



# HNW Divorce

## MAGAZINE

ISSUE 2



*The Community Comes First*

# INTRODUCTION

## *"Community Comes First"*

These are certainly unprecedented times - With the overnight shift to remote working for almost the entire population we are adapting to a whole new normal. Talk is of social distancing and isolation but with the use of video technology and social media platforms we are seemingly more connected than ever.

Our community is so much more than conferences and events. We are grateful to have the support of our Community Partners and Members as we continue to deliver thought provoking industry-led content to our community.

We are delighted to bring you the Second Edition of the HNW Divorce Magazine, connecting you with the family law community in the midst of lockdown.

### The ThoughtLeaders4 HNW Divorce Team



**Paul Barford**  
Founder / Director  
020 7101 4155  
[email](#) Paul



**Chris Leese**  
Founder / Director  
020 7101 4151  
[email](#) Chris



**Danushka De Alwis**  
Founder / Director  
020 7101 4191  
[email](#) Danushka



# CONTENTS

Coronavirus' impact on HNWs advice .....	3
Splitting Finances on Divorce .....	6
Ways of protecting family wealth on divorce .....	8
Attacking and Defending Trusts in Divorce .....	10
UK EU Cooperation in Family Law after Brexit: the effect for HNW families .....	13
Can you enforce the terms of an English order in Jersey? .....	16
Urgent relief and the practical implications of social distancing: business as usual, but not as usual .....	18
Enforcement of Matrimonial Orders and potential funding options .....	21
Attacking and defending (pension) trusts in divorce .....	23
The current obstacles facing intended parents in UK/US international surrogacy arrangements .....	26
Can I Change my Maintenance Order owing to the Coronavirus Pandemic? .....	27
How far does the Split reflect the Family law reality .....	30
Trustees and divorce: navigating stormy waters .....	32

## ABOUT HNW Divorce

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

Working in close partnership with the industry rather than as a seller to it, we focus on delivering technical knowledge and practical insights. We are proud of our deep industry knowledge and the quality of work demonstrated in all our events and services.

### Become a member of HNW Divorce and...

- Join a community of experts, referrers and peers
- Attend events in all formats
- Immediately benefit from our Virtual Forward of events
- Interact using our digital Knowledge Hub
- Learn and share expertise through the Community Magazine
- Grow your network and business
- Build relationships through a facilitated Membership directory

## CONTRIBUTORS

Alexander Troller, **LALIVE**  
 Joséphine Auberjonois, **LALIVE**  
 Svenja Keller, **Killik & Co**  
 Abby Buckland, **Kingsley Napley**  
 Henry Hood, **Hunters Law**  
 David Hodson OBE MICarb, **The International Family Law Group**  
 Lauren Glynn, **Carey Olsen**  
 Catherine Eason, **PCB Litigation**  
 Andrew McLeod, **PCB Litigation**  
 Hannah Davie, **Grant Thornton**  
 Michael Leeds, **Grant Thornton**  
 Alex Cooke, **Schneider Financial Solutions**  
 Alex Hulbert, **Schneider Financial Solutions**  
 Joseph Steadman, **Wilberforce Chambers**  
 Sarah Williams, **Payne Hicks Beach**  
 Stuart Clark, **The International Family Law Group**  
 Samantha Woodham, **The Divorce Surgery**  
 Jonathan Arr, **Macfarlanes**  
 Elizabeth Doherty, **Macfarlanes**

# CORONAVIRUS' IMPACT ON HNWS ADVICE



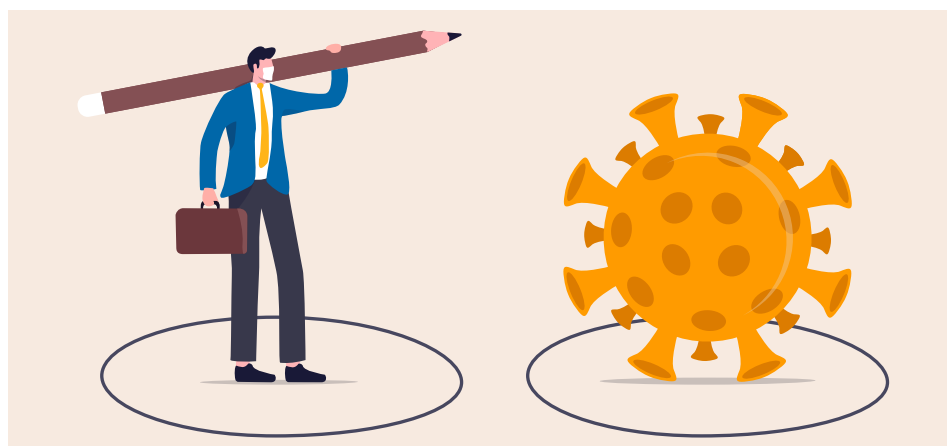
Authored by: Alexander Troller / Joséphine Auberjonois – Lalive

**1** The Coronavirus pandemic reminds us of Simone de Beauvoir's *"All men are mortal"*.<sup>1</sup> Both encourage us to re-evaluate our priorities, prompting us to seize new opportunities otherwise ignored under the "business as usual" regime. We come to humbly share our experience of the past extraordinary days, while also looking ahead to the challenging weeks to come. How can we best nurture the trusted relationship we are privileged to have established with our HNW clients during this crisis? What meaningful advice can we offer them as to COVID-19's impact on their personal life and business operations alike?

**2** In these challenging times, our clients feel vulnerable and need more than usual to feel supported, listened to and accompanied. This means that, as their trusted advisors, we should in turn be as responsive, reachable and attentive as possible, showing empathy and personalising our advice even more than usual. Advisors will emerge unequal from the crisis. Those who will have been proactive and who have tailored their assistance to their clients' specific needs will gain an exponential competitive advantage to average peers who have simply responded to client queries without going the extra mile of a true counsellor.

**3** « *All these husbands and wives who travel will now have to spend time with the person they're married to* ». <sup>2</sup> With stay home orders almost universal, most of our clients must readjust to existing relationships more intensely; the same of course holds true for most of us. Some may see this a welcome respite from an otherwise hectic life. Many may find it difficult to face the relative inactivity of confinement, away from reassuring professional and social routine. Add the anxiety prompted by plummeting financial markets and their impact on our clients' portfolios; and you have an explosive cocktail for a personal crisis in a relationship, possibly aggravated by health issues related to stress (currently unlikely to deserve much attention from the medical community, understandably focusing on more pressing priorities).

**4** Against this background, (legal or other) advisors to private client have a unique opportunity to position themselves as life counsellors beyond the turf so far entrusted to them. With respect and tact, let us reach out to our clients, ask how they are coping with confinement, share our own



<sup>1</sup> *Tous les hommes sont mortels*, published in 1946.

<sup>2</sup> Mitchell Moss, in Bloomberg, Max Abelson, Private Planes, Secluded Homes, and Vaccine Pleas : Here's How Wealthy Americans are Preparing for COVID-19, 2 March 2020.

personal experience and, through such personal interactions, build a deep and enduring personal relationship. Crises often pave the way for restructuring – not only in the corporate world. Being close to our clients now will often give us access to information hitherto withheld from us, not intentionally but simply because the context didn't allow or call for disclosure. By way of example, clients may report how supportive a spouse or child is in these difficult times, or on the contrary how disappointed they are by a family member – be it for the sharing too many insensitive COVID jokes by WhatsApp!

While the seasoned advisor will let the dust settle before possibly recommending any action, he/she should nevertheless make a note of his client's current experience with his relatives, a fertile soil for future advice, e.g. in estate planning, once life will have returned to normal.

- 5** Private clients do not only have changes in their personal life and their finances to deal with during confinement. Many run companies

they own, with as many challenges as employee safety, reduced work time, access to state support schemes where available and more generally business continuation (read survival). These difficulties are those faced by us advisors as well of course, and what we learn and apply to our own firms can serve likewise and immediately to our clients. Proactively checking on entrepreneurs and offering to share our experience (as opposed to immediately selling our services) in these extraordinary times can cement existing relationships; someone facing hardship will always remember support shown in times of adversity.

- 6** Also, and without ignoring the difficulties of those who cannot implement remote work in their businesses, the drastic changes imposed by the confinement paradoxically allow for cost reductions and efficiencies in day-to-day operations. We can help our clients in this process by highlighting what works particularly well in their remote

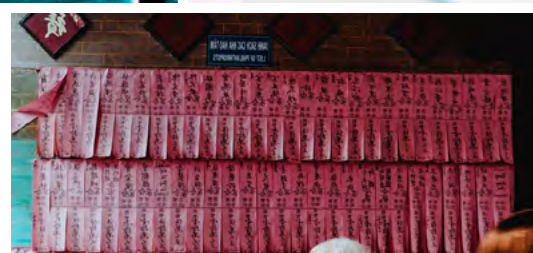
work organisation and suggesting amendments or adjustments where we notice room for improvement. They will be grateful for the praise and the optimisation advice alike and feel that we care for them and their undertakings.

- 7** Do you remember how often you dreamt of a week of Sundays only? We should seize this unique opportunity of a forced slowdown to reflect on the meaning of life in the private and professional spheres and invite those of our clients we know well enough to try doing the same. We, and they with us, now have the time to honestly assess what really matters and what doesn't work. We can emerge from the crisis with a new focus and reloaded batteries to strive, once restrictions will have been lifted or a least eased. The new start will be intense and full of unexpected opportunities. Let us seize them together.

**L**







# WEALTH IS A LOADED WORD

IT IS TIME TO RE-DEFINE IT

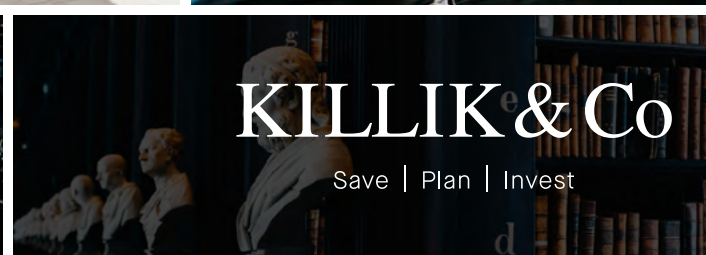
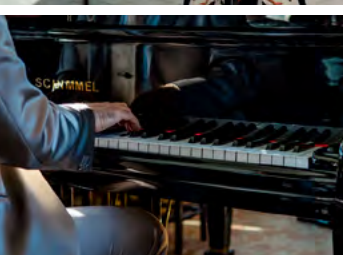
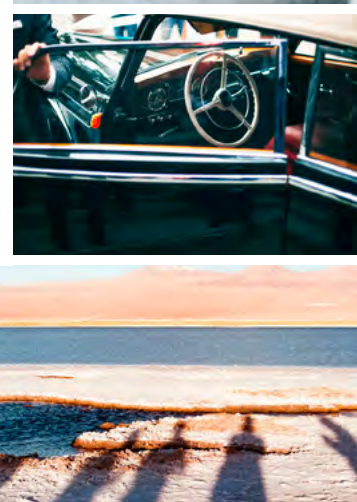
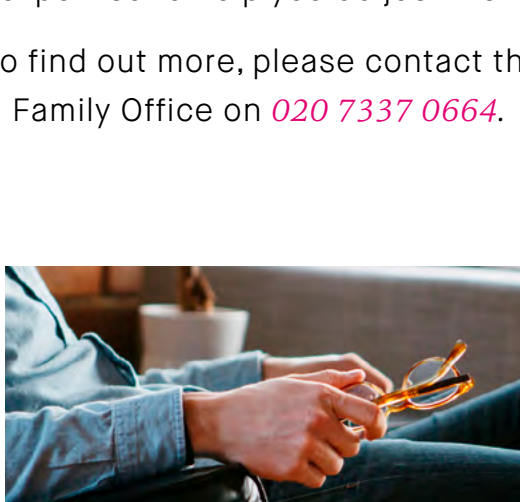
We don't believe that wealth is measured by the size of your bank balance. We believe that wealth, or rather what it means to be wealthy, is far better explained by its original meaning:

**Wealth** *mid-13c., from Middle English; 'wele' meaning "pattern of health" or "well-being"*

When thought about early and managed carefully over time, wealth allows you to live the life you want to lead. Your life well lived.

