ThoughtLeaders4 HNW Divorce • December 2020

HNW Divorce MAGAZINE

ISSUE 4

LOADING...

2020 2021

THE HNW DIVORCE COMMUNITY IN A YEAR LIKE NO OTHER

INTRODUCTION

"An optimist stays up until midnight to see the new year in. A pessimist stays up to make sure the old year leaves."

Bill Vaughan

As this "unprecedented" year draws to a close and we prepare for a new year that hopefully promises a whole new world, we invite our readers to wrap up 2020 with the 4th Edition of our HNW Divorce Magazine.

We would like to thank our authors, members, readers and Community Partners for their contributions and support. Whether you enter the new year as an optimist or a pessimist we look forward hearing from you all in 2021, with to more captivating content and industry insight.

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CONTENTS

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.

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SEPARATION AND DIVORCE

TAX CONSIDERATIONS FOR INCOME AND BUSINESSES

Authored by: Hannah Braisted and Kathryn Evans - Irwin Mitchell

It is not uncommon for spouses or civil partners to be involved in business together, whether both are in active roles or where one spouse or partner has a more passive role in the business, perhaps for tax reasons. Civil partners are treated the same as a married couple for tax purposes and therefore reference to a spouse or spouses in this article should also be taken to include civil partners and reference to a divorce to also cover a dissolution of a civil partnership.

Contrary to popular belief, there is no general tax exemption for a couple when they get divorced. However, the date that an asset is deemed to have been transferred can have an impact, so the timeline of divorce petition, financial order (and the drafting thereof) and Decree Absolute will be relevant. How business interests are dealt with prior to, upon and following a separation can have a significant impact on the individuals' and a company's tax positions.

Business assets can potentially be used to fund a financial settlement upon divorce. Where both parties are directly linked to the business, whether as owners and/or as employees, it's often the case that following the breakdown of their relationship, there's a desire at least on the part of one of the pair for themselves or the other to be extricated from the business, leaving the remaining individual to move forward independently with the business.

As Family Law advisors, it would be prudent to advise clients to also seek tax advice (and possibly employment law advice) prior to and alongside negotiations in respect of the financial settlement pursuant to the parties' separation so that those negotiations can be fully informed as to all the foreseeable consequences of settlement options. This is likely to include: looking to maximise the availability of reliefs such as Entrepreneurs' Relief; choosing what's to be liquidated; and when.

Options such as a director taking a loan from the company, or a shareholder taking a dividend, may be considered, where those funds are to be applied to pay, for example, a lump sum to a spouse as part of a wider financial settlement. Yet the tax implications can be considerable. For example,

corporation tax paid on an overdue director's loan repayment is 32.5% at present, so a director may choose to borrow a significant amount from the company in the short term but should be confident of being able to repay it quickly and within the terms of the loan.

If retained profit is to be used for funding a settlement then the favourability of how best to apply that retained profit should be considered. For example, if it's paid out as salary or dividend then it reduces the taxable profit of the business, but increases the income tax liability of the individual.

If sufficient cash is available to be paid over at completion of a share transfer, it may be worth considering extracting capital from a trading company (or holding company of a trading company) by way of a company purchase of own shares. As an alternative, extraction of funds in capital form by using a new company could be an option – i.e. the new company purchases both spouses shares. The spouse who is to continue in the business gets shares in the new company in return and the exiting spouse gets cash/ loan notes. There are disadvantages to this option, which include stamp duty.

Where shares are to be sold or transferred, CGT liabilities should be considered. Whether the transferor was employed by the subject company, and the size of the transferor's shareholding, will be key to whether or not Entrepreneurs' Relief will be of use. Ensuring the criteria for Entrepreneurs' Relief remain in place at the relevant time should not be forgotten. For example, a disposing spouse shouldn't quit as an officer or employee of the company before the transfer takes place.

Perhaps of most pressing and significant concern in relation to CGT is the fact that current regulations provide for disposals between spouses that are made in the tax year of separation to be treated as made at neither a gain or a loss – therefore no CGT is due. This provides for a potential tax saving and therefore retention of what may be very much needed family capital that can be applied to the parties to help fund their respective new lives. The date of separation (and the evidence of this) is very important. The relevant assets would be transferred pregnant with the gain, but the aim would be to look at that as part of later settlement discussions.

Section 165 of the Taxation of Chargeable Gains Act 1992 means that a transfer of shares from one spouse to another, not in exchange for money, could be covered by gift (holdover) relief, as long as the gift is made pursuant to a court order. Once again, the transferor wouldn't be liable to any CGT on the transfer, but the transferee would receive the shares pregnant with any gain.

Sometimes, 'family' assets, such as the family home, are owned by the family company. It's possible for assets, rather than just cash, to be transferred out of the company as a dividend. The tax consequences of such a transfer should also be considered.

If there are different businesses/ trades under one company's/ companies' umbrella, and each spouse wishes to continue with their area, demerger may be an option. However, this can be complex from a tax perspective, and generally reorganisation requires a high level of co-operation between spouses.

The way business interests are dealt with prior to, or upon separation, can have a significant impact on the individuals' and the company's tax positions, therefore it is important to be alive to these issues and consider seeking expert advice where necessary.

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DEALING WITH HINDSIGHT IN BUSINESS VALUATION

Authored by: Sandra Mossios and Fred Brown - Grant Thornton

Valuations in divorce cases often feature values at a number of different dates pertinent to the case, including the date of marriage, the date of separation and the current date. It is therefore important for those seeking a valuation to understand the information that would or should be taken into account in preparing valuations at each of those dates, and how that might impact on the business value. In this article, we explore case law around the use of hindsight, and also touch upon how hindsight may be relevant in relation to the impact of Covid-19 on valuations.

One of the few joys of reading case law is revelling in some of the more flowery and evocative language of judges. As accountants embroiled in the numbers of valuation and the even-handed presentation of expert views, it's a rare treat. But what do the words of Lord Macnaghten here refer to and what can they teach us about hindsight in business valuation?

"With the light before him why should he shut his eyes and grope in the dark?"

Lord Macnaghten[1]

When it comes to valuing a business at an historical date, the prima facie rule is that **only information likely to have been known at that date should be taken into consideration.** On the face of it, it's a straightforward rule, and there are many examples in UK case law where hindsight has been rejected. But is it so unambiguous in practice?

There are two important caveats to consider regarding events after the valuation date:

- The first relates to subsequent **Actual transactions in the shares;** and
- The second relates to subsequent **Actual performanc**e of the business

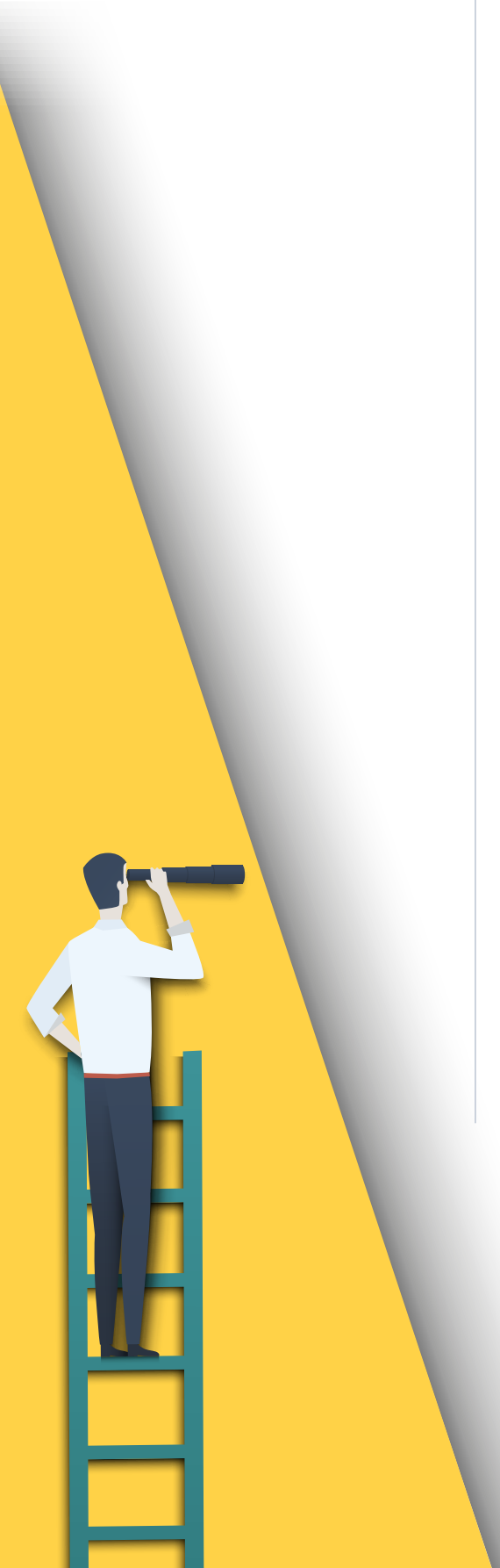
Actual transactions in the shares of the business after the valuation date

From our review of case law, and our experience, a court will on occasion render hindsight admissible to guide its view. We have seen this in US and Australian tax-related cases, as well as our case alluded to above presided over by Lord Macnaghten. In these instances, transactions subsequent to the valuation date have been taken into account, provided that they are sufficiently comparable.

