ThoughtLeaders4 HNW Divorce • October 2021

HNW Divorce MAGAZINE

ISSUE 6

TRUSTS, INTERVENORS & THIRD PARTIES IN DIVORCE

INTRODUCTION

"But I always say, one's company, two's a crowd, and three's a party"

Andy Warhol

We are delighted to publish this issue of HNW Divorce Magazine ahead of our HNW Divorce Litigation Conference taking place on 24th November 2021.

In this edition, our authors focus on trusts, intervenors and third parties in divorce; looking at the effect on the wider family, the division of matrimonial and non-matrimonial assets, and protecting trusts post-divorce. Together with these thought-provoking articles, we find out more about our community with a series of 60 second interviews including some of our speakers at the upcoming HNW Divorce Litigation Conference.

Thank you to all of our authors for providing engaging and refreshing content, and thank you to our members and partners for consistently supporting our growing community. We hope to see you all at our upcoming events, meanwhile please sit back, relax, and enjoy our latest edition.

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ABOUT HNW Divorce

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

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

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Q What would you be doing if you weren't in this profession?

A I'd always hoped to become an opera singer. That's what I told the Law Society when I was asked why I wanted to become a solicitor – and very nearly didn't get admitted. But otherwise I'd have liked to be an architect specializing in restoring old buildings (which I dabble at) or a vigneron, which I still hope to be one day.

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

A Not long after I started at Withers I acted for trustees of a Cayman Islands trust who were some of 84 defendants to London proceedings impugning the validity of the trust and claiming breach of fiduciary duty. It was a mammoth piece of litigation with the government of the country supporting the Claimant voting to spend the equivalent of the legal aid budget for the year on the case. I was anxious to separate out the invalidity issue from the remaining allegations and so with the benefit of advice from Robert Walker QC (Lord Walker) we issued trust proceedings for determination of that issue alone in the Cayman Islands and then defeated the Claimant's attempt to challenge the jurisdiction of the Grand Court. My assistant, who telephoned with the news shortly thereafter, had to tell me three times before the enormity of the news sunk in – that the Claimant had discontinued in London against all 84 defendants. I can only imagine the total of all parties' costs that they had to pay.

Q What is the easiest/hardest aspect of your job?

A Working with the support of my amazing colleagues – it's uncommon not to find someone in the firm who knows the answer, whether its tax, probate, property, divorce, corporate, art law, succession in the EU or just about anything. The one exception I've discovered so far is buying dinosaurs in the ground. One of the hardest is advising trustees what to do when caught up in a divorce with one or more beneficiaries involved. Gauging how the Family Court will react to the protective measures you advise putting in place in any particular case and how to get the tone of communication just right definitely requires both trust and divorce skills.

Q What is the best piece of advice anyone has given you in your career?

A When I was a raw trainee the senior partner of the firm told me never to be ashamed to admit that I didn't know the answer, but to add that I'd reflect on it/ research it and get back to the client.

Q What has been the most interesting HNW Divorce case you have seen so far in 2020/2021?

A Acting –as we often do - behind the scenes in advising offshore trustees on how to address an attempt to pull them into English divorce proceedings. Working with local counsel orders were secured prohibiting any participation or disclosure to the other side or beneficiaries (who would have been vulnerable to third party disclosure orders), the offshore courts involved accepting that this was in the best interest of the beneficiaries. And it worked- the trust funds were not touched.

Q If you could learn to do anything, what would it be?

A So many things! But perhaps top of the list would be a fluent linguist, a vigneron and a perfumier.

Q What is the one thing you could not live without?

A Beauty, in so many forms – the countryside, music, architecture, literature, theatre etc etc.

Q What one positive has come out of COVID-19 for you?

A Being for nearly 18 months with my adult children and learning how differently they do things as Milennials/ Gen Z. I've become convinced they have so much to offer and are right about so many things!

Q Who would you most like to invite to a dinner party?

A Boris Johnson. Apart from finding out and giving him his least favourite dish I'd like to talk to him about the rudiments of trust and what it means to act solely in the interest of those to whom a fiduciary duty is owed.

Q Now the world is beginning to open up again, what are you most looking forward to doing?

A Meeting clients, colleagues and being able to go to see trustees and others in their own environment once more. And carrying out mediations face to face.

Q What does the perfect weekend look like?

A Late breakfast on the terrace, a day out in a historic city or magnificent countryside, back for a swim and dinner before a concert or opera in the open air on a glorious summer day. And strolling around just about anywhere chatting with my children.

Q As chair/speaker at our upcoming HNW Divorce Litigation conference, what are you most looking forward to at the event?

A Interacting with other practitioners in the field and sharing not just knowledge but also experience and thoughts on how this area is going to develop. I've never been at such a conference and not felt that I've come away having learned so much!


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DIVORCING THE IN-LAWS:

MARITAL DISPUTES AND ITS EFFECT ON WIDER FAMILY FINANCES

Authored by: Sarah Bailey-Munroe - Conyers

In most cases, a marriage represents the joining of two families, rather than simply the two individuals who take vows. It is perhaps unsurprising therefore that the emotional fallout of a divorce can similarly involve the wider family, however few expect to find themselves embroiled in ensuing legal proceedings.

Disputes over the availability of family wealth in trusts or businesses are common and those who employ such structures to organise their finances have usually received advice as to their vulnerability on divorce. However, the gifting or loaning of property and cash during a marriage can often take place on an informal basis with little consideration or legal advice as to the consequences upon divorce. Such fluid family finances provide fertile ground for disputes over ownership during a divorce.

The complexity (and as such the costs) of these disputes can quickly spiral as a result of the number of transactions and parties involved. The level of acrimony can also quickly mushroom as family members taking umbrage at the idea of family funded assets being used to meet the needs of an "undeserving ex-spouse".

Client Care

Wider family members can often be surprised to learn that the family court's powers may extend to an asset which on its face belongs to them rather than either spouse. Conversely, upset may be caused by the realization that property gifted or placed in a loved one's name before divorce was on the cards, may now be treated as property owned equally by both spouses.

The unexpected nature of this realisation can create strong emotional reactions (particularly in circumstances where they feel a loved one has already been a victim within the divorce).

It is important to ensure that these emotions do not overshadow the interests and wishes of their loved one and separate representation should therefore be considered as soon as a third party claim appears likely.

All parties will need to keep a firm eye on the merits of any third party claims and their proportionality within the wider proceedings.

Chancery v Family principles

The key difference to keep in mind when dealing with a third party claims is that they will be determined by reference to the applicable rules of commercial or property law . The notions of fairness which guide the division of assets between spouses, have no place in resolving disputes over property ownership or the enforceability of debts. As a result, cases need to be pleaded with precision as they would in the chancery division.

Whilst it may not be uncommon for a spouse's stance to shift in relation to what is fair within substantive financial remedy proceedings, shifting narratives in third party claims are often fatal to credibility and as a result their claim. How an asset came to be transferred should therefore be scrutinized with forensic detail before it is set out in correspondence or statements.

There may be little understanding of the legal implications of transactions which were completed without advice and careful instructions will be needed to ensure the parties' respective intentions and contemporaneous conversations are properly understood. For example, it is all too common for parents to erroneously believe that evidence that a property was transferred for tax planning reasons will defeat a claim that the property was gifted to the couple. In reality transferring a property to escape inheritance tax is successful precisely because the transferor's property rights were extinguished and passed to the recipient.

Of course, property transferred as part of wealth planning may well escape equal division on divorce, by virtue of being treated as an advanced inheritance. But pursuit of a claim that the parent has retained beneficial interests will achieve little besides a heavy costs bill. Clarity as to the case being claimed is essential.

Party status

Where the value of a third party claim is low, a family member may prefer to accept their loss, resolving the issues within the family once the divorce is over. However, where outstanding loans or property interests are significant enough to warrant pursuit, consideration will need to be given to whether party status is necessary.

Whilst TL v ML makes clear that third parties should be joined at the earliest opportunity, in Bebehani the court confirmed that the question of joinder remains a discretionary one and there is no hard and fast rule. Given the cost implications of joinder it will be important to consider whether appropriate alternatives exist.

Family members may seek to resist joinder preferring to advance their case through evidence or even submissions as was suggested in BY v MJ. Personal claims relating to outstanding liabilities will often be dealt with in this way. Whilst this approach will prevent the court's findings being binding on the third parties [Tebbutt v Haynes], the familial relationship between debtor and creditor will usually mean that this approach can be undertaken by agreement.

However, where family members seek to defend or assert a beneficial interest in property, joinder or consolidation of a property claim will likely be necessary. A spouse pursuing a beneficial interest against a family member will almost certainly seek their joinder.

Some UK courts have developed the pragmatic approach of delaying joinder in these cases until after a Financial Dispute Resolution hearing (FDR), albeit with full pleadings and statements being directed in advance. This is a sensible option to pursue where joinder is likely unavoidable in the long run.

Conclusion

The best advice for family members seeking to protect family wealth from a divorce is (unsurprisingly) to seek advice and act before a separation is ever on the cards.

Prenuptial agreements offer the opportunity to comprehensively set out family intentions in relation to any and all financial support and therefore provide the best protection available. Where there is little appetite for this, family members with firm views as to the terms of any ad hoc financial support should ensure that they are properly recorded. Documents should be drafted setting out the terms of any transfer or loans (including repayment dates) even if only in the form of texts and emails.

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MATRIMONIAL AND NON-MATRIMONIAL PROPERTY ON DIVORCE

Authored by: Adam Paterson – Schneider Financial Solutions

From my time in practice, it always seemed that clients felt a great deal of indignation on being advised that cash or property obtained independently from their role in the marriage could be awarded to their ex-spouse as part of a "fair" outcome. "Fair" in this instance having the meaning ascribed by the Family Court rather than the lay client (the two inevitably not always being the same). Taking the family lawyer hat off, it is not difficult to sympathise. If your parents decided to leave some of their wealth to you as their child, it seems vanishingly unlikely that the intention behind that gift was that the Family Court would then take some of it and give it to your estranged spouse.

The combination of indignation and fertile legal ground for argument often makes a case that much harder to settle: this polarising issue of principle that stands at the gates of any negotiation/mediation. That is not to say that all cases where a complex issue arises are incapable of being settled, just that it makes it harder.

