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# HNW Divorce MAGAZINE

ISSUE 8

## A VALENTINE'S SPECIAL

# INTRODUCTION

*"Nowadays love is a matter of chance, matrimony a matter of money, and divorce a matter of course."*

**Helen Rowland**

As we wave goodbye to another Valentine's Day, we thought it only appropriate to bring you a 2022 Valentine's Special. In this edition, our contributors discuss a variety of issues facing HNW's, including love vs lockdown, the financial consequences of marriage, and knowing the assets and weapons in your armory when considering divorce.

Thank you to all of our authors, members and community partners for their consistent support. 2022 will be a busy year for the HNW Divorce community, and we look forward to connecting with you all along the way.

Love,

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## ABOUT HNW Divorce

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

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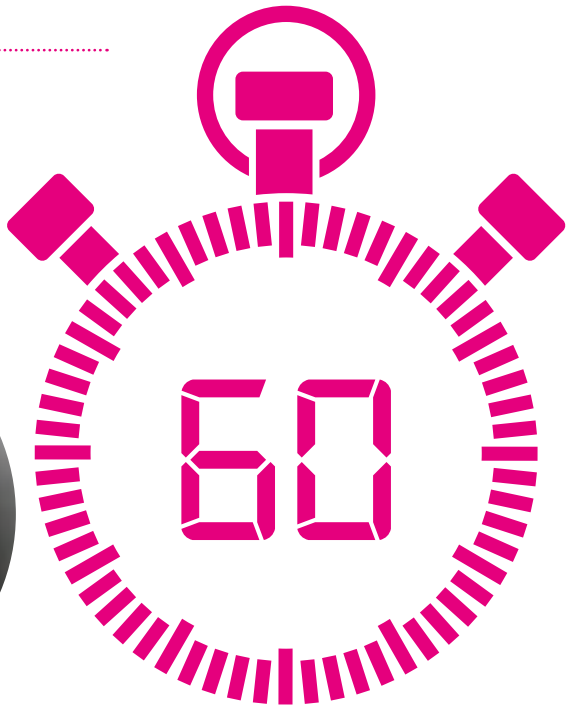
# 60-SECONDS WITH:

## JONATHAN HILLIARD QC, BARRISTER, WILBERFORCE CHAMBERS




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

**A** A mathematician or (in my dreams) a novelist or basketball player.

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

**A** Appearing before the Court of Justice of the European Union in Luxembourg. A very different advocacy experience, and absolutely fascinating, from how the Court looks and works to the number of judges.

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

**A** The easiest aspect is when you click with the team that you're working with, and everything runs along like a well-oiled engine. The hardest is the hours, particularly when you are dealing with a number of cases flaring up at the same time.

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

**A** Spend as much time as possible when you start out seeking to learn from those more senior. Particularly now that so many people are working from home, I think that it is critical that Chambers and firms ensure that those coming through the ranks continue to get proper exposure to more senior practitioners. I learnt a great deal from those more senior than me in Chambers, who were always very generous with their time.

**Q What do you think will be the most significant trend in your practice over the next 12 months?**

**A** I hope that we will all be seeing much more of each other in person! I have enjoyed working from home, but you lose something when you do it exclusively.

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

**A** How to write a good novel, how to play the piano to a better standard, how to paint, how to act, I could go on for ever…

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

**A** Conversation. Particularly with people with different perspectives to your own.

**Q If you could meet anyone, living or dead, who would you meet?**

**A** John Coltrane, Einstein, Miles Davis, Iris Murdoch, William Faulkner, Siri Hustvedt, Plato, Billy Holliday.

**Q What songs are included on the soundtrack to your life?**

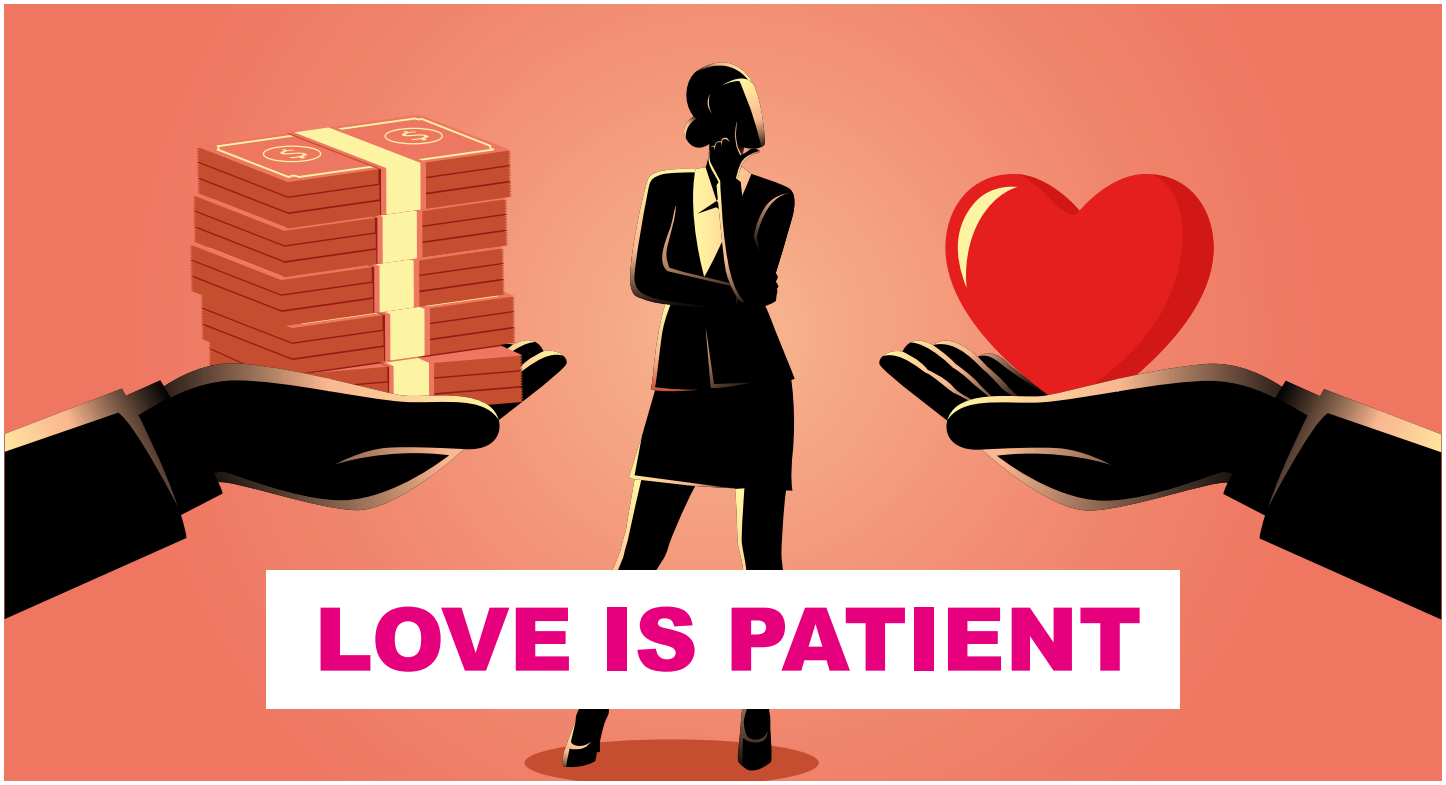
**A** Try a little tenderness; I think it's going to rain today; You're all that I need to get by; The dark end of the street; Like someone in love. That would be volume 1.

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

**A** Swimming in the sea, lying in the sun reading a book, seeing the kids and family, dinner with friends, watching some sport, and something unexpected happening at some point along the way.

**Q Looking forward to 2022, what are you most looking forward to?**

**A** A renewed sense of optimism about the future.



# LOVE IS PATIENT

**Authored by: Matthew Booth - Payne Hicks Beach**

**Love is patient; love is kind; love is not envious or boastful or arrogant or rude. It does not insist on its own way; it is not irritable or resentful; it does not rejoice in wrongdoing, but rejoices in the truth. It bears all things, believes all things, hopes all things, endures all things.**

**1 Corinthians 13.4-7**

## But does it…?

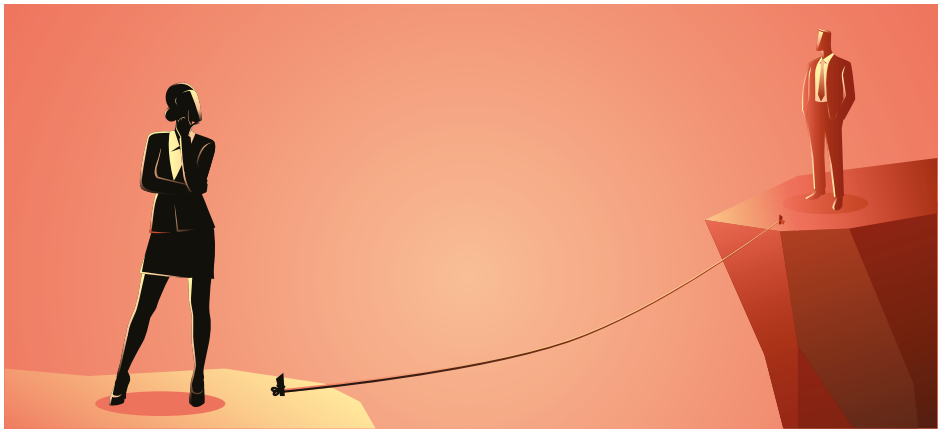
It comes as no surprise that Valentine's Day is a popular date on which proposals for marriage are made. Equally unsurprising is the wealth of advice online for those who may otherwise be struggling to know how, when or where to best 'pop the question'. In our highly curated world, you can even choose to have it filmed which, of course, does run the risk of it turning out to be a less of a rom-com than a black comedy if the proposal should be rejected.

So, at face value, it appears that our own pop culture would wish us, still, to believe in fairy-tale high romance. But, is the reality not rather more prosaic? Surely, the decision to marry is something which two adults should consider and talk about together over a period of time, during which they may each reflect (and take advice?) on the choice they are making and its long-term consequences?

For although the self-styled proposal planners and romance experts (who appear to be a spawn of the sprawling wedding industry) focus on the moment, should some thought not also be given to the long-term implications for these two people of entering into a legally binding agreement.

**For, it should be remembered that - as the law would have it - marriage is a partnership.**

And, as any reader who has been in a partnership will know, exiting a partnership can be a potentially controversial move, particularly if there is not a proper partnership agreement in place (by analogy a pre-nuptial agreement, if you will, although those documents are not for discussion today).



So let us look at two couples and in each case see whether accepting a Valentine's Day proposal would be a wise decision, if, instead of Cupid, a family lawyer has been invited to the party.

First, Geoff (aged 45) and Rebecca (aged 38) who have cohabited together for around 15 years.

Geoff is a self-made man with a large portfolio of investment properties worth in the region of £50 million (some, but not all, of which he has accumulated during the course of his relationship with Rebecca) and substantial pension funds. She is a nurse, but has not practiced for around 10 years. Geoff and Rebecca have three young boys aged 8, 6 and 1 and they lead a comfortable (albeit not ostentatious) life in a substantial property owned in George's sole name.

What should George have in mind when Rebecca proposes out of the blue on 14 February?

First, is the fact that once he and Rebecca are married, by reference to the "seamless" period of cohabitation preceding the marriage, the Family Court will aggregate the cohabitation with the length of the actual marriage. So, even if the marriage subsists only for, say, five years and there were then a divorce the Court would regard this as a long marriage of some 20 years. That factor alone, along with the three children and the family's standard of living will enable Rebecca to say that she benefits from a full sharing claim, and that all of the family's capital resources, including Geoff's pensions, should fall to be divided equally, however short the actual marriage and despite the fact that a large part of Geoff's wealth was made by him prior to their relationship, never mind the wedding day.

In short, Geoff must think twice before accepting or otherwise insist gently upon a pre-nuptial agreement if he wishes to seek to protect wealth generated by him prior to the marriage.

For her part, Rebecca should be aware that for so long as she and Geoff remain unmarried she has no claims of her own for financial provision, despite the length of their relationship and her having given up her own career to care full-time for the children of the family. Nor does she have any interest in the family home, no ability to share in Geoff's pensions and no claim for spousal maintenance. If they were to separate, the only financial claims Rebecca may bring against Geoff are for the benefit of the children, which can include provision of a property (until the youngest has completed his tertiary education after which ownership will revert to Geoff), maintenance for the children and payment of school fees. In other words, a stark difference in financial outcome were the relationship to come to an end.

Next, let us look at Katie and Rob (who have no children together).

They are both in their late twenties and solicitors with jobs in City firms. They have been renting together for a year or so but are in the process of buying a flat. The flat will be owned jointly but Katie has some modest family money and savings to enable her to make a greater contribution. This unequal ownership will be recorded by way of a declaration of trust. Otherwise, they are a typical young couple who both enjoy good incomes, but spend most of their money on lifestyle.

When Rob proposes to Katie on Valentine's Day she is delighted. But, having a scant knowledge of family law from her training, she realises that their flat will become so-called 'matrimonial property' and that the longer the marriage subsists the less relevant her original unequal contribution will become in the event of a divorce. For his part, Rob believes that so long as the marriage subsists for some little while then all that the two of them generate as a result of their partnership will likely to be divided equally on a divorce.

