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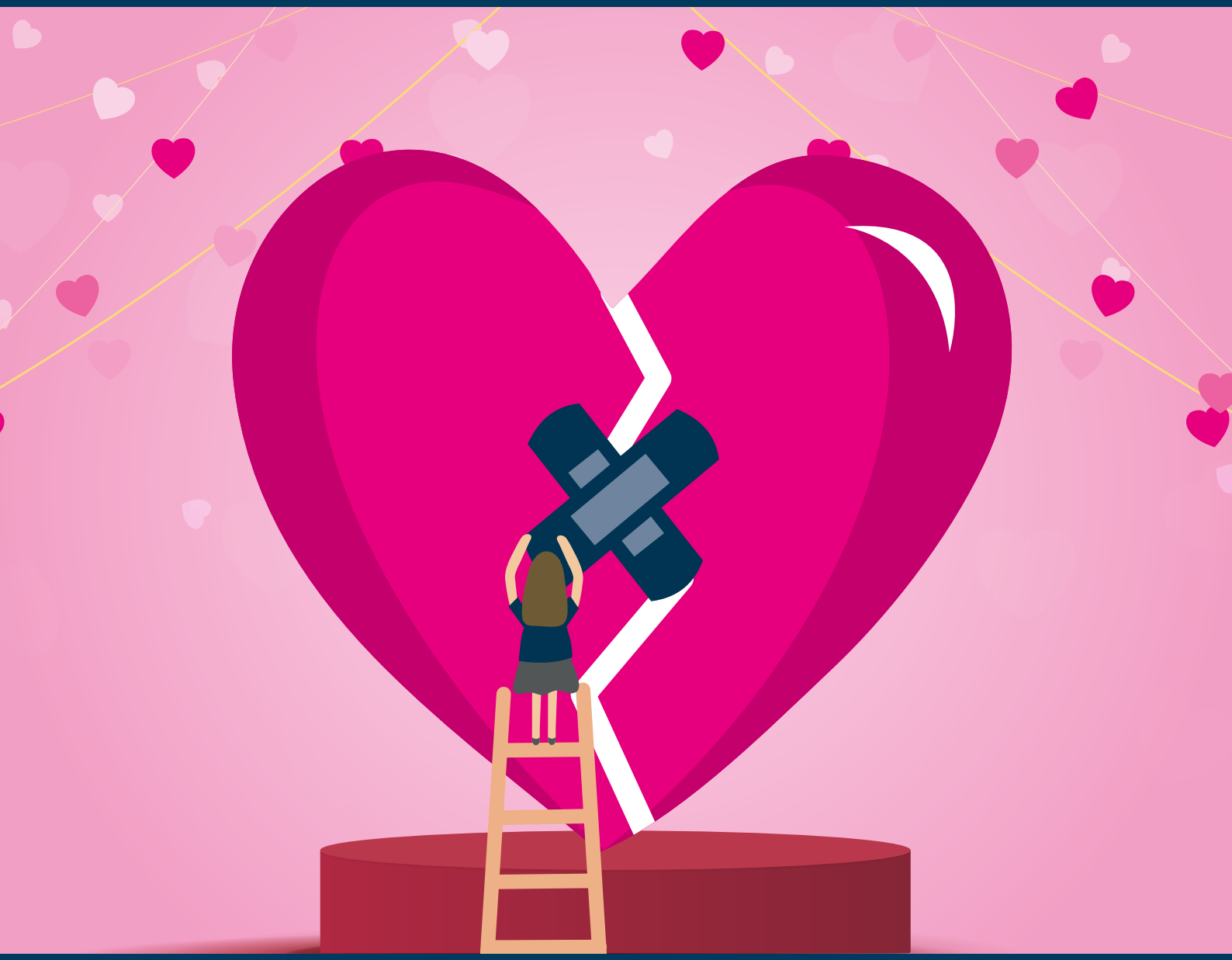
HNW Divorce MAGAZINE

ISSUE 16



BREAKING HEARTS, BUILDING FUTURES: A VALENTINE'S EDITION ON HNW DIVORCE

INTRODUCTION

"It is better to light a candle than curse the darkness"

Eleanor Roosevelt

We are delighted to present Issue 16 of the HNW Divorce Magazine, the first of 2024 and our Valentine's Day edition. Delving into the complexity of love and divorce, this issue promises articles from leading authors in the HNW Divorce community. Whilst this month earns its notoriety from love and relationships, it is an occasion that brings with it reflection, resilience, and contemplation of the road ahead.

This issue provides insight and instruction into the realm of HNW Divorce, in preparation for The Second Annual HNW Divorce Next Gen Summit, taking place on Thursday 14th March 2024.

Thank you to our community partners and contributors for their ongoing support.

We hope you enjoy reading the issue!

The ThoughtLeaders4 HNW Divorce Team

Paul Barford
Founder/Managing Director
020 3398 8510
email Paul

Chris Leese
Founder/Chief Commercial Officer
020 3398 8554
email Chris

Danushka De Alwis
Founder/Chief Operating Officer
020 3580 5891
email Danushka

Maddi Briggs
Strategic Partnership Senior Manager
020 3398 8545
email Maddi

Anne-Sophie Hofmann
Strategic Partnership Executive
020 3398 8547
email Anne-Sophie

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ABOUT HNW Divorce

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

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

Become a member of HNW Divorce and...

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

CONTRIBUTORS

Jessica Crane, **London & Capital**
Alice Rogers, **Hall Brown**
Colleen Hall, **Kingsley Napley**
Sital Fontenelle, **Kingsley Napley**
Neil Llewellyn Davies, **Paris Smith Solicitors**
Cerisse Fisher, **Collas Crill**
Jennifer Macdonald, **Turcan Connell**
Nicole MacDonald, **Tees Law**
Cerys Sayer, **Westgate Chambers**
Aimee Fox, **3PB**
Julie-Ann Harris, **Knights**
Justine Osmotherley, **Montrose Health Group**
Imogen Runacres, **Russell Cooke**
James Carroll, **Russell Cooke**
George Mathieson, **RBC Brewin Dolphin**
Antonia Felix, **Mishcon de Reya**
Nova Maxwell, **Mishcon de Reya**
Izzy Walsh, **Hall Brown**
Sarah Hogarth, **Edwards Family Law**

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TL4Circle's are exclusive, invite-only meetings for experienced practitioners from our community. Curated by a committee of expert advisors, each Circle guest-list brings together a complimentary mix of jurisdictions, individuals and firms renowned for their focus on excellence in delivering both technical knowledge and practical insights.

Find out more:

https://thoughtleaders4.com/circle/

NAVIGATING FAMILY WEALTH PRESERVATION

Q&A ON PROPERTY GIFTS AND COHABITATION AGREEMENTS

Authored by: Jessica Crane (Executive Director) and Alice Rogers (Senior Associate Solicitor) - London & Capital and Hall Brown

In an era where property transactions, financial arrangements, and relationships have become increasingly complex, safeguarding family wealth and assets has become a paramount concern for many.

In this insightful Q&A, our Executive Director, Jessica Crane together with Senior Associate Solicitor at Hall Brown, Alice Rogers, delve into the intricacies of family wealth preservation, property gifts, and the vital role of cohabitation agreements. Jessica and Alice address common scenarios and potential legal challenges that wealth holders may encounter when assisting their children or grandchildren in property purchases. Their expertise sheds light on the importance of documentation and thoughtful planning to ensure a secure and harmonious financial future for all involved.

Q: We often have clients who are looking at ways to help their children or grandchildren with a property purchase. If the child or grandchild is living with a partner but unmarried, is there anything particular that the wealth holder should be thinking about doing in terms of family wealth preservation and protecting their gift?

This scenario is increasingly common, with a growing number of cases involving advanced inheritance gifts. Unfortunately, the idea of common law husband and wife remains a misconception in our society. This, together with a lack of understanding of property disputes for unmarried couples results in property purchases going ahead without a real awareness of the potential legal issues which may arise upon separation.

What this means is that without certain documentation in place the gift can be exposed to a claim from the person who is living with the recipient of the gift. This is an area of law fraught with difficulty and which hinges on evidence, so the steps taken at the outset are crucial.

It is important to have a clear understanding of each party's legal and beneficial entitlement which can be supported by a deed of trust and/or cohabitation agreement at the time of purchase.

Q: What if the parents loaned their child some money to buy a home?

If there is an agreement that monies are provided by way of a loan, any individual entering into the loan should have the benefit of legal advice and this should be documented clearly. This means any loan agreement should ideally be prepared by a commercial solicitor, and include details such as repayment terms, interest, timescales etc. Whilst it is advisable to adopt a 'belt and braces' approach in terms of evidence, if litigation becomes necessary, it is important people are aware of how the Courts distinguish between soft loans (i.e., loans from a family member) and hard debts (i.e., a credit card liability).

Q: Once a couple has signed a cohabitation contract, it is easier to broach the subject of pre-nuptial agreements if the couple then get engaged?

Absolutely. My experience is that if a cohabitation agreement has been discussed and signed by the parties upon purchase of a property (or alternatively, one party moving into the other's property), this creates a helpful stepping stone for future discussions around finances. I would describe the act of a cohabitation agreement as a helpful precedent in a relationship as it indicates what is likely to be required at a later date, and it therefore really manages expectations.

One of the difficulties with pre-nuptial agreements is how to raise them in the first place.

If a couple has entered into a cohabitation agreement, then they have already experienced talking about such matters, have a mutual understanding of how finances are to be dealt with upon separation and experienced the process of documenting an agreement. This makes the task of discussing and agreeing the terms of a pre-nuptial agreement much less challenging.

Q: And what should they consider if the gift is not to buy a primary home but a personal or a business loan or gift?

This really depends on the intention of the loan or gift and whether the parties to whom the loan/gift is being made are married or not. The beauty of pre-nuptial agreements is that you can tailor them to stipulate how monies from family members would be treated in the event of the marriage breaking down.

Q: In the scenario that the child's partner helps pay the mortgage, could they have a claim on the property?

Arguably yes, but this depends on all of the circumstances of the case. This would be considered as a TOLATA claim (i.e., a claim under the Trusts of Land and Appointment Trustees Act 1996), in which the partner is seeking a beneficial interest in the property.

We are seeing a rise of these cases, and they can be complex with substantial sums involved. This is why it is advisable to obtain legal advice when a purchase is considered, so that an agreement in respect of how the property is held, and contributions to the property, can be clearly agreed and documented.

With a clearer understanding of these complex dynamics, we encourage individuals to seek legal guidance and consider cohabitation agreements to protect their assets and foster secure financial futures. If you'd like to know more about how London & Capital can help, get in touch with Jessica here.

To get in contact with London & Capital, click here.

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A FRESH START: WEALTH MANAGEMENT POST-DIVORCE

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

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

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

JENNY JUDD
Director

JESSICA CRANE
Executive Director

WHAT'S LOVE GOT TO DO WITH IT? EVERYTHING – BUT MONEY STILL TALKS

Authored by: Colleen Hall (Associate) and Sital Fontenelle (Partner) - Kingsley Napley

Whether it was love at first sight or a slow burn, a marriage always starts with a couple full of happiness and excitement for their future. It may seem unromantic to "marriage plan" – and by this we mean consider from the outset how a couple will manage their finances – but doing so could save time, money and a whole lot of heartache should the relationship take a turn for the worse. In this article, we take a look at the life cycle of a marriage, and how beneficial forward thinking really is.

