ThoughtLeaders4 HNW Divorce • SEPTEMBER 2024

HNW Divorce MAGAZINE

ISSUE 18

NEGOTIATING PEACE:
THE FUTURE OF ADR IN DIVORCE SETTLEMENTS

INTRODUCTION

"Are you really listening . . . or are you just waiting for your turn to talk?"

R. Montgomery

We are thrilled to introduce Issue 18 of HNW Divorce Magazine, which explores the intricate themes of love and divorce. In this edition, you'll find insightful articles from top experts in the HNW Divorce sector. A key focus is on Alternative Dispute Resolution (ADR) in divorce cases, offering in-depth perspectives. We are also excited to announce our upcoming event, the 4th Annual Flagship HNW Divorce Litigation Conference, taking place on 21 November, 2024. Be sure to secure your spot for this informative gathering. A special thanks to our community partners and contributors for their invaluable insights into resolving disputes and achieving agreements in divorce matters.

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ABOUT HNW Divorce

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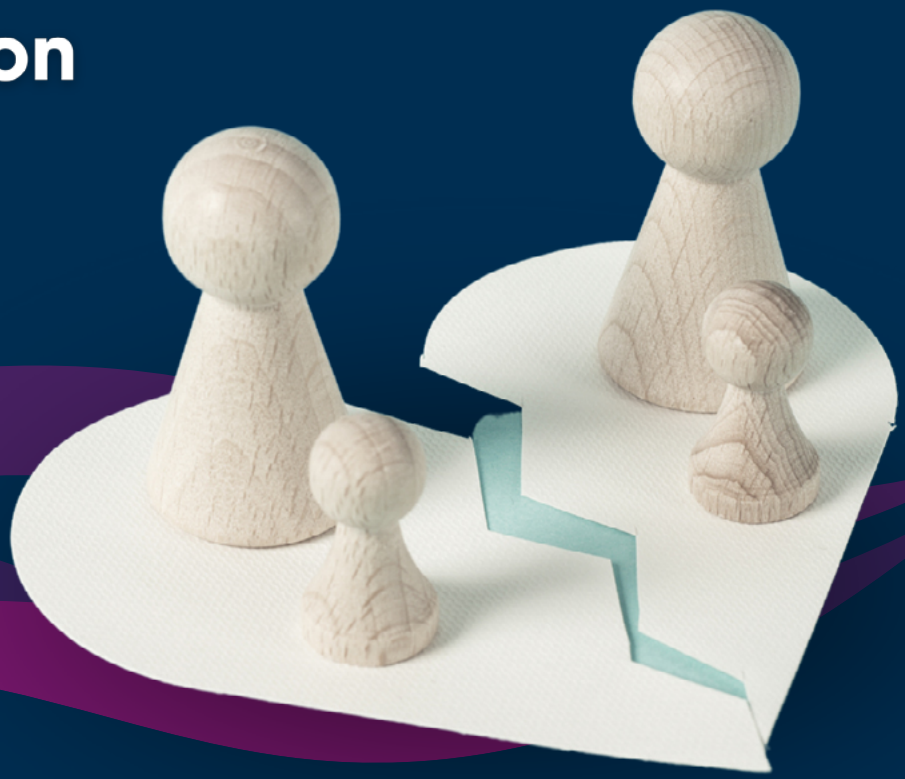

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NON COURT DISPUTE RESOLUTION

IN DIVORCE

Authored by: Amy Scollan (Partner) - Hunters Law

In April 2024 significant changes were made to the Family Procedure Rules which enhanced the court's powers in respect of Non-Court Dispute Resolution 'NCDR', formerly called ADR (Alternative Dispute Resolution).

The rule changes are the result of work undertaken by the Family Procedure Rule Committee who had the goal of considering how the rules might encourage early settlement of family disputes, whilst not quite mandating NCDR.

The Provisions Include:

1. Expanding the definition of NCDR to mean 'methods of resolving a dispute other than through the court process, including but not limited to mediation, arbitration, evaluation by a neutral third party (such as a private Financial Dispute Resolution process) and collaborative law.' (See FPR 2.3(1))

2. Imposing a duty on the authorised family mediators conducting MIAMs (Mediation Information Assessment Meetings) to:

   - 'Indicate to those attending the MIAM which form, or forms, of non-court dispute resolution may be most suitable as a means of resolving the dispute and, why' FPR 3.9(e) and

   - 'Where sub-paragraph (e) applies, provide information to those attending the MIAM about how to proceed with the form, or forms, of non-court dispute resolution in question' FPR 3.9(f).

3. Imposing a duty on the court to consider the appropriateness of NCDR at every stage in the proceedings. FPR 3.3(1A) provides that 'when the court requires, a party must file with the court and serve on all other parties, in the time period specified by the court, a form setting out their views on using non-court dispute resolution as a means of resolving the matters raised in the proceedings.'

4. Providing powers for the court to adjourn proceedings to allow the parties to undertake NCDR. The parties do not need to agree to this – FPR 3.4(1A).

5. Amending the costs rules to strengthen the court's ability to encourage unwilling parties to engage in NCDR. They now state that a failure without good reason to attend a MIAM or NCDR is reason for the court to consider departing from the general starting point that there should be no order as to costs – FPR 28.3(7).

It remains the case that domestic abuse is an exemption from MIAM requirements.

It is hoped that these changes will redirect those who might have seen court as a default option and a natural next step if solicitor negotiations failed, into NCDR at either the MIAM stage or when the court first manages the case.

These changes are welcome, but they are not a panacea. A number of matters require thought and energy from the family law profession.

1. Risk of Abuse

More often than not, delay oftens benefits one party to a dispute.

It is a genuine risk that an abusive party (falling outside the MIAM exception), might manipulate the new rules in order to engage in NCDR to achieve further delay rather than a solution.

The other party might suspect foul play but fear that they have no alternative but to go along with the NCDR charade for fear of having cost order made against them if they were to refuse.

How can be sure that where one party is acting in bad faith that the other is not penalised in costs or delay, in a NCDR context?

Arguably, an NCDR advocate might say that bad faith on one party's behalf might mean that they are not yet ready to address future arrangements whether through court or NCDR, and what they need is to work with a therapist or coach to get to a point where they are able to approach financial remedy claims with a clearer mind. From there, they can learn to focus on the future rather than the past - and both parties will then be better off rather than insisting on rushing into resolving finances first.

I would agree but the system needs a practical solution which protects the victims of bad faith tactics.

2. A Well-Functioning Justice System

The court system, on which the most vulnerable in society rely the most, is creaking under pressure and the cost of financial remedy proceedings can be eye-watering and out of reach to many.

Disputes in which NCDR is not appropriate, or fails, need to be able to fall back into a justice system and be swiftly determined. We all need a justice system that can operate efficiently and effectively.

The current system is plagued by delays and our judges are visibly stressed and overworked.

In respect of financial remedy cases, the number of applications made to court over the last few years have remained fairly constant (49,049 in 2021, 40,097 in 2022, and 44,564 in 2023), the service, from my perspective is in decline.

Sam Townend KC, Chair of the Bar Council said this in March 2024 in a press release:

"The justice system is a fundamental public service, but it has been starved of necessary funding for years. This is a false economy – every penny stripped from the justice sector increases costs elsewhere, through court delays and impacts on other services, such as housing, benefits, and schools."

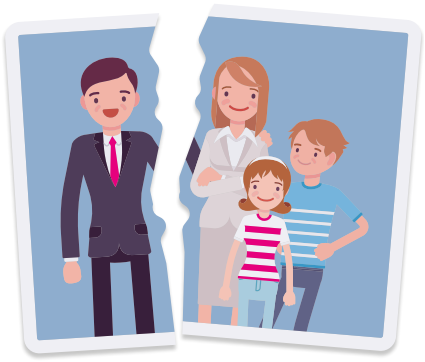
"The criminal and family justice systems are running at boiling point. Over the last decade, funding has declined and services have diminished while demands have increased and are set to increase further."

As professionals in the family justice system, we need to demand that the Government invests properly in the system. I fear that the well-intentioned spotlight on NCDR can detract focus from the necessary attention our creaking court system needs.

3. The Family Justice System

As lawyers we can aim to take clients out of the court process and into NCDR, but there will always be cases which require judicial determination. The system is an adversarial one, and in order to be successful it often requires a combative approach, which seeks to advance your own client's case and capitalise on the weakness, flaws and errors in your opponent's. Discrediting your opponent, in order to boost our own credibility before the court, is a standard litigation tactic.

A by-product of the adversarial system is polarisation in the parties' positions away from resolution.



The President in his 'A View from the President's Chambers: July 2024', wrote about children's matters, stating:

"At present the system is overloaded and inevitable delays in reaching a conclusion, which are obviously unwelcome, have the potential to make matters worse rather than better for a child. But, even if delay were not an issue, a system that pitches one parent against the other in an adversarial setting is likely to exacerbate more than it heals dysfunctional family relationships."

In my view, this comment is equally applicable to financial remedy cases, and whilst we can try and ameliorate it, we cannot change the system's fundamental flaws. This needs to be recognised by the judiciary, when they express concern about the costs incurred and approach taken by some parties.