This makes our purpose clear: to use our expertise to help you do just that.

To find out more, please contact the Family Office on [020 7337 0664](tel:02073370664).



KILLIK & Co

Save | Plan | Invest



Authored by: Svenja Keller – Killik

Getting divorced is never easy and quite often, splitting up the finances is one of the most stressful parts of the divorce process. As financial advisers, we cannot take the emotional stress away but we can make the financial discussion easier and in some cases, we can find ways to improve the overall tax situation. I have even seen one situation in which a divorce became the most viable option to achieve a specific financial goal... more on this later.

## Cash Flow Planning

But first things first... Our starting point is always a cash flow projection, which takes into account the couple's existing assets and liabilities, their income and expenditure. We can then run different scenarios on how assets might be split<sup>1</sup> and what the most tax efficient way of splitting the assets are. For this, we consider the different wrappers clients' assets sit in. This could be pensions, Individual Savings Accounts (ISAs), insurance bonds, main taxable accounts, company structures and

***"It is important to note that some reliefs and tax opportunities are lost at certain points throughout the divorce process and it is therefore vital to start talking to your financial adviser as early as possible."***

we also consider property of course. Each asset and wrapper has a different tax profile and various taxes apply to different types of assets, e.g. capital gains tax, income tax and pensions Lifetime Allowance<sup>2</sup> tax. In other words, it can make a significant difference if one of the divorce parties receives a taxable main account instead of a pension for example. It is important to note that some reliefs and tax opportunities are lost at certain points throughout the divorce process and it is therefore vital to start talking to your financial adviser as early as possible.

Liquidity is also a consideration, in particular when it comes to property assets but there are other illiquid private company investments that could fall into this category. Finally, I would consider the ability to generate income from the assets, how reliable the income stream is and how it would be taxed.

Cash flow planning can provide greater clarity and whilst it doesn't answer the questions on how assets should be split from a legal standpoint it can serve as an objective tool to show what is more efficient from a financial point of view.

<sup>1</sup> Please note we do not provide legal advice on the split of assets – we run through different options, based on what the couple or their solicitors are telling us and work out the financially most efficient way to split assets

<sup>2</sup> The pensions Lifetime Allowance is the maximum amount an individual can accumulate within their pension before triggering additional tax charges. In the 2019/20 tax year, this limit is £1.055m. It will rise to £1.073m in 2020/21.



## “Don’t be a Crazy Fool” - Mr & Mrs T Case Study Example

Let me provide you with an example. Mr and Mrs T were both our clients. They had decided to split up and they wanted to go through a divorce that would be as amicable as possible. They had agreed to a 50/50 asset split and asked us to provide them with financial advice on how best to split their assets. Mrs T was attached to their main home and a buy-to-let property that they held whereas Mr T had a very significant defined benefit pension. They had other assets which could relatively easily be split but the main difficulty lied with the pension and the properties. One option was for Mr T to retain his pension and for Mrs T to keep the properties. Purely looking at values, this would have worked. However, the pension was so sizeable that it breached Mr T’s Lifetime

Allowance2, which meant that his pension would be reduced significantly to pay for the Lifetime Allowance tax charge. In addition, whilst providing a valuable guaranteed income for life that rises in line with inflation, the Defined Benefit pension was relatively inflexible and the entire pension was subject to income tax. The properties on the other hand provided more flexibility to Mrs T as she could decide to sell one of them and release capital and / or rent out the buy-to-let property and thereby generate a taxable income. The other – more tax-efficient – option was that Mr T would split his pension (through a pension sharing order) and they would either split the properties or Mrs T would transfer some of her cash or other liquid investments to Mr T. This enabled them to use both their Lifetime Allowances and pay a significantly smaller amount of Lifetime Allowance tax charges. As a consequence, they were both better off with this option.

## If Divorce is the Answer, What is the Question?

Finally, I wanted to finish off with a more light-hearted example where a divorce actually became the potential solution. One of our clients was concerned about the financial security of his defined benefit pension but could not transfer out of the pension at that time as the scheme trustees would not allow it. The only option to receive a transfer out quote was in case of a divorce. Our client very seriously considered this option given the size of their pension entitlement, but I am pleased to say that they decided not to proceed as the couple did not want finances to overtake their emotional bond.

L



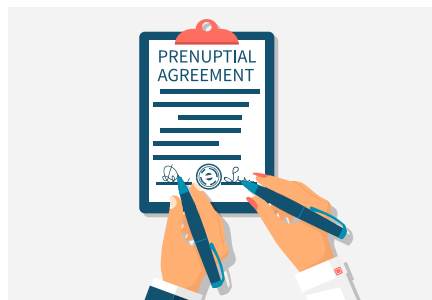
# WAYS OF PROTECTING FAMILY WEALTH ON DIVORCE



Authored by: Abby Buckland – Kingsley Napley

Parents are increasingly reluctant to provide financial assistance to their adult children because they are concerned that the money could be lost in a divorce. We are often approached by anxious parents who are keen to ensure that family wealth intended for their children and grandchildren won't fall into the hands of their estranged son or daughter in law, should they later divorce. Gifts, advancements or inheritance from one spouse's family, however, are in principle generally treated differently by the divorce courts from matrimonial assets generated by the parties during their marriage. The principle that non-matrimonial assets remain protected, including those held in trust structures, was confirmed in the case of *Daga v Bangur* [2018] EWFC 91, in which Jane Keir and I represented the successful respondent wife. The decision in this case reinforces the comfort that English law, for the most part, excludes family assets from the divorce process.

There are, however, a number of proactive steps that parents can take to help preserve wealth intended for their blood family.



## Prenuptial agreements

Prenuptial agreements are often used to protect family wealth and any contributions parents have made, or intend to make, to their children. If a parent wants to make a gift, transfer properties or assets, or leave inheritance to an adult child, but protect them from division in the event of a

future divorce, a prenuptial agreement is essential. Some parents make it a condition of a gift or advance that such an agreement is entered into.

After marriage, a postnuptial agreement serves the same purpose and can be entered into at any time.

There is no act of Parliament in England and Wales making these agreements binding, but in practice they will be enforced so long as they are freely entered into and do not lead to an unfair outcome for one party.

## Loan agreements

A properly drawn up loan agreement can also protect contributions to an adult child's finances. If the parent expects repayment at some point, this should be set out in writing when the money is advanced. In a divorce, it will be far easier to persuade a judge that the contribution from one party's parents towards the deposit on the family home was a firm loan which needs to be repaid, rather than a gift, if there is a clear, contemporaneous agreement drawn up and signed. This should set out the sum to be loaned, the purpose of the loan and detailing repayment terms and conditions.

***“The principle that non-matrimonial assets remain protected, including those held in trust structures, was confirmed in the case of Daga v Bangur [2018] EWFC 91”***



## Trusts

Setting up a trust to preserve wealth for future generations is potentially the most effective mechanism to protect family wealth on divorce. A trust is set up for a number of reasons, including to control and protect family assets when a person is too young to handle their affairs, or to pass on assets while the giver is alive.

The trustees (who can be family members, independent professionals, business colleagues, friends or a mixture) act out the giver's wishes and are the owners of the assets held in a trust. In most cases, the trust will be discretionary and therefore the trustees decide which of the beneficiaries receives what, when, and on what terms.

However, the Family Court can attack a trust in a number of ways:

- It can find that **the trust constitutes a 'nuptial settlement'**, i.e. that there is a connection between the settlement and the marriage or that it makes *"some form of continuing provision for both or either of the parties to a marriage, with or without provision for their children"* (Lord Nicholls in *Brooks v Brooks*). If this is found to be the case, the court can make an order to vary the trust.

- The court can also **challenge the validity of the trust**, either by finding an issue with its technical creation or deciding that it is a 'sham' trust. One of the most common reasons for determining that a trust is a 'sham', is that the settlor retains a level of control that undermines the powers and duties of the trustees. If this is found to be the case, then the protection that the trust offers is at risk of being lost and the assets may be found to be personal assets of the settlor. Expert advice needs to be given to the settlor at the outset and any letter of wishes must be carefully drafted.
- Finally, the court can view the **trust as a financial resource of one party** and make orders accordingly. This is perhaps the most common form of attack against trust assets in a divorce and often the hardest to protect against. Thought needs to be given at the trust's inception, throughout its lifetime and at the time of any divorce proceedings in order to defend the trust assets appropriately against being considered a potential financial resource.

A trust must always be created with a planned and detailed defence in place to ensure it does what is intended; effectively and reliably protects assets. Collaboration between advisers at an early stage is absolutely crucial to pre-

empt and protect against the pitfalls and consequences of marriage and divorce.

## Conclusion

It is necessary to look at all the options and understand the implications of each in order to protect family wealth in the eventuality of divorce. We have experience of advising both parents and adult children and work closely with our private client team and other relevant advisers to ensure the appropriate protections are in place. We are also aware of the difficulties and tensions these situations can create for families. Our advice and action is therefore firm and robust, yet sensitive when the situation requires it.

L



# ATTACKING AND DEFENDING



Authored by: Henry Hood – Hunters Law LLP

Trusts feature in the lives of many HNW clients, whether as long-established family settlements protecting wealth through successive generations, or created by the client to hold wealth they have generated. Whilst both spouses may have been content to benefit from the arrangements during the marriage, trust interests can become contentious on divorce.

The best outcome for those wishing to attack a trust will be to show it is a nuptial settlement, enabling the court to vary the trust and thereby redistribute its assets. Otherwise, those attacking the trust will need to satisfy the court that the trustees are likely to advance funds to the beneficiary spouse. These apart, options for accessing trust funds are limited – but as recent decisions show, may not be non-existent.

Dealing first with nuptial settlements: S24(1)(c) MCA 1973 empowers the court to make an order “varying for the benefit of the parties to the marriage and of the children of the family or either of them any ante-nuptial or post-nuptial settlement... made on the parties to the marriage”. Where there is such a finding, the Court is not limited to the

extent to which it can vary a trust if so minded, and so it can have a significant impact on financial proceedings and their costs.

No definition of a nuptial settlement was given in the MCA. Case authority provides us with a broad definition of a settlement capable of making continuing provision for one or both parties to the marriage in their capacity as husband or wife. However, we are able to identify some significant limits to this definition.

Dynastic settlements from which one spouse benefits will rarely be nuptial as that interest is likely substantially to predate the marriage and so not relate to their capacity as a spouse. In the same vein, a trust made by one of the parties over their own wealth will not be nuptial if made well before the marriage and not in contemplation of it. (This was the position in *Joy v Joy-Maranco and Others (No 3)* [2015] EWHC 2507] to which reference is made below).

Conversely, a settlement made during the marriage by one of the spouses from which they can benefit will almost certainly be nuptial, as was the case in *BJ v MJ* [2012] 1 FLR 667.

These are the two ends of the available spectrum. The possibilities for distinguishing features are many. Therefore, where a dynastic trust contains a clause allowing the spouse of beneficiaries to benefit, this might bring it within the nuptial net (and that can be a key enquiry). By contrast, where it is established that a trust set up during the marriage was not intended to benefit either party, and had not done so, such a trust would not be nuptial (such were the circumstances in *Quan v Bray* [2014] EWHC 3340 (Fam) where the substantial trust was found to be entirely charitable).