But, says Katie, hold on. Not if I have given up my career as a City solicitor to care full-time for our children. I may claim in, say, 20 years that but for that I would be managing partner by now and should be compensated for my relationship-driven career sacrifice and receive generous continuing spousal maintenance payments from you, Rob.

So, yes, love and marriage may be many things, but as Katie knows full well, in the heady world of English family law you may claim compensation for a life you chose not lead whilst yet receiving a fair share of the product of the life you did. Some might describe this as a veritable fairy-tale.

If they were not to marry, and remain childless, then on the breakdown of their relationship (whenever it was to occur) and a subsequent sale of the flat, Katie would as a matter of law be entitled to extract her greater share of the equity based on the declaration of trust. And, beyond this neither of them would have any financial claim against the other, and they would leave the relationship as they entered it, alone with whatever they each possess and their respective income streams.

**And, as may be seen from our two couples, all is certainly not fair in love and war when you are considering the fact specific and stark differences which exist (and continue to be the subject of much misapprehension) in the financial consequences of couples choosing to either cohabit or marry and, indeed, having children together.**

Who says romance is dead? Think carefully on 14 February before saying yes.

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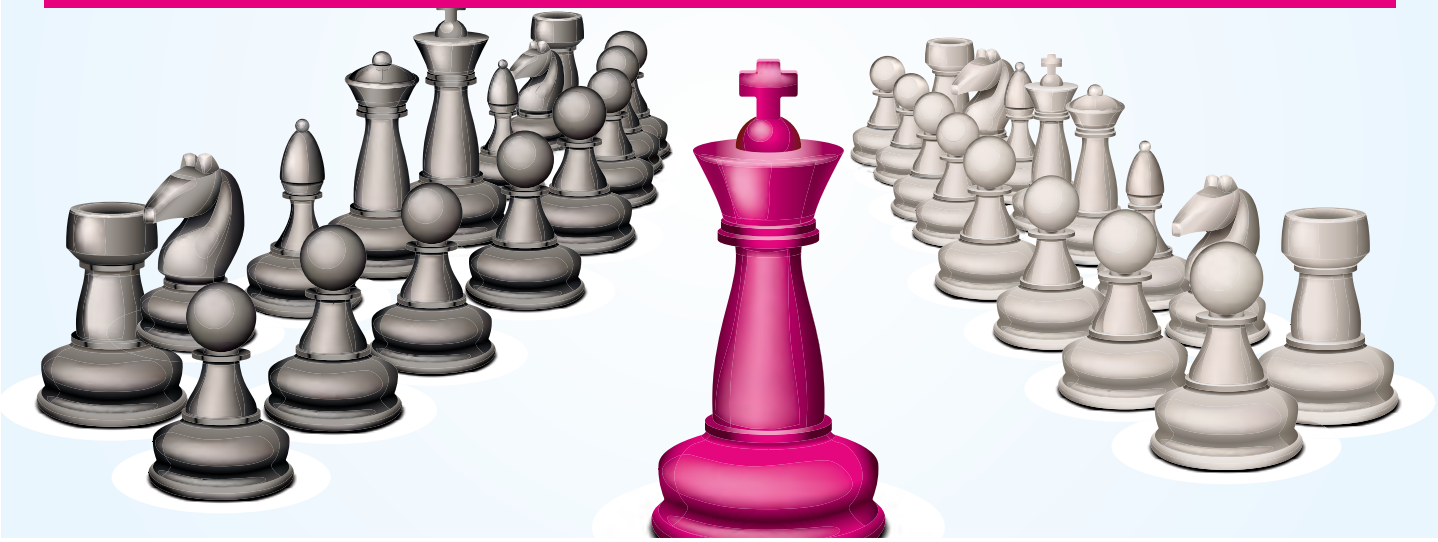
# KNOWING THE ASSETS, KNOWING YOUR ENEMY AND KNOWING THE WEAPONS IN YOUR ARMOURY

## POWERS OF SECTION 423 (INSOLVENCY ACT 1986)



**Authored by: Hannah Davie, Ami Sweeney and Dr. Jennifer White - Grant Thornton**

**"All happy families are alike, each unhappy family is unhappy in its own way".**

Sober opening words from Mrs Justice Knowles, who starts her judgment on the long-running and highly publicized case of Akhmedova & Akhmedov and others [2021] EWHC 545 (Fam), giving apologies to Tolstoy, but stating that the Akhmedov family is one of the unhappiest to have ever appeared in her courtroom. Indeed, though this is a family which has wealth of which most can only dream of, it is an incredibly sad tale of family woe in which a wronged wife seeks to recover divorce settlement monies which are owed to her from a husband who has gone to extraordinary lengths to put every penny of his wealth outside of her reach.

This is of course not the first time London has seen a tumultuous and somewhat torrid divorce play out in their courtrooms. Just recently we saw the ruler of Dubai, Sheikh Mohammed bin Rashid al- Maktoum, being ordered to pay his ex-wife and their two children over £554 million in what is believed to be one of the largest divorce settlements in British history.

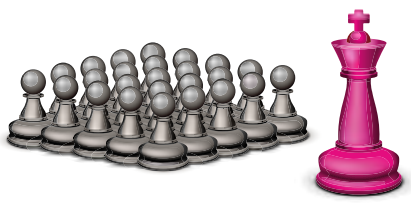
High-profile cases such as these have solidified London as being the divorce capital of the world. This is largely due to the court's unique approach to asset division and financial claims seeking to provide parties with enough to meet their financial needs.

In Akmedov, the story began in 2013 when the wife petitioned the English court for financial relief. Then, on 15 December 2016, the husband was ordered to pay the wife one of the largest financial settlement made in UK matrimonial proceedings history, at 41.5% of the husbands identified assets. This order also set aside various transactions, which were found to have been an attempt by the husband to avoid paying the full weight of the wife's claim and he was consequently ordered to pay the wife a lump sum of £350m and transfer various property.

What followed was a complicated chase that took place on a global stage. Enforcement proceedings concerning various different jurisdictions are never easy, particularly when you throw in a family saga which puts Tolstoy's storytelling to shame. However, as this case illuminates, there is elegance in the English system in arriving at fair decisions in divorce cases, and a real willingness of Judges to achieve justice in financial settlement. This case begs the questions; what can be done when you're divorcing someone who has an astonishing evasion strategy and a small army of lawyers? And even if they are not billionaire tycoons, how can you be sure you know where all the assets are and how do you recover them if they have been put beyond the reach through layers of complex and offshore structures?

**Ultimately, it's a case of working out what the assets are, who (or which company) they are owned by, and where in the world they are.**

If there is the additional issue of intentionally putting assets out of reach, then it is crucial to understand what weapons are available in the armoury that can be deployed to ensure those assets can be recovered once the financial order is obtained.



In Akhmedov, section 423 of the Insolvency Act 1986 was a powerful weapon deployed by the wife and demonstrates how this wide-ranging and powerful section can be used by victims of transactions that are conducted to put assets beyond their reach, or to prejudice the interests of a claimant with an actual or potential claim.

**An important point to note about section 423 is that whilst it is found in the Insolvency Act 1986, there is no requirement for the debtor to be insolvent and claims can be brought by any victim outside an insolvency.**

The trigger for section 423 is a transaction at an undervalue as defined in the Insolvency Act 1986. In short it is where an individual has entered into a transaction with any person at an undervalue.

**There are four requirements that must be satisfied before relief can be granted, there must be a: (1) a debtor; (2) who enters into a transaction; (3) at an undervalue; (4) with the purpose of putting assets beyond the reach of prejudicing the interest of a person with an actual of potential claim.**

Each of these were present in the case of Akhmedov and therefore the court made the order to restore the position to what it would have been if the relevant transactions had not been entered into.

This recent decision in Akhmedov also showcases the broad powers of section 423. For example, in response to the issuing of the claim by the wife the defendants submitted there was a gateway condition requiring that a creditor had to prove that the debtor had insufficient assets following the transactions to meet the liability owed in order for it to obtain relief. This submission was rejected on the basis of the wording of the statute. Moreover, the court recognised that the condition would effectively prejudice creditors' interests in circumstances where the debtor clearly possessed the prohibited purpose of putting assets beyond the reach of or prejudicing its creditors.

The Akmedov case also considers extraterritoriality in respect of the wife's claim against the trustees of several trusts in Liechtenstein. The court considered the question of extraterritorial effect here and concluded that it was satisfied that there was sufficient connection with England on the basis that the transfers had been effected to evade the English claim brought by the wife who was resident in England. The Court held that the transaction was made with the prohibited purpose and that the wife was still a victim of the transactions within section 423 and she had been prejudiced, because the transactions had made a party who owed her liabilities an empty shell.

Further benefits of this section come from the wide reading of the words "transaction" and "victim" and also the fact there is no requirement of dishonesty or fraudulent intent.

However, although broad, caution should be given to any section 423 claim as there are very specific requirements and clear criteria in relation to the transactions so proper grounds for pleading should be carefully considered from the outset.

**Anyone approaching divorce where there are considerable assets and even the faintest likelihood of an Akhmedovian saga looming on the horizon needs to understand from the onset the significance of knowing the assets, knowing the enemy and knowing the weapons available in the armory, such as section 423 of the Insolvency Act 1986.**

The early engagement and involvement of asset recovery specialists is vital in any such cases. They can assist with the identification of assets and advise on the best recovery strategy for any dissipated assets, which will equip the legal teams with the information and support they require in order develop the best possible strategy to secure assets whilst the litigation is ongoing and should it be necessary how to ensure the global enforcement is successful.

Forewarned is forearmed, and a specialist team focused on ensuring assets are recovered once a financial order is made is key.

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# NO FAULT DIVORCE – SETTING A NEW TONE AFTER 50 YEARS OF BLAME?

**Authored by: Rachel Freeman - Kingsley Napley**

## Introduction

**The Divorce, Dissolution and Separation Act 2020 (the DDSA) comes into force on 6 April 2022, bringing about no fault divorce, dissolution and separation. It is the biggest change to the divorce process in almost 50 years, aiming to reduce the opportunity for conflict in relationship breakdown.**

For many people divorce will still be a painful process, but this change means that neither spouse is required, or indeed able, to start the process by making allegations against the other.

**The new rules also enable a married couple to make a joint application for divorce, which many will welcome. According to the Family Procedure Rule Committee, this is to "allow parties to reflect in the legal process the fact that an often difficult decision to divorce or seek a dissolution has nevertheless been a mutual one."**

A person who wants to be divorced no longer needs to be separated for two or more years or satisfy the court that certain behaviour has taken place. The parties still have to have been married for at least 12 months and the sole ground for divorce is still that the marriage has broken down irretrievably, but no other facts or details are to be provided. With their application for a divorce, the applicant has to file a statement that the marriage has broken down irretrievably; this is the only evidence required. Accordingly the respondent cannot contest the applicant's decision to divorce, and there are no facts to dispute, which will avoid acrimonious litigation such as Owens v Owens [2018] UKSC 41 where one party is forced to remain in an unhappy marriage and is prevented from applying to court for financial remedy.

The respondent can challenge the divorce for other reasons, including lack of jurisdiction, invalidity of the marriage, fraud and procedural non-compliance.

It was anticipated that the DDSA would come into force in autumn 2021 but it was delayed until 6 April 2022 so that amendments could be made to the Family Procedure Rules, court forms and the online divorce portal. The new court forms are expected to be released soon. The provisions for divorce and dissolution are broadly equivalent; for conciseness I will refer to marriage and divorce but this article encompasses civil partnerships and dissolutions as well.

**The new rules update the terminology: petitioner becomes applicant, petition becomes application, decree nisi becomes conditional order, decree absolute becomes final order, defended case becomes disputed case and undefended case becomes standard case, sending the message that an undefended case is the norm. Somewhat surprisingly, the statement of reconciliation is still required.**

## Service

Time for service - Under the existing law there is no time limit for service of divorce petitions and this uncertainty has given rise to litigation particularly in international cases where there is more than one potential jurisdiction

(Thum v Thum [2018] EWCA Civ 624). New FPR 6.6A provides that the applicant must take "steps to serve" the application before midnight on the day 28 days after the date of issue of the application. However, there seems to be no requirement that the service is actually effected within that period. There is a new minimum period of 20 weeks between the start of proceedings and the conditional order, start of proceedings being the time that the application is issued, not when it is served on the respondent, expressly to avoid the respondent's ability to delay the 20 week period by evading service. Concerns were raised during the consultation that if an applicant were to delay service (by accident or design), this could mean a respondent having very little notice of the divorce before the 20 week period elapsed. However, it was felt that the "greater mischief" would be respondents being able to delay or frustrate service.

New FPR 6.41A and 6.41B specify that the applicant also has 28 days to take steps to serve the application outside the jurisdiction.

Email service - New FPR 6.7A allows the applicant to serve the application by email provided that they also serve, by post or personal service, a notice confirming the service by email. The notice is an essential component of service and so if the applicant does not have an address for service of this notice, they will have to make an application for alternative service in the usual way.

Court to serve application – The default position will now be that the court will effect service unless the applicant asks to do so. New FPR 6.8 provides that where the court is serving the application, it will do so by email and send the notice required by new FPR 6.7A, unless the applicant does not provide the email address for service or request service not by email, in which case the court will serve it by post or some other service that provides next business day delivery.

## Responding to an application

Acknowledgement of service – New FPR 7.7 provides that the acknowledgement of service must be filed 14 days after the date of service of the divorce application.

