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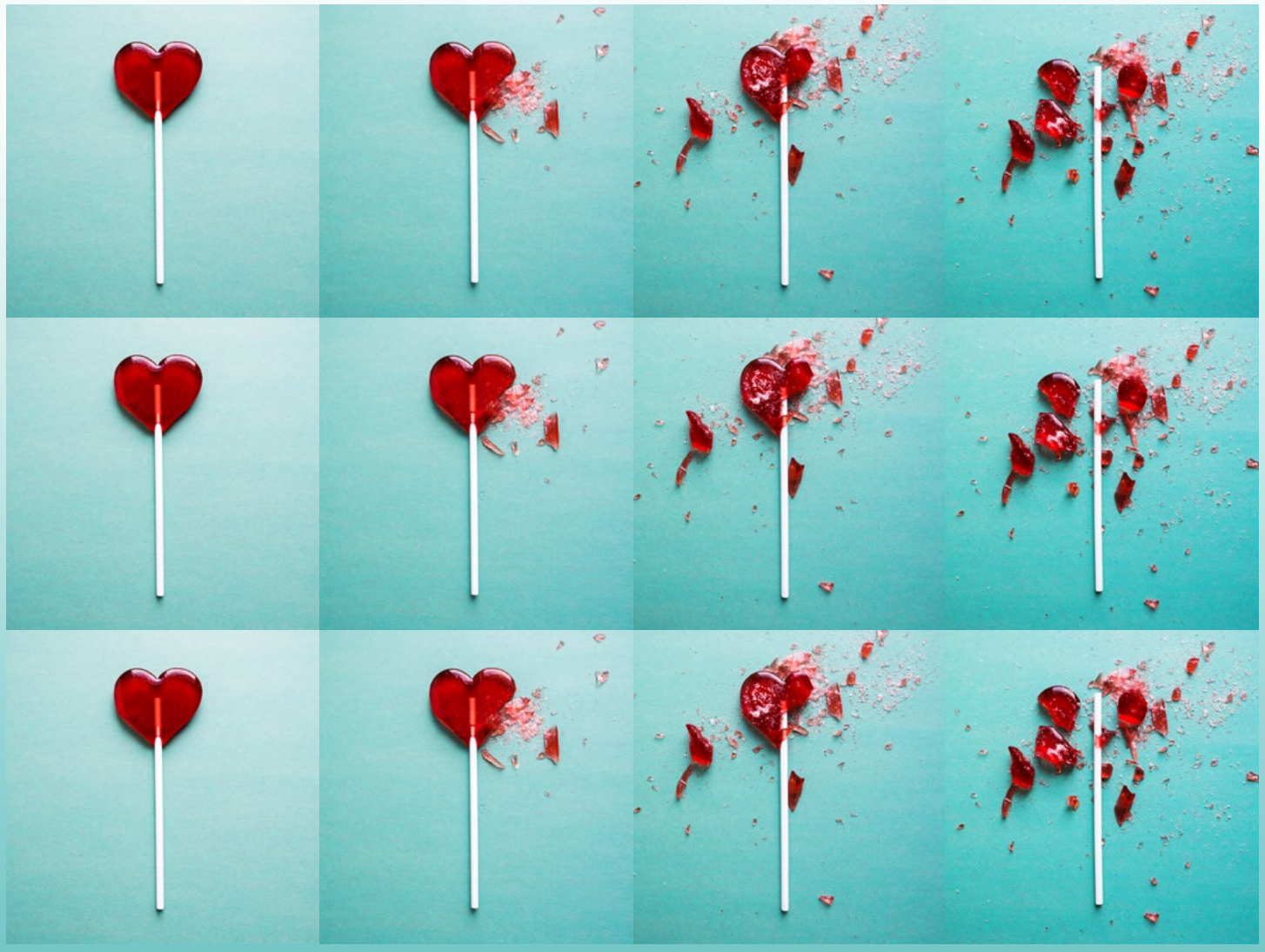
HNW Divorce MAGAZINE

ISSUE 1

The *Valentines Special*



INTRODUCTION

"Love is a voyage of discovery, marriage the goal—and divorce the relief expedition,"

Helen Rowland

High net worth divorces typically raise highly complex legal and commercial issues with assets often held in elaborate structures that present unique difficulties. When taking into account the need to unpick and protect substantial finances, properties and international interests, children, custody and maintenance this multi-disciplinary practice area requires the expertise of specialists from a variety of backgrounds with firms bringing their own unique skills to bear. We are delighted to bring you our inaugural Valentines edition of the HNW Divorce Magazine, where you will get the latest insights from all professionals whose practice encompasses or touches upon the HNW Divorce community.

Love,

The ThoughtLeader4 HNW Divorce Team

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HOW TO ENFORCE A PRENUPTIAL AGREEMENT

Authored by: Jane Keir, Kingsley Napley

How to enforce a prenuptial agreement

It is almost ten years since the landmark decision of the Supreme Court in *Radmacher* v *Granatino* [2010] UKSC 42 changed the law on prenuptial agreements, giving their enforceability a huge boost when holding that the parties would be held to their bargain in the event of a divorce where the agreement *''was freely entered into by each party with a full appreciation of its implications, unless in the circumstances prevailing it would not be fair to hold the parties to their agreement".*

Whilst the law in *Radmacher* applies to all prenuptial agreements, those drafted after the decision should contain a clause or clauses reciting that, at the time of signing, both parties understood the terms, regarded them as fair and reasonable and accepted that they would be bound by them. Many go on to record that each party has been given a copy of the judgment in *Radmacher* (or at least an excerpt or summary setting out the important points) and that each understands fully therefore, the terms and effects of the prenuptial agreement before they sign. Their respective legal advisers too, will sign a certificate respectively stating that has each provided advice on the agreement and whether its provisions are fair and reasonable.

The Office for National Statistics tells us that for opposite sex couples divorcing in 2018, the average duration of marriage is 12.5 years. So the number of couples divorcing with a prenuptial agreement is increasing and they need to understand the current approach of the courts to reliance, or otherwise, on the terms of a prenuptial agreement during the divorce process. Below are some tips and considerations to help you make sure that the agreement you reached before you married is upheld in the event of disagreement on divorce.

"You are unlikely to get everything that you want so try and work out what is really important to you and what you can do without"

1. **Read your prenuptial agreement carefully** - it is likely to be a complex and lengthy document. You cannot pick and choose the parts on which you want to rely and so it is important that you remind yourself as to its entire content and its overall terms and effect.

2. **Remind yourself as to the circumstances in which you signed the prenuptial agreement** - try and recall the background against which you negotiated and signed the prenuptial agreement. Whose idea was it? What did you want to achieve? Did you sign heads of agreement before embarking upon the drafting the prenuptial agreement itself? The heads of agreement set out, in summary form, the clear intentions and the terms you agreed and can be an extremely useful reference document where any doubt is thrown upon original intentions and for the circumstances in which agreement was reached. Does your prenuptial agreement have a review clause? Did you discuss or review the terms of the prenuptial agreement during the marriage? If so what did you decide?

3. **Consider what has changed** - it will be extremely helpful to go back over the history of the

marriage and set out any changes since you got married. Have you had a child or children? Are you both still in good health? Is one of both of you still working? Have you made/lost money during the intervening period? Have you received any gifts or inheritances? All these considerations will be relevant.