This article looks at some of the basic principles and solutions, before and after the fact.

Classification of the Assets

It is sometimes very easy to classify assets as non-matrimonial, for example, savings accumulated by one of the parties prior to the marriage which have been kept in a sole-name account and never touched. Such a simple situation rarely seems to be the case. In Hart v Hart [2017] EWCA Civ 1306 we are reminded that the idea of property being marital or non-marital is a "legal construct" and that an asset can be both.

It is fairly common for the parties to make the family home in a property owned by one of the parties prior to the marriage:

In Miller v Miller; McFarlane v McFarlane [2006] UKHL 24 Lord Nicholls tells us that the home has a "central place in the marriage" so should "normally be treated as matrimonial property". But Mostyn J in JL and SL (No 2) [2014] EWHC 360 (Fam) points out that an unequal division of the family home can be justified by virtue of unequal contribution to its acquisition. Room for an argument, therefore.

Further arguments arise (the detail of which is beyond the scope of this article) when the assets in question are shares in a company in which one of the parties works. Assuming they are pre-marital, they will have a non-matrimonial background but if one party continues to work within the company to improve the business during the marriage then that will give the shares a matrimonial flavour. On the specific facts, has the value been created pre-marriage, during the marriage or post-separation? Expert input will normally be vital.

The case law tells us there is a sliding scale of classification and assets can be "matrimonialised". It stands to reason that the longer the asset is held and the more it has become mingled with other assets, the harder it will be for the benefiting party then to claim that it should be treated as non-matrimonial. One sympathises with the spouse who, for example, uses a part of their inheritance to carry out renovations on the family home, only to find that on separation their spouse claims that the inheritance is there as a sink fund for the family and should be divided.

Note also "unilateral assets" as identified in Miller. An asset obtained during the life of the marriage but treated separately so as not to become matrimonial despite the chronology. The impact can be seen in the Court of Appeal decision in Sharp v Sharp [2017] EWCA Civ 408.

This was a short, childless marriage where both parties had a good (but not equal) income. The wife had received bonuses during the marriage of £10.5m not matched by the husband. The ultimate outcome was that the properties they owned jointly were shared and the husband was then given a sum to meet needs - the departure from equality justified by the unilateral assets of the wife. It's worth noting that Mr and Mrs Sharp had kept their finances unusually separate during their marriage going so far as to split the bill in restaurants.

Does the other party need or seek a share in the property?

Once you have managed to establish that there are some assets under consideration that are non-matrimonial you can work on how to treat those assets in the overall division.

It is a fact of financial remedy decisions in England and Wales that the needs of the parties trump all. If the only asset of a family is non-matrimonial, then it must be utilised to meet the needs of both parties. Similarly, if an equal division of the matrimonial assets leaves one party unable to meet their needs, then the non-matrimonial assets of the other party can be reallocated to square the circle.

However, the "sharing" principle will generally not apply. In In JL v SL [2015] EWHC 360 (Fam), Mostyn J said that a claim to share non-matrimonial property – as opposed to the Court dipping into the non-matrimonial pot for additional capital – is "as rare as a white leopard", and in Hart Moylan LJ noted that he was not aware of any case post-Charman (Charman v Charman [2007] EWCA Civ 503) where a party had been awarded non-matrimonial property by virtue of the sharing principle rather than according to needs.

However, there is still scope for argument. White (or certainly snow) leopards do exist, after all.

If some of the property in question is to be shared, how much? Given the general preference for discretion and broad overview in the Family Court it is unsurprising that the preference of the Court of Appeal in Hart was to take a more artistic approach that gives the Court the freedom to identify non-matrimonial property (without necessarily doing so in exact pounds and pence) and then step back and take a view as to how that can be fairly represented, rather than adopting the more formulaic approach advocated by Mostyn J and set out in Jones v Jones [2011] EWCA Civ 41.

Whilst that may ultimately lead to the Court having the necessary tools to decide a case fairly (in Hart for example, the husband's woeful disclosure deprived the Court of the ability to assess his pre-marital wealth), it does mean that advising a client on the potential outcome at an early stage (and therefore deciding whether any offer is reasonable) becomes more difficult.

Reaching an Outcome

Ideally, of course, the parties would have entered into a Radmacher-compliant pre- or post-nuptial agreement detailing exactly how they want such assets to be treated on separation. In addition, that agreement will have been revisited regularly to ensure that its terms remain relevant. However, where a family lawyer becomes involved after the fact, the real challenge is how to reach settlement without wading through court proceedings to Final Hearing.

When a more artistic approach is required, two artists might paint a different picture despite using the same palate and formulaic guidance is unlikely to be forthcoming from the higher courts.

It seems to me that the situation is perfect for arbitration if the question is a narrow one surrounding the treatment of non-matrimonial assets. Arbitration continues to receive judicial support and anecdotally has grown substantially in popularity during lockdown. The Court system has been put under a great deal of stress by COVID and the idea of waiting months or years for a Final Hearing is likely to result in significant costs to a client. Far better to select an experienced tribunal, decide what expert evidence is required and have the issue decided, potentially with the full section 25 exercise to take place after if the parties can't agree settlement following determination of the discrete issue.

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60-SECONDS WITH:

THE RT HON SIR MATHEW THORPE FORMERLY LORD JUSTICE OF APPEAL

Q **Was there ever a time you would have considered a different profession? If so, what would that have been?**

A Architect.

Q **What was the strangest, most exciting thing you did in your career?**

A I loved trials in Hong Kong when I was in silk.

Q **What was the easiest/hardest aspect of being a Judge in the Court of Appeal?**

A Working in a court of three where there were such opportunities to learn from others.

Q **What was the best piece of advice anyone gave you in your career?**

A To relish the first years in silk earning more for working less.

Q **If you could learn to do anything, what would it be?**

A Speak fluent German.

Q **What is the one thing you could not live without?**

A Beauty.

Q **What one positive has come out of COVID-19 for you?**

A A quieter life.

Q **Who would you most like to invite to a dinner party?**

A My old friends.

Q **Now the world is beginning to open up again, what are you most looking forward to doing?**

A Writing another book.

Q **What does the perfect weekend look like?**

A Anywhere in Steiermark, but preferably Grobming or Festenfeld.

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

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

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

The Blue Poison Dart Frog

(dendrobates tinctorius azureus)

Native to Suriname

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

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

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

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

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

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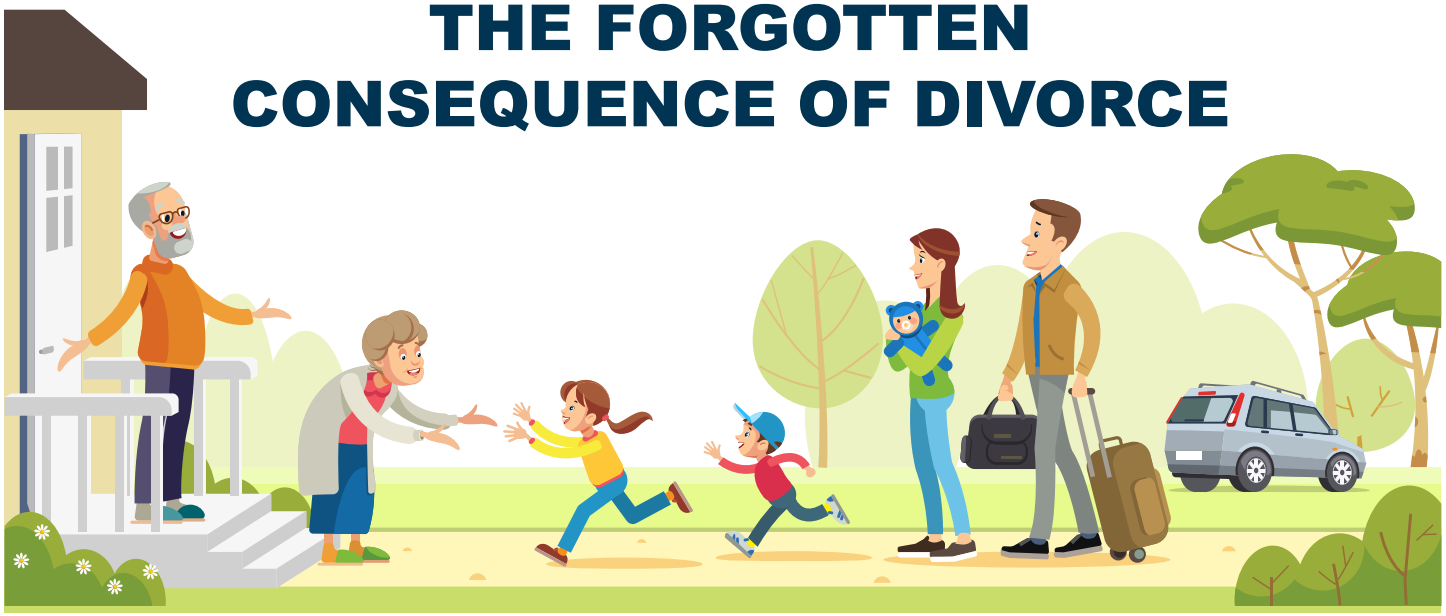
GRANDPARENTS:

THE FORGOTTEN CONSEQUENCE OF DIVORCE



Authored by: Ellie Hampson-Jones - Stewarts

Grandparents provide a range of support to their grandchildren. Research by Age UK suggests that 40% of grandparents over the age of 50 have provided regular childcare for their grandchildren and that nine out of ten grandparents, including those who do not provide regular childcare, feel close to their grandchildren.

It is, therefore, surprising for many who have been so integral to their grandchildren's day-to-day lives that they do not have an automatic right for a child to see or spend time with them under the Children Act 1989 ("CA1989") if they are prevented from doing so by a parent (or parents). Sadly, the severance of a grandparent relationship can often happen on divorce, where one parent has fallen out with the other and considers the grandparent to be an extension of their former spouse's 'team'.

Grandparents can (and often do) seek Special Guardianship Orders in respect of their grandchildren. A Special Guardianship Order appoints one or more individuals to be a child's 'special guardian'. This allows the child to live with someone other than their parent(s), usually until the child is 18. Parental responsibility is conferred on the special guardians, enabling them to make decisions concerning the child's care and upbringing. The court often favours making Special Guardianship Orders over adoption by a grandparent, which can blur and interfere with natural biological lines.