Answer – A respondent wishing to dispute a petition will need to file an answer 21 days after the date of the acknowledgement of service (FPR 7.7(5)). The limited grounds for disputing a case are set out in FPR 7.1(3). The FPR Committee declined to make specific provision in relation to foreign disputes and stay applications on the basis that these can be dealt with separately under the Domicile and Matrimonial Proceedings Act 1973.

## Joint applications

Where an application is made jointly, the court sends both parties a notice of proceedings (new FPR 7.5(3)). This is to avoid anyone making a fraudulent joint application. Both spouses are required to acknowledge receipt of that notice but the court does not need to be satisfied that those acknowledgements have been filed before granting a joint conditional order.

A joint application can be converted into a sole application, the policy intention behind this being to allow each party to progress the divorce on their own if they want to and to prevent the other party blocking the divorce, which would in turn make the idea of a joint application less attractive. A sole application cannot be converted into a joint application. According to the Family Procedure Rule Committee minutes this was to avoid a sole applicant being able to use the possibility of converting the application into a joint application as a negotiating tool between the parties. A joint application can be converted into a sole application at the time of applying for a conditional order or a final order.

## Protection for respondents

Interestingly, section 10 of the Matrimonial Causes Act 1973 has been amended by the DDSA 2020 so that the court can consider an application by the respondent for the court not to progress the case to final order unless it is satisfied as to the financial provision made. Under the existing law this protection is available only in separation cases.

## Summary

All in all, very positive news for divorcing couples, with the expectation that any wrinkles in the rules will be ironed out once they are in practice. Practitioners will still be alive to the fact that divorce is an emotional and often distressing process and clients might still wish to articulate and air their reasons for the relationship breakdown. Hopefully they will have the opportunity to do this in a constructive and containing forum such as counselling or mediation, now that waging war in the divorce petition is no longer an option.

# FOR RICHER FOR POORER

# CAYMAN ISLANDS NUPTIAL AGREEMENTS

**Authored by: Laura Hatfield - Bedell Cristin (Cayman Islands)**

## What is a nuptial agreement and why would I want one?

At its simplest, a nuptial agreement is a legal agreement made between two individuals before or after (or both) their marriage has taken place. The agreement usually sets out how the couple wish their assets to be divided between them if they later separate or divorce.

The nuptial agreement seeks to avoid the uncertainty as to what a court might award upon a divorce and protect the assets each party brings to the marriage from being given to the other party upon divorce.

**Where a party to the marriage has their own wealth or expectations of family wealth which are significantly more than the wealth of the other party a nuptial agreement is considered for these reasons.**

## Will a court respect my nuptial agreement in England?

As most people involved in family and trusts circles know, in 2010 the landscape for divorce changed radically due to the Radmacher (formerly Granatino) v Granatino [2010] UKSC 42 judgment handed down from the Supreme Court on 20 October 2010. The judgment clearly established that, contrary to the previous line of English cases that pre-nuptial agreements a.k.a. pre-marital agreements ("Pre-Nup") were against public policy, they were now to be given effect if freely entered into by both parties with a full appreciation of its implication unless, in the circumstances prevailing, it would not be fair to hold the parties to the agreement.

### In order for a Pre-Nup to be enforceable:

- **it must not seek to avoid responsibility for the financial needs of any children;**
- **each party must disclose to the other sufficient detail of their financial position – to include any pre-existing and/or inherited wealth – and answer any reasonable questions the other may have;**
- **there must be no suggestion of duress, fraud, undue influence, misrepresentation or mistake before entering into the Pre-Nup; and**
- **each party should have obtained independent legal advice before signing.**

It was also decided that the Privy Council in the case of MacLeod v MacLeod [2008] UKPC 64 had been wrong to draw a distinction between the legal status of pre-nuptial and post-nuptial agreements ("Post-Nup"). In that case it was held that no weight would be given to a Post-Nup because it was not by its express terms a formal agreement, it had not been fairly arrived at, it was on its face manifestly unfair to the husband, it contained an untruth and the husband had signed the agreement without competent advice. In the circumstances, the McLeod Post-Nup would not have survived the Radmacher Pre-Nup validity tests anyway and it is clear that the same validity tests apply to both types of agreement.

## Is the Cayman Islands different?

In the Cayman Islands ("Cayman") the court will generally start from a basis of seeking to place both parties to the marriage on an equal footing on the path to living independent lives after divorce. This means a 50:50 approach to asset division is the starting point and is usually the most appropriate award but there are a number of factors which can mean that the court considers a departure from that starting point to be justified.

The Cayman Islands case of DJ v BJ 2019 (2) CILR 511 on the status of a Pre-Nup reviewed Radmacher and subsequent English decisions based on that case and stated that:

**"… where there is a prenuptial agreement which is valid, in the sense that it is not negated by vitiating factors, a court should have regard to and give weight to the agreement except where it would be unfair to do so…"**

The decisions are all clear that a nuptial agreement is not strictly legally binding on the parties in that such an agreement will not override the court's ability to decide how finances and assets should be divided in the event of divorce taking account of the statutory factors and the strands of need, compensation and sharing. However, when considering an application for financial remedy, the court must give appropriate weight to a nuptial agreement as a relevant circumstance of the case and interfere with the agreement only to the extent necessary, usually to ensure needs and compensation are satisfied. In regard to sharing the court is less likely to interfere with or vary a nuptial agreement.

In DJ v BJ the Cayman court enforced the terms of the Pre-Nup which provided for equal sharing of the parties' assets post-separation, which would normally be considered non-matrimonial assets and so absent the Pre-Nup would not be subject to the principle of equal sharing.

The Cayman court has yet to consider a Post-Nup and when it does so it will have to consider whether to follow McLeod which is a Privy Council case based on an Isle of Man divorce and is highly persuasive authority or whether to follow Radmacher which is a Supreme Court of England and Wales judgment and so also highly persuasive authority and which decided that McLeod was wrong.

**Given the detailed consideration and whole hearted adoption of Radmacher in DJ v BJ it seems more likely than not that the Cayman court will follow Radmacher when considering a Post-Nup.**

However, it has to be remembered that Radmacher does require a consideration by the court of changing circumstances but in DJ v BJ it was made clear that the Cayman court will look at the effect of the changed circumstances and whether they create a situation of "real need" in considering if the Pre-Nup is fair. On that basis, parties to a marriage would be well advised to ensure their nuptial agreement is a living breathing document which changes as circumstances change to ensure their autonomy is respected and their nuptial agreement is given effect to by the Cayman court.

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# 60-SECONDS WITH:

## JESSICA CRANE, EXECUTIVE DIRECTOR, LONDON & CAPITAL

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

**A** I always rather fancied being a buyer for a delicious food shop – maybe wine or cheese so I could travel around tasting delicacies

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

**A** Early in my career I was involved in marketing ETFs (Exchange traded funds) which were to be listed on the London Stock Exchange. Attending the market opening ceremony at the LSE and seeing them be launched was genuinely exciting.

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

**A** The easiest part is what I enjoy – meeting people, discussing how wealth management and planning can help them and putting a strategy together. The hardest is keeping on top of CRM systems and the necessary admin that goes with the job…

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

**A** Don't worry about feeling you need to dominate the conversation to make people aware that you know your stuff. Listen first, speak later.

**Q What do you think will be the most significant trend in your practice over the next 12 months?**

**A** ESG (Environmental, Social and Governance) awareness and importance will continue – probably until it becomes the norm and people no longer ask about it as it is just factored in.

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

**A** I'm not exactly graceful so I'd be very bad at it but I'd love to learn to dance

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

**A** Excluding individuals of course, I realised the other day how much I rely on Boris bikes to get around on time (if only his legacy had stopped with a bicycle hire network)

**Q If you could meet anyone, living or dead, who would you meet?**

**A** I've always been interested in medieval history and grew up near Bosworth Field so I'd be fascinated to meet Richard III and see if his unfortunate reputation as a scheming villain was justified

**Q What songs are included on the soundtrack to your life?**

**A** Listening to Serge Gainsbourg/ Jacques Brel and Feist immediately takes me back to when I lived in France as part of my university studies (it is possible that I may have been a little pretentious back then)

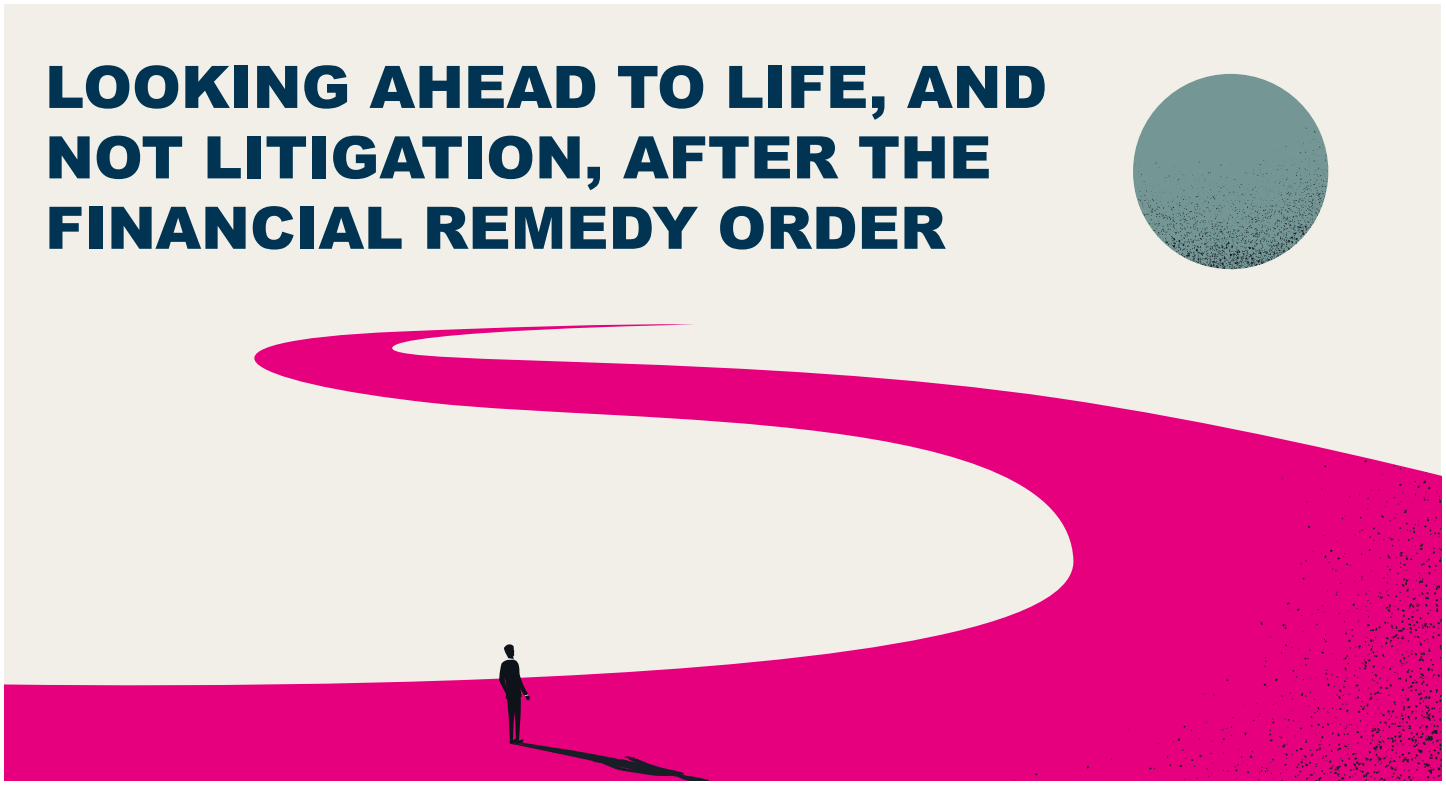
**Q What does the perfect weekend look like?**

**A** Under 5's football practice, a trip to the library and then maybe a 5th birthday party, ideally in a soft play, to round it off

**Q Looking forward to 2022, what are you most looking forward to?**

**A** Everything! Seeing people in person, travelling, going on holiday, not worrying about catching and passing on respiratory viruses..

# LOOKING AHEAD TO LIFE, AND NOT LITIGATION, AFTER THE FINANCIAL REMEDY ORDER



**Authored by: Anthony Riem and Andrew McLeod - PCB Byrne**

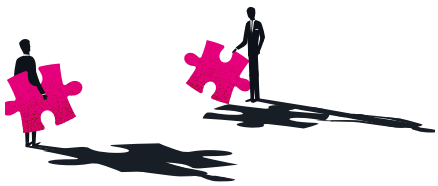

## Abstract

In this article, Anthony Riem and Andrew McLeod, Senior Partner and Associate at the London firm of PCB Byrne LLP, approach the question of how to avoid heartache after a financial settlement is ordered. With examples of particularly high-net worth individuals seeking to avoid and even frustrate the enforcement of financial remedy orders, they consider the potential to protect against that possibility.


## Introduction

Regrettably, though legal separation may end with the decree absolute, the same cannot be said for financial settlement. Whilst that issue should properly conclude with the court's approval of any financial settlement or making a Financial Remedy Order, that may not be the case where the paying party then refuses to comply because s/he feels in some way aggrieved. In more extreme cases that party may attempt to render the order ineffective, or at the very least difficult and expensive to enforce, by hiding assets either by transferring them into the names of third parties and/or moving them to other countries.