4. Lawyers

It is undeniable that the judiciary are frustrated in the way some of the disputes are litigated through the courts. This frustration can be seen in comments from recent judgments:

Crowther v Crowther [2021] EWFC 88, Mr Justice Peel said:

"The lack of cooperation between the parties and their lawyers was very apparent. The mercifully limited exposure I have had to the inter-solicitor correspondence was sufficient for me to see that there appears to have been an almost complete breakdown of constructive communication."

"Each party thinks the other is, to use their own words, "out to destroy" them. These proceedings have been intensely acrimonious. They, and their lawyers, have adopted a bitterly fought adversarial approach."

Lauryn Goodman v Kyle Walker [2024] EWFC 212, His Honour Judge Hess said:

"It is difficult to tell how much lawyers' time will be needed to draft and implement my order. It will depend on how many arguments there are and, whilst I am attempting to produce clarity, the history of this case suggests that the lawyers will find something to argue about."

Undoubtedly, lawyers do not have executive control over their instructions, and when lawyers are in receipt of difficult instructions, and presenting difficult cases to the court, they can find themselves to be the subject of the court's frustrations. Our clients are free to put whatever case they want before the court (subject to the court's case management powers) and indeed it is central to the rule of law that they are free to do so. It is our job to help them whilst acting in their best interests.

It can sometimes feel that Judges would prefer for only reasonable, measured and fair positions and arguments to be put to them. It is understandable why Judges would want lawyers to make their jobs easier rather than harder, as it would streamline cases, which is in the parties' best interests.

We need to do more to tread that difficult line between following difficult instructions in a way that upholds our duty to the court and acts in our client's best interests. This is not work for the faint hearted.

Acting with aggression or with a lack of co-operation does not help the court and cannot be said to be in our own clients' best interests. Francis J made this point in Helliwell v Entwistle [2024] EWHC 740 (Fam) when he stated:

"Even if a litigious client insists upon a difficult, bad-tempered and stroppy letter, … There is a duty upon solicitors not only to their client but to the court, and that duty requires them to temper the tone and not to worsen it."

If the lawyer's job is well done, their work will not be visible to the Judge. The Judge will have no insight into how a lawyer might have guided the client away from presenting an unhelpful argument to the court.

In conclusion, NCDR has been bolstered as means of resolving conflict by the recent rule changes, and it is clear that it will only become an even more essential part of the family justice system as time progresses. However, this does not mean that we can neglect reform to the court system which is urgently needed. Furthermore, we as lawyers must work to better assist the court in cases which need a judicial determination.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OFFSHORE TRUSTS ONSHORE DIVORCES

Authored by: Ben Havard (Partner) Emma Taylor (Senior Associate) and Laura Smith (Associate) - Collas Crill

We have all seen the newspaper articles where a divorcing spouse (or in some cases a willing family member)[1] is accused of 'hiding' money in an offshore trust to avoid including those funds as part of the financial provision on divorce.

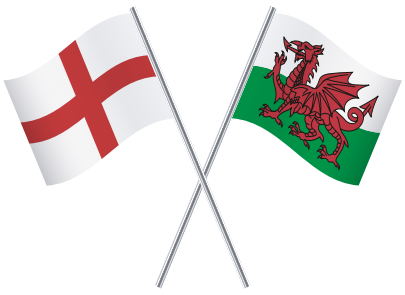
Trusts have long been used by settlors looking to ring-fence their property, whether that be as part of a tax planning strategy, or to shield it from the claim of another. Many offshore jurisdictions (including Guernsey) have built up their offerings in trust services and will often be one of the first places that people will turn to when looking to establish a trust.

But what are the consequences of settling or being a beneficiary of an offshore trust when it comes to the breakdown of onshore marriages?

1 https://www.bbc.co.uk/news/uk-56834722

Nuptial Settlements

In England and Wales, the Family Division of the High Court (Family Division) possesses various powers when determining the appropriate level of financial provision between divorcing spouses. Part of their job is to consider all of the resources and assets available to each of the parties – including those held in trust.

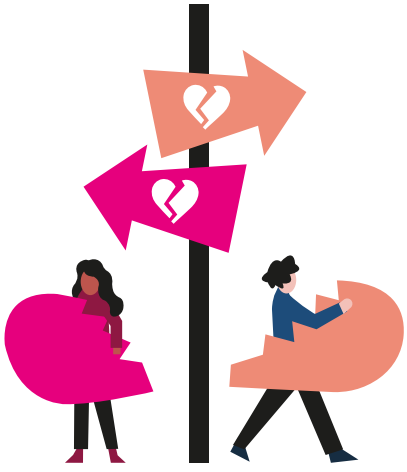


The extent to which the Family Division will take trust assets into account depends on the specific circumstances. A trust from which the beneficiary spouse has no real expectation of benefitting in the foreseeable future is likely to be viewed very differently by the Family Division to one where a history or expectation of benefit can be demonstrated.

There are certain trusts which the Family Division has greater powers over under the Matrimonial Causes Act, 1973 (MCA 1973), known as 'nuptial settlements'. A nuptial settlement is a trust that makes "some form of continuing provision for the parties"[2]: quite a broad definition and one worthy of entire articles in its own right. When it comes to nuptial settlements, the Family Division not only has to take the assets into consideration, but are empowered by section 24(1)(c) of the MCA 1973 to make "an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement…made on the parties to the marriage".

This gives the Family Division a broad range of powers. For example, they could:

- Change the terms of the trust;
- Order that payments be made from the trust assets to one of the spouses regardless of whether or not they are a beneficiary of the trust;
- Order that beneficiaries be added or removed; or
- Require that the trustee be changed.



Where the trust is onshore (a trust governed by English Law, with trustees based in England) such variation orders of the Family Division can be enforced through the English courts, and a professional trustee is likely to follow them in any event. But what are the consequences of such an order on an offshore trust?

Is an English Order to Vary a Nuptial Settlement Enforceable in Guernsey?

When it comes to variation orders made in the course of onshore divorce proceedings, the starting point is likely to be that they are ineffective at varying the trust. Guernsey, like most offshore finance centres, has 'firewall provisions' within the Trusts (Guernsey) Law, 2007 (Trusts Law), which will come into play where a trust is a Guernsey trust.

Firewall provisions will usually specify that only the Court of the trust's jurisdiction (in the case of Guernsey, the Royal Court (Royal Court)) has the power to vary it, and any orders of foreign courts which purport to do so are void and of no effect. That would include an order of the Family Division in relation to a Guernsey trust.

This does of course lead to a tension between the Courts of the two jurisdictions, but a trustee will usually be advised to go with their home Court.

An order by the Family Division purporting to vary a Guernsey trust, therefore, will not be binding on the trustee, unless the trustee has submitted to jurisdiction in the divorce proceedings.

The Royal Court is unlikely to simply enforce without question the orders of the Family Division, and a more complex process usually ensues.

So What Options Are There?

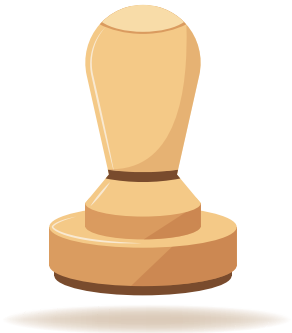
Just because the order is not automatically recognised, hope is not lost for the spouse who stands to be disadvantaged.

If the Family Division has purported to vary the trust (which is increasingly unusual, with a recognition that avoiding a purported variation of a trust in another jurisdiction is preferable), then an offshore trustee is likely to be advised to seek directions or approval from their home court as to what action they should take.

Taking it to Court

As to the approach the Royal Court would take, it will usually be a more involved process than just rubber-stamping the 'variation' ordered by the Family Division.

The underlying policy is that the Family Division's job in considering the division of assets is just to consider the interests of the parties to the divorce (i.e. the spouses). They have no reason to have turned their mind to the wider beneficial class of the trust, whose interests all need to be considered in a decision to vary the trust. It is on that basis that the Royal Court tends to be robust in reserving for itself the ability to make decisions on variation.[3]



That said, we have (largely) moved on from the days of the offshore courts and the Family Division clashing on this issue. We understand from practitioners in England that we regularly work with that the Family Division are less likely now to try and vary trusts of other jurisdictions, in recognition of this issue, and will often explore other options such as the making of financial orders which "encourage" the trustee to make assets available to the paying spouse to meet the orders. If a variation order is made, a Guernsey trustee is likely to approach the Royal Court a bit more delicately than simply arguing that the trust has been effectively varied by the Family Division.

2 Brooks v Brooks [1995] Fam Law 545

3 T Limited (Royal Court, Unreported Judgment 21/2017) at [42]

For example, in the Jersey case of the R Trust[4], Recorder Frank Feehan KC of the Family Division did make orders purporting to vary a Jersey trust. However, the approach by the trustees to the Royal Court in Jersey was not to suggest that such a variation was effective but instead to seek a blessing of their (the trustees') decision to vary the trust on the basis of the factual findings of the Family Division.