An issue potentially remains as to whether a trust can become nuptial having not been to start with. In *Joy v Joy-Maranco and Others (No 3)*, Sir Peter Singer thought not, providing that a settlement which was not nuptial at its creation could not later become nuptial “otherwise every truly dynastic settlement, bereft of nuptial character at the outset but providing benefits for an individual who subsequently becomes either a husband or a wife, would arguably become variable... as soon as that individual, once married, received any benefits”. Coleridge J however



suggested the opposite in *Quan v Bray* (at paragraph 60), and on appeal the Court of Appeal declined to determine the point.

Turning to the resource argument, s25(2)(a) MCA 1973 includes “other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future” as a factor the court must take into account. This includes trust interests, whether nuptial or not. Whilst the court cannot order the trustees of a non-nuptial trust to provide for the non-beneficiary spouse, it can seek that outcome by ordering the beneficiary spouse to make a payment which they would only be in a position to make if the trust advanced the necessary funds.

This practice has been known as “judicious encouragement”; the term originated in *Thomas v Thomas* [1995] 2 FLR 668, where the Court of Appeal held that “there will be occasions when it becomes permissible for a judge deliberately to frame his orders in a form which affords judicious encouragement to third parties to provide the maintaining spouse with the means to comply with the court’s view of the justice of the case”. Amongst various cautions, it emphasised that “improper or undue pressure” must not be placed on trustees.

In *Charman v Charman* (No 4) [2007] EWCA Civ 503, Wilson LJ identified the relevant question as “whether the trustee would be likely to advance

the capital immediately or in the foreseeable future” – if so, the line into undue pressure would not be crossed. In *Charman*, the husband had both settled the trust and written a letter of wishes stating that he should have the “fullest possible” access to trust assets, and the trustee would clearly have complied with any request he made. Few cases are so clear-cut, and the Court must assess the likelihood of provision being made based on factors including the terms of the trust, its original purpose, the attitude of the trustees and their administration of the trust to date (particularly concerning advances).

The term “judicious encouragement” is falling out of favour. Mostyn J in *Quan v Bray* [2018] EWHC 3558 (*Fam*) and *Ipekci v McConnell* [2019] EWFC 19 approved the judgment in the Hong Kong case *KEWS v NCHC* [2013] HKCFA which recommended the term “judicious encouragement” no longer be used, as it suggested that Thomas introduced a new principle under which third parties could be “encouraged” by judges to provide financial assistance to a party. It pointed out that English courts had not interpreted the judgment in this way. Rather, the issue has always been, and remains, whether future provision was likely or not.

Finally, what of the situation where a trust is not nuptial, and the trustees are not likely to advance funds to the beneficiary spouse? Options are limited.

In *AF v SF* [2019] EWHC 1224 (*Fam*) the husband was the life tenant of a fund worth £106 million. It was not a nuptial settlement, nor was it likely the trustees would advance capital. However, as the husband received an annual income of over £1,000,000 from the trust, Moor J was able to order a lump sum payable in instalments which would be funded by trust income.

Another option is to adjourn the non-beneficiary spouse’s capital claims. This was the approach taken in both *Quan v Bray* [2018] EWHC 3558, where it was considered that the husband was likely to be receive significant remuneration from the trust, and in *Joy v Joy* [2019] EWHC 2152 (the continuation of *Joy v Joy-Moranchio*), where claims were left open on the basis that there remained a likelihood of the husband receiving funds from the trust.

Trusts and their capacity to keep wealth at one remove from a marriage will always excite the interest of family lawyers, but whether attacking or defending them, it is important always to be clear as to the limited ways available to bring trust assets within the range of the Court’s dispositive powers.

**L**

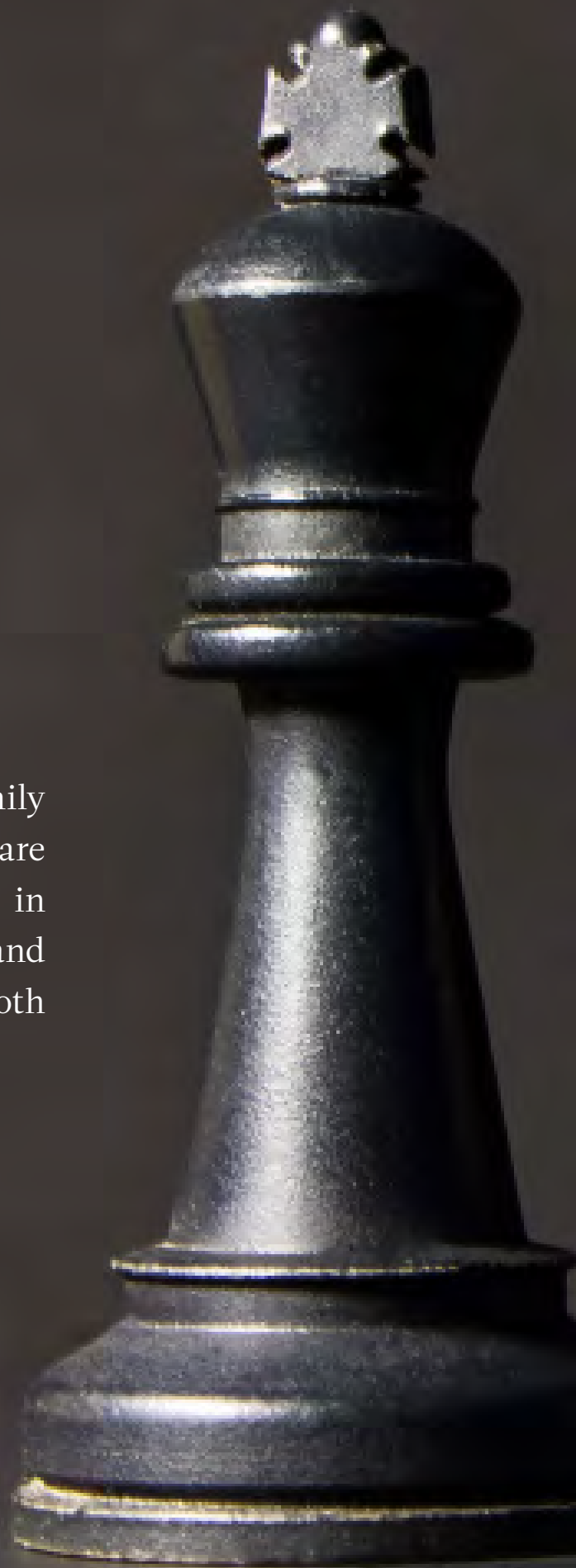
# 1KBW

***“They are as strong on money as they are on children and they’ve got strength and depth in both silks and juniors.”*** – Chambers & Partners, 2020

1KBW has a pre-eminent reputation in family law, both nationally and internationally. We are consistently ranked by the legal directories in the top tiers of leading sets for family law, and are unique in our strength in depth for both finance and children cases.

**One Choice**  
**One King’s Bench Walk**

*1kbw.co.uk — Leading in family law — clerks@1kbw.co.uk*





# UK EU COOPERATION IN FAMILY LAW AFTER BREXIT:

## THE EFFECT FOR HNW FAMILIES



Authored by: David Hodson OBE MICArb – The International Family Law Group LLP

### Executive summary

The UK has left the EU. But existing laws continue throughout the transition period, end December 2020. Some had lobbied for EU family laws nevertheless to continue. In February 2020 the UK government confirmed EU laws will end completely. But the UK is probably the leading jurisdiction for international families and the EU represents a significant number of the independently mobile cross-border families. It is essential there is future cooperation. Moreover, what will be the effect and impact on high net worth families?

### UK EU future co-working to benefit families and children

The UK left the EU on 31 January 2020. There is an implementation period until 31 December 2020 (unless extended because of coronavirus) during which existing laws from the EU will apply. In February 2020, the UK government stated that all EU laws will end on that date. There had been a discussion whether EU family laws might continue because of the many EU families in the UK. This will not now happen. The UK will continue to rely on existing and successful international laws and on new domestic laws introduced to fill the EU vacuum. (References to the UK are of course to the political unit but in the family law context, England and Wales

should be treated differently to Scotland and Northern Ireland. This article only refers to England and Wales.)

But it is crucial for the UK and the EU to work out a good future cooperative relationship together. There are very probably more international families in the UK than in any other jurisdiction (the USA being federal states) with highly experienced lawyers and judges and a widely perceived fair system of law, seeking fairness in outcomes and avoiding discriminations. The EU is home to a significant number of the world's independently mobile international families. Together they are crucial for the future of cooperation on many issues facing international families.

However there are real difficulties. The UK is the original common law country, with huge reliance on judge made precedent law and opportunities for discretion to produce a fair outcome in any particular case. The EU is predominantly civil law with the emphasis on adherence to the codified law, with certainty and predictability to the fore. Next, the UK always applies its own local law; EU countries often apply the law of the country with which the couple have the closest connection. It is little surprise that over the past 20 years there have been many clashes in the family law arena between the UK and the EU especially as the EU has tried to impose civil law orientated laws. But now post Brexit, with these clashes behind, the UK and the EU are wonderfully placed with these very

different historical traditions in law and commitment to improve family law, to work to help international families; not just those connected to the UK and the EU but worldwide. How might this occur?

**First**, domestic abuse is no longer just physical; it is now significantly online such as digital stalking and therefore virtually crosses national borders instantaneously. The EU has already done very good work in domestic violence. The UK has been a leader in cross-border action on aspects such as forced marriage and FGM. Together much urgent work can produce international laws to combat cross-border digital domestic abuse.

**Secondly**, one of the biggest gulfs between the UK and the EU is the expectations of relationship agreements. Within many EU countries there are no or minimal preconditions yet they are a cultural norm. In the UK and throughout the common law world there are strenuous preconditions, to protect the more vulnerable party and make sure there is proper disclosure and good representation. As encouragement of private autonomy increases, so international families will expect their marital agreements to be given weight, probably treated as binding, yet one spouse may consider the provision is thoroughly unfair. The UK and the EU must work to find a way through this huge chasm in global legal expectations. It is possible with some pragmatic compromise.

**Thirdly**, many couples worldwide expect the application of Islamic law on any resolution of matters concerning their relationship. Yet this has been fraught with problems of perceived lack of rights for women and the failure of many Islamic countries to engage with the international community in international children laws. The UK and the EU, with their significant Islamic constituencies, need to find a way forward consistent with national and international laws and yet also with expectations of the Islamic community. It has been achieved in the area of banking and finance. It must be possible for dialogue with the Islamic world to find a satisfactory way forward.

**Fourth**, resolving in which courts a relationship dispute will be dealt with, a forum dispute, remains problematical and takes up too much time and costs. However, the EU answer of the race to court, *lis pendens*, is fraught with difficulties; discouragement of ADR and possible reconciliation, giving the benefit to the party breaking the relationship and having the greater funds and furthermore discouraging prelitigation negotiation. The obvious way forward is a hierarchy of jurisdiction, with forum based on the highest available level in the hierarchy. The EU has this in some laws, and it should be introduced into divorce. The UK and the EU should lead a global discussion on the future of jurisdiction and forum, to reduce litigation and fairly increase certainty and predictability. Preferably this should also encourage more ADR, out-of-court settlements.

There are other areas. These issues need global attention. The UK and the EU are extremely well placed to give a good lead, in conjunction with the Hague Conference of Private International Law, for the benefit of the worldwide, globally mobile, international family community.