4 **Work out what you want** - consider what it is that you want from the prenuptial agreement and communicate it to your ex at the earliest opportunity. Many cases get into expensive and entrenched litigation because one or both the parties will not set out what they want or because when they do, the other will not listen. It can be very difficult to talk in the midst of relationship breakdown but consider using an experienced family law mediator to help resolve any impasse or difficulties – at a fraction of the cost of litigation and at twice the speed.

5 **Be proactive** - the court process for deciding competing financial applications on divorce has not changed significantly over the last few decades. One party makes an application to the court in a document known as a Form A. It is largely a pro forma, tick box document which sets out the general nature of the financial claims. It is returned by the court, with a list of requirements and important dates, culminating in a first hearing, usually at least 2 - 3 months hence. The Form A does not allow any space to explain that you want to enforce your prenuptial agreement and that you have strong arguments for it to prevail and be determined ahead of the whole financial process. You have to set it all out clearly on the face of the Form A. If you do not, the chances are that it will not be picked up by the court until later and you may lose out on the opportunity to have its terms brought straight to the attention of the Judge and for it to feature prominently in his or her early thinking.

6 **Be bold** - when asked to decide or give a view upon competing financial claims on divorce, the court has to look at what are known as the "*s25 factors*". They take their name from s25 of the Matrimonial Causes Act 1973 and refer to eight separate matters such as income, earning capacity, property and financial resources, financial needs, obligations and responsibilities, the standard of living enjoyed, the ages of the parties, any physical or mental disability, the contribution each has made to the marriage, etc. No one factor is more important than another and the court has a wide discretion when working out how each should relate to the facts and matters before it.

There have been suggestions that the existence of a prenuptial agreement should be added as a separate factor under s 25, but in the Court of Appeal case of *Crossley v Crossley [2007] EWCA Civ 1491*, it was held that the essential term in the prenuptial agreement which said that *"both of them should walk away from the marriage with whatever they had brought into it"* was a factor of such "*magnetic importance*" that it would determine and importantly, cut short, the whole

financial application. When the parties met in June 2005, the husband was a 62 year-old property developer who had an independent fortune of approximately £45 million. He had been married previously and had 3 children. The wife was 50 years of age and had a fortune of approximately £18 million. She had been married three times previously and had 4 children. They signed a prenuptial agreement which was negotiated by experienced lawyers some 7 weeks before they married. The marriage lasted one year, during which time they spent periods apart. The wife sought to make a full financial application, but the husband cross-applied for the matter to be determined on the basis that each should take out whatever they brought in. Because the prenuptial agreement was of such "*magnetic importance*", it assumed far greater significance than the other s25 factors and the litigation was halted.

7 **Always negotiate** - keep your lines of communication open for negotiation purposes. An important part of the formal court process is the in court mediation meeting known as a Financial Dispute Resolution appointment. The parties and their representatives must attend court and be willing to negotiate, with the help of a judge, who will give an indication as to what he or she believes will be a fair outcome. Keep listening and responding.

8 **Try and compromise** - litigation is incredibly expensive. It may cost tens or even hundreds of thousands of pounds to have a judge decide on what the financial outcome should be. You are unlikely to get everything that you want so try and work out what is really important to you and what you can do without, both in terms of cash payments and actual items that you want or can forego.

9 **Keep a close eye on the legal costs** - the end may not justify the means. If you win the technical arguments but have spent more on retaining or recovering an item than it is worth, you may find yourself in a worse financial position. Get from your legal advisers the best, detailed and reasoned explanation they can give you as to how much, stage by stage, it will cost to uphold your prenuptial agreement. Have a long hard think about whether it is worth it.

10 **Anticipate the practicalities** - separating/keeping/selling/transferring your assets and income even in accordance with a prenuptial agreement will all call for some logistical, accounting and legal forethought. What will happen to the family home – will it be transferred to one of you or sold? What will happen to a company that you run together? How will you divide the household contents? What will be the tax ramifications? Think ahead and get in first. Do it ahead of the end of the tax year in which you separate to minimise any Capital Gains Tax. Divorce affects an existing will but does not revoke it. Take advice on changing your will if in doubt.

Pre and post nuptial agreements are becoming more and more popular and effective as a means of working out both how you want to organise your finances after you marry and what you want to happen if things go wrong. If done properly they can cut short any arguments on divorce and leave intact the agreement you reached as to what would happen if things do not work out.

First published by [Kingsley Napley]

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HNW FOREIGN DIVORCES WITH A JERSEY CONNECTION

Authored by: Lauren Glynn and Victoria Cure, Carey Olsen LLP, Jersey

Many practitioners will appreciate that Jersey is a self-governing Crown Dependency, with constitutional rights of self-government and judicial independence – we have our own government, legislation and currency (as is also the case in Guernsey – which is not covered in this article). In Jersey, only locally qualified Advocates are entitled to appear before the Royal Court of Jersey, which deals with all family law cases. Despite the heavy influence of French law in the islands, the approach of the Royal Court to family law matters closely follows that adopted in the courts of England and Wales, as Jersey legislation is largely based on the various family law acts passed in the United Kingdom.

This article briefly discusses two cross-jurisdictional issues arising in foreign divorces on which we are regularly instructed to advise from a Jersey law perspective.

The Foreign Divorce & the Offshore Trust

Given Jersey's status as a leading and highly regulated, offshore financial services centre, we frequently encounter HNW and UHNW divorces featuring Jersey trust structures. In almost all cases, Jersey trusts are administered by professional trustees regulated under our Financial Services (Jersey) Law 1998 by the Jersey Financial Service Commission and further subject to the supervision of the Royal Court of Jersey. When beneficiaries of a Jersey trust become involved in foreign divorce proceedings, it is helpful for them to understand that the trustee(s) have a number of important decisions to make, including;

i) What information should/can be disclosed and to whom?

ii) Should and will the trustee submit to the foreign jurisdiction and participate in proceedings?

iii) Will any order of the foreign court be enforceable in Jersey?

It will be less helpful for beneficiaries to hear that the answer to each of those questions is '*it depends*'! It is however clear from a number of seminal, Jersey authorities in which these very questions are considered that the trustee (and the Court) must have in the forefront of its mind the whole class of beneficiaries, and not just the parties to the foreign matrimonial proceedings. This may lead to a very different outcome to that which might be anticipated by the foreign Court.

In considering the key issues for a trustee, the trustee will need to have regard to the nature of any spouse's interest in the trust (e.g. if they are a beneficiary), the location of the trust assets and whether the foreign order varies or alters the terms of the trust in a manner contemplated by the Trust Instrument. It would not be at all unusual for the trustee to seek the Royal Court's blessing of its decisions in respect of any one or more of these issues, which could fundamentally impact upon the outcome of any later hearing before the Royal Court in respect of the enforcement of a foreign order.

Jersey = forum conveniens?

Given the close ties between the UK and Jersey, as well as the good transport links and Jersey's personal tax regime, it is relatively common for couples to have significant links to both jurisdictions. Where this is the case, a dispute may arise between spouses as to which jurisdiction should hear their divorce. What's more, Jersey is not (and never has been) part of the European Union and therefore the Brussels II regime does not apply; it is not as simple as there being a "jurisdiction race". Instead, the issue becomes one of *forum conveniens*. But where is this dispute going to be heard?