So, just as prior transactions will often be given a strong weighting in business valuation, subsequent transactions must also be considered and may bear weight if nothing significant has changed in the business and its market.

1 Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co [1903] AC 426

If the business has moved on, or the subsequent transaction involved a special condition or special buyer, hindsight is unlikely to be accepted, as in the case of Foulser and Foulser v HMRC [2015][2]. Here a subsequent transaction in the shares of the business in question was deemed 'not to reflect a warm light back' onto the earlier date, as it involved a special purchaser.



Actual performance of the business after the valuation date

Hindsight based on actual performance after the valuation date ***may be*** permissible in order to **confirm what forecasts could have been reasonably made at the valuation date.** As stated in Buckingham v Francis [1986][3] *"regard may be had to later events for the purpose of deciding what forecast for the future could reasonably have been made"* but indeed the devil is in the detail as can been seen in Joiner v George [2002][4], where the Court of Appeal rejected the proposition that trading results after the valuation date should be preferred to its trading results actually achieved.

It may also be permissible where **scant information is available** regarding expectations for the business at that time. In certain circumstances, subsequent actual performance might be considered but this should really be a last resort.

Where subsequent actual performance is the **only possible proxy** for expectations of the business at the historical date, here are a few important factors to consider:

- What was the distribution of possible outcomes at the time? When valuing start-up companies, or pharma companies with products in development, there is a huge range of possible outcomes. The probability of success or failure of the business is almost binary. It would be all but impossible to predict the actual performance outcome. Here applying actual performance as a proxy for forecasts at the time is likely to be inadmissible.
- Has anything fundamental changed in the business and its market between the valuation date and the subsequent actual performance? Any fundamental changes are likely to render subsequent performance irrelevant.

As experts in contentious business valuation, we often find that we are asked to develop valuations in situations where there is meagre information. Usually there is something that can shine a light on the situation, but we may have to dig a little deeper to find it.

Hindsight and Covid-19

Covid-19 adds a particular significance to the application of hindsight for historical valuations with a valuation date in late 2019 and the early months of 2020, when it may be necessary to understand whether the onset of Covid-19 was known or knowable.

There are high level indicators which can provide some tangible evidence – for example the reaction to the pandemic of stock markets in the UK in the last week of February 2020, and the sharp decline of FTSE indices from Monday 24 February, which show that the UK market had started to respond to the actual and potential impact of the pandemic and the measures put in place to deal with it. The market reaction timing was similar in the US, but earlier in China, therefore if the company being valued is exposed to different countries, the impact may have been known at different times, for different aspects of the business.

The implications of this knowledge are to inform a valuer as to whether incorporating the impact of Covid-19 on the business (either positive or negative) potentially involves using hindsight, or whether it could reasonably have been anticipated at a historical valuation date and thus should be factored into the business valuation. It will inevitably not be a 'one size fits all' approach, with differences likely depending on the sector and geographical spread of the business in question. However, it is potentially an important factor where there is a relevant valuation date which falls in early 2020 and should be carefully considered.

2 Brian Foulser and Doreen Foulser v The Commissioners for HM Revenue and Customs: [2013] UKUT 038 (TCC)

3 Buckingham v Francis Douglas Thomson [1986] 2 AER 738

4 Joiner & Anor v George & Ors, Court of Appeal - Civil Division, March 27, 2002, [2002] EWCA Civ 160

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A NEW DAWN: THE END OF THE BLAME GAME?

Authored by: Connie Atkinson and Katie Newbury - Kingsley Napley

The much heralded Divorce, Dissolution and Separation Act received Royal Assent on 25 June 2020.

Until 1969 a person could only petition the Court for divorce on the basis that their spouse had in some way been at fault for the breakdown of the marriage due to their adultery, cruelty, desertion, or incurable insanity. Following a push for reform in the 1950's and 1960's the Matrimonial Causes Act 1973 was created, now approaching its half centenary, which remains the basis of the laws governing divorce to this day.

The current divorce system in England and Wales has undoubtedly been a major topic of discussion for many years. Whilst potential reform of the current divorce laws and a push for 'no fault' divorce is nothing new, it was the highly publicised Judgment of the Supreme Court in the case of *Owens v Owens [2018] UKSC 41* that re-ignited major discussion.

Justice Secretary and Lord Chancellor the Rt Hon Robert Buckland QC MP summed up the sentiments of many legal practitioners when he commented:

"These new laws will stop separating couples having to make needless allegations against one another, and instead help them focus on resolving their issues amicably. By sparing them the need to play the "blame game", we are removing the antagonism that this creates so families can better move on with their lives."

But will this come to pass and does the new legislation go far enough?

The new laws seek to encourage a non-confrontational approach, reducing conflict and its damaging effect on family relationships, particularly where there are children of the family. The key provisions can be summarised thus:-

1. Parties can now apply either together or individually, removing the need for there to be a "Petitioner" or aggrieved party.
2. There is no longer the requirement to establish one of the statutory facts in support of irretrievable breakdown of the marriage, thus introducing the long awaited 'no fault' divorce. The Petitioner can simply state the irretrievable breakdown as a fact.
3. It will no longer be possible to contest the basis of divorce as the statement of irretrievable breakdown will be taken as determinative.
4. Contesting the petition will only be possible on the basis of jurisdiction, the legal validity of the marriage, fraud, coercion and/or procedural compliance.
5. It introduces an overall minimum period of 20 weeks from petition to Decree Nisi and maintains the 6 weeks from Decree Nisi to Decree Absolute.
6. There has been a shift towards more modern terminology, making the process more accessible for Court users. A Petition will become an Application for Divorce Order, Decree Absolute will be known as the Final Divorce Order and Decree Nisi is to be rebranded as the Conditional Order. The previous terms will remain in use whilst Petitions issued prior to the commencement date of the Act remain in proceedings.
7. The Act will apply to both divorce and civil partnerships.

Undoubtedly, the new law will bring about a number of positive changes:-

- Reducing the hostility between the parties as the requirement for one spouse to blame the other will be dispensed with. This amendment is likely to be particularly pronounced with the removal of so called "behaviour" Petitions, where antagonistic particulars of divorce can so often cause increased hostility and conflict from the outset, which may then set the tone for negotiations or court proceedings regarding finances or children.
- It will no longer be necessary for the parties to incur costs agreeing who will prepare the Petition and what the particulars of behaviour will be, meaning that they can immediately focus on more important discussions regarding children and finances.
- Parties may be more likely to enter into mediation or other forms of collaborative practice as conflict will be minimised from the outset. It is hoped that this will lead to an overall reduction in court applications.
- The process will be simplified and streamlined, improving access for individuals acting in person.
- Couples who wish to consensually divorce will no longer have to wait for 2 years after their separation to do so. This will eliminate the financial burden on spouses and the potential negative impact on the children of the couple who are separated but forced to remain married for 2 years.
- It will no longer to be possible for an Owens type scenario to arise whereby one party defends the Petition and keeps the other locked in a marriage until 5 years from separation.

Family lawyers have long bemoaned the current laws and the hostility that is too often unavoidable as a result of the "blame" culture encouraged and required by the current system. Parties too, many of whom are agreed that the marriage has broken down, are surprised and disappointed to find that they are then pitted against each other from the outset. The upcoming changes are intended to encourage (and, indeed, require) a more conciliatory and less combative approach to proceedings and this can only be encouraged. Let's hope that the new legislation can persuade not only the divorcing couples but also the practitioners they instruct to take a less combative approach and to join the drive to "be kind".

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After discussions with Durrell, we are delighted that ARC is now the proud sponsor of their Blue Poison Dart Frogs display.

Find out more about the Durrell Wildlife Conservation Trust, their work and the frogs on their website **www.durrell.org**

The Blue Poison Dart Frog

(dendrobates tinctorius azureus)

Native to Suriname

The poison frogs of Central and South America are famous for their toxic secretions, used by native communities when hunting. The poisons are not made by the frogs themselves, but are taken up from their diet of invertebrates, which have in turn ingested plant chemicals. However, in captivity the poison decreases considerably in strength as the food chain needed to supply them with their raw materials does not exist.