This article focuses on private law proceedings rather than proceedings involving adoption, Special Guardianship or a child in the care of a local authority (to which different factors and processes apply).

What rights do grandparents have in private law proceedings?

When a dispute arises about who a child is to live with, spend time with or otherwise have contact with, this can be resolved by applying to the court under section 8 of the CA1989. Under paragraph 10 of the CA1989, a parent and/or a person with parental responsibility for the child may automatically apply to the court to start the process.

Unfortunately, grandparents do not fall within this automatic category. As such, if a grandparent is denied access to their grandchild and they have been unable to resolve the issue directly with the consent of the child's parents, then a grandparent must apply to the court for permission to make an application.

Pursuant to paragraph 10 (9) of the CA1989, when determining whether permission to apply will be granted to a grandparent, the court will have regard to:

(a) The nature of the proposed application,

(b) The grandparent's connection with the child,

(c) Any risk there might be of that proposed application disrupting the child's life to such an extent that they would be harmed by it.

The latter can include the harm caused to the child due to conflict between the applying grandparent and the parent preventing contact.

When preparing this article, the writers came across pieces dating back as far as 2007 discussing the hope for potential reform in this area and members of parliament proposing amendments to the CA1989 to give children the right to have a relationship with their grandparents. Indeed, the role of grandparents has been identified in public law proceedings as being increasingly important. It is recognised that ongoing relationships with grandparents are beneficial against non-relative placement and can help support a child's awareness of their origins. While reported decisions seem to acknowledge the significance of grandparents, there has been no change in the law itself. There is a view that grandparents should be given leave if such an application is made.

What is the process?

Once permission has been granted, the grandparent may proceed with their application. The grandparent will be required to follow the usual court procedure for making an application under section 8 of the CA1989:

- They will need to complete a Form C100, for which the fee is £215
- They will need to include within the application (if known at that stage) the type of contact order the grandparent is seeking the court to make, ie direct contact (face-to-face meetings) or indirect contact (cards and letters, phone calls, video calls)

To the extent the grandparent does not know what order they are seeking, this will be influenced by recommendations made by the court-appointed social worker (Children and Family Court Advisory and Support Service, 'CAFCASS').

Before the pandemic, applications made under the CA1989 were supposed to be listed for a first hearing dispute resolution appointment (FHDRA) within four to six weeks of an application being issued. In the writer's experience, it can now take up to three months for an FHDRA to be listed. This can add even more delay to an already protracted process.

Unless there is agreement between the parties before or at the FHDRA, a judge cannot make a final order at the FHDRA. Instead, the judge will make directions to manage the case to a final hearing where a determination can be made. The child's welfare will be the court's paramount consideration when reaching a decision. While there is a presumption, unless the contrary is shown, that the involvement of a parent will further a child's welfare, the same presumption does not apply to grandparents.

The court will weigh up the grandparent's involvement with regard to:

- The child's ascertainable wishes and feelings
- The child's physical, emotional and educational needs
- The likely effect on the child of any change in their circumstances
- The child's age, sex, background and any characteristics the court considers relevant
- Any harm the child has suffered or is at risk of suffering
- How capable each of the child's parents or any other person in relation to whom the court considers the question to be relevant is of meeting their needs
- The range of powers available to the court under the CA1989

What are the alternatives?

Before making any application to the court, the grandparent will need to demonstrate that they have explored alternative forms of dispute resolution. This means they will need to attend a 'Mediation Information Assessment Meeting'.

If possible, grandparents should first explore whether mediation can be used as a forum for resolving the dispute. This will help ensure a court application is avoided and is usually a much quicker process, helping prevent any further decay in the relationship between grandchild and grandparent from settling in.

Conclusion

Given the crucial role grandparents play in providing support for their grandchildren, it can be incredibly difficult for grandparents to have their relationship with their grandchild disrupted seemingly through no fault of their own. The process can be painful and frustrating for grandparents. Grandparents are advised to move quickly in these scenarios to maintain the bond between them and their grandchild so that it doesn't become a fatal by-product of a difficult divorce.

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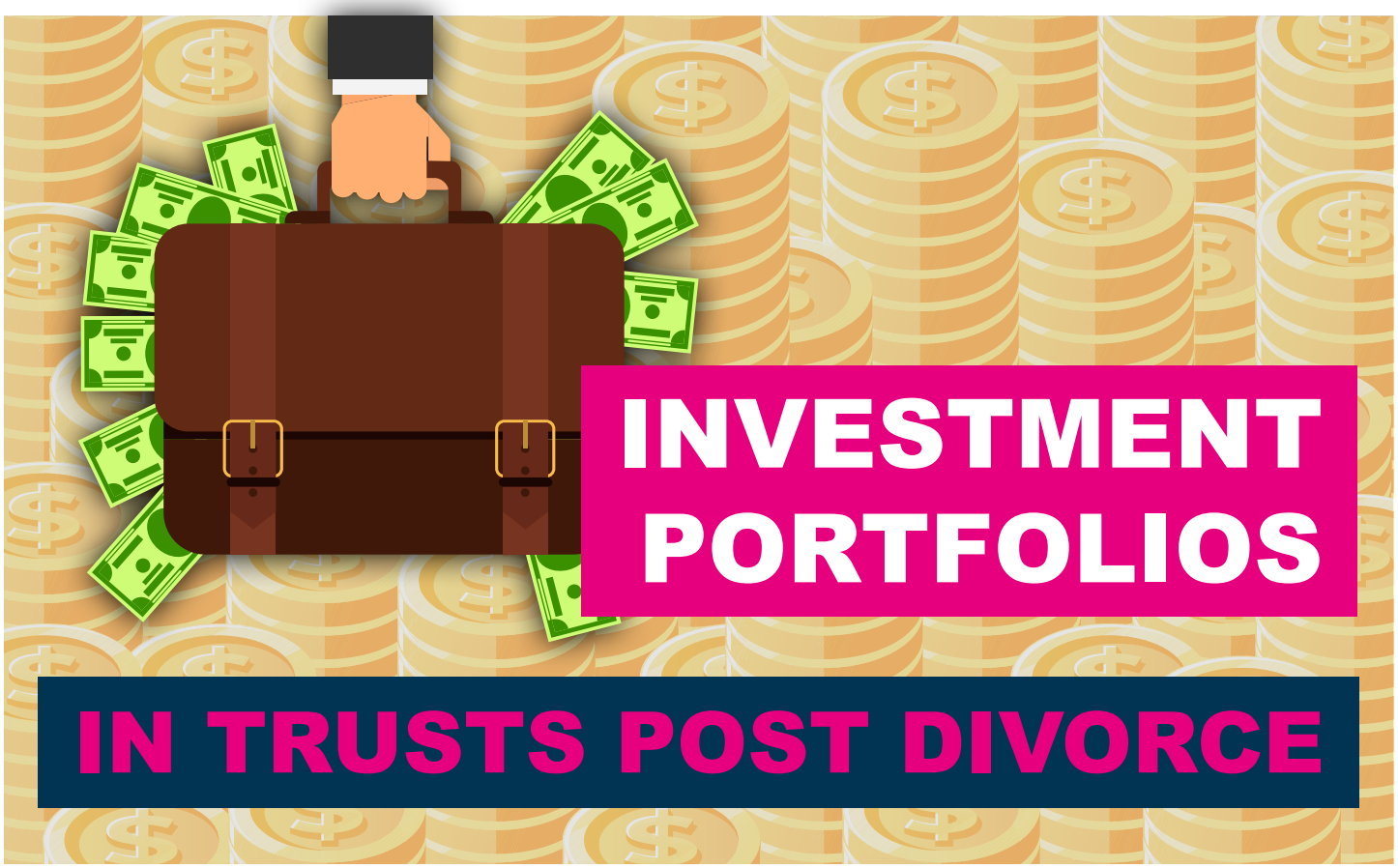

INVESTMENT PORTFOLIOS IN TRUSTS POST DIVORCE

Authored by: Joe Donohoe – Asset Risk Consultants

From lawyers advising on asset protection trusts to jurisdictions imposing firewalls against foreign judgements, there is still a school of thought that assets in trust might be ring fenced in the event of a divorce settlement.

This may sometimes hold true, but more often than not the parties will agree that assets held in a trust should form part of the calculations of family wealth. And even if a judgement is not made against the trust assets per se, the trustees may be requested to make changes to the way in which they manage trust assets in order to allow a beneficiary to meet their obligations under a divorce settlement. Where the trust assets comprise investment portfolios, this can lead to a variety of problems.

The most straightforward position for the trustee is where a payment away is requested. Typically this is where both divorcing spouses are beneficiaries of the trust, perhaps with one being added as a result of the divorce settlement, and the trustees are requested to pay away the investments to one of the beneficiaries. This does not differ from any other request for a distribution and the trustees will follow the same process. The investment question for the trustee is whether to transfer out the investments in specie or to liquidate the portfolio and pay away the proceeds. A number of factors might influence this decision.

The trustees might first seek advice on whether the tax impact on the trust and the beneficiary would be more or less onerous in either scenario. Assuming the tax position is neutral, there are then investment and practical concerns. A liquidation of the portfolio might crystalise losses where individual investments are sitting at valuations below their original purchase price. An instruction to liquidate the portfolio would override the managers own decisions on what to do about these investments. There is also a timing issue as some of the investments might not be liquid and could require notice periods or a delay until the next dealing day. This could upset the overall financial arrangements of the divorce and create additional costs and expenses.

A transfer in specie would not remove all of these issues but would put control of the process into the hands of the beneficiary which might be preferable.

A second scenario we have seen is where the trustees are asked to manage the assets to benefit one of the beneficiaries, typically the spouse on the receiving end of the settlement. How the trustees deal with this request may depend on the current arrangements for the portfolio. Assuming it is in a discretionary portfolio with an investment manager, the first thing for the trustees to do will be to conduct a new risk assessment and suitability review for the beneficiary to establish whether the existing policy will work for them and meet their requirements. If, for example, the portfolio is being managed for long term capital growth but the new beneficiary requires a regular income, then the mandate for the manager may need to change. It is also possible that the beneficiary will be unhappy with the incumbent manager, perhaps because of an association with the other spouse, and will ask the trustees

to make a change. Such a request can pose problems of both principle and practicality for the trustee. If the existing manager has been doing a good job then the trustees might struggle to justify a change which will almost certainly result in additional fees and a negative impact on investment performance.