It is interesting to note that Jersey is listed as a "*related jurisdiction*" under *Schedule 1 of the Domicile and Matrimonial Proceedings Act 1973, "Staying of Matrimonial Proceedings"* and there are special provisions that apply to such related jurisdictions.

Where proceedings for divorce are simultaneously live in both England and Jersey, but a trial has not yet taken place, there will be cases where the English court will be under a duty to order that proceedings in that jurisdiction be stayed. This will be the case where the following conditions have been met:

1. the parties to the marriage have resided together after they entered Jersey, and
2. the parties resided together in Jersey when the proceedings began or if they did not, the parties' last resided together in Jersey before the proceedings were initiated; and
3. either of the parties was habitually resident in Jersey through the year ending with the date on which they last resided together before the date on which the proceedings were started.

Therefore, in almost all cases where the parties have lived together in Jersey prior to their separation, notwithstanding that they may be domiciled elsewhere or one party might have been habitually resident in another jurisdiction for the last year, the English proceedings will be subject to an obligatory stay and the *forum* argument, at least, will take place in Jersey.

Where the above conditions have been met, the Royal Court will, if the issue of jurisdiction is still contested, need to decide whether England is "*clearly and distinctly*" the more convenient forum for the dispute: *SGI Trust Jersey Limited v Wijsmuller [2005] JLR 310*. The *Spilada* test will be applied "… not one of convenience, but the suitability or appropriateness of the relevant jurisdiction" and the burden on proof will be on the party who adopts the position that England (or Wales) is the appropriate jurisdiction. It is manifestly evident from just the handful of reported matrimonial cases in which *forum conveniens* has been considered that the threshold to be surpassed in persuading the Royal Court that a foreign jurisdiction is more appropriate is a high one; it is therefore important to ensure that careful consideration is given to jurisdiction from the earliest stages of your instruction.

DISCLOSURE IN FINANCIAL REMEDY PROCEEDINGS: NO LONGER A "CHEATER'S CHARTER"?

Recent developments and guidance on *Imerman* and *UL v BK*

Authored by: Anthony Riem, Rachel Turner and Caitlin Foster, PCB Litigation

Summary

The Family Court has demonstrated a willingness to assist a party to enforce a financial remedy order by allowing use of confidential documents where there is evidence of deliberate attempts by the respondent to frustrate English court's orders, and where there is no evidence that the applicant acted unlawfully in accessing confidential materials.

The case also supplements Mr Justice Mostyn's practical guidance in UL v BK (Freezing Orders: Safeguards) [2014] Fam 35 on how to manage *Imerman* issues, particularly as to when the need for further intervention of the court may be necessary.

The legal principles

The modern principles governing illegitimately obtained documents in family proceedings are set out in the decision of the Court of Appeal in Tchenguiz v Imerman [2011] Fam. 116. In this decision - often since referred to as a '*cheater's charter*' - the court found that:

i. it would be a breach of confidence to allow a party to rely on illegitimately obtained documents; and

ii. there is no principle (previously referred to as the 'Hildebrand rules') of self-help by obtaining information which might otherwise be concealed or destroyed.

The court in *Imerman* paved the way for exceptions to the rule, recognising that a claim for breach of confidentiality could potentially be defeated by showing that the documents revealed unlawful conduct or intended unlawful conduct by the respondent. This was obiter, as the court decided that *Imerman* was not such a case (it was "*not suggested that the documents themselves disclose measures taken to defeat the wife's claim*").

However, in November 2019 the High Court did identify such a case in Akhmedova v Akhmedov [2019] EWHC 3140 (Fam), and has confirmed the position.

Ms Akhmedova and her solicitors, who were seeking to enforce a December 2016 financial order made in Ms Akhmedova's favour, were allowed to retain and use the documents in question on the basis that the documents were part of a 'fraudulent scheme' and did not attract confidentiality (or that no discretionary relief should be granted to protect any confidentiality) and that although the majority were prima facie privileged, the 'fraud' exception to privilege applied.

Relevant factual considerations

In *Imerman*, in the course of the divorce proceedings the wife's brother had obtained confidential documents by accessing the husband's computer without permission and copying them.

In *Akhmedova*, the matter was post-judgment. In 2016 Haddon-Cave J (as he then was) had ordered the husband to pay the wife the sum of £453,576,152 in settlement of her financial claims in respect of the marriage. Although three years had elapsed, the husband had not voluntarily paid a penny of that award and almost the entirety remained outstanding.

The relevant documents in *Akhmedova* were provided to the wife in 2017 by a former employee of the husband's family office. In the course of his employment, the employee had received financial information relating to the husband and his companies and legal advice (principally from the husband's English solicitors). The employee had been dismissed in 2015.

The court in *Akhmedova* followed the approach set out in *Imerman*, seeking to strike a fair balance between two competing concerns, namely:

a. that a party should not obtain an improper benefit of being able to use the other's confidential documents which have been unlawfully obtained; and

b. that a party should not dispose of or hide documents which they are (or may become) obliged to produce, and that a party should find it more difficult to hide his assets.

In its balancing act, the court in *Akhmedova* took into account the following:

i. that the applicant did not unlawfully access her husband's confidential materials or procure another to do so; and

ii. that at the relevant time the husband was in contempt of the English court's orders, and had been found to have engaged in a campaign to evade and frustrate enforcement of the judgment debt against him and had disengaged with the proceedings with the consequence that he could not be expected to give any or any proper disclosure himself.

"The court in Imerman paved the way for exceptions to the rule, recognising that a claim for breach of confidentiality could potentially be defeated by showing that the documents revealed unlawful conduct or intended unlawful conduct by the respondent."

Additional procedural guidance

Mr Justice Mostyn's guidance in UL v BK requires solicitors who receive such documents to return the documents to the other party's solicitors, who (as officers of the court) can then ensure they are preserved and that proper disclosure is given.

If the other party does not have solicitors acting for them, the UL v BK guidance requires a party to obtain directions from the court, and that such directions are likely be to the effect that the applicant shall pay for an independent lawyer to determine which of those documents are admissible and relevant to their claim. Copies can then be provided to the applicant's solicitor before the files of documents are returned to the other party.

Where questions or disputes arise over the independent review

What the UL v BK guidance does not address is the proper course is for the applicant's solicitors if the independent review identifies the need for guidance on the documents, or if there is a dispute between the applicant's lawyers and the independent reviewer about the outcome of the review.

As such, Mrs Justice Knowles supplemented the current UL v BK guidance as follows:

i. an application to the court for directions must be made in such circumstances, and it should be made as soon as practicable after the documents are received;

ii. if the court makes an order for a review of the documents by an independent lawyer, it would usually be appropriate for the order to permit the owner of the documents to make written representations to the independent lawyer that the material is subject to legal professional privilege;

iii. the independent lawyer should produce a report which should be provided to both the owner and the recipient of the documents, and also to the court in an event of any disagreement;

iv. if there is a disagreement about the outcome of the independent lawyer's review, the recipient's solicitors should refer the matter to the court for determination;

v. if the independent lawyer considers the assistance of the court is required, the recipient's solicitors should refer the matter to court for directions and the independent lawyer should provide a report explaining the basis of the referral; and

vi. independent lawyers conducting such reviews should err on the side of caution by excluding potentially privileged documents from disclosure to the recipient where there is an ambiguity as to their (iniquitous) nature.