## Impact for high net worth spouses

London has traditionally been a magnet for international spouses seeking divorce financial claims. The so-called divorce capital of the world. Whilst a member of the EU, it has enabled one spouse in the many European families with a UK connection to bring the claim before the UK family courts. It will still remain attractive but it may be less accessible. Other features will change.

Whilst in the EU, all that mattered to secure proceedings in the UK was being the first to issue proceedings. That will end. It will be necessary to show that the UK has the closer connection with the family in contrast to other countries in which the family may have been living. This is much fairer. By EU law, the UK has had to treat certain marital agreements as binding even if no independent advice or disclosure or it was entirely unfair. Without EU law, this restriction has gone. A bad marital agreement without fair opportunity for the more vulnerable spouse will carry little weight.

The UK will remain a very attractive location for divorce financial claims. Investigating disclosure is probably as thorough and sometimes more extensive than any other EU country. There are significant powers to obtain evidence and documents in respect of assets abroad. The courts have powers to make orders against some foreign assets. The family courts expect all financial circumstances to be disclosed. Where the wealth can amply meet the needs of both spouses, the family courts will expect to divide equally the wealth arising during the marriage and premarital cohabitation, even if one spouse alone was engaged in the work. For these and many other reasons, the UK will remain a magnet for high net worth claimants seeking a substantial divorce financial settlement.

## Conclusion

The trauma, distress, pain and upset of the leaving of the UK of the EU was appalling. Understandably it was likened to a divorce. But the divorce order has now happened. The financial arrangements will be put in place soon. However the UK and the EU must quickly learn to collaborate and work together as if co-parents. There is a huge opportunity for so much good to be brought about for worldwide benefit, to help other jurisdictions and groups of countries and to help the huge number of cross-border families and their children. Starting on this cannot be delayed. The differences which divided in the past should now be a strength for the future. Nevertheless the UK itself, particularly England and Wales, still provides a significant benefit for the weaker financial spouse in having proceedings in this country.

In all these matters, specialist international family law advice should be taken at a very early stage.

**L**





# With you every step of the way

Carey Olsen is a leading offshore law firm. We advise on Bermuda, British Virgin Islands, Cayman Islands, Guernsey and Jersey law across a global network of nine international offices.

We are a full service law firm advising across the full spectrum of offshore legal services. When it comes to high value family disputes or trust litigation we have been involved in many of the significant cases and matters involving our jurisdictions.

## Family Disputes

We offer prompt, cost effective and pragmatic family law advice. Often in conjunction with our property, litigation and private client experts, we assist individuals, families and those who advise on planning and structuring their affairs, to mitigate those financial risks that relationship divisions can cause.

## Trust Litigation

We are highly regarded for our work in contentious matters involving trusts, foundations and estate disputes. Our experts understand the unique, highly confidential and delicate nature of these disputes. Where a conflict is unavoidable we provide strong guidance and advocacy, be that through alternative dispute resolution or through the courts.

To find out more, please contact one of the lawyers listed.



**Keith Robinson**  
Partner, Bermuda

D +1 441 542 4502  
E [keith.robinson@careyolsen.com](mailto:keith.robinson@careyolsen.com)



**Bernadette Carey**  
Partner, BVI and Cayman Islands

D +1 345 749 2025  
E [bernadette.carey@careyolsen.com](mailto:bernadette.carey@careyolsen.com)



**Elaine Gray**  
Partner, Guernsey

D +44 (0)1481 732035  
E [elaine.gray@careyolsen.com](mailto:elaine.gray@careyolsen.com)



**Marcus Pallot**  
Partner, Jersey

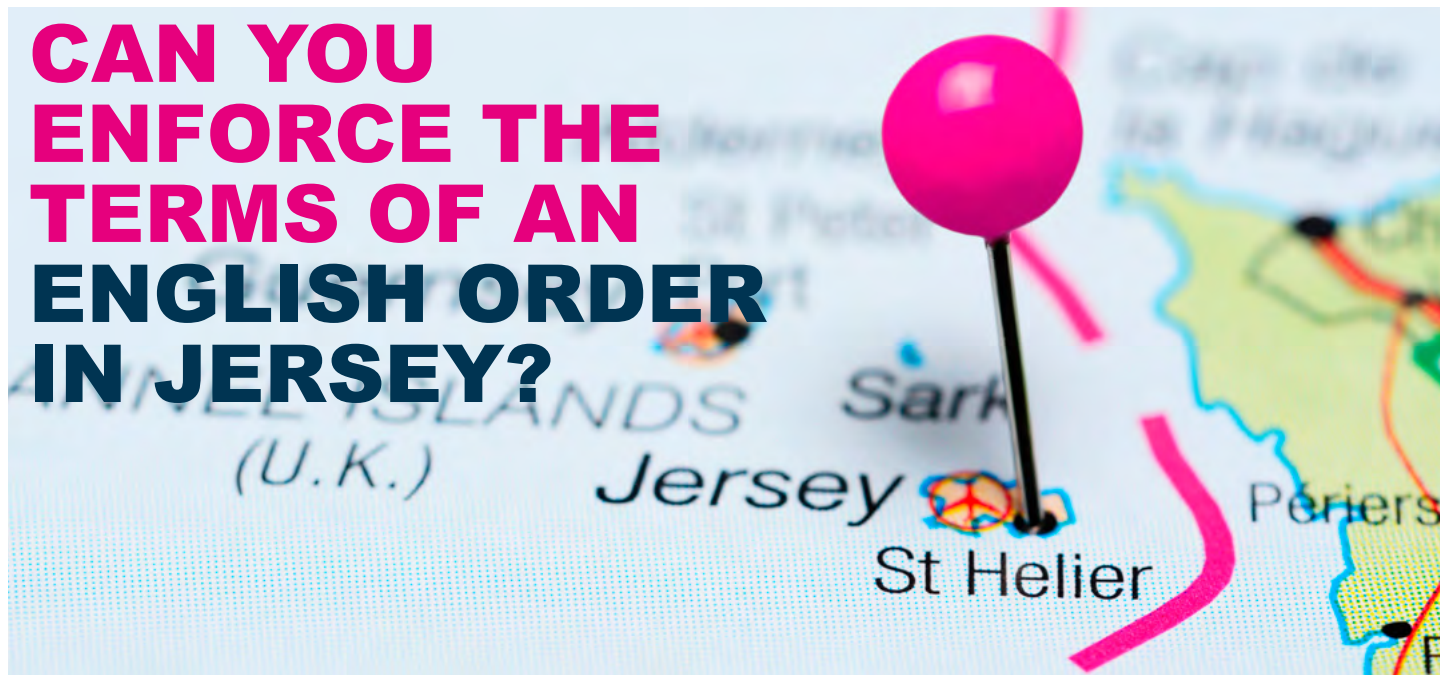
D +44 (0)1534 822427  
E [marcus.pallot@careyolsen.com](mailto:marcus.pallot@careyolsen.com)

*Carey Olsen Bermuda Limited is a limited liability company incorporated in Bermuda and approved and recognised under the Bermuda Bar (Professional Companies) Rules 2009. The use of the title "Partner" is merely to denote seniority. Services are provided on the basis of our current terms of business, which can be viewed at: [www.careyolsen.com/terms-business](http://www.careyolsen.com/terms-business).*

## OFFSHORE LAW SPECIALISTS

BERMUDA BRITISH VIRGIN ISLANDS CAYMAN ISLANDS GUERNSEY JERSEY  
CAPE TOWN HONG KONG LONDON SINGAPORE

# CAN YOU ENFORCE THE TERMS OF AN ENGLISH ORDER IN JERSEY?



Authored by: Lauren Glynn & Victoria Cure – Carey Olsen LLP, Jersey

Many practitioners will appreciate that Jersey is a self-governing Crown Dependency with constitutional rights of self-government and judicial independence. It follows that orders made in the courts of England and Wales are not enforceable as of right in this jurisdiction. We focus in this article on three common scenarios we see when such cross-jurisdictional considerations arise and the steps you can take to ensure that the terms of such an order are honoured.

## Ancillary relief – enforcement of orders against real assets

Jersey has been a leading international financial centre (IFC) for more than 50 years and is at the forefront of wealth management, funds, capital markets and banking. Numerous UK residents have investments located here. We looked at issues which can arise in respect of Jersey trusts in our last article, however when dealing with HNW and UHNW families, it is not uncommon for other valuable assets to also be located within this jurisdiction, such as real estate, interests in real estate, yachts, and monies invested in private wealth investments portfolios and funds. It is therefore unsurprising that, within the context of ancillary relief proceedings, English orders do sometimes purport to make orders against Jersey situs assets.

Our advice to the parties and third party institution on receipt of such orders is simple – in general they are, in themselves, not enforceable. It is important to note that this advice extends to injunctive relief granted by the courts of England & Wales which purports to extend to Jersey and assets sited here. A reciprocal order will need to be obtained from the Royal Court of Jersey to ensure the order's enforceability. Whilst this will for all intents and purposes be an application for a mirror order, the Royal Court will need to be satisfied as to the merits of the application. This is unlikely to require a full rehearing of the proceedings; the Royal Court is guided by the principle of comity. This means that although the Royal Court will review the merits of any stand-alone application by reference to principles of local law, the terms of an English order are usually accepted and "mirrored".

The majority of third party institutions upon whom you might serve an order purporting to cover Jersey situs assets will be professional financial services businesses; they will usually have some experience of dealing with such matters and will almost certainly engage Jersey Advocates in early course. The usual approach adopted by these institutions is a neutral one; however, they could of course find themselves in breach of regulatory requirements by failing to follow client instructions to deal with funds in their control. For this reason, it is really important to ensure you have joined up Jersey legal advice at an early stage and are ready to issue an application in Jersey as soon as possible once judgment has been handed down.

***“A reciprocal order will need to be obtained from the Royal Court of Jersey to ensure the order's enforceability. Whilst this will for all intents and purposes be an application for a mirror order, the Royal Court will need to be satisfied as to the merits of the application.”***





## Children proceedings – leave to remove

The enforceability of English orders in Jersey is also important in the context of children proceedings. As you have already read, Jersey has a leading financial services industry and that, coupled with a good work life, balance means that many professionals relocate to the island every year with their children. To make such a move requires both parents' consent and, where this is not forthcoming, leave to remove proceedings (in England) often follow. It is often helpful to your client's case to be able to present evidence that any order made by the English Court (particularly terms relating to contact with the parent who is to remain in England) will be honoured and enforced in Jersey.

Again, the English order itself will not be enforceable in Jersey and steps should be taken to register the order (in effect, a mirror order). If the order has been made under Part 1 of the Family Law Act 1986 (a familiar piece of legislation for many of you) it can be registered in Jersey without consideration of the merits, although it is important to note that any provision(s) in the English order regarding enforcement will not be recognised. Instead, the Royal Court will have its own full range of enforcement powers available to it.

Procedurally, the English Court should send a copy of the Order, any prescribed particulars of variation, if relevant, and a copy of the accompanying documents to the Royal Court. You may be required to make an application for this to happen, but it is the court of primary jurisdiction that makes the request to the Royal Court.

The Royal Court has been clear that it has the inherent jurisdiction to make such mirror orders. The mirror order will, however, only take effect once the child comes within the jurisdiction of the Royal Court.

Importantly, mirror orders enable parties to plan for their future, secure in the knowledge that the Royal Court will support the orders already made in England.

## Maintenance orders

Where a maintenance order has been made in England or Wales, a question of enforceability may arise should the payer move to Jersey and default on his/her payments.