The frogs' bright colours advertise their poisonous nature. The blue poison frog's pattern of black spots on a blue background is particularly striking and varies from individual to individual. After they metamorphose into tadpoles, the male carries the young on his back to a small pool, water trapped in a hole or a bromeliad, where they develop into frogs after 10-12 weeks.

With the world's amphibians in crisis, captive populations are vital to conservation efforts.

Extremely sensitive to environmental change, amphibians give us early warning of problems that might be due to global warming, pollution and so on. The blue poison frog, like many others, is threatened with extinction.

Durrell has successfully bred this species, and their biosecure facilities at the Trust's headquarters in Jersey will enable them to continue studying and breeding the blue poison dart frog and other threatened amphibians in captivity, developing techniques to help slow their decline.

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Love your Zoo

ENDING YOUR MARRIAGE BUT NOT YOUR VISA: THE IMPACT OF DIVORCE ON YOUR UK IMMIGRATION STATUS

Authored by: Alexandra Mann and Ben Xu – Irwin Mitchell

Marriage

Marriage is the lawful union of two persons to the exclusion of all others. You can get married or form a civil partnership in England and Wales if you are (i) 16 (with parental consent) or over; (ii) not already married or in a civil partnership; or (iii) not closely related. Same-sex couples can convert a civil partnership into a legal marriage.

Immigration considerations will always arise when two people are looking to get married in a foreign land. Getting married in the UK requires "blessing" from the Home Office. Only once you have proven that you will not be a burden on the UK's social welfare system will you be given the permission to remain in the UK and granted a spouse visa. This special permit to a certain extent gives the holder two and half years certainty as far as residence in the UK is concerned which can be extended for another two and half years. After five years with a spouse visa, the non-British spouse would have earned their rights to remain in the UK permanently, subject of course to still being married to their British spouse and being able to maintain themselves financially.

Separation

To start divorce or dissolution proceedings in England and Wales one party to the marriage or civil partnership must file a divorce petition with the court. This is a form that gives the court information about both spouses and informs the court that the marriage or civil partnership has irretrievably broken down. The party filing the petition (known as the petitioner) must briefly set out evidence that the marriage or civil partnership has broken down by providing details in relation to one of the following five grounds for divorce or dissolution: (1) Unreasonable behaviour; (2) Desertion; (3) Two years separation with consent; (4) Five years separation without consent; or (5) Adultery (applicable to divorce only).

Once the divorce petition has been issued the court will send a document called the Acknowledgment of Service to the respondent; to confirm whether or not the petitioner wishes to defend the divorce/dissolution. Upon receipt of the completed Acknowledgment of Service, the petitioner is then able to apply for Decree Nisi or Conditional Order, that being the 'interim' stage of the divorce/dissolution. The judge will review the petition to make sure it fulfils the legal criteria for a divorce/dissolution and if satisfied that the marriage or partnership has irretrievably broken down, it will pronounce Decree Nisi or the Conditional Order.

At any time after Decree Nisi or the Conditional Order has been pronounced, the court has the power to make a legally binding financial order setting out one's arrangements for finances and property upon divorce/dissolution. Until a financial order has been approved and sealed by the court, financial claims as spouses will remain open even if the divorce/dissolution is finalised. It is therefore crucial to obtain a sealed financial order from the court setting out the agreement reached and where applicable, dismissing one's financial claims against the other spouse in respect of capital, income and pensions. If you do not obtain this order, either party to the marriage or partnership could seek further financial provision from the other spouse in the future.

Six weeks and one day after the pronouncement of Decree Nisi or the Conditional Order, the petitioner to the divorce can apply for Decree Absolute, that being the 'final' stage of divorce upon which your marriage or partnership legally comes to an end. It is advisable not to apply for Decree Absolute until such time that an agreed financial order has been approved by the court, given that the way in which assets are held changes upon divorce. Therefore in reality, there is often a much larger gap between the pronouncement of Decree Nisi and Decree Absolute to give parties time to resolve their financial matters.

Visa considerations

So what happens to one's spouse visa when the love fades and marriage ends? Sadly, the Home Office would want their "blessing" back and have the non-British spouse's visa curtailed, meaning they would have to leave the country unless they are able to switch to a different visa category that would allow them to continue their life in the UK.

Even with the most amicable divorce there are undoubtedly a multitude of matters that need to be discussed and agreed before a divorce is finalised. The last thing you want to be concerned about is your visa issues. But the clock starts ticking as soon as your relationship has broken down permanently as you are under an obligation to report your break-up to the Home Office. This would inevitably trigger the process of curtailment of your spouse visa. Therefore, if the intention is to stay in the UK after the divorce, you must summon the courage to seek legal advice on your visa options immediately when you have reached the point of no return.

Getting the right legal representation is only the very first step to a successful application, not only because UK immigration law is a minefield, but also the process of acquiring a UK visa can be long and emotionally draining. The suitability of certain visa categories is completely dependent upon your personal circumstances. The more ties you have to the UK the more options may be available to you. Having a minor child who is a British citizen, for example, may increase your chance of getting a visa to remain in the UK after divorce; so would receiving a sizable divorce settlement which may give you the option of applying for a Tier 1 Investor visa.

For those who have a successful career, you might want to consider taking advantage of the Global Talent visa or a Tier 2 visa (work permit in other words). These are only some of the visa categories which might be available to someone who is going through divorce proceedings. Choosing the most suitable visa is therefore the very foundation of your future residence in the UK.

If you are going through a separation and require advice from a matrimonial or immigration lawyer, please do get in touch with one of our experts to discuss this further.

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WAR STORIES

ON PRE - AND POST-NUPTIAL AGREEMENTS

Authored by: Lucy Greenwood - International Family Law Group LLP

Marital agreements are becoming increasingly popular in England & Wales as more couples seek greater certainty of financial outcomes in the event they divorce. The increasing number of international couples (who may be more used to such agreements) has also made marital and civil partnership agreements more popular and culturally acceptable in England & Wales.

Common reasons to have them include:

- Couples wanting to avoid repetition of an acrimonious divorce
- Families who do not want their extended family's wealth diluted owing to the divorce of a family member
- Business owners who want to avoid the forced sale of shares through the divorce of a business partner/owner; or
- The partner with disproportionately greater wealth who wants to ringfence their pre-marriage assets
- Where there has been a change during marriage, to a couple's circumstances or legal rights

Whilst marital agreements are not legally binding in England and Wales, they hold considerable weight provided they are entered into freely, with full information, independent legal advice and without any undue pressure. However, they are highly contentious documents as they seek to reduce the legal financial responsibilities of the wealthier party and limit the legal rights of the weaker financial party and sometimes that disparity can be considerable.

As every couple's situation is unique, it is essential that marital agreements are drafted to match the specific requirements of each party

If a marital agreement involves a couple who have international connections, the advice required before entering into that agreement may become increasingly complex. There are also many myths surrounding the enforceability of marital agreements worldwide, some may have factual origins, whilst others are completely fictional.

Clients facing a divorce in England, with marital or civil partnership agreements drafted abroad, can find the advice they receive to be in stark contrast to the advice they expected to receive.

There are also many additional considerations for legal practitioners when drafting marital agreements for international couples:

- England's current approach to pre- and post-marital agreements
- Common myths about international pre- and post-marital agreements
- Additional considerations for practitioners drafting pre- and post-marital agreements where there is an international dimension and
- Some of the common threads for challenging the validity of marital agreements in recent case law.


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HOT TOPICS IN PROCEEDINGS FOR FINANCIAL PROVISION AFTER A FOREIGN DIVORCE (PART III)

Authored by: Michael Allum - The International Family Law Group LLP

Proceedings for financial claims after a divorce has already taken place in another country (known in England and Wales as Part III applications) are politically, legally, and culturally sensitive. These applications enable a court in one country to determine whether a financial outcome made in another country is fair and adequate and if not, additional financial relief can be secured. This can sometimes lead to very large financial settlements. This talk deals with the most relevant cases in the last 12 months and discusses some current thorny issues including the difficulty in sharing English pensions after a foreign divorce post 31 December 2020.

One of the most significant recent Part III cases is the matter of Potanin. This case involved estimated wealth of $20 billion of which the former wife had already received between $41.5 million and $84 million in Russia. In January 2019 Mr Justice Cohen granted the former wife (who was represented by specialist family law solicitors and counsel) leave to bring her Part III application. However, at the next hearing in November 2019 Cohen J held that the leave had been given based on three grounds of misrepresentation including misrepresentation as to the law which should be applied. This resulted in the grant of leave being set aside with the judge holding as follows (para 59):

"I am in no doubt that if I had had the full picture before me on 25th January 2019, I would not have granted W leave to make her application. I am further satisfied therefore that the grant of leave was given as a result of material misleading of the court, however unintentional that might have been."

