that the vulnerability of valuations had been specifically recognised by the House of Lords in *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186. Moylan LJ said:
> >
> > > '[5] The experts agree that the exercise they are engaged in is an art and not a science. As Lord Nicholls of Birkenhead said in *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186, at para [26]: "valuations are often a matter of opinion on which experts differ. A thorough investigation into these differences can be extremely expensive and of doubtful utility". I understand, of course, that the application of the sharing principle can be said to raise powerful forces in support of detailed accounting. Why, a party might ask, should my "share" be fixed by reference other than to the real values of the assets? However, this is to misinterpret the exercise in which the court is engaged. The court is engaged in a broad analysis in the application of its jurisdiction under the Matrimonial Causes Act 1973, not a detailed accounting exercise. As Lord Nicholls of Birkenhead said, detailed accounting is expensive, often of doubtful utility and, certainly in respect of business valuations, will often result in divergent opinions each of which may be based on sound reasoning. The purpose of valuations, when required, is to assist the court in testing the fairness of the proposed outcome. It is not to ensure mathematical/accounting accuracy, which is invariably no more than a chimera. Further, to seek to construct the whole edifice of an award on a business valuation which is no more than a broad, or even very broad, guide is to risk creating an edifice which is unsound and hence likely to be unfair. In my experience, valuations of shares in private companies are among the most fragile valuations which can be obtained.'
> >
> > [137] Moylan LJ was referring to a business valuation, as was the Court of Appeal in *Wells v Wells* [2002] 2 FLR 97. Here the court is more specifically concerned with valuations relating to property developments. For the reasons given by Lewison LJ at paras [184]–[195], the same principle found in *Miller* and *H v H* applies as much to development land valuation as to conventional business valuations, perhaps even more so given the dramatic effect that even a small adjustment in a variable can make to a valuation and given the inherent unpredictability, described by Lewison LJ, in relation to property development projects."
>
> Lewison LJ said:
>
> > "[185] The valuation of private companies is a matter of no little difficulty. In *H v H* [2008] 2 FLR 2092 Moylan J said at para [5] that 'valuations of shares in private companies are among the most fragile valuations which can be obtained'. The reasons for this are many. In the first place there is likely to be no obvious market for a private company. Secondly, even where valuers use the same method of valuation they are likely to produce widely differing results. Thirdly, the profitability of private companies may be volatile, such that a snap shot valuation at a particular date may give an unfair picture. Fourthly, the difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious. Fifthly, the acid test of any valuation is exposure to the real market, which is simply not possible in the case of a private company where no one suggests that it should be sold. Moylan J is not a lone voice in this respect: *A v A (Ancillary Relief: Property Division)* [2006] 2 FLR 115, at paras [61]–[62]; and *D v D and B Ltd* [2007] 2 FLR 653 (both decisions of Charles J)."
>
> [92] Given the proximity of the decision in *Versteegh v Versteegh*, and also, as it happens, given that my views have not changed from what I said in *H v H*, I can see no reason why we should depart from the conclusions and guidance set out in the former, namely that valuations of private companies can be fragile and need to be treated with caution. Further, it accords with long-established guidance and, I would add, financial reality.'

It might well be argued that those elements of a single joint expert's opinion that are matters of judgment and discretion – for example, weighted averages for EBITDA[6] and/or choice of multiplier – where different experts may validly hold different views and where alternative calculations can easily be done without the need for further expert input – are not ones where disagreement would justify a *Daniels v Walker* application succeeding and the challenging party should be limited to cross-examining thereon. Conversely, if the objection is a technical one – for example, the construction of a particular accounting standard or a matter of foreign law – this may justify the application succeeding.

It is clear, however, from [88]–[92] of *E v L* that the issues between the experts included maintainable earnings and multiple (leading to enterprise value), surplus assets (leading to equity value), net asset value and value of the

goodwill. Assuming these were some of the opinions to which the husband had objected, this may undermine the distinction between matters of judgement/discretion and technical objections.

Thirdly, it does not follow that just because a case has a modest financial value, it would not be considered to be sufficiently substantial to warrant the instruction of an additional expert. In *Bulic*, Eady J stated that 'substantial' did not necessarily mean substantial in a financial sense and indicated that there was no hard and fast rule confining parties to using a single joint expert in modest value cases where the relevant evidence was both technical and likely to be determinative.

The editors of the *Financial Remedies Practice 2022–23* (Class Legal, 2022) – which include Mostyn J – state at paragraph 25.90 that if a party remains dissatisfied with a single joint expert's opinion after receipt of replies to written questions under FPR 25.10 'the court should not grant permission to adduce expert evidence on the same subject on a party's behalf until there has been a meeting between the SJE and the proposed new expert' with the *Daniels v Walker* application following thereafter. No authority is cited for this proposition, but it may be a reference to the following passage from Lord Woolf MR in *Daniels v Walker* itself:

> '[31] In a case where there is a substantial sum involved, one starts, as I have indicated, from the position that, wherever possible, a joint report is obtained. If there is disagreement on that report, then there would be an issue as to whether to ask questions or whether to get your own expert's report. If questions do not resolve the matter and a party, or both parties, obtain their own expert's reports, then that will result in a decision having to be reached as to what evidence should be called. That decision should not be taken until there has been a meeting between the experts involved … '

It is respectfully suggested that it is difficult to imagine this happening in most (if not all) financial remedy cases, given that the party who is not dissatisfied with the single joint expert's report is unlikely to agree to the other party's (until now) 'shadow' expert meeting with him/her until the *Daniels v Walker* application has been determined. The editors of *Rayden & Jackson on Relationship Breakdown, Finances and Children* (LexisNexis) share this view, stating at paragraph 13.189 that it may be that the requirement for the experts to meet before a decision is made by the court as to what evidence can be adduced at final hearing 'either requires adaption in financial remedy proceedings, or in effect gives rise to a two stage process where first an application needs to be made for the single joint expert to meet the proposed new expert, and then subsequently a decision is made as to whether evidence can be admitted from the proposed new expert'.

The question of whether or not a 'shadow' report should be obtained in advance of the hearing of a *Daniels v Walker* application is something of a circular one. On the one hand, it is usually necessary to instruct such an expert to comment upon the initial report as without such an opinion it is difficult to show that the single joint expert's report is flawed or otherwise incorrect. On the other hand, no party may put expert evidence before the court *in any form* without the court's permission (FPR 25.4(2)). In practice, most applicants obtain such a report and seek to rely upon the same. However, even if the 'shadow' expert's report is not to be adduced in evidence, the production of such information will in all likelihood be required to persuade a court to allow further evidence to be filed.

Separately, there is the question as to whether the issue of 'necessity' – which since 31 January 2013 has been the test required for the admission of expert evidence in place of the earlier 'reasonably required' – is also required for a *Daniels v Walker* application. Is it the case that permission is not generic in that each piece of expert evidence is specifically considered within the context of FPR 25.4(2) and (3) with no distinction drawn between a first application and any subsequent *Daniels v Walker* application, or is it that the test of necessity does not apply as the court has already determined the need for expert evidence on the issue and in *Daniels v Walker* the court is concerned with the broader case management considerations set out above?

Although both of these positions are arguable, it is submitted that the latter is to be preferred given that: (1) on a *Daniels v Walker* application the court is not deciding whether expert evidence is required on a given issue 'to assist the court to resolve the proceedings' but by whom the evidence is to be given; and (2) the CPR equivalent of 'necessary' – which remains 'reasonably required' – was not referred to in the criteria used in any of the civil cases referred to above.

Notes

1 See the *'Postscript'* to *Goldstone v Goldstone* [2011] EWCA Civ 39, [2011] 1 FLR 1926 at [71] per Hughes LJ.
2 The section came into force on 22 April 2014.
3 In his *President's Guidance: Case Management Decisions and Appeals Therefrom* (December 2010) Wall P referred to *W v Oldham* as follows: '[35] This case, although required reading, was wholly exceptional on its facts. It is an example of circumstances when it is necessary in the interests of fairness and justice to allow a parent a second opinion. The judge thought she was dealing with a medical consensus. In reality, it turned out to be nothing of the sort. All the doctors in the case at first instance simply deferred to the one doctor who had the specialism lacked by the others. When a second specialist was instructed, he took a different view (which proved to be that adopted by the judge). The parents were initially deprived of the opportunity to challenge the medical evidence.'
4 It is of note that one of the arguments made on behalf of the mother (as recorded at [124(v)]) was that *Daniels v Walker* is now somewhat out of date, long preceding the introduction of the tighter regime for the instruction of experts in family cases under Children and Families Act 2014, s 13 and FPR Part 25, but this argument was not then dealt with in the judgment.
5 In addition to those referred to below, they include *M v M (Costs)* [2009] EWHC 1941 (Fam), [2010] 1 FLR 256 per Eleanor King J (as she then was) and *G v T* [2020] EWHC 1613 (Fam), [2021] 1 FLR 57 per Nicholas Cusworth QC (sitting as a Deputy High Court Judge).
6 Earnings Before Interest, Taxes, Depreciation, and Amortisation.

Someone! Do Something About Costs! The Single Lawyer Solution

Harry Gates
4PB and co-founder of The Divorce Surgery

Samantha Woodham
4PB and co-founder of The Divorce Surgery

In an appendix to his judgment in the ruinous case of *KSO v MJO & Ors* [2008] EWHC 3031 (Fam), in which the parties managed to expend all but about 28% of the net assets in costs, Munby J returned us to Dickens' excoriating passage in *Bleak House*:[1]

> '"For many years […] the matured autumnal fruits of the Woolsack – have been lavished upon Jarndyce and Jarndyce. If the public have the benefit, and if the country have the adornment, of this great Grasp, it must be paid for, in money or money's worth, sir."
>
> "Mr Kenge," said Allan, appearing enlightened all in a moment. "Excuse me, our time presses. Do I understand that the whole estate is found to have been absorbed in costs?"
>
> "Hem! I believe so," returned Mr Kenge. "Mr Vholes, what do *you* say?"
>
> "I believe so," said Mr Vholes.
>
> "And that thus the suit lapses and melts away?"
>
> "Probably," returned Mr Kenge.'

Six years later in *J v J* [2014] EWHC 3654 (Fam), Mostyn J bemoaned at [11] that 'the mantra "something must be done" is repeated time and again, nothing ever is'. And at [13] 'In my judgment the time has come when the law-makers in this country, whether they are legislators or judges, must stop saying something must be done and actually do something. The first thing would be to insist […] on fixed pricing for cases, whether they are ancillary relief cases or anything else.' As to why, quoting Lord Neuberger of Abbotsbury in his lecture to the Association of Costs Lawyers on 11 May 2012:[2]

> 'Hourly billing at best leads to inefficient practices, at worst it rewards and incentivises inefficiency. Moreover, it undermines effective competition in the provision of legal services, as it *"penalizes ... well run legal business whose systems and processes enable it to conclude matters rapidly. […]"* It also penalises the able, those with greater professional knowledge and skill, as they will tend to work at a more efficient rate. In other words, hourly billing fails to reward the diligent, the efficient and the able: its focus on the cost of time, a truly moveable feast, simply does not reflect the value of work.'

And later in the same speech Lord Neuberger said:

> 'That no-one has suggested a viable alternative is something which needs to be remedied, and the sooner the better. An approach to litigation costs based on value-pricing rather than hourly-billing is one which urgently needs to be worked out and applied. Rather than treating time as the commodity which is being sold, we should be adopting an approach where skill and experience are the commodities which are sold.'

A further 8 years on, via Peel J's decisions in *M v M* [2020] EWFC 41 (94% of the parties' asset base consumed in costs) and in *Crowther v Crowther & Ors* [2021] EWFC 88 (312% expended in famously 'nihilistic litigation'), and a host of other cases in which the level of costs expenditure has been condemned, what has really changed? Nothing, at least according to Mostyn J's widely-publicised recent case, *Xanthopoulos v Rakshina* [2022] EWFC 30 (12 April 2022). Despite the rule changes: (1) requiring orders to record costs incurred and to be incurred (thanks to FPR 9.27(7)); and (2) underlining the obligation on parties to negotiate openly and reasonably (FPR PD 28A, para 4.4), costs 'continue to go up and up'. There is a familiar call to arms at [14]:

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

The standard practitioner response to the difficulty of setting an accurate, proportionate, budget (yet alone fixed fees) is to point to variables in litigation, or in the process of collating financial disclosure, beyond their control. Costs estimates are, anecdotally, all too often provided on something close to a best-case scenario, not least because contingencies (such as the litigation conduct of the other side) can be difficult to quantify. This 'circumstances beyond our control' get-out is a perfectly arguable point if you take as your point of departure that legal advice has to be provided on a two-sided basis.

But it is now clear that it doesn't.

And so, dear reader, at long last to the point of this

article. Couples can, and increasingly are, being advised from the outset *together* as to what constitutes a fair outcome in their circumstances, enabling them to settle at the earliest stage. Precisely because a joint process involves neither litigation nor communication back and forth between opposing legal teams over financial disclosure collated in adversarial fashion over extended timeframes, it is entirely possible to offer such services for a fixed fee. Lawyers can therefore feel comfortable to propose such an arrangement. Couples can budget.

Here we must declare an interest. Through The Divorce Surgery,[3] we have been offering barrister-led advice on a fixed fee basis for some years now. To summarise our 'One Couple One Lawyer' model:

- Couples are met first individually to screen for suitability (not every case will be suitable, for obvious reasons) and to enable preparation of the fixed fee quote, which is itself essentially dependent on the likely complexity of the financial disclosure exercise and seniority of the barrister needed to advise.
- Then, the couple is assisted by our in-house solicitor to give financial disclosure on an open basis, by an exchange of Forms E. This collaborative disclosure process takes on average 6 weeks. In all but the simplest cases, they will meet with their appointed barrister to review each other's disclosure before deciding what further evidence, including expert evidence, is required. If further expertise is required, letters of instruction are prepared for the couple and suitable single joint experts identified.
- Once any gaps are filled to their mutual satisfaction, both attend an advice session together. The advising barrister will then explain what a court would be likely to do in their circumstances and what the practical consequences might be, all on a privileged basis.
- Lastly, the oral advice is finalised in a detailed written document, also privileged, sent out shortly afterwards, to be used as an easy-to-follow roadmap to settlement and to prevent any possible disagreement as to the nature of the advice given.
- The fixed fee for the entire service is agreed with the clients before they commit and remains fixed, regardless of lawyer hours worked. As above, the level of fee will depend on the complexity of the issues but, at present, our average fees range from £5,000 to £10,000 plus VAT per person for the whole process.

This might fairly be likened to an evolved form of Early Neutral Evaluation (ENE), with lawyer support throughout the financial disclosure process, but distinct in that it does not have any adversarial features at all, either at the financial disclosure or advice stages. And most importantly, in our experience at least, it seems to work. At the last count, about 90% of couples utilising the service have settled afterwards, either in line with the advice given or very close to it. Granted, the customer base is self-selecting to some degree. But the early signs are very encouraging.

Across the profession – and consistent with the recent changes to divorce legislation – joint advice is slowly but surely moving into the mainstream. Objections as to conflicts and/or potential regulatory difficulties are being addressed such that a number of solicitor providers have entered the market to offer 'one couple' services of their own, notably Simpson Millar, Withers and Family Law Partners to name but a few. At its conference in Birmingham in May 2022, Resolution announced the development of its 'Resolution Together' programme. There appears to be a real appetite amongst family law professionals to embrace this new form of working.

None of this is to say that joint advice will be suitable for everyone, plainly it won't. There will always be a hard core of cases for which independent, solely-instructed legal advice will be indispensable, for example where there are allegations of hidden or dissipated assets, or where jurisdiction is in dispute, or where there is an abuse dynamic in play. Most of us practising in the field would, however, recognise that such cases are in the small minority and can usually be readily identified during a robust screening process. From those suitable cases, the costs saving in using a fixed fee joint process rather than an adversarial model is enormous. As an extreme differentiator, the Appendix to this article sets out costs reported in the last 12 months as a percentage of net assets.

And costs are, of course, far from the only issue. We know from the second Farquhar report[4] that in 2019 for the whole country (bar London), the average length of proceedings which concluded at the financial dispute resolution (FDR) stage was 55 weeks and the average length of proceedings which went to a final hearing was 84 weeks. The equivalent London figures were 117 weeks (just over 2 years) to FDR and 160 weeks (just over 3 years) to final hearing. Aside from the financial cost, research has shown the huge emotional cost impacting litigants' own mental health[5] and their children's,[6] and litigants' performance at work.[7] As HHJ Edward Hess notes in the recent Review of the Operation of the London Financial Remedies Court:[8]

> 'There must, of course, be a large but unmeasurable number of miserable human experiences tied up in these statistics …'

So, in the spirit of pioneers (and not mercenaries, thank you very much) gallantly answering a call to arms from a desperate judiciary, unheeded over many years, we now propose that something be done: specifically, a radical shift and cultural pivot towards making joint advice the *default first step* in financial remedy practice. The provision of a court room at public expense and the ability to be heard in contested litigation should depend on having satisfied that requirement, absent some disqualifying feature of the kind referenced above. Cases will settle, busy court lists will reduce (so prioritising judge time for the truly meritorious), public money will be saved and – back to the point under discussion – family finances will be protected from the costs of litigation.

As to who should be doing the advising, there is now a growing pool of providers of joint advice to couples. This should be encouraged to grow further. As to accreditation, it is suggested that any 'one couple' provider should simply be required to be regulated by the Solicitors Regulation Authority or the Bar Standards Board, have proper processes in place for screening and ensure that the solicitors or barristers doing the disclosure process, advising and screening are experienced in financial remedy cases (it is understood that the Resolution Together programme will not require specialist training). For a joint service to work, couples need to engage in it meaningfully, so a joint

conference on the brink of issuing while strongly opposing positions are taken in the background will rarely stand a chance of success. Any 'one couple' process needs to be just that: a process, and not a tick box.

Plainly, this would not be a small change. For context, there is of course the specific CPR power to compel (judge-led) ENE at CPR 3.1(2)(m), see *Lomax v Lomax* [2019] EWCA Civ 1467, as part of its general case management powers. There is no FPR equivalent.

Instead, we have the thin gruel of: (1) FPR 1.4(2)(f), whereby the court must actively manage cases, including 'by encouraging the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure'; and (2) FPR 3.4(1), codifying the court's powers to adjourn proceedings if 'appropriate':

> '(a) to enable the parties to obtain information and advice about, and consider using, non-court dispute resolution; and
>
> (b) *where the parties agree*, to enable non-court dispute resolution to take place.' [emphasis added]

But besides the parties in Recorder Allen QC's much-publicised decision in *WL v HL* [2021] EWFC B10, in which the court kept a close eye on the progress of their mediation from afar, which of us has any experience of FPR Part 3 in action? Anecdotally at least, very few. In *Mann v Mann* [2014] EWHC 537 (Fam), [2014] 2 FLR 928, Mostyn J's prescription was to invite amendment of (b) above to delete the first four words (so as to provide consistency with the equivalent CPR provisions), but 7 years later the invitation remains outstanding.

In view of the lack of progress in controlling costs to date, it is strongly arguable that the traditional requirement to proceed with non-court dispute resolution (NCDR) only at the pace of the most unwilling participant has had its day. As Norris J put it in *Bradley & Anor v Heslin & Anor* [2014] EWHC 3267 (Ch), [24], in a different context:

> 'I think it is no longer enough to leave the parties the opportunity to mediate and warn of the costs consequences if the opportunity is not taken. In boundary and neighbour disputes the opportunities are not being taken and the warnings are not being heeded, and those embroiled in them need saving from themselves.'

So what comes next? Attempting to set out a definitive code for the future is a fool's errand without wider consultation, but in the interests of starting the conversation we could:

(1) Abolish mediation information and assessment meetings as the *sole* NCDR gateway to court applications and introduce an option for couples to elect to attend screening meetings with joint legal advice providers instead.
(2) Extend the mediation voucher scheme for the same purpose.
(3) Pending any substantive changes to the Form A, institute a pre-action requirement for the prospective parties to exchange a simple form certifying: (a) whether joint legal advice has already been taken; or (b) the joint legal advice provider has certified an exemption applies (including on the grounds of affordability). The form should display appropriate warnings that invalidly claimed exemptions may give rise to costs penalties and/or adjournment of the substantive proceedings. Both parties' forms can then be lodged with Form A.
(4) The standard directions on issue should repeat the warnings as to possible cost penalties and/or adjournment.
(5) At the first appointment hearing the court should, in every case, enquire into whether any exemption has been validly claimed on each side and record its finding on the face of its order. If the court determines that joint advice should have been taken, and therefore that proceedings have been prematurely issued, the court should simply re-list the first appointment at a later date to enable joint advice to take place in the interim, making any appropriate costs orders.
(6) Restore means-tested legal aid, but only for joint legal advice and only for a fixed fee. It is suggested that doing so would not only meet the state's responsibility to better restore access to justice, but do so in a way which is proportionate and affordable to the taxpayer. We think it might be possible for the baseline cost to the taxpayer of providing joint legal advice to two legally aided spouses to be fixed at as little as £3,250 plus VAT per couple. Since the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) took effect in April 2013, there has been a 30% increase in the number of cases in which neither side has legal representation,[9] with obvious consequences. The stark reality is that many litigants may be issuing simply because a family judge is the first lawyer they can afford to see. This is by no means an original observation, but funding early joint legal advice will save money.

It is hoped that widespread use of early joint advice will, of itself, restrict the volume of cases entering the court system to those who need to be there.

But could more be done? Might a summary of the joint advice from the single lawyer be made open and available to the judge at the outset and in the course of any future litigation between the couple? In principle, it is easy to see how doing so might prove an effective brake on free-spending litigation: the parties could expect to be asked to explain and justify why they propose to depart from their joint advice. Decisions on LASPO costs could take into account the joint advice – a litigant wishing to argue against the single joint advice should have the task of justifying why a LASPO costs order should be made. Then later following judgment, success or failure in bettering the identified bracket could be made a relevant factor in the assessment of costs – an unsuccessful party should ordinarily expect to bear the costs unnecessarily incurred by rejecting the single joint advice if it has turned out to be correct. The attraction to the judge hearing the case would be plain and the existence of joint legal advice should be a significant inhibitor to ongoing litigation. All this needs careful thought, given the obvious privilege implications, but one way of introducing this as a concept might be to enable the couple to opt-in to such a course at the outset.

This is plainly an ambitious shopping list, and to realise it in full would engage both our political masters and the

Family Procedure Rule Committee. But pending reform, much can be done meanwhile, even utilising the existing architecture:

(1) Implement a much more vigorous approach to FPR Part 3, supplemented by comprehensive Practice Guidance as to the court's expectations in this regard and/or an authoritative High Court judgment. The court's duty under FPR 3.3(1) is to consider whether NCDR is appropriate 'at every stage in proceedings'. Litigants should become accustomed to being asked, at every hearing, what has been done or not done in that regard. The court should stand ready to adjourn cases where the parties appear insufficiently informed, or advised about, relevant NCDR options (FPR 3.4(1)(a). Borrowing from the approach in *WL v HL*, litigants should expect to have to inform the court as to progress made between hearings.

(2) Expect judges to take a more proactive role in identifying and informing the parties about appropriate NCDR options, in every case and at each hearing, in accordance with the requirements of paragraph 7 of the FRC's newly-minted *Primary Principles* document,[10] by which judges are to be:

> 'ever mindful of opportunities for the parties to engage in attempts to reach settlement of some or all of the issues out of court by whatever means are suited to the case – Arbitration, Mediation, The Divorce Surgery and Private FDRs – and will encourage parties to explore the available possibilities.'

(3) Be ready to consider the parties engagement with NCDR as relevant to the assessment of costs under FPR 28.3(7), specifically: '(a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant'; '(d) the manner in which a party has pursued or responded to the application […]'; and '(e) any other aspect of a party's conduct in relation to proceedings which the court considers relevant'.

(4) Consider how, as a profession, we can better celebrate settlement, so that it becomes a marker of excellence and career advancement. The court's objective to make litigation a last resort must not be at odds with the way professional achievement is recognised. Each month, a list of notable settlements could be published. If a legal team feels their case qualifies, they should submit, along with the consent order and D81, a one-page document explaining why the settlement should be recognised, for instance due to complex points of law or evidence. Judges could then choose to publish those summaries which merit recognition, naming the solicitors' firms and counsel involved, but otherwise anonymising names and identifying features. There should be the opportunity to apply to a High Court Judge for recognition in the most complex cases.

