ThoughtLeaders4 HNW Divorce • JUNE 2023

HNW Divorce MAGAZINE

ISSUE 13

SHAPING THE FUTURE OF HIGH NET WORTH DIVORCE: EMPOWERING NEXT-GEN PRACTITIONERS

INTRODUCTION

"Peace cannot be kept by force; it can only be achieved by understanding"

Albert Einstein

We are delighted to present our Next Generation Issue 13 of our HNW Divorce Magazine, featuring articles highlighting the impact of new technologies on the divorce process. The articles provide a unique perspective on handling digital assets, understanding financial abuse, and more.

We would like to thank our community partners and contributors for sharing their insights into how to maneuver successfully through HNW Divorces.

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ABOUT HNW Divorce

Through our members' focused community, both physical and digital, we assist in personal and firm wide growth.

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HIDDEN TREASURES:

UNVEILING CRYPTOASSETS IN DIVORCE PROCEEDINGS

Authored by: Sian Penny (Manager Insolvency and Asset Recovery) and Andrew Sidaway (Associate Director) – Grant Thornton

Financial infidelity can be a marriage-breaker, but it's better for your clients to know than not.

London is considered to be the divorce capital of the world due to the discretionary approach the judiciary takes to financial cases and the obligation to ensure that any award meets the parties' (often generously interpreted) needs. For that reason, often the financially weaker party will usually want their divorce dealt with here. Whether that is possible, however, will depend on whether the English court has jurisdiction to deal with the proceedings.

As cryptocurrency becomes more accessible, the likelihood of digital assets featuring in a divorce dispute continues to increase, despite the misconception that digital assets are hard to trace.

When coupled with a lack of understanding of those assets, this misconception can be used to the advantage of the party seeking to deliberately conceal assets during divorce proceedings. However, while tracing hidden digital assets can be a challenge, when armed with the right tools, the public record of digital asset transactions contained on the blockchain means they are in fact one the most difficult assets to hide.

Using a specialist global team of asset recovery experts can therefore assist spouses with their divorce litigation to identify, trace, value and recover digital assets.

The cost of non-disclosure

In the UK, divorcing couples are expected to disclose all assets at the beginning of proceedings, specifically when completing a Financial Statement (Form E).

The English courts have held that digital assets constitute 'property' and therefore, they must be disclosed in Form E. Form E states that "proceedings for contempt of court may be brought against a person who makes or causes to be made, a false statement in a document verified by a statement of truth".

If assets are later discovered to have been hidden by a spouse, it is likely that the courts will vary the order in favour of the other party.

Identifying digital assets when there is suspicion

When it comes to digital assets, indicators to look out for include transfers to cryptocurrency exchanges in bank statements, the use of cryptocurrency-related tools (such as mobile apps designed to manage accounts or digital asset wallets) or an engagement with the cryptocurrency community (for example, through social media).

Once a link has been identified, it may be possible to identify entities that hold information regarding the concealed assets, in which case steps can be taken to obtain court orders seeking disclosure of such material.

Depending on the circumstances, action can be taken without reference to the concealing party, thereby mitigating the risk of the individual being tipped off that their digital assets are about to be revealed and looking to put them further beyond the reach of their spouse.

Transfers of cryptoassets are recorded on the blockchain, a publicly accessible ledger of transactions. Therefore, as soon as a single digital asset is traced to an individual, it is often possible to quickly build a clear picture of how assets have been moved and where they are currently located. This information has already been used in civil proceedings outside of the context of matrimonial disputes to secure assets, often through injunctive relief, to ensure they are available for enforcement at a later date. These authorities will no doubt influence the family courts as they grapple with an increasing number of cases involving digital assets.

Along with the growing number of experts specializing in digital asset valuation, the stage is already set for concealed digital assets to be translated into the 'real world' and properly dealt with in financial divorce settlement overalls.

This methodology demonstrates just one of the routes through which corporate intelligence, forensic investigations and valuation skills can build on often-limited initial financial information to identify, secure and value undisclosed digital assets.

For example

HNW individuals often value privacy and are keen to avoid their financial details from entering the public domain. This provides scope for negotiation in divorce scenarios, but it is essential for clients to be armed with the full picture to be able to achieve a fair outcome.

For example, assume a scenario where during the divorce proceedings, the husband completes Form E and discloses his financial assets with a total value of £2million made up of shareholdings and residential properties in the UK and US.

Post-completion of Form E, several paper wallets are discovered with hand-written notes indicating large holdings of a lesser-known cryptocurrency. The client believes that the crypto holds significant value but consults specialists for professional advice.

Upon review, it is determined that there is minimal value in the lesser-known crypto identified by the client. However, using blockchain analytics tools it is discovered that disposals of more established cryptocurrencies were made leading up to Form E disclosure.

Armed with this knowledge, the client is in a much stronger position and can consider options such as:

(1) Seeking injunctive relief against the spouse to prevent them further dealing with the assets

(2) Using the spouse's failure to disclose the assets as leverage to encourage full and frank disclosure in ongoing settlement negotiations.

Distributing cryptoassets in divorce proceedings

There is also the question of what happens to cryptoassets in HNW divorce disputes when they come to being divided or distributed.

In this regard, clients should lean on asset recovery and valuations specialists to understand the value of the digital assets held, and how they might be located and/or preserved to enable spouses to formulate a recovery strategy to ensure the digital assets are distributed correctly and in accordance with legal protocols. Not everyone needs to be an expert, but it is important to appreciate the unique nature of these assets and know where to start with getting the basics right.

If cryptoassets are identified, and there are various challenges to divide and/or distribute the assets (i.e., the spouse is found to have concealed the digital assets is not forthcoming with payment) then asset recovery specialists can assist with formulating a strategy to enforce payment of the divorce settlement.

Spouses need to be aware that locating and taking control of the digital asset (whether that be cryptocurrency or another digital asset) is the only first stage, and that protection and preservation of the asset through a court directed procedure such as a court appointed receivership, or another type of formal appointment needs to be considered from the outset.

The starting point will be to ensure spouses take quick action. It can take less than five minutes to move funds out of reach!

60-SECONDS WITH:

JAMES PIRRIE
DIRECTOR
FLIP

Q **Imagine you no longer have to work. How would you spend your weekdays?**

A It is terribly sad, I know, but I haven't found the thing that offers all the things that the world of work does … I guess I would focus a bit more on the clients, keeping up to date with the law, trying to improve processes and supporting colleagues at work … oh hang on that is pretty much the day job now.

Q **What do you see as the most important thing about your job?**

A I thought that quote that provides the title of Salinger's 'Catcher in the Rye' a bit weird in the context of the book … but it has started to resonate. This idea of trying to catch well-meaning former lovers as they blunder around in a fog of not-knowing and heading towards a cliff of litigated outcomes. The exciting bit in this domain currently is surely for us all to work out how we can move through the rye cost-effectively and assemble the team to show clients a better way to the futures they want, parenting their children and sorting out safe financial futures.

Q **What motivates you most about your work?**

A Agreements. I LOVE the moment when people can go "ok works for me". Recently I have started to find FDRs gruelling … In mediation and collaborative – and perhaps even arbitration, people can see the upsides of the agreement. But FDRs seem to be much more about clients being ground down by fear away from their just entitlements to thinking they have to agree before the fires properly take hold and turn everything to ash. It shouldn't have to be so hard and maybe it is time to find a new way forward.

Q **What is one work related goal you would like to achieve in the next five years?**

A It used to be the obviously one, namely a coherent and principled scheme for cohabitants (nothing new there, James) … now with the Baronesses' (Hollis & Deech) initiative around matrimonial provision you have to wonder whether it is protecting our current matrimonial law's capacity to provide for the financial dependencies that result from the commitment of marriage. We all think with the great minds in this world that everything is on the up … but looking back on legal aid (in the 80s), child support (up to 2012) and more recently funding of our courts (to name but three), we have to recognize that we must be vigilant also about protecting what is best about what we have - as well as advancing on the obvious deficiencies.

Q **What has been the best piece of advice you have been given in your career?**

A "Fine! Now go back and cut out the unnecessary words, James." I fail to keep to that most days.

Q **What is the most significant trend in your practice today?**

A I seem to be doing a lot more mediation and arbitration work. When it is representative work, it is all about the search for early solutions in collaborative or just constructive conversation (and yes often with arbitration as back up) before the cost and impact of the process put solutions otherwise available out of reach.

Q **Who has been your biggest role model in the industry?**

A The Romans [from my poor understanding of them] … I have the impression that successful attributes in their good times included 1) working hard and 2) being into everything and then seeing which bits worked and building an empire around that. We can do well to follow some of that discipline and it is probably unhelpful that professional training now is often relatively narrow against the "whatever comes through the door" experiences of trainees and the law centre work in the early 1980s, which just gave us a much wider set of experiences to fall back on.

Q **What is one important skill that you think everyone should have?**

A Altruism. Certainly in this industry, what has produced best and lasting change has come from the volunteer ethic and an authentic endeavour to find improvement for all. The pandemic put us online in ways that enable us to reach out further geographically, more regularly and affordably – we probably forget how much we have benefitted from that already.

Q **What cause are you passionate about?**

A Oof – there is so much amazing work being done that it would be great to give proper support to - the relentless hard work of Liz Coe at NACCC ("why no peerage?" one has to say) our fantastic President and all that he supports the 'What about Henry' training of Angharad Rudkin and Only Mums/ Dads … or Gillian Bishop's Reflex training programmes, the work of Family solutions Group from the What about me? report … including MADA and its work to transform how mediation and domestic abuse work alongside. But this week, it is probably online co-parenting initiatives – they surely have the power to properly change things for the better. These go back to Christina McGhee's work with Resolution from 2007 onwards and she is still there – check out Split Up the teen years https://www.splitfilm.org/

Q **Where has been your favourite holiday destination and why?**

A Koh Samui early 1983 (very different then). I remember then looking to go more remote … hiking across the island before dawn, to meet a man with a raft to get to the next door island and crossing that … er only to find that we had busted right through remote and into a terrible resort – it was a proper "other world" experience.

Q **Dead or alive, which famous person would you most like to have dinner with, and why?**

A David Bowie (around 1976, ten amazing albums in) or Nelson Mandela (circa 1964, on his way back to Robben Island after the Rivonia Trial) of course leap to mind. But then imagine the toe-curling shame as you see in their faces that this has been quite the worst evening of their lives ["Another ruddy dinner with possibly the dullest person on the planet, Iggy."] – so perhaps someone kind enough to have a good time reminiscing … quite a few former clients fit this bill and lots of people in this industry that I adore.

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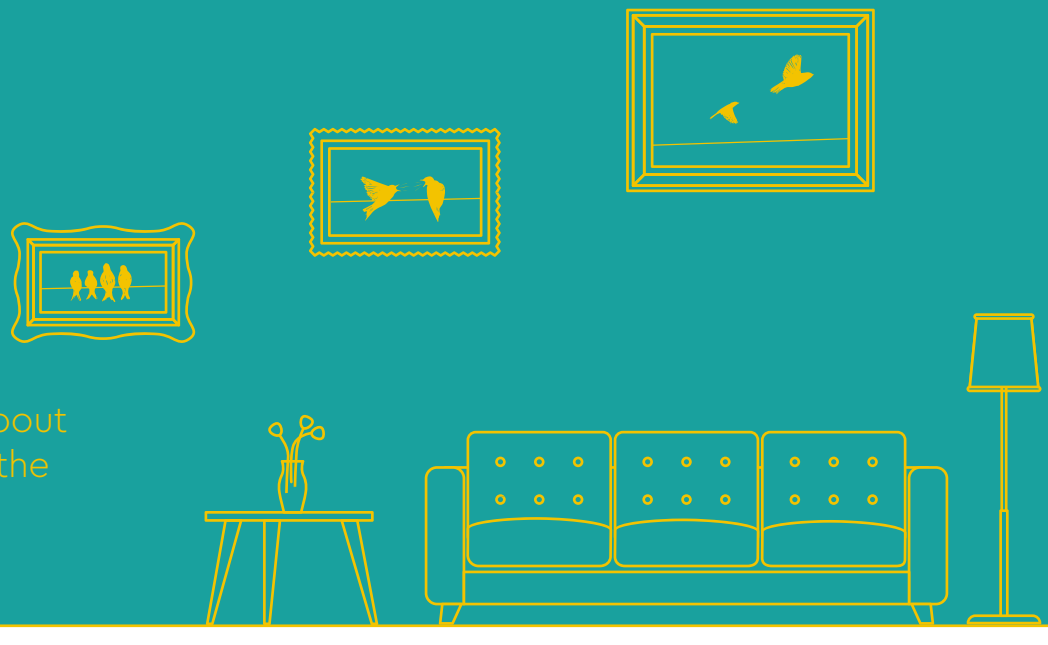

