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HNW Divorce MAGAZINE

ISSUE 3

The perfect staycation read

INTRODUCTION

"Divorce is a declaration of independence with only two signers."

- Gerald F. Lieberman

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IMPLEMENTATION OF COURT ORDERS INVOLVING NON-PARTIES – A WARNING FROM GUERNSEY

Authored by: Julia Schaefer, Carey Olsen (Guernsey) LLP

Family practitioners are well-versed in avoiding potential pitfalls of implementing and enforcing settlements agreed in the family courts. Particular difficulties can arise where an order requires steps to be taken by non-parties resident outside the jurisdiction of the relevant court, potentially requiring unexpected further (and avoidable) litigation to give effect to such an order.

The case of A and C v PQ, RS and T Trustees Limited, [2019] GRC013 is a good example. It concerned an application to the Royal Court of Guernsey for the variation of a private pension scheme in order to provide child maintenance payments due pursuant to orders of the Family Division of the English High Court.

The judgment has considerable jurisprudential value in confirming that variation applications under the rule in Saunders v Vautier can be successful in relation to certain pension schemes, and also confirming the Guernsey law position of the meaning of "benefit" regarding such applications. It is also of great practical relevance in reminding practitioners of exercising caution when agreeing settlements requiring the acquiescence or support of non-parties, particularly foreign trustees.

Facts of the application

Pursuant to two consent orders made in the English High Court in 2014, **PQ**, a famous professional footballer, agreed to pay child maintenance in respect of two illegitimate children, born in 2007 (**A**) and 2012 (C) (the "**2014 Orders**"). The other parties to the 2014 Orders were **RS**, with whom PQ has two children of the marriage and a further step-child, and the mothers of A and C (**B** and **D**, acting as tuteurs).

The maintenance payments were secured against the assets of the PQ Trust, a Guernsey-law Employer Financed Retirement Benefit Plan. The trustees of the **PQ Trust**, T Trustees Limited ("**T Trustees**") were, crucially, not a party to the 2014 Orders or the High Court proceedings.

PQ and RS had agreed in the 2014 Orders to ensure the creation of two equal (50%) sub-funds of half each of the value of the PQ Trust for the benefit of A and C.

An irrevocable undertaking had also been given by PQ and RS to consent to the Royal Court of Guernsey's order in respect of putting these arrangements into effect, and the parties to the 2014 Orders had agreed to co-operate to ensure the terms of the 2014 Orders could be effectively implemented.

In the event, PQ failed to comply with the 2014 Orders, the Guernsey judge noting that he had "consistently breached" their terms. He did not make the required maintenance payments, therefore accruing liabilities to A and C of around £3.4m. He also did not ask T Trustees to create a sub-fund of the PQ Trust for A and C, by which the maintenance payments would have been secured.

A and C were therefore forced to make an application to the Royal Court under s. 57 of the Trusts (Guernsey) Law, 2007 (the "**Trusts Law**") for a variation of the terms of the PQ Trust in order to give effect to the 2014 Orders (the "**Application**").

Legal issues arising

The rule in Saunders v Vautier provides that where all of the beneficiaries of a trust are of adult age with full legal competence, they may require the trustee to vary or terminate the trust.

PQ and RS, the only adult beneficiaries of the trust, had consented to the variation to the PQ Trust by way of the irrevocable undertakings given in the 2014 Orders. This argument was ultimately accepted by the Court[1], however the decision on whether a variation was possible was not altogether straightforward, owing to the terms of the PQ Trust.

Because the class of contingent beneficiaries of the PQ Trust also included any child of PQ living at his death, and any other person who in the opinion of the trustees is dependent on PQ for the ordinary necessaries of life on his death. Consideration needed to be given, therefore, to these contingent beneficiaries before any variation.

In Guernsey, section 57 of the Trusts Law states the Royal Court may approve any "arrangement" which varies or revokes the terms of a trust. This is curbed by section 57(2) of the Trusts Law which provides that the Royal Court shall not approve an arrangement on behalf of a minor, unborn or unascertained beneficiary unless the arrangement appears to be for their "benefit".

The Application clearly concerned an 'arrangement'; the focus of the Court's consideration was therefore on whether the arrangement could be said to be for the 'benefit' of the minor, unborn and unascertained beneficiaries, other than A and C.

On the facts before it, the Court noted that a separate sub-fund at a value of 10% of the PQ Trust assets would be carved out for the minor, unborn and unascertained beneficiaries. This had not been provided for under the 2014 Orders, which envisaged A and C enjoying the entire spoils of the PQ Trust. Other potential benefits were that the properties occupied by A and C and their mothers pursuant to the 2014 Orders would revert to the PQ Trust upon their entitlement to occupy them ceasing, at that point reverting to the benefit of PQ and any other beneficiaries.

Setting aside a specific amount of the PQ Trust for the benefit of the minor, unborn and unascertained beneficiaries was considered by the Court to be "consistent" with the "helpful" Jersey case of In the Matter of the Representation of A Trust Limited [2018] JRC 021.

Regarding any detriment to PQ's other children resulting from the proposed variation, the Court noted the distinct absence of any evidence that there would be any prejudice, other than as stated by way of "bare assertions" made in PQ's affidavits in the proceedings which the judge described "as being strong on rhetoric, but short on fact". Those affidavits had to be contrasted with the "clear and detailed" affidavits provided by B and D in support of the Application, describing in detail the evidence available in support of PQ's wealth as substantiated in the English family proceedings, and the prejudice caused to A and C if the Application were unsuccessful.

Relevantly, however, the judgment serves as a reminder to practitioners to be wary of agreeing any orders which require steps to be taken by trustees and others not before the Court. Even where reassurance is provided by these non-parties, directly or through parties to the proceedings, these will ultimately be meaningless unless separate enforcement action is taken in the foreign jurisdiction. Trustees in particular will often be unlikely to have more than a discretion to act in a certain manner, and in Guernsey will also be bound to act as "bon pere de famille" when exercising that discretion, which will require them to have regard to the needs of all of the beneficiaries, and all of the circumstances. Wherever possible, therefore, trustees should be joined to the proceedings in order to safeguard the implementation of anything that is agreed before the Court.

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[1]Following the Royal Court of Jersey in Mubarak v Mubarak, the Craven Trust Company Limited, S Mubarak, N Mubarak and Renouf [2008] JLR 430.

[2]Saunders v Vautier [1841] Cr & Ph 240.

[3]Specifically Buschau v Rogers Communications Inc [2006] 1 SCR 973 and Thorpe v Revenue and Customs Commissioners [2010] EWCA Civ 339.

On the back of these facts the Royal Court accepted, apparently without hesitation, its jurisdiction to vary the PQ Trust pursuant to the rule in Saunders v Vautier[2]. It did so after considering cases from other common law jurisdictions, which suggest that the application of the Saunders v Vautier rule to pension schemes is highly fact-specific and not altogether straight forward[3].

It is notable also that the Royal Court appeared to place considerable reliance on the undertakings given by PQ and RS in the English proceedings, which it had been argued debarred them from now opposing the Application. It is unknown whether absent those undertakings the Application would have succeeded.

FIREWALLS AND FAMILIES:

ANALYSIS OF RECENT CAYMAN CASE LAW AND LEGISLATIVE CHANGES TO CAYMAN'S FIREWALL PROVISIONS IN RELATION TO FOREIGN DIVORCES WITH A CAYMAN CONNECTION.

Authored by: Robert Lindley and Wesley O'Brien, Conyers Dill & Pearman (Cayman Islands and British Virgin Islands)

Matrimonial disputes can be a trying and traumatic state of affairs for all involved, including trustees. Where a family trust is involved, the more contentious of marital disputes can quickly draw trustees into the ring for a bout over rights to information regarding, or even to assets held in, the trust. If foreign matrimonial proceedings seek to encroach on the administration of a Cayman Islands ("Cayman") trust, the trustee is protected in many respects by what are known as the "firewall provisions" of the Trusts Law (2020 Revision) ("Trusts Law"). Judgments delivered by the Grand Court of the Cayman Islands ("Cayman Court") in 2016 & 2019 and recent legislative reform have affirmed the operation and robustness of the firewall provisions and reinforced the need for a trustee of a Cayman trust under attack in foreign matrimonial proceedings to ensure that its response is, at all times, in the best interests of the trust.

Extension of the "firewall" provisions

Cayman's firewall legislation in Sections 90-93 of the Trusts Law confirms that a Cayman trust can only be varied in accordance with Cayman law and only by a Cayman court, and any foreign order would not be enforceable against the trustee, the beneficiaries of the trust or the trust fund. Prior to its recent reform, the Trusts Law's firewall legislation protected Cayman trusts from being attacked because a foreign law conferred a party with an interest in the trust's assets by virtue of their personal relationship with the settlor. Because the provision only made reference to a personl relationship with the settlor, questions arose as to the protection afforded to the settlor's descendants once the settlor was no longer living. In order to avoid any technical difficulties in this regard, the relevant provision (being sub-section 91(b)) was amended in 2019 by extending the reference to a "personal relationship to the settlor" to include a personal relationship to any beneficiary including a discretionary beneficiary. The legislative amendment has enhanced the protection offered by the "firewall" so that it is clearly available to all beneficiaries in countering any potential claims against a trust's assets such as financial awards in foreign divorce proceedings.

The Cayman Court's Approach

The cases discussed in this article are helpful affirmations of the approach previously taken by the Cayman Court in RBS Coutts (Cayman) Ltd -v- W and Others (known as "Re B Trust"), which confirms that an order of the English High Court is unenforceable in Cayman, whether or not the trustee submits to the jurisdiction because of the terms of the firewall legislation. In that case, the Cayman Court held that a trustee must "jealously guard" its independence and noted that it would be unwise and inappropriate for a trustee to allow itself to be placed in a situation where its trust obligations come into conflict with an obligation to obey an order of a foreign court.

In the Matter of the A Trust

This 2016 case concerned a Cayman STAR Trust (the "Trust") which was the subject of proceedings in Cayman commenced by the trustee. In establishing the Trust, its settlor had executed various Letters of Wishes, which set out his very detailed views about who should and should not benefit from the Trust ,how the assets should be applied and grow from generation to generation, and to also provide support for specified charitable objects.

The settlor and his wife, N, both of whom were excluded from the Trust, subsequently became involved in divorce proceedings before the English High Court ("English Proceedings"). The main asset of the Trust was shares in a Cayman company, which itself owned shares in other companies holding legal title to very substantial property assets in the UK. In the course of the English Proceedings, N was seeking orders to vary the Trust and set aside her exclusion as a beneficiary of the Trust so that she might have an interest in it. Flowing from that, requests were made of the Cayman trustee to release Trust information for the purposes of the English Proceedings.

The trustee determined that it was not in the best interests of the beneficiaries to submit to the jurisdiction of the English High Court or to disclose confidential information to the parties to the English Proceedings. Its concern was that, in doing so, it would confer, on the English High Court, an enforceable

[1]Following the Royal Court of Jersey in Mubarak v Mubarak, the Craven Trust Company Limited, S Mubarak, N Mubarak and Renouf [2008] JLR 430.
[2]Saunders v Vautier [1841] Cr & Ph 240.
[3]Specifically Buschau v Rogers Communications Inc [2006] 1 SCR 973 and Thorpe v Revenue and Customs Commissioners [2010] EWCA Civ 339.

power to act to the detriment of the beneficiaries and to the benefit, instead, of either the settlor or N. However, recognising that it was an important step for a professional trustee to refuse to submit to the jurisdiction of a foreign court, the trustee applied to the Cayman Court for Beddoe-type directions . The trustee's position was that any variation of the Trust's terms or any challenge to N's exclusion from the settlement should only be made in accordance with Cayman law by the Cayman Court and as such further disclosure was not necessary.

The Cayman Court confirmed:

- The claims by N, to vary the trust and to set aside her exclusion using provisions in a foreign statute, were, in essence, third party claims, and it was the trustee's duty to protect and preserve the Trust from such claims.
- Pursuant to Cayman's firewall legislation, any order made by the English High Court against the trustee would not be enforceable against the trustee, the beneficiaries of the trust or the trust fund.
- N had already been given the trust deed and all supplemental instruments, and full financial information for the underlying companies in the structure. The Court found it was reasonable to conclude that N had sufficient information to understand the terms of the trust and its finances, and that for the trustee to submit to the jurisdiction of the English High Court or to provide further information was not in the best interests of the beneficiaries, in all the circumstances.

In the Matter of HSBC International Trustee Limited v Tan Poh Lee et al[4]

This 2019 case relates to a Cayman trustee's application for Beddoe-type relief in respect of proceedings issued in Singapore by one of the beneficiaries of a Cayman trust (the "Trust"), seeking an order that the Trust be terminated (the "Singapore Proceedings").

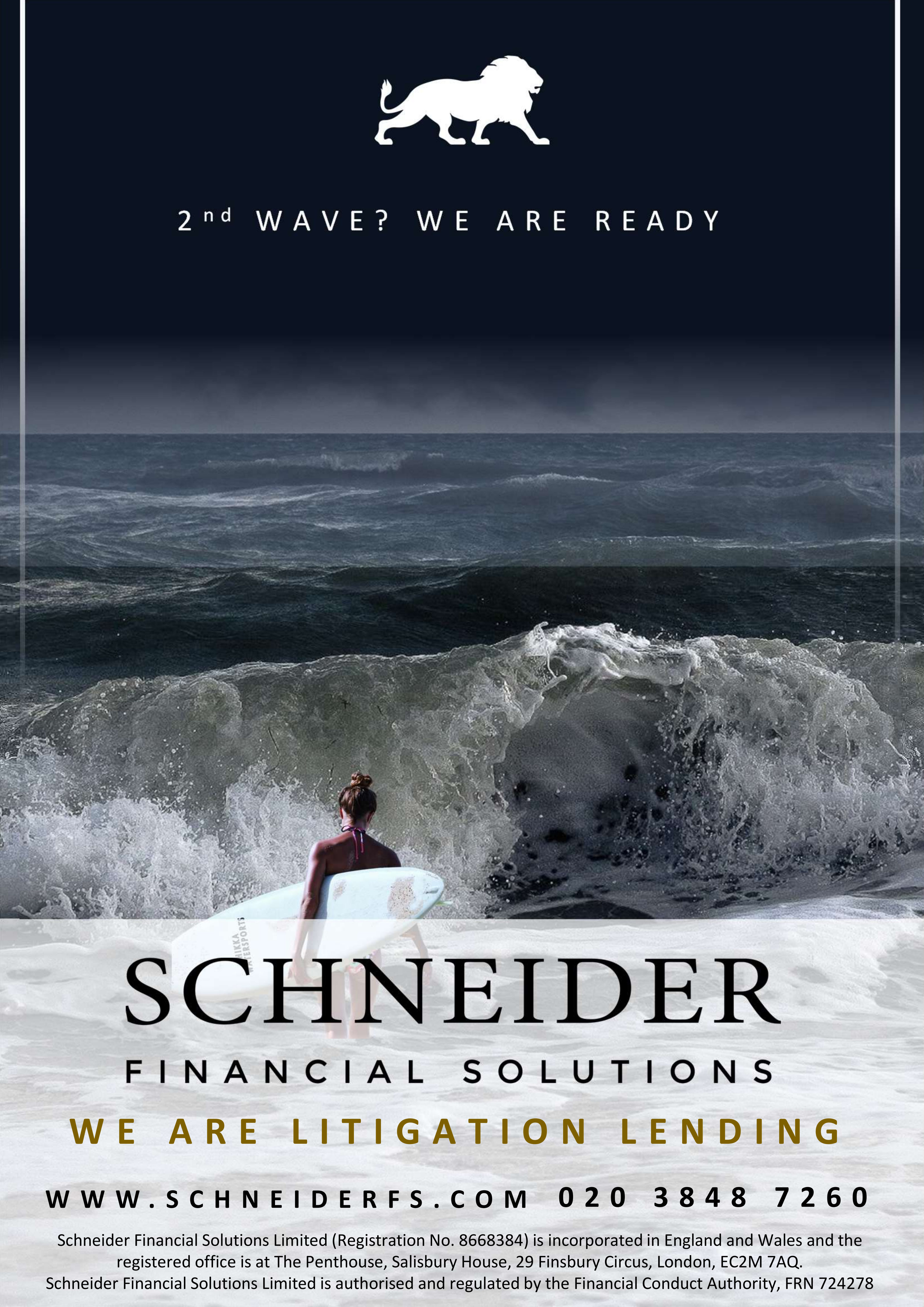
The Cayman Court affirmed that the basis for seeking Beddoe relief was in accordance with the firewall provisions[5] whereby all questions arising in relation to a Cayman law trust are to be determined in accordance with Cayman law and without reference to the laws of any other jurisdiction. Further, it was held that:

- the Cayman Court had exclusive jurisdiction in connection with all such questions relating to the Trust on the basis of the both section 90 of the Trusts Law and the provisions of the trust deed.
- any orders made by the Singapore Court which did not result from the application of Cayman law should not be recognised or enforced for reasons of public policy which runs contrary to any attempt by a foreign court to effectively administer a Cayman trust without applying Cayman law.
- in relation to the trustee seeking a declaration that a Singapore court order will not be enforced, recognised or give rise to any estoppel in Cayman, the judge referred to the cases of Re B Trust and the A Trust (as referred to above) and considered that although those decisions did not fully consider the question of a mandatory need for the Cayman Court to deal with questions concerning a Cayman trust, the judge accepted that it is not clear that the legal position is that a foreign court cannot under any circumstances, even applying Cayman law, deal with such issues..
- the Cayman Courts are willing to act as an auxiliary to the Singapore Court for the purposes of determining any questions relating to, inter alia, the administration of the Trust so as to ensure these questions would be dealt with in accordance with Cayman law.

Conclusion

Divorcing families and related cross-border disputes over asset-protection structures, including Cayman trusts, can place trustees in a challenging, and unenviable, position. However, given the robustness of Cayman's Trusts Law, and the decisions of the Cayman Court, there is a clear set of rules as to how trustees should approach a foreign challenge to a Cayman trust. While these rules may not assist in tempering the trauma of matrimonial proceedings, they will, nonetheless, give the parties clarity to their rights and standing in relation to any such challenge, and be of great support to the trustee in its decision-making processes.