Where such an order is in place, the Greffier or Registrars of the Family Division of the Royal Court of Jersey (our family judges) have the power to register the order within this jurisdiction on receipt of a certified copy of the order. It is important to note that this will likely need to be obtained from the Court which made the order. Before making such a registration, the Registrar is under a duty to take steps to ascertain the payer's residency in Jersey. If the court that made the original order was of unlimited jurisdiction then the order will be registered in the Royal Court. If the court that made the original order was of limited jurisdiction then the order will be made in the Petty Debts Court.

**L**

***“Jersey is a self-governing Crown Dependency with constitutional rights of self-government and judicial independence. It follows that orders made in the courts of England and Wales are not enforceable as of right in this jurisdiction.”***



# URGENT RELIEF AND THE PRACTICAL IMPLICATIONS OF SOCIAL DISTANCING: BUSINESS AS USUAL, BUT NOT AS USUAL



Authored by: Catherine Eason & Andrew McLeod – PCB Litigation

## Introduction

A flood of material released by the courts of England and Wales has ensured that the message has quickly spread that, while it may not be quite as usual, every step is and will be taken to ensure that court business continues.

This response is reassuring, in light of the serious challenge COVID-19 presents to every fabric of our lives – a challenge that might act as a foil for bad actors who see an opportunity to evade enforcement, or sparking new reasons for people to breach court orders.

Still, there is no doubt that all courts (in England and overseas) will be under considerable strain. Lawyers will need to be even more prepared, particularly when dealing with urgent applications, where delay may have significant consequences.

## English / Family Court approach

The Family Court's guidance is "Keep Business Going Safely", which works not just as an objective but also an imperative.

The default position is that all Family Court hearings are to be conducted remotely or on the papers. That said, an in-person hearing may still occur "if a remote hearing is not possible" and if suitable arrangements can be made to ensure safety (including maintaining social distancing). While it is unclear what constitutes "impossible", practical concerns alone will not be sufficient, as is clear from the efforts of Mr Justice Mostyn to conduct an entire three-day hearing (complete with 11 factual and three expert witnesses) over Skype for Business following the introduction of social distancing measures.

If resourcing becomes an issue, priority will be given to urgent applications, such as injunctions, and these will be heard remotely using video links and e-bundles.

## Changes in legal approach

While (as at the end of March) there is yet to be a reported case of urgent interim action determined in these new circumstances, such applications are made relatively frequently in the family context (see *Akhmedova v Akhmedov* [2019] EWHC 3140 (Fam)\*, and most recently *YM v NM* [2020] EWFC 13).

It seems unlikely that the new environment will trigger any change in the law, but it may affect its application – for example, the balance of convenience for injunctions, or the content of the orders themselves (ensuring appropriate safety measures in a search order, for example). No doubt there will be those creative enough to run such novel arguments.

## Practical concerns

Setting up technology for hearings will require lawyers to be patient and communicate with all parties, and begin preparations much earlier. This is not simply matter of practicality – urgent applications, in particular for worldwide freezing orders, may be barred if not brought within a timely manner.

In essence, the objective should be to make remote hearings as close as possible to the usual 'live' court, including enabling the proper participation of the judge, advocates and witnesses, and making sure journalists and members of the public are able to "attend" the hearing.

Some key practical issues counsel and solicitors will have to face are:

- **Creating the online courtroom:** Parties are no longer just in charge of preparing the documents and arguments for the Court, but in effect the courtroom itself. The Ministry of Justice is accelerating the roll-out of a centralised, cloud-based system for remote hearings. Until then, other platforms will be used. While the judicial laptops have Skype for Business installed, the court is open to alternative platforms (including Zoom) to be arranged by the parties.
- **E-bundles:** Again, there is no mandated e-bundling method or platform. It is likely that where a judge (or indeed counsel) has not previously used a particular platform, training will be necessary and factored into preparations. Counsel will need to work with clerks and judges to manage any issues or limitations (whether technical and user).
- **Open court:** Parties will have a greater role in aiding public access to proceedings. This will include liaising with court staff to ensure the daily court lists contain information on remote access, as well as directly contacting the media to notify them of the hearing.

Again, all of these issues must be given even greater care and consideration for urgent applications, where time is of the essence.

## Enforcement overseas

Similarly, there will be practical implications in other jurisdictions where the respondent may have assets, and enforcement is sought. For example, obtaining recognition of freezing orders in a particular jurisdiction may now have practical considerations to address in light of the approach courts in that country have taken in light of COVID-19?

A number of jurisdictions have taken a more restrictive approach than the English courts, reducing capacity to urgent matters only. Whether a particular enforcement application falls within that jurisdiction's scope of 'urgency' will depend on the jurisdiction and the nuanced arguments practitioners may advance. For example:

- All Cypriot hearings are to be suspended until the end of April, however applications for interim orders in civil cases will be heard "in cases of extreme urgency", which "shall be decided by the competent Judge, from whom prior special leave shall need to be obtained".

- French courts have advised that only "essential" litigation will proceed.
- In Russia, until 10 April 2020 courts will only consider the most urgent cases set out in a non-exhaustive list, in a simplified or default format.

In this new world, it will be even more important to ensure that every requirement for such relief is met. The advice and instruction of local counsel will be crucial.

Parties must carefully and continuously consider their litigation strategy during this period of rapid change, keeping up-to-date with the most recent advice given by the courts, and thinking laterally.

In the end, no matter where or how a litigant approaches the courts for urgent interim relief, it seems clear that having an experienced practitioner who is used to dealing with such matters will be crucial to seeking to ensure a client's objectives are met.

PCB Litigation LLP is a boutique dispute resolution firm, specialising in asset recovery, fraud and commercial disputes, including enforcement of Family Financial Orders.

\*PCB Litigation act for Ms Akhmedova.

**L**







STAY HOME



# KEEP CALM AND REST UP

WHEN THIS IS ALL OVER YOU WILL BE BUSY

SCHNEIDER FINANCIAL SOLUTIONS  
+44 (0) 203 848 7260  
INFO@SCHNEIDERFS.COM  
WWW.SCHNEIDERFS.COM



**LEADING THE FIELD IN RESPONSIBLE MATRIMONIAL LITIGATION FINANCE  
SINCE 2013**



# ENFORCEMENT OF MATRIMONIAL ORDERS AND POTENTIAL FUNDING OPTIONS



Authored by: Hannah Davie and Michael Leeds – Grant Thornton UK LLP & Alex Cooke and Alex Hulbert – Schneider Financial Solutions

Disputes within HNW Divorces are increasingly common.

Clients can spend considerable sums and years fighting for a successful Matrimonial Order (Order), which they envisage will be paid after an Order is obtained.

However, often that is not the case. By the time the Order is obtained the Client finds that the spouse has hidden assets offshore, or placed them in such complex structures that makes enforcing the Order incredibly difficult and often these additional costs mean it is just not feasible for them to pursue the matter further.

So how do you ensure your clients do not find themselves in a situation where they receive an Order which they are unable to enforce? Enforcement must be a key part of the strategy from the beginning and kept in mind when dealing with HNW Divorce and when options for settlement or litigation are being considered.

## Prevention is easier than finding a cure

From the outset it is imperative clients identify the assets available to secure their award against.

If there are doubts over the accuracy of the information provided by the spouse, clients should consider instructing a forensic specialist to undertake a Form E review, which will question the assets and values listed.

In addition, Corporate Intelligence services can be utilised to look at Open Source information or use Human Intelligence to investigate the asset position, identify hidden assets, provide a breakdown of complex corporate structures, including jurisdictions of various entities and establish the ultimate beneficial owner.

Understanding jurisdictions is key, as in each location the enforcement approach, the cost of enforcement and funding options available will vary significantly as further detailed below.

Knowing this information gives you time to devise your enforcement strategy and discuss funding options, so you are prepared and ready to act if it becomes necessary.

The hope is that these HNW Divorces are settled or dealt with by way of mediation. In these situations, being able to evidence that false asset information or values have been presented, by providing an independent financial experts report, means clients will inevitably be able to negotiate a higher settlement than would otherwise have been offered.

If, however, settlement or mediation is not possible and the matter goes to litigation and an Order is obtained and your client cannot recover what is due to them, you are immediately ready to move forward with your enforcement strategy.

## Enforcement strategy

The enforcement strategy has to be asset and jurisdiction specific.

Hence, once you have identified the assets and their location, you need to engage with professional advisors/solicitors in the jurisdictions identified and then discuss how you can safeguard the assets from dissipation during the course of the enforcement/litigation. Processes such as Court Appointed Receivers (CAR) or Freezing Orders (FO) can be used effectively in these situations and are discussed briefly below.

A Court Appointed Receiver is a very powerful tool. The powers are determined in the Court Order and are adapted to suit what you require from that particular situation. A CAR can be appointed over just about anything including legal claims, shares in companies which hold underlying assets, properties and valuable assets such as yachts and aircraft.

It is also worth considering a FO, whether a FO would assist will depend on the location and jurisdiction of the assets. If the assets are overseas you would need to consider a Worldwide FO (WFO) and if this would be recognised in the relevant jurisdictions. If a WFO would not be recognised, you should speak to the lawyers in the local jurisdiction to establish if there are any other measures that can be put in place to secure the assets.

Insolvency is also an effective tool, which can be deployed in suitable situations, as the powers of an Insolvency Practitioner (IP) are wide ranging and are recognised in the EU and most common law jurisdictions. Even the threat of insolvency can sometimes be sufficient to elicit an offer of settlement.

There are also all the powers that an IP has to bring claims for antecedent transactions such as transactions at an undervalue, preference claims, misfeasance claims. These can all be used to realise assets for the benefit of the client.

## Funding the enforcement of Matrimonial Orders

The funding of enforcement of Matrimonial Orders is now feasible and, since the enforcement proceedings themselves are often civil proceedings, are not necessarily constrained by the funding rules of the Family Legislation. Accordingly, funding might take on the form of a full-recourse litigation loan that practitioners in the field are likely used to, or alternatively a non-recourse litigation funding arrangement.

A litigation loan will take a standard format, and since the borrower will be the person looking to enforce the Order, will likely be a regulated credit agreement written under the Consumer Credit Act 1974. Lenders offering such loans will need to consider carefully the affordability of such a loan, including

in the event of full or partial failure of the enforcement action, to ensure compliance with the regulatory regime. This means that the use of litigation loans may be limited, however they can unlock smaller claims. The loan will need to be repaid at the earliest opportunity out of the proceeds of enforcement.

Litigation funding arrangements have been used to enforce all manner of court orders for some years. Such arrangements are typically non-recourse in nature (meaning that in the event of losing, the funds will not need to be repaid), but where the funder, upon success, will take a return of capital invested plus either:

- (i) a multiple (typically 2 – 3 times) of the funds invested into the case; or
- (ii) a percentage of the recoveries (typically 20 – 30%).

The definition of “success” will be defined in the litigation funding agreement, but typically will be all monies recovered. Some funders will also require the legal team taking on the enforcement to work on a Contingent Fee Agreement (CFA). Where such a CFA is in place, a waterfall will need to be agreed to ensure a fair repayment structure for all the invested parties.

The type of funding available will depend on the funder (most will only provide one solution) and the associated costs will depend on the risk involved of moving the enforcement proceedings forward.

These risks need to be considered on a case by case basis but some of the key issues will be the types of assets against which the Order may be enforced, their liquidity/risk of dissipation, the jurisdiction and structure in which the assets are held and whether the jurisdiction maintains any public policy provisions that would prevent enforcement of an English Order.

The funding of enforcement proceedings is often complex and at times not without risk to all parties involved. The size of the award in the Order and attitude of the other side and any third parties (such as trustees) will have a material impact on the overall assessment of the value of funding enforcement proceedings.

## Conclusion

Enforcement of an Order is not straightforward, and it will often take time to recover the funds and will likely require significant investment or a CFA/ funding agreement to be in place.