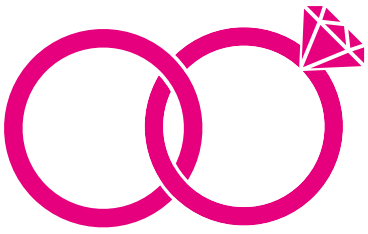
Stage 1
The Engagement

We have all heard of, and advised on, the benefits of nuptial agreements. The articles and blogs detailing the history and progression of the law in this area are numerous, and we do not propose to repeat the basics. What we will note, however, is just a brief reminder that in England and Wales following the seminal case of Radmacher v Granatino [2010] UKSC 42, a court is likely to give effect to a Nuptial Agreement that is "freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to".

Nuptial agreements in general used to be the enclave of celebrities or those with significant inherited wealth. However, we are seeing a greater number of couples simply wishing to deal with their finances in their own way.

English nuptial agreements can be bespoke instruments but legal advice is certainly a must to ensure that a couple is fully aware of the strengths and weaknesses of what they are signing. It is also important to ensure couples with international connections take local advice in any jurisdiction they may have links to, or assets in. A mirror agreement may be needed to ensure that a couple's intentions can be carried out wherever they choose to live in future.

That being said, nuptial agreements are not for everyone. What is most important is at least having those sorts of discussions from the outset to avoid any nasty surprises later down the line. It is a given that we all think a couple should talk about whether or not they want children from the off. The same is true for money. In a society where cash (albeit not in the literal sense) is king, the subject of money impacts everything – where you live, where you holiday, how you raise your children. Different people will have different priorities and these outlooks on life will have a fundamental impact on the way a family manages its finances. Why not reduce the risk and severity of marital arguments by making clear at the outset your approach to money?



Stage 2
The Marriage

The final deposits have been paid, wedding outfits purchased and the big day is fast approaching.

As an aside, for those getting married in England, they will hopefully have

jumped through the necessary hoops to make sure that their ceremony (and all precursors) is conducted in the correct manner so as to render the marriage valid by law. Marriage creates a binding legal relationship (as well as the symbolic and personal significance) with long-lasting financial repercussions such as:

1. **During the marriage:** tax benefits for spouses
2. **On divorce:** distribution of assets and the principles that must be followed
3. **On death:** inheritance rights under the rules of intestacy.

Couples planning to elope or marry abroad must similarly check whether their ceremony is valid, and whether they will need to either get legally married in England beforehand, or register their marriage after the fact.

A further word of warning for international weddings – it is important to check whether the chosen country has any sort of principle of matrimonial regime which would then automatically apply to the marriage. The rules surrounding matrimonial regimes are diverse and complex, with each country having its own set of rules and regulations.

Matrimonial regimes are not automatically binding in England and Wales but, depending on the level of advice sought beforehand, may be a factor to consider upon the breakdown of a marriage.

Whether or not a couple has a nuptial agreement or matrimonial regime in place, there will be conversations at various points during a marriage during which a couple will decide/adapt how they deal with their finances. Some like to keep all finances separate whilst others go for the direct opposite. Others still take a blended approach, or leave aspects such as inheritance or gifts, in a separate account to be dipped in and out of. Every couple needs to understand, however, that how these assets are treated during the marriage will have a direct impact on how they are treated on divorce. For example, use of money for renovations to the family home that had been acquired before marriage and kept totally separate until that point, may mean that the remainder of that money is classified as 'matrimonial' and therefore capable of being split equally in the first instance.

Third party advisers such as accountants, wealth planners or financial managers are also worth considering. Financial planning is not only sensible but arguably vital to ensure that your money is dealt with in a manner right for you.

Stage 3
The Breakdown

The place no couple anticipates reaching on their very happy wedding day. As well as dealing with the emotional toll that a break up brings, throw financial negotiations into the mix and there is a danger that the last iota of goodwill between the two spouses is lost forever.

The breakdown is where we really see the benefits of any forward financial planning that was undertaken either prior to or during the marriage. Nuptial agreements meeting the criteria set down in Radmacher v Granatino are likely to be upheld, which means there only needs to be limited negotiation regarding the final division of assets. Couples that had clear and frank financial discussions during the marriage may find it emotionally easier at the end given that they have already had the heads up as to their spouse's outlook on money.

Investment structures and pension funds may already be in place so that neither spouse has to start from scratch in understanding how to set themselves up financially. Knowledge, as they say, is power.

The above is only a flavour of the sorts of considerations that it would be worth discussing during the early stages of a relationship. Having those uncomfortable conversations at the start means that the more uncomfortable discussions at the end need not take place. The benefits of alternative dispute resolution methods such as mediation or collaborative law are many, and can serve to iron out those final little niggles with much less acrimony. The marriage may be over, but for those with children, the connection is forever. Even for those without children, the manner in which a couple parts ways can either leave the sourest of tastes (and a significant therapy bill) or optimism for the future. We always, always hope for the latter.

KINGSLEY NAPLEY

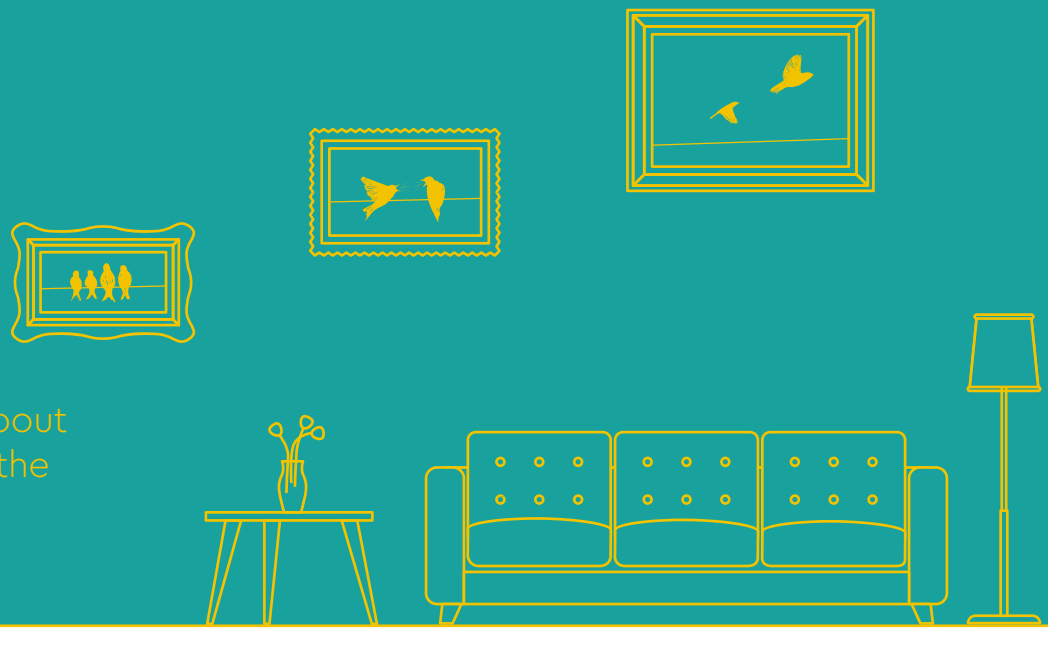
WHEN IT MATTERS MOST

"The dream team"

The Legal 500 UK 2021

We are recognised nationally and internationally as a dynamic and strategic team of family lawyers, known for our expertise in both complex finance and high profile children cases.

We assist clients at all stages of their lives, whether at the beginning of a relationship and planning a future (for example before a wedding or when relocating to the UK) or at the end. Many of our clients or their spouses have international connections, are high net worth individuals and city professionals, or individuals with a public profile.



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

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SPEAR'S500

FINANCIAL MEDIATION FOR HNW CLIENTS

TIME FOR A REBOOT?

Authored by: Neil Llewellyn Davies (Consultant and Accredited Mediator) - Paris Smith Solicitors

It's the Valentine edition so we should really focus on love but that's difficult in the context of separating or divorcing couples. Nevertheless, we might consider how these couples could be kinder to each other and avoid the interminable hostile environments we read about (and which many of us) witness every day.

There are now more dispute resolution options open to clients than there have ever been. When we first meet our clients, we provide them with information on what now seems like 101 different ways to approach negotiation. Twenty years ago there was not so much choice. Options were stark. Either you issued financial remedy proceedings or avoided court by going into mediation. Now there is a whole range of options, from collaborative practice through private financial dispute resolution hearings (pFDRs) to arbitration.

As alternative processes have developed, they have tended to focus, like the collaborative process, on providing more supportive environments for clients – which is welcome – but more complex cases do not seem to be referred to mediation in the numbers they previously were. I think it's time to ask why and to show why mediation should in many cases be high on the list of preferred options regardless of how complex the case might be.

For many lawyers the preferred way forward seems to be to keep hold of the financial disclosure process and arrange a pFDR (whether it is with or without the fallback of a court process). Many practitioners claim to practice

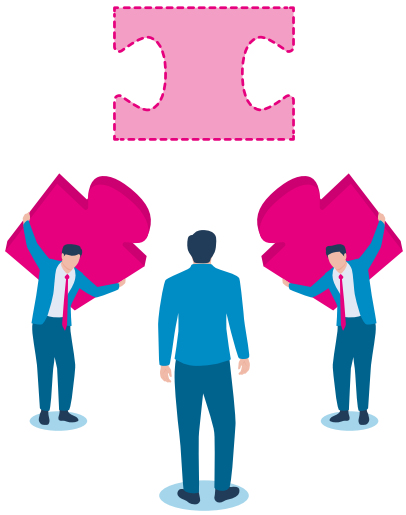
alternative dispute resolution by the fact that they are "working outside the court process" and arranging a pFDR. In reality this remains a highly litigious process which still denies clients their own autonomy.

Although the pFDR model is highly effective in many cases and certainly preferrable to the court model, I would argue that it does not qualify as a DR process. Its aim is to replicate the court system but to be more attentive, timely and effective. And of course to add decent refreshments.

The lawyers who practice in this way are mimicking the court process and really doing what the court should do itself but is unable to do due to it being under-resourced and unable to deliver the appropriate level of service our clients expect.

Also, far from encouraging clients to work together to try and agree a common outcome, the pFDR is now more akin to a mini trial focusing on advocate submissions with the tribunal then declaring what it considers to be the appropriate outcome. Whilst for many they may be able to reach an accord they will still have endured a difficult experience getting there. Their whole case will have been presented in a litigious way and despite best efforts there will inevitably be constant reference to contributions or conduct which rarely impact on the adjudication. The couple will have been pitted against each other, albeit they may emerge slightly less bruised than if they had engaged in a court process.

In 2020 the Family Solutions Group produced their excellent report [1] and queried how conflicts that involve children and finance could best be conducted. One simple but compelling question asked within the report was whether couples were working together to try and resolve a conflict or whether they were working apart? Sadly the answer appears to be that the vast majority of processes require couples to work apart. Any court process, or one that mirrors it, such as pFDR and arbitration, still requires the couple to work apart and focuses on acrimony and best case positions, rather than seeking compromise or acknowledgement of other people's situations.