It is respectfully suggested that Lord Neuberger's 'viable alternative' has arrived. Something can be done, if we want to do it.

Notes

1 Charles Dickens, *Bleak House* (Bradbury & Evans, 1853), Chapter 65.

2 Original emphasis; original footnote omitted. Available online, at www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-acl-lecture-may-2012.pdf

3 www.thedivorcesurgery.co.uk

4 HHJ Farquhar, *The Financial Remedies Court – The Way Forward. A paper to consider changes to the practices and procedures in the Financial Remedies Court* (September 2021).

5 The mental health impact survey by Raydens (May 2021) found that 60% of respondents identified divorce as impacting their mental health and nearly 10% had left employment within a year of divorce.

6 Family Solutions Group, *Inter-parental conflict and Family Separation, Professor Gordon Harold (University of Cambridge)*, 'Family separation is always a stressful experience for children and teens *in the short term*. But what drives the *long term impact* on them is the level of conflict they witness before, during and following parental separation' (original emphasis), available online, at devexmediation.co.uk, and Broadcast: News items, University of Sussex, 'Parental conflict damages children's mental health and life chances' (22 March 2016), available online, at www.sussex.ac.uk/broadcast/read/34955

7 The *Nashville Business Journal* in 2014 undertook research which showed that in the 6 months leading up to divorce, employee productivity reduced by 40%; some impact on productivity continued for the next 5 years; and the divorcing person's co-worker productivity reduced by 4% in the year of divorce.

8 February 2022. Available online, at https://mcusercontent.com/2750134472ba930f1bc0fddcd/files/402dfcd6-d83f-5e03-7027-0472a576b4db/CONSULTATION_PAPER_REVIEW_OF_THE_OPERATION_OF_THE_LONDON_FRC.pdf

9 House of Commons Library, 'Litigants in person: the rise of the self-represented litigant in civil and family cases in England and Wales' (14 January 2016), available online, at https://commonslibrary.parliament.uk/research-briefings/sn07113/

10 *Financial Remedies Court: Primary Principles* (11 January 2022), available online, at https://financialremediesjournal.com/vertix/national-guidance.htm

Appendix – examples of costs reported in the last 12 months

Case name	Date of judgment	Judge	Total net assets	Combined costs on both sides	Costs as % of net assets
VV v VV [2022] EWFC 41	13/05/22	Peel J	c. £12m	£1,235,000	10%
Xanthopoulos v Rakshina [2022] EWFC 30	12/04/22	Mostyn J	W's case: c. £17m H's case: c. £317m	£5.4m (with projected costs of £7m–£8m)	H's case: 3% W's case: 47%
WC v HC [2022] EWFC 22	22/03/22	Peel J	£12.47m	£1.6m	13%
Re A (Schedule 1, Overspend, Costs Clawback) [2022] EWFC 21	21/03/22	Recorder Chandler QC	c. £13.8m (N.B. less relevant as Schedule 1)	£634,929	5%
MG v GM (MPS LSPO) [2022] EWFC 8	01/03/22	Peel J	W's case: £100m H's case: £25m–£50m	c.£1m	W's case: 1% H's case: 3%
Collardeau-Fuchs v Fuchs [2022] EWFC 6	21/02/22	Mostyn J	£1,246m	£917,982 (and £288,700 projected to FDR)	0.001%
P v Q [2022] EWFC B9	10/02/22	HHJ Edward Hess	£5,987,144	£257,379	4%
A v M [2021] EWFC 89	09/11/21	Mostyn J	£2,166,586	£827,000	38%
E v B [2021] EWFC 90	04/11/21	Recorder Chandler QC	W's case: £5.6m H's case: £2.5m	£369,637	W's case: 7% H's case: 15%
Crowther v Crowther & Ors (Financial Remedies) [2021] EWFC 88	27/10/21	Peel J	£738,375	£2.3m	312%
LF v DF (Financial Remedy: Appeal: Costs Debts in a Needs Case) [2021] EWFC B50	23/08/21	HHJ Mark Rogers	£2m	£310,000	16%
Azarmi-Movafagh v Bassiri-Dezfouli [2021] EWCA Civ 1184	30/07/21	King, Moylan and Newey LJJ	£2,268,686	c. £487,297	21%
S v S [2021] EWFC B71	30/07/21	HHJ Booth	£3,082,658	c. £600,000	19%
E v L [2021] EWFC 60	15/07/21	Mostyn J	£9.2m	£887,000	10%

The Scandal of Costs in Financial Remedy Proceedings in English Family Law

Professor David Hodson OBE KC(Hons) MCIArb

Partner, The International Family Law Group LLP

Executive summary

Over the past few years and increasing in intensity, High Court and Court of Appeal judges have strongly condemned very high and/or disproportionate legal costs in financial remedy claims. This is troubling and not good for the reputation of English family law and family lawyers, including with their clients. This persistent judicial criticism has seen a flow of shocking court judgments being handed down with stark judicial language. So changes of some form seem necessary and inevitable. But it is wider and has a potential significance for the English common law process of highly discretionary resolution of financial claims. Unless costs can quickly become proportionate and reasonable, the call for wholesale reform seems impossible to oppose. Therefore, what practical and realistic changes are now needed to bring proportionality between costs and claims?

The problem of proportionality

As long ago as the late 1990s, the Supreme Court, as it now is, in the case of *Piglowska v Piglowski* [1999] UKHL 27, [1999] 2 FLR 763 criticised the disproportionality of the amount of the costs compared to the amount in issue, albeit the amounts were incredibly mild compared to recent instances, barely into six figures.[1] But the warning was given. It was hoped it was, and indeed was then, a moderately rare occurrence. However, in more recent years, the problem has escalated and with it the frequency of judicial complaint, wringing of hands and criticism. Moderate changes such as recording at each hearing the level of costs to date and thereafter[2] seem to have had little effect. As judges have become increasingly busier, there has been insufficient time given at first appointments for appropriate and strong directions and indications to be given about the case.[3]

There is generally the high level of fees in bringing some cases to trial, irrespective of the amount in issue. More crucially and obviously there are the fees proportionate – in reality, disproportionate and unreasonable – to the amount in issue. Into this equation is the perceived failure to negotiate in order to settle without a final hearing with those, end of case, significant costs.

The level of fees goes directly to the law and its application. Why are such high levels of fees being incurred by one or both parties in the resolution of financial claims? Is this a criticism of the law and/or the process or of lawyers and/or the parties?

By and large, there are two distinctive aspects in bringing a claim to adjudication or settlement – obtaining and giving disclosure and then settling. I suggest that there can be no proper consideration of necessary, substantial changes to overcome disproportionate costs without a careful analysis of whether they arise in the former or the latter or both.

In the cases in which there has been distinctive judicial criticism, if the significant part of the costs has been in the disclosure process, as many lawyers might anecdotally perceive to be the case, then reform must be directed to a better, quicker, more efficient, perhaps more judicially inquisitorial process of getting to satisfactory disclosure. Because outside the high conflict dispute cases, once there was satisfactory and sufficient disclosure it is believed many solicitors have a fairly high expectation of settling, particularly with the assistance of specialist in court or private financial dispute resolution (FDR).

If, nevertheless, the analysis is that the greater part of the very high, disproportionate costs is being incurred in reaching a settlement irrespective of the disclosure process then this asks dramatic questions either of the process of settlement or of the uncertainty, unpredictability and unsatisfactory nature of our judge-made law. Whilst there are colossal benefits in the judicial discretionary approach, if it nevertheless leads to such uncertainty of the law and, consequently, directly to greater difficulty in settling with corresponding very high legal costs, then it might well be that the time has finally come for statutory reform. If it is the process of settlement, notwithstanding England being one of the most settlement-orientated family law jurisdic-

tions in the world, then measures must be directed to that process and costs orders made where the pre-final hearing settlement process does not occur, including failure to negotiate appropriately.

Accordingly, there should now be careful analysis of the reported decisions and reflection within the professions about whether these costs issues are issues caused by the disclosure or settlement process itself or settlement difficulties due to uncertainty of the law.

Case-law

Set out in the Schedule to this article are just some of the primary cases, specifically elements of the criticism in the judgments, of the costs.

What can and cannot be achieved?

(1) There cannot be any proscription, capping, of solicitors' rates; this has been suggested in recent cases.[4] Rates derive mostly from commercial market forces: rental, salaries, IT, insurances, etc. Moreover, although much family law is undertaken in either specialist family law practices or in general practitioner firms where there is some degree of control in respect of the family law rates, some family law work – including some of the bigger money cases which genuinely need substantial resources to bring appropriately to trial – is undertaken in larger corporate firms where family lawyers are on the same charging rates as their corporate colleagues. Certainly, there must be judicial comment in a summary assessment of costs where a party has instructed a law firm at rates inappropriate for that particular case, but there should be no limitation between the solicitor and the client in private matters.

(2) One of the best elements of the English family law system is legal services orders, rarely found abroad – the opportunity to level up and give equal representation. Yet, these orders are not made often. Parties struggle on, unable to instruct lawyers fully and comprehensively, sometimes acting in person or taking out litigation loans at very high rates. Cases either do not then settle as they should; alternatively, inappropriate courses of action are pursued. Any review of the processes should encourage the making of more arrangements for legal services orders, for the sharing out of available resources for proper legal funding and a specific court power for interim sales of assets to enable funding. In a few cases it may mean more costs are thereby incurred. In fact, quite probably in the greater number of cases, the matter should settle more quickly.

(3) The *Leadbeater* jurisprudence[5] of adding back paid costs needs review, especially deriving from the previous era of costs regimes. Although it has been narrowed and circumscribed, it is in its basic form still frequently trotted out in relation to costs claims. It is specifically inappropriate across-the-board of both needs and sharing cases, see 'Needs and sharing' below.

(4) Too often, in the perception of many family lawyers, what happens in a few high conflict and/or big money cases changes the way of working for everyone else in the profession in an unnecessary, sometimes quite burdensome, fashion. On any review, it must be very clearly understood that the significant majority of family law solicitors and barristers in the vast number of cases going through the Family Court are conducting them with proportionality of costs to the amount in issue and, indeed, with staggeringly modest levels of costs as seen from the perception of a few colossal costs cases. Such lawyers look on with amazement at the costs in some of the reported decisions, acknowledging this is a wholly different world of professional practice. Any reform must make sure it does not increase the burdens on the majority of practitioners for whom these disproportionate and/or very high costs issues are rarely relevant.

(5) Alongside the shocking costs decisions are other cases with equally strongly worded judgments criticising one party for gross failures in giving disclosure, conducting their personal affairs to make disclosure immensely difficult or, in many other ways, thwarting opportunity to understand the overall finances and then to settle. These cases rightly require work from the highest paid professionals with many lawyers in the team to follow many leads, often here and abroad. These cases have inevitably high costs because it is hard and long work to get to the truth and proper understanding. England rightly has a reputation for quite often finding out the financial background in cases when multitude of obstacles are put in the way. Review of reforms must take account of the immensely difficult balance for lawyers of knowing which are the cases justifiably requiring high costs in this sort of process, receiving praise and vindication in the ultimate judgment, and which cases may result in high costs being disproportionate. This balance can be one of the hardest aspects of the work of lawyers in this area.

(6) We must recognise there is absolutely no public sympathy with the legal profession on this issue. Even the party incurring substantial costs in pursuing necessary disclosure for sharing or appropriate needs resents paying them and some are dissatisfied after the conclusion. Each party naturally blames the lawyers of the other party but, in reality, some are often unhappy themselves at their own level of costs, even though content with the representation. Neither Parliament nor public opinion will have sympathy or support.

(7) The profession has perhaps not helped itself. When the initial costs criticism reported decisions were coming through, it might have been expected that the profession would have made it clear that there was no support for excessive or disproportionate costs. For the public looking in, it is far too easy to consider the profession is simply looking after itself and has a vested interest in not being too self-critical or self-reforming. Indeed, it might be thought the profession has so far been lucky in that there has not been public attention to any extent on this issue. It can surely only be a matter of time before it does appear in public debate, in the more populist media, and to the detri-

ment of the reputation of all those working hard to resolve cases with reasonable, modest levels of costs.

(8) The costs criticisms are also so misrepresentative of the profession; the theme for many lawyers is settling at the earliest appropriate opportunity, including referring matters to alternative dispute resolution. Most lawyers settle most cases at or well before the FDR stage. The reputational risk is great compared to what is really happening.

(9) The relatively recent amendment in May 2019 to the Family Procedure Rules 2010 (SI 2010/2955) (FPR)[6] requires consideration of refusal openly to negotiate reasonably and responsibly to amount to litigation conduct. This is specifically not a revival of *Calderbank*, a discussion not yet fully settled. It has been seen in some reported decisions where patently one party has refused to entertain any discussion of settlement. Yet this provision is very hard in practice. Of course, the court can look at open offers and will,[7] but what can it do about discussions behind privilege? There are some lawyers who insist that even the making of a privileged offer or the holding of a privileged meeting cannot be disclosed openly, the equivalent of the family law super-injunction. The reference in the FPR is to negotiating openly. Thus lawyers have seen a significant increase in the number of tactical open offers being put, sometimes at pointless stages such as just before an FDR hearing, all with the intention of gearing up for a costs claim later. If the court is genuinely and realistically going to look at what has happened about the process of endeavouring to resolve the case, it needs far more opportunity and power than presently set out in the FPR.

(10) Too often, costs can be an adjunct in the closing submissions. It is not yet known at that stage which way the judge will go on the arguments and therefore pressing costs too much may seem counter-productive. Producing detailed costs statements after a long case can be very expensive, and a cost to the client completely wasted if the judgment goes against and no costs application is possible. Of course, judges need an approximation of the costs incurred, but there should be a review of how costs can best be dealt with in the final judgment and outcome. Yet the discussions about *Calderbank* showed how difficult it is for judges coming to a view on appropriate sharing and needs then to have to factor in the analysis of costs. I suggest this is still an area where we do not yet have wholly satisfactory practice.

Needs and sharing

There is an important difference between these respective outcomes when the court looks at costs.

In a sharing case, where shared assets meet needs, whether 50% or according to provenance, each party is, as a matter of present law, liable for their own costs. They have no basis in law for asking for any other provision for their costs to be met as a matter of needs. If one party has substantially greater costs, perhaps through lawyers with a substantially higher charging rate, then that is a matter for them. Nevertheless, dissatisfaction with this apparent simplicity prompts *inter partes* costs claims. This is found within the arena of failures either to give early, open and transparent disclosure or excessive demands on disclosure. A party asserts that they would have had more by way of sharing if they had not had to incur unnecessary and excessive costs, hence a costs claim. I suggest this is a legitimate argument and should result in appropriate costs orders. But this does not require wholesale changes in procedure and can largely be dealt with under existing law or with some modifications.

Into this arena comes the apparent unwillingness of one party to engage in negotiation, making and responding to reasonable offers and similar, as referred to above. Again, this will quite probably lead to discrete costs orders. Any change to the FPR should make this more explicit. The culture has to change to that of even far greater settlement orientation and this requires costs orders where there has been clear culpability and failure. There have recently been several cases where parties have been criticised for a failure to negotiate reasonably and responsibly, within the terms of paragraph 4.4 of FPR PD 28A; some of these cases are included in the Schedule to this article.

It is in needs-based cases where major problems arise, in my assessment. Pursuing extensive disclosure to show a level of assets that can meet, justify, what the disclosing party might regard as a possibly artificially inflated needs-based claim. Resisting disproportionate or excessive lines of enquiry which will add little or nothing to the ultimate needs analysis and provision. Both give rise to significant costs in the disclosure process.

Sadly, in some needs cases, and the heart of the problem in too many cases, what might initially have been available in the overall assets to meet the needs of both parties, including the applicant if the financially weaker spouse, is simply not then available after the legal costs have been deducted or taken into account. One party then finds their needs cannot now be met because of the costs incurred. In these circumstances, needs then include liabilities which are legal costs, sometimes very high legal costs. It is at this point that the Family Court is in a real dilemma in law. It has a statutory duty to look at needs including liabilities, but if these are primarily or wholly the costs of the needs-claimant party, what should the court do? The liability might be a litigation loan or other commercial debt, soft borrowing from family or monies directly owed to the lawyers. If these costs liabilities are not provided for in the needs provision, thereby leaving the party with *that* liability, the party will not have their real, judicially assessed needs met, for example, for accommodation. Therefore, the statutory exercise of the court will have been unfulfilled and frustrated. Yet, understandably, the paying party argues that in the court making a needs provision to include costs incurred, they are in effect being ordered to pay the costs of the applicant, without any or any material summary assessment and perhaps at a disproportionate or excessive level. By providing for costs as part of needs and liabilities, the court is in effect ordering payment of *inter partes* costs without any proper consideration of quantum of the costs incurred by one party with their lawyer. Arguably, this is a costs order by the back door in circumstances where the default is that each party pays their own.

The Court of Appeal recently entered into this area in *Azarmi-Movafagh v Bassiri-Dezfouli* [2021] EWCA Civ 1184[8] by saying that needs includes liabilities for family law and

other legal costs.[9] This was a controversial decision – policy-making at judicial level without, perhaps, considering the wider implications for a significant number of other cases. Not least, by requiring in the financial settlement payment for the other side's still outstanding costs, incurred in already concluded children proceedings but in which there had been no order as to costs, the Court of Appeal was sanctioning the overturning of the no order as to costs in the children proceedings by ordering one party, the paying party, to pay those costs under the guise of financial needs. Was this interference with a previous order made by a family court intended? The impression given was that needs trump costs however incurred and whatever the amount. It risks going back to the pre-*White* case-law[10] of reasonable requirements of the applicant.

Yet at High Court level, other decisions[11] were making it clear that in appropriate cases, costs orders would be made which caused parties to dip below their needs provision. In other words, they had less than their needs because of the liability to meet some of their costs or that of the other party. This remains narrowly used. It cannot be. It must be used far more. It should be embraced in any reform provisions. Otherwise, there is an encouragement to litigate by the needs-claimant, confident that whatever level of costs are incurred, they will be met so that their needs are provided for. Of course, as part of the Matrimonial Causes Act 1973, section 25 exercise, a judge must carry out an analysis of whether the costs incurred by the needs-based claimant are reasonable; in as far as they are not, then liability for those costs would not or should not be included in the needs provision. Yet this is rarely or never part of the final adjudication in the court process. It arises in costs arguments at the conclusion, and sometimes after judgment. It is here that the muddle between unreasonably, excessively incurred costs and the needs-based claim for liability for those costs comes together. I suggest that there cannot be any proper reform and headway in this distinctive set of circumstances without deciding the fair approach and then how that process will work during trial.

Moreover, high legal costs perversely discourage settlement, the primary object for family law dispute resolution. A time arrives in the course of the case where costs reach a certain level when each party must go on to trial to get a costs order against the other side. One obvious reason why some cases, possibly increasingly more cases, are going to trial is that the level of costs of one or both parties makes a fair negotiated settlement extremely hard. One object of any reform must be to find a way for even more matters to settle at the FDR stage at the latest.

A most recent case[12] in the long saga of judicial criticism keenly highlighted the problem. Despite outrageous conduct by the applicant spouse, the wife, costing the husband tens of millions of pounds through various lost opportunities in share dealings, she nevertheless received, after an immensely short marital relationship, a generous needs-based provision on top of existing assets. Then, furthermore, was ordered to make a contribution of only £100,000 towards the husband's costs, which were predictably substantially more. Here was surely, hopefully, the high watermark of needs effectively trumping, overwhelming, substantial judicial criticism, in outcome and in costs, as a warning to other spouses not to interfere in the commercial dealings of the other party. This is one of the primary decisions now compelling the need for a substantial review and reform of practice and procedure. Without this costs reform and without that reform then having significant and early practical change, reform of the entire law itself will become unarguable.

Reform of substantive law

The necessity of substantial and effective changes to avoid the ongoing scandal of excessive and disproportionate costs is key in the face of increasing demands for reform through statute of the law of financial remedies on divorce. *White* in 2000 was brilliant in changing the entire direction of financial remedy law, to one which was in keeping with the expectation of married couples, was not gender discriminatory and which maintained the English priority of provision for needs based on marital commitment. Subsequent decisions have reinforced the flexibility of the English common-law approach to reflect societal expectations. However, in so doing, case reports have also increased uncertainty, unpredictability and thereby the risk and/or benefit of litigation. If the discretionary approach, the opportunity for tailor-made justice, upholding fairness and supportive of contributions and sacrifices made to the marital relationship is shipwrecked on the rocks of disproportionate and excessive costs, then it may be time to rebuild the ship and take another course and direction.

Unless there can be a real change in law, practice and culture in the shorter medium-term in respect of these excessive and disproportionate costs issues, then the argument for statutory reform will become unanswerable. If judges by their articulation of the law over the past two decades coupled with several procedural costs provisions (and any forthcoming reforms now necessary) cannot prevent frequent scandals regarding costs, then Parliament must step in, possibly dismantling the many excellent elements in our present law operating fairly in the vast majority of cases. A few high conflict, high profile excessive/disproportionate costs cases would spoil the good process for the vast majority of parties. This is the challenge presenting the profession.

