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HNW Divorce MAGAZINE

ISSUE 17

ENTRUSTING THE FUTURE TO THE NEXT GENERATION

INTRODUCTION

"When everything seems to be going against you, remember that the airplane takes off against the wind, not with it.."

Henry Ford

We are delighted to present Issue 17 of the HNW Magazine. Delving into the complexity of love and divorce, this issue promises articles from leading authors in the HNW Divorce community. This magazine will delve deeper into how the next generation will take the baton in addressing high net worth divorces.

We are excited to highlight our next event: HNW Divorce Litigation - 4th Annual Flagship Conference. This will be taking place on 21st November 2024 in Central London. For more insightful content, please do not forget to book.

We would like to thank our community partners and contributors for sharing their perspective on settling differences and reaching an agreement in divorce proceedings.

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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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- Immediately benefit from our Virtual Forward of events.
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HNW Divorce Litigation 4th Annual Flagship Conference

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DIVORCE:

HOW FINANCIAL PLANNING CAN SECURE YOUR FINANCIAL FUTURE

Authored by: Greg Oldfield (Associate Director) - London & Capital

Divorce represents a challenging life transition that can bring emotional, logistical, and financial complexities. Amidst this emotional turbulence, it's easy to ignore the crucial role of financial planning during divorce proceedings. However, early consideration and action can have a significant impact on your post-divorce financial stability and financial wellbeing. In this article, we delve into the financial planning process during divorce, and why it should be a priority for individuals navigating this significant life change.

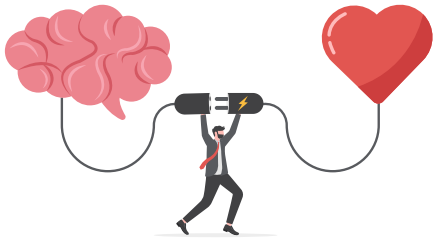
The Financial Impact of Divorce

Divorce represents a seismic shift in an individual's financial landscape. Shared assets are divided, incomes may change, and expenses can significantly increase due to legal fees and separate living arrangements. It's critical to gain a clear understanding of your financial landscape during, as well as after, the divorce process. An important starting point is to have a very clear understanding of your assets, income and spending. All assets – including property, investments and business assets – are taken into account at this stage. This understanding forms the foundation for effective financial planning and management.

The Financial Planner's Role

The first step to securing your financial future after a divorce is to engage a Financial Planning professional with expertise in divorce matters as early as possible. They can provide objective views, help you understand complex financial issues, and guide you in making informed decisions. A Financial Planner will assist in evaluating settlement options and planning for long-term financial goals such as retirement and education expenses for children.

At London & Capital, we have created a few actions for consideration to ensure a prosperous financial landscape post-divorce.



1. Impulsive Decision-Making

Some of the most important decisions to be made during a divorce process are the decisions that are made early on. For example, living arrangements or the decision of investing assets that have been split. It is critical that time is taken to consider various outcomes and

which option is in line with your financial goals. Amidst the various scenarios to consider, you may be tempted to make rapid decisions. However, by building a team of experienced financial planning and legal professionals around you early on in the process, you give yourself the best possible opportunity to achieve a suitable post-divorce outcome.

2. Long-Term Thinking

Financial planning is essential for the newly divorced. The previously joint financial plan will be replaced with a plan that is tailored to your individual needs. Creating a cash flow model will be useful. This will involve taking a holistic view of your finances, looking at your income and expenditure plus your assets and debt. Projections can then be made on your future finances. If you have commitments to meet such as the funding of a child's education or a mortgage, financial planning will be essential to ensure these are taken care of.

3. Financial Literacy

The financial world can be full of jargon, however, it is important that you get to grips with the basics. Investing is an important part of securing your financial future and understanding how it works can stand you in good stead throughout your lifetime. Everyone is familiar with cash, it's flexible and can be easily accessed through a personal bank account, however, if the rate of return is lower than inflation, the value of your capital will be eroded in real terms. Investment portfolios designed to grow over the long term will typically include a blend of other asset classes and can be tailored to your personal risk profile. We suggest working with professionals who will take the time to explain the terminology, so you feel empowered to ask questions and make the right decisions for your financial future.

4. Taking Advice

Engaging a wealth manager early on is a good way to make sure your wealth is in safe hands. A good wealth manager can provide sound advice on decisions relating to property and investments and can connect you to experts in areas such as taxation and estate planning. Sitting down with your adviser and exploring what is most important to you and what you want to achieve over the coming years will ensure your plan is tailored to your new circumstances.

It is important to consider the pivotal role that financial planning plays during divorce proceedings, particularly around the shaping of an individual's post-divorce financial landscape. By building a team of experienced financial planning and legal professionals around you, addressing the key financial considerations covered in this article can be made more manageable. In addition, by maintaining emotional wellbeing you can navigate divorce with greater confidence, peace of mind and financial security.

At London & Capital, we aim to help you preserve and grow your wealth by providing thorough guidance to make the right financial decisions, whatever your life circumstances. (Enlarge)

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A FRESH START: WEALTH MANAGEMENT POST-DIVORCE

For someone who has gone through a divorce and finds themselves managing their finances independently, the risks associated with financial decision-making can be a real concern.

We provide guidance on how to manage and sustain a settlement in the longer term, making it work for a lifetime. Our role is to guide our clients during this pivotal time, unravelling the complexities to ensure that their financial position can be understood, and the right decisions are made.

To arrange an introduction, please call 020 7396 3388 or, email us: invest@londonandcapital.com

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LAW REFORM: VIEWS FROM THE NEXT GEN LAWYERS ON THE FRONTLINE

Authored by: Eri Horrocks (Senior Associate), Polly Atkins (Senior Associate) and Constance Tait, (Associate) – Hunters Law

Many distinguished members of the legal profession have been sharing their views on reform in family law – so we wanted to share our Next Gen perspectives on which areas actually need changing.

Cohabitation – Constance Tait

We are all aware that cohabiting couples are the fastest growing family structure in the country. Recently published ONS [1]stats show that they now account for 18% of families in the UK.

It often comes as a surprise to lawyers how many people believe the common law marriage myth. The issue is twofold: we need both greater awareness of cohabitants' limited legal protection and clarity as to what reform should look like. Whilst some may argue that if people had a better understanding of the legal position they may make different decisions about marriage, negating the need for reform, the most vulnerable are unlikely to be in a position to insist on marriage.

Whilst the first limb has government support, the latter does not, arguing that it cannot consider cohabitants' rights before the current Law Commission review on financial provision of divorce has concluded, as cohabitants' rights must be considered against a "baseline of rights" afforded to married couples and civil partners.

The two are closely linked and if we want to see an overall system that is fair, they should be considered at the same time.

The Law Commission's 2007 recommendations put forward a sensible, fairer model for separating cohabitees, applicable to all eligible cohabitees (meaning couples who have lived together for between 2-5 years, as well as any couple with a child), with the possibility of an opt-out agreement.

The proposals sought to "ensure that the pluses and minuses of the relationship" are "fairly shared". Relief would be based on qualifying contributions, which would offer better protection for the financially weaker

1 Families and households in the UK - Office for National Statistics (ons.gov.uk) - 8 May 2024

party than what is available at present. The suggestion that the scheme would not be exactly the same as financial relief on divorce (e.g., financial remedies would not be granted on the basis of needs) would also help to address criticism from those who see it as a threat to marriage.

Any proposed reform would need to provide both flexibility, to allow for different circumstances and reflect varying degrees of commitment, and autonomy, by ensuring that those who wish to opt-out, and decide the financial arrangements for themselves on separation, may do so.

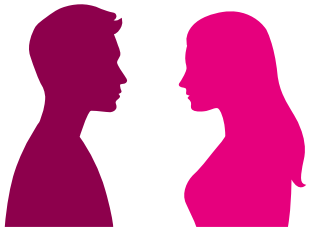
Prenuptial agreements – Eri Horrocks

"Well, what's the point in having one then?!"

How many of us have had clients say this when told that pre-nuptial agreements (PNAs), when entered into with the standard safeguards, will have significant weight but are not binding?

As lawyers, we know that it is still worth having a PNA to place boundaries on the awards that can be made on divorce as well as to ensure couples have discussed their financial future and offer some degree of certainty. For our clients however, the experience of negotiating their possible divorce settlement whilst preparing for their wedding is inevitably stressful, and they want to know those efforts are not in vain. Moreover, there are some clients who, no matter how clear our advice that they must expect to be held to the PNA's terms, sign in the hope of being able to renegotiate or resile from it later on.

Although some judges, such as Moor J, have clearly said that "Litigants cannot expect to be released from the terms that they signed up to just because they don't now like what they agreed" (see MN v AN [2023] EWHC 613 (Fam)), there are other judges who do not take that same approach and may be more willing to exercise their discretion.



The Law Commission has already recommended that PNAs should be made binding in their February 2014 report by way of "qualifying nuptial agreements" but ten years on, we are seemingly no closer to the law being changed. In family law, where there are other more pressing priorities than the wholesale reform of financial remedies on divorce, making PNAs binding would be one way to tackle the issue of "uncertainty" which exists in our discretionary financial remedy system and would give people the ability to "opt out" of having section 25 of the Matrimonial Causes Act applied to their finances.

Legal services payment orders – Polly Atkins

The practical implications of the law relating to Legal Services Payment Orders (LSPOs) pose real challenges for solicitors, their clients, and the solicitor-client relationship.

The purpose of an LSPO is to enable financially weaker parties to obtain legal representation. Whilst it is often said that this is to create a level playing field, in reality that is rarely achieved.

The funding of a case is an important but often uncomfortable conversation to have with a client, particularly when acting for the financial weaker party who may have little knowledge of, let alone access to, matrimonial resources.

Whilst the ability to make a LSPO application is often welcome news, if the other party does not willingly agree to fund our client's costs then the road ahead may not be straightforward.

The application can affect the dynamics of the case. It can only be made after Form A has been issued, which can mean starting proceedings where non court dispute resolution (NCDR) would otherwise be preferred. Further, going "cap-in-hand" to the financially stronger party may exacerbate a power imbalance which clients often feel sets the scene for the proceedings.

LSPOs also require solicitors to bear an element of risk. Preparation of a LSPO application itself is expensive. Whether historic costs are recoverable under a LSPO remains a matter of judicial disagreement[2], and solicitors face scrutiny over their cost estimates, with the client often awarded a lower sum than their carefully considered and thorough estimate[3]. The restrictions on recovery of overspend[4] means that solicitors must then work within the court-imposed budget. It is hard to see how that can be done without cutting corners.

In circumstances where the dynamic starts with a power imbalance and throughout the process the applicant (and their solicitor) is subject to scrutiny and control where the other party has carte blanche access to (often) matrimonial resources to fund their own legal fees, one has to question whether this is appropriate and fair. Whilst there may be no easy solution, we need to think about alternatives.

2 DH v RH [2023] EWFC 111
3 See for example MG v GM [2022] EWFC 8 and LP v AE [2020] EWHC 1668 (Fam),
4 See X v Y, Re Z (No. 4 Schedule 1 award) [2023] EWFC 25 and Xanthopoulos v Rakshina [2023] EWFC 50

AN 'INVITATION' TO INTERVENE...?

Authored by: Seema Kansal (Barrister) - FOURTEEN

At any stage in financial remedy proceedings, the court may add a third party to the proceedings if (a) it is desirable to do so in order to resolve all matters in dispute, or (b) there is a connected issue involving a third party which may conveniently be resolved by adding that party- FPR 9.26B(1). When the court makes an order under this rule, it may give consequential directions about service and case management generally- FPR 9.26B(3). Most of us deal with cases where third parties are joined because the court is being asked to make orders in relation to assets in the 3rd party's name, it being asserted by the H or W that the property of the third party is actually the property of the H or W.

An application for joinder must be made in accordance with FPR Part 18 procedure and, unless otherwise directed, should be supported by evidence setting out the factors which connect the third party with the proceedings or, as the case may be, prompt their removal-FPR 9.26B(5) or, the court may add a party of its own motion-FPR 9.26B(4). Significantly, there is no reference to "inviting" a third party to intervene in the FPR.

When should one apply for joinder?

Mr Nicholas Mostyn QC in the case of TL v ML (ancillary relief: claim against assets of extended family) [2005] EWHC 2860 (Fam) stated:

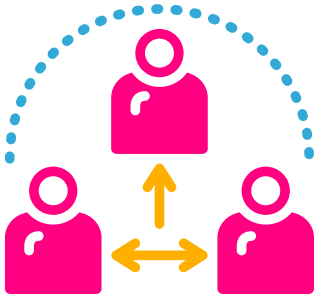
- A dispute between a spouse and a 3rd party as to the beneficial ownership of property can be adjudicated in financial remedy proceedings (quoting Lord Denning MR in Tebbutt v Haynes[1981] 2 All ER 238)
- Endorsing the principle that the court can only make an order for transfer of W of property which is in the H's property, the court cannot order for the transfer to W of someone else's' interest.
- When a dispute arises about the ownership of property in financial remedy proceedings between a spouse and a third party, the following should happen:
  - (i) The third party should be joined to the proceedings at the earliest opportunity;
  - (ii) Directions should be given for the issue to be fully pleaded by points of claim and points of defence;
  - (iii) Separate witness statements should be directed in relation to the dispute; and
  - (iv) The dispute should be directed to be heard separately as a preliminary issue, before the financial dispute resolution (FDR)."

What the court didn't define in that case was who should bring the application for joinder.

The "invitation to intervene":

In the case of Fisher Meredith v JH and PH (financial remedy: appeal: wasted costs) [2012] EWHC 408 (Fam)[1], which involved H transferring shares in a company to Y and where W had made a s37 application, Y was joined to the proceedings. H in the litigation argued that the s37 application succeeding made little difference to the reality on the ground that even if legal title vested in him, beneficial title laid with a unspecified 3rd party. W's solicitors in correspondence wrote to the 3rd party inviting them to intervene. The 3rd party, unsurprisingly, declined the invitation. At the final hearing, the W's barrister appeared to concede that the matter would need to be adjourned because the 3rd party wasn't joined. A wasted costs order was made against the W's firm.

On appeal, the court stated that is a clear distinction to be drawn between the state of affairs where a Claimant is saying that a property held in the name of a third party is the property of the Respondent; and the situation (as here) where the Respondent says that property to which he has legal title is beneficially owned by a third party. In the former case Mostyn J (as he was) endorsed TL v ML. In such a case there is a clear obligation on the Claimant to apply to join the third party at an early stage and to seek to invoke the discipline in TL v ML. Mostyn J then goes on to say, that in the latter case, if an asset is (say) in the name of the Respondent husband then the starting point, or prima facie position, is that it belongs to him both legally and beneficially. Mostyn J re-iterated the principle in Stack v Dowden [2007] UKHL 17[2], [2007] 2 All ER 929[3] that the onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership, so in this case, the onus was on the H.



There are of course cases where the Claimant would not need to apply to join a 3rd party, such as a case where there are assets worth £500,000 in the names of the parties about which there is no dispute that they are beneficially owned by the parties (Pool A), and a further £500,000 of assets in the name of the Respondent but which he says is owned by his uncle (Pool B). The Claimant might take the view that she is not going to go to the expense of joining the uncle, but will rather argue, in reliance on the starting point or prima facie position, in a trial between her and the Respondent alone, that Pool B beneficially belongs to the Respondent. Assume further that the uncle does not exercise his undoubted right to apply to intervene. The court is obliged to decide, in the exercise of its statutory inquisitorial function under s 25(2)(a) Matrimonial Causes Act 1973, which assets belong to the Respondent. It decides on the evidence, giving due weight to the starting point, that Pool B belongs to him alone and awards all of Pool A to the Claimant on the application of the equal sharing principle. Certainly, the finding that Pool B belongs to the Respondent does not bind the uncle, but it binds the Respondent. The Claimant can collect her full award from Pool A without any difficulties involving the uncle [§50 of Fisher Meredith]. The decision for W maybe different if, in order to enforce her share of the capital awarded she may have to deal, on an application for enforcement, a claim by the uncle that he has a beneficial interest in the funds, she may decide at the first instance that it is better to join the uncle.