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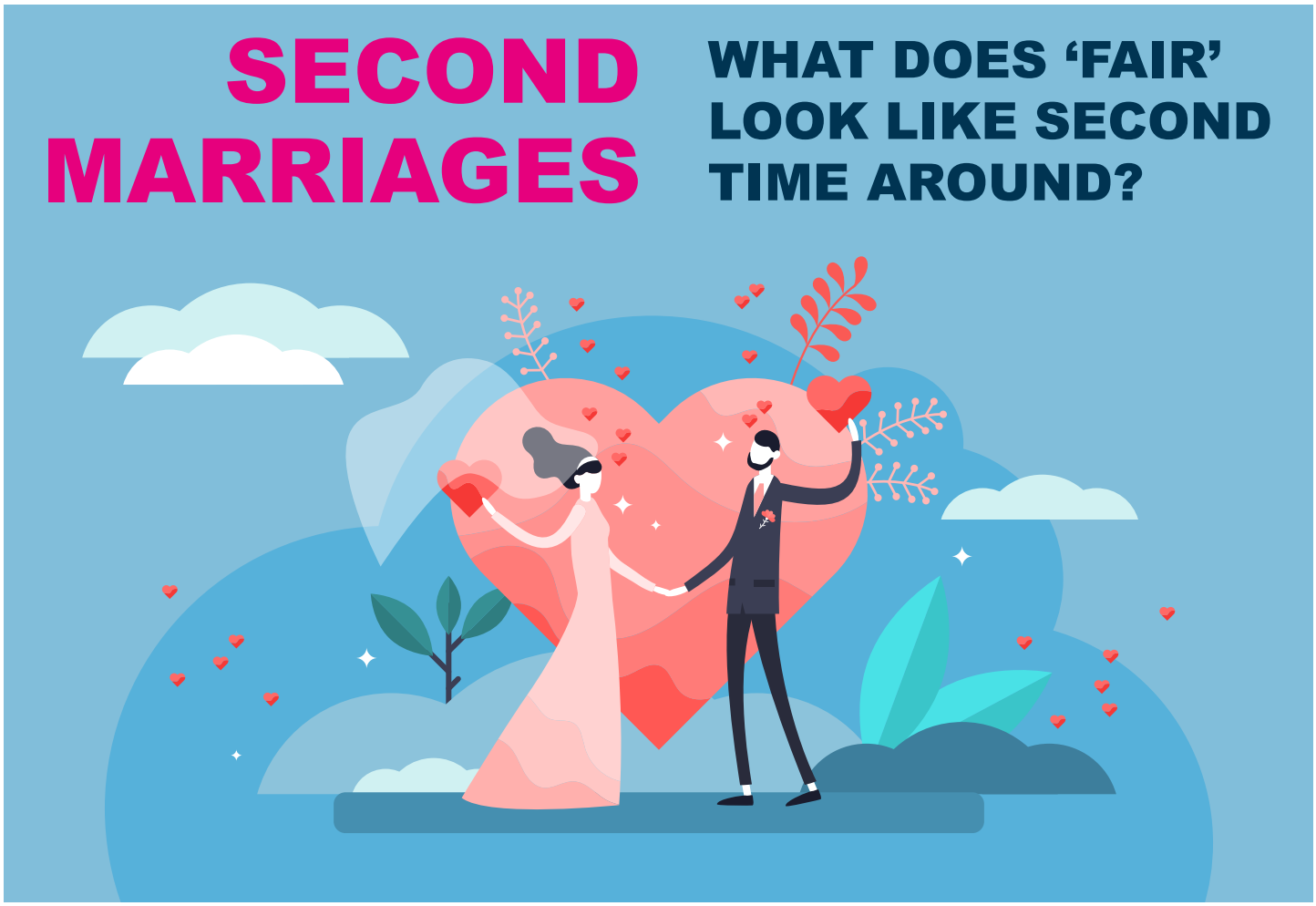
SECOND MARRIAGES

WHAT DOES 'FAIR' LOOK LIKE SECOND TIME AROUND?



Authored by: Cady Pearce (Senior Associate in Family Divorce) – Kingsley Napley

The number of people getting married is now at the lowest rate on record according to the 2023 census results. The number of remarriages, however, has stayed largely the same.

As we are all living longer, are those of us who have braved marriage once willing to do it again? And, if so, what is different second time around?

Wealth protection

Those people willing to marry again seem a particularly optimistic bunch: they have loved and lost and decided to try again.

What I would love to know, though, is how many couples marrying for a second time choose to enter into a pre-nuptial agreement. Whether a second marriage follows a divorce or a death, there may be significant assets that are in no way attributable to the relationship with the new spouse. There may also be children from a previous marriage whose interests need to be protected. For all these reasons, wealth protection may be at the forefront of many client's minds more than it was the first time they got married.

Stephanie Mooney, a colleague in our Private Client team, had this to say about clients considering a second marriage: "Asset protection is definitely a primary focus for clients on their second marriage. This is when wills most commonly incorporate a Life Interest Trust on the death of the first spouse. This ring-fences assets so as to ensure that on the death of the surviving spouse, assets pass to the children (often in these cases being children from the first marriage as well as the second). Having been through a divorce also makes clients look at asset protection more closely when it comes to wealth passing to children. Discretionary trusts are quite popular in this context".

Clients marrying again may set up trusts to protect assets upon their death and may be more willing to consider a prenuptial agreement to secure their position were they to divorce. But, if they wanted to be really optimistic, how much protection would the law as it stands offer in the event of divorce?

Given that pre-acquired assets should fall outside of the matrimonial pot available for sharing, shouldn't any second marriage case where most of the assets are pre-marital be focused on needs anyway? The 2022 Moor J case of ARQ v YAQ [2022] All ER (D) 99 (May) serves as a useful reminder of the usefulness of pre-nuptial agreements for the financially stronger party.

ARQ v YAQ [2022] All ER (D) 99 (May)

The husband and wife married in December 2005. They had both been married before and they each had three children from their previous marriages. They went on to have two children together. They separated in 2020.

The husband said that his pre-acquired assets were worth approximately £57 million in June 2004, around the time they began cohabiting. He argued that his pre-marital assets, uprated to today's values, would be worth £155 million. This was more than the assets in the case at the time of the trial. He argued that there had therefore been no wealth generation during the marriage and the wife's claims should thus be limited to her reasonable needs. The husband offered a settlement of £25 million to meet the wife's needs.

The wife argued that they had not executed a prenuptial agreement at the start of their marriage nor when, in 2017, assets worth £80 million were placed in her name (pursuant to some tax planning advice). She said this was because this was a partnership of equals where the assets were matrimonial – primarily because they had been matrimonialised during the course of the marriage - and should be shared equally.

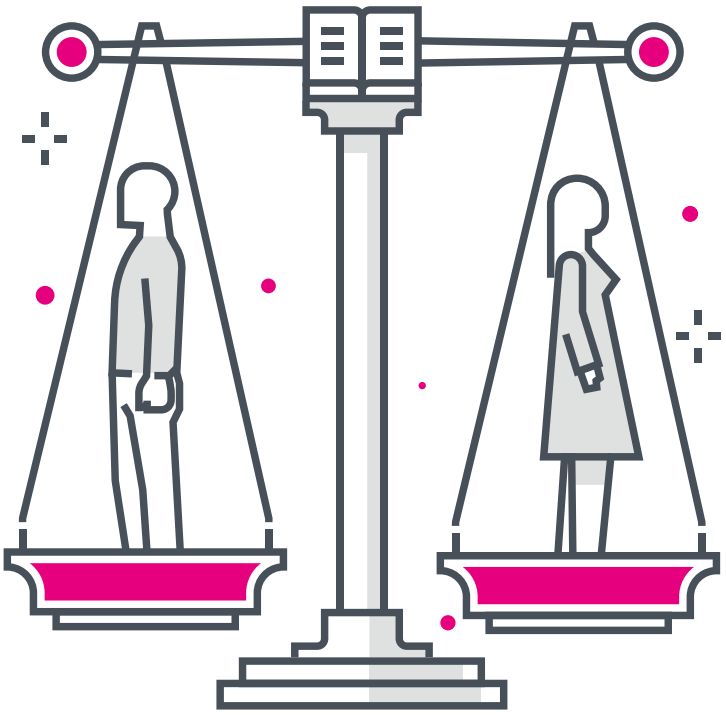
The following conclusions of Moor J are useful reminders of what not to do if you want to protect pre-marital assets when marrying again. Do not:

(1) Transfer assets into your spouse's sole name – it was found in this case that the wife did not hold assets on trust for the husband because, for the tax saving scheme to work, he had to give up all interest in them. Thus the assets transferred to her, for tax purposes, became matrimonial property. The £80 million transferred to the wife was not shared equally but the fact these assets were matrimonialised was undoubtedly beneficial for the wife and detrimental to the husband.

(2) Hope that your pre-marital contributions will protect you – whilst the "magnetic feature" of this case was the pre-marital origin of most of the assets, the wife was still awarded £45 million from overall marital assets of £112,631,062. This amounted to a division of 34% to the wife, 66% to the husband.

As per Sharp v Sharp [2017] EWCA Civ 408 the failure to enter into a pre-nuptial agreement does not result in a presumption of sharing but it does make it more likely that the financially stronger party exposes themselves to the risks of a sharing claim. In this case, the husband's attempt to save money on tax seems to have cost him dearly on divorce: rather than considering the wife's needs, as the husband argued should be the case, Moor J was obliged to consider a sharing claim in respect of matrimonialised assets. Perhaps this would have been the case even if the parties had signed a prenuptial agreement but you cannot help but think that the husband may have considered the transfer more carefully if he had signed an agreement which may have stipulated that any jointly held assets should be divided (perhaps in line with the respective contributions of the parties) and that any property transferred to the other would not be regarded as separate property (even if it originated from one of them).

Where second marriages are concerned, the financially stronger party would be well-advised to be optimistic but pragmatic. The signing of a prenuptial agreement at the start may save a lot of heartache from litigation later.



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COMING BACK STRONGER:

HOW CAN I BE FINANCIALLY SECURE AFTER A DIVORCE?

Authored by: Jenny Judd (Executive Director) - London & Capital

Divorces often last a lot longer than marriages themselves. The way a divorce is finalised can dictate someone's financial situation for the rest of their life. Along with the painful emotional impact of separation, the substantial financial upheaval can leave some seriously disadvantaged when it comes to their wealth and prospects.

The chances of married couples going their separate ways these days is a lot higher than it used to be. The divorce rate in the United Kingdom is today estimated at around 42% and the Office for National Statistics revealed that there were 9.6% more divorces in 2021 (113,505) in England and Wales than in 2020 (103,592). With the divorce rate rising, the spotlight is increasingly falling on how fairly family wealth is divided after a separation.

A May 2022 research note from UK insurance company, Aviva, highlighted that as many as one in five people said they will be, or are, significantly worse off in retirement as a result of divorce. A third of divorcees used savings to supplement their income, while one in five used credit cards for everyday expenses and a similar number borrowed from friends or family.

The pension divide

Awareness of the potentially damaging effects of pension inequality is rising as some find themselves worse off than they planned after divorce. A 2021 report by the University of Manchester and the Pensions Policy Institute found that men tend to have more pension wealth than women. For those aged 65-69, the median pension wealth for married men is just over £260,000 and £28,000 for married women. The research showed that fewer than 15% of couples have approximately equal pensions.

"This research illustrates the pension inequality that persists after divorce," said Tim Pike, Head of Modelling at the Pensions Policy Institute. "In most marriages 90% of the pension wealth is in the name of just one partner, almost always the husband…divorced women have very little pension and significantly less than married women."

Those that are separating from somebody who is a different nationality to them could be particularly vulnerable to post-marriage financial inequality. Deciding to leave a country where you have built up significant assets with your partner may mean you have less chance of retaining them. For example, a U.S. national that has married someone from the U.K. may face having to leave property or other assets behind and argue over ownership from abroad. The departing partner may also have a significant professional network that is lost through moving from London to New York, for instance, and this may mean additional financial strain down the line.

Taking the right advice

Seeking advice from a qualified and trusted adviser can be invaluable. Once a separation agreement has been finalised, an adviser can assess your financial situation. Adjusting to life after divorce isn't easy but developing a financial plan to regain independence is a big part of the process.

For some in a vulnerable position, this can go a long way to improving wellbeing as well as financial security. An assessment can range from something as simple as a review of incomings and outgoings and looking at where savings can be made. It could also mean uncovering any overlooked sources of income or cancelling unnecessary direct debits. More complex matters such as arranging investments, organising tax returns or reviewing pensions could also be included. Financial planning is an ongoing process but taking the first step and engaging with the right advice can be vital.

ECONOMIC ABUSE IN FINANCIAL REMEDY PROCEEDINGS

Authored by: Angela Sussens (Partner) – Stowe Family Law

As family law practitioners, many of us will have acted for clients who can tell you little to nothing about their financial circumstances, other than perhaps the allowance they are provided with by their spouse. Such clients will often be embarrassed and self-critical for finding themselves in this situation but rarely is this by choice and those clients may be victims of economic abuse.

On 1 October 2021, additional provisions came into force as part of the Domestic Abuse Act 2021 ('DAA 2021') and economic abuse was included within the definition of abuse at s 1(3)(d).

S 1(4) DAA provides that "economic abuse" means any behaviour that has a substantial adverse effect on another person's ability to-

(1) acquire, use or maintain money or other property, or

(2) obtain goods or services

Economic abuse can take a variety of forms, including restricting a party's access to financial information and controlling how those financial resources are utilised. In some cases, the alarm bells may ring early, particularly in the cases mentioned above in which a party has no knowledge of the financial resources and whose spouse has unilaterally controlled their financial resources for the majority of their marriage. In other cases, concerns may not arise until the financial disclosure becomes available. In many cases, getting full and frank financial disclosure from the opposing party may prove to be a battle and having withheld financial details from their spouse for many years, the controlling party may continue to attempt to conceal assets which the abused party may have no knowledge of. The inadequate disclosure may be challenged to some extent by raising a questionnaire, a schedule of deficiencies and in some cases obtaining a third-party disclosure order. There may also be a need to invite the court to draw negative inferences where the disclosure remains incomplete or questionable. After the expense and effort of obtaining as clear and complete a picture of the parties' respective financial positions as possible, to what extent will the abusive behaviour impact on the outcome at a Final Hearing?

Mostyn J outlines the four scenarios in which conduct may be considered in financial remedy cases in his judgment in OG v AG (Financial Remedies: Conduct) [2020] EWFC 52 as follows:

(1) Gross and obvious personal misconduct but only where there is a financial consequence. This will include economic misconduct provided the high evidential threshold is met;

(2) Add-back arguments where one party has 'wantonly and recklessly dissipated assets';

(3) Litigation misconduct which should be penalised in costs rather than affecting the substantive disposition;

(4) Drawing inferences over the extent of the asset base following a party's failure to give full and frank disclosure.

Mostyn J adds at paragraph [72] of his judgment that 'Conduct should be taken into account not only where it is inequitable to disregard but only where its impact is financially measurable'.