However, as detailed above, when clients are facing the difficult decision as to whether or not they are able to enforce an Order and recover what is due to them, these funding and enforcement options, when used appropriately, can provide real financial results for clients.

**L**

***“Litigation funding arrangements have been used to enforce all manner of court orders for some years. Such arrangements are typically non-recourse in nature (meaning that in the event of losing, the funds will not need to be repaid), but where the funder, upon success, will take a return of capital invested plus either:***

***(i) a multiple (typically 2 – 3 times) of the funds invested into the case; or***

***(ii) a percentage of the recoveries (typically 20 – 30%).”***

# ATTACKING AND DEFENDING (PENSION) TRUSTS IN DIVORCE



Authored by: Joseph Steadman – Wilberforce Chambers

Pensions can be of huge significance for divorcing high-net-worth couples. The most recent ONS figures show that for the wealthiest 10% of households, private pensions amount to 44% of overall wealth, compared to 30% held in property and 22% held in other investments.

Divorce practitioners will no doubt be familiar with the bespoke tools which have been provided – by amendments to the Matrimonial Causes Act 1973 – in order to allow one spouse to obtain a share of the other spouse's pension: pension sharing orders under section 21A and pension attachment orders under section 25B.

But what about when those tools are not available, or not convenient? What about, for example, overseas pensions falling outside the definition of “pension arrangement” under the 1973 Act?

Whilst it will often be possible for the Court to “offset” the pension assets against non-pension assets as part of the overall award, that will not always be the case—especially if the non-pension assets are limited, or are themselves held in complex structures.

It will sometimes therefore be necessary or desirable to target the pension benefits directly. And in many cases, those pension benefits will be provided through trust structures.

This article explores how some of the tools used to attack trusts in general might be deployed in the specific context of pensions, and how such attacks might be defended. In the space available, it cannot hope to be exhaustive; rather, it is intended as a springboard for further discussion within the HNW Divorce community.

## 1 Varying the pension trust as a nuptial settlement

In *Brooks v Brooks* [1996] 1 AC 375, the House of Lords upheld a district judge's decision to vary a pension trust as a nuptial settlement under section 24(1)(c) of the Matrimonial Causes Act 1973.

Following that decision, the legislature intervened to restrict such use of section 24(1)(c), but only in relation to (onshore) “pension arrangements” as defined in the 1973 Act.

The result is that, where an overseas pension trust falls outside that statutory definition, it is capable – in principle, at least – of being a nuptial settlement and of being varied by the Court.

It is worth noting, however, that *Brooks v Brooks* itself concerned a small pension trust of which the husband was the only member. The husband also controlled the employer and had procured the establishment of the scheme. Lord Nicholls, giving the leading judgment, recognised that the same analysis was unlikely to apply

in the case of a larger “multi-member” scheme.

In addition to denying nuptiality, the trustees of the pension trust could be expected to object that no variation should be made which might prejudice the interests of the other members, and that any variation should be consistent with the applicable tax regime.

Those objections could be expected to carry less weight, though, if the relief sought went no further than to “mirror” the effect of the more usual pension sharing order.

Even a spouse who succeeded in obtaining an order under section 24(1)(c) may still face difficulties at the enforcement stage if the jurisdiction in which the pension trust was established did not recognise or enforce the English court's order. Before seeking a potentially useless order, the spouse would be well-advised to consider both the general conflict of laws rules and any specific “firewall” legislation applicable in the trust's jurisdiction.

## 2 Attacking the pension trust as a sham

Staying with small pension trusts, another weapon in a spouse's arsenal might be to argue that the trust is a sham. So, for example, where a wife has procured that substantial sums are held in an (onshore or offshore) pension trust, the husband might argue that her

true intention – shared with the trustee – was different from that suggested by the governing documents.

Alternatively, he might make a Pugachev-style argument that the true effect of the governing documents is to leave the wife with beneficial ownership of the pension assets.

Again, however, it is likely to be difficult – if not impossible – to sustain either of those arguments against a large multi-member pension scheme, with well-drafted governing documents and proper independent trustees.

### 3 Claiming the pension benefits under a constructive trust

In a case where the evidence supports a common intention by husband and wife that their assets should be held jointly – a substantial hurdle in itself – it might then be possible to trace pension contributions into the pension trust itself and so to claim a beneficial interest in the pension rights granted in return for those contributions.

A tracing exercise of this kind is more suited to personal pensions – where a spouse has made contributions from their own assets directly to the pension trust – than to occupational pensions involving employer contributions.

### 4 Enforcing a lump sum order against the pension trust

Where no substantive order can be sought directly against the pension assets, a spouse might need to wait until the enforcement stage before attacking the pension.

A key difficulty in enforcing against assets held in a pension scheme is that the member can often control when their benefits are paid. So there may be no income or assets against which the usual methods of enforcement can be used.

Even the “nuclear” option of pursuing bankruptcy will not work, as pensions are excluded from the bankrupt’s estate.

There is, however, a mechanism for enforcing against assets held in a pension scheme. In *Blight v Brewster* [2012] EWHC 165, the High Court made an order requiring a judgment debtor to exercise his right to withdraw a lump sum from the pension fund, to be used to repay the creditor. (Importantly – as Chris Pocock QC and Kristina Kicks pointed out in the last issue of this magazine – this mechanism does not apply where the spouse has already been made bankrupt.)

This mechanism is, though, subject to the important limitation that the paying spouse must have a right to withdraw a lump sum from the pension fund—and this may well, depending on the applicable tax regime, mean that it cannot be used until they have reached the relevant retirement age.

### 5 Finding more amicable solutions?

A less combative approach would be to identify a means of extracting value from the pension trust under its own terms. A husband’s pension trust may well include “levers” which could be used to benefit the wife. For example, if a husband is nearing retirement age and he has the option of taking some or all of the pension benefits as a lump sum, he might agree to do so as a means of meeting her sharing claim.

An even less combative approach – albeit one which the majority of divorcing couples could be expected to balk at – would be for the parties to agree to stay the decree absolute or undergo judicial separation without divorce. This could preserve the wife’s entitlement, if there is one, to a widow’s pension on the husband’s death—but at the expense of being unable to remarry.

As with any divorce where a spouse seeks to attack a trust, in the pensions context there is an arsenal of weapons available but no silver bullet. And whilst this may not be of comfort to our clients, it does at least keep our lives interesting as lawyers.

**L**





A forward thinking, vibrant set of family law barristers with a dedicated client focus and highly recommended expertise. We are proactive in our approach and proud of our traditional values and strong reputation.

- One of the country's leading sets of Family Law Chambers
- Specialist knowledge and experience at every level of seniority
  - Top flight practitioners covering all areas of family work
    - Pioneers in Dispute Resolution
- Modern, flexible and user-friendly clerking team

# THE CURRENT OBSTACLES FACING INTENDED PARENTS IN UK/US INTERNATIONAL SURROGACY ARRANGEMENTS



Authored by: Sarah Williams – Payne Hicks Beach

Although both altruistic and compensated surrogacy in the England is legal, it is important to note that English surrogacy contracts are not legally enforceable and therefore wholly reliant on goodwill for their execution. This lack of enforceability, combined with the paucity of English surrogates, mean that intended parents desperate to create a family, are increasingly turning to commercial surrogacy overseas.

Favoured destinations for English intended parents include certain states in the US. Certainly, for those that can afford it, states such as California and Florida offer English intended parents a first-class experience and an American passport for the baby to boot. However, it is very much dependent upon the state in question – commercial surrogacy is still banned in many states, including New York. Although US surrogacy contracts are not legally recognized in the English courts, and consequently neither is the US birth certificate, the transference of legal parentage from the US surrogate to the intended parent(s) in the English High Court is a well-trodden path if skilfully navigated.

The global COVID-19 pandemic has, however, thrown international surrogacy arrangements into uncharted territory. For those at the beginning of a UK/US surrogacy journey, the American Society for Reproductive Medicine have recommended that new IVF treatment cycles be suspended and all fresh or frozen embryo transfers be cancelled. Surrogates who have already undergone

the embryo transfer will, however, continue to receive medical attention.

Where the surrogate is pregnant, the obstacles faced by intended parents will depend upon how far the pregnancy has progressed. If the pregnancy is in its early stages, intended parents will be able to continue to liaise with the surrogate and medical professionals via online meetings and also have time to prepare and make plans to circumvent any anticipated restrictions on travel at the time of the birth.

However, for those whose baby is almost due, intended parents will be bound by the latest Foreign Office's Exceptional Travel Advisory Notice advising British nationals against all but essential international travel with (many airlines are now suspending commercial flights). As from 16 March, it has not been possible for British nationals to enter the USA except in a number of specific categories, and even those allowed to must do so through one of the 13 designated airports and may be required to self-isolate for 14 days. See the latest British and US government advice <https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-other-countries.html> and US Department of State's website

Those intended parents whose baby has been born, should be able to rely upon the latest exemptions on travel restrictions which relate to those having immediate family in the US (although it is probable that they will have to be quarantined if coming from England). However, if they do face a delay entering the US once their baby is born, they should continue to

take steps to protect their child and their legal status as parents. Consideration will need to be given as to who will care for their child in their absence. It may be possible to reach an agreement with the surrogate to continue to care for the child in the interim. In any event, it would be necessary to formalize any such temporary guardianship agreement so that it is legally recognised and enforceable in the state in which your child has been born. Furthermore, intended parents are always advised to commission a specialist will along, with tax and succession planning to ensure your wishes are followed.

Ordinarily, a baby born via a US surrogacy arrangement has the added advantage of being eligible for a US passport (on an expedited basis) within days of both the Final Parental Order being granted and then the birth certificate being subsequently issued. Previously, this has allowed the parent(s) to travel home with their newborn swiftly after the birth. Currently, however, the US government will only issue US passports to newborns on an expedited basis in a "life or death situation", meaning those who do not fall into this category will have to wait the standard time (possibly one or two months) for their baby's passport to be processed.

For those currently stranded in the US with their baby and unable to return home on a commercial flight, hope may be on the horizon. The Foreign Office has, as of 30 March, announced a £75 million airlift initiative that should bring thousands of Britons back under a new arrangement between the government and airlines.

Once intended parents return to England with their newborn child, they can be reassured that their application for an English Parental Order will be processed, although delays can be expected. It is hoped that the court will prioritise these applications so that they are processed within the six month deadline after the child's birth. Since 23 March, the Parental Order Reporters at CAFCASS have introduced video conferencing in order to undertake their welfare checks on the baby at home with the intended parent(s), and it is anticipated that the High Court will conduct Parental Order hearings remotely.

In this uncertain time, it is more important than ever to seek up to date specialist advice. Being fully informed will help both the intended parents and the surrogate cope, allow them plan as far ahead as possible and take interim steps to best protect their legal parentage and their child.





# CAN I CHANGE MY MAINTENANCE ORDER OWING TO THE CORONAVIRUS PANDEMIC?

Authored by: Stuart Clark – The International Family Law Group LLP

Prompted by the helpful commentary by my colleague Megan Bennie which you can read here, as well as a number of enquiries via the iFLG website over the last week or so, I have been considering the impact of the ongoing COVID-19 crisis on spousal maintenance.

Whilst there are many pressing issues affecting us all personally as well as professionally at this time, one of the great many worries for many is the affordability of outgoings when our incomes might be being scaled back. This might be the usual standards of rent, mortgage payments and groceries. Or new outgoings prompted by the crisis, whether it be subscriptions to Zoom (professional) or Netflix, Amazon and Now TV (just to pass the time), other distractions for self and children or 300 toilet rolls. Like those toilet rolls, it all stacks up.

