ThoughtLeaders4 HNW Divorce • May 2021

HNW Divorce MAGAZINE

ISSUE 5

In Focus Supplement: The Modern Family

From Cohabitation to Parenting through the Pandemic and everything in between

Withers Family Law delve into issues facing the Modern Family

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First Quarter: First Slice of 2021

INTRODUCTION

"In times of turbulence and rapid change, you must constantly be re-evaluating yourself relative to the new realities."

Brian Tracy

The "unprecedented" year that was 2020 put many relationships to the test. As a result, Q1 of 2021 has meant turbulent times for marriages and in turn a first quarter like no other for divorce lawyers.

Featuring an In Focus supplement on the Modern Family from Withers Family Law, this issue puts tackling everything from Cohabitation to Parenting in the Pandemic, Q1 and The Modern Family firmly in focus.

In the last 4 months TL4 HNW Divorce has launched our members portal and hosted 14 virtual live and On Demand events. The overwhelming support and excitement for our plans moving forward reaffirms how strong our growing Community is and how vital knowledge sharing is. With many more virtual and physical events in the pipeline and much more content and insight to share we are approaching 2021 with a "full steam ahead attitude" and we have no intention of slowing down...

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

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CONTRIBUTORS

Sarah Harvey, **Stewarts**
Adrian Clossick, **Stewarts**
Kirsty Churm, **Kingsley Napley**
Connie Atkinson, **Kingsley Napley**
Michael Gouriet, **Withers LLP Family Law**
Jemma Thomas, **Withers LLP Family Law**
Katherine Landells, **Withers LLP Family Law**
Claire Blakemore, **Withers LLP Family Law**
Natalie O'Shea, **Withers LLP Family Law**
Jennifer Dickson, **Withers LLP Family Law**
Jessica Crane, **London & Capital**
Lucy Greenwood, **The International Family Law Group LLP**
Rupert Morris, **Walkers (Guernsey)**
Nigel Sanders, **Walkers (Jersey)**
Kathryn Macken, **Walkers (Guernsey)**

COURT REJECTS HUSBAND'S ARGUMENT THAT WIFE'S ASSETS HAD BEEN "MATRIMONIALISED"

Authored by: Sarah Harvey and Adrian Clossick - Stewarts

In the recent case of HX v WX v NX and LX [2021] EWFC 14, Mrs Justice Roberts considered whether the husband's management of the wife's non-matrimonial assets was sufficient to "matrimonialise" those funds so that they should be considered part of the 'pot' available for division by the court. Sarah Harvey reviews the decision and what it means for divorcing couples and practitioners.

Background

The parties married in 1985, and this was, therefore, a long marriage of over 30 years. The parties have three adult children, two of whom were parties to the case (NX and LX) in their capacity as beneficiaries of family trusts.

The wife was the homemaker, and the husband was the breadwinner. Prior to the marriage, the wife had grown up in a financially privileged environment. She was the beneficiary of two trusts, which over the years had produced an independent income for her of up to approximately £235,000 net per year. All the parties accepted that the capital in these trusts (approximately £9m net) had been kept in the wife's name during the marriage.

The husband was a banker when the parties met. The husband's financial acumen was recognised by all, including the wife. With professional input, he put in place several trust arrangements for the benefit of the family to minimise their tax exposure. Not only did he manage the family's money, he also managed the wife's funds on her behalf.

One of the trusts put in place by the husband, of which he was the settlor and life tenant, held the family's Oxfordshire property, which had been valued at approximately £10.3m (net of costs). Due to the importance of this property to the family and the fact that it was seen as integral to their family life, it was effectively treated as a family home. The husband was the life tenant of this trust, and the beneficiaries were the parties' children and grandchildren.

The key issues for Mrs Justice Roberts were:

1. The value and treatment of the Oxfordshire property (held on trust);
2. The extent of pre-marital and non-matrimonial assets; and
3. Whether the wife's non-matrimonial assets had been "matrimonialised" as a result of the husband's actions.

1. Oxfordshire property

Mrs Justice Roberts had to consider whether the Oxfordshire property should be attributed its full value of £10.3m or whether the fact that it was held in trust, thereby effectively limiting its utility for the husband, meant that a lower value should be applied. An expert in the case had suggested that the husband's life interest could be valued at around £1.45m. However, the figure was heavily caveated.

The husband's case in general terms was that he would not have the same financial flexibility in respect of that property as would be afforded to the wife through her unfettered ownership of their London property, which was owned by the parties outright.

Mrs Justice Roberts concluded that despite this potential limitation, the property should be attributed its full value. In her view, the trust had been set up in a manner that offered the husband, with the children's cooperation, the opportunity to enjoy the occupation of the property without the need to contemplate a sale.

2. Non-matrimonial property

Each of the parties entered into the marriage with their own assets. Virtually all the husband's premarital assets were applied for the benefit of the family during the marriage. In contrast, it was accepted by all that the wife's inherited wealth had always been kept separate, outside of the family trust arrangements; the underlying capital had never been mixed or blended with family resources. It was accepted that it had been ring-fenced.

The husband submitted that it was unfair of the wife to ask for half of everything generated during the marriage without any acknowledgement or recognition that she was already a very wealthy woman. Further, he argued that she had only been able to conserve those funds because of the financial arrangements he had put in place and his agreement to fund everything, in part through the effective donation of his own non-matrimonial assets.

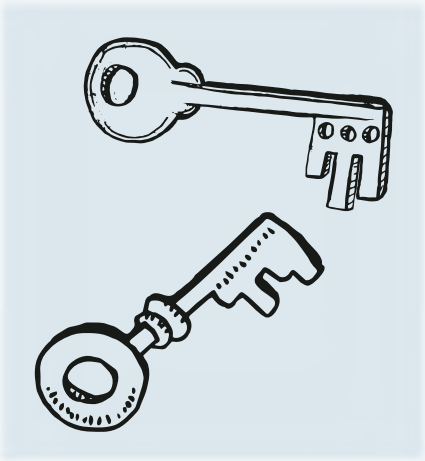
3. The husband's case that the wife's non-matrimonial assets had been "matrimonialised"

The husband also submitted that this unfairness was magnified when seen in the context of the significant contribution he had made managing the wife's independent resources. At the time of the marriage, the wife's wealth was tied up in a privately-owned family trust company whose shareholders were members of the wife's family. The husband advised the wife that she should "liberate" her funds from this arrangement, diversify and reinvest. He navigated this "liberation" on her behalf, an undertaking he described as a huge commitment in both time and effort over nearly four years, largely for no financial reward. He subsequently managed the wife's portfolio over several years.

The husband's arguments, therefore, were that his undisputed (and on his case, unmatched) contribution over many years, producing greater flexibility for the wife and increased value, blurred what otherwise might have been a bright line between matrimonial and non-matrimonial assets.

Mrs Justice Roberts concluded that the wife's inherited assets remained wholly separate from matrimonial assets at all times. There was no suggestion by the husband that following the "liberation" of funds from the previous structure, they should be reinvested in their joint names. Further, the husband accepted during cross-examination that there had never been an understanding that the funds should be shared or that he would acquire an interest in them as a result of his management role. The wife's genuine intention was that the assets should remain available to provide for future generations.

