ThoughtLeaders4 HNW Divorce • NOVEMBER 2024

HNW Divorce MAGAZINE

ISSUE 19

YEAR IN REVIEW

LOVE, LOSS AND LITIGATION

INTRODUCTION

"You can cut all the flowers, but you cannot keep spring from comin'"

Pablo Neruda

We are thrilled to introduce Issue 19 of HNW Divorce Magazine, which delves into the complex dynamics of love and divorce. In this edition, you'll find insightful articles from top experts in the HNW Divorce sector. We were excited to announce the 4th Annual Flagship HNW Divorce Litigation Conference, which took place on 21 November 2024. The conference coincided with the release of a magazine related to the event, providing insightful and relevant content for attendees. A special thanks to our corporate partners and contributors for their invaluable insights into resolving disputes and achieving agreements in divorce matters.We are thrilled to feature the winners of the HNW Divorce Future Thought Leaders Essay Competition, with their outstanding articles showcased below. A heartfelt thank you to everyone who participated!

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FUTURE THOUGHT LEADERS ESSAY COMPETITION 2024

OUR STORY

ThoughtLeaders4 are serious about providing opportunities to up-and-coming practitioners specialising in HNW Divorce. We strongly believe that the next generation of practitioners should be writing, speaking at and attending events in order to build their network and further their careers.

With this in mind, we are proud to present the 2nd HNW Divorce NextGen Future Thought Leaders Essay Competition. Assessed by an illustriously experienced, senior and broad-ranging panel of practitioners this is your chance to stick your head above the parapet and mark yourself as the one-to-watch.

With the opportunity to attend and discuss your essay at our HNW Divorce Litigation Flagship Conference, we look forward to your submissions and to welcoming you to the HNW Divorce community.

THE BRIEF

Matrimonialisation: a mis-step too far?

In the run-up to our HNW Divorce conference on 21st November 2024 in London, we invite submissions from next gen practitioners on this topical debate.

We encourage you to set out your personal views and thoughts on the current law and its potential future direction and to draw on your own or your colleagues' experiences.

We also invite you to be creative, well-researched, opinionated, and take a position on this timely issue, affecting the next generation of divorce practitioners.

We would like to extend our congratulations to everyone who took part in the essay competition. The articles below are just a selection of the many excellent contributions we received

JUDGING PANEL

Sarah Hutchinson
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Sarah has extensive experience advising on all aspects of family law, in particular complex financial issues further to divorce or separation, disputes relating to children, and pre and post nuptial agreements. She gives pragmatic advice, acting with sensitivity and discretion. She is recognised as much for her incisive strategic thinking as well as her empathetic approach.

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Philip is consistently ranked as a leading practitioner (silk) in the field of matrimonial finance and divorce, having appeared in both White v White and Miller; McFarlane in the House of Lords. He represented the appellant wife in Owens v Owens before the Supreme Court. His cases typically involve complex jurisdictional disputes and very high net worth disputes often involving offshore corporate and trust structures.

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Kate specialises in all aspects of family law and in particular acting for international high net worth and high-profile individuals in financial and children matters. Kate has had extensive experience in a wide range of cases including a number of reported cases in the High Court and Court of Appeal. Her cases have included high value financial cases often with an international element and complex cases involving children such as relocation from the jurisdiction and cases involving substance abuse.

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Alex is a founding partner at Hughes Fowler Carruthers. He specialises in complex divorce and financial work and children's work, in particular in international cases. His clients are high net worth individuals with complex legal issues including trusts and jurisdictional disputes.

MATRIMONIALISATION

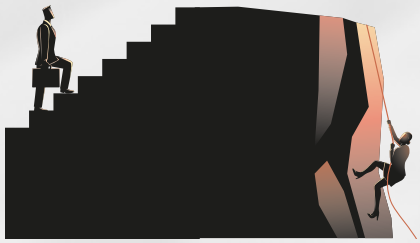
A MIS-STEP TOO FAR?

Authored by: Bethany Scarsbrook (Barrister) - St John's Chambers

Introduction

This essay will argue that two missteps in the law on matrimonialisation recently occurred in Standish v. Standish[1]. These two missteps, when taken together, create a landscape that is confusing for all court users and removes any clear mapped route out of the minefield.

The first misstep doubts 'matrimonial' and 'non-matrimonial' as necessarily discrete binary categories. Instead, a focus on the extent to which an asset has been mixed and matrimonialised is emphasised. The second misstep removes an opportunity for a clear uniform approach by incorrectly relying on JL v SL (No. 1)[2] to conclude that an automatic rule as to how matrimonialised assets should be divided under the sharing principle is contrary to the aim of a fair outcome.



These steps are undesirable in and of themselves, but also directly contradict the wider overarching aims of the Family Court. These include: (i) encouraging out-of-court settlement; (ii) avoiding ruinously expensive litigation; and (iii) improved transparency and understanding by the wider public. It is the way these missteps draw the Family Court away from its broader aims that mean these are indeed missteps 'too far', ultimately causing the Family Court to lose balance and fall away from its own overriding objectives.

The First Misstep

In Standish v Standish[3], the Appellant Wife's alternative argument on appeal was that if the disputed property was found to be matrimonial, then it should have necessarily been shared equally (50%:50%). The Wife was ultimately unsuccessful on appeal and her overall award lowered on appeal. In his judgment, Moylan LJ provided a re-formulation of the K v L[4] scenarios provided by Wilson LJ, where he noted the non-marital source of an asset may diminish over time. It is the reformulation of sub-section (b) which is particularly important for our purposes. Moylan LJ amended situation (b) reads as follows:

1 [2024] EWCA Civ 567
2 [2014] EWHC 3658 (Fam)
3 [2024] EWCA Civ 567
4 [2011] EWCA Civ 550

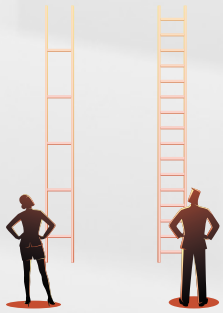
(b) The extent to which and the manner in which non-matrimonial property has been mixed with matrimonial property mean that, in fairness, it should be included within the sharing principle.'

Situations in (b), Moylan LJ said would require a nuanced approach, similar to that described in Hart v Hart[5].

There are two key differences in Moylan LJ's reformulation. Firstly, it introduces a question as to the extent to which an asset has been matrimonialised. This suggests that whether an asset has become matrimonial is not a binary concept.

It is not simply a question of 'is this asset matrimonialised?' but rather, it appears, a question of 'to what extent' has an asset been made matrimonial.

Secondly, Moylan's formulation suggests that there is a point at which an asset is 'matrimonialised enough' for fairness to warrant it being divided under the sharing principle.



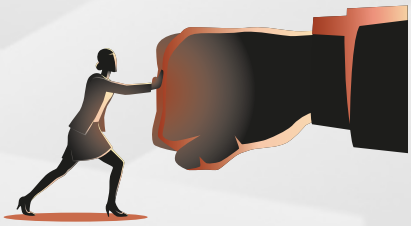
This introduces a considerable area of uncertainty for practitioners and parties alike. What level of matrimonialisation will be enough? What is the extent of mixing with marital property for fairness to require its inclusion within any sharing? This is the first of two missteps on matrimonialisation. Its practical ramifications risk being far-reaching, long-lasting, and financially damaging. Removing, or questioning, the delineation between what is matrimonial and what isn't risks the Family Court's wider aims. In particular: (i) being transparent with and better understood by the general public; (ii) reducing spiralling litigation costs; and (iii) seeking to discourage such disputes being litigated at all (hence the new NCDR rules.)

Writing in 2021, the President of the Family Division was clear that the volume of cases coming before the Family Court means that the impact of the jurisdiction is now felt by far more people, with a greater reach than would have previously been contemplated by legislators.[6] Family Court Quarterly Statistics record a total caseload of 224,902 for 2020.[7] Between July and September 2023, there were 11,118 financial remedy applications. A 15% increase on the same period in 2022.[8] This is why the Family Court's work is so important within our society, but must now also be more easily accessible to (and understandable by) a larger proportion of the population. Introducing questions of 'extent' will instead make outcomes harder to understand and predict. A natural consequence is that this creates more room for arguing different positions as to whether and how an asset has been mixed is a sufficient 'extent'. Hence, more litigation with associated costs will inevitably occur.

Costs have recently been described as 'nihilistic',[9] and 'manifestly excessive and unreasonable'.[10] In Xanthopoulos v Rakshina,[11] Mostyn J struggled to find language to describe the exorbitant nature of the litigation costs[12], (the parties having incurred £5.4m in 18 months). He concluded that the Lord Chancellor should consider statutory measures to limit the scale of costs incurred, or alternatively further steps should be considered by the Family Procedure Rule Committee.[13]

It was against this backdrop that amendments were made to Part 3 of the Family Procedure Rules 2010 on 29 April 2024. The new FPR r.3.4 empowers the court to make directions to stay proceedings for the parties to consider NCDR. This can be done on the court's own initiative even when opposed by the parties.

This first step therefore creates more uncertainty and a loss of balance. The second misstep analysed below then over-reaches too far on the basis of a misconception. This ultimately causes the Family Court to fall too far away from its broader aims and values.



The Second Misstep

The second misstep starts with Moylan LJ's justification for concluding that any rule requiring a matrimonialised asset to be shared equally would be contrary to a fair outcome. He stated that:

'The submission by Mr Todd that, once an asset is matrimonialised and treated as matrimonial property, it must be shared equally is unsupported by any authority and would be contrary to the objective of a fair outcome… again as Mostyn J said in JL v SL (No 1) at [19], it may be that the "non-matrimonial source of the moneys in question" remains "a relevant consideration". …it would be perverse if the court could not decide that the non-matrimonial source, in whole or in part, of an asset treated as matrimonial property could not justify an order other than equal division.'[14]

5 [2017] EWCA Civ 1306
6 Sir Andrew McFarlane, President of the Family Division, 'Confidence and Confidentiality: Transparency in the Family Courts', Para 22.
7 Ibid, Para 5.
8 https://www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2023/family-court-statistics-quarterly-july-to-september-2023#financial-remedy
9 Crowther v Crowther & Ors (Financial Remedies) [2021] EWFC 88
10 Collardeau v Fuchs & Harrison [2024] EWHC 642 (Fam)
11 [2022] EWFC 30
12 Ibid, Para 5.
13 Ibid, Para 14.
14 [2024] EWCA Civ 567, [166].

This is the second part of Moylan LJ's matrimonialisation misstep. The passage quoted from JL v SL (No 1)[15] has been significantly shortened and arguably misses the full nuance of its original meaning when quoted in such an abbreviated form. In paragraph 19 of JL v SL (No 1), Mostyn J is referring to the particular circumstances of the parties in that case. These were that the wife had inherited a sum of money in the final months of the marriage, some of which had been latterly transferred into the husband's name to benefit from better interest rates. The full paragraph, should be considered within that context. It states:

'[19] The fact that there had been some mingling of monies, in the sense that some of the monies had been placed in the husband's name, does not, as the authorities demonstrate (specifically my own decision of N v F, to which I have referred), mean that the non-matrimonial source of the monies in question is destroyed as a relevant consideration; far from it.'[16]

What the abbreviation of JL v SL (No 1) in Standish does, is conflate the question of whether an asset should be found to be matrimonial, with the question of whether, after it has been found to be matrimonial, it should be divided equally. In paragraph 19 of JL v SL, the primary question is the former one of whether the inheritance funds in question should be found to be matrimonial in nature. Moylan LJ relies on this when considering the second question of whether assets found to matrimonial should then be divided equally. This confusion becomes clear when considering what Mostyn J went on to say in JL v SL (No 2)[17], most particularly at paragraphs 18 and 21:

'Matrimonial property is the property which the parties have built up by their joint (but inevitably different) efforts during the span of their partnership. It should be divided equally. This principle is reflected in statutory systems in other jurisdictions. It resonates with moral and philosophical values. It promotes equality and banishes discrimination.'[18]

It cannot therefore be right to rely on JL v SL (No 1) as concluding that such equal sharing would be contrary to the very objective of a fair outcome, when indeed in the same line of jurisprudence Mostyn J goes on to observe how the sharing of matrimonial property aligns with moral values of equality. Mostyn J went on to re-state his updated view from N v F[19] in S v AG[20] as follows:

'Therefore, the law is now reasonably clear. In the application of the sharing principle (as opposed to the needs principle) matrimonial property will normally be divided equally (see para 14(iii) of my judgment in N v F)…'[21]

On the back of conflating two separate questions, Moylan LJ sets a high bar against any rule or presumption that assets which have become matrimonialised shall fall to be divided equally in sharing cases. This compromises the overarching Family Court aims which were already jeopardised by the first misstep. The first step creates such uncertainty, with outcomes harder for practitioners to advise on and parties to comprehend. Less out-of-court resolution and greater costs become inevitable. The second misstep, which strongly denounces any clear rule or presumption as to how matrimonial assets will be treated when sharing applies, means that both questions: (1) 'Has an asset become matrimonial?' and (2) 'How should that asset now be treated?' are equally unclear and rife for bitter litigation.

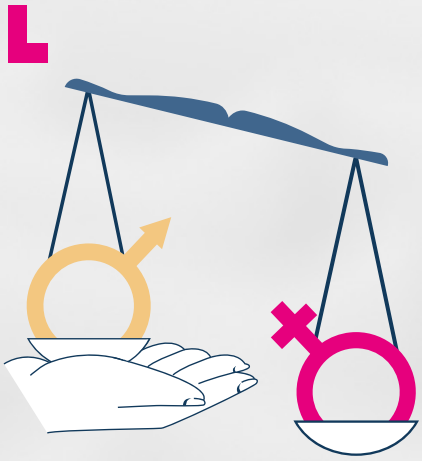
Having made question (1) challenging by the first misstep, the second then loses the chance for any remedy by having a clear presumption flowing from question (2). This not only removes any opportunity to provide clarity, but further enhances and exaggerates the uncertainty caused by the first misstep. Hence, the case law is moved further away from the court's hope to be more transparent, better understood, with more non-court-based resolution. When there is so much room to disagree the nuance and interpretation of what is matrimonial enough and to what extent assets have been mixed, and even then once matrimonial there is no presumption as to how those assets will be treated, it is inevitable that confusion, litigation, and costs of the same will all rise.

Missteps Or Missteps Too Far?

It is the way in which law on matrimonialisation has been brought into conflict with these broader values which means these are not only missteps, but are indeed missteps 'too far'.

Family law is not an island.[22] Similarly, so called 'big money' cases where the sharing principle applies do not hold a privileged position within the jurisdiction entitling them to make the law less clear, less predictable or comprehensible, especially when this is in direct conflict with the aims of transparency and out-of-court settlement. It is for this reason that they are indeed steps 'too far' in this context.

As neither clarity nor uniformity have been forthcoming regarding the law on matrimonialisation, it appears we must be forced to look up, and hope that further elucidation comes from the appellate courts above, thereby restoring balance between the Family Court and its wider aims.



15 [2014] EWHC 3658 (Fam)
16 Ibid, [19].
17 [2015] EWHC 360 (Fam)
18 Ibid, [18].
19 [2011] EWHC 586 (Fam)
20 [2011] EWHC 2637 (Fam)
21 Ibid, [7].
22 Prest v Petrodel Resources Ltd [2013] UKSC 34, Para 37

THE END OF THE AFFAIR?

A CIVIL LAW PERSPECTIVE ON 'MATRIMONIALISATION'

Authored by: Olalla García-Arreciado (Senior Associate) - Howard Kennedy

One of the first times a family lawyer trained in a civil law system is puzzled when coming across English law is when they learn that financial remedy applications, in this jurisdiction, are decided on the basis of fairness.

The immediate rebuttal of the civil law lawyer is: how can a system with such little legal certainty and such disregard for the parties' autonomy[1] possibly be fair?

We have to admit that it does sound paternalistic in its conviction that the court always knows best. And yet, the whole thing has a strange appeal… and the puzzled lawyer, slowly but surely, becomes more and more fascinated by a series of abstract (or, as we euphemistically say here, "elastic") concepts such as 'sharing', 'needs', 'special contribution' and, of course, 'matrimonialisation'; and they end up, by some unidentified external force, defending the very system that puzzled them in the first place, as enthusiastically as if they had been born and raised in Middle Temple. But can that love last forever?

The general rule, with many caveats, is that marital property (accrued during the marriage other than through inheritance or gift) is subject to the 'sharing' principle, whereas non-marital property (accrued before or after the marriage, or during the marriage through inheritance or gift) is not. For the former category of assets, the court's starting point will be an equal distribution; whereas, for the latter category, the court will try its best to leave those assets untouched, unless the 'needs' of the other party require the court to "invade" them.

1 Curiously, these characteristics appear almost exclusively in family law; in most other areas, English law is famously predictable, which is why many commercial contracts around the world are governed by English law, irrespective of the "nationality" of the contracting parties.

Although English family law does not contemplate any matrimonial property regimes, which are otherwise ubiquitous (and mandatory) in every civil law jurisdiction, this categorisation of assets in marital and non-marital is akin to the statutory wording of many Civil Codes around the world (and to the provisions of many English nuptial agreements[2]).

In short, whether the spouses are subject to a regime of separation of assets or to one of community of assets, most civil law systems provide that non-marital assets will always stay with their owner; if the spouses are subject to a separation of assets, there are effectively no marital assets at all, other than those held in joint names; whereas, if they are subject to a community of assets, all assets accrued during the marriage (other than through inheritance or gift[3]) will be marital and shared equally on divorce.

Short, sweet, and certain – just how we like it on the continent. Is there any room to depart from these rules or to tailor the result to the specific circumstances of the case? Not at all; that would introduce an impermissible uncertainty.

Needless to say, these two English categories of marital and non-marital assets are not as rigid as its European counterparts. Firstly, because a marital asset might be shared unequally, and a non-marital asset might be "invaded" to meet 'needs'. And, secondly, thanks to 'matrimonialisation' - a somewhat esoteric process by which an asset which is non-marital might be considered as subject to the 'sharing' principle[4], all in pursuit of fairness[5] – although, again, that does not necessarily mean that the 'matrimonialised' asset will be split equally between the parties[6], because the court can still give some weight to the fact that the asset has a non-marital source. 'Matrimonialisation', therefore, blurs the line that separates these two categories, thereby complicating one of the few easily accessible concepts of English family law. Perhaps the natural tendency to differentiate itself from other legal systems and defend its flexibility, discretion, and focus on fairness, has had some bearing in the genesis of this concept, and in the decision to stand by it despite an express call to suppress it[7].

The 'matrimonialisation' of non-marital property can occur in one of three ways[8]: where the alleged non-marital property represents such a low percentage of the overall assets that exploring the value and source of that property to exclude it from the 'sharing' exercise would be disproportionate; where marital and non-marital property has been 'mixed' in such a way that all the assets should be subject to the 'sharing' principle (by far, the most controversial scenario); and where non-marital property has been used to purchase the matrimonial home (an asset that is always considered marital and almost always shared equally).

The Court of Appeal has been clear that 'matrimonialisation', insofar as it departs from the principle that 'sharing' only applies to marital assets, should be applied narrowly[9]. But as it can still be applied, and as it all depends, ultimately, on fairness, the court's prompt to act sensibly will not curb litigation, and parties will continue to make complex arguments, often underpinned by extensive legal and factual analysis costing tens of thousands of pounds. Of course, the trouble is that most parties think that their case is one of those special ones to which the principle that would result in an advantage to them should apply – and the lawyers on each side not always discourage this mindset, perhaps in search of higher fees, perhaps looking for a reported case (pardon the cynicism).

