ThoughtLeaders4 HNW Divorce • JUNE 2022

HNW Divorce MAGAZINE

ISSUE 9

HNW DIVORCE IN THE NEW ERA

INTRODUCTION

"Algebra is a lot like relationships, do you ever look at your X and wonder Y?"

Stephen Mangan (Nathan Stern, The Split Season 3)

We are delighted to present Issue 9 of HNW Divorce Magazine, where our authors explore all areas of the new era in HNW Divorce. This edition covers all aspects of the industry, indlucding the long-awaited no-fault divorce, the rise and fall of Boris Becker, divorce post-brexit, crypto, and more.

Thank you to all of our contributors, readers,, and community partners for their support as our HNW Divorce community continues to grow. We are excited to connect with you all at more of our events throughout the rest of 2022.

Love,

The ThoughtLeaders4 HNW Divorce Team

Paul Barford
Founder / Director
020 7101 4155
email Paul

Chris Leese
Founder / Director
020 7101 4151
email Chris

Danushka De Alwis
Founder / Director
020 7101 4191
email Danushka

Maddi Briggs
Strategic Partnership Manager
email Maddi

ABOUT HNW Divorce

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

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

Become a member of HNW Divorce and...

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

CONTENTS

CONTRIBUTORS

Natalie O'Shea, **Withers**
Claire Blakemore, **Withers**
Michael Gouriet, **Withers**
Emily Brand, **Boodle Hatfield**
Genevieve Smith, **Boodle Hatfield**
Dr. Jennifer White, **Grant Thornton**
Hannah Davie, **Grant Thornton**
Ami Sweeney, **Grant Thornton**
Alex Hulbert, **Schneider Financial Solutions**
Gabriel Tsui, **PwC China & Honk Kong**
Vivian Leu, **PwC China & Hong Kong**
Elizabeth Doherty, **Macfarlanes**
Richard Hoggart, **Macfarlanes**
Riley Forson, **Macfarlanes**
Matthew Booth, **Payne Hicks Beach**
Katherine Kelsey, **1KBW**
Alex Cooke, **Schneider Financial Solutions**
Jessica Crane, **London & Capital**
Mary Gaskins, **Burges Salmon**
Alexander Chandler QC, **1KBW**
Annabel Barrons, **1GC**
Claire Gordon, **Farrer & Co**
Matthew Taylor, **Stowe Family Law**
Claire Filer, **Irwin Mitchell**
Janette Johnston, **A City Law Firm**

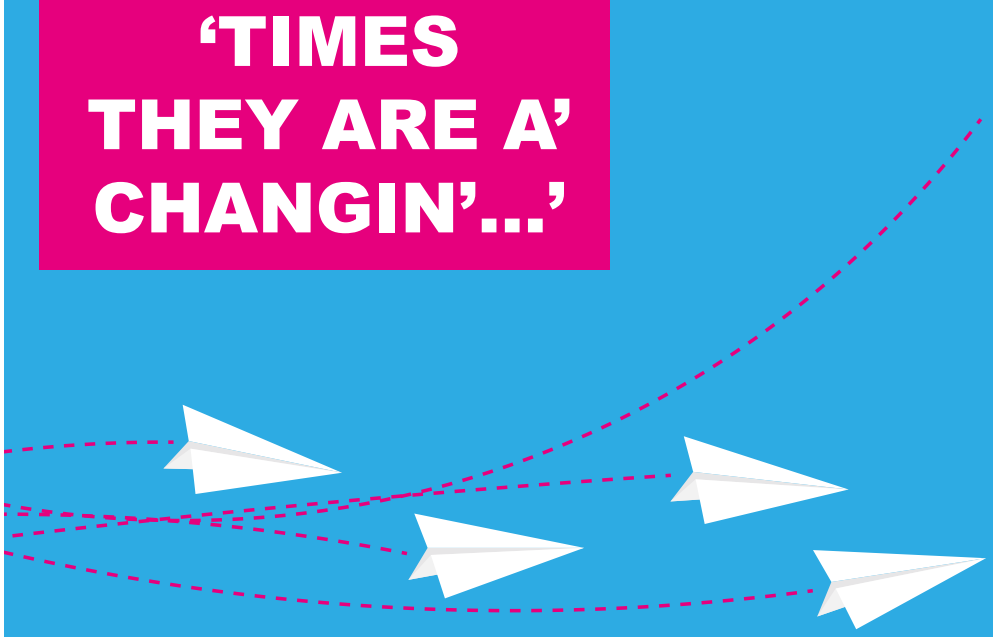
QC Surgery: Complex Finances in HNW Divorce

30th June 2022 | **Morning** | London

Enforcing a Divorce Award

30th June 2022 | **Afternoon** | London

‘TIMES THEY ARE A’ CHANGIN’...’



DOING DR AND LITIGATION DIFFERENTLY: MODELS, PARTICIPATION AND FLEXIBILITY IN FAMILY LAW

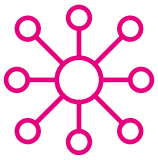
Authored by: Natalie O’Shea, Claire Blakemore and Michael Gouriet – Withers

Bob Dylan wrote those lyrics during a time of political and military upheaval as a rallying call for people to come together to bring about a needed change. Some 60 years on, Bob’s line resonates in many of today’s settings. Perhaps one is our current system for divorcing and separating couples, and so it was a privilege to gather together (joyfully in person for the first time in a long time) at the ThoughtLeaders4 Future of Family Practice DR Conference in May 2022.

The purpose of the afternoon was to exchange information about what we are all doing (or perhaps should be doing) differently as family law practitioners and to share ideas about how the profession is adapting in a family law system which is undergoing rapid change.

As lawyers, mediators, arbitrators, and collaborative lawyers and litigators, reaching an outcome which suits our clients has always been our goal, whether that is through conducting litigation in certain cases, and/or through one of the many family DR processes. But the way clients want to get to that goal is changing, with increasing choice of options, and family lawyers now find themselves competing with unregulated services and multidisciplinary practices. Our understanding of what clients want and above all need, has also evolved. This is in part, because we have been mobilised by an overburdened family justice system - but it is also as a result of consumer-driven demand for a different way of doing things. This excellent conference put the spotlight on how we are creating new models and ways of working in the litigation and DR contexts.

Sharing innovation and encouraging each other as we adapt to changing practices is one of the hallmarks of family law and so in the interests of full disclosure, here are some of the key themes which emerged from the conference, all thanks to the speakers’ generosity in sharing their experience and to Claire Blakemore as Chair.



New models in family law

Jaqueline Marks, Karin Walker, David Lister, and Claire Blakemore candidly and generously shared their journeys and insights in setting up innovative ways of working with family clients (sharing information about The Mediation Space, The Certainty Project and Hybrid Mediation, Separating Together and Uncouple respectively). What emerged was that clients’ needs lie at the centre of each innovation and that an understanding the psychological process of divorce by the couple underpins all of the new ways of working. SRA and compliance issues must and can be worked through and there is flexibility and certainty for clients in terms of the process and the cost.

Frustrations and lack of understanding about what there is on offer?

Many of the panellists - lawyers, mediators and other professionals included - spoke of their frustrations with the mediation process: sometimes it takes too long, or clients want more direction. On other occasions, mediation can be too prescriptive. Good mediators are adept at bringing financial neutrals, lawyers and therapists into the process, but there was consensus that there is a lack of understanding amongst the public about what they need and where to get it.

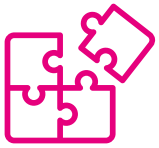
With the advent of digital services and AI tools, any gap in the market will swiftly be filled by unregulated providers offering alternative multi-faceted models and so it pays for the legal profession to be adaptable and flexible too.

The Single Gateway, plain language and listening

As Angela Lake-Carroll highlighted, many clients want and deserve a bespoke wrap-around service when seeking advice on relationship breakdown. If we want to appeal to them in the future, we should set out our stall in a way that makes sense to them. Working in silos does not help. Using plain language about the avenues open to client and listening to what they really need is critically important. We need to be thinking about how to work in DR ways in our everyday practice – everyone can use mediation skills whether mediating or not. We also need a system which allows clients to access all DR offerings whichever firm they call upon first.

Jargon-busting

But perhaps we also need to cut the jargon. The number of processes on offer is confusing for clients and for practitioners. We need to simplify the message, and rather than talking about clients being able to use mediation or private FDRs or collaborative law or arbitration or mediation, should we be using a different connector - 'and'?



Shifts in practice and practice shifts

Adapting within the professions can involve any number of changes to the way we work: using DR skills whether or not we are trained in a specific discipline; knowing enough about the various options to talk to clients about the option they might need; referring clients to the right person for help and advice. Nicola Wager, Tristan Harvey and Simon Pigott shared their experience in shifts in practice and/or shifts in role: whether working in hard-nosed litigation, as a mediator, an arbitrator a private FDR judge, or a selection of each. Frustrations with the current system in terms of achieving efficient outcomes for clients – getting to the heart of what clients really need – often motivated the change. Insights into how to use and combine skills from each discipline were shared – whether that involved bringing in a neutral evaluation when mediation is at an impasse or how best to combine skills in a practice where one client requires mediation in the morning, and another needs an Anton Pillar order in the afternoon.

Deal making

When it comes to negotiating (whether in in the litigation and DR context) we are all deal-makers and clients often need guidance from a barrister with a good sense of what the Judge might determine if the unresolved case went to court. Michael Gouriet, Chris Pocock QC and Katherine Kelsey discussed the pros and cons of FDRs, different models of Private FDRs Neutral Evaluations within litigation, and the method behind choosing your arbitrators and private judges. In court-based FDRs, judges frequently don't have time to read the papers, offers are necessarily positional and clients often come away after an exhausting day at court, dispirited. Conversely, in a private FDR, there's more flexibility in how the process is managed; barristers needn't write such long position statements and judges have time not only to read all of the papers, but to explain to the clients why they have reached their decisions, which then aids negotiations and possible settlement. This happens in the arbitration context too. Lamenting the manifest practice-wide decline in the art and benefit of negotiating a deal in advance of FDRs, Michael Gouriet encouraged lawyers to have the courage of their convictions in making 'outcome' rather than 'positional' offers (and if appropriate on an open basis). There was general support for the re-introduction of Calderbank offers which were considered to encourage negotiations.

Complementary Professionals – involve the experts early on

The specialists on this panel were from non-legal professions: Naomi Goode – a psychotherapist Sarah Middleton – an accountant who undertakes business valuations and Duncan Wilson – a financial planner. When asked by the chair of the panel, Natalie O'Shea, what family lawyers could do to improve services for their clients, there was consensus about the need for solicitors and mediators to involve them earlier and how this benefits clients when we do. The wider professional services needed by divorcing and separating clients are often delivered in a disconnected process with experts being brought in too late or with limited knowledge of the wider context. The need for emotional support, expert valuation advice and financial planning advice doesn't start and end once a deal has been brokered. A good deal means not only the 'right' financial outcome, but one in which both have trust. If it is to work on the ground it must be future-proofed and reality-tested, well before the court is asked to ratify. Perhaps we should be more open and flexible with our colleagues in other professions about the processes at play and about what our clients really need. We should also work harder to understand what those colleagues need from us, so that ultimately, our receive the bespoke, wrap-around service they are looking for.

Family law - it is a 'changin

It was good to meet and even better to share insights and experience as we all start designing different ways of practicing – and so with apologies to Mr Dylan… come family lawyers, private evaluators and Judges, mediators, arbitrators, collaborative lawyers, consultants, psychotherapists, wealth planners, IFAs and valuers – time to heed the call.

Transforming human performance, impact and wellbeing in legal business

Ineo develops individuals, teams and businesses for profound impact and lasting change beyond the realm of workplace

For further details contact
Steve Smith - Managing Director
M: +44 7545 814368
E: steve.smith@ineo-life.co.uk
www.ineo-life.co.uk

ineo
our future is human

300 YEARS OF FAMILY LIFE

SCIENCE, SEX OR PSYCHOLOGY?

Authored by: Emily Brand and Genevieve Smith – Boodle Hatfield

Founded in 1722, law firm Boodle Hatfield has a long and illustrious history. To celebrate, on 11 May 2022, Boodle Hatfield's renowned family law team held a diverse and illuminating panel discussion around modern relationships, love, sex and marriage.

Hosted by 'Naked Attraction' TV presenter, Anna Richardson, the panel comprised evolutionary anthropologist, Dr Anna Machin, Christ Church Southwark's Revd John Henry, psychosexual and relationship psychotherapist, Silva Neves, and influencer, writer, musician (and proud non-binary Northerner), Tom Rasmussen.

The evening centred around what drives our relationships; looking back on the societal and legal changes since the firm was founded and considering whether the institution of marriage will continue for the next three hundred years - and, if so, in what format.

The event opened with an introduction from Family Law Partner, Emily Brand, who set the scene with a precis of the ever-changing laws regulating marriage and love in the UK. She walked the audience through the history of marriage from the Clandestine Marriage Act of 1753 to the introduction of no-fault divorce last month. She questioned whether progress is always linear, particularly in today's turbulent times, where women potentially face renewed hardship around abortion rights in the US.

Ultimately, as Anna Richardson commented, "Love is something that we all experience".

As lawyers, we must reflect on what role the law and the Family Courts should have both by responding to changing social norms and by potentially shaping the next 300 years.

Does marriage still have a place in modern society?

