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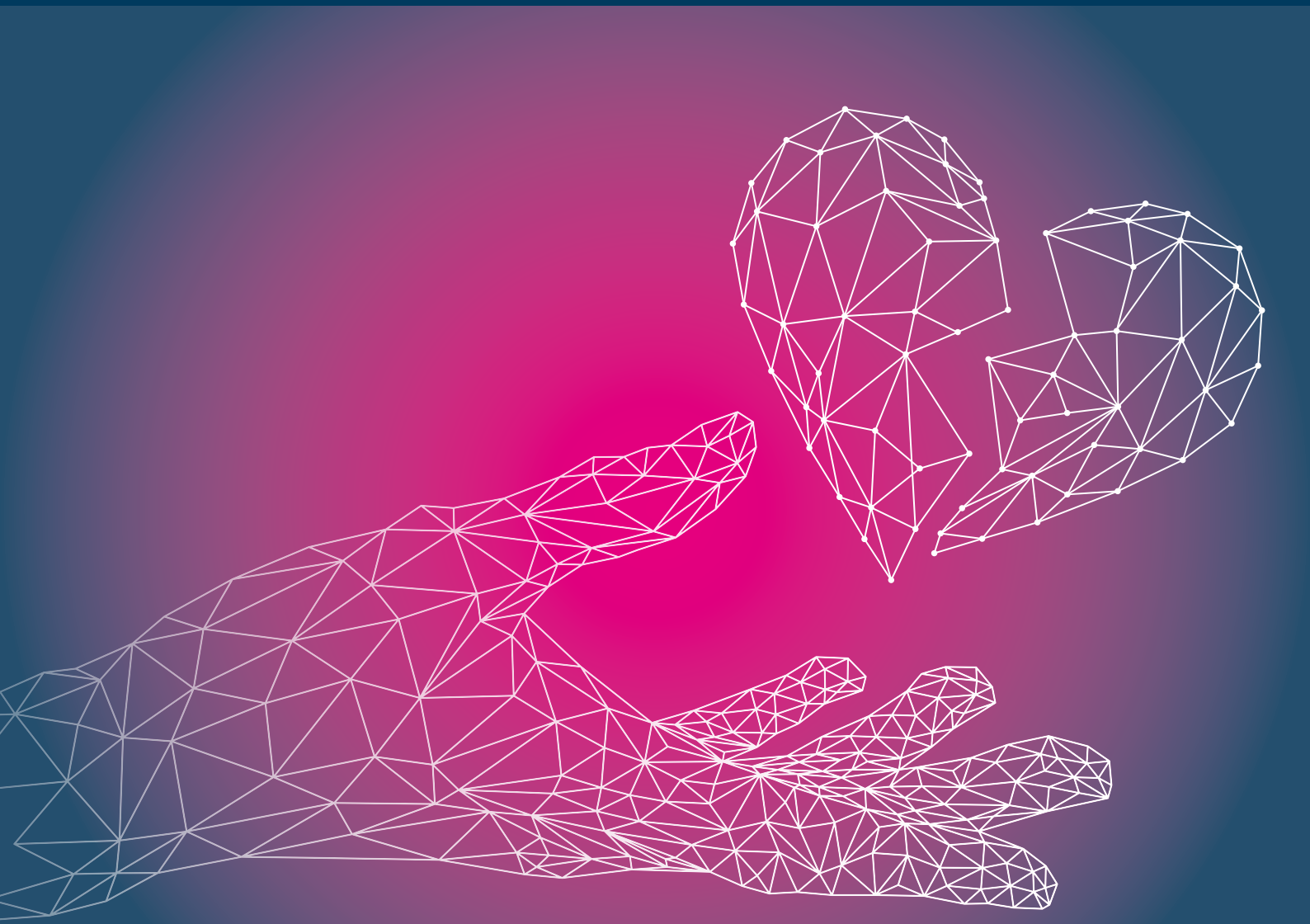

DIVORCE IN A DIGITAL AGE

INTRODUCTION

"Once a new technology rolls over you, if you're not part of the steamroller, you're part of the road"

Stewart Brand

We are delighted to present Issue 10 of HNW Divorce Magazine, where our authors explore the digital changes and developments affecting the divorce world. This edition discusses topics such as the rise of cryptoassets, digital privacy, manipulation of documents and more.

Thank you to our contributors, members and community partners for their continued support. Our annual HYPERLINK "https://thoughtleaders4.com/hnw-divorce/hnw-divorce-event/hnw-divorce-litigation-flagship-conference" HNW Divorce Litigation Flagship Conference is fast approaching on 24th November 2022, and we hope to welcome you there

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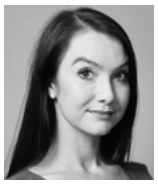

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ABOUT HNW Divorce

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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- Grow your network and business
- Build relationships through a facilitated Membership directory

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HNW Divorce

HNW Divorce Litigation

Flagship Conference

24th November 2022
One Moorgate Place, London

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60-SECONDS WITH:

ANDREW WAGER
DIVISIONAL DIRECTOR – INVESTMENT MANAGEMENT
BREWIN DOLPHIN

Q What do you like most about your job?

A The ability to engage intellectually with investment markets and financial planning technicalities but to deliver this to individuals who inhabit the real world, not some theoretical model!

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

A A farmer! I was brought up on a farm and miss many aspects of that lifestyle (apart from the 365 day/annum, 24 hours a day job requirements!)

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

A Moving from Barclays Wealth to Brewin Dolphin in 2007/8. You could not have had 2 more fundamentally different businesses that were in the same industry. Best move ever.

Q What is one of your greatest work-related achievements?

A Working with the team at BD to develop a successful offering for Family Lawyers that is genuinely different. I am proud to be part of a national team of specialists who have a genuine passion for supporting lawyers and their clients.

Q If you could give one piece of advice to aspiring lawyers, what would it be?

A Don't put off bringing in financial advisors to assist in divorce proceedings. There can be some hugely important benefits, even from a quick conversation.

Q What do you see as the most significant trend in your practice in a year's time?

A 2 elements – for investment markets it is how the inflation story pans out, particularly in the UK.
For financial advice it is going to be how we close the advice gap (the shortage of qualified financial advisers) in an ever more complex world.

Q What personality trait do you most attribute to your success?

A Doggedness – I rarely take 'no' or 'can't' as an answer.

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

A Nick Hungerford (founder of Nutmeg) – I worked closely with Nick many years ago and have been astounded to see the influence he has had.

Q What is something you think everyone should do at least once in their lives?

A Travel in Africa – the people, the landscape, the wildness – it gets under your skin.

Q You've been granted a one-way ticket to another country of your choice. Where are you going?

A Australia – I have never been and it is so huge it will not doubt be a great place for a one way ticket!

Q What is a book you think everyone should read and why?

A Something irreverent and amusing in these difficult times – Decline & Fall by Evelyn Waugh

Q If you had to sing karaoke right now, which song would you pick?

A Wonderwall by Oasis – by the end of the first line the whole room would be singing covering up my lack of singing talent.

THE DIGITAL DIVORCE:

THE RISE OF THE CRYPTO ASSETS IN FINANCIAL REMEDIES

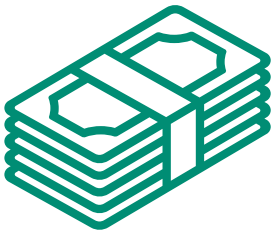
Authored by: Connie Atkinson - Kingsley Napley

What is Crypto

Cryptoassets are a digital type of asset. The ownership of, and transactions relating to, most cryptoassets are recorded on a giant ledger or 'Blockchain'. The first modern cryptoasset was Bitcoin but there are now thousands of others in the market. Most Blockchains are available to the public and cannot be changed or hacked.

A fiat gateway (the act of swapping fiat to crypto) is usually used to make the initial cryptoasset investment. Cryptoassets can be held via digital wallets which are used to store public 'keys' (or addresses) which are used to receive or spend cryptoassets and appear on the Blockchain. Private keys are the passwords to the digital wallets and should not be shared publicly. These keys are not attached to the name or personal details of the owner (they are instead a sequence of letters and numbers) which means the owner is not easily identifiable.

For the vast majority, cryptoassets are held on a digital exchange such as Coinbase, Kraken, Bitstamp, or Binance (as opposed to a private digital wallet). They can provide the cryptoasset holder with a platform to purchase, sell and transfer their cryptoasset. On these centralised exchanges, the cryptoasset holder allows the exchange custody of the assets (the exchange holds the private keys).



Financial disclosure

In divorce proceedings, each party is obliged to provide full and frank disclosure of their financial circumstances. This usually takes place on a Form E. While there is (currently) no specific place for cryptoassets to be listed, it should obviously form part of the financial disclosure, most likely in the "Capital: Other assets" section. While no documents in support need to be provided in accordance with this part of the Form E, it is likely to be helpful to provide detailed information about the cryptoassets held, to reduce the likelihood of detailed questions being asked later.

For a spouse wanting to know whether their ex partner held or holds cryptoassets, bank statements are likely to be the first port of call. Unless a spouse has been gifted cryptoassets, their bank statements should show fiat deposits to an exchange (such as Coinbase). If a spouse suspects that cryptoassets are or have been held, they should formally ask whether their spouse holds any cryptoassets; including but not limited to privacy coins, utility coins and NFTs. It will also be necessary to ascertain the service or venue (including exchanges and custodial and non-custodial wallets) on which those assets are held. Requests should also be made for: a) the name and amounts held for each token; b) the public address keys for each token (the deposit address(es) for each token on each exchange or service where tokens are held); and c) a statement of holdings from each exchange or service where tokens are held.

It is worth noting that most of this information is in the public domain (i.e. amounts, tokens, venues, public address keys) albeit it is not always possible to find out who is associated with a particular cryptoasset.

Non disclosure and verification

The crypto market is opaque but it does not mean that a spouse can hide cryptoassets forever. There are a number of experts in the crypto market who can be instructed to verify information provided in divorce proceedings or trace cryptoassets.

If an address is provided, it can be found on the Blockchain. The timing of transactions, amounts traded and whether the trades correspond to assertions made can be checked. In circumstances where the 'non crypto owning spouse' is not familiar with the family's financial history, it is important for expert advice to be obtained. A savvy 'crypto owning spouse' could for example claim to have sold cryptoassets by providing transaction details showing cryptoassets leaving their wallet only for it to reappear in their wallet later via a different public address.

Transactions can be difficult to follow. Some trades involve the exact sum being provided while others send 'change' back to the sender, which are often deposited into a freshly created address in the user's wallet, thereby increasing the number of addresses on the ledger and controlled by the user. As long as the public address of where tokens are or were sitting or a transaction reference or 'hash' is provided, the cryptoasset can usually be traced. Expert tracing services also deploy heuristics algorithms to identify associated addresses within a wallet. This in turn can help reveal assets which a spouse may have sought to hide.

Settlements

Digital investments such as cryptoassets have been popular among younger, digitally confident and savvy investors. It is not surprising therefore that we are seeing more and more cases in which cryptoassets form part of the assets which a would-be spouse wants to protect in a prenuptial agreement or that must be dealt with on divorce.

Issues remain in respect of the transparency of financial disclosure as referred to above but also, once the asset has been properly identified, the options available when it comes to settlement. It is not as simple as just withdrawing funds from your cryptoassets wallet. Disposal into fiat currency depends on the type of token held, access to exchanges willing to handle crypto-to-fiat transactions, and whether there is a market for those assets.

While courts often aim to spread the risk when looking at the division of each asset class on divorce, this may not be possible or appropriate for a spouse who is not digitally or financially savvy and would not know what to do as a cryptoasset owner.

The cryptoassets market is now a trillion dollar industry. With these sums and level of activity comes the perception that the market is rife with fraud. The marketplace is also extremely volatile which brings its own issues when engaged in lengthy court proceedings. Values may fluctuate significantly during proceedings and a 'crypto owning spouse' who wants to retain this more risky asset in lieu of the more stable assets, will need proper financial advice before committing to this.

One thing that is certain about crypto, is that we all need to get to grips with it.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ELECTRONIC SIGNATURES:

GUIDANCE FOR DIFFERENT TYPES OF LEGAL DOCUMENTS

Authored by: Isabel Agudo - Schneider Financial Solutions

Signing Standard Contracts

An electronic signature or e-signature is a paperless method of entering into an agreement which serves as a legally valid alternative to handwritten signatures. According to the Law Commission, e-signatures are capable in law of executing certain documents, as long as the intention of the signatory can be established and other requisite formalities are satisfied.

Some contracts can be entered into verbally if the right criteria are fulfilled, while others come in the form of clicking "I accept" on a website. Furthermore, e-signature platforms – such as DocuSign which adheres to the UK Electronic Communications Act and Yoti Sign which is government-certified – are online tools that can sufficiently demonstrate the essentials of a binding contract. Quick and cost-effective, they capture information like a signatory's email address, IP address, date and time of access.

The Electronic Identification and Trust Services ("eIDAS") Regulation identifies three categories of electronic signatures: 1) standard, 2) advanced, and 3) qualified. Standard e-signatures do not require identity verification and can be as simple as typed-up initials, whereas advanced e-signatures link the signatory's unique identity to the signed document. Advanced e-signatures guarantee integrity and authenticity. Qualified e-signatures are a more complex form of advanced e-signatures which involve heightened identity verification and make use of a Qualified Signature Creation Device.

For deeds, the position is not as simple as for standard contracts. A key hurdle to bear in mind is that the signing of a deed must be witnessed. In other words, a deed must be signed in the presence of a witness.

Elements of Deed Formation

Legal transactions that require a deed call for more onerous formalities as follows:

- A deed must be in **writing**.
- It must be clear from the face of the instrument that it is intended to **take effect** as a deed.
- The instrument must be validly **executed** as a deed. This is governed by statute and varies depending on the legal personality of the executing parties. The requirement frequently involves witness attestation.
- A deed must be **delivered** (either physically or electronically - the point is there should be evidence of the **intention** to be bound).

If these are not strictly followed, the deed may be void.

Video-Witnessing for Deeds

In the case of Yuen v Wong [2020], the First-tier Tribunal held that the remote viewing of a deed signature via Skype did not suffice under the law for that particular type of deed, which was a transfer deed relating to a property matter. The requirement for a deed to be signed in the presence of a witness requires the physical presence of that witness for deeds generally, even where both the person executing the deed and the witness are attesting by way of e-signatures individually.

In March 2020 the Law Commission recommended an industry working group – a multi-disciplinary team of business, legal and technical experts – to discuss the question of electronic execution of documents. An interim report was published on 1 February 2022 (the contents have not yet materialised as formal amendments to legislation): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051451/electronic-execution-documents-industry-working-group-interim-report.pdf.