A sector of the legal profession in this jurisdiction has been pushing for a while for the 'Europeanisation' of certain aspects of English family law; from arguing that nuptial agreements that meet certain criteria should be binding except where a departure is necessary to meet reasonable 'needs'; to criticising forum conveniens as a principle that is too discretionary and that encourages litigation and the tendency of English courts to keep most cases here, no matter how loose the connection of the case with England (thereby arguing for the return of the predictability attached to the 'jurisdiction' race, where the first application has automatic priority); and standing against divorce tourism and the mis-use of Part III[10] of the Matrimonial and Family Proceedings Act 1984. To this long list of grievances that may result one day in the end of affair between practitioners and English family law's long-standing romance with flexibility, discretion and fairness, one can now safely add the potential 'matrimonialisation' of non-marital assets as something that should be, if not altogether eliminated, at least heavily regulated to narrow the scope for potential dispute.

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2 Although they tend to refer to Separate and Joint Property – the harmonisation of the nomenclature is another battle to be fought.

3 There are some examples of matrimonial property regimes under which all the assets owned by the spouses will become part of the community of assets, including pre-marital assets and assets received through inheritance or gift; for example, the French regime of communauté universelle. Such regimes are rare and almost never apply by default, i.e., the spouses must expressly choose the regime to apply to their marriage.

4 Standish v Standish [2024] EWCA 567 [162]

5 Standish v Standish [2024] EWCA 567 [160]

6 Standish v Standish [2024] EWCA 567 [166]

7 Standish v Standish [2024] EWCA 567 [161]

8 Standish v Standish [2024] EWCA 567 [163]

9 Standish v Standish [2024] EWCA 567 [162-163]

10 Thankfully, the recent decision of the Supreme Court in Potanina v Potanin [2024] UKSC 3 is likely to get rid, finally, of ex parte applications for leave, and has put to bed the infamous knock-out blow previously required (wrongly) to set aside leave given at an ex parte hearing. As Ms Carew-Poole KC and Professor Baily-Harris brilliantly put it at the 2024 edition of the 1 Hare Court seminar, is England entitled to act as "the ultimate world-wide appellate court"?

Perhaps the best (but not necessarily the easiest or most realistic) way to achieve that would be for Parliament to put on a statutory footing the division between marital and non-marital property, narrowing any potential departure from the standard definitions and getting rid altogether of the 'mixing' scenario[11]. The author suggests that the categories are clear enough for the definitions to be relatively straightforward:

'Marital property' means:

1. All property accrued during the marriage, save for property received by one spouse (a) as a gift from a third party, (b) by way of inheritance, or (c) forming part of a trust of which that spouse is a beneficiary (except where that trust is a nuptial settlement, where section 24(1)(c) of the Matrimonial Causes Act 1973 shall apply);
2. All property held in the joint names of the spouses; and
3. The matrimonial home.

The court shall share marital property equally between the parties, save that the court shall be entitled to depart from equality in light of sections 25(2)(b)[12] or (f)[13] of the Matrimonial Causes Act 1973, or where the parties have entered into a nuptial agreement that meets the relevant judicial criteria.

'Non-marital property' means:

1. All property accrued by either spouse before or after the marriage by any means; and
2. All property received by one spouse during the marriage (a) as a gift from a third party, (b) by way of inheritance, or (c) forming part of a trust of which that spouse is a beneficiary (except where that trust is a nuptial settlement, where section 24(1)(c) of the Matrimonial Causes Act 1973 shall apply).

Non-marital property shall be retained by its owner spouse, save that in the event that there is a dispute between the parties as to whether certain property is non-marital or not and the alleged non-marital property represents a low proportion[14] of the overall assets, the court shall be entitled to find that it would be disproportionate and contrary to the overriding objective to allow either party to pursue this argument, and thus to determine that all property should be considered marital.

Modest and uncontroversial as these definitions might look to the continental eye, their introduction in the statute book would be a seismic change in English family law, no doubt to be met with some resistance from a cohort of judges and practitioners that are still very fond (and for very valid reasons, too) of their cherished discretionary system. However, as we await a radical change (and it is coming!) in how the future generations approach their relationships, their autonomy and the management of their finances, it would be a disservice to English family law for it to be on the back foot, a step behind society. Time to change?

11 The notion that the nature of an asset might change from non-marital to marital (but not the other way around) by virtue of how that asset is used inevitably results in endless disputes. Unless the parties actively choose to use non-marital property to purchase a matrimonial home or an asset held in joint names, there is no reason for the court to "re-categorise" a non-marital asset – which can still be deployed towards meeting 'needs' if necessary.

12 "The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future."

13 "The contributions which each of the parties has made or is likely to in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family." This should encompass all the (rare) cases of special contribution and compensation.

14 Whilst it would be tempting to refer to a fixed percentage here (say, 5%), that would be far too specific for the English mind; it would be unfair, patently, to refuse this argument where the alleged non-marital property represents 4.99% of the pot but to allow it where it represents 5.01%.

MATRIMONIALISATION

A MIS-STEP TOO FAR?

Authored by: Kathryn Cassells (Senior Associate) - Vaitilingam Kay

Introduction

Ahead of the Court of Appeal decision in Standish v Standish[1] there was uncertainty as to the future of matrimonialisation.

In L v L[2], His Honour Judge Booth said that matrimonialisation was "a word that I hope will not acquire common usage".[3] In their submissions to the Court of Appeal, Tim Bishop KC suggested that "the court might consider whether this concept merits being maintained at all"[4] and Richard Todd KC invited the court to remove matrimonialisation "from the lexicon of the law of financial remedies".[5] It was not. Instead, the Court of Appeal reaffirmed the principle of matrimonialisation.

Moylan LJ held that "it would be wrong to state that, as a matter of principle, property which has a non-marital source can never be subject to the sharing principle"[6] but warned the principle should be applied "narrowly" as matrimonialisation is "a derogation from the principle that sharing applies to matrimonial property and does not apply to non-matrimonial property"[7].

This essay considers whether the concept of, and the legal principles underpinning matrimonialisation, are a misstep too far by looking at:

- What is matrimonialisation?
- The development of the concept of matrimonialisation in case law.
- The decision in Standish.

What Is Matrimonialisation?

One of the most important stages in financial remedy cases is establishing the extent, and type, of assets.

Matrimonial property is "the property of the parties generated during the marriage otherwise than by external

1 Standish v Standish [2024] EWCA Civ 567
2 L v L [2021] EWFC B83
3 L v L [2021] EWFC B83, para [26]. Note His Honour Judge Booth was sitting as a Judge of the High Court.
4 Standish v Standish [2024] EWCA Civ 567, para [97]
5 Standish v Standish [2024] EWCA Civ 567, para [71]
6 Standish v Standish [2024] EWCA Civ 567, para [162]
7 Standish v Standish [2024] EWCA Civ 567, para [162, 163]

donation" i.e. assets generated during the marriage due to the efforts of the parties.[8]

It follows that non-matrimonial property is the opposite: "assets (or that part of the value of an asset) which are not the financial product of or generated by the parties' endeavours during the marriage."[9] Common examples of non-matrimonial property include inheritance, or other gifts given to a spouse during the marriage, from an external source.

Despite these seemingly straightforward definitions, the exercise of establishing what constitutes matrimonial property can be more "an art than a science"[10] for fairly obvious reasons: often assets do not sit neatly in the matrimonial and non-matrimonial categories. For example, businesses incorporated before the marriage, but increasing in value due to the efforts of the parties during the marriage.[11]

Nonetheless, establishing which assets are matrimonial/non-matrimonial is an important art to master because it can significantly impact the outcome for a client. The family court has long applied the sharing principle to ensure that assets generated during the marriage (matrimonial assets) are shared equally between the parties, save for in cases where needs require a departure from equality.[12] Non-matrimonial property is not subject to the sharing principle.

Matrimonialisation, whereby non-matrimonial property (or part if it) becomes matrimonial during the course of the marriage, adds a layer of complexity to the art of categorising assets.

Development Of The Concept Of Matrimonialisation In Case Law

Before K v L[13], the idea of matrimonialised assets was touched upon, but the court did not specifically define the term.[14]

In K v L the court had to decide how much weight to attach to W's non-matrimonial wealth after a long marriage of 20 years.[15]

Wilson LJ posed three separate situations in which assets could be matrimonialised:

(a) Over time matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property.

(b) Over time the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult.

(c) The contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home which, although vested in his or her sole name has – as in most cases one would expect – come over time to be treated by the parties as a central item of matrimonial property.[16] "

Ahead of the Court of Appeal decision in Standish, the issue of matrimonialisation appeared in several cases[17], with clear principles emerging as to both the concept and the impact on the sharing principle:

1. The concept of matrimonialisation properly recognised that there were situations in which non-matrimonial assets could become subject to a sharing claim.
2. The existence of the concept of matrimonialisation did not mean that assets which had been matrimonialised were subject to equal sharing between the parties.
3. The court has discretion as to how to arrive at a fair division and can apply a broad assessment of the division that would affect "overall fairness".

8 Direct quotation from Charman v Charman [2007] EWCA Civ 503, para [66], but builds on concepts from White v White [2001] 1 AC 596, and Miller v Miller and McFarlane v McFarlane [2006] UKHL 24. Endorsed in, for example, Hart v Hart [2017] EWCA Civ 1306 and Waggott v Waggott [2018] EWCA Civ 727.

9 Referred to in Standish v Standish [2024] EWCA Civ 567, para [135]

10 Hart v Hart [2017] EWCA Civ 1306, para [85]

11 See, 'Source not Title: First Reflections on Standish', Calum Smith published on financialremediesjournal.com. As for approach to identify non-matrimonial property which has been mingled with matrimonial property, see forexample, Jones v Jones [2011] EWCA Civ 41 (historic value uprated for passive growth and springboard) and Martin v Martin [2018] EWCA Civ 2866 (straight line apportionment) – examples of the detailed assessment as opposed to the "broad brush approach" expounded in Hart v Hart [2017] EWCA Civ 1306.

12 White v White [2001] 1 AC 596, Principles further developed in Miller v Miller and McFarlane v McFarlane [2006] UKHL 24 – see specifically para [16]: "when their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary".

13 K v L (Non-Matrimonial Property: Special Contribution) [2011] EWCA Clv 550

14 See for example in Miller v Miller; McFarlane v McFarlane, where Lord Nicholls stated at para [22] that "one of the circumstances is that there is a real difference, a difference of source" between the different types of property.

15 W owned a share in the family business worth £57.4m. The total asset base was £59m. The couple had a modest lifestyle, and W had ring-fenced her share in the family business.

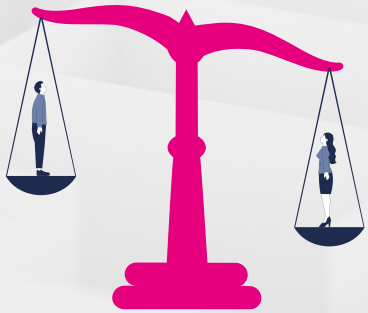
16 K v L (Non-Matrimonial Property: Special Contribution) [2011] EWCA Clv 550, Wilson LJ at para [18]

17 Including but not limited to Hart v Hart [2017] EWCA Civ 1306; WX v HX (Treatment of Matrimonial Property and Non-Matrimonial Property) [2021] EWHC 241 (Fam)

The Decision In Standish

The central issue in Standish was whether the transfer of £77m in non-matrimonial assets to W in 2017 as a part of tax and estate planning had resulted in those assets becoming matrimonialised.[18]

At first instance[19], Moor J included the full £77m as matrimonial property and awarded £45m to W, a 40:60 division of the assets. H and W appealed.



W's appeal was dismissed, with Moylan LJ finding:

1. The transfer of the £77m did not change their characterisation and it did not transform them into matrimonial property – the key factor was source of asset, not title.

2. Moor J had misapplied the sharing principle – he recognised that most of the sum was pre-marital and only an element was not, but then proceeded to include the full amount when applying the sharing principle. Moylan LJ reduced W's award from £45m to £25m – the largest ever reduction made on appeal.

As well as making clear that matrimonialisation was here to stay, Moylan LJ reformulated the test in K v L as follows:

(a) the percentage of the parties' assets (or of an asset), which were or which might be said to comprise or reflect the product of non-marital endeavour, is not sufficiently significant to justify an evidential investigation and/or an other than equal division of the wealth

(b) The extent to which and the manner in which non-matrimonial property has been mixed with matrimonial property mean that, in fairness, it should be included within the sharing principle; and

(c) Non-marital property has been used in the purchase of the former matrimonial home, an asset which typically stands in a category of its own."[20]

Was The Decision In Standish A Mis-Step Too Far?

In circumstances where the judgment relies on well-established legal principles, it cannot be said that the decision in Standish is a mis-step, never mind a mis-step too far.

Taking the key elements of the decision in turn:

1. It Is Source Not Title That Is Important

This is not a new legal principle: it is well-established law that source not title is determinative. Lord Nicholls said in White, "the parties' proprietorial interests should not be allowed to dominate the picture".[21] The emphasis on source and the type of asset has shaped the law on financial remedy for over two decades.[22]

Most often, this approach prevents discrimination: the financially stronger party cannot exclude assets purchased during the marriage in their sole name from the sharing principle.

As a legal principle, the emphasis on source of wealth rather than title is sound.

However, from W's perspective it must have felt that her part in reducing the family tax burden meant that the assets had been used in a manner which matrimonialised them and therefore which, in fairness, meant H should not have been able to accrue the tax benefit (shared between them in the course of the marriage) and then benefit again by being able to exclude some of the assets from the sharing principle.

But, case law predating Standish was clear that an involvement with a spouse's non-matrimonial assets for the purpose of financial planning, or even investment, would not, on its own, be sufficient to matrimonialise those assets. In the decision of WX v HX[23], Roberts J found that W's inherited assets had remained wholly separate from matrimonial assets, even with H's activities as an investment manager managing the portfolio on W's behalf. The source of W's assets was external to the marriage.

2. Matrimonialisation Should Be Applied Narrowly

The existence of a legal principle does not mean it has universal applicability in every case.

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18 Incidentally, W asserted that the transfer of the assets had transformed them into her "separate property".

19 Reported as ARQ v YAQ [2002] EWFC 128

20 Standish v Standish [2024] EWCA Civ 567, para [163]

21 White v White, [2001] 1 AC 596 p.611, Lord Nicholls.

22 Lord Nicholls went on to say in White v White [2001] that the need to "attempt to unravel years of matrimonial finances and reach firm conclusions on who owned precisely what and in what shares" had been "swept away in 1970 when the new legislation gave the court its panoply of wide discretionary powers".

23 WX v HX (Treatment of Matrimonial Property and Non-Matrimonial Property) [2021] EWHC 241 (Fam)

Take, for example, the decision of RC v JC[24] on compensation where Moor J made clear that successful compensation claims remained rare.

In the vast majority of financial remedy cases, needs require all the assets to be subject to division, regardless of whether they are matrimonial, non-matrimonial or matrimonialised.[25] The concept of matrimonialisation is likely to arise in limited circumstances – principally where high net worth individuals have brought significant assets into a marriage and where it is then possible for the question to arise as to whether that non-matrimonial property has been mixed.

3. Was It A Mis-Step To Adjust The Test In K V L?

It was not a mis-step for Moylan LJ to adjust the K v L test to reflect other leading decisions and developments since 2011, specifically Hart.[26]

The adjustment to (b) streamlined, rather than significantly altered, the original test.

Whereas previously the Court, at least in principle, needed to consider whether the contributor had expressly or impliedly accepted that non-matrimonial property had been matrimonialised, now the Court need simply consider the extent and manner of the mixing and what fairness therefore requires.

It seems self-evident that under the former test if the extent and manner of mixing meant it was fair to treat the asset as matrimonial the Court would have concluded an implied intention on the contributor's part.

What Moylan LJ has done is remove that, potentially confusing, assessment of the contributor's mental state from consideration. Placing fairness at the forefront of (b) is more reflective of the statutory requirements of section 25 of the MCA 1973 and the decades of case law that preceded the decision.

Conclusion

Matrimonialisation is not a mis-step too far.

For decades, it has been established that the court must apply its discretion, alongside legal principles and statute, to achieve a fair outcome which properly reflects all the circumstances of the case.

Whatever clever legal arguments may be made around the concept of matrimonialisation, it patently reflects the reality in marriages. Assets in a marriage inevitably fall into three distinct categories: those generated during a marriage, those wholly separate to the marriage, and those generated outside of the marriage which come, via the passage of time and/or through decisions taken during the marriage, to be matrimonialised. The family home is the clearest example of this, hence the specific reference to it in both K v L and Standish at (c).

The decision in Standish properly reflects this reality and, rather than putting in place hard lines which would inevitably create unfairness, recognises that in most marriages the border between 'mine' and 'yours' is porous and that in the right circumstances assets can become 'ours', however they entered the relationship.

24 RC v JC [2020] EWHC 466 (Fam)

25 See for example the case of J v J [2011] 2 FLR 1280 in which applying a needs basis, W received 46% of the assets. The Judge recognised that had this been a sharing case, the % would have been significantly lower. Interestingly, in that case a similar transfer had been made on non-matrimonial assets in order to benefit from W's non-domiciled tax status.

26 Standish v Standish [2024] EWCA Civ 567, para 165 – Moylan LJ explained that the adjustment to (b) required a "more nuanced approach similar to that referred to in Hart, at [96], when the evidence does not establish a clear dividing line between matrimonial and non-matrimonial property".

MATRIMONIALISATION A MISSTEP TOO FAR?

Authored by: Anthony Cule (Associate) - Mills & Reeve

A misstep can only be so in retrospect. Some step has been taken. It took us in the wrong direction, and now we are lost. I narrowed myself to two frames through which to view this question, which both feed each other. I give my reasons and set out those framing questions below.

They say that history is written by the victor. Tim Bishop KC who represented the husband in the landmark Standish case[1] writes that "there is no want of principle"[2] when it comes to the division of assets on divorce. He also that there has been no greater tool for the advancement of women's rights in our society than family law[3]. I hope it is not controversial to say I view the advancement of women's rights as a fundamental good for our society: a fairer, more equitable society must be desirable[4]. But is it true that the developments in family law since White have (in the limited sphere of family law, if not the wider world) been steps on the road to a more equal society?

As ever when faced with these broad legal questions I turned to Lord Bingham's book The Rule of Law[5]. His second fundamental principle: "Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion"[6]. He does not oppose discretion per se, but does "require that no discretion should be unconstrained"[7]. The Family Court is known for its discretionary approach[8]. Unconstrained discretion leads to arbitrariness, a lack of certainty and makes it impossible to give good advice.

I propose to look at the steps taken in White[9] and in Miller[10] and finally, briefly, Standish through the framework of the following questions in order to determine ultimately if matrimonialisation is a misstep too far:

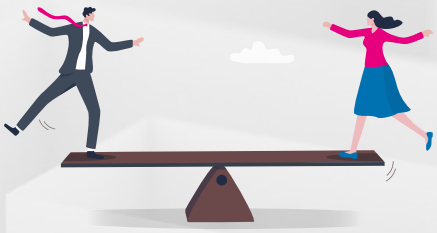
1. Was this a step away from a more equal society?
2. Was it a step towards unconstrained judicial discretion?