The panel's first question was whether they considered the institution of marriage to be broadly redundant. Machin began by describing the origin of 'romantic love', which was "dreamt up by the Victorian poets". This, in turn, is imposed by society onto "a biological relationship - a reproductive relationship, essentially". She went on to explain that there is no such thing as a monogamous species, with marriage originally introduced as a way to homogenise and regulate society. As a 'display' species, she argued, we embrace the tradition and ritual of marriage, although the tension between biology and cultural expectation can often cause problems within relationships, which family lawyers see play out on a daily basis.

Neves reasoned that marriage is so embedded in our culture that adult life can often be seen as a 'conveyor-belt to marriage'. In his experience, the expectation of marriage and how partners define what it means to them can either help or hinder their relationship.

He argued that "marriage is outdated now and people need to understand about a more modern version of marriage, because of all the choices we have now we can be a bit more creative with it".

Rasmussen, themself in a queer polyamorous relationship (and engaged to marry their primary partner), considered the complicated experience of the queer community towards marriage; on the one hand, having been excluded from the institution until only seven years ago, there was a willingness in some spheres to embrace and participate in what had been 'won', while on the other hand, there was a sense that participation in such an institution was to partake, to some extent, in social injustice. They noted that the legal documentation pertaining to marriage did not provide for 'they/them' pronouns and, as a consequence, they said; "I feel protected by being polyamorous, protected from being fully recognised by the state. It feels like I can play it my own way".

Henry commented that, linguistically, Greek offers both 'eros' (an exciting, attraction-based love) and 'agapē' (a giving, faithful and sacrificial love).

For him, "Principles such as covenant, commitment, stability and sacrifice, are important and precious, because they are linked to the idea that love, fundamentally, is actually an act of will, as opposed to just a feeling".

This idea feeds in to the discussion surrounding attachment theory and how we express love to one another. For him, the real question is

"How will we learn about what is fundamental about human beings that gives some structure to the diversity that we're seeing? What are the underlying rules of human nature?"

The broad consensus suggested that marriage in some form still has a role to play in modern society but to navigate this relationship successfully, spouses would have to define (and re-define) their respective and joint expectations and to communicate effectively with one another as their relationship evolved. In order to adapt their relationship over time, partners would need to review their life-long promise and adjust their expectations accordingly. In other words, a regular 'relationship-MOT' should be deemed essential.

From a legal perspective, certainly there are modern trends and practices that sit outside the current framework, posing some interesting questions: will we see the development of legal protections for individuals and offspring engaged in polygamous relationships, or those in long-term platonic relationships? When will they/them pronouns appear on legal documents? Will "others" ever be included in a legal marriage in this jurisdiction? And pertinently, do we really want all aspects of marriage or relationships to be legislated?

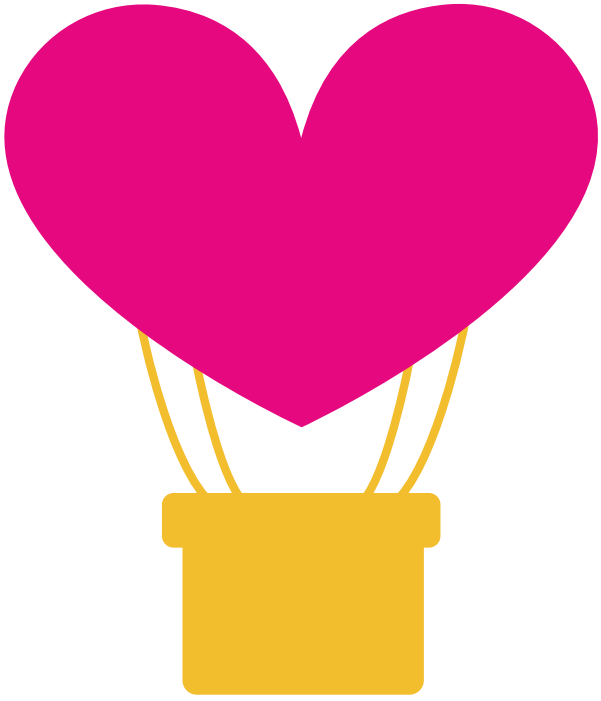
Education has a major role to play

While viewpoints on the drivers of love, marriage, and religion differed, there was wide-ranging consensus that there is a lack of education for young people in the UK as to what a healthy long-term relationship looks and feels like.

As lawyers, there is a tendency to focus on the 'common law marriage myth' - although it was clear from the discussion that education about the implications of marriage could also be beneficial - both from an emotional wellbeing / healthy relationship perspective but also about the legal implications. As one audience member commented, "we take financial advice when getting double glazing, but not when getting married".

Indeed, practitioners will often encounter an expectation that a spouse will walk out of a marriage with what they came in with, and even with what a spouse has 'made' along the way. As lawyers are aware, this is rarely the case, with overarching judicial analysis of the 'fairness' of any financial settlement. With women's liberation, there has been a move away from the traditional expectation of financial commitments of a marriage (think of 'dowries') to a partnership of financial equals (even allowing for the gender pay gap, there are increasing numbers of dual-income families) - will this misplaced expectation become even more common without broader education of the legal implications of marriage?

The panel also looked at how expectations of traditional gender roles can still affect marriages, and Neves discussed how this often causes problems in the relationships that he sees every day. In light of the expanding nature of femininity and roles



available for women in modern society, he considered that, conversely, men were stuck in a more restrictive box of 'masculinity' which had not developed and expanded at the same rate. He often encountered partners dealing with the friction this could cause.

The panel moved on to discuss the notion of radical acceptance and the understanding that every committed relationship involved actively choosing the "whole person". Often, it is indeed a person's flaws and not their perfect self that we fall in love with. Machin supported this with evidence from her research into AI. She said that the only way to recreate a humanoid robot is to introduce flaws, as these are fundamentally part of what makes us human.

So, is accepting each other's flaws the path to true, authentic love, rather than simply 'swiping right' until we find what we think will be our 'perfect partner'?

Equally, in a world where technology and social media teach us how to "present", as opposed to experience and live, how can people navigate this artificial social construct when it comes to developing relationships in the real world? Should society encourage young people to embark on healthy relationships by moving away from the idea of 'happy ever after'? Certainly, Machin argued that the romantic "narrative does not necessarily prepare us for the difficulties of long-term relationships".

Where do we go from here?

From this discussion, it is clear that it is human nature to want to be loved in some capacity - whether by our friends, our romantic partners or by our family. Education and open communication appear to be the key to strong relationships, including, perhaps, an acceptance that the defining measure of the success of a relationship is not solely the length of its duration.

In our ever-changing society, there are many lessons for us to learn - what can monogamous relationships learn from polyamorous? Is there a case for 'beta-marriages' which are designed to only last in the short-term? Will platonic co-parenting replace the traditional model of a conventional marriage and 2.4 children? Rasmussen commented that in their experience there were "way more languages of love and ways to love in the queer community; chosen family, platonic relationships, sex with friends - there's something to be looked at there".

Our love for one another and how we express it continues to develop with changing societal norms and could look very different in another three hundred years. What remains certain, as the last 300 years have shown, we are living in a human experiment and we can expect continuing evolution as the law catches up with the expanding notions of partnership and parenting.

BORIS BECKER

FROM BRILLIANCE TO BANKRUPTCY

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

In arguably the most high-profile conviction ever under the Insolvency Act of 1986 (the IA 1986), former tennis champion Boris Becker has been sentenced to 2.5 years imprisonment. Following his bankruptcy in 2017, Becker was legally obliged to disclose his assets so that his trustee could distribute available funds to his numerous creditors. However, Becker failed to do so and in fact concealed and removed significant assets from the Official Receiver and his Trustee in Bankruptcy. This led to his discharge from bankruptcy being suspended indefinitely. He was also subject to a 12-year Bankruptcy Restrictions Undertaking, effective from 17 October 2019. A prosecution was brought by the Insolvency Service, on behalf of the Secretary of State for Business, Energy and Industrial Strategy.

Following a trial at Southwark Crown Court, Becker was convicted on four counts against the IA:

- **Removing property totalling close to €427,000 from his bankruptcy estate (count 4)**
- **Failed to disclose ownership of a property in Leiman in Germany (count 10)**
- **Concealed a loan of €825,000 from the Bank of Alpinum of Lichtenstein (count 13)**
- **Ownership of 75,000 shares in Breaking Data Corp (count 14)**

Whilst Becker was acquitted of no fewer than 20 additional charges against him, (including nine counts of failing to hand over trophies and medals from his tennis career), those 4 counts listed above were enough to warrant a 2.5-year sentence. In a cruel twist of fate, Becker now finds himself in Wandsworth prison, just a stone's throw from the Wimbledon courts. Is this a cautionary tale warning all bankrupts of the consequences of contravening the Insolvency Legislation? Or rather, is this a high-profile case in which sentencing would not have so harsh had Becker not been a celebrity? Here we take a brief look at the decline of Becker, who is no stranger to litigation, and try to make sense of this astonishing insolvency case.

Decline to Bankruptcy

Becker was declared bankrupt on 21 June 2017 following a petition made on 28 April 2017 from private bank Arbuthnot Latham & Co. The bank had lent him circa EUR 4,600,000 on his estate in Mallorca and Becker had failed to make payments.

In those proceedings, Becker argued that his earlier fortune (of approximately USD 50,000,000) had been eaten up by his divorce from his first wife, Barbara.

It was Becker's contention that high school fees, child maintenance payments and general "expensive lifestyle commitments" accounted for his overall dwindling finances. There are also reports that Becker was also unable to repay a loan he took from British businessman John Caudwell, who founded Phones 4u. Nevertheless, Becker's fortune had already taken a tumble following his retirement. It was seemingly his divorce from first wife which marked the real start of his financial plight, and ultimately acted as a catalyst for his decline to bankruptcy. Divorce is a great leveller, as we are all aware.

Under Becker's Bankruptcy Order, he was legally bound under a statutory

duty to both provide full disclosure of assets to his trustee and to inform lenders of a bankruptcy when he was seeking to borrow more than GBP 500. However, the Official Receiver of the estate found a series of undisclosed transactions worth more than GBP 4,500,000. During proceedings, it was found that Becker had removed property worth around EUR 427,000 from his bankruptcy estate, in contravention of s. 354(2) IA 1986; he had failure to disclose ownership of a property in Germany in contravention of s. 353(1) IA 1986; he had concealed the aforementioned EUR 825,000 from the Bank of Alpinum of Lichtenstein in contravention of s. 354(1)(b) IA 1986; and he had failed to disclose ownership of 75,000 shares in Breaking Data Corp in contravention of s. 353(1) IA 1986.

Becker's Sentence

On 29 April 2022, Judge Taylor sentenced Becker to two and a half years in prison. She concluded that although Becker had been humiliated during the trial, he had shown no remorse nor humility. This behaviour, or lack thereof, seems to have played into her decision. It is schedule 10 to the IA that provides the sentencing guidelines for the four offences, which if one looks at the requisite sections 343 & 345, in some instances it can be up to 7 years on indictment. So evidently, it could have been a lot worse for Becker. Nevertheless, in addition to the 2.5yrs sentencing, Becker's discharge from bankruptcy has been suspended indefinitely. Therefore, it will be up to the Official Receiver to free Becker from bankruptcy. Becker is also subject to the previously mentioned 12-year Bankruptcy Restriction Undertaking, which will take effect as of 17 October 2019. Consequently, Becker will be subject to the restrictions up to 16 October 2031.

Moreover, there is a question mark over whether Becker will be able to stay in the UK. Becker, it is believed, does not have British citizenship, and so could either be considered for deportation under the previous version of the UK Borders Act 2007, or the more stringent updated version, which was implemented on 31 December 2020. Ultimately, what this means is any foreign national who is convicted of a crime and goes to prison is considered for deportation at the earliest opportunity.

So in theory, the Home Office could claim that Becker's criminal offences continued after the Brexit withdrawal agreement were implemented on 31 December 2020, which made immigration law for EU citizens (Becker is German) more stringent, and Becker could be forced to leave the UK after he has served his sentence.

Uncharted Territory

Evidently, this is not just an interesting insolvency case involving a tennis star, known for his rather racy liaison in a Nobu broom cupboard, a divorce, and a bankruptcy. This could become a sophisticated and potentially protracted immigration case which makes legal precedent. As it stands, Becker's story is a stark and very public reminder of the powers afforded to Trustees and how the Insolvency Act can be used to not just recover assets for creditors but can also have criminal consequences if ignored.

So, what does the immediate future hold for Becker? Because of this being a white-collar offence, he could theoretically be moved to a low-category prison – though in practice this may be unlikely as usually one would have to go through parole to obtain a decision to be moved from a category B to a category C. Becker could of course seek to appeal Taylor's judgment, but this is also unlikely due to the high costs and timeframes involved. What is more likely is that he will serve at least half of his sentence and the rest shall be on probation. Thereafter, he may need to consider whether he wishes to fight for his right to remain the UK or indeed return to his native Germany. That is so say, if Becker is not a UK national. Either way, the rise and fall of Becker is certainly not over. We anticipate Becker will reinvent himself once he is out of prison. After all, the British public do like a story of redemption. And Becker shall need a source of income, considering the sanctions he is under. One can envisage a talk show, a sports commentary role, or perhaps Strictly Come Dancing. In the interim, this fascinating case continues to unfold.

High net worth divorces and family disputes

Our aim is to work collaboratively and strategically with legal teams to achieve the best possible outcome for clients.

We know that divorces can be messy, emotionally charged and sometimes extremely acrimonious. But we also know that with the right team in place, realisations can be maximised and even well-hidden assets recovered, so enabling your client to make a fresh start on a firm financial footing.