Schedule of some costs criticism judgments

KSO v MJO [2008] EWHC 3031 (Fam), Munby J – the total marital assets were £818k, the total costs incurred to the financial dispute resolution hearing were £553k, leaving £217,530. Munby J quoted his earlier decision of *A v A* [2007] EWHC 1810 (Fam) at [270]:

> 'Costs in too many so-called "big money" cases – in modern conditions many such cases do not in truth involve "big" money at all – are, as here, grossly disproportionate to either the amounts or the issues at stake. I have had occasion before to deplore the expenditure – one is tempted to say the waste – of money in such cases … A very recent example is provided by *Wood v Rost* [2007] EWHC 1511 (Fam), where, speaking of a case which had been conducted at "vast expense," the Deputy Judge lamented that the late Mr Charles Dickens was no longer alive to write a 21st century sequel to *Bleak House*. The simile, if I may say so, is all too apt. The accusatory finger which in the 19th century was appropriately pointed at the High Court of

> Chancery is, in the modern world, more appropriately pointed at the Family Division.' [77]

J v J [2014] EWHC 3654 (Fam), Mostyn J – the total costs were £2.885m, the total costs by the final hearing were £920K. The judge observed:

> 'In my judgment the time has come when the law-makers in this country, whether they are legislators or judges, must stop saying something must be done and actually do something.' [13]

WG v HG [2018] EWFC 84, Francis J – the total assets were circa £12.25m, the needs claim was assessed at £3.65m, the wife's total costs (including children) were £925k:

> '… people cannot litigate on the basis that they are bound to be reimbursed for their costs … no one enters litigation simply expecting a blank cheque.' [91]
>
> 'Parties cannot spend £1 million on their representation without being prepared to face the consequences of their decision to incur that level of expenditure.' [94]

OG v AG [2020] EWFC 52, Mostyn J – the total assets were £16.3m, the total costs were £1m, largely as a result of the husband's conduct:

> 'It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, whether it is being decided by reference to needs or sharing'. [31]
>
> 'The message should go out that if you are guilty of deliberate non-disclosure, even if it is relatively minor, you will pay a penalty in costs.' [89]

LM v DM (Costs Ruling) [2021] EWFC 28, Mostyn J:

> '… the applicant made no serious attempt to negotiate openly and reasonably beyond setting out her in-court forensic position in her witness statements. My impression was that the applicant was determined to fight the application come what may.' [3]
>
> 'Litigants must learn that they will suffer a cost penalty if they do not negotiate openly and reasonably.' [4]

WG v HG [2018] EWFC 84, Francis J:

> 'People who engage in litigation need to know that it has a cost … She will have to make the sort of decisions about budget managing that other people have to make day in day out … 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.' [93]

R v B & Ors [2017] EWFC 33, Moor J*:*

> '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.' [85]

LM v DM [2021] EWFC 28, Mostyn J – interim applications ought to be 'pragmatically settled' and:

> 'the result was much closer to her position than the respondent's. She also succeeded on issues of principle which divided the parties. I agree that there were aspects of the respondent's case which were unreasonable' [2]
>
> 'However, I agree that the applicant made no serious attempt to negotiate openly and reasonably beyond setting out her in-court forensic position in her witness statements. My impression was that the applicant was determined to fight the application come what may.' [3]

FF v KF [2017] EWHC 1093 (Fam), Mostyn J:

> 'Swathes of evidence and time were devoted to an enquiry as to the scale of the marital acquest, which with hindsight seems almost completely irrelevant and unnecessary. The wife's case was that the acquest amounted to just over £3 million. Given that the husband's open offer was for more than half of that figure one can see that this was always going to be from first to last a needs case. Indeed, both parties' open positions were predicated on an assessment of the wife's needs and so it is very difficult to understand why the court allowed this elaborate enquiry to be played out.' [7]

E v L (No 2: Costs) [2021] EWFC 63, Mostyn J:

> 'As I have said before and will no doubt have cause to say again, if you do not negotiate openly, reasonably and responsibly you will suffer a penalty in costs.' [7]

Uddin v Uddin & Ors [2022] EWFC 75, HHJ Wildblood QC:

> 'These are feral, unprincipled and unnecessarily expensive financial remedy proceedings. It took days for me to read the papers and has taken even more days to write this judgment.' [1]
>
> 'It is the costs, a significant proportion of which have been driven by the wife's dogmatic pursuit of the speculative and unprincipled trust claims and by the husband's dishonest portrayal of his position within the business, that make the discretionary decision under section 25 complex.' [11]
>
> 'As I have made plain throughout this judgment, I consider that these proceedings are a disgraceful example of how financial remedy proceedings should not be conducted.' [200]

Xanthopoulos v Rakshina [2022] EWFC 30, Mostyn J:

> 'Figures like this are hard to accept even in a conflict between the uber-rich, but in this case the wife's Form E discloses two properties in London each worth about £5 million and a sum of about £11 million in the Coutts account. There are predictable disputes as to the true beneficial ownership of one of the properties and of the sum in the Coutts account. The wife also discloses properties in Siberia worth a little over £1 million. The husband, who has next to nothing in his name, says that this is an entirely false presentation and that the wife is correctly ranked by Forbes as the 75th richest woman in Russia, with vastly valuable interests in supermarkets in Siberia. Even if this were true (and the suggestion is hotly contested) to run up in domestic litigation costs of between £7 million and £8 million is beyond nihilistic. The only word I can think of to describe it is apocalyptic.' [12]

Crowther v Crowther & Ors [2021] EWFC 88, Peel J:

> 'The parties have argued before me about almost every imaginable issue, no matter how trivial. Unsurprisingly, the legal costs are enormous.' [1]

> ' … the costs are utterly disproportionate.' [2]
>
> 'The only beneficiaries of this nihilistic litigation have been the specialist and high-quality lawyers. The main losers are probably the children who, quite apart from the emotional pain of seeing their parents involved in such bitter proceedings, will be deprived of monies which I am sure their parents would otherwise have wanted them to benefit from in due course.' [87]

Re Z (No 2) (Schedule 1: Further Legal Costs Funding Order; Further Interim Financial Provision) [2021] EWFC 72, Cobb J – the judge criticised the mother's solicitors for showing insufficient restraint accumulating billable hours since the previous hearing:

> 'I set a budget within which I expected the mother's solicitors to work.' [34]
>
> 'I am not prepared for my legal funding orders, and the rationale which lies behind them, simply to be disregarded. [36]
>
> 'I am prepared to allow the mother a further sum … Any potential overspend will require prior court authorisation, or will otherwise need to be accepted at the solicitor's risk.' [41]

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Notes

1 Total costs of £128,000 of both sides up to the Supreme Court including a total of five discrete hearings, versus net assets of about £127,000.
2 FPR 9.27.
3 Compounded as a consequence of the COVID-19 lockdown experience by many first appointments being on paper, including by consent, with much reduced judicial opportunity to reflect on the future direction of the case and the costs thereby being incurred. This is not to argue against more paper and consent first appointment hearings, but to identify one cause.
4 For example, *Xanthopoulos v Rakshina* [2022] EWFC 30 at [14].
5 *Leadbeater v Leadbeater* [1985] FLR 789.
6 FPR PD 28A, para 4.4.
7 FPR 28.3(7)(b).
8 Paying party ordered to pay £425,000 for accommodation but also £200,000 of a costs liability of £257,000 in respect of the financial remedy proceedings, children proceedings and some criminal proceedings, on the basis that the recipient would only be responsible for a small level of debt.
9 On a similar basis, it has recently been held by the Court of Appeal in *Hirachand v Hirachand & Anor* [2021] EWCA Civ 1498 that an award of reasonable financial provision under the Inheritance (Provision for Family and Dependants) Act 1975 can include, by way of provision for the claimant's needs, a sum in respect of the claimant's liability to pay a conditional fee agreement (CFA) uplift (notwithstanding that this would be irrecoverable under an *inter partes* costs order), where entering into a CFA was the claimant's only option in order to pursue the claim.
10 *White v White* [2000] UKHL 54.
11 To include *VV v VV* [2022] EWFC 46; *TT v CDS* [2019] EWHC 3572 (Fam); *R v B and Capita Trustee Services Ltd* [2017] EWFC 33.
12 *VV v VV* [2022] EWFC 41.

Predatory Marriage – the Great Inheritance Scam?

Charlotte John

Gatehouse Chambers

The term 'predatory marriage' is not a legal concept, but rather a convenient descriptor for a marriage entered into in circumstances where one party to the marriage is vulnerable and has been induced to enter into the marriage by the other party who is acting solely for financial gain. The effects of a later life predatory marriage are pernicious and sad, and the current state of the law, particularly in the context of inheritance rights, is unsatisfactory.

The topic gained attention in the United Kingdom following the death of Joan Blass, who died in 2016 at the age of 91 with a diagnosis of severe vascular dementia. Joan had formed a friendship with a man, CF, who was 24 years her junior. Following Joan's death, her family discovered that Joan and CF had married in secret only a few months earlier. If these events were not shocking enough, Joan's family discovered that this secret marriage, for reasons explained further on in this article, had caused them to be disinherited.

This article explores the following issues:

- The impact of marriage on inheritance rights.
- The particular difficulties that arise where one party to a predatory marriage has subsequently died.
- The steps that can be taken to prevent a predatory marriage and to unravel its consequences in the lifetime of a vulnerable individual.
- Possible avenues for the development of the law in this area.

While this article, for convenience, refers to marriages and focuses on the statutory provisions governing marriages, for all material purposes the formation of a civil partnership will have the same consequences.

Marriage and inheritance rights

There are three key consequences of a marriage in the inheritance context:

(1) Unless a will has been made in contemplation of a marriage between the testator and a particular person, a marriage will have the effect of automatically revoking any prior will: section 18 of the Wills Act 1837 (WA 1837). Divorce or annulment of the marriage does not revive a will revoked under section 18 of the WA 1837.

(2) Where a testator dies intestate, either because they never made a will in the first place or because a prior will was revoked upon entering into the marriage, the surviving spouse has a statutory right to a share of the estate: the entire net estate if the deceased left no issue (children or remoter descendants), or otherwise the sum of £270,000 plus interest and a half share of the residue.

(3) A surviving spouse also has standing to bring a claim for reasonable financial provision under the Inheritance (Provision for Family and Dependants) Act 1975 (the IPFDA 1975).

English law draws a distinction between void and voidable marriages. A void marriage is a nullity from the outset and does not change the marital status of the participants. A voidable marriage, on the other hand, although tainted by some particular defect, is treated as a valid subsisting marriage unless and until the marriage is annulled.

Since a void marriage will be treated as though it had never taken place, an earlier will is not revoked by a marriage that is void in the eyes of English law: *Mette v Mette* (1859) 1 Sw &Tr 416.

Historically, English law had been willing to treat a marriage formed in circumstances where one party lacked the necessary mental capacity to enter into the marriage as being void from the outset: see e.g. *Browning v Reane* (1812) 2 Phill Ecc 69.

The position changed as a result of the Nullity of Marriage Act 1971, now re-enacted in all material terms by the Matrimonial Causes Act 1973 (MCA 1973). The grounds on which a marriage is void are set out in section 11 of the MCA 1973 and do not include a lack of mental capacity. Under section 12(1)(c) of the MCA 1973, a marriage entered into by a person who did not validly consent to it, whether as a result of duress or a lack of mental capacity, is merely voidable and not void. A decree of nullity in the case of a voidable marriage does not operate retrospectively and the marriage is recognised as subsisting prior to its annulment (section 16 of the MCA 1973).

Challenging a voidable marriage post-death – the current law

The consequences of this change in the law for inheritance rights were considered by the Court of Appeal in *Re Roberts* [1978] 1 WLR 653. The deceased had made a will of which the defendant was a beneficiary. The deceased then married and, following his death, his wife sought letters of administration on the basis that the deceased had died intestate since the will had been revoked by the marriage. Her entitlement to a grant was contested by the defendant, who claimed that the deceased had lacked capacity to consent to the marriage.

The defendant argued that consent was so fundamental to the formation of a marriage that a marriage formed in circumstances where one of the parties could not consent, or had not consented, should not be treated as being a marriage that engaged the revocation provisions of section 18 of the WA 1837 and that the will therefore remained valid.

The Court of Appeal rejected that argument. It was held that a marriage cannot be annulled where one of the parties has died, but in any event, since a voidable marriage is to be treated as subsisting and effective until it is annulled, such a marriage will revoke an earlier will whether or not the marriage is later annulled. It was acknowledged that this could produce the surprising result that a party could be coerced into marriage, thereby automatically revoking their will, and then die without having had the opportunity to annul the marriage, leaving the perpetrator to benefit from the resulting intestacy.

The circumstances in which the courts can make declarations as to the validity of a marriage are now further defined by statute. Section 55 of the Family Law Act 1986 (FLA 1986) provides that a person with sufficient interest can apply to court for a declaration that a marriage was valid on a particular date, but section 58 of the FLA 1986 prevents a court from making a declaration that a marriage was void at inception.

Joan Blass's family found themselves caught in this particular bind. As the law stands, there is little that can be done to unravel the consequences of a predatory marriage post-death. The only option available to a party who loses their inheritance, or receives a reduced inheritance, as a result of events of this description would be to consider bringing a claim under the IPFDA 1975, but that will not afford a remedy where the disappointed party is outside the category of eligible claimants or where the disappointed party is unable to demonstrate any need for financial provision from the estate.

Preventing predatory marriage/unravelling its consequences

In much the same way that it is possible to lodge a caveat to prevent a grant of probate from being issued, it is possible to lodge a caveat against marriage under section 29 of the Marriage Act 1949 at the local Register Office. The entry of a caveat will not, however, prevent a religious marriage from taking place.

Recourse can also be had to the inherent jurisdiction of the High Court, in the case of vulnerable individuals who possess capacity, and to the Court of Protection, in the case of persons lacking capacity, to put in place protective orders, including injunctive relief, to prevent contact between a vulnerable individual and a person seeking to exploit them, and also to obtain a forced marriage protection order under Part 4A of the Family Law Act 1996 to prevent a marriage from taking place.

It should be noted that the test for capacity to marry is much lower than the test for capacity to make a will or to manage one's property and financial affairs. It has been emphasised repeatedly in the case-law that the contract of marriage is a simple one which does not need a high degree of intelligence to comprehend. The principles have been helpfully summarised by Mostyn J in *NB v MI* [2021] EWHC 224 (Fam), in which he held at [27] that a prospective spouse 'must have the capacity to understand, in broad terms, that marriage confers on the couple the status of a recognised union which gives rise to an expectation to share each other's society, comfort and assistance'. Beyond this, the wisdom of a particular marriage is irrelevant and it is not necessary that a person understands the financial consequences of a marriage.

Given that the test for capacity to marry is much lower than the test for capacity to manage property and financial affairs, it will often be necessary for the matter to be placed before a dual ticketed judge able to exercise any relevant Court of Protection jurisdiction alongside the inherent jurisdiction to protect vulnerable individuals.

In *WU v BU & Ors* [2021] EWCOP 54, BU was a 70-year-old lady with vascular dementia and an estate worth circa £1.3m. She had established a relationship with NC, a much younger man. NC had a slew of convictions for dishonesty offences, including fraud, theft and blackmail. He had taken BU to visit a solicitor to make a new will, moved into her home and had received cash from her. He had been arrested after attempting to liquidate BU's investment portfolio. BU had proposed to NC. NC wished to enter into a civil partnership with BU, expressing the view that he would not marry her because the relationship was platonic and that there was an understanding between them that NC would have sexual relationships with other women. BU herself viewed the relationship as pivotal to her happiness and well-being. She lacked capacity to manage her property and affairs or to make decisions about contact with NC, but possessed the capacity to enter into a marriage.

The court found that there had been a 'deliberate and calculated attempt' by NC to subvert any independent decision-making on BU's part, which had been financially motivated. As a result, and notwithstanding that BU possessed capacity to enter into a marriage, the court made orders preventing contact between NC and BU and made a forced marriage protection order.

In circumstances where a predatory marriage is discovered after the fact, proceedings may be brought in the Family Court to dissolve the marriage and in the civil courts to recover any misappropriated funds. It may well be the case that an individual had capacity to enter into the marriage, but that they lack capacity to litigate, and in such a case some suitable person will need to act as a litigation friend. Where there is a dispute about whether or not the vulnerable individual has capacity, or as to whether or not contact with their spouse or the dissolution of the marriage or other litigation is in their best interests, an application to the Court of Protection will be required.

If the vulnerable individual possesses testamentary capacity, they will be able to execute a new will or to make a codicil republishing the will revoked by the marriage. If they lack testamentary capacity, an application can be made to the Court of Protection for a statutory will. In the case of a very frail individual, such applications can be made on an emergency basis for an interim holding will to be made and may need to be the first line of attack in unravelling the consequences of a predatory marriage. In *Re Davey* [1981] 1 WLR 164, an elderly lady had married an employee of the nursing home at which she resided, thereby revoking her will. In light of the urgency of the situation, her age and poor health, and the clandestine and suspicious nature of the marriage, the court authorised the execution of a statutory will on the terms of her original will, and without notice to the husband. She died 6 days after the execution of the statutory will.

Avenues for the development of the law

Scope for development of the common law

There have been a handful of cases post-dating *Re Roberts* [1978] 1 WLR 653 in which the courts have declined to recognise marriages, and have made declarations to that effect, where the marriage was formulated in a foreign jurisdiction in circumstances where one of the parties has lacked capacity or was coerced into the marriage, on the grounds that such marriages offend public policy: see e.g. *KC & Anor v City of Westminster Social & Community Services Department & Anor* [2008] EWCA Civ 198; *B v I (Forced Marriage)* [2010] 1 FLR 1721; *Re RS (Capacity to Consent to Sexual Intercourse and Marriage)* [2015] EWHC 3534 (Fam).

These cases were examined by Mostyn J in *NB v MI* [2021] EWHC 224 (Fam) and the correctness of the decisions doubted, on the grounds that it is at least seriously arguable that they, impermissibly, offend section 58 of the FLA 1986. This line of authority certainly seems unlikely to be extended as a means of circumventing a marriage solemnised in this jurisdiction.

What these decisions all reveal, however, is a natural repugnancy on the part of the courts to marriages conceived in exploitative circumstances. The argument has not yet been tested in English law, but this begs the question as to whether or not there could be any scope for equity to fashion a remedy so as to deprive a predatory spouse of an inheritance gained through the marriage.

It is an established maxim that equity will not allow a statute to be an instrument of fraud. Equity may also intervene so as to prevent a person from profiting from their own wrongdoing. This latter principle underlies the forfeiture rule, which precludes a person from obtaining or enforcing inheritance rights in cases of unlawful killing. The forfeiture rule does not depend upon, or even require, a successful criminal prosecution to have taken place and the unlawful killing must be proved on the civil rather than criminal standard. There is a statutory scheme, the Forfeiture Act 1982, allowing the court to grant relief from forfeiture, where the rule would produce an injustice.

At present, the forfeiture rule has only been applied in this jurisdiction to cases involving crimes leading to death. However, the public policy basis of the rule is a broad one. In the notorious case of *In the Estate of Crippen, Deceased* [1911] P 108, Sir Samuel Evans P said:

> 'It is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime …'

The English courts have also withheld legacies from parties who have been found to have procured them by fraud, including marriage related fraud. In *Wilkinson v Joughin* (1866) LR 2 Eq 319, a woman had purported to marry the deceased, who made provision for her as his wife in his will, when all along she was married to another man. In view of the fraud committed by her, the bequest was held to be void.

In other jurisdictions, the courts have been willing to extend the forfeiture rule to deprive a predatory spouse of inheritance rights. On this basis, in *Campbell v Thomas* 73 AD3d 103, the New York Supreme Court held that a woman who had secretly married a man who lacked mental capacity as a result of dementia had forfeited any claim to a share of his estate.

On the right facts, it is conceivable that an English court could be persuaded to adopt such an approach in a case of predatory marriage.

Statutory reform

The Law Commission in its report, *Celebrating Marriage: A New Weddings Law*,[1] makes recommendations for a strengthened system of preliminary checks and, in the case of intended civil marriages, the publishing of notices of intention to marry online, which may, if adopted, offer some enhanced protection against predatory marriage. The issue of inheritance rights was outside of the scope of the Celebrating Marriage project, but the interaction between marriage and the law of wills is an issue that is within the scope of the Law Commission's Making a Will project[2] and which will hopefully be picked up when the Law Commission resumes that project (which was paused after its commencement in 2017 to focus on the Celebrating Marriage project).

The family of Joan Blass are campaigning for reform of the law. Their MP, Fabian Hamilton, proposed a Private Members' Bill in 2018 (the Marriage and Civil Partnership (Consent) Bill), but the Bill did not progress beyond a first reading.

One of the goals of the family's campaign is to create a specific offence of predatory marriage. However, 'forced marriage' is already a crime under section 121 of the Anti-social Behaviour, Crime and Policing Act 2014 carrying a sentence of up to 7 years' imprisonment. A person commits an offence if they use violence, threats or coercion for the purposes of causing another person to enter into a marriage, or cause a person lacking mental capacity to consent to marriage to enter into a marriage, in circumstances where they believe or ought reasonably to believe that their conduct would cause the other person to enter into a marriage without free and full consent.

Beyond circumstances of outright coercion, it is difficult to prove that a person has induced another person to enter into marriage for untoward reasons and it is not easy to precisely define and legislate against predatory marriage.

The reasons that lead two people to enter into a marriage may be multifarious and mixed, and each party may have their own motivation. If two consenting adults

wish to enter into a marriage, one for reasons of financial security and another for reasons of companionship, the state should naturally be slow to interfere in such matters save in cases, such as in *WU v BU & Ors* [2021] EWCOP 54, of very obvious exploitation.

Even cases involving lack of capacity may not be entirely clear cut, there may be nothing inherently exploitative in a marriage formed at the end of a long and loving relationship where the capacity of one of the parties has waned.

One of the proposals of the Marriage and Civil Partnership (Consent) Bill is to repeal section 18 of the WA 1837 outright. That is an outcome that has the potential itself to lead to undesirable results. Given the low threshold for capacity to marry, the repeal of section 18 of the WA 1837 could lead to situations whereby a person enters into a valid marriage but then lacks sufficient capacity to make a new will making provision for their spouse. People are also often not terribly efficient at sorting out their affairs. There is a tension between the expectations of beneficiaries under an earlier will, formulated before a new marriage was in prospect, and the responsibilities that the new spouses owe to one another. In many, if not most cases, it may be preferable that this tension is, by default, resolved in favour of the new spouse by automatically revoking the prior will so that the survivor will at least receive provision on intestacy if either party dies before making a new will.

A more limited amendment to section 18 of the WA 1837, preventing a marriage formed in circumstances where one of the parties did not validly consent by reason of duress or lack of capacity from automatically revoking a will, may be a better solution. If the marriage is not annulled, the survivor would still have the status of a spouse for the purposes of any claim under the IPFDA 1975, which would be considered on its merits, but otherwise any prior will would stand.

Revocation or amendment of section 18 of the WA 1837 would still not provide a complete solution to the problem of predatory marriage, since a predatory spouse would still take on intestacy if the deceased spouse had not made a prior will.

Other commentators have suggested, therefore, that lack of capacity should be added to the circumstances in which a marriage will be void from the outset under section 11 of the MCA 1973. However, that is also not without the risk of undesirable consequences. Capacity may fluctuate. Why should a person who regains capacity and wishes to remain in a marriage formed when they temporarily lacked capacity not retain the status of being a spouse?

The author suggests that the introduction of an express forfeiture rule, depriving a person who has caused another to enter into a forced marriage, defined in equivalent terms to section 121 of the Anti-social Behaviour, Crime and Policing Act 2014, of any financial benefits resulting from such a marriage, akin to that which applies in cases of unlawful killing, would be preferrable to sweeping changes to the law relating to marital status and its consequences for wills. A measure of this description would provide a tailored remedy in those rare but devastating cases of predatory marriage, without diminishing the rights that are currently otherwise extended to surviving spouses.

Notes

1 Law Commission, *Celebrating Marriage: A New Weddings Law*, Law Com No 408 (18 July 2022).

2 Details of the project and the Making a Will consultation paper are available online, at www.lawcom.gov.uk/project/wills/.

Pound for Pound Orders – Are They Legal?

Simon Calhaem

29 Bedford Row

It is now over 20 years since Holman J, in *A v A (Maintenance Pending Suit: Payment of Legal Fees)* [2001] 1 FLR 377, recognised that a maintenance order could reasonably include a contribution towards the payment of legal fees. At the time he handed down his decision, the Judge identified a mischief that he sought to remedy, namely the fact that the wife was denied eligibility for legal aid by the making of her maintenance pending suit (MPS) award. The problem of providing a level playing field to all parties, however, remains one which has consistently faced litigants since that time, aggravated by the removal of legal aid funding for almost all financial remedy cases.

The law in this area has evolved considerably since then. Sections 49–64 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 gave us section 22ZA of the Matrimonial Causes Act 1973 and power to make legal services payment orders (LSPOs). Funding orders have also been made (on an *A v A* basis) in proceedings under Schedule 1 to the Children Act 1989 (see *BC v DE (Proceedings under Children Act 1989: Legal Costs Funding)* [2016] EWHC 1806 (Fam), [2017] 1 FLR 1521 by Cobb J), Part III of the Matrimonial and Family Proceedings Act 1984 (see *LKH v TQA AL Z (Interim Maintenance and Costs Funding)* [2018] EWHC 1214 (Fam) by Holman J) and the Inheritance (Provision for Family and Dependants) Act 1975 (see *Weisz v Weisz & Ors* [2019] EWHC 3101 (Fam), [2020] 2 FLR 95 by Francis J).

That the law should permit the proper availability of litigation funding (and with it, access to justice) is now well settled, but this article seeks to investigate an increasingly common new type of legal funding order, the so-called 'pound for pound order', described in its simplest terms as an order requiring the respondent to pay the applicant's lawyers £1 for each £1 which he chooses to spend on his own.

The use of such orders at an LSPO hearing are (anecdotally) becoming more common at all levels of the Family Court, giving rise to the question: Is it legitimate simply to fix the husband's contribution to the wife's costs by reference to his own?

What of the 14 principles set out by Mostyn J in *Rubin v Rubin* [2014] EWHC 611 (Fam), [2014] 2 FLR 1018 at [13] – a list of guidance which has been followed at High Court level and noted by the Court of Appeal with approval in *Villiers v Villiers* [2018] EWCA Civ 1120, [2018] 2 FLR 1183? While it is not necessary to replicate the entire list of the judge's principles, a pound for pound order would seem to offend against the following (using the same subparagraph numbering as found in *Rubin*):

> '(iv) The court cannot make an order unless it is satisfied that without the payment the applicant would not reasonably be able to obtain appropriate legal services for the proceedings.'
>
> '(xi) Generally speaking, the court should not fund the applicant beyond the FDR, whereafter a further hearing should normally be listed to consider ongoing funding needs.'
>
> '(xiv) [The] evidence must … include a detailed estimate of costs both incurred and to be incurred.'

To order that a husband (more commonly the payer) must pay to the wife whatever he pays his own lawyers seems to break the causal link between what the wife reasonably needs in order to be represented and what the husband is to pay for those services. His own reasonable legal fees may be more or less than the wife's, meaning she may suffer or profit unfairly and, to complicate the picture, LSPO orders in fact rarely cover 100% of the costs sought, since the parties' solicitors are often expected to 'carry' an acceptable element of unpaid costs until the next stage.