1 Standish v Standish [2024] EWCA Civ 567
2 Tim Bishop KC, 'No need to tinker with asset division' Divorce: No need to tinker with asset division | Law Gazette accessed 7 September 2024
3 Law & Disorder, 'Big Money Divorce' Big Money Divorce–Law and Disorder – Apple Podcasts accessed 6 September 2024
4 A McKinsey Global Institute study from 2015 suggested advancing women's equality could add $12 trillion to global growth - McKinsey Global Institute, 'The Power of Parity' Septer 2015 report available here: mgi power of parity_full report_september 2015.pdf (mckinsey.com)
5 Tom Bingham, The Rule of Law (first edition, Penguin, 2011)
6 Ibid, p.48
7 Ibid, p.54
8 I have heard it said ten different judges given the same set of facts will likely come up with ten different outcomes.
9 White v White [2001] 1 AC 596
10 Miller v Miller/McFarlane v McFarlane [2006] 2 AC 618

White

The decision in White was a "great leap forward"[11]. Previously the model focused on the needs of the financially weaker party, with the result that the 'breadwinner' usually kept the bulk of the finances. White turned away from this 'breadwinner' approach, establishing the overarching principles of fairness, equality and non-discrimination in the financial settlement of a divorce[12]. Lord Nicholls said "as a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so."[13]

Was this a step away from a more equal society?



By any measure, this cannot be so. It is an express step towards fairness and equality. "There should be no bias in favour of the money-earner and against the home-maker and the child-carer" said Lord Nicholls in his judgment.

Would a decision upholding the status quo give us more fair outcomes today? It is beyond my imagination to put forward an argument that it would.

Was it a step towards unconstrained judicial discretion?

Lord Nicholls established the starting point as equality and required that there should be clearly articulated reasons for straying from that[14]. This is a narrowing, not a widening of discretion. This is a clear constraint.

In all, White cannot be a misstep on either count when thus measured. The principles established are expressly fair and striving for equality, and sufficiently robust as to have clear definition and yet allow wiggle-room for the facts of an individual case.

Miller

Miller followed the overarching principles established in White, and added refinement in the form of three further, famous principles: sharing, need or compensation. In practice, the latter is rarely called upon[15].

Lord Nicholls said "It is not a case of 'taking away' from one party and 'giving' to the other property which 'belongs' to the former."[16] The judges also considered how and when matrimonial property and/or non-matrimonial property should be taken into account when determining an outcome. Lord Nicholls said "where it becomes necessary to distinguish matrimonial property from non-matrimonial property the court may do so with the degree of particularity or generality appropriate to the case."[17]

Was This A Step Away From A More Equal Society?

The simple, intractable problem is that of trying to spread the resources of one household to create two. The level of discretion built in – consideration of the degree of particularity or generality appropriate to the case – may in fact lead away from equality. One of Lord Bingham's principles in The Rule of Law is that there should be equality under the law[18] and only objective differences should justify differentiation. Family law, by its nature, does not lend itself to only objective differences – quite the opposite, it may be the most subjective practice area. Therefore, on a broad view, it seems a step away from a more equal society. Zooming in, though, the Miller judgment represents just as much of a leap forward as White. One of the issues in question was that of a wife who had given up her career as a solicitor in the city to run the household. This is not measurable, because of the degree of crystal ball gazing involved. However, following and building on the principles in White gave the judges the ability to take it into account. This flexibility to look at the particular issues of each case allows them to be held in the balance. Such flexibility allows the law to move more with changing public need and perception and allows progress to be made quickly.

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11 So says Lady Hale at para [134] of her judgment in Miller.

12 White, p.604 H

13 White, p.605 G

14 Ibid

15 Mr Justice Mostyn, Rules, Rule OK!, An analysis of the exercise of judicial discretion in the Family Law sphere,, 25 April 2019 Address-by-Mr-Justice-Mostyn-to-the-Hong-Kong-Family-Law-Association.pdf (judiciary.uk) accessed 7 September 2024. In his speech Mr Justice Mostyrn refers to compensation as "a unicorn, much discussed and described but never actually seen."

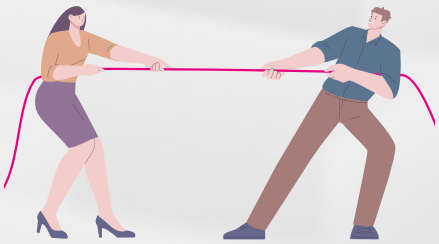
16 Miller, para [9]

17 Miller, para [27], emphasis added

18 Bingham, The Rule of Law, p.55

Was This A Step Towards Unconstrained Judicial Discretion?

From Lord Nicholls' quote above, it would seem the doorway to judicial discretion was kicked further ajar. But, in his speech to the Hong Kong Family Law Association[19], Mr Justice Mostyn considers many so-called discretionary decisions are actually value judgments. In that piece he puts forward his view that when considering the sharing principle, "the exercise is exclusively one of evaluation and there is nothing discretionary about it."[20] Mostyn J admits that the process is inherently "more intuitive and subjective than scientific and objective"[21]. However, this does not mean it is discretionary. The judge is still determining whether a legal standard is met. Needs, Mostyn J concedes[22], is a discretionary exercise. However, he goes onto explain how the development in case law since Miller gives rise to a discretion which, far from being unconstrained, is "fettered and narrow… regulated by, and subordinated to, rules…a rules-based strict needs exercise."[23]. What seems discretionary and free, is actually well constrained and defined, whilst retaining critical flexibility.



Standish

The outcome of Standish may appear extreme[24], but the message cannot have been clearer – source, not title, is the critical factor[25]. Moylan J in Standish agreed with Mr Bishop KC's submission on matrimonialisation, that "it is a derogation from the principle that sharing applies to matrimonial property and does not apply to non-matrimonial property, it should be applied narrowly". This is not a situation where the law suddenly opened up a whole new avenue and great uncertainty was created. It is one where the principles already established in White and Miller were reinforced, and if anything, clarified. The emphasis is that matrimonialisation is not to be incautiously wielded.

Was This A Step Away From A More Equal Society?

The outcome of this decision is undeniably that the 'breadwinner' of the couple has walked away with the vast majority of the assets. On the face of it, this seems to surely be a step backwards to the pre-White days. The finding of source being the critical factor in determining whether assets were matrimonialised could surely lead to less equitable outcomes for the financially weaker spouse – usually the homemaker. It was, however, noted that a needs assessment would be required. And this is a key point: matrimonialisation can be overlooked if needs are not met.

Was This A Step Towards Unconstrained Judicial Discretion?

Mrs Standish tried to argue so, by invoking Radmacher[26] principles of autonomy, and agreement. That was roundly rejected, not least because Radmacher applies expressly to written agreements made in contemplation of divorce, and not to day-to-day decisions and oral agreements during the course of a marriage. As outlined above, Moylan J's judgment is careful to emphasise that matrimonialisation is an exercise to be undertaken with the utmost caution. If anything, the guidelines around judicial discretion were reinforced here.

Conclusion

In my submission, of the cases I have explored above, only Standish can be said to have been any form of misstep, in the sense that it seems to reinforce the old 'breadwinner' model. However, this comes with heavy caveats. Otherwise, the trend is either towards greater equality or away from unconstrained judicial discretion, or both. That is to say positive steps forwards, rather than missteps.

I will close with saying that in our system movement towards equality cannot exist without some degree of judicial discretion. To manage the individual cases faced by the court requires a system that can adapt, with robust and flexible tools that can be reached for and applied when needed. Too rigid a system will break when dealing with edge cases. Matrimonialisation should not be viewed as a paternalistic threat. Quite the opposite, it asks first – can a fair, equal and non-discriminatory outcome be reached by sharing those assets which are clearly the fruits of this marital partnership? If so, then it is only fair to allow those assets that were generated outside of the marriage to remain outside of it. If such an outcome cannot be reached, or one parties' needs are not met, then a judge can look at non-matrimonial assets. I set this out to show that these are clear, constrained and principled steps. To paraphrase Leo Tolstoy, every unhappy family is unhappy in its own way[27]. Family lawyers know this all too well. We are in the business of unhappy families, and can confirm that no two such families are alike. That the family law is so discretionary is a feature, not a bug. That is why matrimonialisation is not a misstep, but an essential tool.

19 Mostyn J, Rules, Rule OK!
20 Ibid, para 44.
21 Ibid, para 47
22 Ibid, para 48
23 Ibid, para 50.
24 I do not propose to recount the facts, suffice to say Mrs Standish's award was downwardly varied by some £25 million.
25 Standish, para [178]
26 Radmacher (formerly Granatino) v Granatino [2010] UKSC 42
27 Tolstoy, Leo, Anna Karenina, (first edition, Penguin Classics, 2003)

60-SECONDS WITH:

SOPHIE VOELCKER PARTNER KINGSLEY NAPLEY

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

A Pilates and too much shopping. More travel!

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

A Helping people and families work through some difficult decisions, often at difficult times. I also really value the long term relationships I am lucky enough to build with clients. I do not view myself as a transactional lawyer.

Q What book do you think everyone should read, and why?

A *The Great Gatsby* –tragic but so beautifully written.

Q What legacy would you hope to leave behind?

A I think it would be an achievement to be remembered for being kind.

Q Do you have any hidden talents?

A I am hyper mobile so lethal at the cereal packet game and I can also do accents, Liverpudlian is my favourite.

Q What's the most important quote you've heard that you have adapted to your personal or professional life.

A Try to move everything forward a bit each day – invaluable when trying to handle a large number of demanding clients at the same time!

Q Is there anything you want to do/ achieve that you haven't already?

A Ride a Lime bike.

Q What piece of advice would you give to your younger self?

A Don't sweat the small stuff – things will work out in the end.

Q Where has been your favorite holiday destination and why?

A Mustique is hard to beat: sun, sea, and Basil's! Plus the sea plane there from St. Lucia is pretty cool not to mention lying on the beach next to Mick Jagger.

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

A Henry VIII – it's Henry VIII!!

Q What's your go to relaxing activities to destress after a long day at work?

A After a cuddle with my boys (I have a 5 and 6 year old), a long hot bath with Epsom salts and lavender oil, plenty of candles, a good magazine and a glass of red wine!

Q What is your New Years Resolution?

A Find more time to run and practice the piano.

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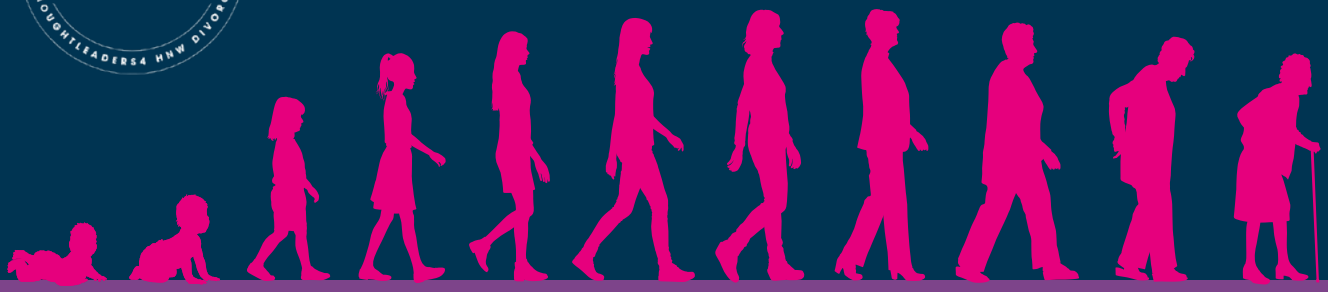

ON DIVORCE OR FOLLOWING THE DEATH OF A PARENT

Authored by: Sarah Dodds (Senior Associate) - Kingsley Napley

Grandparents have become increasingly involved in their grandchildren's day to day lives over the last few decades, providing love, support, child care and a sounding board for frazzled parents. A number of studies have highlighted the benefit to children of having positive relationships with their grandparents and the importance of these connections is celebrated each year on Grandparents' Day. However, as family dynamics shift over time, particularly following a divorce or bereavement, grandparent/grandchild relationships are often impacted.

Divorce is perhaps the most common scenario and can be particularly difficult when the separation is acrimonious. Grandparents can appear aligned with one parent and their relationship with the other parent can be damaged. This then has a knock-on effect on the time that they are able to spend with their grandchildren. Whilst mercifully more rare, the death of a parent can also impact family relationships and over time, the wider family of the parent who has passed away can sometimes begin to feel like they are been kept at a distance.

Practical Steps To Take

From a practical perspective, grandparents should always try to focus on the child's best interests and try to stay as neutral as possible. Children understandably feel unsettled during divorce or following a bereavement and will be looking for stability from those close to them. They may well be look to their grandparents to provide that, particularly if there is conflict at home, and it is important to try not to interfere with their relationship with their parents. In particular try to avoid belittling either of their parents in front of them as this can lead to feelings of insecurity and instead just focus on supporting the child during what can be a confusing time.

If issues begin to arise in respect of the time that you feel you are being allowed to spend with your grandchild, try to tackle the issues with both of the child's parents quickly and sensitively.

Mediators can often assist and will work through issues before parties become entrenched. Depending on the age of the child it might also be appropriate to involve the children in a child-inclusive mediation process although this would have to be considered on a case by case basis. In certain cases, family therapy may also be a sensible option.

What Can You Do If You Cannot Agree

Grandparents don't automatically have the right to make an application to court in respect of their grandchild's arrangements. In most cases they will instead require the court's permission to do so. In deciding whether to grant permission, the court will look at the nature of the proposed application, the relationship between the person making the application and the child and any risk that the application would disrupt the child's life to such an extent that they would be harmed by it. The grandparent/grandchild relationship does not have special status in law and so the court will look at the connection between that particular child and the applicant grandparent.

If permission is granted, as with all applications relating to children's arrangements, the court's paramount consideration is the child and their best interests. There is no presumption that a child must have contact with a grandparent and so again, the court will look specifically at the circumstances of the case and in particular, the relationships between all parties. Where there is strong evidence of a positive relationship between the child and their grandparent we tend to find that judges are keen to make orders that allow this to continue albeit previous arrangement may not be replicated in a changed family landscape.

If you have any queries about your relationship with your grandchild following divorce or a bereavement or you would like advice about how to manage your child's relationship with their grandparents, please do reach out and speak to our expert team.

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FAMILY TIES: WHEN TRUSTS, SECRETS AND DNA COLLIDE...

AND WHEN "CHILDREN" MEANS MORE

Authored by: Fritha Ford (Partner) - Collas Crill

"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master — that's all."

- Through the Looking Glass, Lewis Carroll

There can be no doubt that a trust is a powerful wealth planning tool; through the use of a trust structure, individuals can protect and preserve family assets, transfer wealth in a particular way, mitigate tax liabilities and meet estate planning objectives.

In most cases, the terms on which the settlor and the trustees have agreed that the trust fund will be held and administered is set out in a trust instrument. However, although designed to bring clarity, courts around the world are often tasked with interpreting the provisions of a trust instrument in order to establish the wishes of the settlor, long after they have died.

In the recent case of Marcus -v- Marcus [2024] EWHC 2086 (Ch), the English Court was required to determine whether a discretionary trust created in favour of the Settlor's "children and remoter issue" and their spouses could benefit a stepchild, the Settlor during his lifetime never having had reason to doubt the paternity of the beneficiary in question.

On examining the circumstances in which the Settlement was established, the Court felt able to expand the definition of "children"; however, far from opening the floodgates to claims by stepchildren, this case serves to highlight the importance of context in understanding the true intention of a settlor.

Background

The Settlor was a successful entrepreneur who in 1962 established a business manufacturing and selling toys. In 1973, the Settlor married his wife, Patricia, and together they raised two boys, Edward born in March 1978 and Jonathan, born in December 1981.

Over the years the business grew and diversified and in 2017 “demerged” into two groups of companies for tax reasons. In 2003, and on advice from their advisers, the Settlor and his wife each established a discretionary trust in similar terms designed to postpone payment of Capital Gains Tax. The beneficiaries of the trust established by the Settlor (the Settlement) were stated to be “the children and remoter issue of the Settlor now in being or born hereafter”, their respective spouses, widows and widowers and any charities.

The Settlor believed himself to be the biological father of both Edward and Jonathan and indeed the boys were raised believing themselves to be brothers. However, in 2010, Patricia told Edward that the Settlor was not his biological father. Edward kept his mother’s secret and the Settlor died in 2020, unaware of his wife’s infidelity.

In 2023 and in the midst of a family fall-out, Jonathan learnt that Edward was, in fact, his half-brother and brought proceedings before the High Court in England disputing Edward’s entitlement to the assets of the Settlement on the basis that he was not a “child” of the Settlor. The Court was asked to determine:

1. Whether, on the balance of probabilities, Edward was the biological son of the Settlor; and
2. If not, whether the term “children” in the trust instrument could include stepchildren such that Edward was entitled to benefit from the Settlement.

As at the date of the hearing in July 2024, the value of the shares held in the Settlement was estimated to be £14.5million. [enlarge]

Family Secrets - Edward’s Legitimacy

The Court noted the rebuttable presumption that a child born during a marriage is the child of the husband, and further accepted that whilst the Settlor being named as Edward’s father on his birth certificate was prima facie evidence of paternity, it was not determinative.

In light of the DNA evidence and the witness evidence given, the Court held that on the balance of probabilities, Edward was not the biological son of the Settlor. As a result, the Court was required to determine the proper construction of the word “children” as used in the Settlement.

Construction – All A Question Of Context?

Applying the natural and ordinary meaning of the word “children”, the Court held that the term does not include stepchildren unless the context indicates otherwise.

Turning to consider whether the context provided by the Settlement was enough to displace the natural meaning of the word, the Court described its task as being to ascertain “the objective meaning of the language which the parties have chosen to express their agreement”. In approaching this task, the Court was required to consider what a reasonable person, in possession of all of the background knowledge which would have been available to the Settlor at the date of execution, would have understood the words used by the Settlor to mean.

The Court concluded that in the circumstances, a reasonable person would have understood “children” to have included Edward – the Settlor and his wife appeared to have a stable marriage and Edward and Jonathan were raised in the family unit as brothers. The Settlor believed them both to be his biological children and there was no evidence to suggest that the Settlor would have wanted them to be treated differently from one another.

Noting that Patricia had established a mirror settlement on the same day and for the same reasons, the Court noted the stark inequality that would have arisen had the natural meaning of “children” been applied.

The Mastery Of Language

The importance of using clear and precise terms in order to reflect a settlor’s true intentions is well known. However the case of Marcus -v- Marcus highlights the need for practitioners to give careful consideration to all possible eventualities and outcomes.

This is particularly important as the use of ancestry services such as 23 and Me becomes more prolific, and as the definition of “family” becomes more fluid - does a settlor wish for adopted children to benefit, or those born via sperm or egg donor to benefit? Is a trust established for the benefit of the “sons of the settlor” intended to benefit those who choose to change their gender by law?

Whilst where the context allows, the courts may look beyond the strict legal definition of family relationships in order to determine a settlor’s true intention, practitioners should be aware of family dynamics – and family tensions– looming on the horizon and would do well to address potential issues at an early stage.