The recently reported case of DP v EP (conduct: economic abuse: needs) [2023] EWFC 6 appears to be the first case where economic abuse has been found to be conduct as defined by s25(2)(g) Matrimonial Causes Act 1973 ('MCA 1973'). An important factor in the case was that the husband was functionally illiterate and had for the entirety of the lengthy marriage depended on the wife to manage their financial resources for their joint benefit.

The husband's position was that the wife had exploited his illiteracy by siphoning off joint funds which had in part funded assets which were then concealed from him and the court. The husband invited the judge:

(1) To add back certain items that he alleged the wife had misappropriated on the basis that she had either recklessly or deliberately dissipated them from the parties' resources;

(2) To draw negative inferences against the wife and to find that she had undisclosed assets which derived from the funds she had misappropriated during the marriage;

(3) To find that the wife's conduct amounted to economic abuse under s 1(4) DAA 2021 and that it would be inequitable to disregard her conduct under s 25(2)(g) MCA 1973.

By comparison, the wife's position was that there should be broad equality although she conceded that she should be solely liable for certain debts in her name.

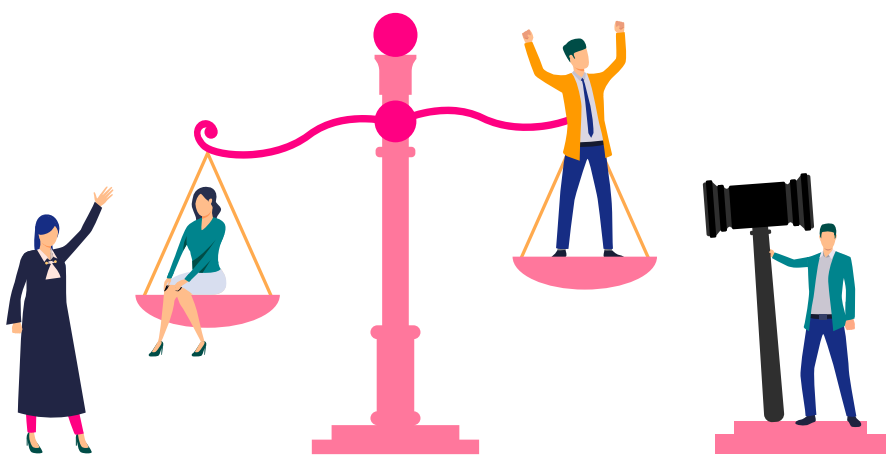
It was held that the wife's conduct fulfilled the definition of economic abuse under DAA 2021. The judge found that the wife held undisclosed assets and also 'added back' an additional sum in respect of misappropriated rental income from a jointly owned property. Notwithstanding the observation by Mostyn J in OG v AG, that in order to impact on the ultimate distribution, s 25(g) conduct must have 'financially measurable' consequences, the judge also made a small departure from equality to reflect the wife's poor conduct. The husband was awarded 53% of the total assets (as adjusted). The wife was also ordered to make a significant contribution towards the husband's legal costs. Her Honour Judge Reardon states at [147] of her judgment:

'In my view, W's conduct falls within the definition of economic abuse contained in DAA 2021. In the longer term, if not on a day to day basis, W's conduct has had a substantial adverse effect on H's ability to access and use his own money […] I appreciate that there are some forms of economic abuse, for example those that involve the coercive restriction of the other party's day-to-day expenditure, that may be more familiar, and therefore more easily recognised as abusive. However, W's conduct in this case involved the exploitation of a dominant position, which is the essence of all forms of abusive behaviour; and the fact that H was unaware of W's behaviour at the time, and that it did not directly impact on his daily life during the marriage, has only made his subsequent discovery of it more shocking. I am in no doubt that H feels a profound sense of betrayal, and that the harm caused by W's actions has extended well beyond the financial detriment they have caused.'

The case of Traharne v Limb [2022] EWFC 27 addressed the closely linked issue of coercive and controlling behaviour as conduct. The case involved a post-nuptial agreement and the wife sought to argue that she was subjected to coercive and controlling behaviour and had not freely entered into the agreement. The judge ultimately awarded the wife additional provision but her conduct arguments against the husband were unsuccessful. The wife was criticised for the time and costs spent on the conduct issue which was found to be 'entirely unnecessary' [54]. As a consequence, the wife did not recover her legal costs in full. Whilst not persuaded that coercive and controlling behaviour was a factor in this particular case, Sir Jonathan Cohen was clear in his judgment that it may be a relevant factor in other cases [27].

'In my judgment, Ormrod LJ's words are as relevant now as they were when uttered over 40 years ago. They stand the test of time. Coercive and controlling behaviour would plainly be an example of undue pressure, exploitation of a dominant position of relevant conduct. It would be part of all the circumstances as they affect the two parties in "the complex relationship of marriage". If Ormrod LJ were writing his judgment today, he might have employed words such as "coercive and controlling behaviour".'

In summary, the inclusion of economic abuse within DAA 2021 and the decision in DP v EP has broadened the definition of conduct within financial remedy proceedings but the evidential threshold, in order to succeed with conduct arguments, remains high. The potential cost consequences of running an unsuccessful conduct argument must be borne in mind as is highlighted in the cases of Traharne v Limb, and in the more recent case of SS v RS [2023] EWFC 32 (Fam).



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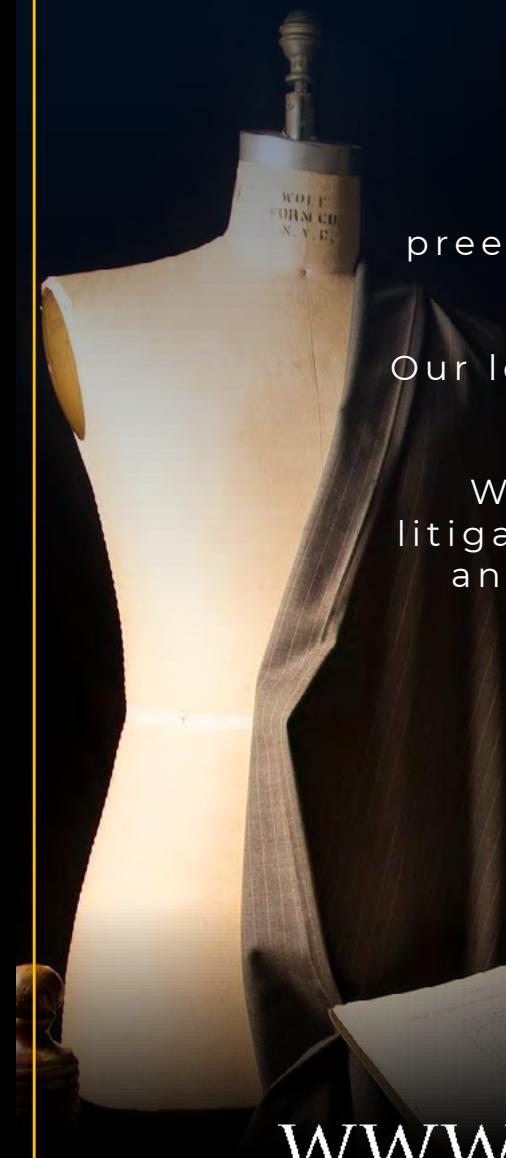

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DIGITISATION IN DIVORCE

Authored by: Trina Little (Barrister), Laura Buchan (Family Barrister), Cerys Sayer (Barrister), Scott Sharp (Barrister), Nicola Sully (Pupil) and Lauren Winser (Pupil Barrister) – Members of Westgate Chambers Financial Remedies Team

Introduction

Every divorce brings discussion about the division of assets; what makes High Net Worth divorce complex is the different types of assets involved. Such assets can traditionally be property, cars, artwork, unique jewellery, or collector's items. However, more recently, there is also a digitalisation of assets; these can be NFT's (Non-Fungible Tokens) or digital currency such as Bitcoin, for example.

Traditional assets, which are unique, are often difficult to value but the legal sector has become accustomed to using insurance policies, storage costs, expert reports or auction valuations to produce an estimate of value.

The difficulty with the digitisation of assets is that values can vary greatly over relatively short periods of time. You may be familiar with reports of Justin Bieber's Bored Ape NFT, plunging from $1.3 MILLION in value in January 2022 to around just $70K in November 2022.[1]

The legal sector has quickly had to adapt not just to the digitisation of assets, but also the digitisation of evidence regarding values. This article takes a look at two key digitisation challenges, crypto-assets and digital evidence and what both lawyers and clients need to be conscious of moving forward.

Crypto assets

Since the launch of Bitcoin in January 2009, crypto-assets have soared in popularity. As of May 2023, there are in excess of 23,000 different types of cryptocurrencies. Whilst the more well-known coins, such as Bitcoin, are still leading the way with one Bitcoin currently valuing c. £21,600. This coin has fluctuated over the last 3 months significantly, namely dropping to c. £16,000 at the start of March 2023. This demonstrates the extreme volatility in value within a short timeframe.

It was estimated by the Financial Conduct Authority in April 2023 that 3.3 million people in the UK hold some form of crypto-assets. This 'boom' of investments in this market means that the financial remedy process, family practitioners and the courts need to adjust.

Crypto assets now form part of the various assets that must be disclosed within Form Es and taken into account upon divorce. There is a significant disparity in practitioners detailed disclosures for stocks and shares investment, in comparison to the information provided for crypto-assets. As this is such a new asset with ever-changing values, the courts and practitioners need to continually re-assess the values of client holdings. These assets must be particularised

1 (https://www.dailymail.co.uk/tvshowbiz/article-11441763/Justin-Biebers-Bored-Ape-NFTs-value-plunges-1-3M-just-70K-FTX-crash.html; 18th November 20022)

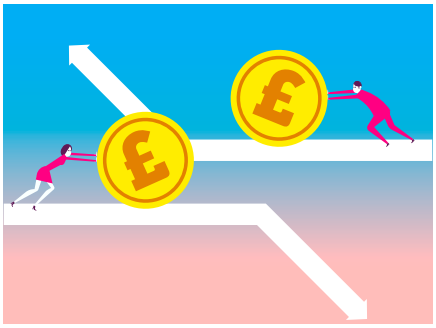
and set out; the value at the time of Form E, the amount of the asset held (i.e. coins- which can be held in portions) and the name of the individual crypto-assets held (i.e.. Bitcoin or Ethereum)

Whilst the courts and practitioners need to adjust, there has also been recognition by the UK government that these type assets are here to stay, and they need to be regulated and taxed accordingly. As of the tax year ending in April 2025, taxpayers will be required to record any crypto gains separately. At present, there is much discussion between UK MPs on how these assets are to be regulated whether they should be akin to investments or whether gambling regulations should apply. This will need to be kept in mind by practitioners.

In Bitcoin, AA v Persons Unknown [2019] EWHC 3556 (Comm), the court held cryptocurrencies to be 'property' and as such are subject of property adjustment orders under section 24 of the Matrimonial Causes Act 1973, and deliberate failure to disclose crypto assets may be considered conduct that justifies a departure from equality under section 25(2)(g).

Laura Buchan and Trina Little of Westgate Chambers comment:

"In light of the summary above, it is paramount that practitioners move with the digital age. The future (and current) generation of counsel must not be ignorant to these assets. Employers are beginning to pay bonuses in this form, holdings can be linked to bank accounts and understanding these assets will be necessary to properly particularise questionnaires in the best interest of our lay clients and represent them to our fullest. "



Digitisation of documents

By the very nature of financial remedy proceedings, the parties are to give full and frank disclosure. However, the existence, and more importantly the discovery, of falsified and manipulated documents undermines this, to the detriment of any claim.

Recent case law of X v Y [2022] EWFC 95 highlights the potential for digital manipulation of documents by a party, and reminds practitioners on both sides of the fence, that they must be extremely careful in accepting documents for face value in the digital age we now find ourselves in.

It is generally easy to create, manipulate, re-write or alter the contents of documents. Equally, documents can be printed, scanned and manipulated thereafter, particularly with programs being available free of charge or at a low cost. These programs often have features that 'match' the font included within the document, so that any manipulation is unlikely to be detectable. In the same breath, it is possible to take photographs of documents and edit them on a smart phone or tablet, which is of great importance when considering that litigants in person frequently provide photographs rather than hard copy documents or direct downloads.

There are some clear red flags, the most obvious being any history of fraudulent behaviour. The general evasiveness or obstructiveness of a party may also cause alarm bells to ring. Wherever possible, physical documents or original downloads should be provided. This may also help to identify any irregularities, as comparing versions may reveal differences.

Inconsistencies in the appearance of a document, however minor, should be scrutinised. Typographical errors in company names or bank account numbers, incorrect dates such as 31st September, missing company logos or discoloured text, and possibly so far as the overall tone of correspondences need to be carefully balanced when considering conduct.