So why then does the pound for pound order seem to stand as an outlier to the *Rubin* principles? It is true that there have been some other limited examples of exceptions to those principles – for example, in *Villiers v Villiers* [2018] EWCA Civ 1120, [2018] 2 FLR 1183, the Court of Appeal declined to interfere with the LSPO made by Parker J, despite there being no detailed cost budget and the order being made 'until further order' rather than until the financial dispute resolution. In giving the lead judgment (in what was an exceptional case of wilful non-disclosure), King LJ said (at [111]) 'in dismissing the appeal in relation also the costs allowance, I should not, on any basis, be regarded as in some way condoning any "dumbing down" of the now accepted procedural requirements in the making of such an application. However, this was a discretionary exercise in an interim application'.

The answer may lie in the fact that a pound for pound order is not in fact an order for LSPO at all; it appeared (by proper application) as an enforcement order or injunction – pursuant to the *Hadkinson* line of authorities – dating back to *Mubarak v Mubarik (Contempt in Failure to Pay Lump Sum: Standard of Proof)* [2006] EWHC 1260 (Fam), [2007] 1 FLR 722 (a case which requires little introduction to the family lawyer). Mr Mubarak had been guilty of the most

egregious breach of court orders (he had been ordered to pay his wife £4.8m over the previous 7 years but had paid almost none of it) when Bodey J dealt with the wife's *Hadkinson* application to debar Mr Mubarak from defending her substantive applications (for the setting aside of certain transactions and the variation of nuptial settlements). Bodey J refused her request for blanket *Hadkinson* relief; her secondary position appeared to be that his participation should instead be conditional upon his compliance with certain terms (including that if he paid £1 to his own lawyers, he should also pay £1 into a joint account in the names of the parties' respective solicitors). In acceding to Mrs Mubarik's submissions, (and if the pun be forgiven) Bodey J seems to have coined the phrase 'pound for pound' during the course of that hearing. Such an order fits well in this context given that *Hadkinson* relief is available only where there exists an 'impediment to the course of justice' (see *de Gafforj v de Gafforj* [2018] EWCA Civ 2070).

What this order was not, was an order for legal services (at the time, *A v A*) provision. It was argued by Mr Mubarak's counsel that the wife should have passed down that route: Bodey J rejected that argument in the following way:

> '85 On the question of terms, Mr Howard says that there is no reported case of facts remotely like these where conditions have been imposed, and that it would be quite wrong to use Hadkinson to put money in the wife's hands as a condition of the husband's participation at the December 2006 hearing. It would amount to enforcement by the back door. The wife could instead have used the conventional route of an application pursuant to *A v A (Maintenance Pending Suit: Payment of Legal Fees)* [2001] 1 WLR 605 to obtain a costs fund. However, I consider that such would have been both déjà vu and pointless. She already has more than adequate income provision; but the husband does not comply with it and practical enforcement has not proved possible.
>
> 86 An *A v A* application would simply have been a re-run of the same expensive hare as previously ended up in stalemate when the wife tried to enforce the existing periodical payments order … '

In *LKH v TQA Al Z (Interim Maintenance and Costs Funding)* [2018] EWHC 1214 (Fam), Holman J said:

> '20 … it is, in my view, an especially strong thing for any court to debar a litigant even from being heard in defence of an application made against him. It is one thing under the *Hadkinson* jurisdiction (*Hadkinson v Hadkinson* [1952] P 285) to prevent a party who is in contumacious breach of orders from making some further application for himself or herself. That may in appropriate cases be appropriate and permissible. But it is, in my view, a very different and indeed very extreme, course for a court altogether to debar somebody from being heard. In the process the court in fact denies itself the opportunity of being as fully informed as it would wish on the issues in question …
>
> 21 In my view, however there is an alternative approach which is clearly available to me. I will injunct the husband from paying any further money (whether for their profit cost or disbursements) to any firm of solicitors practicing in England and Wales (or any counsel instructed him in on a Direct Access basis) unless he pays an equal amount (i.e. pound for pound) to the wife's solicitors towards satisfaction and discharge of the arrears and current instalments of legal services …
>
> 22 Mr Hale objected that such an order and approach was denying the husband the means of obtaining legal advice, which he submitted is contrary to principle and is impermissible. I wish to stress very clearly indeed that it is not intended to deny, nor is it denying, him the means of obtaining legal advice. As far as I am concerned, he can go straight out and pay £100,000 to Stewarts Law for further legal advice, the only condition is that he also pays pound for pound £100,000 to the wife's solicitors.'

Holman J was there dealing with a *Hadkinson* type situation – not a freezing injunction (in respect of which there is a significant body of authority that such an injunction should not impede the payment of legal fees at any billed cost – see *Cala Crystal SA v Alborno*, *Times Law Report*, 6 May 1994, *HMRC v Begum* [2010] EWHC 2186 (Ch), or what Neuberger J said in *Anglo-Eastern Trust Ltd and Kermanshahehi* [2002] EWHC 2938 and 3152 (noted with approval by Mostyn J in *Xanthopoulos v Rakshina* [2022] EWFC 30) authorities which might, perhaps, provide persuasive grounds that this form of order had the practical effect of operating as an interference in the husband's right to instruct whomever he chose, and at whatever the cost levied to him – although such arguments could be assuaged or deflected by showing that non-payment amounted to an 'impediment to the course of justice'.

It is important to note then that 'Pound for Pound' in *LKH v TQA Al Z* [2018] EWHC 1214 (Fam) was not used as to fix the *quantum* of the LSPO award (that had already been determined according to the *Rubin* principles), but by way of a means of enforcement – the order (in the form of an injunction) requiring the husband to make a contribution to the arrears and ongoing LSPO in the same amount as any future contribution to his own solicitors.

Sometimes, pound for pound orders appear where there is a lack of clarity about the husband's resources or his ability to meet an LSPO. This should not happen; instead (as stated by Charles J in *G v G (Maintenance Pending Suit: Costs)* [2003] 2 FLR 71), the court is entitled to take 'a broad and robust view as to the means which it is not then in a position to decide'. The husband can and should address any potential unfairness (as Charles J confirmed in *G v G*) by providing proper disclosure of his means and applying for a variation (which would now be made pursuant to section 22ZA(8) of the Matrimonial Causes Act 1973).

A not uncommon phenomenon without a fixed sum underlying the pound for pound order is that the husband simply sacks his legal team in order to act as a litigant in person, leaving the wife with an unenforceable order.

The authorities demonstrate that pound for pound orders should *not* be made as a general form of LSPO but *should* rightly exist in the context of enforcement (or security), and when there are grounds for an injunction against the payer of the sort identified above; to make such orders by way of general cost funding goes well beyond the 'reasonable' test associated with maintenance/the *A v A* provision or the strict terms of section 22ZA. More is required to justify such an order, Holman J was clearly describing the impediment to justice presented by the husband in *LKH v TQA Al Z* [2018] EWHC 1214 (Fam) at [23]:

> 'It is, frankly, intolerable and an affront to justice that in

> the last month this man paid £95,000 to his new solicitors at the very time when he was already in arrears and getting further into arrears with his wife and her very patient and long-suffering solicitors in the amounts I have described. The rationale behind the Mubarak decision must be to try and achieve an equal or level playing field and that is all I seek to do by this order …'

The laudable aim of providing a level playing field to all litigants should not be confused with a somewhat *laissez faire* method of fixing the quantum of an LSPO in a way which ignores (or at least sidesteps) the *Rubin* principles.

Annex – Pound for pound injunction precedent

Legal services order

1.

a. This is a legal services order made pursuant to [section 22ZA of the Matrimonial Causes Act 1973] /[paragraph 38A of Schedule 5 to the Civil Partnership Act 2004].

b. The court was satisfied that without the amount specified below, the [applicant]/[respondent] would not reasonably be able to obtain appropriate legal services for the purposes of the proceedings.

c. The [respondent]/[applicant] shall pay the amount of £[*amount*] [by [*time and date*]/[per calendar month commencing on [*time and date*] until [*time and date*]] to [*name*], the legal representatives of the [applicant]/[respondent].

Pound for pound injunction

2. The [respondent]/[applicant] is prohibited from paying (or causing to be paid by any third party) any further sums after [*time and date*] (whether for their profit costs or disbursements) to any firm of solicitors practising in England and Wales instructed by him in relation to these proceedings (or any counsel instructed by him on a Direct Access basis) unless he pays an equal amount (i.e. pound for pound) to the [applicant's]/[respondent's] solicitors in respect of [the arrears of] [MPS]/[LSPO], ordered [above]/[on [*time and date*]].

Cryptoassets – Still an Enigma?

or

Alice and Bob's Adventures in Cryptoland: understanding the basics of crypto – a roadmap for the uninitiated

Ben Fearnley

29 Bedford Row

As at October 2022, the time of writing this article, the market capital of Bitcoin is US$400 billion, down from a high of US$870 billion just last year. Despite the ravages of the crypto winter of 2021–22 the total cryptocurrency market (covering the circa 19,000 cryptocurrencies currently in existence) is still worth an estimated US$1 trillion. To put this into some perspective, this is circa one-tenth of the total value of all the world's mined gold. This is an astonishing figure for an asset class which was only sketched out as a concept in 2008.

Given the rise of crypto it is unsurprising that financial remedy cases increasingly involve cryptoassets in one form or another – ranging from small holdings of cryptocurrency held exclusively on online platforms such as Binance or Coinbase, to the hobby purchase of non-fungible tokens (NFTs) (generally proving ownership of digital art of often questionable quality), to the prospect of vast and undisclosed sums held in 'offline, cold-wallets' for which the veil of anonymity inherent in the platform causes significant identification and tracing problems.

To many, this jargon-filled world still seems rather new and unfamiliar. Without a basic understanding of what these assets are, how they are created, how they are traded and how they are valued, one can be excused for feeling a little lost when dealing with a 'cryptocase'. The hope is that this article will shed at least some light on these issues, together with a brief discussion of the legal problems that arise and matters that may be of particular relevance to financial remedy cases.

In parallel to this article, Sofia Thomas of Thomas Consulting is providing a blog post on the tax implications associated with holding crypto, a must read for anyone grappling with the gross and net value of such assets.[1]

What are cryptoassets?

There is no one single definition of 'cryptoassets' although the umbrella term is generally used to cover asset classes all linked by the following main features:

- the assets are intangible, existing only virtually;
- trades are recorded on a publicly distributed transaction ledger;
- cryptographic authentication is used to prove ownership;
- transactions are valid if deemed so by the majority; and
- transactions take place in the absence of any form of central control.

The rise of the cryptoasset has both interested and concerned governments. In March 2018, HM Treasury, the Financial Conduct Authority and the Bank of England were jointly tasked with creating a 'Cryptoassets Taskforce' to report on the cryptoasset market and its potential risks and rewards to the UK economy. The Taskforce reported in October 2018,[2] identifying three broad classes of 'cryptoassets' then being traded, being exchange tokens (often referred to as 'cryptocurrency'), security tokens (which prove ownership of a fractional stake in a larger asset, similar to a share or other form of equity) and utility tokens, which can be redeemed for a specific product or service (perhaps similar to a voucher for a specific retailer).

Advances in the market are such that there are already new classes of asset in addition to those identified by the Taskforce. There is the NFT, in respect of which US$41 billion was spent in 2021, mostly on digital artwork (or more accurately 'bragging rights' to claim ownership of a piece of artwork which can still be accessed, viewed, copied and printed out by anyone). The catalyst of the NFT rush was the sale in February 2021 of a collage of 5,000 pieces of artwork created by the artist Mike Winkelmann (known online as 'Beeple') by Christies for US$69.3 million.[3]

There is also now a burgeoning crypto financial services market (essentially peer-to-peer lending platforms) which use 'smart-contracts' to enforce agreements in an arena known as 'decentralised finance' (or 'DeFi' for those in the know).

Given the breadth of the term, the complexity of the market and the regular evolution of the technology, it is not possible here to provide a detailed explanation of all forms of cryptoassets. In order to try to achieve some focus, this article concentrates on the basics of the first of these, the exchange token ('cryptocurrency') and in particular Bitcoin, being the first and most well-known.

History – from 'crypto' to 'cryptocurrency'

'Crypto'

Being half of the portmanteau, cryptography deserves some exposition. Despite the bad pun in the main title of this article, it was the cryptographic breakthroughs of the 1970s, not the 1940s, that led us to the workings of cryptoassets. In brief, prior to the 1970s all codes (Enigma included) suffered from the same inherent flaw. To encode a message a master set of instructions ('a key') was required. That single encryption key explained both to the sender (in cryptographic convention, 'Alice') how to encode the message and, when applied in reverse, to the recipient (conventionally, 'Bob') how to decode the message. This traditional method of encryption is known as single-key (or 'symmetric') encryption. This created a constant problem for the codemakers – that single key needed to be shared between Alice and Bob in absolute secrecy. Often the weakness of the encryption lay not in the code itself but in the risk of the key being intercepted.

In the 1970s, this seemingly intractable problem was solved twice. First by GCHQ (but the work remained classified until 1997) and, secondly, by two American cryptographers, Whitfield Diffie and Martin Hellman. In 1976, Diffie and Hellman published a paper outlining a dual public/private key distribution technique,[4] whereby Bob could provide a 'public' (i.e. non-secret) key to Alice to enable her to encrypt a message, but Bob would use a separate private (secret) key in order to decrypt it. Or to put it differently, the encryption works only one way. Once Alice has encrypted a message neither she, nor anyone else without the private key, can decrypt it again. In this way a message could be encoded entirely safely, Bob knowing that it was only his secret private key which could decode the message. This two-key encryption technique is known as 'asymmetric' encryption.

Asymmetric encryption provides one other extremely important benefit – the ability to mathematically authenticate a document. Anything encoded with Bob's private key can be decoded with Bob's corresponding public key. Therefore, if Alice successfully decodes a message using Bob's public key, she can be sure that it must have been encoded (or 'digitally signed') by Bob, thus proving Bob's authorship of the document. It is this technique of digital signatures that is utilised by Bitcoin.

Since the 1970s, other asymmetric encryption techniques have been created, including that used for Bitcoin (known as ECDSA[5]).

'Currency'

On 31 October 2008, the presumably pseudonymous Satoshi Nakamoto[6] published a white paper 'Bitcoin: A Peer-to-Peer Electronic Cash system'[7] proposing a new system of digital currency based on utilising private key digital signatures combined with a distributed public record.

The ground-breaking feature of Nakamoto's proposal was to entirely dispense with the need for financial institutions or central authorities. All previous systems of electronic transactions require the transacting parties to repose trust in a financial institution to facilitate the transaction. That comes with cost, delay and the risk of fraud. In Nakamoto's own words, 'what is needed is an electronic payment system based on cryptographic proof instead of trust, allowing any two willing parties to transact directly with each other without need for a trusted third party'.

Nakamoto then proffered an elegant solution. The very brief summary is this: parties could replace trust in institutions with mathematical certainty and absolute transparency.

What was proposed was the creation of an electronic public ledger which relied on public-private key cryptography to mathematically verify all transactions. Transactions would be connected in a long chain with each transaction mathematically linked to the transaction prior. To create a transfer of a coin, a transferor would use their private key to 'sign' a mathematical combination of the prior transaction of that coin and the public key of the recipient. Any recipient could verify the signature using the transferor's public key and thus verify the chain of ownership all the way to them. Transactions would then be collated together in blocks, time-stamped and cryptographically joined to the previous blocks (thus creating the 'blockchain') by way of a mathematically intensive puzzle. Completing the puzzle is known as a 'proof of work' and being involved in doing so is called 'mining'. Computers that undertake mining are known as 'nodes'. Mining is vital – as without time-stamping and validating there is no method to prevent fraud (i.e. double-spending the same coin). To incentivise mining, the successful miner receives brand-new minted Bitcoins by way of 'block rewards' and also transaction fees. Thus, mining additionally adds new currency to the pool.

Given the absence of any financial institution or centralised record keeping, Nakamoto believed that absolute transparency was required so all can see that the system is trustworthy and accurate. All transactions are therefore public. But transparency comes at the cost of privacy. The solution for Nakamoto is anonymity. Bitcoin addresses are entirely anonymous. Anyone can create a new address at any time. Per the white paper, 'the public can see that someone is sending an amount to someone else, but without information linking the transaction to anyone'.

Having sketched out the basics in the white paper, in January 2009 Nakamoto published the open-source software and created the first block in the blockchain ('the genesis block'). Perhaps to prove the date it was created or perhaps to make a political point, the genesis block contains the headline from *The Times* from 3 January 2009, 'Chancellor on brink of second bailout for banks'.

The growth of Bitcoin, the rise of other cryptocurrencies and volatility

The almost mythological rise of Bitcoin is well known. At first, Bitcoin was exchanged and mined by a relatively small hobbyist community. On 22 May 2010, Laszlo Hanyecz became the first person to directly purchase products or services with Bitcoin and therefore has the honour of being the first person to spend Bitcoin. Hanyecz purchased two pizzas for the grand total of 10,000 Bitcoins. Those two pizzas would today be worth £178,000,000.

The increase in value of Bitcoin is, of course, due to the vast rate at which it has been adopted and traded. That same increase in value led many to jump on the mining

bandwagon. Once the preserve of a few 'bedroom miners', now mining is largely associated with huge operations in vast data centres located in jurisdictions where electricity is cheap and regulations may be few. The popularity of Bitcoin is such that Bitcoin mining currently consumes approximately 160 terawatt hours of electricity per annum, more than that used by the entire country of Argentina.

It may not be a surprise therefore that other would-be currency creators have attempted to follow suit. Indeed, anyone at any time can create a cryptocurrency. Most are worth nothing, but some become popular for reasons that are utterly unpredictable. In December 2013, software engineers Billy Markus and Jackson Palmer created 'Dogecoin'. The coin was intended as a joke (a 'memecoin'), the name referencing an amusing picture of a Shiba Inu dog. At the time of writing, the market capital of Dogecoin is US$16 billion.[8]

By far the most popular coin (after Bitcoin) is Ethereum. Ethereum's blockchain is radically different to Bitcoin. Ethereum allows more than just currency transactions. Ethereum's blockchain includes financial instruments such as 'smart contracts' and NFTs for art and collectibles. Following the 15 September 2022 upgrade to Ethereum v2 (known as the 'merge'), 'proof of work' mining has been replaced by 'proof of stake' mining, virtually eliminating mining's very high energy consumption and the attendant detrimental impact on the environment.

Volatility

The vast increase in the value of crypto has come at a cost of spectacular volatility. On 1 April 2020, one Bitcoin was worth circa £6,000. On 1 April 2021, it was worth £41,000. On 1 April 2022, it was worth £35,000. At the time of writing, Bitcoins are currently trading at about £17,900. No doubt when you read this, the price will be radically different again.

This instability is found with nearly all cryptocurrencies. Attempts have been made to provide some stability and coins have been created which claim to be stable ('stablecoins'). Stablecoins are notionally pegged to the value of an underlying asset – sometimes backed with collateral and sometimes not. But even stablecoins can come with significant risk. In May 2022, over the space of 4 days the price of TerraUSD (algorithmically linked to the value of the US dollar but not properly collateralised) fell from US$1 to US$0.03.

The volatility in the market is such that the value of a cryptocurrency portfolio may be radically different at the start of proceedings than at the end.

In addition, liquidity may be an issue if a party has a holding of a rather exotic cryptocurrency. While there are always likely to be purchasers of Bitcoin and Ethereum, a party may genuinely struggle to find a purchaser for 'Useless Ethereum Tokens' (UET)[9] or 'TrumpCoins' (FREED).[10]

Given the risks (and conversely, the potential rewards), parties and the court should think carefully about how such assets are factored into the distribution exercise. Cryptoassets may be good candidates for in-specie *Wells v Wells* [2002] EWCA Civ 476, [2002] 2 FLR 97 sharing.

How is cryptocurrency purchased and held? Exchanges, wallets and wallet addresses

Exchanges

Since the age of the at-home Bitcoin miner has largely ended, most individuals now obtain their cryptocurrency by purchasing it from others in exchange for fiat (i.e. traditional) currency. For most, the only way to do so is by utilising the services of a cryptoexchange. Some of the best-known exchanges are Binance, Kraken, Gate.io, Coinbase and Bitstamp, but there are many others. To purchase crypto, fiat currency is sent to the exchange, an order is put in for the purchase of cryptocurrency and, assuming the order is filled, cryptocurrency is received.

Once crypto has been received, any balance is accessed via the use of a wallet (in this context essentially an account) held on that exchange. Keeping cryptofunds on an exchange is indeed akin to keeping funds in a bank account – the funds are held on the user's behalf by the exchange. The user can spend the funds or withdraw them as they please, but the funds are ultimately controlled and held by the exchange – the exchange retains the private keys. The wallet is said to be 'custodial', the custodian being the exchange. Many people are content with managing their crypto in this manner.

However, there are risks inherent in keeping crypto on an exchange. If the exchange were to go out of business, the entire balance could be lost with no recourse to the Financial Services Compensation Scheme. This is not unprecedented, in July 2022 crypto trading and lending firms Celsius and Voyager Digital filed for bankruptcy leaving users with no access to funds. Further, exchanges have been known to have been hacked. By way of a very recent example, in October 2022 Binance was the victim of a hack, losing an estimated US$570m of which (at the time of writing) US$100m still remained unrecovered. Indeed, to date, an estimated circa 50 exchanges have been hacked losing an estimated total of over US$2.5 billion.

To avoid this possibility and to retain total (and anonymous) control over crypto, users can and do transfer their balances out of the exchanges and into non-custodial wallets solely controlled by the user.

Non-custodial wallets – hot and cold

A non-custodial wallet is any wallet address for which the private key is known only to the user. Public/private key pairs can be created for the user by online wallet providers, or by the user themselves using either software or well-known websites such as www.bitaddress.org.

However, having sole knowledge of the private key comes with its own risks. The private key is the only method by which a user can prove the right to deal with its associated cryptoassets. If the private key were lost, the user would be unable to sign transactions and thereby essentially 'loses' the funds (or at least has no access to them unless the private key is again located – with some people going to great lengths to find lost keys[11]). By some estimates, circa 10% to 15% of all Bitcoins have already been lost in this way. Similarly, if a private key were stolen, the thief would have unfettered ability to spend all the associated funds.

It is therefore extremely important to keep wallets safe. This creates a difficulty. In order to transact, the user needs

to be connected to the internet. But keeping data online always comes with security risks. Therefore, it is not uncommon for users to have two types of wallet – one wallet connected to the internet for regular transactions, known as a 'hot wallet' and one wallet kept entirely offline for funds which are transacted infrequently, known as a 'cold wallet'. A cold wallet could be no more than a simple piece of paper stored in a safe on which the keys are printed, or the use of more sophisticated encrypted hardware wallets (which often look like key fobs or USB memory sticks) which require codes or some form of two-factor authentication to access. Such devices can contain numerous pairs of keys for numerous different pots or for different currencies.

Public keys and privacy

The transparent nature of the blockchain means that knowledge of a public Bitcoin key (or the associated wallet address) allows oversight of all transactions conducted with the associated private key. This raises security and privacy concerns. Understandably, Alice may not wish Bob to be able to view all the transactions she has ever undertaken with her private key.

There have been several advances to deal with this concern. The two major ones are HD (also known as 'seeded') wallets and 'privacy coins'.

HD wallets employ an algorithm which creates a brand-new public/private key pair for each individual transaction. These wallets use master key pairs (called 'seed keys' or 'extended keys') to create numerous (perhaps millions) of subkeys. Such wallets are called hierarchical deterministic ('HD' or 'seeded') wallets and can be used with many different coins including Bitcoin.

With HD wallets, privacy is retained because knowledge of the single-use public key only provides details of that single transaction. However, knowledge of the seed/extended public key would indeed provide overview of all transactions undertaken within the wallet by all of the keys derived from it. Therefore, when seeking disclosure of public keys, it is important to ensure that the extended public key for such a wallet is disclosed rather than just some of the individual sub-keys. Without the extended public key, it is impossible to have full oversight of the transaction history of that wallet.