60-SECONDS WITH:

ANNA SUTCLIFFE
BARRISTER
1KBW

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

A Travelling and exploring the world with my son who just turned 1. Watching him experience new things is my favourite thing to do!

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

A We are invited into people's families at what is often one of the worst times in their lives. Being able to help people navigate a way through that and start to see a way forward, with all the relief that brings, is really rewarding.

Q What book do you think everyone should read, and why?

A I think books are such a personal thing that I'm not sure there is one book for everyone – but I will say that one of my all time favourites is *The Heart's Invisible Furies* by John Boyne. It is beautifully written and made me both laugh and cry.

Q What legacy would you hope to leave behind?

A I feel very strongly about widening access to the Bar and making sure that the best talent isn't being missed as a result of those from less traditional backgrounds thinking that it is in some way "not for them". I have been lucky enough to receive some invaluable guidance, encouragement and friendship from more senior figures throughout my career and I would hope to be able to pay some of that forward.

Q Do you have any hidden talents?

A I once managed to empty a bar with some truly terrible karaoke – does that count as a talent?! It is definitely best left hidden…

Q What's the most important quote you've heard that you have adapted to your personal or professional life.

A "Whatever you are, be a good one". I'm not very good at doing things half-heartedly and was always brought up to believe that it didn't matter what I chose to do, so long as I was giving it 100%.

Q Is there anything you want to do/ achieve that you haven't already?

A I would like to be able to speak a second language. I'm ashamed to say that I gave up French at school (despite everybody telling me not to!) and have regretted it ever since. I'm working my way through Duolingo whenever I have a spare moment.

Q What piece of advice would you give to your younger self?

A "You're not here by accident so stop waiting to get 'caught out'". I suffered from imposter syndrome from pretty much the second I went to university, and was convinced I had only been given pupillage as a result of some sort of clerical error! It still crops up from time to time but I am certainly much better at keeping it at bay these days.

Q Where has been your favorite holiday destination and why?

A Costa Rica – the sheer variety of landscapes and wildlife was mind-blowing! The country is incredibly proud of its biodiversity and all of their tourism is very carefully geared towards preserving that, which is impressive. Also I got to meet some very cute sloths!

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

A Jessica Ennis-Hill. I think her return to win an Olympic medal in Rio after having her child was so inspiring – and she does a lot of important work around fem-tech in sport which I would love to understand more about.

Q What's your go to relaxing activities to destress after a long day at work?

A I've played competitive water polo since I was 12 and still play for my local club. It's a great way to blow off some steam, and I love the camaraderie that comes with being part of a team.

Q What brings you the most joy.

A Undoubtedly my son. Coming home to his cheeky grin makes even the toughest days 100% better.

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NAVIGATING DIVORCE

IN A CHANGING ECONOMIC WORLD

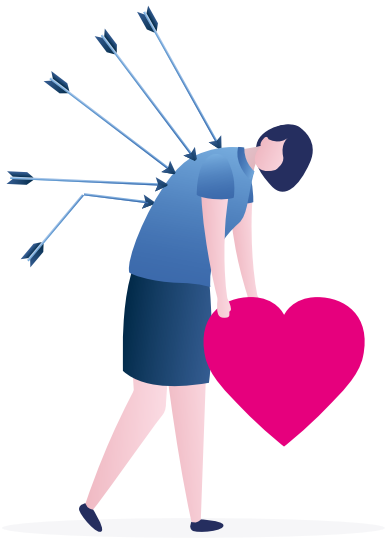
Authored by: Marie Kilgallen (Partner) - Irwin Mitchell

Divorce can be a complex and emotionally charged process, and for high-net-worth (HNW) individuals, the stakes can be high. They typically involve significant assets including properties, investments, trusts, pensions and potential business interests. The division of these assets can lead to contentious negotiations and litigation particularly when each party seeks to protect their own financial future and that of future generations.

Ahead of the Autumn 2024 budget there was much speculation of the potential impact of economic changes on those already engaged in divorce or those contemplating divorce particularly HNW individuals. As a result steps were both taken and paused to try and anticipate changing economic factors leading to a need for 'joined up' advice from legal professionals, tax advisors, financial advisors and pension experts.

Specifically, the 2024 budget made changes to the following which may affect HNW individuals:

- Abolition of the Non-Domicile Tax Regime from 6 April 2025
- Capital Gains Tax Changes – Increase in Capital Gains Tax on business and other assets (but no residential property)
- Increase in additional Stamp Duty Land Tax on second homes or buy to let properties
- Changes in the taxation of Carried Interest (Private Equity Holdings)
- VAT on private school fees
- Pension Reforms specifically relating to unused pension funds and death benefits forming part of a person's estate for IHT purposes



On reflection the changes appear to be less impactful than were anticipated but still require careful and considered planning both pre- and post- separation and divorce.

Separate from budget changes it is also important to be alive to more general economic factors such as:

- **Market Volatility:** Fluctuations in the stock market can affect asset values significantly. For HNW individuals, investments in shares, businesses and other assets can vary widely. When markets are unstable, the valuation of assets can become contentious, requiring expert appraisals. It is important to consider when assets were last valued and whether there have been changes in the market requiring fresh valuations.
- **Inflation:** Rising inflation can erode purchasing power, making it essential for HNW individuals to reevaluate their financial strategies. This could apply to those who are paying monies as part of a settlement in either capital or income terms or those who are receiving capital or income as the sum they are to receive may have to 'stretch' further if the cost of living is rising. Engaging a financial advisor to assist in considering the impact on long term financial goals is often of vital importance.
- **Interest Rates:** Changes in interest rates can impact mortgage costs and investment returns. This can have a positive impact if an individual has cash assets or investments which will see growth as a result of higher interest rates. In recent years the impact of higher interest rates has had a negative impact on HNW individuals who have seen mortgage payments increase significantly either as a result of the expiry of fixed rate mortgages or requiring a new mortgage. Financial advise on affordability is often critical.
- **Tax Implications:** The tax landscape can shift, impacting both parties during divorce. Understanding capital gains taxes across all other assets and not just residential property and the tax consequences of asset transfers is crucial for HNW individuals.

Conclusion

Divorce is inherently challenging, and for high-net-worth individuals, the added complexities of budget and economic conditions can make the process even more daunting. It is crucial to understand the economic landscape and adopt a collaborative approach. HNW individuals can navigate divorce more effectively, ultimately securing their financial futures, through seeking professional advice from legal professionals combined with financial and tax advice to ensure informed and contemporaneous decision making.

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MAGIC CIRCLE AWARDS 2024 SHORTLISTED

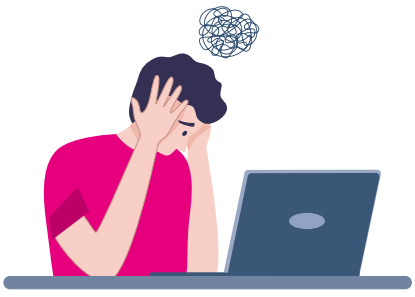
WHAT PRICE A TITLE?

DIVORCE AND LOST OPPORTUNITIES

Authored by: Izzy Walsh (Partner) - Hall Brown

Divorce can be a very emotional and intensely personal experience.

However, no matter the individuals circumstances of a couple's relationship, the process by which they end their marriage is common to all.



When it comes to the financial terms of their separation, there is an emphasis on arriving at a settlement which is fair to both parties.

The Matrimonial Causes Act 1973 sets out a number of matters which the family court takes into account to ensure that is the case, including things such as respective financial needs, income and the standard of living enjoyed during the marriage[1].

Whilst those factors are relatively routine, another provision listed by the legislation is rather more rarely used.

1 https://www.legislation.gov.uk/ukpga/1973/18/section/25

Section 25 (2)(h) of the MCA 1973 requires the court to consider

"the value...of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring".

Generally, such lost opportunities encompass assets to which financial value can be attributed and redress then achieved, such as pensions, interests in business ventures, future bonuses or unvested share options.

A case involving the businessman Dale Vince has given the provision another noble dimension.

Various media have reported that his wife, Kate, is arguing that Mr Vince is trying to speed up their divorce because he believes that he may be given a peerage as a result of his support for the Labour Party and wants to deny her the chance of becoming a Lady.[2]

Earlier this year, Mr Vince was apparently ordered by the High Court to disclose any intended political donations while their divorce was ongoing.[3]

His barrister has described the latest claim as the "purest of speculation".

Nevertheless, it highlights how the assets under consideration in a divorce settlement are not just those which form part of the joint marital 'pot' but can include a "benefit" - in this case, a title - which may not yet have been delivered and which has a value that is both unascertainable and subjective.

Income in the form of performance-related or the proceeds of a sale of shares in a business often require certain criteria to be met in order for them to happen.

The closer in time to the point at which spouses split up that such an eventuality arises, the stronger the argument can be that such resources are referable to a marriage and can be shared.

If Mrs Vince's argument is considered valid, it prompts two questions. Firstly, should the court delay her divorce? Secondly, if it does not and she loses out on a title, what value can be put on that?

This is not the first time that Dale Vince has been involved in a headline-making divorce.

In 2016, his first wife, Kathleen Wyatt, was awarded £300,000 nearly 20 years after their marriage ended, in a matter which one Supreme Court judge described as "highly unusual".[4]

Although the current case and the claims which it has featured are somewhat exceptional, they underline the importance of individuals thinking broadly about their current and prospective assets when it comes to divorce.

Few of us might stand a realistic chance of ennoblement, high office or fabulous wealth but it is always worth taking specialist advice to avoid nasty surprises or lost opportunities.

2 (https://www.thetimes.com/article/5598955e-79a5-44c7-a56e-3a5ef72f8af6?shareToken=23a31aa21669bbe8f1e0cbe7dc8681a3

3 https://www.dailymail.co.uk/news/article-13247913/Labour-megadonor-Dale-Vince-tell-wife-plans-make-donations-High-Court-orders-eco-tycoon-accused-keeping-dark-plans-fund-Keir-Starmers-party.html

4 https://www.supremecourt.uk/cases/docs/uksc-2013-0186-judgment.pdf

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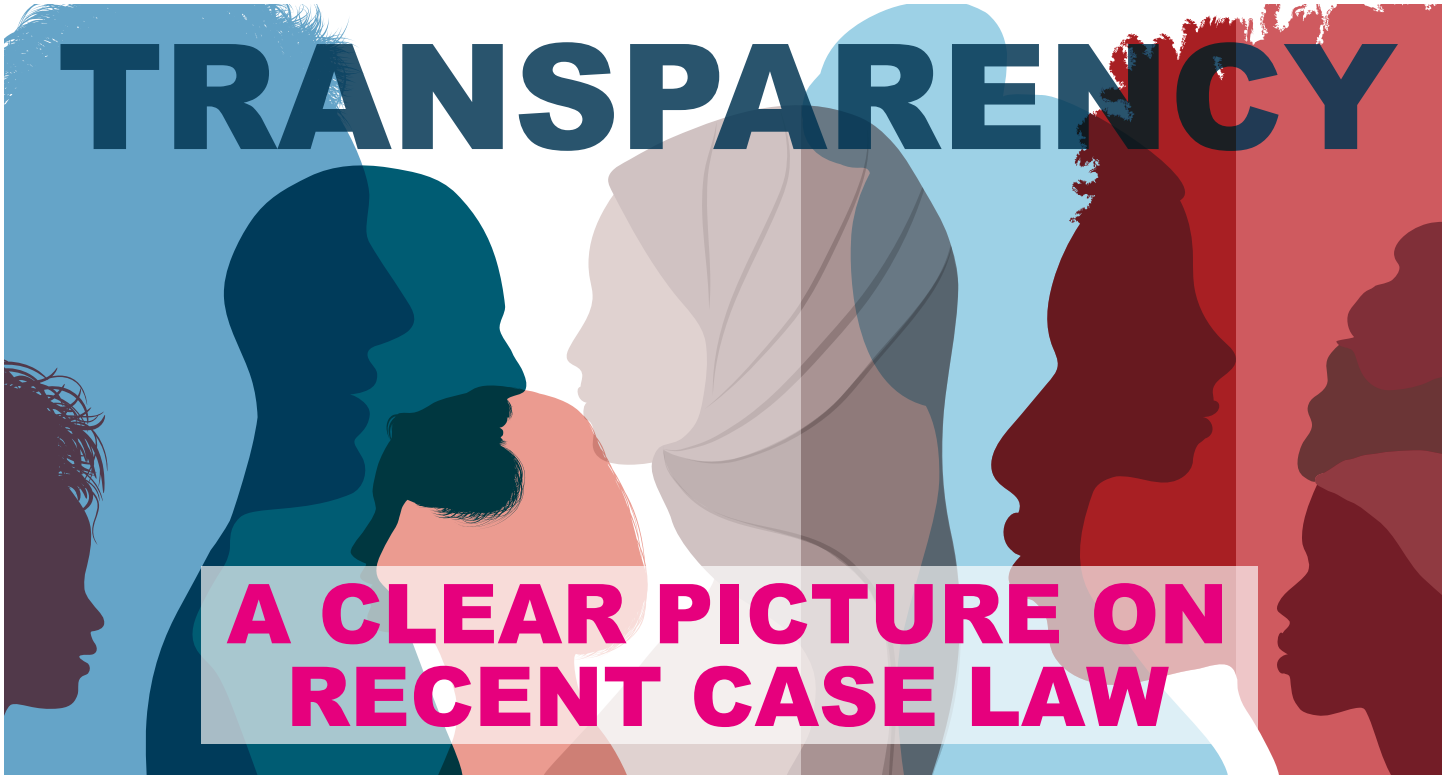


TRANSPARENCY

A CLEAR PICTURE ON RECENT CASE LAW

Authored by: Joe Ferguson (Associate) - Myerson Solicitors

Transparency used to be the buzzword of family law. A frequent favourite topic of members of the judiciary, most notably Mr Justice Mostyn, it was the subject of frequent judicial commentary. However, in the period since Mr Justice Mostyn's retirement, some cases have shown the recurrence of the much-dreaded "desert island syndrome" which family lawyers are often criticised for, whilst others have shown the best of family courts. In this article, Joe Ferguson critiques recent case law on the topic as a reminder to practitioners of the missteps to avoid.

It is often said that family proceedings take place confidentially. This is not the case, though there is of course an implied duty of confidentiality as it relates to financial disclosure, for instance. Instead, they take place in private, with limits as to who can be present per r.27.11 and with publication restrictions in place.

Scott v Scott [1913] AC 417 is often cited as the foundation in the administration of open justice. In his judgment, Lord Atkinson stated (emphasis added):

The hearing of a case in public may be, and often is, no doubt, painful, humiliating or deterrent both to parties and witnesses… but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.

Open justice is therefore not just about attendance at court but also the more general issues of public confidence and respect. In a recent editorial, The Guardian opined that:

Senior [family] judges have indicated their support for a more open system. But a lack of resources hinders progress...[and] this means that no one – not journalists, lawyers, campaigners or the public – can learn from them.

In spite of The Guardian's comments, there is of course work being done to make the family courts more transparent. The culture around reporting judgments has evolved significantly and the transparency pilot has been rolled out across 16 courts across the country. This is incredibly positive.

Nevertheless, there have been recent cases of concern which have brought the issue of transparency back into the fore.

Louise Tickle v Father & Ors [2023] EWHC 2446 (Fam)

In this well publicised case from late last year, Mrs Justice Lieven allowed an appeal from Ms Tickle, a well known family law reporter and transparency campaigner.

The Judge in the first instance had erred by adjourning the application of Ms Tickle to report on a multi-day final hearing in a private children case.

Mrs Justice Lieven said that the Judge had not applied the Article 8/10 balance in a "legally appropriate manner", particularly given that the journalist was not seeking to report about the factual or evidential matrix of the case.

She allowed Ms Tickle's appeal, and due to serious points raised in the Mother's skeleton argument (in support of Ms Tickle's appeal), the transcripts for both Days 1 and 2 of the Final Hearing were made available to Ms Tickle.

The fallout of the appeal was covered extensively in trade and non-trade publications alike.

G v S (Family Law Act 1996: Publicity) [2024] EWFC 231 (B)

In this case, HHJ Reardon refused the husband's application to speak publicly about proceedings for a non-molestation order, finding that while s12 of the Administration of Justice Act 1960 did not apply, the starting point should be that proceedings are confidential given that there were allegations of harm.

This was deftly and robustly rebuked by Mr Justice Mostyn in his article Absence of Authority, published on the Financial Remedies Journal blog earlier this year. Mr Justice Mostyn stated that the decision of HHJ Reardon is at odds with previous House of Lords decisions on the very topic:

> HHJ Reardon's statement…that the matter is devoid of authority is difficult to understand. On the contrary, the highest court in the land has on two occasions (Pickering and Re S) pronounced on the subject.

Accordingly, judges who do not deal appropriately with issues of transparency must now grapple with the very real threat not only of appeal but also a Mostynian lashing from beyond the bench: pick your poison wisely.

Still Stranded? Walker v Goodman [2024] EWFC 212 (B)

In stark contrast, this well publicised Schedule 1 judgment heard by HHJ Hess in July 2024 shows how far the family courts have come.

The Daily Mail, via their Counsel, sought for permission that the newspapers could publish information about the proceedings without redaction or anonymisation: a premise that was supported by the Father.

The Mother argued, via leading Counsel, for the interim transparency order which had been made in the case to be made final.

The Mother's position was rejected by the Judge, who stated that given (i) the "journalistic fodder" which the Mother had engaged with (and at points instigated), (ii) the substantial reporting to date and (iii) how ineffective restrictions would prove in light of the above, it would be a nonsense trying to anonymise the judgment.

It is therefore not the case then that parties in Children Act proceedings (including Schedule 1) can simply seek to hide behind the Administration of Justice Act. Instead, parties should exercise restraint, particularly when in the public eye.

Conclusion

Family law and its practitioners have oft been accused of treating family law as entirely separate from other areas of law. Family practitioners are not alone in these failings. As Vaisey J observed In re Hastings (No 3) [1959] Ch 368:

> [A] good deal of colour is lent to the suggestion of separate courts by various expressions which are used, "a Chancery judge," "a Queen's Bench judge," … Section 2 of the Supreme Court of Judicature (Consolidation) Act, 1925, obliges us to be appointed under the description of "judges of the High Court" … That has to be remembered. If it is thought that there is some kind of emanation of the Chancery spirit which can overrule the decisions of the Queen's Bench, or some special inspiration of common sense which allows a judge of the Queen's Bench to say that the decisions in the Chancery Division are wrong, that is complete illusion.

Desert Island Syndrome has been commented on by the likes of Lord Sumption JSC and Mr Justice Mostyn in an abundance of case law and the issue of transparent justice is seemingly central to the issue. As Mr Justice Munby stated in the case of Whig v Whig [2007] EWHC 1856 (Fam):

> Nigh on fifty years have passed since those words were uttered, yet the illusion that there is some special inspiration of common sense infusing the Family judges and which is lacking in our brethren in the Chancery Division – an illusion no doubt fostered by our inveterate practice of sitting in private – seems to be as prevalent today as ever. It cannot be stressed too much that there is simply no basis for this illusion.

Thankfully for those ailing, Desert Island Syndrome remains responsive to treatment. All one needs is the cooling balm of thought leadership and an occasional, sharp reality check.

60-SECONDS WITH:

EMMA HARGREAVES
BARRISTER
SERLE COURT

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

A Travelling the world.