The trustees relied on the argument that, in making the order it did, the Family Division had considered all of the factors that are relevant to the proper consideration by the Royal Court in Jersey. It suggested that the Court might find a way to bless the trustees' decision to the same effect. Importantly though, it was framed as recognising that it was a decision for the Court to take. The Court gave its approval.

That case was thankfully straightforward, as the beneficiaries of the trust were the immediate family of the husband and wife only (i.e. their minor children). All of whose interests were considered by the Family Division. Not every trust would follow that model.

The Royal Court will generally be keen not to "set itself against" the Family Division, and provided it is satisfied that all of the relevant interests have been considered, it is likely to make orders that the trustee should give effect to the Family Division's proposed split or variation.

Ignoring the Family Division's Order

But what if the trustee fails to take any action, perhaps due to pressure from the settlor or spouse set to benefit if the order is not carried out? All is not necessarily lost for the disadvantaged spouse. If they are:

1. A beneficiary of the trust; or
2. Obtain permission to do so from the Royal Court,

It would be open for them to bring an application in their own name in the Royal Court to ask them to make the necessary orders.[5]

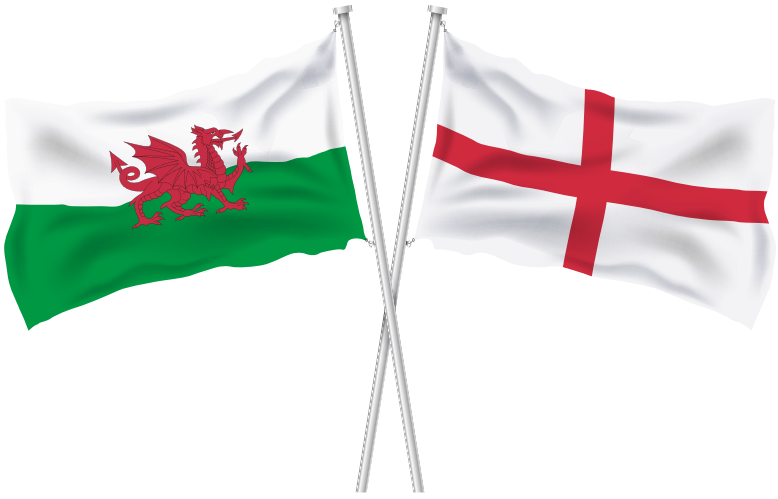
In Summary

It is clear that there is not a straightforward enforcement system, should the Family Division purport to vary an offshore trust. If you are considering setting up a trust which could later be construed as a nuptial settlement, or if you stand to benefit from such a trust, we would recommend that you seek advice to protect against future possibilities (including marriage breakdowns, however unlikely that may seem).

Assets based in England and Wales

There is one important caveat to all of the above. If the offshore trust owns assets based in England and Wales, then the Family Division could well enforce an order directly against those assets, bypassing any firewall provisions entirely. So if you are targeting assets situate in England or Wales, seeking a variation from the Family Division may still be an attractive strategy notwithstanding the above risks.

Indeed, with assets located within reach of the Family Division (in England), the landscape can be very different in terms of disclosure and a willingness on the part of the trustee to be involved in the divorce proceedings from the start.



4 R Trust [2015] JRC 267A

5 The Trusts (Guernsey) Law, 2007 – Section 69

60-SECONDS WITH:

FRANCES STRATTON
DIRECTOR
1KBW

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

A I'd return to my native Cornwall like a shot. I love swimming in the sea, so I'd start each day with a bracing dip, play the piano all afternoon and spend all the summer evenings sailing.

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

A It is such a privilege to have a job that is as incredibly varied and interesting as the clients we represent. I enjoy almost all aspects of my job, but, if pushed, I would say that persuading a judge to find in my client's favour on a tricky point is perhaps the most satisfying element of all.

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

A I am very wary of making book recommendations, having had my fingers burned in a pupillage interview years ago when I was asked to describe a book I hadn't enjoyed. I chose Tess of the D'Urbervilles by Thomas Hardy because I'd been forced to read it during my A levels and found it miserable and the protagonist a bit wet. I spent a good five minutes of the interview explaining why I didn't like it, only to be told by the Head of Chambers that chambers (a soon to be High Court Judge) that it was a 'classic family law text'. Ouch.

Q **What legacy would you hope to leave behind?**

A For the last eight years, I've been a trustee of a charity which seeks to help people who are or are at risk of experiencing homelessness. We saw during the pandemic, with the 'Everyone In' initiative, that it is possible to make big positive changes as a society if there is joined up action. I would love for this spirit to prevail into the future. It would be wonderful if everyone were able to say that they had a safe place to call home.

Q **Do you have any hidden talents?**

A I can make surprisingly delicious ice cream.

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

A Don't sweat the small stuff. Like most lawyers, I am a bit of a perfectionist and, from time to time, that can get a bit stressful. When it does, I remind myself that there is so much that is outside of my control and that the best course of action is to focus the bigger picture.

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

A There is so much more that I would like to achieve. I was called to bar at the tender age of 22 so while I am eleven years' call now, I am excited that my career has a long way yet to run.

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

A Never be afraid to reach out to those around you. More senior members of the profession are more often than not absolutely delighted to be asked to offer help, advice and mentorship.

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

A In 2019 I was fortunate enough to be awarded a Pegasus Scholarship by the Inns of Court to spend three months on secondment in India. I had an incredible time, working at the Dehli High Court, the Dehli Commission for Women (the municipal body which aims to combat the epidemic of violence against women and girls in the city) and the Supreme Court of India. At the end of my placement, I spent a bit of time travelling, with a week's long trek in the Himalaya a real highlight: digging our way out of our tent after a blizzard on a high mountain pass was an experience I'll never forget.

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

A They say never meet your heroes, but I would be fascinated to talk to Volodymyr Zelenskyy. The idea of going from a comedian, media mogul and national treasure to a full-blown war leader with the bravery to stand up to the whole of the Russian war machine and the negotiation skills to ensure that the Western Alliance will back his country blows my mind.

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

A I find going for a run is a great way to clear my head. I live in a small town in Hertfordshire so I can be out in beautiful countryside in about five minutes, it's liberating (if a little hilly).

Q **What brings you the most joy.**

A I am very lucky to have a wonderful three-year old daughter, as well as three little nephews and a niece. They are undoubtedly what brings me the most joy and motivates me to strive for the future.

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WITH THIS RING, I THEE HOUSE:

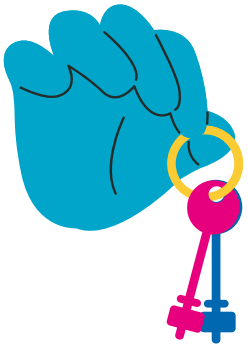
PROTECTING PROPERTY INTERESTS IN PRENUPTIAL AGREEMENTS

KINGSLEY NAPLEY
WHEN IT MATTERS MOST

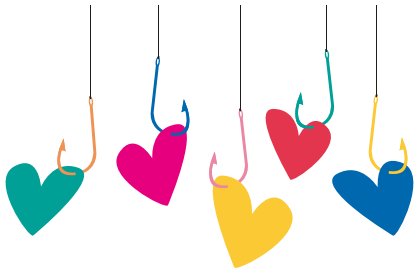
Authored by: Nevin Rosenberg (Associate) - Kingsley Napley

Deciding to get married and buying a dream home are among life's happiest milestones. Engagements and property purchases involve a great deal of energy and excitement as the loved-up couple starts to plan their happy day and life together.

However, there are more practical considerations for engaged couples. These might not be as enjoyable as wedding dress shopping or cake tasting but they have a much more lasting impact on the couple, their relationship and their finances. Namely: prenuptial agreements.



Traditionally seen as only for the super wealthy or members of the aristocracy, prenuptial agreements are becoming increasingly common in England and Wales. This is largely down to a seminal shift in the courts' approach to nuptial agreements following the key case of Radmacher v Granatino in 2010, which held a French-German couple to the terms of their prenuptial agreement even where the financially weaker husband sought to be released from it. In the 14 years since that case English family law has witnessed a significant uptake in prenuptial agreements, and they are also increasingly being tested and litigated in the courts as the early adopters of prenuptial agreements are now going through their own divorces.



A well-drafted prenuptial agreement can give couples greater clarity and control over financial arrangements during their marriage and on divorce. While this might not sound like the most romantic task on the pre-wedding to do list, there are several benefits to entering into prenuptial agreements, not least because they should in theory significantly reduce the scope for future litigation and the associa[ted cost (both financial and emotional).

The Family Home

Under English law, the family home has a central importance during a marriage and is also regarded as a particular category of asset on divorce because it sets a benchmark for the couple's standard of living during the marriage which will be relevant to the overall financial settlement. As a starting point, it is usual for a court to treat the family home as belonging to the couple in equal shares regardless of their individual respective contributions to the purchase price, and sometimes even regardless of how the property is legally held.