The second advance was the creation of the 'privacy coin'. These are different cryptocurrencies which have blockchains specifically designed to obfuscate the wallet address associated with any coin. There are numerous such coins, currently the most popular being Monero (XMR)[12] and Zcash (ZEC).[13] Privacy coins often use several techniques in combination to hide a wallet balance, including the use of encrypted one-time keys and transactions signed by numerous private keys, only one of which belongs to the actual sender ('ring signatures'). As a result, it can be extremely difficult to obtain details of the balance of such holdings, although there are some companies that claim to be able to provide tracing services for such coins.

The legal status of cryptocurrency

Cryptocurrency as 'property'?

The debate as to whether cryptoassets are property to which proprietary injunctions (or, indeed, property adjustment orders) can attach has now largely been put to bed. Given that a cryptoasset is no more than characters in a record, it was argued in some quarters that the inability to easily define cryptoassets as either a 'chose in action' or a 'chose in possession' should lead to the conclusion that cryptoassets are not property at all.

However, in November 2019 the UK Jurisdictional Taskforce (not to be confused with the previously mentioned joint 'Cryptoasset Taskforce'), published a paper ('Legal statement of cryptoassets and smart contracts'),[14] in which they undertook a broad overview of the law and concluded instead that 'cryptoassets possess all the characteristics of property'. The Taskforce's view was that the asset class met all the characteristics of property as set out by Lord Wilberforce in *National Provincial Bank v Ainsworth* [1965] 1 AC 1175 (being definable, identifiable by third parties, capable in their nature of assumption by third parties, and having some degree of permanence or stability), and by the Court of Appeal in *Fairstar Heavy Transport NV v Adkins & Anor* [2013] EWCA Civ 886 (being 'certainty, exclusivity, control and assignability').

In *AA v Persons Unknown* [2019] EWHC 3556 (Comm), Bryan J adopted the view of the UK Jurisdictional Taskforce and held that Bitcoins were, indeed, property over which a proprietary injunction could be made.

AA v Persons Unknown was not the first case to treat cryptoassets as property (preservation orders over such assets had been made in at least two previous authorities: *Vorotyntseva v Money-4 Limited t/a as Nebeus.com* [2018] EWHC 2598 (Ch) and *Liam David Robertson v Persons Unknown*, CL-2019-000444 (15 July 2019, unreported)), but it was certainly the first cryptocase to be reported after the publication of the Taskforce report and certainly the first to examine the legal nature of cryptoassets in any detail.

AA has since been followed by *Fetch.Ai Ltd & Anor v Persons Unknown* [2021] EWHC 2254 (Comm), in which HHJ Pelling QC (sitting as a Judge of the High Court) granted a worldwide freezing order and a Norwich Pharmacal/disclosure orders against Binance Holdings Ltd and Binance Markets Ltd, again concluding that Bitcoins are, indeed, property.

Pelling J also cited and approved the decision in *Ion Science Ltd v Persons Unknown & Ors* (21 December 2020, unreported) (Commercial Court), in which Butcher J considered that the governing law (*lex situs*) of the cryptoasset was the place in which the person or company who owns it is domiciled.

Given the above conclusions, it is suggested that there is little doubt that the Family Court can make both property adjustment orders and proprietary injunctions in respect of cryptoassets.

Cryptocurrency as 'currency'?

Although the legal status of cryptocurrency varies from jurisdiction to jurisdiction (ranging from outright bans in jurisdictions such as Egypt, to outright acceptance in El Salvador where Bitcoins are now legal tender), as far as the United Kingdom is concerned, while the holding of cryptocurrency is legal, it is not considered currency or money.

This reflects the stance of the Bank of England, the G20 Finance Ministers and the Central Bank Governors. The October 2018 report of the Cryptoassets Taskforce stated 'while cryptoassets can be used as a means of exchange,

they are not considered to be a currency or money'. HM Revenue & Customs has also adopted this view.[15]

Given that cryptoassets are not considered 'currency' by HM Revenue & Customs (albeit this does not appear to have been tested by the courts), it is suggested that the Family Court should not make either lump sum or periodical payments orders expressed as being payable in cryptocurrencies.

Cryptoassets – particular issues arising in financial remedy proceedings

Disclosure

Assuming possession of the appropriate public key (assuming extended public keys are held for HD wallets) and assuming the coin in question is not a 'privacy coin', any party wishing to examine historic wallet transactions can do so with relative ease. There are several websites (www.blockchain.com/explorer being one of the most well-known) which will display the full transaction history of any wallet address.

Therefore, knowledge of the public key is vital for full disclosure. It is suggested that anyone dealing with a cryptoasset case should ensure that they have requested the following:

- Full details of all cryptoassets held together with details of name, type of asset (i.e. cryptocurrency, NFT, smart contract, etc), size of holding and where held (including details of all exchanges or other commercial platforms on which such assets are held).
- For assets held on exchanges, commercial platforms or otherwise in custodial wallets: account numbers/wallet addresses with associated public keys for all such accounts (with extended public keys to be provided in respect of all HD wallets), together with detailed transaction statements for the period of 12 months prior to the date of Form E.
- For all cryptoassets held outside exchanges in non-custodial wallets: wallet addresses for all wallets held together with associated public keys (with extended public keys to be provided in respect of all HD wallets).

In most cases the above should provide enough information to enable completion of the computation exercise.

As for private keys, it is suggested that an order for their disclosure should only be made in very limited circumstances. Public keys are sufficient to provide full oversight of all transactions. It is much more difficult to understand why disclosure of a private key should be ordered when that provides no further assistance with the discovery exercise and hands unfettered control to anyone in possession of it. Furthermore, communicating the private key (an undertaking that goes entirely against all the core principles of private key cryptography) brings with it the risk that the information will be compromised and funds lost.

If full disclosure is not forthcoming, the anonymous nature of the blockchain can create real difficulties in finding assets. However, the one exception to the rigorously deregulated and anonymous world of the blockchain are the cryptoexchanges. At some point, individuals are likely to need to exchange fiat for crypto, or the reverse. Not only is the use of fiat currency likely to appear on the face of bank statements, but also many exchanges are in territories that require the use of 'know your customer' policies. Since January 2020, firms carrying on cryptoasset activity in the United Kingdom have had to comply with the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692). Many other jurisdictions have similar provisions. As a result, third party disclosure applications against such exchanges could provide fruitful results. Of course, much will depend on the jurisdiction in which the exchange is based, and legal advice from that jurisdiction may be required.

The other starting point in any non-disclosure case must be to consider engaging the services of an appropriate expert. There are several companies that offer identification and tracing services of one sort or another, often using proprietary software to identify the quickly branching movement of funds out of a wallet and into or through other wallets. Discussions with such an expert are likely to be of fundamental importance and may well inform the forensic avenues that should be pursued. It was the use of such a forensic tracing company that allowed the anonymous claimant insurer in *AA v Persons Unknown* [2019] EWHC 3556 (Comm) to trace the funds stolen from their defrauded client to the Bitfinex exchange.

Freezing injunctions

Rather like disclosure, the efficacy of the freezing exercise may depend on whether the funds are held with an exchange against whom an order can be served, or in an anonymous non-custodial wallet. If funds are on an exchange based in a foreign jurisdiction, again advice may be required from that jurisdiction. If funds are held in a non-custodial wallet, all may depend on the willingness of the respondent to comply with any order the court makes. Parties may also want to consider whether there are any steps that can be taken to have the cryptofunds held securely pending final outcome. Cryptocurrency does not lend itself to being held in such a way (given that mere knowledge of the private key provides anyone unfettered ability to deal), but there are companies that offer escrow services. Care should, of course, be taken when using any such services given they may essentially become custodian wallet holders. Additionally, parties may wish to explore the use of moving funds into 'multi-signature' wallets, which require at least two private keys (one held by each party) to authorise any transaction.

Interim orders in crypto cases – forms of order

In an article for Family Law Week, Andrzej Bojarski and Byron James provide three suggested example orders that could be used when seeking freezing orders, disclosure orders or the instruction of an expert.[16] The drafts are no more than a suggestion and they certainly do not form part of the compendium of standardised orders, but they do offer a good starting point for anyone seeking to freeze cryptoassets or seeking an order for specific disclosure. It should, of course, be noted that given the unusual nature of crypto and the vastly differing factual circumstances that can arise, care should be taken to obtain an order which achieves the required outcome but at the same time is sufficiently proportionate and limited in scope.

Final orders

Given the current view of HM Revenue & Customs that

crypto is a capital asset and not a currency, it is suggested that cryptoassets are properly dealt with by way of property adjustment orders and not by way of lump sum or periodical payment orders.

However, before making any such order the court will need to consider the risk and liquidity profile of the asset. Given the volatility and high-risk profile, crypto may be apt for a *Wells v Wells* [2002] EWCA Civ 476, [2002] 2 FLR 97 sharing order. It is suggested any cash offsetting exercise should otherwise be taken with care. Given the *Cornick v Cornick* [1994] 2 FLR 530 line of authorities, parties should be made aware that even a radical change in value post-final hearing will very unlikely found an application for a *Barder* set-aside.

Conclusion

In a research note published in June 2021,[17] the Financial Conduct Authority estimated that 2.3 million British adults (4.4% of the population) held cryptocurrency in some form or another. Given these numbers, it is likely that Forms E will refer to cryptoassets with increasing frequency. Certainly, anecdotal evidence appears to suggest that crypto is being raised by clients on a more regular basis.

This world of crypto can seem odd, if not surreal, to the uninitiated. There is something Carrollian about an economy where an incorporeal coin stamped with the face of a grinning dog can be worth US$9 billion or where a collage of pictures by an artist called 'Beeple' can be sold for US$69 million even though it can still be viewed by anyone on the Christies website.[18] It should perhaps be noted in passing that the price paid for Beeple's 'the first 5000 days' is just a shade under the price paid for van Gogh's '*Cabanes de bois parmi les oliviers et cyprès*' sold by the very same auction house in the very same year.[19] Given Charles Dodgson's fascination with ciphers and mathematical puzzles, often referenced in his poems,[20] he no doubt would have found some wry satisfaction in all of this peculiarity.

However, at its heart, cryptoassets are just items of value. They can be held, valued and transferred just like any other asset. All that is needed to deal with them is a basic roadmap. Having trekked through this article, it is hoped that practitioners may feel that they now at least have some landmarks to assist.

Notes

1 Available on the Blog page of the *Financial Remedies Journal* website at https://financialremediesjournal.com/category/blog.htm
2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752070/cryptoassets_taskforce_final_report_final_web.pdf
3 https://onlineonly.christies.com/s/beeple-first-5000-days/beeple-b-1981-1/112924
4 'New Directions in Cryptography', [1976] 22 *IEEE Transactions on Information Theory* 6, https://ee.stanford.edu/~hellman/publications/24.pdf
5 Elliptical Curve Digital Signature Algorithm.
6 In the recent case of *Wright v McCormack* [2022] EWHC 2068 (QB), the High Court came tantalisingly close to having to make findings to who Nakamato was or was not, but ultimately such findings were not required.
7 www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2018/Emerging_Tech_Bitcoin_Crypto.pdf
8 https://coinmarketcap.com/currencies/dogecoin/
9 https://coinmarketcap.com/currencies/useless-ethereum-token/
10 https://coinmarketcap.com/currencies/trumpcoin/
11 www.bbc.co.uk/news/uk-wales-62381682
12 https://coinmarketcap.com/currencies/monero/
13 https://coinmarketcap.com/currencies/zcash/
14 https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/11/6.6056_JO_Cryptocurrencies_Statement_FINAL_WEB_111119-1.pdf
15 www.gov.uk/hmrc-internal-manuals/cryptoassets-manual/crypto10100
16 www.familylawweek.co.uk/site.aspx?i=ed212069
17 www.fca.org.uk/publications/research/research-note-cryptoasset-consumer-research-2021
18 https://onlineonly.christies.com/s/first-open-beeple/beeple-b-1981-1/112924
19 www.christies.com/en/lot/lot-6341120
20 '*Yet what are all such gaieties to me/Whose thoughts are full of indices and surds? \ x2 + 7x + 53 \ = 11 / 3*', From *Four Riddles – The First Riddle, Phantasmagoria and Other Poems* (1869).

Waking Up and Smelling the Coffee – International Tax Considerations in Financial Remedy Applications

Sarah Lucy Cooper
Thomas More Chambers

Dilpreet K Dhanoa
Field Court Tax Chambers

This article came to be written via a chance meeting in a coffee shop between Sarah Lucy Cooper, a family practitioner specialising in international cases, and Dilpreet Dhanoa, a specialist in tax, one early morning on the way to court.

The purpose of this article is not to provide an answer to all and every tax issue in an international context, but rather to ensure that family practitioners are aware of some of the challenges surrounding such issues.

Why do overseas tax considerations matter?

What are the types of tax about which individuals should typically be concerned in a divorce where the parties have some overseas connection? There are usually a few core aspects of taxation that all parties undergoing divorce with an international element should consider:

(1) properties overseas;
(2) income overseas – remote working – there will be very complex taxation issues where an individual working in the United Kingdom for a UK entity and paying PAYE or other UK tax has spent large periods of time overseas, perhaps in their home country. Anecdotal evidence from 2020 when many white-collar workers spent lockdown overseas suggests that some overseas taxation authorities are actively considering taxing them in their jurisdictions regardless of what HM Revenue & Customs might think;
(3) tax on companies registered overseas;
(4) future inheritances and trust charges;
(5) parties who are physically overseas.

As in relation to any other international issue, there should be no assumptions made in relation to overseas tax systems, so check in relation to the other jurisdiction:

(1) Are there joint spousal tax liabilities?
(2) Do both parties have to fill in one tax return (joint returns do exist)? If one party has not complied, could this be 'financial conduct'?
(3) Timing of payments – if overseas tax is due, when will it need to be paid?
(4) What powers do local tax enforcement tax authorities/agencies have in the overseas jurisdiction? Is there a robust Land Registry system in the overseas jurisdiction against which the tax can be secured?
(5) Is the overseas tax effectively a soft liability that will never be paid?

In addition, where marriages which have irretrievably broken down have an international element, there are usually other important aspects to consider which can impact the taxation position:

(1) multiple nationalities and hence a multiplicity of overseas tax authorities' involvement;
(2) differing residence qualifications and statutory residence rules in relation to whether UK tax is payable;
(3) possibly differing domicile rules for UK tax purposes rather than for the purposes of the jurisdictional criteria for divorce in England and Wales.

The impact of double taxation treaties

Double taxation arises if two jurisdictions seek to levy tax on the same income or chargeable gain (that is, the taxpayer could end up paying income tax and/or capital gains tax (CGT) twice on the same income or disposal of an asset). Many jurisdictions tax individuals, companies and other entities that are 'resident' in their jurisdiction on all of their worldwide income or profits, irrespective of where they arise. Additionally, many jurisdictions tax profits and income resulting from an economic activity carried on in their territory or profits arising from a source in that jurisdiction.

Double taxation treaties (DTTs) are agreements between two states, designed to protect against the risk of double taxation where the same income might be taxable in the two states. DTTs exist to provide certainty of treatment for certain cross-border trade, investment and to limit or avoid double taxation. So why could this be relevant to couples going through a divorce? If one person or both in a couple is resident (or deemed to be resident) for tax purposes in two countries at the same time, and/or they own property (separately or jointly) in a country, resulting in income and gains (from one country or both), the individuals may be liable to tax on the same income in both countries.

In divorce proceedings, which can often be complex and financially messy, this adds another layer of consideration

that is worth thinking about: What is the tax liability in cases for couples with ties, assets and/or connections in more than one jurisdiction?

Other common examples to bear in mind where DTTs can assist (along with specialist tax advice) is where an individual is non-resident in the United Kingdom for tax purposes, but has UK-source income. For example, suppose a husband residing in France owns a rental property in the United Kingdom and receives rental income from it. If the husband is tax resident in France he will also pay income tax there, but would also be liable for tax in the United Kingdom, hence the necessity of a DTT.

The DTTs tend to follow standard models (such as the Organisation for Economic Co-operation and Development (OECD) Model[1]) with appropriate edits as agreed by the two states in question. They cover a wide range of taxes to assist in facilitating cross-border trade and investment, so not all the taxes and reliefs covered will necessarily be relevant to divorcing couples. Having said that, if there are complex business interests tied up in such divorce proceedings, then more of the Articles in a DTT may apply. Typically, though, the taxes one might expect to be covered and which will be of particular relevance are CGT reliefs and income tax reliefs.

The United Kingdom has a prolific network of tax treaties. At the time of writing, there are over 100, and a complete list country by country can be found on the Government's website.[2] In the first instance, individuals should always seek to obtain tax advice in conjunction with their divorce proceedings – particularly if there is a real risk that the divorce could include assets and/or tax liabilities located in more than one jurisdiction. The next step would then be to identify potential tax liabilities that could arise. Where the United Kingdom is one such jurisdiction, the next would be to check if there is a tax treaty in place that might offer some relief from the risk of double taxation. Lastly, where an expert may be needed to offer advice on DTTs and their application, the Bar has several such experts, and it is worth instructing a single joint expert with tax expertise to assist the parties and the court in providing guidance and clarification as to the interpretation and application of a DTT.

Jurisdiction for divorce and the impact on tax overseas

In order to divorce in the jurisdiction of England and Wales it is necessary to show that one or both parties are either habitually resident or domiciled in this jurisdiction. An assertion of either habitual residence or domicile whether in this jurisdiction or another may, of course, be hugely interesting to tax authorities both here and overseas.

Take an example of a husband, H, who wishes to contest jurisdiction in England and Wales and who asserts that both parties are in fact habitually resident or even 'domiciled' in Vietnam instead as he holds a Vietnamese passport. The wife, W, on the other hand, asserts that they are both habitually resident and/or domiciled in England and Wales. Clearly, there exists the potential for these assertions of residence/domicile/nationality to be highly relevant to the tax authorities in both Vietnam and the United Kingdom, given that they will rely on a factual matrix.

Residence and domicile for tax purposes

It is crucial to understand that these two concepts (residence and domicile) are not equivalent to similar concepts in family law. For tax purposes both concepts rely on further statutory legislation in addition to the common law.

A person's tax residence status or their tax domicile status will, of course, affect the extent to which someone is liable to tax in the United Kingdom.

Tax residence is a more short-term concept. It is assessed and determined for each tax year in isolation, and usually reflects where you reside. It is therefore possible albeit inconvenient to have more than one tax residence.

Tax domicile is a longer-term concept. The Dicey test for domicile reflecting common law states:[3]

> 'A person is in general domiciled in the country in which he is considered by English law to have his permanent home. A person may sometimes be domiciled in a country although he does not have his permanent home in it'

In contrast to family law, in tax law there is also a statutory deemed domicile provision which covers more taxpayers than those who are actually domiciled in the United Kingdom as a matter of common law.

It is also important to remember that the tax domicile is UK-based, whereas the test in relation to family law jurisdiction is whether an individual is domiciled in one of the territorial units, for example, England & Wales. In other words, in relation to taxation the UK tax authority – HM Revenue & Customs – is interested in whether an individual has a 'UK domicile'. The same is not true for the jurisdictional criteria for divorce (or children either), as for family law purposes the United Kingdom is split into territorial units, i.e. England & Wales, Scotland and Northern Ireland. The term 'domicile' therefore means something very different in taxation and family law, and it is important for advisers to be cognisant of this.

As already noted, income which arises in the United Kingdom is generally treated as being taxable in the United Kingdom. A person's residence and domicile statuses are therefore particularly important for determining the extent to which any overseas (that is, non-UK) income is taxed in the United Kingdom. The starting position for tax purposes is usually if a person is resident and domiciled in the United Kingdom, then they are liable to tax on their worldwide income and gains. If individuals were born in the United Kingdom and have lived in the United Kingdom most or all of their lives, it is highly likely they will be considered to be both resident and domiciled in the United Kingdom. Alternatively, individuals who come to the United Kingdom for a short period of time, or do not spend much time in the United Kingdom at all, may not be considered domiciled or possibly even resident (again, depending on the application of the residence rules). Where an individual does not become tax resident in the United Kingdom, their foreign income and gains generally do not fall within the scope of UK tax. Where an individual is resident but not domiciled in the United Kingdom, then the 'remittance basis' rules may apply to a person's foreign income and gains. This means an individual may not have to pay any UK tax, or otherwise a reduced amount on their foreign income and gains unless remitted back to the United Kingdom.

Remaining with the issue of jurisdiction, once jurisdiction

has been seised in the divorce, the parties are, of course, free to relocate and many will do so, confident in the knowledge that it will be the English courts now dealing with their financial claims. It might be assumed at this point after the new tax year that if neither of the couple remain in the United Kingdom, there will be no liabilities for UK tax – this is, however, most definitely not the case if some assets remain in the United Kingdom, in which scenario there is still a risk that UK tax will arise.

It is worth bearing in mind that the helpful change coming into force in April 2023 in relation to extending the time frame for divorcing spouses to effect transfers between them and not incur CGT will be particularly helpful in relation to complex cases where there are tax issues involving overseas tax authorities.

Inheritance tax

Issues in relation to inheritance tax (IHT) on divorce are also more complex when there are overseas connections.

In contrast to income tax and CGT which rely on the date of permanent separation, IHT relies of the date of the final order in the case of divorce. If the divorce is in the United Kingdom, then until the final order, transfers between divorcing partners are legally not liable to IHT as the parties are still married. However, even after this date, if a transfer is made pursuant to a court order in respect of divorce proceedings, then such transfers are still considered to be *exempt* for IHT purposes by HM Revenue & Customs. Watch out though for cases where one spouse is UK-tax domiciled and the other is not, as there are restrictions on how much can be transferred. Again, specialist tax advice should be sought in such circumstances.

Maintenance

The tax treatment of maintenance can be very different overseas which can be very relevant to final orders as the English court will be interested in the net effect on both parties. Broadly speaking, jurisdictions provide for one or more of the following:

(1) taxing the payer of the maintenance such that all maintenance is paid from taxed income – the United Kingdom being such an example, as are Chile, the Dominican Republic and Mexico;
(2) providing tax relief for the payer of the maintenance – Argentina and Ecuador are examples of jurisdictions where the maintenance can be set off by the payers as against their gross income;
(3) taxing the recipient of some or all of the maintenance – in Spain, some types of spousal maintenance are taxed on receipt whereas child maintenance is not.

Complex tax issues will, no doubt, arise in relation to maintenance orders made in relation to same sex relationships where such an order is not recognised by an overseas jurisdiction where the payer is based.

Disclosure to and from overseas tax authorities

Disclosure to overseas tax authorities

We are in an era where unprecedented levels of information are now exchanged between tax authorities globally. This may come as a nasty surprise to some divorcing litigants who might be hoping to hide their assets and income from the prying eyes of other tax authorities or their ex-spouses.

The Common Reporting Standard (CRS) is a global initiative launched by the OECD, designed to prevent tax evasion using Automatic Exchange of Information (AEIO) between countries' tax authorities. As of 2021, over 100 countries had signed up to applying the CRS for sharing information, including all member states of the European Union, the United Kingdom, India, China, Hong Kong and Russia. The United States of America had previously implemented its own version of reporting with the Foreign Account Tax Compliance Act, which generally requires foreign financial institutions and certain other non-financial foreign entities to report on the foreign assets held by their USA account holders, or be subject to withholding on withholdable payments. The United States of America is not signed up to the CRS, but the United Kingdom has a reciprocal agreement with the United States of America in any event.

The CRS and AEIO apply to any person with financial accounts or responsibilities outside their country of tax residence. For UK residents, this is likely to impact those with undisclosed assets overseas, and/or those with complex structures in place involving overseas assets as these are likely to be reported to HM Revenue & Customs possibly for the first time. The sort of information exchanged automatically under the CRS and AEIO is as follows: the taxpayer's name, address, date and place of birth, country/countries of tax residence, tax identification number or national insurance number (or other equivalent), bank account details, total account balance/value of accounts calculated at the end of the calendar year (including any interest, but excluding the balance of any excluded accounts[4]).

Information is automatically exchanged with other jurisdictions on an annual basis. It therefore permits countries (and specifically their revenue authorities) to know the true value of a resident taxpayer's wealth, and to therefore ensure they pay the right amount of tax. The key element is that the information is shared automatically, and not on request or in return for anything.