[5] Specifically, section 90 of the Trusts Law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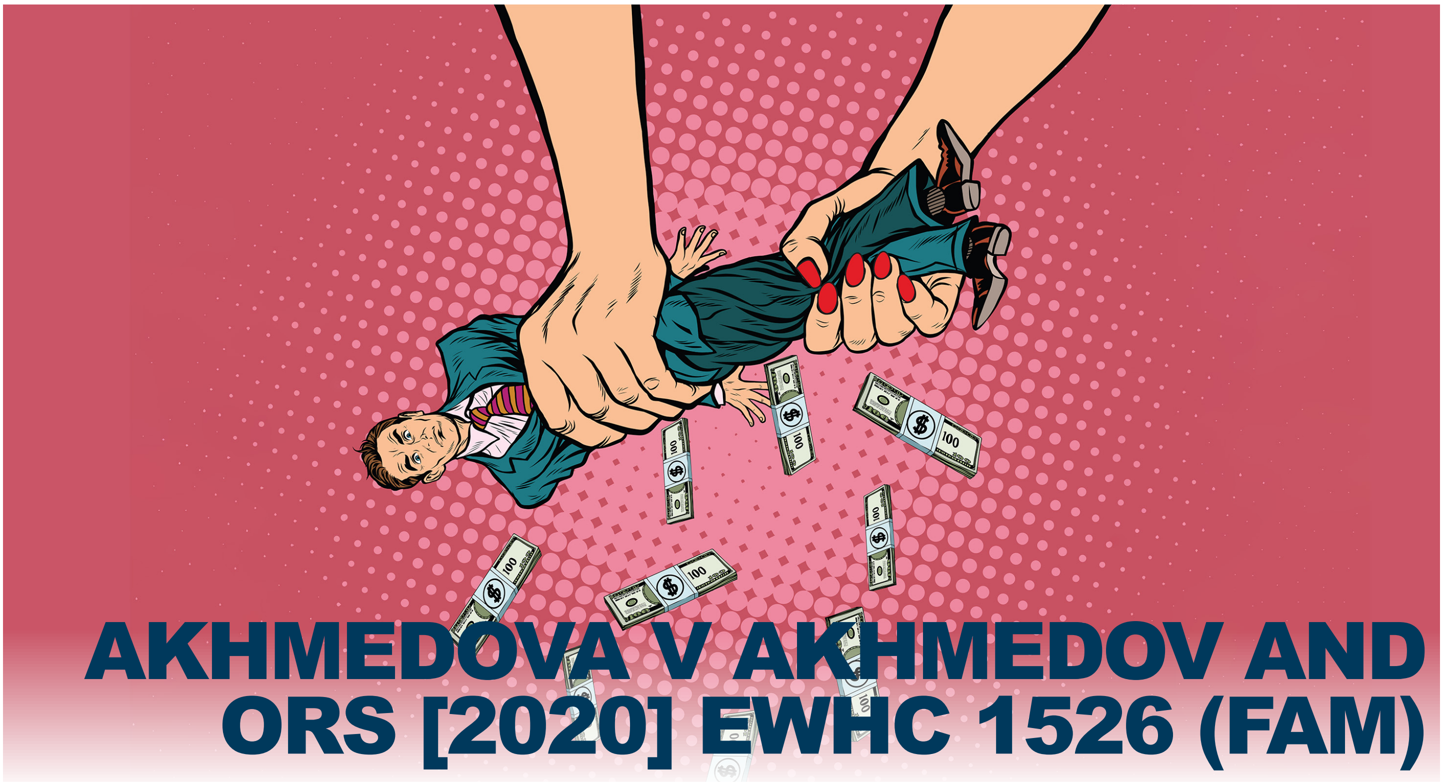
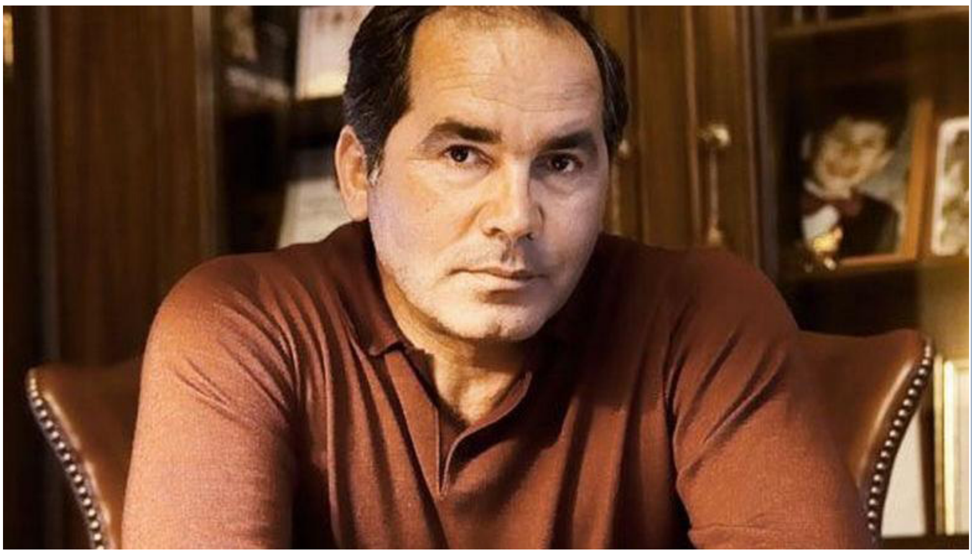


AKHMEDOVA V AKHMEDOV AND ORS [2020] EWHC 1526 (FAM)

Authored by: Rachel Turner and Andrew McLeod, PCB Litigation LLP (act for Ms Akhmedova)

The value and importance of litigation funding, described by the Court of Appeal as "an accepted and judicially sanctioned activity perceived to be in the public interest", has received a further endorsement by the recent judgment of the Family Division of the High Court in Akhmedova v Akhmedov and ors [2020] EWHC 1526 (Fam). It also represents a clear signal that speculative challenges to legitimate funding arrangements will not be entertained. Whilst the judgment is plainly relevant to family proceedings, it also has wider application to litigation financing across the board.

The latest judgment in these proceedings arises out of Ms Akhmedova's ongoing attempts to enforce a financial award of over £450 million against her ex-husband, Farkhad Akhmedov ("FA"), awarded to her by Mr Justice Haddon-Cave (as he then was) in December 2016. It is well known by now that FA has refused to pay a penny of the award voluntarily, and that he has been engaged in "an elaborate and contumacious campaign to evade and frustrate the enforcement of the judgment debt". Ms Akhmedova's enforcement proceedings now include claims against the couple's son, Temur Akhmedov ("TA"), in which she says that he received substantial assets from FA, as part of FA's schemes to put those assets beyond her reach.



In response to the proceedings now brought against him, TA filed a counterclaim for an injunction seeking to restrain Ms Akhmedova from instructing any solicitors funded by her agreement with Burford Capital. TA argued that the funding agreement was unlawful on the grounds that:

i. such agreements were contrary to public policy against the champertous maintenance of litigation; and

ii. he had also raised a novel and important issue of public policy in the conduct of family proceedings, where third parties should not "traffic" in the outcome of the spoils of matrimonial litigation.

Ms Akhmedov applied to strike out that counterclaim and, following a 4-day hearing in May, Mrs Justice Knowles granted Ms Akhmedov's application. The court found that Temur had no standing to bring the claim and no grounds in fact and law for asserting that the arrangements were unlawful or contrary to public policy.

The judgment contains a useful summary of principles for litigation funding, including:

- **Compliance with Code of Conduct:** The judgment represents a significant endorsement of the Code of Conduct produced by the Association of Litigation Funders ("ALF", of which Ms Akhmedov's funder Burford are founding members). The Code of Conduct has already received the endorsement of the Civil Justice Council, and the Court of Appeal in Excalibur Ventures LLC v Texas Keystone Inc [2016] EWCA Civ 1144). Mrs Justice Knowles concluded: "It is thus difficult to envisage how litigation funding conducted by a responsible funder adhering to the Code of Conduct could be construed to be illegal and offensive champerty or might be held to corrupt justice."

- **No exception for family proceedings:** Family proceedings are not inherently different to other proceedings. The judgment referred to other first instance decisions in the Family Division, recognising that funding can be a "necessary and invaluable service in the right case". TA invited the court to draw an analogy between litigation funding and conditional fee agreements (which are expressly not permitted in family proceedings by statute) but Mrs Justice Knowles refused to do so on the basis that such argument was "misplaced".

- **Rights of control:** A funder of litigation is not forbidden from having rights of control, and public policy would only intervene to prohibit a funder from exercising rights of control in a manner which would be likely to undermine or corrupt the process of justice, such as if (as stated in Davey v Money) that control would allow the funder "to suppress evidence, influence witnesses, or procure an improper settlement". In fact, it promoted the administration of justice for responsible funders to be involved in rigorous analysis and review of the litigation which they fund.

- **Settlement:** This is particularly the case in relation to settlement. Even if Mrs Akhmedova were required to obtain Burford's consent before settling her case, that would appear to be a perfectly proper protection for Burford as funder and would not tend to corrupt justice.

- **Value irrelevant:** The fact there is a significant value of the financial investment, or any profit obtained from it, has no bearing on whether a funding arrangement is champertous.

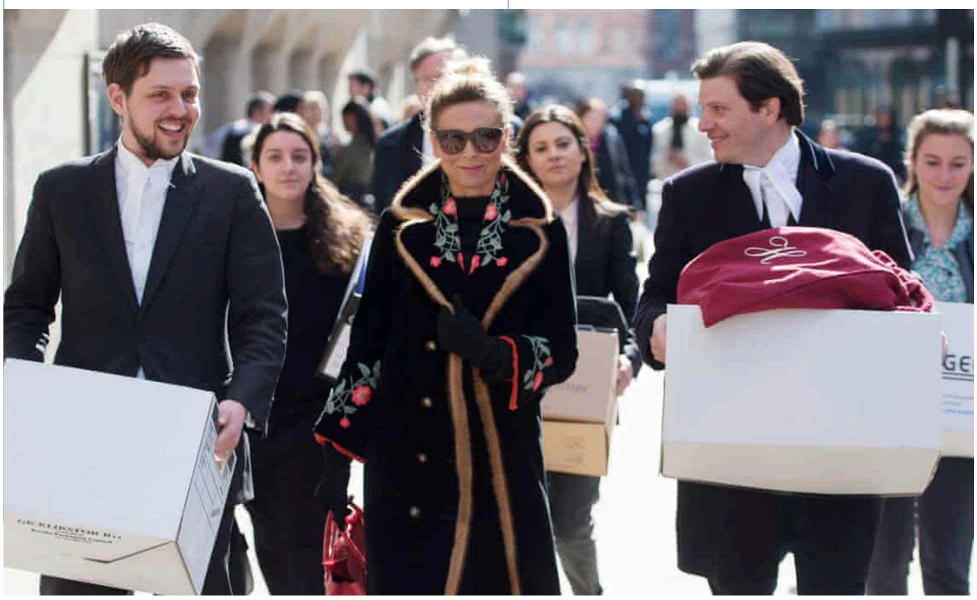
The judgment also contains useful guidance that those wishing to challenge litigation funding agreements should heed:

- Knowles J stated that it was necessary for TA "to show some prejudice or injustice to him arising from those funding arrangements or that the funding arrangement may be champertous". However, given he had failed to do so, and in the context of a litigation funder adhering the ALF's Code of Conduct, "[i]n my view, he cannot sensibly maintain, in the light of the Court of Appeal decision in Excalibur, that the litigation funding in this case is prima facie champertous."

- It is well-established that the court will not stay a bona fide action even if it were to be supported by a champertous funding agreement. In circumstances where TA had pleaded no cause of action, and had also failed in oral argument to demonstrate that there were any legally recognisable grounds to challenge the legality of those arrangements, TA had no standing to seek relief in any event.

- Without such good reason, a party cannot be granted disclosure of the terms of the funding agreement, in order to investigate whether it is in fact champertous: "Ignorance as to the precise terms of the Wife's funding arrangements does not, of itself, justify further enquiry or disclose reasonable grounds for bringing the application particularly in circumstances where the Wife's litigation funder adheres to the ALF's Code of Conduct."

Finally, the judgment recognised that champerty was "increasingly recondite area of law", and "is not a developing area of jurisprudence which requires detailed consideration by this court". Unsurprisingly, however, in this heavily fought litigation TA is seeking permission to appeal from the Court of Appeal.



TIPS FOR FAMILY LAWYERS DEALING WITH SPANISH PROPERTY DURING DIVORCE PROCEEDINGS.

Authored by: Alvaro Aznar and Olalla Garcia Arrecidao, Child & Child

It is becoming more and more frequent for family practitioners in the UK to find that their clients own a holiday home overseas. Or to come across an international couple that bought property abroad before relocating to the UK. The approach that the English courts have when dealing with property is far more practical than in civil law systems, such as Spain, and for the practitioner it can feel like trying to square the circle.

In Spain, as in most countries of continental Europe, there is no marriage without matrimonial property regime. These regimes are a set a rules which govern the effect that the marriage will have in the ownership and administration of property during the marriage, and they regulate the distribution of such property upon the dissolution of the marriage. Spanish judges have no option but to allocate the property under the terms of the regime applicable, and cannot exercise any discretion in this respect – judicial discretion is only possible when it comes to maintenance, where the range of orders available are limited to periodical payments and, exceptionally, lump sums. Fairness is irrelevant, and the will of the parties when they decided to elect a particular regime is what prevails.

If you are a solicitor dealing with divorce and financial relief proceedings in which Spanish property is involved, you should consider the following issues:

1. An English court order will not be automatically enforceable in Spain under any EU Regulation save for those provisions expressly relating to maintenance.

   If you need to enforce the order because the payer does not proceed voluntarily, you will have to resort to Spanish exequatur proceedings, which can prove a lengthy and costly exercise. Although the defences available in exequatur proceedings are limited, the payer may succeed if the order has not been carefully drafted and contains provisions that are alien to the Spanish system – such as an order of transfer to the payee of a property fully owned by the payer.

2. You should be careful with the wording of the order and use the assistance of a Spanish qualified lawyer. The order should include detailed description of the Land Registry entries of any relevant property, and the entries should preferably be annexed to the order. Simply including the property address may be confusing and inefficient - it is not unusual for Spanish local authorities to change the name of a street. Only in 2017 the Town Hall of Madrid approved the renaming of 52 streets, and if your client had a property in Calle de los Héroes del Alcázar, he has a property now in Calle de la Filósofa Simone Weil. If a property is to be sold or transferred from one spouse to the other, you should consider in detail the enforceability of such an

order and weigh any alternatives, such as a lump sum, a mortgage or an embargo.

3. There are costs involved in any transfer of property. Notarios and Land Registrars will charge for the execution and registration of the Deed of Transfer. In addition, Stamp Duty (Actos jurídicos documentados) will be payable in a range from 0.5% to 2% depending on the Autonomous Community where the property is located. Capital Gains Tax may also be due if the property has increased in value since it was purchased.

   These taxes will need to be paid prior to the registration of the Deed. In addition, the order, Decree Absolute and other documents will need to be translated into Spanish and legalised with the Apostille of the Hague. The judge should also be asked to complete any necessary Annexes under the Regulations to speed up the recognition and enforcement of the different provisions of the order.

4. If there is a mortgage on any relevant property, you should discuss with the lender prior to finalising the order if they will agree to transfer the mortgage to only one of the spouses. Bear in mind that Spanish banks are notorious for offering less advantageous conditions for non-residents.

5. Carry out a search at the Land Registry. This is necessary to ascertain if there are any charges and encumbrances on the property.

6. You will need cooperation from the other spouse. Both spouses, or their legal representatives (using a power of attorney in Spanish form), will have to sign a Deed of Transfer before a Notario. If you anticipate a lack of cooperation on the other side you should try to seek different alternatives, bearing in mind that undertakings are unknown and unenforceable in Spain

Word of advice: beat the clock and instruct a lawyer that can assist you with the Spanish formalities at the earliest stage possible – the enforcement stage is the eleventh hour!

HOW THE CHANGES TO CGT ON PROPERTY TRANSACTIONS FROM 6 APRIL 2020 MIGHT IMPACT SEPARATING OR DIVORCING COUPLES

Authored by: Lucy Greenwood, The International Family Law Group LLP

Despite many significant fiscal measures which the Government is introducing owing to Covid-19, there is no change to the new CGT rules which had already been announced and remain due to be introduced on 6 April 2020.

We look in general terms at the impact the changes to capital gains tax (CGT) on property transactions might have on separating or divorcing couples.

We also reference some of the unforeseen implications, the timing of the introduction of these new tax rules has brought, owing to Covid-19.

For the purposes of this article wherever divorce, spouses or marriage are referenced, these references are interchangeable with dissolution, civil partners and civil partnerships.

The usual approach to CGT on the transfer of family assets

Generally, the transfer of assets between spouses or civil partners does not create either a taxable gain or loss, although the party who receives the property takes over the original cost history of the person who is passing the asset to them. This means the recipient spouse/partner becomes liable for the CGT, but only when they eventually dispose of the asset. The couple also benefit from their individual annual CGT exemption (£12,000 for 2019/20) and be responsible for their own tax returns for chargeable gains.

These rules continue during the 'tax year of permanent separation' so there can be advantages of making inter spouse/civil partner transfers during this period even immediately after permanent separation.

However, the method of determining the date of permanent separation and hence in which tax year that date falls is ambiguous. In effect it can sometimes be the date from when the couple deem/decide their separation to be 'permanent'. Is this when one spouse/ civil partner announces to the other that they want to separate? Is it when they separate physically from their shared home? (Many couples who plan to separate, live together for a long time before they divorce.) Or is it perhaps only once the divorce/dissolution petition is issued?

It is most tax efficient for separating and divorcing married couples'/ civil partners' permanent date of separation to be on or as soon after 6 April (the start of the new tax year) as possible as that then gives them until the following April to transfer assets without creating either a taxable gain or loss. Given this, it can be important that advice is sought from a specialist family lawyer, accountant or tax specialist to discuss the impact of a client's possible date of permanent separation on their particular circumstances.

CGT and The Marital / Civil Partnership Home

The CGT changes proposed for the marital/civil partnership home are potentially hugely significant for separating, divorcing couples or those dissolving civil partnerships.