By contrast, a prenuptial agreement allows couples to set their own rules in terms of how different assets, such as the family home, are treated during the marriage and on divorce. For example, consider the following example scenarios and how a prenuptial agreement can assist:

- A young couple are starting out in their careers and living in rented accommodation. They do not have much individual wealth so the bride's parents decide to gift them a large amount of money to buy their first house without a mortgage. That money derives from the sale of a long-established family business which the bride's parents only recently sold. The couple decides that the bride will receive credit for her parents' gift, and that they will share equally in any increase in the property's value. In this way, the bride's early inheritance is effectively ring-fenced, while still allowing the couple to share in the fruits of their marriage.
- A couple marry later in life. They will move into the husband's home which he bought many years ago and has spent significant sums of money renovating prior to their relationship to include a state-of-the-art studio from which he works. Their prenuptial agreement allows the husband to retain this home and studio outright, but states that the wife will be entitled to live in a property of a similar, though not equivalent, standard. The agreement further states that if the husband is required to pay a sum of money towards his wife's housing needs, that sum will be at least partially held on trust such that it eventually returns to his estate.
- The groom-to-be of an engaged couple is the heir to his parents' landed estate. While he and his fiancée currently live in a relatively modest flat in London, it is accepted that they will move into the family ancestral home in the future. Their prenuptial agreement has to comply with strict rules set out in his family trust documents so as to protect the estate from claims on divorce, but includes a fairly generous provision for his fiancée so that she is guaranteed a minimum sum from which to meet her housing needs – a sum that increases in line with the length of their marriage and depending on whether they have children.
- A couple are living and working in London at the time of their marriage, but one of them is French and the other is American. While they are happy to share the value of any family home which they purchase together in London (in percentages tied to their respective contributions), they each want to protect family holiday homes in France and in the US so that these remain in their respective families under any eventuality.

It is not just prenuptial agreements that can help protect property interests during relationships and/or marriages. Unmarried couples may wish to enter into a cohabitation agreement to set out their interests and intentions in the event of a relationship breakdown, and to establish principles in relation to the home they share, for example if one party is repaying the mortgage on a property owned in the other's sole name. In a similar way, a married couple can decide to enter into a postnuptial agreement if they wish to set out an agreed framework for their overall financial division in the event of a divorce, including terms relating to keeping their financial affairs and the divorce process confidential, which is a significant concern for our clients these days.

While it still may feel unnatural to think carefully about what should happen if a marriage does not last at the same time as planning a wedding, prenuptial agreements are helpful in encouraging couples to have frank conversations about their finances and their expectations for their marriage, which is no bad thing. Prenuptial agreements can be tailored to the couples' specific circumstances and can include a variety of different scenarios so the couple knows that they still retain some flexibility over how to manage their finances. Both parties should receive independent legal advice on the terms and implications of the agreement, and the implementation of the agreement should not leave either party in a predicament of real need, i.e. in any of the scenarios above it would not be sensible to say that the financially stronger party should retain all of the significant assets in the marriage leaving the financially weaker party unable to meet their housing and income needs. However, as the cost of housing continues to increase and as the family home will always have a significant emotional and financial value in a marriage, we expect that more and more engaged couples will turn to prenuptial agreements to ensure they are protecting and clarifying their respective rights and responsibilities towards each other.

This article was originally published on the Kingsley Napley website.

HANNAH NEELEMAN

AND THE REVIVAL OF THE TRAD WIFE

Authored by: Nichola Bright (Partner) - Myerson Solicitors Family Law Team

The Rise of the Trad Wife Movement

A burgeoning trend on social media is the emergence of the "Trad Wife." This movement features women embracing traditional values, routines, expectations and choosing to become stay-at-home wives and mothers.

This trend recently gained significant attention due to an in-depth profile of Hannah Neeleman, published by The Times, which dubbed her "The Queen of the Trad Wives."

The Reality Behind BallerinaFarm

Hannah Neeleman shares her life on her widely popular TikTok account, "BallerinaFarm," boasting 9.3 million followers.

While her videos depict an idyllic lifestyle, The Times article reveals the significant sacrifices and struggles inherent in being a "Trad Wife."

One of the first hints of these sacrifices is the name of her account. Before meeting her husband, Neeleman was training to become a professional ballerina at Juilliard, one of the most prestigious dance schools in the world.

Instead of performing on stage, Neeleman now dances in fields of livestock in rural Utah.

She told The Times that her dream was to live in New York City and that she was "a good ballerina," but meeting her husband, Daniel, changed her path.

Pressures and Sacrifices

Daniel pushed for marriage and children within the first year of their relationship. Neeleman admitted she wanted to wait, but that "wouldn't work" for Daniel.

Consequently, she became the first ballerina in modern history to be pregnant while studying at Juilliard.

However, she left to move to rural Utah with Daniel before completing her studies.

Over the past ten years, she has had eight children and takes full responsibility for raising them, managing the household and preparing meals from scratch daily.

Followers of BallerinaFarm noticed a painting of a ballerina above her stove, with one commenter calling it a "tragic reminder of what her life could have been."

Concerns of Coercion and Control

The article raised serious concerns about coercive control and abuse within the "Trad Wife" lifestyle.

One alarming aspect was Neeleman's childbirth experience; she stated she did not use pain relief.

However, when Daniel was not present, she confided to the reporter in a hushed tone that she did have an epidural when giving birth alone, calling it "awesome."

Additionally, Daniel mentioned that there were times when Neeleman could not get out of bed for a week, attributing it to exhaustion.

Many readers interpreted this as a possible sign of depression. It appears that many of Neeleman's life choices have been influenced by her husband, from rushing into marriage and children to decisions about her medical care during childbirth.

The Lifestyle

Neeleman's life is displayed on her TikTok account, inspiring many women to pursue the "Trad Wife" lifestyle.

In this lifestyle, traditional gender roles are strictly adhered to. The husband works outside the home, while the wife maintains a tidy house, cooks homemade food and cares for the children, all while being presentable for her husband's return from work.

The "Trad Wife" has no independent income and relies entirely on her husband for financial support, housing, food, and necessities. Some may have savings or assets if they recently adopted this lifestyle, but many wholly depend on their husbands.

This raises questions about their financial security in the event of a divorce.

Financial Implications of Divorce

If a financial agreement cannot be reached in a divorce [1], the court will review the assets and determine a fair settlement based on several factors:

1. **Welfare of the Children:** Any family's children's welfare is considered first.
2. **Financial Resources:** The court considers the income, earning capacity, property, and other financial resources each party has or is likely to have.
3. **Financial Needs:** Each party's financial needs, obligations, and responsibilities.
4. **Standard of Living:** The standard of living enjoyed by the family before the marriage breakdown.
5. **Age and Marriage Duration:** The age of each party and the duration of the marriage.
6. **Physical or Mental Disability:** Any physical or mental disability of either party.
7. **Contributions to Family Welfare:** Contributions made by each party to the family's welfare, including home care.
8. **Conduct:** The conduct of each party, if it would be inequitable to disregard it.
9. **Loss of Benefits:** The value of any benefits lost due to the divorce, such as inheritance.

Earning Capacity

A key factor in a "Trad Wife" divorce is the wife's income and earning capacity. If she is not employed, she likely has no independent income stream. The court will assess her ability to live independently and, depending on her circumstances and time out of the workforce, may expect her to seek employment.

Standard of Living

The court aims to replicate the standard of living enjoyed during the marriage as much as possible. This might favour the "Trad Wife," potentially resulting in a larger share of financial resources, including spousal maintenance, allowing her to rebuild her life. However, she will likely be expected to obtain and maintain her income.

Contributions to Welfare and Household

The court recognises non-financial contributions to the family, such as household maintenance and childcare. A "Trad Wife" cannot be disadvantaged because her husband is the breadwinner. Case law ensures no bias against the homemaker, considering her contributions to the financial settlement.

Coercive Control

Coercive control, recognised as a form of abuse, involves a continuous pattern of behaviour to exert power over another person, depriving them of independence and impacting daily living. At Myerson, we work closely with domestic abuse charities and refugees and can assist with urgent referrals.

Conclusion

The "Trad Wife" lifestyle is a personal choice with both pros and cons. Recognising the financial implications if this lifestyle ends in divorce is crucial.

While there are options for rebuilding independence, these are not guaranteed and depend on individual circumstances.

It's advisable for "Trad Wives" to protect themselves, such as securing a generous pre or post-nuptial agreement, maintaining an independent savings account, or earning income through small or stay-at-home jobs.

For advice on divorce or financial settlements, contact our specialist family solicitors at 0161 941 4000 or lawyers@myerson.co.uk.