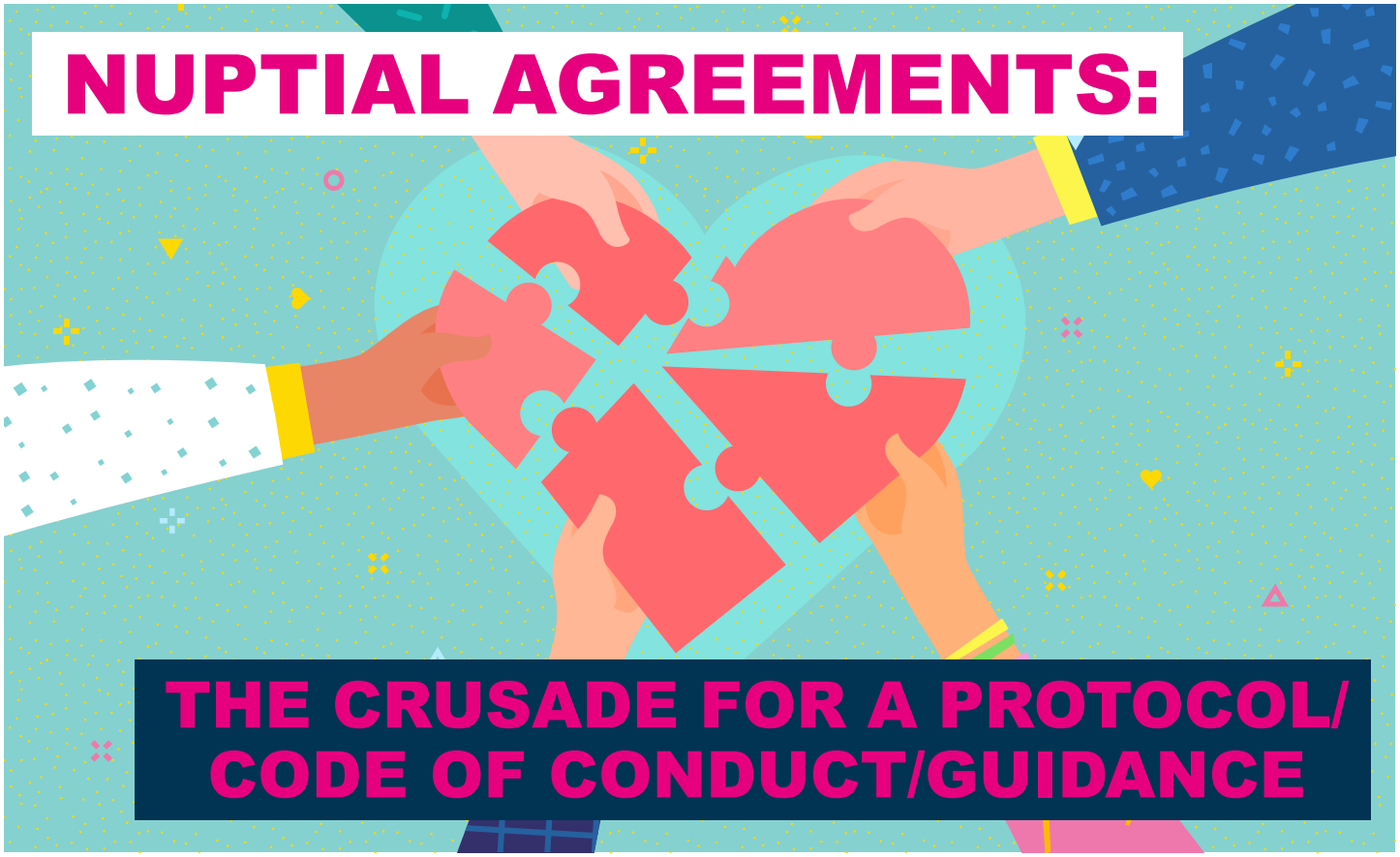
It is understood this decision is being appealed with the appeal hearing scheduled to take place in early 2021. Given the scale of the wealth involved it has the potential to be one of the largest ever Part III settlements if allowed to proceed.

Another late 2019 decision of MHW v GSH highlighted the inability to bring a Part III claims after a divorce in a country within the British Isles such as Jersey. In that case the former wife had been given permission by Mr Justice Cobb to apply for a pension sharing order under Part III following a divorce in Jersey (where pension sharing orders are not available).

However the former husband responded by successfully applying to set aside that leave on the basis Part III is only available following a divorce from an 'overseas country' which is defined as meaning a country outside the British Islands and did not, therefore, include Jersey which is a British Island.

In addition to covering recent case law this talk will also discuss the difficulties facing those divorcing abroad but wanting to share an English pension will face from 1 January 2021 onwards. At the moment it is possible to use the residual power in the EU Maintenance Regulation to make needs-based orders, pension sharing, on an exceptional basis provided the courts of no other EU Member State have jurisdiction. However, from 1 January 2021 this basis of jurisdiction will no longer be available so couples with an English pension, living and domiciled abroad will be unable to obtain a pension sharing order.

NUPTIAL AGREEMENTS:



THE CRUSADE FOR A PROTOCOL/ CODE OF CONDUCT/GUIDANCE

Authored by: Teena Dhanota-Jones – Simons Muirhead & Burton LLP

Blame Culture

From my experience the lack of protocol in relation to nuptial agreements crecates a blame culture. Family lawyers are placed in a very unusual position when advising on nuptial agreements. We are not dealing with warring parties, but quite the reverse, the parties are very much in love and they are about to embark on a marriage. They each instruct their solicitor to reach an agreement on the terms that they have usually agreed. Such an immediate consensus is rare with separating parties. Unsurprisingly, I will always advise that there are some aspects of the agreement that are simply unreasonable and/or unfair. Relaying this to a client who has discussed the terms usually at length with their prospective spouse/civil partner can actually lead to conflict between the lawyer and the client, and worryingly between the parties themselves. A client can view their own solicitor as the obstacle in the negotiations. Importantly, the advice that each client receives can lead to unintentional acrimony between the parties.

Further, many family lawyers are presented with a nuptial agreement that has already been drafted by the wealthier parties' solicitor. The financially weaker party is expected to take legal advice on a document that they were not directly involved in negotiating. Invariably, this can leave a client feeling that they have been dictated the terms and generally the advice is further negotiations are necessary to achieve an agreement that is fair.

I am confident, that most family lawyers have had the experience of the acrimony that a nuptial agreement can create between the parties who were not in a dispute in the first place.

Inflated Legal Fees

The absence of a protocol increases legal fees.

Firstly, every solicitor has their own procedure, sometimes an agreement has been drafted, but the weaker party is unaware of the terms. On occasion an agreement may have been reached between the parties prior to instructing their respective solicitors; when reviewing the terms with their solicitor, the agreement does not reflect the agreement they reached. Further the parties reach a decision, which they feel is satisfactory only to be told by a family lawyer that the agreement is unfair.

Finally, the nuptial agreement can be drafted as a bespoke document or using one of a number of precedents, whether that be Practical Law, Lexis Nexis or the numerous other options available online. For lawyers, to always be reviewing agreements that vary in style and content is time consuming.

The Benefit of a Protocol

I am confident that the existence of a protocol would undoubtedly iron out the issues that I have outlined above. Hopefully, many other issues that family lawyers are confronted with when addressing nuptial instructions could also be addressed by the use of a protocol.

The procedure provides a very clear structure and enables parties to be in control and in charge of the terms from an early stage prior to setting anything down on paper. This should reduce the conflict that can lead to the blame culture in these matters. Following the steps above before preparing the first draft, should in mind save the ultimate cost of numerous amendments.

I sincerely hope that my personal opinion expressed in this article creates the traction for change in this every increasingly busier area of law. I hope that the powers that be, will look at the drafting of a protocol, a code of conduct or even some guidance in this much needed area of law. We do not want clients that are about to marry to become entrenched and ostracised during this process.