The marital/civil partnership home is usually exempt from CGT upon divorce / dissolution. However, when one of the parties leave the property, Final Period Exemption Relief is available and currently provides exemption from CGT **for 18 months** after he or she vacate the property. **From 6 April 2020 this period is to reduce to just 9 months.** (It might be possible to extend this period if, for example, the family have only vacated the marital/civil partnership home owing to a relocation for work abroad.)

Currently, if a couple both move out of the marital/civil partnership home to let the property, they can qualify for Lettings Relief, which is up to £40,000 each (£80,000 for a couple). **This relief currently has no time limit from the date they moved out, but from 6 April 2020 this too will only apply to a period of 9 months after the spouses/ civil partners both left their family home.** (It is be possible to extend this period if one spouse remains in occupation with a tenant.)

When is CGT on a property transaction due for payment to HMRC?

Currently it can be possible to defer CGT payments for up to 21 months after exchange of contracts dependent upon the date of exchange. However, **from 6 April 2020 the due**

date for payment of CGT will be just 30 days from completion of the property transaction.

Failure to pay within 30 days of completion will result in HMRC imposing interest and potential penalties.

Examples of how the proposed changes to CGT on Property Transactions from 6 April 2020 might impact on couples who are separating and divorcing

- The proposed changes do not affect couples who are both still occupying and only own one property (their family home)
- Upon separation, it is usual for one of the spouses/civil partners to leave the former family home and for the parties to only then talk about whether the family home should be sold or transferred. Many couples do not want to commence divorce proceedings or finalise their long-term financial arrangements immediately after separation and it is not uncommon for couples to wait several months or even years before they start formal divorce proceedings (if applicable). It can also take longer than 9 months to reach a financial settlement in family proceedings, particularly if the breakdown and resulting arrangements require the matter to be assisted with by a court process. The proposed reduction to 9 months for the qualifying period for Final Period Exemption Relief is therefore likely to impact a significant number of separating families
- A number of separating couples might initially think their priority is to transfer any potentially chargeable property before 5 April. However, from a family law perspective huge care must also be taken if this is before any final financial settlement pursuant to any separation or divorce is agreed or ordered
- The proposed change to paying any CGT due on a property transaction within 30 days of completion will also need to be factored into any financial negotiations pursuant to separation; particularly where there might be liquidity issues for the party paying the CGT, if not from net proceeds. The scope for refinancing or awaiting the maturity of certain other investments to pay the tax bill will be more limited
- It will be increasingly important to calculate CGT as precisely as possible prior to concluding any financial settlement. (In family matters this work is commonly completed prior to settlement anyway as net values are adopted for negotiations.) However, it's still important to allow enough time to prepare the relevant CGT calculation. Costs of renovation works can offset some CGT (but to calculate this, all receipts for such works need collating). The separating couples' individual chargeable gains will also need to be considered
- Indemnities and undertakings might also be needed in family financial orders, to ensure the party paying the CGT pays it within the 30-day period (or otherwise remains solely liable between the spouses/civil partners for any subsequent penalties by HMRC)
- These proposed new rules might also affect decisions about vacating, selling or letting properties the couple own. Where they own more than one property, they might even adjust their thinking about which properties they wish to retain in any settlement.

How Covid-19 might impact those who have been rushing to transfer or sell property before 5 April 2020 owing to these changes to CGT

Some couples might have found that their transaction has come to a halt, for example owing to:

A. The restrictions placed on removal companies and moving possessions between properties

B. Those in their chain losing funds through the sharp decline in the stock market or adverse currency fluctuations; or

C. Mortgage companies no longer feeling confident about property valuations when assessing the mortgage ability of the purchaser or recipient of the transfer

For others, who have factored in the transfers or sales as part of an overall financial settlement upon separation, divorce or dissolution, there might also be renewed concern about the fairness of the overall agreement. If you have such concerns, please contact iFLG.

COVID-19 might also now make it even harder for couples to transfer or sell potentially chargeable property within the year of permanent separation.

Other tax issues affecting couples

There are other aspects of CGT upon relationship breakdown affecting second properties, cars and other assets, not covered here. iFLG publishes an annual a guide to taxation on marriage, separation, divorce and dissolution It can be found here.

PRESERVING MULTI-GENERATIONAL FAMILY WEALTH ON DEATH AND DIVORCE

Authored by: Jordan Williams, Artorius & Abby Buckland, Kingsley Napley

Families are increasingly concerned about succession and preserving family wealth across multi-generations. Integral to this is designing and implementing estate planning measures to provide for, and benefit, their children and future generations. The irony is that in seeking to support their children and to protect, preserve and ensure the safe succession of their wealth to the next generation, parents may well be putting a significant part of the family wealth at risk, should their adult child get divorced in the future.

Jordan Williams, wealth manager at Artorius, and Abby Buckland, Senior Associate in the family and divorce team at Kingsley Napley, believe that a collaborative approach at an early stage is necessary. In this article, they share some of the practical ways in which family wealth can be preserved in the event of divorce or death.

Time must be taken to discuss what is important to a particular individual/family today, tomorrow and for future generations. Good wealth managers work with clients and their advisors, reviewing their financial situation to ensure their affairs are appropriate and providing guidance and assistance to address any areas of need.

The pace of planning for succession and providing for the next generation has undoubtedly accelerated for many families in recent months with the outbreak of the global COVID-19 pandemic. The speed, surprise and severity of the coronavirus pandemic has caused untold hurt, hardship and loss for many. One direct consequence of its devastation has been the growing desire of many families to review their financial affairs, ensuring they are fit for purpose, with appropriate succession plans in place that can be implemented in case of death. Matters that have often been overlooked, or placed to the bottom of the pile, which have nothing to do with directly growing wealth, but are absolutely key to protecting and preserving wealth. These include IHT & Estate Planning, Life Insurance, Wills and Lasting Powers of Attorneys, which are now rightly at the forefront of discussions and at the top of many families' agendas.

Measures to protect family wealth in the event of divorce

However, in devising and seeking to implement such succession and estate planning measures comes the realisation for many parents that their children will stand to receive significant amounts of wealth, and the resulting concern about what effect a divorce could have on this wealth.

Whether parents are making lifetime gifts to their children, providing capital for a child's business venture, or simply naming them as beneficiaries to their estate, the end result is that a significant part of the family wealth, which the parents have conceivably worked hard to generate, is now out of their control and exposed to potential challenge.

Divorce is not what any parent wishes for their children, but the number of parents raising the issue and seeking advice as to what measures can be taken to limit this risk is growing rapidly. Rightly, it is a subject which should be addressed when reviewing a family's overall wealth management strategy and is integral to maintaining a sustainable wealth plan.

There are measures which can be taken, and key to a successful outcome is unquestionably having joined up advice between the family's wealth manager, who is fully aware of the family's overall wealth position and family dynamic, and expert matrimonial lawyers, who in collaboration, can guide the family on what actions can be taken, by whom, and when?

There are a number of proactive steps that can be taken to help preserve wealth intended for immediate family, in the event of a divorce later down the line.

Prenuptial agreements

Prenuptial agreements ("pre-nups") are often used to protect family wealth and any contributions parents have made, or intend to make, to their children. If a parent wants to make a gift, transfer properties or assets, or leave inheritance to an adult child (including as part of early estate planning measures), but protect them from division in the event of a future divorce, a prenuptial agreement is essential. Some parents make it a condition of a gift or advance that such an agreement is entered into.

Whilst currently there is no act of Parliament in England and Wales making these agreements binding, in practice they will be enforced so long as they are freely entered into by both parties with a full appreciation of its implications and, importantly, the agreement does not lead to an outcome which leaves one party in real financial need.

There has been a steady rise over the last 10 years in those seeking to have a pre-nup in place. They are much more common than they were a decade ago and increasingly, clients are looking to prepare pre-nups to give them more certainty about their financial rights and obligations if the marriage breaks down and also to tackle financial, tax and succession planning.

A pre-nup needs to be approached

carefully and sensitively; there is a distinct lack of romance in contemplating a marriage breakdown before (or shortly after) a wedding but looking ahead is essential for families who are concerned with succession planning and preserving family wealth. Very often the desire to have such an agreement in place comes from family in the background and when that is the case, a delicate balance needs to be struck between keeping all future relationships intact but achieving the required agreement. A good matrimonial lawyer will help you to accomplish that.

Postnuptial agreements

After marriage, a postnuptial agreement ("post-nup") serves the same purpose as a pre-nup and can be entered into at any time. In exactly the same way, a post-nup sets out how assets should be distributed should the marriage break down. The most common reasons why a post-nup, rather than a pre-nup is entered into is that it was not thought about before the marriage, the couple simply ran out of time before the marriage to have a properly considered, negotiated and executed pre-nup drawn up (the Law Commissions recommendation is that the agreement should be entered into at least 28 days before a wedding) or there has been a change in financial circumstances (such as a gift or advanced inheritance) for one of the parties to the marriage.

Loan agreements

If a parent expects repayment of their contribution to an adult child's finances, then this should be set out in writing when the money is advanced. It is increasingly common for parents to contribute money to their offspring for a family home, or property renovations and if that contribution is a loan, not a gift, then a properly drawn up loan agreement can provide an added layer of protection in helping to ring-fence that money upon a future divorce.

In a divorce, it will be far easier to persuade a judge that the contribution from one party's parents towards the deposit on the family home was a firm loan which needs to be repaid, rather than a gift, if there is a clear, contemporaneous agreement drawn up and signed. Ideally this should be a formal loan deed drawn up by a lawyer and should set out the sum to be loaned, the purpose of the loan and detailing repayment terms and conditions.

No-one goes into marriage wanting to think about and plan for divorce and for parents, asking a child and their (future) spouse to do so is not an easy task at all. However, an experienced matrimonial lawyer will help to address this sensitively and cohesively, whilst achieving the necessary protection required and working closely with relevant wealth management advisors.

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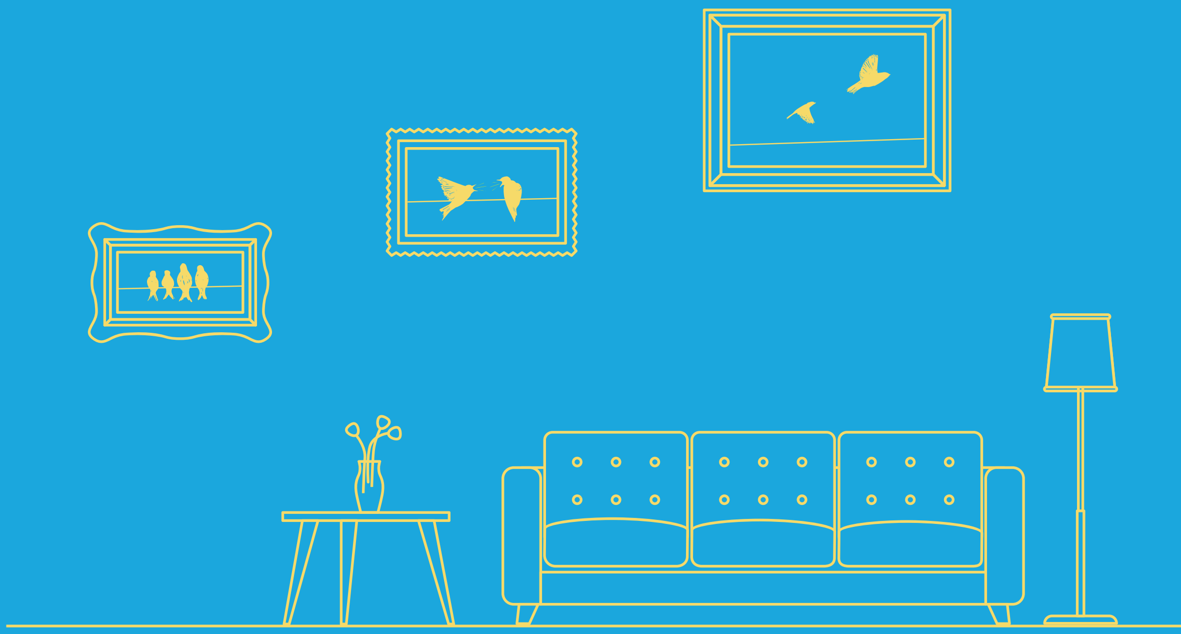

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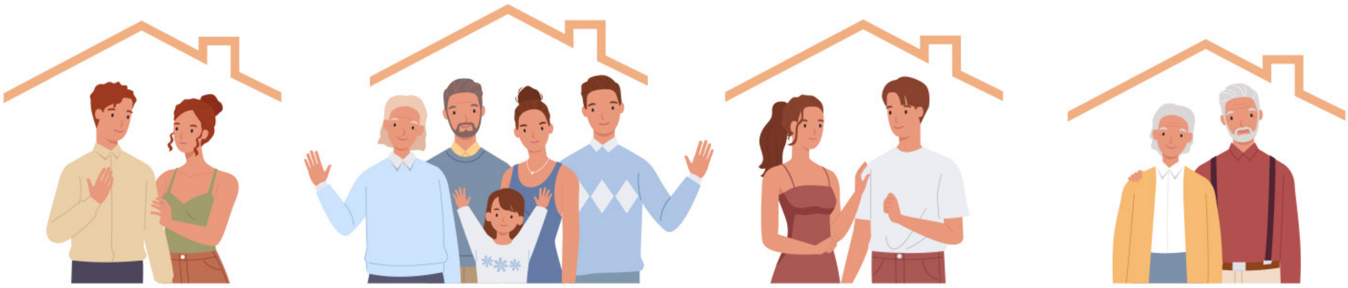
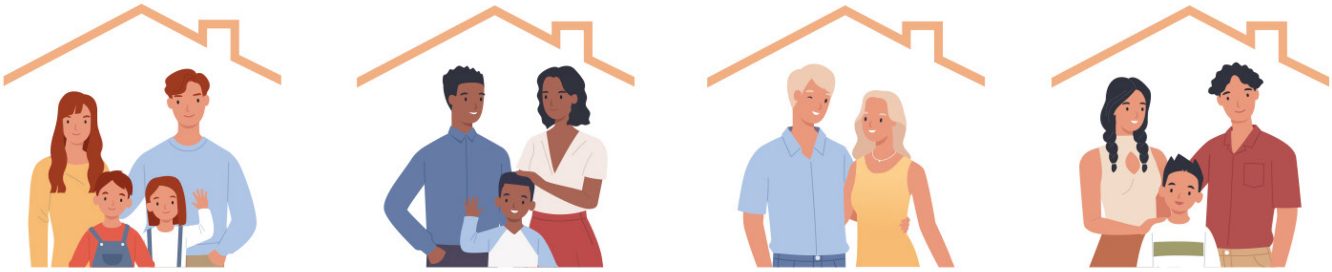


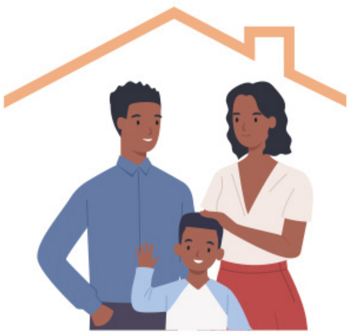
FAMILY LAW IN A CRISIS



Authored by: Catherine Eason and Andrew McLeod, PCB Litigation

Covid-19 has caused stock markets to go into free fall, the housing market to enter the deep freeze, liquidity to dry up and unemployment and business failure rates likely to soar. This article considers the implications for HNW individuals who are in need of Family Law advice in relation to their finances in the midst of a global pandemic.

Happily Ever After?



Lockdown and the prospect of a return to social distancing for the foreseeable has resulted in wedding celebrations being postponed, sometimes without a new date being set. Undertaking an audit of pre-nuptial agreements entered into in recent months and contacting those clients whose nuptials are likely to have fallen victim to the pandemic seems sensible. Such agreements commonly provide for circumstances where a wedding is delayed by up to 12 months, but in the current climate, practitioners must be live to the fact that some may now be rearranged to a date beyond that. Consideration of whether to execute a short deed confirming a wish to continue to be bound by the terms of the original agreement; or, if the financial picture has significantly changed in the interim, enter into a new agreement will be needed. Where clients are or will be cohabiting or having children prior to marriage now may be a good time to consider the merits of a cohabitation / parental agreement and ensuring that Wills are up to date in any event.

Clients (and separated parents in particular) are feeling the strain. The stress of self-isolation on top of dealing with a divorce can be profound. Where appropriate, clients should be signposted to counselling or therapeutic services.

Financial Negotiations

Covid-19 has had a profound effect on the economy. The value of the asset base and the risk profile of the individual assets within it, are likely to have altered significantly. When – and if – stabilisation and recovery will happen is a matter of conjecture. In times of great uncertainty it is, therefore, prudent to proceed with caution. Parties may be wise to defer negotiations until there is more stability. Where that is not possible, or where it is beneficial to negotiate a settlement when asset values are low, clients and their advisors should consider:

i. Interim arrangements. It is likely that implementation is going to take longer particularly where capital is being released from the sale of real property.

ii. Revisiting valuations. Many pensions, ISAs and investment portfolios will have taken a tumble and valuations will change on a daily basis. Consider also the impact on business valuations already obtained and any conclusions reached as to liquidity as well as property valuations.

iii. Revisit tax and CGT calculations. Rishi Sunak's budget may seem like a distant memory, but hidden amongst all the Covid-19 news were some key points to be aware of including the reduction of the lifetime allowance for Entrepreneur's Relief and the reduction of the Principle Private Residence final period exemption to 6 months.

iv. Consider mechanisms to share risk, for example by seeking to agree (i) percentage splits (and where appropriate a guaranteed floor) rather than specific figures for lump sums or proceeds from the sale of property; (ii) a contingent lump sum; and/or (iii) Wells sharing (Wells v Wells [2002] 2002 EWCA Civ 476, 2FLR 97).

In terms of the practicalities for settling disputes, hearings will happen remotely. Until IT systems and support are in place and those involved are familiar with this Brave New World, expect (and prepare clients to expect) disruption, delays and last minute adjournments. To mitigate this as far as possible, practitioners should look to deal with applications on paper wherever possible and in the case of First Appointments, using the accelerated procedure. Arbitration, early neutral evaluation, private FDRs and mediation become more appealing options than ever.