It should also be noted that competent revenue authorities can also make specific information disclosure requests to another revenue authority. If the information is publicly available or held on a database or source to which the revenue authority has access, the competent revenue authority is likely to reply directly. If this arises, the relevant tax authority may also write to the taxpayer to establish the facts in circumstances where it does not have (full) access to the information being requested.

Interestingly, for HM Revenue & Customs' purpose, it is not obliged to disclose everything to the taxpayer about what information that has been requested by an overseas tax authority. It is only obliged to disclose the minimum amount of information necessary, and the letter from the overseas competent revenue authority should not be shown to the UK taxpayer (nor does the jurisdiction from which the request came from need to be disclosed).

It is therefore entirely possible that in the context of divorce proceedings a litigant might have far larger overseas tax liabilities than those of which they were aware and that unbeknown to them HM Revenue & Customs has, indeed,

provided a great deal of information to another tax authority.

Furthermore, there is a large network of intergovernmental agreements for mutual assistance in the collection of tax debts. That network of arrangements has grown in recent years, particularly with the inclusion of a provision on assistance in the collection of taxes in the OECD Model – which, as noted above, forms the basis on which most DTTs are now negotiated.

Disclosure from overseas tax authorities

So what of the divorcing spouse who suspects that there is relevant information held by an overseas tax authority? Can this be disclosed to the Family Court?

Family Procedure Rules 2010 (SI 2010/2955) (FPR) 21.2 provides in terms for disclosure from a third party:

> '(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.
>
> (2) The application—
>
> (a) may be made without notice; and
>
> (b) must be supported by evidence.
>
> (3) The court may make an order under this rule only where disclosure is necessary in order to dispose fairly of the proceedings or to save costs.
>
> (4) An order under this rule must—
>
> (a) specify the documents or the classes of documents which the respondent must disclose; and
>
> (b) require the respondent, when making disclosure, to specify any of those documents—
>
> (i) which are no longer in the respondent's control; or
>
> (ii) in respect of which the respondent claims a right or duty to withhold inspection.
>
> (5) Such an order may—
>
> (a) require the respondent to indicate what has happened to any documents which are no longer in the respondent's control; and
>
> (b) specify the time and place for disclosure and inspection.
>
> (6) An order under this rule must not compel a person to produce any document which that person could not be compelled to produce at the final hearing.
>
> (7) This rule does not limit any other power which the court may have to order disclosure against a person who is not a party to proceedings.'

Interestingly, the Red Book[5] identified in terms that this may be from HM Revenue & Customs. This will come as no surprise to the seasoned financial remedy practitioner well used to dealing with the non-disclosing litigant.

While FPR 21.3(1) also provides for that third party to withhold disclosure in certain circumstances, it is telling that none of the reported cases on this provision references HM Revenue & Customs:

> 'A person may apply, without notice, for an order permitting that person to withhold disclosure of a document on the ground that disclosure would damage the public interest.'

The vast majority of the cases engaging this provision have been in relation to information held by the police, for example *Chief Constable of West Midlands Police, ex parte Wiley; R v Chief Constable of the Nottinghamshire Constabulary, ex parte Sunderland* [1995] 1 AC 274, which sets out the three-stage test for arguing public interest immunity:

(1) whether the information is sufficiently relevant to require disclosure in the interests of justice;
(2) whether there is a real risk that disclosure would cause 'real damage' or 'serious harm' to the public interest; and
(3) whether the public interest in non-disclosure is outweighed by the public interest in disclosure for the purposes of doing justice in the proceedings.

Letters of request to overseas authorities

Albeit not in family context, this is a procedure used relatively frequently between tax authorities and there is no reason in principle why it should not be used in a divorce case to extract information from the overseas tax authority.

The 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention) provides that signatory states can make letters of request to any signatory state where the evidence is located without having to rely on consular and diplomatic channels.

There are 64 contracting parties to this Hague Convention including not only the majority of EU states, but also the United States of America, China, Kuwait and much of Latin America.

FPR 24.10 provides:

> '(1) This rule applies where a party wishes to take a deposition from a person who is out of the jurisdiction—
>
> (a) out of the jurisdiction; and
>
> (b) not in a Regulation State within the meaning of Chapter 2 of this Part.
>
> (2) The High Court may order the issue of a letter of request to the judicial authorities of the country in which the proposed deponent is.
>
> (3) A letter of request is a request to a judicial authority to take the evidence of that person, or arrange for it to be taken.'

No order will be made without evidence that the overseas court will be receptive and amenable to that request. At the hearing of the application for the issue of the letter of request the applicant will need to address: the procedure that will be followed by the foreign court, whether any special procedure is sought, how long the entire process will take and how much it will cost. Evidence from a foreign lawyer experienced in the execution of a letter of request in the jurisdiction in which they practise will be helpful.

Once an order is made by the High Court, FPR PD 24A provides a template for the letter of request itself, which is

then signed by the Senior Master of the Queen's Bench Division.

The Court of Appeal in *Honda Giken Kogyou Kabushiki Kaisha v KJM Superbikes Ltd* [2007] EWCA Civ 313 clarified that the court should subject each request to four specific considerations:

(1) whether the request would be oppressive;
(2) whether the request is too wide;
(3) whether the issue of a letter of request would be inappropriate for some other reason, for example, because the cost of obtaining the evidence would be disproportionate or because the evidence is unnecessary to resolve the issues in dispute; and
(4) the effect of any delay in making the application for the letter of request.

While a request must be for specific documents, this does not mean that every document must be listed in the request. The documents may be described compendiously (*SL Claimants v Tesco PLC* [2019] EWHC 3315 (Ch)). It is also important to note that in *Charman v Charman* [2005] EWCA Civ 1606 itself the President indicated that in family cases it might be less necessary to list documents as the requesting party would have less knowledge, which is also in line with the Family Court's quasi-inquisitorial role pursuant to section 25(1) of the Matrimonial Causes Act 1973.

It is, however, important to note that pursuant to Article 12(1) of the Hague Evidence Convention, a letter of request may be refused on the following grounds:

(1) the 'other judicial acts' required to fulfil the execution of the request do not fall within the functions of the judiciary in the state of execution;
(2) the state addressed considers that its sovereignty or security would be prejudiced by the execution of the request.

It is also important to note that the execution of a letter of request requires cooperation from the person required to provide the documents set out in the request. Article 11(1) provides that a person may refuse to do so if they are protected by privilege or if they have a duty to refuse under the law of either the state of execution or the state of origin. It is therefore particularly important for there to be clarity as to the extent of such privilege and whether they that person would be permitted to disclose such information prior to the application being made.

It is also important not to overlook the Crime (International Co-operation) Act 2003, which was considered in *CPS & Anor v Gohil & Anor* [2012] EWCA Civ 1550. In *Gohil*, evidence had been disclosed from the authorities in the United States of America to the Crown Prosecution Service (CPS) via a letter of request. This was then utilised by the wife in her financial remedy proceedings, presumably via third party disclosure from the CPS. The Court of Appeal was very clear that this should not have happened, and that the wife had no right to have used this evidence, which had not been disclosed for this purpose.

Conclusion

In summary, tax and divorce are complex and when there are overseas issues, it is even more complex.

While there is a flow of information between tax authorities which litigants may well not be aware of, there are huge complications for an individual litigant who seeks to investigate the overseas tax affairs of their divorcing spouse.

Notes

1 The OECD is a unique forum where 38 of the world's governments with market-based economies collaborate to develop policy standards to promote sustainable economic growth. More information can be obtained at www.oecd.org/
2 www.gov.uk/government/collections/tax-treaties
3 Dicey, Morris & Collins, *The Conflict of Laws* (Sweet & Maxwell, 16th edn, 2022), Chapter 6.
4 The term 'excluded accounts' relates to accounts which have been identified by the OECD under the CRS and which do not need to be specifically reported. They include retirement and pension accounts, non-retirement tax-favoured accounts, term life insurance contracts, estate accounts, escrow accounts, depository accounts due to not-returned overpayments and low-risk accounts.
5 *The Family Court Practice 2022* (Family Law, 2022), Commentary on FPR Part 21.

Women in Good Shape

Baroness Ruth Deech

Reading Farhana Shahzady on 'Menopause – turning the clock back for women' ([2022] 2 FRJ 148) caused me to be even more fearful than usual about the progress of women's equality, freedom, respect and opportunity in the workplace and in education. After a lifetime of fighting for more freedom for women, we now see so many rights being watered down or taken away – abortion, women's spaces, and now the risk of the menopause as an excuse for not hiring older women. Some men feel free to deny women the distinctive nature of their bodies when it suits them in transgender disputes – and then emphasise that distinctive nature against women in the workplace, where it will also suit them.

Significance of menopause to financial remedies on divorce

Shahzady paints a gloomy picture of the menopause. It is not one that has previously been brought to wide attention as anything other than a personal matter, and not one that appears to have impeded women working in the law, in education, in medicine and in most very demanding careers. Some women have blamed discrimination, lack of childcare facilities or the workplace culture for not reaching the top, when that is the case, but not their physical destiny.

There is nothing unique about a form of bodily frailty affecting working lives. It is reported that there are about 100,000 long COVID sufferers who are finding it hard to work; there are millions on NHS waiting lists. Over 50,000 men are diagnosed with prostate cancer every year and subjected to debilitating treatment. In none of those cases are the financial deficits placed on their spouses. It is quite right that it is now recommended that every workplace design a menopause support policy[1] because the Equality Act 2010 requires adjustments to be made for disability, sex and age. It is true that the government has been backward in protecting disabled people and others as required in that Act and some of the relevant sections have not yet even been brought into force, as uncovered in the report that I chaired.[2] In this context section 14 of the Equality Act 2010, dealing with combinations of protected characteristics, could beneficially be brought into force. The point that needs to be made is that long COVID, disability and other physical conditions of men and women are conditions where the workplace, if any, should make the necessary adjustments. We do not argue that because men are prone to prostate cancer that this should place an extra financial support duty on their wives; nor that heart disease, which affects many more middle-aged men than women, should be taken into account in calculating a split of assets on divorce.[3] The menopause is no different. It is not the husband's fault that his ex-wife's menopause might affect her badly and it is no more his responsibility than it would be hers to support him if he gets prostate cancer. It is one thing to compensate women for perceived discrimination without grounds, but quite another to place them all in a category of deficiency due to their physical lives.

A rebuttal of the arguments around menopause and divorce

There are two basic flaws in the demand that financial provision on divorce be adjusted for the menopause. One is the risk of reverting to 19th-century images of women with the consequent removal of advances we have made; the other is the generalisation that all women will lose income by suffering the menopause. Some may suffer for a few years, one in four according to Shahzady; some may not or only briefly; some may carry on at work; some may never have had or intended to have a paying career at all; half of the divorced women are younger than the average of menopause; others are older and past it. So what is being suggested are more complicated and aggressive financial negotiations for a small section of women who fall into the category of being middle aged and at work and suffering to the extent that it affects their income and their employers are not making adjustments. However, research has shown that most women do not get anything at all out of the divorce settlement because their husbands do not have the means, and that the entire system is run largely for the better off.[4] Indeed, the least well off spouses lose their awards pound for pound to Universal Credit. A divorced wife who gives up work because of the menopause will not be able to count on financial provision making it up to her.

Other European countries, Australia and New Zealand manage to have fairer, more straightforward laws with little ongoing maintenance, even though women all over the world go through the menopause. More older women than ever are at work, about one in six of all workers. The

disadvantages of being of menopausal age are widely known. The advantages, however, of additional confidence, freedom from menstruation, more experience and less childcare responsibility are also present. A survey carried out for noon.org.uk found that 78% of women of that age did not want to be branded as menopausal.

Most poignant of all is the blithe disregard in family law for single women. They too suffer from possible discrimination at work, some from childcare burdens, from the cost of living, from lower pension provision. However, the call for recompense for these handicaps, where they exist, is only ever made in relation to women who are fortunate enough, some would say, to have been in a presumed sexual relationship with a man. There is no one to compensate a 50-year-old single woman who is feeling less able to work. Wives and in some cases cohabiting women are entitled to financial provision on divorce and/or death, to a share in pensions and property, tax advantages and better child support enforcement through transfers of capital. They may or may not have children when dissolution occurs. It has been said (*E* v *L* [2021] EWFC 60, Mostyn J) that the childless wife should be treated with no less generosity than the mother; and it may be that the children have long since left home. In financial provision law women who have once lived with a man are often exempt from ever being expected to work again, and unfortunately this legal presumption is reflected even in the younger generation today. Once married, nobody asks why they are not working outside the home: it is a given that they have escaped that path. It is high time that family lawyers showed some empathy for single women by pressing for better conditions for all women and most especially by fighting for enforceable child support.

Treatment of women: historical context

As all readers will know, the 19th century saw the oppression and domination of women (and, of course, so did preceding centuries) in the realms of finance, work, voting, exercise and custody of their children. What was different about 19th-century oppression was the scientific explanations that were produced to justify male dominance in every sphere. A sample of those explanations, below, may make you laugh or cry.

When I was teaching law, I would quote Nietzsche to my students: 'when a woman has scholarly inclinations there is usually something wrong with her sexually. Sterility itself disposes one toward a certain masculinity of taste; for man is, if I may say so, "the sterile animal"'.[5] This did not seem to deter them. They knew that the old supposed physical and mental inferiority of women was a thing of the past and so it should remain. In the 19th century the ideology of separate spheres for men and women prevailed. A woman was considered physically weaker but morally superior to a man, which meant that she was rightly constrained to the domestic sphere, and deemed to be queen of the home, which militated against giving her the vote. Like Nietzsche, some doctors regarded study as having a damaging effect on the ovaries, turning fertile young women into dried up crones. A woman who evinced sexual interest risked being labelled a nymphomaniac or hysterical, and very damaging medical treatments were given to cure them. Women who earned wages were unnatural, denying their vocation of childbearing and rearing. This supposed physical and mental frailty meant of course that she required male protection over her money, her whereabouts and her care for her children, and that she could not be trusted to vote or make weighty decisions. Even in the 20th century, those who fought against women's liberation relied on women's natural and traditional roles as they saw them. It was claimed that madness in any form is a breakaway from traditional roles. Phyllis Chesler wrote: 'what we consider madness, whether it appears in women or in men, is … the total or partial rejection of one's sex role stereotype'.[6] Octavio Paz, Mexican Nobel Prize winner, considered: 'women are inferior beings. Their inferiority is constitutional and resides in their sex … which is a wound that never heals'.[7]

Nineteenth-century doctors believed that menstruation was a particular handicap, an illness for which women should treat themselves every month and limit their physical and mental activity, and especially limit their sporting activities. Women's sport has taken more than a century to recover and only now is being perceived as equally demanding and entertaining, never more so than England winning the UEFA European Women's Championship this summer. Premenstrual symptoms were seen as a cause of irrationality and excess emotion in women giving them a reduced capacity for reason. Of course, divorce was rare or non-existent and so was the working woman, so those factors were not brought into play on dissolution.

A revival of the past?

By now generalising menopause difficulties, in the way Farhana Shahzady advocates, the 19th century is being revived with consequent – no doubt unspoken – barriers to be placed in the way of working women and their advancement. The point of feminism was for women to escape being defined by their biology. The tendency of family judges and practitioners to rule out the requirement and ability of any divorced woman, with or without children, ever to keep herself again is as insulting and self-fulfilling an approach as are the reported automatic low expectations of ethnic minority schoolchildren. The rejection of self-support in English law also risks setting back the great challenges of equal education, equal pay and equal opportunities facing women. If the notion takes hold that once they have partnered with a man, they need never go to work again, then it must follow, consciously or unconsciously, that they can go to the back of the opportunity queue. Easy divorce must mean that every woman should, and should want to, take control of her own ability to self-support throughout her life. This was never truer than now when the huge rise in the cost of living means that many people holding jobs cannot afford to support their families, let alone a separated family and a new one.

Certainly, the English law of financial provision needs adjusting, but in the opposite direction to that suggested by Shahzady. As the New Zealand Law Commission said recently:[8] 'the moral basis for why one partner should be liable to provide income support to the other partner through maintenance after the relationship has ended is unclear in contemporary New Zealand'.

Gender equality

It is posited that women, especially middle-aged women, suffer more economic deprivation than men on divorce. This situation is never advanced as an argument against easy divorce, but is thrown on to financial provision law, at least where there is any money to distribute. English law is the most stereotyped in the western world in this regard, despite the facts. The EU Gender Equality Index[9] ranks the United Kingdom at above the EU average, behind only Sweden, Finland, France, the Netherlands and Denmark, which puts paid to the argument that English financial provision law cannot be reformed until after social equality is achieved. Nearly every other country in the European Union, and many beyond, has financial provision laws that recognise pre-nuptial agreements, time-limit maintenance and divide post-marital property equally. They are also more likely to ensure that child support is enforced after separation.

There is no link that can be established between gender equality in practice and financial provision law in other European nations, but perceptions of independence matter. So one has to ask why England is the odd one out, not why our law should not change. The current system is discredited by its ineffectiveness and the frequent dissipation of a large proportion of the couple's assets in legal costs in operating it. There is little benefit for anyone who really needs it in our existing system, and the way it is used by wealthy divorce tourists is shameful.

No-fault divorce

Now no-fault divorce has been introduced. Changing the ground of divorce to no-fault will not assist couples to reach an early amicable settlement because, according to research, sudden and short notice of divorce makes couples less amenable to resolving issues than a more protracted and gradual period of coming to terms with it, as in say 2 years' separation. 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. Moreover, the government has recently announced that it will pay couples with children to mediate.[10] If the government has to help people to avoid the law, there must be something very wrong with that law!

The position of the children involved in divorce is not sufficiently considered in the law.[11] Surely maintenance for children should continue to the age of 21 at least, given that so many go into higher education. The emphasis of financial settlement should shift 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. Now that there is hardly any legal aid – and, indeed, even when it was available – using it for these disputes is a deplorable waste of resources that ought to be preserved.

Conclusion

The vested interests of lawyers 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. COVID-19 has accelerated the move to remote and online handling of family disputes. There is an urgent need for a new law that is adapted to that and to the situation of no-fault divorcing couples who have little legal advice and need ready guidelines. Lawyers who advise in bigger money cases may well say that the subtlety and adaptability of the current law should not be lost and that the more dependent spouse should not lose out. Those lawyers benefit from the complexities and antagonistic nature of the current law.

The reforms proposed in New Zealand and those proposed by Baroness Shackleton and me – binding pre-nuptial agreements, an equal split of post-marital property, longer support for children and shorter support for spouses – would offer an off-the-peg solution and one capable of online resolution, as in the Australian project.[12] They would end the attitude of some lawyers that, since we all look better in Savile Row suits, there must be no Marks & Spencer ready-made. The increasingly frantic efforts by financial provision lawyers to justify by, for example, the menopause the unjustifiable English exceptionalism may lead us down a dangerous path.

Notes

1 House of Commons, Women and Equalities Committee, *Menopause and the Workplace Inquiry* (July 2022).

2 Select Committee on the Equality Act 2010 and Disability, *The Equality Act 2010: the impact on disabled people* (HL Paper 117, 2016).

3 Ana Catarina Pinho-Gomes, Sanne AE Peters, Blake Thomson and Mark Woodward, 'Sex Differences in prevalence, treatment and control of cardiovascular risk factors in England', [2021] 107 *Heart* 462–7.

4 Emma Hitchings and Joanna Miles, 'Financial remedies on divorce: the need for evidence-based reform' (2018), available online, at www.nuffieldfoundation.org/sites/default/files/files/briefing%20paper%20Jun%202018%20FINAL.pdf.

5 Friedrich Nietzsche, *Beyond Good and Evil*, Part IV (publisher unknown, 1886), 144.

6 Phyllis Chesler, *Women and Madness* (publisher unknown, 2nd edn, 1997).

7 Octavio Paz, *El laberinto de la soledad* (publisher unknown, 1950, transl. Kemp).

8 New Zealand Law Commission, Report 143, *Review of the Property (Relationships) Act 1976* (2019), para 48.

9 EIGE, *Gender Equality Index*, available online, at https://eige.europa.eu/gender-equality-index/2020/compare-countries

10 Ministry of Justice press release, '£1 million voucher scheme to help families resolve disputes outside of court' (26 March 2021), available online, at www.gov.uk/government/news/1-million-voucher-scheme-to-help-families-resolve-disputes-outside-of-court

11 Report of the Family Solutions Group, *'What about me?' Reframing support for Families following Parental Separation* (12 November 2020), available online, at www.judiciary.uk/wp-ontent/uploads/2020/11/FamilySolutionsGroupReport_WhatAboutMe_12November2020.pdf-final.pdf.

12 Patrick Parkinson, 'Family property division and the new technologies', [2020] *Ex Curia* 25–38.

DR Corner: Review of *(Almost) Anything But Family Court*

Only Mums and Only Dads, May 2022

Jo Edwards

Partner and Head of Family, Forsters LLP

Earlier this year, my good friends at Only Mums and Only Dads, Rebecca Giraud and Bob Greig, with a stellar author in the ever-fabulous Jo O'Sullivan, launched *(Almost) Anything But Family Court* at the Resolution national conference. The President, Sir Andrew McFarlane, was present in person to reinforce themes which feature in his Foreword to the book:

> '… issuing proceedings in the Family Court should be the last resort, rather than the first. [A]lmost any other avenue … is likely to be quicker, much less stressful and less expensive …'
>
> 'To end up "fighting" a case in the Family Court is a sign of failure'
>
> 'The arrival of this clear and very accessible book represents a most valuable and significant addition to the available resources … Oozing with common sense and emotional insight, the available options and various routes are explained in non-legal language.'

As practitioners, we all know this. Yet good quality resources which demystify things have long been lacking, and those navigating separation and divorce have often been left confused. There has been a tendency to put different processes into silos, without providing guidance as to how someone may find their way seamlessly to resolution using a different approach if, for example, mediation founders. There has also been a habit – perpetuated by government policy – to put mediation (and just one model of mediation) at the heart of people's thinking, so that they are ignorant of the wealth of other non-court dispute resolution (NCDR) approaches available (such as early neutral evaluation, collaborative practice, arbitration and, indeed, the different and developing models of mediation).

The choice between court and non-court options has often felt binary. How often do we read resources which demonise court completely and make people feel like a failure if they end up there and, at the other end of the spectrum, pieces written by dyed-in-the-wool litigators who seem almost suspicious of NCDR and all it represents, and signpost clients straight to court?

So when I came to read *(Almost) Anything But Family Court*, it represented a refreshing change in approach.

In speaking to the editors, I discovered that producing a resource like this had been on their to do list for about 4 years and it came to a head when they saw a tweet about hybrid mediation and wondered what that was. They reasoned that if they did not know, there was a very good chance the general public (who contact Only Mums and Only Dads in their thousands every year looking for support) would not know either. That thinking was confirmed as other new terms – 'Med-Arb', 'Arbitration', 'Private FDR' – came to the fore. During those conversations, an email arrived from Jo O'Sullivan asking if they could produce a resource for the public to outline all the alternatives to the Family Court. As Bob and Rebecca said to me – 'Ha! That will teach her …'. Jo agreed to write the book on two conditions, that she would only do so free of charge and that any royalties coming her way would be put to support the work of the Only Mums and Only Dads' not-for-profit organisations. Discussions, drafts, layouts, what to put in and what to leave out started within days.

What a brilliant book has resulted. The clear message that permeates it, as trailed in the editors' introduction, is that, 'No matter how daunting and difficult, reaching an agreement with your ex outside of the family courts that works for both of you will be the best possible outcome for you and your family'. Jo herself stresses that this is first and foremost a book written for the public, for those contemplating or navigating a break-up. The important secondary audience is family law professionals (and, no doubt, others helping people to navigate separation, be it therapists, family consultants, financial neutrals and the like), to help guide clients and for it to prompt discussion. However, given that we know that since the advent of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 almost 10 years ago, around 80% of private law cases in the courts involve at least one unrepresented litigant, and that the online divorce portal and no-fault divorce have driven ever more people to start their process without accessing any legal advice, it is vital that the book speaks first and foremost to the public.

Importantly, while the focus of the book is to explain in

layman's terms the detail of all of the non-court processes known at the time it was written ('at least 12'), the first chapter covers domestic abuse and ongoing safeguarding. There is a helpful description of what constitutes domestic abuse and the types of relationship it may cover, and an important checklist to help someone consider whether there has been domestic abuse in *their* relationship. The message is clear (and made upfront in the book) – that the processes the author outlines rely on someone being able to speak and be involved freely in all the discussions and decisions, and not being at risk of duress or other harm. If that is not the case, then the reader is cautioned against NCDR processes and signposted to available resources.