If the trustees are happy to accommodate the request for a change of manager, then they will be faced with the practical difficulties of finding a new manager and then organising the transfer between the managers. The decision for the trustees might be made easier if the existing manager would not be an ideal choice for the new set of objectives. A top performing manager for capital growth might not be the number one choice for a portfolio designed to produce income. If this is not the case, and the trustees would be happy to stay with the existing manager, then it might be sensible to persuade the beneficiary of the benefits of leaving the manager in place, at least until their track record under the new mandate can be established.

The final scenario to consider is where the trustees are asked to separate the portfolio into two, with one pot notionally or explicitly designated for each spouse. This is the most complex situation for the trustees and brings together the problems of the previous two scenarios and adds a few more for good luck.

Questions around in-specie versus liquidation, suitability and choice of manager will all need to be answered. The added difficulty is that the same answer might not work for each spouse.

If the trustees are lucky, both spouses will be happy to continue with the existing manager following the existing mandate. This would allow the manager to simply divide each holding and segregate into two accounts. There may be practical problems relating to minimum holdings or other conditions specific to individual investments but with the same manager in place these might be easier to overcome. It may even be that the manager can continue with a single portfolio with the notional split happening at trust level. Sadly, post a divorce this level of harmony and cooperation is rare so it is more likely that the trustees will be asked to make greater changes. The same manager might stay in place but with different investment objectives for each new portfolio. Or one or other spouse might ask the trustees to find a new manager. As discussed previously, the issue is getting from one arrangement to the other at the least cost in fees and damage to investment performance.

The investment issues identified in this article can all occur outside of a divorce situation but the added personal issues which a divorce brings can make the decisions seem more difficult and the pressures on the trustees can be more intense.

The key for the trustees is to ensure that they do not lose focus on the investment portfolios while sorting out the requested arrangements.

All of the regular disciplines around performance monitoring must be maintained. It is ultimately not in the interests of either spouse, or the trustee, to see the portfolio diminish in value as a direct result of a badly handled transition.

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LUCY LOIZOU MANAGING PARTNER, THE INTERNATIONAL FAMILY LAW GROUP

Q What would you be doing if you weren't in this profession?

A I would love to be a professional golfer. It is a game that requires a lot of skill and concentration yet at the same time is very relaxing.

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

A The most exciting thing that I have done is addressing circa 500 delegates at the annual Resolution Family Conference about the future of family law.

Q What is the easiest/hardest aspect of your job?

A The easiest part of my job is Interacting with people and helping them to find solutions to the challenges that they face. The hardest part is finding enough hours in the day to get everything done!

Q What is the best piece of advice anyone has given you in your career?

A Work hard and you will succeed. I became Managing Partner of the International Family Law Group LLP on 1 August 2021. It shows that hard work and determination pays off. I am relishing my new role and looking forward to embracing all new challenges that come with it.

Q What has been the most interesting HNW Divorce Case you have seen so far in 2020/2021?

A Acting for an intervenor in family law proceedings who is seeking to safeguard his family wealth that has been generated over many decades.

Q If you could learn to do anything, what would it be?

A To become and astronaut and travel to space.

Q What is the one thing that you could not live without?

A My beloved dog, Mylo and the sunshine!

Q What one positive thing has come out of COVID for you?

A To be grateful for all I have and to never take anything for granted. Life can be too short.

Q Who would you most like to invite to a dinner party?

A All of my favourite iconic Greek singers for a evening of Greek food, singing and dancing.

Q Now the world is beginning to open up again, what are you most looking forward to doing?

A Spending a few weeks in Cyprus enjoying the warm temperatures and swimming in the ocean.

Q What does the perfect weekend look like?

A Reading, walking my dog, catching up with sleep after a busy, productive week and seeing friends and family.

THE COST OF PROTECTING TRUST ASSETS IN A DIVORCE

Authored by: Jessica Henson and Rebecca Moseley – Payne Hicks Beach

John Steinbeck once said that "anything that just costs money is cheap".

Trustees joined to financial remedy proceedings are unlikely to agree with him on this: they rarely have to endure the emotional turbulence that divorce wreaks on its protagonists, but they would still be unlikely to accept that it's cheap.

Of course, no litigation is cheap, and the reality is that trustees joined to financial remedy proceedings – an essentially inquisitorial process – have relatively limited opportunity to recover their costs from the applicant. The result is that usually most, if not all, of the trustees' legal costs will be borne by the trust fund in question.

Usually, discretionary [1] beneficiaries who are not party to the marriage in question will accept (begrudgingly) that this is the justified cost of giving their interests a voice in the proceedings. But that is not always the case: some beneficiaries will be understandably aggrieved by the erosion of the trust fund by divorce proceedings that do not concern them.

Against that context, we consider in this article the applicable cost rules and what trustees can do to limit cost exposure once they are joined, and submit, to financial remedy proceedings in England & Wales.[2]

What procedural rules apply?

The general rule under the Family Procedure Rules 2010 (FPR) regarding financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another (the "no order as to costs" rule) (FPR 28.3(5)).

When it comes to third parties, however, their costs are not subject to the same regime: the "no order as to costs" rule does not apply (see Baker v Rowe [2009] EWCA Civ 1162 which dealt with the equivalent provision in the old FPR 1991).

Does this mean that one should turn to the Civil Procedure Rules and the default rule that costs follow the event under CPR 44.2(2)(a)?

No – that's not applicable either: FPR 28.2(1) disapplies CPR 44.2(2) expressly. So where does this leave trustees in this procedural no-man's land?

The applicable rule is simply that "the court may at any time make such order as to costs as it thinks just." (FPR 28.1). This is likely to be frustrating for trustees who seek certainty as to the consequences for the trust fund.

1 Where the divorcing spouse has a vested interest or an appropriated fund, the cost can of course be allocated to his or her share.

2 This article does not consider trustees' personal exposure: ordinarily, trustees should expect to obtain Beddoe relief as a preliminary step to ensure that they may rely on their right of indemnity in respect of the legal costs incurred.

Beyond this 'clean sheet' procedural rule, case law provides a little more guidance:

> ***"the fact that one party has been unsuccessful, and must therefore usually be regarded as responsible for the generation of the successful party's costs, will often properly count as the decisive factor in the exercise of the judge's discretion" (Baker v Rowe 25).***

The case of Gojkovic v Gojkovic (No 2) [1991] 2 FLR 233 also gives authority for the idea that there should be a rebuttable presumption that costs will follow the event. This approach also received approval more recently in Solomon v Solomon & Ors (Rev 1) [2013] EWCA Civ 1095.

The question then is, when it comes to trustees, what is the "event" in question that costs should follow? Or to put it another way…

How can trustees "win" in financial remedy proceedings?

Where a third party, such as a parent, has been joined to financial remedy proceedings for the determination of a particular issue such as the ownership of a particular asset, it may be very apparent where success lies and where the costs should fall.

When it comes to the joinder of trustees, however, the position may not be so clear-cut. This is particularly the case where trustees adopt a 'neutral role' as between the husband and wife – precisely so that they avoid an adversarial stance that could incur an adverse costs order.

The difficulty is that by adopting a wholly neutral role, the trustees may also be losing the opportunity to benefit from a costs order in their favour against the applicant.

Specifically, where trustees adopt a neutral stance on the issues in the proceedings and merely assist the court by furnishing it with information, it might be said that vis-à-vis the trustees, there is in fact no issue in dispute that could determine where costs fall.

In those circumstances, it is likely that a court will make no provision as to the trustees' costs.

Where an order is silent on costs (and the no order as to costs rule does not apply) the general rule is that no party is entitled to their costs.[3]

So, if trustees want to 'win' a substantive issue (so that they are able to claim their costs from the applicant), they will need to venture a positive case against the applicant – most likely on the issue of whether the trust is nuptial in character and, by extension, whether it should be varied by the matrimonial court.

Naturally, the approach taken will need to be informed by the merits of the case. If the trustees are not sufficiently confident in their case, they will not want to risk running a positive case which could fail and result in adverse costs.

So, other than 'winning' substantive issues in dispute, what else can trustees do to recoup, or otherwise minimise, their legal costs?

What should trustees do to limit cost exposure?

01 Deal with trust issues only

First and foremost, trustees would be well-advised to avoid incurring additional costs by becoming embroiled in issues as between husband and wife. This might sound obvious, but it is often a delicate balance to strike: ensuring that the trustees and their legal team are kept apprised of any procedural developments or correspondence that has a bearing on trust matters while avoiding involvement in issues that do not. A clear protocol should be set down from the outset.

02 Raise the issue of another party's conduct

When deciding what (if any) costs order to make, the court must consider all the circumstances of the case, including the conduct of the parties (CPR 44.2(4) and (5)). Specifically, this includes:

- conduct before, as well as during, the proceedings;
- whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- the manner in which a party has pursued or defended its case or a particular allegation or issue;

and

- whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

The acrimonious nature of many divorce proceedings means that they can be fertile ground for unreasonable conduct. If the trustees' costs have been disproportionate because of another party's actions, the trustees should consider making representations to the Court that the unreasonable party should bear the burden of those excessive costs.

03 "Winning" interim applications

The summary assessment of costs on interim applications can provide a valuable means of recouping costs for trustees. Unlike the substantive issues in dispute where (as discussed above) it may be more difficult for the trustees to adopt an adversarial stance, interim applications will usually involve procedural issues of dispute on which the trustees can more easily be said to have 'won'. As such, it can often be worth trustees seeking the summary assessment of their costs – especially where the interim application process goes hand-in-hand with the issue of unreasonable conduct, whereby a party will make multiple interim applications in order to delay the proceedings.

3 This is provided for by CPR 44.10(1), which also applies to family proceedings (FPR 28.2(1). However, this is a general - not an absolute - rule and the court may make a retrospective order, where no order has previously been made (Timokhina v Timokhin [2019] EWCA Civ 1284).