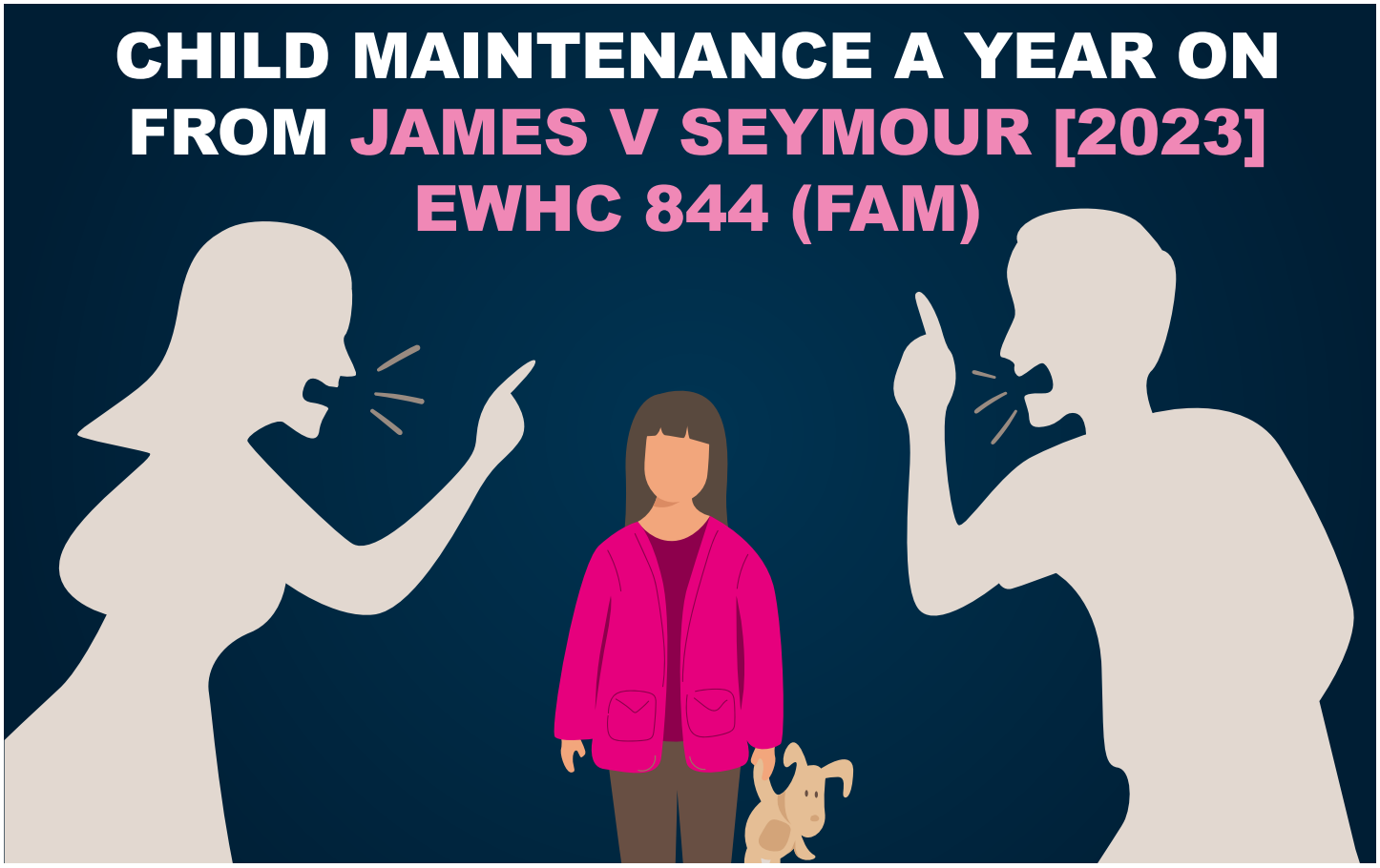
In Gourisaria v Gourisaria [2010] EWCA Civ 1019[4], the H contended that the assets held in his name were held by him on behalf of his extended family under a form of co-ownership or a form of trust. An invitation to the brother to intervene in the ancillary relief proceedings was made and declined, or at any rate not taken up. The wife did not seek to join the brother to the proceedings; nor did she take any of the steps referred to in the discipline in TL v ML. Mostyn J in that case stated

"I reiterate my view that if a third party is aware that there are ancillary relief proceedings between husband and wife, and wishes to make a claim to the subject matter of those proceedings, then, in my opinion, the only proper procedure, in order to avoid the spectre of inconsistent judgments, and to ensure that all disputes are resolved in one fell swoop, is for him to apply to intervene in the ancillary relief proceedings."

Ultimately, in relation to the "invitation" Mostyn J said in the Fisher Meredith case that it was open to the H to invite members of his family to intervene. He was not putting a gloss on his guidance in TL v ML that invitations to 3rd parties to intervene should form part of an order of the court or that a failure to take up an invitation by the 3rd party would render the order binding upon them.

1 Fisher Meredith v JH and PH (financial remedy: appeal: wasted costs) [2012] EWHC 408 (Fam)
2 [2007] UKHL 17
3 [2007] 2 All ER 929
4 [2010] EWCA Civ 1019

CHILD MAINTENANCE A YEAR ON FROM JAMES V SEYMOUR [2023] EWHC 844 (FAM)



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

Earlier this year, I spoke at the Thought Leaders 4 HNW Divorce – Next Gen Summit, on the 'Examining Cohabitation: Schedule 1 & TLATA claims' panel. I covered the topic of Child Maintenance a year on from James v Seymour. This article builds on that panel discussion.

Child maintenance before James v Seymour

Before James v Seymour came CB v KB [2019] EWFC 78, where Mostyn J re-stated the principle that the CMS calculation should be the starting point for child maintenance with incomes up to £650,000, unless there was a good reason for departure from that formula.

In the years that followed, several cases flagged issues with CB v KB's formulaic approach, including the wide range of outcomes generated by different numbers of children when applying the formula (Moor J noted in CMX v EJX [2022] EWFC 136 that applying the formula led to £12,600 per child where there were four and £63,804 when there was one). Practitioners also commented on the different outcomes for parents depending on whether child maintenance was one of many issues (as when dealing with finances on divorce) or when it was the main issue (as is often the case when dealing with a Schedule 1 claim for unmarried parents).

What happened in James v Seymour?

The case dealt with child maintenance provision for two children, aged 12 and 10, for whom maintenance had been set at £10,000 per annum each in July 2014. M applied for an increase in maintenance and was awarded £26,400 per annum in total. M had applied for £91,700 per annum, so this award fell far short of what she had hoped her application would achieve.

M appealed.

Her appeal was dismissed by Mr Justice Mostyn who departed from his earlier decisions and created "the adjusted formula methodology", which I refer to as the "new formula".

The new formula

The new formula can be summarised, without algebra, as follows:

1. **Work out paying party's gross income**
2. **Deduct a % for number of children**
3. **Deduct pension contributions**
4. **Deduct school fees and extras**
5. **Apply relevant rates found in table at the back of the decision**
6. **Apply relevant tariff – again found at the back of the decision in helpful tables – this reaches a "sensible end point"**
7. **Adjust the amount to reflect the number of overnights the paying party spends with the children.**

Having followed the steps above, the figure arrived at is the Child Support Starting Point. Note; there are online calculators and spreadsheets available to help with the calculation.

Notably:

1. **Emphasis on starting point - Judges still retain discretion to depart from the new formula and not find themselves appealed.**
2. **The new formula does not apply to the following cases:**
    a. **More than four children**
    b. **Income:**
        i. **under £156,000 (the CMS retains jurisdiction)**
        ii. **over £650,000**
        iii. **unearned**
    c. **The parties live off capital**
    d. **Variation cases**
3. **A Household Expenditure Child Support Award ("HECSA") can still be made, in cases where the child maintenance claim is front and centre of the application and the emphasis is therefore on budget and needs (see Collardeau-Fuchs [2022] 1 EWFC 135).**

Response to James v Seymour.

The decision has been well received. The introduction of revised rates and tariffs goes a long way to addressing the shortcomings with the old formula. But there are new problems created by James v Seymour. Perhaps most notable is the impact of the court taking school fee payments into account, but the CMS not.

To illustrate, a paying parent paying child maintenance and school fees of £20,000 per year would be worse off if earning £155,000 (total obligation £40,400 applying CMS formula) versus £157,000 (total obligation £36,000 applying James v Seymour).

The most significant endorsement of James v Seymour to date has been Mr Justice Cobb's decision of Renée v Galbraith-Marten [2023] EWFC 253. In this case, F and M settled their child maintenance claims by consent applying the CMS formula (as in CB v KB [2019] EWFC 78). F applied to set aside the consent order in the light of James v Seymour. His application was successful, with James v Seymour having been unforeseen and unforeseeable at the time M and F lodged their consent order. When Cobb J came to deal with the quantum of child maintenance payable, he strongly endorsed the new formula in James v Seymour, identifying positive reasons for the use of the new formula, including:

a. **Mimicking the provision for the statutory computation**

b. **Reflecting the paying parent's responsibility towards other children**

c. **Prevents arbitrary distinction between the computation of child maintenance under the CMS and cases dealt with by the court**

d. **Provides certainty, predictability and transparency and achieves consistency and efficiency (if adopted by many).**

Although Cobb J acknowledged that there were still some limitations with James v Seymour, especially in respect of the judicial subjectivity built into the new formula. he concluded that

"there is a great deal to be said for promoting higher degrees of consistency in judicial decision-making to applications under Schedule 1 CA 1989".

Where does that leave child maintenance a year on?

To summarise the approach to take:

Income under £156,000	Child maintenance formula
Income £156,000 to £650,000	New formula as starting point If run needs/lifestyle and budgetary approach, then HECSA applies, with careful budget analysis. Remember does not apply to cases where: a. More than four children b. Income: a. under £156,000 (the CMS retains jurisdiction) b. over £650,000 c. unearned c. The parties live off capital d. Variation cases
Income £650,000+	Formulas do not apply
Variation	Starting figure is original order, adjusted for inflation

Although Judges still retain discretion, in a world where our clients are being told to avoid court proceedings, the formulaic approach of James v Seymour, when it applies, goes a long way to at least narrowing the issues in dispute.

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WHAT DOES DIVORCE AND SEPARATION LOOK LIKE FOR THE NEXT GENERATION?

Authored by: Karen Barham (Mediator, Parenting Coordinator & Solicitor) - Moore Barlow

On Monday 29 April, the Family Court of England and Wales underwent a significant shift in its approach to family proceedings with the introduction of the Family Procedure (Amendment No 2) Rules 2023. First and foremost, this legislative change is intended to move issues arising from family breakdown out of the courtroom in favour of a less contentious and more holistic approach.

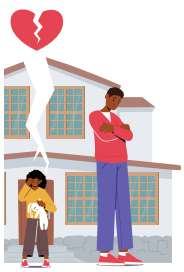
In this article I will discuss the aims of the rules in more detail, examine the implications for family professionals, including the next generation, and look towards the future in how we serve families and their children.

What are the new changes trying to achieve?

The Family Procedure (Amendment No 2) Rules 2023 place an emphasis on all forms of non-court dispute resolution: essentially, the Family Court is going to expect people to resolve their issues before or away from the court, using the myriad of sophisticated non-court dispute resolution (NCDR) processes available to them, where it is safe and appropriate to do so.

Everyone involved – the divorcing or separating parties themselves, the professionals advising them, and the judiciary – will be expected to consider NCDR at every stage of the process. To support the new rules both PD 12B Child arrangements programme[1] and PD 9A Application for a Financial Remedy[2] have been updated to include pre-action protocols detailing the steps prospective parties should take before starting any court proceedings. Lawyers have an obligation to ensure their clients are aware of the provisions of the protocols.

Ultimately, this means the court should be seen as a forum of last resort, which hopefully will free up precious resources for a system that is struggling to cope. If the new rules fail to achieve this objective, the call for some form of mandated NCDR might be unstoppable.



What are the implications for family professionals?

The current and future crop of family and dispute resolution specialists should work towards putting the needs of the family, particularly children, front and centre. Those experiencing family breakdown

1 https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12b#annex
2 https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_09a#IDAIQMGC

will often benefit from a combination of services and support. They will require legal and financial advice; they often benefit from some form of emotional support to process the impact of their relationship breakdown; and mediation can help resolve the immediate, medium and long-term issues. If clients are supported emotionally, they are better placed to absorb the legal and financial advice from their lawyers and other professionals.

Family lawyers will still have their part to play, of course, but in properly serving their clients, and fulfilling their professional obligations, they will increasingly need to be able to provide more holistic, multidisciplinary support for their clients. To do so, they will need to build good relationships with other family professionals so that they can confidently refer their clients to practitioners within the therapeutic sector and work with those in the NCDR space i.e. early neutral evaluators, private FDR providers, mediators, child consultants etc.

What does the future look like?

Family lawyers will be expected to be peacekeepers, negotiators, and problem solvers. They will need to understand how best to support people experiencing a myriad of emotional responses; they will need to be able to tap into additional resources, building a network to enable them to work in a multidisciplinary way when required.

They will be working in a climate of 'the court is the forum of absolute last resort'.

They will need to know about all forms of NCDR and other client support services. The professional obligation to discuss the suitability or otherwise of NCDR, in its various forms, with their clients and to keep this under constant review, is now part of the family law landscape. The way that solicitors correspondence with one another should include open invitations to consider and engage in appropriate NCDR.

The new provisions, including the new financial remedy pre-action protocol, places responsibilities upon lawyers. Those working in the civil and commercial space have worked in the shadow of a pre-action protocol for some time; they would not dream of issuing proceedings without having complied with the protocol. In financial remedies particularly, family lawyers would be well advised to adopt the same approach; the amendment to rule 28.3 may result in costs orders where the court determines there has been an unreasonable refusal to attend a MIAM and/or NCDR without good reason.

Lawyers must inform their clients of the obligations to consider and engage in NCDR where appropriate. Clients must understand that any application to court may be adjourned on invitation or of the court's own volition – see the very recent judgment of Nicholas Allen KC (sitting as a Deputy High Court judge) in NA v LA [2024] EWFC 113[3].

Lawyers must read the recent judgment of Mrs J Knowles Re X (Financial Remedy: Non-Court Dispute Resolution) [4]

It does not name the solicitors' firms, but future judgments almost certainly will; district judges have been told they are expected to have around five reported cases a year, and circuit judges between five and ten.

It has been an honour to work with Mrs J Knowles and colleagues in the MOJ's Early Response Working Group. Here she says;

'This judgment is for those involved in family proceedings, to understand the court's expectation, that a serious effort must be made to resolve differences before they issue and at any stage of the proceedings …. I want to signal that the court will be active in considering if NCDR is suitable…. The FPR changes will give added impetus'.

'It may be thought that the decision in Churchill v Merthyr Tydfil is of limited relevance to family proceedings. To make that assumption is unwise'.

'I have learned today that the parties never engaged in any form of NCDR before issuing – a failure I regard as utterly unfathomable'.

It behoves all of us working with separating families, to use our skills and talents to resolve matters away from the court, where it is safe and appropriate to do so. There may be developments in AI - I shall leave others to comment - but in my view people will always need people. These people are the next generation of family lawyers, family breakdown (dispute resolution) professionals, some of whom may never step inside a court room.

3 https://caselaw.nationalarchives.gov.uk/ewfc/2024/113

4 https://www.bailii.org/ew/cases/EWHC/Fam/2024/538.html

60-SECONDS WITH:

AMANDA BELL
CO-FOUNDER
SEPARATE SPACE

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

A I actually think work is pretty good for the soul so I wouldn't just be lying on a beach indefinitely! (Though that sounds like an excellent plan for next week if only I could make it happen!)

Right now, I'm really motivated to see what we can achieve with SeparateSpace. We know that divorce is totally overwhelming and most people can't afford to have a lawyer by their side throughout the process. This leaves people feeling powerless and stressed out. At SeparateSpace we're combining decades of experience as divorce lawyers with great tech to create a straightforward, affordable solution. It's an exciting way to spend my weekdays!

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

A Just like most family lawyers, I was drawn to working in this space because I care deeply about helping people to transition through one of the most stressful chapters of their life as smoothly as possible. Though I'm no longer working with clients one to one, the most rewarding part of my job is exactly what it was when I was part of the team at Withers: seeing the impact that expert support can have on someone's life. When we get feedback from people using SeparateSpace it always makes my day.