Mrs Justice Roberts concluded that none of the factors identified by the husband in respect of his contribution



operated to change the underlying analysis in relation to the fundamental nature of the wife's separate property. The wife's non-matrimonial property was preserved as her own property; it had not acquired a matrimonial character, either in whole or part, due to the husband's activities. The wife's trust assets would remain her separate property and would not be shared by the court as they were non-matrimonial in nature.

Partner Adrian Clossick says:

"This case serves as a useful reminder to practitioners of how the court will apply the concept of non-matrimonial property within a sharing claim. A party seeking to demonstrate that non-matrimonial funds have been "matrimonialised" will need to evidence their claim thoroughly. Careful consideration of whether it can be said that there is an acceptance that the ring-fenced funds have been matrimonialised as a result of that party's endeavours will be required."

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

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

The Blue Poison Dart Frog

(dendrobates tinctorius azureus)

Native to Suriname

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

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

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

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

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

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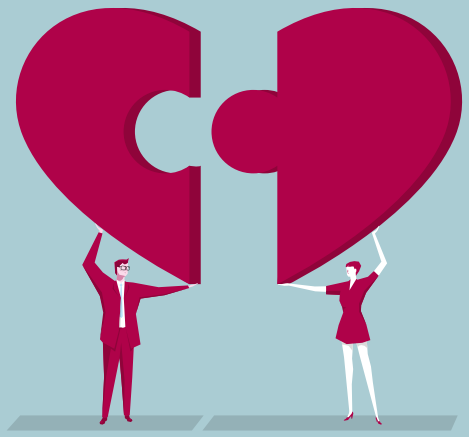
THE IMPORTANCE OF SEEKING SUPPORT FROM YOUR EMPLOYER WHEN GOING THROUGH A DIVORCE



Authored by: Kirsty Churm and Connie Atkinson – Kingsley Napley

The breakdown of a relationship is a challenging and stressful time, even when you and your partner are on relatively good terms.

There are a number of support services we recommend to help manage the strain which comes with relationship breakdown and the significant changes to your and your children's circumstances. People often go first to friends and family and then perhaps to a lawyer, counsellor or financial advisor. Many people do not feel comfortable talking to their employer about their circumstances and in this blog, we explore how it can be important from a personal as well as family law and employment law perspectives.

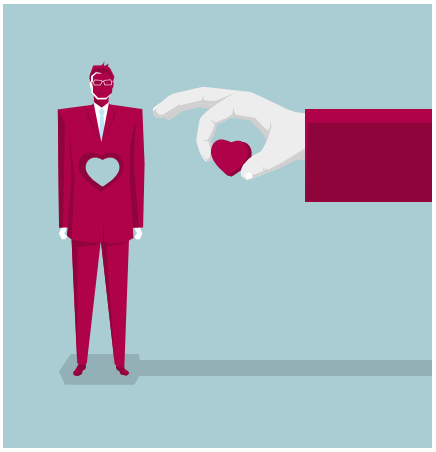
Court proceedings

If you are unable to agree the children and financial arrangements arising out of your separation either directly or through using another form of dispute resolution, court proceedings may be required. Court proceedings can take a significant amount of time and energy and it is likely to be beneficial to you if your employer is made aware of the circumstances you are in. Although there are relatively limited legal obligations on your employer in these situations, many employers will recognise the benefit in supporting employees through difficult times. It can be important for them to understand when key dates are approaching and, where relevant, how the family legal advice you are being given may impact on your job.

In a straightforward Financial Remedy case, you may have to attend two or three hearings. Prior to each hearing, you will be required to prepare a number of documents to enable the court to manage your case, such as a Form E (which is a statement setting out your financial disclosure), replies to questions arising out of your disclosure and, if your matter proceeds to a final hearing, a full statement in support of your position. For a children case, you will be expected to provide a full statement if the court needs to make a decision about the overall arrangements for your children and children proceedings usually take place separately to financial proceedings, meaning two sets of hearings.

When it comes to the hearings themselves, while they may be 'listed' at a set time for, say, 30 minutes, an hour or for a number of days, in reality you will need to set aside the whole day so that you can discuss the case with your legal team and you are available when the judge calls you on. You should be sure to agree any necessary time off from work in good time and make sure you "set aside" sufficient annual leave for these purposes.

In between the hearings, there will be a number of intensive periods during which you are in regular communication with your solicitor. In addition to this, you will need give yourself time and space to consider your case and to make use of additional therapeutic support. It may help to ease the pressure if your employer is aware and can afford you flexibility in respect of court commitments and the work required in the lead up to them.



Tactical considerations

Your working arrangements will impact on both the financial and children arrangements and it is critical that you consider these at an early stage.

CHILDREN ARRANGEMENTS

A divorce or separation is one of the most significant events you may go through in life and this in itself may cause you to re-evaluate your employment situation. Your solicitor will also want to explore your plans for the future with you, as these will be vital to the management of your case.

If you are making a proposal in respect of the arrangements for your children, whether this is part of a general child arrangements discussion or a relocation case (in which one parent seeks permission to move away with the child(ren)), it is important that the proposal is achievable. It should take into account how the children will be looked after on a day to day basis, including before and after school and

during holidays. If you have historically worked full time and relied on the other parent for more of the childcare, now may be the time to consider adapting your working pattern and discussing this with your employer. If you are asserting that you will be available for school pick up and drop offs on certain days, that you will be home by a certain time to relieve the nanny, or that you will be available for half of the school holidays, you ideally need to show the court that you can or are already doing this. This may require support and written confirmation from your employer.

FINANCIAL ARRANGEMENTS

While children and financial arrangements are considered separately by the court, they are linked. In making proposals about your children, you may need to reduce your working hours temporarily or on a permanent basis. This can have a direct impact on your earning capacity now and in the future, which is one of the court's considerations when assessing which financial orders should be made. Your employer's willingness to accommodate flexible working arrangements will be relevant to the applications before the court and you may want to approach your employer early on for written confirmation.

Employment options

From an employment perspective, you may consider options such as:

1. A Flexible Working Request

The starting point is to understand your employer's flexible working policy. Legally, an employee can request flexible working once they have been employed at least 26 weeks and only one request can be made in any 12 month period. In practice, some employers operate less restrictive, voluntary schemes. If your manager is supportive, it may be helpful to discuss your plans informally first, in order to adjust your proposal as necessary before making a formal written request.

You might request a change to (i) the hours you work, (ii) the times when you work or (iii) where you work. Your request should address, so far as possible, any obvious potential effects on the business and how these might be dealt with. It is also important to consider whether the adjustments you are requesting are for a temporary period or a permanent change to your contract, and make this clear.

If you meet the qualification criteria, your employer has an obligation to consider your written request and give you a decision within three months. It can, however, refuse your request on business grounds, or insist on a trial period. Unfortunately, there is very limited scope to challenge their decision and there is no legal requirement to offer you an appeal.

2. Parental Leave

Parental leave can be useful to cover time off to look after your child(ren), for example during school holidays. Although it is unpaid, you are entitled to 18 weeks' parental leave per child up to the child's 18th birthday if you have been with your employer at least a year. Your employer cannot refuse to let you go on parental leave, but they can postpone your leave for up to six months in certain circumstances.