This article examines some of the steps that can be taken prior to obtaining a financial remedy order, to preserve assets from dissipation prior to enforcement, with a view to avoiding unnecessary heartache.



## The problem

The risk in this area, and the difficulties a spouse can face when dealing with a contemptuous refusal to comply with court orders, was illustrated very publicly in the divorce proceedings between Tatiana Akhmedova and Farkhad Akhmedov. Despite being ordered in December 2016 to pay his wife an amount equal in value to the total sum of £453,576,152, Mr Akhmedov transferred substantially all his assets into a Liechtenstein trust structure, and then entered into a global effort to resist enforcement, describing it publicly as a war that he would "continue to fight for as long as it takes, and in whatever jurisdiction necessary".

Though the steps taken by Ms Akhmedova showed that effective action can combat such conduct, this can be an expensive and time-consuming process where the paying party challenges enforcement, uses delaying tactics, and takes further extra-judicial steps to insulate themself.

## Protective measures – the freezing order

Where there is a real risk that a spouse will seek to make any financial award difficult to enforce by hiding their assets, the obvious protective mechanism to seek is a freezing order over that spouse's assets, including assets held by third parties on his/her behalf. A freezing order includes an order which requires the respondent to disclose his/her assets. Where assets are held overseas, then a freezing order can be made on a worldwide basis.

**What makes a freezing order so effective is that if the respondent breaches it and is found to be in contempt of Court, then they can be imprisoned for up to 2 years. Further, a freezing order made on a worldwide basis can also bind overseas third parties if an application can be made in the court where those assets are located and the third parties then notified of the order.**

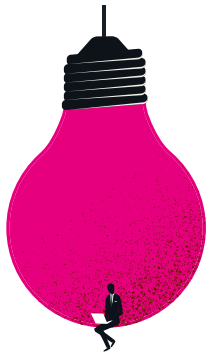
The requirement that an applicant demonstrate, with "solid evidence", [1] that there is a real risk of the disposal or dissipation of assets prior to judgment will likely be the crucial hurdle to be cleared. Presenting evidence that the defendant has participated in an actual contumacious breach of an existing freezing injunction is powerful, and perhaps even conclusive. However, while obtaining evidence is not unusual – recent examples include Temur Akhmedov (as described in Akhmedova v Akhmedov & Ors [2021] EWHC 545 (Fam)), as well as that dealt with by the Court of Appeal in Lakatamia Shipping Company Ltd v Morimoto [2019] EWCA Civ 2203 – in practice, it is more likely that the risk will be inferred from a multitude of matters to convince a court that there exists a real risk of dissipation. The exact equation in any given case will vary according to the individual circumstances.

As such, in practice the starting point is likely to come from assessing the other spouse's Form E disclosure for facts that might support an application, such as assets being located assets in jurisdictions where enforcement of a judgment may be difficult, or in fungible/easily transferrable forms. In the event of a failure to disclose all assets, that disclosure (signed with a statement of truth) may provide a starting point for seeking to infer dishonesty. A spouse may be able to identify undisclosed assets from his/her personal knowledge, but even in the absence of that, the value of further investigative work should not be overlooked – whether that may involve the use of investigators or forensic accountants to identify the existence of undisclosed assets.

## Other alternatives

It is also worth considering other protective mechanisms that are less extreme than "the nuclear remedy of a freezing order". [2] For example, a less restrictive form of freezing order known as a "notification injunction" might be sought, in which an otherwise standard freezing order is subject to a general carve out in relation to transactions that have been properly notified to the claimant. While the test is no different and the same risk of dissipation would be needed to obtain one, it may be considered a more appropriate mechanism for some circumstances.

Alternatively, a spouse might be willing to offer an undertaking to the court not to dissipate his/her assets until resolution of the claim. If rejected, this may provide a basis for escalating matters towards one of the options above. Ultimately, however, the undertaking is only as good as the willingness of the party giving it to comply with its terms and the recipient's ability to enforce it.



## Future development?

**While the Court of Appeal has only recently warned against the "undesirable situation" of freezing orders becoming a commonplace threat,[3] a principal policy driver in the Family Court is the need to enhance public confidence in the Family justice system.[4]**

Whether this might influence attitudes when considering the appropriateness of interim protective relief remains to be seen. However, in cases where there is a clear risk of dissipation of assets, then preventing their unwarranted dissipation is important as it maximises the prospects of warring spouses reaching settlements or enabling the Court to enforce its orders.

1 Holyoake v Candy [2017] EWCA Civ 92, [2018] Ch. 331 at [34]; see also Les Ambassadeurs Club Ltd v Yu [2021] EWCA Civ 1310, [2022] 4 WLR 1 at [31].
2 Holyoake v Candy [2017] EWCA Civ 92, [2018] Ch. 331 at [58].
3 Les Ambassadeurs Club Ltd v Yu [2021] EWCA Civ 1310, [2022] 4 WLR 1 at [19].
4 Sir Andrew MacFarlane "Confidence and Confidentiality: Transparency in the Family Courts" (28 October 2021) <https://www.judiciary.uk/wp-content/uploads/2021/10/Confidence-and-Confidentiality-Transparency-in-the-Family-Courts-final.pdf>

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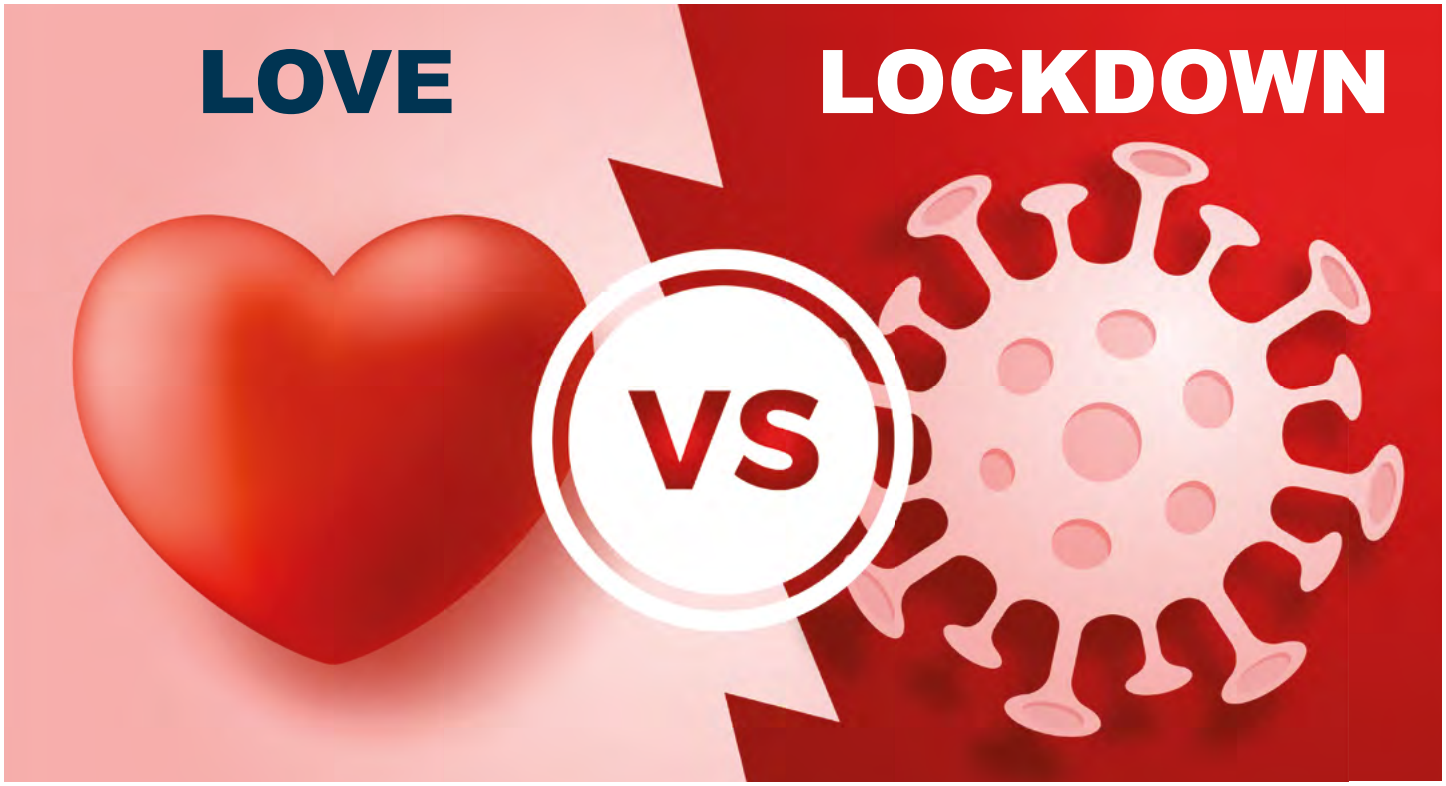



Authored by: Alex Carruthers and Stacey De Souza - Hughes Fowler Carruthers

**The Office for National Statistics recently reported that divorces fell by 4.5% in 2020.**

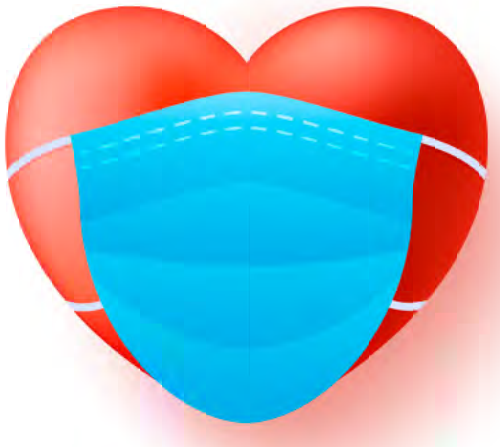
That is not to say that the number of divorcing couples was low in 2020; 103,592 decree absolutes were still granted in England and Wales that year, but as with everything else, the pandemic had far-reaching and unexpected effects on the divorce industry.

In the months following the government's announcement of a lockdown, new referrals ground to a halt across the industry as couples and families stumbled to figure out exactly what lockdown would look like for them. This proved to be a double-edged sword. For some, lockdown was a welcome pause to 'normal' life. It meant swapping time in the office and on business trips for quality time with partners and children. For others, the absence of a work and social life outside of the family home highlighted underlying cracks in their relationships that were previously easy to ignore with distractions such as extramarital affairs and travel.

**HNW individuals were not exempt from these pressures. Their coping mechanisms, however, were arguably less limited than "let's try to make this work".**

In our experience, relationships break down for a variety of reasons, but often there has to be a "stick" and a "carrot". During the pandemic, the stick became bigger and more painful but the carrot (whether the ability to escape the unbearable atmosphere at home or having a fling at a conference) disappeared.

We therefore saw a trend in couples having to ride out the pandemic away from their family homes in England, in countries where they had the benefit of more space and where limitations on daily life were less severe. We saw other couples spend lockdown entirely apart in different homes and, in some cases, in different countries. The decision to be together in a less stressful environment, or to be physically separated entirely, made it possible to put divorce on the back burner while we all waited in limbo to see what the virus' next move would be. Then of course, there were the couples who used the pandemic to leave England altogether, thus calling their ties with this jurisdiction into question whether in the context of divorce or otherwise.



For existing clients who found themselves mid-divorce when the pandemic struck, lockdown presented new obstacles to progressing matters to decree absolute. The problem was threefold. First, the courts (already in a dire state pre-pandemic) took a while to work out the kinks of remote hearings, e-filing and the rest. The most urgent cases, typically involving children or domestic abuse, had to be prioritised during this time which, whilst clearly correct, led to an administrative backlog on matters considered to be less urgent. Second, almost every business faced a degree of uncertainty in lockdown, even if only initially. Some clients took a cautious approach to market fluctuations, wanting to delay matters for as long as possible while they waited to see how things would unfold. Others sought immediate valuations / revaluations of their assets, hoping to depress the final bottom-line figures. This inevitably held up settlement, not least because the experts themselves were trying to figure out how to do their jobs in unprecedented circumstances. The third and final problem was the decline in success rates of private settlement hearings (known as Private FDRs). While these hearings continued over Zoom throughout lockdown, settlement rates dropped significantly as the psychological factors which usually attribute these hearings with such success were stripped away. The stakes simply did not feel as high to clients over Zoom as they do during in-person negotiations, making it easier to walk away from good deals.

The pandemic also threw up a variety of issues for children of separated families. Parents were justifiably more anxious than usual and differing attitudes towards lockdown restrictions presented the perfect cocktail for disagreement. Many HNW individuals had the unique ability to travel during lockdown (whether by private means or otherwise), meaning disputes over living arrangements were not only about which home a child would be in that night, but often, which country. We saw parents wishing to relocate temporarily and permanently to other countries during the pandemic and others (whose children did not live with them) wishing to fly their children back and forth to see them in whatever country they chose to call home during the pandemic. In both scenarios, health concerns and testing and quarantine requirements added several more complexities to already strained co-parenting relationships.