It is trite to say that for most couples, working together to achieve an outcome is a far better method than working apart. Again, it is appreciated that in the current age this may be a more difficult objective. We increasingly listen to voices that validate our own thoughts and shy away from hearing opinions that contradict our beliefs. Listening, acknowledging, and accepting that someone else may have a valid point may not conform with the way in which many people live their lives today.

However, we all know that contested processes are damaging, and even more so for the increasingly vulnerable clients we are asked to assist. I would urge lawyers to think first about mediation as an appropriate forum for high net worth couples who wish to move on with their lives, thinking of their futures rather than raking over the disappointments of the past. And avoiding the often cataclysmic damage caused by proceeding through contested processes.

With changes to the FPR coming in on 29 April the court will further focus on non-court-based DR and will want to know what efforts couple have been engaged in to avoid court hearings. Costs penalties may be imposed if a party has been deemed to act unreasonably.

Mediation has moved on considerably in the last few years. No longer are clients abandoned on their own to try and negotiate in an environment where there is inequality.

In high net worth cases the client's legal team are very much part of the mediation process rather than seen as an obstacle to it. Trends have developed so that there is now far more external involvement.

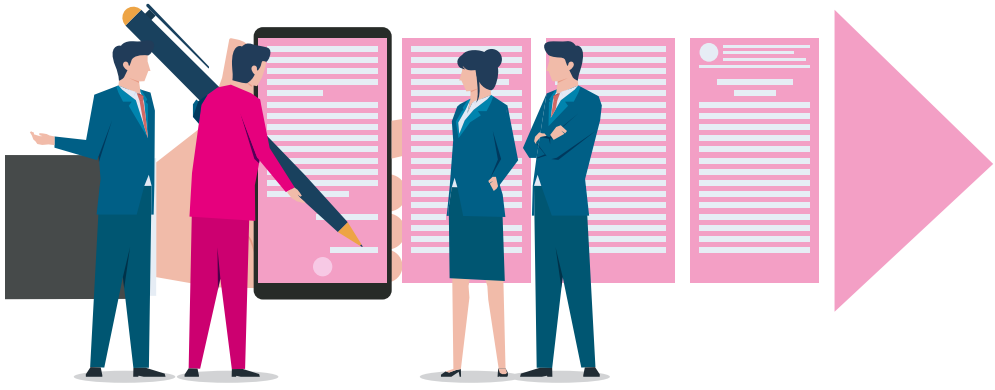
The two most popular mediation methods are:

Hybrid mediation

This is where clients attend mediation together with their legal advisers and are kept separate from each other. The process is similar to a civil mediation. A great amount of preparatory work will have been done before any meetings and the aim is often to find a resolution on the day, which may mean committing to a half or full day's attendance.

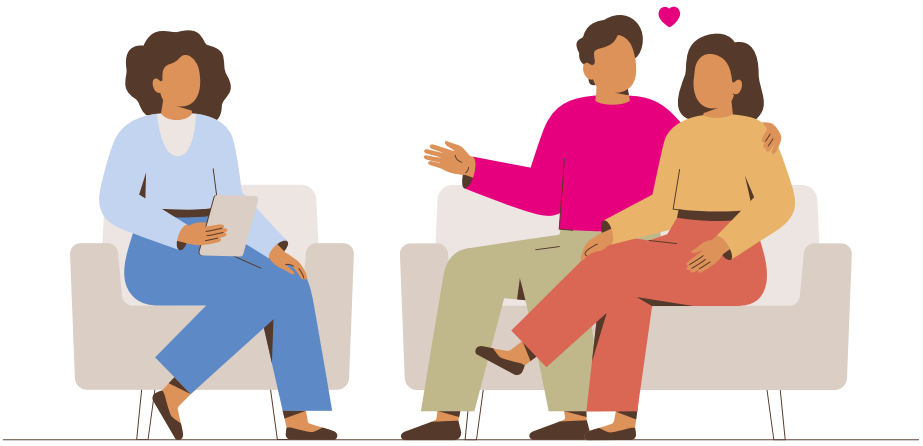
Sole mediation

This is where the clients work directly with the mediator. Meetings tend to be together, although the clients can be kept separate. Often an ARB1 is signed out the outset so that if mediation does not succeed the couple can move swiftly in to arbitration using the information prepared for the mediation.



It may be helpful to look at how this process might work for high net worth couples as, typically, there is far more involvement from lawyers and professional advisers and follows a different pattern to a standard mediation. A complex case may proceed as follows:

1. Clients have individual MIAMs with a mediator where the range of processes are explained and safeguarding is considered.
2. The mediator meets (virtually) with legal advisers to discuss how the case can move forward, agree disclosure requirements and timescale.
3. Following disclosure, initial joint meeting with clients, an outcome summary and asset schedule are prepared by the mediator and shared with all necessary advisers.
4. If required, a follow up meeting with the mediator and legal advisers is held to deal with any 'follow up' requirements for disclosure and preparation of proposals.
5. Further meetings with clients and any relevant external experts where required, accountants, pension experts, counsel for neutral evaluation etc.
6. If there is no resolution from direct meetings then a 'final' meeting may be held in person with legal advisers present.
7. Assuming resolution reached, draft consent order prepared (hopefully a working draft will have been circulated prior to the final meeting) and matters conclude without the need for an MOU. If resolution is not achieved the parties may move into arbitration.



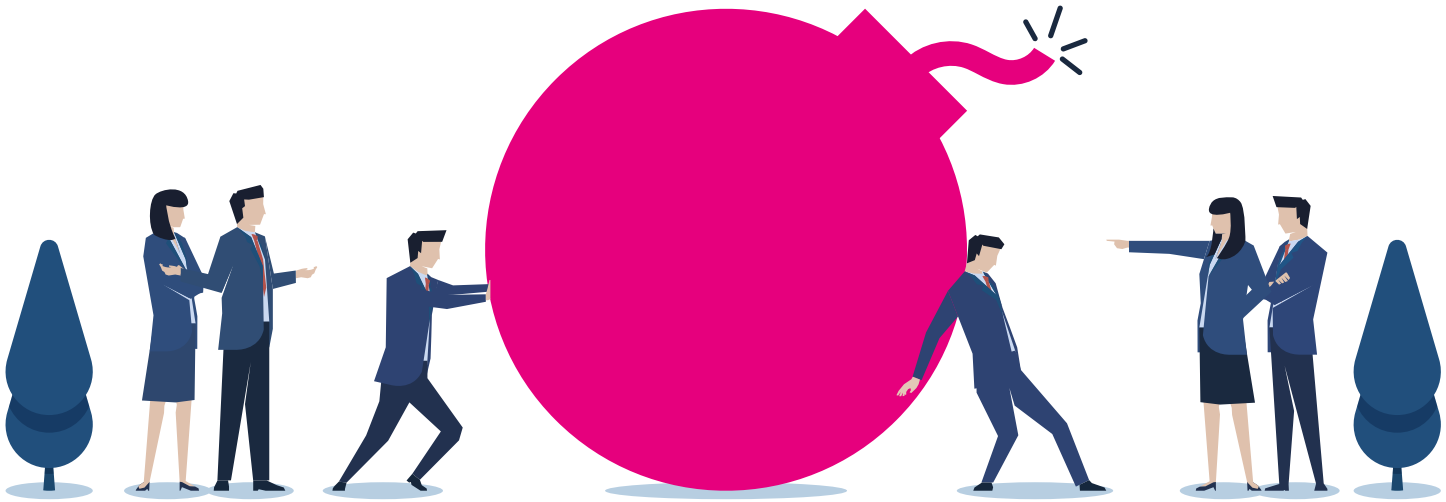
Cases best suited to mediation

Remember the flexibility of mediation means solutions can be found that are not always available in the court system. Examples include:

1. Situations where the couple accept their relationship has ended but want to continue running a successful business together;
2. Where the main asset is a trust and monies will only be advanced to one partner if the trust is willing to cooperate. Acting constructively rather than fighting a battle and hoping for judicial encouragement is often a much better strategy;
3. Where the priority is protecting wealth for future generations and imaginative financial strategies need to be considered;
4. Any case where dynastic wealth is a feature such as a family farm or a landed estate; and
5. Any case in which bespoke outcomes are preferrable to the rigid straitjacket of the court.

Hopefully the above summary will give you more confidence to consider mediation where appropriate and to discuss the potential benefits with your clients.

Returning to the Valentine theme, our clients have already discovered that they cannot have eternal love - that is disappointment enough without us adding to their plight. Whilst we can't turn back time (even Cher couldn't manage that) hopefully we can at least help them move on with dignity and hope.



60-SECONDS WITH:

CERISSE FISHER GROUP PARTNER COLLAS CRILL

Q Why did you choose a career path in the legal industry?

A Whilst I'd have loved to have had a "creative" profession (in the artistic/ design sense), I realised fairly early on that my strength lies more in the written word. A couple of visits to the Old Bailey to watch some live proceedings and some experience at a local solicitors alongside a healthy dose of Ally McBeal and This Life cemented my interest.

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

A Private client practice should always be all about looking after your client and their particular interests. Whether that client is an ultra-high-net-worth (UHNW) individual with a large structure to maintain or a local family looking to plan for future generations, each client's circumstances and needs are different and relevant. One size does not fit all, so it's about applying the law to work for them and steering them through their specific problems in the most helpful, clear and efficient way.

Q What motivates you most about your work?

A It does and always has interested me, every day. The trust and fiduciary world is a diverse and broad practice area. The human element makes things wonderfully complicated, emotive and a constant learning curve.

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

A To be more involved in helping others rise in their careers. I have a lot of gratitude for others around me that have helped me along the way, whether they've known it or not. Unless you are a naturally astounding and inspiring person (which I have never been accused of) being a role model and making a difference is, I think, something you have to consciously make time to do.

Q What has been the best piece of advice you have been given in your career?

A To keep a healthy perspective. Lawyers tend to be naturally driven, hardworking, competitive and don't want to accept failure. This easily leads to work overtaking life in all other respects. Yes; it's so important to succeed for our clients and for ourselves. But stepping back and - (cliché) not sweating the small stuff - helps us win in the healthiest way possible.

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

A Not a new trend, but an on-going issue to navigate in the offshore trust world is disclosure/transparency, and the continuing criticism of the offshore world in general. There are some great proponents for the offshore trust industry and lots of organisations and industry bodies who ensure what we do is well regulated and that the best standards are upheld. It takes a lot of work and commitment from everyone in the industry but the intermittent bad press will continue (often politically motivated, of course).

Q Who has been your biggest role model in the industry?

A There are lots of well-known legal professionals who inspire me, but really, I don't know how they do what they do. So it's those people around me in practice over the last 20 years that I've looked to and learnt from, to see exactly how they do what they do and why it works.

Q What is one important skill that you think everyone should have?

A In life? Listening. In the legal profession? Giving clear and practical advice. Something that is helpful to the client, rather than just a display of technical prowess.

Q What cause are you passionate about?

A No one particular cause, but I try to do what I can to support those people who dedicate their time to the innumerable causes that affect the world around us. With busy work and family lives, it's easy to make addressing causes someone else's problem and responsibility. Like most people, I could do more.

Q Where has been your favorite holiday destination and why?

A I've been fortunate enough to have had a few fantastic holidays over the years, but my favourite is and has always been my family's home in Southern Spain. I've been holidaying there since a young child and now take my own children there; it's full of very happy memories and a place to make lots of new ones.