1 https://www.myerson.co.uk/personal/family-law/divorce-solicitors

PROTECTING YOURSELF AGAINST THE IMPACT OF DIVORCE

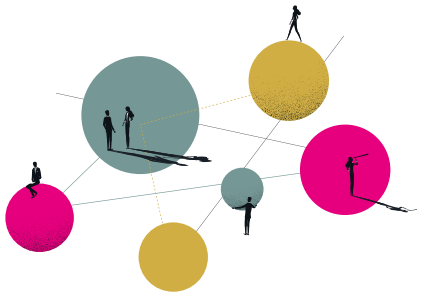
Authored by: Holly Hill (Associate Director) - John Lamb Hill Oldridge

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

Aspects to Consider…

Joint-Life Policies for IHT

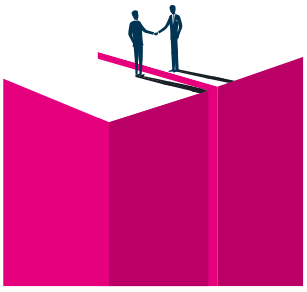
Where a divorcing couple have an existing joint-life policy, unless there is a 'separation clause' or a 'carve-out' option included, the policy cannot be divided. As a result any pay-out is unlikely to match the timing of when funds are required to pay a tax liability. Post separation, inheritance tax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



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

New Spouses

If there is a likelihood of a re-marriage in the near future, clients may want to consider taking out a 2-3 year term assurance on a single life basis, before replacing the cover with a new joint-life policy. Some clients may wish to take the opportunity, while unmarried, to secure single-life cover for the longer term. This will protect them from any future changes to their circumstances, although the downside is that single life cover is typically more expensive than joint-life cover.



Maintenance Payments

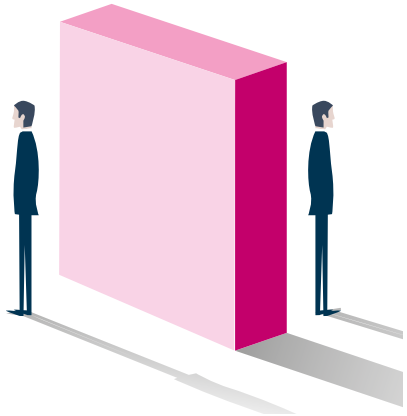
Typically, one party will be ordered to pay maintenance payments to the other following divorce. This may just continue until the children reach 18 or could continue throughout life. Maintenance for children may also cover school fees. In the event of the death of the ordered party, the maintenance will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

It is possible to structure a life insurance policy to match future maintenance payments in a very cost-effective way.

For example, maintenance payments of £100,000 a year for 10 years on the life of a 40 year old, non-smoker, would cost just £340 per year.

These policies are also very simple to financially underwrite using the court order alone, although a medical would still be required.

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



Protecting New Families

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

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

60-SECONDS WITH:

AMY ROWE
PARTNER
HUNTERS

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

A I would love to travel and eat my way around the world's best restaurants, but given my children are aged only 4 and 18 months, in reality I would probably end up spending my time running around after them. In all honestly, I would find time to volunteer and help clients – I feel privileged to be able to do something that I am passionate about and genuinely gives me satisfaction.

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

A Working as a family lawyer and mediator is an incredibly rewarding job. Clients rely on us at the most difficult times in their lives and it is an honour to be trusted to support and protect them through the process, and to secure the best outcomes for their children. I specialise in both domestic and international family law so my job is interesting and diverse from dealing with different nationalities, jurisdictional disputes, relocation cases, achieving the return of children who have been abducted, protecting victim-survivors of domestic abuse, protecting a child's relationship with their parent and helping clients through surrogacy and adoption. The job is also intellectually stimulating and I feel fortunate to have been involved in many of the cases at the cutting edge of legal changes in my field. Getting to help my clients, whilst at the same time being a part of legal developments is extremely satisfying.

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

A *Revolutionary Road* by Richard Yates is a book that had a profound impact on me. It is a powerful commentary on the way that lots of people live, and the theme is relatable to the situation that so many of my clients find themselves in.

Q What legacy would you hope to leave behind?

A That my children are happy and fulfilled in their personal and professional lives (and that I made a mean margarita).

Q Do you have any hidden talents?

A I asked my husband for the answer to this question and he said my childhood talent for Tetris on the Gameboy has translated to an uncanny ability to pack bags, stack a dishwasher, and parallel park like Lewis Hamilton.

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

A "This too shall pass". Being a family lawyer can be incredibly stressful as we deal with very emotional and, sometimes, traumatic cases. This phrase often serves as an anchor during anxious and challenging times.

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

A So many things but the ones that come to mind right now are to visit South America, achieve a better work-life balance, and learn to play tennis – I have a wholesome vision of playing doubles with my husband and children when they get older.

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

A Worry less… I have wasted a lot of energy worrying about things that never came to pass. And so much of what we worry about doesn't really matter in the grand scheme of things. I would tell my younger self that it will all work out so slow down, be present and have even more fun!

Q Where has been your favourite holiday destination and why?

A The Philippines. The islands are beautiful, and the scuba diving was incredible. I spent three glorious weeks there learning to dive and I would love to go back.

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

A The nature of my cases and the fact that my clients are located all over the world means I never truly 'switch off', but relaxing at home and playing with my children is what I look forward to most at the end of a long day. Also, I am lucky to work with supportive and talented colleagues at Hunters Law and a chat at the end of the day helps to alleviates stress.

Q What brings you the most joy.

A My children (when they are not being unruly), walking the dog in dappled sunlight in the woods, and enjoying good food and wine with family and friends.

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A FRESH START: WEALTH MANAGEMENT POST-DIVORCE

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JENNY JUDD
Director

JESSICA CRANE
Executive Director

ADR IN DIVORCE

NO LONGER JUST FAMILY MEDIATION

Authored by: Helen Midgley (Partner) - Tees Law

Family ADR (Alternative Dispute Resolution) or Family NCDR (Non-Court Dispute Resolution) refers to the numerous processes now available which help families resolve disputes without having to go through an adversarial court procedure.

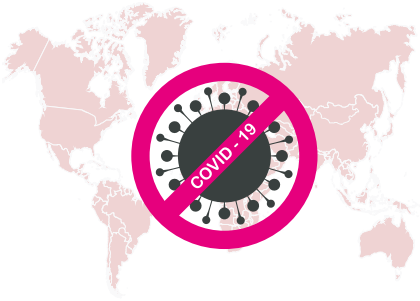
The family court process can be unfamiliar, stressful and, for some, a traumatising experience, despite the considerable efforts by the judiciary to improve both transparency and access (particularly for litigants who are not legally represented). Regrettably the often-confrontational approach of court means that parties' positions are almost inevitably polarised: often escalating and protracting parental conflict.

The family court backlog, which was exacerbated by the Covid-19 pandemic, remains extensive:

as reported by the Law Society, during 2023, more than 100,000 children were involved in family court cases and an average Private Children case took more than 11 months to conclude[1].

It is therefore increasingly important that families consider all of the options available for them to reach resolution.

In April 2024, changes to the Family Procedure Rules (the rules that govern how family court cases are conducted) came into effect and these changes have strengthened the court's requirement for every case to consider NCDR where possible and appropriate. It is now expected that parties in court will have actively engaged in NCDR and, if they do not, the judge may scrutinise the reasons why not. Significantly, a party who has not engaged in NCDR without a good reason may find themselves at risk to a costs order being made against them in those court proceedings.



So with these various push and pull elements in place for those already going through the difficult experience of relationship breakdown, having a broad understanding of the types of NCDR approaches available is essential:

1 More than 100,000 children trapped in family courts backlog | The Law Society

Mediation

Family Mediation is probably the most well-known of NCDR approaches. During Family Mediation a neutral third party (the trained mediator) will facilitate direct negotiations and discussions between participants to try to reach a consensus. Family Mediation is conducted on a without prejudice basis, which means that the content of the negotiation cannot be shared later in court. This helps participants to 'test' possible concessions and settlement structures to reach a bespoke and mutually agreeable outcome. Family Mediation is often a cost-effective way for families to resolve issues; government voucher funding can be applied for when issues relate to children and, for some, Legal Aid remains available for Family Mediation.

Collaborative Law

Collaborative Law is another way that families can work together to resolve their disputes. Within this approach, the parties are each separately legally represented but bound by an agreement to conduct their negotiations collaboratively (often by way of a series of joint meetings). During these joint meetings, the family can often be supported by other experts (accountants, family consultants, financial advisors for example) to provide a multi-disciplinary approach. If the negotiations are unsuccessful and the parties decide to use the court process, the parties are required to instruct new solicitors (their collaborative lawyers are prevented from continuing to represent them). This ensures all involved are committed to finding the best answer together.

Early Neutral Evaluation or a Private Financial Dispute Resolution

For some families, working together, even with their own representation, is not enough to secure an agreement and they may also need the support and expertise of an experienced and neutral legal advisor, who can provide an indication of the form of the settlement to help the negotiations. This indication can be provided on paper or in person during a quasi-court hearing.

Joint Advice: One-Couple, One-Lawyer or Resolution Together

One of the most modern NCDR approaches is for a separating couple to receive joint advice from a single specialist family lawyer. The neutral advisor does not represent either individual's sole interests but provides joint information and specialist advice so that the couple can reach a resolution together. Their advisor may then prepare documents to record the consensus reached jointly.

Parenting Coordination

For disputes about arrangements for children, some parents could consider Parenting Coordination, which is a child-focussed negotiation approach, combining skills of mediation, parenting training and effective communication. Often the parenting coordinator will be legally and/or psychologically trained so they can provide specialist support to help parents together and lessen conflict.