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

A Assisting people in difficult times.

Q What book do you think everyone should read, and why?

A *Ottolenghi – Simple*. Recipes for absolutely delicious food, even if you are short on time.

Q Do you have any hidden talents?

A "Predicting the end of whodunnit mysteries after around the first minute of the show" according to my fiancé.

Q Is there anything you want to do/ achieve that you haven't already?

A Hike the W-Trek in Torres del Paine, Patagonia.

Q What piece of advice would you give to your younger self?

A Don't panic when you fail (you'll pass your driving test eventually…!)

Q Where has been your favorite holiday destination and why?

A The Everest trail in Nepal – unbeatable scenery and the hiking provides a complete escape from normal life.

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

A David Attenborough. He is such a brilliant storyteller and hopefully, therefore, a great dinner guest.

Q What's your go to relaxing activities to destress after a long day at work?

A I'm not sure many would describe it as relaxing but a workout at Barry's Bootcamp always helps me to destress after a long day at work (I am incapable of thinking about work at the same time as sprinting on a treadmill).

Q What brings you the most joy.

A Spending time with my family and friends.

Q What has been a 'stand out' moment for you this year?

A Getting engaged to my wonderful fiancé.

Q What is your New Years Resolution?

A To play my classical guitar more often.

NAVIGATING FAMILY COURTS IN HONG KONG

A SOLICITOR ADVOCATE'S PERSPECTIVE

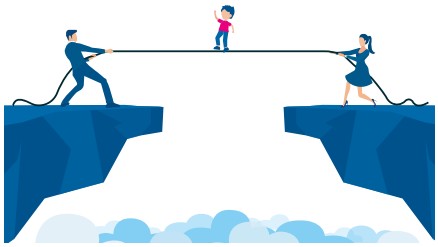
Authored by: Jonathan Mok (Solicitor Advocate & Partner) - Karas So

The purpose of this article is to provide an overview of the operation of the Family Courts in Hong Kong from the perspective of a solicitor advocate who regularly represents clients without instructing counsels. Of the 11,666 solicitors with practising certificates, there are only 103 solicitor advocates and the writer is currently the only solicitor advocate specialising in family laws.

Being part of the District Court of Hong Kong, it is not a requirement for litigant to be represented by a barrister, and a solicitor has a full right of audience in the Family Courts. Counsels are, however, frequently instructed owing to the value of the matrimonial assets and complicated issues such as trust arrangements.

Just as in other jurisdictions, marriage breakdown has been consistently on the rise in Hong Kong with divorce cases having increased from 17,774 cases in 2021 to 20,261 cases in 2023. There appears to be a drop in the number of divorce cases in 2024, with the total standing at around 11,500 as of 28 October 2024.

Family Courts currently comprise 15 judicial officers with 8 Judges and 7 Masters. Initially, only Judges can adjudicate family cases but with the introduction of the Masters' system on 3 October 2023, Masters now handle preliminary hearings such as First/ Children Appointment and other call-over hearings requiring directions. Masters' jurisdiction is limited to pre-trial hearings and they can determine interlocutory applications such as interim maintenance and interim custody, care and control but their involvement usually ends after Financial/Children Dispute Resolution hearings.



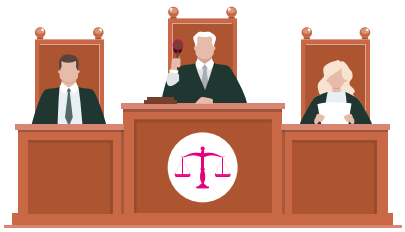
Judicial officers in the Family Courts work very hard balancing full-time sitting with writing judgements. Even so, there is still a lengthy waiting period before cases are heard, mainly due to parties' inability to reach early settlements.

A major change to the practice of the Family Courts is the gradual application of civil rules and procedures, which the Judiciary has been implementing in recent years. There is also an effort to consolidate different pieces of family legislations and rules to conform to civil practice and procedure. It however remains the case that there are essentially only a few ordinances and rules, making it relatively easier for practitioners to familiarise themselves. The use of Chinese in court proceedings is now becoming a norm.

The acrimony commonly seen in family disputes has rendered the practice of family laws unpleasant, as the main task of a family lawyer is to resolve deep-rooted differences between couples.

It would not be unfair to say that family lawyers invariably end up "picking up the pieces".

All these factors have made it difficult to recruit family practitioners to join the Family Courts. Judicial officers joining the Family Courts tend to come from Tribunals such as Small Claims and Labour or the Magistrate Courts. Owing to the immense caseload, which is not made easy with the increasing number of litigants acting in person, there has not been much interest from family practitioners. The workload is so overwhelming that the Family Courts have been accepting experienced family laws specialists to sit as deputy judges to help out.



There are certainly advocacy training opportunities for solicitors as they appear in Family Courts more frequently than barristers, particularly in relation to pre-trial hearings. A family lawyer who intends to become a specialist should represent clients as an advocate as this allows them to observe the inquisitorial approach of Family Judges and how discretion (an important feature of family law) is exercised, a practical learning experience that cannot be acquired from simply reading judgments.

The major advantage of a solicitor advocate is their clear grasp of their client's case derived from daily case handling, which equips them with the ability to recall relevant or milestone events. Clients are attracted by their ability to deal with the same lawyer from preparing court documents at the start of the litigation through to advocating their position in court. This arrangement leads to costs saving since there are no additional fees for instructing counsel.

It cannot be denied that the trust and confidence clients have in their solicitors is intensive, as clients invariably count on their solicitors for emotional support during difficult times. It is not unheard of for a family solicitor to simultaneously assume the role of a counsellor.

Some high net-worth clients may consider it vital to have a senior counsel advocating their case, often depending on whether there is senior counsel on the opposing legal team. It might be a matter of appearances, but clients sometimes find the idea of having a smaller legal team than the other side to be inadequate. Senior counsels bring invaluable expertise to the legal team since advocacy is an art which cannot be acquired through textbooks and judgments. It is therefore a good opportunity for aspiring solicitors to learn from the experts.

The practice of family law has been gaining greater importance in recent years, and with the increasing wealth of couples, it has attracted experienced barristers to join the practice. This has made it difficult for young lawyers to participate in 'big money' cases but it should not deter them from gaining experience in handling less substantial (but by no means less important) cases.

Wealth may well lead to complicated financial structures, but couples still face similar problems in resolving matters arising from their marriage breakdown – a prime example being the future care arrangement for their children. Cross-border marriages are also very common in our community, and extraterritorial enforcement of orders is always an issue in divorce cases.

Solicitors, through regular dealings with their clients, understand the problems they face. Consequently, they are better positioned to come up with pragmatic solutions when considering the appropriate mechanisms in implementing court orders. By also being their advocates, solicitors can offer a more comprehensive service to their clients, potentially leading to early settlements and avoiding costly and time-consuming litigation.

WEALTH AND CONTROL

UNMASKING ECONOMIC ABUSE IN FINANCIAL REMEDY PROCEEDINGS

Authored by: Abbie Green (Trainee Solicitor) - Mills & Reeve

Hopefully in 2024, the myth that domestic abuse exists solely in lower-income households has been completely dispelled. This article seeks to explain how domestic abuse, particularly economic abuse, manifests in HNW divorce cases and how victims/survivors are best protected.

What is Economic Abuse?

First recognised in the Domestic Abuse Act 2021, economic abuse includes any behaviour that substantially affects an individual's ability to acquire, use, or maintain money or other property, or obtain goods or services. It can manifest as control over financial resources, as well as the restriction of access to essential transport and technology, limiting an individual's ability to work and stay connected, and restricting access to property and daily necessities like food and clothing. On 5 April 2023, a new provision added also criminalised controlling or coercive behaviour that occurs after a relationship has ended.

Domestic and economic abuse are deeply interlinked, with research indicating that financial abuse occurs in 99% of domestic violence cases. Practitioners dealing with cases of economic abuse should therefore be vigilant and aware of the potential for broader domestic abuse dynamics, ensuring they address all aspects of the victim/survivor's safety and well-being.

The 2024 Resolution Report

The Resolution Report on Domestic Abuse in Financial Remedy Proceedings, published in October 2024, shed light on the impact of economic abuse and expressed concern that the failures in the system were used by abusers to perpetrate ongoing abuse.

Prevalence and Impact

The report found that, despite nearly two-thirds of legal professionals encountering economic abuse in more

than 20% of their cases, gaps in the legal framework and practice overlook the nuanced ways economic abuse can affect the financial independence of the victim/survivor. The impact of economic abuse is therefore inadequately considered when determining the division of assets.

Key Procedural Issues

Disclosure: A consistent theme in financial proceedings involving economic abuse is the failure to comply with the duty to give full and frank disclosure. By dragging out proceedings, being non-transparent, and using the process to wear down the other party, abusers obstruct effective resolutions and continue their abuse of the victim/survivor throughout the proceedings. This issue was highlighted in the case of Tsvetkov v Khayrova, which illustrated the complexities in assessing the financial needs and resources of both parties when economic abuse has occurred, emphasising the importance of transparency and honesty.

Approach of the Court: The "exceptional" requirement for conduct under section 25(2)(g) of the Matrimonial Causes Act 1973 means that many instances of economic abuse are not considered unless they are immediately obvious to the Court. This leaves victims/survivors in poor financial positions and without adequate financial remedies. This was highlighted in the recent case of N v J, where the court stressed the need for clear and compelling evidence to meet this high evidential bar. The introduction of the no-fault divorce system has also amplified this problem, as allegations of economic abuse can go unaired at the outset of divorce proceedings, getting pushed back to financial remedy where this 'exceptional' bar leads to abuse being unaddressed.

Recommendations For Practitioners

In the long term, the Resolution Report, along with research by institutions such as the Nuffield Foundation and Cafcass, call for systematic changes in how economic abuse is addressed. These include:

- Legislative changes;
- Training for judges and legal practitioners; and
- Development of robust mechanisms to identify and address economic abuse in financial remedies.

However, as we all know too well, the wheels of justice turn slowly and, while these changes are being integrated, legal practitioners should consider the following recommendations if faced with a client at risk of economic abuse:

- **Educate yourself:** Know the warning signs and be constantly alert to the potential existence and impact of economic abuse in your cases. Do not let your preconceptions of what domestic abuse 'looks like' prevent you from identifying it in cases. In HNW cases, be cautious where, despite the ample resources, one party's access to the assets is being overly restricted.
- **Encourage legal representation:** Both sides should be actively encouraged to instruct legal representation. Be aware if your HNW client is denying access to the resources for legal fees, forcing the other party to either go unrepresented or borrow at high interest rates, as this may indicate an abusive dynamic.
- **Listen and record:** Hear and accurately record the experiences of clients, ensuring their accounts are presented clearly to the court. Detailed documentation of the victim/survivor's financial situation and the ways economic abuse has impacted their ability to manage and access financial resources should be evidenced.
- **Refer to specialists:** Be vigilant in identifying signs of economic abuse, conduct thorough risk assessments and make appropriate and proactive referrals to local authorities and specialist domestic abuse support services when needed. Meet now with your local specialist service so that when you refer clients, you can understand how your role will differ and tell them what to expect.
- **Cooperate:** Work with all legal professionals involved in your case, across both sides and the judiciary, to ensure that non-disclosure and non-compliance with the process has consequences in the proceedings. Be proactive and engage with your local family justice board to ask them about the proposed approach. Judges should decide on consequences of non-compliance with financial remedy orders at the time of making the order, especially if enforcement proceedings seem likely.

Conclusion

Given the current process in financial remedy proceedings inadvertently perpetuates economic abuse, it is essential that legislative and procedural changes are made. While awaiting these changes, legal professionals must work together to ensure abuse is accurately identified and addressed within proceedings to prevent it from further negatively impacting the financial remedy process and victims/survivors. Practitioners should hold themselves accountable for working to reduce the impact of economic abuse on their clients by advocating for comprehensive disclosure, ensuring both sides are appropriately represented and informed, and supporting victims/survivors throughout the legal process. By addressing these issues, the family justice system can better protect victims/survivors of economic abuse and ensure fairer outcomes in the financial remedy proceedings of HNW divorces.

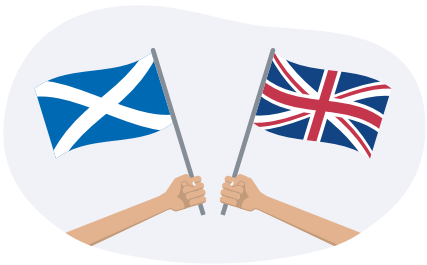
COHABITATION LAW IN SCOTLAND

REFORM IS COMING

Authored by: Jenny Jarman-Williams (Consultant) - Turcan Connell

In 2006 the Scottish Parliament introduced the rights for cohabitants. They are now able to make a financial claim against the other on the breakdown of the relationship, or when a partner dies without a Will. Eighteen years on, reform is on the horizon. As England contemplates its own cohabitation provision, what can the English take from Scotland's experience?

Should the Scottish system be replicated, or are there lessons to be learned and mistakes to be avoided?



Many would say the legislation hasn't fulfilled its potential. Scotland's current cohabitation laws have been criticised for their complexity and vagueness, with courts given significant discretionary power without a guiding framework. This has made it difficult for legal advisors to predict outcomes for clients and, arguably, some unjust outcomes. The Scottish Law Commission have considered the matter and published a lengthy report and accompanying Draft Bill in November 2022. They recommended that change should be made, and proposed wide ranging reform. The Scottish Government's initial response was that "The report is very thorough, impressive and readable. It provides a sound basis for reforming the law in this area." They went on to say they intend to consult on the Commission's recommendations, but no consultation has started as yet. The recommendations, if adopted, would bring extensive changes aimed at providing greater clarity and predictability as to outcome and giving the Court a wider range of powers.

Key Recommendations and Proposed Changes

1. **Updated Definition of "Cohabitant":** The Commission advocates modernising and redefining "cohabitant" to better represent contemporary relationships. At the moment cohabitants are defined as a couple who live together as if married. Under the proposed change, a cohabitant would be defined as a person in an enduring family relationship with another, focusing on the relationship's characteristics

rather than likening it to marriage. Factors like the relationship's length, co-residence, financial interdependence, and childbearing would guide courts in making determinations about cohabitant status.

2. **Guiding Principles for Financial Awards:** To address the vagueness of the law in relation to financial claims, the report suggests a principled framework for financial provision. The proposed new test requires the court to make such orders as are justified on the application of any or all of a set of guiding principles, and reasonable having regard to the resources of the cohabitants. The guiding principles are an almost exact replica of those applicable in a divorce and so are familiar to all Scottish family lawyers and Judges.

They are:

- Any economic advantage derived by one cohabitant from the contributions of the other should be fairly distributed between the cohabitants.
- Any economic disadvantage suffered by a cohabitant in the interests of the other cohabitant or of a relevant child should be fairly compensated.
- Where a cohabitant seems likely to suffer serious financial hardship as a result of the cohabitation having ended, such financial provision should be awarded as is reasonable for the short term relief of that hardship.
- The economic responsibility of caring for a relevant child (that is, a child of whom the cohabitants are parents, or who has been accepted by them as a child of the family) after the end of the cohabitation should be shared fairly between the cohabitants.

The Law Commission has recommended that assistance in applying the guiding principles should be provided, by inclusion of lists of factors relevant to the application of each guiding principle. Those factors are again very like those from the divorce legislation and include:

- The terms of any agreement between the cohabitants
- Whether either cohabitant's behaviour, including abusive behaviour, has resulted in economic advantage or disadvantage or affected the resources of either cohabitant
- All the other circumstances of the case.

3. **Expansion of Court Orders:** One of the key criticisms levelled at the Scottish legislation is that the orders available to the Court are too limited. The report recommends diversifying court orders beyond simple monetary awards to include property transfer orders and periodic payment orders for short-term relief. Courts would also gain powers to address occupancy rights in shared homes, valuation and sale of property, and incidentals related to financial provision. This extended range allows courts to more flexibly to support cohabitants during transitional periods after separation.

4. **Time Limit Flexibility for Financial Claims:** The report is critical of the existing rigid one-year limit for cohabitation-related financial claims and proposes courts should have discretion to accept a late claim on special cause shown within a further one year period. This would be subject to a two year absolute deadline. They also recommended that provision be introduced allowing cohabitants to agree, in writing, to extend the one year time limit, to enable them to negotiate with a view to settling their claims for financial provision. Where such an agreement is entered into, the time limit for making a claim would be extended to 18 months from the date of cessation of cohabitation, but the two year absolute deadline would continue to apply. This adjustment is intended to allow time for negotiation and mediation, providing couples with the opportunity to resolve disputes without immediately resorting to legal action.

5. **Recognition of Cohabitation Agreements:** As things stand there is no special provision under which to challenge an unfair cohabitation agreement. The contract will stand unless a party can meet one of the common law grounds of challenge (error, fear, force of fraud). There is a recommendation that a new provision should be introduced, allowing the court to vary or set aside an agreement (or any term of an agreement) between cohabitants if the agreement was not fair and reasonable at the time it was entered into. This would bring cohabitation agreements in line with Prenuptial and Postnuptial Agreements.

The Future

While the Scottish Government has not yet implemented these reforms, the report and draft Bill lay a foundation for significant changes in cohabitation law. It would bring it closer to the existing provision for financial provision on divorce, without mirroring it. If (or when) these changes proceed, most agree they would mark an important improvement in how Scottish law recognises and supports non-marital relationships.

PROTECTING YOURSELF AGAINST THE IMPACT OF DIVORCE

Authored by: Holly Hill (Associate Director) - John Lamb Hill Oldridge

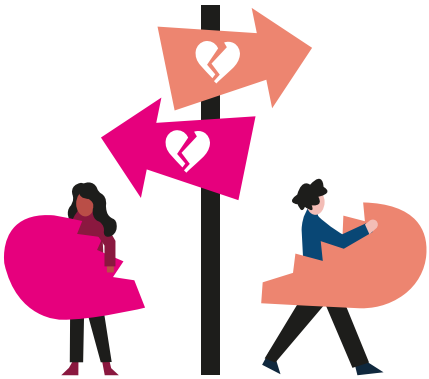
UK divorce statistics reveal that approximately 42% of marriages are currently ending in divorce. The Divorce, Dissolution and Separation Act 2020 allows couples to legally end their relationship without attributing any blame, thus hopefully reducing the likelihood of conflict. However, divorce proceedings continue to remain expensive, time consuming and complicated, and amongst these complications are some life insurance issues which ought to be considered.

Aspects To Consider…

Joint-Life Policies For Iht

Where a divorcing couple have an existing joint-life policy, unless there is a 'separation clause' or a 'carve-out' option included, the policy cannot be divided. As a result any pay-out is unlikely to match the timing of when funds are required to pay a tax liability. Post separation, inheritance tax will arise on each death individually (depending on the capital eventually held by each party) and insurance covers need to be restructured to reflect this. Any existing joint-life policies will be rendered unfit for purpose and will need re-broking into two separate single-life policies.

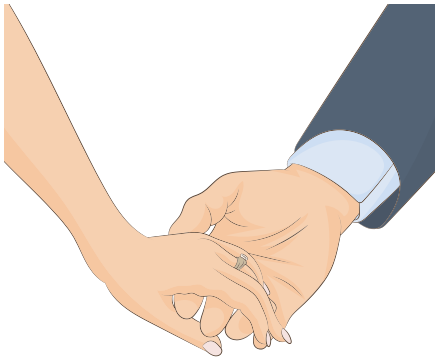
When advising married clients in the future, advisers should be seeking out polices that have this separation flexibility built in, allowing divorcees to restructure their cover without the need for further medical underwriting.