Clients too, need to be prepared for what an online hearing might look and feel like. Practitioners would be well advised to read the experiences of a participant in a virtual hearing:

http://www.transparencyproject.org.uk/remote-justice-a-family-perspective/

It is sobering reading and highlights the need to ensure client expectations are carefully managed.

Concluded agreements

And what of those settlements arrived at pre-pandemic which are either no longer affordable or no longer achieve what was envisaged? The first point is that it will depend on the nature of the order. Orders for periodical payments, lump sums by instalments and orders for sale (in terms of mechanics and timing but not the underlying capital distribution) are capable of variation. A pension sharing order in narrowly defined circumstances and certain deferred lump sums which include provision under pension rights can also be varied. Family courts have jurisdiction to vary orders that have not yet been implemented. Applications can also be made to set aside orders (whether made by consent or following a final hearing) on the basis of 'a subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis on which the order was made.'

Applications to vary

On an application to vary the court will consider all the circumstances of the case, with first consideration being given to the welfare of any minor child. Whilst the court must consider any change in circumstances since the order was made, those changes will be but one factor under contemplation in the balancing exercise. Our view is that a court is likely to vary a periodical payments order where the payer's circumstances have altered to such an extent that the previous order is no longer affordable. In relation to lump sums by instalments, judges have generally been more willing to extend the timeframe for payment than to reduce the total due under the order. Ancillary powers of variation exist in relation to orders for sale but these do not extend so as to interfere with the underlying capital award. An application to (for example) delay the marketing of a property for sale may be of use where the housing market is essentially frozen. Finally, the power to vary an executory order (i.e. one that has not yet taken effect, or been implemented) may assist, although the test to be met is whether it would be inequitable to hold the parties to the terms of the order in view of the change in circumstances, and so very close to the test laid down in Barder v Calouri [1988] AC 20.

Applications to set aside

Where supervening events invalidate either the basis of the order or the fundamental assumptions on which it was made, an application to set aside may be possible Barder v Calouri set out four conditions which must be met for an application to succeed, namely:

- the new event invalidates the basis or fundamental assumption upon which the order was made;
- the new event occurred within a relatively short period of time of the order being made (in the majority of cases within months, and possibly up to a year);
- the application is made reasonably promptly; and
- granting the application would not prejudice third parties who have acquired an interest in relevant property in good faith for valuable consideration.

Following the 2008 global financial crisis, a number of applicants sought to apply the 'Barder test'. The most relevant for current purposes is that of Myerson v Myerson [2009]. In Myerson, the husband sought to set aside a consent order which provided for a 57:43 division of the assets in his favour, in part to reflect the more risk laden and illiquid assets that he would retain. By the time the matter went before the Court of Appeal, the order in fact left the husband with -5.2% and the wife 105.2% of the assets. The husband's appeal was refused, in part because in structuring the original order in the way that it had been, he had accepted some risk on the basis that he would retain more wealth. In refusing the appeal the Court was mindful of the fact that the order provided for any potential upside in market fluctuations as well as the downside; considered the risk to be foreseeable; and, since a series of lump sums by instalments remained to be paid, it would be open to the husband to apply to vary these in the future if his finances had not improved by the time the instalments fell due.

The question for family lawyers is whether a global pandemic which the financial ramifications we are seeing will satisfy the 'Barder' test where the global financial crisis of 2008 did not. For now, clients will be well advised to exercise extreme caution in arriving at settlements based on historic and inaccurate valuations and consider employing the tools considered above to insulate the overarching aim of a settlement from further volatility.

Conclusion

We are living in unprecedented times, but we are better placed than ever to deal with the challenges. Our key messages are to consider the pitfalls of a turbulent market, think creatively about how to use technology and ADR to keep matters moving. Cliché it may be but now is the time to keep calm and carry on.

DIVORCED FROM REALITY: PUGACHEV, WEBB, AND ILLUSORY TRUSTS IN DIVORCE PROCEEDINGS

Authored by: Gemma Willingham, Luke Richardson and Gareth Roberts, Baker & McKenzie LLP

Executive summary

Illusory trusts are (for now) a reality, even if the term itself is not widely recognised by the courts. The concept gained widespread coverage following the first instance decision of JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2017] EWHC 2426 (Ch). Since then, its relevance to divorce proceedings came into sharp focus in the Cook Islands' Court of Appeal decision of Webb v Webb [2017] CKCA 4. Webb was then appealed to the Privy Council, whose judgment is eagerly awaited.

Therefore, we should shortly receive persuasive guidance from the Privy Council on the existence and scope of illusory trusts. Until then, existing case law suggests that the illusory trust concept is an attractive weapon in the armoury of applicant spouses seeking to attack trusts in financial remedy proceedings, and a growing concern for those seeking to "divorce-proof" assets using trusts.

Pugachev and illusory trusts

Pugachev concerned five New Zealand discretionary trusts settled by Sergei Pugachev between 2011 and 2013. Pugachev was also a beneficiary of the trusts (together with his family members) and the protector. As protector, he had wide-ranging powers, including the ability to veto trustee decisions.

Mezhprombank was a Russian bank formed by Pugachev that entered liquidation in 2010. Pugachev was accused of misappropriating huge sums from the bank, resulting in the bank and its liquidator obtaining judgments against him. They then sought to enforce those judgments against the trust assets through the English courts. The claimants' case included an argument that the trusts were "illusory" on the basis that the trust instruments did not divest Pugachev of beneficial ownership of the trust assets, given Pugachev's extensive protector powers and the fact that he was a beneficiary.

The judge noted that he did not find the term 'illusory trust' to be a helpful one. Nonetheless, he found for the claimants on the substance of this point and held that the trustees in fact held the assets on bare trusts for Pugachev rather than on the terms of the trust instruments. Therefore, the trusts provided no protection from Pugachev's creditors and their assets were available to the claimants to satisfy the judgments.

The court's determination that the protector's powers in the trust instruments were personal rather than fiduciary was crucial to its finding that Pugachev had not divested himself of beneficial ownership of the assets:

- if the powers had been fiduciary, Pugachev would have been obliged to exercise them in the interests of all beneficiaries and so may have divested himself of beneficial ownership; but
- as the powers were held to be personal, Pugachev could exercise them for his personal benefit without considering the interests of other beneficiaries.

Webb and illusory trusts in divorce proceedings

The judgment in Pugachev was swiftly followed by the Cook Islands decision in Webb, which deals with trusts in the context of divorce proceedings.

Two trusts had been settled by the respondent spouse, Mr Webb. The applicant, Mrs Webb, argued that the trust assets should be considered matrimonial property and subject to division between the parties, because she said the trusts that purported to hold them were invalid (as they were effectively illusory trusts, although this term is not used in the judgment). Having been unsuccessful in the High Court, Mrs Webb succeeded before the Cook Islands' Court of Appeal.

The key issue in Webb was similar to that in Pugachev - whether, on an objective analysis of the settlor's reserved powers in the trust deeds, Mr Webb had demonstrated an intention irrevocably to relinquish beneficial interest in the trust assets.

The Court of Appeal tested this by reviewing the reserved powers and asking what would happen if the settlor tried to recover the property apparently settled on trust. They considered that:

- if this would: (i) require agreement from a truly independent person, or (ii) be subject to an enforceable fiduciary duty on his part, the trust would be a valid trust; but
- if the trust instrument reserved an uncontrolled power for the settlor to recover the assets, the settlor would not have divested himself of beneficial ownership, and the trust would be invalid (i.e., effectively an illusory trust).

In the Webb trusts, Mr Webb was the settlor, trustee and a discretionary beneficiary. These roles together afforded him many powers, including an ability to:

- appoint a consultant to advise the trustee. The consultant had powers relating to investment, removing and replacing trustees, and veto powers on the acceleration of final vesting and variations to the trust deed. Mr Webb appointed himself as consultant;
- exercise his powers and discretions even if his interests or duties might conflict with his duty to the trust or any beneficiary;
- distribute capital or income to any beneficiary (including himself). He could also resettle the trust or vary its terms (the latter with the consultant's consent, i.e., his own consent), to vest all trust property upon any beneficiary (again, including himself). Any resultant breach of fiduciary duty would be negated by the above conflicts clause;
- replace beneficiaries, including nominating himself as the sole beneficiary; and
- retain a high level of control as consultant even if he resigned as trustee. The consultant's power to remove and replace trustees was exercisable "at his absolute discretion and without giving reasons therefore". The Court determined that this power was non-fiduciary, allowed Mr Webb to dispose of uncooperative trustees, and added to "the picture of a settlor who has never intended to alienate his beneficial interest for the purpose of the law of trusts".

After considering the above, the Court of Appeal concluded that Mr Webb had not alienated his beneficial interest in the trust assets, as his powers meant he could recover the property he had purported to settle on trust at any time. The trusts were therefore deemed to be invalid, and the Court of Appeal ordered that a leasehold interest in the matrimonial home allegedly held on trust should instead vest in Mrs Webb.

Mr Webb appealed to the Privy Council, which heard the **case in January 2020**. Judgment is eagerly anticipated, as it should provide persuasive authority from the highest court on the existence and scope of the illusory trust principle.

Considerations

Subject to any changes following the Privy Council's judgment in Webb, determinations as to whether trusts are invalid on "illusory" grounds will be made on a case-by-case basis, based on the terms of the trust instrument in question. These are therefore important issues for applicant spouses seeking to attack trusts and those seeking to "divorce-proof" trust assets.

For applicant spouses:

1. The illusory trust principle provides another method for challenging trusts and may be easier to prove than the usual alternative of demonstrating that a trust is a "sham". The latter is notoriously difficult (and expensive) to establish, as it requires factual evidence of a joint shamming intention of the settlor and trustee. In contrast, establishing the existence of an illusory trust may be more straightforward (and cheaper), as this depends only upon an objective reading of the trust instrument.
2. Normal enforcement considerations will apply. Applicant spouses should consider the trust's governing law and the location and nature of its assets before determining whether an attack is feasible.
3. If a trust holds substantial assets and might be vulnerable to being deemed "illusory", this may provide a useful negotiating tool for applicants seeking an early and attractive settlement without the need for significant court intervention.

For those divorce-proofing assets:

1. The trust terms are crucial to determining whether a trust is vulnerable to attack. To reduce the risks, settlors should be encouraged to reduce any control that they retain over the trust assets. In particular, they should consider:
   a. minimising the number and type of any reserved powers that they have;
   b. particularly limiting the number and type of any personal powers that they have. Whether a power is personal or fiduciary can be a matter of interpretation, but it will be still helpful for trust instruments to state expressly where a power is intended to be fiduciary;
   c. avoiding including any settlor powers to revoke the trust or a general power of appointment over the assets, as these powers in particular might point to invalidity; and
   d. avoiding the settlor also serving as trustee and/or protector, particularly if they are also a beneficiary.
2. Jurisdictional considerations are key and settlors should consider carefully where to establish their trusts:
   a. illusory trusts are less likely to be found when they are governed by the laws of jurisdictions with wide-ranging reserved powers legislation. The trusts in both Pugachev and Webb were governed by laws without such legislation; and
   b. the existence and type of firewall legislation in overseas jurisdictions will be important to consider, although the effectiveness of such legislation may reduce if the trust assets are not located in the same jurisdiction as the governing law of the trust.
3. Seek specialist independent advice on the nature of the trust instrument and the settlor's powers at the earliest possible stage and ensure that all decisions and arrangements are documented.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THE END OF ENGLISH PENSION SHARING FOR COUPLES ABROAD?

Authored by: David Hodson OBE MICArb and Michael Allum, The International Family Law Group LLP

Can a couple living abroad and divorcing abroad but with a UK pension share that pension? Yes, until the end of the year. But not from 1 January 2021. This summary article looks at the implications for many international families, calls for statutory reform and urges couples to get their pension share orders quickly.

To share a foreign pension in the context of a divorce financial settlement will almost always require an order of the court where the pension is situated. Some countries but not England will permit a written agreement. So, if a couple divorcing abroad with a financial settlement abroad want to share their English pension, they need an English court order.

The English family court can do so. It has the power to make financial orders after an overseas divorce pursuant to Part III Matrimonial and Family Proceedings Act 1984, used as a vehicle to obtain an English pension sharing order for those getting divorced abroad to share their English pensions.

But there is a potential problem. There has to be a sufficient connection with England for the courts to make an order. This is known as jurisdiction. In broad terms what is required is habitual residence or domicile of one spouse. But this presents a real difficulty for international families who no longer have such an ongoing connection.

They may have temporarily moved here for work purposes for several years and built up an English pension. They may have lived their working life here and now retired abroad. There are many other circumstances where a couple with an English pension find themselves without the necessary connectedness for the English court to make an order. It was a real problem and a number of foreign settlements had to be unpicked and rearranged

Several years ago, my colleague, David Hodson OBE, discovered that it was possible to use a piece of EU legislation (The EU Maintenance Regulation) to provide jurisdiction. In summary it contains a residual power to make needs-based orders, pension sharing, on an exceptional basis provided the courts of no other EU Member State have jurisdiction. Although the UK left the EU on 31 January 2020, this legislation will remain in force in England until 31 December 2020 when the transition period ends. But from 1 January 2021 this basis of jurisdiction will no longer be available so couples with an English pension, living and domiciled abroad would seemingly be unable to obtain a pension sharing order.

For many years before Brexit, David and I as well as others have been lobbying for a change to be made to domestic law to fill the gap. For example, when the Law Commission consulted in relation to the enforcement of financial orders in family cases, they extended the scope of the consultation at our request to include obtaining pension sharing orders after overseas divorces. Our firm responded with a recommendation that domestic law be introduced to provide limited jurisdiction where there is an English pension. This recommendation was endorsed by the Law Commission but regrettably has not been taken up by the government.

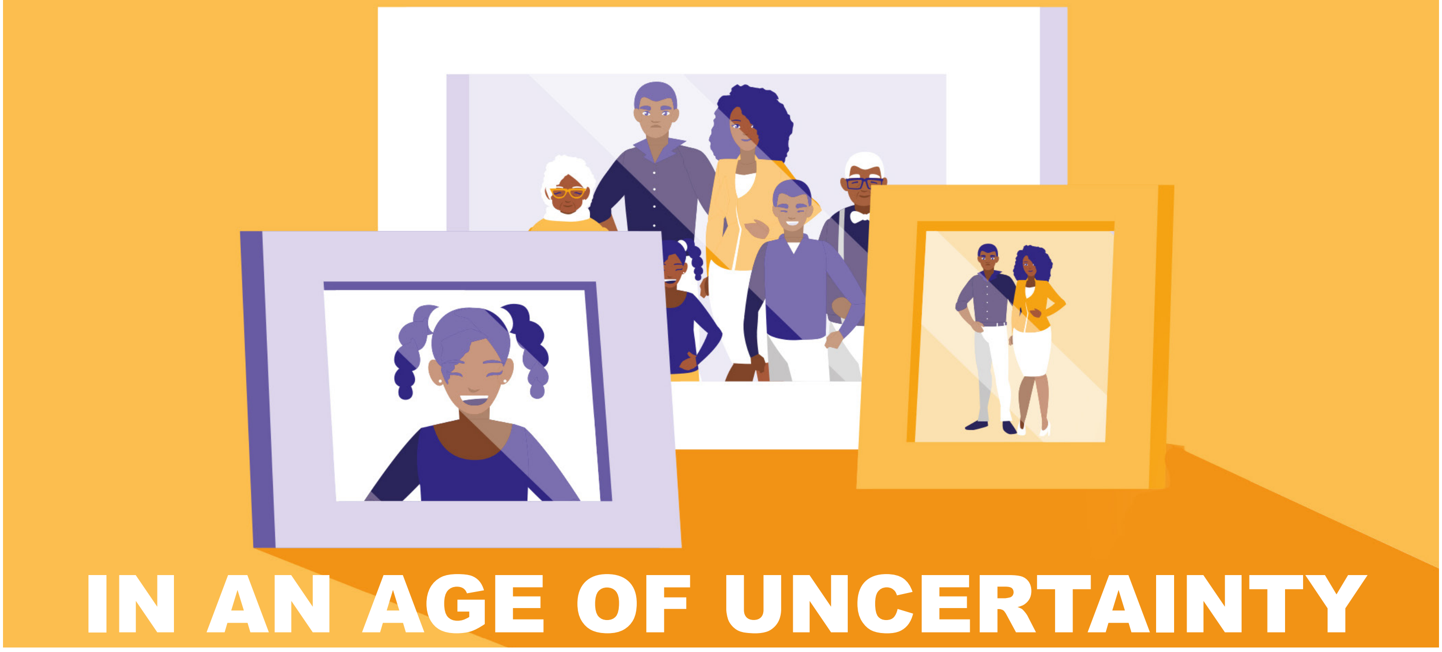
Our firm have been actively involved in discussions with the Ministry of Justice throughout the Brexit process and this has continued during the transition period. My colleague, David Hodson OBE, has written separately **here** with an analysis of the likely future position. In summary, it is understood that the UK will no longer be within existing EU laws after the end of the transition period. Consequently, the jurisdiction currently used to obtain an English pension sharing order where there is no other ongoing connection will be lost. Moreover, we understand from the Ministry of Justice that there is no current intention of introducing domestic law to fill the gap at the end of the transitional period.

We strongly urge and encourage the government to bring in a short and thoroughly uncontentious amendment to existing legislation to allow the English courts to make a pension sharing order in respect of an English pension after a foreign divorce where there is a connecting feature of a UK pension.

For a similar reason, we strongly encourage any couples, and their lawyers, presently working out divorce financial arrangements which may involve sharing a UK pension to get in touch with a specialist English international family law solicitor, experienced in dealing with international pensions, to make sure an order can be obtained before the end of December. It doesn't need a comprehensive final order if the parties are willing to agree the pension share as a stand-alone, self-contained part of the settlement. But it does require a final divorce. It cannot happen if the divorce has not yet been finalised. It is also available for those in a civil partnership which is being dissolved. It is not available for those in cohabitation, de facto relationships.

If domestic legislation is not introduced many international families could be forced to revisit financial settlements which have been reached or were in the process of being negotiated to find alternative ways of seeking to achieve a fair distribution of assets without sharing pensions which are administered in England. This may mean unpicking them, making other arrangements to the settlement, perhaps using the very unsatisfactory method of offsetting and an entitlement to a share in the pension against non-pension assets.