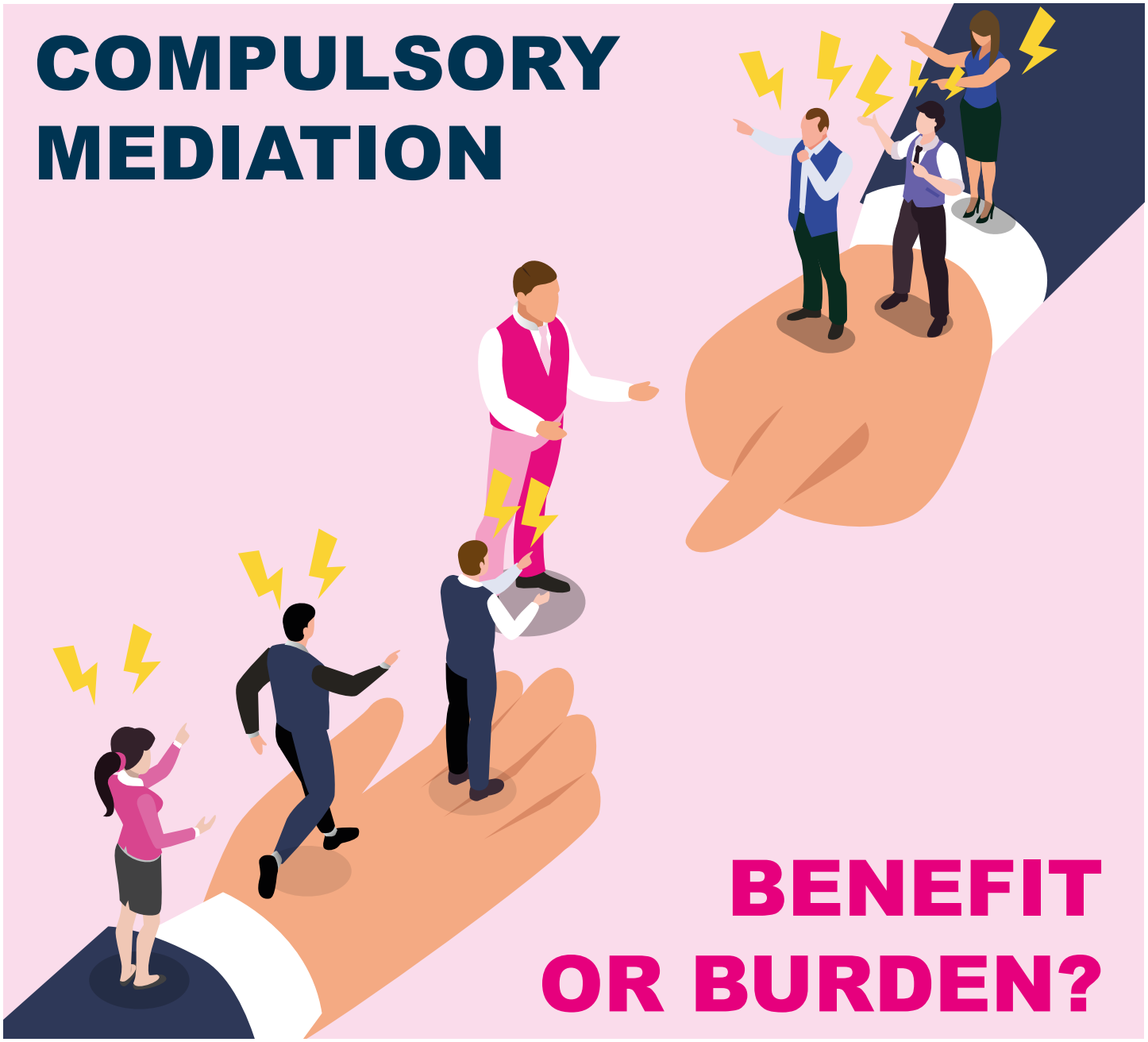
As stated by HHJ Hess, X v Y highlights "the ability of dishonest parties to manufacture bank statements (and other documents) which, for all practical purposes, look genuine, but which are in reality not in that category".

The challenge for practitioners remains determining the appropriate level of investigation in circumstances where the prevalence of fraud or manipulation of documents is unknown. As a starting point, we should not trust the content of any document that has not been verified, either by the original third party or other means of cross reference, although this is not without further expense or delay to the client.

Conclusion

Digitisation within the legal sector has undergone a period of acceleration particularly since the global pandemic. It brought with it advances in service such as virtual hearings and remote working, electronic sharing of documents and data rooms but what we have witnessed over the course of the last few years is an organic evolution of legal practice driven by necessity and circumstance, wherein the law has retrospectively created a framework to regulate and support itself. Similarly, where digital assets and evidence is concerned, the legal scaffolding has been very much superimposed ex post facto. We as practitioners, are now encountering cases where the pace of digitisation has outpaced practice and we need to proceed with caution to ensure our client's assets are valued and reported correctly.

COMPULSORY MEDIATION



BENEFIT OR BURDEN?

Authored by: Laura Jennings (Director) – A City Law Firm

The government has recently announced (March 2023) compulsory mediation for Child Arrangements disputes to avoid court proceedings for families. There will apparently be dispensation for domestic violence/ abuse cases and funding in order to make the mediation option more viable. This goes further than the prerequisite in place currently and requires a "reasonable attempt" to agree matters in mediation and face fines "if they act unreasonably and harm a child's wellbeing by prolonging court proceedings".

Dominic Raab's reasoning was cited as; 'When parents drag out their separation through lengthy and combative courtroom battles it impacts on their children's schoolwork, mental health and quality of life. Our plans will divert thousands of time-consuming family disputes away from the courts – to protect children and ensure the most urgent cases involving domestic abuse survivors are heard by a court as quickly as possible.'

Can we assume then that this is a consequence of the government 'reading the room' and facilitating agreements for families or is it possible a case of desperately streaming cases elsewhere, to avoid further pressure on an already crumbling court system?

Child Arrangements in Court

The legal position on Child Arrangements and Residency is governed by the Children Act 1989 and the welfare principle with the first consideration being the ascertainable wishes and feelings of the child concerned.

Clearly there are many parents who are unable to resolve the arrangements for their children, whether that is how much time should be spent, specific issues or concerns regarding welfare aspects, because they believe they are being guided by the wishes and feelings of their child/children. Traditionally all Children Act cases were reviewed and decided upon by the Judiciary as part of the CAP when introduced, with it's now all too distant time frames. Increasingly cases were moved to Magistrates and in some instances, Legal Advisers only for the preliminary stages.

It does seem that in recent years, the parents in the court system are viewed as being unable to resolve matters themselves but not warranting of Judicial overseeing as the arrangements can fall for the most part to be based on working out logistics, with the overall arching, what is best for the child. The inference being that they should be able to resolve it themselves and which this mediation compulsion leans towards.

However, a key part of the Child Arrangements court process is CAFCASS and their ability to carry out safeguarding and when necessary speak to the children, which is all the more pertinent when there are cases alleging alienation and/or children ages make their voices all the more relevant in the proceedings. The ascertainable wishes and feelings are given an independent voice via CAFCASS.

Is there a danger that in removing CAFCASS, the underlying principle behind the law governing child arrangement, the welfare of the child, is not easily identifiable and in some instances adequately protected?

The cases that end up in the court system are not usually the ones where an ability to see the other side or a recognition of compromise are prevalent. Either parent can become entrenched in the belief that their view is the one that best protects the child and without an independent third-party perspective view such as CAFCASS brings, how can a mediation progress?

I am more right than you!

Most parents do not seek to enter the court arena without a significant reason for feeling they need to do so and it is not necessarily the case that those types of disputes are best resolved in mediation.

Overall and speaking as a practitioner and Resolution trained mediator, mediation is incredibly helpful to some families but it does not suit all. The Law Society view on this recent announcement was that it may not be the best way forwards.

Society president Lubna Shuja stated: "The risk is that compulsory mediation could force the wrong people into the process, at the wrong time and with the wrong attitude for it to be effective. They need to be ready to mediate and have a full understanding of what the process will involve."

The ethos of mediation is to be voluntary and balanced. In making it compulsory one or both parties may be there without any wish to resolve and the whole process then is completely unhelpful. Without the wish of both parties to be there, there will be no way to break an impasse. There will be no third-party independent view to consider and the two parents potentially still entrenched but just in a different forum, just then delaying the inevitable need for someone else to make the decision for them about what works best.

It will remain to be seen how the construction of 'acting unreasonably and harming a child's wellbeing by prolonging proceedings' will be interpreted with these cases and it does appear that could be construed quite widely. There is obviously possibility of it being utilised as a stick to beat the other parent with and that in itself does not promote the viability of successful mediation.

Progress or Distraction?

The key really will be how this is then incorporated and whether the mediators are not expected to make the decisions by the parties attending. The framework of mediation and all the benefits of it are not compatible with the compulsory element. The loss of independent third party within these types of disputes, does not assist the breaking of pre-determined positions.

Nobody disputes that ideally parents can resolve these matters fluidly, with parenting plans and out of the court system but with the cases that cannot, forcing mediation is not going to do anything other than prolong the dispute, granted not within the court system but the dispute itself regarding the arrangements will just have a further hurdle and then delay, to be resolved, if the parties themselves cannot agree. Facilitating out of court agreements is always better and gives the parties the ability to be more involved in the outcome but it is not always the right route and in making it compulsory in these circumstances, is likely to create more delay but in a different forum, without a way of breaking the deadlock. Somewhere in that midst, the independently assessed ascertainable wishes and feelings of the child risk getting further away from being heard.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PRIVATE EQUITY AND DIVORCE:

NOT AS SIMPLE WE ARE LED TO BELIEVE?

Authored by: Josh Moger (Partner) – Payne Hicks Beach

Despite the large number of private equity ("PE") divorces that financial remedy practitioners, like me, will have dealt with, there are only two widely cited reported judgments. And, importantly, both of those judgments are first instance decisions – informative to other Judges but will not bind them – a different Judge may well take a different approach. This point is in fact illustrated by the contrasting approaches taken in the two cases themselves. In B v B [2013] EWHC 1232 (Fam), Mr Justice Coleridge took a broad, discretionary view, as to how to divide the husband's carried interest ("carry") – this is in stark contrast to A v M [2021] EWFC 89 in which Mr Justice Mostyn took a strictly arithmetical approach.

What is clear from the judgment in A v M, which is the more recent of the two, is that Mr Justice Mostyn, in his typical style, seeks to create a simple, universally applicable 'rule'. In the two years since A v M, practitioners (and Judges) have been grappling with the extent to which his straightforward approach is something to be strictly followed, is a helpful starting point or is a cross-check against the broader discretionary approach (as applied by Mr Justice Coleridge). This is particularly the case given that simplicity does not always, and often doesn't, create fairness. As dealt with below, how fair is it for a Judge to treat effort and endeavour as 'straight line'? Does the 'straight line' approach properly take into account the post-separation endeavour/risk/skill to meet the hurdle rate in the 'harvest' period of the PE fund?

A v M

In A v M the husband had received carry during the marriage, which would only pay out after the marriage. This is not uncommon in PE divorces. Mr Justice Mostyn alighted upon a linear, time-based, formula to determine the 'marital' element of the husband's carry. The husband had interests in two funds: one established in October 2016 (the first close was in March 2017) with committed funds of €187m ("Fund 1"), and the second established in October 2018 (the first close in December 2020) with committed funds of €323m ("Fund 2"). Although both funds had different anticipated terms and extension periods, Mr Justice Mostyn used an assumed term of nine years from the first close for both, in order to "compare like for like". The formula used was as follows (below is the calculation in relation to Fund 1):

A = 60 (the number of months from the establishment of the fund, October 2016, to the date of the trial, October 2021)

B = 113 (the number of months from establishment to first close (5), plus 108 months (9 year fund term))

= C = 53%

The same calculation for Fund 2, produced 31%. Therefore at the end of the term of the funds, the wife would receive 26.5% (53%/2) of the Fund 1 payments and 15.5% (31%/2) of Fund 2. However, recognising that the husband "would be much less unhappy if [the wife] were a shadow carry partner in one fund only" the Judge "relocate[d] the wife's share of the husband's carry in Fund 2 in the husband's carry in Fund 1". He calculated this would be effected by the wife having a 48.53% interest in the pay out from Fund 1, and no entitlement from Fund 2.

Where other Judges may take a different approach

1) Nature of a carry/co-invest.

Mr Justice Mostyn's view was that "carried interest ('carry') is neither exclusively a return on a capital investment [as the wife submitted it was] nor an earned bonus [as the husband submitted it was] but rather a hybrid resource with the characteristics of both." Despite this, by dividing the carry in the way he did, the Judge effectively treated it as capital. This capital/income distinction is crucial as it is well established law that applicants can share capital accrued during the marriage, but have no right to share income (which a bonus is included in). A different Judge may consider carry more akin to income/a bonus and whilst it is likely they would still share the carry, they may make some adjustment to the formulaic approach to reflect this.

2) The relevant end date

Mr Justice Mostyn determined that the end of the marital period would be the date of the trial, rather than the date of separation. In A v L the divorce petition was lodged in July 2019. Assuming separation of say January 2019, if the date of separation had been used, the marital element of Fund 1 would have been 34.5% (compared to 53%). A different Judge, using the date of separation, might have given a multi-million pound different outcome.

3) The relevant start date

The use of the 'establishment of the fund' date is logical, but again might not be followed. Another Judge may use an earlier relevant date, to reflect the preparatory work prior to establishing a fund. Or they may simply use the 'first close' date for A (in the calculation), taking the view that this is when the real effort, and investment, starts.

4) Treating carry and co-invest the same

Mr Justice Mostyn expressly stated that he "allocate[s] the co-investments in both funds in much the same way [as the carry calculation above]". But arguably they are different beasts. Would another Judge take into account that the funds for the co-investment usually come from marital capital? And how would they account for circumstances where the contribution is not marital capital but deducted from salary?

5) Being part of a larger PE fund

In A v L the husband effectively started his own PE fund. But most people working in PE are employees/partners in a large PE company, giving rise to other considerations, such as how the carry is paid out – on the European waterfall structure (aggregate) versus the US waterfall structure (deal-by-deal), and whether there are clawback clauses.

6) Post-separation endeavour

It is arguable that, the 'harvesting' phase of a PE fund, typically towards the end, is where most endeavour, risk and skill is at play. If the PE fund is unable to meet the hurdle rate in the harvesting phase, then there will be no payment at all from the carry. If the parties separated or divorced shortly before the harvesting phase, a different Judge may take greater account of this 'enhanced' post-separation endeavour, rather than treating it linearly with the other phases.

7) Aggregating into one fund could create significant unfairness.

Whilst Mr Justice Mostyn's approach of aggregating the wife's interest into a single fund is practical, a different Judge may consider that this could create an unfair situation where Fund 1 does not meet the hurdle, and so neither party receives any pay out and Fund 2 does meet the hurdle and the husband keeps the entire payment.

By way of final thought, none of this deals with the situation where one party seeks to be 'cashed out' of the share that they would otherwise have in the other's carry. Cashing out is arguably even more fraught with issues, particularly relating to valuation. That discussion will have to be for another article!