New Spouses

If there is a likelihood of a re-marriage in the near future, clients may want to consider taking out a 2-3 year term assurance on a single life basis, before replacing the cover with a new joint-life policy. Some clients may wish to take the opportunity, while unmarried, to secure single-life cover for the longer

term. This will protect them from any future changes to their circumstances, although the downside is that single life cover is typically more expensive than joint-life cover.



Maintenance Payments

Typically, one party will be ordered to pay maintenance payments to the other following divorce. This may just continue until the children reach 18, or could continue throughout life. Maintenance for children may also cover school fees. In the event of the death of the ordered party, the maintenance will cease and although there may be a claim against the deceased's estate this is likely to take a significant amount of time to finalise. In the meantime the surviving ex-partner and children are likely to have significant loss of liquidity.

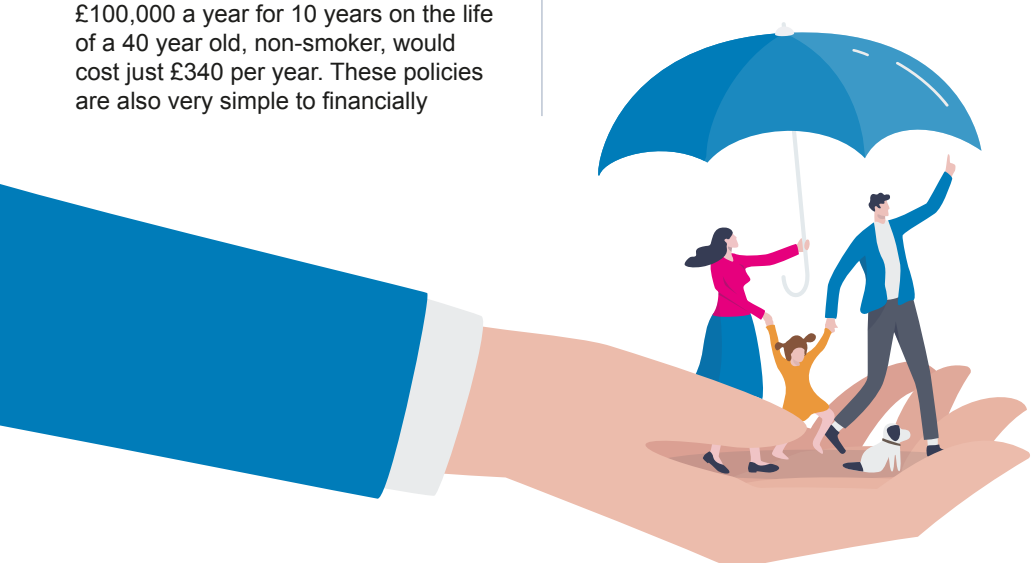
It is possible to structure a life insurance policy to match future maintenance payments in a very cost-effective way. For example, maintenance payments of £100,000 a year for 10 years on the life of a 40 year old, non-smoker, would cost just £340 per year. These policies are also very simple to financially underwrite using the court order alone, although a medical would still be required.

These policies can be structured such that the dependant spouse owns the policy at outset on a 'life of another basis' giving them oversight and control of the policy to ensure that it remains in force.

Protecting New Families

Post divorce everyone needs to review their protection needs. Often capital has been seriously depleted and there can be significant debt. Clients need to consider their family and debt protection requirements and, if cash flow is an issue, it may be worth putting up a very inexpensive protection umbrella which will last for five years.

In addition, both parties need to consider if they should be buying a critical illness contract, which provides a lump sum on diagnosis of certain illnesses (predominantly for heart and cancer related issues). They should also be reviewing their income protection cover to ensure that, should they be unable to work, their income will be replaced and the maintenance payments will continue.



WHEN BAD BEHAVIOUR ISN'T RELEVANT BUT IS STILL IMPORTANT

Authored by: Clare Pilsworth (Partner) - Tees Law

The landscape of family law has shifted dramatically since the introduction of no-fault divorce.[1] It seems strange to remember that, just a few years ago, we family lawyers spent time taking instructions from clients about why it was unreasonable for them to continue living with their spouses or about alleged adultery, so that we could prepare their petitions.

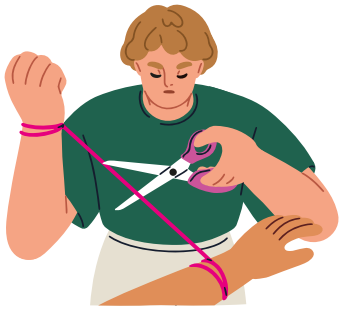
Usually, we were able to persuade our clients that anodyne particulars of unreasonable behaviour would be best, to pave the way for resolving finances and children's arrangements. We would explain that behaviour would not be relevant to the divorce; but the need to 'find fault' created an opportunity to get to know our clients' experiences and what had brought them to take our advice.

Over the same period, financial remedy law has restricted further the extent to which behaviour plays a part in financial remedy proceedings.

We advise that:

- In deciding how to exercise its powers to divide assets on divorce, the court is to have regard, along with the other section 25 factors, to 'the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it'.[2]
- Per Mostyn J, in OG v AG, conduct may be reflected in the financial award where there has been 'gross and obvious personal misconduct meted out by one party'… 'which can extend, obviously, to economic misconduct... provided the high standard of "inequitable to disregard" is met...'.[3]
- But cases in which conduct of this nature have been successfully pleaded are rare.

1 Divorce, Dissolution and Separation Act 2020
2 Section 25(2)(g) Matrimonial Causes Act 1973
3 OG v AG [2020] EWFC 52, paragraphs 34-35



Section 4.4 of Form E, initially supports this advice and says, 'Bad behaviour or conduct… will only be taken into account in very exceptional circumstances…'. But then goes on: 'If you feel it should be taken into account in your case, identify the nature of the behaviour or conduct below'. It's understandable that faced with this question, clients have been reluctant to stay silent about personal misconduct – after all, they've been told that the court wants to achieve fairness and how can it be fair for bad behaviour to be ignored, especially when it is serious in nature?

As Lead Judge of the Financial Remedies Court, Mr Justice Peel has sought to clarify the position over the past 12 months. His guidance in Tsvetkov v Khayrova last year confirms the approach the courts now expect when dealing with conduct.[4]

References to bad behaviour, except where it reaches the exceptionally high bar, are strongly discouraged. Peel J notes, 'an increasing tendency for parties to fill in Box 4.4 (the conduct box) of their Form E by either (i) reserving their position on conduct or (ii) recounting a litany of prejudicial comments which do not remotely approach the requisite threshold'. Unequivocally, he confirms that 'These practices are to be strongly deprecated and should be abandoned.'

In Tsvetkov, Peel J described the two-stage test for any party asserting conduct[5]. The second stage is the court's consideration of how the conduct and financial consequences should impact the outcome of the proceedings, alongside the other s25 factors. But first, stage one requires the person asserting conduct to prove the facts they rely upon; and, if those established facts meet the 'high or exceptional' conduct threshold, that 'there is an identifiable (even if not always easily measurable) negative financial impact upon the parties which has been generated by the alleged wrongdoing. A causative link between act/omission and financial loss is required …'. Peel J interpreted the causative link as requiring a direct impact on resources (including for example, earning capacity) or something which has a financial impact on one of the other section 25 factors (for example, increased needs).

While financial remedy case law has seen the relevance of personal conduct confined, the Domestic Abuse Act 2021 and related case law has seen our appreciation of the pervading relevance of personal conduct in the form of domestic abuse in family breakdown broaden.

Peel J recently addressed, in N v J, the 'difficult and sensitive topic of the interplay between domestic abuse and conduct in the context of financial remedy proceedings'.[6] He confirmed that increased awareness of the 'pernicious effects' of domestic abuse did not lower the exceptionally high bar of 'gross and obvious' and while, theoretically, conduct could be taken into account absent a financial impact, such cases will be 'vanishingly rare'. Further, alleged conduct must be material to the outcome and investigation into conduct must be proportionate.

We know that domestic abuse can be wide-ranging – encompassing physical, sexual, financial, emotional and/or psychological abuse (as in the case of N v J). Abuse may involve a course of conduct which evades the specificity the Financial Remedy Court requires. Reconciling the different approaches is difficult. This month, a Resolution report[7] revealed that approximately 80% of family justice professionals believe domestic abuse and specifically economic abuse is not sufficiently considered in financial remedy proceedings, and more work needs to be done to address what it believes is a prevalence of unfair financial outcomes for victim-survivors of domestic abuse resulting from courts' approach to s25(2)(g) MCA 1973.

The financial remedy court is not the place for a party to seek validation and justification of their sense of ill-treatment upon divorce.[8] Unproven allegations of bad behaviour that is not of a serious nature often serve only to heighten emotions, delay resolution and increase costs, and litigating past trauma can be harmful. Greater rigour in this area of law is helpful in managing clients' expectations early and focussing on resolution.

However, as family lawyers, we would be mistaken in not continuing to work with clients keeping in mind that bad behaviour – whether we consider it serious and whether it clears the statutory or jurisprudential bars or falls far short – is part of the client's lived experience, colouring how they give instructions; how we approach communication and advice on settlement; how we assess appropriate forms of non-court dispute resolution for them; and how we support them through a court process. Taking time to listen to a client's story, even if it at first might not seem 'relevant' will enable us to better represent them and help them to a resolution.

4 Dmitry Tsvetkov v Elsina Khayrova [2023] EWFC 130, paragraph 45.
5 Paragraphs 43-46, Dmitry Tsvetkov v Elsina Khayrova (supra)
6 N v J [2024] EWFC 184, paragraph 1.
7 Domestic abuse in financial remedy proceedings, October 2024
8 N v J (supra), paragraph 38 iv)

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INSIGHTS INTO THE MATRIMONIALISATION OF ASSETS

Authored by: Lauren Deane (Partner) and Charlotte Jeanroy (Associate) - Hughes Fowler Carruthers

The concept of matrimonialisation of assets is here to stay following the Court of Appeal's decision in Standish, albeit in narrow form.[1] The term is widely considered to be clunky, but the principle has been reaffirmed as a tool in the judicial arsenal in the pursuit of achieving fairness.

The Court of Appeal's unanimous decision preserves the starting point that the sharing principle is applied to matrimonial assets and not to non-matrimonial assets. It retains the concept of 'matrimonialised' assets – those which were once non-matrimonial (because, for example, they were acquired prior to the marriage or were introduced by inheritance or gift) but have "become part of the economic life of [the] marriage".[2] Standish is the latest authority on how to approach these assets: the sharing principle applies, though their origin may warrant an unequal division. The court's objective is to arrive at a fair outcome – and it is awarded a broad discretion to achieve this. However, Moylan LJ's judgment states that because matrimonialisation is "a derogation from the principle that sharing applies to matrimonial property and does not apply to non-matrimonial property, it should be applied narrowly".[3]

What, then, are the considerations for practitioners encountering arguments in respect of the matrimonialisation of assets in light of the decision?

Determine The Source

Standish reaffirms that the origin of an asset carries determinative weight rather than the current legal and beneficial ownership.

Particularly where the dispute concerns money accumulated before the marriage, evidencing the origin of an asset may involve accessing documentary records dating back many years, possibly before electronic recording keeping. Frontloading the evidence gathering and making an early assessment as to which assets might be considered matrimonial or not is crucial.

The merits of pursuing arguments to have these excluded from any financial settlement need to be assessed – if the property (or a portion of it) claimed to be non-matrimonial pales in significance to the parties' overall asset base, it may be that a court will undertake a "broad [read: light touch] evidential assessment" and the sharing principle may be applied.[4] Proportionality, as ever, should be at the front of your mind. However, in (typically big money) cases where the available assets are more than sufficient to meet each party's needs, identifying non-matrimonial assets could move the dial from a 50:50 overall division as far as 40:60 or, as Standish shows, well beyond. If the

1 Standish v Standish [2024] EWCA Civ 567 ("Standish")
2 Mostyn J, JL v SL (No. 2) ECHC 555 (Fam) [2015] at [19]
3 Moylan LJ, Standish at [162]
4 Moylan LJ, Standish at [135]

scope of matrimonialisation is narrow, the potential financial consequences of evidencing a non-matrimonial contribution could be significant and well worth the effort of digging through old files.

Assess Whether The Nature Of The Asset Has Changed

"The importance of the source of the assets may diminish over time", so goes the phrase.[5] The court will determine whether the status of property derived from non-matrimonial origin has changed as a result of its treatment during the marriage.

At the centre of Standish lay two key financial events: the transfer of investment funds worth some £80 million from the husband's sole name to the wife's sole name ("the 2017 Assets"), and the issue of shares in the wife's name in Ardenside Angus (the business operating from the large Australian farm the husband had purchased prior to his relationship with the wife) ("the shares"). In both cases, the purpose of the transfers had been tax planning. So, did those transfers matrimonialise the assets? It is on this point that the Court of Appeal parted company with Moor J at first instance in respect of the 2017 Assets and decided it did not – a transfer towards the end of the marriage made for tax planning purposes did not alter the nature of the assets and importance of their source. Moylan LJ decided that to find otherwise would prioritise title over source.

The facts in this case were stark – both in terms of the size of the assets that had been transferred, the timing of the transfers and the backdrop that future tax planning transfers into a trust had been intended but never happened. It remains to be seen how far reaching this decision will be in narrowing the scope of matrimonialisation of assets. What if a property is transferred into joint names for tax planning reasons during the marriage. Before this judgment, it is not difficult to see how it would be argued that this step matrimonialised the asset, even if tax planning played a part. More than ever, a wide assessment of the reasons for the transfer and the extent of the integration or 'mingling' of the asset into the financial landscape of the marriage may be needed.

In respect of the shares, the Court of Appeal upheld Moor J's assessment that the shares had become matrimonialised in transferring them into the wife's sole name. However, this conclusion was reached on the basis that there was insufficient evidence to determine that this conclusion of Moor J was wrong.

The practical management and intention of the parties, and evidence of this, is crucial. In the case of WX v HX, despite the husband's management of property brought into the marriage by the wife, the court found that the nature in which they had been managed by the parties allowed them to retain their non-matrimonial status.[6] The assets had remained separate to matrimonial assets and had never been applied to meet the needs of the family. Furthermore, evidence of intention was paramount. The court found that there had never been an understanding that the husband would acquire an interest as a result of his assistance.

Reaching A 'Fair Outcome'

In the case of the 2017 Assets in Standish, although the husband accepted that he had been permanently excluded from the benefit of the assets, the Court of Appeal considered that the vast majority (at least 75%) was pre-marital in origin and this had not changed upon transfer. The balance was divided, with the wife receiving £25 million – a reduction of £20 million from the original decision.

This approach reaffirms the court's broad discretion under section 25 MCA 1973 to achieve a fair outcome. The Court of Appeal considered that because the court at first instance did not reflect the extent of the non-matrimonial source of the assets in the division, it fell foul of this aim.

Critics of the approach may question whether this decision has gone too far: should the husband in Standish have been saved from the "monumental folly" of transferring the 2017 Assets, as he accepted, to a point beyond his reach? But then again, is it not right that, where there are ample resources easily in surplus to the parties' needs, the pre-marital origin should be reflected in the award? It upholds the White principles of fairness and judicial discretion to assess cases individually and allows for a departure from equal sharing where there is good reason to the contrary. Although seminal, it is arguable that Standish is an affirmation of the preceding case law. It keeps the door open for arguments on the facts of the case, while offering overarching principles to guide the determination of a fair outcome in all the circumstances.

5 Wilson LJ, K v L [2012] 1 WLR 206 at [18]

6 WX v HX [2021] EWHC 241


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HEDGE FUNDS VERSUS PRIVATE EQUITY

SAME "SUPER PROFITS"?

Authored by: Emily Brand (Partner and Head of Family) and Katie Male (Senior Associate) - Boodle Hatfield

Valuing business interests in the context of divorce proceedings can be notoriously tricky and a spouse's stake in a hedge fund is no exception. Hedge funds operate on what is called a 2 and 20 principle namely that the managers will be paid a management fee of between one and two per cent of the sums invested. In addition, the hedge fund manager will receive a performance fee (usually around 20 per cent on any profit). Partners in private equity firms are also paid to manage a "fund" which is a pool of investments for which they will be paid a management fee and if, on the realisation of those assets, they achieve a return of more than 8% or whatever has been agreed, the partners will be paid "Carried Interest", which is in effect a "super profit" reflective of the success of the fund.

Most hedge fund and private equity managers invest in their own funds on the basis that "skin in the game" conveys confidence to external investors. In private equity, this is referred to as "Co-Invest".

In divorce cases involving a hedge fund manager, you need therefore to consider:

1. The value of any investment that a spouse has made into the fund itself;
2. The intrinsic value of their stake in the hedge fund business; and
3. The income they receive from the fund, deriving as explained above from management and performance fees all of which are usually paid out through a LLP vehicle. The structure is comparable to that of an equity partner in a law firm – drawings are made monthly (on the basis of anticipated profits) and then, depending on the firm's profitability at year end a large "top up" payment reflecting the partner's share in the profits is made once the accounts for the LLP in the relevant year have been finalised. In a successful hedge fund these payments can run into millions. Due to the LLP structure the profits have to be distributed each year.

But how are each of these potential pots of value treated by the divorce courts? Taking each in turn:

1. In a straightforward 50/50 case, the non-fund manager spouse would have a prima facie claim to 50% of the value of any family investment in the fund (albeit if they can be adequately compensated from assets outside the fund and a withdrawal of the fund manager's investment can be avoided, that may be preferable);
2. The question of whether a spouse's stake in the hedge fund business itself has any intrinsic value over and above its net assets in which the other spouse can expect to share has been the topic of heated debate, particularly where there are "key man" provisions at play. Placing a reliable value on such an interest presents a further challenge (see further below).
3. If and to the extent that, following a division of the available capital, one spouse is not able to meet their income needs going forward, they would have a claim for spousal maintenance. However, there is no entitlement to share post-separation income.