5 practical tips

1. ***Inform your employer at an early stage to help them understand your circumstances and obtain the relevant policies.***
2. ***Provide your employer with the key dates for hearings and the work involved as part of your case, and request these days off as soon as possible. Speak to your employer to see if it is possible to limit your work commitments in the lead up to these dates.***
3. ***Request time off in order to prepare during critical points in your case such as the preparation of your financial disclosure and statements and attendance at hearings.***
4. ***Inform your employer that you may need time off for therapeutic support/family counselling and ask HR whether your company benefits provide free access to these and any other well-being resources. Although there is no general right to time off for medical appointments, your employer will need to consider making reasonable adjustments if your condition meets the definition of disabled within the Equality Act 2010.***
5. ***Discuss flexible working with your employer either as a short or long term measure, and make any formal request as soon as possible.***

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Jonathan Tickner
t: 020 7822 7766 e: jtickner@petersandpeters.com
Maria Cronin / Partner
t: 020 7822 7737 e: mcronin@petersandpeters.com
w: www.petersandpeters.com

Withers Family Law *in Focus:* Modern Family

LIVING TOGETHER

WHEN IS A GOOD TIME TO TALK ABOUT UNDERSTANDING AND PROTECTING YOUR LEGAL RIGHTS?

Authored by: Michael Gouriet and Jemma Thomas - Withers LLP Family Law team

Recent ONS statistics are clear: the majority of the population (60%) live in a couple and around one in five are cohabiting. Cohabiting relationships are more prevalent in the younger generation, with over two-thirds of people aged 16 to 29 years living in a cohabiting couple, and we are yet to see the extent to which the Covid-19 pandemic will have had an impact on numbers of unmarrieds who have opted to move in together.

But a key question remains: are people aware of the legal implications of their decision not to marry or form a civil partnership? Unfortunately, the research suggests not.

- In 2017 Resolution (a body of family law professionals which has been campaigning for better legal protection for cohabitants and also to increase awareness of the gaps in the law) carried out a survey of 240 family lawyers. The results were striking - 98% reported having worked with a client coming out of a cohabiting relationship whom they were unable to help due to a lack of legal protection. More concerning is that 89% of those surveyed reported that unmarried persons who separate are often surprised to find they have no legal rights.
- In January 2019, NTCen published findings from the British Social Attitudes Survey revealing that 46% of people mistakenly believed in the existence of the outmoded concept of the common law spouse (equating the same rights to unmarried couples as married couples). The number increases to 55% for households with children. This critical misunderstanding is dangerous because without the knowledge of their legal position, people cannot protect themselves.

It is not surprising that there is such a gap in the public's knowledge; popular culture often refers misleadingly to 'common law marriage' and the Department for Work and Pensions treats married and unmarried couples in the same way for the purposes of unemployment benefits, Working Tax Credit and Child Tax credit (but does not for the purposes of bereavement payments and widowed parents allowances).

As well as lawyers (especially conveyancers and wealth planners) other professionals, such as accountants, financial advisers, and real estate agents are ideally placed to improve awareness and understanding.

There are various ways to spread the message to ensure that people are aware of the legal realities of their relationships, but first .....

What do cohabiting couples need to know?

The following highlights some key points of which cohabiting couples should be aware:

i Regardless of how long or committed the relationship there are no automatic legal entitlements in the event of separation. A couple who have been together for 30 years, had several children together (who have now grown up) do not have any financial claims against one another by virtue of the relationship – even if one may have given up financial independence in order to look after the children.

ii Unless specifically named in a valid Will, a cohabiting partner will not automatically be entitled to share in their deceased partner's estate, as intestacy rules do not apply to those who live together outside marriage. The survivor is left in the position of having to make an (often expensive) application to the court showing that they were either cohabiting for at least 2 years before the death or were financially dependent on the deceased before they died. It is then for the court to decide what they should receive.

This is why it is very important that cohabiting couples consider creating valid Wills if they wish their partner to benefit on death, and also, as there is no equivalent to spousal exemption from inheritance tax, consider taking out life insurance to cover the tax on death which would otherwise deplete the deceased's estate and may, for example, result in the home in which the couple lived having to be sold.

ii Understanding the formalities of co-ownership of property. First, the underlying beneficial ownership (being the actual value in the property) may not necessarily reflect the legal title (ie what is registered at the land registry) if, for example, there is an agreement in the form of a declaration of trust or evidence of a common intention between the parties as to how the value is to be divided. There are two different legal means of joint ownership - tenants in common or joint tenants. Tenants in common means that each person owns their specific share. The shares do not have to be equal but they must be defined. As joint tenants both own the whole property equally; there are no defined shares. This is particularly relevant on death: for tenants in common, the share goes to the deceased's estate and is distributed in accordance with their will; for joint tenants the share passes automatically to the survivor.

iv Pension providers often require cohabiting couples to nominate their partner, whereas usually spouses will automatically benefit from the pension in the event of their partner's death.

What about children of unmarried parents?

There is no difference between married and unmarried parents when it comes to the exercise of parental responsibility so if there is an issue about the amount of time a child spends with each parent or other disputed aspects of a child's upbringing after separation (eg medical care or which school they should attend), the law is the same regardless of marital status of the parents. The presumption that it is better for both parents to be involved in the child's life (unless the contrary can be shown) applies irrespective of marital status.

Married and civil partnered fathers automatically acquire parental responsibility when the child is born. Unmarried fathers automatically have parental responsibility if they are registered on the child's birth certificate. Alternately, they can acquire parental responsibility by entering into a parental responsibility agreement with the mother, by order of the court, or by seeking to rectify the birth certificate.

The relationship status of parents is also irrelevant in terms of financial claims for maintenance for children (which are usually made through the Child Maintenance Service save in limited exceptions such as where one parent lives abroad, or has a very high income, in which case the court has jurisdiction to make awards). However, whereas for separating married couples, any capital claims (eg for housing) would be subsumed within spousal financial claims on divorce, for cohabiting couples, one parent can make a claim against other parent (for example to provide a home), but only in so far as it is benefits the child and only whilst that child is under 18 or in full time education.

Claims against the property

In the event of separation, the extent to which one person has any entitlement in relation to the property in which they live will predominantly depend on decisions that were made when the property was purchased.

The starting point is how the property is registered: if it is in joint names (without any underlying declaration of trust as to ownership share) then the presumption is that each person owns half; if it is one person's name then the presumption is they own the entirety.

In order to a claim a share in a property where it is registered in the sole name of their partner (or a greater than 50% share where in joint names) a cohabitant would need to prove evidentially that there was an agreement or common intention to share the value in the property in the contended way – either when it was purchased or at a later date. Material financial contributions made towards the property would be relevant – particularly if there was a direct contribution to the purchase price. However, payment of regular outgoings (such as mortgage interest payments, utility bills, repairs etc) will not alone confer an ownership interest.

An example in practice: in 2019 Mr Sandford claimed an interest in the home he had shared with his partner. They had been together for 23 years and had 3 children together. He claimed that there was a common intention to share the property (which was in

Ms Oliver's sole name) and that he had carried out renovations to the property on that basis, but his claim to a beneficial interest was rejected by the court. This cases exemplifies the complexity and uncertainty of the esoteric law in this area - with each case turning on its own disputed facts.

It is imperative that when people purchase property together, or move in together, they take advice as to how to establish or protect and preserve their interest in that property.

When is a marriage not a marriage?

The Law Commission is conducting a review of the law which may result in legislative reform, but currently many religious marriages (without additional registration) may not constitute a legal marriage. In order to be recognised, a marriage must comply with the strict requirements of the statutory Marriage Acts. This can often result in injustice where people believe that they are married but legally they have the same limited status and lack of rights as cohabiting couples.