Q What's the strangest, most exciting thing you have done in your career?

A The journey from established lawyer to first-time founder has been a bumpy one. There's something extremely unsettling about going from doing a job you're very experienced in, to being a beginner and having to learn the ropes in a new domain. And yet, being part of the quickly evolving legaltech space is also one of the most exciting things I've done in my career - I'm learning all the time. Whether it's exactly how an LLM works or how the design of digital products hugely impacts the way people engage with them, every day I'm learning something new.

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

A As co-founder of a very early stage startup, it's quite tricky to make predictions about what things will look like in 5 years time! That said, my brilliant co-founder, Victoria Nottage and I, are very clear that our goal for SeparateSpace is for it to help thousands of people have a better divorce, with less stress, less conflict and a fair financial outcome.

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

A SeparateSpace isn't a law firm so we're not practising as such. What I do see as a trend generally is the way in which people increasingly want more for less. Consumers in all industries are demanding efficiencies in their services. Law is no different.

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

A I was lucky enough to pick up Richard's Susskind's book 'Tomorrow's Lawyers' several years ago and it changed the trajectory of my career. I know that sounds dramatic, but the truth is that technology is changing the world quickly. As a profession we need to think carefully about how we can responsibly leverage technology to better serve our clients.

Susskind's vision for the future of the legal sector got me thinking about how things might change for those of us practising law today. It sparked something in me. I believe we've got an opportunity to redefine how lawyers work and deliver value for clients. The trick will be not getting left behind.

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

A Can I pick two?! Katherine Ryan and Reshma Saujani. Totally different women - one a comedian, one a lawyer turned technologist. Both are incredibly smart, huge advocates for women and I'm convinced would make for a funny, interesting evening!

Q What is the best film of all time?

A I'm so terrible at watching films. By the time I've got my three kids to bed, I rarely have the attention span for a film... I love a romcom, though I can guarantee none of my favourites would make it into the running for 'best film of all time'...

Q What legacy would you hope to leave behind?

A I hope people would think of me as someone who cared deeply about others.

Q Where has been your favorite holiday destination and why?

A My husband and I visited South Africa on honeymoon in 2016 and it was the most magical place. Quite a few people I know in the family law world had been there many times and were generous enough to share their tips and recommendations - so it was not only my favourite holiday but also the most packed itinerary I've ever had!

Q Do you have any hidden talents?

A I am lucky enough to have sleeping as a bit of a super power. No one else is remotely interested in this. But - having been through the sleep deprivation that twins and a third child bring - I know that being able to fall asleep easily is a bit of a talent!

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

A Your career is a marathon not a sprint. (I have actually borrowed that advice from the brilliant Suzanne Todd who was my boss for many years at Withers!)

The reality is that, if we're lucky, we'll all be working until we're relatively old. A career can be squiggly, and that's ok.

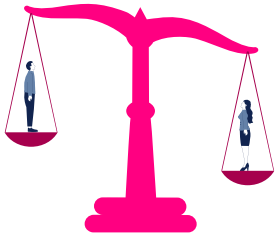
LSPO: OUTDATED, SEXIST AND ENABLER OF FINANCIAL ABUSE

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

We have all been there – a new client meeting where it becomes clear that the wife (and it is almost always the wife) has no real access to money and therefore a way to pay her legal fees.

You tell her; "don't worry; there is a great piece of legislation that allows us to apply for him to pay your legal fees".

But is it great? And is it really him paying her legal fees? Is it not in a post-White world, 'family money'? If so, why does the court prefer a loan to be taken out rather than provide access to family money? Despite only being 11 years old, applications for Legal Services Payment Orders ("LSPOs") feel antiquated and do not serve the next generation of divorcing couples.



The Legal Aid, Sentencing and Punishment of Offenders Act 2012 added subsections 22ZA and 22ZB into the Matrimonial Causes Act 1973 ("MCA 1973"), which has been in force since 1 April 2013. So, for the past 11 years it has been possible to obtain a LSPO i.e. one party is to pay the other's legal costs. Prior to this, the route to payment was via a costs allowance within a maintenance pending suit application.

In White v White [2000] UKHL 54, Lord Nichols stated that, "If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer".

Yet the hoops that women (as statically the main homemaker and child carer) must jump through to get access to their own money are considerable and costly.

It is not a coincidence that LSPOs came into existence at precisely the same time as the cuts to Legal Aid in family law cases. They were one of the measures the government introduced to try to alleviate the effects of the cuts. However, to prepare a persuasive application and statement in support for a LSPO requires a significant amount of work to be carried out. The costs are therefore often quite significant and must be frontloaded by the person who has no or limited access to family money. Therefore, when making an application for an LSPO you need to be confident of the outcome. Anecdotally speaking, LSPO applications are reserved for reasonably wealthy cases where one party is simply being difficult about paying. The risk and need to frontload the costs of the application, mean it is inaccessible to your typical separating couple.

S.22ZA(4) of the MCA 1973 states that the court must be satisfied that (a) the applicant is not reasonably able to secure a loan to pay for the services; and (b) the applicant is unlikely to be able to obtain the services by granting a charge over any assets recovered in the proceedings. The decision of Mostyn J in Rubin [2014] 2 FLR 1018, established that the refusal from two commercial lenders will normally be sufficient evidence that a litigation loan is unavailable. In addition, it is necessary for the instructed solicitor to provide evidence that they will not enter into a 'Sears Tooth agreement' with their client. Essentially the focus is on whether the payee can fund their legal fees any other way, which includes incurring high interest rates.

Yes, if loans are offered "at a very high rate of interest it would be unlikely to be reasonable to expect the application to take it…" but a loan is still the court's expected first port of call.

Is it not backwards to adopt this approach when the payee can simply point to matrimonial funds sat in the payer's bank account? The undertaking that is required in any LSPO order (confirming that the payee will pay any funds back to the payer, if at the conclusion of proceedings, the court considers it fair and reasonable to do so) surely protects from any spurious claims.

The unfairness is compounded in cases involving abuse. The hoops the payee is required to jump through and the burdens of proof, provide an opportunity for a requested payer to continue any financial abuse that the payee may have suffered during the marriage. Furthermore, ss22ZB(1)(f) of the MCA 1973 (matters the court must have regard to when deciding to make a LSPO) only considers the applicant's conduct in relation to the proceedings. There is no statutory requirement for the proposed payer's conduct to be analysed by the judge at all. This cannot be right. It provides the proposed payer with an opportunity to exploit their dominant position without scrutiny and perpetuates the idea that the person holding the money has a greater entitlement to it.

Unfairness strikes again when you look at the requirement for detailed cost estimates and the general cap on providing LSPOs up to and including an FDR only. Given the drive to try to resolve matters outside of court, this approach is understandable. However, the criteria set out in Rubin means that only the payee's costs are scrutinised. The payer continues to have free reign to incur legal costs as they see fit and the onus is on the payee to apply for a further order at a later date, if the FDR is not successful. This approach emphasises the very un-White notion that the person holding the money has a greater claim to it.

The aim of LSPOs was to try to level the playing field. What is relatively modern legislation feels extremely dated and indirectly sexist. Figures shared by 16 major law firms in May 2023 (as referenced in Neil Rose's article in Legal Futures on 12 July 2023) confirm that across that sample, 85% of applicants for LSPOs were female. Should the burden not be on the payer to prove that the payee has alternative means to pay and/or the money is non-matrimonial. The starting point in financial remedy proceedings is that all money, no matter who it is held by, is family money and is available for distribution, unless robust evidence is shown to the contrary – at which point it can be ringfenced (subject to the parties' needs). Why does this eminently sensible, fair and White outlook not apply in LSPO applications? Change is most certainly needed if there is to be any true hope of levelling the playing field in funding family law litigation.

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PENSIONS ON DIVORCE:

PAG2, HIGH EARNERS AND THE ABOLITION OF THE LIFETIME ALLOWANCE

"DON'T PANIC"

Authored by: Rachel Osgood (Partner) - Paris Smith Solicitors

Many years ago, when I started dabbling in divorce and family, pensions were just something the husband had and kept to himself. No-one even questioned that outcome. That's just the way it was.

It wasn't until 1999[1] that it became possible to properly share pension assets between the divorcing couple. For many couples, this was a game-changer, particularly for those for whom a large pension formed a significant part of their assets – for example, consultants, pilots and senior executives in final salary schemes.

Since then, our approach to pensions has shifted from a sort of contented innocence (after all, no-one understood them) through a somewhat baffled bewilderment (and suspicion about who knew what), and finally to a certain degree of confidence (which might be more or less justified). This is quite something, given the mind-boggling complexity surrounding pensions. In fact, to paraphrase Douglas Adams, pensions are a lot more complicated than you might think, even if you start from a position of thinking they're pretty damn complicated in the first place.

Luckily, in 2019, we got our hands on our very own Hitch-Hiker's Guide to pensions, in the form of the report of the Pensions Advisory Group[2] ("PAG"), which was published in 2019.

Although the report was not given quite the reception it would have got if it had dressed itself in a blonde wig and called itself Taylor Swift, it did, for the first time, give practitioners a really clear guide to how to deal with pensions on divorce, including:

- When to get pensions valued by an expert.
- How to instruct an expert.
- What to expect in larger money cases, where the assets exceed the combined needs of the parties.

The aim of the report was to promote consistency amongst both practitioners and the judiciary, and it's fair to say that it achieved those aims. As practitioners, we knew that judges would be relying on it, and so we knew we could - and should - rely on it too. We did, and it noticeably reduced the scope for argument about when expert advice would be needed and how the pensions would be likely to be treated by the court.

1 Welfare Reform and Pensions Act 1999

2 PAG is funded by the Nuffield Foundation, which is an independent charitable trust with a mission to advance educational opportunity and social wellbeing. It funds research that informs social policy, primarily in the realms of education, welfare and justice. The report itself however is entirely independent of the views of the Foundation (whatever they may be).

Of course, divorce lawyers can't be experts when it comes to pensions. Venturing into the territory of "financial advice "will ring alarm bells with both the Financial Conduct Authority and your insurers. You need a PODE both for assistance and protection. A PODE is a mystical creature (somewhat like a Vogon, but without the bad poetry) created by PAG. An expert in practising the dark arts of an actuary, they may not actually be an actuary, but may be a financial adviser with sufficient expertise such that they meet the criteria for being a "Pensions On Divorce Expert".

A PODE will advise on:

- **How much the pensions are worth, using a consistent and realistic methodology.**
- **The most efficient way to share them in such a way as to preserve as much pension income as possible.**
- **How much will need to be shared in order to achieve equality of income in retirement.**
- **The outcome if the values of the pensions are shared equally.**
- **The value of the pensions for off-setting purposes.**
- **A whole host of other things, including things you didn't know you didn't know.**

The divorcing couple can then rely on the PODE report in order to agree how their pensions should be shared in the context of the overall settlement (or the judge at the final hearing can decide if the couple can't agree).

PAG updated its report in December 2023, and that's when we knew that the first report was only an appetiser – the second is the main event – a tour de force of a report, an absolute barn-stormer of expertise, knowledge, experience, commonsense and wisdom all wrapped up in 177 pages of page-turning professional excellence.

PAG2, as the report is affectionately known, provides updates and further insights based on developments and feedback since 2019. In particular, it:

- **Confirms that in HNW cases, where pensions form only a modest part of the assets, you don't need to get the pensions valued by a PODE;**
- **Confirms that it is almost always going to be wrong to discount pension earned prior to the relationship if that pension is needed to meet the other person's needs in retirement – this, on the face of it does not apply to bigger money cases, but beware the court's discretion about "needs", which, as we know, are often interpreted not only generously, but beyond the realms of what most ordinary people would consider necessity;**
- **Considers in detail whether the couple should be seeking equality of income or equality of capital.**
- **Includes the "Galbraith Tables", an attempt to simplify the valuation of a pension for off-setting purposes; and**
- **Expands its consideration of the endlessly fascinating and ultimately insoluble problem of the income gap.**

Importantly, PAG2 also anticipates changes to the taxation of pension investment brought about by the Finance Act 2024 which are of particular relevance to high earners.

Prior to April 2023, there was a limit to how much you could invest over a lifetime into your pension without suffering some pretty punitive taxation consequences – this was the lifetime allowance (LTA). Although the limit fluctuated somewhat wildly, it was finally set at £1,073,100 in 2022/2023. Anything more than this and the taxpayer had to pay a whopping 55% tax when drawing down on the excess.

In his 2023 budget, the Chancellor announced the abolition of the LTA, and this was brought about by the Finance Act 2024. So, with effect from April 2024, there is no upper limit on how much you can save into an approved pension before being bitten savagely on the backside by the tax dog at Number 11.

From April 2024 onwards, you can save as much as you like into your pension, and when you reach retirement, you can take a tax-free lump sum of either 25% of the value of the pension or £268,275, whichever is the lower. You can take more than this if you like, but any excess will be taxed as income.

Of course, it's never that simple, and there are many caveats to the above, including – most importantly and obviously – the annual cap on contributions, or the "annual allowance". This is the amount you can invest into your pension each year whilst claiming tax relief on the contributions. Once you exceed the annual allowance, you not only lose the tax relief, but you also incur tax charges.

A few years ago, this made big news, with senior doctors choosing to retire early rather than to keep facing massive tax bills on their excess pension contributions. Other high earners may have faced similar issues but in the private sector there were at least other options open to the employer/ employee, such as cash in lieu of pension contributions or membership of non-registered pension schemes. For the NHS, there was no such flexibility, and the doctors were revolting.

In response, the government increased the annual allowance to £60,000 and that, together with the abolition of the LTA, was enough to soothe the consultants back into their consulting rooms.

But there is a sting in this tail. What the tax man giveth, the tax man taketh away, and the annual allowance is tapered to as little as £10,000 per annum for the highest earners.

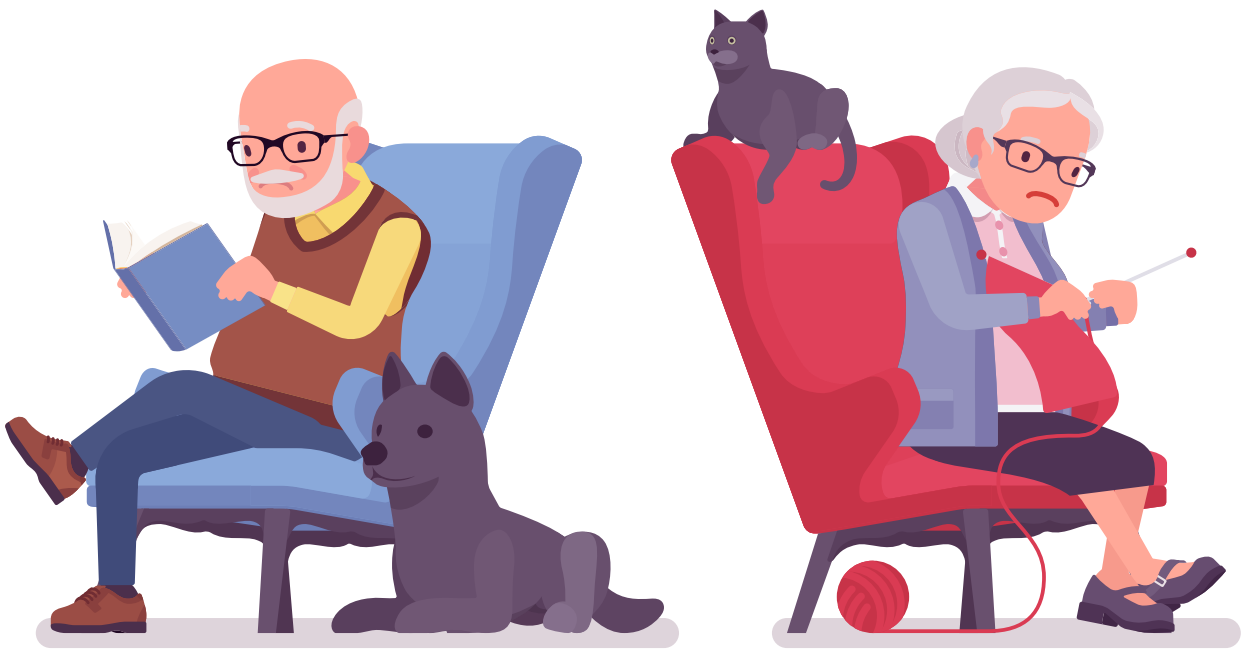
There are also transitional arrangements and LTA protections to be considered. These go far beyond the expertise of even a specialist divorce lawyer – you need to consult your tax expert for that.