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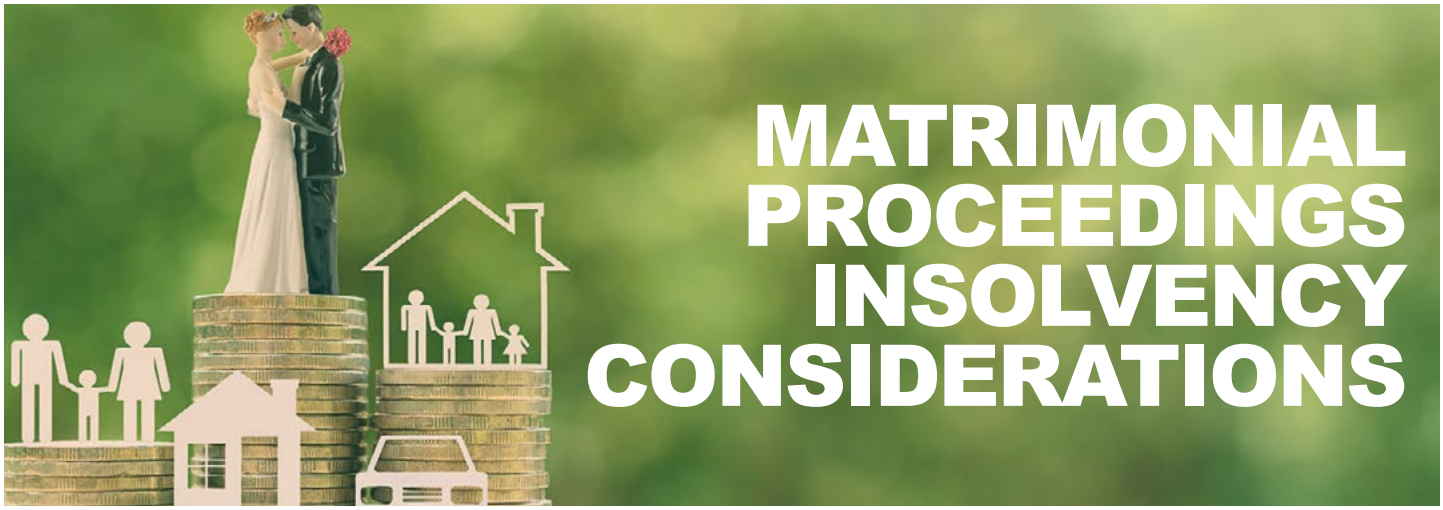

MATRIMONIAL PROCEEDINGS INSOLVENCY CONSIDERATIONS

Authored by: Chris Pocock QC, 1KBW and Kristina Kicks, KPMG

Insolvency proceedings

Insolvency proceedings are a potential option for clients to consider in situations where there are unpaid debts, judgments and orders and/or concerns over the dissipation of assets.

It is recognised that insolvency can seem a nuclear option for enforcement but insolvency proceedings can be an effective strategy to maximise recoveries where a client has an outstanding award.

Bankruptcy proceedings

One spouse may bring bankruptcy proceedings against the other where there is a provable debt. In the matrimonial context, 'provable debt' includes lump sum and costs orders made in family proceedings (Rule 14.2 of the Insolvency (England and Wales) Rules 2016).

The role of the trustee in bankruptcy is to realise assets for the benefit of creditors (including the creditor spouse) and make a distribution from the bankruptcy estate.

Insolvency powers

The trustee in bankruptcy has a duty to investigate the bankrupt's affairs and has wide powers, including:

- Gathering information and records from the bankrupt, advisers and accountants
- Collating banking information and statements
- Interviewing the bankrupt and other persons involved in the bankrupt's affairs
- Securing recognition of the bankruptcy overseas

The trustee also has powers to bring legal proceedings to challenge transactions and restore the position to what it would have been if a transaction had not taken place, for example transactions at undervalue and preferences.

Further, a claim under s423 of the Insolvency Act 1986 (IA1986) – transactions defrauding creditors – is available to the victim of the transaction as well as the trustee in bankruptcy. The trustee will have the benefit of the wide insolvency powers.

When should insolvency be considered?

Insolvency proceedings must not be used simply as a weapon against the other spouse when there is no net debt in the creditor spouse's favour, or when "ordinary" enforcement options are clearly available (Ella v Ella [2008] EWHC 3258 (Ch)), but can be beneficial in matrimonial proceedings where despite all efforts, the debtor spouse will not comply with lump sum and costs orders.

The trustee may uncover assets or take control of complex structures, for example replacing trustees and taking control of trusts.

A further consideration for bankruptcy as a method of enforcement is that the trustee's costs are deducted from the bankrupt's estate before distribution to creditors and any residue is paid out to the enforcing spouse. The quantum and basis of the trustee's costs are approved by creditors and the trustee will regularly report to creditors on the issues and potential assets in the bankruptcy estate. Both the payment of the costs and the trustee's ability to make a distribution to creditors from the bankruptcy estate will be dependent on the quantum of asset realisations.

"Any disposition by the bankrupt between the issue of the petition and the vesting of his assets in the trustee is void unless made with the consent of the bankruptcy court or later ratified by it."

However, a client should not (otherwise) be in a worse position by pursuing insolvency proceedings if, in any event, payment of an award is not being made and is unlikely to be made in the future without rigorous steps being taken. The insolvency route enables the opportunity to identify undisclosed assets and maximise recoveries.

Moreover, whilst a bankruptcy order is usually discharged after one year (s279 IA1986)), in matrimonial cases this discharge will release the bankrupt from debts arising out of family proceedings only if the court so directs (s181(5) IA1986). Hayes v Hayes (2012) EWHC 1240 (Ch) confirmed that the default position is that debts arising from family proceedings will survive the discharge.

Some other insolvency issues in Matrimonial Proceedings

Divorcing a bankrupt spouse

The court's options for making financial orders against a bankrupt spouse are limited, since upon bankruptcy the bankrupt's assets vest in the trustee in bankruptcy (s306 IA1986). The family court can therefore no longer make a property adjustment order under s24 of the Matrimonial Causes Act 1973 (MCA1973). Pension rights do not vest in the trustee (Welfare Reform and Pensions Act 1999 s11), so pension sharing orders remain an option but once the pension is in drawdown the income is vulnerable to an income payments order (although a bankrupt cannot be forced by the trustee to drawdown his pension (*Horton v Henry [2016] EWCA Civ 989*)).

That said:

- The bankrupt's interest in the family home (which on bankruptcy vests in the trustee), automatically re-vests in the bankrupt after three years unless the trustee takes steps to retain the interest (s283A IA1986 and Enterprise Act 2002 s261(6)).

Lump sum orders can usually be made, payable out of the residue of the bankrupt's estate, as can periodical payments orders (*Re G [1996] 2 FLR 171*; *Hellyer v Hellyer [1996] 2 FLR 579*), although the latter would be subject to any income payments order made in the bankruptcy proceedings (s310 IA1986) (and see *Albert v Albert [1996] BPIR 233*).

Bankruptcy during financial remedy proceedings

If bankruptcy and financial remedy proceedings are concurrent, both courts have jurisdiction to stay the family proceedings while the bankruptcy petition is pending (s285(1) IA86 and s285(2) IA86).