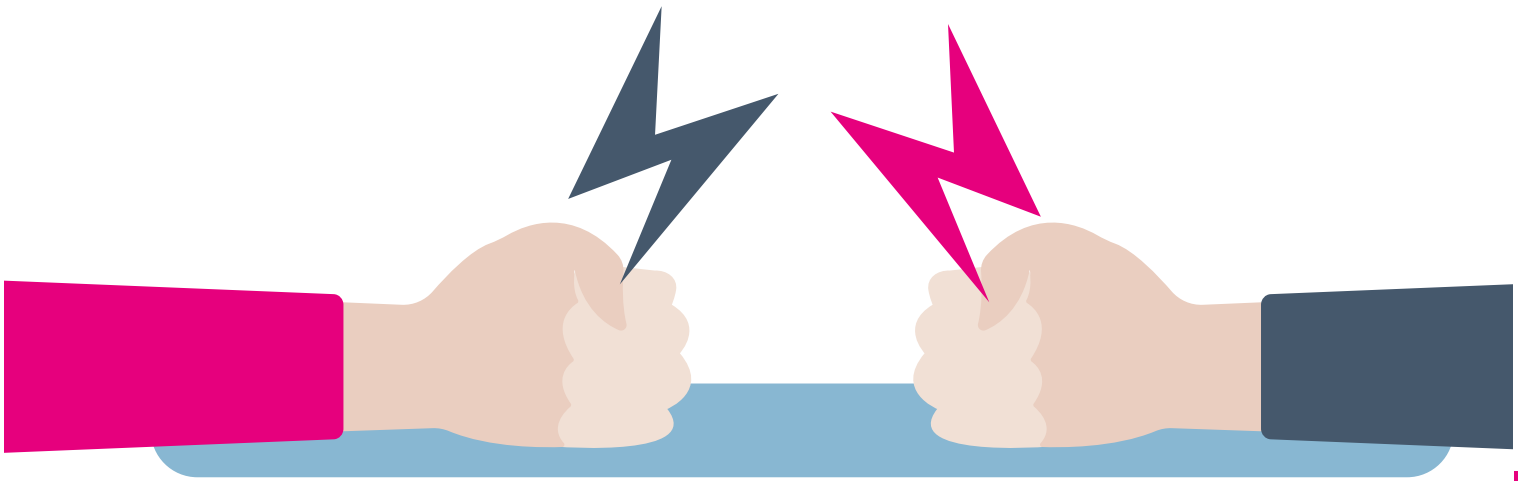
We acted for the wife in the case reported as CG v DL [2023] EWFC 82. The husband was the founder and 62.5% owner of a hedge fund set up during the marriage. Two experts sought to value the hedge fund business. They both agreed that it was unlikely any third party would be willing to purchase the business at the date of the trial due to the prevailing economic climate and that it was difficult to ascribe any value to it – although it was clear that it was very valuable to the husband given the high levels of income it had generated previously. The husband argued that there was no value and that any profits he received after the marriage should be considered purely "income" to which, post the Court of Appeal decision in the case of Waggott, the wife was not entitled.

Compare this argument to the potential outcomes in private equity cases pursuant to A v M [2021] EWFC 89 in which it was determined that the non-owning spouse was entitled to share in the Co-Invest contributed during the marriage as well as the marital element of Carried Interest (i.e. the proportion which was generated from work undertaken during the period from the date of the marriage to the date of trial, calculated on a straight-line basis).. The Carry is paid out regardless of how many years after the marriage the monies arrive and, as most fund managers will explain, the work to realise Carried Interest cannot be determined on a straight-line basis.

In our case, although it was agreed that the non-fund manager spouse was entitled to 50% of the investment in the hedge fund (comparable to the idea of "Co-Invest"), the case law was unclear with respect to providing for any entitlement to post marriage income from the hedge fund even though an element of the profits from a hedge fund are arguably comparable to Carry.

Our client sought to challenge that inequity and was successful.

It was determined that future value (generated in the form of remuneration by way of a profit share distribution) was in part the product of marital endeavour and it would therefore be unfair for the husband solely to retain it without any compensation for the wife. As it was impossible to ascribe a reliable value to the husband's interest, the judge decided that the wife should share in the husband's future profits to the tune of 17.5% (as well as any capital realisation received by him) for a further 4 years. This was not deemed to be a sharing of post-separation income but rather a mechanism for the wife to receive her fair share of the value in the husband's interest in the hedge fund created during the marriage.



FROM SEPARATE TO SHARED

UNDERSTANDING THE 'MATRIMONIALISATION' OF PRE-MARITAL AND NON-MARITAL ASSETS IN DIVORCE

Authored by: Tom Quinn (Partner) and Francesca Skakel (Associate) - Birketts

What's Mine Is Yours…?

In 2001, the House of Lords in White v White ratified the cliché 'what's mine is yours' by setting down the precedent in a marriage that there should be a strong presumption in favour of an equal split of the divorcing parties' assets (a 'yardstick of equality'). This is often referred to as 'the sharing principle'. At first, this was to be considered 'a final check' of fairness – does the settlement broadly leave the parties with an equal split? However, subsequent case law has encouraged practitioners and judges to see this as an appropriate starting point: 'property should be shared in equal proportions unless there is a good reason to depart from such proportions' (Charman v Charman (2007)).

The Court has wide discretionary powers to consider whether a departure from equality is 'fair' and, in 2006, the House of Lords went further in Miller; McFarlane to identify three (very broad) strands to fairness:

1. **Equal Sharing (i.e. White v White).**
2. **Meeting Needs; and**
3. **Compensating for relationship generated disadvantage.**

In part because of the foregoing, England & Wales have earned an international reputation as being very favourable to the economically weaker party on divorce and, often, with a departure from equality in favour of that party: There is great scope to infringe on assets held by the economically stronger party.

However, the means by which parties can challenge these presumptions has broadened since the millennium; in particular, there has been a significant influx of case law on the treatment of pre-matrimonial wealth (i.e. that wealth which has not been built up during the marriage) and other non-matrimonial wealth (e.g. wealth that has been generated outside of the matrimonial endeavours), and the extent to which those assets can be shared as part of financial settlement.

Crucially, the recent Court of Appeal decision in Standish v Standish (2024) has enhanced the practitioner's toolkit by providing specific guidance on treatment of those assets used during the marriage but that can be largely or wholly 'sourced' to pre- or non-matrimonial wealth and – importantly - regardless of whose name is on the legal title. This process has historically been termed 'matrimonialisation', and this category of asset has now been more formally recognised in Standish.

The upshot is that the pot available for division is progressively shrinking as the Courts are invited to consider more nuances regarding the history of wealth generation and financial accounting during the marriage.

What's In A Name?

Broadly, parties can draw on three main categories of assets in a divorce settlement: 'matrimonial assets', 'non-matrimonial assets', and 'matrimonialised assets'.

Historically, there was debate over whether such broad asset classifications were appropriate, especially in long marriages. However, recent guidance supports this approach, emphasising that the nature of the asset should ultimately guide whether the Court applies the sharing principle (equal division) or not.

Matrimonial And Non-Matrimonial Property

Matrimonial property is that property acquired/generated during a marriage. A simple example of this would be the family home, purchased from savings built during the parties' relationship together. Matrimonial property is to be shared equally as a starting point, and firmly and squarely falls within the White v White presumptions.

Non-Matrimonial Property

Non-matrimonial property can include inherited/gifted assets, pre-matrimonial wealth, wealth generated post-separation.

In Miller; McFarlane the Court encouraged a more 'broad brush' approach to treatment of non-matrimonial property in their awards i.e. the longer a marriage, the less relevant someone's contributions may become and the more these assets should be considered as within the pot available for sharing.

However, recent case law has sharpened this principle and the decision in Standish in respect of "matrimonialisation" is of a piece with that principle and confirmed that these 'non-matrimonial' assets should not (ordinarily) be shared at all as part of a divorce settlement and unless needs otherwise justify.

Impact Of Intermingling: 'Matrimonialisation'

Non-matrimonial assets can become matrimonialised, meaning that assets, originally non-matrimonial in nature, can be shared (intermingled) or applied and used for matrimonial purposes during the marriage.

In the case of Standish itself, some 5 years prior to the parties' separation, the Husband transferred c.£80m in invested assets to his Wife. The reason for such the transfer was for inheritance tax planning and, once a period of time had elapsed, the assets would be transferred from the Wife's name into discretionary trusts in Jersey. However, the trusts were never established, nor was the evidentiary question of whether the husband would have – hypothetically – been a beneficiary of that trust. Therefore, the judge concluded that these assets were given entirely 'without reservation of benefit' to the Wife.

As they were now in her name, the Wife claimed that these assets were matrimonial and therefore contended that these assets be subject to the sharing principle (i.e. part of the pot available for equal distribution). However, the crux of the issue lay with the fact that a considerable proportion of these assets were a product of Mr Standish's pre-matrimonial endeavours; in other words, they were non-matrimonial assets. In grappling with the issue, the Court confirmed that even once an asset is placed either in joint names or even the sole name of the other spouse (as was the case here), (i) the source of the asset is "the critical factor"; and (ii) it does not necessarily follow that it will be subject to sharing, far from it, in fact.

In determining whether or not certain property/assets have become "matrimonialised" and, thus, subject to sharing the Court noted that concept must be 'applied narrowly' and with reference to the following factors (at [163-165]):

(a) The percentage of the parties' assets (or of an asset), which were or which might be said to comprise or reflect the product of non-marital endeavour, is not sufficiently significant to justify an evidential investigation and/or an other than equal division of the wealth' - In this example, sharing would apply in the conventional form.

(b) The extent to which and the manner in which non-matrimonial property has been mixed with matrimonial property mean that, in fairness, it should be included within the sharing principle' – In this example, a more nuanced approach is required. Does fairness justify the asset being included within the sharing principle?

(c) Non-marital property has been used in the purchase of the former matrimonial home, an asset which typically stands in a category of its own' – The matrimonial home should be shared equally, but this is not always the case (noting the case of FB v PS (2015) where the Husband had made significant unmatched contributions which justified a departure from equality to reflect these unmatched contributions)

Whether or not this will lead to greater clarity for the courts, practitioners and parties to matrimonial litigation – as the Courts in Standish hoped - remains to be seen.

Final Bite of the Cherry?

Whilst the above categories help with a starting point on how to value the initial pot available for distribution, the Court retains jurisdiction to delve into those non-matrimonial assets or award a greater proportion of matrimonialised assets as part of settlement if necessary to meet the parties' needs without undue hardship.

Protect Your Wealth

To best protect pre-matrimonial or non-matrimonial wealth, parties should consider a nuptial agreement. These can be entered into during or before a marriage. While not legally binding, Courts will place significant weight on these agreements, respecting the parties' autonomy in their asset division — provided the right safeguards are in place.

AN OFFSHORE PERSPECTIVE

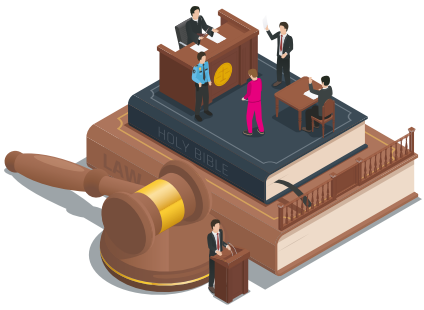
FREEZING INJUNCTIONS IN MATRIMONIAL CASES

Authored by: Keith Robinson (Partner), Marcus Pallot (Partner), Elaine Gray (Partner), Tim Baildam (Counsel), and Victoria Cure (Associate) - Carey Olsen

Divorce and financial remedy proceedings are frequently characterised by a lack of trust between parties. Warring spouses may try various tactics to put assets beyond their spouse's reach during proceedings or following judgment. This can include using existing offshore structures or accounts or setting these up specifically to move assets offshore.

It is important to be aware that steps can be taken to stop illegitimate movement of assets by parties, including from offshore jurisdictions.

The offshore jurisdictions we work in – Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey and Jersey (which we will refer to in this article as the "Offshore Jurisdictions") – are self-governing, with their own governments, legal systems and laws. These offshore jurisdictions are highly regulated and guided by the principle of comity. Where there is concern that a party is improperly seeking to dispose of assets or put them beyond the reach of the parties' home courts via the use of an offshore structure or account, it is prudent to seek early advice in the relevant jurisdiction to understand what action can be taken to secure the relevant assets. Complex financial remedy proceedings can be lengthy and there can be significant value in ensuring that assets are preserved to meet a spouse's claims.



The purpose of this article is to give any onshore practitioners who are not already familiar with the procedure associated with seeking a freezing order in the Offshore Jurisdictions a practical insight into the approach taken by the courts to the granting of freezing injunctions in matrimonial cases.

When Will A Freezing Injunction Be Granted?

Freezing orders can be granted in the Offshore Jurisdictions in relation to proceedings that have (or will be) commenced in the respective jurisdiction, or in support of proceedings in foreign jurisdictions. Freezing injunctions can have worldwide effect and prohibit the defendant from dealing with their assets in any jurisdiction. An application for a freezing order may be made before or at any stage after the commencement of proceedings (including after judgment).

The applicable test taken in the Offshore Jurisdictions mirrors that in England and Wales. The applicant must have a good arguable case in the substantive proceedings in support of which the order is sought, and it must be just and convenient to grant the injunction. It must be shown that a freezing injunction is needed to prevent asset dissipation, and the risk that assets will be dissipated must involve more than merely the fact that the defendant resides outside of the jurisdiction. The greater the delay in bringing the application, the more

difficult it will be to satisfy the Court that there is a risk of dissipation. It is therefore important that advice is sought in the relevant foreign jurisdiction as quickly as possible.

Practical Issues To Consider

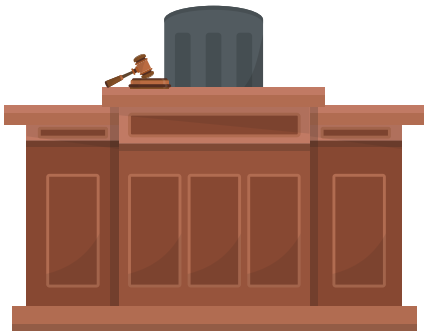
Where a freezing order is sought in respect of assets or monies held by the defendant in an offshore financial institution (such as a bank or trust company), it may be prudent to cite the relevant institution in the application. It is also usual to seek a disclosure order from the institution as part of the application. The Offshore Jurisdictions are international financial centres and financial institutions in these jurisdictions are well-versed in being cited in such applications. In our experience financial institutions understand that they are innocent parties caught up inadvertently in the proceedings and are bound to comply with the relevant court order. Once the financial institution has been served with an injunction, it will be bound by its terms and will be in contempt of court should it deal with the defendant's assets, or allow the defendant to deal with the assets, in a way that is inconsistent to the terms of the injunction. A bank's contractual duty to its client is overridden by the injunction.

Complexities can also arise if the freezing injunction concerns assets held through a trust, in which case it is necessary to consider which legal entities or individuals should be the respondents to the application.

A freezing injunction will ordinarily not prevent the defendant from using the relevant monies to pay their reasonable living or ordinary business expenses and legal fees, unless they have alternative funds available upon which to draw for this purpose.

The applicant must give an undertaking in damages as a condition of the injunction, whereby the applicant undertakes to pay damages to the defendant if the injunction is found to have been wrongly granted. This is often referred to as the 'price' of obtaining a freezing injunction and, given the large sums commonly involved, this undertaking can require fortification by the provision of some form of security, such as a payment into court or a bank guarantee.

Even if all of these requirements are satisfied, the court has a discretion whether or not to grant a freezing injunction and will only make the order if it considers it just and convenient to do so.

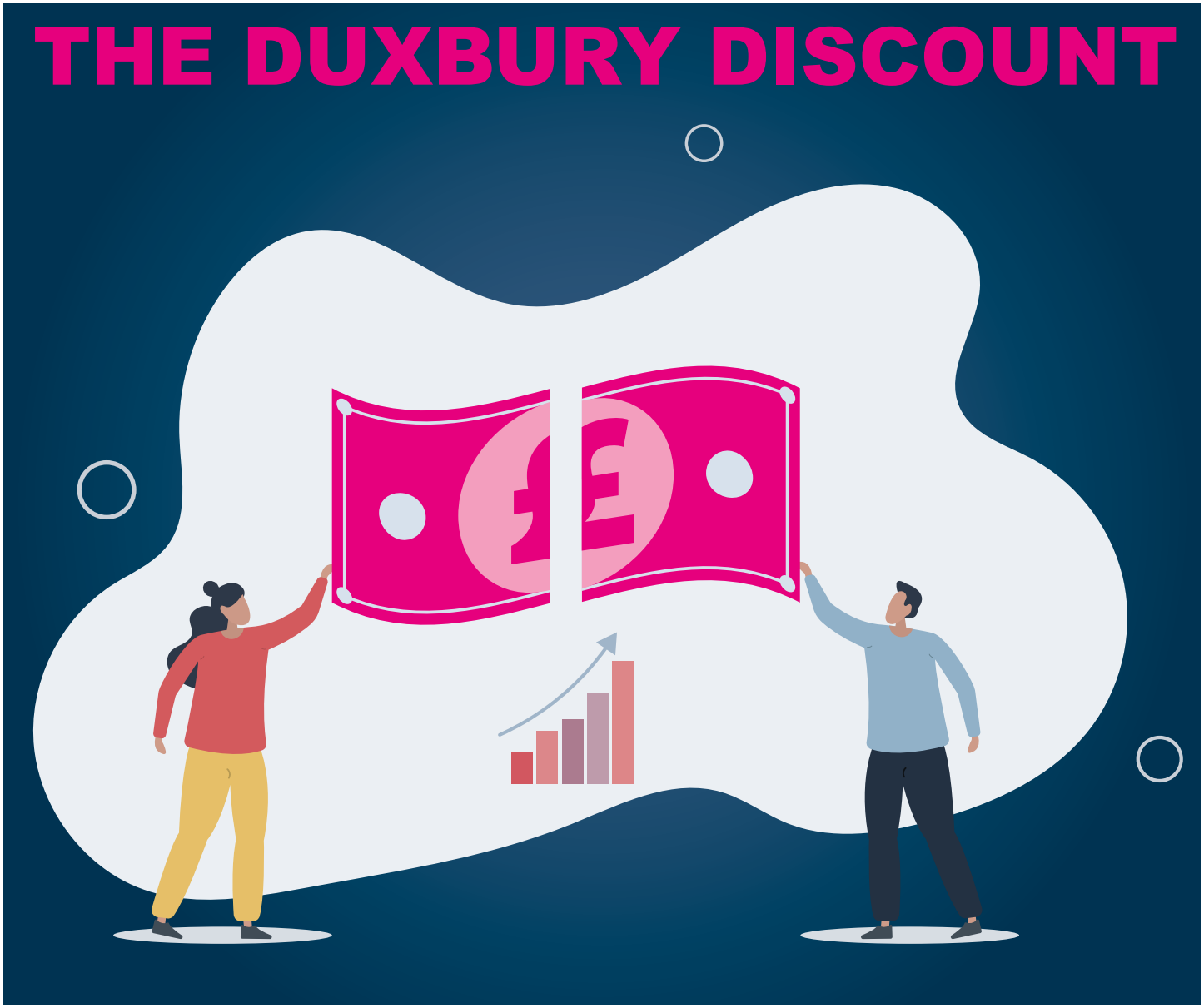


Due to the fear that, if they have notice of the application, the defendant will take steps to remove assets from the jurisdiction and put them beyond the reach of the court, it is usual for applications to be made on an ex parte without notice basis, to avoid any risk of the defendant being tipped off before the injunction has been granted. The applicant must make full and frank disclosure of all facts and matters which it is material for the judge to know.

If the injunction is granted, the defendant will have the opportunity to seek to overturn the injunction at a return date hearing, typically held a few weeks after the ex parte hearing. Common grounds for seeking to overturn the injunction include the defendant asserting that there is no risk of dissipation of the relevant assets, attacking the applicant for failing to disclose all material facts to the Court or questioning the applicant's ability to meet the cross-undertaking in damages.

Applications for freezing orders require careful and strategic consideration, whilst simultaneously moving forward with the requisite urgency to ensure that assets are not dissipated in the meantime. The importance of seeking sensible, expert legal advice as soon as possible cannot be overstated.

THE DUXBURY DISCOUNT



Authored by: Julian Whight (Financial Planner) - Evelyn Partners

The Duxbury Discount, if it exists, is the difference between a reasonable sum of money that might produce a given level of income for a specified period, for the recipient of a Duxbury payment, and the figures in the current Duxbury tables.