We should also remember that the current government looks set to be replaced within the next 12 months, and Rachel Reeves, the shadow chancellor, has already said that Labour is committed to reinstating the LTA. That will be relevant to our high-net-worth clients in terms of their retirement planning and on divorce, and our role will be to signpost them to specialist tax and financial advisers.

Whether the LTA is revived or not, we should all be aware of our limitations when it comes to pensions. Real experts spend a lifetime considering the alchemy of tax, trusts and statistics. It is their expertise we must seek when needed and we cannot give financial advice (unless we are regulated to do so). The real trick for us, as divorce lawyers, is to:

- **Recognise a pension when we see one.**
- **Be cognisant of the limitations imposed by the tax regime.**
- **Know when advice from a PODE is likely to be required.**
- **Understand what we want from the PODE.**
- **Understand the PODE's advice when it is given.**
- **Advise our clients as to the approach likely to be adopted by the court.**

And the good news for us is that it's all right there, in PAG2, which should be emblazoned, in large friendly letters with the words, "Don't Panic". Happy reading!



60-SECONDS WITH:

LAURA PHILLIPS LEGAL DIRECTOR KINGSLEY NAPLEY

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

A Growing up, I did lots of travelling as my dad worked in aviation. I'd like to take my son around the world and give him the same experiences I had. The reality is that I would probably be doing something much more mundane like dropping him off at various after-school activities!

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

A It will sound like a cliché but the most rewarding thing is feeling like I've actually made a difference to vulnerable clients (which doesn't always mean getting significant financial awards – it could be something more subtle like ensuring they are able to remain living in their own home).

Q What's the strangest, most exciting thing you have done in your career?

A When I was training, I worked on the Lucasfilm v Ainsworth trial. Sitting in Court surrounded by Stormtroopers debating whether they would be able to breath in space when they removed their (fictional) helmets was fairly surreal.

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

A I have been working with the trainees and trainee recruitment recently. It's really quite humbling to support and help people coming to the profession so I would like to continue with that.

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

A We have seen an increase in Court of Protection applications relating to a protected party's property and financial affairs and, in particular, concerns with financial abuse during a protected party's lifetime.

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

A Mary Berry Makes it Easy…because who wouldn't want to be able to save £30 on a take away! I love cooking and I wish I had more time to do it alongside work and generally 'doing life' so this book is a keeper.

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

A There are several people who probably make this list but I think that David Attenborough has had the most extraordinary life and his documentaries have been in my life since I was tiny.

Q What is the best film of all time?

A I wish I could say something highbrow but, as a child of the 80s, I'm going to have to go with a cult classic like the Goonies or Labyrinth.

Q What legacy would you hope to leave behind?

A It is not my quote but I think there is a lot to be said for "in a world where you can be anything, be kind". I would like to think that I used whatever position I have to help others in whatever way I can.

Q Where has been your favorite holiday destination and why?

A One of the best trips I've done was to Botswana and Zambia even though I did manage to visit the Victoria Falls in dry season so it looked more like a leaky tap than a waterfall! I've been extremely lucky to visit some spectacular places and they all stick in my mind for different reasons.

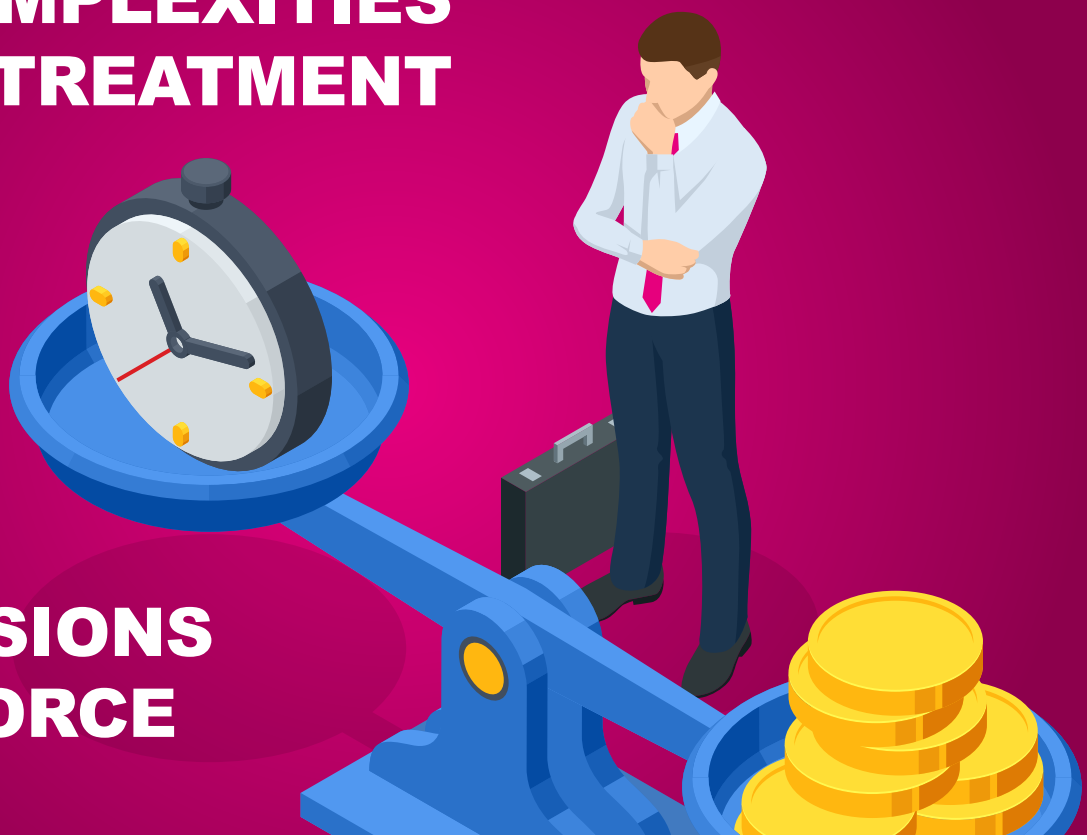
Q Do you have any hidden talents?

A I'm not sure whether it's very hidden but I love to bake (and my colleagues certainly appreciate that!).

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

A Don't panic. There is a lot of pressure when you are starting out to get the training contract, stand out from other applicants, not to make mistakes etc. I think that even if things don't work out as you may have thought, taking a step back and a deep breath and you will find a different way to get there.

THE COMPLEXITIES IN THE TREATMENT OF PENSIONS ON DIVORCE



Authored by: Alexandra Drew (Solicitor) – Tees Law

The first Pension Advisory Group (PAG) Guide to the Treatment of Pensions on Divorce ('PAG1') was published in 2019 and provided much-needed guidance to family law judges, practitioners, and pension experts and aimed to encourage settlement by improving consistency of approaches to pension division on divorce. The second edition of the Guide (known as 'PAG2') was published in December 2023, with updates to reflect changes in the law, as well as to expand and improve upon certain sections of the guidance. This article summarises the most significant changes.

Part 4 of the report considers approaches to cases driven by needs and those where equal sharing is appropriate.

PAG2 notes that 'the vast majority of cases will be needs-based, even cases with assets in the low £millions…'

In relation to needs, section 4.4 emphasises that it is fundamental that the relevant factors of Section 25 of the Matrimonial Causes Act 1973 are considered, including the parties' needs in retirement, before considering whether it is fair to exclude any non-matrimonial pension assets. It had become common practice to exclude pensions accrued prior to a marriage prematurely when obtaining a report from a pension on divorce expert (a PODE). The updated guidance is firmer that where apportionment is appropriate, the relevant date for apportionment is the commencement of seamless cohabitation and not the date of the marriage itself.

In relation to whether pension assets accrued post-separation should be excluded, the PAG2 makes clear that there remains some debate owing to the competing approaches in case law. C v C [2019] and Waggott v Waggott [2018] indicate that assets accrued from income earned post-separation are not matrimonial and therefore subject to the sharing principle, whereas E v L [2021] and Rossi v Rossi [2007] suggest that assets accruing in the twelve months following separation are classed as matrimonial (and so subject to sharing).

There is a new section dealing specifically with short marriages, at 4.8 to 4.11.

When determining whether apportionment of non-matrimonial pension assets is appropriate in such cases, it is necessary to consider whether there is a relationship-generated need for retirement income, the most obvious example being needs generated because of ongoing caring responsibilities for children of the marriage.

Overall, PAG2 makes clear that in needs cases, as with other assets, the source and timing of pension assets are not necessarily relevant and therefore apportionment of pensions is rarely appropriate. The court will rarely be assisted by these calculations by a PODE.

There are several additions at Part 6 - dealing with pensions fairly on divorce. The updates provide a more nuanced view than PAG1.

There is some expanded commentary as to when a PODE report is necessary, and more unusually, may not be required, which will further assist practitioners. It is noted that in bigger money sharing cases where pension values are relatively modest compared to the capital, it may not be proportionate or necessary to obtain a PODE report, following the cases of SJ v RA [2014] and CMX v EJX (French Marriage Contract) [2022]. However, PAG2 provides additional commentary in relation to thorny tax and valuation issues which point to the risks of taking pensions at face value – and there is a flag that some professional indemnity insurance policies require a recommendation of a PODE report to be given. There is also new guidance that a pension sharing order should apply to each component of the relevant pension arrangement, including crystallised and uncrystallised benefits.

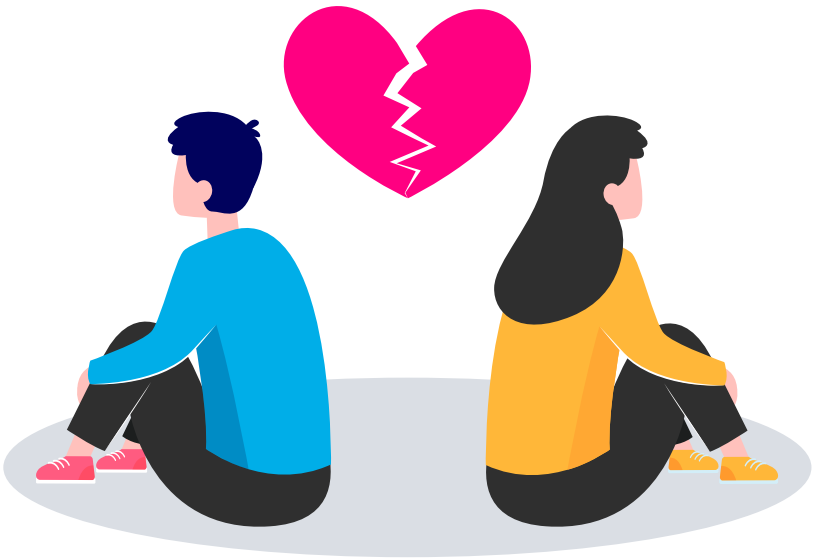
The most significant change to Part 6 of the report is the expanded discussion about whether pensions should be divided by income or capital, addressing some criticisms that PAG1 had suggested an equality of income approach in all cases. There is reference to the intervening case of CMX v EJX [2022] which sets out that in 'big money', sharing cases, an equality of capital approach is correct and PODE calculations on equality of income are not required. While the tenor of PAG2 appears to be that this is right, it is noted that there remains a divergence of views even within the PAG on this issue, but that the equality of income approach should not be considered the "holy grail". PAG2 references further commentary and discussion on this issue in George Mathieson's paper for the Financial Remedies Journal (What does Equality of Pension Capital Mean?) and in At A Glance 2023.

Part 7 of PAG2 deals with pension offsetting.

The main addition is the introduction of the Galbraith tables, launched in 2022. The Galbraith tables provide a starting point for an approximate valuation of defined benefit pension benefits where parties do not wish to obtain a PODE report. PAG2 warns that the tables are not a substitute for obtaining a report from a PODE and that practitioners should use them with caution. In most cases, particularly those where the cash equivalent value of a defined benefit scheme is material (i.e. more than £200,000) the tables will be less suitable than a PODE report.

In addition to the above and other changes to the Guide itself are some helpful updates to its Appendices, including the letter of instruction, self-certification by experts, McCloud guidance and reference to the dangers of ticking box F in a Pension Sharing Order.

The world has changed significantly since 2019 but the Pensions Advisory Group guidance continues to be indispensable to family law practitioners advising their clients on the myriad complexities in the treatment of pensions on divorce.



WHAT IS DARVO IN A RELATIONSHIP AND HOW CAN FAMILY PRACTITIONERS HELP?

Authored by: Claire O'Flinn (Partner) and Isobel Mundy (Partner) - Keystone Law

If acting for victims of toxic relationships, it is essential to be aware of the different patterns of abusive behaviour that can exist. DARVO, an acronym for Deny, Attack, Reverse Victim and Offender, is a form of manipulative control that is used to avoid taking responsibility for harmful behaviour towards others. It happens when the perpetrator is confronted by their behaviour – either by the victim or by those supporting the victim.

It is commonly used by those who perpetrate domestic abuse in all guises to escape culpability by manipulating partners into submission. The family courts are increasingly alive to it.

Named by American psychologist Jennifer Freyd PhD, DARVO involves a set of specific behaviours:

1. **The perpetrator vehemently denies that any wrongdoing has occurred,**
2. **They go on the offensive, attacking the victim and anyone seeking to call them to account, often making false accusations, and**
3. **They reverse the roles, declaring themself the victim and the actual victim to be the aggressor, deftly flipping the narrative so that the abused becomes the villain.**

DARVO and gaslighting

Gaslighting is a form of psychological abuse where the perpetrator manipulates the victim into doubting their own memory, perception, or sanity, through lies, distortion, withholding information and trivialisation, thus creating doubt and attacking credibility.

Through gaslighting, the perpetrator is able to control the victim by eroding their sense of trust in themselves, and their own judgement, making them easier to manipulate using DARVO tactics.

Coercive behaviour

Coercive behaviour is a pattern of abusive conduct using fear, intimidation, or pressure to control another person.

It can include physical violence, emotional abuse, financial control, and other forms of abuse. While DARVO can be used as part of a broader pattern of coercive and controlling behaviour, it focuses specifically on manipulating the victim's perception of events.

This can make it harder to identify and address, as victims may not understand or realise that they are being manipulated.

Narcissism and DARVO

Narcissism is a personality disorder, characterised by an excessive sense of self-importance, a lack of empathy, and need for validation.

Those displaying narcissistic traits often use DARVO to maintain control and avoid taking responsibility for their actions. By attacking the victim and reversing the blame, they maintain the façade of being a victim themselves, thereby reinforcing their perceived position of entitlement and superiority.

Why is it important to understand DARVO?

Dealing with a DARVO perpetrator and supporting their victim is challenging. The abuser will not accept responsibility for their behaviour, nor change it. The relationship fails and the victim believes it is their fault. They find it difficult if not impossible to leave, believing themselves to be unlovable and so remain trapped in a toxic relationship.

Victims may also suffer trauma-related symptoms, depression, anxiety and panic attacks. The effect on the victim's wellbeing and on any children from the relationship is devastating and long-lasting.

Recognition of and understanding DARVO, its relationship to gaslighting and coercive and controlling behaviour is essential for victims of domestic abuse and for those supporting them. By recognising the patterns of manipulation that perpetrators use, victims can gain a better understanding of what is happening to them and can work to protect themselves, and their child(ren), against further harm. Family law professionals can play an important role during family proceedings by providing information, support, and advocacy to those who are suffering from abuse.