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

A My celebrity dinner party guests (in no particular order) would be: David Attenborough, Alan Partridge, Michelle Obama, Frida Kahlo, Margot Fonteyn, Stevie Nicks. Oh, and Ally McBeal obviously.

PLANNING A VALENTINE'S PROPOSAL!?

SAY YES TO A PRENUP

Authored by: Jennifer Macdonald (Senior Associate) - Turcan Connell

We have come a long way in society since the days of Saint Valentine, the third century priest who was sentenced to death for marrying couples in secret against the orders of Emperor Claudius II. According to popular belief, Claudius had banned people from marrying, believing that married men made poor soldiers. When he was discovered, Valentine was swiftly jailed and sentenced to death. The legend suggests that whilst Valentine was awaiting his fate, he fell in love with his jailer's daughter and when he was taken to be killed on 14 February, he sent her a love letter signed "from your Valentine".

In the United Kingdom today, couples are, generally, free to get married, and priests and other celebrants can conduct their roles in public without fear of incarceration or death. In both Scotland and England, two individuals can legally get married if they are of legal age (which is 16 and over in Scotland or 18 and over in England), so long as they satisfy the following requirements:

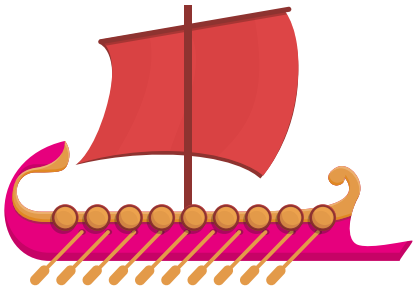
1. They are not already married or in a civil partnership with someone else;
2. They are not closely related to each another; and
3. They are capable of understanding what marriage means and of consenting to marriage.

And thanks to Saint Valentine, on 14th February this year, many of the more romantically disposed among us will be going down on bended knee (whether literally or metaphorically – one wonders how many might pop the question over WhatsApp this year with side-by-side emojis of a ring and a question mark…).

Newly engaged couples will soon be immersed in the depths of wedding planning and preparations for their big day. Amidst the joyful planning, however, it is also worthwhile taking a moment to pause and consider the significant legal consequences of marriage.

Marriage bestows a range of rights and obligations on individuals which can have significant financial implications, particularly if the marriage breaks down or on death of one of the parties.

For example, in Scotland, on divorce both parties will be entitled to share fairly in the net value of "matrimonial property", which includes all assets (and debts) held by the couple in either joint names or their sole names at the date on which they separated. Assets held by them before the marriage do not form part of the matrimonial property (except a family home that was bought prior to the marriage), and assets acquired by way of gift from a third party or inheritance are also excluded. Excluded assets can be "converted" during the course of the marriage so that they do fall within the matrimonial pot (e.g. where inherited funds are used to purchase a new property or a car). Disputes about the conversion of assets and how to divide the net value of matrimonial property fairly can be extremely difficult to resolve.



In England and Wales, all of the parties' assets (even those acquired before the marriage) are taken into account for division. There is no specific framework regulating the division of assets on divorce, and the courts have extremely broad powers to make any financial orders they consider to be fair. Whilst the courts in England and Wales can recognise the non-matrimonial source of an asset, such protection is by no means guaranteed.

Prenuptial agreements are becoming an increasingly popular tool for couples who wish to record the arrangements they wish to apply either during the marriage or following separation and/or death. Often, they are used to specify that certain assets (for example, those which a person has acquired before the marriage, or which are received during the marriage by way of inheritance or gift) will be excluded from the matrimonial pot, regardless of changes to such assets during the marriage. In particular, individuals with existing business, financial or property interests, those who stand to inherit assets or money in the future, or those who have children from previous relationships, are well placed to think about the benefits of having a prenuptial agreement in place.

Prenuptial agreements can also set out specific arrangements which will apply in the event of separation, such as the provision of housing.

Whilst it may no longer be necessary for a benevolent priest to conduct wedding ceremonies in secret, prenuptial agreements are one aspect of wedding preparation which individuals often prefer to keep private. Whilst such desire for privacy is entirely understandable, it must also be borne in mind that the disclosure of financial information is an important aspect in ensuring the enforceability of prenuptial agreements both north and south of the border. Individuals will be expected to disclose the full extent of their wealth and assets to each other (and to their solicitors) during the process. That can sometimes cause a degree of discomfort, especially in situations where significant family wealth exists for the benefit of multiple generations. Having an experienced lawyer who can guide their client through the process can be especially valuable for those who are sensitive about the confidentiality of their financial affairs.

The enforceability of prenuptial agreements in Scotland has yet to be fully tested by the courts, but it is generally accepted that they will be upheld provided that certain safeguards are met. In England, whilst the courts will retain ultimate control over financial arrangements, prenuptial agreements can be given decisive weight, again subject to safeguards being met.

It is important for a prenuptial agreement to be signed as far in advance of a marriage as possible, and also for both individuals to receive well-qualified independent legal advice.

While it may be difficult (and would certainly be unwise) to bring up the idea of a prenuptial agreement in a love letter signed "from your Valentine" this 14th February, early consideration of the legal implications of marriage and the financial options available can provide much needed comfort and protection for couples choosing to get married.

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COULDN'T HAVE SEEN IT COMING?

BARDER EVENTS

Authored by: Nicole MacDonald (Solicitor) - Tees Law

We've all been there – a former client calls, as circumstances have changed, and they want to vary their final financial order. Whether the original order was made following the outcome of financial remedy proceedings or by consent, the starting point is the same – firstly, it is necessary to establish whether the aspects of the order the client wishes to change are variable, in line with section 31 of the Matrimonial Causes Act 1973 (MCA), or whether an application to 'set-aside' the order is more appropriate.

Broadly speaking, income orders are variable whilst capital orders are not, except in limited circumstances. Therefore, if the client is seeking to change capital provision or seeking redistribution where no error of the court is alleged, an application should be made to set aside the order.

The 'traditional grounds' the court will consider upon receipt of an application to set aside a financial order are summarised in L v L and include vitiating factors, such as fraud or material non-disclosure, or a supervening event, more commonly known as a 'Barder' event.

Barder v Barder

The tragic case of Barder v Barder (Caluori intervening) introduced the concept of 'Barder' events which would allow the court's intervention in previously concluded financial proceedings. In this case, the parties had reached an agreement by consent on 20 February 1985 that the husband would transfer to the wife his interest in the family home subject to the mortgages secured upon the same, and both sides gave undertakings in respect of the reassignment of various life assurance policies. The husband agreed to the settlement on the basis that it would meet the needs of the wife and the two minor children of the marriage.

However, on 25 March 1985, the wife killed the two children and then committed suicide. The husband argued that he should have leave to appeal out of time - the time for appealing the order was fixed at five days per rule 124(1) of the Matrimonial Causes Rules 1977 (MCR) in force at the time. As things stood, the wife's mother would inherit the family home and benefits relating to the life insurance policies if the consent order was implemented, and the husband's position was that the situation had been "fundamentally and unforeseeably altered by the circumstances of the death of the petitioner and of the two children". Furthermore, it would not be fair for the wife's mother, who had her own 'substantial means', to benefit as she was not a member of the family unit for which the MCR made provision. The wife's mother was given leave to intervene and oppose the husband's application.

The case ended up in the House of Lords, who confirmed that the death of a party did not result in automatic abatement of proceedings, and the first instance judge had the right to give leave to the husband to appeal out of time.

Barder Legacy

The initial Barder case set out that, if there had been a new event which then invalidated that basis on which the original order was made, the court could intervene if the four Barder conditions were met. These conditions are:

1. The new event invalidates one of the fundamental assumptions on which the order was made.
2. The new event takes place within a relatively short time of the order being made;

A potential fifth condition was proposed by Mostyn J in the case BT v CU, namely "the applicant must demonstrate that no alternative mainstream relief is available to [the applicant] which broadly remedies the unfairness caused by the new event". In that case the court considered whether it could review the order under the 'Thwaite jurisdiction' which suggested the court has jurisdiction to refuse to enforce an order which remains executory. This was further explained in L v L 'The essence of the jurisdiction is that it is just to do – it would be inequitable not to do so – because of or in the light of some significant change in the circumstances since the order was made' – a lower threshold than under Barder.

A Barder or not a Barder?

There is a necessary balance to be struck between the interests of finality in legal proceedings and the need to revisit an order because of unforeseen events. As such, it is vital to understand what the courts have determined could be a Barder event to advise a client on their prospects of success.

As we saw from Barder v Barder, the death of one of the parties may be considered a Barder event, and significant inheritances may also amount to a Barder event, assuming all the other Barder conditions referred to above are met. However, other life-events, such a remarriage or formation of a new civil partnership, are unlikely to be Barder events in themselves. General misfortune, such as unemployment, will not normally constitute a Barder event.

One of the most popular motivations for revising an order is financial or economic changes – whilst the financial crash of 2008 was not held to be unforeseeable and instead an example of natural price fluctuation, the global pandemic, resultant lockdown measures and restrictions which had such a significant social and economic impact across the world, potentially could constitute a Barder event.

There has been no definitive answer from the courts. The argument set forward in FRB v DCA (No 3) was rejected on the basis that insufficient evidence regarding the valuations of the assets had been provided by the applicant, so the application failed based on insufficient evidence.

In HW v WW, HHJ Kloss stated:

The Covid 19 pandemic is an extraordinary event, different in nature and scale, to any similar world event in the lifetime of the parties. I therefore find that in principle, the Covid 19 pandemic can open the door to a successful Barder claim.

The failure of this specific application was on the basis that the court did not accept the applicant's assertion that he could not have foreseen the impact of the pandemic upon his business. It was also not accepted that his business had 'fallen off a cliff' – it was still profitable, just on the same scale. Again, a lack of evidence is the stumbling block to this application.

One further notable, albeit unusual, Barder case is that of De Renée v Galbraith-Marten in October 2023. The parties had agreed a figure for child maintenance following a hearing in which the well-established formula for high incomes was advocated. Just a few months later, in the case of James v Seymour, that formula was adjusted, and the methodology changed, taking into account criticisms of the original formula. Under this new formula, the father would have paid less child maintenance – he therefore applied to set aside the consent order and the court agreed that a change in the law, or a change in how the law was applied, was capable of being a Barder event, so allowed his application to proceed.

In conclusion, the Barder bar is a difficult one to overcome – clients who seek to set aside their financial order need to show the event itself satisfies the Barder test, but just as important is having the requisite evidence to convince the court of the same.

NOTICE TO SHOW CAUSE

WHEN AND WHY FINANCIAL REMEDY AGREEMENTS MIGHT COME UNDONE

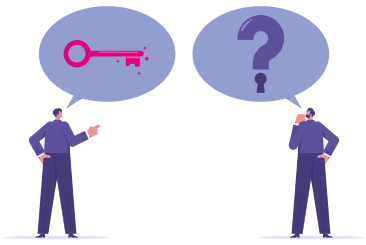
Authored by: Cerys Sayer (Barrister) - Westgate Chambers

A brief introduction

It certainly seems from my recent caseload, and that of my colleagues, that we are seeing an increase in notice to show cause applications.

Ultimately, there can be little worse for all concerned to believe that an Edgar[1] agreement has been reached, only to then learn that the other side or indeed your own client now wishes to renegue.

The following overview highlights how and why such applications can materialise and the applicable law.