The group supports electronic signature platforms with a regulated digital identity trust framework as capable of fulfilling the same objectives as physical witnesses and attestation of documents, such as deeds. Benefits include speed, clarity, simplicity and security. The report notes that "legal reforms and technological advances will be far more effective if they are developed in step with one another". On the topic of video-witnessing, ideas like a "Qualified Electronic Signature (QES) with a witness" process, removing the legal requirement for a witness where a QES is used, capturing signatory intent in video format, or developing facial and movement analysis tools, are considered.

Interestingly, the report queries whether signatories and witnesses must be within a certain geographical location at the time of signing, witnessing and executing. Clear instructions on how to validly e-sign and how to validly e-witness would need to be incorporated in official video-witnessing platforms. In light of the digital audit trails available, it is arguable that advanced and qualified e-signatures are likely to be more reliable than a signature witnessed in an unsupervised environment.

Video-Witnessing for Wills

In July 2020, during the national lockdown as a result of the COVID pandemic, the UK government temporarily amended the rules for Wills under the Wills Act 1837, and allowed Wills to be witnessed remotely in England and Wales, i.e. virtually through Skype, Zoom or Microsoft Teams if the Will cannot be executed in person. Wills remotely witnessed as of 31 January 2020 were, retrospectively, deemed valid.

Importantly, for Wills in particular, wet-ink signatures are mandatory even for the remote witness, and the use of counterparts (two identical copies of the Will) is not permitted – the same Will document must be signed by all parties. This means a witness may virtually witness a signatory sign the Will, and that hard copy would have to be posted to the remote witness for them to then sign and complete themselves.

On 11 January 2022, the Ministry of Justice announced that this temporary legislation on remote witnessing in relation to Wills is to be extended until 31 January 2024 to support vulnerable people who may need to self-isolate, or in case of further restrictions. Deputy Prime Minister, Lord Chancellor and Secretary of State for Justice has made the following statement:

"I want people to be able to use technology safely and securely to ensure they can record their final wishes no matter the circumstances. This is a common-sense measure that will give vulnerable people peace of mind that their wills are recognised if they are forced to have them witnessed via video due to isolation."

Compliance with Current Rules

For now, physical presence of a witness remains critical to execute a deed, save for the temporary exception in relation to wills as mentioned above. The Law Society's practice note advises that if a witness genuinely observes the signing of a deed, and the witness then goes on to sign the adjacent attestation clause - whether electronically or otherwise - the deed will have been validly executed.

It will be interesting to monitor any future changes in legislation to reflect the cultural shifts in document execution, and whether all types of deeds may one day be virtually witnessed validly. We can expect to see software development companies rolling out improved e-signature and e-witnessing platforms. In the meantime, it is best practice to remind signatories and witnesses that the physical presence of the witness is compulsory for deeds generally, even if electronic signatures are used.

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DIVORCE IN THE DIGITAL AGE –

THE NEW CURIOSITY SHOP

Authored by: Matthew Booth - Payne Hicks Beach

Maybe this is a generational thing. And so, reader be warned, this is not an altogether sanguine review of the impact of the digital age on the world of divorce. But people will be people and the internet is an essentially unregulated market place for information and services. A New Curiosity Shop.

And, famously, as were are told in The Old Curiosity Shop "if there were no bad people, there would be no good lawyers".

To begin at the beginning

The need for a divorce only arises if there has first been a marriage. It is some time since I last married, but I am conscious that entering the legal or as it is still sometimes known holy state of matrimony requires no small amount of bureaucracy and investment of time. And, of course, a degree of physicality insofar as the couple involved are required, however briefly, to be present in the same place at the same time. For let us not forget that romance and religiosity aside, getting married additionally bonds you legally (and not necessarily to the matrimonial law of the country in which you married but where you may later find yourself getting divorced). And so in light of the fact that it follows that you are not free to untie the knot without once again engaging with the law of the land should it not be at least as onerous to divorce as it is to marry?

But, yet it is now as easy to go online and order a divorce as it is a pizza. Google “divorce online” and you may indeed “Start your divorce today!” and apparently for as little as £199 enjoy a “100% stress free divorce” with “24/7 Case Tracking” – such online fun - just like watching the progress of your Deliveroo rider. Even on the Government website there is only the most coy reference (“Legal advisor fees vary depending on their experience and location”) to the fact that unravelling this legal relationship may require more information and, dare it be said, professional advice than ordering a Quattro Stagioni with extra pepperoni.

Welcome to the club

Should it be so easy and why this aversion to legal advice and an apparent determination to deal with this most consequential life event - which does after all engage the law - in the most amateur DIY fashion? Cost, of course. But at what cost if matters are not properly dealt with?

But, here the digital divorcee may now access a welter of help and support on all things relational from a growing crowd of self-styled digital divorce coaches. In this busy online world one is promised anything from alchemy to metamorphosis from a range of practitioners whose main credential appears to be the fact that they too have been divorced. One presumes just the once for the most part, but nevertheless that singular experience is enough for them to lead you on your own divorce recovery journey. This service isn’t free of course, but why spend money on lawyers when you can instead give your money to someone else who (typically) is neither legally qualified nor for the most part an appropriately registered mental health practitioner?

Before the beginning – a late education

But let us return to the beginning, or more precisely before the beginning, because there one finds the pre-nup. An opportunity for sentient adults to assert a degree of autonomy and all things being if not equal then fair to seek to avoid the state telling them how to arrange their affairs. And, interestingly, here the law does us all a favour by requiring that each of the parties to a pre-nup must benefit from their own independent legal advice if there is to be any prospect of them being held to it.

This late education means that those individuals who enter into a pre-nuptial agreement are better informed than most about matrimonial finance law prior to their marriage and, therefore, already possessed of a better understanding of their legal positon in the event that the marriage breaks down.

Most of the rest of us it seems prefer not to know. If only the law demanded that all couples who marry understand at least a little of the legal implications of doing so. Perhaps there should be an online exam along the lines of the driving theory test?

And, as for those who elect not marry but to cohabit the level of ignorance as to their legal position remains alarmingly widespread and unaided by the popular press continuing (still) to pedal the myth of common-law marriage.

Correspondence course

Having presumably run out of things to talk about during their relationship, the parties to a divorce often find that there is so much they want to say to each other once the marriage has broken down. Happily, in the digital world they have any number of platforms by which to correspond and then (should they have them) share with their respective family law advisors. As any practitioner reading this will know, much time is now devoted to reading this correspondence and where necessary crafting the best bits into our own (hopefully more considered) prose and in due course exhibiting it to witness statements. It is not particularly edifying and at the outset of any new matter one must be sure to counsel the client to keep firmly in mind the reality that anything they write to their spouse may find its way before a judge.

And, in the end

The digital age (allied with the IT advances enforced on us all by Covid) has of course also given us the Zoom meeting. And, whilst it is right that an online meeting is no substitute for meeting face-to-face and building a relationship with another person, the Zoom call does provide a remarkably facile means to convene a meeting, especially so when third parties, Counsel and the like, may also attend without having to travel to physically be present.

The Family Court went online too of course but there seems to be a consensus that the virtual hearing was unsatisfactory and most are now largely reverting to in-person attendance.

But, let us find a positive note to close on.

For it seems that one forum - and for many an invaluable ADR one at that - has flourished with the online revolution.

As I have heard it, both the mediators and the mediated report that the at one remove environment of mediation via Zoom facilitates a more flexible space in which to work and enables a greater ability for the participants to listen and speak with candour freed from the physical constraint of being in a room together.

In the interests of promoting debate I invite others to herald further positives of the digital divorce. I have to deal with my inbox now.

60-SECONDS WITH:

EMMA HARGREAVES
BARRISTER
SERLE COURT

Q What do you like most about your job?

A The variety. No two cases are ever the same.

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

A Some form of teaching. I taught the undergraduate trusts law module at King's College London before coming to the Bar and enjoyed it more than I had expected I would.

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

A Not the most exciting, but the strangest thing was probably the hearing early in my career at which the defendant turned up and asked the judge for (and obtained) permission to be represented by a professional clown.

Q What is one of your greatest work-related achievements?

A Winning "Chancery Junior of the Year" at 8 years' call.

Q If you could give one piece of advice to aspiring lawyers, what would it be?

A Never stop learning from those around you.

Q What do you see as the most significant trend in your practice in a year's time?

A It is hard to predict but I expect that issues relating to crypto-assets will increasingly be present in my cases.

Q What personality trait do you most attribute to your success?

A Determination.

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

A There have been so many, but when it comes to HNW divorce cases, I would say Deborah Bangay QC. She is a fearless advocate and brilliant mentor.

Q What is something you think everyone should do at least once in their lives?

A Sky-dive. Nothing compares to the adrenaline rush of falling out of a plane, followed by the calm of floating back to earth.

Q You've been granted a one-way ticket to another country of your choice. Where are you going?

A New Zealand. It has hiking, skiing, beautiful scenery and, in a matter of weeks, my first nephew.

Q What is a book you think everyone should read and why?

A Ottolenghi – Simple. Recipes for absolutely delicious food, even if you are short on time.

Q If you had to sing karaoke right now, which song would you pick?

A Mr Brightside by The Killers (not that anyone would ever want to hear me sing it!).

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DIGITAL DANGERS AND OPPORTUNITIES

Authored by: Quinta Pusey - Withers

I think lawyers can often fall into the trap of thinking that our jobs are rather mainstream and traditional. I know I've certainly felt that way when spending time with friends who work 'in tech' and who chat away about their favourite types of coding and how you could 'easily build an app' to solve almost any issue discussed, while I vaguely nod along. However, of course, no job, and no sector, no matter how traditional it might seem, is immune from the 'tech' world and family law and divorce certainly has gone through something of a digital revolution in recent years and no doubt there is far more to come. This was a change undoubtedly always looming on the horizon, but one that was supercharged by the Covid-19 pandemic.

Digital issues are everywhere you look in divorce and family law. They are inherent in how we communicate with our partners and now also our lawyers, the options and resources available to us in the event of a relationship breakdown or in a children dispute, and they can even be the catalyst for a relationship breakdown.

WhatsApp warriors

Every family lawyer will tell their clients to step away from their phone at times of emotional distress but, let's face it, we're all human and we all do it. The problem is, aside from being exceptionally stressful and upsetting for our clients in the moment, things like WhatsApp exchanges or unfortunate comments on social media regularly crop up in legal proceedings. Sometimes, they might be used as evidence of character or even attitude to parenting and so a flurry of messages in a heated moment really can cause damage later. This is also likely to become even more of a significant issue in the coming months, as the family courts grapple with the introduction of reporting permission orders and the removal of anonymisation of financial remedy judgements, under pressure to become more transparent.

As easy as it is to say, and as difficult as it is to do, to avoid this particular issue, the best thing to do when things get heated is to switch off and have a digital detox.

Technology is both friend and foe in the family arena however, and one instance where it can be beneficial to reach for the phone is to make use of the abundance of relationship support tools and apps that are now available, and which really have boomed since the Covid-19 pandemic. There are a wealth of therapy apps and relationship podcasts, such as our own Modern Relationships series, that can be supremely helpful to clients navigating through a divorce or pursuing reconciliation, as well as a number aimed at helping clients to reduce conflict and effectively co-parent.

Likewise, keeping track of client's assets should (at least in theory) be easier in the digital age- with mobile banking and online platforms enabling clients to comply with their disclosure requirements without too much paper pushing. A higher proportion of clients also now have significant digital wealth that must be identified, understood and dealt with on divorce, with assets such as cryptocurrency and NFTs (often themselves purchased with cryptocurrency) cropping up with increasingly regularity. For further information on the approach taken to digital assets on divorce, see my colleague Katharine Landell's very helpful article in TL4's Crypto Insight.

The perils of the shared iCloud.

This digital issue is obvious, but it happens startingly often. A forgotten shared cloud or even just a shared device can lead to shocking and unexpected discoveries of relationship-ending issues, from dating apps and adultery to gambling addictions. It can also raise issues during disclosure- for example, financial documents available on a shared cloud might be found and used by the discovering party on the basis that the documents have lost their confidential quality.

Perhaps most importantly, documents such as these cannot be unseen by the finder, even if they are not used in proceedings, and therefore all clients should be reminded of the importance of digital hygiene.

The potential shortfalls of DIY online divorces

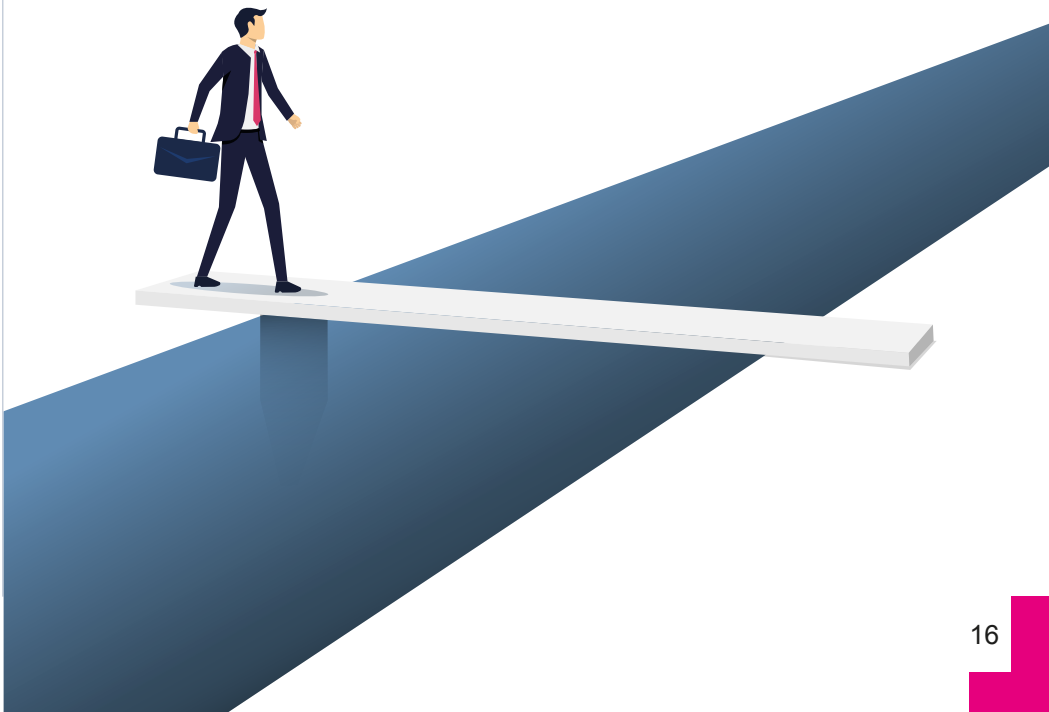
As well as various apps, there are now a large number of online resources aimed at helping clients take charge of their own divorces. Whilst these resources might be cheaper at the time and can work well where a couple's assets are relatively simple, they can sometimes be costly in the long run. For example, it's been widely reported that DIY divorces could be leaving women in particular worse-off. The introduction of these services has overlapped with a reduction in applications for pension-sharing orders, suggesting that more complicated assets may not be adequately addressed by these online resources and women, who generally have significantly less saved for retirement than men, are most often losing out.