The Court of Appeal recently confirmed in the case of Akhter v Khan [2020] that the Nikah ceremony alone which does not meet the essential formalities required by marriage laws in this country, will not result in a legally valid marriage. As the court declared it an invalid marriage, Ms Akhter could not have any legal recourse following their separation.

It is important that all formalities are adhered to so as to ensure that the marriage is valid, otherwise on separation the parties will be in the same position as those who have cohabited.

What are the red flags as to when to have discussions about legal rights?

If clients mention moving in together, buying a property together, having children together, or making significant financial decisions together, such as transferring assets and accounts into joint names, these are all times for them to take advice.

It is not just for couples who are starting out together; how property is co-owned can be highly relevant for those embarking on new relationships post-divorce. For example, some clients may wish to preserve their share of the property for children from their previous relationship and so 'joint tenancy' co-ownership may not be appropriate for them.

What steps can you suggest?

Clients can sign a cohabitation or living together agreement, which allows them to set out their intentions around property, finances and how they would support their children if they separate.

If they are buying property together and both intend that they have an interest, they should ensure both names are on the deeds to the house and importantly enter into a simple declaration of trust as a clear evidential understanding of their respective shares in the property.

It is a good idea to make a Will and check nominations for pensions and life insurance. Taking out life insurance also helps to protect loved ones on death, and can be useful to mitigate against the adverse impact of inheritance tax.

Clients should be warned that words matter: they should not make promises they do not intend to keep about their property: 'What's yours is mine' can be the basis of a claim that there was an intention to share a property – especially if the person relying on the promise is giving up their own property, or making an economic sacrifice on the basis of a belief that there is an agreement to share.

Talking to clients about the legal implications of their relationship status, and ensuring that they take advice could save significant financial and emotional cost in the future.

What is the future for legislative change?

Whilst other countries (including Australia, New Zealand, Canada and more recently Scotland and Ireland) introduced statutory law to protect the rights of their cohabiting population, it has been 14 years since the Law Commission published clear recommendations for reform in England and, despite various valiant attempts (most recently Lord Marks of Henley-on-Thames' Cohabitation Rights Bill presented to the House of Lords on 6 February 2020), as well as campaigning by interest groups such as Resolution and high level judicial support for reform, there have been no substantive legislative changes to protect the rights of cohabitants on relationship breakdown.

Small steps have been made in the arena of bereavement allowances, but only in consequence of courageous individuals bringing their precarious position to the attention of the courts. For example in Jackson and others v SSWP [2020] the High Court found that it was discriminatory for Bereavement Support Payment to be paid at a higher rate for those who were married or civil partners than for those who were in a cohabiting relationship, and found that the relevant legislation was incompatible with the European Convention on Human Rights. Similarly, Siobhan McLaughlin (mother of four who had lived with her partner for 23 years) successfully persuaded the Supreme Court that the law preventing her from claiming for the benefit of her their children widowed parent's allowance was incompatible with the European Convention on Human Rights. Also, Denise Brewster who had been with her partner for 15 years when he unexpectedly died and she found that she was not entitled to his pension as the administrator had not received the form (which she thought he had completed) to nominate her. Had she been married, no such nomination form would have been required.

It may be overly optimistic to think that the first cohabiting couple at Number 10 may be the catalyst for the government to enact legislation to reflect social change and promote rights for the millions of cohabiting couples (who now number 3.5m and counting).

Without legislative change, greater awareness of the lack of rights for cohabitants and the cost and uncertainty of outcome of disputed property ownership claims would encourage those entering, or already in, cohabiting relationships to take advice to understand and preserve or protect their position.

Withers Family Law *in Focus:* Modern Family

GRIEF AND GAME THEORY:

THE DELICATE PSYCHOLOGICAL BALANCE IN FAMILY DISPUTES

Authored by: Katherine Landells - Withers LLP Family Law team

An expert lawyer who understands the psychology of litigation offers a significant advantage to their clients. Making the right strategic calls at the right time can make the difference between win or lose. And for a client going through a divorce, having an advisor on board who can couple this with an appreciation of the dynamic of a separation makes the difference between a positive experience and a crushingly negative one.

Helping a client to understand what can be achieved and also what can be lost in litigation is a pivotal insight that a good litigator brings to their cases; a resounding victory in court can be hollow when the client's psychological state remains in tatters after the Court award. Similarly, a settlement negotiated in psychological harmony that fails to address the parties' future practical and financial needs can quickly unravel. Both scenarios can cause lasting resentment, further litigation and continued emotional damage.

Marrying up the advice on strategy with an appreciation of the delicate mental wellbeing of many clients going through the breakdown of what has been their most important relationship gives advisers the ability to control the pace of the legal journey with an eye to securing the right outcome for their clients; financially and emotionally.

The particular psychology of family disputes

Divorce and separation is a painful and deeply affecting life experience, whether it has taken the client by surprise or has been planned in detail. Clients respond differently and go on to experience different emotions at different times throughout the process. A good family lawyer will understand the range and breadth of the lived experience of divorce, and can help the client become aware of this journey and how it impacts on their ability to engage with the concurrent (and often complex) legal process.

Understanding the emotional journey

Many psychologists believe that individuals going through divorce and separation experience some of the same emotions as those experiencing bereavement. For example, the first stage (although not always experienced first) is the denial stage. Denial can have a huge impact on the client's ability to engage with divorce proceedings. Some clients in denial are able to function enough to carry out the administration of divorce and provide basic instructions, but a litigator with an eye on the strategy of the case will need to have clear instructions about the destination of travel from the start.

Some clients or their former partners are unable to engage at all. Pressing ahead without the engagement of the 'other side' can lead to increased costs, more entrenched positions and further resentment. Solicitors will need to be able assess whether it's right to press

on: this can be a complex question, requiring an appreciation of all the circumstances in the case, including whether there are children, what the financial landscape is, and whether there are any urgent issues that must be dealt with.

Also present in the grief cycle is another emotion common in divorce and separation: guilt. Clients who have instigated separation can become almost paralysed by guilt. Although for a different reason, this can also manifest as an inability to focus on outcome and the absence of cogent and thought through instructions. Identifying the role played by guilt, drawing attention to it and explaining the prevalence of that emotion during separation can enable a lawyer unlock the paralysis for a client and help them to engage with the legal process and think more rationally about their future.

Anger is another – far easier to spot – emotion in the grief cycle. But whilst anger is more readily identifiable, that doesn't make it any easier to deal with in the context of divorce proceedings and it can often cloud good judgment – and the execution of good strategy. It might be more productive in terms of client engagement but it can derail negotiations and push the parties to court. A lawyer who is not prepared to positively direct or diffuse a client's anger, or who uses it to drive an aggressive strategy, does no service to their client on that front and more often than not both the process and the ultimate outcome is damaging for all involved.

All of these emotions, and many others, are often present in the aftermath of the breakdown of a relationship and can cause clients to get 'stuck' on points. Being aware of the various emotions in play, and the propensity for those emotions to block progress, will help a family lawyer to unlock the next steps and, most importantly, to empower their client to make the decisions necessary to move forward.

Understanding the legal journey

With the foundation of a deep understanding of these emotions and an acknowledgement of their impact on the client's motivation and engagement, a solicitor can devise an optimum strategy for the legal process to ensure that their client's experience of that journey is positive, not just in terms of their emotional well-being but also in terms of outcome.