Case 1

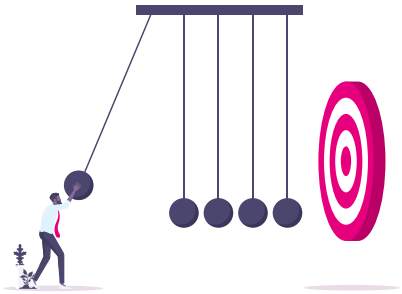
At a recent Financial Dispute Resolution hearing, (FDR) the other side suddenly raised the existence of a signed consent order, which had purportedly been sent to the then local court for sealing some years ago. My opponent sought to locate the document immediately, but we were (some might say unsurprisingly) hampered by HMCTS not being adequately electronic; the other party being of the view that the previous consent order reached a far more favourable settlement for their client than that being presently negotiated.

Understandably, you may be wondering: 'Why was this not raised prior to the FDR?' Arguably, the reasons were twofold:

1. There was uncertainty regarding the historic proceedings, due to both sides having appeared as litigants in person until instructing Direct Access counsel, at short notice, for the FDR.
2. Tactically, what better way to secure an immediate settlement than by threatening enforcement of a potentially less advantageous pre-existing agreement against you?

In practice, a notice to show cause application should be made as soon as the need arises, ideally before the First Appointment or at the soonest directions appointment thereafter. Forms E will need to be exchanged plus statements and disclosure in some circumstances. The Court of Appeal endorsed this approach in the case of Crossley[2].

If you are for the respondent however, you will likely wish to resist the application being frontloaded and given such a platform. Instead, it may prove preferable to argue that the issue simply forms one of many matters to be considered at a Final Hearing, section 25 of the Matrimonial Causes Act 1973, (MCA 1973).



That said, the following demonstrates how our cases often veer from the well-trodden case management path:

1 Edgar v Edgar [1980] EWCA Civ 2 (23 July 1980)

2 Crossley v Crossley [2007] EWCA Civ 1491 (19 December 2007). Although Crossley concerns pre-nuptial agreements, it applies equally to Edgar agreements. Links below to mine and Scott Sharp's related articles
https://westgate-chambers.co.uk/wp-content/uploads/2023/02/HNW_Divorce_Magazine_Issue_12_Valentines_Special_FINAL_with_Edits-Will-you-be-attaching-a-prenup.pdf
https://westgate-chambers.co.uk/wp-content/uploads/2023/11/HNW-Divorce-Issue-15-Scott-Sharp-Article.pdf

Case 2

I was subsequently instructed to represent the applicant at a Final Hearing, in relation to her notice to show cause application, issued at the end of 2022. The directions hearing had taken place before my involvement in early 2023 and the two-day Final Hearing had been listed for December 2023.

The parties had reached an agreement and signed the same, with the benefit of disclosure and representation, at a remote private FDR in October 2021. However, the court latterly requested a form D81, which had never been satisfied. The result being the order remained unapproved and unsealed by the court for over 2 years.

Uniquely, financial remedy agreements are the one area where the court must scrutinise an agreed consent order before it sanctions the same, to ensure that it is fair and chimes with the section 25 criteria, MCA 1973.

Both the applicant and respondent had immediately acted in reliance on most of the capital and income elements of the settlement. However, in the intervening period, the maintenance, which had been less welcomed by the other side had fallen into hefty arrears. The respondent now claimed to have always been suffering with mental health issues, even before the private FDR, which had resulted in them losing their job and all other funds and savings.

At the directions hearing the other side had advanced that given the passage of time and their change in circumstances, it was now unfair to hold them to the agreement. However, by the time we reached the Final Hearing their position had expanded to them claiming that no agreement had ever been reached and they now wished to rewind and be released from all elements of it which had a financial impact on them.

My client had been on strong ground in relation to the respondent's initial position, given the absence of any undermining circumstances, as set out by Lord Justice Ormrod[3]:

To decide what weight should be given in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel, all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that, formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue.

However, the change in the other side's position then introduced an additional layer of complexity, forcing the court to consider whether an agreement was ever reached in the first place.

In order for the court to do adjudge this, the FDR papers and Without Prejudice documents must be disclosed and considered by the judge. The practical ramification of this assessment being that whatever the outcome, the matter will then likely go off for yet another hearing:

1. If the judge upholds the agreement, they would then be likely precluded from considering its fairness, or
2. If the judge finds no agreement was reached, again the judge would likely be unable to preside over the final hearing.

On realising the protracted impact of their change of position, the respondent resiled and the order was sealed in due course.

Case 3

Just before Christmas, when securing a non-molestation order, occupation order and prohibited steps order against an alleged controlling and coercive ex-partner, it came to light that the other party had also recently issued a notice to show cause in the parallel financial remedy proceedings. Their reason being, in retrospect, they felt they should have achieved a more beneficial settlement.

As we all know, courtesy of Lord Justice Thorpe:

'The whole purpose and effect of the FDR would be lost or compromised were parties free to analyse and re-evaluate crucial decisions… and to decide on further reflection that they made the wrong choice.[4]'

Given the above context, one can empathise with how frustrating it was for my client, that her ex-partner was able to re-evaluate their agreement. Essentially, the shared view was that the process enabled the respondent to extend his abuse of the applicant via the legal system. On making submissions to this effect, the court endeavoured to expedite the listing of the directions hearing.

Conclusion

Notice to show cause is a well-established and fit for purpose remedy which clients are often willing to embrace when purported agreements are under threat. However, as the above also demonstrates, it can at times prove to be a cumbersome process which is not immune to tactical exploitation by canny litigants.

3 Edgar v Edgar [1980] EWCA Civ 2 (23 July 1980)
4 Rose v Rose 2002 EWCA Civ 2008.

60-SECONDS WITH:

AIMEE FOX
BARRISTER
3PB

Q Why did you choose a career path in the legal industry?

A I knew I wanted to be a barrister from quite an early age. I debated competitively at school and really enjoyed it so that probably planted the seed.

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

A To find solutions amongst disputes.

Q What motivates you most about your work?

A Achieving a settlement that allows someone to move on with their life is my biggest motivation and making sure they are treated fairly. We can't undo the past for our clients but we can help with their future.

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

A I have one simple goal, I'd like to win every case! Have I set the bar too high?

Q What has been the best piece of advice you have been given in your career?

A Be yourself.

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

A I see a real increase in the appetite for ADR which can only be a good thing. People are more aware of the alternatives to court and it is becoming increasingly affordable so that it's an option even in modest needs cases.

Q Who has been your biggest role model in the industry?

A My many role models are the people, from the most junior to the most senior, that I encounter everyday trying to achieve the very best for their clients and doing so with integrity and courtesy.

Q What is one important skill that you think everyone should have?

A The ability to empathise is really important in family law. Having the capacity to understand what someone is going through helps in all sorts of ways. Some people will remember their day in court for the rest of their lives so, as well as doing everything you can to achieve the best result, I think it's important to be able to support them through the process.

Q What cause are you passionate about?

A Getting papers on time

Q Where has been your favorite holiday destination and why?

A I completed my LLM in European Law at the College of Europe, Bruges so I love going back there. Back then family law was just a twinkle in my eye and I was focused on the 4 freedoms and other aspects of European Law. I have lots of happy memories from my time there and it's a beautiful place.

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

A I would love to have dinner with Oscar Wilde. I love his wit and I'm sure I would come away with some fantastic one liners. I'm not sure what his view on family law would be. He said 'One should always be in love. That is the reason one should never marry'.

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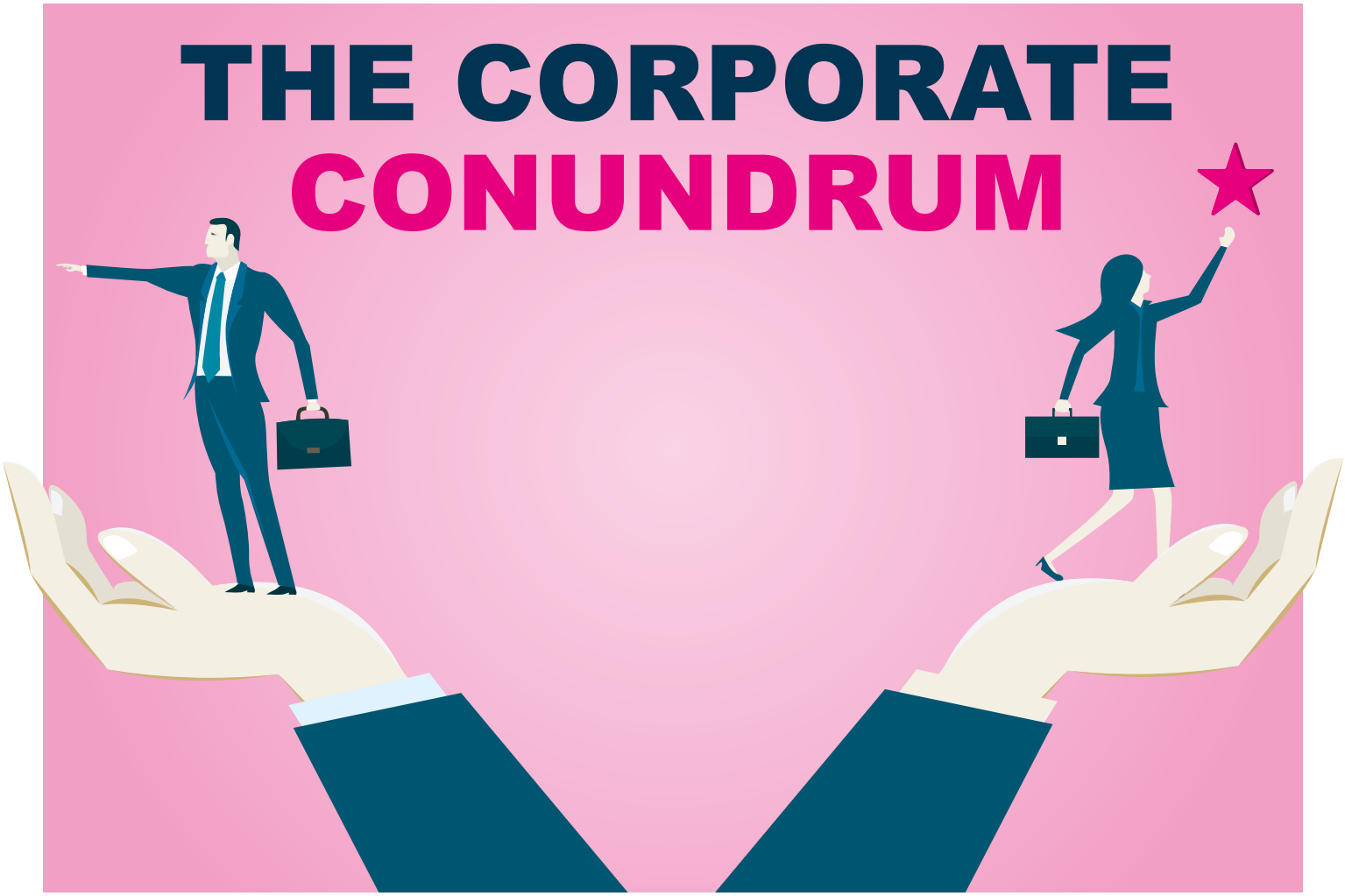

Authored by: Julie-Ann Harris (Partner) - Knights

It is now commonplace that corporate structures fall to be dealt with in financial remedy matters as a resource of one or both of the parties under section 25(2)(a) Matrimonial Causes Act 1973 (MCA 1973). When considering a fair outcome, the court should first establish the value of the business interest before it is able to decide how the asset is treated in the eventual settlement.