Therefore, whilst completing something in a few clicks is generally thought to be a positive, going down the more traditional route of taking legal advice -at least before you 'submit'- is still the safest option.

It's not all about third-party apps and online services however, the family courts and practitioners have moved online too, with remote hearings becoming the norm during the pandemic and remaining the norm -at least in respect of First Appointments and directions hearings- afterwards. Divorce and financial applications can now be submitted to court directly by solicitors, removing the need for frequent court runs and undoubtedly saving the trees. Receiving documents digitally, whilst undoubtedly efficient, can pose some issues. Clients requiring originals can be met with a 'computer says no' approach to their pdf Decree Absolute or final order, meaning they increasingly need assistance with legalising their documents (whether by means of an application to the FDCO or to court) so that they can be used and recognised overseas.

Clients can submit an application for divorce directly, on a separate portal, meaning that it is easier than ever (particularly following the introduction of No-fault divorce in April 2022, which has greatly simplified the application itself) for individuals to start proceedings. Lawyers too have moved online, and where once it was once exceptionally unusual to talk to clients about such personal matters on screen instead of in person, it is now not abnormal to have clients who you never meet 'in real life'- a bit of an adjustment for lawyers who often choose this area of work precisely because of the personal element.

In the family arena (as in most arenas), digital technologies pose great opportunities but also potential problems. They improve our lives in many ways, but it's probably never a bad idea to reserve a healthy amount of caution towards them and to check ourselves in our usage of them.



THE PERFECT BLEND:

DIGITAL PLUS TRADITIONAL ADVICE FOR THE RIGHT POST-DIVORCE WEALTH STRATEGY

Authored by: Jessica Crane - London & Capital

When a client is managing their own money for the first time after a divorce, financial decision-making can be fraught with risk. Ideally, wealth management advice would start during the divorce process, and be complemented by digital tools and technologies ongoing for a fully rounded service.

According to the Open Money survey published in 2021, only 5% of respondents were offered financial advice during their divorce proceedings. Given that divorce is one of the most financially discombobulating events in a person's life, this is a disappointingly low figure. Especially when there are so many accessible technologies that support traditional advice and help create, and maintain, the right wealth strategy post divorce.

How divorcing parties benefit from traditional advice

With high-net-worth clients, or where there is complexity or challenging decisions to be made, an experienced traditional adviser is likely to be best placed to help, based on their ability to draw on their experience in many different scenarios. Many people find it helpful to be able to talk things through with an adviser.

Finding an adviser with good communication skills is key, particularly for clients who haven't engaged with wealth managers in the past. There is a lot of impenetrable jargon in the wealth industry and it can be very alienating. Rather than bombarding these people with talk of bonds, equities and investment returns, advisers should be putting advice in the context of real-life goals and objectives.

If clients have a good relationship with their adviser, there's no such thing as a stupid question. They should always be able to have an open and frank conversation and never feel judged. And the adviser should be able to gauge the level of their client's financial literacy from the start.

A good wealth adviser would also start by doing some analysis, which for our clients, takes the form of cash flow modelling.

The beauty of cash flow modelling

Once the division of assets is complete, the client – often the wife, but not always - is left with a pot of money and perhaps some assets, which is their financial lifeline, and potentially their childrens', for the foreseeable future.

Most wealth management firms, ours included, use a cash flow modelling platform to show what assets clients have now, where they're likely to be in 10, 20 or 30 years' time, and how much they can afford to take out each month.

By tweaking the different eventualities and showing the different outcomes - you personalise for each client. These events might include buying a new house, a new car and/or paying for school fees. Other factors might include returns from an investment portfolio, inflation, taxes, and any lump sum payments looming. These cash flow analyses help clients gain an understanding of the sustainability of their assets, to see whether they will be able to afford their lifestyle indefinitely.

Armed with this information, clients can tackle the most challenging decisions, such as how much they can afford to pay for a house for example, by factoring in not only the purchase price but the ongoing maintenance costs, energy bills etc. They can decide on schools by inputting different schools' fees; or how much to allocate as day-to-day living expenses, discretionary spending or on big purchases.

Because cash flow modelling is based on assumptions, they do need to be revisited on a regular basis, through a consultation with an adviser.

Combining digital and traditional for best results

There is nothing quite like personalised service, but digital certainly has its role to play. In our firm we increasingly recommend our clients adopt a blend of digital tools alongside traditional advice to deliver a more fully-rounded service.

This might involve using apps for reporting and keeping track of finances. Clients can consolidate different portfolios – pensions, individual savings accounts, cash accounts - on one platform. From there, they can easily view real-life performance updates, on their smartphones if they prefer.

Video calls, now de rigueur since COVID, are also useful when clients are time poor.

Webinars and podcasts on divorce topics can be invaluable in educating clients, without asking the client to attend a meeting or in-person event.

It's another way in which technology has improved flexibility and enabled access for more people, especially women with children.

To robo, or not to robo

We've heard a lot of talk about robo advice, a system whereby a software algorithm asks the client a series of questions then issues them with appropriate portfolios to suit their scenarios. It also monitors and manages them.

Robo advice is well suited to lower values and retail investors, is highly accessible and is generally cheaper than a traditional investment manager. While robo advice is definitely becoming more sophisticated, it has its shortcomings. Because it's based on a limited number of pre-existing scenarios that aren't fine-tuned to the user, there is a limited range of responses. Clients don't receive the nuanced, personalised approach offered by a real-life wealth manager.

The client also needs to be quite autonomous and be prepared to DIY, which might be a bit daunting if they've never had to be responsible for their family finances before. Often people who have been through a traumatic divorce would rather be dealing with a real person than making decisions by themselves, and being reliant on algorithms.

Back to the core issue: advice during divorce proceedings

Ideally financial advice would happen during the divorce proceedings, before the divorced party is out on their own.

To be fair, family lawyers, divorce lawyers and divorce coaches aren't in the business of providing wealth management advice. Once they have given their guidance, helped steer their client through the divorce process, and achieved a good settlement, their job is technically done. They are right to be wary of making suggestions in the financial space.

But if there is a party to the divorce whose financial skills are weaker than their ex-partner, and who doesn't have an existing relationship with a professional financial services firm - they can feel quite adrift. They may struggle to decide what to do next.

Family lawyers and divorce coaches are well positioned to steer their clients toward a number of possible wealth management options – advisers who demonstrate the requisite expertise, track record, and most importantly, communication skills to ease their clients into a more confident financial future.

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A FRESH START: WEALTH MANAGEMENT POST-DIVORCE

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

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

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

JENNY JUDD
Director

JESSICA CRANE
Executive Director

A NEW WAVE IN DISPUTE RESOLUTION?

Authored by: James Pirrie - Family Law in Partnership

Family law seems to progress in leaps and lulls: leaps when everyone is on board and the collective energy truly changes the shape of how we practice. At other times, progress can feel like more of a gentle float downstream.

We leapt forward when collaborative taught us about the power of multi-disciplinary working – it even created the private FDR. There was another quiet-ish revolution at the time when Resolution's Parenting After Parting emerged in the "Prague Spring" of child-centred practice in 2007/8 … Ed Balls was also leading the charities & Agony Aunts/ Uncles in an alliance towards his Children's Summit in December 2008, in an initiative that ultimately failed to capture as much as Denise Ingamells, Duncan Fisher and other leaders would have wanted, but the legacy of which is very much about us.

We are surely now in another period of revolution: a confluence of forces of nature such as Helen Adams, an inspirational President and senior judiciary with hopes to change what lies upstream from the court, increasing stridency from our Judiciary that we find better ways and the 'stick' of a changed approach on transparency, all on stage against a backdrop of changed expectations with the arrival of no fault divorce and impatience at the current lack of diversity in our offerings.

The launch of arbitration (finances in 2012 and children in 2016) the Divorce Surgery and then the Certainty Project and the repackaging into Hybrid Mediation were early runners in this era. Alongside there has been a stronger insistence led by our friends at Exeter university on child inclusive approaches, with Amicable and JK v MK [2020] EWFC 2 jolting our sense of what was possible.

Recent to join includes:

- Withers' 'divorce without taking sides'
- Simpson Millar's 'separating together'
- Family Law Partner's Agreeable
- Mediation space

There is even my own firm's recent branding of its joined up offering into "settle" [please forgive me for other initiatives not called to mind or that are even now fledging to take up a strong place].

A success would be that we properly harness the energy of this wave and carry the aim to improve the practice of family law as far up the beach as we can. What might help that to become

reality rather than seeing the early promise sink into the sand as perhaps was permitted back in 2008 and in other waves before and since?

Well first is surely the mindset of plenty.

The second that we are drawn into that "we are better than" thinking between our firms we will share less well and fail to encourage each other to reach further. Perhaps since 2008, we are in worse shape there with the relentless stream of award and quality tables. It will be easy for us to lose our way. Collaborative reached further than it might have done in changing minds because of the centrality of its pods and community thinking. At its best (and indeed where it did its best, for example in Bristol, Brighton, Cambridge, Hampshire, Berks, Herts and elsewhere it was where there was strong leadership authentically engaged with the hope of "better for all". If we have found something of authentic benefit to the separating population, where there are better solutions to be found more cheaply & quickly, through a process that is easier on all involved, then it is something to share and we should be aiming to take the cohort of our colleague-professionals with us. It was so positive that TL4, hosted a well-attended seminar to bring this movement together when all gave freely of their hopes and insights. But of course, though very welcome, one seminar does not a revolution make.

Secondly, (and more importantly) we will be guided by a resolute focus on what benefits the client and promotes the well-being of children.

Solicitors who are in practice primarily for their bottom line are in a business with, surely, a limited lifespan – eventually word will seep out to the population of potential new cases which will dry up and go to practices that are focused on the well-being of the family (with business well-being as a by-product of that focus rather than client satisfaction being a happy by-product of the pursuit of profit).

Thirdly, surely is likely to be multi-disciplinary working.

One of the basic tenets of collaborative was the norm of working with therapists and financial professionals as equals. Failing to adopt that norm, so many of us failed to harness the potential the model could have provided us, whilst those who operated in a truly collaborative in the way that it was intended saw its efficacy in the outcomes being negotiated and many have not looked back as they have stepped away from what has remained in the mainstream. They found that co-working added quality and generally reduced costs.

Lawyers benefit from a constant reminder that:

- not only do we not know it all,
- but that we are only likely to be working at our best when we are working as equals with the other disciplines that our clients need to onboard to solve the conundrums their circumstances deposit on our desks.

Fourthly and as highlighted by for example the Certainty Project, we are likely to embrace complex process models.

These are procedures that link together processes in parallel or sequence. For example they use legal input in parallel to mediation which might be underpinned by counselling support. Often they will have the safety net of arbitration in place so that clients can be offered the guarantee of closure, even if agreement is not ultimately possible.

Fifthly (as we reach out for integrating therapy into our mediation, bringing in technical domestic abuse/ insolvency skills or legal advice into that process and underpinning it all with arbitration – or whatever we are doing), is the idea of boundaried practice:

We must hold to the essentials of the model in which we are working. Yes high skills and experience may permit us to reach out for harder cases, but the second that we are practicing outside the territory for which the model is designed we are in territory that risks damage and loss for clients. We are hoping we can squeak home with an outcome rather than pursuing a process that has a clear beginning, middle and end point. We engage the risk of the cobbled together deal because carrying on is too painful or the descent into court process that could and should have been avoided.

It is an exciting time but we must bring our best selves to surf these opportunities to ensure that they are not wated.

HOW TO HAVE A TECH-SAVVY DIVORCE

Authored by: Amy Radnor - Farrer & Co

6 April 2022 marked the start of a new digital age for family law – petitions for divorce can now only be filed online, via the court system's own portal. Gone are the days of complicated paper forms, filed in triplicate, which were all but impossible for most clients to navigate without help. Now clients must only answer some simplified questions (complete with guidance notes), upload a photo of their marriage certificate, and put in their card details to pay the £593 court fee. This has undoubtedly made the process of filing for divorce speedier, more accessible, and more up to date than it has ever been. Most clients can and do navigate the online system themselves, even if they instruct solicitors in relation to their child arrangements or their finances.

While this digital advance has streamlined and improved family law for its users, the impact of the digital world on other aspects of family law is not always so benign.

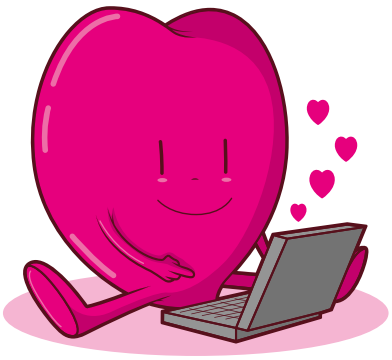
Many clients live their lives online, on social media, and can find that global reach and instant access turned against them in the context of a relationship breakdown. The internet and social media may have created many more opportunities for people to have affairs or deceive their spouse, but they have also made it much easier for them to get found out. Whether it is the GPS tracking on your iPhone, being tagged in an unexpected photo, or your private texts coming up on the family iPad, it has never been easier for your partner to find out where you are and what you are doing.

Once a relationship breaks down, that access can become an invaluable evidential resource. A spouse who claims to be suddenly impoverished and living a frugal life can be undone by social media posts showing their recent lavish holidays. Consultants can be employed who specialise in mining social media and the internet for evidence of where someone has been and how they have been living; a private (or non-existent) social media presence of your own is no protection if you appear in photos posted by friends or relatives. Few of us leave as light an online footprint as we may think, or understand the information trail we leave behind and what a skilled investigator can piece together from it. Debt recovery, asset tracing and enforcement are also major beneficiaries of these techniques and, again, companies have sprung up to meet that market need.

For celebrity and high-profile clients, whose image is their livelihood, reputational risk can be the most pressing concern. Alice Evans and Ioan Gruffudd's deeply acrimonious Hollywood divorce, played out via Twitter and Instagram, has been a graphic recent example of one party sharing deeply private family issues with millions of followers, instantly, at the press of a button, and without any of the pre-publication steps, however inadequate, which tabloids are required to follow.

Some clients are willing to go beyond what is publicly or legally available, often with disastrous consequences.