At the start of litigation, although the pressure might seem off as both sides make their opening play, and nothing is 'set in stone', an experienced litigator will be aware that these initial forays set the tone for the remainder of the dispute. Some parties' relationships never recover from the mudslinging that take place at this stage (as recognised by the campaign for no fault divorce). But the opening plays are vital in setting the tone not just of the discussion more generally but also the parameters of the dispute. Moving too quickly to purchase a new home, set up with a new partner, or to agree a status quo regime in relation to finances or arrangements for children can result in later regret. Equally, setting out a strong opening position can pay dividends later down the line not just in terms of how that might play out but also by putting on pressure in terms of costs.

Once the opening gambit has been navigated and proceedings are underway (whether they are court proceedings, voluntary negotiations or discussions in mediation), the next stage of the journey for family disputes requires stamina and considerable attention to detail. At this stage both parties exchange financial disclosure. The preparation of this can be hard work and the consideration of the 'other side's' efforts can trigger a range of emotions from shock and outrage to frustration and mistrust.

During this middle stage, there will be a number of possible routes that will open up to enable the parties to secure a good outcome for them both, and the role of the legal adviser to bring these to the fore will be vital. It's really important that the client is in a place where they can imagine their future and envisage how this will look (and are not embroiled in feelings of revenge or anger). Trading in relation to interim positions and judging what battles should be picked is a very important call for lawyers to make at this stage – conserving energy and momentum for the latter stages of the discussions.

Those latter stages of the discussions – the end game – will be the culmination of all of the work that has gone before. The strategy deployed up until this point will determine the overall tone and likely outcome of these endgame discussions or, if there are court proceedings, the determination made by a judge. Clients who, with the support of their lawyers, have navigated the opening and middle stages successfully, choosing which battles to fight and maintaining a positive momentum, will be in the best place at this point to make decisions which empower them to move forward. A judge may have ordered an outcome setting out the overall terms, or the parties may have agreed the deal, but it's this endgame which acts as the spring board for the client's future.

Client expectations

No client will want to go through the heartache of a divorce, or a dispute about the repercussions of it, twice. But a client who can reflect on their whole experience – both emotional and strategic – and who considers it to have been positive, progressive, and fair, will be in a much better place to face their future. Clients should expect to be supported to achieve that view when working with a lawyer who is properly able to understand and hold that delicate psychological balance in family cases.

The difficulties faced by modern families who try to navigate family law disputes with dignity, is at the heart of the idea behind Withers' new legal model for separating couples. You can hear Kate discuss this and other issues faced by modern families in her interview with Mariella Frostrup and Vanity Fair editor Michelle Jana Chan as part of the Vanity Fair 'Future of' series.

Withers Family Law *in Focus:* Modern Family

INHERITED WEALTH ON DIVORCE FOR INTERNATIONAL COUPLES

Authored by: Claire Blakemore and Natalie O'Shea - Withers LLP Family Law team

What can we tell clients (especially those with an international connection) about how their inheritance, whether by Will, forced heirship or marital property regime, will be treated by the family court in England and Wales on divorce?

For those international couples who are from countries which have matrimonial property regimes, whether that be pursuant to domestic law or the Matrimonial Property Regime Regulation, it can come as a surprise to discover that assets inherited during a marriage are not automatically excluded from the assets to be divided on divorce in England.

So what is the approach to inherited wealth on divorce in England and Wales?

The family court takes a number of factors into consideration when applying the statutory considerations under s25 MCA 1973 in dividing assets including: whether the inheritance is in payment or is foreseeable; the size of the inheritance; the length of the marriage; how the inheritance was dealt with during the marriage; the financial needs of the parties; the standard of living enjoyed by the family, and the financial and non-financial contributions made during the marriage and respective present and future income resources (as ascertainable).

These matters, along with the other s25 factors will be considered in each and every case to enable the court to determine whether the inheritance should be subject to 'sharing' claims on divorce; invaded to provide for one parties' needs; or subject to variation (in the case of nuptial settlements).

Inherited assets represent a contribution by one party to a marriage but their relevance on divorce depends on the facts of the case, especially where they have been:

- 'intermingled' with the matrimonial assets, and/or
- transferred in to joint names of the parties, and/or
- used for the benefit of the family during the marriage.

The greater the connections between the inherited assets and the marriage, the greater the potential risk of them being vulnerable to orders being made against them by the family court on divorce.

Case law is fact-specific, but gives some guidance as to when the court may well consider it fair to subject inherited assets to orders for re-distribution on divorce. The nature of inherited asset is relevant. As Ward LJ commented in Robson v Robson [2011] 1 FLR 751, an ancestral castle

may deserve different treatment from a farm inherited from a parent who had acquired it during his or her lifetime, just as a valuable heirloom intended to be retained by future generations is of a different character from an inherited portfolio of stocks and shares

The treatment of an inheritance during the marriage can also be of critical importance, both as to whether the court invades it for needs, or as to whether one party receives credit for the inheritance as being an (exceptional) contribution. The court is more amenable to invading inherited assets which have been intermingled or integrated into the family finances and less inclined to do so where they have been cordoned off and not used to sustain or augment the family finances, but it entirely depends on all the wider relevant facts. In Marano v Marano [2010] EWCA Civ 119, a Withers case, the judge had regard to the extent of the wife's inherited property and to the fact that it had not been used towards sustaining the finances in the marriage. As the husband's commercial property developments had had fallen into negative equity, invading the inheritance was indeed required and so the wife was ordered to pay the husband a lump sum of £5m.

In K v L [2010] EWHC 1234, a departure from equality was justified where the wife inherited assets over a decade before the marriage took place. Those assets were used as the family's only financial support during the marriage (during which the couple lived modestly). However, the wife's actual shareholding (c £60m), remained her own distinct asset throughout the marriage and never became intermingled with the family finances. The husband sought £18m, but the court held that the wife's offer of £5m was generous. There were grounds for departing from equality, given the wife's exceptional contribution in subsidising the family finances from her inherited wealth (which had meant that neither party had to work to support the family during the marriage). The fact that the inheritance was kept separate and there was no intermingling, strengthened the justification for this departure.

Future Resource?

The court can also take into account future inheritance as a potential resource. When doing so it will consider the extent to which a future inheritance is foreseeable and/or certain. This is an area where international couples might find their potential inheritance to be at greater risk than couples from the UK. In the UK, the prospect of an inheritance by way of a Will is uncertain, because testamentary freedom means there is no guarantee of inheritance on death. Compare that with inheritance under Sharia law or forced heirship, or under the EU Succession Regulation which may be more certain as to entitlement, albeit not as to timing. Despite not being entirely foreseeable as to receipt, an inheritance under Sharia law or forced heirship can be regarded by the family court as more foreseeable than an inheritance under a Will. This was illustrated in Alireza v Radwan [2017] EWCA Civ 1545, where the Court of Appeal emphasised that in the ordinary course of events, uncertainties as to the fact of any inheritance and as to the time at which it would occur, would make it impossible to hold that an inheritance) was property which was 'likely to be had in the foreseeable future' and therefore vulnerable to financial claims on divorce. However, in Alireza, the wife's inheritance prospects derived from Sharia law, which rendered it less 'uncertain' and therefore capable of being taken into account.