In many cases, professional valuations are essential but in others not so. Mr Justice Moylan reflected that in some cases the usefulness of a business valuation is limited to help the court test the fairness of the proposed outcome[1].

This principle by definition, makes it far more difficult to decide when it is essential to value and when is it not and of course, introduces the hurdle to jump over for permission to adduce such evidence before the court but only if it is necessary (FPR25.5(2)). Do be alert to a general rule of thumb that sole traders, cash businesses, minority shareholdings in FTSE quoted companies and businesses that generally yield income only, may not justify the costs of the valuation when balanced against the value to the court[2]. If you ever find yourself in doubt, a forensic accountant should be your first port of call.

Almost all valuations are undertaken at "the present day" but do consider if the hindsight approach is preferable, especially in circumstances where arguments of matrimonial and non-matrimonial property arise. Beware however, the bear trap and consider the words of Mr Justice Peel in GA v EL [2023] EWFC 187 where he gave fair warning regarding historical valuations and the requirement for 'clear justification.'

Experts have several valuation methods including discounted cash flow (where there are minority shareholdings with no control or influence), net assets (such as property investment/management companies) or earnings (where the company is trading it is necessary to establish future maintainable earnings and assess how much a prospective purchaser might pay) and in the majority of valuations, all three methods are deployed to test for suitability and cross check.

1 H v H [2008] 2 FLR 2092 (Moylan J)
2 Cooper-Hohn v Hohn [2014] EWCA Civ 896

Once a value is attributable the expert will consider if any discounts should apply to consider issues such as illiquidity, minority shareholdings and whether the company is attractive to the open market for sale. Valuation experts will also stress test for tax implications.

Practitioners should be alert to the issue of double counting that may arise if a capital value is attributable to a company based on future maintainable earnings and if included in full, on one side of an asset schedule where ongoing spousal maintenance is a possibility.

This was illustrated in the Court of Appeal case of Smith v Smith [2007] EWCA Civ 454, where the District Judge's order was appealed after he fell into error and divided the parties' assets equally, attributed 100% of the business to the husband and ordered the husband to pay spousal maintenance equal to half his earnings from the business.

Where liquidity is an issue, the courts may adopt the approach in Wells v Wells [2002] EWCA Civ 476[3] where the wife received a share in her husband's business as part of the overall settlement. This option is most often deployed when other assets are insufficient to produce the sums necessary to secure a settlement and whilst it files in the face of the courts duty to consider a clean break, the protection for the parties can outweigh this consideration.

Other options available to the court for settlement purposes include one party retaining the business or shareholding and pay either a lump sum or spousal maintenance, or sometimes it is appropriate to do both. Either way the court will often depart from strict equality of 50% to reflect one party retaining the more risk laden assets, whilst the other receives the benefit of liquid cash or the "copper bottomed assets."

Ordering a sale of a company to produce an income to support the parties is less rare as it once was, although a deferred lump sum to be paid upon realisation of a shareholding might find favour as shares remain with the owning party rather than subject to a transfer. Security for the recipient spouse is however essential, as is tax advice.

It is vital to remember that a limited company is a separate legal entity and unless the court can pierce the corporate veil there is no power under section 24 MCA 1973 to transfer corporate assets to either party other than shares which are classed as property in accordance with section 24(1)(a) MCA 1973.

In complex corporate structures the court may look for more creative options as it did in Prest v Petrodel Resources [2013] UKSC 34, where it was satisfied that the companies were simply the husband's nominee.

The chimeric nature of corporate structures in the context of financial remedy claims should make the most seasoned practitioner reach for their circle of trusted advisers and this element of family work with engagement with other professionals should be seen as the rule rather than the exception.

3 Revisited in Versteegh v Versteegh [2018] EWCA Civ 1050


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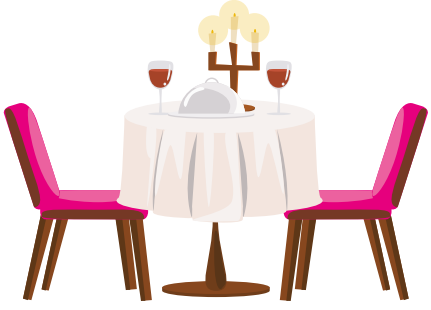
DATING AN ADDICT ON VALENTINE'S DAY

Authored by: Justine Osmotherley (Consultant, Vulnerable Client and Corporate Team) - Montrose Health Group

Valentine's Day is a big deal in the UK and in 2022 alone it was estimated we spent £990M on cards; gifts; nights out and other romantic gifts/gestures for our loved ones. In fact, consistently around 75-80% of the UK population each year planned to celebrate the 14 February.

Restaurant bookings are up compared to an average day in February and the wine; champagne; spirits and cocktails consumed are all significantly higher than the same day the week earlier. Not really the night out an alcoholic or partner of an alcoholic should indulge in.

Restaurants put "Specials" on which usually involve highly indulgent and calorific foods. For those with eating disorders such as bulimia; binge eating etc these nights can cause psychological and physical problems. Of those that chose to stay in, many will order a takeaway or succumb to one of the many "dine-in" offers to be consumed at home.



It is therefore easy to see why Valentine's Day, and many other special dates can be hard for the recovering alcoholic. Alcohol is a huge part of our everyday lives and it is big business. The UK was the largest market in Europe for alcoholic drinks in 2022 - the revenue was a staggering £24.3 billion.

It isn't just alcohol addiction that is a problem for the UK. We had the highest rate of drug-induced deaths in Europe with opiates still causing the most health and social harm.

However, cannabis; cocaine; mdma and ketamine are the popular drugs of choice amongst many users - many of whom start experimenting in their teens. Some, however, due to genetic predisposition and/or environmental factors become drug addicts.

The Diagnostic and Statistical Manual of Mental Disorders ("DSM") first introduced "Addictions" in the 1950s as a Sociopathic Personality Disturbance. In the latest version DSM-5-TR addictions are dealt with under the umbrella of "Substance related and addictive disorders". 10 separate classes of drugs are identified including alcohol; tobacco; caffeine; opioids and criteria is laid down in relation to substance-use and substance-induced disorders. Gambling disorder is identified as a recognised behavioural addiction. For some the uncontrollable urge to bet online; play slot machines etc can have devastating consequences - spending more than you can afford; borrowing or stealing to try get that win; that uncontrollable urge that the next win will be the big one. However, for now excessive buying; exercise; sex; internet use are not included yet as a Mental Disorder.

Addiction is a complex and multifaceted issue that affects individuals, families, and communities. It can manifest in various forms, and its impact on the brain is profound.

It can impact physical health, mental well-being, relationships, and overall quality of life. To better understand addiction, we need to take a closer look

at its neurobiological underpinnings. The brain plays a central role in the development and perpetuation of addiction, and several key brain regions and processes are involved:

Reward System: Addiction is closely linked to the brain's reward system, which is responsible for feelings of pleasure and reinforcement. When an individual consumes a substance or engages in a behaviour that triggers a pleasurable response, the brain releases dopamine, a neurotransmitter associated with pleasure and reward. This release reinforces the behaviour and creates a sense of euphoria, making the person more likely to repeat it.

Tolerance and Withdrawal: Over time, the brain can become less responsive to the same level of stimulation, leading to tolerance. To achieve the same pleasurable effects, individuals may increase the amount of the substance they consume or engage in the behaviour more frequently. Additionally, when the substance or behaviour is removed, withdrawal symptoms can occur. These symptoms can be physically and psychologically distressing and often drive individuals to seek relief by returning to addictive behaviour or substance use.

Cravings and Compulsion: Cravings are intense urges to use a substance or engage in a particular behaviour. They are often triggered by environmental cues, stress, or emotional states associated with the addiction. Cravings can be overwhelming and make it challenging to quit the addictive behaviour or substance use, even when an individual is aware of the harm it causes.

Brain Changes: Long-term addiction can lead to structural and functional changes in the brain. These changes can affect decision-making, impulse control, and the ability to experience pleasure from natural rewards. Areas of the brain that are particularly affected include the prefrontal cortex, which plays a crucial role in decision-making and self-control, and the limbic system, which is involved in emotions and motivation.

Recovery: Recovery from addiction is a challenging journey, but it is possible with the right support and resources. By addressing the underlying causes of addiction, providing access to evidence-based treatments, and fostering a compassionate and nonjudgmental environment, individuals can break free from the cycle of addiction and regain control over their lives.

Ultimately, the road to recovery is a testament to the resilience and strength of the human spirit.

By understanding the triggers; the addictions; the highs and the lows, it is of course possible to have an enjoyable Valentine's Day that doesn't for example involve drink for the alcoholic, or a line of cocaine for the drug addict.

The Do's

Here are some activities to do together on Valentine's Day:

Nature: Hiking; camping; exploring with a ready made picnic can be a calming way to spend the day - though a blanket and umbrella may well be essential.

Movie: Most cinemas don't serve alcohol (a phone call can establish this) so a movie; some popcorn and sweets could be a great way to spend it.

Day Date: Going to the art gallery; bowling; museum etc during the day is a good way to spend time together without temptation.

Recreating your first date: Go on your "first date" again and experience those early memories together by revisiting where you had your first date.

Staying in: Sometimes it's good just to stay home without outside distractions and enjoy each other's company.

The Don'ts

Pubs: Don't go to places that serve alcohol or where many people will be drinking. If you do go out for a meal, call ahead and check e.g. no champagne on arrival.

Avoid Triggers: If your partner has an eating disorder then being given a huge box of chocolates is going to cause an adverse response.

Coping strategies: Having a plan for what to do if the trigger arises will help the individual to cope and not be so affected by the trigger.

Give in: If it all begins to feel too difficult the temptation may be to buckle. Have support on hand to help; guide and support.

And finally to any addicts out there on their own at valentines

Being single at Valentines can feel tough - the emptiness and loneliness can sometimes be enough to trigger addictive behaviour.

Here are some things to do to get through it with positive outcomes:

1. Reach out to those you love - friends; family.
2. Practise gratitude by writing a list of everything you have to be thankful for.
3. Cook yourself a great meal.
4. Watch your favourite movie; tv show.
5. Keep yourself busy and remind yourself of what you have already achieved.

It is just one day after all, no different to the 13 February or 15 February if truth be told.

THE FUTURE OF FAMILY LAW?

HOW CRYPTOCURRENCIES ARE TREATED UPON DIVORCE

Authored by: Imogen Runacres (Associate) and James Carroll (Partner) - Russell Cooke

A survey in 2023 by Binance, a cryptocurrency platform, found that 83% of respondents would prefer a crypto gift card rather than flowers for Valentine's Day.

The landscape of family law continues to expand and evolve as both families and how they manage their money likewise evolves. As such, family lawyers will increasingly need to consider and advise on the court's treatment of cryptocurrencies. In 2023, around 3.3 million people invested in crypto assets in the UK alone.

With cryptocurrencies increasingly forming part of people's asset bases, they are likely to become commonplace in divorce proceedings.

Family lawyers will need to develop an understanding of the issues around the disclosure, value and division of crypto assets.