Family Therapy and Divorce Coaching

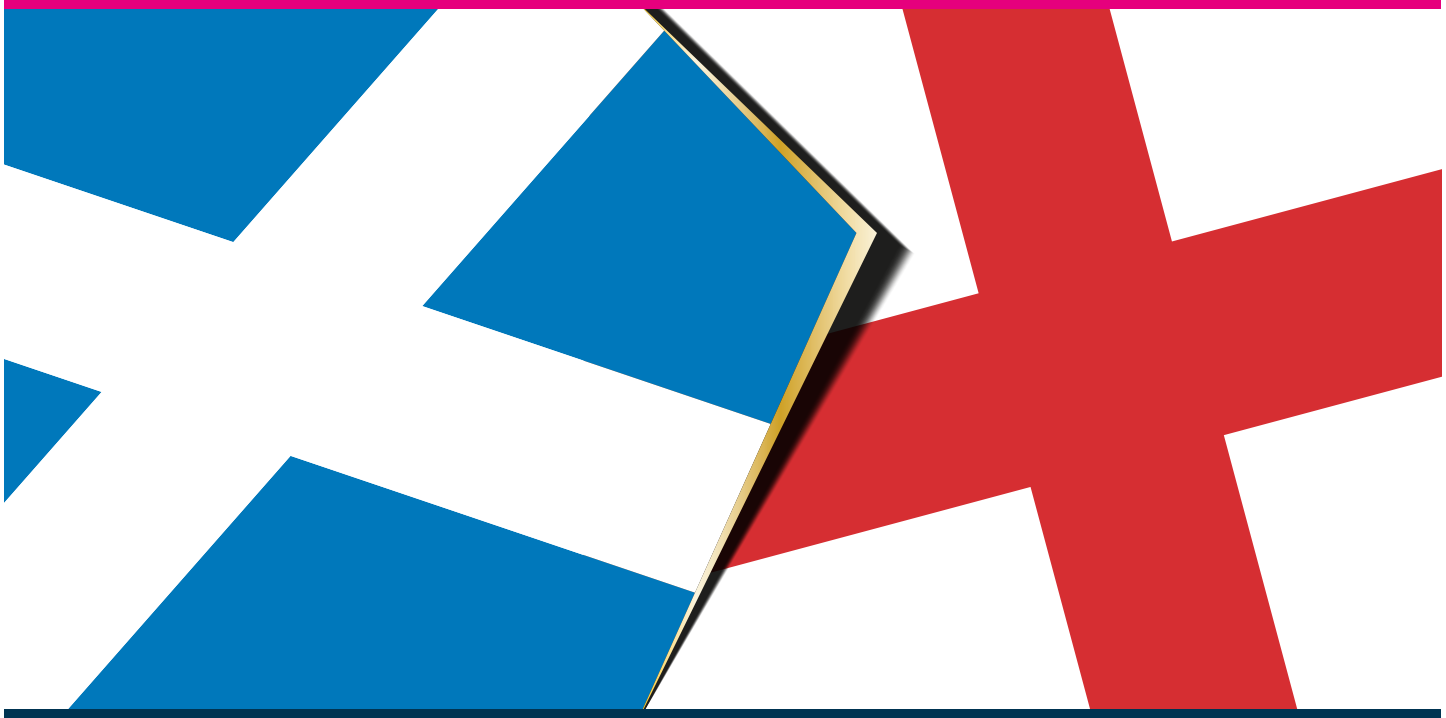
For many families, the barrier to reaching resolution is having first to deal with the emotional consequences of their relationship breakdown. Family therapy or coaching can help bring such elements into a different perspective, leaving room for practical considerations.

Arbitration

Not all disputes can be resolved satisfactorily by agreement and joint negotiation. When an impasse in negotiation cannot be broken or where families would simply prefer a decision to be made for them, Arbitration may be an appropriate approach. An Arbitrator is a jointly instructed expert lawyer, who is empowered to make a binding decision in the family dispute. Arbitration ensures finality while often resolving a dispute in a timelier way.

Overall, selecting the right NCDR approach depends on the family's specific circumstances and needs: the level of cooperation between the family is an important consideration. One of the key benefits to NCDR approaches is these processes are not necessarily standalone and it may be possible to use one or more (alongside or within the traditional court process if necessary). NCDR can ensure a prompt and private resolution of sensitive family disputes and ideally limit both the financial and emotional toll that relationship breakdown takes on families. Taking specialist legal advice about these different NCDR processes and their appropriateness is the best first step that a separating family can take.

IS ENGLAND ABOUT TO FOLLOW



IN SCOTLAND'S FOOTSTEPS WHEN IT COMES TO DIVORCE?

Authored by: Gillian Crandles (Managing Partner) & Jenny Jarman-Williams Consultant - Turcan Connell

England has earned a reputation as the "divorce capital of the world" for its often-generous financial settlements, particularly in relation to spousal maintenance. This is partly because the English Judges have more discretion than most other countries and partly because the English system favours the financially weaker party. Scotland on the other hand is viewed as being rules based and significantly less generous. All that may be about to change.

The Law Commission's Review

The Law Commission (England and Wales) has started reviewing the current law to establish if it is working effectively and delivering fair and consistent outcomes for divorcing couples. As part of that they are going to analyse the current laws on financial remedies, determine whether there are problems with the current framework which require law reform, and consider the financial orders made by the Courts in England and Wales. They will compare the law in England against the law of other countries, including Scotland. The review is broadly framed but the Law Commission is widely expected to explore if the English Courts should move away from their discretionary system to a more rules-based system like Scotland, France, and the majority of western countries. At this stage it is a preliminary review, but the scoping paper is expected to be published in November 2024 and it could provide the basis for a full review with substantive recommendations for reform.

The Arguments For And Against Reform

There was close to unanimous support amongst English family lawyers for the introduction of no-fault divorce and there is strong support for the reform and modernisation of the law in relation

to unmarried cohabiting couples, surrogacy and, to a lesser extent, prenuptial agreements. However, when it comes to financial remedies on divorce any change appears to be deeply controversial. The mere fact the review is taking place tells us there are influential voices arguing reform is needed. Other well respected family lawyers feel strongly that the status quo should largely prevail. While they support more modest procedural changes, they openly say that changing the underlying law is not the best answer.

Tim Bishop KC, an experienced English Family Law Barrister, recently wrote an article entitled "Fixed rules for division of matrimonial assets a formula for disaster". His view is that any move to a more fixed set of principles would be "a waste of time and money" and that "worse, a one-size-fits-all, formula-based approach would result in unfairness". He believes that "what we have in England and Wales is a sharing system with clear principles but with the flexibility to deal with needs and with hybrid assets". His view is supported by another prominent barrister, Samantha Hillas KC. She writes " I do not agree that repealing [the current law] and replacing it with [a new one] would do anything other than create confusion for everyone involved in financial remedies work and substantially more work for lawyers." She argues that it is better to focus on making the current process quicker, publishing more Judgements so people can see how other cases have been decided and increasing the use of non-Court dispute resolution rather than "suggesting we rip everything up and start again".

On the other hand, there are those who support change, such as Baroness Ruth Deech. She commented "No defender of the current system (which, incidentally, has taken 50 years of money wasting litigation to get to the place that Bishop claims is settled) has ever been able to answer the question – why is England alone in the western world in having an uncertain system? Scotland introduced set rules over 30 years ago and is very satisfied with them".

A key question is how much discretion a Judge should have. Some believe significant discretion is crucial in family law cases because it allows Judges to look at the couple's unique situation and assess what is fair for them. Others equate discretion with inconsistency, uncertainty, and cost. One Judge's view of "fair" could be very different from the next, and that unpredictability can fuel litigation and lead to significant legal fees. It will be some time before we know what direction the English will take, but turning their back on a discretionary system and moving to one more like Scotland's is undoubtedly one possibility.

The View from Scotland

Baroness Deech's assessment that Scotland is "very satisfied" with our rules is, in general, a fair one. Scotland has a well-established set of rules, but there is still scope for flexibility within them and it would be wrong to characterise the Scottish system as rigid in the same way as the child maintenance rules for example. While the Scots would give a positive appraisal of our system, it is for the English to decide the right way forward for them. Who knows, they might introduce something even better that we in turn will adopt in the future.

Gillian is a dual qualified solicitor in Scotland and England & Wales & Jenny is a qualified solicitor in Scotland"

60-SECONDS WITH:

JAMES WEALE
BARRISTER
SERLE COURT

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

A Working: it's still fun and rewarding even if you don't have to do it! But if I really had to stop (and money was no object), I'd try to revive my long-lapsed PPL and fly around the world.

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

A Having the opportunity to present arguments before judges who are at the top of their game and (very occasionally) persuading them that I'm right.

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

A The Story of Russia by Orlando Figes. It provides a fascinating insight into the psyche of Russia's rulers and subjects. As well as its current geo-political significance, it is essential reading for anyone in litigation involving Russian parties.

Q What legacy would you hope to leave behind?

A I don't pretend that I could leave behind any meaningful legacy. But decency and kindness are two qualities which I will certainly aim for.