When acting for a victim of DARVO tactics in family proceedings the following steps may be beneficial

- Establish the existence of manipulative tactics. Look for evidence of denials, deflection, attempts to normalise or trivialise acts of abuse, claims of forgetfulness and attacks on credibility. Assure and keep reassuring your client that this is not normal behaviour.
- Remember that your client will forget details or may doubt their recollection or perception of an event so follow your instinct and keeping gently questioning until events are clearly established.
- Remember that the trauma may affect memory, so encourage your client to keep records, including specifics, what was said, date, time and location, or screenshots of electronic messages. Voicemails should be retained but do caution against covert recordings.
- Gather evidence at an early stage, such as police, GP and hospital records.
- Choose your battles. Consider carefully when or when not to engage in lengthy arguments in correspondence.
- If raising an allegation in court proceedings, always consider making this in the context of DARVO tactics and highlight such tactics to the court.
- Finally, ensure your client is reminded to look after themselves and to use all forms of available support. If you sense your client is in danger do remind them to call the police immediately.

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YOU JUST CAN'T GET THE SERVICE: THE CASE FOR REFORM

Authored by: Joe Ferguson (Solicitor) - JMW

When considering the case for family law reform, there is tendency to focus on legislation and not the procedural improvements which the present system requires. This is unsurprising: it is hardly glamorous, but continual review and improvement of our systems is essential and hence, the most important area for reform is that of service.

Rules for Service: An Anachronistic Approach

The present rules for service came into effect on 6 April 2022. Rule 6.4 of the Family Procedure Rules 2010 allows a party to serve an application by way of:

- personal service;
- first class post or similar which provides for delivery on the next business day;
- DX; or
- email[1]

Email was added as an option in 2022. Even now, Practice Direction 6A still has practical limitations upon the ability of an applicant to serve upon a respondent, by virtue of consent being required.[2]

Indeed, when one thinks about our means of communication, the options are seemingly endless. Texts, WhatsApps, DMs – it has never been easier to communicate.

97% of UK households have access to a mobile[3], 91.17% of people have social media accounts[4].

However, the FPR have remained conservative to this evolution, running counter to the innovation in the wider court system.

The system is imperfect. The court must send a respondent both an email and a physical letter when an application

1 FPR 6.4
2 FPR PD 6A para 4.2
3 Mobile communications in the United Kingdom (UK) - statistics & facts | Statista
4 Social media usage in the United Kingdom (UK) - Statistics & Facts | Statista

is served upon them by way of email[5]. This does not accord with the rules for solicitor service via email[6] and is costly and inefficient – in an overstuffed system[7].

In the civil case of D'Aloia,[8] Trower J gave the applicant permission to serve proceedings via non-fungible token ('NFT'). This was done by dropping the NFT into the digital wallet of the fraudster who had stolen c.£2m of stolen cryptocurrency. Trower J was able to do so, on the basis that under the Civil Procedure Rules, a claim form can be served by any method authorised by the court[9]. The case of D'Aloia canbe distinguished from family law insofar as there will not usually be "Persons Unknown" in matrimonial finance proceedings. However, the example is reflective of the flexibility which is provided to parties who litigate under the CPR, as opposed to the FPR.

There is no reason such flexibility cannot be expressed in the FPR. Indeed, in MG v AR, Mostyn J stated plainly that:

wherever possible [the FPR] should, if not mirror, then certainly be aligned with the CPR […] to allay concerns that family law, and those who practise and administer it, occupy some kind of desert island[10]

These comments, in the vein of those of Munby LJ[11] and Lord Sumption[12], should give family practitioners pause for thought.

One must also consider how globalised litigants are. It is not uncommon to have divorces in the Family Court conducted by litigants from abroad. This can impact upon service and the constraints of present service guidelines often prove prohibitive, not just in terms of costs but also in respect of transparency. Practice Direction 6B, which sets out the practice for service out of the jurisdiction, does not make for an easy read.

There is something quite arbitrary about the variations in the periods of time for acknowledging/answering an application. This, in and of itself, could be an impediment to justice, particularly in cases where urgent action in required.

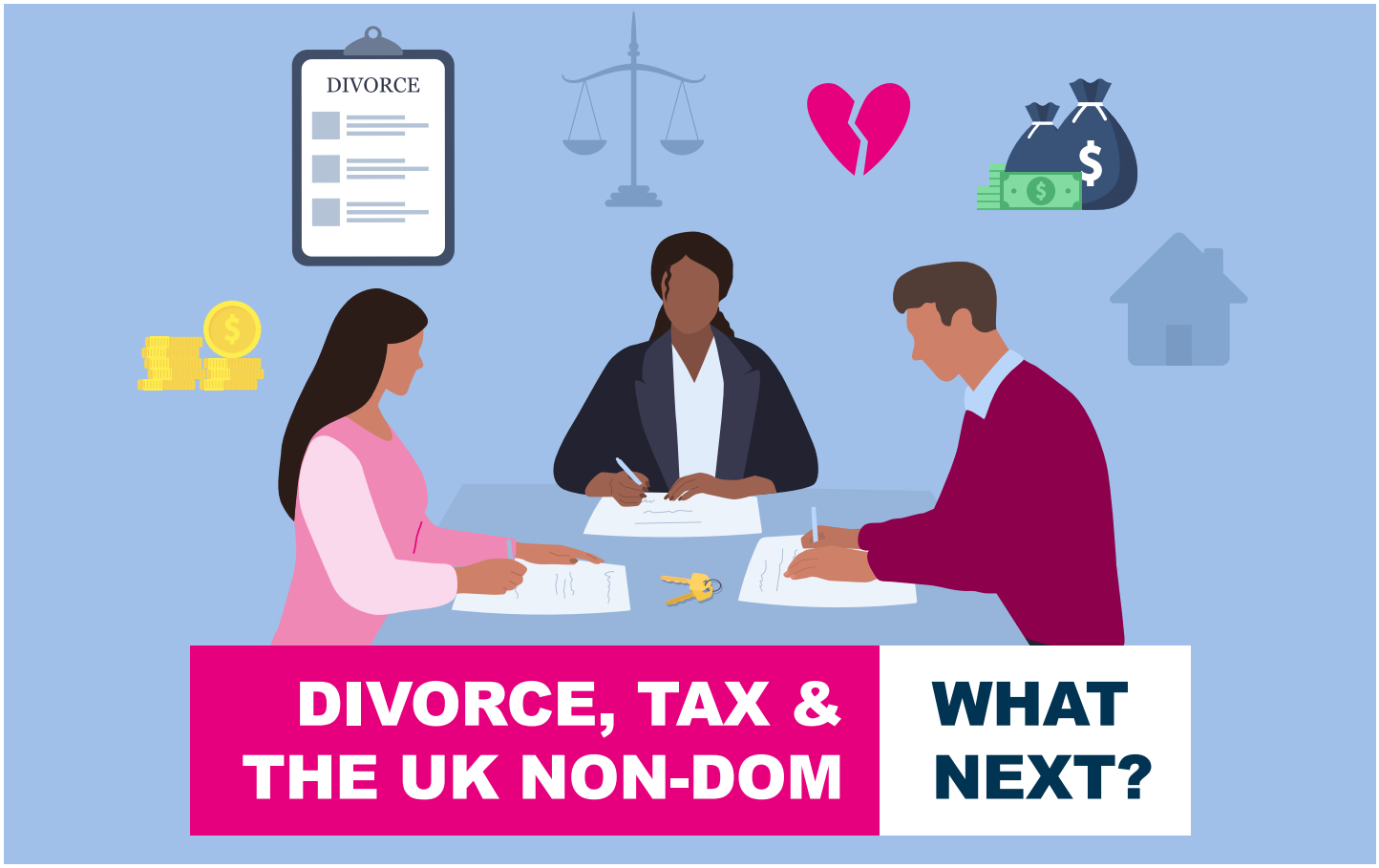
CPR Part 6.33(2B)(b)-(c) was introduced to simplify service outside of the jurisdiction, allowing for proceedings to be served without first obtaining permission from the court, in circumstances in which the contract contains a term to the effect that the English court shall have jurisdiction to determine that claim and the claim is in respect of that contract.

The difference between a civil and a family case here is that there may be a choice of jurisdiction clause within a contract – where this would not be part of divorce proceedings typically (absent a nuptial agreement).

That is not to say that the family court will not be pragmatic. For instance, in the case of Maughan v Wilmot, Mostyn J stated that the respondent had been validly served via email whilst abroad, as he had relied on communication via email during the litigation and therefore his protests that email service was invalid rang " very hollow"[13].

It is clear that in the digital era, we need to consider service of documents anew[14]. Email, social media and even NFTs can provide ample opportunity for service. There are of course ramifications to these solutions which will require pragmatic case management to avoid any impediment to justice.

5 FPR 6.7A(2)
6 FPR PD 6A para 4.4
7 Children facing delays and uncertainty in family courts | The Law Society
8 D'Aloia v Persons Unknown and Others EWHC 1723 (Ch)
9 CPR 6.3(1)(e)
10 MG v AR [2021] EWHC 3063 (Fam) 8
11 Richardson v Richardson [2011] EWCA Civ 79
12 Family Law at a Distance, At a Glance Conference 2016, Royal College of Surgeons, Lord Sumption (8 June 2016)
13 Maughan v Wilmot [2016] EWHC 29 (Fam) [9]
14 Service abroad following Maughan v Wilmot [2016] IFL [154]



DIVORCE, TAX & THE UK NON-DOM WHAT NEXT?

Authored by: Jackie Hockney (Private Client Tax Director) – Crowe

Whilst tax is understandably not a prime concern when a couple decide to divorce, significant consequences to the value of any financial settlement can arise if tax is not given proper attention. This is particularly so when dealing with UK resident, non-UK domiciled ("UK non-dom") clients and the complex tax system currently surrounding them.

As the future of UK non-doms is fast becoming a tool of political electioneering, it is important to consider what this means for those UK non-doms currently proceeding or about to proceed in divorce…

What Is Domicile?

Domicile is a common law concept separate to residence, citizenship or nationality. It is a subjective identification of where a person considers their permanent home to be and where they are ultimately "from." An individual has only one domicile at a time and generally it follows the domicile of their father at their time of birth. Domicile can change through individual choice or due to dependency on another in certain circumstances.

Why Is The Tax Status of UK Non-Doms Such a Focus?

Since colonial times, those moving to the UK have enjoyed privileged tax advantages in the UK. At present, UK domiciles are taxed on everything, everywhere as it arises ("the arising basis"). Conversely, UK non-doms whilst also taxed on arising UK income and gains, can elect for foreign income and gains ("FIGs") arising in a tax year to only be taxed if they are brought to or enjoyed in the UK, enabling FIGs to potentially roll up tax-free offshore ("the remittance basis"). The remittance

basis is available to most UK non-dom newcomers to the UK for the first fifteen tax years of residence in the UK (although a charge is payable to enjoy this treatment after seven years of UK tax residence).

Remittances are taxed at the rate appropriate for the source of the sum remitted. This may be income, gains or clean capital (the latter being tax-free if brought into the UK). If the individual segregated their accounts prior to entry to the UK, this source is easy to identify. If not, HMRC applies strict ordering rules to "mixed fund" remittances which taxes them in layers of income first and clean capital last. Furthermore, determining when each layer of deemed source is depleted (so that the lower tax rates can be applied) can require expensive analysis of the account movement history.

What Is The Relevance To Divorce?

Where at least one party to divorce is UK non-dom and their wealth is situated outside of the UK, care must be taken if part of that wealth is transferred to the other party in the UK. Whilst under post 6 April 2023 rules, the transfer itself may occur without any immediate tax liability, if it is funded from previously untaxed FIGs, the transferor may still be liable to tax on those sums brought into the UK if due care and planning is not undertaken.

For example, if UK non-dom H transfers FIGs to W in the UK before Final Order, H will be liable to tax on that remittance even though he has not enjoyed that sum himself. This is because the parties are still married and therefore "relevant persons." Furthermore, if H gifts the sum to W in the UK after Final Order, from which H's minor children can indirectly benefit, H will still be taxable on the remittance under the "gift recipient rules." In all instances, W is treated as receiving "clean capital" and therefore not taxed on the sum received. H is left with a tax bill and a smaller value to his net settlement.

A workaround exists whereby H transfers FIGs to W's offshore account prior to Final Order and then W does not bring this into the UK until after Final Order. After Final Order H & W are no longer relevant persons so the remittance into the UK is not taxed on H. Furthermore, the gift recipient rules cannot apply as at the time of the gift, H and W were relevant persons. This now leaves H with no tax bill and potentially the ability to clear out the income layer from his mixed accounts leaving him with lower taxed future remittances for his own benefit.

H may still be taxable on the remittance if it is applied by W for the direct benefit of minor children (e.g. paying school fees) as H and his minor children will remain relevant persons. However, if minors benefit indirectly from the lump sum (e.g. living in the house W purchased with the FIG payment) then the remittance should not be taxable on H.

HMRC challenged this recently in Sehgal [2023] SFTD 212, despite HMRC's previous confirmation that payments made in the scenario above would not be taxable remittances (further to the CIOTs letter to HMRC of 15 June 2012). HMRC now state that whether or not such a remittance is taxable in the UK depends on the specific facts of the case. It is therefore even more important that advice is taken on the transfer of FIGs from a UK non-dom spouse to the other on divorce.

Proposed Changes To The UK Non-Dom Regime

In this year's Spring Budget, it was announced that the current tax regime for UK non-doms will be abolished and the concept of domicile in taxation will be replaced by a residence-based regime.

From 6 April 2025 most newcomers to the UK will have a period of exemption from tax on their FIGs (proposed to be four tax years) and thereafter will be taxed on the arising basis. Various transitional rules have been put forward for those UK non-doms who have been in the UK more than four years on 6 April 2025. These will apply to both newly arising FIGs and on the remittance of pre-6 April 2025 FIGs in the transitional period. There will also be an opportunity to rebase assets to 5 April 2019 values.

However, this is of course all dependent on who is in government on 6 April 2025. Labour are supportive of scrapping the UK non-dom regime but have made it clear they do not believe the Conservative changes go far enough.

The Effect Of Change On UK Non-Dom Parties To Divorce

Going forwards, despite the headlines, it will still be important to determine whether a client is a UK non-dom or not. Whilst the "remittance basis" may have seen its day, the concept of "remittances" is very much alive and kicking for the foreseeable future. It is most unlikely either political party would permit untaxed pre-6 April 2025 FIGs to be brought into the UK tax-free so the concepts of "relevant person" and "onward gifting" and the careful planning around both will continue to apply.

Now, more than ever, early considered expert input can help considerably in the tax efficiency of a financial settlement and avoid some potential nasty surprises for the divorcing UK non-dom.

60-SECONDS WITH:

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

A I would love to get back in touch with the garden, and to spend more time cooking, reading, singing, cycling, playing bridge and board games, and most importantly time with the family, helping my daughters to grow up to be kind and happy people.

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

A I love the fact that my cases invariably involve real people, and 'Real People Personalities', meaning that they are motivated by more than just money – the money is often a proxy for some other emotional need, and often at a time of family crisis. Helping clients identify what really matters to them can really help unlock a dispute.

Q What's the strangest, most exciting thing you have done in your career?

A I appeared on TV last year, as a talking head in a series called Inheritance Wars: Who Gets the Money. That was a bit scary and quite fun, especially teasing my children that I would be on Strictly next.

Appearing in the Supreme Court, in Marley v Rawlings, back in 2013, and actually being allowed by my leader to address the court myself, was also pretty wild.

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

A I've been advising on a number of offshore matters over the last few years, but none of them has reached court yet. So I hope I have a chance to appear in a foreign court within that timeframe. I've also got a few pet theories on the law I'd like to have an opportunity to test out in court, if the right case comes along!

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

A I'm seeing issues around mental capacity arising in lots of different contexts. We are used to seeing will validity challenges based on lack of capacity, but lately I have people raising mental capacity points to get what they want in other situations, such as trusts, divorces, and professional negligence. All interesting and useful applications of principles familiar to me from my probate background.

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

A I can't think of any one book which would suit everyone, but I can strongly recommend The Hitch-Hiker's Guide to the Galaxy, which indirectly was responsible for me meeting my wife!

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

A I quite often day-dream about bringing a famous composer from the past (Henry Purcell perhaps – he seems like a lively character) forward to our own time, to see what they would make of developments in music, and the way every aspect of life has changed almost beyond recognition in little more than a single lifetime.

Q What is the best film of all time?

A Shaun of the Dead, of course. Oh, okay then: 2001: A Space Odyssey.

Q What legacy would you hope to leave behind?