I have some ideas for a sensible and seemingly logical procedure. The first and most obvious, the nuptial agreement should not be drafted until:

1. **The parties have discussed the terms directly.**
2. **The parties have exchanged financial disclosure.**
3. **The parties have taken legal advice.**
4. **The respective solicitors then collaborate to agree who will prepare the first draft and if appropriate agree the precedent to be used.**

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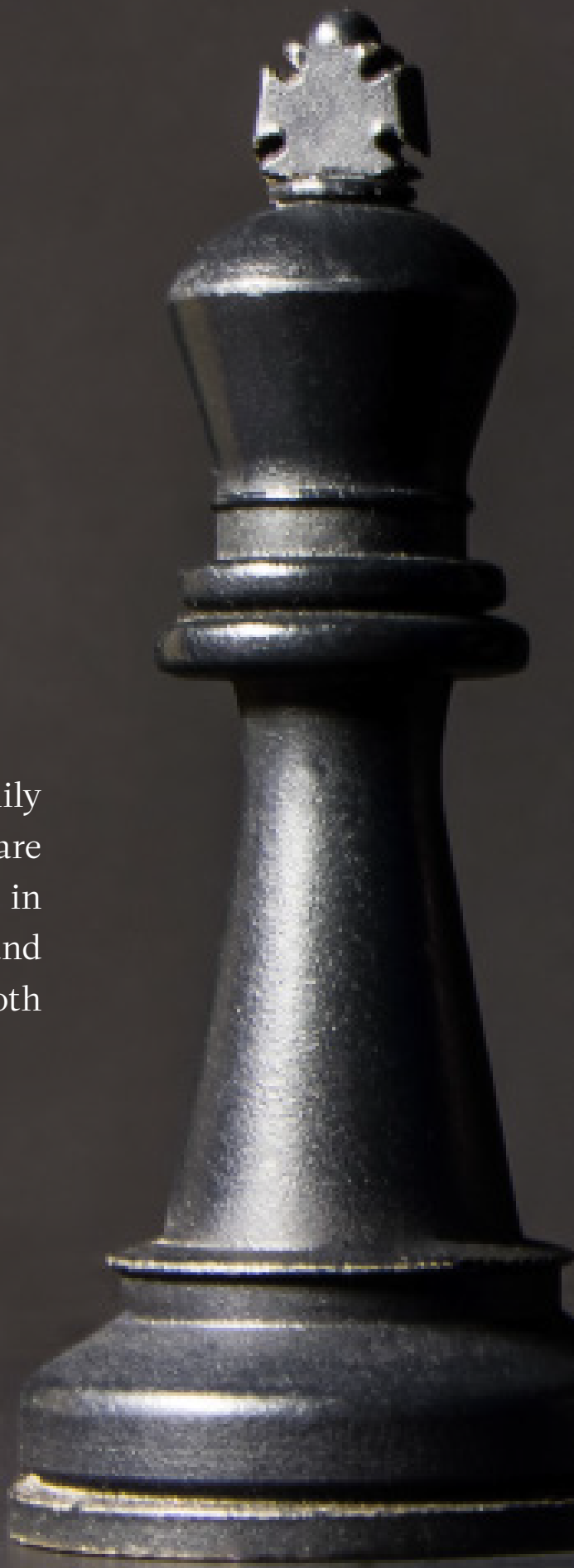

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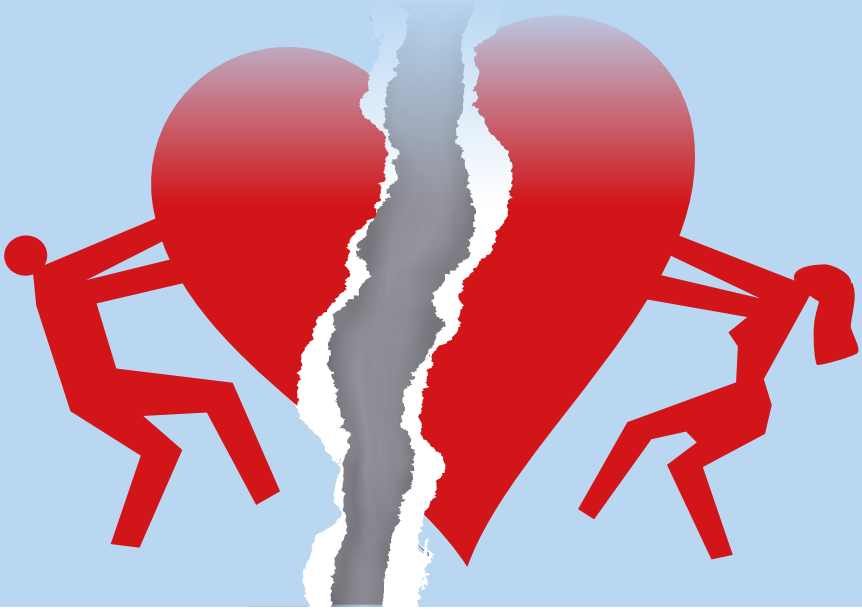
JOHNNY DEPP, AMBER HEARD, AND THE ONGOING FALLOUT OUT OF A 'BAD' DIVORCE



Authored by: Jeremy Clarke-Williams, Charlotte Purves & Grace Lymer-Sullivan – Penningtons Manches Cooper

As readers of any newspaper in recent weeks will know, the American actor, producer and musician, Johnny Depp, lost a high profile libel action against The Sun newspaper. As a result, Mr Depp will now forever be associated with the term 'wife beater' which is already having consequences for his career and his former wife, Amber Heard, will have to continue to live with the impact of past domestic abuse.

Partner Jeremy Clarke-Williams, and Grace Lymer-Sullivan, trainee in our reputation management and privacy team take a look at the reported judgment to outline what lessons can be learnt before making such a claim, and Charlotte Purves, associate in our family team, looks at the remedies available to victims of domestic abuse, and provides some useful tips to practitioners as to how to assist clients who are suffering from, or at risk of suffering from, harm.

Libel case - Depp v News Group Newspapers Ltd

On 27 April 2018, The Sun published an article on its website, written by its executive editor, Dan Wootton, with the headline *"GONE POTTY: How can JK Rowling be "genuinely happy" casting wife beater Mr Depp in the new Fantastic Beasts film?"* The headline to the article was altered the next day so that the phrase *"wife beater"* was removed, but the rest of the content remained the same. An article in substantially the same form was then published in the print edition of the paper on 28 April 2018.

The article contained serious allegations that Depp, was excessively controlling throughout his relationship with his former wife, and was both verbally and physically abusive towards her, in particular when he was under the influence of substances.

Depp strongly denied these allegations and issued libel proceedings against News Group Newspapers, the publisher, and Dan Wootton on 1 June 2018 in relation to each of the articles.

The action was defended, and the Defendants pleaded the defence of truth (section 2 of the Defamation Act 2013) in relation to the following meaning which they contended the articles bore (and which the trial judge accepted):

"the Claimant beat his wife Amber Heard causing her to suffer significant injury and on occasion leading her to her fearing for her life."

The Sun relied on 14 alleged incidents between 2013 and 2016 that had occurred all across the world (from LA to the Bahamas, from Hicksville to Tokyo and from Australia to south east Asia), when it said Depp had physically assaulted his then wife, causing her serious injury.

The enmity between Depp and Heard had been extensively reported since their marriage ended. The case was never likely to settle and so the outcome of the trial was going to be determined on whose evidence the judge preferred – Johnny Depp's or Amber Heard's. The trial took place over 16 days in July and was extensively and breathlessly followed by the world's media. Hollywood glamour may have come to the Royal Courts of Justice – but the allegations at the heart of the case were extremely serious and decidedly unsavoury. The stakes were incredibly high for the parties.

The judgment in the case was ultimately handed down on 2 November 2020 with Mr Justice Nicol dismissing Depp's claim. He found that the allegations against Depp that he was a "wife beater" were substantially true, and held the following:

1. The meaning of the articles was as the Defendants had pleaded.
2. The imputation of this meaning was "substantially true". The Judge found that 12 of the 14 incidents outlined above were true. The Judge also concluded that on 3 of these 12 occasions, Ms Heard had indeed been in fear for her life.

The judgment was met with horror by legions of Depp fans. Inevitably (and depressingly) many surfaced on social media defending him and making concerning and threatening comments about the judge.

Depp's legal team called the judgment *"perverse and bewildering"* and suggested it was *"so flawed it would be ridiculous for Mr Depp not to appeal this decision".*

Despite this reaction, this looks like a difficult judgment to appeal. The trial judge listened to, and saw, all the witnesses and reached his conclusions. On the basis of the evidence presented to him, he found that the Defendants had proved the substantial truth of their allegations. Unless his conclusions were ones that no reasonable judge could have reached, it is difficult to see the Court of Appeal interfering with the judgment.

There are currently further libel proceedings brought by Depp pending in the United States – this time against Heard personally, so the drama may not be over just yet. The UK judgment will be a helpful one for Ms Heard (as no doubt will be the transcript of the evidence which Depp gave on oath in the witness box) in the US proceedings but it does not of itself carry any evidential weight. All the witness evidence will have to be given again.

What to take away from the case?

The fact that the action even reached trial is rather rare, as the vast majority of libel cases are settled before trial. However, when a case depends almost entirely on whose oral witness evidence is believed, and the accounts differ so markedly between the Claimant and the Defendant, settlement becomes much more difficult. (Another example was the 'Plebgate' trial between PC Toby Rowland v Andrew Mitchell in 2014. In that case PC Rowland's evidence was preferred and he won the case).

Other than being a case in the public eye, there is a lot to take away from the interplay between legal elements and real-life scenarios in this case.