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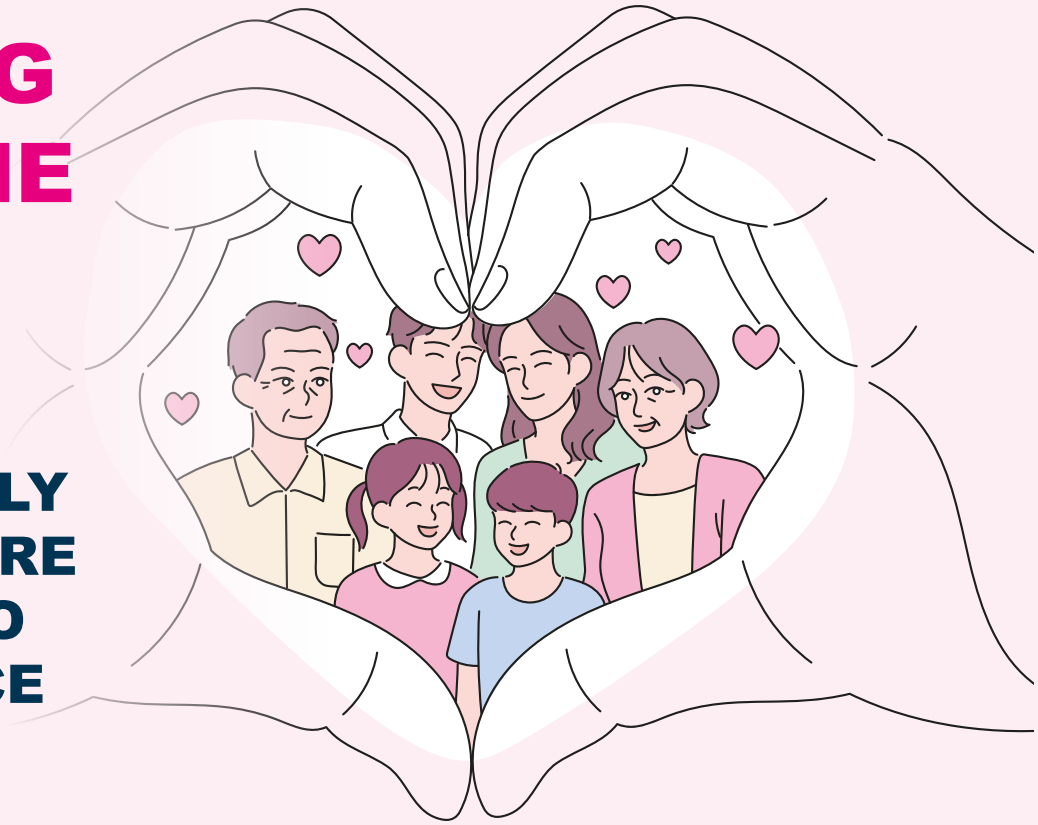
KEEPING IT IN THE FAMILY

WHAT TO DO WHEN WIDER FAMILY MEMBERS ARE DRAWN INTO THE DIVORCE PROCESS



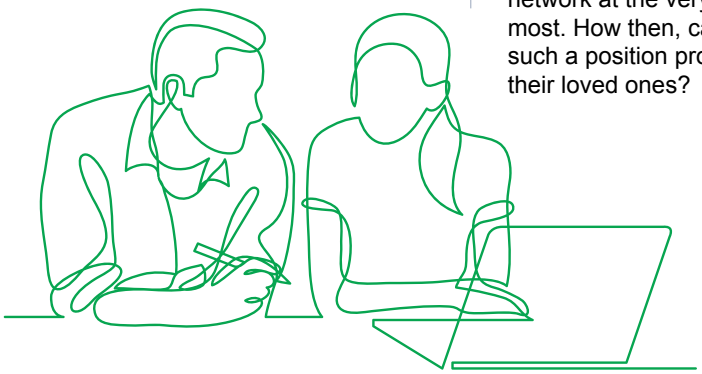
Authored by: Cate Maguire – Kingsley Napley

For relatives of those getting divorced, their concern for their loved one can be compounded by the fear of wider financial repercussions for the family. This can be particularly worrying if family assets have been 'intermingled' with the couple's marital assets, opening up potential claims against those assets, whether held in immediate or extended family members' names, within family financial structures, or by a spouse on behalf of other family members.

Common issues include:

- Parents (or indeed grandparents or other relatives) who have permitted the divorcing couple to reside in properties they own may find that their former son or daughter-in-law now brings a financial claim against the property in question. Such claims may also be pursued against family trusts in which such properties are held, with a view to varying the trust to benefit the non-beneficiary spouse.
- Parents seeking to recover loans made to their child used towards the purchase of a property may find that their child's spouse disputes the validity of such loans.
- Family members with a beneficial interest in a property legally owned by the divorcing party may similarly find that this interest is disputed.
- Where financial support has been offered to the divorcing couple during the marriage, whether directly from family members or via a trust, it may be argued that the court should rely on the likelihood of such future financial support to order the recipient to provide financial support to their former spouse.

It can be a source distress to the divorcing spouse that their family members may be drawn into the legal disputes in this manner, and their assets made potentially vulnerable. In turn, this can often put great pressure on a party's relationship with their support network at the very time they need them most. How then, can family members in such a position protect themselves and their loved ones?



Plan ahead

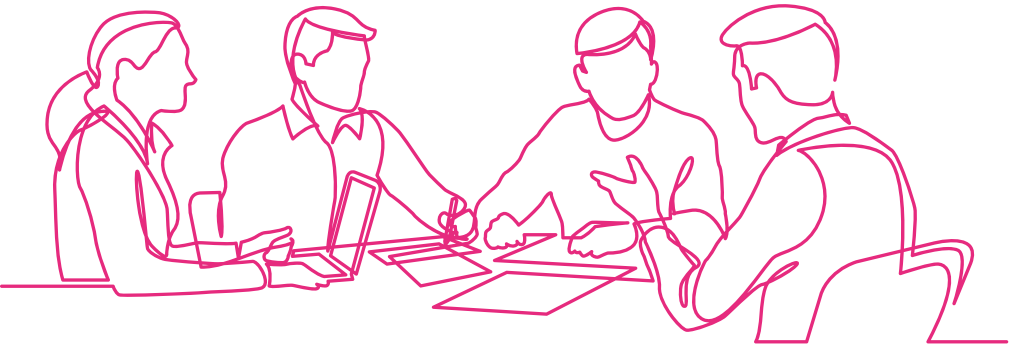
Pre-empting any relationship breakdown can help avoid such difficulties. Prenuptial agreements between the spouses are often invaluable, in that they can define the boundaries of marital and non-marital property and clarify any third party interests from the outset, as well as setting out what financial provision will be made upon divorce.

It may also be appropriate for other legal documentation to be drawn up at an early stage, such as loan agreements clarifying the terms on which funds are being lent and when repayment is required, or other legal instruments specifying the basis upon which are couple are being permitted to live in a family member's property.

Although these documents will not of themselves be determinative, or prevent a dissatisfied spouse making claims upon divorce, contemporaneous documentary evidence as to the intentions of all involved when an arrangement was put in place can make all the difference financially. However, as above, it is preferable that such steps are taken well in advance of any divorce.

Consider intervening

Independent legal advice is particularly important when family members are considering whether – and when - to intervene in financial proceedings, either by way of a proactive application or following an invitation to do so. This decision will be fact-specific, and largely dependent on the strength of the applicant's or intervenor's case, and the risks involved.



Take advice early

Taking early legal advice as soon as separation or divorce is on the cards is key. Family members who fear that their assets are at risk or that they may otherwise be financially affected by the anticipated divorce should obtain their own separate advice, rather than relying on the advice given to the divorcing spouse. This not only avoids any potential conflicts of interests or disclosure difficulties, but also means that, should family members need to become involved in the financial proceedings, they have consistency of representation throughout.

Where advised, family members should also take steps to formalise any financial or other arrangements between them and the divorcing relative they are or have been supporting

The general rule is that the joinder of third parties should take place as early as possible. Points of claim and points of defence should be prepared, together with witness statements addressing the dispute in which the third party is involved. The dispute should then be heard as a preliminary issue in the overall financial proceedings.

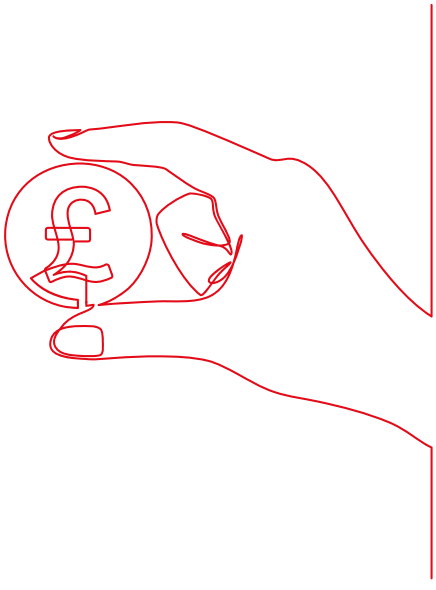
Although this approach may not be followed in every case, given the added complication that their involvement in the proceedings can bring, the intervenor's position should be addressed as soon as possible within the proceedings, with a view to concluding their involvement in the case and limiting cost and delay. Whilst the prospect of becoming involved in such litigation is often daunting, potential intervenors can take reassurance from the fact that the process is designed to limit their involvement to the greatest extent possible.

Keep costs in mind

The decision as to whether the family members in question should involve themselves in the financial proceedings is particularly significant given that the usual 'no order as to costs' rule in family proceedings does not apply to the intervenor's involvement. To that end, the party who 'loses' may face an order to cover the legal costs incurred by the other party, or parties. For example, a parent who unsuccessfully intervenes in financial proceedings to argue that an asset in their child's name is beneficially theirs may find themselves responsible for meeting their former son- or daughter-in-law's costs of disputing this.

Potential intervenors with strong cases may also find that the risk of being on the receiving end of an order to meet their costs may be the trigger which brings their former son- or daughter-in-law to the negotiating table.