To find out more about how we can assist your client going through a divorce or dealing with a family disputes, please do get in touch.

We help you resolve disputes through:

- Intelligence and research
- Expert witness services
- Valuations
- Asset tracing and management services
- Formal appointments
- Insolvency appointments
- Debt enforcement and recovery strategies

Visit grantthornton.co.uk to find out more, or contact:

Hannah Davie
Partner, Head of contentious estates and family disputes
T +44 (0)20 7865 2849
E hannah.davie@uk.gt.com

Grant Thornton

DS1966

60-SECONDS WITH:

ALEX HULBERT
COO & SOLICITOR
SCHNEIDER FINANCIAL SOLUTIONS

Q What do you like most about your job?

A At risk of sounding cliché, my colleagues.

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

A Lead guitarist in a rock band. Well, a man can dream right?

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

A I'm one of few individuals who has had a career as a family solicitor, only to leave to pursue something commercial. Leaving a defined and established career path to be employee number one in a nascent litigation finance business was a fairly bold leap in hindsight, but I don't regret it for a moment.

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

A Never neglect your own health. All the knowledge and ability in the world mean nothing if you're too burned out to make the most of it.

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

A While one might think that litigation finance is the geared to the financially disenfranchised, frequently I am seeing wealthy, financially sophisticated individuals utilize litigation finance as a tool in order to most effectively manage their liquidity and overall wealth.

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

A Adaptability.

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

A My first training principal at Hodge Jones and Allen, Peter Todd. A subtle and outstanding litigator, deeply committed to the training and development of junior lawyers. I'm fortunate enough to have my own trainee now, so I try to live up to his example daily.

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

A A substantial road trip. For our honeymoon my wife and I drove the width of America, which we both agreed was significantly better than staring at a pool for two weeks.

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

A Music. I'm attempting, with varying success, to teach my two year old how to play his miniature guitar. Being able to create and play music for my own enjoyment and to share with others is a privilege, and a wonderful escape.

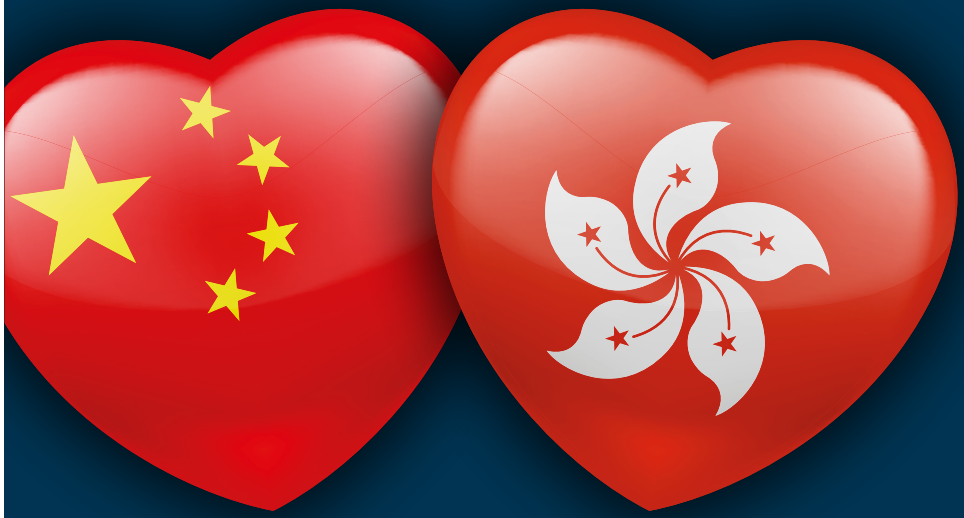
Q What is a book you think everyone should read and why?

A Bonfire of the Vanities. A stark lesson in the dangers of hubris, plus you don't see enough people struggling with the heft of a 700 page novel on the train these days.

Q What would be your superpower and why?

A If you're offering, teleportation please. While I love living in Surrey, public transportation into the City seems to get a little worse each passing year. Thanks very much.

DIVORCE IN A NEW ERA



RECIPROCAL RECOGNITION AND FAMILY JUDGMENTS BETWEEN MAINLAND CHINA AND HONG KONG

Authored by: Gabriel Tsui and Vivian Leu – PwC China & Hong Kong

Introduction

Cross-border investment is no stranger to many couples nowadays. There are government-driven initiatives to facilitate residents in both Mainland China and Hong Kong to acquire assets or investments across the border.

According to the Trade and Industry Department of Hong Kong, at the end of 2019, Mainland China was Hong Kong's second largest source of inward direct investment representing about 28.1% (HK$4,081.0 billion) of the total inward direct investment.

On 15 February 2022, Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance Cap. 639 was enacted and came into effect. The new law establishes mechanisms for (a) registration of specified orders in Mainland judgments given in matrimonial or family cases; (b) recognition of Mainland divorce certificates; and (c) application for certified copy of and certificate for Hong Kong judgments given in matrimonial or family cases.

The new law has been long-awaited and well received by matrimonial practitioners. Before the new law, divorcing parties in the Mainland may have had to re-litigate their cases in Hong Kong.

In our experience, for divorce proceedings with cross-border investments or assets, we often see needs to:-

1. **seek disclosure of possible hidden income or assets**
2. **investigate for possible dissipated family assets**
3. **value investments and businesses**

(1) Seeking disclosure of possible hidden income or assets

One of the commonly requested services is to investigate transactions to uncover possible undisclosed or hidden assets based on available information. This is not an easy task because it requires clear instructions from the legal team and documentary evidence plus an experienced team of accountants, otherwise the investigation may merely look for a needle in a haystack.

It is not rare to see non-disclosure of assets in a divorce proceeding, especially when the couple comes from different jurisdictions or where their business dealings are scattered in different regions. We often receive enquiries for investigation into personal accounts and company books and records in both the Mainland China and Hong Kong when there is suspicion of the opposing party not making full, frank and clear disclosure.

These include analyses on personal income level/ sources and spending patterns, trends/ variances in the company's financial records, etc.]

In cases where substantial assets are involved, supporting analyses not only assist the legal team to make further disclosure applications but also strengthen the case arguments.

In HCMJ v HYM [2020] HKFC 164, the wife alleged that the husband had an undisclosed business in Mainland China and Hong Kong. She supported her allegation by naming several companies and bank accounts which had not been disclosed by the husband. After considering different evidence to

substantiate the income and expense level, the judge commented "Apparently from the evidence, the lifestyle of himself, the wife and the children do not match with the income and assets of the husband… The husband's scale of business in PRC is huge, I have no doubt to conclude he has hidden funds. I then should quantify realistically and reasonably, also in broadest terms, the value of the matrimonial asset and the true financial position of the husband."

(2) Investigate into possible dissipated family assets

With today's global financial systems, money can move from one account to another within seconds, even out of a jurisdiction to another. Assets can be transferred from one company to another company, some even to trusts or offshore places such as BVI, Cayman Island, Samoa, etc.

Companies may be set up in offshore locations. Some of the jurisdictions provide high privacy to the company owners as they require the owner's consent for the public to obtain shareholder's information.

In addition, we have seen cases whereby there are significant cash withdrawals from bank accounts before or during a divorce proceeding. In CSY v CPK [2019] HKCU 3031, the wife challenged the husband about some cash withdrawals made shortly before separation and at a time when the wife had already threatened divorce. The cash withdrawals from the husband's bank accounts totaled approximately HK$4.4 million. The husband explained all cash withdrawals were foreign exchange services for his client but the judge found "it is hard to accept the scale of service involving millions of dollars."

The level of assets in the matrimonial pool can change within a short period of time.

Without a detailed look into one's finances such as analyses of changes in assets, tracing of funds to a certain entity or trust, ultimate owner research, the true picture of the matrimonial assets which should be subject to asset divisions may not be revealed.

(3) Value investments and businesses

Valuation is often one of the most sought-after services in cases where ownership of business or investment is involved. In some cases, we are asked to value businesses that were disposed of in the past because a spouse has question about the consideration.

More examples of valuation needs include

- **valuing assets believed to be misappropriated or transferred out of the matrimonial pool;**
- **quantifying past spending as a supporting proof for a maintenance application; and**
- **hypothetical valuation analysis for company or business based on certain add-on or adjustments allowed by the Courts.**

In LYH v YHKB [2022] HKFC 81, the husband sold the assets of a family company 4 months after the consent order for ancillary was made, without making full and frank disclosure to the wife. The deal was therefore not included in the valuation report for various family companies which are subject to asset division. The judge commented that "the wife "would not have accepted the methodology of valuating EEL and the E Group by assessing the net asset value as in the Tact Report", and/or "would probably not have agreed the settlement on her ancillary relief without making further discovery" on the negotiation with Avnet".

Investigation considerations

The discussion above is only a summary of commonly observed financial-related issues in divorce proceedings. A team of experienced accountants will be able to provide services in areas such as

- **fund flow analysis to identify a spouse's spending pattern and tracing of possible dissipation of assets;**
- **review and analyse the company's books and records to assess the value of the company and value of the parties' interest.**
- **e-discovery services for recovering supporting documents that would be useful in assessing the parties' true financial status.**

Conclusion

With the new law coming into effect, parallel divorce proceedings in mainland China and Hong Kong for the same matrimonial cause of actions are believed to be more cost-effective. However, it is crucial to engage a valuation expert or investigation expert at an early stage, to assist the legal advisor and the party to identify areas to request for further disclosure, any traces of dissipated family assets and the valuation of the parties' investment and businesses.

FIREWALL FESTIVAL

Authored by: Elizabeth Doherty, Richard Hoggart and Riley Forson - Macfarlanes

After three years in which significant amendments to various regimes have been made, we take a look back at the basics of firewalls, the main trends that have emerged in practice, as well as the latest legislative developments. These have all had a measurable impact on both divorce and trust practitioners in the UK.

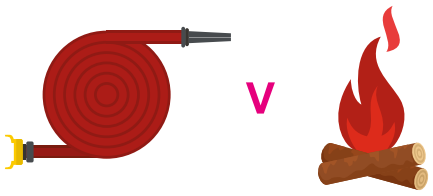
Firewalls: a brief recap

Firewall legislation stemmed from the wish of settlors to be able to choose the law governing their trusts. The Hague Convention provided a basic level of protection in this regard by granting settlors of express trusts the power to choose the law applicable to certain trust matters. However, the Convention provided that certain other issues, such as marital rights, should be dealt with under usual conflict of law rules, re-introducing foreign law into the equation. It was from these gaps that firewall regimes grew; augmenting the Convention by fortifying choice of law rules for settlors.

The Cayman Islands introduced the first firewall legislation in the Trusts (Foreign Elements) Law 1987 to defeat forced heirship claims. Other offshore jurisdictions soon followed suit, including Bermuda, the British Virgin Islands, Guernsey and Jersey.

Generally, the legislation confirms (i) the application of local law to certain trust-related issues (typically including the settlor's capacity and the trust's validity and administration) and (ii) the disregard of foreign law in relation to certain other issues, including rights conferred by reason of 'personal relationships'.

While the precise definition of 'personal relationship' is a living and evolving animal, broadly speaking, firewall regimes define 'personal relationship' as any relationship between a person and the settlor by blood or marriage. The effect of this is that property rights provided for under foreign law, such as pursuant to forced heirship rules or a foreign divorce order, may not be considered by a court in the firewall jurisdiction when determining challenges to, say, the settlement of a trust.



Notes on the implementation of the firewalls in divorce cases: watering down v or stoking the fire?

In practice, certain trends have emerged in the divorce context since the inception of firewall regimes.

Some courts have demonstrated a willingness to circumvent the firewall and allow the enforcement of English High Court divorce orders against local

trusts. In each of the cases of Compass Trustees Ltd v McBarnett [2002] and In Re IMK Family Trust [2008], the Jersey Royal Court granted an order to vary a Jersey trust pursuant to the terms of the English Matrimonial Causes Act 1973, in spite of the firewall, on grounds of comity (among others). These decisions caused some concern that the firewall was not operating as envisaged by the legislature, and demonstrated to divorcing couples that the door was open to pursue foreign assets held in trust notwithstanding the existence of firewalls. The two cases also provided a reminder that the strength of a firewall will in large part be determined by the approach of the judiciary.

However, since the IMK and Compass cases, Jersey amended its firewall regime in 2019 to prevent local courts from enforcing judgments of foreign courts against a local trust where that judgment is inconsistent with local law. Consequently, an application by a former spouse to enforce an order for financial maintenance by varying a local trust – which would likely be inconsistent with the rule against applying foreign law – would be prohibited under the terms of the firewall. This change brought Jersey in line with other jurisdictions, making it more difficult for parties divorcing in England to access offshore assets.

Guernsey has gone one step further and is therefore emerging as one of the more robust regimes, with provisions capable of withstanding pressure from foreign divorce orders.

Guernsey's legislation provides local courts with the power to refuse to recognise or enforce foreign judgments that do not protect beneficiaries' interests, even if the judgment is consistent with Guernsey's legislation. In contrast, as is the case in Jersey, most other firewall regimes prevent enforcement only where the foreign order is inconsistent with local law.

Blazing ahead with developments in the modern era

Since Jersey's 2019 update, three other firewall jurisdictions have passed statutory amendments. These all have a common theme of modernising the scope and meaning of 'personal relationships', with the intention of broadening the protection from rights arising from relationship breakdown.