If anyone has any questions or wishes to discuss any of the issues raised in this note please do not hesitate to contact Michael Allum or David Hodson OBE, both of whom would be very happy to discuss including ways in which a solution could potentially be found.



FAMILY GOVERNANCE IN AN AGE OF UNCERTAINTY

Authored by: Patricia Boon, Forsters LLP

As we witness the impact that the pandemic is having on economies across the globe, there is a natural apprehension about what the future might hold in a post-Covid 19 world.

Uncertainty, apprehension, and concern for the future may be catalysts which prompt high and ultra-high net worth families to review their existing succession planning or (where a family has no succession planning in place at all) to consider options which might be appropriate for them. This may be especially the case in cultures where it is discouraged or taboo to talk about subjects like death.

Implementing flexible and adaptable family governance solutions remains particularly crucial for inter-generational family businesses and, if the circumstances are appropriate, this could be a timely moment in which trusted family advisors can talk to clients about family governance and succession planning considerations.

Of the key points outlined below, some are particularly pertinent to living in a world in lockdown. However, the greater majority are of ongoing application and relevance, and will continue to be important to clients in the long-term:

Update the Will of the patriarch/matriarch:

This is particularly important for individuals who made their Wills some years ago and have not reviewed them since. They should consider whether all the provisions still meet their wishes and intentions and reflect their present circumstances. If their Will includes a discretionary trust, they should also review the Letter of Wishes to check that it is still up-to-date and, if there are family trust structures, check that the Will and Letter of Wishes dovetail with such trusts.

If they do not already have a Will, talk to them about the need for a Will:

For those of us who work in the private wealth industry, a Will represents the most basic form of succession planning. However, there are surprising cases where individuals holding substantial wealth, with personally-owned assets in many different jurisdictions, have no Will. In the current situation it may be timely to offer advice to clients about the benefits of having a Will to avoid the need for obtaining probate in multiple jurisdictions and the potential pitfalls of an intestacy situation.

Review trust structures and Letters of Wishes:

This is a good opportunity for clients to conduct a health check of their structures. If the settlor of any family trust (or trusts) is still alive, they should be encouraged to review their Letter of Wishes. They may wish to consider whether there is, or should be, any mechanism for updating the Letter of Wishes or the philosophy behind the trust in the future (e.g. whether the members of the most senior generation of the family should be able to make certain amendments). To the extent that younger generations are not already aware of any family structures, thought may be given, as part of any review, to the way in which members of the next generation should be introduced to the family governance plan.

Role of the Protector:

Many of our clients are concerned about building and, perhaps even more importantly, maintaining a circle of dependable individuals whom they can trust to be involved in their structures over the years. A Protector-type figure, in particular, can often have a significant part to play in the life of a family structure. It is unwise for clients to become too reliant on one such individual and there may be circumstances where a Protector

Committee may be appropriate. A general overhaul of family trusts (or equivalent vehicles) may focus minds on considering potential successors and/or the benefits of a committee in the event of the sudden incapacity or death of a Protector.

Family Constitutions and other governance mechanisms:

The form of such Charters or Constitutions can vary widely, and some may provide for how the Family Council (or similar body) should communicate and interact with one another. Most documents of this type would already provide for the parties to meet remotely (which is a much more acute issue in the current situation). The same applies to company board meetings, including meetings of private trust company boards (the mechanics of which may be set out in the documents comprising a family's overall governance plan). However, there are questions arising from this virtual, remote form of interaction which should be raised in discussions with families, so that they can take them into consideration, including:

- Decision-making: should all decisions always be able to be made virtually, or are there any decisions which are (or should be) required to be made in physical meetings? Should special exceptions be made only for "emergency situations" and how would such situations be defined?
- Family interaction: will some family members be able to dominate virtual meetings in a way that might be harder in a physical meeting (where body language and dynamics might be easier to read)?
- Regulatory and tax (relevant to company board meetings): where are various directors participating in meetings and making decisions? Directors who find themselves in lockdown in high-tax jurisdictions should ensure, as far as possible, that they do not make actual decisions relating to the company, if that is practicable. In order to evidence how (and where) decisions have been taken, there should be a full record of decisions taken and a note of the physical location of officers involved.
- Confidentiality: is the family concerned about a potential lack of confidentiality in virtual meetings and sharing information using digital technology?

Encouraging clients to review, or to implement, their long-term succession goals is, of course, not just relevant in a time of international emergency. However, this period in which we are living has thrown into sharp relief the importance of having robust and flexible structures and mechanisms in place to govern family businesses and family dynamics. Without these mechanisms, there is a much higher risk of division and dispute between individuals, resulting in the potential dissipation of wealth.

THE HEARTBREAK OF GRANDPARENTS DURING CORONAVIRUS

Authored by: Vanessa Lloyd Platt, Lloyd Platt & Co

The media has been at great pains to emphasize the huge surge in cases of domestic abuse during the course of the Coronavirus lockdown. In some areas there has been reported some 400 cases over the lockdown period which has lasted a month. Translated across the country and in fact the world, the case numbers are ever growing. This has led many to wonder why this should be the case when families are at last having the opportunity to spend considerable meaningful time together with their children which is something that has been at an all time premium prior to the shutdown. However, practitioners are only too aware that the greatest spike in divorce cases comes at two major periods in the year, namely after the summer holiday break, when parties have been together for a length of time, and over the Christmas break with a huge spike coming in January.

During this lockdown period we have also heard much about how families are longing to get together with each other and spend time when they are in isolation and are missing the hugs, the laughter and the companionship that they have hitherto enjoyed because households are now having to self-isolate. However, do spare a thought for those grandparents that have hitherto been deprived of a relationship with their grandchildren and can only wonder at the thought of when they will ever get to see their grandchildren again.

This firm, together with others, has campaigned for some considerable time to try to emphasise the heartache felt by so many grandparents at the failure to see their grandchildren for a multitude of reasons and for periods that have stretched over months and years. Whether this is caused by a breakdown in their children's relationships or divorce, or a death of one of their children, many grandparents across the country have not had any contract with their grandchildren for some time. The approximate numbers are anywhere between one to two million.

Numbers vary depending on certain areas and information that has been provided to various members of Parliament

The system under which grandparents have the ability to seek any redress legally is very limited. The first place that grandparents can go to for help is to seek assistance from a mediator, to see if a mediator can find a solution to the problem. Often, however, mediators have voiced the view that all that happens in mediation is that both sides can become even more entrenched in the difficulties. Those difficulties can simply be caused by an innocent word spoken by a grandparent, for example that in their day the children weren't allowed to run around in restaurants, or talk, or that food was made in a different way or cooked and prepared more personally in the past. These kinds of comments, whilst innocently spoken, can have a very different meaning when received by a daughter or son-in-law who is of a sensitive disposition or a son and daughter-in--law who already feel that the parents have interfered too much.

It is the case that mediation in relation to grandparents has been the least successful of all types of mediation.

If the relationship reaches the point where a grandparent feels that they have to resort to legal formalities by applying for a what is known as a Child Arrangements Order, these situations can spiral out of control. Following a recent campaign before Parliament, in which this firm was heavily involved, it became clear that there could be as many as two million grandparents deprived of the ability of seeing their grandchildren over the last year. Of the stories that the grandparents, who came to a meeting at Parliament had to tell, many centred around the court system itself and the necessity of having to apply for leave first, and if they were lucky enough for the Court to have granted leave, that then they would then be in a position to apply for a Child Arrangements Order. In many cases they described their humiliation of having to appear before the courts and the courts persistently failing to recognise the importance to the grandchildren of a relationship with their grandparents.

This firm has advocated that the need for leave should be abolished and that a simple amendment to the Children Act could facilitate lessening the time that grandparents have to wait in order to resurrect their relationships and would be a very easy way of amending legislation. Indeed, we provided a first draft to Parliament.

During the course of meetings before Parliament grandparents stated, that when they lost the right to contact, that the courts placed too much emphasis on believing that, if parents were divorcing, that arrangements could readily be made within that framework for the grandparents to see the grandchildren. Regrettably, in millions of cases, we now are only too aware that that is not the case and there isn't the sharing of time, forcing these applications to be made and without sufficient understanding of the difficulties caused by severing that relationship.

Grandparents have also confirmed that when the courts deal with an application for leave, the welfare of the child is not of paramount consideration. What the Court takes into account is the relationship that the grandparents have had with the grandchildren, and the wording under section 8 being "the applicants connection with the child or any risk that there might be of that proposed application disrupting a child's life to the extent that he or she would be harmed by it". These words that have been taken in such a harsh way to deprive many grandparents of seeing their grandchildren.

There seems to be too much emphasis on the courts looking to weed out what they consider to be vexatious applications when they have failed to take into account the nervousness that grandparents feel in making such applications in the first place.

There have been further cases of heartache for grandparents during this lockdown period, where some sons or daughter-in-laws have been utilising this lockdown period as an excuse to stop the grandparents having any contact to the grandchildren. Many grandparents have contacted us saying that they are being told by the children that the reason they are being prevented from seeing the grandchildren is to stop the grandparents being at risk from the grandchildren giving them the Coronavirus. Regrettably, in many cases, this has not been substantiated.

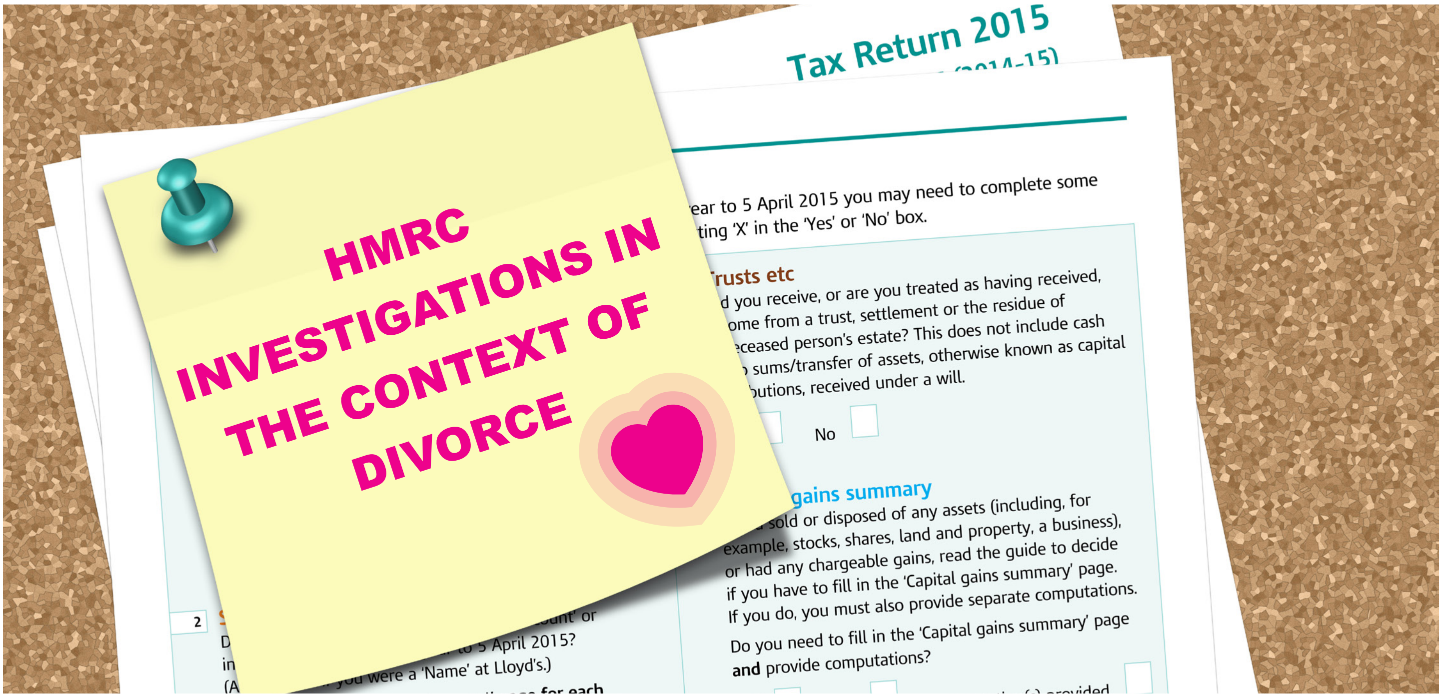
Many have indicated that the fact that they have not been able to see their grandchildren feels almost as bad as having the Coronavirus itself. They believe in some cases they will never be able to resurrect their relationship, since some many of them are not computer savvy and have been unable to see their grandchildren through the media of Zoom, Facetime, Skype or Life Size They are worried that by the time the lockdown is released, that they would not have been permitted to see the grandchildren for such a period of time and are aware of other grandparents' experiences that the courts will state that since such a period of time has elapsed, that they will not be able to resurrect their relationship. One cannot underestimate as a practitioner the sense of loss, heartache and distress that this causes to so many grandparents who have previously had a really good relationship with their grandchildren. The Coronavirus of course must be taken in context and it is in fact the case that many elderly people should not see grandchildren at this time because it does pose a risk and should not flout Government's recommendations. However, it is the period after the lockdown is raised that is causing consternation to many grandparents who anticipate that their relationships will be cut off.

Many grandparents have voiced the view that they are concerned that if a Judge has to determine whether it is in the best interests of a grandchild to see a grandparent, it may have been so long because of the way the system works that by the time they get a hearing date, that they will be denied any further contact because the courts will not consider it is in the grandchildren's interest after such a length of time. What has been expressed time and time again by those cut off from their grandchildren is that the courts, Judges and Cafcass officers demonstrate a complete naivety in the presumption that everyone is going to agree matters readily and facilitate contact and do not adjust the procedures to where there have been intractable withdrawal of contact.

What practitioners know is that there has been a huge change in family form and social structure over the last twenty to thirty years. Marriage rates have slowly declined, cohabitation is increasing and cohabiting relationships are three times before likely to breakdown than marriages. Given those statistics it is all the more important that grandparents have a role to play. From earlier research it is quite clear that most families receive some kind of childcare support from the grandparents and almost all families receive some kind of financial support from them. Whenever children are using their parents to be carers of their children, to allow both the father and the mother to work, it is imperative therefore that during this lockdown period we do not allow more grandparents to be severed from their grandchildren and find other means of dealing with these kinds of disputes as the courts are in lockdown.

This firm for some time has introduced a system of allowing grandparents to have sessions with us, in a safe setting, which will allow them to find some kind of solution if at all possible to the problem. In addition to this procedure we have named "the successful outcomes meeting procedure", this firm would strongly advocate using children's arbitration during this time or immediately after the lockdown is lifted. The arbitration system that hitherto has not been frequently used by practitioners is an ideal way at this time to ensure that cases are heard quickly and sensibly. Any fears at dismissing cases where children's welfare is not best served by contact can of course be very easily and readily determined at a much earlier stage than the court system and arbitration hearings can be listed very quickly with arbitrators used to dealing with matters remotely. In this way, decisions can be given very quickly to end the waiting, the misery and unhappiness felt by so many.

If you have clients that are thinking of severing the relationship with the grandparents after the lockdown is lifted, please encourage them not to do so and to understand that it is fundamental in a Society such as ours, with such fractured relationships, that the children should and must maintain a relationship with the grandparents. They provide a richness, history and a warmth that all grandchildren need.



Authored by: Jonathan Arr and Elizabeth Doherty, Macfarlanes LLP

An open HMRC enquiry in the context of a divorce may seem a dauting prospect or an impediment to settlement but if handled properly it need not be anything more than an additional entry on the Form E that may need to be revisited over the course of time.

The existence of an open HMRC investigation needs to be disclosed and discussed early on in proceedings. The reasons for HMRC's involvement in the taxpayers affairs and the severity of the investigation will vary substantially and the amount of credence to be given to the matter needs to be gaged by the parties divorce lawyers in conjunction with either separate or a jointly appointed tax expert.

Anxiety can be tempered by knowledge so this article looks to explain briefly what might be going on and accordingly how to deal with HMRC's presence in the divorce proceedings.

An open enquiry

Invariably what is happening is that HMRC have opened an enquiry or compliance check into the taxpayer's affairs- either business or personal. A tax enquiry is the process by which HMRC check in detail that the information on a tax return is accurate and complete- they may enquire into a specific aspect of a return or ask more general sometime far reaching queries. For individual returns HMRC usually has 12 months from the filing date to open an enquiry. HMRC write to the taxpayer and ask detailed questions about the contents of a return, will review records and meet with the taxpayer to discuss the matter. At the end of the enquiry HMRC have the power to make amendments to the return and the amount of tax due which may create an increased liability for one party to the divorce proceedings. It will usually be possible for a tax adviser to estimate this liability as the enquiry progresses. If the taxpayer disagrees with HMRC's conclusions, then he or she can appeal to the tax tribunal at which point professional costs will start to accumulate.

Code of Practice 9

An alternative disclosure made by a party to divorce proceedings that often crops up is that there is a COP9 investigation underway. A COP9 may be commenced if HMRC suspect a large loss of tax through fraudulent taxpayer behaviour. In the event a COP9 investigation is ongoing, professional advisers will be compiling a report and undertaking a detailed examination of the taxpayer's affairs to ultimately be disclosed to HMRC under a Contractual Disclosure Facility offer (which importantly offers immunity from criminal investigation). Invariably a COP9 disclosure should be made within 60 days but if particularly complex HMRC may agree to extend this deadline. Interest and penalties in these circumstances can be more than double the amount of tax found to be owing depending on how many years have elapsed since the event of default. It should be noted that HMRC have far reaching information gathering powers to obtain information and documents enabling them to require 3rd parties to produce evidence.

Taxpayer Disclosures

As a result of various recent global exchange of information agreements HMRC are receiving an influx of information from foreign tax authorities about recalcitrant UK taxpayers. Consequently, many taxpayers are choosing to voluntarily approach HMRC to resolve past irregularities particularly in relation to offshore matters given that the penalties in relation to such can be enormous. HMRC have offered favourable settlement terms and sometimes immunity from criminal prosecution under the terms of various tax amnesties. Where parties to a divorce are still finalising such settlements or still uncovering irregularities, often inherited, disclosure and provision needs to be made.