13 years ago, Imerman v Imerman re-defined what the existing privacy and disclosure rules, developed many years earlier when the risk was warring exes opening each other's post, going through filing cabinets, or breaking open a locked office or desk drawer, meant in the modern digital world. In the years since Imerman, family law practitioners have seen a steady rise in satellite litigation about privacy, "hacking" and the (mis)use of confidential information. This can range from clients who log into their ex's emails or online banking post-separation, right up to the use of highly sophisticated spyware, as well as everything in between.



This activity, when it is discovered, usually transforms what might have been a relatively straightforward case into something much more acrimonious, protracted, and expensive. If nothing else, trust will be lost between the parties and costs incurred on solicitors negotiating undertakings, the return of any wrongly accessed information, and details of exactly what has been accessed and when.

For some, it will prompt separate litigation in the Chancery Division, and the instruction of specialist privacy counsel. This litigation will then run in parallel to the family proceedings, resulting in spiralling costs and delay. The wish to gain an advantage, or know what the other person is planning in order to protect yourself, can be exactly what torpedoes any hope of a cost-effective, speedy, and amicable resolution.

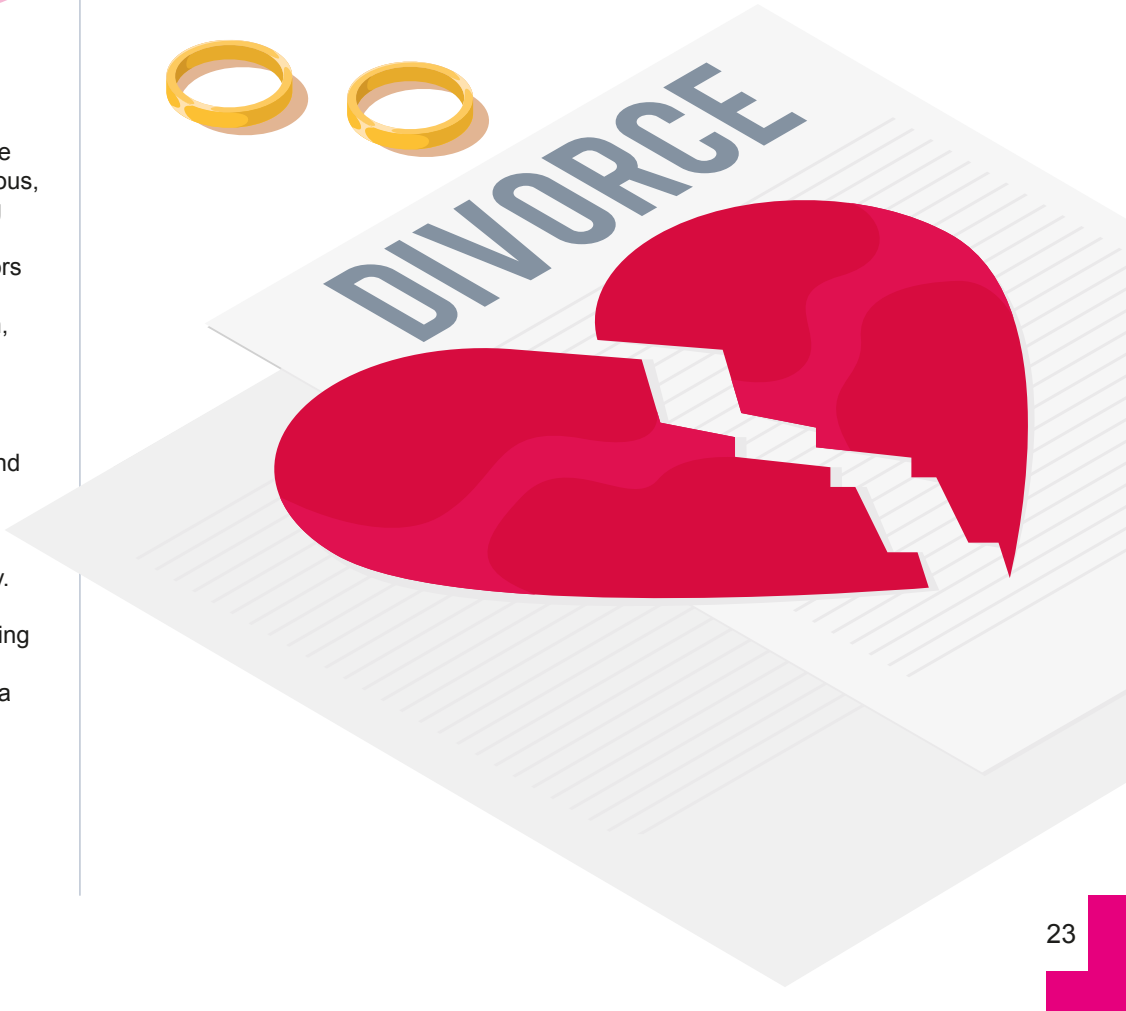
Digital do's and don'ts for divorce:

DO

- Change the passwords on your email accounts and online banking (and disable any autocomplete functions);
- Know where all the family devices are and how they are synced. Do text messages sent to your mobile phone come up on the family iPad? Can documents saved to the cloud be accessed from another laptop?
- If you have a genuine concern your information is not secure, consider instructing an expert to sweep your home and examine your devices;
- Know your social media privacy settings (i.e. for Facebook / Instagram / Twitter). Even if you are set to private, go through your friends list and consider who they in turn are friends with and how information might spread beyond your immediate circle. Consider restricting some or all posts so only close friends can see them, and removing historic content;
- Talk to your friends and agree ground rules about posting and tagging photos of you on their accounts, especially if they are public or have friends in common with your ex;

DON'T

- Post court documents online or refer to what is going on in court proceedings (especially those relating to children). This may be contempt of court, which carries the potential for a prison sentence, and will almost certainly backfire and damage your case;
- Be tempted to snoop. Even if you still know the password to your ex's email account, or have an old device that is automatically logged in, resist the urge to log in and see what your ex is saying to their friends and family (or, even worse, their lawyers). It will be found out and may well have very serious consequences.



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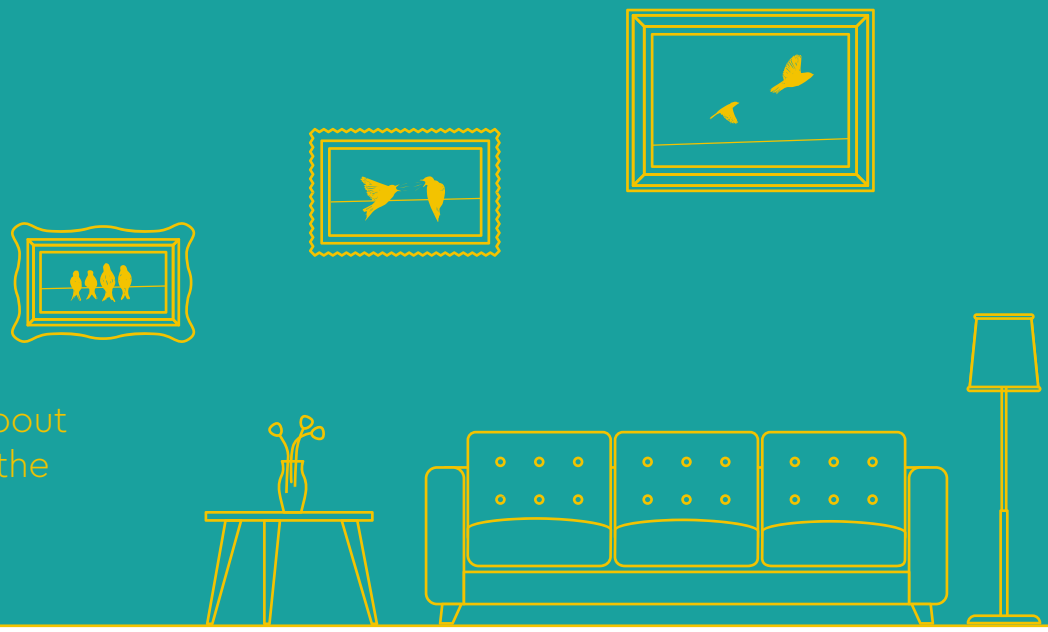

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60-SECONDS WITH:

CONNIE ATKINSON PARTNER KINGSLEY NAPLEY

Q What do you like most about your job?

A Every day is different. One day I may be reviewing company accounts and liaising with experts and the next day I'm in court securing a parental order to ensure legal parentage for intended parents.

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

A A mechanic! I have always wanted to be able to fix my own car.

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

A One of the strangest moments was when a client, at the end of an intense hearing, threw a tub of bright blue fairy dust all over her ex-husband and swore very loudly at him in court.

Q What is one of your greatest work-related achievements?

A Making Partner. I started as a trainee at Kingsley Napley in 2008 and have been here ever since.

Q If you could give one piece of advice to aspiring lawyers, what would it be?

A Get as much work experience as you can. Everyone has fantastic academic achievements and life experiences and it is hard to stand out. Think about niche areas you are interested in which may stand you apart.

Q What do you see as the most significant trend in your practice in a year's time?

A Volatility in the markets and the impact of this on valuations obtained within court proceedings and on overall financial settlements.

Q What personality trait do you most attribute to your success?

A Everyone tells me that I am very calm in stressful situations.

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

A The notorious Ruth Bader Ginsburg.

Q What is something you think everyone should do at least once in their lives?

A Take a sabbatical. We have a sabbatical policy at KN and I'm sure I'm due another one soon…

Q You've been granted a one-way ticket to another country of your choice. Where are you going?

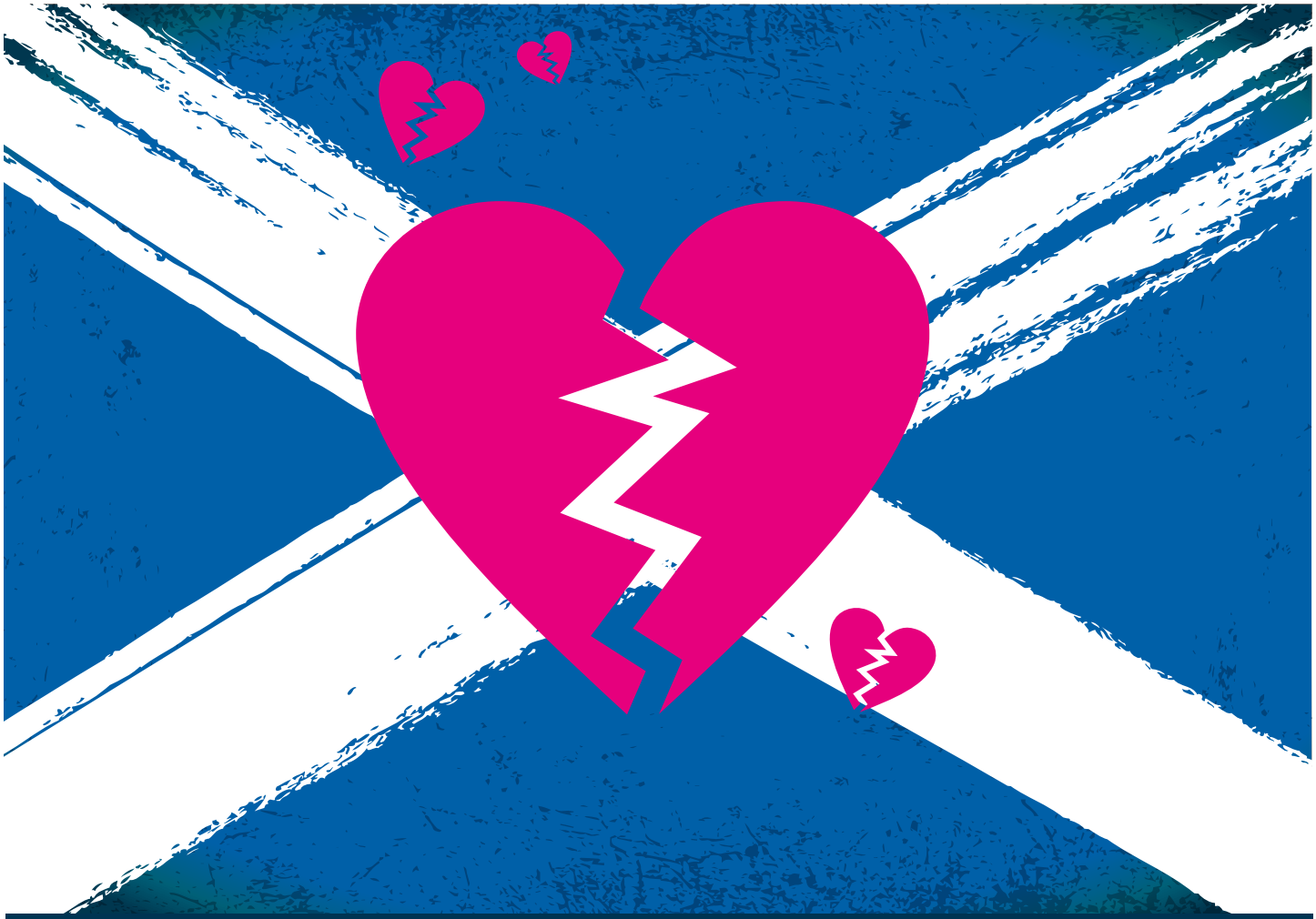
A Italy – I love pasta and pizza.

Q What is a book you think everyone should read and why?

A Abi Morgan's "This is Not A Pity Memoir". I met Abi when I worked as the legal advisor on the BBC series "The Split". [It's a beautifully written account of the difficulties she and her family have faced in recent years.]

Q If you had to sing karaoke right now, which song would you pick?

A I would have to mime. I am absolutely terrible at singing.



CRYPTO CURRENCY ON DIVORCE – SCOTLAND

Authored by: Susie Mountain - Brodies

There is a famous legal bookshop in Edinburgh called Avizandum. If one could conjure up an image of the type of place you might expect a traditional lawyer to inhabit, this would be it. Set in the Old Town with its winding cobbled streets and the soft murmur of pedestrians moving past, it is the perfect place in which to immerse oneself in law (despite my family's contention that it sounds like something out of Harry Potter).

However, family lawyers are required to maintain a far broader range of skills than wandering dreamily between shelves of legal tomes. Our clients are often sophisticated and commercially minded. In the last decade, we have become au fait with a full range of new technology: recording a child handover with a doorbell; presenting legal productions on an iPad; conducting entire hearings via virtual means… if you don't know your Facebook from your Snapchat, or your Twitter from your TikTok, your clients will soon ensure you do.

This is a serious point: clients expect their solicitors to be up to date – and rightly so.