1. In 2019, the Cayman Islands extended the scope of 'personal relationship' to include a relationship to any beneficiary, rather than just with the settlor. This amendment also introduced a prohibition on enforcement of foreign judgments (akin to the Jersey amendment of the same year).
2. In the following year, Bermuda passed an amendment to provide protection to settlors and beneficiaries from foreign-law rights arising from personal relationships, which is now defined to include domestic and analogous partnerships, as well as other familial relationships.
3. Similarly, in 2021 the BVI's Trustee Act 1961 was updated to extend the definition of personal relationships to capture "every form of relationship by blood, adoption, marriage or cohabitation, whether or not the relationship is recognised by the law", which relationship can also now be with a beneficiary. It is thought that this would also capture same-sex marriages, even though they do not enjoy general recognition under BVI law.

With beneficiaries given further protection, and with more modern forms of marriage and partnership included, these firewalls will assist in preventing the enforcement of foreign orders against local trusts.

Implications of the changes

The recent amendments to firewall legislation indicate a clear intention of firewall jurisdictions to reinforce the protections for trusts and to strengthen the primacy of local laws.

All offshore jurisdictions are demonstrating a willingness and ability to evolve and adapt their regimes in response to, or in anticipation of, legislative, political and societal change.

However, the developments, particularly with regard to the evolution of the definition of personal relationships, are interesting, as it is clear that jurisdictions are adapting at different rates and in different ways to incorporate modern personal relationships.

Given this, settlors and beneficiaries should be encouraged to engage with their trust practitioners in a thorough and regular analysis when determining which jurisdiction caters most comprehensively to their particular needs. It is also worth remembering that, regardless of how strong a firewall may be, it will have limited effect if there are no assets within its jurisdiction to protect. Location of assets (and their use and enjoyment) will therefore always be a central question in any structuring exercise.


serle court
Universally high quality **from bottom to top**
...what we love is that they are so pragmatic and commercial, real team players
LUNA
chancery & commercial
@Serle_Court
Serle Court
+44 (0)20 7242 6105
clerks@serlecourt.co.uk
www.serlecourt.co.uk

‘NO FAULT’ DIVORCE

THE IMPACT ON DISPUTE RESOLUTION

Authored by: Karin Walker - KGW Family Law

On 6th April 2022, we experienced the most major change in the divorce legislation in almost five decades. ‘No fault’ divorce has been the sought-after route for the process of divorce since the 1990s – in part, to fall in line with the preferred conciliatory out-of-court route for resolution of all other issues between separating couples.

When the only consensual means of bringing a marriage to an end was a two year wait after separation (provided the other spouse would consent), this change has revolutionised the way in which a marriage can be terminated. But what other consequences flow from this?

A cynical view might be that as the new online regime is so simple (and perhaps rightly so) and therefore designed to be activated without legal input, there must be a risk that separating couples with limited resources may seek no legal advice at all – with concerning consequences.

If no financial order is made, matters may unconsciously be left open-ended for many years until one party wakes up to the fact that a claim might be made or remarriage may prohibit a claim for financial resolution, which could otherwise have been validly made.

So, are we at a pivotal point in the way in which family practitioners work? Are we at the outset of far more fundamental and far-reaching change than actually has been envisaged?

The new legislation provides an initially fixed (albeit extendable) time period of twenty weeks between the issue of the divorce application to the conditional order of the divorce – formerly Decree Nisi. It is entirely impossible to resolve disputed issues within the court process in such a time frame, so once again – albeit on a different basis – the divorce process sits out of kilter with the other aspects of the process. Although that may work for those who are able to afford legal fees, such non-alignment of timing plus the potential of excessive cost may drive separating couples away from the legal profession towards a more ‘DYI’ mechanism.

Broadly, separating couples either want to be helped to reach their own outcome or, if they are really unable to achieve this, want to have someone make a decision for them quickly, fairly and cost-effectively. Out of court dispute resolution methods achieve exactly that. The range of methods available have never been more innovative or diverse.

It is counterproductive to expect your client, who is already confused / scared / hurt / angry to make a choice from the variety of options available when they are undoubtedly in no emotional state to do so. Instead, listen carefully to their ‘back story’. Find out what they are like; what they might need; what is important to them.

Use your skills to tailor a process from that which is available to specifically meet their individual needs. Speak to the other side. Ultimately, you have a common goal – to achieve a fair result for this family, with particular reference to any children who sit at the centre of the process.

If there is a clear 'knotty' issue which can clearly be argued either way and is undoubtedly likely to cause an impasse, endeavour to deal with this at the earliest stage possible, ideally by reference to neutral evaluation. In cases where resources are tight don't be afraid to use junior counsel to provide such facility. They will be more cost-effective and will actually attend more regularly at the coalface of the court dealing with similar cases before the judiciary than their more senior colleagues.

Mediation is the obvious way to facilitate reaching an agreement. The couple do not need to be conciliatory or close to agreement to do this. The hybrid model, where the mediator can hold confidences to assist the negotiation, will suit even the most high-conflict couple, and in both mediation models (both classic and hybrid) solicitors can be present within the process or in the mediation meetings to provide support and on hand advice. Whilst this may seem initially expensive, the concentration of support (both from the neutral mediator and your individual lawyer) will ensure that the mediation process is more focused and fast-moving, with the opportunity to take advice within the meeting as the discussion unfolds. If proposals are advanced which are mutually acceptable, the privilege of mediation can be removed, allowing the meeting to become open and a binding agreement achieved. It may even be possible for the lawyers there and then to draft the necessary paperwork to enable those proposals to be embodied within an application for order by consent.

If agreement simply cannot be achieved in some or all issues, arbitration (children or finance) is the obvious solution. Far from being an expensive option, arbitration provides a selected tribunal dedicated to the couple who can construct a bespoke option for the particular needs of the family. An arbitrator will be seeking a reputation for diligence and fairness.

In Children Proceedings, unfortunately, the maintenance of the status quo will always suit one parent. An opportunity to resolve issues more swiftly may therefore be unattractive to one side. This, however, does not take account of the untold damage which ongoing contested court proceedings can do to the children, who undoubtedly have some awareness that their parents are engaged in a court battle which relates to them. Might it be incumbent upon the legal advisor to use whatever methods may be available in order to underline to the 'status quo' parent that other factors should be taken into account and that timely resolution must be in the best interests of their children?

'Uncoupling' provides the fusion of all options, bringing in professionals from all areas who may assist the family. 'The Certainty Project' combines mediation and arbitration with the arbitrator maintaining overall control of the process, providing certainty of personnel, timing and cost. Other methods of resolution offered, including the 'one lawyer two clients' model, are equally innovative and intended to provide separating couples with flexibility and value.

In all situations the need to listen is paramount.

In high conflict cases some form of personality disorder, such as narcissism, is highly likely to be present. As a consequence of low empathy and an inability to maintain relationships, narcissists are much more likely to be involved in relationship breakdown and, as a consequence of the desire to create chaos and drama, would be attracted to the court process. Specialist skills are essential in such circumstances in order to understand the pattern of behaviour, how best to negotiate and what to look out for and evaluate in a decision-making environment. Allowing such cases to reach the court will play into the hands of the narcissistic spouse and, as a consequence of the time constraints imposed upon the judiciary, may mean that a decision is made in difficult circumstances, which can create an outcome which inadvertently perpetuates coercive abuse. Out of court dispute resolution will provide specialist practitioners the ability to identify and deal appropriately with such behaviours. An arbitrator will have proper time to fully consider the nuances of the case if an imposed outcome is the only option.

So significant change on all fronts must be inevitable. How that change may manifest itself lies in the hand of the gatekeepers to family law. Added value and sensible costs will attract separating couples to seek professional help. Careful listening and selection of the appropriate process outside of the court system will achieve resolution within the twenty-week initial window and promote the desire for separating couples to engage in a service provided by family practitioners now far more attuned to the requirements of individual families and their future.

SCHNEIDER
FINANCIAL SOLUTIONS

Scalable, Sustainable, and Secure Lending Solutions

Established in 2013
Schneider Financial Solutions is the preeminent lending partner for private client and family law matters.

Our loans are tailor-made and underwritten by solicitors on a case-by-case basis.

We understand that the complexities of litigation require intelligent finance solutions and we will support your client from case inception to completion.

020 3411 1033
WWW.SCHNEIDERFS.COM

60-SECONDS WITH:

KATHERINE KELSEY
BARRISTER
1KBW

Q What do you like most about your job?

A Every day is different. I maintain a mixed practice, doing financial remedy and private law children cases. There are times when I do a run of finance cases and it's nice to then have a break and to do a children case (and vice versa) and to focus my attention in a completely different direction. I'm also doing an increasing number of Schedule 1 cases, which is the best of both worlds. I decided to specialise in family law because I find people and their lives fascinating, and you really do see the best and the worst of people.

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

A Good question! I've wanted to be a barrister since I was at primary school. But, with hindsight I think that I would have been well suited to working in hospitality (managing a hotel and constantly straightening cushions) or retail (as a buyer for a large department store). If my (lack of) talent was not a consideration, then being a cabaret singer, or stand-up comedian would also have its attractions. Anything that involves interacting with people…and an element of performance.

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

A When I first started at the Bar, I did some criminal work. It was an invaluable grounding in advocacy and cross-examination. I remember my first (and only) Crown Court trial. There are few things more exciting (or nerve-racking) than addressing a jury. Having to pitch your advocacy to be as persuasive as possible to twelve complete strangers. Looking each of them in the eyes and hoping / wondering if you will be able to persuade them in one direction or the other. Utterly exhilarating!

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

A Breathe. I've been a barrister for nearly 20 years. It is a very rewarding career – but at times it is very difficult and stressful. Each phase of my career has brought with it a different set of challenges as well as opportunities. I still get nervous before a big case. I still feel the weight of expectation on my shoulders daily, knowing what is at stake for my client. I still think of cases that I did years ago – wondering what happened to the clients I met and tried to help. And when I stand up in court to address a Judge I always pause to focus and to breathe.

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

A The move to ADR. I find the opportunities this presents exciting. I act as a private FDR Judge, and I appear in front of Arbitrators and private FDR Judges. I also mediate. It can be so much better for clients if they can resolve their family disputes without having to go to court. Also, the skills I have developed in my ADR practice are transferable to my court-based work. It has led to deeper insight and greater versatility.

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

A A good sense of humour. Given the gravity of the situations I find myself in on a near daily basis, it is important to keep some sense of perspective. Also, when a client is particularly stressed or nervous it can be very helpful to be able to engage with them on a human level and to try to make them see the lighter side of life. I think that one of my skills is that I can build a rapport with a client relatively quickly and (hopefully) put them at ease. Likewise, when interacting with a professional client or an opponent, the ability to break the ice and diffuse an otherwise fraught situation, can be invaluable.

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

A Without wanting to sound too nauseating, my husband (who is also a barrister). He never ceases to impress and inspire me.

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

A Karaoke. It is a great release. And you tend to sound better as the evening progresses.

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

A My family.

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

A Plato: The Republic. Not just as an A level text! It really makes you think hard about society and the human condition.

Q What would be your superpower and why?

A To travel through time. Probably forwards rather than backwards. I love science fiction and any Netflix box set with a dystopian theme (although the last couple of years of real life has felt dystopian enough at times!) so the ability to see what society and technology will be like hundreds of years from now would be exciting.

TALES FROM THE CRYPTO

Authored by: Alex Cooke – Schneider Financial Solutions

Alex Cooke is founder and CEO of litigation finance provider Schneider Financial Solutions, and recently completed the University of Oxford Blockchain Strategy Programme. Read this article to confidently engage in crypto discourse. There's a high chance you'll be asked about it.

For the uninitiated "crypto" is enticing, confusing and often a little scary. The crypto road is fraught with risk from setting up accounts on exchanges, to price volatility, let alone transferring assets from one wallet to another - especially when one wrong move could send your crypto to the land of the lost forever. That's right, there's no getting it back, no-one to call, and no Ombudsman or government to turn to. Crypto is not for the faint-hearted.

That being said, as an investor in crypto and a verifiable blockchain enthusiast, it does not surprise me to see crypto assets becoming increasingly prevalent in private client and matrimonial disputes; Bitcoin is after all "digital gold", and the current market cap across all crypto assets stands at $1.2 trillion (at the time of writing and down from $2 trillion just a few days ago). If Elon has his way, Dogecoin will be the future currency of Mars.

At last count crypto is responsible for 19 billionaires according to Forbes, which recently featured Binance's CEO "CZ" or Changpeng Zhao on its front cover. It is estimated that there are between 100-300 million Bitcoin users currently (noting that one wallet address does not equal one user).

Love it (like Michael Saylor) or hate it (like the European Central Bankers), crypto is going to become an increasingly common asset in our clients' portfolios, and I believe often the source and medium of their wealth.

Advisors can no longer afford a lack of understanding about cryptocurrency and how it works. In this article I will explain the basics which will hopefully get you started in thinking about the right questions to be asking your clients where crypto assets are involved.

BLOCKCHAIN

Cryptocurrency is intangible. As it does not operate through any traditional banking system, one of the main questions often asked is "where does it actually exist"? Whilst there are some (technical) exceptions, crypto assets exist on blockchains.

So, what exactly is a blockchain and why is this important? A blockchain is a decentralised and immutable digital ledger secured by a large, distributed network of nodes (computers with relevant software connected to the network), each holding an identical copy of the full ledger.

For a new transaction to occur and be entered into the ledger the majority of nodes must verify the transaction as true. So essentially a blockchain is a system for recording information in a way that makes it almost impossible to change the data or cheat the system.