60-SECONDS WITH:

CHARLOTTE BRADLEY PARTNER KINGSLEY NAPLEY

Q Imagine you no longer have to work. How would you spend your weekdays?

A Very easily! While I love my work, I know I would still have a busy week. So, after getting my 13 year-old twins out of the door for school and taking my cocker spaniel for his first walk of the day, I'd start off with a hot pod yoga class (yoga in a large tent at 37 degrees – I love it!), meet up with some friends for a nice brunch and then do a much longer dog walk, probably on Wimbledon Common, listening to a podcast if not with friends. I'd also probably do some more charity work if I wasn't working. I help run the shop at our local rugby club opposite (which is at the heart of my local community), but I'm sure I would do many other things if I had more time (beyond giving lots of free legal advice to friends of friends!). And I would probably do lots more writing, not necessarily law related, but more observational pieces as I already do.

Q What do you see as the most important thing about your job?

A Helping clients navigate the way forward at one of the worst times in their life and giving them lots of guidance and emotional, legal and practical support (in relation to the children as well as the finances) which usually includes recommending other professionals eg counsellors, child therapists, accountants etc.

Q What motivates you most about your work?

A After 28 years as a Family solicitor (also mediator and collaborative lawyer), I still love it. The job is so varied, and my favorite thing is first client meetings as no case is ever the same. First and foremost, I enjoy helping clients in all aspects of their lives, and, as someone who does a lot of international work (finance and children), learning about the differences in other jurisdictions. But, equally, I love my team at Kingsley Napley, and my fabulous colleagues. I enjoy the management, and particularly enjoy seeing my junior trainees and solicitors developing into the wonderful lawyers they now are. While I relish all types of business development (including the social and conference side), I'm also a bit of a nerd (when I have time) and enjoy the technical side of Family law. I'm about to go 'live' on the 3rd edition of the Schedule 1 book (Financial Provision for children) which I co-author with James Pirrie at Family Law in Partnership (with whom I did work experience when I was 21!) and which we're publishing on line in exchange for donations to three charities.

Q What is one work related goal you would like to achieve in the next five years?

A That's difficult, I've achieved what I would like in my career but I would hope to continue with all that I do and to encourage others in my team (more capable than me!) to take over in due course so cementing the reputation of Kingsley Napley in the Family world.

Q What has been the best piece of advice you have been given in your career?

A Career wise, when I was applying for my equity partnership 13 years ago, a former colleague remarked that, when I wrote, I often underplayed my qualities and needed to be more assertive. So I stopped writing 'I consider, I believe, I think' and so on, and consciously started to write 'I am', etc. They were words of wisdom which I have passed on to many people since.

Q What is the most significant trend in your practice today?

A The increase of different options for clients in resolving their separation beyond just court and mediation. When I first qualified in 1995, there were no private FDRs (not even court FDRs), no collaborative law or arbitration. Now there are so many options available to meet the needs of different clients; personally, I really enjoy collaborative law (I was in the first group trained in the UK in 2004) and also, as a mediator, hybrid mediation, working with solicitors and clients jointly to reach a settlement. Acting for HNW and high profile clients, who want to keep their lives private, there are so many options now available.

Q Who has been your biggest role model in the industry?

A I would say two women, with whom I've worked for the last 26 years at Kingsley Napley; Linda Woolley our Managing Partner, and Jane Keir my colleague in the Family team (and former senior partner).

Q What is one important skill that you think everyone should have?

A To understand the importance of getting on with and relating to all types of people, from all walks of life, something which I learned from my parents and which has really helped my career and life generally.

Q What cause are you passionate about?

A Encouraging others (clients and lawyers) to try and reduce conflict to a minimum for children. All the studies show the huge impact of ongoing parental conflict on children (which can be caused by drawn out litigation). I've been fortunate to be part of the Family Solutions Group (FSG), https://www.familysolutionsgroup.co.uk/about-us/ whose report in 2020 has been described by the President of the Family Division as a 'blue print for radical change'. It's wonderful to see some of our recommendations already coming to fruition.

Q Where has been your favorite holiday destination and why?

A I love travelling - city breaks, and long distance back packing (and camping) holidays, so it's difficult to choose one. I love South America and Africa but I'd probably say the Serengeti (Tanzania) or Masai Mara (Kenya) as a Safari, and seeing the animals in their natural habitat, is an amazing experience. But then again, I love the excitement of cities such as New York or Chicago!

Q Dead or alive, which famous person would you most like to have dinner with, and why?

A A difficult choice but, having heard Michelle Obama at the Southbank Centre, just after she'd published her book, I'd say her (and hopefully Barack would be helping in the kitchen as well!). She comes over as so rounded, authentic but also hugely intelligent and fun. All qualities I admire.

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A NEW WAY OF WORKING: THE BRAVE NEW WORLD OF ONE LAWYER/ TWO CLIENTS

Authored by: James Carroll (Partner) and Harriet Collins (Associate) - Russell-Cooke LLP

Resolution (the membership organisation for family lawyers) is now into its' fourth decade. Since its inception the family law profession has been proactively moving towards helping couples separate sensibly and, as far as possible, avoid courts and litigation. Over many years those developments have seen varying forms of NCDR (Non-Court Dispute Resolution) develop including mediation, collaborative working and other forums such as private FDRs, ENE and the like.

Whilst this all aligns with the ethos of amicable resolution and of helping separating families, the fact remains that those processes usually entail each party instructing their own solicitor perhaps alongside a neutral third party. Effort needs to be made in outcome focused discussions to maintain good intentions and more so to avoid creating an adversarial atmosphere where both parties are lining up their respective negotiating positions.

Since the advent of the Divorce, Dissolution and Separation Act 2020 we of course now have the option for to file for a joint application for divorce. Working together should be the norm, yet the conventional wisdom is that separate representation is a must. The SRA has debunked that myth – as have brave early adopters of working as a legal advisor to both parties going through a separation. Whether or not this is possible is no longer a matter of debate. It is possible and permissible. The question is – how do you do it and who should you do it for? As to the how, various models abound though Resolution have created their Resolution Together training which though not a prerequisite to a one lawyer practice many firms are now adopting/adapting.

Will this work for everyone?

The 'who' question is perhaps more challenged that the 'how'. Working with one lawyer is not going to suit every couple and every case. The aim of the model is to reduce unnecessary conflict between individuals and assist them in reaching fair outcomes with the support of legal advice given as part and parcel of that process. In order to achieve that goal, couples seeking to work in this manner must have an existing degree of respect for (or at least cooperation with) one another which will enable them to have reasonable discussions. Couples don't need to agree on everything for the model to work but do need to be able to have those guided discussions. Fundamentally in order to be compliant with SRA regulations they must have a substantial common interest, and must not be in a position of legal conflict.

Sometimes it will be immediately obvious that this process won't work for a particular couple whereas in other scenarios this may become apparent from the initial discussions or even as matters progress.

As a headline, the one lawyer model should not be used where:

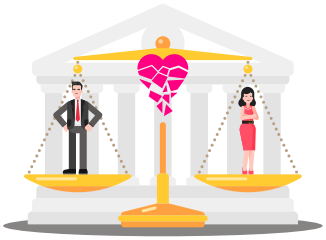
(1) There has been a history of or allegations of abuse;

(2) There is a significant imbalance of power or there are any concerns as to duress;

(3) There is a high level of emotional conflict;

(4) There are safeguarding issues whether relating to an adult or a child;

(5) There are issues over financial disclosure.



What does this look like in practice?

Many firms are likely having internal discussions about how they can roll out this model for their clients – both within the family teams themselves, but also engaging with any risk and compliance function.

There is no strict methodology though a very brief and broad overview of the approach adopted by Russell-Cooke in divorce and finance cases includes:

(1) Holding individual meetings with each client before moving forward with the process. The consultation enables each party to find out a little more about the process itself and also allows any issues to be identified which may prevent the process from even starting. That is of course an assessment which must be carried out as the matter continues.

(2) If both parties wish to proceed and it is safe and appropriate to do so, then they will need to sign an agreement committing to working together with a single lawyer. Resolution has helpfully prepared some example retainers/ agreements which can be adapted by each firm.

(3) A first joint meeting can then take place. The number of joint meetings will vary for each couple depending on how quickly financial disclosure is provided, the extent of any issues to be discussed, the need for any third party advice (e.g a pension or tax expert) etc.

(4) If an agreement is reached, this can then be recorded in a Consent Order.

Many take the view that existing experience of working with couples together is a benefit, and indeed the Resolution training model recognises such with abridged training for mediators. Interestingly, being a mediator, though perhaps an advantage, isn't a must. Conversely, unlikely mediation, being legally qualified is a must as the process has the giving of legal advice (to both) as its key feature.

Acknowledging that this is a new way of working and perhaps not something that all junior solicitors will be able to offer themselves, there still remains an active and important role for junior solicitors to play. That can include attending the joint meetings, dealing with any follow up work, reviewing and processing any disclosure received or drafting the final agreement. The key, as with an NCDR process, is for junior solicitors to be part of the process so that they can expand their own practice as they gain more experience rather than be schooled in the art of litigation only later in their career to be shown the 'other path'.

Conflicts, conflicts, conflicts!

Having attended a number of different seminars, events and meetings exploring this new approach one of the main concerns which has consistently been aired is conflict. There is though an inherent difference between parties who are in 'conflict' personally and that of a legal conflict. Just because individuals have discussions to have, decisions to reach and may have a different perspective or different ideas from the other does not mean that there is a legal conflict.

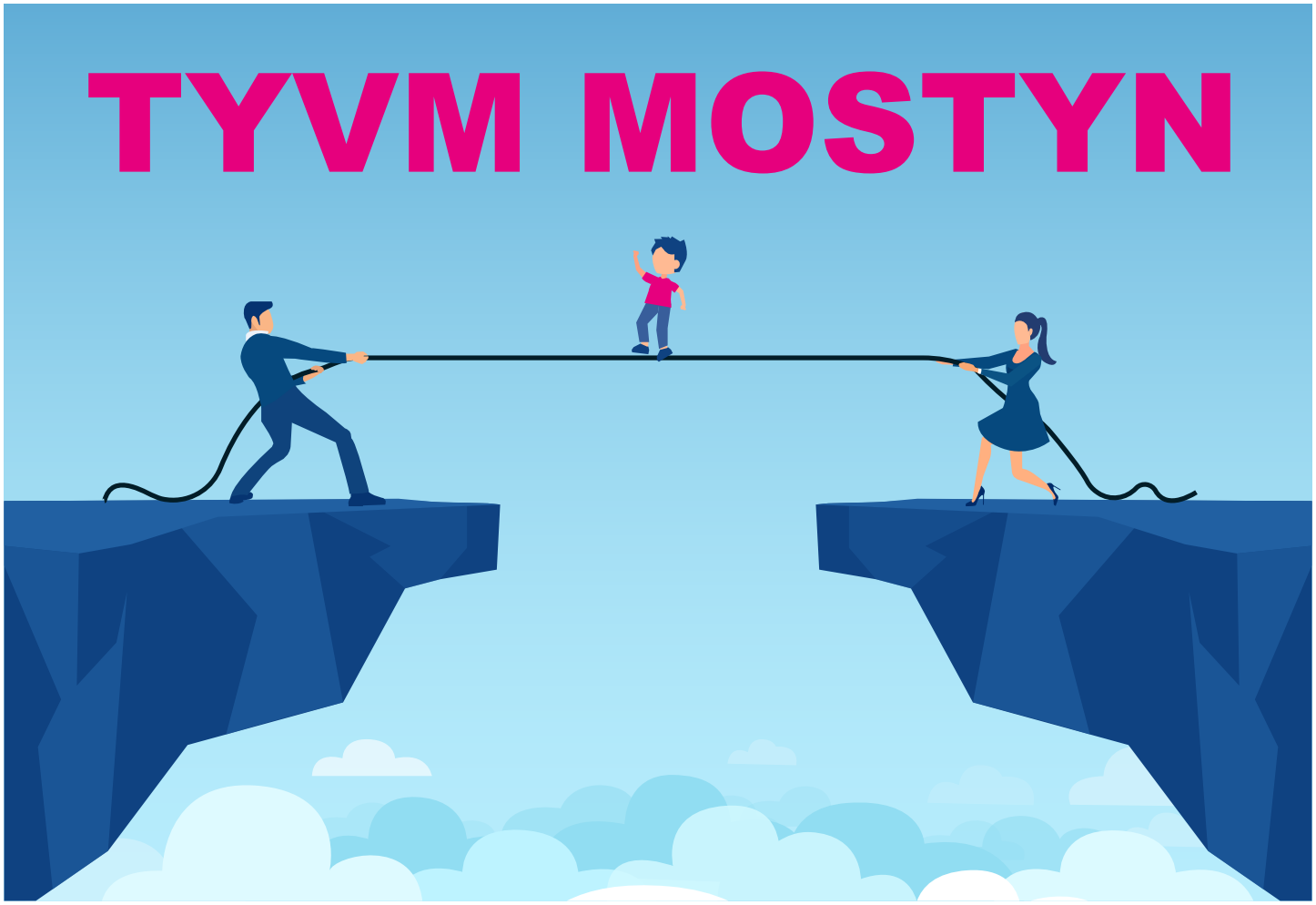
An example from recent actual experience relates to a couple who both have international connections with one party currently residing overseas. With such a case there is a risk that one or both of the parties could apply for divorce proceedings outside of England and Wales seeking an advantage over their partner: classic jurisdiction shopping. By signing up to the one lawyer model, both parties agreed to receive joint advice and whether either party then uses that advice to gain an advantage over the other is ultimately a choice but that doesn't mean that advice cannot be given to both parties. In a real life case, the parties were thoroughly disinterested in exploring such and seemed somewhat shocked that people behave in this way. Should though others act on that advice to the detriment of the other – they no longer have a substantial common interest, and indeed, find themselves in a legal conflict preventing their working together in a one lawyer forum.

Ultimately, just because there is a potential for legal conflict or tactical play does not mean that we should pre-judge the ethos that people want to bring to their separation and make the determination ourselves to close the door on constructive alternative forums which may be suitable to the parties in question.