Finding that a prospective inheritance (whether deriving from Sharia law, forced heirship or provision in a will) is resource under MCA 1973, s 25(2)(a), will not mean that it is inevitable or appropriate that the court will make an order dependent on that prospective inheritance. This is neatly illustrated by the case of HRH Louis Prince of Luxembourg v HRH Tessy Princess of Luxembourg [2018] EWFC 77, where a prospect of further inheritance was established, but the timing and amount were too uncertain for it to amount to a financial resource capable of distribution on divorce.

In K v L [2010] EWHC 1234, a departure from equality was justified where the wife inherited assets over a decade before the marriage took place. Those assets were used as the family's only financial support during the marriage (during which the couple lived modestly). However, the wife's actual shareholding (c £60m), remained her own distinct asset throughout the marriage and never became intermingled with the family finances. The husband sought £18m, but the court held that the wife's offer of £5m was generous.

The international dimension.

Unlike the UK, in some countries, a married couples' rights in property are governed by fixed regimes which rely on certain connecting factors with that country. Civil marital property regimes operate in many EU countries including France and Italy; they are often administrative in nature (no exchange of financial information or legal advice) and signed before notary; elections are usually made a few days before the marriage ceremony; and

they generally take one of two forms: Community of Property (where assets acquired and saved during marriage shared equally) or Separation of Property (where assets are held in the parties' respective names and neither has a claim against the other's). The EU Matrimonial Property Regulation and the EU Registered Partnership Regulation, which came into force on 29 January 2019, are designed to clarify which courts should deal with matters concerning a couples' property and which national law should apply for those couples with connections with the participating states. The Regulations apply to some international couples when managing their property on a daily basis and when their assets are divided in the case of divorce, separation or death.

The interplay between our discretionary system on the one hand and the more regulated approach operated by countries with marital property regimes on the other, can result in unexpected risks for some international couples with expectations of inherited wealth. This risk may arise either from their particular domestic marital property regime and/or from the application of the above-mentioned Regulations. Whilst the English Court can have regard to either an election of a matrimonial property regime or a default regime when carrying out its statutory duty under the Matrimonial Causes Act 1973, it is not obliged to apply such foreign law when distributing assets on divorce. This is not the case in some EU member states, where the said Regulations may apply a default position as to property ownership on divorce and death, in the absence of agreement between the couple as to the law and jurisdiction to be applied and this can apply to all assets, regardless of location. As such, for some international couples, inherited assets may not receive the same level of 'protection' in England as they might do if the divorce takes place in a country with marital property regimes and/or where the said Regulations apply. However, in a somewhat contradictory application, the English court might feel more inclined to bring into the pool of resources to be taken into account on divorce, those potential inheritance assets which will allocated to a party under a marital property regime or through the Regulations, rather than those bequeathed under a Will, for the reasons explained above.

Marital agreements cannot oust jurisdiction of the English court, but can be highly effective in protecting assets on divorce, as is clear from the Supreme Court decision of Radmacher v Granatino [2010] UKSC10: 'the Court should give effect to a marital agreement

It remains advisable for anyone who is seeking to protect inherited assets to enter into a prenuptial or a postnuptial agreement; they are often used as vehicles designed to protect pre-acquired wealth, and/or future inherited wealth. Marital agreements cannot oust jurisdiction of the English court, but can be highly effective in protecting assets on divorce, as is clear from the Supreme Court decision of Radmacher v Granatino [2010] UKSC10: 'the Court should give effect to a marital agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement'. For international clients, it will always be important to consider the impact of any chosen or default marital property regime will have, so as to understand its consequences in terms of applicable law and jurisdiction.

Most international clients will want clear advice about how to future-proof their inheritance on divorce. Whilst the nature of our discretionary system does not provide civil code certainty, armed with an understanding of the potential impact that any chosen or default marital property regime (or equivalent for civil partners) and/or the relevant EU Regulation may have in any particular case, it is possible to provide a framework for clients to adopt before marriage (prenuptial agreements and estate planning) and during marriage (clarity of use of inherited property, no intermingling, postnuptial agreements) as part of a strategy to protect assets, including inheritance, on any future divorce in this jurisdiction.

Withers Family Law *in Focus:* Modern Family

PARENTING THROUGH A PANDEMIC

AND WHAT STRATEGIES CLIENTS CAN DEPLOY NOW?

Authored by: Jennifer Dickson - Withers LLP Family Law team

In the last year, we have all faced huge changes to every aspect of our lives, stifling restrictions and challenging pressures. But we have different experiences: different home situations, different jobs with different demands, different financial positions, different concerns about the health or the safety of loved ones, or grief for those we have lost. As well as those external factors, we also have different levels of resilience. For some, juggling work, home-schooling and domestic life might be a breeze, for others it will be physically and mentally crushing. This all has an impact on practical and psychological parenting.

And it's not only parents of younger children who have felt the strain. Parents of teenagers may have been able to leave them to get on with online lessons unsupervised during the day, but lie awake at night worrying about a host of issues: the impact the interruption in school life has had on their mental health; the number of hours spent in their rooms; the unfairness of losing out on education and extra-curricular activities and of having no exams to show the culmination of their hard work; the effect of being cut off from spending physical time with their friends; and their increasing dependence on social media. An increase in mental health problems and self-harm has been widely reported in recent months. According to the Lancet, 54·2% of 11–16 year olds with probable mental health problems said lockdown had made their lives worse, while 27·2% said their lives were better as a result.

In April 2020, during the first lockdown, an average of 28% of parents reported that home-school was affecting their mental health, compared with 50% in the third lockdown. Research published in Lancet about 'Mental health before and during the COVID-19 pandemic' showed that parents, compared with working age adults without young children, have experienced larger than average increases in mental distress during the pandemic.

Relationships during lockdown – have we go the balance right?

The ONS has released figures showing that 67% of women were supervising home schooling during the third lockdown compared with 52% of men. This saw a change from the first lockdown when home schooling responsibilities were shared more equally, but with more women doing the cooking, clearing, washing and getting children dressed. This imbalance in responsibility can cause stress and resentment, which may build up over time.

All in all, the last 12 months will undoubtedly have put strain on most relationships and for those who were (or are now) contemplating or discussing separation it will have been yet more difficult.

Family breakdown

Even before the pandemic, it was not uncommon for couples going through a divorce to continue living under the same roof, waiting for the house to sell or for a settlement to be reached. That situation is tough, and can become something of a pressure-cooker. Previously, each of a couple would have been able to counterbalance some of that pressure by going out to work, meeting friends for a drink or a coffee or visiting friends family for a weekend away. None of those outlets have been available for some time – and there are limited benefits from setting out on yet another walk around the block.

Courts

The Family Courts in England and Wales are creaking under the weight of current court proceedings. Even before the pandemic, cases were on the rise and the courts were struggling. In his June 2020 report 'The Road Ahead', Sir Andrew McFarlane, President of the Family Division acknowledged this, pointing out that before COVID 19, the Family Court was trying to process an "unprecedented level of applications relating to children". He went on to say, in light of the pandemic and the social distancing restrictions: "The reality to be faced is that the Family Court must now, for a sustained period, seek to achieve the fair, just and timely determination of a high volume of cases with radically reduced resources in sub-optimal court settings."

What this means on the ground is that parents wanting to make private children law applications can be faced with a wait of months even to get to the first hearing (and delay is not normally in a child's best interests) and, for some time to come, may have to make do with a virtual hearing. Fortunately there are alternatives, and options such as children arbitration and hybrid mediation are taking off.