North of the Border, where I practise, I have often heard financial provision on divorce/dissolution cases being described as a three stage process. Firstly, matrimonial property is identified. It is then valued (that is stage two). Finally, we look at what might constitute a "fair" division. Please note: no needs-based approach here, although there is scope for considerable discretion during the third and final stage, and it is at this point that clients tend to disagree (with each other… and occasionally with their legal representatives). This approach necessitates being able to identify, locate and, crucially, to accurately value, the matrimonial assets.

In a digital age, gone are the days where clients would bring bin liners of papers into our office for us to photocopy within the hour before they were returned back from whence they came, with a little luck, before

the unsuspecting spouse returned home. Details of parties' assets are carried on tablets and phones, heavily password protected. We resort instead to scouring bank statements for clues, employing forensic accountants where necessary. We can readily deal with savings accounts, ISAs, shareholdings, partnership agreements, SIPPS, assets held in trust, liferent interests, bonds, hedge funds, QROPS.. you name it, we know about it.

However, just when you think you have it all covered… enter… the crypto currency.

Crypto currency has no central authority. Indeed, it has no tangible form. There are well over 20,000 types of it and it can be traded anonymously. An asset unlike any other, it remains an asset (ironically, just like any other) in terms of the law and as such needs to be identified, valued and taken into account in determining a fair sharing of the matrimonial property.

Stage one: identification

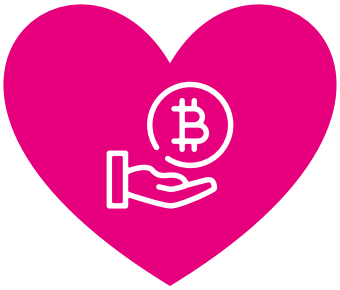
Those investing in crypto currency often like to talk about it, so in initial meetings with clients we ought now to be making enquiries with clients as to whether crypto has been mentioned by a spouse, in the same way that we might enquire about the existence of any other type of investment. If parties are unsure, bank statements may assist in demonstrating that funds have been transferred to fund the purchase of crypto currency. Although most information regarding crypto is stored digitally in a "wallet", although sometimes written down instead, specialists can be instructed to carry out further investigations, particularly if there is some suspicion as to the existence of such assets. Clues may also be found in annual tax returns. This is not straightforward and there has been much concern that, due to its anonymity, it can be difficult to link crypto currency to an individual. Courts can be invited to make orders forcing disclosure where necessary.

Stage two: valuation

The best way to identify the value of crypto currency held by a party at a given date is to view the transaction history. This reads something like a bank statement. In Scotland we would be valuing any crypto currency held by one party as at the date of separation, regardless of the passage of time since that date (a date which can be hotly contested as a result).

Where crypto currency forms a significant proportion of one party's investments, market fluctuations can be significant and ultimately make a huge difference to the value of the "pot". (nb. Scots Law does specifically state that any financial award made on divorce should be reasonable having regard to the parties' resources. There might therefore be scope for some judicial sympathy in the event of the value of crypto monumentally plummeting between the date of separation and the date at which any financial award is ultimately made.)

Expert evidence may require to be obtained and led on the value of crypto-currency, so be advised that this is not an area in which to dabble.



Stage three: fair sharing?

Often, one party may have no interest having crypto-currency transferred to them on divorce, although in theory this may be done. Off-setting can be used as an alternative option, and may well be more attractive in most cases given the inherent difficulties of enforcing any order relating to crypto-currency. The objective in the vast majority of cases is to achieve a clean break.

The future

It is within our gift to equip ourselves with the knowledge to navigate this evolving area of the law, and from a risk management perspective, appropriate that we do so, not only in relation to crypto-currency, but all of the other digital advances moving forward. Who knows what we will be faced with next… marriage in the metaverse, perhaps?

COMPUTER SAYS IT'S NOT MY FAULT

Authored by: Janette Johnston and Laura Jennings - A City Law Firm

Technology is always evolving and usually the law was slow to keep up, but during the pandemic the legal sector needed to adapt. Divorce proceedings moved online, simple no fault divorce was introduced, electronic bundles and remote hearings became prevalent.

It is a positive move that during the pandemic that HMCTS moved Divorce proceedings online and no-fault divorces have been initiated. This has helped many people to apply for their own divorces, facilitating quick applications and without expensive legal costs since it offers online step by step guides. However, it's not all plain sailing and if issues arise, without legal counsel, often things get protracted, acrimonious or are left unresolved. The problems that can and do happen maybe when the other party does not wish to divorce or end their Civil Partnership or they do agree, but do not wish to share the costs of the procedure or they can't agree the finances or child arrangements which are not dealt with by the divorce proceedings themselves.

When might you need advice rather than an online process?

Our experience has been that clients will often contact us when they have either pressed the wrong button or got lost on whether they can get divorced or when terms cannot be agreed, and the parties struggle to work together especially on the finances once the divorce has been applied for. Divorce is a big step and there are costs implications not just the divorce proceedings, which now seem cheap and easy, but you must consider whether you can afford to divorce. As ultimately you will also need to address (1) living arrangements (2) your children (3) sharing your assets and dividing the finances which might mean a second home or selling the main house or another mortgage, for example Administration errors.

Pressing the wrong button without knowing whether you can divorce or entering the wrong details can also be expensive. Addressing and amending

errors can be quite an administrative struggle within the digital system, as there is no human to explain what you did wrong. Some of the downfalls include having to amend your Divorce Petition on the basis you have used the wrong ground. For example, a common mistake is that when you agree to divorce on the grounds of 2 years separation, but it is then compulsory that you agree who is going to pay the costs as well. You would not be advised to argue that the party issuing the petition should pay and you would be at risk of having your Divorce Petition dismissed if no agreement is reached – that means either amending it (if you can) to another ground which is a further application fee or paying the fee entirely. So, what started off to be a straightforward exercise could turn out to be an expensive waste of time.

So, be careful and cautious.

No Fault Divorce, is the way to go, no?

It has been highly publicised in the press that the "blame game" has ended in most parts of the UK (save for Northern Ireland) the No Fault divorce ground is now up and running but there are still mistakes to be made and to remind people it DOES NOT address the house, finances, and children, these should not be left unaddressed.

There are lots of advertisements out there – "we do it cheaper and better", "we care more". Whatever you choose to be careful as there are wider implications – the Matrimonial/Civil Partnership finances from your marriage/civil partnership will need to be taken into account and should not be left open to later issues. Should you inherit money, add value to your house or meet another partner you don't want to be arguing

over money at that stage sometime on. That includes unliquidated assets such as pensions, this is not straight forward and you would be advised to consult a Family lawyer who can talk you through some of the issues that you may face as again these may pay out in 10 years, but you divorce now, a clean break is often advisable where possible.

Children are central to any separation.

The divorce will not address child arrangements, and this can often be difficult to agree or document, but if you can as a family agree this and avoid conflict and costs this is ideal. This should be discussed at the same time as finances and the divorce, ideally, so everything is documented and agreed together.

Going online has helped many that couldn't afford the legal costs of divorce and has made this far more accessible and swifter for those in agreement. However, advice and support maybe needed when it comes to anything not fully understood, the finances, house and pension and children so don't be fooled it is as easy as pushing a button.

A GUIDE TO DIGITAL SNOOPING ON DIVORCE

Authored by: Marie Kilgallen - Irwin Mitchell

Separation and divorce are never easy and a relationship breakdown will almost certainly leave couples digitally intertwined. One of the first crucial steps should be to identify digital connections and how and when they should be disabled, separated and divided both in terms of monetary and sentimental value. Taking practical action as early as possible protects the privacy of the parties and can set the tone for the divorce.

Email

Setting up a new email account for the purpose of legal communications is recommended at the outset of a separation. Legal communications are privileged and steps should be taken to minimise the risk that a third party can access previous email addresses.

Passwords

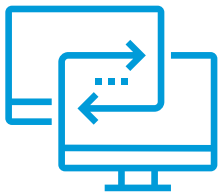
There is always a temptation for a snooping ex-partner to access online accounts whether that is via email, social media, bank accounts or other mobile phone apps.

The number of passwords to be changed are often more than expected – the advent of technology has seen us live our lives through devices and there are often unknown digital connections.

The passwords for any existing email addresses should be changed as well as mobile phone pin numbers, banking app passwords, shopping apps, TV and internet subscriptions and social media sites. Any features that keep a client signed in or allow them to 'remember my password' should be disabled.

The Wi-Fi password should also be changed to prevent any third party access to the network. Access to the network can result in access to everything contained on the network.

A client should consider using a password generator in case an ex-partner can guess the replacement passwords.



Sharing devices

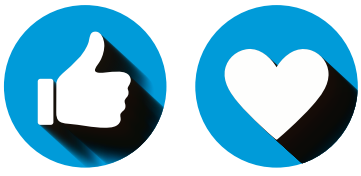
Families often subscribe to a family sharing app or have an iCloud account and share calendars and appointments. If these are not removed or disabled then they can still be accessed and used as a means to gather information – a meeting notification with a lawyer, for example, may pop up on an ex-partner's mobile telephone. Ideally, new

accounts should be set up. However, remember that any important data or photographs should be saved before an account is closed or disabled.

Services such as 'find my phone' are often enabled when parties are together but can be used as a tracking device after separation and should be removed. They should be removed from all devices.

Care should be taken to change access to smart devices such as the Ring doorbell, Hive heating systems, smart lighting systems which can all be controlled remotely.

The same advice applies to laptops or family computers - parties should make sure they have removed personal files they may wish to access or documents they want to keep as they may not be able to gain access to the hard drive in the future. A point to note, however, is that a party is only able to retain files that relate to them personally or those in joint names and not documents or files in the sole name of the ex-partner.



Social Media

Social media plays such an important part of our day to day lives but can have a negative impact on parties engaged in divorce proceedings. Consideration should be given to the online personality already demonstrated by the client, the impact that may have moving forward and whether any changes should be made.

As tempting as it is clients should be told to avoid posting derogatory comments about an ex-partner on social media – they rarely help and create a risk of breaching privacy laws. Check social media settings and 'lockdown' any accounts if there are concerns they will be used as a means of harassment and consider blocking ex-partner and/or family members.

Consider the impact of social media postings – it is damaging for a party to plead they have a lack of income but post photographs of their third holiday in as many months. A party is often advised to consider the benefits of being heavily present on social media – it can sometimes be beneficial to take a break.

Social media often involves sharing of family information and photographs – consider an agreement at an early stage as to what can and cannot be posted on social media where children are involved.

Financial and Digital Assets

Bank accounts, credit cards, Paypal and other financial apps are now all online and couples often have access to each other's accounts. Changing passwords should offer protection but be sure to check all accounts including those that are dormant. Request any additional debit or credit cards are handed over or destroyed – if they are not consider cancelling them so they cannot be used.

From a sentimental perspective the largest digital asset are often family photographs which are often stored on mobile devices or laptops. Save photographs to a separate device or create a new iCloud storage device for them to be stored securely. An agreement to share the photographs should be made at an early stage

Digital assets also exist in the form of cryptocurrency. It is helpful to prepare a list of digital assets at the outset as they can be very difficult to trace and monitor. Cryptocurrency is virtual and anonymous – if a party suspects there are undisclosed crypto-assets a digital forensic expert can be instructed.

Children

It is important that children are protected as far as possible from the impact of separation.

Limiting social media use can help minimise exposure particularly in the case of older children who will have their own devices and may see online posts.

Children will often have devices that both parents can access to monitor their online use and care needs to be taken to ensure that that access is not used as a form of monitoring or harassment.

From a positive perspective there are useful apps which can help parents successfully co-parent and agree child care arrangements. A number of families agree to maintain a shared calendar, album, access to school information recognising that whilst the couple may no longer be connected they have to stay connected as parents

Conclusion

Divorcing in a digital age requires a digital approach – whilst digital connections make it easier for us to remain connected to all aspects of our lives, care has to be taken upon separation and divorce to make sure unwanted connections do not continue and parties are able to move forward 'digitally free' from one another.

CRYPTOCURRENCY:

THE LATEST HEADACHE FOR LAWYERS

Authored by: Laura Buchan - Westgate Chambers

The world of cryptocurrency came about following the introduction of Bitcoin in 2008. In light of the extreme rise of the value Bitcoin (and the thousands of other cryptocurrency options) these investments have become increasingly relevant to family lawyers and we have had to learn to deal with them amongst the various assets to be taken into account.

In January 2022, Law Society guidance (in collaboration with Tech London Advocates) said that '…there are (with only slight exaggeration) almost as many definitions of a cryptocurrency as there are cryptocurrencies'.
The type of cryptoassets most frequently encountered in family law proceedings are notional payment tokens such as Bitcoin. Cryptoassets, which are themselves capable of subcategorisation to include cryptocurrencies, form part of a broader group of digital assets, including, for example, digital files, digital records and domain names. This article will focus on cryptocurrency in respect of individuals, not businesses.

Cryptocurrencies are extremely volatile and may be subject to wild fluctuations in value within a short timeframe and these are frequently described as 'bull' (increase) and 'bear' (decrease) runs. So if that is the case, how does the court approach these assets when relationships break down?

Cryptocurrencies have been determined as 'property' in England and Wales (Bitcoin, AA v Persons Unknown [2019] EWHC - a large sum of Bitcoin paid in relation to a malware ransom attack was held to be property which the court could make orders to protect and recover) as they meet the four criteria set out in the classic definition of property in National Provincial Bank v Ainsworth [1965] 2 All ER 472 as being:

- definable
- identifiable by third parties
- capable in their nature of assumption by third parties, and
- having some degree of permanence

The consequence of this definition is that an individual asserting a proprietary interest in cryptocurrencies can protect their rights by injunctions over others claiming rights and seek to recover.

In some cases, there can be significant cryptocurrency and the next question that follows is; what are the tax implications if sold?

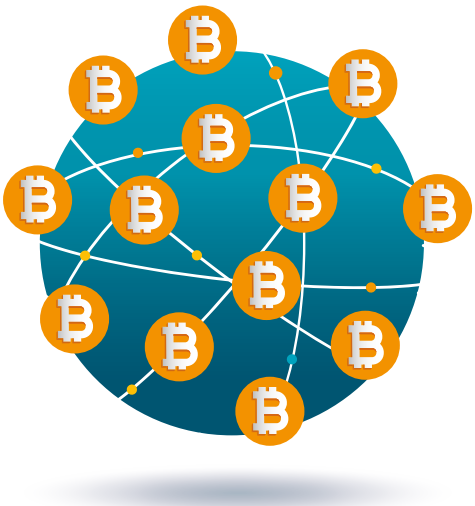
HMRC has published the approach to cryptoassets in a manual, which recasts HMRC's previous guidance on their website. In summary, the vast majority of disposals by individuals of cryptocurrencies are subject to capital

gains tax (CGT) as they are not being exempt as currency, rather than as part of income tax.