## What of maintenance?

Not a question on everyone's lips right now, but as family lawyers we will be asked this question over the coming weeks.

Many Court orders dating back several years will have provided for spousal maintenance based on projected incomes. The thought at that time, even as recently as orders made in January or February of this year would have been that, save for an extraordinary event, that income would continue.

But we are now experiencing an extraordinary event. And for many, the impact of coronavirus and the current shutdown will be a reduction or complete stop to their income.

Payers of spousal maintenance may no longer be able to afford the periodic payments. Recipients of spousal maintenance may no longer be able to make ends meet with their usual non-maintenance income either reduced or extinguished.

Section 31 Matrimonial Causes Act 1973 permits the variation of a maintenance order during the course of that order. The Court is bound to consider changes in circumstances since the original order. A significant change of circumstances, such as a reduction or complete stop of income, can prompt the Court to re-visit and vary the original spousal maintenance order. The Court does not have carte-blanc to vary and the purpose and underlying premise of the original order must be taken into account.

But the primary concern of any Court dealing with a variation application, whether under normal circumstances or these new-normal circumstances, will be to ensure that the needs of both spouses and any children are met.

I cannot speak here as to the principles the Court might apply in the current crisis, given the developing extraordinary situation and the fact that

***“Payers of spousal maintenance may no longer be able to afford the periodic payments. Recipients of spousal maintenance may no longer be able to make ends meet with their usual non-maintenance income either reduced or extinguished.”***

the Court has a wide discretion when determining variation applications to consider all circumstances.

But in normal circumstances the Court would most likely reduce or extinguish a spousal maintenance obligation in the event that the payer's income has reduced or ceased. The Court might consider whether the payer has any capital resources or alternative income with which to continue payments as part of the general circumstances of the application.

If the recipient of spousal maintenance no longer receives an income from employment or other non-maintenance sources, the Court may consider an uplift to the ongoing spousal maintenance so as to ensure the needs of the spouse and any children are met. The affordability of that uplift to the paying spouse will be considered. Again, any capital resources of both spouses will also be considered.

So, if you are in a position where your income or your former spouse's income has been affected by the COVID-19 crisis, you may need to be alert to the potential to vary the spousal maintenance order.

## How will this work in practice?

As I have said, the Court can vary a spousal maintenance order. If a variation is required and it cannot be agreed, then an application will need to be made to the Court.

In the best of circumstances, this might take the Court 6-12 months to resolve. In the current shutdown, the Court are not experiencing the best of circumstances. And so, this timeline is likely to be protracted unless the court can be convinced of the urgency of an application.

We presently do not have any firm indication of how long the shutdown will be operative. We are hoping for a return to normal life by the summer, but it may be longer. The longer-term impact on income is not yet known. And so, the rationale for a variation application may be out of date by the time it comes to be determined by the Court. The costs of a Court application may well outweigh the temporary benefit which is sought.

It is therefore worthwhile to explore alternatives to the Court process. This might involve mediation or negotiations personally or via solicitors.

A solution might involve temporary measures in the shadow of what the Court might do. A temporary cessation or suspension of maintenance for as long as the crisis continues. As well as the power to vary, the Court can temporarily suspend payments, or it might involve an increase to payments to meet needs. The Court can vary maintenance upwards, even temporarily.

All options might be considered as temporary non-binding agreements without prejudice to the longer-term maintenance obligations for when the crisis is over. It is a time to take sensible practical steps and I would urge former spouses to negotiate a short-term solution rather than engage in long-term expensive litigation.

These are all options in the shadow of a formal Court application.

In these trying circumstances it is best to take advice from a specialised family lawyer and in the first instance, to see whether a temporary fix can be negotiated. The Courts are over-stretched and are unlikely to be able to consider and determine a variation application expeditiously.

We recommend taking advice on what might be achieved at these pressing times. At iFLG, we can advise on the Court based options or on what might be achievable in sensible mediation or negotiation discussions.

If you have any questions or wish to discuss any of the issues raised in this note please do not hesitate to contact me, Stuart Clark or any of my colleagues at iFLG who would be very happy to discuss, including ways in which a solution could potentially be found.

**L**





## Upcoming Events

Virtual Conference (Zoom)  
May 2020

### Trustees & Divorce: Navigating Stormy Waters

[UPDATES ON WEBSITE](#)

Virtual Conference (Zoom)  
June 2020

### Enforcement of a Divorce Award

[UPDATES ON WEBSITE](#)

Virtual Conference (Zoom)  
4 June 2020

### Trusts in Divorce

[UPDATES ON WEBSITE](#)

Virtual Conference (Zoom)  
June 2020

### Wealth Planning for Divorce

[UPDATES ON WEBSITE](#)

Virtual Conference (Zoom)  
July 2020

### Compensation

[UPDATES ON WEBSITE](#)

Virtual Conference (Zoom)  
July 2020

### What is the Role of the Family Court?

[UPDATES ON WEBSITE](#)

1 Day Conference  
29 Sep 2020

### HNW Divorce Litigation

1 Day Conference featuring 25+ renowned international experts drawn from the spectrum of the HNW Divorce Litigation landscape.

[AGENDA & SPEAKERS](#)

Bespoke4 Panel  
Oct 2020

### Building your Personal Brand

[COMING SOON](#)

Bespoke4 Panel  
Oct 2020

### Immigration Issues on Divorce

[COMING SOON](#)

1 Day Conference  
Dec 2020

### Complex Finances

[COMING SOON](#)

1 Day Conference  
Dec 2020

### Divorce Proofing Wealth Planning

[COMING SOON](#)



Targeted at those with 2-12 years' experience

Bringing together up-and-coming HNW Divorce Practitioners specializing in HNW Divorce to forge networks and share knowledge

[FIND OUT MORE](#)



Authored by: **Samantha Woodham – The Divorce Surgery**

The Split, a BBC One drama which follows the personal and legal challenges faced by the Defoes (a family of female divorce lawyers to high-end and celebrity clients), returned to our screens last month after the success of its first series back in Spring 2018.

As you would expect from any legal drama, the series is full of glamour, excitement and dramatic legal plots which deal with a variety of family law matters including divorce, nuptial agreements, Non-Molestation Orders and adoption. Whilst The Split does not fail to keep us engaged and thoroughly entertained, it does prompt us to consider the extent to which such drama is a genuine reflection of the reality of family law today in England and Wales and the work that family lawyers do.

Although the drama makes a clear effort to touch upon several modern and pertinent issues in family law, the general theme of the series fails to stray away from the all too familiar narrative– that which suggests that divorce is the ultimate failure; an event full of acrimony and shame and which is further inflamed by the adversarial legal process and the involvement of egotistical lawyers.

## The Decision

The main legal plot of the series details the marital breakdown between glamorous TV personality, Fi Hansen

and her manipulative and controlling TV producer husband, Richie. In the first episode, a flustered Fi comes to Hannah Defoe (the heroine of the series), requesting that she take a look at her pre-nuptial agreement. Hannah is shocked that any lawyer advised Fi to sign it, not least because it required Fi to sign a suffocating Non-Disclosure Agreement. Without much further analysis Hannah immediately advises Fi to change the terms of her pre-nup by signing a post-nup but, as their meeting progresses, Hannah asks Fi if she wants to leave her marriage and Fi decides that she does.

From this initial meeting, the suggestion is that divorce is a 'spur of the moment' decision entered into lightly by clients and often unilaterally or even on persuasion by their lawyers. Although Fi had probably given much contemplation to leaving her marriage over the years, her arrival at the decision to get divorced during the meeting suggests that it is a decision that spouses arrive at with the help of their lawyers. In reality, this just isn't the case. For family lawyers, it is of the utmost importance that their clients are certain that this is what they want to do. For spouses, the decision to get divorced is one of the most carefully thought through decisions that 42% of married couples make and is not one made off the hoof with the gamely encouragement of an eager lawyer, but rather together after lengthy deliberation. The drama fails to highlight this truth and the Hansens are dragged into the adversarial process.

## The Process

Hannah's first instruction to Fi as her solicitor is to keep a record of her husband's unreasonable behaviour and to disguise this as her 'Ocado shopping list'. It is at this point that Fi becomes a victim of the system and the viewer is pushed into believing that divorce must be a process full of secrecy and strategy. There is no attempt by Hannah to facilitate any constructive discussions between Fi and Richie in order to reach agreement on certain issues or to suggest the use of any sort of alternative dispute resolution. Instead, the client is actively encouraged by her lawyer to start plotting and planning against her spouse, without first considering whether or not they are on the same page in relation to any matters.

Granted, Richie's controlling and coercive behaviour towards Fi means that in reality, the decision to leave the marriage probably would be a unilateral one on her behalf and given his general inability to respect and co-operate with her, it may have inevitably become adversarial. This, however, does not change the fact there is still an obvious absence throughout the whole drama of the vast majority of separating UK couples, whose aim is to avoid, where possible, becoming trapped in the bitter and acrimonious divorce process.

The absence of such a storyline enables the writers to paint a worrying and wholly inaccurate picture of divorce,

one which is grounded in competition and aggression, which pits spouse and spouse against each other and in which there is a winner and a loser. In doing so, *The Split* fails to help family lawyers lift the oppressive stigma around divorce, turning a blind eye to the fact that divorce does not have to be 'a failure' and that for many couples, it can be a positive step forward for two people who have accepted that a period of their life is over.

## The Lawyers

All of this acrimony in the Hansen divorce is further exacerbated by the family lawyers themselves, who are more than ready for the fight. The first meeting that takes place between Fi and Richie with their solicitors present is in a clinical board room, with the parties sitting on opposite sides of the table threatening Non-Molestation Orders and professional embarrassment as leverage against each other. The sentiment of confrontation could not be stronger. To add flame to the fire, their representatives also happen to be professional rivals. In the room, there is a tense atmosphere of one-up-manship, not only between the spouses but between their lawyers too, and it appears as though the more important objective for them is their own professional gain. Here, *The Split* fails to highlight the fact that one of a family lawyer's key objectives is to ensure that the trauma of divorce is mitigated as much as possible by settling cases at the earliest feasible opportunity and that such confrontational and distressing meetings would never, in fact, be contemplated let alone take place.

## The Conflict

On a 'nit-pickier' note, the drama is also peppered with some quite substantial conflicts of interest. In one instance, an aggressive and public conversation takes place between Hannah and her client's opponent at parents evening without his lawyer present. In another, Hannah is seen at her client's house, drinking wine and socialising with her friends. The series does not shy away from unrealistic and inappropriate scenarios in this respect and whilst it is clear that these conflicts are put in for the sake of drama and plot intrigue, it is fair to say that such conflicts would not only be totally inappropriate in reality but also a breach of professional conduct by family lawyers. Unfortunately, in this respect, *The Split* pays little tribute to the high levels of discretion and integrity that family lawyers exercise.



## The Reality

Credit where due, in the final meeting between Fi, Richie and their lawyers, the dust appears to be settling. After reaching agreements on the residency of their children and press statements, Ruth Defoe (Hannah's mother and eminent family lawyer), says "it doesn't serve anyone to draw this out any longer" whilst handing Richie the divorce papers. This scene, along with the fact that the Hansen v Hansen divorce never actually progresses to litigation, appears to be an attempt by the writers to tone down the confrontational and aggressive picture of divorce that they painted in the earlier five episodes and to show that important issues on separation can be settled by calm and considered negotiation and compromise.

Perhaps the most realistic separation of the series, however, is the one that occurs between Hannah and her husband Nathan. After months of marital problems and adultery (by both of them), Nathan informs Hannah that after 20 years of marriage, and much to the viewer's disappointment, it is over for him. Here, the viewer comes to understand the genuine and deep sadness that family lawyers observe on a day to day basis, when their clients come to terms with the fact that their marriage is over. Unlike with the other plots, the suggestion here is that the separation between the heroine of the drama and her husband will be civil and most importantly child-centric.