Q Do you have any hidden talents?

A Handwriting that is so messy that only I can read it.

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

A "Don't let the perfect be the enemy of the good". Particularly, when up against a deadline, don't get distracted by inconsequential details.

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

A Gaining a better understanding of tax law, so that it doesn't scare me quite so much! Or, more realistically, learning how to make edible naan bread.

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

A Don't be intimidated by lawyers on the other side with impressive CVs; equally, never underestimate anyone who doesn't have an academic background.

Q Where has been your favorite holiday destination and why?

A South Africa. The scenery is unparalleled, and the people, food and wine are all amazing (and it's one of the few countries where the pound still gets you a long way).

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

A Volodymyr Zelenskyy: his unbreakable courage and resilience in the face of prolonged and horrific adversity is inspirational. What he and Ukraine may achieve in the coming months could shape the world for generations to come.

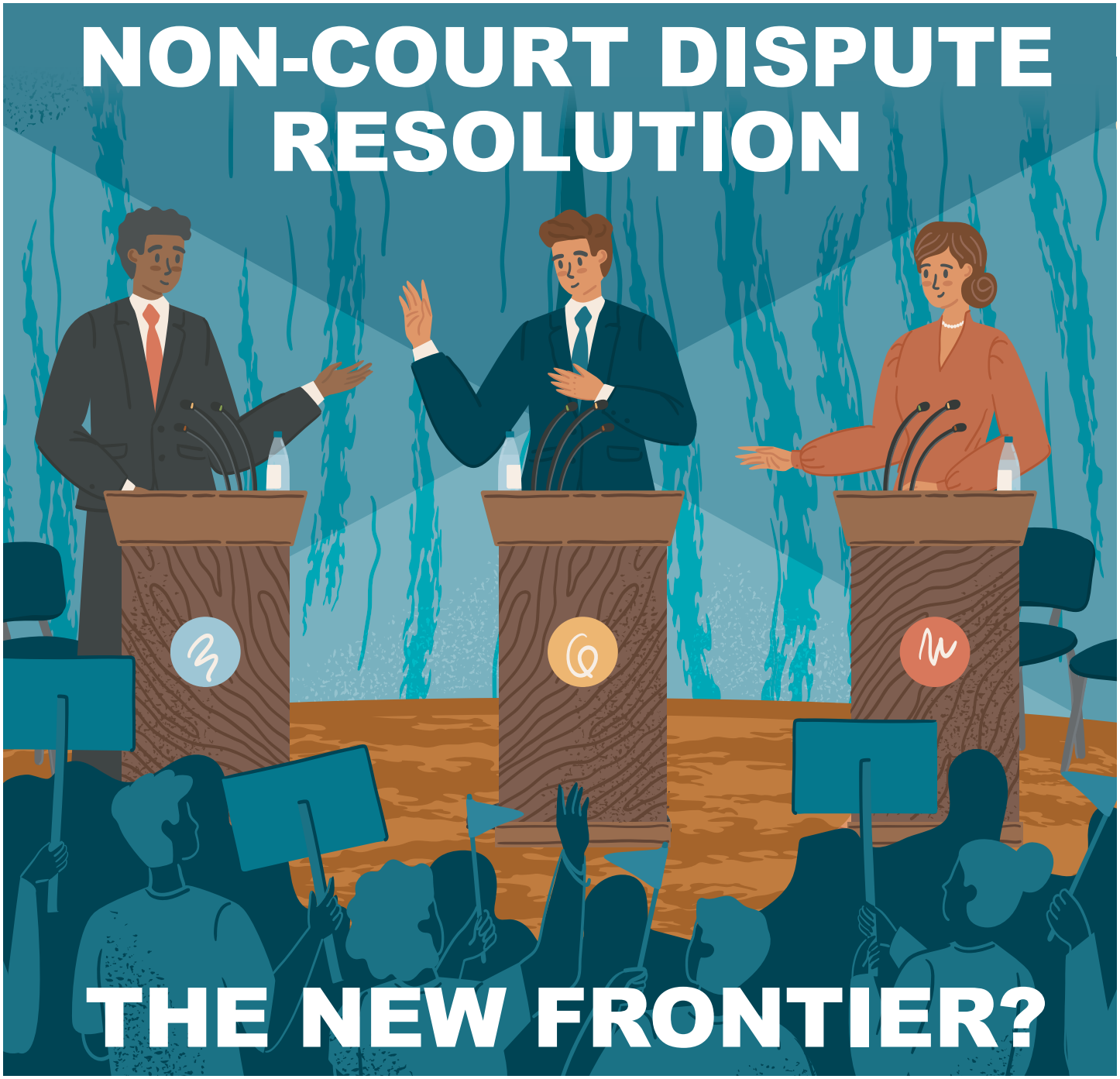
Q What's your go to relaxing activities to destress after a long day at work?

A Going for a walk on my own and/or listening to the latest broadcast of Choral Evensong – whatever your religious beliefs, good choral music is otherworldly.

Q What brings you the most joy.

A Family aside, travelling. Having spent most of the year in a single room (let alone country), there is nothing quite like opening one's eyes to entirely different scenery, culture and food and people (reminding us how much we have in common with each other).

NON-COURT DISPUTE RESOLUTION

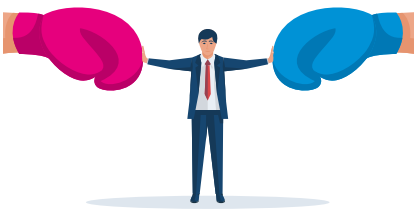


THE NEW FRONTIER?

Authored by: Joe Ferguson (Associate Family Solicitor) - Myerson

In April this year, the Family Procedure Rules were amended to provide the court with greater powers relating to non-court dispute resolution (NCDR). NCDR refers to methods of resolving disputes without court attendance or even issuing proceedings. These methods include mediation, arbitration, early neutral evaluation and collaborative law but the list, as set out at r.2.3(1)(b) is deliberatively non-exhaustive, allowing for new methods of dispute resolution to develop and emerge in the years to come.

The amendments state that the court should encourage parties to both (i) obtain information and advice about, and consider using, NCDR and (ii) undertake NCDR and that this can include adjourning proceedings (r.4.1). This promotion of NCDR is not without good reason.



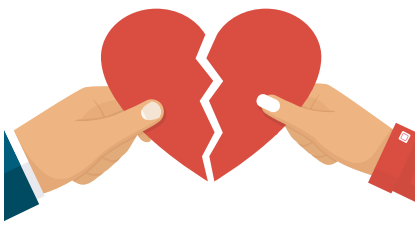
This promotion of NCDR is not without good reason. HMCTS management statistics show that there were 43,953 open private family law cases in April 2024 and that the average timeframe from receipt to final order was 42 weeks. Some cases will resolve in a

matter of weeks. Others span for the better part of a decade. The family court, chronically underfunded, continues to struggle under the weight of these applications, and applications previously seen as urgent (such as a parent not seeing a child) can now take many months until even a first hearing, where decisions may not be made (and in some cases, may be heard by only a legal adviser). Accordingly, the court seeks to outsource cases in which a lack of judicial intervention will not prove an impediment to resolution, as part of its active case management obligation under r1.4(1).

The changes, which were set out in late 2023 and subsequently came into force in April 2024, were met with initial reticence from both parties and solicitors alike. It was unclear to what extent the judiciary would seek to use these powers and how the court would seek to encourage parties to undertake NCDR as envisaged. Many considered that the provisions may not change the steady flow of cases which were, and are, streaming into the family court, and may simply cause further delay as the parties engage in what may be seen as a box ticking exercise. Then the case of NA v LA was reported and the tides turned.

The case of NA v LA, which was heard by Nicholas Allen KC sitting as a Deputy High Court Judge on 23 and 24 May 2024, was described by the Judge as "a paradigm case for the court to exercise its new powers". A case which was neither unusual or unduly legally complex, the Judge used it as an opportunity to advocate for the benefits of NCDR and to dispel common misconceptions and qualms.

On 14 May 2024, Wife sought an order under r20.2(1)(c) for preservation of property order in respect of the parties' two London properties. Husband was given short, informal notice of 28 minutes before the hearing. Wife was also granted ex parte non-molestation and occupation orders under the Family Law Act 1996 that same day, which required the husband to leave the family home within 6 hours of him becoming aware of the terms of the orders. Whilst at court on 14 May, Wife also applied for divorce and filed her Form A without previous correspondence with Husband. The Wife did not attend a Mediation Information and Assessment Meeting (MIAM). This did not occur because, as per the Form A, "the application must be made urgently because...Any delay caused by attending a MIAM would cause irretrievable problems in dealing with the dispute (including the irretrievable loss of significant evidence". Wife subsequently filed an application for maintenance pending suit/interim periodical payments (MPS/IPPs) and a legal services payment order (LSPO) on 22 May 2024.