There are a few exceptions to this general rule, such as where a person is involved in mining, but otherwise it is only in exceptional circumstances that the above would not apply.

Digital currency is becoming more prevalent in the day to day in current society. Some employers are paying their employees with cryptocurrency and in these circumstances, both income tax and National Insurance contributions will be applied.

It should be noted when considering pensions in proceedings, that cryptoassets cannot be used to make tax-relievable contributions to a registered pension scheme, as they are not considered to be currency or money.



Until relatively recently, the family courts have failed to address the large volume of cases where one, or both parties have cryptocurrency. The fact that cryptocurrencies are regarded as 'property' means they may be the subject of, other orders including a property adjustment order. (s24 of the Matrimonial Causes Act 1973). Due regard must be had to the taxation consequences of any such order, as set out above.

The expectation within financial remedy proceedings is complete transparency. The principle was set out in NG v SG (Appeal: Non-Disclosure) [2011] EWHC 3270 (Fam):

"The law of financial remedies following divorce has many commandments but the greatest of these is the absolute bounden duty imposed on the parties to give, not merely to each other, but, first and foremost to the court, full frank and clear disclosure of their present and likely future financial resources."

Cryptocurrencies should be disclosed in Form E in the same way as any other asset. However, the very essence of cryptocurrency is that they afford a level of privacy to investors which makes it difficult to trace a link to a particular individual beyond the initial investment, for example a transfer from a bank account or debit/credit card. Cryptocurrencies are held through digital wallets which are accessed using public and private keys. Without the keys, it is nearly impossible to identify what is owned.

If the holder has used a digital exchange, the exchange provides the owner with a platform in their name with records which should enable information to be obtained as to the holding, a record of trades and the value of the current holding. The wallet and transaction information should be sought in questionnaires to ultimately use a block explorer to confirm the contents.

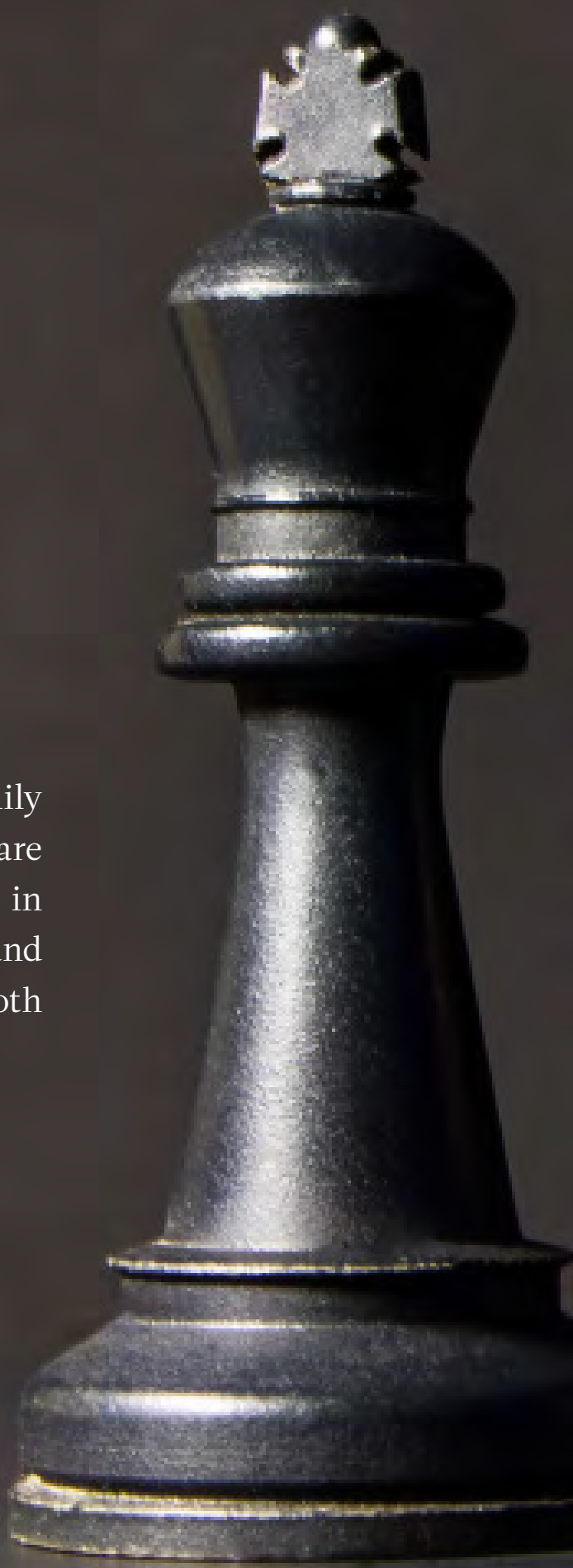
A deliberate failure to disclose a cryptocurrency, or to co-operate in the disclosure and valuation process in relation to it, may potentially be considered conduct justifying a departure from equality under s25 (2) (g) Matrimonial Causes Act 1973.

Where there is possibly a significant amount of cryptocurrency digital forensic expert evidence may, subject to the court's permission, be necessary from a cryptocurrency expert to reveal the user, cash value and their transaction history.

The courts are constantly having to evolve with the introduction of the digital world and it is safe to say, there is still a long way to go! Whilst the first steps have been taken, given the volatility of these assets the court and lawyers must appreciate and consider the possible life-changing valuations this type of asset can produce!

1KBW

"They are as strong on money as they are on children and they've got strength and depth in both silks and juniors." - Chambers & Partners, 2020



1KBW has a pre-eminent reputation in family law, both nationally and internationally. We are consistently ranked by the legal directories in the top tiers of leading sets for family law, and are unique in our strength in depth for both finance and children cases.

One Choice
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60-SECONDS WITH:

ALEXANDER CHANDLER KC
BARRISTER
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Q What do you like most about your job?

A That it doesn't feel like a job. It's unpredictable. You have intense periods of work followed by lulls when a case unexpectedly settles. It's endlessly challenging: as the saying goes, you're only as good as your last case.

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

A Writer / House husband.

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

A Representing the wife of a Russian oligarch in the Court of Appeal against Lord Pannick QC, who was arguing that the High Court had broken international sanctions by ordering his client to pay my client maintenance. Happily, the Court of Appeal didn't agree.

Q What is one of your greatest work-related achievements?

A Turning around a case which had gone very badly for the preceding two years: advising my client to draw a line under his missteps by lodging a schedule of admissions, so we could go into battle on the nineteen remaining allegations about allegedly hidden assets. At trial the court found in our favour on all nineteen issues.

Q If you could give one piece of advice to aspiring lawyers, what would it be?

A There's one way to win a case when you're very junior, which is to be fully prepared and on top of your brief. Also, never be arrogant or behave in a condescending way to anyone, whether judge, solicitor, witness, opponent, court staff or clerk. Legal careers are long and a reputation for being sharp or arrogant, once picked up, is hard to lose.

Q What do you see as the most significant trend in your practice in a year's time?

A I'm afraid that in a year's time the courts are likely to be dealing with the fallout from an economic recession: inflation, rising interest rates and a stagnant property market, which alter clients' priorities when it comes to financial remedy claims.

Q What personality trait do you most attribute to your success?

A Grit. What you don't see when you're starting out is that everyone has their setbacks. It's a hard and at times lonely profession. You need to be resilient and have the ability to brush yourself off and keep going. Aside from that, a willingness to be open to new ideas – I've enjoyed going paperless and building up a social media profile (Twitter: @familybrief, Blog: www.familybrief.org).

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

A Can I have two? Firstly, Philip Marshall QC, who was an inspirational pupil supervisor and one of the best cross-examiners I've seen in court. He was instrumental in my move back to 1KBW, was for many years my head of chambers with Deborah Eaton QC, and is now a friend in chambers. Second, James Turner QC who I've always admired as a polymath: who would appear in the House of Lords one day on a family case, and in the Crown Court on a murder on another. Sadly, we are all too siloed these days in our specialisms.

Q What is something you think everyone should do at least once in their lives?

A Everyone should try distance running, even if it's a 5km parkrun. You'll learn something about yourself and may find you have hidden strengths. And if you don't, at least you've had some exercise in the fresh air.

Q You've been granted a one-way ticket to another country of your choice. Where are you going?

A Japan, with a stopover in Sweden if that's allowed.

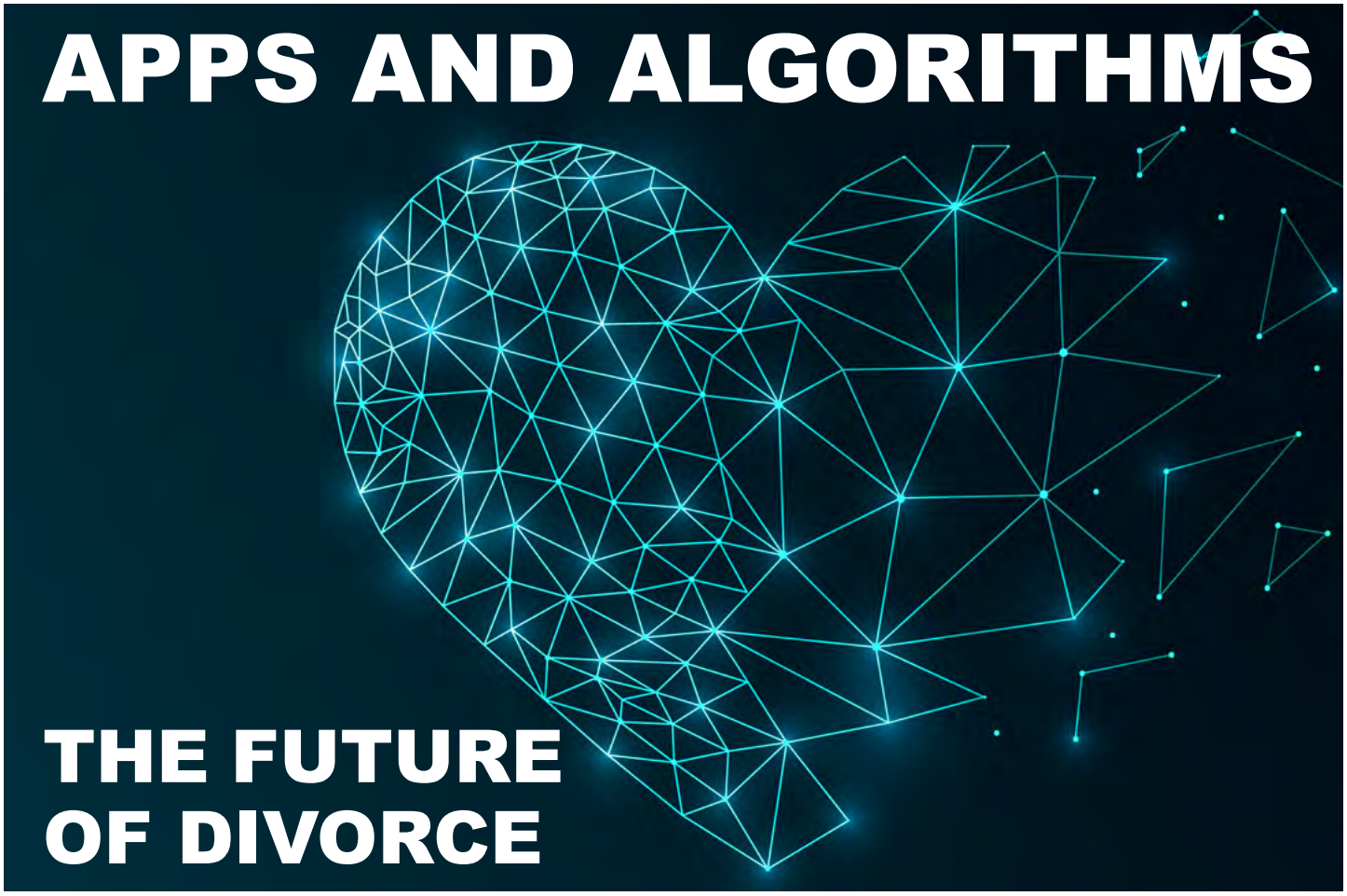
Q What is a book you think everyone should read and why?

A Shuggie Bain by Douglas Stuart which I thought was magnificent. Stuart breathes life into the characters and makes them fully three-dimensional, sympathetic, and compelling in spite of the hopelessness of the story. Essential reading for anyone interested in family law, or who wants to understand how hard life can be for some of our clients.

Q If you had to sing karaoke right now, which song would you pick?

A I'm a big fan of karaoke duets: "No one in your life is with you constantly/ No one is completely on your own…"

APPS AND ALGORITHMS



THE FUTURE OF DIVORCE

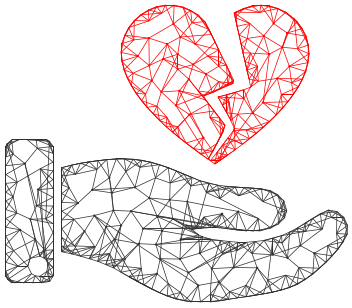
Authored by: Edward Floyd and Alex Woolley - Farrer & Co

At their most basic, financial remedy proceedings simply require an assessment of what the assets are (quantification), followed by an analysis how they should be divided (distribution). Much is written and discussed in family law circles about the second part of that process, whether in the context of alternative dispute resolution or in the analysis of reported decisions.

Much less thought is given, however, to the first stage (quantification) and, in particular, how to make use of developed and emerging legal technology to speed up and make this more efficient and accurate. There is a feeling that commercial lawyers and civil litigators are some way ahead of family lawyers in their adoption of such tools.

Family law risks being left behind to the detriment of their clients and the lawyers who must grapple with new asset classes and increasingly more complex structures.

The purpose of this article, therefore, is to highlight (without endorsement) a small number of the tools that are currently available and consider what tools might be developed in future that could aid family lawyers in taking a more efficient and rigorous approach to the quantification stage of financial remedy cases.

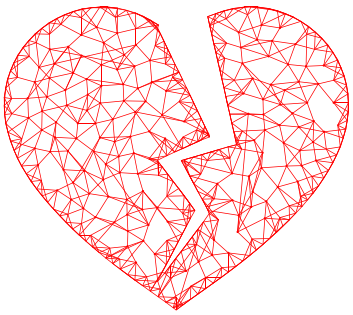


MLTPL

It is not uncommon to be quoted fees of tens or even hundreds of thousands of pounds and time estimates of many months for a company valuation report. Parties are, for obvious reasons, rarely willing to commission their own reports (rather than on a Single Joint Expert basis) and so, often, no meaningful negotiations or discussions can take place until the SJE report has been received, by which time many months have elapsed.