Sensibly, later on, the book also explores the circumstances in which legal steps may be required, broken down into 'protection of assets' and 'protection of the person'. In that context there is a helpful description of the different types of support available; and an invaluable list of tips about how to choose your lawyer and how to manage your relationship with them (including their involvement in the different NCDR processes).

The meat of the book, then, is the 'sorting things out' section. Twelve options away from court are dissected – what each one is, the pros and cons and the circumstances in which the particular process may be used. The spectrum runs from DIY/kitchen table discussions, through different models of mediation, collaborative, round-table meetings, arbitration, med-arb, one lawyer two clients, online, early neutral evaluation and private financial dispute resolutions. This is distilled into a really helpful table which summarises the options and sets out what the team involved may look like in each scenario (a really commendable feature of the book is its focus on different professionals who may be involved, not just lawyers). For me, one of the best things about the book is the way in which it seeks to break down the walls between the different process options, which (speaking as a mediator who often struggles easily to help clients transition into arbitration if any element of mediation has failed) have for too long existed. In the summary table, Jo includes a 'process mixes well with' column to describe the possible mix-and-match approach which could be adopted, borrowing from what she sets out in the chapter. As dispute resolvers, it is for us to do more work on how we make this happen in practice.

The book ends with some typically useful pointers for members of the public – detail about parenting plans and sorting out the finances; details of 'who's who' in the team they may work with; and a glossary of legal terms and signposting to other resources/organisations.

Rightly, the book has had a warm reception from legal and other professionals who work with separating couples. What is key is to get the word out to members of the public. Getting the book 'out there', Bob and Rebecca tell me, is a challenge and it is hoped that lawyers and mediators will signpost clients to it. From Bob and Rebecca's perspective, the President's endorsement is crucial in the messaging they want to cascade down. The book now has the most senior family judge, and an experienced and respected solicitor in Jo O'Sullivan, and two parent organisations saying to parents, 'don't go to court unless you really have to'. There is power in that unity.

From my perspective, I have no hesitation in highly recommending *(Almost) Anything But Family Court* to readers of the *Financial Remedies Journal*. While we should all be giving two copies to each of our clients so they have one for themselves and one for their soon-to-be-ex, you should buy a copy for yourself as well. I would be very surprised if you did not learn something new from it yourself and, given the ongoing (and much-needed) push to divert more cases away from the Family Court, we are all well-advised to brush up on our knowledge and understanding of the new and rapidly evolving models of dispute resolution. Exciting, innovative times indeed.

Tech Corner: Thoughts from the Home Office (No, Not That One)

Ishan Kolhatkar

Former Barrister, now working in Tech, ishankolhatkar.com

When we first went into lockdown in 2020, like everyone else, I was concerned by an unfamiliar world. One where you couldn't go outside, had to cook more and work from home. Then I looked around my then kitchen dining room and thought, 'Hang on, you work from home and you spend most of your spare time cooking'. To a casual observer, it would appear you have been unwittingly preparing for such an event.

Early 2020 was filled with me writing Twitter threads on tech for working from home and livestreaming as I cooked. Some of it ended up in MacDonald J's document 'The Remote Access Family Court' – the advice about appearing from home, not my recipe for Short rib ragu and pappardelle.[1]

Whether you are looking to upgrade your existing home setup, start again from scratch or just audit what you have, here are my thoughts as a work from home veteran.

Desk

I'm a professional fidget. I find it increasingly difficult to sit down for long periods of time. But I can comfortably stand up for long periods. For me, a standing desk was the best purchase I made this year (don't let my coffee machine hear that) because it gave me the freedom to stand and carry on working. I'm standing as I type this now. I also prefer to present when standing. Whether it's an internal meeting or an online conference spot, I feel most comfortable when standing up. If you've got an Apple Watch, you can smugly stop it from reminding you to stand up every hour and bask in the glory of hitting your stand goal. (Other annoying reminders are available.)

The variety available means it's impossible and impractical to recommend a particular desk. I have one from Ikea because it was well priced and they could deliver the next day; that and the online reviews suggesting that even I could assemble it. There are desks out there with an array of charging ports, some with wireless charging and even some that you can write on as the top is made from the same material as a whiteboard.

Chair

It's easy to baulk at the price of a good office chair because at first glance the RRP and telephone number of the retailer appear indistinguishable. But take a moment to consider that this is something you are going to use regularly and that selecting the correct one will save you from a visit to the doctor. Back support is the name of the game. In short, not a dining table chair. It's not designed for extensive use as you pour over schedules and craft submissions. I suggest either an ergonomic chair designed to keep your back aligned, or a stool that makes you sit straight. This is also where you need to try before you buy. I spent an hour in a shop sitting on chairs to see which one suited me. I took my laptop with me and mimicked my working position. I ended up with a stool rather than a high-backed chair. It makes me sit up and then, from time to time, discard it in favour of standing.

I screen, you screen, we all screen for ice cream

Computer screens are like bowls of ice cream; after eating three you realise that not only do you not have room for more, but that the adults who advised you in your childhood may have had reason for cautioning restraint. Much like the adults in the above scenario, I will advise that quality is better than quantity.

How many screens can your computer support?

There is a limit. The graphics card in your computer or the processor itself may limit the number of external displays your computer can support. For example, a MacBook Air or Pro with an M1 chip can only support one external monitor. There is a way round it using a piece of kit called DisplayLink, but that adds to the cost and complexity. Macs with M1 Pro, Max or Ultra chips can support between two and five external monitors depending on the machine. With a Windows machine there will be limits you need to bear in mind before buying. The easiest way to find out is to Google the model of your computer and "number of external monitors" (in double quotes) and look for the manufacturer's website. This will also tell you which physical connections are available for your computer; the two most common

being HDMI and USB-C. You may find for example that you can connect two, but they need to be using both of those ports, i.e. one per screen. This will affect what you can buy.

How many screens do i need?

Rather than thinking about screens first, consider what your ultimate workspace would look like. In a previous job, I wanted to have my email open alongside a spreadsheet and a Word document. Sure, in an ideal world I'd have 64 windows open at the same time displayed on a massive wall, but back to reality, if I had to get down to the bare minimum it was email, Word and Excel. I therefore had two external monitors: one landscape for Excel and one portrait for Word. There are monitors available that are either portrait by design or can be swivelled between landscape and portrait.

My current setup is different. My M1 equipped MacBook Pro can only support one external monitor so I purchased a widescreen one. It comfortably allows me to have three windows open at a time, or two if I have a very wide spreadsheet. Of course, I still yearn for the 8 x 8 wall of monitors, but that will have to wait for another day.

One widescreen or two external displays is my general recommendation. Why? You'll probably want to look at multiple documents at the same time. Yes, if you have a laptop, you can use that as one of your screens, but bear in mind that it's going to be smaller and you'll have to keep looking up and down, changing focus from something near to far. As with the chairs above, save yourself a trip to the optometrist in the future and use the laptop screen for something you'll look at less often, or should look at less often – in my case, Twitter. If, like many of us, you insist on using the laptop screen, I'd recommend some kind of riser, many stylish options are cheaply available.

What size and spec do I need?

I'd suggest a minimum of 32 inch for an external display given the sort of documents I know readers of this publication will be working on. In terms of tech specs, the two popular monitor types are LED and IPS. The latter, in my view, is better for documents because what's rendered on the screen appears clearer and crisper.

What about when I'm at court?

Unless you are in a long case, lugging about a standard monitor is not really an option. Worry not, there are others. If you have an iPad, this can be used as an external display. If you have a Mac, all the software you need is baked into your devices. Using Sidecar, you can make your iPad a second monitor. Of course it stops being an iPad at this point and instead a relatively expensive display. However, the advent of Universal Control from Apple lets you use your Mac and iPad as two separate devices, but with the trackpad on your Mac controlling the iPad as well. If you had two iPads, you could set one up with each. But something tells me if you have two iPads you probably aren't reading this!

A Windows laptop can also be connected to an iPad to use it as a second monitor. You'll need an app to do it; there's a selection available for free and others for a small fee. I've not used any of them, but Duet Display, iDisplay and SplashTop appear well rated. Note, with some you'll need to use a cable and others support wireless connections.

I wouldn't recommend buying an iPad just to use as a display. There are cheaper and better options if you just need a monitor as opposed to the computing power of an iPad. Or perhaps you want to use your iPad, laptop and still have another display. Recently, I've been impressed with a brand called Espresso,[2] which have a range of displays, with or without touchscreen capabilities. They also offer a 30-day money back guarantee.

I can hear you Clem Fandango

Perhaps one of the most neglected areas in home working is sound quality. Built-in microphones on laptops vary in their quality, both in terms of your voice and the background noise they filter out. One option is to buy a headset with a microphone, but I know that some don't like the way they look and others think they aren't appropriate in a court setting. The alternative is a good quality external microphone. I have a Blue Yeti which means my voice is crisp and clear (the jury is out on whether this is a good thing) and have also used the RØDE NT-USB. Both are about £100 and are worth the money if you are a regular remote worker. To avoid feedback, you should wear some sort of headphones. Small wireless in-ear ones are probably best. Note, the better in-ear wireless headphones (e.g. AirPods) have pretty good microphones on them. So much so that you might find an external mic is superfluous.

Can you see me now?

A final word about cameras. Laptop cameras have got much better in the last couple of years (and those that haven't hide at least some of the work from home bad hair days) so an external one is probably unnecessary. The only point I make here is to consider its placement. The built-in camera on your laptop can't be moved unless you also move your laptop, whereas an external camera can be placed almost anywhere. The top of your external monitor might be a more natural eyeline position. Or even attached to a wall if you want to stand up when speaking.

Conclusion

The perfect home office takes time to craft. But with a bit of planning you can have a set up that works and makes you more productive or, worst case scenario, helps you to live that childhood dream of being the Q to your office's Bond.

Notes

1 That can be found at www.ishankolhatkar.com/food/ragu.
2 uk.espres.so

Money Corner: RPI v CPI – Why Inflation Matters in a Divorce Settlement

Charlotte Wright

Chartered Wealth Manager,
Brewin Dolphin

The rising cost of living has brought into focus the importance of considering inflation when negotiating divorce settlements.

While many of us are aware of the eroding effect of inflation on wealth over time, what is less well known is that there are various methods of measuring inflation. When the parties to a divorce settlement are calculating how much money one party requires to support their lifestyle over time, the result could be markedly different depending on which inflation measure has been applied.

Understanding the differences between these inflation measures, and identifying which one has been or should be used, are vital to achieving the fairest possible outcome for clients.

Why does inflation matter?

The impact that inflation can have on money's 'real' value over time must not be underestimated. While price rises in food and energy bills are noticeable, the effect on savings and investments is less evident, which is why inflation is often called the 'silent thief'. Although capital might not be declining in nominal terms, rising prices can reduce its purchasing power, particularly over long periods. To put it simply, £1,000 is likely to buy you significantly less in 20 years' time than it could today.

Being aware of inflation is especially important in financial remedy cases where the parties involved are looking to achieve a clean break and one partner is awarded a lump sum payment. The lump sum may need to support the ex-partner's lifestyle for several decades, so it is important that it is calculated fairly and accurately, taking into account expected future increases in the cost of living. The *Duxbury* model, for example, assumes a uniform rate of inflation at 3% per annum.

Inflation is also important where spousal maintenance has been ordered. If the monthly payments are not linked to inflation, the lifestyle the recipient could afford could prove significantly different to the one that was intended. Hence the inclusion in many financial orders of an annual adjustment to the maintenance in line with inflation. If a client is receiving maintenance that has not been increased for some time, they would likely benefit from legal and financial advice on their options. The same goes for their ex-spouse – those facing the possibility of making higher maintenance payments will be looking for reassurance that their future is financially secure.

How is inflation measured?

Inflation is simply the rate at which the price of goods and services is increasing over a given period. If the annual inflation rate is 10%, then prices are, on average, 10% higher than they were a year ago. In reality, this is more complex because there is no single method of calculating price rises over time.

In the United Kingdom, the most common inflation measures are the retail prices index (RPI), the consumer prices index (CPI), and the consumer prices index including owner occupiers' housing costs (CPIH). Chart 1, which compares the annualised rates of RPI, CPI and CPIH between January 1989 and June 2022, illustrates the extent to which the different measures can vary from one another.

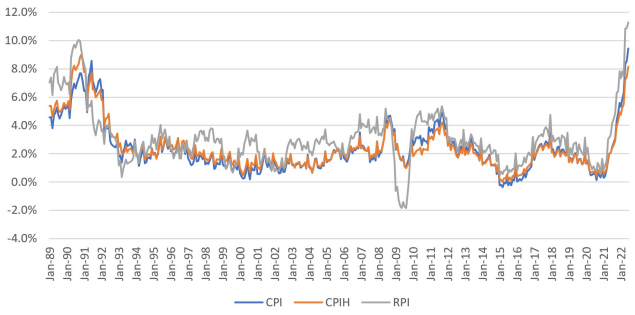

Chart 1: CPI vs CPIH vs RPI.
Source: Brewin Dolphin/Refinitiv Datastream.

The reason why CPI and CPIH differ from one another is simply that the latter includes the costs of owning, maintaining and living in one's home, along with council tax. RPI

differs from CPI for a range of reasons which, according to the Office for National Statistics (ONS),[1] include:

- *Population base*: CPI is based on spending by all private and institutional households, whereas RPI excludes the top 4% of households by income, pensioner households with three-quarters of their income coming from state pensions and benefits, and institutional households.
- *Commodity coverage*: owner-occupied housing costs and TV licences are included in RPI, but excluded from CPI. University accommodation fees and some financial services charges are included in CPI, but excluded from RPI.
- *Index construction formula*: RPI is an arithmetic mean of price changes (the increases are added together and divided by the number of increases), while CPI is a geometric mean (the increases are multiplied together and the nth root is taken, where n is the number of increases).
- *Rounding*: the monthly and 12-month rates from CPI are calculated using unrounded indices, whereas those from RPI are calculated using rounded indices.

Although RPI has not been classified by the ONS as a 'national statistic' since 2013, it is still currently being used across government, by pension schemes and consumer companies.

How do CPI, CPIH and RPI affect capital?

Understanding the differences in CPI, CPIH and RPI is important in financial remedy proceedings because the parties involved will need to agree on the best guide for estimating the erosion of capital over time and ensure they are comparing like with like.

As Chart 2 demonstrates, the real value of £100 after three decades looks markedly different depending on which inflation indicator is used. If £100 was placed in an interest-bearing cash savings account[2] in January 1989, its real value in June 2022 would have been £141 after adjusting for RPI, £178 after adjusting for CPIH, or £180 after adjusting for CPI.

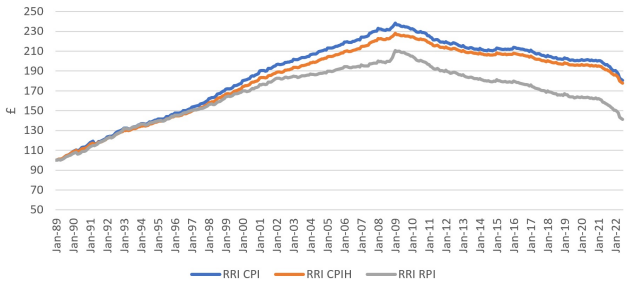

Chart 2: Real value of £100: 1989–2022.
Source: Brewin Dolphin / Refinitiv Datastream.

Over the past 10 years – a period that has seen historically low interest rates – the real value of £100 would have declined as interest rates were no match for the eroding impact of inflation. Chart 3 shows that between June 2012 and June 2022, the real value of £100 would have fallen to £68 after adjusting for RPI, £70 after adjusting for CPIH, or £73 after adjusting for CPI.

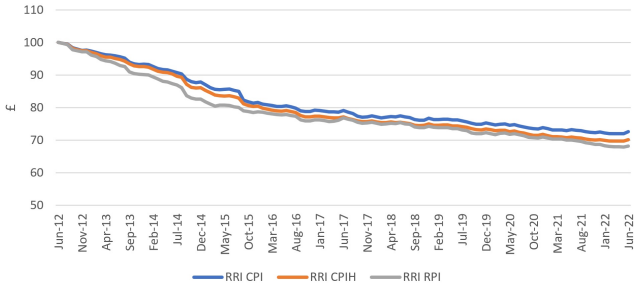

Chart 3: Real value of £100: 2012–2022.
Source: Brewin Dolphin / Refinitiv Datastream.

What are the key takeaways for family lawyers?

If you were to use historical inflation data to determine how much capital or spousal maintenance a client should be awarded, RPI would generally produce a higher figure than CPI or CPIH, as can be seen from Chart 1. One could therefore argue that the party who is paying the lump sum or spousal maintenance would be better off if the payment was calculated using CPI or CPIH, whereas the party receiving the money would be better off if it was calculated using RPI.

Ultimately, the key thing to remember is that seemingly small differences in inflation measures could, over the long term, have a substantial impact on a client's financial position. And while inflation is, of course, only one metric to consider when determining how much should be ordered, with the cost-of-living crisis at the top of the news agenda, it is certainly something that should be on a family lawyer's radar.

While we cannot predict the future, nor the path of inflation, we can help clients to build a plan with clear goals and protections in place, so that they can look towards the future with confidence.

Notes

1 Office for National Statistics, 'History of and differences between the Consumer Prices Index and Retail Prices Index' (2011), available online, at https://webarchive.nationalarchives.gov.uk/ukgwa/20160108003710/http://www.ons.gov.uk/ons/rel/cpi/consumer-price-indices/history-of-and-differences-between-the-consumer-prices-index-and-retail-prices-index/index.html.

2 The interest rate used is the 3-month delayed LIBOR.

Financial Remedies Case Round-Up

May to October 2022

Polly Morgan
Case Editor, Associate Professor and Director of UEA Law Clinic, University of East Anglia

Henry Pritchard
One Hare Court

Welcome to this round-up of developments since the second issue of the *Financial Remedies Journal* (FRJ) went to press in April 2022.

All (yes, all) cases involving the financial consequences of married or unmarried relationship breakdown, or the maintenance of children, are summarised on the FRJ website[1] by an experienced team of lawyers: Case Editor, Polly Morgan, and barristers Rebekah Batt, Stephanie Coker, Alexandra Hampton, Krishma Patel and Henry Pritchard. We summarise not merely financial remedy cases on divorce, but also the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA), Schedule 1 to the Children Act 1989, the Inheritance (Provision for Family and Dependants) Act 1975, enforcement, Part III of the Matrimonial and Family Proceedings Act 1984 – and anything else we think might provide a line of argument to the reader. When preparing a summary, the team has in its mind the practitioner who, late in the evening, is trying to prep an urgent case and doesn't want to read unnecessarily. Accordingly, the cases are easily searchable by the same keywords used in the *Dictionary of Financial Remedies* and we try to focus on the points in each case that are likely to be of most help for future cases.

Polly Morgan and Henry Pritchard provide a concise round-up of recent financial remedies judgments.

G v W [2022] EWHC 101 (Fam) (Sir Jonathan Cohen)

Appeal in Schedule 1 proceedings from the decision in *Re A (Schedule 1, Overspend, Costs Clawback)* [2022] EWFC 21.

Keywords: Children Act 1989 Schedule 1 applications; costs.

Re D (A Child) (Appeal from the Registration of a Maintenance Order) [2022] EWCA Civ 641 (Lewison, Moylan and Baker LJJ)

Reciprocal Enforcement of Maintenance Orders (United States of America) Order 2007 (SI 2007/2005) provided right of appeal to registration in England and Wales of a US child maintenance order.

Keywords: child maintenance; jurisdiction; international enforcement; appeals.

VV v VV [2022] EWFC 41 (Peel J)

Expensive and acrimonious proceedings. Judgment useful for detailed survey of case-law on premarital cohabitation.

Keywords: sharing principle; needs; premarital cohabitation; conduct; matrimonial and non-matrimonial property.

VV v VV [2022] EWFC 46 (Peel J)

Costs judgment in relation to the above.

Keywords: conduct; costs.

VSN v Secretary of State for Work and Pensions and JN [2022] UKUT 138 (Administrative Appeals Chamber) (Upper Tribunal Judge Poynter)

Question: Was a mirror order a 'maintenance order' within the meaning of the Child Support Act 1984? Answer: yes, but in this case as it was more than 12 months old it was superseded by the jurisdiction of the child maintenance service.

Keywords: overseas divorce and the 1984 Act; child maintenance; child support; mirror orders; international enforcement.

SC v TC [2022] EWFC 67 (HHJ Edward Hess)

Financial remedies case involving post-nuptial agreement, in which the husband had, in the face of a foreshortened life expectancy caused by Parkinson's disease, voluntarily relinquished his clear entitlement both to sharing and to a needs-based award.

Keywords: impaired life expectancy; agreements.

D v D (Financial Remedy Case) [2020] EWFC B24 (DJ John Smart)

Rare reported modest asset case. Identification of needs in a marriage that, with prior cohabitation, had lasted only 10 months.

Keywords: needs; clean breaks and term maintenance;

duration of the marriage; conduct; spousal maintenance (quantum).

XZ v YZ [2022] EWFC 49 (Mostyn J)

The judge granted an interim reporting restriction order (RRO). He followed the decision in *Xanthopoulous v Rakshina* [2022] EWFC 30 in which Mostyn J held that a financial remedy judgment (which is not predominantly about child maintenance) may be reported without anonymity save where a RRO was successfully applied for. Successful application, primarily because the disclosure in question had been provided before the court's change in approach to anonymity. Cf *Gallagher v Gallagher (No 1)* [2022] EWFC 52 (below).

Keywords: publicity; confidentiality; reporting restriction order.

Villiers v Villiers [2022] EWCA Civ 772 (Moylan, Coulson and Arnold LJJ)

The wife's successful appeal of the order of Mostyn J to dismiss her claim under section 27 of the Matrimonial Causes Act 1973, following extensive litigation which had gone all the way to the Supreme Court in relation to jurisdiction. The husband has since died.

Keywords: jurisdiction; disclosure; maintenance.

Gallagher v Gallagher (No 1) [2022] EWFC 52 (Mostyn J)

Application for a reporting restriction order (RRO) or an anonymity order. Focus on *Re S (A Child)* [2004] UKHL 47 balancing exercise in respect of Articles 6, 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. RRO granted, but only in relation to information about the parties' children.

Keywords: reporting restriction order; publicity; confidentiality.

Gallagher v Gallagher (No 2) [2022] EWFC 53 (Mostyn J)

Financial remedies final judgment. Valuation of a construction company with findings as to the non-matrimonial portion of said company adopting a linear method. Equal division of a portion of the company reflecting the marital acquest. Criticism by the judge of the large legal costs incurred in a 'simple' case.

Keywords: non-matrimonial property; valuations.

Paul v Paul & Ors [2022] EWHC 1638 (Fam) (Moor J)

Inheritance (Provision for Family and Dependants) Act 1975 claim. Applicant applying for reasonable financial provision from the estate of her late husband and a declaration that she had a beneficial interest in a property he had owned. The husband's will had left everything else to his children. Common intention constructive trust found in favour of the applicant as to 50% of property. Equal division of the estate.

Keywords: TOLATA; Inheritance (Provision for Family and Dependants) Act 1975.

DE v FE [2022] EWFC 71 (Cohen J)

Financial remedies judgment. Question of whether former family home was a matrimonial property when the husband had owned it before marriage and the parties had lived there for 18–24 months before renting it out. Thirty per cent of the value treated as matrimonial. Discount in division of husband's business on the basis of post-separation endeavour and liquidity.

Keywords: duration of marriage; division of former matrimonial home; non-matrimonial property; valuations.

Brake & Anor v Guy & Ors [2022] EWHC 1746 (Fam) (HHJ Paul Matthews)

Application for a third party debt order (TPDO) against trustees of a SIPP pension. Not possible for a TPDO to bite on income from pension since Mr Brake had only a beneficial interest in the underlying investments, subject to tax and costs. Order instead made on *Blight v Brewster* [2012] EWHC 165 (Ch) basis by delegating his power to receive funds to someone acting for the creditor.

Keywords: enforcement; pensions.