Moving forward

There are obvious benefits for clients who suit this model to work with one lawyer. A couple will be paying for one lawyer, hearing the same advice and working together openly to reach a resolution. It is though new territory and should be approached cautiously with good training and good peer support.

We need to be able to continue to grow, develop and adapt our practice to offer this method of working to our clients as it is unlikely to disappear. This way of working represents a huge change from what is our day to day practice. It provides us with opportunities to create new and creative solutions for our clients and should be embraced with that in mind.



Authored by: Polly Atkins (Associate) - Hunters Law

In the fast-paced, 6-minute unit, cost-conscious world we operate in, it is common to stumble across a mysterious acronym. You stare at the screen wondering what on earth this means, enlisting the assistance of unfortunate colleagues in the vicinity - minds race, ideas are thrown about and someone finally lands on the answer. BINGO. No, that one isn't an acronym…

The latest set of acronyms comes courtesy of Mr Justice Mostyn, in the sphere of child maintenance in HNW cases.

The process began with the introduction of the HECSA - Household Expenditure Child Support Award - in Collardeau-Fuchs v Fuchs [2022] EWFC 135, where the parties' pre-nuptial agreement addressed the wife's personal claims but left open provision for children.

A couple of years earlier in CB v KB [2019] EWFC 78, Mostyn J had set out that "in every case where the gross annual income of the non-resident parent does not exceed £650,000, the starting point should be the result of the [CMS] formula ignoring the cap on annual gross income at £156,000". Following CB v KB, that approach was widely – though not universally – adopted. In Collardeau-Fuchs however, Mostyn J clarified that the CB v KB approach was "obviously intended to apply forcefully to those cases where the court is considering child support as a subsidiary claim within a wider financial remedy claim", rather than in Schedule 1 cases, or in cases such as the one before him, "where there is no corresponding spousal claim being heard at the same time."

Mostyn J then introduced the HECSA, which should apply instead of the formula in such cases. Its "essential principle is that it is permissible to support the child by supporting the mother", such that child maintenance can extend beyond the child's direct expenses to meet the expenses of the mother's household insofar as such expenses are not directly personal to her with no reference to the children. In fixing the level of the HECSA, the court should not necessarily replicate the parties' standard of living prior to separation, or the payer's standard of living, but the award should be judged by reference to them. It should be at such a level that the mother is "not burdened by unnecessary financial anxiety" and should be the result of a broad-brush assessment of the mother's budget. On the facts, Mostyn J awarded a HECSA of £554,494 pa for two children.

In March 2023 the HECSA reappeared in Re Z (a child) (No 4) (Schedule 1 award) [2023] EWFC 25 where the father had annual income of c.£2.7m. Cobb J applied Mostyn J's approach in a Schedule 1 claim, awarding a HECSA of £148,250 pa for one child. Cobb J (rightly, in the author's

opinion) agreed with Mostyn J that references in the Schedule 1 caselaw to a "carer's allowance" were outdated, but recognised that the principle remained important - an appropriate child maintenance award would meet the expenses of the mother's household to the extent that she was not able to meet them. Cobb J also confirmed his agreement with Mostyn J that the CMS formula should provide guidance where the payer's income exceeds £165,000 only in cases where is a spousal maintenance claim, and not in Schedule 1 cases.

In April 2023 Mostyn J offered further guidance on HECSAs in James v Seymour [2023] EWHC 844 (Fam), introducing three further acronyms: Child Support Maintenance ('CSM'), the Adjusted Formula Methodology ('AFM') and the Child Support Starting Point ('CSSP').

The case was an appeal, by the (remarried) wife, of HHJ Vincent's refusal to apply the CB v KB approach to her application for increased child maintenance. In upholding HHJ Vincent's decision, Mostyn J took the opportunity to give wide-ranging guidance on child maintenance claims where the payer's income exceeds £156,000.

Crucially, he differentiated between two types of child maintenance claim:

(1) The HECSA, which applies where there is no spousal maintenance claim (e.g. as it is Schedule 1 claim (as in Re Z (No 4)), because the applicant has remarried (as in James v Seymour), or because spousal maintenance is precluded by a PNA (as in Collardeau-Fuchs v Fuchs). A HECSA can include the reasonable costs of the applicant's household where the applicant cannot meet them, but not costs unrelated to the applicant's role as carer of the child. In such cases, the CMS formula is irrelevant and maintenance should be determined by reference to the applicant's budget in the context of all the relevant circumstances. (In both Collardeau-Fuchs v Fuchs and Re Z (No 4) a 15% cut was applied to the applicant's budget to determine the appropriate level of maintenance, but that is not referenced in James v Seymour.)

(2) CSM, Child Support Maintenance, where the maintenance is simply a contribution to the children's direct and indirect costs. Mostyn J acknowledged criticisms of the CB v KB approach, in particular that it produced very high figures, especially in families with one or two children. However, given the benefits of having a formula for child maintenance where the payer earns more than £156,000 pa, Mostyn J developed a new one – the Adjusted Formula Methodology ('AFM'). The AFM operates on the payer's 'exigible' income ('E') – their gross income adjusted for pension payments and other children in their household (as in the CMS formula), but also for school fees payments. The AFM, and the tables it produces, are set out in an appendix to the judgment. The AFM produced a 'CSSP', Child Support Starting Point, described by Mostyn J as a 'loose' starting point, such that it is still necessary to review the applicant's budget and carry out the discretionary exercise. Note, however, that the AFM is said not to apply in variation cases, where the starting point should normally be the original order adjusted for inflation, nor where there are 4 or more children, income is over £650,000, the income is largely unearned or the payer lives on capital. In such cases the discretionary exercise should be carried out without a starting point.

Mostyn J's guidance appears helpful in providing a digestible, step-by-step approach to child maintenance where the payer's income exceeds £156,000. However, whether we will see wider judicial uptake of the bifurcated approach to child maintenance, such that we will need to advise clients on whether they have a claim for CSM or a HECSA, and what CSSP will be produced by the AFM, remains to be seen…

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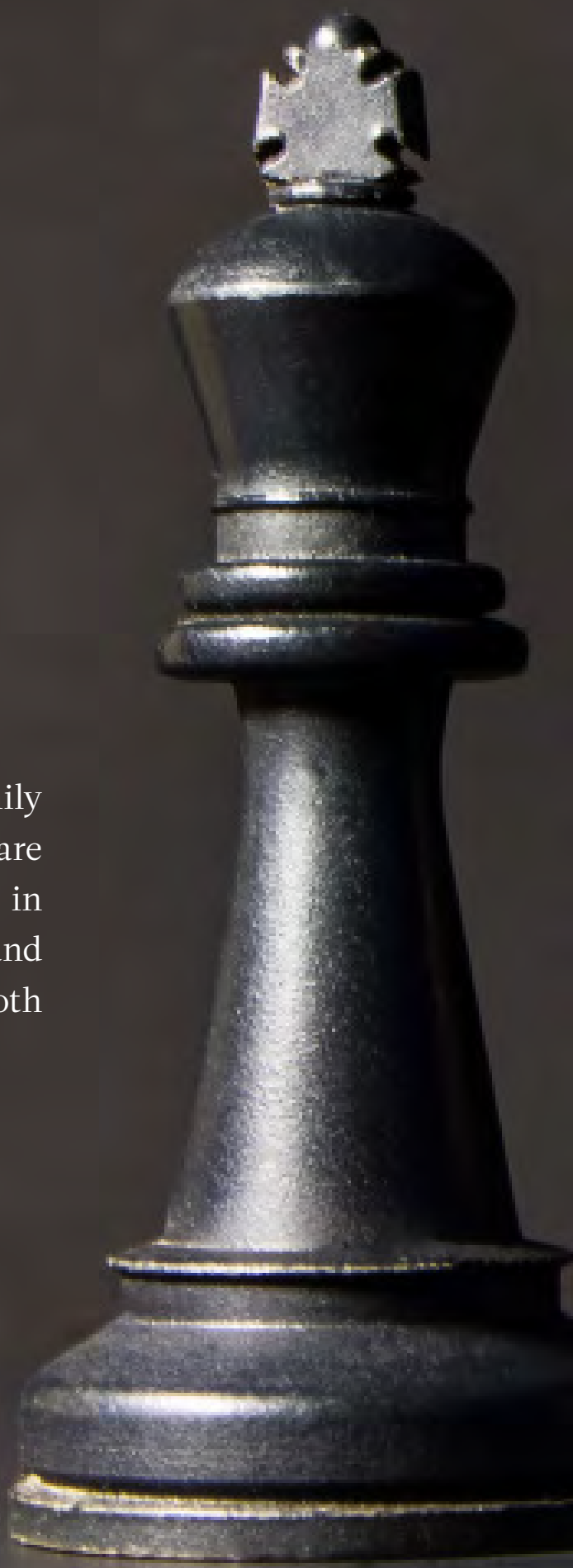
"They are as strong on money as they are on children and they've got strength and depth in both silks and juniors." - Chambers & Partners, 2020



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THROUGH THE LOOKING GLASS

THE FINAL REPORT OF THE FRC SUB-GROUP OF THE TRANSPARENCY IMPLEMENTATION GROUP (TIG)

Authored by: Ollie Guest (Senior Associate) and Natalie O'Shea (Senior Knowledge Lawyer and Mediator) – Withers

As a profession, we owe much to the members of this sub-group who have devoted their time and energies into a comprehensive, detailed, and thorough report (despite its wide terms of reference) in considering all aspects of transparency as far as it concerns the work of the Financial Remedies Court and in providing such a helpful report as to suggested ways forward.

What is the TIG and what has it been doing to make the family court more transparent?

For those that may not be familiar with the Financial Remedies Court sub-group of TIG the Transparency Implementation Group, it is a committee chaired by His Honour Judge Stuart Farquhar made from all levels of first instance judiciary, solicitors, barristers, a legal blogger and a press reporter charged with the task of considering all issues of transparency as they impact upon the Financial Remedies Court (FRC).

And for those who are not familiar with the work of TIG… that was created by The President, Sir Andrew McFarlane following the rallying call by Mostyn J (then National Lead Judge for the Financial Remedies Court) in January 2022 to fully investigate the issue of Transparency in the Financial Remedies Court. TIG has four sub-groups: Press Reporting, Anonymisation of Judgments; Contacts with Media; and Data Collection. It was decided that there should be a fifth sub-group dealing with Transparency issues in the FRC and work under the TIG umbrella – and they have worked on and produced this Final Report.

Ruminations, Cogitations and Suggestions

Fortunately for us, all members of this sub-committee have ruminated, cogitated and collaborated, having read and analysed each and every response received to their survey and then thoughtfully compressed their recommendations and pathways to implementation in a succinct executive summary. This concise summary is appreciated, given the report runs to 164 pages. Rather generously, the authors give a gracious nod to the reality that it would be unlikely that many people 'would wish to read the report as a whole at any given time' (for even the keenest of family lawyers, as the days get longer and the allure of an evening beer draws them in, have been known to set aside their studious ruminations on the future of the profession).

Refreshing too (in a time when polarisation of (certainly political) views seems to be the norm) to read a measured summary of valid and differing opinions as to the best way forward in relation to the reporting of judgments and the rubric to be adopted. One can only imagine the calibre of the erudite and civilised exchanges which have gone on behind the closed doors of the sub-committee over many months.

Specifically, the group was asked to address:

(1) Should FRC cases be heard in Private or in Open Court?;

(2) Should the parties remain anonymous?;

(3) What documents, if any, should be made available to the press/legal bloggers?;

(4) How should highly confidential information (including that which is commercially sensitive) be considered?

(5) Contents of published judgments?

(6) How to ensure a greater number of judgments in cases involving a lower level of assets, which are generally heard by the District bench, can be published?

The President of the Family Courts has on more than one occasion acknowledged the size of such a task. That said, at least it is not quite as far reaching as the fabled story of a trainee who was once asked to summarise the changes in civil rights in English law since the time of William the Conqueror...

The recommendations

Attendance at Hearings. FRC cases are heard in private – although legal bloggers and accredited journos can attend alongside the parties and their lawyers. The sub-committee suggested there should be no change here, but judges and lawyers need to know what to do if a reporter does attend. The answer is not to panic and to follow the advice handily set out by the Transparency Project (an independent charity) – the authors recommended that this be more publicised – so giving we're giving a shout out right here – and you can find it in Appendix 1 of the report.

Out of Court Settlements. Again, no suggested change to the status quo, which is that all out of court settlements are private and confidential. But a fair acknowledgement that this situation indirectly supports the growth of the risk of a 'two tier' system; those with enough money can afford private FDRs, arbitration, neutral evaluation (such as our firm, Withers, offers with Uncouple), which are not accessible by most separating couples who simply don't have the financial resources to opt for the no-publicity (no press scrutiny out of court) options.

Harvesting settlement information for future guidance and AI. The report calls for much needed harvesting of the valuable information contained in the updated Form D81 (which document raises more than a hearty groan amongst the solicitor ranks these days) to be put into place (on an anonymised basis of course). As the authors say – this could provide 'invaluable insight into the level of agreement that is being reached' – such information would be gold dust for litigants, mediators and practitioners, albeit it will be necessary to ensure that data from of all manner of financial settlements (moderate and medium finance cases, not just high net worth) is collected and shared. It would be great if, from this data, we were also able to gauge how many couples had reached agreement through solicitor negotiation, mediation and other forms of dispute resolution. That said, to do so will rely on the data being put in at the end of what can sometimes be a long and painful process. The last thing many clients wish to do is produce yet another comprehensive piece of paperwork about the finances they have been arguing over for so long. Of course, the statistical harvesting of D81 data is needed to feed into the AI finance on divorce apps which we will no doubt be using in the future.

Reporting orders. The report concludes that the default position should be that reporters should be entitled to see the position statements of each person together with the ES1 form which sets out the basic chronology and facts. They recommend that a Reporting Order should be standard in each case. This would set out precisely what documents are to be provided and objections to this could be made on application to the judge. Again, clear, succinct guidance.