Throughout this case, the media has largely focused on the graphic evidence given on both sides about the allegations which has perhaps left some confusion regarding what exactly a libel Defendant must establish when they seek to prove that the words complained of are "true".

Legally, a Defendant does not have to prove the truth of every single imputation so it was not necessary in this case for the Defendants to prove that every single allegation of domestic abuse alleged by Heard occurred. It was enough to establish that 12 out of the 14 incidents relied on by The Sun were substantially true, and that Depp had been violent towards Heard during their marriage.

It is of course always a risk for a Defendant (here the newspaper group) who seeks to defend a libel claim by pleading that the words complained of are true, because the burden of proof is on them. If they are unsuccessful, they are likely to be liable for a significantly increased level of damages because the judge will take into account the fact the defendant has never apologised, and the enormous additional stress to the Claimant caused by the litigation and trial process. The costs of a fully contested action and trial are also substantial and the general rule is that the loser pays the winner's costs (in addition to their own). However, in this case, the Defendants were a wealthy newspaper group and so they could bear the cost. In addition, the fact of the litigation itself provided its own compelling ongoing media story to report and (as mentioned) the outcome of the case was largely going to rest on whose evidence the judge preferred. As a result, The Sun will have felt that defending the claim was a risk worth taking.

Depp, decided that libel proceedings were the most effective way to try and vindicate his reputation. As a seasoned star, he must have anticipated the media storm that such proceedings would bring. For other, less wealthy parties, the sheer cost of contested litigation is another important factor in deciding whether to litigate, but the wealth of these parties made it a less crucial consideration. However, in the aftermath of the judgment, Depp must be wondering whether ignoring the story would have had a lesser impact on his career; he has already lost the part of Gellert Grindelwald in the Fantastic Beasts franchise. Round two of the libel battle now shifts across the Atlantic to the US courts.

Domestic abuse – a family law perspective

Though the case itself was a libel action, it was allegations of domestic abuse that lay at the centre of this matter. Some readers may be surprised to learn that there is presently no definition of domestic abuse enshrined in legislation. There is a bill in Parliament for this purpose awaiting its second reading. This bill, if passed, will provide a definition of domestic abuse, and will seek to ensure that the offence is better understood, so as to encourage more victims to come forward (The Domestic Abuse Bill). For further information, see this Government factsheet.

There is, however, a cross-government definition, which was extended in 2012:

[Domestic abuse refers to] 'any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, the following types of abuse: • psychological • physical • sexual • financial • emotional.'

'Controlling behaviour is: a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

Coercive behaviour is: an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.'

The definition rightly encompasses many forms of abuse, which historically, had not been widely acknowledged. This is particularly so for coercive and controlling behaviour, which is now an offence in its own right (s76 Serious Crime Act 2015). It is expected that lawyers will have seen a growing number of such allegations within their own caseload.

What to do when a client discloses domestic abuse

It is not uncommon for clients to disclose that they have suffered from a form of abuse. Sometimes, the separation itself solves the issue, but there are circumstances in which there is a threat of, or there remains, continuing abuse.

Involve the police

In such circumstances, the first consideration for any lawyer must be reporting the matter to the police, particularly if it appears that the behaviour complained of is escalating. The police can issue a Domestic Violence Protection Notice or apply for an Order on the victim's behalf. Many individuals are, however, reluctant to inform the authorities, and if that is the case, there are other avenues which can be investigated which will provide the necessary protection.

Use the family courts to provide protection

If the decision is taken to avoid police involvement, then consideration should be given to making an application to the Family Court for a protective order. The first, and most common type of order that can be obtained, is known as a non-molestation order.

Non-molestation order

A non-molestation order can protect an individual against violence, threats of violence, harassment and controlling or coercive behaviour. The Orders generally last a year, and a breach of the Order can result in the perpetrator being imprisoned (for two to five years) or fined. The Order will come into effect once it is served upon the perpetrator, and it is often wise, therefore, to arrange personal service.

Orders can only be obtained against certain individuals, such as:

- a current/former cohabitee
- a fiancé/fiancée (or equivalent, an intended civil partner)
- a relative
- someone with whom the victim has had an intimate relationship of significant duration

To apply for a non-molestation order, you must generally be over 16 years old (if younger, the court's permission is required first). These orders are not made freely, and the court will expect to see evidence of the abuse complained of. The Court will need to be persuaded that protection, by way of an order, is required. As such, a full and detailed statement should accompany the application, along with photographic or documentary evidence in support.

Do not, however, think that physical violence needs to have occurred for an order to be made. As outlined above, the legislative definition of domestic abuse encompasses harassment and controlling behaviour.

Occupation orders

It may also be necessary to apply for an occupation order, and the reality is that more often than not, a party will wish to apply for both types of order at the same time.

If made, an occupation order will prevent the offending party from re-entering the home for around 6 months (or in some cases, they can regulate the areas of a home in which the perpetrator is able to go). Such orders are rare, and will be made in those cases where very serious harm is complained of.

When considering an application for an occupation order, the Court will apply the 'balance of harm' test, which means that the Court will weigh up whether the applicant is likely to suffer significant harm if the order is not made, versus the harm that the respondent will suffer if the order is made. In carrying out this exercise, the court will look at the housing needs of both parties, their respective financial resources, the impact of any order upon any child of the family and the parties' behaviour towards one and other.

The ability to obtain an occupation order is dependent upon the relationship between the parties, and the applicant's right to occupy the home in question. The law is quite complex, and the assistance of a lawyer should be sought at an early stage.

With or without notice?

It is possible to make the above applications to the Court without telling the respondent, but the circumstances in which such an approach should be taken are limited. Although there are often good reasons for not wanting to tell the respondent about your intention to apply to the court (such as fear for their reaction) it is almost always advisable to at least provide informal notice. This is extremely fact specific, and there is certainly not a 'one size fits all' approach.

Orders in practice

The courts are prioritising applications for non-molestation and occupation orders during the Coronavirus (Covid-19) pandemic. The courts service has issued guidance to help to make sure that victims of domestic abuse receive protection as soon as possible. Our experience is that the court is working hard to ensure victims are given access to the safeguarding they need. Kerry Fretwell, partner in the firm's Reading office commented:

"Non-molestation and occupation orders are draconian measures and breaching them is a criminal office. It is important that anyone seeking such orders puts forward a comprehensive case which meets the criteria set out in law. Legal advice should be sought to ensure the proper evidence and procedure is followed to have the best chance of persuading the court the orders are proportionate and necessary."

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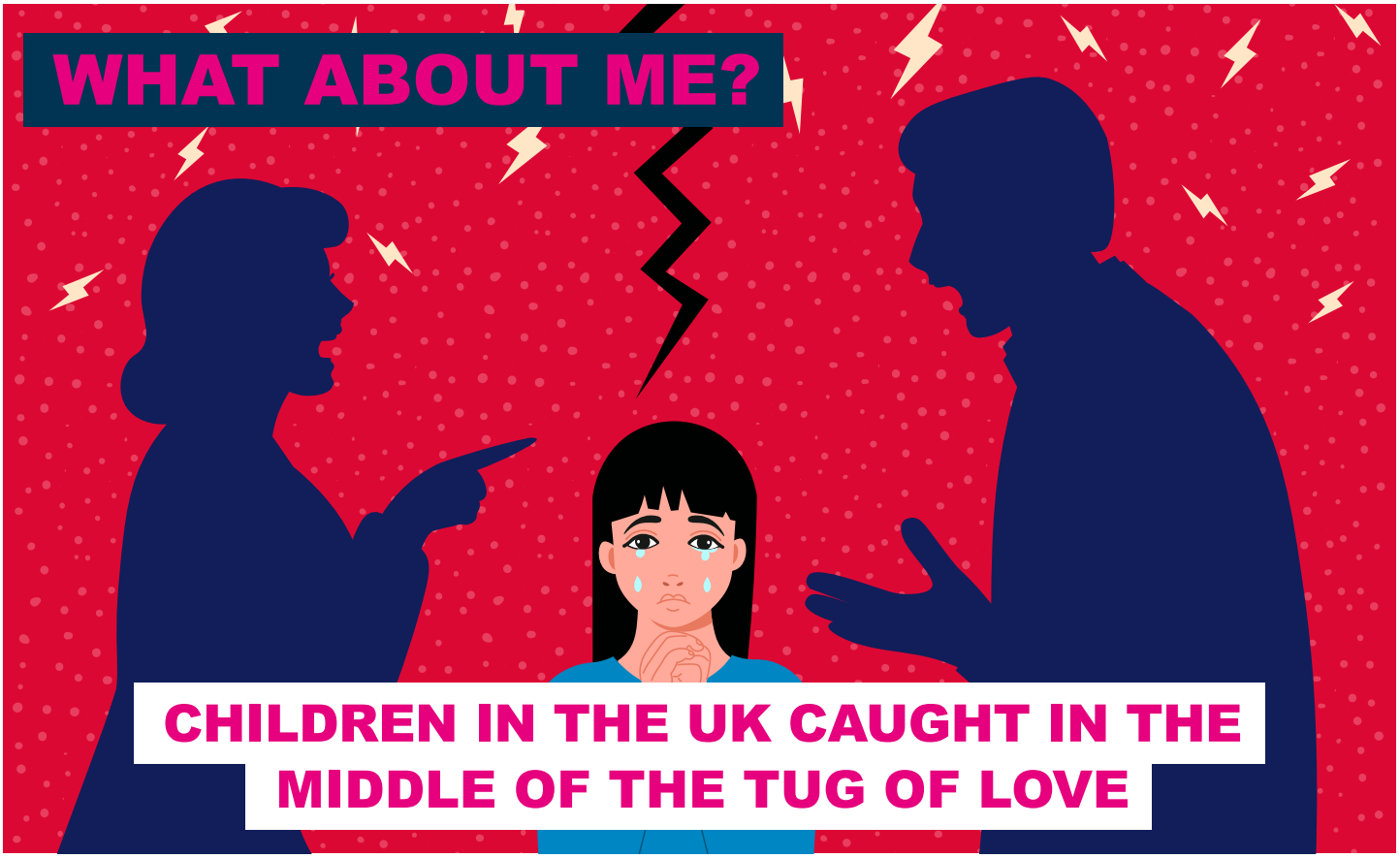