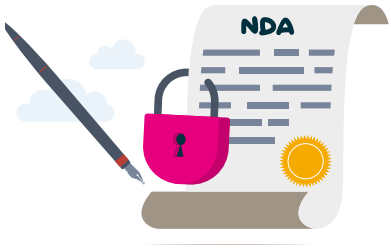


There was a subsequent hearing on 23 May was the return date of the orders first made on 14 May 2024: (i) an ex-parte non-molestation, (ii) an ex-parte occupation order and (iii) a preservation of property order.

The hearing on the 23 May was unusual. The return hearings were listed before the Judge at 10.30am for 2 hours but the parties spent the day at court negotiating, and provided three agreed orders:

1. An order which confirmed that Wife did not seek the continuation of the occupation order and that the non-molestation orders were replaced by undertakings;
2. An order compromising the MPS/IPPs and LSPO; and
3. An order transferring the family home to Wife.

The Judge, no doubt in part buoyed by the parties' ability to negotiate, asked for the parties views on NCDR and thereafter, on 24 May stayed the ongoing financial proceedings so that the parties could engage in NCDR. The MIAM exemption provided by Wife was now no longer applicable given the orders agreed.



Wife's leading counsel had championed in submissions the need for disclosure ahead of any consideration of NCDR, on the basis that Wife was "semi-blind" on the parties' assets and it was therefore premature to suggest a stay as she could not be advised on the likely outcome. The Judge observed that there was no need for financial disclosure to be given prior to parties engaging in NCDR, as disclosure is likely to be given as part of the process.

Wife also suggested that the Husband would use NCDR as a means to frustrate settlement. This was rejected by the Judge, who cited that there are ways to engage in NCDR which will not allow a frustrated settlement, citing the powers that the court has to enforce an arbitral award as an example.

Of course, one could wax lyrical about the benefits of NCDR, which clearly were on the Judge's mind. For instance, in recent days, we have seen greater transparency in the family courts. Such transparency has given rise to the family courts becoming an increasing media spectacle. The recent case of Goodman v Walker, which found the parties (and their respective legal arguments) splashed across the tabloids should be borne in mind by practitioners. Such frenzied media attention proves deeply unattractive for those who wish to keep their private lives private, either for the benefit of their children, their profession, their reputation or a mix of the three. Indeed, even the judgment in NA v LA, which does not refer to the parties by name, refers to property holdings in such specificity that it would be possible for someone with knowledge of the parties to identify them. The reality is that the doors of the family courts are now open and the draught is rather unwelcome to many litigants, who will no doubt seek alternative, private options which grant them the oxygen of anonymity. The Judge in NA v LA was no doubt conscious of this when he stated that NCDR would be to the parties "emotional and financial benefit as well as to the benefit of their children".

And what of the financial benefits? Wife in the case of NA v LA had spend around £120,000 by the time of the reported hearing, weeks after the initial applications had been filed, with a further £60,000 due to be spent by the First Appointment. NCDR can prove cheaper than court proceedings, though of course this is dependent on a number of factors including the form of NCDR and the issues raised. NCDR is often faster than the court process also, as the parties can decide their own timetable for disclosure, expert evidence and any hearings (in private FDR and arbitration, that is).

Not every case will be appropriate for all forms of NCDR. For instance, instances of domestic abuse and coercive and controlling behaviour may impact on the effectiveness (and indeed attractiveness) of a standard mediation setting, though shuttle and hybrid mediation options remain available. The reality is that it is clear from the changes that have been made to the Family Procedure Rules and the judgment of NA v LA that solicitors and their clients alike are going to have to consider NCDR in all its forms at the first opportunity and throughout the case. In doing so, solicitors and counsel alike should consider speed, the parties' relationship and the associated cost of the potential NCDR to maintain proportionality.

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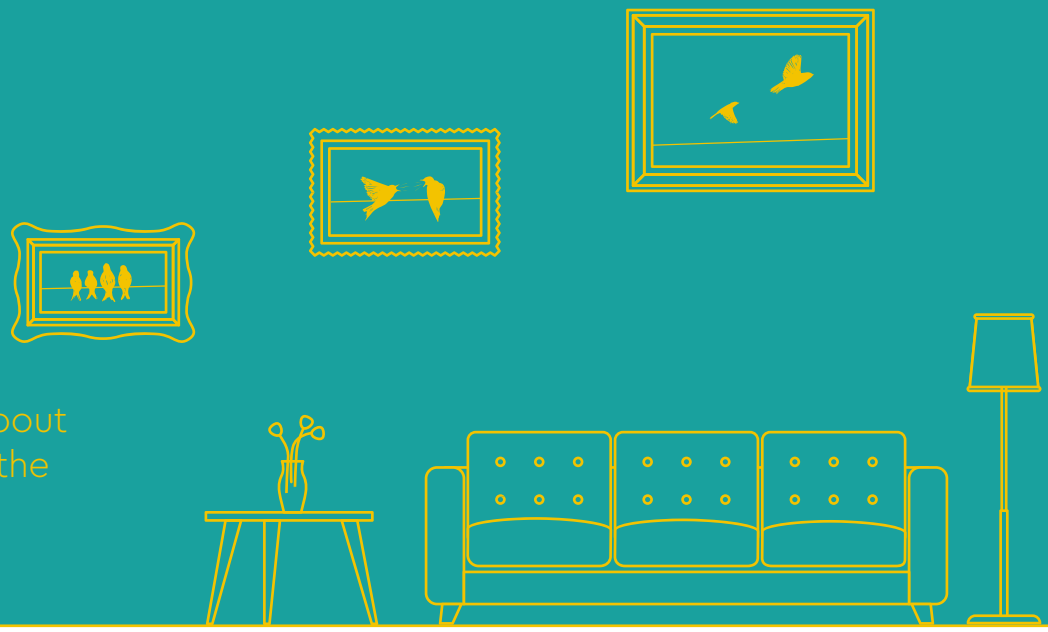

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CONSEQUENCES OF NON-ENGAGEMENT IN NCDR IN FINANCIAL REMEDY PROCEEDINGS

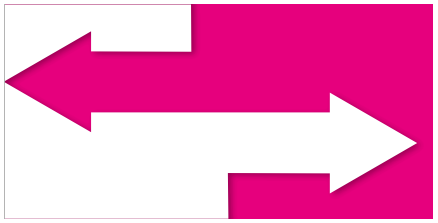
Authored by: Laura Buchan (Barrister) - Westgate Chambers

A number of amendments were put into place with effect from 29 April 2024 by way of Family Procedure (Amendment No 2) Rules 2023.

Whilst the amendments made to the Family Procedure Rules do not give the court the power to compel parties to engage in NCDR, there is strict scrutiny into the efforts made by parties prior to issuing proceedings. The annex of PD9A amended the pre-action protocol in financial remedy proceedings to reiterate the requirement to attend a MIAM and detail steps parties must have taken to engage in NCDR.

The court will, and has a duty to, at each stage of proceedings to continuously review (not just at the outset of proceedings) whether NCDR is suitable in order to resolve proceedings.

If the court considers NCDR is appropriate, and if the timetabling of proceedings allows sufficient time, the court may give directions to the parties, either on an application or of its own initiative, to obtain information about, and consider using, NCDR and to encourage parties to undertake NCDR. The court may also adjourn or stay proceedings generally with direction to update after a specified period about the efforts made. It should be noted that the parties' agreement is not required. (Rule 4.1)



An example of this can be seen in the case of NA v LA [2024] EWFC 113, whereby Recorder Allen KC stayed the proceedings of his own initiative (as per FPR 3.4 (6)), following interim issues being dealt with. Within this case, W was opposed to this and sought court directed disclosure, claiming little knowledge of H's financial position. This was rejected by Recorder Allen KC and the decision confirmed that there is no need for financial disclosure before parties engage in NCDR and the disclosure will almost always be provided as part of the NCDR process in any event.

Whilst the starting point in financial remedy proceedings has been no order for costs, the court may now consider a party's failure to engage in NCDR or a MIAM as a matter of conduct when determining costs orders (FPR 28.3(7)(aa) and paragraph 10E, PD 3A). Costs orders being made whereby parties have failed to engage in the NCDR following the court's encouragement can be seen in case law. (WL v HL (rev 1) [2021] EWFC B10 and JB v DB [202] EWHC 2301)

It should be noted that within Civil proceedings following Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416, the Court of Appeal held that the court has the power to stay proceedings and make an order compelling parties to participate in any suitable form of NCDR process at whichever stage of the proceedings it considers appropriate provided to do so would be compliant with Article 6 rights to a fair trial.

While this is not currently the position in family proceedings, as set out above, the remarks of Knowles J in Re X (Financial Remedy: Non-Court Dispute Resolution) [2024] EWHC 538 (Fam), in which the court stated that it would be unwise to assume the decision in Churchill v Merthyr Tydfil was irrelevant to family proceedings. [Paragraph 15]

As a result of this shift in the landscape, parties to prospective proceedings must think long and hard about properly and fully engaging in NCDR to avoid wasted hearing costs by proceedings being stayed or adjourned or active costs order being made against them!

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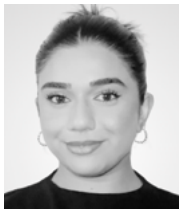

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