A I'd like to think I'm still too young to be worrying about a legacy! I'd actually like to live forever, just to find out what happens next.

Q Where has been your favorite holiday destination and why?

A I've loved taking my daughters to places I've visited years before, and seeing their reactions to new experiences, and seeing how the places themselves have changed. We had a brilliant trip to Italy last year, with a good balance between culture and relaxing by a pool in the Tuscan hills.

Q Do you have any hidden talents?

A I do a lot of singing in my spare time, with choirs and in operas, although that is no longer so hidden, as I have been finding my musical and legal worlds colliding; I have sung opera for Baroness Hale of Richmond, choral music for Lord Neuberger of Abbotsbury,

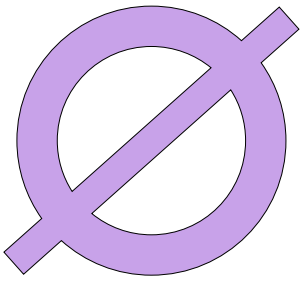
Q What piece of advice would you give to your younger self?

A I quite often remind my clients of the so-called 'Serenity Prayer', in particular the part which asks for the serenity to accept those things we can't change – or maybe just the song Que sera, sera. I think I could have used that advice when setting out on my career: work hard, and trust the process - everything will work out all right in the long run.

MARRIAGE: WHAT IS IT GOOD FOR?

Authored by: Emily Brand (Partner) & Genevieve Smith (Associate) – Boodle Hatfield

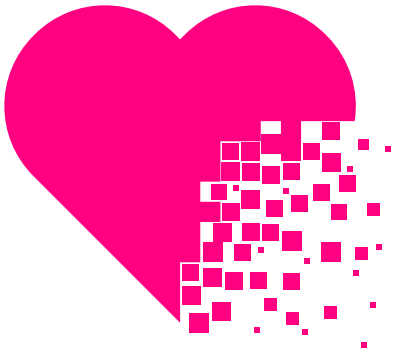
When '80s band, Frankie Goes to Hollywood sang 'War: What is it Good for?' (from which this title was plagiarised), the answer they gave was a resounding "Absolutely Nothing".



Boodle Hatfield were delighted to host a conference on 13 March exploring with our experts and illustrious audience whether the same can be said for the institution of marriage in the modern world.

The discussion was hosted by multi-award-winning financial journalist and commentator, Claer Barrett, and was enhanced with insights, research and experiences from retired High Court judge and podcaster, Sir Nicholas Mostyn; journalist, broadcaster, and author, Caitlin Moran; Professor of the Psychology of Education and Mental Health at Cambridge University, Professor Gordon Harold; and Professor of Social and Public Policy at the London School of Economics and Political Science, Professor Berkay Ozcan.

While family lawyers will often hear the case against marriage from their divorcing clients, in the UK marriage is still awarded something of a **"special status"** – both legally, politically and culturally. It is still widely viewed as the 'norm' for many couples, notwithstanding a number of significant societal shifts in relation to private affairs that have occurred in recent decades. It is an area where the statistics contradict policy decisions and may even defy anecdotal experience; the rate of divorce is high and current trends suggest that marriage will all but disappear by 2062, with many couples choosing to engage in committed relationships and cohabit instead of pursuing marriage at all.



Professor Berkay Ozcan highlighted that an enduring relationship - whether inside or outside of marriage - can have the same positive value, provided that, in addition to the mutual benefit felt within the relationship, society recognises the worth and stability of the couple as a unit.

Certainly, marriage does not guarantee relationship longevity. So, should other types of enduring personal relationships – beyond marriage – be given official recognition? Are couples making a conscious decision to remain unmarried, or should protections and privileges offered to married couples be extended to those who aren't? Does

that marriage certificate really make a tangible difference to people's lives? What metrics can be used to measure the 'success' of a relationship?

While marriage was traditionally about trading roles within the unit of the couple; the roles within a traditional partnership were defined and different (the archetypal protector/breadwinner and the homemaker scenario). Now, Professor Ozcan observed that people are more likely to marry a person who is similar to themselves, having comparable backgrounds, characteristics and abilities - with the effect that there is less "trading" within the couple to their mutual benefit. He explained that conflict can arise as a consequence of these 'team roles' overlapping with one another and causing confused expectations or blurred lines within the couple itself.

Where conflict does arise, the way in which a couple manages this can have a bigger impact than one might initially imagine. Professor Gordon Harold described how his research shows that a couple's engagement with conflict can actually echo across generations. He described how the full range of the **"silence to violence"** continuum of disagreement, from passive aggressive behaviours through to violent outbursts, can impact upon a family dynamic, all with profound effects. This is particularly true if children are subjected to unhealthy discord in a parental relationship. He explained that children who are thus exposed are more likely to be both victims and perpetrators of interpersonal and parental discord in their own lives, thereby perpetuating these patterns and behaviours for their descendants too.

Thus the notion of parents staying together 'for the sake of the children' is called into question. What became apparent – whether for married or unmarried parents – is that it is how the parents engage with one another which was likely to have the biggest impact on a child and generations to come. If a constructive approach was adopted, even in areas of disagreement or 'conscious uncoupling', this is likely to have a more positive impact. In contrast, high-conflict scenarios are likely to have a harmful impact for those involved - with a far-reaching knock-on effect.

Clearly, the importance of mutual investment into the relationship extends beyond emotional investment and into the financial sphere. Interestingly, it was reported that when divorce law was introduced in Ireland, individualised savings increased in married households, regardless of the length of the marriage. There was some debate within the research as to whether the availability of divorce might therefore invite a more individualised mind set, notwithstanding the existence of the marital partnership. Similarly, statistics show that there might be lower 'joint' contributions to family wealth, including lower financial investment in the children of a relationship, where divorce was an option.

For those choosing to get hitched, how much then has really changed? The words of the traditional marriage ceremony state;

"with this ring I thee wed, with my body I thee worship, and with all my worldly goods I thee endow"

. Indeed, a common case made in favour of marriage in the legal profession is the protection that it offers the financially weaker spouse on the breakdown of the relationship. In an imperfect system therefore, Sir Nicholas Mostyn commented, this is what marriage is good for.

Still, the question remains whether unmarried couples should be offered the same legal securities. It is common knowledge in the legal sector that the myth of a 'common law marriage' still leaves many members of the public who might believe themselves to be in a position to bring financial claims against their long-term but unmarried partner exposed on the breakdown of their relationship.

Different legislative provision is made in England and Wales, depending on the legalities of the relationship. This means that the Courts deal with those in unmarried relationships on an unequal footing to those who were married. There are also difficulties for those, for example, in a religious marriage, who believe themselves to be married but whose ceremonies do not comply with the legal requirements for a valid marriage in this jurisdiction. Whilst legal protections may be proactively put in place between unmarried couples themselves, it was acknowledged that many do not take the necessary steps to do so – whether by conscious choice or perhaps because they simply do not know about them.

By way of contrast, Sir Mostyn explained that in Australia couples who are in a 'de facto' relationship (in essence, those in a committed domestic partnership of 2 years or more duration, or with a child) are able to bring a financial claim against their partner, in the same way as married couples on a separation. The audience was asked to consider whether marriage would hold the same status if cohabiting couples were legally offered the same safeguards as married couples. Perhaps this would render the system entirely redundant.

In her view, Caitlin Moran, felt that marriage was a 'creative act' – with room for each couple to make of it what they will; at the end of the day, no one really knows what goes on behind closed doors in another marriage. So perhaps the idiom really is true, that, put simply, "you get out what you put in" in respect of marriage/relationships too.

One observation from the floor stressed the need for a more holistic assessment of the value ascribed to all kinds of personal relationships and even a change in language; for example, it was said that a divorce should not be described as a "failed" marriage and equally the simple fact of the length of a relationship is not necessarily a representative measure of "success". For instance, is it not a success where the exit from the relationship is managed in a conscious and collaborative way, to minimise any potential negative impact on the couple and any children? To the contrary, one of the markers of "success" might be to undergo separation and maintain a co-parenting relationship once a natural conclusion to a beneficial partnership has been mutually reached and negotiated.

Ultimately, there remains considerable room for debate about the value or otherwise of marriage. As Caitlin Moran observed;

'I feel like marriage the way I feel about Wales - I love it, it's the only place I go on holiday, but I've got friends who've had a terrible time there'.

Nevertheless, the audience voted by a vast majority at the conclusion of the debate that they felt that marriage was on balance "good for something" – despite the number of divorce lawyers in the room!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HAVE WE LOST THE ABILITY TO HAVE A CONVERSATION?

Authored by: Jamie Orchard (Partner) - Myersons

Did you know that you're likely to have had over 89,000 heated altercations with your closest relations before you have reached the age of…...eight? As we progress through our lives, we will experience potentially millions of disagreements with those around us, meaning that we become "experts" in disagreeing.

Added to that, with the advent of social media and its impact upon the way we communicate with people with whom we disagree, the number of arguments that polarise and defy resolution appears to be at an all-time high.

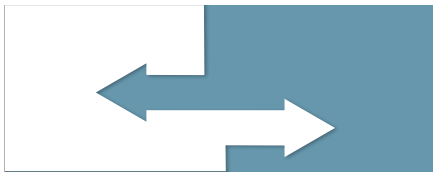
As we look back over the last decade, some incredibly divisive events have highlighted our inability (certainly when looked at from the psychology of large groups) to have constructive debate and try to find resolution.

By way of example, think back to the events of 2016:

Brexit and the Trump Presidency. Two of the most controversial and hotly debated topics in recent memory. Social media played a huge role in both of these events where effusive support for one side was met with a vehement torrent of disdain and condescension (and in some cases violence) towards any opposing view. These were not matters of debate, they were matters of tribalism.

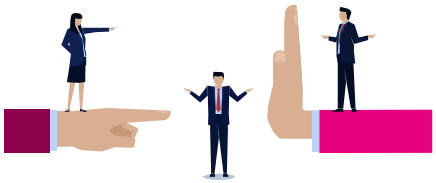
The list continues as full-blown riots, assaults and "cancellations" take place as a result of people arguing over: BLM and slavery; Covid; vaccines; and gender fluidity, to name a few.

So, in this world where reasoned conversation and debate appear to be so lacking, what impact does this have on our closest relationships? As you may imagine, our ability to resolve issues which have an even more emotive element to them (such as family, health or personal issues) has not improved either. We live in a world where our social media acts as an echo chamber for our own views, opinions…. and prejudices. Our confirmation bias is constantly reinforced to cement our beliefs that we are "right" and those with opposing views are "wrong".



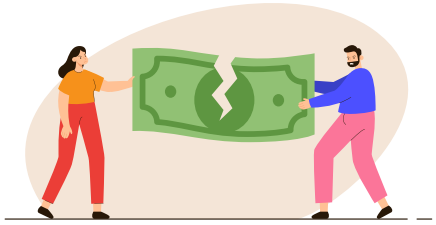
This can be seen most acutely when helping couples going through divorce proceedings. Emotions are high, there is often a long and painful history leading up to the breakdown of the marriage and then just to sprinkle some petrol on the emotional fire, there are often issues involving their children to deal with as well.

As family lawyers, we have to tread a fine line between resolutely defending our clients' interests, without irreparably damaging their relationship in the process. We try to avoid antagonistic language and allegations which ultimately will make no difference to the outcome of a case.



This has led to the forthright encouragement of alternate dispute resolution (or Non-Court Dispute Resolution "NCDR"). Mediation is a fantastic tool in the family law profession's arsenal, and, to my mind, it grapples, with both hands, this growing trend of defensive entrenchment which inevitably makes settling cases more difficult, more costly and less satisfactory for clients.

Given mediation's impressive success rate at around 72% for settlement on the day with a further 20% of cases settling shortly thereafter[1], it is unsurprising that mediation is finding its way into the limelight.



A good mediation should focus not on the positions of the parties, but on what their underlying needs are and encourage both sides to view the dispute from the other person's perspective. A husband who is encouraged to view his "money grabbing" wife as a person who is fearful of how she is going to make ends meet once she loses the financial support of her spouse, is far more likely to be willing to reach a settlement. It should be more about listening to understand rather than just waiting for your turn to fight back.

There is an ongoing debate about whether mediation should be mandatory. Many other jurisdictions have adopted this approach such as Australia, Singapore, Canada and a number of States in America with mixed reports of success.

It has long been a cornerstone of mediatory practice that the parties should be entering mediation with a genuine intention to try and settle matters in good faith. However, it's vital to distinguish between an obligation to attempt mediation and a genuine commitment to reaching a settlement in good faith.

The Court of Appeal in the 1995 case of Little v Courage, held that an agreement to negotiate in good faith was unenforceable as lacking the necessary certainty, Millett LJ distinguishing this from an agreement to "use best endeavours".

The resistance to enforced NCDR was further strengthened by the comments of Dyson LJ in the case of Halsey v Milton Keynes General NHS Trust where he commented that an order "to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court".

However, the recent case of Churchill v Merthyr Tydfil County Borough Council confirmed that the comments of Dyson LJ were obiter and the court does indeed have the power to order parties to undertake NCDR. Although, the Court of Appeal made clear that parties should be ordered to take part in NCDR and mediation only if that does not impair their rights to proceed to trial and is proportionate to achieving a settlement fairly and quickly – and at a reasonable cost.

The Court of Appeal even went as far as to suggest that mediation, may still be beneficial for parties who do not wish to mediate, so long as they were using a suitably skilled and experienced mediator. The family courts have followed the thrust of Churchill in the case of Re X [2024] EWHC 538 (Fam) and have shown an appetite to adjourn proceedings for the purpose of NCDR even where both parties aren't in agreement.

The issue of mandatory mediation is complex when it comes to family law cases, especially when considering power imbalances and the like. However, in my experience, the benefits of mediation, in terms of empowering couples to step into each other's shoes as a tool for resolution, are not widely understood by clients and lawyers alike. That is its USP. So, in a world where we are becoming less and less able to empathise with another's point of view (especially when we don't agree with it), the need for mediation has never been stronger. Unlike other litigation disputes the relationship between the parties doesn't end with the final judgment, as those relationships will potentially last a lifetime where children are involved. Successful mediation enhances relationships whereas traditional forms of litigation (and even some types of NCDR) can drive that wedge deeper between them. Therefore, a truly client focused approach should, in my view, position mediation as the first choice for NCDR.

1 CEDR 2023 Mediation Audit

DO WE HAVE TO HAVE SEPARATE SOLICITORS?

Authored by: Fiona Ryans (Senior Associate) – Hay & Kilner

The short answer is no!

Until recently parties had to have to have their own separate solicitors. However, ways of working have evolved in response to demand from couples who are in agreement or simply want to work constructively together to reach an amicable solution.

More and more couples want to avoid court or expensive legal battles given it just reduces the asset pot available for their future lives apart.

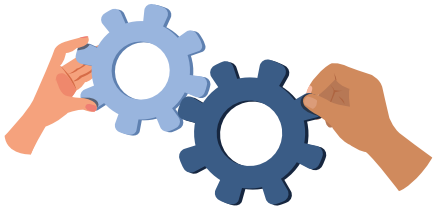
Resolution, the umbrella organisation for family lawyers, has considered this issue in depth and put together a framework to enable parties to work together with one (suitably trained) solicitor. It is known as Resolution Together.

The Resolution Together model provides a structure which is flexible to the parties' needs and is not a "process" as such. Instead it enables one solicitor to act for both parties in suitable cases to resolve issues arising from the breakdown of their relationship, whether in relation to finances or their children or both. It 'facilitates' an outcome.

Having one solicitor does not necessarily mean they will provide all the advice needed to resolve matters. Other professionals and services can be involved as required, such as mediators, valuers or pension actuaries. Every case is unique and the solicitor will have a range of options open to them to try and progress matters to an agreed outcome both parties are comfortable with.

Needless to say it is not appropriate option for everyone.

At the very outset each party will have an individual meeting with the solicitor so they can screen for domestic violence (whether physical or subtle such as coercive control), check there is no imbalance of power and generally get a 'feel' for the situation to decide if it is the right approach. The solicitor will continue to be mindful of this throughout.



The parties have to demonstrate a commitment to work together, managing their emotions and showing goodwill and commitment towards each other too. The aim has to be a joint desire to reach an overall agreement and being honest about assets and the situation generally.