CHILDREN IN THE UK CAUGHT IN THE MIDDLE OF THE TUG OF LOVE

Authored by: Jennifer Dickson – Withers Worldwide

My six-year-old said the other evening 'If your mum and dad are arguing, you need to tell a grown up at school'. This rather took us aback, but in a refreshing and reassuring way. That his primary school was already raising this and encouraging children not to bottle up worries and to be open about talking about difficulties, or perceived difficulties, at home was heartening.

Which brings me on to the latest report on the impact of parental separation on children. 'What about me?' from the Family Solutions Group, led by Mr Justice Cobb, puts those children front and centre in a process that too often sees them as commodities in a transactional negotiation.

280,000 children experience parental separation each year. This report recognises that parental conflict harms children. It causes harm at the time of the breakup, but it also risks creating longer lasting damage, or as the report puts it, 'casts a long shadow over the child's life course'. Research suggests that children subject to parental conflict have a greater chance of suffering emotional and behavioural issues later in life. It can also affect academic performance, mental health, social interactions and resilience.

There is acknowledgement in the report that the UK is behind other jurisdictions in addressing problems arising from family breakdown, and the systemic change that is needed could take 5 to 10 years. But there is also excitement among its authors and professionals that this could be the holistic and joined up approach that is so desperately needed. One of the report's core recommendations is to establish a dedicated government minister and department, to give separated families the focus and oversight they need and deserve.

Court is not the third parent

As family lawyers, we advise clients that court should be the last resort. It is a necessary backstop, but it is a blunt instrument and inevitably something of a lottery given judicial discretion. Whether we like it or not, different judges have different views on what is best for children. And in practice, often what is in dispute is not susceptible to legal remedy. Nowhere in the statute book does it say whether a child should be allowed to go to football club on a Friday night, have their hair cut every six weeks or six months, or at which junction of the M4 the handover should take place.

Unless there is a risk of harm (in which case, court is the place to go) we try to keep issues surrounding the children away from bitter lawyers' letters and out of court. These are often better resolved by referring couples to mediation or to a child psychologist or therapist, who are more qualified than lawyers to help parents navigate and resolve issues between them, and to guide them in supporting their children in as joined up a way as possible through what will inevitably be a traumatic period.

Every family is different and what works for some children will not work for others. For example, some cannot cope with staying overnight midweek at the other parent's house, and prefer a week on / week off arrangement. Whereas for others, a week will be too long away from one or both parents. The law provides neither insight nor answers to these matters.

Education

What is clear from the report is that not only couples, but all of us, including lawyers and judges, need to have a better understanding of how to support families navigate their way through this, minimising harm to their children.

1. High prole public campaign

The report recommends a high profile public campaign, because we do need to bring about a general mind shift, a sea change – not only of individual couples, but of the legal system and the wider public. We need to get away from the language of courts and legal rights and towards an understanding of child welfare, promoting the rights of children to enjoy a relationship with both parents (provided there are no safety concerns). We need to start by changing the language. For example, the term Custody has no place in these matters. Children are not objects or inmates. Likewise, in this context, parents do not have rights – they have responsibilities. The child has a right to a relationship with their parent or parents, not vice versa. A fact that is easily forgotten.

2. One central website: 'The Separated Families Hub'

And above all if (hopefully if) parents do decide to separate, they know where to go for information and that information is clear about the need for them to put their child's interests first and their own relationship issues second.

At present, the report says, the information available to parents is neither easily accessible nor always reliable and it can be difficult for them to know which information to trust. There needs to be clear, comprehensive and co-ordinated information about parental conflict. In the report, its authors recommend having one authoritative website called 'The Separated Families Hub'.

3. Widespread dissemination

It should be freely available, taught in schools, given out by health visitors, at GP surgeries, Citizens Advice Bureaus, and the report makes clear that children whose parents are separating need a 'place to go' online, which could be a dedicated section for them on 'The Separated Families Hub'.

What will that information look like?

At an early-stage guidance on parental conflict and how it affects children needs to signpost parents in the right direction. Where there is abuse or any risk of harm, the path to safety will direct parents to the court system and legal support straightaway.

In all other circumstances, the appropriate route should be towards cooperative parenting, supported by:

1. Legal information (not advice) – advice polarises and can entrench people's positions, whereas legal information, which the report suggests can be given to both parents neutrally by the same professional, need not have that effect.
2. Therapeutic support to help parents with their own feelings.
3. A safe process for resolving issues with other parent, for example through mediation.
4. Attending a parenting programme.

We need to accept that parents cannot just be told to stop fighting. Many will need the practical support to do so, and to understand the damaging impact such conflict can have on their children. There are many parenting programmes available but as the report points out they are not always easy to find and would benefit from being streamlined and co-ordinated. Attending a parenting programme should, the report says, 'become the norm following separation'.

Listen to the children

Any child who is 10 or older should have their voice, their views and their wishes heard directly, the report makes clear. There is evidence that not only does it empower the child to feel listened to and to be part of the process, but if their views are respected it makes the arrangements that are then put in place more likely to last. It is hardly surprising that such an approach will have more chance of success than arrangements imposed by a judge who has never met the child.

The report makes clear that the child's voice should be heard in practice and not just in theory, and that their views should be recorded and documented.

The President of the Family Division has described this report as 'exciting'. For those of us who have spent years imploring our clients to try to settle children issues without resorting to the overwhelmed court system, this report sends a welcome message, and even more so given the cross-sector input it has had, and the widespread support it seems to have attracted. There is much to be done. But if schools are already talking to children about parental conflict in a measured and sensible way, it is an encouraging sign and the rest of society must follow that lead.

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THE IMPACT ON DIVORCING COUPLES WHEN FAMILY AND IMMIGRATION LAWS COLLIDE

Authored by: Emily Foy - Payne Hicks Beach

The decision to divorce is never an easy one. By its very nature, such a decision can often be emotionally charged and sometimes made in haste. If the relationship involves a couple with roots outside of the UK, there are a number of important issues which should be considered before divorce proceedings are commenced.

One crucial issue, which is often overlooked, is how the couple's immigration status may be affected following their decision to separate and potentially divorce, so immigration as well as family law advice should be sought in these circumstances. This potentially affects a large proportion of families in the UK as according to the Office of National Statistics, over a quarter (28.7%) of live births in England and Wales in 2019 were to women who were themselves born outside the UK. It is also reasonable to assume that a number of these and other births were to children with foreign fathers.

Immigration status

In many cases, one spouse will be the main visa or immigration status holder and the other will be granted a visa as a dependant. The ability to remain in the UK and to maintain continuity for the family, particularly where young children are involved, is often an important consideration in a relationship breakdown.

Spouses of EU citizens in the UK prior to the end of the transition period of the UK leaving the EU may benefit from the rules on 'retained rights of residence', which allow the non-EU spouse to remain in the UK if certain conditions are met, even if they have not yet qualified for settled status in the UK.

Partners of British citizens and settled persons will typically have fewer options if the relationship ends before they have obtained Indefinite Leave to Remain. Their options will often depend on a relationship to a minor child in the UK with whom they have contact or for whom they are the main carer.

The options available will also very much depend on the spouse or partner's circumstances, including but not limited to considerations as to whether or not the migrant spouse is employed or intends to be employed in the UK, and whether or not they have access to funds for investment, as an alternative immigration route.