How do the family courts see crypto assets?

Cryptocurrencies are recognised as 'property'. This means that they can be transferred (if they are capable of being transferred) between divorcing couples via orders under The Matrimonial Causes Act 1973 which governs the division of a couple's finances upon divorce. Crypto assets, like any other asset in divorce proceedings, will be considered depending on the specific circumstances of a couple's family and financial life.

HMRC considers cryptocurrency to be a taxable asset, so family lawyers will also need to consider the tax consequences arising on a financial settlement in the same way they would for assets like shares or second homes.

Disclosure issues

A key challenge for the family courts is the relative anonymity of these types of assets.

It may be hard to identify cryptocurrencies in the first place. Cryptocurrencies are often held in digital wallets and there is no personal information associated with them at all. There is simply a 'public key' (like an account number and sort code) and a 'private key' (like a password).

Fortunately, family courts have wide ranging powers and are alive to the issues around disclosure generally. Upon divorce, each spouse is under a duty of full and frank financial disclosure. As part of financial remedy proceedings, parties complete a Form E, which sets out details of their assets, liabilities, business interests and employment status.

If your spouse has crypto assets, they, in their Form E, will need to include its current value and any applicable tax, and provide supporting documentation.

If someone has failed to disclose crypto assets in their Form E, it may be obvious from their disclosed bank statements, as there are likely to be transactions to cryptocurrency exchanges. Analysis of someone's tax returns may also provide evidence of them cashing in crypto holdings. If these kinds of transactions are apparent, family lawyers would ask questions about any cryptocurrency in a questionnaire before the First Appointment, and if necessary, they could even instruct specialist forensic experts specialising in crypto to investigate further. Though such applications are rare, if it is obvious that a spouse is trying to dissipate assets, solicitors can apply for a freezing order to prevent this happening. There have been cases where the courts have made freezing orders against digital wallets.

If someone has noticed their spouse discussing cryptocurrency during their marriage, but they have been unable to find evidence of this in their bank statements or tax returns, the court could draw adverse inferences and conclude that their spouse should be treated as holding cryptocurrency on their side of the balance sheet and in turn, they would be awarded a smaller share of the remaining marital pot.

Valuation challenges

The values of a couple's assets may change during financial negotiations, particularly assets like shares. Cryptocurrencies can be highly volatile and market-dependent, and their value can fluctuate hugely. You need only look at the news for examples of these seismic shifts. The crypto assets' future worth also needs to be considered in conjunction with its current value. Cryptocurrency experts may need to be instructed if a couple is struggling to value a holding accurately.

It is vital that family lawyers have up to date valuations at every stage of the negotiations. It is usual for updating disclosure to be provided throughout the process.

Division

Once the value of the crypto assets has been determined, they will need to be divided in the same way as other assets. Due to their volatility in their value, cryptocurrencies will be considered riskier assets in divorce. A judge may consider it appropriate that both spouses receive some of the more risky assets, so that they are both sharing the risk.

Conclusion

Looking forward, the role of cryptocurrency in family law is only set to increase and family lawyers need to be increasingly alive to the role these types of asset will play. It is vital that cryptocurrencies are appropriately and fully disclosed during financial remedy proceedings. It will be interesting to see how the family courts deal with the unique challenges presented by these types of asset moving forwards in relation to their disclosure, value and division. If someone is gifted cryptocurrency this Valentine's Day, these are the sorts of questions a family lawyer may need to be asking in future.

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60-SECONDS WITH:

GEORGE MATHIESON

DIVISIONAL DIRECTOR, STRATEGIC PARTNERSHIPS

RBC BREWIN DOLPHIN

Q Why did you choose a career path into "pensions and divorce."

A I don't think anyone goes to their careers adviser at school and says, "I'd like to become an expert on pensions and divorce." I really did not know what I wanted to do, which was a constant theme until I was about 40 years old. I drifted into banking (corporate, retail, and private) then I found myself dealing with some really technical pensions stuff, and believe it or not, it really excited me. Then I saw a seminar advertised on pensions and divorce by Christopher Wagstaffe KC, which I attended, and I thought, "This is an area of pensions about which I know nothing," which intrigued me, and I never looked back.

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

A Making the solution easily understood. Pensions are complex. Some of the sums are complex. Pension experts and actuaries alike have to remember that the ultimate reader of the reports is not a pensions expert. I read some reports, and I think, 'I have not got a clue what is being said', and I know something about pensions. Does the author really understand the issues, one of which is that all parties, in a potentially highly charged situation, have to be comfortable with what is being proposed? As physicist Richar Feynman once said, "If you can't explain it in simple terms, you don't understand it."

Q What motivates you most about your work?

A I love problem solving, and that is largely what pensions on divorce is all about. At the risk of littering this interview with quotes from physicists, Einstein once said, "If I had an hour to solve a problem, I'd spend 55 minutes thinking about the problem and five minutes thinking about solutions." The point he makes is important: preparation has great value to problem solving.

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

A A codified approach to pensions on divorce, such that an equitable solution is the norm for 95% of divorces, and not just within the purview of the 5% of divorces where the parties can afford to instruct an expert.

Q What has been the best piece of advice you have been given in your career?

A A good friend of mine from the past, who was a sales consultant at a financial services firm at the time and is now CEO of a large firm, once said to me (we were in our late 20s, I think) "not all in-house meetings are a waste of time – some are cancelled."

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

A The increase in Litigants in Person (an individual, company or organisation that has to go to court without legal representation from a solicitor or barrister). This trend is both significant and worrying. The brilliant Fair Shares project led by Professor Emma Hitchins of Bristol university should worry every professional connected with financial remedies in divorce proceedings. The reluctance of people, for whatever reason, to engage the services of lawyers and other experts, is leading to wholly unsatisfactory and unfair outcomes.

Q Who has been your biggest role model in the industry?

A Marc Saunderson, a solicitor in Birmingham. Marc encouraged me into this space, supported me when things were slow at the start, but above all showed me that even when he was confronted by people who were egotistical, rude and arrogant, he would remain calm, composed, and dial down the tension, for the benefit of all.

Q What is one important skill that you think everyone should have?

A A sense of humour and self-deprecation – and an inquiring mind.

Q What cause are you passionate about?

A The restoration of the church as a moral compass and hub of the community.

Q Where has been your favorite holiday destination and why?

A Outer Hebrides (Isle of Harris). Totally unspoiled, with white sandy beaches and turquoise blue seas, and mountains as the backdrop. The beaches stretch for miles and miles, and if you see one other person on them, it's overcrowded, and you seek another beach. (And mobile phones tend not to work).

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

A I think I am supposed to say something like Gandhi, or the Dalai Lama. But for me, it would be a toss-up between explorer Ernest Shackleton, rugby player Willie John McBride, cricketer Ian Botham, Freddie Mercury, comedian Jasper Carrott, and author of my favourite cookery books, Madhur Jaffrey.

SEEKING FINANCIAL SUPPORT FOR CHILDREN UPON SEPARATION

Authored by: Antonia Felix (Partner) and Nova Maxwell (Associate) - Mishcon de Reya

Love is in the air this month…and while it is not romantic to consider relationship breakdown, understanding how the law works in such situations can help avoid even more heartache, not to mention stress and cost should things come to an end.

There is significant media coverage of divorce cases, particularly those referred to as "big money" cases (which are a tiny minority of cases overall), but what about cases where the parties are not married but do have children?

The year 2021 saw children born outside of marriage/ civil partnership outnumber those born within marriage/ civil partnership for the first time. This pattern continued in 2022, and there is nothing to suggest that the figures in 2023 will be any different.

There is a public perception that "common law" marriage exists in England and Wales and clients are sometimes surprised to discover there is no such concept. Those who are cohabiting with children and then separate are unable to seek financial provision under the Matrimonial Causes Act 1973 like those in a marriage or civil partnership. There are a number of potential routes for seeking child maintenance, particularly in cases where the non-paying parent earns a significant salary and/or holds substantial wealth.

What role does the CMS play when seeking maintenance?

Upon separation, circumstances might occur where the children are living with one parent and the other parent fails to provide money for the children's living costs, or fails to provide adequate provision. In this situation, the Child Maintenance Service (CMS) is the first port of call. The CMS will do a calculation based on the non-resident parent's gross annual income and how many nights the children stays with that parent. Whilst involving the CMS will be sufficient for the majority of cases, the CMS only takes into account gross salary of up to £3,000 per week. If a parent earns more than this cap, the additional income is not taken into account and there is therefore a limit as to how much the resident parent can receive. As well as this ceiling on salary, the CMS only has jurisdiction where both parents live in the UK (except in very limited circumstances).

In the event that one of the parents lives outside the UK, or the non-paying parent earns more than £3,000 a week, what should a parent do to pursue a child maintenance claim?

As long as one of the parents or the children are habitually resident or domiciled in England and Wales, an application can be made to the court under Schedule 1 of the Children Act 1989.

What orders can the Court make under Schedule 1?

If an application is made under Schedule 1, the Court can order the non-paying parent to provide one, some, or all of the following:

1. Housing for the children and the parent with whom the children live. The property is usually held on trust, to be returned to the parent who purchased it once the youngest child has completed their full-time education;
2. A lump sum or sums to provide a home for the children and/ or for other capital expenditure (for example, furnishing a home, or purchasing a car, etc.);
3. Ongoing periodical payments to meet the children's expenses and outgoings (for example, food, clothes, extra-curricular activities, nannies, nursery costs, etc). This might also include a "Household Expenditure Child Support Award" (previously known as a "carer's allowance"), which is for direct expenses of a child and the expenses of the resident parent's household that cannot be met from the parent's own resources;
4. Funding for school fees or training;
5. If certain conditions are met, money towards the legal fees of the parent who made the application.

While a financial claim under Schedule 1 can only be made for the benefit of the children, the parent with whom the children live can also indirectly benefit from such an application, by being housed for example, during the time in which they are caring for the children, and by receiving other compensation. Financial provision will not be made, however, to fund the resident parent's savings or their retirement. Note also that ongoing periodical payments (3 above) can only be made where the CMS does not have jurisdiction (e.g. where one parent lives abroad), or where the CMS has made a maximum assessment, while the other forms of relief may be available even where no maximum assessment has been made.

What factors will the Court consider?

When determining what (if any) of the above orders would be appropriate, the court would consider all the circumstances of the case, but in particular the following factors:

1. Both parents' respective incomes, property, earning capacities, property and other financial resources (current and future, UK and overseas) available to them;
2. Both parents' financial needs, obligations and responsibilities now and in the foreseeable future;
3. The financial needs of the children;
4. The income, earning capacity (if any), property and other financial resources of the children;
5. Any physical or mental disability of the children;
6. The manner in which the children were being, or were expected to be, educated or trained.

Can child maintenance be contracted out of?

A recent case that should have been a straight-forward Schedule 1 claim for child maintenance turned into protracted and acrimonious litigation, and confirmed the principle that proper financial provision must be provided for a child irrespective of previous agreements.

The case of A v V [2022] EWHC 3501 (Fam) involved an extremely wealthy father who did not provide any child maintenance to the child's mother once the parties had separated. The parties had one child, born in 2014, and they lived a "remarkably lavish lifestyle" during their relationship which endured from 2004 to 2018. In the judgment it is observed that "in about two decades, the father earned some $82 million".