The solicitor cannot hold any confidences between the parties and there has to be trust between everyone. The parties have to be **"emotionally ready"**

If the Resolution Together process is deemed inappropriate then other options will be discussed, for example, mediation, working collaboratively, traditional separate solicitor representation, arbitration and (as an absolute last resort), court.

Assuming the Resolution Together approach is suitable, a specifically worded retainer letter is provided to each party along with a copy of an agreement setting out everyone will work together. It is signed by both parties and the solicitor and demonstrates everyone's commitment to resolving matters jointly. Then the facilitated discussions can begin.

The solicitor might decide input from other professionals is required as the discussions proceed and it could be that one party is be referred for individual legal advice if a specific area of difficulty or concern arises.

The beauty of the Resolution Together approach is it is completely flexible and enables the parties to work together, using whatever professional input they require, to reach an agreement.

They also have control of the timescale and the number of meetings as well as the issues they want to discuss. Often important issues for parties are not deemed important in the eyes of the court so would not be considered in the traditional court approach. These can be discussed in detail in this forum if the parties wish.

There is also the added bonus all the discussions and the final agreement will be completely private other than being considered by a judge if a court order is sought. This would be to embody the agreement into a legally binding document.

Increasingly the press are being allowed into the family court so this is often a key consideration for parties as privacy cannot be guaranteed in that setting.

All discussions are privileged and confidential so they cannot be shared with anyone else without agreement of both parties.

If an agreement is reached in discussions (and it usually is given the parties commitment at the outset), the paperwork can be drawn up by their solicitor, explained to them together and ultimately approved by both parties jointly.

The solicitor has a professional responsibility to keep individuals and especially any children safe from harm as discussions are facilitated. Advice is given at every stage to assist the parties to formulate a workable outcome but the solicitor's role is not to negotiate on behalf of one party with another.

For parties who want to deal with matters in a cost-efficient way, do not want to have a "war" and certainly do not want to go to court this is a calm and dignified way to sort things out between them with professional help to ensure the agreement is fair to them both.

Separation is an emotional experience with a legal component and not the other way round and solicitors who undertake Resolution Together work recognise this. It is an approach which has been needed and requested for a long time. Finally there is a framework in place for it to happen.

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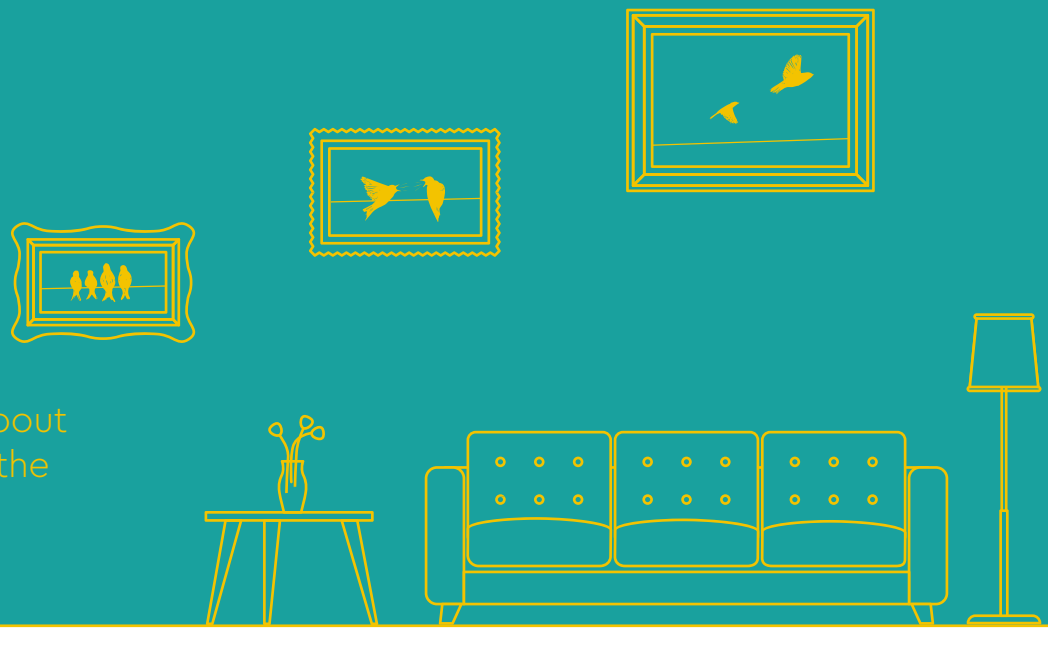

For further information about our practice, please use the contact details below.

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TRUST CONFIDENTIALITY VS. DIVORCE:

UNDERSTANDING THE CONFLICT

Authored by: Cerisse Fisher (Group Partner) - Collas Crill

Divorce proceedings often entail complex negotiations over assets. Assets held in trusts established in international jurisdictions can present unique challenges in divorce settlements. Here we explore the balance between the confidential nature of trusts with duties to disclose, rights to information and how to navigate this conflict.

Confidentiality: A key trust attribute

Why do high net worth individuals place assets in trust in the first place? The stereotypical misconception is that it's simply to avoid taxes in home jurisdictions or to hide assets out of reach of scrutiny from authorities, the media or estranged spouses/family members. Think Leonardo DiCaprio in The Wolf of Wall Street and his slick Swiss banker.

However, the world has moved on from the clichéd man with a briefcase stuffed with cash and bearer shares. Regulators, tax authorities and courts increasingly demand transparency from offshore jurisdictions. Reporting, beneficial ownership registers and global regulatory bodies ensure that there are now far fewer ways to conceal wealth offshore. The majority of offshore jurisdictions themselves are happy to (and work hard to) comply.

However, the details of trusts still remain inherently confidential and confidentiality is important for a few key reasons:

Privacy Protection: Trusts allow individuals to keep their financial and personal matters private. Unlike wills, which go through the public probate process, trusts typically do not become part of the public record. This can be particularly important for high-net-worth individuals or those who wish to keep the details of their estate and beneficiaries confidential.

Family Dynamics: Confidentiality helps manage family dynamics by keeping the specifics of inheritance and asset distribution private. This can prevent potential conflicts or jealousy among heirs and beneficiaries.

Security: Keeping trust details confidential can protect beneficiaries from potential risks such as fraud, bribery, identity theft, undue influence or even kidnap. It may also help safeguard assets from creditors or other third parties who might attempt to make claims.

The challenge in divorce proceedings

Despite greater transparency and reporting, the inherently confidential nature of trusts and their assets presents a challenge for family practitioners. Without full disclosure from both parties, one of the primary difficulties is establishing the nature and extent of the assets held within a trust.

Here we take a look at the example of a Guernsey law trust.

What information is publicly available?

Essentially, very little. Trust documents, including the trust instrument itself and financial statements and details of the key stakeholders (such as settlor and beneficiaries) are private and it will be at the discretion of the trustee to decide who gets to see or know what.

Very little information needs to be filed and any information that is, as things currently stand, is not publicly available.

Who is entitled to information?

Whether a party to divorce proceedings can obtain information about trust assets depends upon their standing and connection to the trust. The Trusts (Guernsey) Law, 2007 provides that a trustee shall, at all reasonable times, at the written request of (a) any enforcer, or (b) subject to the terms of the trust: (i) any beneficiary (including any charity named in the trust), (ii) the settlor, or (iii) any trust official (which could include a protector), provide full and accurate information as to the state and amount of the trust property.

There is potential for a person not listed above to apply for an order of the Royal Court to obtain information, but the circumstances in which this is possible are fairly limited.

Note that this statutory right of a beneficiary, settlor or trust official to request information is subject the terms of the trust. It is common practice for Guernsey law trust instruments to expressly exclude this duty to give information.

What information would or should be disclosed?

The Trusts (Guernsey) Law, 2007 refers to "full and accurate information as to the state and amount of the trust property" but does not prescribe any further what this means. Generally, it is considered that the following would be disclosable:

- trust instrument and supplemental instruments;
- accounts/financial statements of the trust;
- potentially, documents relating to underlying companies.

The following documents would not normally be disclosable:

- documents detailing trustee deliberations (such as minutes/ resolutions);
- letter of wishes;
- internal trust correspondence.

The Courts in Guernsey would follow the principles set out in Schmidt v Rosewood [2003] UKPC 26.

How does a trustee determine whether information should be disclosed?

A trust instrument may contain provisions confirming who the trustee may (or should not) provide information to, or what information they may disclose. More commonly, and in line with the confidential nature of trust information, a trust instrument will contain provisions restricting the disclosure of information.

The trustee must pay heed to the provisions of the specific trust and to the law in determining whether it can or should disclose information about trust assets. If a person generally entitled to trust information under the law of the trust makes a request, the trustee will likely go through the following process:

- Consider its powers under the trust and any express restrictions.
- Consider who is making the request – if it is a beneficiary, the likelihood of their receiving any benefit from the trust will be an important factor in determining whether disclosure should be made and the extent of that disclosure.
- Consider whether the disclosure is in the best interests of the beneficiaries.
- It may even consult with beneficiaries or other trust stakeholders to obtain their views, if appropriate.
- It would consider the circumstances surrounding the request. The trustee will be mindful that any actions it takes when it is on notice of significant family distress, such as matrimonial proceedings, will be subject to greater scrutiny. Where there is a much greater chance of challenge to any action a trustee takes, the trustee will likely be more cautious than normal.
- Take formal advice.

A trustee should not ignore a request for information and should give sufficient consideration to a request. Whilst trustees have a difficult balance to strike between maintaining confidentiality and legal duties, there are circumstances in which disclosure might be the prudent option. There are also, of course, circumstances in which disclosure is wholly inappropriate.

What to do when faced with an unresponsive trustee

If a request for information is based on the known entitlements under the laws of the relevant jurisdiction, this will help start the process correctly. Entitlement to information and duties to disclose differ between jurisdictions, so taking advice in the relevant jurisdiction is key.

Bear in mind that the trustee may not be able to give you a full explanation as to why it will not disclose the requested information, as the reasoning itself should be kept confidential.

If approaches to the trustee are not fruitful, there may be a process in the relevant jurisdiction to apply for an order of the Court requiring disclosure.

It may be tempting to believe requests issued to an unknown trustee entity in a far-off jurisdiction disappear off into the ether, never to be responded to. Rest assured professional, regulated trustees should know their statutory and fiduciary duties and should act on requests for information, whether that ultimately means disclosure or not.

WHY YOU SHOULD STRUCTURE LIFE INSURANCE INTO HIGH NET-WORTH FINANCIAL REMEDY ORDERS

Authored by: Alexandra Merz (Private Client Advisor) - Vie International

Security on Maintenance Payments

During a financial remedy order, a breadwinning spouse is often ordered to pay large monthly maintenance payments to the non-breadwinning spouse. Many financial remedy orders and out of court settlements do not contain a protective clause for this maintenance payment through a critical illness or life insurance benefit. In almost all high-net-worth cases where there are ongoing payments and no clean break, there should be an order incorporating life insurance and critical illness. If one does not exist, the non-breadwinning spouse must assume the maintenance payment could be zero in the case of death or critical illness unless other life policies exist. This means the dependents could be at risk too at the demise of the former breadwinner.

Old life insurance policies do not necessarily give the non-breadwinning spouse any rights post-divorce. They are unlikely to be the named policy beneficiary in the future, so it is not safe to rely solely on these old policies. If orders are not made for them to continue, what's to stop the owner of the policy from cancelling them? Whilst orders can be made for the old policy to maintain the ex-spouse as beneficiary, these policies will not necessarily relate to the amount of the maintenance order. Old policies can potentially be restructured with expert advice. If possible, new policies should be used to secure these payments with the appropriate beneficiaries whether it be the non-breadwinning spouse or the children. Thought should also be given to the correct tax structuring and potential to put policies in trust. If your client is due to receive annual maintenance payments please call a specialist such as Vie International to find ways in which we can secure these payments for their future and any other dependents regardless of the ex-spouse's health or circumstances. These policies can and should be ordered by the court or brought into the settlement drafting early on.

Other ways in which life insurance can be used to assist in financial divorce settlements/orders include:

1. Bridging the Divide

From experience, we all know divorce negotiations breakdown at the very end and usually about the smallest of funds. If there is disagreement about the remaining funds to split, this amount could go to purchasing policies to benefit the dependents (or a joint life policy which will be ordered to continue before the divorce is finalised). Orders can specify the new policies must name the Dependants or Children as beneficiaries and stay in place for a fixed term or, where budget allows,

whole of life. These can safely be put in trust so neither party has any control and the trust proceeds would be managed by a Third Party/professional trustee. This is rarely a product used in family law mediation but is a very useful tool in cases where there are excess funds beyond a "needs" basis but where spobridgeuses disagree on how excess funds should be split.

2. Inheritance Tax Planning For Large Settlements In Divorce

If there is a lump sum/clean break on a high-net worth divorce settlement/order, then maintenance payments would be irrelevant, however life insurance is still a useful tool to secure the Children's future and the remaining estate planning for either spouse. Family law advisers often refer clients to Will/Trust legal advisers but rarely think to refer clients to life insurance specialists. Life insurance is an integral part of Inheritance tax planning. Where a spouse is told to rewrite their Will once the divorce settlement is finalised, they should also consider estate planning and inheritance tax exposure at the same time.

3. Survivor Benefits For Defined Benefit Pension Plan

Life insurance can be used to replace complex survivor benefits that may not be optimal to split in the pension sharing orders. Where blended families are involved, life insurance set up optimally in trust, can often help alleviate the need to put former spouses and dependent from those spouses in the restructured will so that all remaining property post-divorce can go to the "new family", avoiding family stress and difficult probate discussions after death.

4. Wealth Protection Post-Divorce Settlement

Once the dust settles on the divorce, it is important to look at the each respective estates exposure to IHT. Financial advice should be sought by both parties. Life insurance can be used as a flexible and efficient gift tool by paying premiums into a trust that holds a large policy. These allow for more flexible spending of wealth and help mitigate the IHT liquidity event that will be inevitable for large generational wealth transfers.

Why Should My Client Look At a US Life Policy Rather Than A UK Policy?

Although UK life insurance products are suitable for UK domiciled individuals, US life insurance is a product accessible to most high-net worth individuals and deemed domicile or domiciled UK residents. In most HNW cases, it is superior to UK life insurance because of following benefits:

- **Lower premiums**
- **More diverse range of products**
- **Higher credits on Insurers**
- **USD currency diversification**
- **US Tax compliance for US citizens or US citizen beneficiaries**
- **US Trust Law**
- **Tax efficiency - Can be structured to be out of scope from UK IHT for a US individual which might not necessarily be true for UK policies placed in trust**

Vie is a US licensed independent life insurance broker and UK regulated firm. We are a London based firm with the correct regulatory qualifications to sell US life insurance. We also offer the following services in addition to bespoke life insurance planning:

- **Cross border pension expertise**
- **Single-joint expert reports for insurance, pe nsion and any financial advisory work**
- **Financial advisory work in divorce**
- **Post divorce holistic financial planning and asset management**

INVESTIGATIONS, ASSET TRACING, AND DIVORCE

Authored by: Sofia Batchelor (Director) - J.S. Held (Dubai)

Investigators can be reticent about their involvement in divorce cases. Compared with the supposedly unemotional terrain of commercial disputes, our involvement in family cases is assumed to imply a level of immoral subterfuge.

But - just as anyone who has worked on large commercial disputes will know that they are rarely unemotional - those who have worked in the family sphere will understand the importance of unravelling holding structures, establishing jurisdiction, and all the dry procedural things that asset recovery entails.

Aside from the occasional request to "do some surveillance" (not always, but often, a waste of the client's money), investigators usually get called in at the enforcement stage. There has been a judgment, but where is the money? These assignments are similar in methodology to the work we do to support the enforcement of commercial judgments or arbitral awards. We comb the public record for concealed corporate interests, property, moveable assets like yachts and private aircrafts, investments, and bank accounts.

In both commercial and family disputes, this trawl of the public record is underpinned by work to establish the basic facts of a party's lifestyle and modus operandi. Where do they spend the summer? Do they use nominees to hold personal assets? Are their corporate interests structured through offshores? Do they take out too many loans? To this end, we try and speak discreetly to known associates, business partners, and sometimes family members.