Accelerated Payment Notices (APNs) and Follower Notices (FNs)

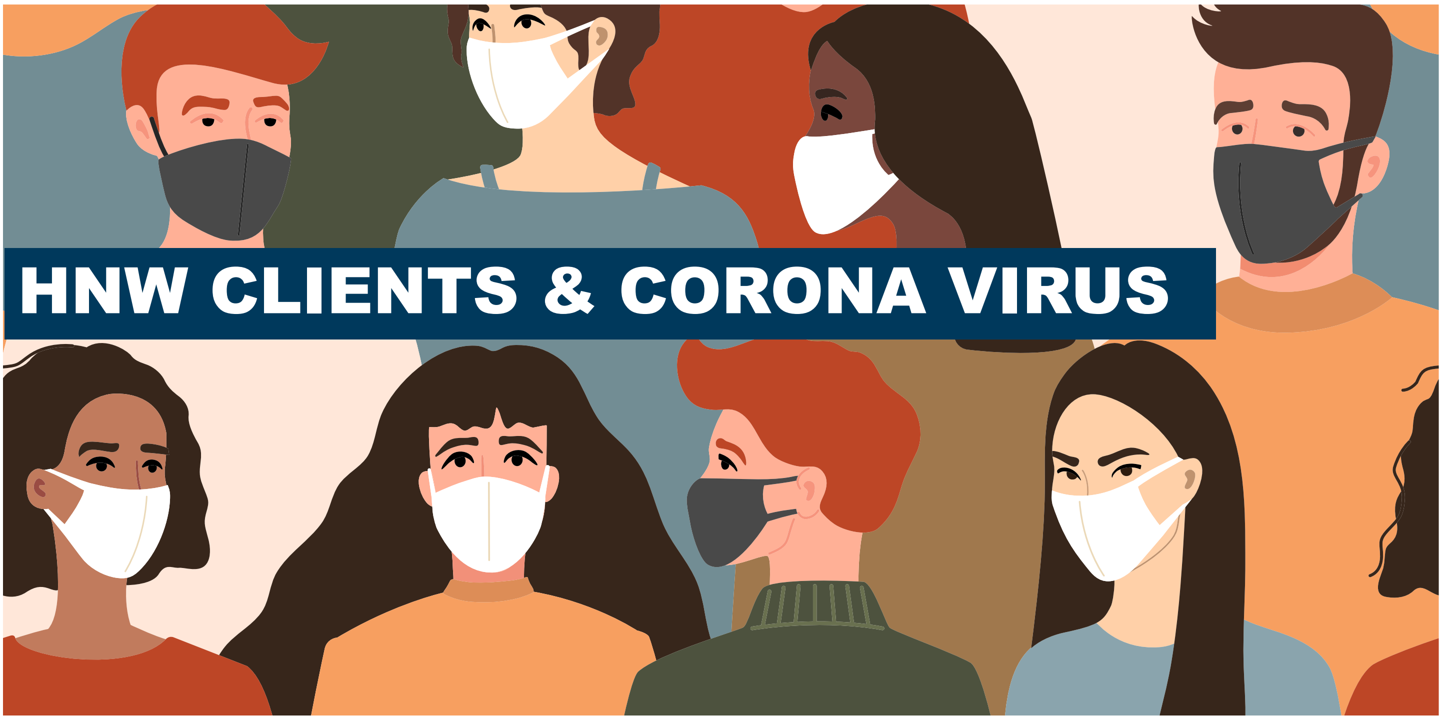
Often during a financial settlement meeting a party may make reference to a payment made pursuant to an APN or FN. Essentially what this means is that there has likely been some kind of participation in a historic tax avoidance scheme which has been challenged by HMRC who have issued an APN or FN requiring the taxpayer to pay any disputed tax amount upfront in order that it sits with the Exchequer until the matter is resolved. In the context of a divorce this apparent financial clarity can be helpful in that fixed economic provision can be made but caution still needs to be advised as the ultimate outcome will in the most part depend on litigation which may involve further costs and uncertainty will linger for years. Details of any past tax avoidance schemes entered into by either party really need to be addressed early on with the help of a tax adviser.

Interest and Penalties

Penalties will arise as a result of late or unpaid tax, returns that are not filed on time, a failure to notify HMRC of a chargeability to tax or errors in tax returns. Some penalties are fixed, others are based on a percentage of the potential lost revenue for HMRC so may take some time to quantify. There may also be reductions for disclosure and taxpayer behaviour can mitigate the penalty exposure. Enhanced penalties apply for failures or inaccuracies relating to offshore matters. HMRC will automatically charge late payment interest based on the Bank of England base rate running from the day after the tax should have been paid until the date it is paid.

Making adequate provision

Financial exposure to a potential HMRC liability needs to be included in the Form E. The difficulty comes in quantifying the exact amount of any exposure given the many moving parts involved in any tax investigation not least in relation to interest and penalties. Payments on account are always advisable in order to minimise the former and extensive taxpayer cooperation will go a long way towards mitigating the latter. Ultimately it is in the interests of both parties to engage fully with any HMRC investigation to preserve the amount of the family pie that will be available for distribution between the parties.



HNW CLIENTS & CORONA VIRUS

Authored by: Hetty Gleave, Hunters Law

The Coronavirus pandemic is having a huge impact on families across the socio-economic spectrum, but the scale of potential losses faced by HNW clients will be particularly daunting.

Solicitors with HNW clients are likely to see a rise in clients whose matters have recently concluded looking to revisit capital settlements, as they may well have businesses or investments that have suffered from, or even collapsed, as a result of the economic disruption caused by the pandemic.

Often, the financially stronger party (whom I'll refer to as the husband) will have retained his businesses and investments, and have been ordered to pay a lump sum, or series of lump sums, to the other. If the value of the assets the husband is retaining have crashed, then the cash sum he has been ordered to pay may amount to a far higher proportion of the overall assets than had ever been intended.

The Court of Appeal considered this scenario following the 2008 crash, in Myerson v Myerson [2009] EWCA Civ 282, where, as a result of a dramatic fall in the value of the husband's business following the financial crash, the wife's award of £11 million ended up reflecting more than 100% of the assets, rather than the 43% that had been anticipated.

As practitioners will know, under the Barder jurisdiction, a financial remedy order may be set aside where a new event has invalidated the basis on which the order was made. Mr Mostyn QC, then at the bar, successfully argued for Mrs Myerson that asset depreciations resulting from the financial crash did not amount to Barder events.

The Court of Appeal in Myerson built on the judgment of Hale J (as she then was) in Cornick v Cornick [1994] 2 FLR 530 (in which Mr Mostyn also acted for the successful party). In Cornick, Hale J had held that it was necessary to distinguish between cases where "an asset…correctly valued at the date of the hearing changes value within a relatively short time owing to natural processes of price fluctuation", and those where "something unforeseen and unforeseeable had happened since the date of the hearing which has altered the value of the assets". Only if a case fell into the latter category, rather than the former, could the order be set aside under Barder.

In Myerson, it was held that the case clearly fell into the first category; what had resulted from the economic crash was part of the natural process of price fluctuation in share values. The court also noted that the husband had chosen the more speculative option by retaining the riskier assets, and queried why the court should now relieve him of the consequence of his speculation, as well as noting that what had gone down in value could increase again, and that the husband would be able to take advantage of the opportunities in a bear market.

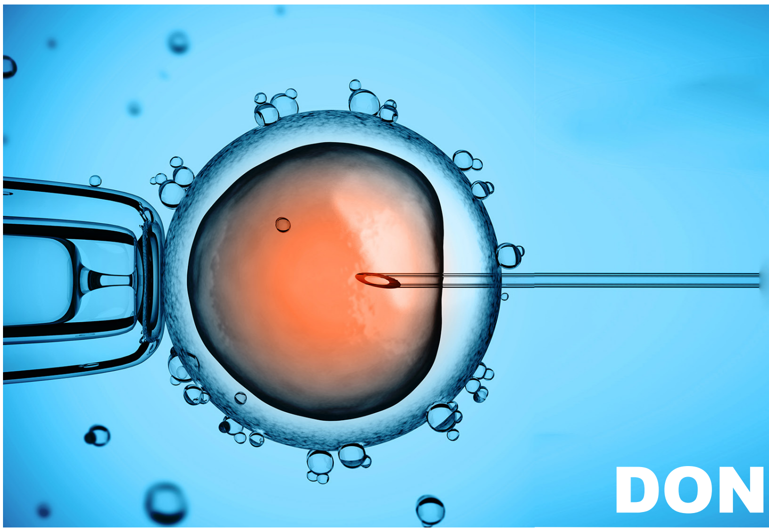
However dramatic and unforeseeable the Coronavirus pandemic has been, its main impact on asset schedules will be a result of market fluctuations. Hale J in Cornick specifically stated that unforeseeability does not turn something which is not a Barder event into one. Nevertheless, there may be a case where the impact of the pandemic has such a dramatic impact on a family (perhaps beyond asset values) that an argument could be made that it falls within Barder. Such an application would be speculative, but may be warranted in an appropriate HNW case. In order to ensure the other requirements of Barder are met, the order being challenged will need to have been made relatively shortly before the outbreak of the pandemic (within a year and ideally less), and the application will need to be made promptly.

Alternatively, there may be another option if the final order provided for the lump sum to be paid in instalments (as distinct from a series of lump payments). It will be possible with any lump sum order to apply for an extension of time for payment, but with a lump sum payable in instalments, s31(2)(d) MCA 1973 not only allows the court to vary the timing and quantum of the instalments, but also empowers the court to vary the overall quantum of the lump sum.

A lump sum payable in instalments is distinct from a series of lump sums, and it may not always be clear into which category an order falls. The Court of Appeal in Hamilton v Hamilton [2013] EWCA Civ 13 confirmed whilst ordinarily a reference in the order to "lump sums" (in the plural) will mean that there is a series of lump sum payments, this is not necessarily so, and indeed, was not definitive in the case. Rather, the court must look at the context and consider whether, objectively, the order was for one overall sum which was payable in instalments for reasons of convenience, or whether there are genuinely separate lump sums. A recital explaining whether the payments are a series of lump sums or a lump sum payable in instalments is likely to be conclusive.

Even if it is established that there is a lump sum payable in instalments, a high bar has to be met before a court would vary the overall quantum. The Court of Appeal in Westbury v Sampson [2002] 1 FLR 166 held that this "should only be countenanced when the anticipated circumstances have changed very significantly, and/or for cogent reasons rendering it quite unjust or impracticable to hold the payer to the overall quantum of the order originally made". In Horne v Horne [2009] EWCA Civ 487, another failed attempt to invoke Barder following the 2008 crash, Thorpe LJ indicated that the court's approach in applications to vary the overall quantum of a lump sum by instalments should be "almost as stringent" as in determining a Barder appeal. However, he did recognise that more latitude exists in such cases.

Finally, of course, maintenance orders always remain open to variation. This may, however, be less relevant to HNW clients, who are more likely to have been able to afford to capitalise maintenance claims at the time of the original order.



MODERN FAMILY CREATION – THE LEGAL IMPLICATIONS OF DONOR INSEMINATION

Authored by: Sarah Williams, Payne Hicks Beach and Jennifer Lee, Pump Court Chambers

From single-parent families to "blended" or extended family units, whether they be same-sex parents or opposite-sex parents (whether married/in a civil partnership or not), the concept of the "nuclear family" has become less prevalent, and less apt, to describe modern families in the 21st century.

Today's modern family structures include those where children are created through assisted reproductive technologies and encompass sperm/egg/embryo donation, or children born via a surrogate or are adopted. Despite dedicated legislation in the form of HEFA 1990 and 2008, the law is in a permanent state of catch-up with the advances in medical reproductive technologies. Novel legal issues are emerging, which the law has had to respond to, and grapple with.

Further, the demand for donor gametes shows no sign of abating: 35% of men suffer with sub-optimal sperm, more women are embarking on motherhood alone and increasingly, same-sex couples are choosing to have children. The latest domestic figures from HEFA show the number of women attempting to start a family on their own has soared by a third in two years: 1272 women registered to have fertility treatment without a partner in 2016, up from 942 in 2014. The worth of the global sperm bank market is expected to reach an astonishing $5 billion by 2025 .

The demand for donor sperm, in particular, vastly outstrips domestic supply. The shortage of domestic sperm donors received extensive media coverage when Brexit threatened to impact on the importation of Danish sperm. While the proportion of imported egg donations remains small, the proportion of imported sperm is now at 39% of all newly registered sperm donors. Of the non-UK sperm donors registered, the most common countries are dominated by the US (49%) and Denmark (45%). This demonstrates the need to make donating sperm more appealing to men in the UK.

> **"Every year around 2,700 children in the UK are conceived with the help of a donor. Fertility clinics in the UK are regulated by the Human Fertilisation and Embryology Authority (the HFEA). This ensures that everyone undergoing treatment or donating gametes has received appropriate information and counselling in order to make informed decisions."**

This article provides an overview regarding the legal implications of donor conception in England and Wales.

In the UK, it is illegal to pay a donor anything other than expenses. This means that most donors donate for altruistic reasons rather than financial gain. In line with the requirements set by the HFEA, in the UK, a donor's sperm may only be used to create up to ten families (not including their own). There is also a limit on compensation. Those donating sperm can receive up to £35 for each clinic visit, and those who donate eggs £750 per donation "cycle". It is a rigorous process to be a registered sperm donor in the UK: he must be between the ages of 18 and 41, be screened for sexually transmitted diseases and some genetic disorders, his sperm must be of good quality and he must answer questions regarding his sexual habits and drug use.

Furthermore, since the law changed in 2005, it is no longer possible to register with a HFEA-licensed clinic as an anonymous sperm or egg donor. Donors must, therefore, agree to be identifiable once the donor conceived individual reaches 18, and consent to their details being included on the HEFA Register of Information. As this law was only introduced in 2005, and the oldest donor conceived individuals will have just reached 15, it remains to be seen how many children will seek to contact their sperm donor.

The law regarding donor insemination is complex. Whose genetic material is involved, and how, when and where conception takes place, will affect whom the law determines are the legal parents of the child, and who has parental responsibility. On that note, it is important to remember that legal parenthood is not synonymous with having parental responsibility.

It is vital that intended parents seek specialist legal advice prior to their child's conception to ensure that those who intend to be the legal parents are recognised as such, and that there is a clear understanding of who has (and who does not have) parental responsibility for the child. Donors may also be concerned about financial claims being made against them in the future, or the impact upon their own family.

The Legal Implications

Conceiving with an unknown donor via a HFEA licenced fertility clinic.

If one chooses to conceive with an unknown donor through a HFEA-licensed fertility clinic in the UK, the donor will not be the legal parent, and will be protected from any legal claims pertaining to the child, such as maintenance and Inheritance Act claims.

The woman who gives birth to the child will be the legal mother (under English law, the woman who gives birth to the child will always be treated as the legal mother). If she is married or in a civil partnership, her spouse or civil partner will be the second legal parent. If she is not married or in a civil partnership, her partner may become the second legal parent provided certain prescribed forms (which would be available via the licensed clinic) are signed before conception.

It is also worth bearing in mind that in addition to the intended parent(s) being entitled to certain information about the donor, any child conceived via a licensed clinic in the UK will also have the right to certain information in respect of the donor. Any child who has been donor conceived at a licensed clinic in the UK after 31 March 2005 will now be entitled, at the age of 16, to some limited information about their donor, such as a physical description, their year of birth, marital status, and medical history.

At the age of 18, the child will be entitled to identifying information about their donor, including their donor's name, date of birth and last known address. If the child was conceived after 1 August 1991, they can also join the HFEA's Donor Sibling Link , which would enable them to make contact with any donor-conceived genetic siblings (provided those siblings have also joined the Donor Sibling Link, or join in the future).

An important development has arisen in the arena of anonymous donation which relates to so-called "three parent families". Here, the embryo is created from three genetic parents. The UK is the only country so far to have officially approved the use of mitochondrial replacement therapy (MRT) technique, and only in order to prevent children from inheriting severe mitochondrial disorders. The procedure, undertaken in a clinic, is similar to IVF but uses genetic material from three people. It was developed for women who have genetic mutations in the DNA of their mitochondria as this DNA is only passed on via the mother. The MRT technique swaps the woman's defective mitochondrial DNA with that of the donor.

As the resulting embryo's DNA is predominantly derived from the two parents who supplied the egg and sperm (the mitochondrial DNA is by far the smallest contribution at less than 1%), the DNA donor has no legal rights in relation to the child and will remain anonymous (i.e. the child will not be able to apply for identifying information about them when they are 18). However, from the age of 16, the child can access non-identifying information about the donor in the form of the screening tests carried out on them, their personal and family medical history, a personal description and any additional information that they have agreed to share with the child .

Conceiving with a known donor

The legal position in relation to conceiving with a known donor depends on whether the arrangement is undertaken via a licensed clinic in the UK, or elsewhere (i.e. pursuant to a private arrangement at home).

"Will the donor have a parental role? If not, will the donor have another role, i.e. akin to an uncle?

Will the donor have any contact with the child? If so, when, and how frequently will such contact take place?

Will the donor be consulted in relation to the child's name, education, etc.?

Will the donor be expected to provide any financial support to the child?

Will the child be told about the role of the donor in their creation?"

Conceiving with a known donor – licensed clinic in the UK

If one conceives with a known donor at a licensed clinic in the UK, the position will mirror that set out in the paragraphs above. The known donor will be given a health check at the clinic, undergo the necessary counselling, and be provided with information to ensure that they are able to give informed consent to the donation, and understand their legal rights and responsibilities. Here, the donor will not be the legal father if the couple he donates to are both legal parents. If there is no second legal parent, he could be the legal father, depending upon the consent forms at the clinic and any agreement between the parties.

Conceiving with a known donor – other arrangements

If the conception is not undertaken at a licensed clinic in the UK (for example, if it is pursuant to a private arrangement), the legal situation is more complex. As stated above, under English law, the woman who gives birth to the child will always be treated as the legal mother.

If the woman is not married or in a civil partnership, the donor will be the legal father (and will consequently be liable for child support if an application were to be made to the Child Maintenance Service). However, if the woman is married or in a civil partnership at the time of conception, the woman's spouse or civil partner will be the second legal parent (and be eligible to be so named on the child's birth certificate) . The donor will not be the legal father despite being the biological father.