According to Cointelegraph the number of active Bitcoin nodes in July 2021 exceeds 13,000.

Whilst I will concentrate on public blockchains in this article, it is important

to note that there are both private and public blockchains. The likes of Bitcoin, Etherium and Avalanche (to name but a few) are all public blockchains, meaning that they are fully decentralised, and transactions are visible, (if you know how to get the analysis).

Private blockchains on the other hand are centralised and as the name suggests entirely private. Sectors such as (non-decentralised) finance and healthcare use private blockchains.

Whilst often overlooked, at least 57 central banks are at various stages of creating digital versions of their own fiat currencies, known as Central Bank Digital Currencies (CBDC's). CBDC's will run through private government-owned blockchains with CBDC's held in secure digital wallets.

TERMINOLOGY

The terms "digital assets", "cryptocurrencies" and "tokens" are often used interchangeably, however there are differences. A "digital asset" is a non-tangible asset that is created, traded and stored in a digital format. "Cryptocurrencies" and crypto "tokens" are sub-classes of digital assets that utilize advanced encryption techniques, or cryptography, to ensure authenticity of the asset, as well as eliminating the potential for counterfeiting or double spending. So, what's the difference between a currency and a token?

A cryptocurrency, (for example Ether "ETH" on the Etherium blockchain), is issued directly by the blockchain protocol (the computer-coded rules that establish the structure of the blockchain) and is therefore the native asset of a blockchain that can be traded, utilised as a medium for exchange and used as a store of value. When completing transactions on blockchains, fees (known as "gas") will be incurred, which will be charged in the native currency. Cryptocurrencies will also be used to incentivise users to maintain the network security, i.e., for Proof of Work (PoW) consensus mechanisms, in return for verifying transactions a node will be rewarded in the native cryptocurrency.

Tokens on the other hand are units of value that blockchain-based organisations develop on top of existing blockchains and allow for interoperability across the blockchain's ecosystem. Building and maintaining your own blockchain is expensive and time consuming, therefore most protocols are built on top of existing major blockchains, (in the same way that if I wanted to create a taxi company, I don't need to set up a car manufacturing plant to build my own cars). Tether's USDT stable coin (not to be confused with CBDC's) is a good example of an Etherium based (ERC-20) token.

There are four common traits of tokens:

1. **Programmable – they run on software protocols, composed of smart contracts;**
2. **Permissionless – they can participate within the ecosystem without special credentials;**
3. **Trustless – no centralised authority controls the system; and**
4. **Transparent – the rules of the protocol and its transactions are viewable and verifiable by all.**

The ease of building on top of existing blockchains and the interoperability of tokens, means that the number of new protocols is likely to continue to grow extensively.

DIGITAL WALLETS

A digital, or non-custodial wallet is used to store, send and receive cryptocurrencies and tokens on a blockchain. The wallet owner maintains control and security over their assets instead of a third-party custodian, such as a bank. Whilst no third-party custodian can prevent wallets making transactions, in very rare cases it would be possible for a wallet operator to prevent a particular wallet address from making transactions. Such action would be extremely uncommon and would likely involve a directive from the Courts.

A digital wallet has two primary components:

1. **Private Key: denoted by a randomly generated series of numbers and letters that is only known by the owner; and**
2. **Public Key: The public key can be given to anyone who wishes to send funds to that digital wallet.**

Through public key addresses, users can view transactions that occur "on-chain". This is a critical part of blockchain's transparency, and whilst the name of the person associated with a particular wallet address is never associated with that address on the blockchain, the balance of the wallet is easily verifiable along with the associated transactions to and from other wallets.

Digital wallets come in two forms:

1. **Cold wallets: Hardware wallets that are not connected to the internet, making them more secure against hackers who are unlikely to get access to them offline; and**
2. **Hot wallets: Digital wallets connected to the internet, such as MetaMask.**

ACQUISITION AND "HODLING" CRYPTO ASSETS

While Decentralised Finance (or DeFi) offers crypto investors and speculators significant opportunities to create (and lose) wealth through mechanisms such as staking and yield farming, for the purposes of this article I am going to refrain from going into the detail on these fascinating protocols and will focus on the more common and longer-term strategy of buying and holding, or "hodling" as it is now known in the cryptoverse due to a celebrated typo.

It is likely that the majority of clients will acquire their (non-CBDC) cryptocurrencies and tokens

(collectively "crypto assets") initially through a centralised exchange, such as Binance or Coinbase, however it is less likely that they will necessarily maintain the assets on that exchange.

For many, centralised exchanges are simply an "on-ramp" to convert fiat currency into crypto that will then quickly leave the exchange to a "hot" wallet such as MetaMask to be deployed into a decentralised exchange (DEX) such as Pancake Swap or Trader Joe. Such DEX's allow investors to acquire less-mainstream crypto assets or participate in token sales before listings on the larger centralised exchanges in the hope of locking in 100x+ returns. DEX's do not custody assets acquired through their exchanges, but rather the assets are transferred directly into the hot wallet, that likely lives on the owner's phone or computer.

Others will acquire their preferred crypto assets and then withdraw these assets from the centralised exchange to a cold storage wallet. Maintaining crypto assets on an exchange means that these holdings are potentially at risk from hacking or business risk (such as the failure of the exchange). To mitigate these risks, the majority of investors (both institutional or retail) will send their crypto assets to a cold wallet for safekeeping.

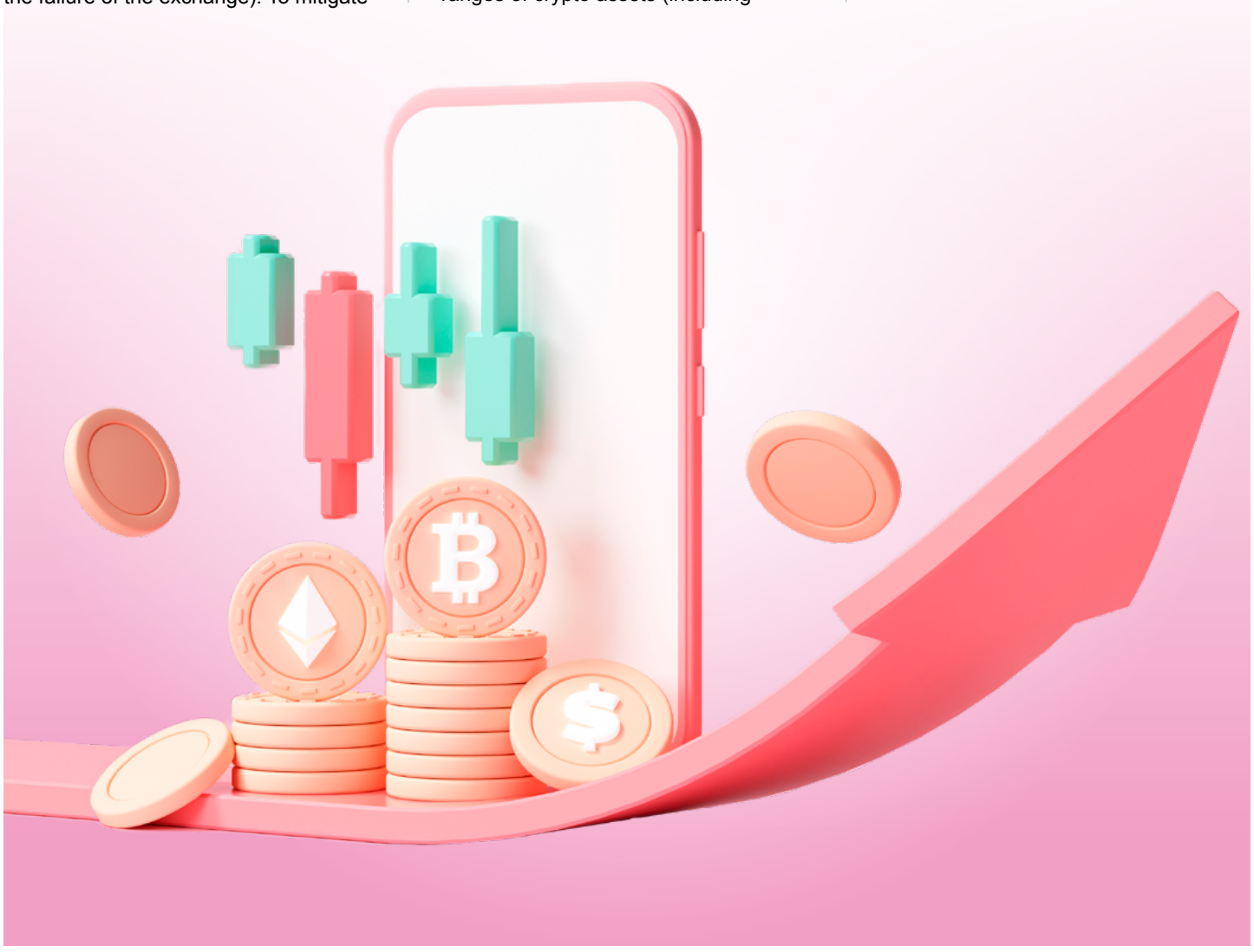
By way of example just 12.36% of all BTC (Bitcoin) in circulation is held on centralised exchanges.

This means that the vast majority of BTC is currently being "hodled" off-exchange. Given the effort, risk, and gas fees in moving crypto assets on and off exchanges, it is generally considered that assets held off-exchange are long term investment assets, whilst assets held on-exchange are available for trading.

The rapid growth in awareness in this ever-growing asset class coupled with increased ease of access to major crypto assets through exchanges and consumer banks is leading to mass adoption and bringing about interesting challenges for family lawyers.

There will be an increasing need to identify, consider and deal with vast ranges of crypto assets (including NFT's), held across multiple centralised exchanges, hot and cold wallets and throughout the metaverse(s). Valuation of such assets will be critical to establishing fair awards, however I would suggest that protocols will need to be established to deal with price volatility across these "risk assets". Perhaps a good example of this is that the "Top 10" ranked crypto Terra's LUNA (whose market cap was approx. $18bn at the start of May 2022) fell from over $100 per token to $0 within just a few days. Exactly how such assets should be addressed upon an asset and liability schedule is going to take careful consideration.

Considerations will need to be made as to how private keys may be held securely and anonymously until required, as well as strategies around the monetisation and liquidation of assets, and not forgetting potential tax issues. Practitioners will also have to consider how to identify where hidden crypto assets are held and how they can be enforced against.



London
&Capital

A FRESH START: WEALTH MANAGEMENT POST-DIVORCE

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

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

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

JENNY JUDD
Director

JESSICA CRANE
Executive Director

Authored by: Jessica Crane – London & Capital

The gender pay gap has become a prime measure of inequality in the workplace, and a focal point for anti-discriminatory policies. Yet while it receives far less attention, the gender pension gap is an even bigger issue – especially for divorced women.

The most recent research from Prospect [1] found the gender pension gap – the difference in pension income between female and male pensioners – increased to 37.9% in 2019-20, more than twice the level of the gender pay gap (15.5%).

Analysis from the University of Manchester and Pensions Policy Institute [2] showed that while "around 90% of couples have some pension wealth between them, in about half of couples with pensions, one partner has more than 90% of the pension wealth."

Fewer than 15% of couples have pensions that are approximately equal, with women on average retiring with less than half the income of men.

The pension gap in part reflects the fact that women generally are still paid less than men. But a recent UK government briefing paper [3] also highlighted various other factors, including women's higher propensity for part-time employment to undertake unpaid caring for young children or relatives, and to spend time outside the labour market. Labour market factors are then exacerbated by demographic differences – women are more likely to live longer, while in heterosexual marriages, wives tend to be younger than their husbands (by two years on average, according to the Scottish Widows Women and Retirement 2021 report) [4] so will be relying on their deceased husband's pension.

This gender divide shows how important pensions can be when divorcing, with divorced women at much greater risk of being underfunded at retirement.