**A new 'normal' has now taken effect which begs a multitude of questions for the immediate future. Will there be more divorces than ever before as couples "break free" from lockdown? Will the divorces get uglier as resentment has had two years to build? Will we see a flood of couples returning to the UK now that restrictions are at their lowest level yet? What approach will parents take to vaccinating their children?**

Whatever the answers to these questions, a repeat of the 2020 statistics seems unlikely.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# DATA SUBTERFUGE ACCESS REQUEST

## ARE THE DOCUMENTS I SEND TO MY LITIGATION LENDER SAFE FROM THE OTHER SIDE?

**Authored by: Alex Hulbert - Schneider Financial Solutions**

## Introduction

In 2006 Clive Humby, mathematician and the man behind the Tesco Clubcard, claimed "data is the new oil". As our lives became increasingly digitized, big corporations began to refine that oil and used it to more effectively market and sell to consumers, and the volumes of data held increased exponentially.

Steadily, one scandal and data breach at a time, it became clear that the old data protection frameworks (mostly drafted in an age before "big-data") needed to be brought into line with modern life. Enter, in 2018, the EU's General Data Protection Regulation ("GDPR"), which was enacted into the UK's Data Protection Act 2018 ("DPA 2018") and remains in force regardless of Brexit.

**Under the terms of the GDPR, organisations must ensure that personal data is gathered under strict conditions, and those who collect and manage it must protect it from misuse.**

Individuals whose data is held have specific rights over that data, including the right to be forgotten and the right to access their data, normally made by way of something called a Data Subject Access Request ("DSAR") [1].

While almost everyone would agree that the rights afforded to individuals within the DPA 2018 are entirely appropriate, there is the potential for friction in the context of litigation, and particularly within the context of litigation lending. As your litigation lender, we are a "data controller", as through the application process we gather and hold significant personal data about your client. Importantly though, we have also likely been provided with significant data about your client's spouse and the case generally.

In post-GDPR 2018, I wondered whether, sooner or later, a client's spouse would have a go at making a DSAR in an attempt to obtain information about a funded client's case. Given that the data we hold often includes assessments about at what point a client might be willing to settle and points they may concede, such a request handled incorrectly could be catastrophic. While rare, such requests do happen, and in the rest of this article I will explain the protections in place and how your lender should deal with those misguided enough to make them.

## The law and process

Under DPA 2018, an individual can make a DSAR to a data controller and request all personal data that the data controller holds in relation to the individual. If the data controller fails to comply, the individual can make an application to court.

The Court of Appeal, in Dawson-Damer v Taylor Wessing LLP [2], confirmed that while the court retains its discretion and may refuse to make an order if it amounted to (for instance) an abuse of process, a data subject is in principle entitled to make a DSAR in order to obtain information for the purposes of litigation, whether or not the information would be disclosable in the litigation in question.

1 Section 45, DPA 2018; Article 15(3) GDPR.

2 [2017] EWCA Civ 74

**However, the DPA 2018 contains a number of exemptions from the data controller's obligation to comply with the DSAR. Where the personal data consists of information in respect of which a claim to legal professional privilege could be maintained, the data controller does not have to comply with the DSAR [3] (the "privilege exemption"). This echoes the exemption to the rights of access in the GDPR at section 19 of Schedule 2 of the DPA 2018.**

For the purpose of the privilege exemption, "legal professional privilege" includes both legal advice privilege and litigation privilege. [4] It is also likely to extend to "common interest privilege", which applies to documents shared between parties who have a "common interest" that are otherwise privileged. Such a common interest exists between a litigation lender and the funded litigant.

The fact that most information and documents held by your lender will be subject to privilege does not obviate the requirement for us to identify and consider the data and respond to the request, and it is possible that certain data provided to your lender may arguably be outside the scope of privilege. For example, certain information provided to assist in the assessment of credit risk may pre-date the litigation or (arguably) have only the loan (and not the litigation) as its dominant purpose. This would usually include at least the occupation, date of birth and even income of the other side, but we have yet to encounter a situation where it has extended further.

To place all this in context, we once had a funded client's spouse contact us, through their solicitor, requesting documents provided to us relating to our client's application. In response, the individual received a copy of our client's application form, redacted in its entirety save for his own name, address and occupation. We never heard from him again.

## Recommendations

While I hope the information above would assuage the majority of concerns about sharing information with your lender, there are some extra tips to bear in mind if you wish to be extra-careful:

- Only ever send your lender the information necessary for them to transact with you, which will usually be only the information expressly required by the application form. There is always the risk that superfluous data (e.g. information about some future plans your client may have) could fall outside the scope of privilege. The less data held, the smaller the pool of data vulnerable to a DSAR. If your lender requires further information or documents, they will tell you.
- You may wish to consider marking correspondence send to your lender as being in contemplation of and for the dominant purpose of litigation. Whilst no such marking is ever definitive, and the court will always look at the substance of the document, it can help to evidence the intention behind the documents.
- Either as a belt-and-braces step generally, or if you are concerned that there are some documents your lender may need to see which risk not being covered by privilege, consider asking your lender to enter a Confidentiality Agreement. All lenders worth their salt will deal with NDAs and Confidentiality Agreements regularly and should have templates available for you if needed. Such a document can bolster any claim your lender has to privilege.

3 Section 9, Schedule 11, DPA 2018;

4 Dawson-Damer v Taylor Wessing LLP

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# 60-SECONDS WITH:

## JAMES ROBERTS QC, HEAD OF CHAMBERS, 1KBW

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

**A** I am afraid I am one of those lucky (or sad depending upon your point of view) people who always wanted to be a barrister but, if I had to choose something else, I would probably have been a theatre or film director.

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

**A** I worked on job that meant I needed armed security protection. During a foreign work placement with a law firm and whilst still at University I was part of a team conducting a verification exercise before the sale of a company. The authorities in the relevant country opposed the sale. To ensure our safety we had armed bodyguards who slept outside our hotel rooms.

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

**A** The hardest part of the job is undoubtedly having to get on top of very significant volumes of complex material in short spaces of time. I don't think there are any easy parts to my job, but the most enjoyable aspect is cross-examination.

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

**A** For the bar in particular, the complete unpredictability of the job can be a major issue. It is vital to ringfence time in which to recharge. Do not work all weekend and book your holidays ahead!

**Q What do you think will be the most significant trend in your practice over the next 12 months?**

**A** I think transparency, or more properly publicity, in relation to Financial Remedy proceedings (traditionally heard "in private") is going to be a major issue this year. There is a consultation out at the moment, but I foresee the potential for significant impact upon how (and where) cases are conducted.

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

**A** To play the piano. My mother was a natural jazz pianist who taught music to children with severe learning disabilities. It was amazing to see what her students could achieve through music. I regret not having let her teach me to play.

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

**A** Family : the support of my wife and the ego-popping witticisms of my 9 year old daughter.

**Q If you could meet anyone, living or dead, who would you meet?**

**A** I would very much like to have met the brilliant actor, Leo McKern. He played "Number 2" in the 60s TV show "The Prisoner" and "Rumpole" of course!

**Q What songs are included on the soundtrack to your life?**

**A** I love almost anything by any of the great crooners – Sinatra, Sammy Davis, Tony Bennett etc.

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

**A** A Saturday morning fry-up and then a brisk walk on Wimbledon Common to work 2 or 3 % of it off.

**Q Looking forward to 2022, what are you most looking forward to?**

**A** Getting everyone back together in 1KBW. We are a close-knit supportive set and I have really missed the opportunity to easily bounce ideas off one another.

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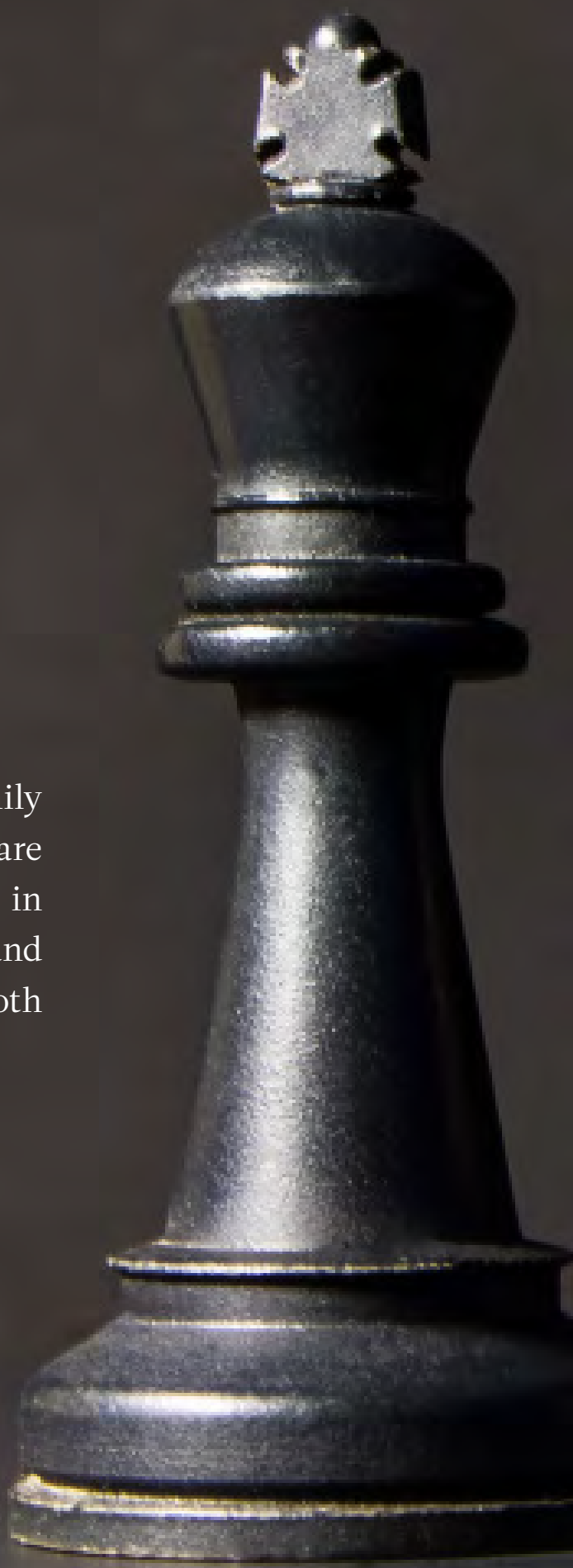
***"They are as strong on money as they are on children and they've got strength and depth in both silks and juniors."*** - Chambers & Partners, 2020



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# CASHFLOW MODELLING FOR US CITIZENS LIVING IN THE UK

**Authored by: Jenny Judd - London and Capital**

Cashflow modelling is a useful tool to help clients plan their financial future, especially when clients are facing significant life changing events such as divorce.

Wealth Managers will combine the cashflow modelling with clients investment objectives to create a tailored investment strategy. As with all models extending into the future, assumptions made in the model must be continually adapted to ensure they are still reflective of real life. However they allow families to garner an understanding of how their wealth will develop over time and the options this may or may not provide for them.

Unfortunately, the vast majority of cashflow modelling tools typically focus on one jurisdiction. Whilst this can be hugely valuable for these families, this often renders them only partly beneficial for families who have built up wealth over time in different countries.

On top of this, the various rules that apply to accounts in different jurisdictions mean that often cash flow modelling can be more complex than when dealing with a single jurisdiction, where the usual income generation, inflation and home country tax factors apply.

## Four things to keep in mind

Below, we highlight some of the most common complicating factors which need to remain paramount when cashflow modelling with an American connected family who has assets both in the US and also offshore.

### 1 Multiple Tax Jurisdictions

The USA is one of the few nations to tax citizens on their worldwide income, regardless of their residency.

**In short, this means international Americans often contend with the task of complying with multiple tax jurisdictions when residing outside the US.**

Through precise implementation it is possible to build a model which can incorporate the differing tax rates.

**The Internal Revenue Service (IRS) (currently, and who knows for how long?!) taxes ordinary income at rates up to 37%, whereas HMRC charges up to 45%, compound this over 5 years and the difference can be over 50%.**

The overall effect of not accounting for the tax accurately could significantly affect the long-term financial plan.

### 2 Foreign Exchange (FX)

All too frequently we see American families being required to exchange all their holdings to a common currency to benefit from a cashflow exercise. As an example, an American living in the UK would convert all account values held outside of the UK to Sterling to satisfy the single currency conundrum. This conversion can cause inaccuracies when forecasting over lengthier periods of time. We can mitigate the imprecisions of FX'ing pots where it is not necessary, by keeping the accounts in their respective base currencies.

Whilst this issue cannot be resolved entirely, due to volatility of foreign exchange markets and external macro-economic factors. Regular reviews of the model with the Wealth Manager can allow for the assumptions to be updated, and financial objectives be assessed.

**The assets should not be manipulated to fit the model, instead the model should be reflective of what you actually have.**

## 3 US accounts

Another hurdle to overcome when building a cashflow model for Americans is account or product types that differ from those traditionally seen by UK managers. To the uninitiated, an Individual Retirement Account (IRA) may appear to be like the UK equivalent Self Invested Pension Scheme (SIPP).

On the face of it both are investments used for pension purposes funded gross, withdrawn net and grow tax free inside the wrapper. However, Uncle Sam and the IRS have other ideas. The IRS enforce Required Minimum Distributions (RMDs) as annual mandatory distributions upon all IRAs when the holder surpasses the age of 72. The withdrawal is at a factor rate based on the account holder's age, and if not taken a potential tax penalty of 50% of the missed distribution. This is significantly different from the SIPP, which has no distribution requirements and is excluded from the estate on death.