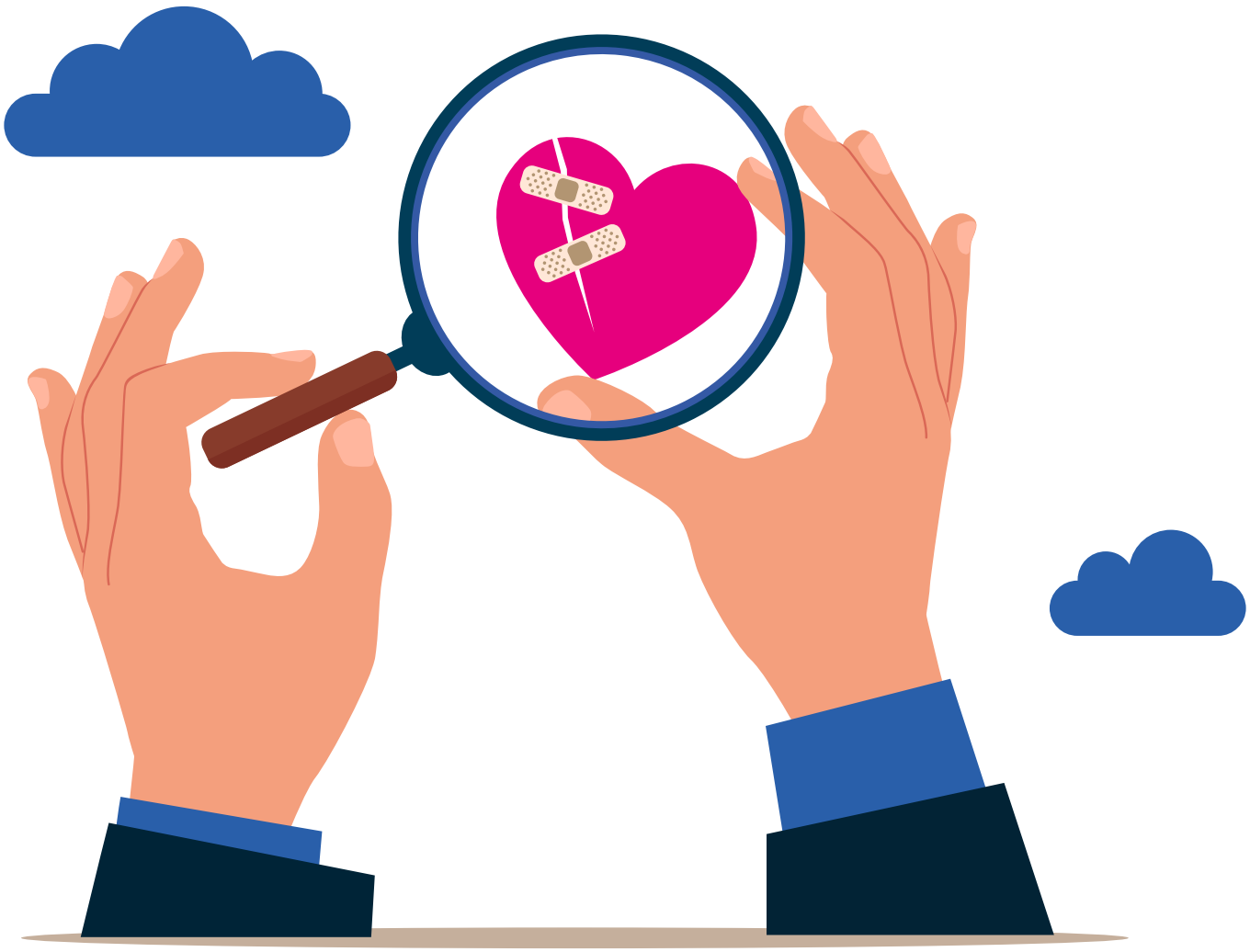
Asset tracing in divorce cases can be more straightforward than in the commercial context. The parties know a lot about each other; disclosure requirements are stringent. But

there are complications. The risk of dissipation, and the inventiveness with which it might be pursued, is often higher in disputes where the other party already knows where everything is. Nominees spring up. Work is needed to establish dates of transfer, and what has been paid versus the actual value of the thing. If a valuation is suspiciously low, who signed off on it?

Jurisdiction is important, and divorce tourism in London has had unexpected consequences. Settlement agreements have been known to be filed with the UK Land Registry and can be downloaded by anyone with the patience to figure out how the website works.

Investigators are better placed than most to advise on the privacy implications of divorce proceedings - something which clients might not think about at the start but often should. Whatever settlement is reached may become public, especially when it places a charge over assets pending a sale. In England and Wales, where corporate and property filings are both detailed and readily accessible, this can have unexpected consequences down the line.

Overall, the investigator's role in divorce proceedings is less mysterious and more analytical than widely imagined. It requires a strong understanding of how to hide an asset, the basis for challenging jurisdiction, and the rules governing disclosure. Only in rare circumstances will "doing surveillance" help to win a case, but we can usually bring some better solutions to the table.



TECHNIQUES FOR SAFEGUARDING THE FAMILY BUSINESS

Authored by: Lindsey Ogilvie (Partner) and Kirsty Ross (Director) - Turcan Connell

With almost 300,000 family businesses representing a staggering 83.9% of private businesses in Scotland, it is understandable that they are seen as the bedrock of the country's growth. As major employers, families rely upon these entities for their living, and the income generated is ploughed directly back into our economy.

Given the top 100 Scottish Family Firms generate circa £22.6 billion for the economy every year and employ over 874,000 people, Scottish family businesses can safely be described as a crucial source of growth and success for the Scottish economy across all sectors, including retail, food and drink, property and construction sectors.

You may ask, what makes family businesses so unique?

Although management dynamics play a role as they navigate relationships between the owners, family and business, the largest difference is the socio-emotional wealth that many of them have. These are the non-financial reasons for their existence.

Family businesses are likely to place their priorities within the family. When asked about long-term goals in the PwC 10th Global Family Business Survey 2021 (PwC, 2021a), continuity for future generations appeared to be particularly important.

Findings further indicated from the family firms that took part in the survey, that 82% of those said protecting the business as the most important family asset was a key aim.

In addition, 65% reported that they wanted businesses to remain in the family, and 64% wanted to ensure a legacy was created. Other common reasons included the provision of employment for the local community, raising funds to support a charity or philanthropic activities.

With continuity for future generations being one of the most prominent aims, it is important to think about how family businesses can plan for their future. The earlier you expose the next generation to the family business, the better, because it allows them to make an informed decision as to whether they want to get involved in that family business in the future. Quite often, the senior gen is surprised at the emotional attachment that the next gen has to the family business. They remember having family gatherings, pushing grandad round the factory in his wheelchair etc. Indeed, covid prompted many next gens to return to their family homes for lockdown, and as a result, got involved in the family business perhaps earlier than they may have done so.

There tends to be a few triggers, that prompt family businesses to look for help and put formal governance in place. There are of course the usual prompts - death, divorce, the lack of a successor from the family to take over the family business. These are all important, and the most successful family businesses have formal governance in place before the family is put into a state of shock and emotion, which is always a tough environment in which to operate and make important decisions.

Often a well organised family business may reach out for advice, when they have noticed that the family values instilled in their family, are not mirrored in the future partners of their kids. They see their children being influenced by these "outsiders," to make decisions which would normally not be taken and so fail to align with their own family values. This circumstance is often the catalyst for family owners to start introducing governance that will protect the family business and its future from these outside influences. These may be shareholder agreements, who and when can become an owner of a family business, perhaps putting in place pre-nups or post-nups, or policies on employing family members. These are all used as means of protecting for the future and safeguarding against some of the more common triggers highlighted.

Safeguarding – Generations – Prenups/ Post nups.

There is a general rise in those seeking advice about the protective measures which can be put in place to safeguard family business interests from a claim on separation or divorce, and death, particularly when a second marriage is involved.

While Scots law provides a decree of protection to assets acquired before marriage, and inherited assets or those gifted to a party from a third party (gifts between spouses are matrimonial property) during the marriage, that is only the case if that gift or pre-marital asset remains in the same form. In other words, if assets are sold or realised, even for sound tax planning reasons, one could have inadvertently created matrimonial property where a claim can be made. The asset which could be considered matrimonial, would be the value of that person's shareholding at the date of separation, and possibly any directors loan account. With a partnership, it would be the value in their capital account and/or any retained profit. A significant point.

Business interests by their very nature rarely remain static, they change over time. Shareholdings change hands. Business entities are restructured. It would be heart breaking for the family if one family member's separation and divorce brought the business to its knees.

A carefully worded pre or post nuptial Agreement can provide vital protection for any such transactions.

With the right knowledge of a family business, an Agreement could be crafted to ensure it supports and protects the family business succession plans, so vital for a business's successful continuance. Importantly, these agreements are binding, as long as the parties are consenting adults, and the provisions of the Agreement are lawful. It is recommended however that parties secure independent legal advice as far in advance of the wedding as possible before entering their pre-nuptial Agreement.

It is also important to note that prenups have another important benefit by protecting a business from the untimely death of a family member. For so long as a couple are married, even separated, and until either a Minute of Agreement in full and final settlement is entered into or they divorce, it is possible for a surviving spouse to claim upon the moveable estate of the deceased. Depending on whether there are children, the claim would be to ½ or 1/3 of the net moveable estate. A pre or post nuptial Agreement, can include provision to discharge the right to make this kind of claim.

If this inclusion is proven to create a difficulty and families truly view the protection of their business as the most important family asset, then careful succession planning measures are vital when safeguarding the family business for generations to come.

HO V TL:

LESSONS FOR TRUSTS CASES

Authored by: Grace Lawrence (Senior Associate) - Family Law in Partnership and a member of the Society of Trust and Estate Practitioners

Financial remedy practitioners in the HNW/UHNW space will often be instructed in cases where either their client or their client's spouse has substantial trust interests. In such cases, there is an obvious tension between traditional trust concepts (including the trustees' duties to act in the interests of the beneficiaries as a whole and to safeguard trust assets) and the desire of the English court to achieve a fair outcome as between the divorcing couple. HO v TL [2023] EWFC 215 is one such case. Amongst other issues, Mr Justice Peel had to grapple with the extent to which the Husband's interests in two family discretionary trusts were accessible and therefore "financial resources" available to him.

Summary

The Husband was 48 and the Wife was 56. The parties were married for 17 years and had 3 children. They had an international lifestyle and extremely high standard of living (multiple homes, luxury holidays, full-time staff). The couple had co-founded a hotel group in which they both worked. It owned a luxury beachfront hotel which was "at the centre of the marriage and the family". The "bedrock of the parties' wealth" and most of the original funding for the business came from the Husband's pre-marital wealth and capital injections from his family.

Mr Justice Peel concluded that the business was worth £9.59m and there were total resources of £22.44m, over £10m of which were non-marital on the Husband's side. The Wife, whose needs exceeded her sharing entitlement, received an award of £7.75m on a clean break basis.

Trusts as a "financial resource"

The case provides clarity on the application of the Charman test. In considering whether the Husband's trust interests were available "financial resources", Mr Justice Peel looked at "whether the trustee would be likely to advance the capital immediately or in the foreseeable future" (as per paragraph 13 of Charman v Charman [2005] EWCA Civ 1606).

The Husband was a beneficiary of two discretionary trusts both with wide classes of beneficiaries:

- "Trust Y" had been settled by his late father prior to the marriage and had a value of c.£2.25m. In a letter of wishes his father requested that after his death and the Husband's mother's death (which happened in 2022) the trust fund be divided into equal shares for the Husband and his brother; and
- "Trust Z" had been settled by the Husband's grandmother in 1975 and had a value of £27m. The letter of wishes earmarked certain percentages of the trust fund for individual beneficiaries, the Husband's percentage increasing after his mother's death. It also suggested very limited outright capital distributions, so that capital would be preserved for future generations.

Mr Justice Peel referred to earlier authority which emphasized the need to look at the facts realistically and referred to the practice of "judicious encouragement" arising from Thomas v Thomas [1995] 2 FLR 668. He then listed "relevant factors" to consider when determining whether the Charman test is met. By way of summary, these included:

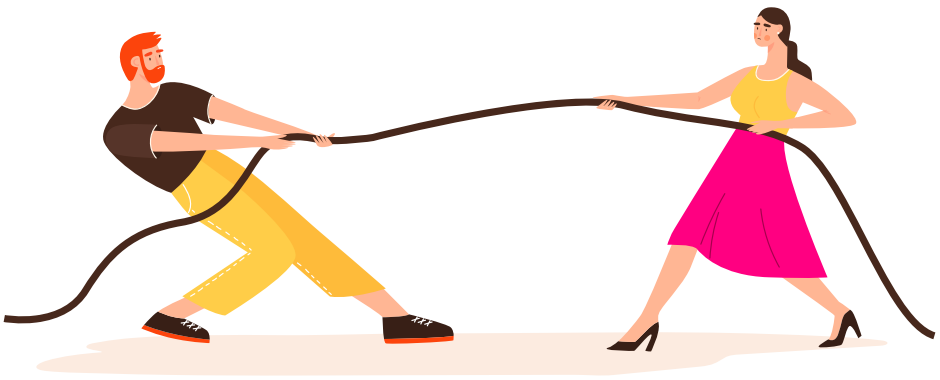
- The nature and purpose of the trusts, trust documents being "informative" along with evidence within the family as to the working of the trust/their expectations;
- Whether the spouse is the main/ principal beneficiary or one of many beneficiaries of similar standing;
- Whether distributions to a party would "appreciably damage" other beneficiaries;
- The history of distributions and loans to a party, including their frequency, purpose and terms of repayment/ security (and whether requests had been refused);
- The overall value and liquidity of the trust funds;
- Whether the spouse beneficiary has a close relationship with the trustees or protector; and
- "The extent of explanation, information and documentation provided by the trustees, and whether they declined to attend court in a witness capacity".

Applying these factors, Mr Justice Peel concluded that 50% of Trust Y and 38% of Trust Z should be "notionally allocated" to the Husband and treated as a "resource" available to him. Mr Justice Peel relied on the terms of the letters of wishes and the earmarking therein, saying that he saw "nothing exceptional in treating the funds as desired by H's father". It was relevant that liquid funds were available in the trusts, that the Husband had received loans from Trust Z of £4.45m which were generally unsecured and rarely repaid and that he had never been turned down for funds.

Lessons

There are several takeaways from this case for practitioners:

1. It is clear from Mr Justice Peel's reasoning that trust documents will often be material to outcome. Not only did the letters of wishes provide the foundation for his 'notional allocation' approach, Mr Justice Peel also referred to clause 11 of the Trust Z trust deed which authorised the trustees to disregard the interests of other beneficiaries when exercising their powers in favour of one particular beneficiary.
2. Careful thought needs to be given on both sides of a case to the involvement of the trustees. If the beneficiary spouse is arguing against the history of the trust i.e. saying distributions/loans will no longer be forthcoming, then the trustees will potentially need to give evidence to persuade the court to that effect. Mr Justice Peel commented that "attendance by the trustees as witness would have been helpful" not least to explain the inconsistent positions they had taken in correspondence (and he cited earlier authority which indicated that this would not amount to submission to the jurisdiction). As things stood, he saw no reason why he should accept their position "about non-advancement of funds to H at face value"[1].
3. It is not sufficient for the beneficiary spouse to defer to the trustees. Unless said spouse engages realistically with the question of accessibility, they may face cost consequences. Mr Justice Peel found the Husband to be "somewhat evasive and legalistic about his trust interests" and, in his subsequent costs judgment, said that "[o]rdinarily, this would justify an order for costs against him". However, taking a wider lens, the Wife was ordered to pay £100,000 of the Husband's costs largely due to her failure to negotiate reasonably.



1 Though Mr Justice Peel was in favour of trustee participation, offshore trustees will need to consider the view of their home courts. The Cayman courts, for example, have previously directed trustees not to participate in English financial proceedings, not to give indications of how they might exercise their discretion in future and not to provide further disclosure (see Re B Trust [2010] (2) CILR 416 and Re A Trust [2016] (2) CILR 416 respectively).

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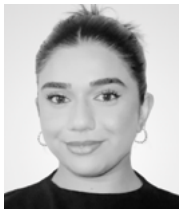

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