Communication is key, and whether parents are in court proceedings, or pursuing alternative means to find resolution, negotiation is such an important tool for them: finding creative solutions that work for their family in reaching their ideal outcome is the aim. This was encapsulated at the outset of the pandemic, by Sir Andrew who provided guidance that parents would have to make decisions together about whether their children should continue to move between their homes and in doing so they should respect the spirit if not the letter of the law, being prepared to justify their positions in the event that they made further applications to court. For some parents, this offered the opportunity to be flexible about their children's arrangements, particularly when children were out of school and learning at home. Finding a way through these monumental changes to everyday life will have been a huge learning experience for some parents and will have elevated the possibility and importance of finding bespoke, flexible solutions that work for the whole family.

Naturally, negotiation will not work in every case, and whilst the court is not prepared to be a 'third parent', expecting parents to do what they can to make decisions together, there are cases where the best option is to seek an imposed solution from the court.

Sir Andrew Mcfarlane, President of the Family Division - [In light of the pandemic and the social distancing restrictions:]

"The reality to be faced is that the Family Court must now, for a sustained period, seek to achieve the fair, just and timely determination of a high volume of cases with radically reduced resources in sub-optimal court settings."

Some strategies for clients

Family breakdown is hard to navigate at any time, and at the moment it is inevitably tougher, but there are some strategies for clients that can help:

1. **Reaching out** to friends, colleagues, family seems obvious, but is not easy in the current pandemic, and it does not hurt to remind clients not to suffer in silence.

2. **Getting support** from counsellors or therapists can be helpful for many couples and vital for others.

3. **Schools** can offer children support and stability and some will have ensured that children who are more vulnerable or who are having a tough time at home have been able to continue attending school during school closures. Clients can be encouraged to contact the child's form tutor or the school's pastoral lead to ask for advice if they are worried about their child. Some schools have visiting counsellors or therapists that children can talk to.

4. **Communicating and listening** – encouraging clients to try to explain to their concerns to their partner to encourage their partner to voice (and then listen) to theirs..

5. **Arguing well** – trying not to criticise the other parent can be hard, especially for separated parents, but is to be encouraged, as is working on taking the emotion out of an argument, deciding what is important, letting the little things go, and resisting trying to have the last word. Our podcast on 'How to Argue Better ' is worth a listen (LINK).

6. **Being child focused** - keeping children at the heart of decision-making and ensuring that they know what is going on (but don't feel responsible for it) is good advice for separating parents in whatever model of dispute resolution they choose.

7. **Being kind to yourself:** It is easy for clients to feel as though they are failing in every aspect and to feel guilty for that. They can remind themselves that they cannot and need not be the perfect parent, teacher, partner, housekeeper, employee, particularly at a time when all our social interactions are curtailed.

What might we learn from our lockdown experiences?

Some parents may look back at Lockdown #1 with fondness, perhaps with rose tinted glasses: the sunny days, the Thursday night claps, Captain Sir Tom Moore warming the nation's hearts. Some may have been glad of the chance to slow down, to spend time with their children. People have explored their local areas and for some children (aside from having hundreds of hours of screen time), there have been elements of a 1950s childhood, exploring local streets, parks and woods, spending time as a family, not rushing from swimming to football to Stagecoach to birthday parties, which have been life-affirming

This forced time together may have helped some families bond, taught parents more about their children and of the benefits of rolling up their sleeves to work as a team. For parents whose relationship has been tested, the pandemic has been tough on them and on their children. However, even for those whose relationship will not survive post-pandemic, the lessons learned and skills acquired in arguing well, negotiating constructively, finding solutions, and keeping communication channels open, will stand them in good stead when parenting together after separation.

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

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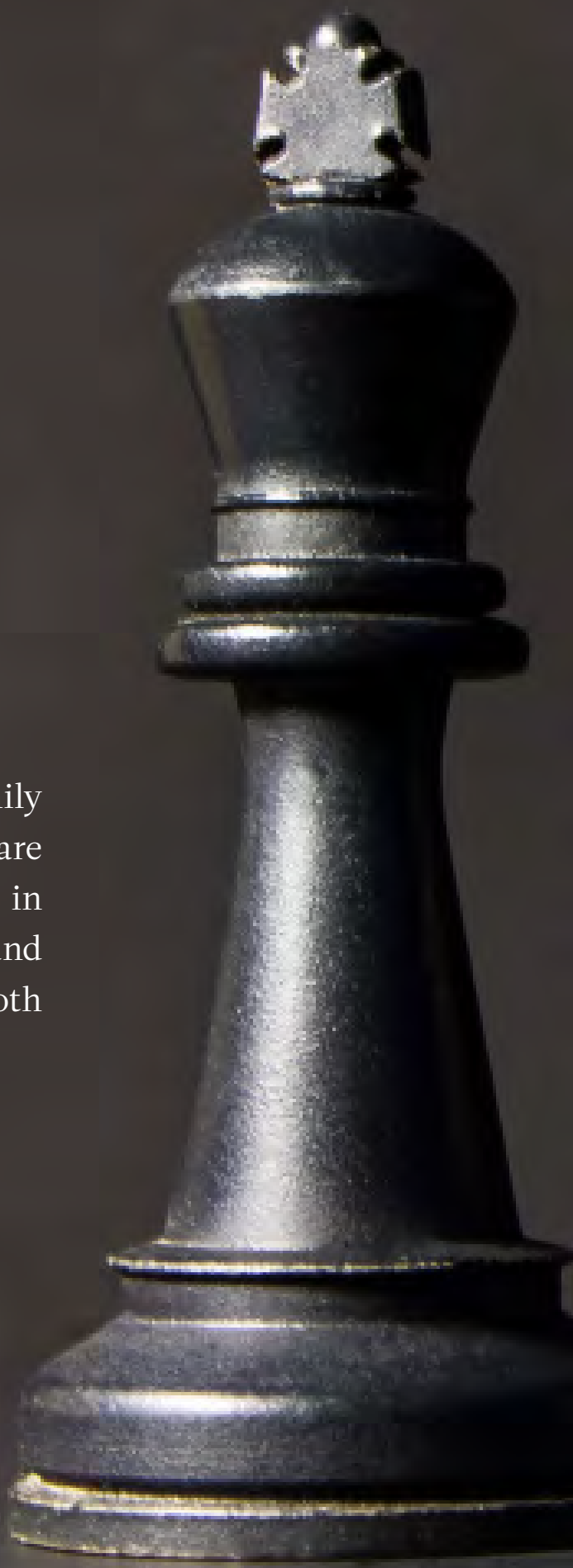

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DOES GENDER MATTER WHEN CHOOSING A WEALTH MANAGER?

Authored by: Jessica Crane – London & Capital

When I have put this question to peers, the first reaction tends to be surprise, that they haven't really considered it before. Their second reaction tends to be no, gender shouldn't matter because if you are receiving good sound advice, from an individual that you trust and respect, why should it even come into the equation?

Interestingly, when the question is put to clients, the answer is rather different. Although they agree that gender shouldn't matter from a quantitative point of view, from the relationship side, clients often have a preference.

The single biggest factor that affects whether you can reach your investment objectives is ensuring that you have provided for all eventualities that are likely to affect your investment outcome. This begs the question: should you consider gender when choosing your wealth manager?