The improved expediency of divorcing following the recent No Fault Divorce law change may also lead to pensions being discussed or factored in less, aggravating the issue. As spouses can receive notice of the divorce just a few months before the court is asked to grant the first divorce order, pensions may be omitted from discussions as

1 https://prospect.org.uk/article/what-is-the-gender-pension-gap/
2 https://www.manchester.ac.uk/discover/news/pension-inequality-a-major-issue-when-couples-divorce-research-finds/
3 https://commonslibrary.parliament.uk/research-briefings/cbp-9517/
4 https://adviser.scottishwidows.co.uk/assets/literature/docs/60528.pdf

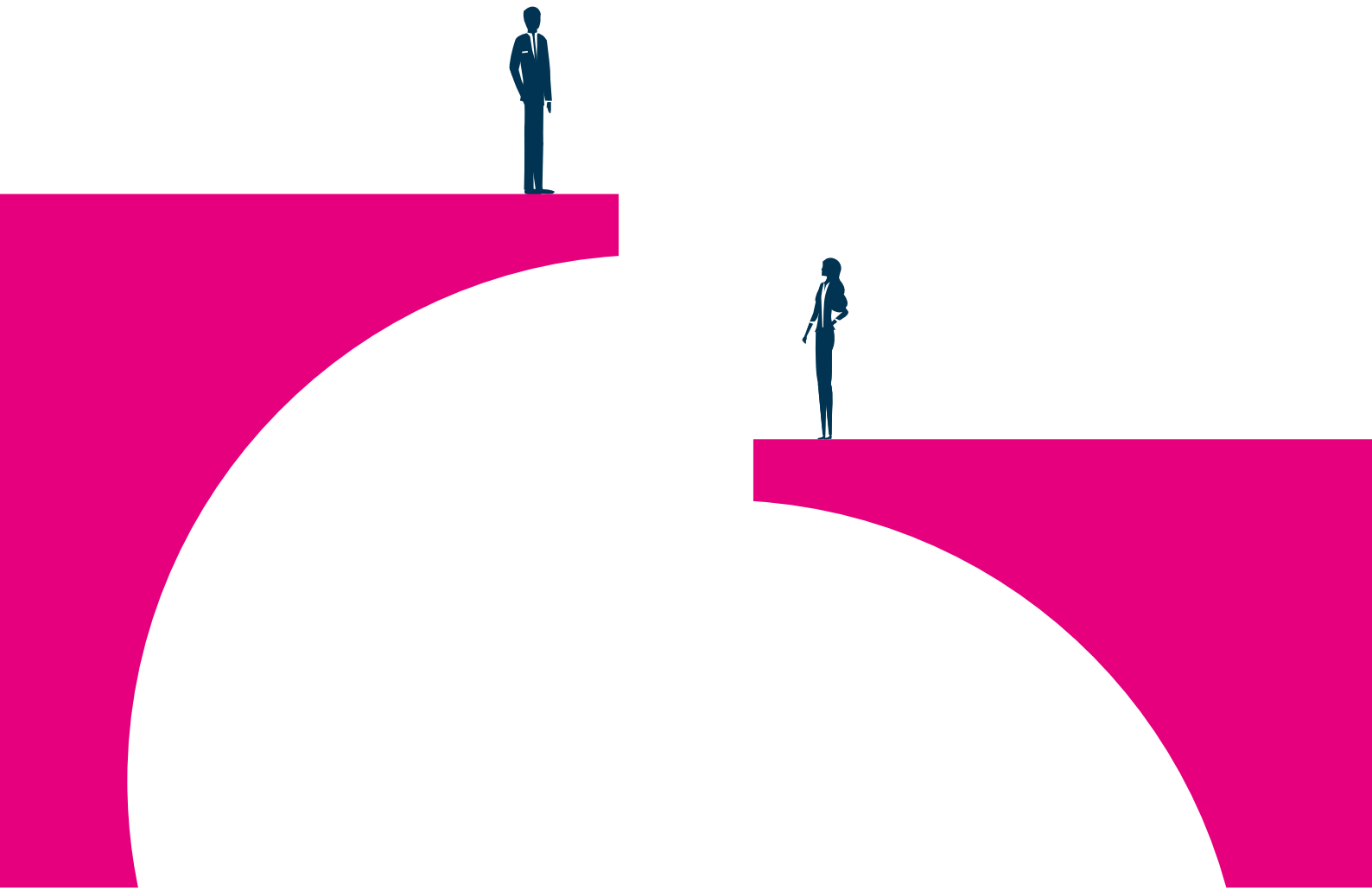
spouses try to keep relations amicable and avoid mentioning assets that might be seen as "personal".

So how can you help your clients improve their situation?

- **Suggest a full review of their private pension arrangements with a wealth manager or IFA.**
- **Consider the potential for making additional pension contributions, using past three years carry back rules if relevant UK earnings exist.**
- **Check their state pension entitlement and National Insurance records on HMRC. For example, they could make extra National Insurance contributions or be eligible for National Insurance credits if they were looking after children.**
- **Ensure all pension funds are invested appropriately and not sitting stagnant in cash, being eroded by inflation.**
- **Consolidate pensions where appropriate.**
- **Suggest opting back into a scheme if they opted out.**
- **Consider buying additional years.**

The value of investments and any income from them can fall as well as rise and neither is guaranteed. Investors may not get back the capital they invested. Past performance is not indicative of future performance. The material is provided for informational purposes only. No news or research item is a personal recommendation to trade. Tax treatment depends on the individual circumstances of each client and may be subject to change in the future. Nothing contained herein constitutes investment, legal, tax or other advice.

The value of investments and any income from them can fall as well as rise and neither is guaranteed. Investors may not get back the capital they invested. Past performance is not indicative of future performance. The material is provided for informational purposes only. No news or research item is a personal recommendation to trade. Tax treatment depends on the individual circumstances of each client and may be subject to change in the future. Nothing contained herein constitutes investment, legal, tax or other advice.



CRYING OVER SPILT MILK

THE POWER OF MEDIATION IN FARMING CASES

Authored by: Mary Gaskins – Burges Salmon

"Farming cases are notoriously difficult to resolve… the case is almost, although I believe not quite, insoluble. It is a case where it is far easier to criticise a suggested solution than to devise one."

Mr Justice Wilson R v R 2004 1 FLR 928.

Farming divorces can be complex. Typically asset rich and cash poor, they involve property that has been in one family, often, for hundreds of years. Mr Justice Munby in P v P in 2004 summarised farming cases as "excruciatingly difficult" and went on to talk of the "creative ingenuity which may on occasion be necessary if a fair and just result is to be achieved."

In R v R, Mr Justice Wilson had to deal with a situation whereby there was no means, either by immediate payment or by borrowing, to provide a lump sum for the wife to rehouse. In the end, he ordered the husband to pay £30,000 immediately and then £225,000 over 20 years (charged on the husband's shares in his business). In P v P Munby J did not order a sale of the farm and the wife received very little.

What is abundantly clear from the case law is that farming cases need creativity and flexibility. Unfortunately, due to the ever increasing pressure on the Family Justice System and its (lack of) resources, this may not always be found in the family court. Parties in farming cases need to approach litigation with care or they could be faced with disaster. Litigation is a lottery and there is an increasing need for family practitioners to explore alternatives to litigation. Mediation is one of those alternatives and it can be extremely constructive and effective. It also buys certainty and enables the parties to retain control.

Mediation can preserve relationships and ensure that both parties feel heard. It enables one or both parties to air their feelings about a particular issue. The third party impartial mediator encourages constructive discussion and prevents clients from falling back into old habits. If the parties have children, the preservation of the relationship is invaluable.

Mediation is extremely flexible which is of particular use in farming disputes which can often involve more than two people. There may be a child, a sister, or an uncle involved and mediation can address this. Co-mediation, where there are two mediators, can ensure the power balance remains on track.

Resolving farming cases requires creativity and an assessment of the different options. A dialogue needs to be encouraged between the parties to try to work out a possible resolution. There are many issues that need to be considered such as:

- **How is the farm held? Is it a within a company structure and are there minority interests? Are assets held in trust? Is the family home a farmhouse that is held on trust? Is that trust nuptial?**
- **If there is a partnership – is all the property partnership property – how do you distinguish between partnership property and separate property even if the owners are co-owners?**
- **Finance may need to be raised against the retained farm or land and what are the cash flow implications of this?**
- **Land might need to be sold to retain the majority of the farm to be passed on to future generations and what are the practical implications of doing this? For example; are utilities and access points being cut off in the division of the land and do new rights of way need to be created?**
- **Are there separate farm buildings that could be developed and hived off as part of a settlement both in order to create liquidity but also to provide a separate income?**
- **Are there opportunities to diversify to raise money – for example solar panel leases to generate regular income or battery storage arrangements?**
- **What are the age of the parties? Are they contemplating retirement from farming? Does the Lump Sum Exit Scheme apply? Could this raise capital?**
- **What are the cash flow and liquidity issues facing the business now but also as a result of the options being discussed?**
- **What are the tax implications of the different options available to both parties and are there more tax efficient ways of dealing with the assets which meets each parties' needs?**

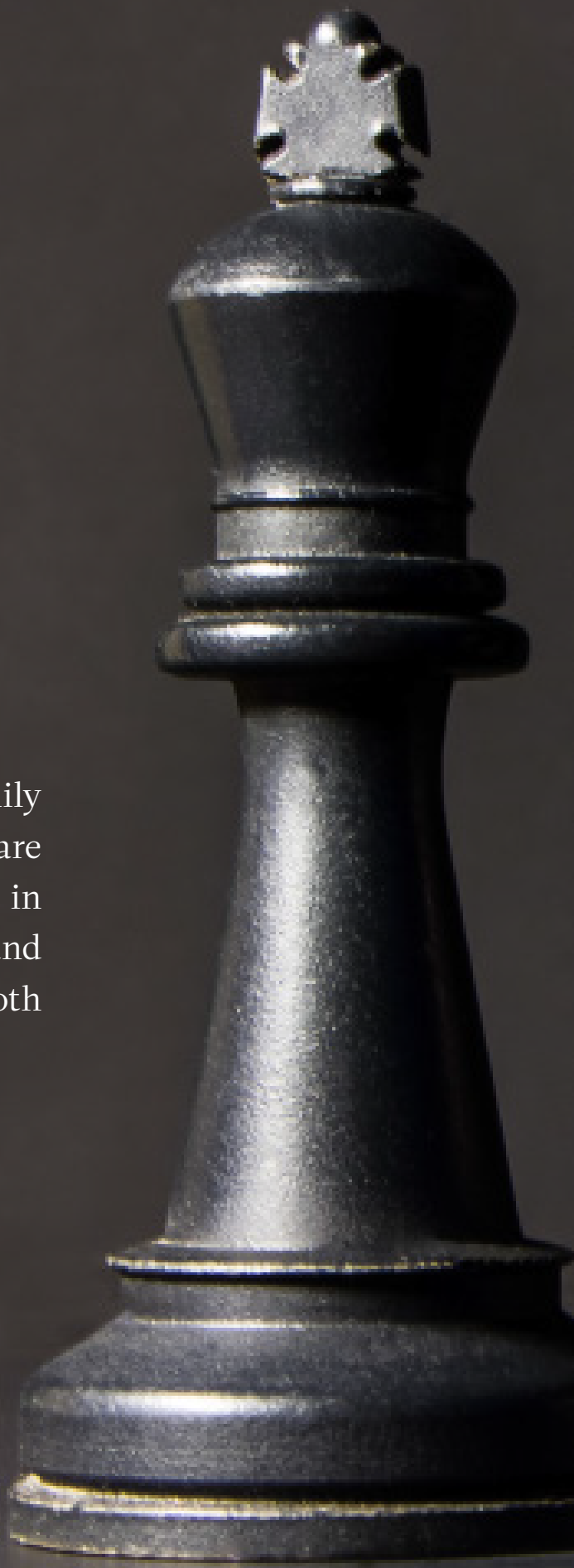
These questions, amongst others, form a crucial part of exploring how a settlement might be achieved and will also, in most cases, require expert third party evidence from accountants and valuers. Mediation provides a forum for obtaining this information and makes it accessible to both parties.

Using the mediation process enables both parties to retain control and decide their own fate.

It buys certainty and avoids entering into a process which could result in a contested hearing. As a process, it can give power back to the clients who know the assets and know the reality of life on the ground.

Finally and most importantly - find the right mediator. An experienced family lawyer with knowledge of the type case that is being dealt with is key. A family lawyer will know how these cases are being dealt with in the courts and also have the knowledge to think creatively about solutions. Does that lawyer mediator understand farming families and different business models (e.g. partnerships, trusts, family investment companies, limited companies)? Do they understand inherited wealth? Do your research and match the mediator to the case.

1KBW



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

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

One Choice
One King's Bench Walk

1kbw.co.uk — Leading in family law - clerks@1kbw.co.uk

"FINANCIAL REMEDIES, CONTROLLING AND COERCIVE BEHAVIOUR"

Authored by: Alexander Chandler QC – 1KBW

It is a truth universally acknowledged that, save for the most egregious cases, the courts do not take misconduct into account in financial remedy claims.

The s.25(2) checklist of relevant factors includes "…(g) conduct… if that conduct is such that it would… be inequitable to disregard it", but for fifty years this has been interpreted as applying only to exceptional cases: "gross and obvious" to adopt the formulation of Ormrod J in Wachtel v Wachtel [1973] EWCA Civ 10, which the Lords upheld in Miller; McFarlane [2006] UKHL 24, per Baroness Hale at [145]

"…This approach ['gross and obvious'] is not only just, it is also the only practicable one. It is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases."

But does this reluctance to hear allegations of conduct in a financial claim need to be reviewed in light of changing attitudes towards domestic abuse, which the Domestic Abuse Act 2021 now defines to include "controlling[1] or coercive[2] behaviour" and "economic abuse [3]" (s.1(3)). Might a finding of controlling or coercive control amount to conduct which is either 'inequitable to disregard' (per the statute) or 'gross and obvious'. Is the Financial Remedy Court heading towards the sort of fact-finding hearings that take place in private law children proceedings, pursuant to PD 12J and Re H-N [2021] EWCA Civ 448.

The recent case of Traharne v Limb [2022] EWFC 27 is not directly on point: the wife relied on allegations of domestic abuse as a defence to the husband's case that she should be held to a pre-nuptial agreement (PNA), rather than as a freestanding conduct argument. Nevertheless, the judgment of Sir Jonathan Cohen is instructive in terms of the approach a judge in the FRC is likely to take to allegations of controlling and coercive control.

Traharne v Limb

The essential facts were as follows: the parties were aged 59 (W) and 68 (H). This was a second marriage for both parties, which lasted 8 years. The assets were worth £4m. H sought to hold W to a pre-nuptial agreement (PNA). W raised as an (Edgar) defence to the PNA that H had subjected her to controlling and coercive behaviour, including financial control, 'gaslighting', isolating her from her support network and 'love bombing' her. H's open proposal was to offer £465k less amounts already paid by way of interim maintenance and a costs allowance (net £305k); W sought £1.05m and a modest pension share.