Any disposition by the bankrupt between the issue of the petition and the vesting of his assets in the trustee is void unless made with the consent of the bankruptcy court or later ratified by it. This would include a property adjustment order, and *Treharne v Forrester [2003] EWHC 2784 (Ch)* suggests (although the family court was unaware of the bankruptcy proceedings) that the bankruptcy court would be unlikely to ratify such an order.

Bankruptcy as a shield

Because of the restrictions upon the family court's powers brought about by the vesting of all a spouse's assets in the trustee, spouses have occasionally used bankruptcy to attempt to protect themselves against financial orders in family proceedings. For a debtor can himself issue the bankruptcy petition (s272 IA1986).

However, if a spouse makes himself or herself bankrupt in an attempt to defeat a family finance order, the other spouse may apply to annul the bankruptcy under s282 IA1986 on the basis that, on grounds existing at the time the order was made, the order ought not to have been made, e.g. in *Paulin v Paulin [2009] EWCA Civ 221*, where the husband had exaggerated debts and was in fact solvent at the time of his (own) bankruptcy petition.

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GENDER IDENTITY AND UK FAMILY LAW: REFORM IS NEEDED

Authored by: Joanna Lazarus and Freya McMurray, Withers

The evolution of the 21st century family is very much a focal point of our practice as we seek to ensure our legal advice meets our clients in their personal and unique experiences.

Family law has at its core, a concern for the individuals within a family unit, whether that's child, partner, spouse, parent or grandparent.

Over the last 50 years we have seen the dynamic response of the law in England and Wales to developments to modern families such as adoption, IVF, surrogacy, civil partnerships and same sex marriage. It is therefore disappointing that further, much needed and planned legislative reform in the sphere of family law with the Divorce, Dissolution and Separation Bill (introducing No fault Divorce) and the Domestic Abuse Bill (increasing the protection for victims of domestic abuse) has fallen away due to the election.

Notwithstanding this concerning legislative gap, the courts are continuing to grapple with the day to day diversity and complexity of true modern families.

One example is the recent case brought by Mr McConnell challenging the Registrar's refusal to amend his child's birth registration information, to record him as the child's father or non-gender specific, parent. Mr McConnell is a transgender man, who gave birth but considers himself the child's father, not mother.

The President of the Family Division, Sir Andrew McFarlane, ruled that being a child's 'mother' or 'father' is not necessarily gender speci5c and that a person's gender can be different to their status as parent.

Tellingly, the President 'looked back at earlier times' to draw upon the common law definition of mother 'prior to mid-20th century, when conception and pregnancy other than through sexual intercourse was unknown' when 'motherhood was established by the act of giving birth'.

Having said that, the President did recognise that the legal approach was at odds with the 'social and psychological reality' of the situation and noted the 'pressing need for Government and Parliament to address square-on the question of status of trans-male who has become pregnant and given birth to a child.' Stonewall estimate that 1% of the population might identity as trans, including people who identify as non-binary, meaning 600,000 individuals from our population of 60 million.

Given the political situation, this call for legislative change may be some way off. However, Mr McConnell has been granted permission to appeal, in an indication that he has at least an arguable case that the historic approach to legal parenthood may require modernisation. We await this hearing and meantime look forward to the further legislative change that has been planned and hope for further legislative reform that will improve the protection of the law for cohabitees.

This article was first published by **Withers**

"Over the last 50 years we have seen the dynamic response of the law in England and Wales to developments to modern families such as adoption, IVF, surrogacy, civil partnerships and same sex marriage.

DATES FOR 2020

19 FEBRUARY MUMBAI	**28 MAY** HONG KONG	**22 OCTOBER** MIAMI
19 MARCH MANCHESTER	**10 JUNE** GENEVA	**5 NOVEMBER** SHANGHAI
26 MARCH LONDON	**17 JUNE** NAIROBI	**12 NOVEMBER** DUBAI
12 MAY NEW YORK	**2 JULY** LONDON	**19 NOVEMBER** JERSEY
20 MAY GUERNSEY	**30 SEPTEMBER** ZURICH	**26 NOVEMBER** LONDON
26 MAY SINGAPORE	**14 OCTOBER** ISLE OF MAN	**3 DECEMBER** CAPE TOWN

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USING ARBITRATION TO SETTLE FAMILY DISPUTES LESS HOLLYWOOD, MORE PRIVACY

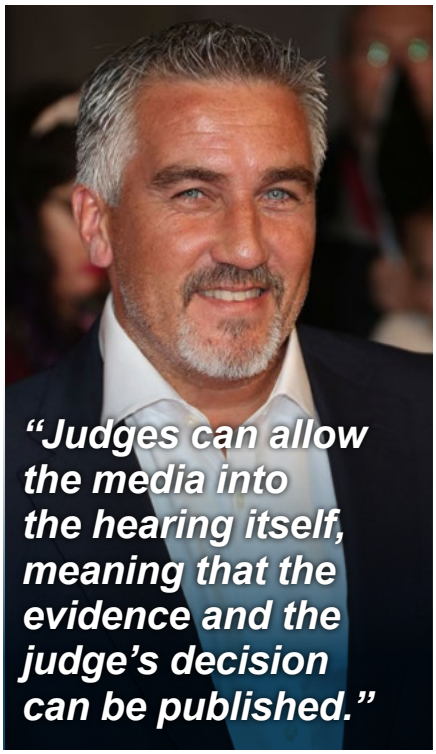
Authored by: Abby Buckland, Kingsley Napley

Paul Hollywood is a highly public judge on one of Television's most popular shows, with over 6 million viewers watching him and his taste buds push Great British Bake Off contestants to tears, frustration and occasional joy but when it comes to his divorce, he and his wife of over 20 years have chosen for their financial arrangements to be adjudicated in private.

Having already experienced the raft of publicity that the breakdown of their marriage attracted, alongside speculation as to the reasons behind their separation and rumours about the split of their purported £10 million asset base, the former Mr and Mrs Hollywood have agreed to have the outcome of their financial separation decided upon by an arbitrator rather than by a family court judge. One of the likely reasons for this route is that it allows them to keep the process and the outcome completely private; something they no doubt seek for themselves but also crucially, for their son.

Family court proceedings do not guarantee privacy and confidentiality. High profile divorcing couples will often enter the court building on the day of their hearing through a sea of paparazzi and Judges can allow the media into the hearing itself, meaning that the evidence and the judge's decision can be published.

The Hollywoods have chosen Arbitration, which is a form of private, out of court dispute resolution and it



"Judges can allow the media into the hearing itself, meaning that the evidence and the judge's decision can be published."

offers an alternative to court based litigation for couples who are unable to reach agreement. It allows parties to agree upon their 'judge' (typically a senior barrister or retired judge), the timescale, venue and procedure. The process provides flexibility, comfort and control; none of which can be said of the family court system in England and Wales which is under-resourced and overloaded, leading to delay and increased expense for parties. The only involvement the family court will be required to have within the arbitration process is to approve the decision made by the arbitrator and convert it into a binding court order. However this is undertaken on paper, without attendance of the parties.

Like all out of court alternatives, both parties have to agree to proceed by way of Arbitration; it cannot be imposed and so for a particularly difficult, uncompromising individual, court based litigation may still be the right way forward. However, when two parties agree that a resolution must be reached but they cannot settle on what that is, there can be no doubt that Arbitration delivers a faster, smoother and less costly conclusion.