**Ensuring that the RMDs' effect on the clients tax rate and reduction of the tax-free growth pot has been taken into account when evaluating income requirements in retirement, is key.**

## 4 Gifting

A consideration for most in the latter stages of life is gifting in the most tax-efficient manner. The discussion may be to make use of the historically high lifetime allowance for US citizens ($11.58m); or creating a plan to utilise the UK's Potentially Exempt Transfer (PETs) rules and evaluate the suitability.

An effective cashflow can merge your investment and financial plan into a simple model, built to factor in multiple objectives or 'what-if' scenarios. When constructed to accurately reflect the families requirements or circumstances, it is an invaluable tool for the donor to understand the implications on their own finances for giving away their wealth.

This is by no means an exhaustive list, but instead it raises some of the most common shortfalls of what is otherwise an extremely useful exercise for all families regardless of wealth. Done properly across your entire wealth and with an understanding of all the facets that effect it, this can provide real comfort and understanding to what otherwise can result in unnecessary cost and stress.

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Executive Director

# CAN YOU EVER REALLY WALK AWAY?

## THE SPECTRE OF FORCED HEIRSHIP CLAIMS

**Authored by: Gemma Willingham and Luke Richardson - Baker McKenzie**

It is a common fact pattern where international families are concerned: the generator of the family wealth, perhaps at an early stage in his or her career, marries and has children; later, the marriage ends (through divorce or death), and the richer party moves on and eventually starts another family, perhaps in another country, all the while continuing to build a fortune. A will is made, or trusts are set up. Years later, the patriarch/matriarch dies, and it is discovered that the first family has been completely disinherited. Or has it? Concepts such as forced heirship and community property are well known to private-client practitioners but, as the court reports demonstrate, many wealthy families continue to be caught out by the reach of such claims.

Forced heirship has its roots in civil-law systems and generally provides that a certain portion of a person's estate must be distributed to particular heirs upon death. The rules vary by jurisdiction but can be found in one form or another in countries such as Germany, France and Spain, as well as in Sharia legal systems and certain Asian and Latin American countries. They are in contrast with common-law jurisdictions, which tend to favour testamentary freedom. [1] Many of these legal systems also provide for community of property, whereby assets acquired during the marriage are subject to specific rules for division upon the end of the marriage.

**If an individual who is subject to the succession rules of a forced heirship jurisdiction seeks to transfer their assets (before or after their death) outside the scope of the forced heirship rules, a spouse and/or other heirs who are thereby deprived of their compulsory shares may be able to bring claims seeking to set aside the individual's purported transfer of assets—whether by attacking the validity of any will or seeking to undo their lifetime transfers of property to third parties.**

Of course, in response to this, many offshore financial centres have passed 'firewall' legislation to try to protect assets transferred to structures in their jurisdictions from falling within the scope of such succession claims. However, there are many situations in which individuals wish to transfer assets (before or after their death) into jurisdictions with no protective firewalls, such as the UK (a popular destination for international families with sizable property portfolios). If those individuals could be subject to the succession rules of a forced heirship country, advanced planning is critical to reduce the risk of the transfers being set aside by future forced heirship claims.

In particular, clients should be advised that they may find it difficult to favour the children or spouse of a later marriage at the expense of children from an earlier one. A recent high-profile example concerns the famous singer Johnny Hallyday, the 'French Elvis', who passed away near Paris in 2017. According to media reports, the four-times-wed performer's two adult children from prior

1 Such as the UK, subject to the Inheritance (Provision for Family Dependents) Act 1975, which sets out a general expectation that testators should make reasonable provision for their dependents.

marriages challenged a will, drafted in California, which purported to leave the entirety of Hallyday's €38million estate to his final wife, with whom he had adopted two young children. The adult children succeeded in establishing that their father was habitually resident in France before his death, overcoming the widow's case that he had made his primary home with her in Los Angeles since 2007 (which would have enabled him to dispose of his estate free of restrictions, in accordance with Californian law). While the case caused outrage in France at the suggestion their beloved entertainer was more American than French, the court more soberly undertook an analysis of the singer's Instagram posts to calculate how much time he had spent in his birth country during his final years.

**The elder children's success meant French succession laws applied to Hallyday's worldwide assets and that they each qualified for an 18.75% share of his multimillion-dollar estate. [2]**

His widow said she would appeal, but the case ultimately settled on undisclosed terms.[3]

Similar claims feature in a case pending in the US District Court for the District of Columbia,[4] the latest chapter of the long-running dispute over the estate of Wang Yung-Ching, a plastics tycoon and one of Taiwan's richest ever men. The plaintiffs, who are the joint executors of Mr Wang's widow's estate, assert an entitlement under Taiwanese law to 50% of the couple's marital estate [5] and a claim to recover assets transferred to third parties without the widow's consent during the last five years of Mr Wang's life, [6] plus restitution.

In that case, Mr Wang and his wife were never divorced during their 72-year union, although Mr Wang purported to marry various other women and had at least three other families and at least twelve children by those companions, before dying intestate at the age of 91. While he spent most of his life in his native Taiwan, Mr Wang—like the French Elvis— travelled regularly to the US and died there in the home of one of his 'wives'.

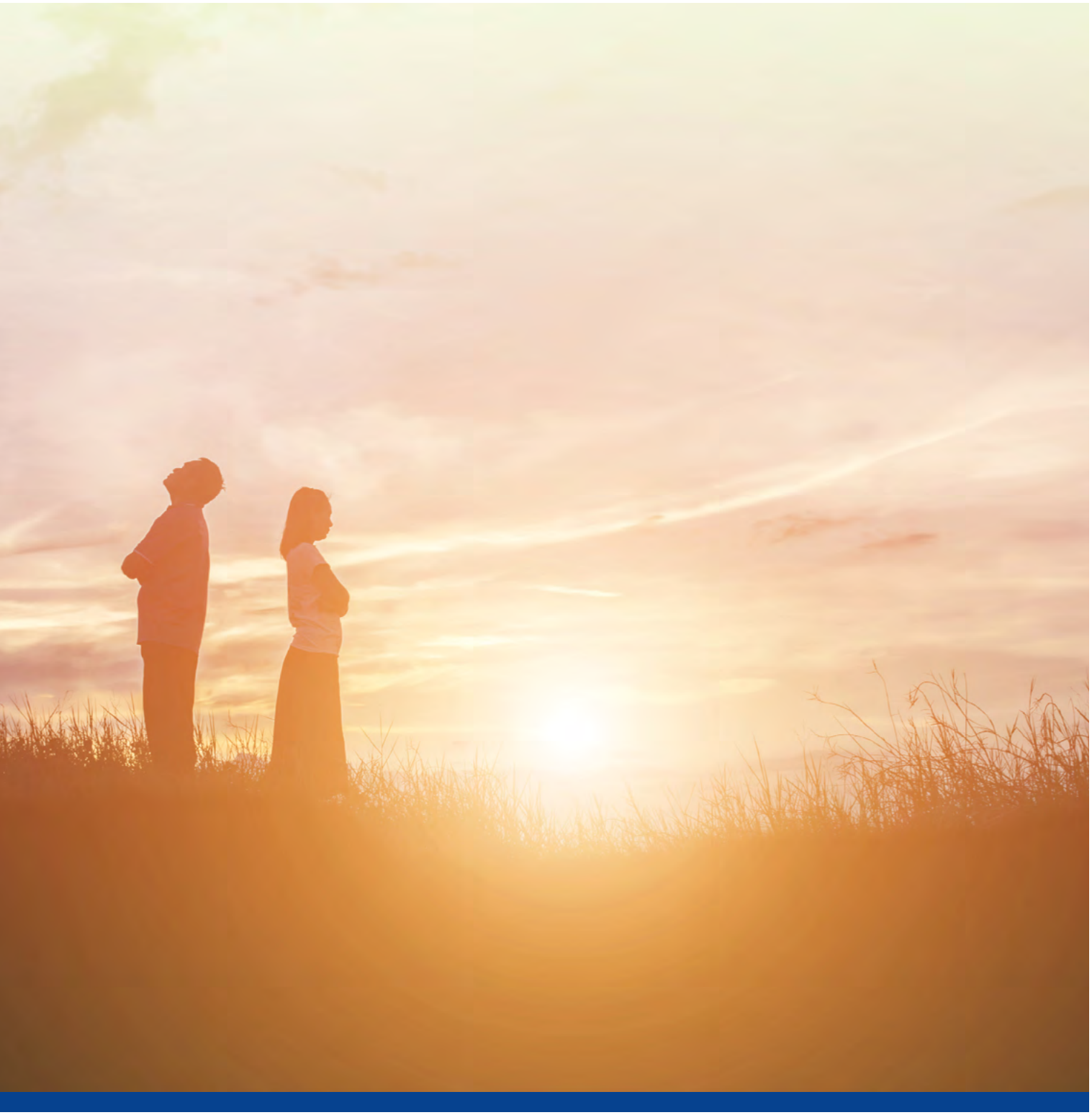
**This complex fact pattern has led to an ongoing legal battle worth billions of dollars about the relevance of Taiwanese forced heirship rules to the family's overseas assets.**

The US proceedings are expected to go to trial next year.

Both of these cases highlight the potential dangers and substantial implications of forced heirship claims and, therefore, the importance of careful succession planning for international families.

**As another Valentine's Day comes and goes, high-net-worth individuals would do well to pay attention not only to their current paramours but also to those relationships that they might feel are in the past but which—depending on the legal systems involve—may give rise to inviolable claims!**

2 Under French law, if a person has three or more children, the children are entitled to an equal share of three quarters of the net estate.
3 https://www.france24.com/en/20200703-children-of-french-rocker-hallyday-bury-hatchet-with-widow-over-inheritance
4 Civil Action No 1:10-cv-01743-JEB, Hsu and Ors v. New Mighty U.S. Trust and Ors
5 Article 1030-1 of the Civil Code of Taiwan ("Civil Code")
6 Article 1030-3 of the Civil Code



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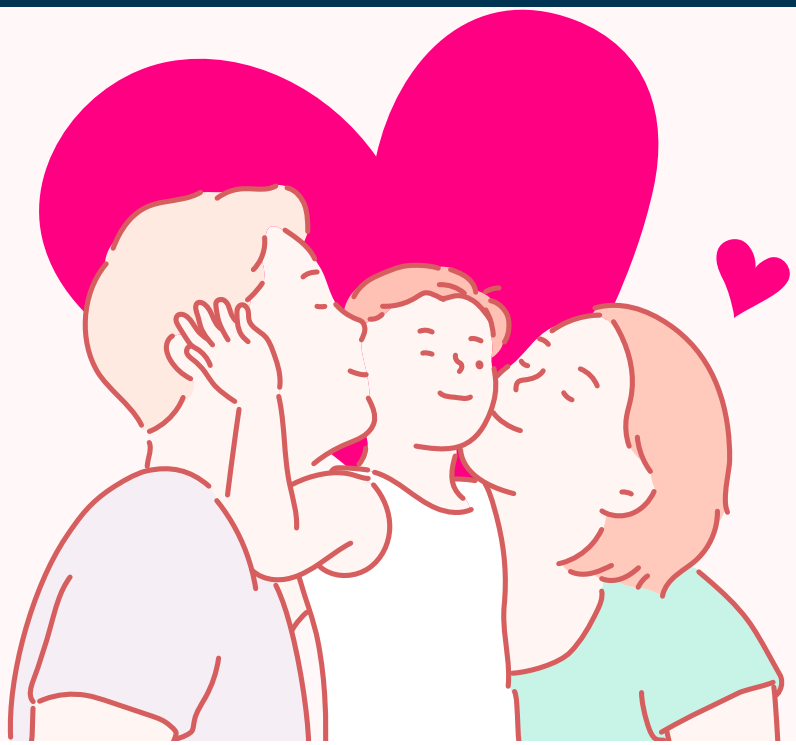
# FOR THE LOVE OF OUR CHILDREN



Authored by: Laura Flanagan - International Family Law Group

**Schedule 1 of the Children Act 1989 allows the English family court to order financial provision for children. Applications under Schedule 1 can be made by parents, stepparents, guardians, special guardians, any person named in a Child Arrangement Order as a person with whom a child is to live and indeed any child themself.**

**Schedule 1 is commonly used by unmarried parents given the difference in financial provision that can be made following the breakdown of a relationship for cohabiting couples compared to those couples who are married.**

**This article provides a brief summary of the law on Schedule 1, analyses two recent reported decisions and considers the impact of these cases on future Schedule 1 claims.**

## What orders can be made?

The courts have the power to make orders for the transfer or settlement of property, lump sums, periodical payments (in certain circumstances) and school fees orders. Any order made by the Court must be for the benefit of the child [1].

The courts power to make maintenance orders for children has been limited by the Child Support Act 1991. The Child Maintenance Service (CMS) now has primary jurisdiction for assessing and enforcing child maintenance. The court does retain a jurisdiction in certain circumstances including where the one of the parents is resident abroad or where the CMS has assessed the paying parent's income as being above £156,000 gross per annum

1 Schedule 1 (1)(2) Children Act 1989

## Recent Case Law

**DN v UD [2021] EWCA Civ 1947**

**Can an order be made for long term capital provision for children into their adulthoods?**

This was an appeal from the earlier decision of Williams J [2] in which long term capital provision was made for children extending into their adulthood.