In summary, consulting specialist, separate legal representatives from an early stage (and ideally, prior to the marriage taking place) ensures that the best interests of all involved family members are protected. This not only offers the best prospect of a positive outcome, but also allows those involved to focus on supporting their loved ones, trusting in their advisors to guide them through the process towards a brighter future for the family as a whole.



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60-SECONDS WITH:

NICHOLAS ALLEN QC BARRISTER, 29 BEDFORD ROW CHAMBERS

Q What would you be doing if you weren't in this profession?

A Indulging my childhood fascination with aeroplanes – so a pilot or flight attendant. Sometimes you've just got to get away from it all.

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

A The strangest – I once spent five hours at Slough County Court negotiating contact arrangements about a donkey called George. The most exciting was probably the three days in the Supreme Court when I was junior counsel in the case of Sharland in 2015 – probably a once in a lifetime experience - although I had a bad cough that week so had to constantly eat cough sweets without anyone noticing or it being picked up on the very sensitive microphones.

Q What is the easiest/hardest aspect of your job?

A I don't think any aspect of trying to predict outcomes given the wide discretion in financial remedy cases is easy!

The hardest has been my experience hearing public law children cases as a part-time judge. I have nothing but respect for advocates – and judges - who deal with those cases on a daily basis.

Q What is the best piece of advice anyone has given you in your career?

A Barristers are like magpies - don't be afraid to pick up phrases that catch your attention and incorporate them in your own oral and written advocacy. We all do it.

Q What has been the most interesting HNW Divorce case you have seen so far in 2020/2021?

A The Court of Appeal's decision in Haley last October and their judgment that challenges to arbitration awards should be treated as if appeals from first instance judicial decisions. The judgment is not without its critics – particularly from civil and commercial arbitrators – but there is no doubt that it has made financial remedy arbitration a more attractive option for solicitors and clients alike.

Q If you could learn anything, what would it be?

A Three things: to cook (I can't – at all), French (I just about struggled to GCSE), and the piano (I passed Grade 2 and then stopped. My late mother said I'd always regret that decision and she was right).

Q What is the one thing you could not live without?

A I should probably say my husband Alex - but instead I am plumping for my Doctor Who box sets (please don't judge me).

Q What one positive has come out of COVID-19 for you?

A Spending more (enforced) time in the place we have in West Sussex has been a pleasure, sitting in the garden with the occasional a gin and tonic in the evening sun.

Q Who would you most like to invite to a dinner party?

A Russell T Davies, Michelle Obama, and Anneka Rice. Although explaining Treasure Hunt (never mind Challenge Anneka) to the former First Lady may be a challenge.

Q Now the world is beginning to open up again, what are you most looking forward to doing?

A I have sorely missed the buzz of activity around chambers. I do believe it's not a normal workplace, it's a family (if at times a slightly dysfunctional one …), and I look forward to being able to reintroduce that social aspect to my working day.

Q What does the perfect weekend look like?

A If at home – a leisurely brunch on the Saturday with a trip to the theatre in the evening. If away – a small hotel and spa in the Cotswolds.

Q As chair/speaker at our upcoming HNW Divorce Litigation conference, what are you most looking forward to at the event?

A That it is taking place in person – and so I'm not having to lecture to my own computer (which has always felt a bit weird …) and also to see and chat with other speakers and the delegates.


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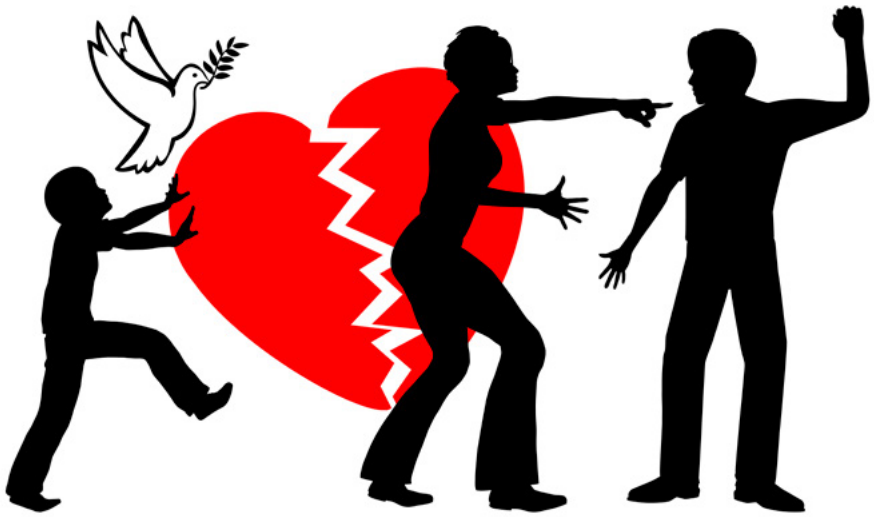
THE TENSION BETWEEN DOMESTIC ABUSE AND PARENTAL ALIENATION AND HOW THE PASSING OF THE DOMESTIC ABUSE ACT 2021 MIGHT IMPACT UPON SUCH ISSUES IN FAMILY PROCEEDINGS



Authored by: Natasha Slabas – DMH Stallard

The starting point in assessing any dispute over the arrangements for children in the family courts is that there is a presumption that there should be equal time with both parents.

But what happens in a polarised family where there is implacable hostility between the parents resulting from allegations of domestic abuse coupled with the accused alleging the other parent of manipulating the children and causing parental alienation, rendering a shared care arrangement as virtually impossible? It is necessary to grapple with the family court's approach to such tensions, and assess how the passing of the new Act might further impact upon that analysis.

Parental Alienation and reported case examples

Parental alienation is widely recognised in the family courts, having emanated from the U.S.A. by a psychologist, Richard Gardner. Such views were widely controversial and the term was not recognised as a mental health condition by the American Psychological Association, the American Medical Association nor by the World Health Organisation.

CAFCASS, the Children, Court and Family Advisory Service, define parental alienation as "when a child's resistance or hostility towards one parent is not justified and is the result of psychological manipulation by the other parent".

The U.K. has had a plethora of case law where judges have dealt robustly following a finding of parental alienation – even where there are counter-allegations of some form of abuse - and ordered a transfer of 'residence' of the child in favour of the alienated parent, which has been considered as a last resort and the only option available in preventing ongoing harm from the accused parent and in re-establishing the relationship between that minor and the estranged parent.

A recent example of the distinction between allegations of harm factored against an allegation of alienation, is when Lord Justice Peter Jackson in S (Parental Alienation: Cult: Transfer of Primary Care) (2020) EWHC 1940 (Fam) stated that the mother's alliance with the cult 'Universal Medicine' was a "pervasive source of ongoing harm to [the girl], emotionally and psychologically, and may make her vulnerable to eating disorders" which ultimately led to a transfer of residence. In that case, the founder of Universal Medicine was idolised by the daughter to the extent she was virtually unable to be in her father's presence, who opposed the cult. Examples of some of its philosophies were that all gluten be banned, and the daughter avowed that she would end up with a hole in

her stomach if she did consume gluten, and that of the teachings that actions were taken in an anti-clockwise manner, whether walking in a shop or stirring something amongst other wildly unusual idealisations. Earlier in the case, the mother insisted that the father was attempting to exert coercive control in insisting on her giving of undertakings, and alleging that her influence over the child in endorsing the cult had created the alienation. As can be seen by the outcome, the alleged abuse was given little weight in such circumstances.

There is now a set of four recently reported cases concerning one family in A and B (Parental Alienation: No.1, No.2, No.3 and No.4) [2020] EWHC 3366 (Fam) demonstrating a continuation of the draconian action the family courts will adopt when faced with alienation cases. In that case, Karen Woodall and Janine Braier, known well by now to most family law practitioners as experts in their fields on alienation, were involved with a family whereby the mother was accused and found to have not been able to separate her views of the father from the children. The experts did not believe the mother's cooperation with their program was disguised compliance or that she was deliberately alienating the children. Mr Justice Keehan stated that this presented the worst case scenario:

"Rather, she did not know that either her actions, behaviour or her emotional state was having an adverse impact upon the children and their relationship with their father, and/or she had re-ordered matters in her mind to conform with her view of the world and avoid her coming to that conclusion that she had been causing harm to the children". The judge went on to say "if the mother does not and/or cannot, because of her psychological profile be aware of the serious harm she is causing her children now and for potentially for the whole of their lives, how is she to change?"

The judge did not adopt any of the possible outcomes recommended by the experts of a full transfer, 80/20, 70/30, 65/35 or 50/50 and instead ordered the children live with their father, with no contact with their mother for the first month, other than if the mother accepted the decision, to enable a phone call in the days after the judgment and a telephone call supervised over Christmas (the judgment was handed down on 25 November 2020), and if that went well, after the first month with their father, for the mother to have supervised contact for up to 4 hours every 3 weeks for 3 months, and staying contact every 3 weeks from Friday to Sunday with staying contact for 1 week during Easter and Christmas holidays and two separate 2 week periods during summer holidays.

The judge saw the children to tell them of the decision and they were said to have "not taken the news well", fleeing from their father's care the following day, necessitating police involvement. The children once again sought to leave their father's home and the police became involved "with the use of some force" on that second occasion to get them to return to their father. The mother was ordered to pay part of the costs but not all, as the father had sought. Ultimately, the final and fourth judgment in this case described how the mother had "not moved one jot" since the November 2020 judgment and so Mr Justice Keehan adopted the roadmap recommended by Karen Woodall reducing the time she spend with the children. It would appear the mother only has supervised direct and indirect contact. Unfortunately, the judge stated in the final judgment that "the mother has not moved on" and that his decision was "not only necessary but it is proportionate to the risks the mother presents to both children".

But in which household should the child end up where allegations of domestic violence are raised in tandem with an allegation of parental alienation and both are apparent, and both are warranted, serious concerns? Practice Direction 12J of the Family Procedure Rules 2010 had attempted to fill this lacuna by ensuring that fact finds are listed early in proceedings on real issues of significance. If a fact find is listed, and the parent who is alleging domestic abuse is on the balance of probabilities found to be telling the truth, then is the parental alienation justifiable and thereby cancelled out by that harm? Can the domestic abuse justify the parental alienation to the extent whereby it is impossible for the child to spend time with the abuser? Conversely, following a fact find hearing resulting in no findings of domestic violence but an allegation of parental alienation is subsequently raised, would it be fair to automatically rise to an application for a single joint expert alienation psychologist to become involved? In other words, are the two forms of abuse usually mutually inclusive? It would be impossible to tell without some form of data specifying whether the two competing allegations were present themes in a family law case.