For example, if a cash lump sum of £200,000 might reasonably be expected to cover expenditure of £20,000 p.a. for 15 years, and the Duxbury tables figure is £150,000, the Duxbury Discount would be £50,000, or 25%.

What Is Reasonable?

A reasonable basis might assume the recipient accepts a degree of investment risk necessary to achieve a real return above inflation, with which they may not be comfortable. It should not unfairly penalise the payer of the Duxbury lump sum due to an excessive aversion to risk of an individual recipient, nor should it liberate the recipient from all financial responsibility and risk.

It is not a guaranteed income for life, akin to an annuity, nor should it enable the recipient to confidently spend at the assumed rate without the risk of running out of money.

It is reasonable to assume the recipient dies based on average life expectancy; even though this results in a 50% chance of outliving the capital in whole life cases.

It should be an attempt to identify a net present value of a periodical payments award that is fair to both the payer and the payee.

The core assumptions should be based on a reasonably achievable investment return.

The above points appear to be agreed by the Duxbury committee and many of its critics.

However, the critics of Duxbury assert that the recipient should not be expected to accept a degree of investment risk, to achieve the target income for the term, which is so far above their natural tolerance that it runs a high risk of severe adverse financial consequences, and disagree with the Duxbury committee's view of a reasonably achievable investment return.

Whereas The Report of the Duxbury Working Party (provisional), September 2024 'the Duxbury Report'. asserts that the critics place too much emphasis on the risk to the recipient, and that the committee has focused more on fairness between the parties, given the uncertain nature of maintenance payments.

The Range Of Opinion

The recent provisional Duxbury report concludes, 'We consider that the overall weight of the data supports the continued reasonableness of assumed average real returns of at least the 3.75% p.a. currently assumed, and arguably somewhat higher returns.'

The FCA, the financial services regulator, specifies (for non-pension projections) real rates of return must be 1.5% as a lower rate, 2.5% an intermediate rate, and 3.5% a higher rate, above inflation, before all charges, expenses and deductions.

The only available details on the range of expert opinion on Duxbury assumptions we have found is in the December 2015 Family Law article "Apples or pears? Pension offsetting on divorce". The related research sought views from "14 leading pension experts" made up of nine actuaries and five financial planners. The article primarily deals with pension offsetting but page 9 includes a small section on Duxbury:

"The group had strong views about Duxbury in terms of its ability to produce a whole life income stream, it was referred to as not fit for purpose, with experts being 'horrified' by the court's continuing adherence to it'. The group appeared broadly in agreement with the following: For assets not held in a pension a real rate of return of 1.5% to 2% (i.e. after inflation) was realistic".

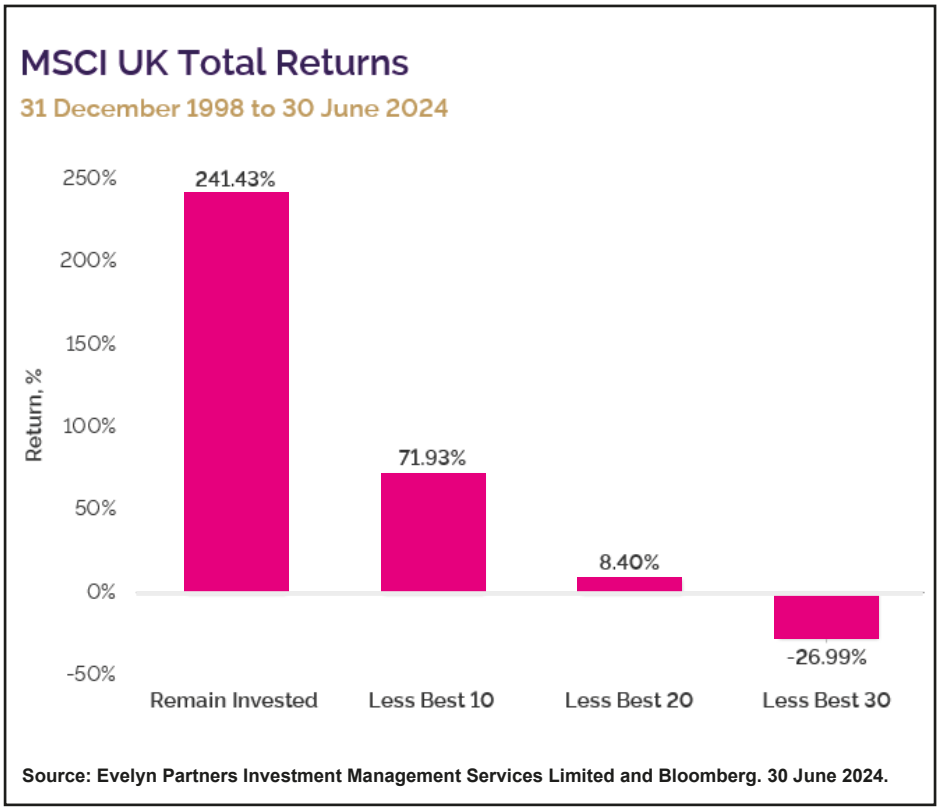
The Importance Of Selecting An Appropriate Investment Strategy And Remaining Invested

One fundamental aspect of a successful investment strategy is for portfolio volatility to not exceed the investor's ability to withstand investment risk without undue anxiety.

In broad terms, the higher the equity content of a portfolio, the higher the potential for long term investment returns, but the higher the volatility.

Typically, anxiety heightens at times of market volatility and the likelihood of cashing out increases. Reducing risk or switching to cash, when markets fall, and missing the market recovery, can have a catastrophic financial impact. It is impossible to time the markets when re-investing, so it is fundamental not to take excessive risk.

The chart below shows the total return from the MSCI UK since 1998, firstly based on buying and holding the index, reinvesting dividends and, subsequently, showing the impact of missing out on the best 10, 20 and 30 days. This highlights how much of investment growth occurs during short periods and why coming out of the market temporarily when anxious, or de-risking, can cause irretrievable loss.



Source: Evelyn Partners Investment Management Services Limited and Bloomberg. 30 June 2024.

Selecting 'Fair' Investment Assumptions

One approach, utilised by many financial planners and investment managers, is to consider potential inflation adjusted target returns, for portfolios carrying different risk categories with corresponding equity allocation.

The table below is an example of inflation adjusted target returns, by investment strategy, used by Evelyn Partners.

Investment strategy	Description	Target return
1	Defensive	CPI
2	Conservative	CPI +1%
3	Cautious	CPI + 1.5%
4	Balanced	CPI + 2%
5	Growth	CPI + 2.5%
6	Adventurous	CPI + 3%
7	Maximum Growth	CPI + 4%

Managing Expectations When Selecting An Appropriate Investment Strategy

To reduce the risk of clients de-risking following market falls, missing out on market recoveries, and crystallising losses, advisers can explain how different categories of portfolios might perform in different market cycles. This helps prepare clients for future periods of volatility which are inevitable when investing.

The 'maximum drawdowns' shown in the table below represent the largest peak to trough falls in investment portfolios over the last twenty years. This is based on indicative asset allocations and generic investment performance, rather than any specific portfolios or products.

Investment Strategy	1	2	3	4	5	6	7
Equities %	17.5	30.0	40.0	55.0	65.0	75.0	95.0
Maximum Drawdown	-15.9	-17.23	-20.5	-25.04	-28.15	-31.23	-38.81
Long term target return	**CPI**	**CPI+1**	**CPI+15**	**CPI+2**	**CPI+25**	**CPI+3**	**CPI+4**
Best 12 months	18.6	22.7	26.2	31.4	34.9	38.5	45.8
Worst 12 months	-12.8	-14.5	-16.6	-19.4	-21.4	-23.3	-27.8
Time to recover (months)		7	10	10	10	12	12
Volatility	5.0	5.8	6.6	7.9	8.9	9.9	12.0

As one might expect, the higher the equity content (towards the right-hand side of the table), the higher the maximum drawdown, and the higher the volatility. The volatility or risk represents the average annual rise or fall in the portfolio values over the same period.

Conclusions / Questions For Consideration

In can be difficult for legal professionals to debate the reasonableness of Duxbury, because of the financial elements.

As such we have tried in this article to separate some of the financial considerations from the legal considerations.

We have also tried to clarify the position of financial experts who disagree with the Duxbury assumptions, not fully reflected in the Duxbury report.

We hope that this might be a stepping stone to making conclusions and proposals.

Is the understanding, as set out in the 'What is Reasonable?' section of this article, flawed for legal reasons and does it demonstrate a misunderstanding of the purpose of the calculation?

To what extent can any legal considerations be isolated?

If Duxbury investment assumptions are inflated, to balance out the risk of variation or cessation of maintenance payments, should the same tables be used as a means of cross-checking whether a sharing award would meet needs?

Should the recipients of Duxbury lump sums have a realistic hope of matching the forgone maintenance or is this not relevant?

Should a reasonable return be set by investment professionals, or an independent body that monitors their performance such as ARC?

If so, should the Duxbury committee set a specific percentage additional discount for the uncertainty of maintenance? Might this approach help the Duxbury committee and other legal practitioners make a more informed assessment of the fairness of Duxbury?

When selecting the assumptions for Duxbury, should consideration be given to the likelihood of the payer having built up the means to fund the payment by their willingness to take entrepreneurial risk?

THE ART OF THE AWARD

DELIVERING AN ARBITRAL AWARD IN A FINANCIAL REMEDIES CASE

Authored by: Rhys Taylor (Vice Chair of the Editorial Board & Journal Editor) - 36 Group

Like advocacy, award writing is a solitary and idiosyncratic art. No doubt others use different brush strokes. These are my tips for award writing.

A stitch in time saves nine. The tribunal does not want to be left at the end of a hearing without a clear roadmap of what is required of them. I favour case management which provides for a 'proper' advocates' statement of issues. No argument, just a thoughtfully organised and numbered list of the factual, legal and discretionary decisions I am being invited to determine. This becomes a useful cross-check both in closing submissions and in writing the award, to ensure all the issues I need to consider have been dealt with.

In a particularly knotty and document-heavy case, I may invite the advocates to list and cross-reference the relevant page number for each document which is said to be pertinent to each issue. The PD 27A requirement for 350 pages is an attempt to get the parties to think more carefully about what documents the tribunal will need to consider. A cross-referenced list of all relevant documents is a further step in encouraging the advocates to focus on the key issues. It then acts both as an invaluable index for the write up and an aide memoire of the documents which may need to be referenced in the award.

In advance of a hearing, a tribunal will have carefully considered the papers, schedules and skeleton arguments. But the pre-read is different to the advocates' preparation. It has a lighter touch. It is interested. It is curious. It will canvass the figures. But it will be open-minded. The tribunal is ready to listen and to learn. The heavy lifting for the tribunal starts once the hearing is over.

Professional life has many demands. We all know that just an afternoon away from your desk will be rewarded with an inbox which has come under sustained mortar fire. Requests, demands and enquiries big and small will await from all directions.

My practice at the end of a hearing is not immediately to re-engage with the world around me. Instead, in the solitude and calm of the post-hearing room, I like to jot down my initial thoughts. I am not attempting to write up the case or determine the outcome. But whilst everything is fresh and clear, I like to jot down key impressions, first thoughts I may have, and a list of things to do which I expect will have to be wrestled with before an award can be delivered. At that moment, the case is teeming with bits of information which I want capture and store for later on. I do not want to let them swim away.

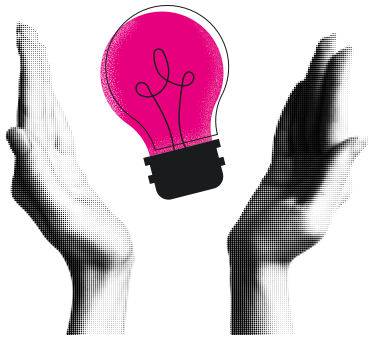
Parties to an arbitration have paid for a premium service which includes timely delivery of the award. Aside from fulfilling the expectations of the anxious parties, there is another reason to crack on with the write up. However good the note taking has been, the tribunal's grasp and feel for the case has a limited half-life. The longer time passes by, the more impressions fade and the more the mastery of the essence and detail of the case erodes and degrades. It is a truism that the more time that elapses the longer the award writing will take.

Within 24 hours of the end of an arbitration I will have perfected a skeleton plan of where I am going. I may not have determined the issues, but I will have sketched out what I know I need to do. This will be a combination of the statement of issues and a reflection upon my post-hearing first thoughts. I will know my direction of travel, although rarely anything like precise figures.

It is said that advocates glide like swans but kick furiously underneath. It is not dissimilar for the tribunal. The 10,000- or 15,000-word award does not just drop out of the tribunal's mind on to the page. There is a heavy lift to be done which is most unlikely to be done in one sitting.

It is much easier for an award writer to nibble away at their task in bite size chunks. I tend to write the award broadly in narrative order. Others may write up the factual background first but then jump to deal with a particular legal point which they want to get clear on the page before they deal with the evidence and findings. They will then knit it all together at a later stage.

The document needs to be set with a heading, introduction and background. Once these preliminary steps have been committed to the page there is a document which is ready to be worked on. It is gratifying to see how quickly an award can come together if this ground is broken first.



I will work through my award plan, ticking off various tasks as I go. Once the background has been summarised, next is my impression of the parties. Bearing in mind that a court will have to approve my award, I want any future (and potentially critical) reader to get a clear impression of my thoughts on the feel and sense of the case beyond just the cold hard numbers.

There is a story to be told in an award. Good advocacy with well-chosen words and phrases should be repaid in kind. The thing must be readable.

Unless a day has been set aside for judgment writing, which is not always possible, the award will be crafted in 'magic time'. Even if a day is set aside, it is almost always insufficient. Fresh professional demands will grind on around the tribunal, but once the draft is underway it is so much easier to slope off into the study and be lost in the quiet of the evening for a couple of hours. Ditto rising early and getting a couple of hours in before the bustle of the day. The writing of the award is an ever-present priority. It weighs heavily on the mind until the tribunal has got the better of it.

The task of the arbitral award writer is different to the private FDR tribunal. The FDR tribunal must articulate an outcome quickly. Whether delivered orally or in writing, everyone accepts that it will of necessity have an element of instinct and shorthand about its character. It is non-binding and so it will never need to go through the process of court approval or appeal. The FDR tribunal indication has an element of 'thinking fast' whereas the arbitral award is more closely related to 'thinking slow'. It is anxiously considered. It must winnow and organise. It must be clear, analytical, and its conclusions (hopefully) unimpeachable, however disappointing that may be to one or both parties. It aims to be appeal proof. It is much more of a slog than the FDR indication.

It may be that a considered decision on the outcome is impossible until the key factual issues have been wrestled into submission. I can think of cases where it really was not obvious even after closing submissions whose position was going to prevail.

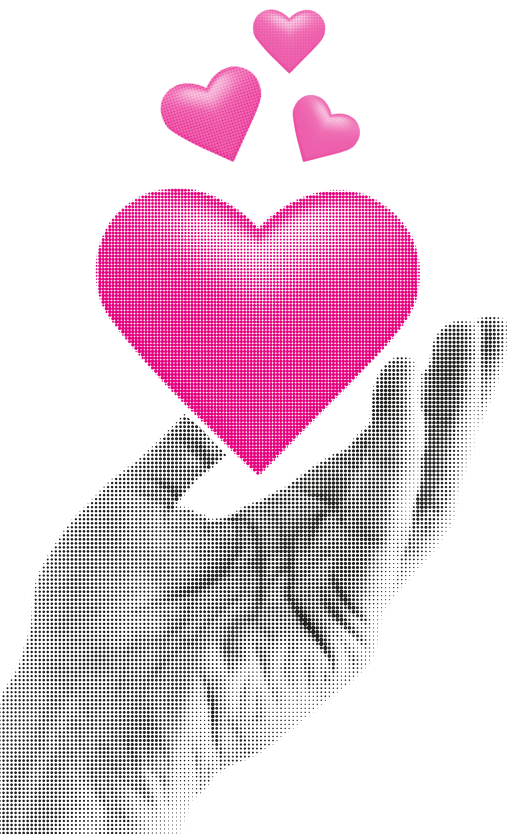
Making factual findings is perhaps the most alien task to a tribunal whose primary occupation is otherwise as an advocate. As an advocate (with a very few exceptions) one simply assumes instructions are true and seeks to persuade the tribunal to believe them. The arbitral tribunal must take disparate and often conflicting pieces of evidence and craft to fit a coherent whole. I have heard it described as putting together a jigsaw puzzle without having the picture on the lid. Sometimes the picture isn't clear until the last piece is put in place.

I also like to settle my factual conclusions into a short summary of the assets in light of my factual findings. One can then look down across the plain and craft the solution. The cake is ready to be cut.

The discretionary distribution is sometimes the easier part of the tribunal's task. But it was only possible with the heavy slog to the summit of the factual findings and then taking in the view. That said, the more modest the assets, the more difficult the discretionary exercise may be. A fine sable may be needed and not a broad(er) brush.

A good tribunal should not be in a rush. Preliminary conclusions and drafts are best slept on. I recall one of the trainers on the IFLA course saying that he always went for a walk before pressing send. Wise words.

If the essential text of the award may come together within a week or so, my suggestion is that the tribunal still leaves it alone for enough time that it can be returned to more dispassionately. It is very hard to proof-read your own text when you are in the thick of it. You need some cool detachment. If something continues to nag away as not being right, it probably isn't and needs to be revisited.



Opinions differ on the circulation of an award in draft. I am firmly in the camp that this is helpful to all. With even the most anxious and careful consideration there may be some typographical errors or fact polishing that the advocates are able to identify. The Court of Appeal has repeatedly been clear as to the limits of requests for 'clarifications'.

I am aware that some say that the draft award is an anathema. I respectfully disagree and find a tight timetable for any comments to be a useful collaboration with the advocates. The draft can also often usefully express an initial view on costs. A brief 'Addendum' dealing with issues raised in response is often a useful coda for any future reader.

The canny tribunal will want to ensure that the award is capable of swift conversion into a court order. Wherever possible, solutions should not be overly complicated in their structure. There is beauty in simplicity.

The orders to be made consequent upon the award should be plainly heralded in the award itself. A short time for agreeing a reflective order should be given. In strict legal terms the arbitral tribunal is functus officio upon delivery of the award. If the parties wish me to, and they usually do, I will remain briefly involved as the arbiter of the reflective draft court order.

I am aware of stories of disappointed parties dragging their feet with agreeing an order which is reflective of the award. In some circumstances this may be a continuing example of domestic abuse. The last lash of the tail. If one party refuses to engage, then the propounding party should promptly issue a notice to show cause with their suggested draft order.

It is often said that a decision-maker should write any decision for two audiences. First the loser needs to know why they have lost. Second, an appeal court will want to know why and how a decision has been reached, so that this process can be reviewed if needed. The arbitral tribunal will want any court to understand why they have arrived at the award that they did. The single most useful piece of advice I have been given as a tribunal is to 'find your facts carefully'. Both the burden and standard of proof can have real significance.

The arbitral tribunal is also on show themselves, unlike a judge sitting with the benefit of security of tenure. An arbitral tribunal will need to find a way to package hard decisions. The temptation not to bite one of the two hands that feeds is to be resisted. Awards are to be delivered (to borrow a phrase) without fear or favour, affection or ill-will.

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