The father tried to rely on an agreement the parties had entered into in 2007, which sought to limit the mother's claim to a payment of EUR 845 per month (index linked). The mother said she was forced to sign this agreement as a condition of the father agreeing to provide samples for her IVF treatment. She subsequently made an application pursuant to Schedule 1 of the Children Act 1989.

The Judge in the case, Francis J, disregarded the 2007 agreement. Instead he ordered the father (amongst others) to purchase a property of up to £4 million, to be held on trust, to provide periodical payments of £125,000 a year, to provide a lump sum for the purchase of a car and to pay the child's school fees.

By disregarding the earlier agreement, the judge emphasised that the court will not permit a party to contract out of child maintenance. "An agreement cannot oust the jurisdiction of the court to make proper financial provision for a child".

The case is a reminder that parties cannot ordinarily enforce a pre-nuptial agreement (or post-nuptial agreement) that does not provide adequate provision for the children of the relationship. With changes to the way people create families, it is becoming increasingly important to understand the financial responsibilities that prevail when having a child.

**Please note we refer to "parents" in this article as a shorthand, but the legislation also applies to guardians.*

OLIGARCHS, DIVORCE TOURISM AND DYSTOPIA

Authored by: Izzy Walsh (Partner and Head of London) - Hall Brown

For some years now, London has been regarded as the divorce capital of the world. That is a label which has been earned due to a succession of high value cases which have notably been regarded as more generous to financially weaker spouses than might have been the case in other jurisdictions.

Within the last few decades, there has been a rise in the number of international marriages and a consequent increase in divorces featuring arguments and assets spanning the borders of many different countries.

In a practice widely referred to as 'forum shopping', financially weaker spouses in some cases like this have instigated proceedings in jurisdictions which they believe will grant them settlements more favourable to them.

In some of those cases, proceedings here have actually followed divorces concluded in other countries. English courts can still determine financial settlements in such matters if they determine that there was no, or inadequate, financial provision made during the overseas' divorce process. A spouse such as Mrs Potanina could, in principle, bring a subsequent application for financial relief here. The other spouse, very likely believing that the matter was done and dusted in the overseas jurisdiction, may well thereafter have been subjected to protracted, complicated and extremely expensive litigation in the courts here.

Such proceedings can be brought because of a law which came into force 40 years ago this year, namely Part III of the Matrimonial and Family Proceedings Act 1984 ("Part III") (https://www.legislation.gov.uk/ukpga/1984/42/part/III). This provides the Court the power to make a wide range of financial orders, but importantly, it does require that certain conditions should be met in order for the Court to take up these sorts of cases.

Those criteria include the connections of the individuals involved to England and Wales, including any property which they may own here, and the nature of any financial settlement which was made in a foreign divorce.

These proceedings can be incredibly complex, something made apparent by the case of Potanin v Potanina recently decided by the Supreme Court in a majority decision thanks to which the Russian billionaire husband has prevailed[1].

During the course of Vladimir Potanin's 30-year marriage to his wife, Natalia, he amassed enormous wealth. He has been described as Russia's richest man, with a fortune which the Supreme Court said was estimated to be in the order of $20 billion.

When the couple divorced in 2014, a Russian court awarded Mrs Potanina a substantial, albeit disputed, sum. Mr Potanin claimed that the settlement was $84 million, while his ex-wife maintained that it was just under half of that total.

1 https://www.supremecourt.uk/cases/uksc-2021-0130.html

Following the Russian divorce, Mrs Potanina purchased a property in London, and moved here soon after. She began proceedings in 2019 in the Courts of England & Wales under Part III, claiming, the Supreme Court judgment explained, "an amount of money measured in billions of dollars".

Part III proceedings involve a two-stage process, the first of which requires the applicant to apply, ex parte, for permission to bring the financial application. If permission is granted, they may then proceed with their substantive application.

In this case, Mrs Potanina was granted permission (on an ex parte basis) to bring her application. Mr Potanin, however, objected, insisting that his wife's demands should not be entertained for a number of reasons. He applied for her permission to be set aside and was successful.

Mrs Potanina then appealed to the Court of Appeal against the setting aside of permission and was herself successful. The Court of Appeal took the law to be that the power to set aside may only be exercised where there is some "compelling reason", demonstrable by a "knock-out blow", to do so, and in practice only where the court has been misled.

That ruling established what had come to be seen as the law in this area. If the knock-out blow could not be established, then the litigation would continue.

Last week, Lord Leggatt described this Catch-22 scenario as a "dystopian situation", as had arisen in the case of Vladimir Potanin and his ex-wife, Natalia.

In a judgment which included some unusually robust language, Lord Leggatt, the Supreme Court judge who delivered the majority ruling, described how the use of the legislation by an increasing number of foreign individuals had led to "mischief".

"Rule one for any judge dealing with a case", he said, "is that, before you make an order requested by one party, you must give the other party a chance to object".

"This fundamental principle of procedural fairness", Lord Leggatt continued, "may seem so obvious and elementary that it goes without saying".

He further explained that "on this appeal, we are asked to review a practice which has developed...that violates this principle".

This perfectly sums up the challenges faced by parties (and their representatives) in dealing with these cases in recent years.

This latest ruling will provide the opportunity to contest the more egregious attempts to exploit Part III in order to 'top up' already healthy settlements made in foreign courts.

To be clear, the Part III jurisdiction has a very valuable role in protecting those people who are subject to cynical attempts to leave them inadequately provided for upon divorce obtained overseas. Preventing the law itself being used in a wholly cynical manner is all the more important, and something which many people would regard as a very positive outcome.

The Supreme Court's decision does not, however, mean an end just yet to the Potanin proceedings.

Lord Leggatt and two of his five colleagues - Lord Lloyd-Jones and Lady Rose - have entrusted the Court of Appeal with resolving part of the issue which will determine whether the former Mrs Potanina's financial claims succeed or not.

The guidance which the Supreme Court ruling provides, however, could be made even clearer. Lord Briggs, one of the two judges who disagreed with the majority decision, has asked the Family Procedure Rule Committee - the body which determines the protocols which govern how family courts operate - to consider whether part III of the Matrimonial and Family Proceedings Act 1984 is still fit for purpose or should be reformed.

WHAT HAPPENS WHEN THE MAGICAL ONCE UPON A TIME, DOES NOT END HAPPILY EVER AFTER?

Authored by: Sarah Hogarth (Senior Associate) - Edwards Family Law

Before the Family Law Act 1981 came into effect, the happy announcement of an engagement was considered to be a legally binding contract. If the engagement was called off without any lawful justification, the person responsible for withdrawing could be sued for damages for breach of promise.

Whilst this is no longer the law, there are still many issues resulting from the breakdown of such a relationship. It is important to note that whilst engaged couples do not enjoy the same rights as married couples, even though the concerns and issues resulting from the fallout can be similar, they are afforded some unique enhanced protection, as simply compared to cohabiting couples.

Who keeps the ring?

The law is clear on who keeps the ring. S3(2) of the Law Reform (Miscellaneous Provisions) Act 1970, confirms that an engagement ring should be regarded as an absolute gift, unless there is clear evidence to show that it was agreed to be returned in the event of the relationship ending.

If the ring is a treasured family heirloom, a court may be more likely to be persuaded that there was an implied intention that it be returned if the relationship ended, but this is by no means guaranteed. Therefore, it is always prudent to record this in writing at the outset, however unromantic it may seem.

Engagement gifts from third parties

There is a presumption that any gifts provided to the happily engaged couple are gifted jointly, absent any evidence to the contrary. In circumstances where the couple unfortunately don't make it down the aisle, it is unlikely that they will have friends and family banging on their door demanding the return of an air fryer or decorative throw for what was to be the new family home. However, there may be circumstances where family members have gifted substantial financial contributions towards proposed renovations to the new home, or perhaps indeed towards a deposit for a new home. In such a situation, that third party may be able to seek financial remedy through the court.

Costs associated with the wedding

Depending on how advanced wedding plans were and how close the couple were to the big day, in many cases it is likely that significant sums may have been incurred. The wedding venue, the catering, the photographer/ videographer, the band, the dress, the makeup artist, the suits, the cake, the honeymoon; the list goes on and it certainly all adds up.

For a couple who have met each of these expenses jointly, their only likely recourse is to read the fine print of the contracts with the various suppliers to assess whether there is any chance of a percentage refund of the costs already incurred.

In circumstances where one party has footed the majority of the deposits and bills, the paying party may struggle to recover the sums incurred from the other aggrieved party, especially in the absence of any clearly documented agreement. The same applies in more traditional settings where the bride's family may have paid for various expenses towards the wedding and are now seeking compensation from the groom's side.

What happens to the house we have bought together?

There is no such thing as a "common law marriage". Whether the couple have been together for five months, five years or fifty years.

Unmarried couples often rely on the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA") should any property dispute arise. This allows a person with a potential beneficial interest in a property to have the nature and extent of their interest assessed and determined by a court, which may result in a number of orders, including an order for sale. TOLATA proceedings can be both time consuming and costly and largely turn on the veracity of the evidence provided by the parties.

Importantly, whilst engaged couples do not enjoy the same legal protections as married couples, many are not aware that they do have some enhanced protection as compared to non-engaged cohabiting couples:

1. S37 of the Matrimonial Proceedings and Property Act 1970:

A formerly engaged party may make a claim for an interest in a property where there has been:

- a contribution in money or money's worth (i.e. paying a builder or undertaking such work yourself);
- to the improvement of a "substantial nature" to real or personal property;
- provided such contribution can be seen to have enlarged both parties' shares.

However, this claim would be subject to any agreement advanced by the other to the contrary, either express or implied.

2. The Law Reform (Miscellaneous Provisions) Act 1970 and the Married Women's Property Act 1882:

Most of The Married Women's Property Act has been repealed. However, S2(2) of the Law Reform (Miscellaneous Provisions) Act 1970 affirms the application of S17 of the Married Women's Property Act 1882 to formally engaged couples, providing declaratory relief for ownership of property and personal possessions (such as cars, jewellery etc). Crucially, any claim must also be brought within three years of the engagement ending.

Protection and prevention

Where engaged couples own significant assets together or gifts have been made in the anticipation of the future happy couples' big day, they may consider it sensible to enter into a pre-nuptial agreement. Whilst many liken pre-nuptial agreements as an insurance policy for divorce, the agreement may also make provision for what will happen to such property and gifts, as well as wedding expenses, should the wedding not go ahead.

Similarly, if the couple envisage a longer engagement period, they may consider entering into a cohabitation agreement; again, to record how the assets will be dealt with both during the relationship and, more importantly, upon any breakdown of the relationship.

In the merriment of a new engagement and the excitement of wedding planning, unromantic practicalities are usually, understandably, not at the top of the priority list. However, where there are assets to protect, prevention is always better than cure.

ThoughtLeaders HNW Divorce

Meet ThoughtLeaders

Paul Barford
Founder/
Managing Director
020 3398 8510
email Paul

Chris Leese
Founder/Chief
Commercial Officer
020 3398 8554
email Chris

Danushka De Alwis
Founder/Chief
Operating Officer
020 3580 5891
email Danushka

Maddi Briggs
Strategic Partnership
Senior Manager
020 3398 8545
email Maddi

Anne-Sophie Hofmann
Strategic Partnership
Executive
020 3398 8547
email Anne-Sophie

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