The outcome is the same; an independent and binding decision but the process is very different. For the Hollywoods, the main attraction of Arbitration may well be the confidentiality and privacy it affords them but for other couples it delivers much more than that.

We encourage Arbitration and other alternatives to court litigation, such as Early Neutral Evaluation (ENE) including private Financial Dispute Resolution (FDR) hearings, whenever they are appropriate. When the end of a marriage or relationship can be so difficult and the future holds such uncertainty, the route to resolving any issues should not add to that strain.

This article was first published by **Kingsley Napley**

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UPCOMING EVENTS

Next Gen Event
01 Apr 2020

Love Hurts: Divorce Proofing Inter-Generational Wealth Planning

Content led panel session followed by drinks!

AGENDA & SPEAKERS

4Sight Panel
21 Apr 2020

Trust Busting in Divorce Proceedings

6pm informative panel session with drinks and nibbles after.

AGENDA & SPEAKERS

1 Day Conference
19 May 2020

HNW Divorce Litigation

1 Day Conference featuring 25+ renowned international experts drawn from the spectrum of the HNW Divorce Litigation landscape.

AGENDA & SPEAKERS

Jun 2020

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Sep 2020

ADR and Alternatives to Court

COMING SOON

Sep 2020

Defending Trusts in Divorce

COMING SOON

Oct 2020

Enforcing a Divorce Award

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Oct 2020

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DIVORCES, DEATH AND DEALING WITH THE DECEASED ESTATE

Authored by: Michael Leeds and Hannah Davie, Grant Thornton

Boris Berezovsky Case Study

Background

Boris Berezovsky was born in January 1946. He was a Russian business Oligarch, government official and mathematician.

Berezovsky was politically opposed to the President of Russia, Vladimir Putin, following Mr Putin's election in 2000 and remained a vocal critic of Mr Putin for the rest of his life. In late 2000, after the Russian Deputy Prosecutor General demanded that Berezovsky appear for questioning, he did not return from abroad and moved to the UK, where he was granted political asylum in 2003. He was subsequently the subject of criminal proceedings and convictions "in absentia" in Russia for fraud and embezzlement charges.

The wealth was held through complex corporate and trust structures. Berezovsky stated that the trust structures were intended to prevent (what he believed to be) the unlawful expropriation of his assets by the Russian State.

There is also evidence that despite the existence of these structures, Berezovsky continued to exercise control over these assets and regarded himself as the ultimate owner of the assets held within them and/or that it would be open him to recover the assets from the structures when he wanted.

Marriages, Divorces and Death

Berezovsky had two children with his first wife, Nina Korotkova, who he divorced in 1991.

He married his second wife, Galina Besharova, in 1991 when he was a professor of maths in Moscow, said to be earning £60 a month. Berezovsky had another 2 children with Ms Besharova, but they separated after only two years, and then finally divorced in 2010.

Berezovsky's wealth was largely accumulated after he and Ms Besharova separated. However, when they divorced, Berezovsky asserted that he had assets including property worth over £500 million (excluding potential recoveries from litigation), which included substantial property held in various trusts, companies and other entities. Berezovsky and Ms Beharova settled the divorce proceedings, but at the time it was said to have been the largest ever divorce settlement.

After Berezovsky separated from Ms Besharova he started a relationship with Yelena Gorbunova. Berezovsky was with Ms Gorbunova for 15 years, during which time they had two children.

Berezovsky died in March 2013. The circumstances surrounding his death caused lots of speculation and the coroner recorded an open verdict.

"Claims from creditors, property claimants and family members have been identified which are estimated to exceed £400m."

The Deceased Estate

Berezovsky's death revealed a large and complex Estate with seven beneficiaries as well as there being five named Executors. Three of the Executors renounced probate, one was conflicted, and one had no experience to deal with such a complex Estate.

There were considerable assets to be secured and realised and ongoing litigation, where Berezovsky was the claimant as well as substantial litigation as the defendant, which needed to be dealt with. The beneficiaries, along with the applicants and claimants of the litigation desperately needed someone capable to take control of the Estate and take the reins in relation to the ongoing litigation.

Aeroflot, the Russian Airline, had commenced proceedings against Berezovsky before his death and applied for the appointment of Court Appointed Receivers in respect of the Estate. An application under the Civil Procedure Rules resulted in an order dated 29 April 2013 pursuant to which Messrs Kevin Hellard and Nicholas Wood of Grant Thornton UK LLP were appointed as Joint Receivers of the Estate. The Receivers had limited powers granted by the Court, which were to identify and secure assets and establish the Estates liabilities. The Receivers also had the power to deal with the ongoing litigation.

The Receivers stayed in office for 12 months before one of remaining Executors came forward, a family member of Berezovsky. However, the Court felt that dealing with the Estate was too complex for her to deal with alone. Therefore, the Court appointed her as a 'Special' Administrator, so that she could deal with the grave and personal effects.

The Court also appointed Messrs Hellard and Wood, as 'General' Administrators on 10 April 2014. The General Administrators had responsibility on behalf of the Estate for the legal proceedings and had powers to realise assets and also investigate the assets and liabilities within the Estate.

The Estate was established as being insolvent by the General Administrators who presented a petition for winding up the Estate and placing it into a formal insolvency process. Mike Leeds of Grant Thornton UK LLP (Grant Thornton) along with Messrs Hellard and Wood were then appointed by creditors as Joint Trustees in bankruptcy of the Estate in January 2015.

Since then the Trustees have used their open source Corporate Intelligence capabilities to investigate the complex web of companies and corporate structures put in place by Berezovsky. Assets have been traced that were transferred to third parties prior to Berezovsky's death along with assets held overseas in complicated ownership structures involving offshore companies and trusts.

The Trustees also took conduct of substantial litigation in which Berezovsky was a party. They engaged with litigation funders and adverse costs insurers to enable them to pursue and defend the various legal claims. This approach proved to be successful, and substantial realisations have been made for the benefit of the Estate.

To date assets have been identified and realised which are estimated to be worth over £130m. Potential further assets have been located in UK, Gibraltar, France, Russia, Eastern Europe and BVI. The realisation strategy for these remaining assets is ongoing.

Claims from creditors, property claimants and family members have been identified which are estimated to exceed £400m. This includes high value legal proceedings brought by creditors worth over £230m, which the Trustees continue to defend.