Every case is fact specific. The family courts apply a holistic approach in private children disputes but always come back to upholding the paramountcy principle and whether that behaviour would impact upon the accused's ability to properly care for the child.

The treatment of domestic abuse in fact find hearings

The first detailed judgment on coercive control within the family court arena came to fruition on the handing down by Mr Justice Hayden in F v M [2021] EWFC 4. That case emanated from an extremely difficult procedural history. The judge stated that the formulaic approach in ordering Scott Schedules to list specific episodes of domestic violence was archaic and unfit for purpose if having to determine allegations of coercive control, as was the issue in that particular case. More focused training was needed by various professionals in the judge's opinion, to grapple with what were insidious and underlying acts of control which were impossible to pin down to specific episodes.

Following that decision was the Court of Appeal decision of Re H-N an Others (Children) (domestic abuse: finding of fact hearings) [2021] EWCA which amalgamated 4 cases. The case of Re T was an appeal against Her Honour Judge Evans-Gordan whose analysis in distinguishing intention from the affect of the abuse which she found of a father coming up from behind a mother, who was at the time holding their baby, and placing a plastic bag over her head, saying "this is how you will die" was not the right approach. The very act itself was sufficiently serious and intention was irrelevant.

Section 68 of the Domestic Abuse Act 2021 – Coercive control

The legislative recognition of coercive control pursuant to the Domestic Abuse Act 2021 is likely to bring about an increase in allegations because it amends and widens the scope of persons being 'personally connected' in Section 76 of the Serious Crime Act 2015 from being:

(a) in an intimate relationship or

(b) living together or

(c) having lived together; to include

(d) relatives,

(e) married couples,

(f) civil partners or

(g) those who have agreed to either marry or enter a civil partnership whether or not such an agreement has been terminated.

This is likely to bring about a greater number of fact find hearings which could give rise to retaliating claims of parental alienation.

From the above, it would seem there might be a shift from the recent alienation decisions on transfers of residence if there are serious allegations of abuse, particularly in light of the new legislative recognition for coercive control. This will require a fine balancing exercise, but despite the very 'fact' of an abusive incident being inconclusive to severing a child's ties with its parent, we have yet to see a reciprocated approach where parental alienation is concerned.

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TO SHARE OR NOT TO SHARE: THAT IS THE QUESTION

THE DIVISION OF ASSETS ON DIVORCE: WHAT IS SHARED?

Authored by: Stuart Clark - The International Family Law Group

Or when is it noble in the Courts to share the cash and investments of non-matrimonial fortune?

Stepping away from this very loose approximation of the words of the Bard, this article asks: what exactly is available for division when sharing assets on divorce in England and Wales?

The answer is not always straight-forward but I shall endeavour to give as good an explanation as is possible based on the weaving and ever-changing parameters of the law in England and Wales.

I start with the essential elements underpinning all. Upon a divorce taking place in England and Wales the Courts have the power to make orders dividing assets and making provision for income, maintenance. I am concerned here with the first aspect – the division of assets.

I say that the Courts have this power; in reality the great majority of all disputes about finances on divorce are settled, agreed, without a Judge having made a determination. Most clients manage to resolve their differences and agree a settlement without having to litigate to a trial. There are of course also many spousal disputes which do not settle, and which require the intervention of a Judge to decide. But that is not the only way.

Whichever way a dispute is resolved, we follow the same set of legal principles. Those principles are derived from Parliament made law, statute, which is primarily found in the Matrimonial Causes Act 1973, and Court-made law, judgments made in cases in the High Court, Court of Appeal and Supreme Court. This caselaw is derived from disputes between spouses in which Judges make decisions based on the interpretation of statute and previous caselaw, creating Judge-made authorities.

The article focuses on situations where there is sufficient capital available to meet the reasonable financial needs of both spouses and any children of the family. Where there is insufficient capital to do so, the financial needs of the spouses and any children will always take priority over the principle of sharing.

And finally, these principles apply equally to divorces or civil partnership dissolutions.

What is Past is Prologue: A short history

Parliament set down the law in relation to the Court's powers to resolve financial matters following a divorce in the Matrimonial Causes Act 1973. Over the next 48 years the Courts have developed the law beyond the recognition of the checklist of factors contained in that statute.

In the early 1980s the prevailing mood of the Courts was that any applicant for financial provision upon a divorce could expect to have only their reasonable financial requirements met. No entitlement to share the fruits of the marriage, merely to be able to leave the marriage with enough to get by. It floundered somewhat. The spouses of the very wealthy were left with only basic (or 'reasonable') financial provision, leaving a great disparity in standard of living even after lengthy marriages. In the more modest of cases, the financially affluent spouse might find themselves closed out of their wealth by having to provide for the other spouse for life. Unsatisfactory at both ends of the scale.

This changed in 2001 following the Supreme Court case of White v White. The emphasis since 2001 has been on equality; a starting point of equal division. The Supreme Court cast its judgment on the decisions of years past which created great wealth gaps upon divorce. It said that the previous law was gender discriminatory and that it did not respect that a marriage is a partnership of equals, the fruits which should be shared equally no matter the form of those contributions: all contributions must be respected and there can be no discrimination in how assets are divided.

Over the next 20 years the Courts have given further guidance and we are now in the position where the law about sharing capital assets on divorce can be distilled into two central tenets:

- Marital assets are shared equally
- Non-marital assets are not shared at all

Both propositions are caveated and there are circumstances where equal sharing of marital assets does not take place and non-marital assets are relevant to the division of marital assets (or may even be divided).

Those cases predominantly involve situations where the needs of one of the spouses or of the children would not be met if the basic principles are rigidly applied. If one of the spouses needs more capital so as to be able to continue to reasonably live with a similar standard of living as was enjoyed during the marriage, then these tenets are relaxed.

But the nutshell analysis is that marital assets = shareable: non-marital assets = non-shareable.

What's in a name? Assets by any other name would smell as sweet

But what does this mean? What are marital and non-marital assets? The Supreme Court sowed the seeds of defining this in White:

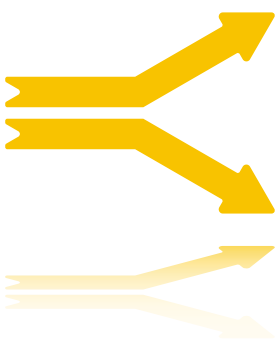
- Property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may loosely be called matrimonial property

Pretty straight-forward. If one spouse had assets before the marriage or if they received an inheritance, then the pre-owned or inherited assets are non-matrimonial and therefore cannot be shared. Everything else can be shared.

Simple.

End of article.

But life is not that simple. The arrangement of financial affairs during the marriage is never that straight-forward It is not always possible to squarely define what was owned before the marriage and what was acquired during the marriage. It is rare that spouses will lead entirely separate financial lives, meaning that often there is a blurry line between marital and non-marital assets. It is rare that the wealth of a couple at the time of divorce will have developed only during the marriage or only before the marriage.



We know what we are, but know not what we may be: separating marital and non-marital

Family lawyers often speak of the two schools of thought when categorising assets: formula vs feel.

In a case from 2014 called S v S the husband brought approximately £13m into the marriage. At the time of the divorce this had risen to £25m. £12m was accrued during the marriage. The wife received a £6m settlement. The Formula approach.

But what of the case of Nick Robertson, the founder of online clothing retailer ASOS. Mr. Robertson launched ASOS in 2000, before he met his future wife. When they eventually started their relationship, his shares in ASOS were worth 8-12p each. If those shares had been left to grow passively during the course of the marriage, they would have been worth £5m at the time of the separation. But, after the 11-year marriage the family fortune was in fact £219m.

Mr. Robertson's wife argued that she should receive one half of £219m minus £5m, being the matrimonial acquest; the added value to the wealth brought about during the marriage, deducting for what would have happened had there simply been passive growth. Net result of £107m to her. Mr. Robertson proposed that his former wife received £30m.

She in fact received £69m. The Judge put a gloss on the formulaic approach in a bid to achieve, fairness, abstractly. Mr. Justice Holman described the aforementioned S v S methodology as a tool, not a rule. The overall award to the wife was 31% of the matrimonial assets. The feel approach.

How can one predict what might happen? As family lawyers, we continue to scratch our heads. It is not always predictable. English family law is incredibly discretionary.

If you can finely de-mark between the matrimonial and the non-matrimonial, then great: de-mark, apply a formula and the outcome becomes predictable.

But where the non-marital assets become enmeshed with the finances of the family there is less predictability. Mr. Robertson's pre-marriage shareholding value only really took off during the course marriage, a natural enmeshment of financial life occurred. The Judge gave some account to the springboard

of the pre-marital work and came down on an outcome which 'felt right', so such outcomes are less predictable.

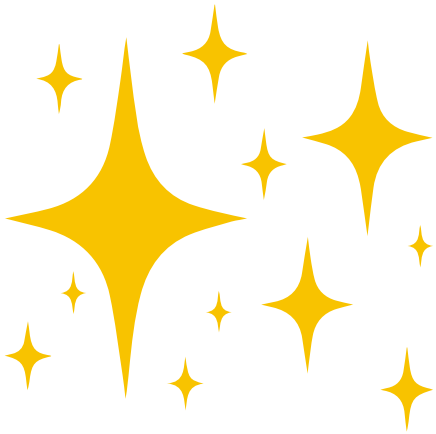
You speak an infinite deal of nothing: what does this mean?

For marriages where it is quite straight-forward to separate out what is and what is not a marital acquest, then the court can and usually will use the formulaic approach.

But when pre-marriage assets have been mixed with the marital fruits, or there has been a continuum throughout matrimony of a pre-martial endeavour the courts will be less likely to divide assets formulaically. We are then into the more abstract arena, a 'lawless' approach as one Judge has called it, of feel.