The parties had three children who, at the time of the first instance decision, were aged 22, 19 and 14. The Mother sought provision of a home, income for the children during their minority and education and capital provision for the two younger children once they finished tertiary education. The Mother's arguments at first instance were that contrary to previous case law there was no need for "exceptional circumstance" to justify capital provision in adulthood but, in any event, on the facts of the case there were exceptional circumstances as the father's conduct had been such that he was unlikely to contribute to their financial positions in the future.

Williams J considered father's behaviour (there had been previous Children Act and Injunction proceedings) and determined that "[the children's] vulnerability or potential dependency upon their father results in a clear need for financial and emotional protection"[3] Williams J considered that the only way to provide the children with such financial independence would be to make financial provision extending into their adulthood.

The Father appealed on a number of grounds; Moylan LJ granted permission to appeal only in relation to the settlement of property order.

**The grounds of appeal which were allowed were as follows:**

- **That any order for financial provision must be made before the relevant child attains the age of 18**
- **That the court does not have the power to make a property transfer order or lump sum order to a person who is a child at the date of the order, but who will be aged over 18 when it takes effect or will be paid; and**
- **That, in any event, the judge was wrong to make an order under which the children would receive capital provision when they were adults because there were no special circumstances justifying such an award in this case.**

The court concluded that it did have the power to make an order in circumstances where a child has attained the age of 18 before the application is determined. Lord Justice Moylan indicated that should that not be the case "a properly constituted application could be defeated by the effluxion of time" [4]. In considering the second ground Lord Justice Moylan concluded that "the order must be made before the child is 18 but there is nothing to suggest that the financial provision made has to cease when the child is 18".[5]

The third, and arguably the most important aspect of this appeal, was whether the future capital provision awarded was wrong. On behalf of the father, it was argued that the authorities are clear, there needs to be a "special" or "exceptional" circumstance to warrant such an order being made. On behalf of mother, it was submitted that the court had a wide discretion when considering the "special" circumstances and the potential of father issuing a "financial ultimatum" to the children was such that it would "comprise a special circumstance". Lord Justice Moylan remarked that it was in "[his] view, clear that such power as there is to order financial provision in favour of an adult child who is not in education or training is limited to "special" or "exceptional" circumstances". [6] It was determined that the first instance decision had been made on what the father's behaviour in the future may be.

It was therefore held that the long-term capital provision made by Williams J was not justified and must be set aside.

Therefore, whilst an order could be made that provides financial provision beyond the child's 18th birthday, it remains the case that capital provision cannot be made for adult children in the absence of a special circumstance.

**CA v DR [2021] EWFC 21**

**Can a periodical payments order include provision for the receiving party to build up their own pension fund?**

This matter came before Mrs Justice Roberts following an unsuccessful Private FDR. The matter related to a child, E, who at the time of judgment was 4 years old. E's parents had been in a relationship for some 7 years, separating approximately 2 years after E's birth.

The matter was allocated to be heard by a High Court judge by District Judge Hudd who considered that given the scale of the father's resources and incomes and the mother's contention that the court should revisit, update and/or restate the principles set out by the Court of Appeal in Re P [7].

The Mother sought, as an element of periodical payments, £40,000 per year to contribute to her own pension fund.

The Father, with wealth of circa £190 million, was running the "millionaire's defence" and had therefore indicated that he could meet any "reasonable" order of the court.

This case provides useful consideration of what should be covered by periodical payments and whether any element of those payments could be used by

2 DN v UD [2020] EWHC 627 (Fam)
3 Para 162, DN v UD [2020] EWHC 67 (Fam)
4 Para 60, DN v UD [2021] EWCA Civ 1947
5 Para 74, DN v UD [2021] EWCA Civ 1947
6 Para 76, DN v UD [2021] EWCA Civ 1947
7 Re P (a child) [2003] EWCA Civ 837

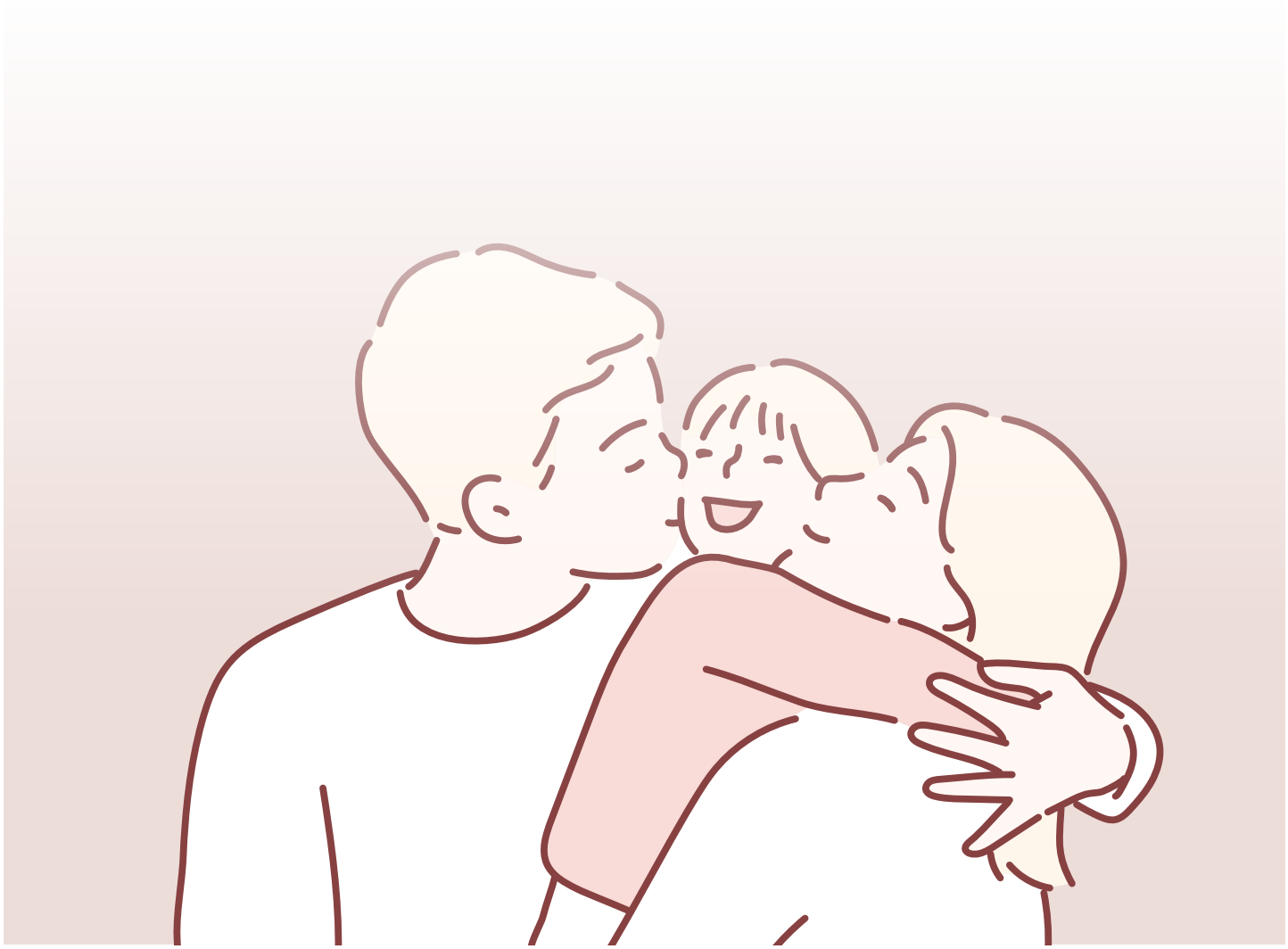
the receiving party to contribute to a pension fund. Mrs Justice Roberts summarises the mother's claim as "an entitlement to build up personal savings over many years of E's dependency to fund ongoing income needs at a time when the child's claims have come to an end as a matter of law" [8].

On behalf of Mother, it was submitted that the time had come for the principles in Re P to be re-visited. In Re P Thorpe LJ clearly rules out the existence of any "slack to enable the recipient to fund a pension or an endowment policy or otherwise to put money away for a rainy day" [9]. It was submitted that in the first instance these comments by Thorpe LJ we obiter and secondly there are now "public policy reasons why the burden on the state in retirement should be reduced by requiring adults to make provision for retirement" [10].

The Father, in opposition, relied on the case of Re A (a child) [11] in which the court was asked to determine "to what extent can the element of carer's allowance take into account the future needs of the carer at the conclusion of the relevant child's dependency by reason of the benefit to the emotional welfare of the child in knowing that his/her parent is not going to be rendered "destitute"?" [12] Macur LJ succinctly concluded that it was "none" [13].

Mrs Justice Roberts concluded that she was bound by the decisions and guidance in Re P and Re A. Mrs Justice Roberts suggests that the submissions made on behalf of mother were an attempt to closely align schedule 1 claims with claims under the Matrimonial Causes Act 1973 in light of the courts wider powers, in the latter, to make lifelong provision for a mother via a pension sharing order and periodical payments which, over and above meeting needs, can be used to build up a capital reserve.

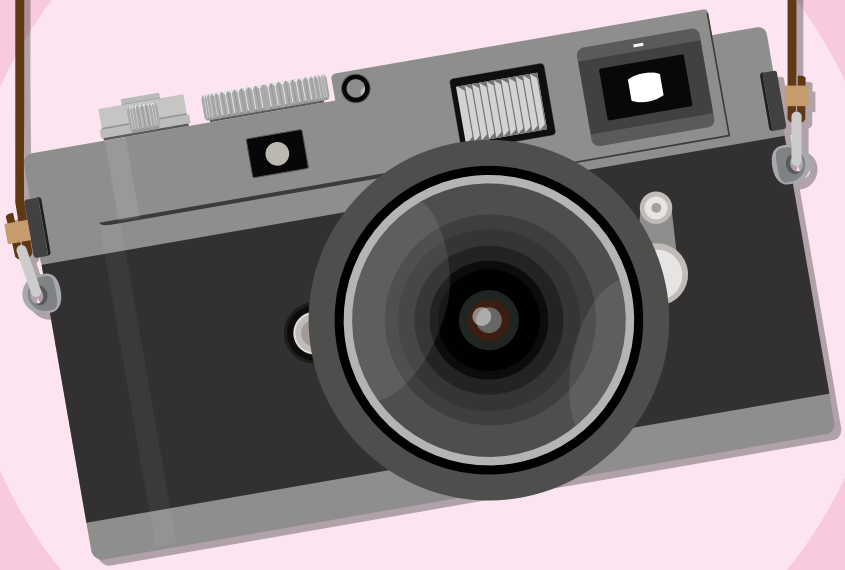
Mrs Justice Roberts concluded by reiterating the limits on the jurisdiction of the courts in dealing with Schedule 1 claims and refused to include any provision for a pension fund in the periodical payment award stating "however desirable the aspiration may be, and I make no comment on that in this judgment, the extension of the current law which [mother] invites me to endorse requires either the intervention of Parliament or a further decision of the higher appellate courts" [14]. It therefore remains to be seen whether there will be a move towards longer term provision similar to that which can be ordered on divorce.



8 Para 65, CA v DR [2021] EWFC 21
9 Para 49, Re P
10 Para 67, CA v DR [2021] EWFC 21
11 [2014] EWCA Civ 1577
12 Para 5(iii), Re A (a child) [2014] EWCA Civ 1577
13 Para 23(iii), Re A (a child) [2014] EWCA Civ 1577
14 Para 70, CA v DR [2021] EWFC 21

# PRIVACY VS TRANSPARENCY

## THE MEDIA ARE COMING TO A FAMILY COURT NEAR YOU!



**Authored by: Will MacFarlane - Kingsley Napley**

As family lawyers we help clients through challenging times when they may struggle to manage the overwhelming emotional impact of divorce. Until recently, they could be entitled to assume that any court proceedings would be heard in private and it would be highly unlikely for them to be reported in the media or for any documents to be available for any third party to inspect.

Sir Andrew McFarlane's October 2021 report entitled, *Confidence and Confidentiality: Transparency in the Family Court`s* threatens to turn that assumption on its head in a development that is potentially alarming for anyone contemplating a divorce or likely to be a party to future litigation in the family court.

**The thrust of the report can be summarised in one of the concluding paragraphs in which Sir Andrew states that, 'the time has come for accredited media representatives and legal bloggers to be able, not only to attend and observe Family Court hearings, but also to report publicly on what they see and hear.'**

As a team that frequently acts for clients in the public eye, we are preparing carefully for the changes to ensure that our clients are given the greatest possible protection from the media glare.

### How did we get to this point?

The general direction of travel since 2009 has been towards greater transparency but there has always been a tension between privacy on the one hand and transparency and accountability of the family justice system on the other.

**Sir Andrew summed up the accountability argument in his report commenting that, 'Justice taking place in private, where the press cannot report what has happened and where public information is very limited is bound to lead to a loss of public confidence and a perception that there is something to hide.'**

Accredited members of the press have been able to attend certain family hearings since 2009 and there was a degree of angst in the profession at that point with many clients wishing to settle rather than risk going to trial. One high profile (and widely reported) example was Earl Spencer's proceedings which settled out of court following the previous president, Mr Justice Munby's decision to refuse the Earl's application to have the media excluded from attending the final hearing *(Spencer v Spencer [2009] EWHC 1529 (Fam)*.

This led to many in the profession referring to the *'Spencer effect'* as people in the public eye scrambled to settle rather than face having their situation pored over in the court of public opinion.