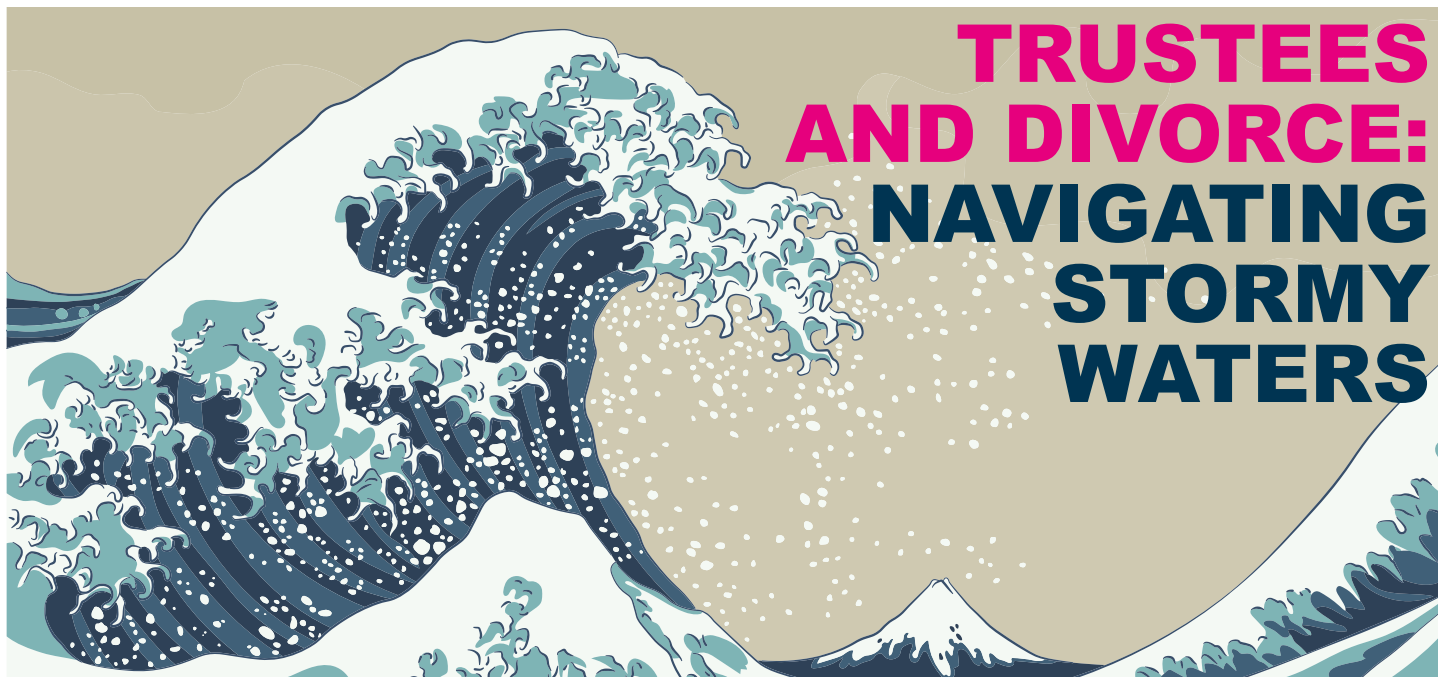
## The Conclusion

Despite efforts to deal with some interesting and relevant areas in family law, what really stands out is the absence of a plot in which a couple decide to separate on their own terms, respectfully and constructively and most importantly, without unnecessary conflict. It therefore seems, that in an era where the Courts are under enormous strain from family law matters and family lawyers are trying their hardest to keep divorce, where possible, away from the adversarial, expensive and agonising process of litigation, *The Split* is unhelpful and does not remotely reflect the growing calls of separating couples for a dignified, non-confrontational approach to divorce.

At *The Divorce Surgery*, our 'One Couple, One Lawyer' approach means that we can help couples, who have made the decision to separate, to do so in a constructive, open and amicable way which looks to secure what is best for them both. We recognise that not all separations are suited to the adversarial legal process portrayed so often in *The Split*, and that most separating couples just want to be fair to themselves, their children and each other, viewing contested litigation as an absolute last resort to be avoided wherever possible.

L





Authored by: Jonathan Arr and Elizabeth Doherty – Macfarlanes LLP

Debt, death and divorce: often grimly cited as the estate agent's best friends, they are also three main harbingers of trust litigation. The last of these can be particularly troublesome for trustees, who can find themselves in a difficult position when a beneficiary (or beneficiaries) of a discretionary trust divorce, especially when it is taking place in the English courts. There are many reasons why alarm bells start ringing for a trustee in such cases, such as:

- if the trust is a nuptial settlement, it may be made the subject of an order to vary it under section 24(1)(c) of the Matrimonial Causes Act 1973 (MCA 1973);
- the trust assets may be treated as a resource available to the spouse against whom an application for financial remedy is made under section 25(2)(a) of the MCA 1973;
- the trust may be held to be a sham so that its assets belong to the settlor, who may or may not be the respondent spouse; or
- the trust may be attacked on other grounds, for example fraud or undue influence.

Once English divorce proceedings loom, trustees must consider what strategy they should adopt with regard to their involvement. Each situation is different, and there is no set formula, but from experience, trustees are likely to need to engage in the type of enquiry and analysis set out below.

### The class of beneficiaries and pattern of distributions to date

First, trustees need to obtain advice about whether the trust may be a nuptial settlement for English law purposes. The classic definition of a nuptial settlement is found in *Brooks v Brooks* [1996] AC 375. For a settlement (which includes not only trusts but any structure that holds money) to be nuptial, broadly speaking "the disposition must be one which makes some form of continuing provision for both or either of the parties to a marriage, with or without provision for their children". If a trust is held to be a nuptial settlement, it is vulnerable to an order varying its terms – and the court has the power to make extremely wide variation orders.

Secondly, the trustees should look at the pattern of payments out of the trust, which will influence the view the English court might take on whether (and to what extent) the trust is a resource of one or both of the spouses – and thus what order it might make against the spouses or, indeed, the trustees. Questions the trustees might consider include:

- What regular or one-off payments have the trustees made to the spouses or their children?
- Have the trustees ever refused requests for money?
- Have payments been made to other beneficiaries? Is it intended that they will be in the future?

***“trustees should look at the pattern of payments out of the trust, which will influence the view the English court might take on whether (and to what extent) the trust is a resource of one or both of the spouses”***



## Providing information – how involved should the trustees be?

Once divorce proceedings are imminent, trustees should consider the manner and scope of their engagement with the warring spouses. Whilst trustees may wish to be helpful, balancing confidentiality and disclosure obligations should also be at the forefront of their minds.

As well as the general law affecting a trustee's duties in relation to trust information, different jurisdictions make different provisions as to the sharing of trust information. Trustees therefore have a difficult job balancing orders for information made against them or their beneficiaries, the possibility of adverse inferences being drawn as a result of a failure to provide information, the conflicting interests of their beneficiaries, and the provisions of local legislation.

## When should trustees submit to English jurisdiction?

One or both of the spouses may seek to join the trustees to proceedings and the trustee will be left to decide whether to engage or stay out of the fray. In this situation, the trustees must consider: (i) the governing law of the trust; (ii) where the trustees are located; and (iii) where the trust assets (including debt) are located.

If the trust is not governed by English law, the trustees are resident out of the jurisdiction and there are no UK assets, their position is relatively strong, particularly if they have the protection of "firewall legislation" which may block the enforcement of any order varying the trust. In such cases, the best answer may be a strict position of non-engagement. Whatever the answer, trustees have more room for manoeuvre in designing a strategy which balances the interests of all parties and protects the trust.

However, if there are assets in the UK, those assets may be vulnerable to enforcement of orders of the English courts regardless of the terms of the trust or its local law. In this situation, lack of engagement could leave the assets more vulnerable. Mostyn J warned in *DR v GR* [2013] EWHC 1196 (Fam) that, "if trustees do not voluntarily participate as witnesses and give proper disclosure, they cannot complain if robust findings are made about the realities of control and the likelihood of benefit".

Trustees therefore have to consider whether the best thing to do in such cases is to participate actively in the divorce proceedings knowing that, if they do, they may well be treated as having submitted to the jurisdiction of the English court with no realistic defence to enforcement of an unfavourable order.

## Assistance of the court

In such circumstances, trustees are not expected just to take a decision and hope for the best. Whichever approach they adopt, one of the spouses may well complain, or adverse inferences may be drawn against them in the English court.

To protect themselves, they are entitled to seek court approval or directions, generally from the court whose law governs the trust. This is a well-trodden path and the courts in many jurisdictions are used to dealing with these issues. Whilst the directions proceedings themselves can be an opportunity for satellite litigation in a highly contested divorce, and may require the involvement as parties of a number of beneficiaries, the trustees cannot then be the subject of breach of trust proceedings for any action they may take with the court's approval.

## Conclusion

Trustees face a number of challenging decisions when navigating the choppy waters of divorce. When emotions run high and proceedings move quickly, planning early, seeking legal advice, and having a clear strategy from the beginning, will prove invaluable in maximising the protection afforded to the trust, its assets and the interests of the beneficiaries as a whole.

**L**



## Upcoming Events

Virtual Conference (Zoom)  
May 2020

### Trustees & Divorce: Navigating Stormy Waters

[UPDATES ON WEBSITE](#)

Virtual Conference (Zoom)  
June 2020

### Enforcement of a Divorce Award

[UPDATES ON WEBSITE](#)

Virtual Conference (Zoom)  
4 June 2020

### Trusts in Divorce

[UPDATES ON WEBSITE](#)

Virtual Conference (Zoom)  
June 2020

### Wealth Planning for Divorce

[UPDATES ON WEBSITE](#)

Virtual Conference (Zoom)  
July 2020

### Compensation

[UPDATES ON WEBSITE](#)

Virtual Conference (Zoom)  
July 2020

### What is the Role of the Family Court?

[UPDATES ON WEBSITE](#)

1 Day Conference  
29 Sep 2020

### HNW Divorce Litigation

1 Day Conference featuring 25+ renowned international experts drawn from the spectrum of the HNW Divorce Litigation landscape.

[AGENDA & SPEAKERS](#)

Bespoke4 Panel  
Oct 2020

### Building your Personal Brand

[COMING SOON](#)

Bespoke4 Panel  
Oct 2020

### Immigration Issues on Divorce

[COMING SOON](#)

1 Day Conference  
Dec 2020

### Complex Finances

[COMING SOON](#)

1 Day Conference  
Dec 2020

### Divorce Proofing Wealth Planning

[COMING SOON](#)



Targeted at those with 2-12 years' experience

Bringing together up-and-coming HNW Divorce Practitioners specializing in HNW Divorce to forge networks and share knowledge

[FIND OUT MORE](#)

# ThoughtLeaders HNW Divorce

## Meet ThoughtLeaders



**Paul Barford**  
Founder / Director  
020 7101 4155  
[email](#) Paul



**Chris Leese**  
Founder / Director  
020 7101 4151  
[email](#) Chris



**Danushka De Alwis**  
Founder / Director  
020 7101 4191  
[email](#) Danushka



---

### Our HNW Divorce Community Partners:

CAREY OLSEN

KILLIK & Co  
— Family Office —

Kingsley  
Napley

 PCD Club

  
SCHNEIDER  
FINANCIAL SOLUTIONS

29  
BEDFORD ROW  
CHAMBERS

1KBW