Anonymity – greater certainty? It is acknowledged that there is a difference of judicial opinion as to whether the identify of separating couples in the Financial Remedy Court should remain anonymous or should be named. The report recognises that this issue has been controversial and has caused uncertainty for practitioners.

The answer, the authors say, is that the default position is one of anonymity at first instance. And they set out why:

(1) Because much of the information disclosed (and remember it is done so under compulsion) is not just financial, but also relates to health and highly personal issues.

(2) Because the privacy of children needs to be protected – naming the parents is likely to identify them too.

(3) Because some people in the midst of divorce/finance litigation might be adversely affected – there is a risk that the threat of publicity could distort the proceedings in some way; 'settle with me for (£x) or I'll take you to court and everyone will know about [Y] etc.'

(4) Because there will always be cases where the presumption of anonymity will be rebutted (where there has been poor litigation conduct or conduct outside the court arena) and this will remain a safety net for the judge to decide on a case by case basis.

Reporting of Cases – giving the public and the profession a more balanced view. Aside from the position statements and chronologies in reporting orders, the authors propose that more routine (ie not only 'Big Money') judgments should be reported.

Next steps? So many reports come and go – full of promise of reform and a better way of protecting separating couples and improving the process of divorce (cohabitation rights, marital agreements for example) but then simply fade into the background. Not so this, because the vast majority of the recommendations are capable of implementation without any need for a change of the rules or of the substantive law. The only real issue which would need a change in statue law is if Mostyn J's analysis of anonymity in family proceedings is right. Conversely, if the approach of other High Court Judges is correct, then no change in law would be required. So we're already off to a flying start.

At A Glance – the icing on the cake of the Executive Summary is the eye-catching summary of recommendations - 'At a Glance' – every lawyer's dream of a summary and in glorious technicolour, with its headings: Issue; Position; Recommendation; Impact (upon Transparency); Implementation. So succinct and digestible that it undoubtedly refreshes the parts other reports cannot reach and surely forms a template for reports to come.

INTERNATIONAL SURROGACY: AN UPDATE

Authored by: Antonia Felix (Partner) and Alice Mantle (Managing Director) – Mishcon de Reya

Surrogacy law varies considerably across the world. In this jurisdiction, the law on surrogacy is primarily governed by the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 2008. As science and societal attitudes have progressed over the decades, the law here is seen by many to have lagged behind. Whilst there have been piecemeal developments in the case-law and in statute, significant issues remain.

Following the Law Commission of England and Wales and Law Commission of Scotland's Report and Recommendations on "Building Families Through Surrogacy" earlier this year, considerable focus has been placed on their proposed "new pathway to legal parenthood". However, this would only apply to domestic surrogacy. This article, by Alice Mantle and Antonia Felix, instead focuses on international surrogacy journeys and the Law Commissions' recommendations in this area.

Terminology

- Intended parents ("IPs") – the parents seeking a child via surrogacy, also known as Commissioning Parents
- Surrogate – the person carrying the child (the term surrogate mother is unpopular and now not widely used)
- Traditional surrogacy – uses the surrogate's egg
- Gestational surrogacy – uses the egg of the Intended Parent or a donor

Current Law

Somewhat akin to the "common law marriage myth", there is significant misunderstanding regarding surrogacy in the general population. Many people believe that surrogacy in England & Wales is illegal, and that it remains the preserve of celebrities in the Sunshine State. That is not the case. Whilst the Surrogacy Arrangements Act created certain criminal offences, surrogacy itself is not illegal. However, surrogacy contracts are not enforceable and for this reason, some IPs choose international surrogacy journeys, as explored below.

When a child is born via surrogacy, English law views the birth mother as the legal mother. If the surrogate is married or in a civil partnership, then their spouse or civil partner will be the legal father or other parent. This is an area of particular confusion for IPs who travel abroad for surrogacy arrangements, as regardless of whether they are recognised as the legal parents in another country, they will not be in England and Wales until they have obtained a Parental Order.

The current framework for bestowing legal parenthood on IPs via Parental Orders is set out in the Human Fertilisation and Embryology Act 2008.

Following statutory amendments, in 2010 it became possible for same sex and unmarried couples to apply for Parental Orders, and in 2019 it became possible for single applicants to apply for Parental Orders (this followed a declaration of incompatibility with the Human Rights Act) . For international surrogacy journeys, careful consideration needs to be given to the law in the relevant foreign jurisdiction as same-sex, unmarried or single parent surrogacy is not universally permitted.

Presently, section 54 of the Human Fertilisation and Embryology Act 2008 sets out the requirements for a Parental Order. The guiding principle in this area of law – as in the law concerning the care of children generally – is that the child's welfare is paramount.

The Court has stated that "The essential question in every case is: all things considered, which outcome will be best for the child? The law does not take a special approach to decisions about surrogacy breakdown or other disputes within unconventional family structures. The welfare principle applies with full force in such cases…"

This guiding principle has resulted in a considerable level of judicial interpretation in awarding Parental Orders – even when a strict literal application of the statute would have prevented this. However, there are still certain requirements which prevent some IPs from obtaining Parental Orders, some of which are the subject of the Law Commission recommendations considered below.

Choosing International Surrogacy Journeys

Many IPs choose international surrogacy journeys because of the relative speed. Some IPs turn to surrogacy after long and harrowing fertility journeys, others as single applicants or in same-sex relationships. It can be particularly difficult when, having decided on surrogacy as a route to parenthood, they discover that a domestic surrogacy journey could take several years. The delay is often due to a shortage of surrogates. There may be multiple reasons for the lack of surrogates in this jurisdiction, including the lack of commercial payment and enforceable contracts. In other jurisdictions, commercial surrogacy agencies can often match IPs and surrogates in much shorter time periods.

The sense of security given by enforceable surrogacy contracts and pre-birth legal parentage for IPs in certain other jurisdictions is also an important factor for some IPs who choose international surrogacy journeys.

Proposed Reforms

The following are some of the key recommendations made by the Law Commission Report which may impact those on international surrogacy journeys in the future:

(1) Reforming immigration practices to reduce waiting times to obtain travel documentation to bring babies home;

(2) Not bestowing legal parenthood on the surrogate's spouse or civil partner. This would end the need to obtain the spouse or civil partner's consent to a Parental Order. Where the biological intended father is British, this would ensure the child has British citizenship from birth;

(3) Enabling IPs who are habitually resident in this jurisdiction, but not domiciled, to apply for Parental Orders. This would be a significant benefit for international clients who presently live here but are not domiciled here, who currently face a lacuna in the law;

(4) Granting the court the power to dispense with the surrogate's consent if the child's lifelong welfare needs require it (although this would only apply to new arrangements entered into after the law came into force). This would introduce consistency with the current law in adoption cases; and

(5) Introducing a Surrogacy Register, holding information for people born through surrogacy including details of their surrogate, whether donated gametes were used and the fertility clinic. This will help future children born via surrogacy with their "life story".

Limitations to the Proposed Reforms

It had been hoped by many stakeholders that the Law Commission Report would recommend a streamlined process for recognition of legal parenthood granted in certain other jurisdictions following international surrogacy journeys, to avoid IPs having to go through two separate processes to obtain legal parenthood in different jurisdictions. However, no such recommendation was made so Intended Parents will still need to go through the Parental Order process here as part of an international surrogacy journey.

The Law Commission Report also did not recommend that the law be expanded to enable the courts to grant Parental Orders in cases of double donation (where donor egg and sperm are used so the IPs have no genetic link to the child). In such cases, consideration would still need to be given to acquiring legal parenthood or parental responsibility via other means, for example, adoption.

What next?

The Law Commissions began their "Building Families Through Surrogacy" project in 2018, the consultation took place in 2019 and their report and recommendations were published in March 2023. The Government will consider the recommendations and should provide an initial response within six months and a full response within a year. Making changes into law will take longer. Given the forthcoming general election, campaigners for reform will want to get commitments from both major political parties that they will set aside time to consider these issues in any new government.

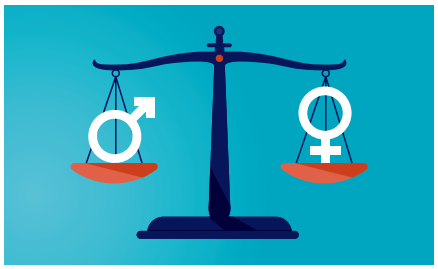
WHAT IS FINANCIAL ABUSE AND HOW IS IT DEALT WITH?

Authored by: Charlotte Newman (Partner) – Stowe Family

All too often, family solicitors find themselves advising clients about domestic abuse. This is often in the context of injunction proceedings or those relating to children. In such circumstances the abuse is at the heart of the decisions made by the court. But, what happens when the abuse is a feature of a marriage – how does the fact that abuse has occurred impact divorce and financial proceedings, if at all?

Abuse can take many forms. The mind often goes to abuse of a physical, verbal or emotional nature. However, what about the less considered financial abuse? Thankfully, there is now greater recognition of financial abuse. Within the long anticipated Domestic Abuse Act 2021, the definition of domestic abuse was extended to include economic abuse. This was important in providing victims with greater access to support. This type of abuse refers to any behaviour that has a substantial adverse effect on a person's ability to a) acquire, use or maintain money or other property; or b) obtain goods or services.

Economic abuse does not just impact the wealthy and can be less so about the assets and more about using the finances to exert control over a spouse. Abuse of this form can be devastating to those experiencing it; leaving them feeling extremely vulnerable and as if there is no way out. They will often not have any autonomy over their finances, understand the asset base that exists within the marriage or know how they will be able to fund divorce proceedings. Their lives are impacted greatly by the conduct of their spouse. It is for this reason that it can be very disheartening to learn that the conduct may not necessarily be considered when the court is determining the appropriate financial settlement – it seldom meets the high level required to be regarded as conduct under s25(2)(g) of the Matrimonial Causes Act 1973. It is fair to say that there is still some way for the legal sector to go and domestic abuse continues to be largely overlooked in terms of conduct.



What does the law say? The starting point:

As regards the exercise of the powers of the court under section 23(1)(a), (b) or (c), 24, 24A, 24B and 24E above in relation to a party to the marriage, the court shall in particular have regard to the following matters –

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it.

Gross and Obvious

As family practitioners, it can be very difficult to advise that conduct will only be taken into account in limited circumstances – where is gross and obvious.

Lady Hale summarised the point in the case of Miller v Miller [206]:

"it is only equitable to take their conduct into account if one has been very much more to blame than the other: in the famous words of Ormrod J in Wachtel v Wachtel [1973] Fam 72, at p 80, the conduct had been 'both obvious and gross."

This was stated as being a practicable approach as it is not "possible for any outsider to pick over the events of a marriage and decide who was more to blame for what went wrong save in the most obvious and gross cases."

The upshot being that it would not be possible to attribute an amount to each specific behaviour being complained of. In the more recent case of S vS [2006] the 'test' for applicable conduct, was considered to be those which had the 'gasp factor' not the 'gulp factor'.

"However, although the whole sad history of the marriage, which I have sketched, and which Judge Hughes made unavailing attempts to save, may leave me with what might be called a 'gulp factor', arising out of what each of these two parties did to each other, verbally and physically, I am not left with Mr Mostyn QC's 'gasp factor'. I do not conclude that the conduct of the Respondent…was such that it would be inequitable to disregard it in making my orders as to proper financial provision."

Further Guidance

The Court has helpfully categorised the types of conduct that can be run within financial remedy proceedings [OG v AG 2020]:

(1) gross and obvious personal misconduct;

(2) wanton and reckless dissipation of assets;

(3) litigation misconduct; and

(4) non-disclosure cases.

It remains the case that in most cases misconduct is not going to be relevant to the bases upon which financial relief is ordered today. The authorities indicate that such conduct would only be reflected in the financial award where there is a financial consequence to it. As we are exploring financial conduct here, it is worth noting that litigation misconduct and non-disclosure of assets are ways in which economic abuse can be exerted during the divorce process by a perpetrating spouse. They can feel more able to hide assets when their spouse has not been aware of the finances generally or try to delay or obstruct progression in a case purposefully – even sometimes to increase the costs of their spouse and encourage capitulation out of frustration. Generally speaking, litigation misconduct is properly dealt with by way of costs orders (see Ezair v Ezair [2013] 1FLR, 281, CA). However, there have been cases where litigation conduct, in a party failing to engage in the process of disclosure assets has resulted in a party being awarded 50% of the assets and an uplift in respect of the other's conduct (see A v A [2012] All ER (D) 180 (Dec), FD).

In the case of OG, Mostyn J comments that gross and obvious conduct "can extend to economic misconduct such as was alleged in the case. If one party economically oppresses the other for selfish or malicious reasons then provided the high standard of 'inequitable to disregard' is met, it may be reflected in the substantive award".

Recent cases?

The judgment in the case of DP v EP (Conduct; Economic Abuse; Needs) [2023] EWFC 6, references the Domestic Abuse Act 2021 noting that its role in financial remedy cases is yet to be established. The range of behaviour exhibited by controlling spouses was drawn upon from the Court's experience, including within their financial relationships. This case concluded with a departure from equality in favour of the spouse who had suffered the 'abuse' and a costs order was also made in their favour. This is a very recent decision where economic abuse was indeed taken into account and is promising for the future.

What to look out for

New research revealed that around 1 in 6 people in Britain have suffered from economic abuse at the hands of their partner. It is estimated that 95% of reported domestic abuse involves financial abuse. This is a staggering statistic and highlights the need for greater recognition and awareness of the same. The decision referred to above is a promising sign of what may be to come in the future. Nevertheless, it remains important for lawyers to be aware of the signs of financial abuse at the outset of a case, so that claims can be properly explored.

WHAT'S THAT DOWN THE BACK OF THE SOFA?