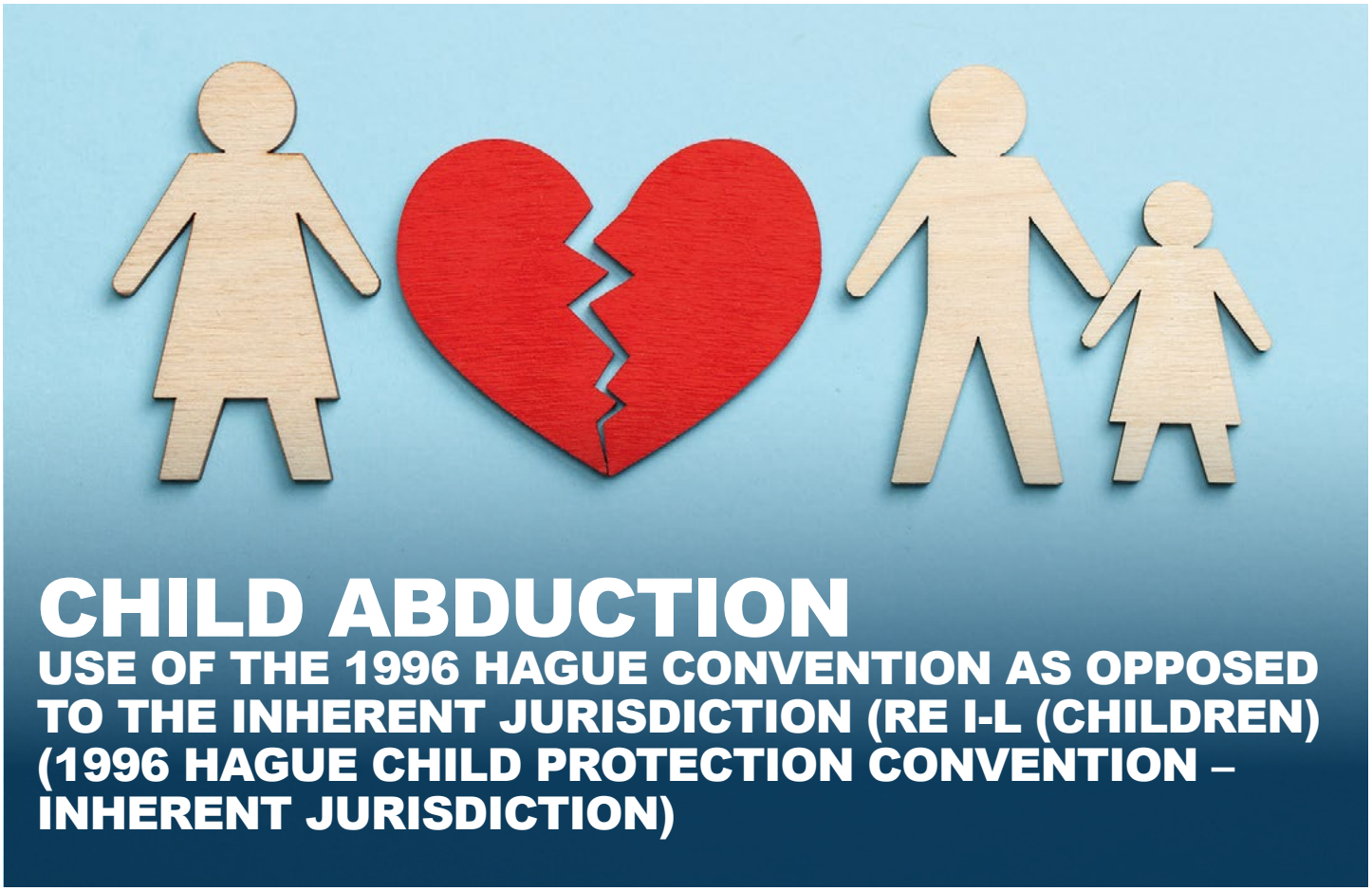
Conclusion

Engaging independent professionals to act as Receivers, Administrators and Trustees in Bankruptcy when dealing with a complex disputed deceased estate has real benefits for beneficiaries, executors and other affected parties.

Independent professionals can take responsibility for dealing with an entire estate and have the required expertise to identify, realise assets and participate in litigation, which provides reassurance to the executors and can provide real financial benefits for those with an interest in the estate.

They are also able to act independently at every stage through the entire journey of dealing with an estate, from initially identifying and securing assets to investigating transactions entered into. As well as investigating creditors' claims, realising assets, participating in litigation and distributing assets to beneficiaries.

In addition, if an estate is thought to be insolvent, independent professionals can be appointed to act as Trustees in Bankruptcy, which removes any personal risk for the Executors and beneficiaries.



CHILD ABDUCTION

USE OF THE 1996 HAGUE CONVENTION AS OPPOSED TO THE INHERENT JURISDICTION (RE I-L (CHILDREN) (1996 HAGUE CHILD PROTECTION CONVENTION – INHERENT JURISDICTION)

Authored by: Eleri Jones, 1GC Family Law

Family analysis: In Re I-L (children) the Court of Appeal allowed the father's appeal and held that where the 1996 Hague Convention applies between two countries, if a 1980 Hague Convention application is made and is not successful, the applicable jurisdictional provisions are those of the 1996 Hague Convention, particularly Art 11, and the inherent jurisdiction is not available to use. Eleri Jones, barrister at 1GC Family Law, who represented the appellant father, considers the implications.

Re I-L (children) (1996 Hague Child Protection Convention: inherent jurisdiction) [2019] EWCA Civ 1956, [2019] All ER (D) 111 (Nov)

What are the practical implications of this case?

This case highlights the range of options open to parties in relation to children disputes across borders and the need for practitioners to be aware of the various international instruments which apply, both in terms of choosing from the routes available to them but also in relation to the limits on the court's powers.

The mother in this case chose to seek a summary return under the Hague Convention on the Civil Aspects of International Child Abduction (the 1980 Hague Convention) from the English court while also litigating in the Russian courts. The mother was unsuccessful here under the 1980 Hague Convention, but the judge found that at the relevant date, the children remained habitually resident in Russia and accordingly Russia retained substantive jurisdiction over the children. Therefore only the provisions of the Hague Convention on Jurisdiction Applicable Law, Recognition and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children 1996 (the 1996 Hague Convention) were available and

The mother in this case chose to seek a summary return under the Hague Convention on the Civil Aspects of International Child Abduction (the 1980 Hague Convention) from the English court while also litigating in the Russian courts.

the mother could not turn to the inherent jurisdiction.

The Court of Appeal was aware that the mother had obtained an order in Russia in the middle of the English proceedings for the return of the children to her care. The mother had already obtained orders in England for recognition and enforcement of the Russian order, but the father appealed against recognition and enforcement. The view of the Court of Appeal was that the appropriate course was for the appeal against recognition and enforcement to be determined next rather than the English court utilising its 'secondary jurisdiction' under the 1996 Hague Convention, Art 11 and risking inconsistent orders. The judgment is useful for its consideration as to the requirements for, and appropriateness of, return orders under Art 11 and highlights the differences in the issues engaged by applications under Art 11 compared with the process of recognition and enforcement of orders, to which different considerations apply.

The decision is a further caution in relation to the difficulty in mounting appeals against evaluative decisions such as habitual residence or repudiatory retention where the trial judge had correctly set out the law and gave sound reasoning for their decision based on the evidence.

What was the background?

The mother (Russian) and father (British) married in 2013 and initially lived in England. Their two children were born in Russia. The older child spent time living in England. After the second child was born, the children lived in Russia and spent time frequently with their father in England. When the parties separated in 2017, the arrangements were set out in a separation agreement between the parties. In late 2018, the mother told the father via lawyers that she wished to spend three months in the USA with the children. The father disagreed and so the mother went alone, leaving the children in Russia with nannies and refusing the father direct contact. Both parties commenced proceedings in Russia.