In reality, the accompanying reporting restrictions were so tight that there was often little or nothing that could be reported and the press rather lost interest in attending.

In January 2014, Mr Justice Munby moved to encourage greater transparency with his publication of guidance on the publication of judgments in the Family Courts and the Court of Protection. Despite encouraging more judges to publish anonymised judgments, numbers declined and it was clear that not all of the High Court bench had taken the medicine. In particular, there was a clear divide between those who favoured hearings in open court such as Mr Justice Holman and those seeking

to maintain the privacy of parties such as Mr Justice Mostyn. With the latter apparently seeing the 'transparency light' in his judgment in *BT v CU [2021] EWFC 87*, the dominant opinion at the High Court bench is now firmly on the side of transparency.

## What exactly is being proposed?

The current system was based on the Administration of Justice Act 1960 which enshrined the principle that proceedings in the Family Court should be heard in private. Although proceedings relating specifically to children will remain that way, the presumption is reversed so that the starting position is that the media will now be able to report on proceedings subject to the relevant judge's discretion as to whether any non-parties should be excluded.

Perhaps more alarming is the current plan for members of the press to be given access to the position statements filed by the barristers acting on each side. These documents typically set out the background to the case in great detail before setting out the arguments being deployed on both sides. It is also envisaged that third party attendees would be given access to any witness statements filed in the proceedings.

Subject to a carve out relating to minor children, the working draft standard reporting permission order assumes that accredited members of the press will be able to refer to, quote from or use any of the following:

**a) the names of the parties;**

**b) photographs of the parties;**

**c) a description of the factual, evidential or legal issues in the proceedings including the open proposals made by the parties;**

**d) quotations from, or information derived from, any documents filed in the proceedings ("the filed documents"), including, but not limited to, witness statements, replies to questionnaire, voluntary disclosure and position statements;**

**e) quotations from, or summaries of, the oral evidence of witnesses, or of the submissions of the advocates, or the comments of the court; and**

**f) quotations from, or summaries of, the judgment and order disposing of the proceedings.**

## Possible practical effects

While increased public confidence in the family courts is a worthy and important aim, it remains to be seen how these proposals can be implemented without a raft of unintended consequences. Given the level of detail set to be publishable, it is hard to imagine how the risk of so called 'jigsaw identification' could be eliminated. A primary concern has to be the welfare and mental health of children who may risk having their parents' situation discussed by their friends and peers but there are also wide ranging implications for the parties themselves.

As a team we act for people from all walks of life including business leaders, hedge fund managers and professional sports people. Whether it be the need to maintain the confidence and backing of your investors, your board, your manager or your teammates, details concerning conduct could operate as a distraction and cause irreversible damage to careers and sometimes to the value of corporate entities.

Professional sportspeople are a good example of those who may be adversely affected by the proposed changes. Their careers may burn brightly for a short period before being cut short by injury or a loss of form leaving them with a small window in which to maximise their earnings and commercial impact via endorsements and media appearances. In football, for example, details of conduct might dent a player's transfer value, limit their commercial appeal before one even considers the likely loss of form and focus on the pitch.

If you are a fund manager with 'skin in the game' or a business founder with significant personal wealth invested in their business, lurid personal details being reported in the press might have implications for their FCA registration or dent investor confidence leading others to withdraw their capital.

At a time when the court system is overburdened with a backlog of cases, some consider these changes to be yet another encouragement to those who can afford it to seek alternative routes to using the court system (discussed below).

It is possible that the proposals may act as such a deterrent to litigation and that parties may be more inclined to settle and behave in a more constructive and sensible manner rather than litigating points of principle or seeking to punish the other party for their alleged conduct.

## Alternative routes and solutions

While anything that increases public confidence has to be a net positive, we are looking closely at ways in which we can protect our clients' privacy. In particular:

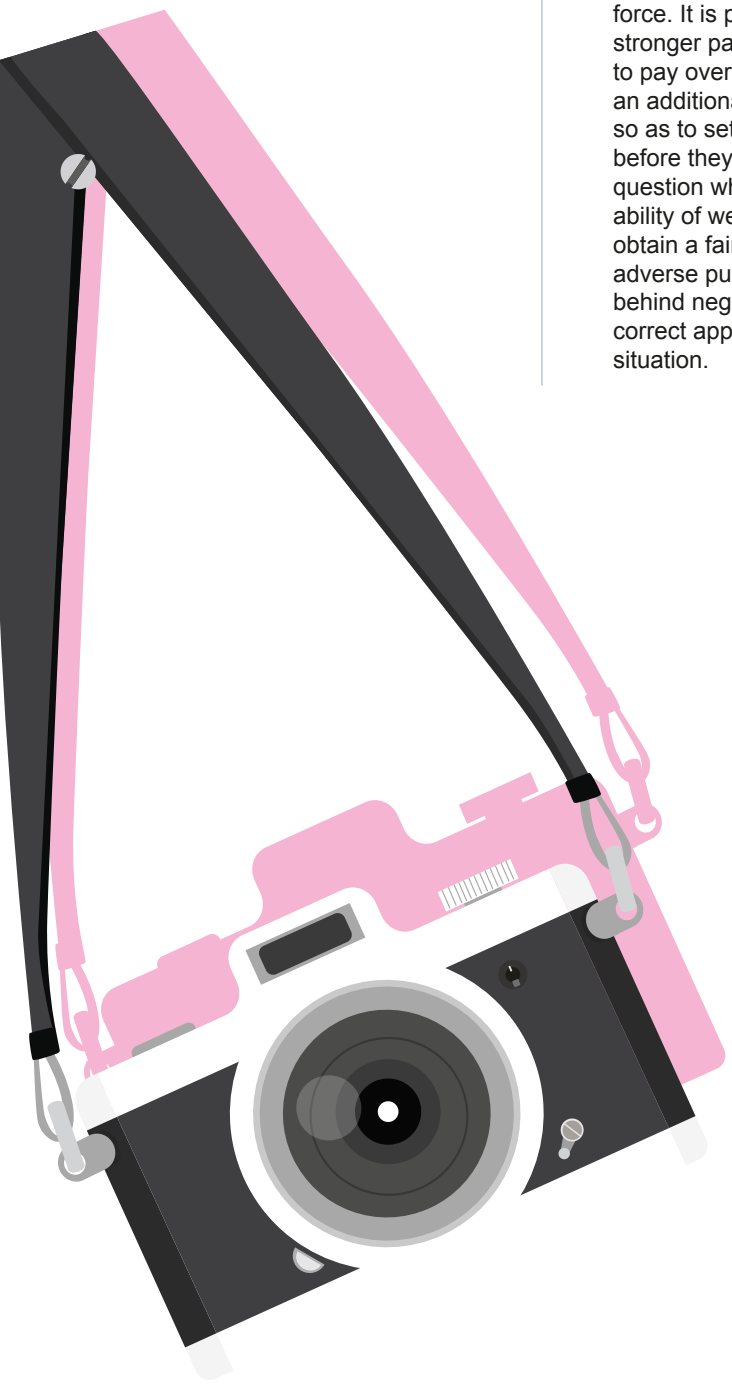
1. **Arbitration** – First introduced in 2012, this provides for cases to be determined by a specially trained barrister or solicitor as arbitrator. This has the advantage of taking place in private and the parties are bound by the 'arbitral award' which is then converted into an order to be approved by the court. From a slow start, this has increased in popularity over the pandemic as a sensible way of resolving cases quickly instead of clients having to wait for up to a year for a final hearing to be listed. The Court of Appeal's decision in *Haley v Haley [2020] EWCA Civ 1369* has also been key to increasing the popularity of this process with clients. The judgment confirmed that an award can be appealed in the same way as a court order. That said, *Haley* is also problematic from a privacy perspective. While arbitration takes place in private, any appeal would be public so arbitration is not necessarily a silver bullet for those wishing to avoid public scrutiny.

2. **Mediation** – While a voluntary, non-binding process, mediation provides a confidential alternative to court proceedings which also offers parties with flexibility to agree a tailored process to suit their situation. It is becoming increasingly sophisticated allowing for the involvement of experts dealing, for example, with valuation evidence or evidence relating to the effect of medical conditions.

3. **Private Financial Dispute Resolution hearings ('pFDRs')** – These see parties instructing an independent barrister or solicitor to act as judge to provide an indication as to the likely outcome of the case at trial. The process is akin to using private health insurance rather than the NHS in that the parties choose their tribunal and the 'judge' is able to devote a whole day to the case rather than parties being sandwiched between a number of other cases in a busy court list. Settlement rates are high and these take place in private avoiding any impact of the proposed changes. Once again, this process requires the consent of both parties and cannot be imposed if one

party fails to agree. If agreement is not reached, the parties will be left with the court process or arbitration so the there is no guarantee that public scrutiny can be avoided.

4. **Confidentiality clauses in nuptial agreements** – While the size and scope of such clauses has been increasing in recent years, it is not clear what protection they might offer once the transparency changes have been introduced. Typically such clauses seek to restrict what parties can say to third parties and also to limit what can be said on social media platforms such as Facebook or Twitter. Agreements commonly include clauses that commit parties to taking all necessary steps (to include making applications by consent) to ensure that hearings are held in private and that accredited members of the press are excluded.



Such clauses are likely to be rendered ineffective by the proposed changes. Perhaps more helpful is the inclusion of clauses in which parties agree how disputes are to be resolved. Clauses committing parties to arbitration are likely to grow in popularity as the only way to avoid public scrutiny.

5. **Stay married** – There is a risk that parties (particularly those in the public eye) may choose to remain in unhappy marriages rather than risk being the subject of press attention. Regardless of one's view as to whether this strengthens or weakens the institution of marriage, there is certainly an argument to suggest that this might adversely affect minor children living with parents constantly at loggerheads.

6. **Increased generosity** – The *'Spencer effect'* may become a reality once the proposals come into force. It is possible that financially stronger parties may now be forced to pay over the odds (rather like an additional 'privacy premium') so as to settle their cases long before they reach court. Some may question whether this restricts the ability of well-known individuals to obtain a fair outcome if the cost of adverse publicity is the main driver behind negotiations rather than the correct application of the law to their situation.

## Conclusion

The President has been decisive in addressing a perceived decline in public confidence in the Family Courts. His wish to increase public understanding of the system via increased transparency is well-intentioned and may well achieve the desired outcome. Despite that, there are other practical consequences of those changes.

**It is crucial that we prepare for the changes now to ensure that our clients and their families can continue to resolve disputes in a way that causes the least possible damage to all concerned and in particular to their children.**

The role of reputation management lawyers has never been more important and we are lucky at KN to be able to call on the expertise of our leading media team.

**This article was first published by Kingsley Napley.**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# 60-SECONDS WITH:

## GILES RICHARDSON, BARRISTER, SERLE COURT

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

**A** Goodness knows, but what I would like to be doing is either designing gardens (this seems to be a common lawyerly desire - before Covid I did a fantastic week long course at Great Dixter garden in Sussex where most of my cohort seemed to be recovering lawyers) or, perhaps even better, writing about them in some form.

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

**A** Being sent when pretty junior to Moscow in a freezing February to take a witness statement from a "business man". I was made to wait in a hotel for four days to see him with no company save my translator (who kindly took me to various Ukranian restaurants runs by assorted cousins where my vodka tolerance was repeatedly tested), and then was finally summoned to the office of the possible witness, who, he been an actor, would have cleaned up in roles for very scary, very large men with a taste for leather jackets, big watches, gold chains, and huge cigars who bump off weedy English lawyers for sport. Meeting done, I have never been so glad to see BA cabin crew in my life. It was very strange and rather too exciting.

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

**A** I think the hardest, but also often most satisfying, is working out how to structure the architecture of a case – the facts and the evidence, the law, the procedural avenues available, the personalities involved, and so on – in the way which stands the best prospect of achieving the client's objectives and the optimal outcome for them.

The easiest part is dealing with my professional clients – I feel very fortunate that I consistently get to work with people I both like and respect.

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

**A** Be yourself: you will probably be working more hours over many years than you would really like to, and it is a much more endurable – and indeed often pleasurable – to do the job whilst being comfortable in your own skin than in trying to be someone you are not or someone you imagine others would prefer.

**Q What do you think will be the most significant trend in your practice over the next 12 months?**

**A** Hopefully, seeing clients, colleagues and indeed even judges in real life again.

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

**A** Draw well; I find watching people who can do it proficiently incredibly soothing as well as engaging, and imagine it must be even more so to be doing it.

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

**A** Our garden; and if I had ever doubted it was that, the last couple of years would have taught me not to.

**Q If you could meet anyone, living or dead, who would you meet?**

**A** At the moment, I am just looking forward to seeing friends in real life I have not seen for too long.

**Q What songs are included on the soundtrack to your life?**

**A** Richard Strauss' Four Last ones.

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

**A** Being at home in Suffolk in midsummer in perfect weather, with a houseful of friends occupying themselves, someone else cooking, pottering in the garden with no sign of either muntjac or blackspot on the roses, evenings on the beach at Dunwich with the North Sea 10 degrees warmer than usual and no jellyfish.

**Q Looking forward to 2022, what are you most looking forward to?**

**A** The same as many people I think: hugging friends; real conversations; good food in good company; breathing out.

# ThoughtLeaders HNW Divorce

## Meet ThoughtLeaders


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