X v C [2022] EWFC 79 (HHJ Farquhar)

Modest asset financial remedy judgment. Clean break in which the wife was left unable to purchase a home for some years (by contrast to the husband), but where she retained the whole of her valuable pension. Successful application for a reporting restriction order applying *Re S (A Child)* [2004] UKHL 47 balancing exercise. Commentary on the difficulty for lower court judges in ruling on anonymity in the context of inconsistent High Court authority.

Keywords: pensions, publicity; confidentiality; conduct, needs, tax.

Barclay v Barclay [2022] EWHC 2026 (Fam) (Cohen J)

Judgment summons of Sir Frederick Barclay. Failure to pay £100m after final order, legal services payment order and arrears of maintenance. Defence that assets were tied up in trusts controlled by family which he could not access. Criticism by judge of Sir Frederick's family. Judge did not find for the wife in respect of judgment summons pertaining to the £100m, but did in respect of the order two orders. Sanction to be considered for breach at later hearing.

Keywords: enforcement; judgment summons.

Goodyear v Goodyear (Deceased) [2022] EWFC 96 (HHJ Farquhar)

Our recipient of this issue's Mostyn Award case, discussed below.

X v Y [2022] EWFC 96 (HHJ Edward Hess)

Financial remedies case where the judge adjourned the wife's capital claims for 10 years after the husband dishonestly represented his finances, including via fabricating bank statements. The case highlights the need for practitioners to be alert to the practice of using software to edit digital documents such as bank statements.

Keywords: adjournment of capital claims; conduct; disclosure.

Enforcement

The last few months have brought several interesting judgments about enforcement. We are not referring in particular to the *Barclay* case, as despite the judge's interesting exercise of soft power this is primarily notable only for sartorial reasons. *Brake and Anor v Guy & Ors* [2022] EWHC 1746 (Fam) is an interesting reminder of the potential for enforcement of a costs award against a party's pension. Pension funds have no power to refuse a delegation by the debtor policy-holder of his rights to receive the pension benefits, and it is not necessary to appoint a receiver to revoke the trust. The experience of those involved in *Goodyear v Goodyear (Deceased)* [2022] EWFC 96, our Mostyn Award winner, also reminds us to look carefully at the terms of the pension documentation – including the underlying scheme rules and trust documents.

On the enforcement of child maintenance, we have two recent judgments and a useful blog post.

In *Re D (A Child) (Appeal from the Registration of a Maintenance Order)* [2022] EWCA Civ 641 the Court of Appeal confirms that there is a right of appeal in relation to the registration of maintenance orders under the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

In *VSN v Secretary of State for Work and Pensions and JN* [2022] UKUT 138 the Administrative Tribunal confirms that a mirror order – here an order made under Part III of the Matrimonial and Family Proceedings Act 1984 mirroring a Hong Kong order – was capable of holding the Child Maintenance Service at bay, but only for the statutory 12 months per section 4(10) of the Child Support Act 1991.

Lastly, we refer the reader to the blog post for this journal by HHJ Andrew Greensmith, the Financial Remedies Court lead judge for Cheshire and Merseyside.[2] In the blog, he provides guidance on how courts should approach applications for a Child Maintenance Service liability order and any subsequent appeals.

The Mostyn Award

The Mostyn is our regular award for the for the most outstanding judgment published since the previous issue and which accordingly represents a 'must read' for all financial remedy practitioners. It is named for the person who has given family practitioners many must-read judgments.

This time, our award goes to HHJ Farquhar, who sits in Brighton, for his judgment in *Goodyear v Goodyear (Deceased)* [2022] EWFC 96.

The case considered whether the wife's unforeseen death, a few months after a very substantial pension share had been ordered in her favour, was a *Barder* event. The case turned on one particular *Barder* requirement: Did the wife's death invalidate the fundamental basis on which the order was made? The children – the wife's executors and the beneficiaries of her estate – argued not. The pension had been treated as just another form of capital and divided according to the sharing principle. Not so, said the husband: the pension share provided the wife with income which she did not now require. Both arguments were correct, said the judge, after considering the rationale behind the share on the facts of this case and instructions they had given the pension on divorce expert at the time. The wife had earned her share of the pension under the sharing principle and was entitled to pass on capital, but the parties' needs had to be met and the pension was designed in part to do that. A reduced pension share 'will appropriately reflect the "earned" share whilst providing a "discount" for the many years over which income will not be required for Mrs Goodyear', ruled the judge.

An added complication was that the pension scheme rules were unclear and did not incorporate the requirements of the Pension Sharing (Implementation and Discharge of Liability) Regulations 2000 (SI 2000/1053). This meant that it was uncertain how or whether the pension share might be implemented in the circumstances. Careful investigation and analysis by judge, solicitors and counsel was necessary, and this work ultimately led to the pension trustees amending their scheme rules.

Note that the standard family orders project clause agreeing to permit an application to vary or set aside the order if the recipient was to die prior to implementation had not been included in the order, but such agreement, HHJ Farquhar points out, refers only to an application and not to the parties' position when that application fell to be determined.

A summary of this decision by Stephanie Coker of 5 St Andrew's Hill and a link to the judgment can be found on the FRJ website.[3]

Dealing with the lovelorn litigant

The modern family lawyer is part agony aunt, part legal scholar, and part photocopier wrangler. In the next issue we will bring you an illustrated guide to unjamming the paper tray, but on this occasion we devote ourselves to helping readers with the important legal skill of sympathising with the lovelorn while nonetheless dismissing their case, probably with costs. At least, we assume that is why a senior judge sent the following judgment to us.

This is the judgment of HHJ Patrick Kiage of the Court of Appeal in Kisumu, Kenya, in *Walutsachi v St Mary's Mission Hospital* [2022] KECA 1023 (KLR):

> '15 The field of love, no doubt, is littered with the wreckage of many a broken heart. The tears that have flowed, in the wake of betrayal, perfidy and other two- or multiple-timing adventures of lovers, is beyond reckoning. Thus must one who ventures into love do so alive to the perils that abound.
>
> 16 For the appellant herein, whose sad tale is well captured in the judgement of my learned sister Mumbi Ngugi, JA, with which I am in full agreement, the lesson learnt is that the wounds of love find scant balm in the courts of law. Love's ills and woes can only be found in lover's return and reconciliation, failing which in

accepting and moving on, while holding onto hope for comfort elsewhere, or leaving love's threshing floor altogether, paying heed to Kahlil Gibran's *The Prophet*: "But if in your heart you would seek only love's peace and love's pleasure, then it is better for you that you cover your nakedness and pass out of love's threshing floor …"

17 I agree that if a man takes a woman he loves to hospital labour ward for she is heavy with child, while happily believing himself the father, but upon the child making a landing, the woman by subterfuge eludes him, and leaves the hospital in the company of another man, a shadowy rival, judges may empathise with the deceived first man, but cannot in law agree with him that the hospital should compensate him for not detaining the woman, till the man who brought her in should claim, and discharge her. Adult she is, a free moral agent (though the man may protest the word 'moral') and in a free country she is perfectly free to associate with and as in this case, be discharged from hospital in the company of whomever she pleases.

18 Thus, while the emotional anguish the appellant had to endure by reason of those events evokes sympathy, the courts of law deal not in that currency. It must cut to the core that the woman in this case declared the other man, one Echesa, as the child's father and not the appellant but are not the hearts of men, and of women, deceptive above all things? It dawns on the appellant, alas too painfully, too late, there is lie in the words, spoken usually in jest, that children are mother's babies but father's may-bes. And in the circumstances of this case, no remedy lies in law, least of all against the hospital.

19 I concur that the appellant's case before the High Court was properly dismissed and perceive that though arguably laden with moral merit, this appeal is unmeritorious in law, and must be dismissed.

20 As Tuiyott, JA also agrees, the appeal be and is hereby dismissed along the lines proposed by Mumbi Ngugi, JA.'

While we commend the use of poetry, we do think that 'This Be the Verse', recited by Wall LJ in a judgment once, rather better fits most family cases than Kahlil Gibran. Further suggestions of appropriate poetry may be sent to the Case Editor at her own risk.

Notes

1 https://financialremediesjournal.com/bykeyword/cases.htm
2 https://financialremediesjournal.com/content/cms-liability-orders-and-appeals-against-liability-orders-made-in-the-magistrates-court.07882c3acb8242f694b2bc19bee4df29.htm
3 https://financialremediesjournal.com/content/goodyear-v-goodyear-deceased-2022-ewfc-96.354f4c0d037a47a5a05aef386e124d48.htm

Interview with Jo Miles, Fellow of Trinity College, Cambridge

HHJ Edward Hess

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

Photo credit: Eugenio Polgovsky (1977–2017), Fellow Commoner in the Creative Arts, Trinity College (2015–17)

Jo, thank you for agreeing to be interviewed for the *Financial Remedies Journal*.

You teach law at Trinity College, Cambridge University – surely one of the best jobs in the world of academia in one of the most beautiful places – tell me about your work.

I've been at Trinity and in Cambridge for over 22 years, teaching undergraduate students Criminal and Family Law, and running a popular LLM seminar on Comparative Family Law & Policy with my colleagues Professor Jens Scherpe and Dr Claire Fenton-Glynn. Being a Fellow of a Cambridge college brings some nice perks (especially on the food-front), but also a lot of admin on top of the teaching. Some of that is student-oriented: supporting cohorts going through their degree and beyond, running the undergraduate admissions process, doing outreach with potential applicants. A lot of it is to do with the running of the college – you get caught up on various committees, particularly as a lawyer (and as a woman …). But, especially somewhere as big as Trinity, it's all fascinating stuff. Then there are all the obligations that you have to your faculty, and I've held a few posts in the Faculty of Law over the years that have meant a lot more admin! And then, of course, there's all the research and writing, in relation to which I have complete autonomy. But yes, the place is beautiful, and you never get tired of the vistas. The gardens at Trinity are a real joy and one of my most enjoyable duties has been service on the Garden Committee (not only because we get fruit cake at our biannual meetings).

You have established yourself in recent years as one of the leading academics in financial remedies law – was this always your main interest and how did you come to specialise in this subject?

By accident! I began my teaching career at Christ Church in Oxford and it was only after I'd got the job that I thought to ask them what they actually wanted me to teach. The answer, for the first term, was Crime and Family (they added another four subjects to the list over the years … !). So I was teaching Family from the outset. Then not long after I moved to Cambridge, *White* came out and I was invited to write the case note for the *Cambridge Law Journal.* That was the first time I'd thought properly about ancillary relief (as it then was), and the interest built from there. I had a sabbatical in New Zealand just after they'd updated their relationship property law in 2002, which they'd extended to *de factos* (cohabitants), and did some serious thinking then about the principles that might underpin financial remedies/property division on relationship breakdown. Thanks to one of my first Oxford students, the brilliant Deepak Nagpal (now QC – my first student to take silk!), some of my work from that project made its way to the House of Lords in *Miller, McFarlane*. Meanwhile, I was seconded to the Law Commission to work on its *Cohabitation* project, which was a fascinating experience. It taught me lots of things, not least that being an academic is easy: you just get to chuck stones at the efforts of everyone who's having to build stuff (whether that's case-law or legislation). Actually having to start with a blank sheet of paper and come up with a whole scheme, within all sorts of constraints, is jolly hard! All of that then set me up for the rest of my career.

Of what achievements in the academic world are you most proud?

In terms of research and publications, it's been a mix of what I'd call 'proper academic' stuff and then a lot of much more public-facing, policy-oriented, practitioner-related stuff. The 'proper academic' stuff involves writing books (my co-authored OUP textbook – *Family Law: Text, Cases, and Materials* – is going into its 5th edition next year) and articles, doing empirical research, curating interesting, edited collections, most recently on the life and times of the now-gone 1969 divorce reforms. As for the other stuff, I've been incredibly lucky to have a lot of opportunities to contribute out there in the real world – notably for the Family Justice Council (the financial needs guidance, including the LIP guide with AdviceNow) and the Pensions Advisory Group (PAG), as well as consulting on some leading cases as they've worked their way through the appellate system. It's hard to pick a highlight, but high up the list has to be getting

involved more or less directly in the recent divorce reforms – consulting for Mr Owens' team, led by the serene Nigel Dyer QC, in the Supreme Court (a case that it was essential to win in order to get legislative reform), advising on Liz Trinder's vital research project, and being involved in Ministry of Justice discussions on the shape of the reform. But the academic world consists of other things too, and supporting generations of students through the ups and downs (including some quite deep 'downs') of their university lives has been very rewarding.

You have been given credit as one of the founders of the Financial Remedies Court (FRC) – what reflections do you have on this development?

As PAG members will know, some of the best ideas are had in court building lifts. And so it was that you and I started chatting about the concept of a specialist financial remedy unit within the Family Court in a lift (fortunately, not a stuck lift) in the Birmingham Civil Justice Centre on our way out of a meeting with District Judges to road-test the financial needs judicial guidance that we were involved in drafting at the time. (Special mention to Philip Marshall QC, #QCInThe Garden/#QCOnATrain who did most of the heavy-lifting on that!) I don't think I'd realised before then that District Judges weren't ticketed for money work, and I was pretty shocked – it's really specialist stuff, even before we get to the scary topic of pensions! Having seen the consent order approval process from the inside (as an empirical researcher), I don't know how anyone can decide these cases without a really firm grasp of the area of the sort that only professional experience and/or specialist training can give you – and my research interviews with practitioners have revealed worries about the effectiveness of FDRs in front of non-specialists … It's for others to judge how well the FRC is working (and I know that the initial proposal ruffled some feathers), but I hope that people agree that it's a positive and necessary development.

From the perspective of an independent academic, how could the world of financial remedies be improved?

Not by adopting Baroness Deech's Bill, which I think adopts quite the wrong policy and is not grounded in a solid understanding of the data about women's economic lives and the impact of parenthood. But I do agree with Baroness Deech that increased certainty about potential outcomes in financial remedy cases would be helpful, particularly in our post-LASPO world where more people are having to navigate these cases without full-service (or any) legal advice and assistance. One big tension in our financial remedies law post-*Miller, McFarlane* has been between those who embrace the broad discretion that our system can be understood to afford and those (like me) who prefer to foreground the clear set of principles that underpins (or should underpin) outcomes reached and that therefore structure the discretion. This could be taken somewhat further – as the Canadians have done with their Spousal Support Advisory Guidelines. There was a huge amount of interest in these when, right at the end of the consultation period for the Law Commission's financial needs project, Professor Carol Rogerson (Toronto, one of the scheme's architects) gave a presentation on their guidelines at an event in the Inner Temple. Sure, the Canadian context is different – not least as they have a sort of deferred community of property, to which spousal support is an add-on, but I think that the example remains relevant to us. It would be good to see the Law Commission's hope that work be done on this in the English context come to fruition.

Do wives get a fair deal in financial remedies cases?

What do you mean by 'fair'? We need to be circumspect here. We simply don't know – and have no easy way of knowing – what is happening in about two-thirds of divorces, as we can see from court statistics that only a third of divorces gets any money order at all. What is happening to the other two-thirds? Are these just cases where there's nothing to divvy up at all? (Though, as Mr Vince is painfully aware, getting that 'dismiss all claims' order is a very good piece of housekeeping!) Are they cases where one party has the upper-hand and can just dictate the outcome? A new project led by my colleague Professor Emma Hitchings (Bristol) – the *Fair Shares Project* @shares_fair – is going to try to get a handle on at least some of that. As for the third who *are* getting orders – we mustn't draw conclusions from reported cases, which are almost invariably 'big money' (or at least *bigger* money). Wives getting 50% of a big slab of capital accrued during the marriage seems fair to me – 'fairness' here means sharing the fruits of the joint partnership on which they embarked on marrying. (I was disappointed that the Court of Appeal in *Work v Gray*, on which I worked with Tim Bishop QC, didn't take the opportunity to slam shut the 'stellar contributions' door …) But what of the vast majority (of that third), the 'everyday' cases, which are rarely reported? Here, the right measure of 'fairness' is whether needs, certainly needs generated by the marriage, are being met (which equal sharing won't do in a lot of cases) – and the pain necessarily attendant on the fact of limited resources shared. My big research study with Emma based on analysis of 400 court files found very few periodical payment orders, even in cases involving dependent children, and not many pension sharing orders. One of the big take-away points from that project, which the FRC has acted on to some extent, is that Form D81 as was really doesn't give you enough information about the parties' finances to be confident that the order as approved is fair. Our practitioner interviews underscored many wives' preference for a house-for-pension swap clean-break outcome. But I worry, as some of our interviewees did, that wives who do that may come to regret that choice later on. Analysis of data from our big household panel surveys (particularly by economists Hamish Low, Oxford, and Hayley Fisher, Sydney) shows that women's standard of living drops following divorce while men's improves. Depressingly, those data also show that women's best hope of economic recovery is through repartnering – but that is harder for older women and mothers. And then Professor Debora Price's hugely important work, recently with Dr Jennifer Buckley (Manchester), has shown how far behind wives are when it comes to pension saving – and how often the pensions are more valuable than the property wealth at stake (certainly outside London/the south east). So I think there's work to be done on ensuring that outcomes really are fair for more wives – and on countering the inevitable resistance that will come from those on the other side of the equation.

In the interests of balance, I should ask whether husbands get a fair deal in financial remedies cases?

To the extent that wives aren't getting a fair deal (see above), then no! Because it's not fair for husbands to walk away with more than they 'should', given the applicable principles. It's really important to grasp the immense value to husbands of their intact earning capacity (often boosted to the extent that they were freed of domestic responsibilities during the marriage, and still after divorce) and their continuing ability to save into pensions (including to replenish funds that have been shared). To be clear, I'm not saying that earning and saving capacity are assets that should be shared – but nor should they be ignored (see s 25(2)(a)!) when evaluating the parties' respective positions at the point of divorce and thinking about how to divvy up the assets (and whether to make income provision). Otherwise, we aren't giving the ex-spouses a genuinely 'equal start on the road to independent living', as Lady Hale would put it.

You were a leading member of the PAG – what effect do you think PAG has had and what else needs to be improved in the world of pensions on divorce?

I hope a very positive one. We learned during the course of the project just how much practitioners (and judges) felt the need for guidance in this arena – it really does seem to be the scariest part of financial remedies practice, and for good reason. For those who might have been reluctant to take new guidance on board, it has been particularly useful to be able to say that offsetting cases are the biggest generators of professional negligence cases against solicitors … But I think at least as important is ensuring that the parties themselves – especially wives – appreciate the importance of pensions and the necessity of their being brought properly into account on divorce. And in a needs case that means the whole pension fund – not just that bit accrued during the marriage. So I think it's been incredibly important that the project, supported by the Nuffield Foundation, has been able to work with AdviceNow/Law for Life and others to produce a pensions guide for divorcing couples and *a really good short infographic animation* (big thanks to Debbie Price for leading on that) to help people understand why this matters. Until we break through that psychological wall and get wives to take pensions seriously (and get husbands to accept that their pensions are not 'off-limits'), I fear we won't make the progress needed to ensure that wives in the everyday cases really are getting fair deals. The whole PAG team was excellent – it was the most intellectually stimulating project I've been involved in (really not knowing very much about pensions at the start!) – but we owe a huge debt to Hilary Woodward, whose research with Mark Sefton and then with Rhys Taylor kicked this whole thing off. PAG #2 is now underway (I'm not involved in that, given my impending move), reviewing and revising the original guidance in light of feedback from experience with it so far. And, of course, we now have the Galbraith Tables, which really could be a game-changer for offsetting cases.

Do you think lawyers' costs in financial remedies cases have got out of hand? How would you improve this?

As with financial remedies law/cases generally, it's so important not to be distracted by a few reported (mostly) big(ger) money cases where, yes, eye-wateringly disproportionate costs appear to have been generated. They are atypical. Most couples spend very much less (both in raw terms and as a percentage of their wealth) on resolving these issues. Of that third who come to court at all, around 70% are simply applying for a consent order, and around 20% will settle their case somewhere along the line. So it's only a small minority of what is already a minority of divorcing couples who run up the huge costs that can arise from fully litigated cases. And the reasons for that, in my view, have nothing much to do with the substantive law and an awful lot to do with the turbulent emotions and distrust (sometimes, of course, well-founded) that drive these proxy battles. Would a return of *Calderbanks* help? Others are far better placed than I am to take a view on that. I would just urge, again, that the debate not be dominated by atypical, headline-grabbing cases, and that thought be given to how parties to 'everyday' divorces can fund early advice and assistance to help defuse any potential problems arising from legal misinformation/false expectations and set them on a course to a fair outcome. Is it too much to hope that LASPO might one day be repealed…?

If you had full legislative powers for a day and could introduce one reform, what would it be?

Easy: cohabitation reform. Whether or not along the lines of what the Law Commission recommended way back in 2007. Marriage rates are declining, and the extension of civil partnership to opposite-sex couples is no substitute at all for a scheme of financial remedies between those who – for all sorts of reasons – do not formalise their relationships. I could go on at length on this one, but shan't. Over to Graeme Fraser and the other doggedly persistent campaigners at Resolution! LASPO repeal would be a very, very close second…

Do you ever wish you had become a practising lawyer as opposed to an academic?

No. When I was a kid, I wanted to be a barrister – I remember being very impressed by the dramatisation of the life of Sir Edward Marshall Hall that was on the TV then, with the begowned and bewigged Jonathan Hyde swooping into court as the protagonist. And I was all set to go off to Bar school when I changed my mind during my LLM year and ended up on the academic track instead, sort of by accident (again). I've been incredibly lucky over the years to have had several opportunities to contribute to the development of the law and the family justice system, including my involvement in some real cases (with the support of Steve McCrone and the 1 Hare Court team). That's been plenty to feed my appetite for the glamour of practice (imagined – yes, I know reality is very different …) whilst letting me enjoy the intellectual freedom of academic life. Acquiring some insight into life at the practitioner/judicial coalface has really enriched and informed my academic take on things – so I'm very grateful for all the opportunities have had and the contacts I've made across all parts of the profession across the country (essential to avoid falling into a London-centric trap). Hopefully, it has helped mitigate any ivory tower problems …

You are shortly to be undergoing a complete career change – tell me how you came by this plan and what you are now planning do? What will you miss? Do you think you might ever return to the law?

Yes, I'm off into the world of horticulture, hopefully to work hands-on in the heritage sector (big garden open to the public sort of thing). I've been secretly planning this leap for about 5 years, quietly accumulating a whole new CV of qualifications and practical experience in a lot of wonderful places. I reckon I've had a pretty decent quarter century in law, and – while I'm physically fit – I'm keen to enjoy the outdoor life in all its rigours (yes, February is the worst, but the answer is very thick socks). I definitely won't be returning to the law – so this textbook edition is my last, but with two fabulous co-authors, Professor Rob George (UCL) and Dr Sharon Thompson (Cardiff) continuing the title. What will I miss? Fortunately, I've served so long at Trinity that I've accumulated some 'emerita' rights and privileges, so will still be able to enjoy some of what college life has to offer – mostly edible. I've really enjoyed teaching, but I'm sure that my pedagogical (and research) instincts will find an outlet somewhere in horticulture.

What is your ideal day away from work? How do you like to spend your leisure and holiday time?

At the moment, gardening! Both at home in the garden and on my growing complex of allotment space, and then out and about. I'm at Great Dixter for all of August, which I'm very excited about (Google it if you don't know why!). That may not be the case after I've been gardening professionally for a year … More likely to want to put my feet up. But not reading law. Spending a day with my feet up at Lords, as I will be next week (thanks to NDQC), would definitely be on the list!

What would your 'desert island' piece of music, film and book be?

Film is easy: *The Muppet Christmas Carol* – surely the best film of all time. Book: am I allowed to cheat, and have a massive, necessarily multi-volume anthology of Golden Age crime fiction? Must include Allingham, Christie, Marsh and Sayers, ideally all of each. Music is the hardest! I've done a lot of singing in my time. Emma Kirkby is one of my singing heroines, so any of her recordings would suit me fine. I like a bit of Handel and there's a gorgeous aria in *Acis and Galatea* that I could happily sing along to on a loop. But then I do also have a fantasy alternative career in musical theatre, for which reason I must have the National Theatre 2002 cast recording of *Anything Goes* too, please.

As they say on Desert Island Discs, they shall all be yours. Thank you for talking with us.[1]

Note

1 This interview took place before the sad death of the late HM The Queen and we have made the editorial decision to leave in references to QC rather than change them to KC.

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