More generally, when conceiving with a known donor, it is also very important to ensure that everyone involved understands exactly what each expects from the arrangement, and what their respective roles will be. For example, consideration should be given at an early stage of the process, preferably pre-conception, to these matters:

A sperm donor who is not the legal father has no rights and responsibilities towards the child and cannot be recorded on the child's birth certificate. He can, however, apply to the court for parental responsibility in respect of the child, so for example, he can enjoy spending time with the child and be involved in some decisions .

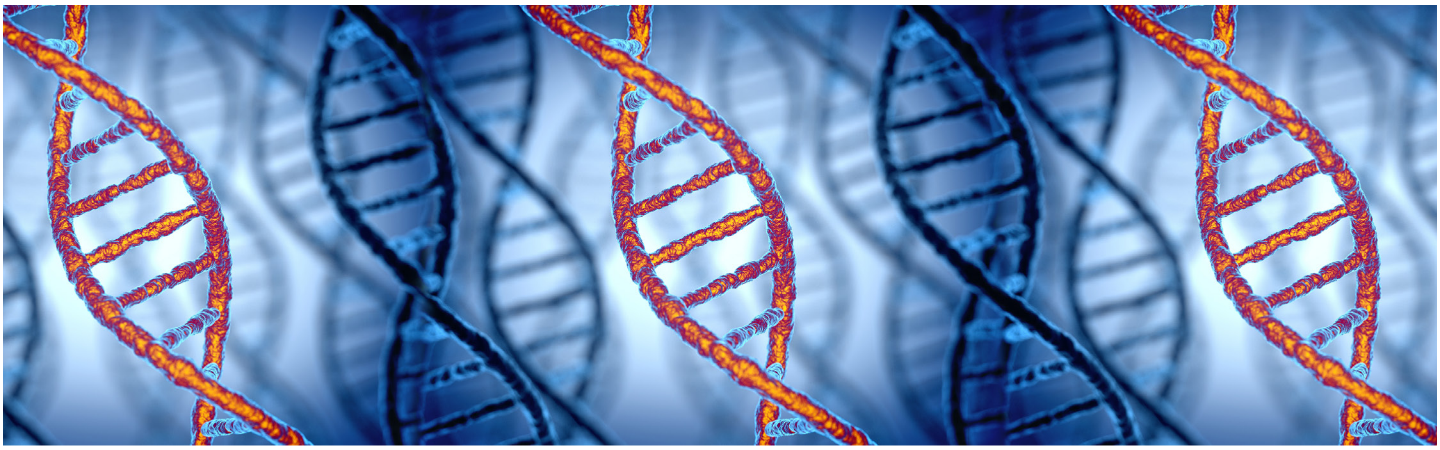
These are just a few of the issues which will need to be considered by intended parents and donors. In the authors' collective experience, these issues, if not properly discussed and agreed upon at the very outset, can very often lead to bitter disputes. Those who wish to embark on a journey towards building a family via donor insemination are therefore strongly encouraged to consider and agree upon these issues before conception, and to record their "agreement" in writing.

Donor or Pre-conception Agreements

Donor agreements or preconception agreements are intended to set out the roles and responsibilities each of the parties will have. Whilst these agreements are not legally binding, they can be incredibly helpful in facilitating honest conversations, setting a guiding framework in relation to the adults' roles and responsibilities in the child's life, and help avoid future disputes. There is also now case law which suggests that judges will give proper weight to these agreements if the courts are called upon to decide arrangements for a child, and the role of the adults in that child's life . In this sense, they are akin to prenuptial agreements.

Conclusion

This area of law can be immensely complex, and the stakes can be high. It is therefore vital that those intending to embark on this journey seek specialist legal advice at the very outset, preferably pre-conception, as to the possible legal implications for them and any child conceived via gamete donation.



COMPENSATION CLAIMS ON DIVORCE - WHEN THE CLOCKS CAN'T BE TURNED BACK TO RECOVER LOSS OF FUTURE EARNING POTENTIAL

Authored by: Stacey Nevin, Kinglsey Napley

Jane Keir and I recently acted for the successful wife in the case of **RC v JC [2020] EWHC 466 (Fam),** assisted by Alice Trotter. The case has received a broad spectrum of media attention, and unsurprisingly so.

Our client was successful in her claim for "compensation" for what Mr Justice Moor described as her "relationship generated disadvantage". The principle of compensation was first successfully used and established in the family courts in the 2006 judgment of Miller v Miller; McFarlane v McFarlane [2006] UKHL 24. Since then, there have been no reported cases where the principle has been argued successfully, until now.

What is "relationship generated disadvantage"?

In theory, the idea is quite simple. A party to a marriage gives up or seriously impedes their career prospects for the marriage and the family. It is a scenario known to many couples; the cost of childcare and the wish for children to be looked after by their parents, rather than a nanny or au pair, against career progression. A couple may decide together that one party will reduce their working hours or give up work entirely to care for the children, whilst the other party can continue with their career, acting as the main, or even sole, "breadwinner" for the family. For many, it is not a choice; the cost of childcare so often outweighs the financial benefit of a second salary, particularly if that salary is reduced to allow for flexibility to help with child care. For the more fortunate, it can be a choice that is not financially driven; a couple may have strong views about being hands on parents and a desire for at least one parent to be at home for school runs, activities and the bedtime routine.

Where such a decision has been made, there are potential consequences on earning capacity and career progression. Our client had a promising legal career ahead of her. As part of the parties' decision to have children, not only did our client leave the law firm at which she had worked hard to build an impeccable track record, and at a time where she had partnership in her sights, she left private practice and ultimately the legal profession entirely, to ensure she had the possibility of flexible working to allow for childcare. Her hopes of future partnership and, eventually, her legal career came to an end.

Whilst our client took a step back from her career to take on the childcare responsibilities, the husband (already a partner at the time) continued to further his ambitions. He worked incredibly hard, often long hours, to achieve his career goals. He had the freedom to chase his aspirations, in the knowledge that our client took on the childcare arrangements.

By the time the marriage came to an end, the husband was earning £2million gross per annum. Had our client continued with her career progression, such income, we argued, would have been within her reach, if not already achieved. On the contrary, our client had years out of practice. Her partnership hopes were extinguished. Had she been able to return to work at all, she had no hope of earning anything like she would have earned had she remained on course for partner. The choices she and her husband had made many years ago meant she no longer had the potential of the lucrative career earnings for which she had been on track.

Why is this different to the time the husband sacrificed with his children?

Some may argue that if the primary carer can be compensated for their career loss, shouldn't the bread winner be compensated for the time lost with children whilst burning the midnight oil at the office? Since the landmark cases of White v White and Miller/Mcfarlane, the role of the "breadwinner" as against the "primary carer" or "homemaker" is viewed equally. The principle of compensation does not change that. However, career and earning prospects cannot be adjusted in the same manner that child arrangements can.

It is of course correct that the husband in this case, and many like it, sacrificed time with his children as he worked hard for the family. That is a choice he made, but it is not a choice that dictates his relationship with his children for the foreseeable future. In fact, as is mentioned in the judgment, following the breakdown of the marriage, he had already reduced his working hours to cater for the childcare arrangements, with the children now spending five nights every fortnight during term time with their father, and half of the school holidays. Our client, however, is unable to adjust her earning abilities quite so easily; she cannot turn the clock back to restore her previous career and earning potential. The choices she made carry through into her future.

An exceptionally rare case

The scenario of one parent reducing their working hours or stepping back entirely is not uncommon. It is a decision that many couples face. For many individuals who make that decision, it is in the belief that they are financially secure; couples find a balance where the family finances can be balanced against growing families and the need for childcare that comes with that. Beyond claims for needs based maintenance on divorce, future income is not an asset that can be shared. In the event that the marriage ends and a couple separates, the "primary carer" can feel financially disadvantaged because of choices made in the relationship. However, that does not necessarily translate to a compensation award from the family courts.

In giving judgment, Mr Justice Moor was very clear that an award for compensation will only be made in cases where the circumstances are exceptionally rare. In the case of Mcfarlane where compensation was first established, the court was clear that the wife's future success was not a matter of speculation, that the career she had given up "would very probably have been a lucrative and successful career" and that she had a proven track record. In this case, our client's track record was exemplary, and witnesses, along with appraisal documentation created at the time, supported the case that she had partnership prospects. Had she stayed on track, and there was nothing to suggest she would not have done so, her future career would most likely have been lucrative, akin to the husband's as it is today.

Is compensation for women only?

Relationship generated disadvantage and compensation claims are not limited to women. It is true that the only two reported cases where such claims have been made successfully have seen compensation paid to the wife. In those cases, it was the wife who had sacrificed a lucrative career whilst the husband was "relieved of the day to day responsibility" of childcare.

Families and working parents are increasingly bucking traditional trends; there are more stay at home fathers, more families taking shared parental leave and, I hope, more women starting to break the glass ceiling when it comes to wage equality and therefore more families where it is the woman who is the breadwinner. Had it been the husband in this case who had stepped back from his career, whilst the wife's lucrative career flourished, then there is nothing to say that he would not have had a successful compensation claim.

Compensation claims will continue to prove to be the rare exception to the rule, but where a husband can show that he had given up what was probably going to be a lucrative and successful career, with a proven track record, and is therefore left at an economic disadvantage as against his spouse whose career has continued to rise, then a claim is worth considering. The bar for compensation is equally high, whether the claimant is male or female.

What does this mean for future compensation cases?

The judgment confirms that the principle of compensation still exists in family law. Given the media coverage this case has had, we may well experience a spike in compensation claims in family law proceedings. However, a flurry of successful claims remains highly unlikely and compensation will continue to be a principle reserved for rare cases. Mr Justice Moor's closing remarks in his judgment are that this case should not open the floodgates, and that successful compensation claims will remain rare. In the family law sense, it is not as simple as a spouse giving up work and reducing their hours. Nor is it a matter of pure speculation; of what might have been had an individual decided not to have children.

Where the facts can be established to demonstrate a "relationship generated disadvantage" in the family law sense, this may not translate to a difference in the financial award. In some cases, the assets or income at the time of the divorce may be insufficient to cater for such a claim, only meeting the needs of the parties. In others, where there is a surplus of assets, any loss may already be covered in the share of the assets. In the case of our client, the judge felt that her share of the assets was not sufficient to cover her loss, and he awarded her an additional sum of £400,000.

Compensation claims should not be put in the bin. However, while family lawyers may well spot particular features and the prospect of a compensation claim at an early stage, they do need very careful consideration. In the rare circumstances where the facts do point to a potentially successful claim, consideration needs to be given as to whether this is likely to considerably change any financial award. Compensation claims remain a rare but valid principle in exceptional circumstances.

Stacey Nevin is a Senior Associate in the family and divorce team at Kingsley Napley LLP.

ATTACKING AND DEFENDING TRUSTS IN DIVORCE

Authored by: Stella Mitchell-Voisin, Summit Trust

To paraphrase a comment recently made at a conference by a senior family court judge, if the impression that the trust fund is a resource of one of the parties is not corrected, a decision will be taken on the understanding that it is. The family law concept of the 'ATM Trust Fund' needed little explanation.

Two basic thoughts occurred to this trustee: fair enough; and why are trustees still letting this happen?

On the first point, while no doubt decisions will be taken on the facts of the specific case, the Mr Charmans, the Mr Prests, the Mr Pugachevs do leave an impression - in the latter case, complete with the image of a James Bond baddie stroking an Angora Cat . The lesser-known trustees in some tucked away jurisdiction make something less of an impression. Or at least not one that supports a case for robust trusteeship.

On the second point, the most often cited and valid reason is that the trustee will not wish to unwittingly submit to a foreign court. Legal guidance would usually be taken when being asked to assist in a beneficiary divorce that should ensure that this does not happen. The other reason may be simply because the files do not read well. Within the context of defending the integrity of a trust relationship, words such as 'client' (denoting the settlor) and 'instruction' littered throughout will not be helpful. Or maybe the files barely read at all. If the exercise of discretion cannot be shown to have been properly considered and/or the trust has been poorly administered the beneficiary will surely struggle to dispel the family court's impression that the trust fund is a personal resource. The trustee then is likely to have an unwelcome 'judicially encouraged' distribution decision on its hands.

Examples of the sort of disclosures requested to trustees in divorce cases include: copies of trust deeds; financial statements of trusts and underlying companies; supplemental instruments, letters of wishes; schedules of underlying assets; distribution schedules (including the date of the request, identity of the requesting party, reason for the request, the amount and nature of the provision requested, a copy of the actual request, a copy of the response to the request, the amount and nature of the provision made pursuant to the request, the recipient of any such provision, in the event of any such request having been refused, the reason given for the refusal.

Assuming that the trust was settled on discretionary terms for multigenerational benefit, trustee cooperation in the above requests (absent good reasons to refuse disclosure) should be helpful in dispelling misconceptions. All of the above-mentioned documents should be immediately at hand for the trustee of a professionally administered trust. There will be (or should be!) some considerable embarrassment for a professional trustee if any of these documents cannot be located or proceedings are held up while historical financial details are hurriedly pulled together from scratch.

As a side point, much of the trust information may very well be already in the divorce jurisdiction, such as copies of deeds and financial statements sent to beneficiaries, making it potentially subject to a court subpoena. As a result, uncooperative trustee behaviour in withholding trust information will be ineffective in concealing information and serving simply to prolong and increase the overall cost of the divorce.

Having touched upon cost, the trustee should keep their duty to account in mind. They should engage in rigorous - and recorded - scrutiny of legal bills (ensuring that the lawyers performed only the work for which they had been engaged) before settling them out of the trust fund.

As any trustee knows, usually they are adapting to imperfect 'we are where we are' circumstances. In non-contentious family circumstances, oftentimes the trustee will have communicated trust information more regularly with one senior family member beneficiary, rather than each individual adult beneficiary equally. Done not out of a desire to conceal the trust from other beneficiaries, rather on the implicit understanding the immediate family beneficiaries' interests would be broadly aligned with the family's natural financial provider. Trustee neutrality is a widely accepted as a general guiding principle when two members of a discretionary class of beneficiaries decide to divorce. The word 'neutrality' can convey an impression of passivity or inaction. It is rarely thus: adopting a stance of 'co-operative neutrality' can require some tough decisions, often beginning with any information imbalance being readdressed.

Each circumstance involving divorce will clearly be different but a trustee with complete and well organised files that demonstrate the integrity discretionary trust that properly considers all the beneficiaries' interests, will always have more options should the time come to defend it. History cannot be re-written, so the time to ensure this is from the outset, rather than the storm clouds of divorce on the horizon. And well before that lift shaft is set in motion .

SURROGACY: SEPARATED PARENTS AND PARENTAL ORDERS

Authored by: Teena Dhanota-Jones, Simons Muirhead & Bolton

Upon the birth of a child borne by a surrogate mother and subject to a surrogacy arrangement, the intended parents must obtain a parental order in England and Wales. This order transfers the legal parenthood from the surrogate mother (and any other legal parent at that time), to the intended parents.

In seeking to obtain a joint parental order in this case, the intended parents were separated and were making this application two years' after the birth of the child.

Section 54 of the Human Embryology and Fertilisation Act 2008 (s.54) stipulates the statutory criteria to be applied when considering parental order applications. Specifically, in relation to this case the following section 54 factors were pertinent parts of the law that had to be addressed:

(2) (c) two parents who are living as partners in an **enduring family relationship.**

(3) ….must apply for the order during the period of **6 months** beginning with the day the child is born.

(4) (a) the child's **home must be with the applicants.**

Mr Justice Keehan granted a parental order to both parents despite the criteria set out at s.54. In addressing the issues, he stated:

6 months

1. Para 56:

"I am satisfied that the fact that this joint application for a parental order was made over 2 years after the time limit prescribed by s.54(3) is not a bar to the court making a parental order. To find to the contrary would be nonsensical and would deprive A of the enormous benefits of a parental order."

Enduring Family Relationship

2. Para 57:

"The mother and the father are committed to A's welfare and future care in which both are agreed they should play an active role. I am satisfied that A has a 'family life' with both of his parents. Accordingly, I am satisfied that his Art 8 and Art 14 rights are engaged. In light of their agreement and commitment to A, **I am also satisfied that the parents are in an enduring family relationship."**

Home must be with the applicants

3. Para 58

"The term 'home' must be given a wide and purposive interpretation. **The authorities make clear that the term is not and should not be restricted to cases where the applicants live together under the same roof.** It is the plain intention of the parents that A will be cared for by both of them, albeit not necessarily, and not at present, on the basis of an equal shared care arrangement. Giving a wide and purposive interpretation of the word 'home', I am satisfied that A has his 'home' with the mother and the father."

In summary, whilst the intended parents did not strictly fall within the statutory criteria; the Judge was satisfied that the statutory requirements were met. It does seem that it was deemed necessary to invoke a degree of interpretation, sensibility, and common sense. The overriding objective is really what would be in the best interest of this child and it was held that; "It is overwhelmingly in the welfare best interests of A that he is made the subject of a parental order." This really was the best outcome for all parties concerned and certainly shows how elastic the application of the law can be when considering such cases.

LEARN FROM ADVERSITY

Authored by: Tim Bennett, Killik & Co

2020 has proven to be a challenging year so far when it comes to building and protecting wealth. However, the "new normal" that has been adopted, in working patterns, the way our children are schooled, or our relationship with the community, has also provided an opportunity to reflect on how we manage our financial lives. Here are three personal takeaways from what has been a tumultuous year across just about every market and asset class.

Learn from adversity

As a child of the 1970's, I was raised to the sounds of Queen, Fleetwood Mac and Stevie Wonder. Back then, home computing was non-existent, as were smartphones and streaming services. Yet, as far removed as those years may seem, the arrival of coronavirus, with all the ensuing mayhem it has wrought, has made me realise that this distant decade can remind us of some important lessons.

The first relates to investing. In the bear market of the early 1970's, UK stocks lost around two-thirds of their value. The decline was so steep that I would not be surprised if it frightened off many long-term investors for good. We now know that the stock market not only recovered but went on to scale new highs, albeit not without some sharp spells of subsequent volatility. History will likely look back on 2020's hugely volatile markets, in everything from oil and gold to bonds and shares, with a similar degree of detachment. I therefore conclude that unless one sharp downturn has the power to destroy your faith in our ability to progress economically and financially over the long-term, quiet optimism remains the best emotional bet now just as it was back then.