Divorce and financial proceedings

In some cases, for example where the parties have not been in the UK long enough to allow a migrant spouse to make their own application for Indefinite Leave to Remain, a spouse who had been considering separating may decide not to do so at all while their immigration position remains so dependent on their spouse. This may place a huge amount of pressure on the relationship.

Spouses also have to be careful when considering this, particularly if they regularly travel outside of the UK, as a migrant spouse's visa is dependent on the relationship remaining genuine and subsisting. Even if they have not commenced legal proceedings or divorced, if the relationship has ended they are likely to be under an obligation to notify the Home Office of the change and will be unable to obtain Indefinite Leave to Remain or an extension on the basis of the relationship.

Spouses could also, on any occasion when re-entering the UK after any international travel, be asked to verify

that their marriage is subsisting or whether there have been any change in circumstances relevant to their current visa.

If a spouse does not wish to remain in the UK long term, they may still need to explore the ability to remain or enter as a visitor if any divorce proceedings take place here. It may also be possible to apply for time limited discretionary leave in order to pursue proceedings in the UK.

When a couple has separated, one option for the spouse of an investor migrant on divorce may be to make his/her own independent investor visa application and this will therefore feed into the family law advice and negotiations regarding the financial settlement. Lump sums may be required to assist one or other of the divorcing spouses with an alternative UK immigration application.

The place where a spouse is intending to live long term, and their financial needs for doing so, could also potentially affect the outcome of any financial settlement.

Children proceedings

The UK has rules in place to enable a parent to obtain a visa to remain with a British child or a child who is settled in the UK. However, these rules do not as easily deal with the position of parents of children in the UK with limited leave to remain. Further, where one parent wants to leave the UK, the Immigration Rules contain outdated provisions, which may preclude a child from obtaining a visa to remain with the other parent unless that parent can meet a high threshold of 'sole responsibility'. Sole Responsibility, according to the Home Office's own guidance:

By the Home Office's own admission, the test set out by the Immigration Rules is directly contrary to how most separated families operate. It is also contrary to the operation of family law, which starts with a position that it is in a child's best interests for both of its parents to have full involvement in the child's upbringing and where orders are regularly made providing for children to live with both parents across two different homes (and sometimes in circumstances where those homes are in different countries).

"Is intended to reflect a situation where parental responsibility of a child, to all intents and purposes, rests chiefly with one parent. Such a situation is in contrast to the ordinary family unit where responsibility for a child's upbringing is shared between the two parents (although not necessarily equally)."

Child relocation

A change in a parent's immigration status does not give an automatic right to change their child's place of residence. Assuming both parents have parental responsibility for a child, they must both give consent to their child relocating permanently to another country. Without consent or a court order, a parent cannot legally take their child with them and an attempt to do so could be child abduction.

If there is no agreement between the parents for a child to leave the UK, a court application will need to be made to obtain an order granting permission to go. This is the case even where one parent's immigration status means they cannot remain in the UK permanently. A relocation or leave to remove application can take at least 6-9 months to complete and whereas a parent's immigration position can be impacted immediately upon separation. The court endeavours to deal with children related applications promptly, however, delays in getting a case to court could see the countdown to the expiry of the right to stay in the UK outstrip the speed of the court process. Add to that time for an appeal against a court's decision, and one parent could find themselves having to leave the country before a final decision has been given.

A migrant parent may have to consider making a discretionary application outside of the Immigration Rules to remain for the duration of the family proceedings (during which they would be in the UK legally while the application was being considered) or leave the UK and return as a visitor as necessary for the hearings and to see their child (if the child was not permitted to go on an interim basis). It is critical that any application under the Immigration Rules is made before leave is due to expire to protect the parent's lawful status in the UK. As part of the family proceedings, the migrant parent may need to ask the court for an urgent hearing in respect of the relocation application or for permission to leave with the child on an interim basis (in time for the expiration of any visa) on the basis that they will return to England for the final hearing.

When considering an application to relocate, the paramount factor the court will consider is the welfare and best interests of the child. In assessing this, the court will look at the applicant parent's plans for housing, schooling, financial support and, perhaps most importantly, how the child will retain as full a relationship as possible with the parent that is 'left behind' following the move. The immigration rules in the country to which a parent wants to move and the ability of the child and left behind parent to move freely between two countries will be important and parents may wish to obtain local expert advice to present as part of any English proceedings.

A court is likely to have sympathy for a parent whose right to stay in the UK is in question, and the motivation for an application to relocate will be an important but not necessarily deciding factor. If a parent can no longer stay in the UK, their UK immigration status and prospects of this changing will be very important. Equally, the impact their uncertain immigration status is having on their ability to find work in the UK may be relevant.

The collision course of family and immigration laws in the UK

Immigration and family laws have been on a collision course for some time. While the UK Government has been focused on reducing net migration, they have neglected to update archaic provisions of the Immigration Rules which do not address modern family life. Although a 2009 Act introduced a provision requiring the Secretary of State to make arrangements to ensure that she carried out her functions in relation to immigration, asylum or nationality having regard to the need to safeguard and promote the welfare of children who are in the UK, this obligation falls short of the paramount importance afforded to welfare and best interests of the child in the family courts.

Check Your Privilege

Confidential Communications Between Lawyer / Client and Litigation Lender

Adam Paterson &
Isabel Agudo

Privilege is a legal right that grants individuals and corporate entities the power to resist disclosure of confidential and potentially sensitive material. In basic terms, these rights ensure that a litigant can obtain advice and investigate their case without fear that the documents produced and advice obtained will need to be disclosed to another party or the Court at a later date.

There are various forms of privilege including:

– "Legal advice privilege" protects written or verbal communications between a lawyer and their client for the purposes of giving or obtaining legal advice.

– "Litigation privilege" protects written or verbal communications between a lawyer or their client on one hand, and a third party on the other, where adversarial legal proceedings are reasonably in prospect such as litigation, arbitration, or investigations.

– "Common interest privilege" allows a party to share material that is already privileged with another third party who has a common interest in the subject matter.

It is possible for a document or communication to be protected by more than one form of privilege.

Sharing Info with a Third Party Litigation Lender

It is of course crucial to the conduct of proceedings that information sent to us as a third party litigation lender are not going to be disclosed to the other party at a later date.

Much of the information shared with us by a client or solicitor is already privileged between them, such as counsel's advice for example. The privileged status is preserved when the document is disclosed to us. Even though the document has been disclosed outside of the lawyer-client relationship it remains protected because:
– Any waiver of confidentiality and privilege is for the limited purpose of seeking a litigation loan to fund proceedings.
– Arguably, there is a common interest between the client and us as the lender which means that the documents disclosed to us gain a new privileged status when sent to us for the purpose of initial or ongoing due diligence.

This means that we cannot be compelled to disclose various documents, for example application forms, asset schedules, counsel's submissions, expert reports, continued correspondence, telephone attendance notes, cost estimates and case updates among others.

Explaining the Threshold for Litigation Privilege

1. Unlike legal advice privilege, the scope of litigation privilege is wider in that it can protect communications not only with legal professionals, but also with non-legal advisers. Therefore, in addition to a third party lender, material produced by an accountant, a forensic expert, a surveyor, an estate agent, or an executor for instance, may be covered by litigation privilege.

2. Litigation must be afoot or ongoing. In a matrimonial case, even where the parties have yet to issue Form A, the divorcees are anticipating financial remedy proceedings in order for the court to determine how to fairly divide their assets. The same principle applies where a matter settles early and does not culminate in a Final Hearing.

3. Litigation must be the dominant purpose of the communications. The term "dominant" is described as the ruling, prevailing, paramount or most influential purpose. As a third party lender we are only concerned with information for which litigation is the main purpose and therefore this Is overwhelmingly likely to apply to information we are sent as part of an application for lending or information that we request as the case progresses.

General Data Protection Regulation (GDPR) vs. Privileged Data

Legal professional privilege is one of the exemptions to GDPR disclosure obligations. Personal data to which a claim to legal privilege could be maintained – such as litigation privilege – prevails over the right to be informed and the right of access as set out in the GDPR's key provisions.
Consequently, if the spouse or other family member of a client logged a subject access request for documentation that relates to them on the basis of GDPR, a third party litigation lender would have the right to deny this request by citing litigation privilege. We are legally permitted to withhold certain information from a spouse, family member or any other opposing party.

The Data Protection Act 2018 (the most recent data protection legislation) upholds this GDPR exemption.

At Schneider Financial Solutions we value confidentiality and protect communications with our partners and clients with careful information governance policies and procedures.

Follow our LinkedIn page for more articles: https://www.linkedin.com/company/schneider-financial-

If you have queries about this article, or you would like to discuss your client's funding requirements, please contact info@schneiderfs.com

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