MLTPL (https://www.mltpl.tech/) is an AI based tool which cuts through this and asserts it can provide an accurate company valuation within minutes and for a fraction of the cost of a traditional valuation.

Whilst it may be said that this is no replacement for the traditional SJE who is able to meet the company owners, ask questions of both parties, and leave no metaphorical stone unturned, the potential upside in parties having a good understanding of the company valuation from a much earlier stage in the proceedings, and start negotiating, are huge. Later down the line it could also offer a valuable “cross-check” to parties when considering a jointly commissioned report, either adding another data point confirming an estimate or informing questions of why the expert valuer’s view differs.

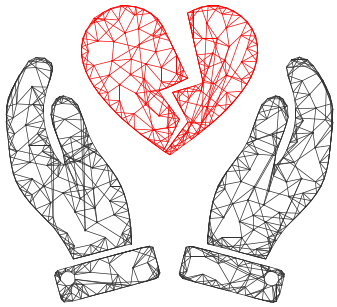


Capitalise

Most family lawyers still have the latest At a Glance sitting on their shelf and will turn to the Duxbury Tables contained therein when advising on and negotiating potential capitalised maintenance awards.

Whilst a good starting point, it often appears to be the case that these tables are also taken as the final word on the matter, despite the 'blunt' way in which they work. The columns are split into 12-month segments, there is no ability to build in 'step downs' or increases in maintenance or to take into account anticipated receipts of capital in the future when, for example, the recipient is to downsize.

Capitalise offers the ability to do all of this and as a result can produce much more bespoke calculations suited to the particular circumstances of the parties. It is easy to produce multiple different variations, so a range of options can be considered and presented to a client when advising on potential terms of a settlement.



Open Banking

It is not uncommon for the bank statements exhibited to a Form E to run to over 300 pages across multiple different accounts. Even in the post-pandemic age of e-bundles, these are usually provided as scanned hard copies and anyone seeking to analyse such statements must simply scroll through page after page and hope to spot patterns and discrepancies. If a more 'analytical' approach is required, it is not unheard of for junior solicitors or barristers to be paid to, in effect, copy-type the transactions from these statements into Excel so that they can be more easily analysed.

Suggestions are often made that it would be helpful to be able to 'scan in' the hard-copy or PDF statements using character recognition software so that the transactions can then be analysed. In the age of Open Banking, this simply isn't necessary. It is akin to asking for an extra-long extension lead on a land-line telephone instead of making use of a mobile phone.

Open Banking provides an opportunity to quickly (in as little as 5 mouse-clicks) and securely access in one place the raw transaction data from all of a client's bank accounts across all their banks. That data can then be exported to Excel and, once there, the transactions can be easily categorised and analysed so as to produce a budget that the lawyer can be confident actually reflects the reality of the client's historic spending. Most clients know, and lawyers can assist with, the cost of their mortgage, utility bills and travel. They may not realise, until it is presented to them in a simple format, quite how much they spend each year on their morning coffee or on Amazon. Open Banking allows this sort of recurrent spending to be easily identified and dealt with.

There is little reason why an opposing party should not also be obliged to use Open Banking to provide their own transaction data in Excel format to the other party – it is exactly the same data they are obliged to provide with their Form E, just in a different format. Once received, it becomes much easier and quicker to spot patterns and discrepancies and avoid the painstaking bank account analysis required to analyse another party's budget.

Whilst in the future, tools could be developed to automate the collation of this information for Form E purposes[1], in the meantime, similar (albeit less efficient) results can be achieved by asking the client (or potentially the other side) to download the transactions from each of their accounts online banking in CSV format before compiling them into one master Excel spreadsheet.

As can be seen above, family law focused technology is still at the stage of 'making existing processes better'.

There is, in future, clear scope for tools to be developed to assist parties in resolving aspects of many financial remedy claims without the need of so much involvement of lawyers or the courts. One only needs to look to other common law jurisdictions where they employ algorithmic processes for areas where English law still relies on discretion, such as spousal maintenance, e.g. California.

In the meantime, family lawyers should be looking to make use of already existing tools that will improve the accuracy of the quantification and analysis stage of their advice. It is no longer enough to rely on blunt tools in text-books and 'instinct'.

1 The co-author of this article developed software called Formily, but this is no longer available

DIGITAL MANIPULATION OF DOCUMENTS

Authored by: Henry Hood - Hunters Law

HHJ Hess's recent judgment in X v Y [2022] EWFC 95 came with a post-script warning of the danger of fraudulent manipulation of digital documents - one of the darker sides of the digital age.

The issue has been highlighted over the past couple of years by practitioners including Helen Brander and Byron James. This intervention from HHJ Hess, the Lead Judge of the London FRC, should raise further awareness of what is undoubtedly a cause for concern.

In X v Y, the forged document in question was not produced during the proceedings, but several years earlier, and sought to inflate rather than deflate the husband's financial position - yet still had a most deleterious effect on the wife.

The parties, neither of whom was originally from the UK, had, following their 2002 marriage, been living in the husband's home country where he had a successful career as a tech entrepreneur, enabling the parties and their two children to enjoy a good lifestyle. However, in 2015 the husband tricked his wife into moving to England using forged documents.

The husband had been running, and largely owned, a successful business, and wanted to move to England. The wife was less keen, but the husband persuaded her that the move would increase his financial success. He told her that a company wished to buy his business for £80,000,000 and produced a draft sale contract at that price, as well as a bank statement purporting to show that the buyer had made a down-payment of £8,000,000.

On the basis of those documents, the wife agreed to move. Whilst they initially continued to live a good lifestyle, in 2018 the husband ceased paying the rent on the family home and the children's school fees. By the time of the hearing the wife was dependent on benefits and the children (now 15 and 18) had serious medical problems, worsened by stress, and were no longer in any education.

The husband maintained in the proceedings that the 2014 documents were genuine but that the deal had unravelled. However, the wife had obtained from the bank a genuine bank statement for the account from the period, which did not show the transaction. Although the husband suggested that because he had had to return the funds they ceased to appear on the bank statement, HHJ Hess found, unsurprisingly, that the husband had "dishonestly and falsely manufactured the presented 2014 bank statements to mislead the wife into moving to London". Whilst there was

no direct evidence that the draft sale contract was faked, HHJ Hess regarded it with suspicion.

As HHJ Hess noted, this issue was "by no means the only unsatisfactory evidence of the husband's evidence'; the husband was 'both evasive and obstructive". In a further indication of his casual approach to the manipulation of digital media, the husband claimed that recent social media images of him enjoying expensive activities, at a time when he purported to be insolvent, had been deliberately photo-shopped, as he understood "everybody did this sort of thing on the internet".

The judge concluded that the husband was dishonest and unreliable and that everything he said should be treated with a great deal of caution; ultimately the wife's capital claims were adjourned on the basis that a one-off division of capital at this point would be unjust.

In a post-script to his judgment HHJ Hess explained his decision to publish it on his "wish to draw wider attention to the ability of dishonest parties to manufacture bank statements (and other documents) which, for all practical purposes, look genuine, but which are in reality not in that category".

The case follows a growing number of media reports of digital manipulation of documents in financial remedy cases, with the BBC reporting in June 2022 that a man who had dishonestly edited emails from estate agents to lower the value of the family home was jailed for seven-and-a-half months; That man discovered after the wife requested a copy of the email from the estate agent. In an earlier case in 2021 a man who had disclosed doctored bank statements in a variation application to show a lower income was jailed for nine months. He had been caught out after counsel (Ben Fearnley of 29 Bedford Row) spotted an entry on the statements for "31 September", and then checked the metadata on the emailed explanation and new statements from the bank.

For many of us older lags, it is hard to recognise the current reality that for those with the appropriate expertise, a pdf bank statement or payslip is now as easily manipulated as an Excel spreadsheet or Word document. Whilst pdfs were once considered reliable, it is clear that we must now be ready to be significantly less trusting of them.

It has been proposed that we have guidance under which the starting point is not to trust the content of any document which has not been verified by the original third party or through the document's underlying metadata. The difficulty, of course, is the additional time involved, and thus greater expense to our clients, in undertaking such checks. The challenge for the profession is to work out the appropriate balance in circumstances where the prevalence of fraudulent manipulation of digital documents is unknown. One hopes it is a small minority of cases, but we must recognise that in cases where it does occur, the consequences for the other party could be severe.

Whilst we may see judicial guidance on the verification of documents in due course, for now we must all ensure that we are on high alert for the possibility of digital manipulation. A history of fraudulent behaviour by a party may be a red flag large enough to justify seeking that all documents supporting their disclosure be sent directly to solicitors from the third-party providers. Other flags should include our client's insistence that something is not right with the documents, inconsistencies (even seemingly minor ones) in a document's appearance, discrepancies between documents, and a general approach of evasiveness or obstructiveness on the part of the other party.

HHJ Hess's call must be a warning to us all.

WITH INFLATION OVER 10%...

CAN WE STILL RELY ON DUXBURY?

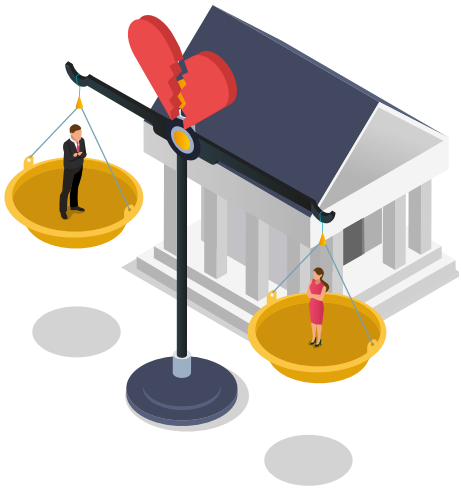
Authored by: Jonathan Drysch - Killik & Co

Divorces across England and Wales are generally speaking on the decline, with the ONS indicating a 4.5% decline from 2019 to 2020 and a 28% fall between 2005 and 2015. However, the number of couples divorcing later in life - aged 65 onwards - is going against this trend. Within the same ten-year period, the number of men divorcing aged over 65 increased by 23% and the number of women over the same age increased by 38%.

Unlike younger divorcing couples who may share dependent children, divorcing couples later in life may prefer to seek a completely clean break, rather than being reliant on income from their former spouse. Achieving this will usually involve a lump sum transfer from existing pensions, investments, or the sale of property.

But how does a solicitor calculate the lump sum required? How can they be confident that it will be sustainable for the rest of their client's life? Historically, solicitors have relied upon Duxbury Tables, which give an indication of the capital sum required, which should hopefully sustain a fixed level of income until their client's demise. However, these tables rely heavily on fixed assumptions, being:

- Total investment return of 6.75% p.a. after associated costs.
- Inflation of 3% p.a.
- Constant level of drawdown/income in real terms.
- The recipient will survive for the ONS expected average age of their contemporaries (e.g. for a 65-year-old female, this is currently aged 87).
- The recipient will become entitled to a full UK State Pension, currently requiring 35 completed years of National Insurance Contributions.
- All income is assumed to be taxable at normal rates for savings – they do not take into account different rates of tax applied to other types of income/ accounts e.g. pensions with potential Lifetime Allowance tax liabilities, property with capital gains, or other tax-wrappers such as Offshore Bonds.



With the Consumer Prices Index (CPI) rising by 10.1% in the 12 months to July 2022, and MSCI World (the average stock market indicator) being -22% year to date, it is easy to see how relying purely on Duxbury Tables with such inflexible assumptions may lead to troubles in years ahead.

Interestingly, Duxbury Tables date back to the divorce case of Duxbury vs Duxbury (1992), where Mrs Duxbury's accountant compiled a set of tables to calculate her lump sum requirement – we can only hope that she hasn't run out of money!

So, what is the best alternative for a divorce solicitor wishing to calculate an appropriate lump sum for their client? The answer is, they engage with a financial planner with the ability of utilising cash-flow modelling software.

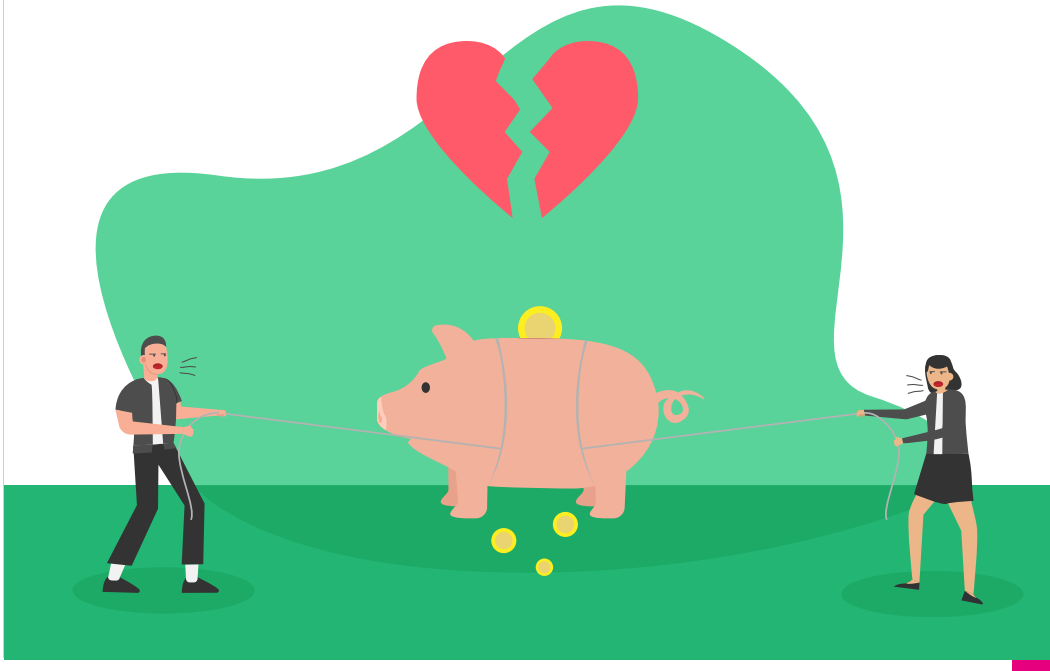
They will be able to accurately incorporate factors including more realistic assumed investment returns given their client's attitude to investment risk, different levels of expenditure at various stages of life e.g. long term care costs, existing investment/pensions/property income and the different rates of tax applied to different assets which may be offered in a settlement – some being more preferable than others. The latter is often overlooked, for example, withdrawing funds from a General Investment Account to that applied on withdrawals from a pension portfolio. Cash flow modelling will be able to answer questions from prospective clients, such as:

1. Will I be able to maintain my current lifestyle/level of expenditure?
2. What happens if inflation keeps rising?
3. What happens if we have another recession?
4. Will I be able to financially assist my children in getting onto the property ladder?
5. Will I be able to afford long term care?
6. How much will I be able to leave my children?
7. Will I run out of money?