If you are financially planning for the future, be cautious of the financial effects of a potential divorce settlement. If you are the financially affluent spouse, aim to keep your finances separate. Do not mix pre-marital assets with the marital finances. Divert and de-mark your earnings. Consider a pre-marital agreement. These options may not all be available.

If you are already separating, take advice early, find out the scope of discretion and try to settle as best you can within that scope.



It is not in the stars to hold our destiny but in ourselves: What of the future?

What happens to financial gain following separation and going into the future?

Juliet owns and manages a fast-food franchise. After a 20-year marriage, she and Romeo separate. Business is booming and the franchise is worth £10m on the day on which they separate. Two years later, after much wrangling, Juliet and Romeo divorce and settle their financial affairs. By this time the company is worth £12m. Juliet can expect to receive an income going forward of £1m per year as owner of the franchise.

During the two years since separating Juliet also starts working in a start-up company. This becomes her main focus as her fast-food franchise is just ticking over. She invests considerable time and efforts but, crucially, puts no money in. Over the course of the two years this start up goes from strength to strength and her shares in the start-up are worth £5m on the date of settlement.

What is shared? The most likely answers are as follows:

- The £12m value of the fast-food franchise, including the £2m accrued since separating, is shared equally. The increase in value is a 'continuum'. It is seen as passive growth of a pre-existing company even if there has been an investment of time by Juliet during those two years. The answer might be different if many more years had elapsed, especially if Romeo caused the delay or if perhaps Juliet had introduced a new direction to the franchise which made the most profit during that period
- The £1m future fast-food income is not shared. The Courts recently have been very keen to say that future earnings are not shared
- The value of the shares in the start-up is not shared. This is an entirely new endeavour post-separation for which there has been no matrimonial investment

I am not bound to please thee with my answers: a conclusion

- The financial fruits of a marriage are shared with a starting point of equality
- Any assets from outside of the marriage are not shared, whether it is pre-acquired assets, an inheritance, or the fruits of a new endeavour post-separation…
- …provided the needs of both spouses' post-divorce are met. If needs are not met, then these rules are applied less rigidly
- If it is simple to discern what is marital and what is non-marital, try to apply a formulaic approach
- Where the non-marital assets have been mixed with the marital assets, or become enmeshed with the family's finances, then you may not be able to apply a formula, and a more abstract feel approach may be applicable
- The fruits of new endeavours after separation and a spouse's future earning potential are not shareable
- Consider financial planning, separating assets or income and a nuptial agreement if you are concerned by any of the themes raised in this article

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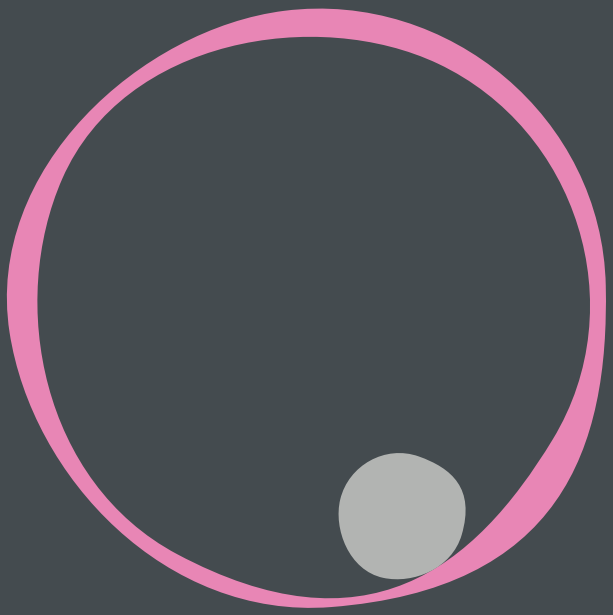

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HOW UK CAPITAL GAINS TAX IS APPLIED TO UK PROPERTY WHEN NON-UK RESIDENT SPOUSES DIVORCE

Authored by: Laura Harper – Kingsley Napley

As non-UK tax residents, the couple will be subject to special rules for calculating the capital gains tax ("CGT") due in relation to either the sale or transfer of their UK property.

Exposure to UK Capital Gains Tax as a non-UK resident

CGT is self-assessed on an annual basis in line with the UK tax year. The rate of CGT in relation to gains realised on the disposal of UK situate residential property is 28% for higher rate and additional rate taxpayers (or 18% insofar as the basic rate band is available).

Since 6 April 2019, chargeable gains realised on all forms of UK real estate held by all kinds of non-resident, both individuals and companies, have been within the scope of CGT (in the form of corporation tax if held within certain company structures).

The tax would ordinarily be charged on the difference between the sale proceeds and acquisition and enhancement costs, with no allowance for inflation if the couple were UK resident. However, as non-UK residents, the spouses will be subject only to Non Resident CGT which applies to disposals made on or after 6 April 2015. Under the Non Resident CGT regime, the default position is to rebase property to its 5 April 2015 market value so that only a gain realised in excess of that value is subject to CGT.

In addition, in tax year 2021/22, individuals, including non-UK residents, can realise gains of £12,300 before CGT becomes payable under their annual capital gains tax allowance.

It is also possible for the taxpayer to elect to straight-line time apportion the whole gain over their period of ownership (with only that part of the gain apportioned to their post-5 April 2015 period of ownership being subject to Non Resident CGT). Alternatively, the taxpayer may elect to subject the whole gain or loss over their entire period of ownership (both pre- and post-5 April 2015).

If this is an issue faced by non-UK residents, we would advise that a market valuation of the property as at 5 April 2015 is requested from an estate agent or surveyor so that the taxable gain can be calculated.

The CGT implications if the property is sold and the proceeds are split

If the couple were to sell the property, the taxable gain would be calculated as the price for which the property was sold (provided that is the full market value), less the rebased market value as at 5 April 2015.

Allowable deductions can also be made from the disposal cost to include:

- estate agents' and solicitors' fees;
- the cost of the valuation obtained for the market value as at 5 April 2021; and
- any expenditure incurred by the seller wholly and exclusively for the purpose of enhancing the value of the asset (if the expenditure is reflected in the state or nature of the asset when the seller disposes of it).

For Non-resident Capital Gains Tax purposes all disposals by non-UK residents of UK residential property must be reported using HMRC's online return form within 30 days of conveyance of the property, irrespective of whether there has been a chargeable gain or tax to pay. This includes assets transferred to a spouse or civil partner.

Where a property was jointly owned, each owner must tell HMRC about their own gain or loss.

The deadline for paying any CGT due is the next 31 January after the end of the tax in which the gain was made. For example, if the property was sold between 6 April 2021 and 5 April 2022 the deadline to pay the tax due will be 31 January 2023. You can be charged interest and have to pay a penalty if your payment is late.

The CGT implications of the transfer of an interest in the property

Any transfer of an asset between spouses whilst they remain married is treated as giving rise to neither a gain nor a loss to the person transferring it and any amount actually paid is ignored. This is true for both UK resident and non-UK resident couples.

As non-UK residents, if the transfer occurs on or after 6 April 2015, the transferee (the person receiving an interest in the property) is treated as acquiring the asset at neither the gain/loss amount. This treatment is available provided that the couple are treated as living together, which they will be unless separated:

- under a court order;
- by a formal Deed of Separation executed under seal; or
- in such circumstances that the separation is likely to be permanent.

Provided that the spouses were living together at some time in a tax year, they can transfer assets at any time in that tax year at no gain/no loss. There's no requirement that they should be living together at the time of transfer.

However, it should be noted that on a subsequent disposal, the non-UK resident spouse to whom the property is transferred will be treated as having owned the asset from the date of transfer so will not be able to rebase the cost to April 2015, even though they may have acquired the asset before then.

Stamp Duty Land Tax ("SDLT") may also need to be considered if consideration for the transfer of the property is being paid but it should be noted that a transaction is exempt from SDLT when a couple divorce, separate or end their civil partnership, and they either:

- agree to split their property and land between them; or
- split the property under the terms of a court order.

It is, therefore, advisable to deal with the division of interests in the matrimonial home or any other shared property as part of the separation or divorce proceedings instead of putting this off until a later date.

[Formalising an interest retained in a property owned with a former spouse through a court order is also advisable if that spouse intends to buy a replacement property. Ordinarily, anyone who has a "major interest" in a property would be subject to the higher rate of SDLT where an additional 3% is charged on purchasing a further property. However, a special exemption is made for separated or divorced parties who have retained an interest in a property subject to a property adjustment order issued by the court. They will not be subject to the higher rate of SDLT if they can provide evidence of the property adjustment order provided certain conditions can be met by both parties at the time of purchase of the additional property. Advice should be sought if this is likely to be an issue]

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Q What would you be doing if you weren't in this profession?

A I studied Psychology and took an evening class in Counselling a few years ago, I might well have pursued that if I didn't enjoy what I already do so much.

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

A I completed a Triathlon for my previous company's charitable Foundation, not entirely a business-related achievement but I loved the experience, and we raised a large sum of money for a very deserving cause.

Q What is the easiest aspect of your job?

A The easiest and most enjoyable aspect by far is building relationships with my clients and their families. I'm definitely a people person.

Q What is the best piece of advice anyone has given you in your career?

A Never stop learning. It doesn't matter what stage you are in your career there's always room to learn and develop. It keeps things interesting.

Q If you could learn to do anything, what would it be?

A To cook. I can get by but have so much admiration for people that can cook well. I would love to throw together an impressive 'MasterChef' style meal for friends and family.

Q What is the one thing you could not live without?

A It sounds very cliché but my family. I have two boys (12 and 8) and outside of work they are my world, they can make me smile even after the hardest of days.

Q What one positive has come out of COVID-19 for you?

A The benefit so many of us are experiencing with hybrid or more flexible working. I think it has been a positive change to people's lives which I hope will remain.

Q Who would you most like to invite to a dinner party?

A If I'm being entirely honest it would have to be the Friends cast. So many moments in life remind me of episodes of Friends!

Q Now the world is beginning to open up again, what are you most looking forward to doing?

A Travelling. We started taking an annual ski holiday around 4 years ago, I still class myself as a beginner and it was so lovely to be learning as a family. I can't wait for us to be on the slopes again.

Q What does the perfect weekend look like?

A An ideal weekend for me is actually a very quiet one. Quality time at home with my family and watching a good film with a glass of wine.

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