Authored by: James Pirrie (Director) – Family Law in Partnership

When investing any cash lump sums, for example a clean-break divorce settlement, it is important to ensure the portfolio is structured appropriately to make use of tax-free annual allowances. Current legislation makes it possible to earn up to £35,070 tax-free in a year.

For a lot of people, the Personal Allowance on the first £12,570 of their earnings represents the extent of utilising available tax-free allowances.

However, there are many more to take advantage of…

Dividend Allowance - £1,000

Everyone is entitled to earn their first £1,000 of dividend income tax-free.

It is worth noting that, above this threshold, dividends are taxable at lower rates than applicable to other sources of income, so taxable dividends can be more tax-efficient than, for instance, rental income.

Personal Savings Allowance - £1,000 / £500

Ever wondered why interest earned on your cash savings is not usually taxed?

This is due to the Personal Savings Allowance of £1,000 for non or basic rate taxpayers, and £500 for higher rate taxpayers.

Additional rate taxpayers do not receive this entitlement.

Starting Rate for Savings - £5,000

If your total income (excluding savings and dividend income) is under the Personal Allowance (£12,570), you are entitled to up to a further £5,000 in tax-free savings interest, which can also be applied to government and corporate bond income.

This £5,000 tapers to zero as your total income increases between £12,570 and £17,570.

With interest rates rising again, both these allowances could become increasingly important.

Capital Gains Exempt Amount - £6,000

Everyone is entitled to £6,000 in tax-free profit from the sale of assets.

More useful still is the CGT exemption on assets transfers between spouses. This allows one spouse to move investments into their partner's name

tax-free (no limit), for that spouse to sell them using their own exemption.

This represents a clear advantage to holding liquid assets, such as company shares, as they can be easily managed to optimise your overall tax position.

Rent-a-room allowance - £7,500

If you put a furnished room in your home up for rent, the first £7,500 of rental income will be tax-free.

However, it must meet those qualifying conditions and you would not be able to claim landlord's expenses from your tax bill (e.g. for renovations) in tax years where you also claim this allowance. You would instead choose between the two each year.

Property allowance - £1,000

Income earned from a property, land, buildings or even a parking space benefits from a £1,000 tax-free allowance.

Again, you must choose between claiming expenses or the allowance.

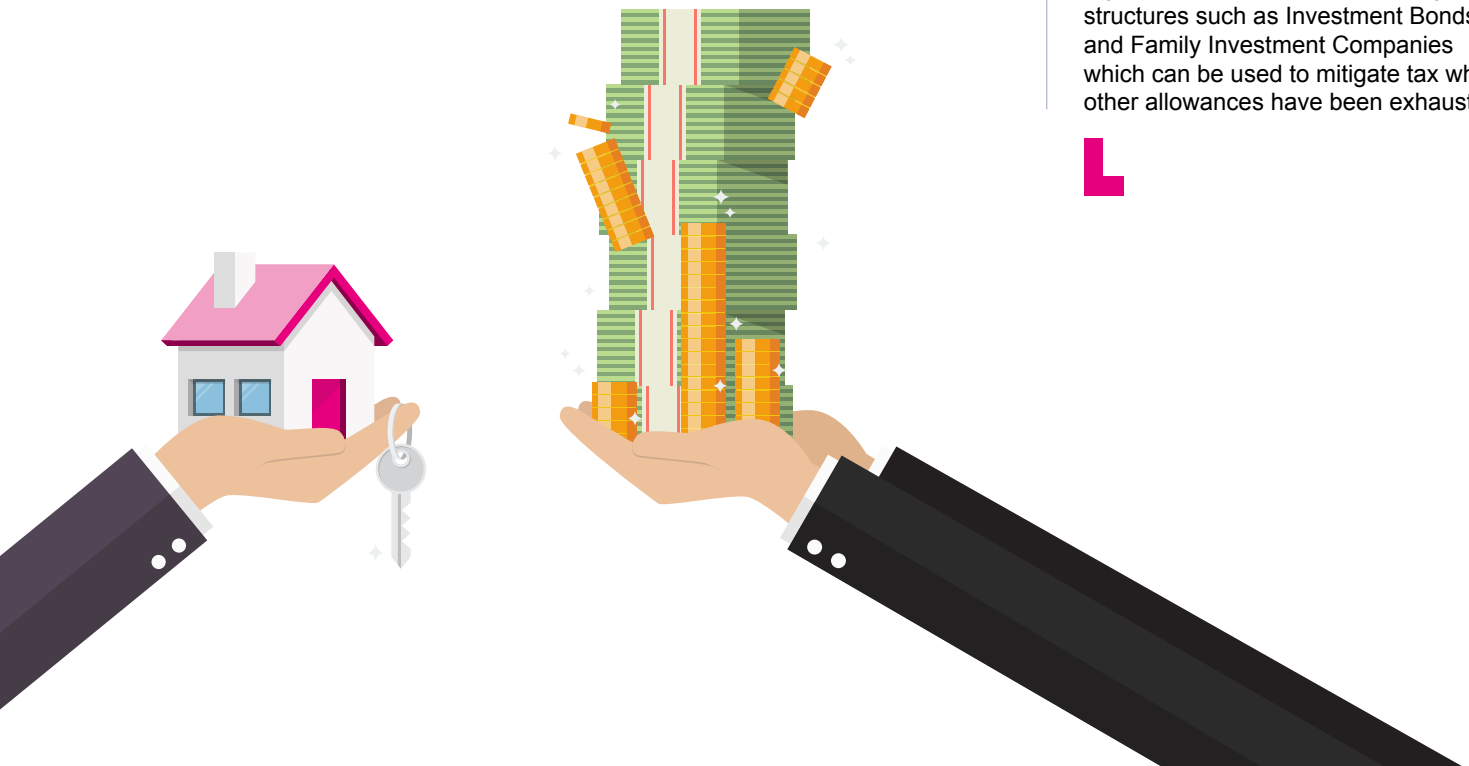
Additionally, it can't be combined with the rent-a-room allowance, which is reserved for income earned through your Main Residence.

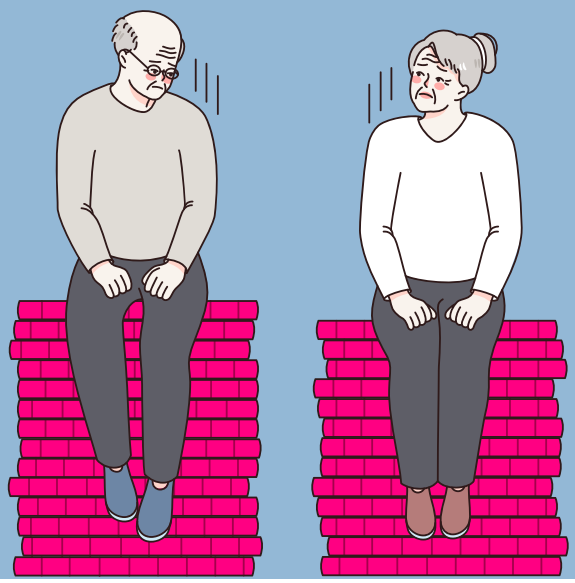
Trading Allowance - £1,000

Should you earn income from a second trade of any kind – this could be anything from babysitting to selling crafts online – you would not have to declare those earnings if they are under £1,000.

Summary

Just by structuring a portfolio correctly and investing into the correct asset classes can generate a healthy tax-free return. However, tax-free allowances have fallen from last tax-year and they are set to fall again from 6 April 2024. Therefore, it is important to seek ongoing financial advice from a qualified adviser to ensure you are up to date on legislation, in addition to exploring other structures such as Investment Bonds and Family Investment Companies which can be used to mitigate tax when other allowances have been exhausted.





SEEKING (DIS)CLOSURE

Authored by: Andrew Morgan (Senior Associate) – Russell Cooke

Most family lawyers can probably imagine a scenario where their client (typically the economically weaker partner) has limited and vague details of a family trust on their spouse's side, perhaps operated by the ex-partner's parents for their children.

This piece seeks to shed light on the rules and tactics around obtaining disclosure of (onshore) trust information in family remedy proceedings. Particular focus falls on the perspective of the trustee caught in the tug of war, which should help family law practitioners understand the competing pressures on the trustees, as well as remind trustees how to deal with these.

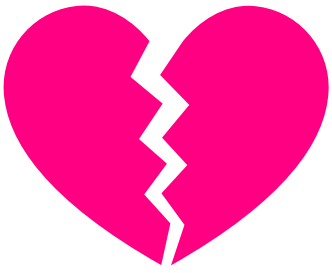
Duties of Parties vs Trustees

As part of financial remedy proceedings, parties must provide "full, frank and clear" disclosure (I v I [2009] EWCA Civ 412, quoting J v J [1955]). Section 2.14 of Form E requires disclosure of "trust interests".

However, a party is only required to provide information that they have or are able to obtain. A divorcing beneficiary may request, but has no absolute right to, trust documents (Schmidt v Rosewood Trust Ltd [2003] UKPC 26).

Non-party trustees are not required to make "full, frank and clear" disclosure. The trustees owe duties to all of the beneficiaries in accordance with the terms of the trust and its governing law. As trustees owe a duty of confidentiality to their beneficiaries, they cannot, without a Court order, share trust information with third parties, such as a non-beneficiary spouse of a beneficiary (though information could be shared with the beneficiary spouse who could pass it on).

In practical terms, the party seeking disclosure will either want to see evidence of the requests made by their partner for trust information from the trustees or make their own requests.



Trustee Approach to Disclosure Requests

A trustee faced with a request should, following the guidance in Schmidt v Rosewood, balance the "competing interests of different beneficiaries, the trustees themselves, and third parties".

That balancing exercise must be done on a case-by-case basis. The trustees will need to consider all the circumstances, including the source of the request, the source's interest in the trust and what documents are sought. Unsurprisingly, a trustee is more likely to engage with a beneficiary with a fixed (as opposed to discretionary) interest with a focused request.

Trustees may be tempted to dismiss or ignore requests at a glance, but this can prove counter-productive and lead to otherwise avoidable litigation (and costs). The party seeking disclosure may be forced to apply for a disclosure order pursuant to FPR 21.2 or for a witness summons under FPR 24.2. It is worth a reminder that the Family Court can order disclosure from non-parties. The trustee may end up facing a Family Division judge, whose priorities may not be to protect trust confidentiality, and whose order requires disclosure far beyond what the party seeking disclosure may have been initially satisfied with. Early trustee co-operation can prove a prudent investment to avoid bigger pitfalls.

An effective request should make it difficult for a trustee to refuse and focus on the task at hand. If the trust is a suspected nuptial settlement (i.e. a trust for the benefit of one or both of the parties or their children, created in contemplation of or owing to the marriage), the discloser seeker should explain why and their request may focus on the creation and development of trust assets. If the trust is not necessarily thought to be a nuptial settlement capable of variation but a suspected resource available to one of the parties, the request may focus on the value of previous distributions and the intention and wishes of the settlor. The aim should be to pitch requests at 'no more but no less' than what is needed for the specific purpose of the request.

Guidance on Specific Documents

Paragraph 64 of order 1.1 (from the Standard Financial Orders updated in May 2023) provides a draft clause as to "documents to be produced by trustees": It reads:

"The [second] / [third] / [etc. as appropriate] respondent shall by [time and date] send to the court and serve on the applicant and the first respondent the following information and documents in respect of the [insert] settlement:

(1) copies of the deed of trust and all subsequent deeds of variation and appointment;

(2) copies of the completed and approved trust accounts for the last [number] years;

(3) [copies of any letter of wishes;]

(4) confirmation as to the identity of the present trustees [and protector] of the trust;

(5) confirmation as to the identity of the present beneficiaries of the trust;

(6) a schedule authenticated by the trustees setting out all distributions and appointments made to or on behalf of the [applicant] / [first respondent] / [insert other] since [date]; and

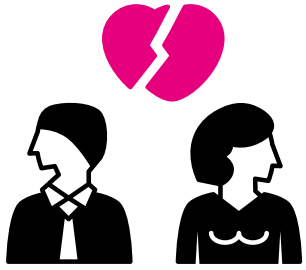
(7) a short narrative statement setting out the trustees' anticipated position in respect of any further distributions to or on behalf of the [applicant] / [first respondent] / [insert as appropriate]."

It is worth bearing in mind that, although paragraph 64's drafting assumes that the trustees are parties, it is likely to inform requests for disclosure in other circumstances.

The disclosure of the trust instrument (and any subsequent variations, and appointments), relevant trust accounts, identity of the present trustees, identity of the present beneficiaries and confirmation of distributions and appointments made to the divorcing beneficiary are unlikely to warrant significant issues for trustees in most cases, particularly with appropriate redactions.

Nonetheless, trustee will pay careful attention to other issues. For (c), as the letter of wishes is a confidential document, the decision to disclose at all and, if so, in what form is likely to be contested (underscored by the addition of square brackets to (c) in the most recent update to paragraph 64. For (g), as trustees cannot fetter the future exercise of their discretion, they must outline any anticipated position on distributions with caution.

If a third party disclosure order is made against trustees who consider that compliance with the order would cause breaches of their duties, the trustees can apply to vary or set aside the order, but this must be done within the directed number of days from service of the order (which could be as short as three business days).



Other Avenues

This piece has focused on disclosure requests made to trustees for onshore trust information. It is worth a brief tour of offshore considerations and requests to non-trustees.

The offshore trustee will likely wish to avoid submitting to the jurisdiction of England and Wales (i.e. to avoid acknowledging that an order from a Court in England and Wales may bind them). The offshore trustee will typically hold off on voluntary disclosure and seek directions from their local Court.

A party seeking disclosure may find non-trustees who are able and willing to part with trust information, such as settlors and beneficiaries. More creatively, disclosure can be sought from professional advisers, via, for example, focused and proportionate subject access requests.

Conclusion

As each trust and divorce has its unique characteristics and characters, there is no one size fits all approach to seeking trust disclosure. The most effective request is probably a mutually advantageous one - the party seeking disclosure requests enough information for the task at hand, and the trustee takes comfort that voluntary disclosure may prove less onerous than a Court order.

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