As an example, we ran a scenario through our cash flow modelling software to stress test a lump sum offer determined by Duxbury Tables. Based on the most up to date 2021/22 tables, a female aged 65 requiring £50,000 per annum would require a lump sum of £622,000. As this lady has no prior investment experience and is completely dependent on this portfolio to survive, a fairly cautious investment strategy would be needed and therefore an investment return of 5% per annum after fees would be more realistic. As per Duxbury tables we assumed she would be entitled to the full State Pension and for the purpose of consistency, we also assumed inflation of 3% per annum, despite this not being realistic at least for the next few years.

The results – in the scenario that Mrs Example receives a £622,000 cash lump sum which is invested within a General Investment Account, she would completely run out of money aged 83. Alternatively, assuming that she receives a £622,000 pension sharing order/transfer from her former spouse's pension fund, she would run out of money aged 80. On the other hand, Duxbury tables would have deemed this lump sum sufficient regardless how it was received, assuming the ONS expected average age of death for a 65-year-old female, being 87. In addition, cash flow modelling illustrates how not taking into account differences in tax regimes for different types of fund can result in a less favourable outcome.

In summary, although Duxbury Tables are favoured by the Courts for their simplicity and still can be useful as a starting point for negotiations, financial advice should be sought to undertake cash flow modelling for ensuring fair outcomes - especially given how investment factors and assumptions have significantly changed since the introduction of Duxbury Tables in the early 90s. Like all things, engage with professionals as early as possible in the process. Hopefully, there will not be another divorce further down the line, so there is only once chance to get things right!



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DIVORCE IN THE DIGITAL AGE:

CRYPTOCURRENCY

Authored by: Chris Salter - Burges Salmon

By now we have all heard of cryptocurrency – Bitcoin, Litecoin, Ethereum – and whilst we might not know how it works or the computer science behind the block chain or the decentralised nature of digital currency, we know what it is (more or less).

First appearing in 2009, it is now commonplace in the news; be it the rise, the fall, Elon Musk's influence or simply a new cryptocurrency to market.

This article looks at how cryptocurrency, first left in the hands of computer scientists, is now so much a part of the news and the effect it is having on the "Divorce in the Digital Age".

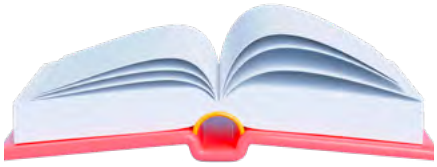
WHAT IS CRYPTOCURRENCY

A cryptocurrency is a digital currency traded through an online ledger, known as a blockchain. It does not physically exist and transactions take place via a system of encrypted online code. Cryptocurrency purchasers own encrypted digital wallets and transactions are effected by sharing keys (or code) which is attributed to each individual crypto-asset. Figures are hard to pin down due to the very nature of crypto, however one commentator has estimated that over the past two years $2.8trillion has been traded via various blockchains.

HOW IS CRYPTOCURRENCY HELD

Once an online wallet has been set up, the code can be traded online through a decentralised system via an exchange (such as Coinbase), this means that no one person or no government controls it. The code is a series of numbers and letters and the code in an individual's online wallet correlates to that which is held on the currencies' account ledger. Due to the complex web involved in owning and trading cryptocurrencies, the Family Courts are more frequently encountering issues surrounding the non-disclosure of these assets, as well as difficulties valuing and distributing them on divorce.

The trading platforms must conform to the laws of the host country, and therefore in many countries need to be compliant with anti-money laundering rules. If an individual opens a Coinbase account they will need to provide ID documents and the account must be linked to a traditional bank account. So although the blockchain is anonymous and outside of government controls, laws, regulations and taxes do still apply.



CRYPTO AND THE COURTS

Cryptocurrency is treated like any other asset in the Family Courts. As part of disclosure, details must be provided confirming units held and a current value, much the same as the more traditional assets, such as properties, bank accounts and shares. The court has the power to make the same type of orders against crypto assets – from freezing injunctions to prevent sale or dissipation or property adjustment orders to transfer assets between parties.

Whilst most are familiar with the further information might be requested when dealing with more traditional assets – property particulars, mortgage redemption figures, pension statements for example, the questions that should be asked regarding crypto assets are less well known – so what should be asked for?

Below is a short list of things to consider:

- **Ask for the public key** – the blockchain is public after all. If you have the public key you can search the blockchain for transactions (or there are now companies out there who will do it for you).
- **Full account history** – do not just settle for a screenshot of the trading platform. Like bank accounts, you should see the detail too. The full trading history is available.
- **Evidence of purchases**. If a party is using a widely recognised online exchange, their traditional bank accounts will show payments credited. Ask for these to be identified.

Unlike traditional assets however, the volatility of crypto is well reported and that causes difficulties when trying to assign a value. For example, if the parties completed Form E on 1 January 2022 and the wife owned 1 Bitcoin, the value noted in her Form E would have been $47,738.59. If the Final Hearing was then held on 1 September 2022, the value would have fallen significantly to $20,045. Of course this would be picked up during the course of updating disclosure, however the volatility is stark. The question therefore is, how are the courts dealing with this as part of a financial settlement?

A couple of options include:

- Division upon crystallisation: An order for sale could mean the crypto will be crystallised, turned into cash and divided - a fair solution where the market dictates the price. Caution should be taken with this approach as the proceeds of sale will be paid to the crypto owner and could be whisked away before being divided, so security may need to be put in place.
- Off-setting: The date for valuing the crypto will need to be agreed and any tax taken into account. As with all assets, the true net position needs to be understood if off-setting is to work effectively.

Importantly, tax must not be forgotten. Selling crypto is a chargeable event for Capital Gains Tax in England and Wales and therefore appropriate tax advice may be required.

Cryptocurrencies are likely to become more commonplace in the future and despite appearing mysterious at first, it is important that practitioners become familiar and comfortable dealing with them.

DOMESTIC ABUSE ACT 2021:

PROHIBITION OF CROSS-EXAMINATION IN FAMILY PROCEEDINGS

Authored by: Poonam Bhari - 3PB Chambers

Section 65 of the Domestic Abuse Act 2021 (DA Act) came into force on 21 July 2022. This enactment under Part 4B of the Matrimonial and Family Proceedings Act 1984 (the MFPA) prevents a perpetrator / alleged perpetrator of domestic abuse from cross-examining in person a party or witness in family proceedings. In addition, the DA Act prevents a victim / alleged victim from cross-examining in person the perpetrator / alleged perpetrator.

The prohibition extends to civil proceedings, however the focus of this article will be on family proceedings.

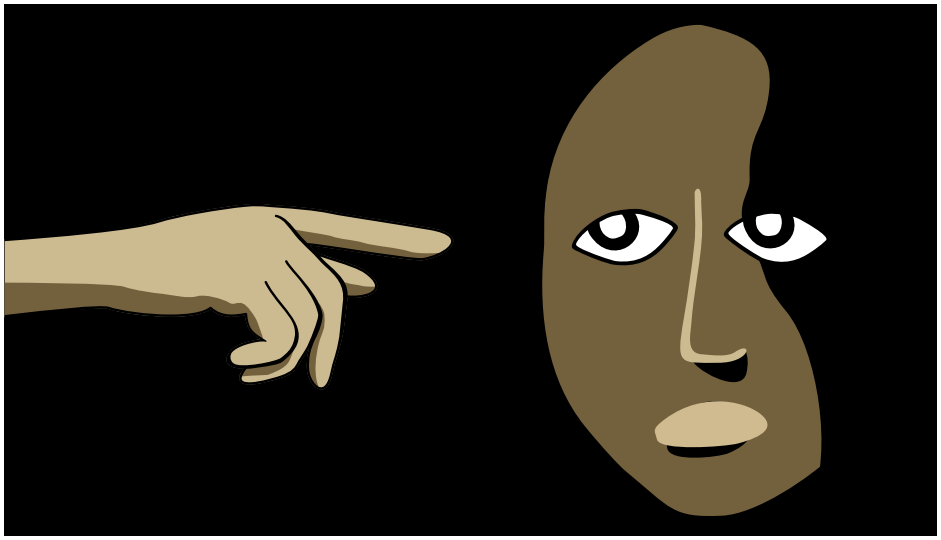
In a situation where both parties are litigants in person the court may need to appoint a qualified legal representative to conduct the cross-examination.

It has been possible to appoint qualified legal representatives / court appointed advocates in criminal courts for many years. Sections 34 and 40 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA) provide for the protection of witnesses from cross-examination in person by the defendant / accused. Section 38 YJCEA provides for defense representation where an accused is prevented from cross-examining a witness in person by virtue of sections 34, 35 or 36. In relation to sexual offences complainants are automatically protected by a bar on cross-examination by the defendant in person. In addition child witnesses and complainants in relation to certain other offences are also protected by an automatic bar. The criminal courts have had the discretionary power to prohibit cross-examination in person for over 20 years.

This is a new approach in family proceedings. There have previously been judicial concerns expressed about an unrepresented perpetrator / alleged perpetrator cross-examining a witness / party in person.

In Re A (a minor) (fact finding; unrepresented party) [2017] EWHC 1195 (Fam) Hayden J said it was 'a stain on the reputation of our Family Justice system that a Judge can still not prevent a victim being cross examined by an alleged perpetrator'.

In PS v BP [2018] EWHC [2018] EWHC 1987 (Fam) Hayden J overturned a fact-finding decision in a case where the judge in the lower court tried to cross-examine the mother on behalf of the father accused of rape because the process of the hearing was 'so fundamentally flawed that it inevitably corroded the reasoning of the Judgment' [20].



A qualified legal representative may be appointed by the court under section 31(W) (6) of the MFPA, which addresses 'Alternatives to cross-examination in person'.

The qualified legal representative will not be 'representing' the person on whose behalf they have been appointed by the court. The Judge is no longer expected to carry out the cross-examination on behalf of an unrepresented perpetrator / alleged perpetrator.

Sections 31W(5) and (6) MFPA set out the following:

'31W(5) The court must consider whether it is necessary in the interests of justice for the witness to be cross- examined by a qualified legal representative appointed by the court to represent the interests of the party.

31W (6) If the court decides that it is, the court must appoint a qualified legal representative (chosen by the court) to cross-examine the witness in the interests of the party.'

The definition of a 'qualified legal representative' means a person for the purposes of the Legal Services Act 2007, who is authorised in relation to having a right of audience in family proceedings [31W(8)(b)]. Guidance has been issued for legal representatives appointed under 31W(6).

A qualified legal representative will only be appointed in cases where there is no other satisfactory means of drawing out the relevant evidence to enable the court to make a determination in cases where the prohibited party has not instructed their own legal representative.

This is a unique and restricted role, whereby the qualified legal representative is not responsible to the party on whose behalf the cross-examination is to be conducted [31W(7) MFPA]. They are accountable to the court and do not take instructions from a party in the traditional sense but may meet with the party to obtain relevant information that will form the basis of the cross-examination.

Qualified legal representatives are expected to have undertaken suitable advocacy, vulnerable witness and domestic abuse training and have the skills and experience to enable vulnerable witnesses to give their best and most accurate evidence.

The court decides when a qualified legal representative is to be discharged from the case, but given the role is limited to cross-examination purposes.

The role will involve reviewing a bundle and putting the 'essence' of a party's case to witnesses on those parts of the evidence that require determination.

Practice Direction PD 3AB set out the process to be followed in a situation where the prohibition of cross-examination in person applies.

Paragraph 2 of PD 3AB notes that the court must consider what directions to give, if the court is informed or it appears that the circumstances provided for in sections 31R, 31S and 31T of MFPA apply.

The court's duty to give consideration to making directions regarding cross-examination begins as soon as possible at the start of proceedings and continues until the conclusion of proceedings [PD 3AB 3.2].

The court will select and appoint the qualified legal representative, who will conduct the cross-examination. The qualified legal representative will be paid through public funds. The fee schedule for qualified legal representatives is available on the internet. The Ministry of Justice opened registration for its Domestic Abuse Advocacy Scheme in July 2022. A completed application form, together will a completed excel sheet specifying which courts an application is able to attend can be sent to QLRCross-Exam@justice.gov.uk

60-SECONDS WITH:

LAURA BUCHAN
BARRISTER
WESTGATE CHAMBERS

Q What do you like most about your job?

A I like that every day is different. I thrive on the unexpected challenges that arise 'at the door of court' that keep my on my toes. It really is one of the most satisfying jobs, to be able to leave court and know you made a difference.

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

A My dream would have been to continue playing rugby to the elite standard, but the more realistic answer is probably a police officer… following in my parent's footsteps!

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

A During a remote hearing in the pandemic, opposing counsel's camera suddenly went blank during his submissions. At this time, we had become accustomed with technical difficulties and myself and the Judge assumed this was as a result of internet difficulties. Upon his return, it transpired armed police had knocked at the wrong door! Certainly unexpected!

Q What is one of your greatest work-related achievements?

A Early in my career I represented a Mother in care proceedings in an 8 day final hearing on the 2 week lead up to Christmas. All the odds were stacked against her with both professionals opposing childs return to her. After 8 intense days of oral evidence, the Judge determined that her son would be returned to her in readiness for Christmas. It was so emotional and overwhelming, but reminded me of the impact we as counsel can have.

Q If you could give one piece of advice to aspiring lawyers, what would it be?

A Imposter syndrome is very real and very normal. When you first start, it will feel overwhelming and as if you just cannot keep up. I wish I had been told that - nearly every person of my call at the time, felt the same. Perseverance and use your peers to vent to!

Q What do you see as the most significant trend in your practice in a year's time?

A The rise in private FDRs and the impact on financial remedy proceedings as a whole

Q What personality trait do you most attribute to your success?

A Affability. Whilst it is important to know the law and process, being able to speak to your clients in laymans terms and work WITH your instructing solicitor, I feel has been imperative in my progression at the Bar.

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

A Baroness Hale

Q What is something you think everyone should do at least once in their lives?

A Visit Niagara Falls!

Q You've been granted a one-way ticket to another country of your choice. Where are you going?

A Canada. We recently travelled around a few of the provinces– you can be in one province sipping wine at a vineyard in the sunshine and then travel across up to the mountains and see the snow. Best of both worlds!

Q What is a book you think everyone should read and why?

A Secret Barrister – great insight into the profession with a touch of humour.

Q If you had to sing karaoke right now, which song would you pick?

A Defying gravity – I love a musical classic!

ThoughtLeaders HNW Divorce

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