The matter came before Sir Jonathan Cohen for a 4 day hearing. The headline points from Mr Justice Cohen's characteristically clear and concise judgment are as follows:

01 Both sides were criticised for the 'misconceived steps' which had led to the incursion of £650,000 of costs in a 'not big money' case;

1 Defined in the Explanatory Notes to the 2021 Act at § 76 as follows: "a continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish or frighten their victim

2 Defined in the Explanatory Notes at § 75 as "…a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour"

3 Defined in the Explanatory Notes at § 77

02 In relation to the PNA, the court applied Radmacher v Granatino [2010] UKSC 42 and Edgar v Edgar [1980] EWCA Civ 2, finding that Ormrod LJ's formulation of the vitiating factors is "…as relevant now as they were when uttered over 40 years ago". Notably, allegations of coercive and controlling behaviour "… would plainly be an example of undue pressure, exploitation of a dominant position or of relevant conduct";

03 On the facts, the court found that W was vulnerable at the time when the PNA was negotiated, and that it did not meet her financial needs;

04 However, the court rejected W's allegations of controlling and coercive behaviour, and found no causal link between those allegations and W entering into the PNA;

05 Cohen J criticised W's side heavily for concentrating on issues of domestic abuse: "[54] I very much regret that so much energy has been devoted to exploring this subject. The emotional and financial consequences on the parties has been considerable. It has also been entirely unnecessary"; and

06 W's needs were assessed at £378k, comprising an income fund of £192k, capital of £21k and £165k pension. In terms of costs both sides were criticised and "[95]… W has set her sights far too high. She has increased her claim rather than sought to mitigate it". H was ordered to contribute a further £80k, which meant that W exited the marriage owing between £70k to £80k to her solicitors.

Commentary

Firstly, had W been successful in (i) achieving findings of coercive and controlling behaviour, and (ii) a better outcome based upon those allegations, it might have been argued that Traharne was a breakthrough case, comparable to Hayden J's judgment in the private law case of F v M [2021] EWFC 4. However, W plainly was not successful, although (i) query if W will appeal and (ii) bear in mind that the facts of Traharne were unusual, in that W relied on allegations of abuse as a shield to H's PNA argument.

Secondly, there was a modest development of law, in relation to Cohen J's view that coercive and controlling behaviour came within the Edgar factors including undue influence. That conclusion is perhaps unsurprising given that the court has always approached Edgar arguments holistically, and (per Ormrod LJ in Edgar) "…it is not necessary in this connection to think in formal legal terms";

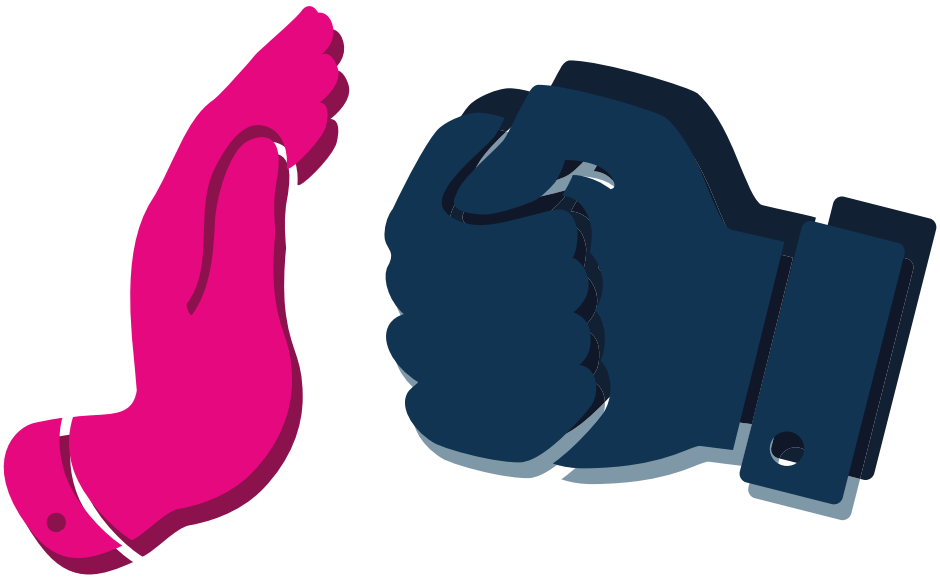
Thirdly, Cohen J's judgment identifies the problems with raising allegations of domestic abuse:

(i) legal costs will inevitably rise, particularly where a pattern of behaviour is alleged. Anyone who has argued for an 'add back' will know that there is a world of difference between raising one allegation (e.g. sale of a house at an undervalue) as opposed to establishing a pattern, e.g. from dozens of individual transactions or allegations. The latter (pattern) can require a significant amount of documentary evidence and in due course, longer hearings, and delay, if the individual allegations are disputed.

(ii) the allegations may not be necessary to resolve a case. On the facts of Traharne, Cohen J found W's allegations "entirely unnecessary". Financial practitioners would do well to study the recent judgment of the Court of Appeal in K v K [2022] EWCA Civ 468, which discourages court inquiry into domestic abuse in the context of private law children cases, save where 'strictly necessary',

"A fact-finding hearing is not free-standing litigation...It is not to be allowed to become an opportunity for the parties to air their grievances. Nor is it a chance for parents to seek the court's validation of their perception of what went wrong in their relationship".

Fourthly, how would a finding of controlling and coercive behaviour fit into the distribution of assets? A judge may conclude (i) that controlling and coercive behaviour amounts to relevant conduct, and (ii) may be sympathetic to the argument that (to cite Lord Nichols in White), "…there is much to be said for returning to the language of the statute", but how does that fit within the general principles of the law (see helpful recent summary by Peel J in WC v HC [2022] EWFC 22)? Presumably not by enhancing a sharing claim. In which case, it would seem that the argument is only worth pursuing if it means that a party's needs have increased (e.g. because of the impact of the abuse). Unless the court is also going to be asked to review another issue where most courts have show great reluctance to act: compensation. And then things would really get interesting.



60-SECONDS WITH:

ANNABEL BARRONS
BARRISTER
1GC

Q What do you like most about your job?

A The people, I'm lucky in the people I get to work with and I always knew that I wanted to do a job that revolved around people. The fact that there is a real person waiting at court for me each day (if remotely at the moment) is what drives me in preparing my cases.

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

A I'd be a pastry chef. Having said that, I did spend a lot of time baking (and eating) during lockdown and perhaps it is for the best that I'm at the Bar - I eat fewer pies.

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

A I don't know about exciting, but I did once spend half a day making submissions as to who should keep the family cat. The cat was very sweet - and rather expensive by the end of it all.

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

A Cases are won and lost in the preparation, before the hearing even starts. You can only be so brilliant, as an advocate, on the actual day. It cannot replace all the hard work done beforehand.

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

A Remembering how to travel to court again which, I think a positive development for many cases. It also means I can remind myself where the best snacks are; if anyone wants to know where the best sausage rolls in the South East are, do come and ask me in 6 months.

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

A Patience is very important – and not least the patience and dedication of my clerks and of the supervisors who trained me.

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

A Janet Bazley QC, Laura Heaton and Penny Clapham. Three amazing women who I have either shared a room in chambers with, or who I worked with early on in my career. They have been incredible to watch and they are all inspirational.

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

A Go to Bali!

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

A Coffee. I wouldn't make it beyond 11am otherwise.

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

A Anything published by Persephone Books. They re-publish gems have fallen out of print, particularly those written by women and which would not have been given the prominence they deserve when written.

Q What would be your superpower and why?

A Sleep! If I could have 8 hours whenever I wanted I'd feel superhuman.

IS AN LIP A VIP?

THE RISE OF THE LITIGANT IN PERSON

Authored by: Claire Gordon – Farrer & Co

Legal aid is not available to the vast majority of separating couples. This is nothing new (as both family lawyers and the general public are only too well aware). The extensive legal aid cuts were introduced by the Legal Aid, Sentencing and Punishment of Offender Act as long ago as 2012. However, rising prices and the consequent economic pressures means that more people than ever before are representing themselves to deal with their divorce and the issues that flow from it. There can, of course, also be non-financial reasons why an individual may wish to represent themselves – they may distrust lawyers following a previous bad experience for example or feel it puts additional negotiating pressure on their spouse in some way. Some individuals may just not see the need or benefit of legal advice.

From 2013 to 2020, the number of cases in the family courts where neither party had a legal representative almost trebled – increasing from 13% to 36% (see The Law Society, Civil legal aid: a review of its sustainability and the challenges to its viability) and that trend is set to continue given the financial challenges many will be facing now.

The courts are therefore increasingly being faced with a number of hearings where one or both parties is in person. This presents challenges for both the court and for practitioners.

This article considers some of those challenges, what can be done to assist a litigant in person (LiP) and includes some tips for practitioners who represent the other spouse. Solicitors must be aware of what the court expects of them in their dealings with unrepresented parties and alive to the many ways it may impact their client when the other party is unrepresented.

Assisting a litigant in person

First and foremost, it is important not to use jargon, abbreviations, or unnecessarily complex legal language. At all times, it is important to spell out what you are asking the court to do, or what your client's case is, and why.

Whilst solicitors obviously cannot give a LiP advice, they can provide information. For example, the recent FRC Advisory Notice dated 19 April 2022 makes clear that the obligation to produce forms ES1 and ES2 applies equally to LiPs. Explaining this requirement, setting out the deadlines, and where documents should be filed will all help the court to have what it needs to progress matters at the hearing – which is clearly in both parties' interests. It is also sensible to explain what directions are being sought and what those directions actually mean (in plain and simple language). Where there is a reference to a particular practice direction, or authority, both providing a link to it by email and attaching a full version as a PDF will ensure that the LiP can refer to it if they wish.

Where one party is unrepresented the solicitor must also prepare the bundle, even where they act for the respondent (see paragraph 3.1 of PD27A).

The recent FRC Advisory Notice reiterates this in the context of electronic bundles, and confirms that if one party alone has a solicitor, then absent an agreement or order to the contrary, it is for the solicitor (and not the LiP) to prepare an electronic bundle.

It is important to serve position statements and evidence as early as possible. Re B (Litigants in Person: Timely Service of Documents) [2016] EWHC 2365 suggests that in any case where a party is unrepresented, the court should direct that they be sent position statements and any other practice direction documents at least 3 days before the final hearing. It is not advisable to insist on exchanging, particularly if the result would be that the LiP does not receive documents until shortly before the hearing. Failing to act in this way is likely to attract judicial criticism and may result in the hearing being adjourned.

It is also important to recall that it is mandatory to copy the LiP in on every email on matters of substance or procedure that may be sent to the court (see FPR rule 5.7)

Advising your own client

It is important to explain to clients at the outset that there are some additional steps that may have to be taken because the other party is unrepresented. Some of these steps (eg preparing the bundle as the respondent) will result in increased costs for your client. Other steps (eg serving position statements early and not pressing for them to be exchanged) may be interpreted by your client as the other party 'having an unfair advantage' or you 'doing their job for them' because they are unrepresented. Your client needs to be aware that you owe a duty to the court as well as to your own client. Ultimately, it is in your client's interests that the case is well prepared for trial, the judge has the right papers in the right format, and that the case is not adjourned at the eleventh hour.

If there is a possibility of your client being cross-examined by the other party in person, it is advisable to consider asking the judge to convene a 'ground rules' hearing (Family Procedure Rules 2010, Part 3A and PD 3AA) on the first day of the final hearing, or at the PTR, to determine what questions the LiP should be allowed to put, whether they should be put by the judge instead, and what protections are necessary for your client.

It is also sensible to prepare your client for the degree of lenience judges will give to a LiP at hearings, in contrast to a represented party. It will not affect the outcome but your client needs to be prepared for the judge to allow a LiP to 'say their piece' at length and uninterrupted, even where it is of little or no relevance to the issues, whilst a barrister instructed may be given less time, and will commonly be frequently interrupted by the judge.

Dealing with the 'difficult' LiP

Dealing with a difficult LiP can be extremely stressful, even for experienced practitioners. It is important to consider what practical steps can be taken to limit the impact of that stress.

For example, if they are abusive on the telephone, then state that you will only correspond via letter/email. If they send multiple emails throughout the day, or at unsociable hours, then consider diverting their emails to a separate folder so that you can deal with them at the same time, and at a time that suits you rather than in a piecemeal fashion. This can also be reassuring for your client who may well be concerned the LiP is intentionally increasing the client's costs by deluging you with irrelevant correspondence. Remember, there is no obligation to respond to every email and it might be better to send one combined response, dealing only with those points that you have not already dealt with. It can often be helpful to tell the LiP this is what you will be doing so that they are forewarned. It can also be sensible to take someone with you to take a clear note whenever you are having substantive or settlement discussions either on the telephone or in person at court.

Do also bear in mind the particular impact dealing with an impassioned LiP, and the barrage of correspondence that can sometimes ensue, can have on more junior members of your team. They may well be particularly front and centre to help keep costs down for your client as well, but if so it becomes even more crucial to ensure they are fully supported, that they have a regular chance to debrief (or just let off steam) and to know the partner will step in as and when needed.

Cases where the other party is unrepresented can bring with them particular challenges. It is hoped that this article provides some practical measures that can be taken to help smooth the waters. If you are not sure of your obligations in a particular situation, or are in need of any further advice, there are detailed Bar Council, Law Society and Resolution guides on dealing with LiPs. What is already palpably clear is that the courts will continue to be faced with many more LiPs going forwards and we, as practitioners, must be alive to the issues that this entails.