My second lesson from the 1970's relates to the way we choose to live. When I was growing up, we didn't worry much about the outside world at weekends – a feat made easier by the absence of mobile devices and the presence of a television that only offered a handful of channels. We just talked, played, chatted and ate. Now that people have been forced to "self-isolate" it seems they are rediscovering some of the joys of a simpler existence. A crisis like this should throw into sharp relief the fact that living in a global economy, with all the independence and opportunity it creates, does not really make us any less dependent on other people when it comes to the crunch. Indeed, in an era when the cost of everything from education to care is rising and State support is on the wane, the strength and support of other family members, within and across generations, is more important than ever.

Avoid financial regret

As I finalised my New Year's resolutions back in January, a phrase climbed to the top of my banned-for-2020 list – "What if?". It got there thanks to a conversation with a friend. He asked me, "do you know how much money you would have today if you had invested £100 in Amazon at its Initial Public Offering (IPO)?". Before I could answer he said "£140,000". I tried to look impressed, but I was feeling irritated. Factoids like that make you feel inadequate ("why didn't I invest?") and promote dangerous thinking ("what if I can catch the next Amazon?")

Let's return to that IPO to see why this is unlikely to happen. Had I put £100 into Amazon when it first came to the public markets in 1997, I would have had to stay invested as the firm racked up $3bn of cumulative losses in its first 21 months post-IPO. I would then have had to hang on as my shares fell by 95% between 1999 and 2001. To stay the course subsequently I would have needed massive faith in the firm when so many others were falling by the wayside. Seen in that context, my friend might as well have asked me where I would be now if I had trained to become an astronaut.

Fast forward to today and some people will be beating themselves up about the arrival of coronavirus – "why didn't we take evasive action. And sooner?" Again, this is not helpful thinking. The truth is that very few people saw this pandemic coming and fewer still did anything about it. So, let's stop asking "what if?" – it focuses us on the past (which we cannot change) rather than the future (which we can). It also dredges up the negative (things we did not do) rather than the positive (things we did). My suggestion therefore is, the next time someone starts a phrase with the words "What if?" counter them with, "So what?"

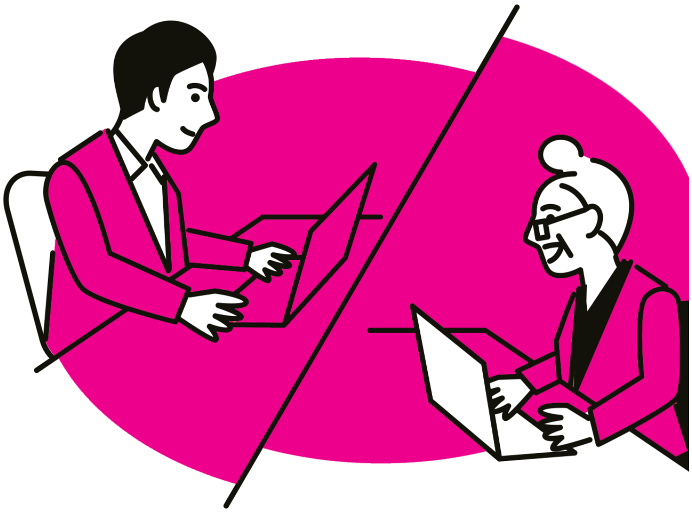
Give something back

A recent US study found that once our annual income goes beyond $75,000, we derive less and less relative pleasure from each extra dollar that is added to our pay checks. This suggests that, at a certain level of financial wealth, the path to happiness lies elsewhere. For many people, fulfilment comes, not only from building wealth but also, at a certain point, giving some of it back. The disparity of experience and hardship caused by COVID-19 across different parts of society has reinforced this desire in many people.

The good news is there are many ways to do it. Some of us focus on raising and supporting children and grandchildren who will hopefully become good citizens and make a positive contribution. Then there is charitable giving in its many forms. I work for a firm that prides itself on giving back through the work of a Charitable Trust. Our Founder and SEO, Paul Killik, also helped pioneer the Share Gift scheme, which allows people to donate low value shareholdings to charity at minimal cost (sharegift.org).

For my part I can reach thousands of people on a weekly basis with my free Killik Explains videos and guides. I may, or may not, be "the best financial educator on YouTube" but I hope I am doing my bit to help families to make sense of the financial world.

TOP 10 TIPS FOR SUCCESSFUL VIDEO INTERVIEWS



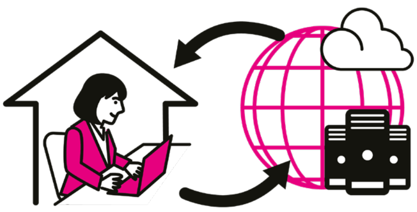
Authored by: Siobhan Lewington and James Quick, Fox Rodney Search

Now that we're all working remotely and practising social distancing, we're seeing our clients' meetings with candidates moving to video platforms such as WebEx, Zoom or Skype. As this is a new experience for many of us, we thought we would share our top 10 tips for successful video interviews.

In Advance

1. Test the technology

If you've never used the video platform before, make sure you do a test run well in advance. Ask a family member to do a test with you. Some people even record the test run to see how they present on screen, especially if they're not accustomed to it. Check the visuals but also the sound. In any event, have back up contact details in case the technology doesn't work on the day: it's good to swap phone numbers in advance.



2. Find your location

Choose the right spot for the meeting. This could be in your home office but not everyone is lucky enough to have one. If you normally work in your bedroom and your bed is visible or the light is poor, try and find another spot. If you normally work in the kitchen, make sure other family members are not coming in and out. They'll laugh but one option is to put an "On Camera!" sign on the kitchen door. In any event, try and have a neutral background: a blank wall or a bookcase works well. Some video platforms allow you to choose your own background (e.g. tropical beach, cityscape, or if you are our CEO, Thierry Henry!) but this can look a bit stilted and artificial. Try not to have a window or light behind you. Ideally, have a window or lamp in front so that light is shining on your face. This allows for a more professional camera look.

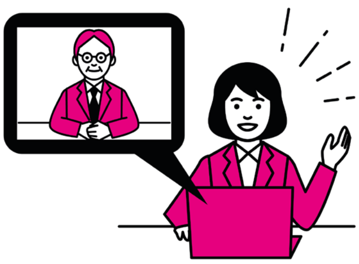
3. Do the usual pre-meeting or interview preparation

Sometimes, as there is less of a time investment, we find that some people tend to treat video interviews more casually and don't prepare as much as they might for an in-person meeting. Remember this is not a less important meeting: it's exactly the same meeting, it's just on video!

On the Day

4. Dress Professionally

Lots of advice around video interviews advocates dressing smartly from the waist up only. Yes, it's true, the other person only normally sees your top half. However, if you need to get up during the meeting (e.g if your 2 year old is threatening to join you) your whole outfit will be seen so it's best not to pair your smart sweater or shirt with your pyjama bottoms. Just in case. If you want advice from those on TV, solid colours are best rather than patterns.



5. Optimise your chances for a good video connection

This means pleading with other household members not to stream the new season Money Heist or play in a Fortnite tournament when you're doing your video call.

6. Be early and double check your set up

Get to your desk (or table! try not to do the meeting from your sofa) early and ensure you've connected before the start time of the meeting. Just as you would turn up to an interview in person a bit early, you should connect to the meeting 5 minutes early. This also gives you time to sort out any technical issues or problems. Make sure you put your phone on silent and also silence any app notifications. Ideally, you should set your camera a little higher than your face. Most of your top half should be seen on screen rather than just your face: this is mirroring how you would look in an in-person meeting.

7. Look at the Camera!

During the meeting, ensure you are looking at the camera, not at the screen or even your keyboard. It if helps, put a tiny post-it with an arrow pointing at the camera. If you're looking directly at the camera, your points will come across more powerfully and you'll have a stronger connection with your interviewer. Whatever you do, don't check yourself out on screen: I've seen people check out their hair and fix it during videocalls.

8. Put your interviewer at ease

It's a nice touch if you can put your interviewer at ease by having a bit of small talk at the beginning if there is the opportunity. The interviewer should do this also of course but sometimes it doesn't happen. When you meet in person, this normally happens but in video meetings, this personal touch at the beginning is missed out which is a shame as it can put everyone at ease. At the very least, you can ask if the connection is okay and if they can hear and see you properly. Sometimes, people are too polite to say there is a problem.

9. Be natural but try to be energetic

It's a well-known fact to those who make their living on camera that video deadens your energy. This means that you need to make an effort to be engaged and energetic otherwise you may present as a bit flat. It's very important to smile and to nod occasionally to acknowledge what the other person is saying. Speak clearly and don't speak too quickly. If you normally speak quickly, slow down as there can be a sound delay during a video meeting. Whilst it's good to be energetic, try not to fidget or bounce around in your chair: a lot of movement on video can make you appear fuzzy or out of focus.

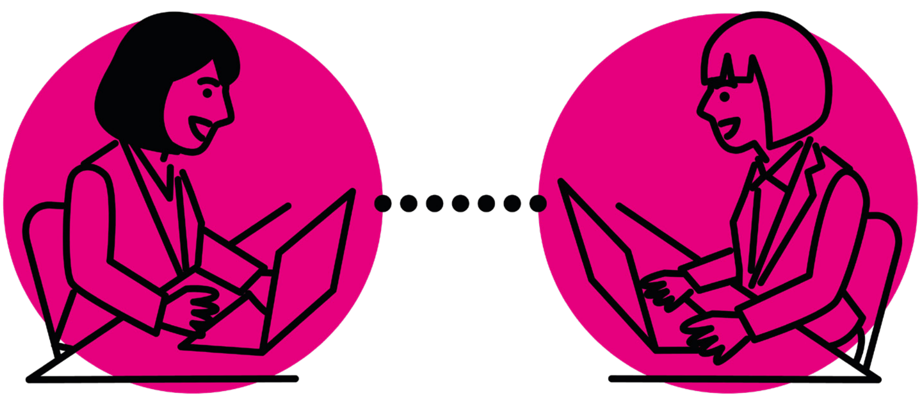
10. Unexpected interruptions

These can happen! It could be your teenager who is angry that he's lost out in that Fortnite tournament or your partner who has forgotten that you're on a videocall. If this happens, don't be embarrassed, just say "Excuse me for a moment, whilst I look after this". Remember, you're at home so these interruptions are perfectly understandable and no reflection on you.

And finally...

Thank the interviewer as usual afterwards by sending a follow up email. If you are meeting more than one person, send an email to each of them to thank them and to express your interest in continuing the discussion…… if of course you want to.

Good Luck!



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Supporting Durrell & Jersey Zoo

Jersey Zoo is the heartbeat of the Durrell Wildlife Conservation Trust. All of their conservation work around the globe is underpinned by the zoo. Despite their hardest efforts, the present pandemic is having a devastating effect on the income of Durrell.

When they wrote to inform us that their global conservation program and 61-year history of saving species and habitats from the brink of extinction was in real danger due to the financial impact of the pandemic on Jersey Zoo, we asked how we could help.

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

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

The Blue Poison Dart Frog

(dendrobates tinctorius azureus)
Native to Suriname

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

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

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

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

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

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Love your Zoo

VARYING LUMP SUM ORDERS

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Summary

With increasing economic uncertainty arising from the Covid-19 crises, some clients may be concerned about how affordable it is for them to meet their obligations under a lump sum order.

This article looks at the types of lump sum orders capable of variation under section 31 of the Matrimonial Causes Act 1973 (the MCA 1973) and the factors the court will consider when dealing with any such application.

Varying a lump sum order: the law

The court has the power to make lump sum orders payable either to a party of the marriage or to the person specified in the order for the benefit of a child of the family or to such child directly.

Depending on the type of lump sum order, it is possible to make an application to the court to vary both the quantum and the timing of the payments.

Pursuant to section 31(1) of the MCA 1973:

> *"The court has the power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended".*

Lump sums by instalments are captured by section 31(2)(d):

"(2) this section applies to the following orders…:

(d) any order made by virtue of section 23(3)(c) or 27(7)(b) above (provisions for payment of a lump sum by instalments)".

Varying a lump sum: what will the court consider?

In accordance with section 31(7) of the MCA 1973, when considering an application to vary a lump sum order, the court will:

> "have regard to **all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family…** and the circumstances of the case shall include **any change in any of the matters to which the court was required to have regard when making the order** to which the application relates".

The case of Hamilton v Hamilton [2013] EWCA Civ 13.

The leading case on varying lump sum orders is Hamilton v Hamilton [2013] EWCA Civ 13.

In this case, H and W reached an agreement which was embodied in an order dated 18 January 2008. The assets comprised the former matrimonial home and W's recruitment agency, valued at £1.5m.

Pursuant to that order, W was to make lump sum payments to H, totaling £450,000. After payment of the first payment, H was to transfer his interest in the former matrimonial home to W on a clean break basis; a liberty to apply provision was included as to the implementation and timing of the terms of the order.

W was able to pay a total of £240,000 to H (reflecting payment of the first and part of the second of the lump sums). W's business then went into a "dramatic decline", eventually going into administration.

H was owed £210,000 plus interest. He issued enforcement proceedings and served a statutory demand on W, as a precursor to bankruptcy proceedings. W made an application under s31 of the MCA 1973 and sought a variation of the original order.

First instance decision

At first instance, Parker J held that:

1. Any order for the payment of lump sums over time is an order for a lump sum by instalments and thus capable of variation
2. Only the timing of the lump sum payments could be varied but the quantum.

H appealed.

Court of Appeal decision

At the Court of Appeal, W maintained that the 2008 order was a lump payable by instalments and so capable of variation; H contended that the 2008 order was a series of lump sums not capable of variation.

The Court of Appeal found in favour of W and upheld the order made by Parker J.

Baron J, in giving the judgment of the Court of Appeal, made the following findings in respect of the appeal:

1. *Parker J was wrong to conclude that any order for the payment of lump sums over time is an order for a*

lump sum by instalments.

2. *Parker J was, however, entitled to find that the order in this case was an order for a lump sum by instalments and thus capable of variation.*

3. *In circumstances where the Court can vary a lump sum, it stood to reason that they could vary both the timing and the quantum payable. This was addressed at paragraph 43 of the judgment:*

"The court is given the power to vary a lump sum and it stands to reason that that power must extend to quantum as well as timing".

The Court also looked at the approach that should be taken when there is a disagreement between the parties as to the nature of the order and found that the court retains jurisdiction and should assess what the parties agreed against the objective factual matrix of what happened during the relevant period. In short, if the language of the order did not settle matters, then the court was entitled to look to the surrounding facts and circumstances which bear upon the terms of drafted.

Varying the quantum payable

The following cases pre-date the Court of Appeal decision in Hamilton but continue to provide useful guidance on the approach the court may take to varying the quantum payable under a lump sum.

In short, the court will only vary the quantum payable in exceptional circumstances where there has been a significant change in circumstances between the original order and the application to vary such that it would be unjust or impracticable to hold the payer to the overall quantum of the order originally made.

In Westbury v Sampson [2002] 1 FLR 166, W was to pay H a lump sum of £42,500 by way of two instalments, one of £2,500 within 28 days and the balance within six months of the date of the order (when H's interest in the FMH would be transferred to W, subject to the mortgage).

At the time the agreement had been reached, it had been thought that the equity in the property was £118,000. However, when the property went on the market it realised equity of only £18,000.

W applied to vary the consent order and the total quantum was reduced from £42,500 to £25,000.

Bodey J, on the issue of variation, said:

> *"The re-opening under section 31 of the overall quantum of lump sum orders by instalments, especially when made as part of a package intended to be final (and all the more so when ordered by consent following an agreement), should only be countenanced when the anticipated circumstances have changed very significantly, and/or for cogent reasons rendering it unjust or impracticable tohold the payer to the overall quantum of the order originally made."*

H then took a claim of negligence against his solicitors and claimed that he had not been told that the lump sum payments could be varied. The claim did not succeed.

Although the case of B v S [2012] EWHC 265 (Fam) does not focus exclusively on the law on varying lump sum orders, at paragraph 82 of the judgment there is useful guidance on the approach the court may take on varying the quantum and the timings of the lump sum payments:

> *"A lump sum payable by instalments is variable under the terms of s31(2)(d) MCA 1973. The quantum will only be variable in exceptional circumstances, but the timing of the instalments is variable on an unfettered basis: see Westbury v Sampson [2002] 1 FLR 166, CA at para 57. Therefore, H can apply to extend the dates I have set; W can apply to accelerate payment."*

Therefore, the court will only vary the quantum of lump sum orders by instalments in exceptional circumstances and only when there has been a very significant change in circumstances which would render it unjust or impracticable to hold the payer to the quantum payable.

Practical points

Lump sum payments over time remain an attractive option for parties wishing to achieve a capital clean break but where the capital resources are not immediately available, for example, where equity is tied up in properties or in circumstances where the funds need to be drawn down from a business over time.

In agreeing lump sum payments, it is important to be clear as to what is intended in order to avoid a possible variation application:

1. Correspondence: when negotiating a consent order in correspondence, the words used and communications may be examined by the court in a variation application. Care should be taken to specify which type of lump sum order is intended.
2. If negotiating at an FDR, a detailed note should be kept of the offers made. Again, care should be taken to specify which type of lump sum order is intended.
3. Advice: practitioners should ensure that clients are made aware of the type of lump sum orders which can and cannot be varied.
4. Consent orders: when drafting the order, a recital setting out the parties' agreed intention in terms of potential variation should be clearly expressed.

In making an application to vary a lump sum payment:

1. Carefully consider the wording of the original order to ensure that it is capable of variation.
2. If the order is unclear, review the correspondence from the time to see if that sheds any light on the parties' intentions.
3. Undertake a detailed assessment of the circumstances at the time the order was reached. Consider whether there has been a significant change in circumstances since then such that it would be unjust or impracticable for the paying party to be held to the original terms of the agreement. Keep in mind that an application to vary the quantum payable will succeed only in exceptional circumstances.
4. The application to vary must be made in the lifetime of the order, but the hearing of any application can take place after the order has expired.
5. Making an application for variation of an order is not an inexpensive process and so a commercial view may also need to be taken as to how much money will actually be saved when set against legal fees.

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