After the boys went on an agreed holiday with the mother to the USA in April 2019, they travelled to England to spend time with their father. The parties communicated extensively about their proposals for the future and it was agreed that the children would be in England until at least October 2019, spending time with both parents. The mother wished to relocate to the USA—the father disagreed. The mother relented but also stated that a return to Russia was 'out of scope'. Proceedings in Russia continued, but the father withdrew his claim in June 2019 (the mother's continued). The boys were due to be cared for by the mother in England in June 2019 but, fearful of the mother's intended relocation, the father commenced proceedings in England. The mother then issued her 1980 Hague application for summary return to Russia, arguing that the father had wrongfully retained them in England, his application to the English court amounting to 'repudiatory retention'. The father opposed this and argued that the boys had already become habitually resident in England.

Prior to the final hearing of the mother's 1980 Hague application, the mother obtained an order in Russia for the return of the boys to her care which the father appealed in Russia (ultimately unsuccessfully). The mother obtained orders in England for recognition and enforcement of the Russian order and the father appealed.

The judge at first instance found that there had been no repudiatory retention but that the boys remained habitually resident in Russia. He granted the mother's application to return the children to Russia pursuant to the inherent jurisdiction.

What did the court decide?

The Court of Appeal dismissed the father's appeal in relation to habitual residence and the mother's cross-appeal in relation to repudiatory retention but allowed the father's appeal in relation to the use of the court's inherent jurisdiction.

The Court of Appeal had invited additional submissions on the application of the 1996 Hague Convention. The parties accepted that this would apply in circumstances where the children remained habitually resident in Russia and so the Russian court retained substantive jurisdiction over the children. The parties also both accepted that therefore the court would only have been able to order return under the 1996 Hague Convention, Art 11 (Re J (A Child) (1996 Hague Convention) (Morocco) [2016] [2015] EWCA Civ 329, [2015] All ER (D) 53 (Apr)). The mother argued that the decision under the inherent jurisdiction could be exchanged for one under Art 11. The father argued that an order under Art 11 would not have been made and should not now be made.

The Court of Appeal considered the requirements of Art 11 as set out by Lady Hale in Re J (A Child), namely 'urgency' and 'necessity' of orders. It is a 'secondary jurisdiction' which should only be used 'to support the home country' and not 'interfere'. Given the proceedings in Russia and the pending appeal here of the recognition and enforcement of that Russian order, the Court of Appeal considered that that appeal was the next appropriate step for determination rather than consideration of an Art 11 return order which may give rise to inconsistent judgments.

This article was first published by Lexis®PSL on 21/11/2019. See here

HNW Divorce

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Cohabitees Berezovsky Jersey Cryptoassets Akhmedova
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CRYPTOASSETS AND DIVORCING A 'CRYPTOQUEEN': PART 1 - IDENTIFICATION, VALUATION & PRESERVATION

Authored by: Cady Pearce and Liam Hurren, Kingsley Napley

In just ten years, cryptoassets have become a £100 billion industry. We now face the alarming prospect that millions of pounds can be hidden behind a few lines of computer code without ever touching a bank account. If your soon-to-be ex-partner has made a fortune with Bitcoin, how do you get a share?

The shadowy world of cryptoassets

In 2014, Dr Ruja Ignatova, known as the 'Cryptoqueen', claimed to have created a new cryptoasset called "OneCoin", securing investments of more than 4 billion euros around the world. Then, in 2017, she disappeared and has not been seen since. It was later discovered that OneCoin was in fact a scam, meaning that those who invested are unlikely to see their money again.

Cryptoassets, of which the most famous is Bitcoin, are a digital type of "money" which use a technology called Blockchain. Blockchain is simply a secure record of transactions, like a giant ledger, which is available to the public and cannot be changed or hacked. Cryptoassets are not controlled by a state or a bank therefore transactions can take place between individuals without any middle man.

I think my partner has cryptoassets – what do I do?

This blog will focus on the first three questions your lawyer should ask if you think your partner owns cryptoassets:

- **Identification** - How can we find out if they have cryptoassets?
- **Valuation** - What value do they have?
- **Preservation** - How can we preserve that value?

Identification

Cryptoassets are held via 'digital wallets' and are accessed using 'keys'. These keys are sequences of letters and numbers, which are written down or saved to a computer or USB drive, but which are not attached to the name or any personal details of the owner. Without the keys, it is near impossible to identify what is owned. There have been instances of cryptocurrency fortunes being lost because the keys could not be located when the owner died (see James Ward's blog – *Doing well in the crypto-currency market? Make sure you don't die rich!).*

It is not all bad news, however. Your partner might use a digital exchange, like

"Doing well in the crypto-currency market? Make sure you don't die rich!"

CoinBase or Kraken, which is a common method of dealing in cryptoassets. While digital wallets and keys are still used to hold and access the cryptoassets, digital exchanges provide the owner with a platform, in their name, which allows them to purchase, sell and transfer their cryptoassets quickly and easily. Records from the platform should allow you to see what your partner holds, a record of trades and the value of the current holding.

Whether or not a digital exchange is used, your partner should disclose their cryptoassets in their Form E, the usual starting point for financial disclosure in England and Wales. If they do not, you will need to put your detective hat on and get creative. We can help and, if necessary, engage a forensic expert or apply to the Court for various orders to ascertain the true picture.

Valuation

Cryptoassets are volatile. Between June 2013 and November 2013, for example, the value of 1 Bitcoin jumped from $70 to $1,242, an increase of 1,674%. If cryptoassets represent a significant portion of your family's assets, changes in value could have a big impact on the overall settlement.

Given the relative infancy of cryptoassets and depending on recent fluctuations, it may be necessary to consider taking an average value over a particular time period rather than looking at the value on a particular date. It is likely that the value of any cryptoasset holdings will need to be monitored more closely than something more established and stable. We are experienced in dealing with fluctuations and can explore the different options with you.

Preservation

If you have a real concern about your partner dissipating assets, you can consider applying for a freezing order. You can freeze, for example, a bank account which means that your partner will be prevented from withdrawing funds from that account without permission. Freezing cryptoassets is more tricky.

If a digital exchange has been used or if you know that your partner has transferred cryptoassets to a particular person or company, it may be that you can ask the Court to make a freezing order. In the case of Vorotyntseva v Money-4 Limited et al, we saw, for the first time, a freezing order made against a company and its principal officers who held cryptoassets belonging to the claimant worth around £1.5 million. Likewise, in Robertson v Persons Unknown (unreported), CoinBase, the digital exchange concerned, not only complied with the order made by the Court, but co-operated with the wider investigation surrounding the claimant's stolen cryptoassets. The order made was an asset preservation order, which is different to a freezing order, but it is hoped that digital exchanges would co-operate in a similar way with a freezing order.

Your partner could be asked to give up control of their digital wallets. If they refuse, it may be that wider ranging remedies in civil law are available. The Court could be asked to order, for example, delivery up of all devices where the keys are stored, or for the cryptoassets to be transferred to a new digital wallet which your partner cannot access.

As is always the case, with whatever asset types are in question, if we have evidence that your partner has not provided full disclosure or has dissipated assets, we can ask the Court to draw adverse inferences. This could see you get a bigger share of the remaining available assets. If you have any concerns, it is important to act quickly.

Next: Distribution and Enforcement

In our next blog in this mini-series, we will look at how cryptoassets may be distributed as part of a financial settlement and how you might enforce an order where your partner refuses to give you your share of the cryptoassets.

This article was first published by Kingsley Napley

"Your partner could be asked to give up control of their digital wallets. If they refuse, it may be that wider ranging remedies in civil law are available."

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