Kingsley Napley

"A stellar firm with well-regarded partners and associates alike. It is known for being very experienced in both finance and children cases. The firm as a whole provides a Rolls Royce service"

The Legal 500

kingsleynapley.co.uk/family | +44 (0)20 7814 1200 | @KNFamilyTeam

DIVORCE POST-BREXIT

Authored by: Matthew Taylor - Stowe Family Law

The impacts of Brexit continue to have an effect throughout life in the UK. The world of divorce is not insulated from this as the severing of ties between the UK and EU has led to significant changes in several key areas, including jurisdiction and maintenance claims, and the ability to share pensions.

Jurisdiction and maintenance claims

Prior to Brexit, EU rules concerning jurisdiction required a party to demonstrate that one of the following criteria applied to commence divorce proceedings with a full suite of financial claims in England and Wales:

1. **Both spouses were habitually resident in England and Wales;**
2. **Both spouses were last habitually resident in England and Wales and one of them continued to reside there;**
3. **The respondent was habitually resident in England and Wales;**
4. **The applicant was habitually resident in England and Wales and had resided there for at least one year before the divorce petition is presented;**
5. **The applicant was domiciled in England and Wales and had been habitually resident in England and Wales for at least six months before the divorce application was made; and**
6. **Both parties were domiciled in England and Wales.**

If none of the above 6 criteria applied and no other court of an EU Member State had jurisdiction, the English courts could be seized on the basis of either party being domiciled in England and Wales, rather than both. However, any application that was based on sole domicile was extremely limited in scope and prevented orders for maintenance being made.

Following Brexit, the provisions to establish jurisdiction under Brussels IIa have been largely replicated in domestic law, but crucially with the addition of sole domicile as a standalone basis to establish jurisdiction.

In turn, the bar on maintenance claims in an action deriving from sole domicile has been lifted and the court has the full range of powers available to it.

This is significant as it regards maintenance, with the courts of England and Wales able to make lifetime awards in appropriate cases, unlike in many other jurisdictions.

Running alongside the jurisdictional criteria within Brussles IIa was the doctrine of lis pendens. This provided that in the event of two related actions being brought in different EU Member States, the first application in time would be determinative in seizing jurisdiction. This frequently led to a jurisdiction race, with parties racing to issue in different countries according to where they might receive a more favourable outcome.

With Brussels IIa no longer applying, the first in time rule falls away, to be replaced by the concept of forum non conveniens, enabling the court to determine which jurisdiction has the closest connection with the divorce. This allows an overseas applicant to make an application to commence divorce proceedings in England even after their spouse has commenced the process elsewhere. This is likely to lead to more litigation as parties fight over which jurisdiction should hear their divorce even before substantive matters are dealt with.

Pension sharing

The UK's departure from the EU has also had a drastic effect on the ability for divorcing spouses to makes claims in respect of pensions following an overseas divorce.

For divorces in England and Wales, pension sharing orders can be used to divide a pension between former spouses. Pension sharing orders cannot generally have an extraterritorial effect and pension funds located in England and Wales will require a court order made here to implement a pension share.

For couples who have divorced in another jurisdiction, this means that any financial order made in that jurisdiction cannot create a share of an English pension.

It is not uncommon for overseas couples to retain pensions in this jurisdiction. This can be because of couples who have always previously lived and worked in England and Wales moving abroad for their own place in the sun, or where someone who was not born and raised in England and Wales comes here to work for a period before moving on to another country.

Following an overseas divorce, a financial order can be made under Part III of the Matrimonial and Family Proceedings Act 1984 (MFPA 1984). This statute was designed to allow the court to make financial orders where insufficient provision has been made overseas and the parties have a connection to England and Wales.

Section 15 of MFPA 1984 sets out that the court has jurisdiction to make such orders where either spouse is:

1. **domiciled;**
2. **habitually resident for a year; OR**
3. **an owner of a matrimonial home in England and Wales.**

Prior to Brexit, overseas parties could also rely on EU law to establish jurisdiction, enabling a needs-based order under MFPA 1984 where proceedings could not be brought elsewhere. This was known as the "necessity" grounds. Given that the vast majority of pension funds need a local order to be made, this test would generally be passed and the court could make a pension sharing order.

Following Brexit, overseas couples without an ongoing connection to England and Wales will be unable to share pension administered in England and Wales. This is likely to frustrate financial settlements or agreements reached following an overseas divorce and could produce unfair results.

It is imperative that overseas parties with pensions in England and Wales should take advice from a family lawyer based in this jurisdiction regarding their ability to share a local pension at an early stage. Divorcing spouses should also be aware that in making an application for a divorce in another country a domicile of choice can be made, thereby losing the ability for an application under MFPA 1984. Advice should therefore be taken early to prevent parties unwittingly making a statement about their domicile that would prevent there being a pension sharing order.

WE'VE GOT YOU

WHO DO HIGH NET WORTH INDIVIDUALS NEED ON THEIR TEAM IN THE NEW ERA?

Authored by: Claire Filer - Irwin Mitchell

The last two decades since the landmark House of Lords decision in White v White has been a time of change inside and outside the world of family law. The way we look at and experience the world has changed, what wealth looks like is changing as has the way in which High Net Worth (HNW) individuals want to deal with separation and divorce. Couples divorcing are looking towards more modern approaches including mediation, arbitration and private hearings or a combination of all of the above. However they chose to deal with their divorce, it has never been more important to have the right team to provide legal, practical and financial advice, a sounding board, a voice of reason, vital information and support. So, who do they need on their team?

The Psychotherapist or Counsellor

The early days of a relationship breakdown are extremely hard for many. It can be like a grieving process and one person may be further along the journey than the other. Many find the decisions they need to make overwhelming even if the level of their wealth offers them more options financially. It is therefore a real benefit to have talking therapy at any early stage whether as a first port of call or alongside legal advice and doing so provides the resilience and maturity needed to maximise the chances of resolving the dispute.

The Lawyer

It is vital to have tailored and clear legal advice. That expert can adapt their service to suit the needs of their client with their expert knowledge of what is required. Increasingly, law firms are adapting their approach with the lawyer as a project manager creating a bespoke service for HNW clients in this new age of choice.

The Mediator

Mediation is a fantastic way of helping separating couples resolve disputes and the mediator is a vital part of the team. The mediator can often be the hub around which the whole team operates pulling everyone together to find a solution. Where clients choose not to mediate all issues or are unsuccessful in doing so, the mediator can still be a vital part of the team, to deal with discrete issues.

The Wealth Manager

HNW clients will often have a wealth manager looking after their investments already. As part of the relationship breakdown it is important to review their objectives. One party may have had little or no advice and need a new and trusted person on their team. Wealth managers and investment advisors can provide modelling information to ensure that the separating spouse understands whether the capital and income upon which they are basing their proposals will last them long into the future as well as assisting with budgeting and cross checking affordability.

The Barrister

Despite separating couples in the new age being increasingly attracted to non-court dispute resolution, a barrister is an important member of the team providing clear guidance where needed particularly on thorny legal questions (either to one party or an early neutral valuation about the likely outcome). A private Financial Dispute Resolution hearing ("FDR") is an option in the toolkit with barristers advocating for their clients and another as the private FDR judge.

The Expert Valuer

The lawyers' and mediators' job can only provide the right advice and information about a fair outcome when everyone knows what the assets and liabilities are. Assets may include shares in a private company, an interest in a trust or a structure involving both companies and trusts. If that is the case, it is vital those assets are valued by an expert accountant and selecting the expert is key to ensure that the report is understandable to all, even those that are not financially savvy. The expert may need to consider minority discounts or liquidity. Tax advice is also imperative. If, for example, a lump sum is going to be paid out of a structure, how is that going to be achieved in a way that mitigates tax but also how much tax will need to be paid and, if so, in what jurisdiction or jurisdictions? Whilst one party may resist a valuation of non-matrimonial property, it is likely to be necessary to assess the overall fairness of any proposed outcome. Land may also need to be valued by an expert who is experienced in valuing that type of land – a different expert may be required for commercial property to agricultural land.

The Pensions' Expert

Research last year by the University of Manchester suggested that despite pension sharing legislation having been in force for more than 20 years, in many cases, people (particularly women) are still not adequately providing for their needs in retirement as part of the resolution of their finances on divorce. In the majority of cases, expert pensions' advice is necessary, some of which could be provided by the wealth manager or financial planner, but often a pensions' actuary will be involved. Selection is key to ensure that the report provides clear advice about the options and future income in a variety of scenarios. The pension advisor may need to work in conjunction with a tax advisor if there are issues in relation to the lifetime allowance.

The Decision Maker

In many HNW cases, all of the above and more are needed. Ultimately, if an agreement cannot be reached using all of the tool box family lawyers in the new era have at their disposal, a decision can be made. If this is not "in court", an arbitrator is increasingly the final decision maker on selected or all issues, whether appointed at the outset or to deal with a dispute which cannot be resolved by other means.

If clients have the right advisors from an early stage they will have a team behind them focused on delivering a fair outcome that works for their family. Ultimately it will maximise the chances of settlement and provide a more cost effective solution.

NO FAULT DIVORCE IS FINALLY HERE! 6TH APRIL 2022

Authored by: Janette Johnston – A City Law Firm

It has taken almost 50 years, but it has finally become a reality, welcomed by many family solicitors, the new ground for "No Fault" divorce.

Unless you can evidence unreasonable behaviour, you must use the long-winded routes of separation. This is difficult when you both accept your relationship is over, but you must wait for this to be formally pronounced.

The case of Owens v Owens (2018] UKSC41) for example exposed the unfairness of the high proof needed to show the grounds of "unreasonable behaviour." Mrs Owens having been advised that she could only use the ground of 5 Years Separation as her grounds for "unreasonable behaviour" had failed to satisfy the courts. Despite this, it is known that many separating couples already agree, albeit behind the scenes, that their marriage is over and have come to agreements relating to the grounds for the divorce.

Otherwise, you must cite the affair or other conduct issues - this makes an amicable separation difficult and often parties take a claimant v defendant type stance as a result.

No more!

As from 6th April 2022 the Act Divorce, Dissolution and Separation Act 2020 came into force. The benefits:

- it removes the requirement to provide evidence of 'conduct' or 'separation' facts replacing this with a simple requirement to provide a statement of irretrievable breakdown of the marriage or civil partnership or to obtain a judicial separation.
- it removes the ability to defend the decision to divorce or end the civil partnership.
- allowing, for the first time, joint applications for divorce, dissolution, and separation, meaning that couples can now apply together for a divorce, dissolution, or separation. This takes away the blame or opposing party stance that do often causes issues.
- introducing a new minimum overall timeframe of six months (26 weeks) made up of a 'minimum period' of 20 weeks in divorce and dissolution proceedings between the start of proceedings (when the court issues the application) and when the applicant(s) may apply for a conditional order and the current minimum timeframe of 6 weeks between the conditional order and when the order can be made final.
  - This ensures that there is a period of reflection, and where divorce is inevitable, provides a greater opportunity for couples to agree the practical arrangements for the future.
- updating the legal language used for divorce.
- 'Petition' will become 'Application', 'Petitioner' will become 'Applicant',
- 'Decree Nisi' will become 'Conditional Order' and 'Decree Absolute' will become 'Final Order'.

This makes the language simpler and more accessible to those outside the legal profession, and aligns across all legislation relating to divorce, dissolution, and separation.

You can apply solely or jointly.

However, bear in mind that if you apply solely, it will be you that will pay the issue fee. The other party can still dispute this, but the grounds are narrow and are as follows:

- They dispute the jurisdiction of the court in England and Wales to conduct the proceedings
- Where neither party lives in or has any other connection with England & Wales (this could be Scotland or Northern Ireland); or
- They dispute the validity of the marriage or civil partnership; or
- The marriage or civil partnership has already been legally ended.

Flexibility Joint applications can be made on paper or digitally. If for some reason the relationship breaks down and an applicant refuses to complete the joint application, it is possible to "switch" the application from a joint to a sole application.

This all sounds flexible and helpful for family lawyers and separating spouses. Let us see what happens next, but we hope there will there be less negativity towards separating?

This should reduce the costs incurred by l the parties and hopefully likewise the timeframes.

As resolution solicitors we are always looking to settle things amicably, swiftly and cost efficiently as we have the tools to help the parties achieve this.

HNW Divorce

HNW Divorce Litigation

Flagship Conference

24th November 2022
One Moorgate Place, London

To register for the events and speaking opportunities contact:

Paul Barford
Founder/Director

paul@thoughtleaders4.com

020 7101 4155

ThoughtLeaders HNW Divorce

Meet ThoughtLeaders

Paul Barford
Founder / Director
020 7101 4155
email Paul

Chris Leese
Founder / Director
020 7101 4151
email Chris

Danushka De Alwis
Founder / Director
020 7101 4191
email Danushka

Maddi Briggs
Strategic Partnership Manager
07825 557739
email Maddi

Our HNW Divorce Community Partners:

KINGSLEY NAPLEY
WHEN IT MATTERS MOST

1KBW

SCHNEIDER
FINANCIAL SOLUTIONS

Grant Thornton

withersworldwide

serle court

PCD Club

In aid of Refuge
For women and children.
Against domestic violence.

London&Capital
WEALTH AND ASSET MANAGEMENT

CONYERS

BREWIN DOLPHIN