In my experience, women who are appointing a wealth manager for the first time – perhaps after a divorce or a bereavement – will often specify that they are looking for a female wealth manager. Gender can be one of the first and most important differentiators when they are deciding who to go with. This was reinforced recently by a survey carried out by Boston Multi Family Office which showed that whilst 70% of wealth holders saw gender as a primary segmentation factor, only 17% of advisors did.[1]

A plan built around your needs

It is crucial that you completely trust your adviser, and that they fully understand what drives and concerns you. Considering your wealth manager's role in your life, and the importance of wealth planning being attuned to your unique needs, it is important that you choose someone who can most appropriately guide you through your unique circumstances.

We would argue that this is even more important in the case of women, as the factors that affect their investment plans are more likely to change over the course of their life, requiring a more adaptable approach.

The same survey on the state of the female wealth conducted by the Boston Multi Family Office [2], approximately 63% of respondents – who included wealth holders, entrepreneurs and family office professionals – believed that women's financial planning requirements are particularly neglected, and that the industry is not doing a good job of serving women's needs.

Without wanting to resort to gender stereotypes, on the whole women face different challenges than men – across such areas as pay differential (gender pay gap), maternity leave and care responsibilities leading to flexible working requirements and longer life expectancies. Working with an advisor who recognises these challenges and who has perhaps experienced them also, could be useful or at least prove bonding for you both.

In our experience, the biggest variable for women is their ability to continue on their earnings trajectory amid major life events. The birth of children, a global pandemic [3], the illness of family members, and divorce tend to affect women's career trajectory more than men.

1 HTTPS://BOSTONMFO.COM/WP-CONTENT/UPLOADS/2017/11/FINAL-WINNING-WOMEN-REPORT-L-RES.PDF
2 HTTPS://BOSTONMFO.COM/WP-CONTENT/UPLOADS/2017/11/FINAL-WINNING-WOMEN-REPORT-L-RES.PDF
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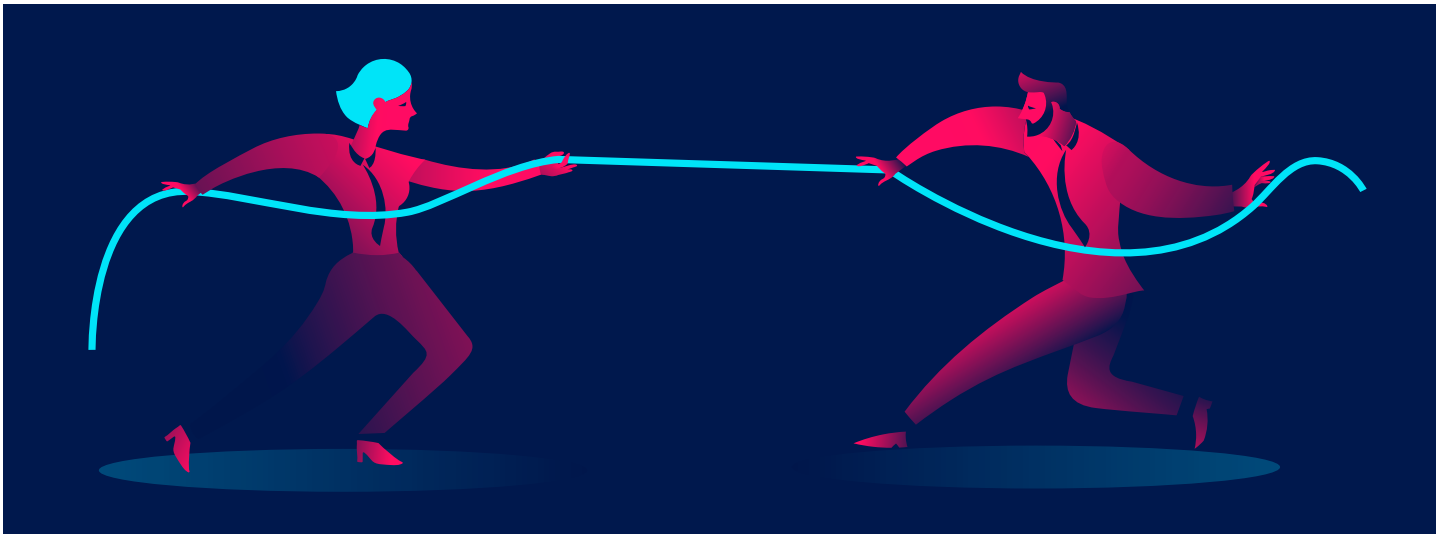


What sort of professional relationship are you looking for?

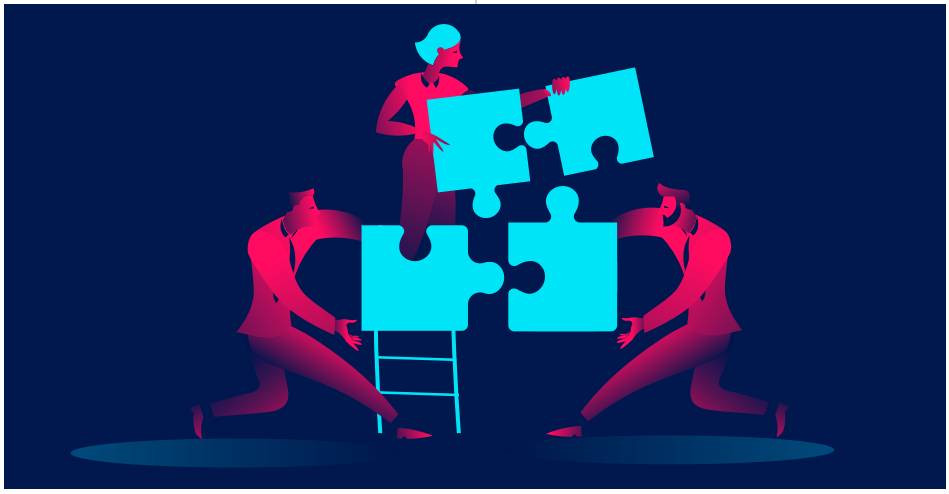
While we would not recommend that you look at your professional relationships in the same way you might choose a friend, it might be worth considering what sort of professional relationship you are looking for. In the Channel Islands, the ideal trusted adviser has historically been described as someone who behaves "en bon pere de famille" – as a good father. Although this sort of relationship certainly has its merits, it doesn't necessarily feel appropriate in the modern world and it certainly won't reflect the relationship that many people seek from their wealth manager. I think the concept of collaboration is important and a more modern interpretation of the ideal trusted advisor should be more akin to a sensible friend, or a wise sibling.

As well as whether the wealth manager "gets" you and understands your goals and priorities, do you actually like them and respect their professional opinions and their values? These things are impossible to quantify but from a human nature perspective, makes the relationships so much more fulfilling. As with any business relationship, the closer you're aligned personally, the more successful the partnership is likely to be.

More responsibilities and more choice

Needless to say, these factors and how you choose to deal with them, have significant ramifications for your wealth plan. Everyone is likely to face these choices in their lives, but no two people will have the same motivations about what drives their concerns and objectives. Similarly, no two people will have an equal ability to absorb any limitations on their income trajectory and may need to make difficult decisions to ensure they still reach their goals.

It is here where the power of a professional adviser who understands your life experiences, concerns and motivations cannot be underestimated. It can be invaluable to have an independent ear who can guide you towards a sufficiently flexible plan focused on your needs, while helping you take control of your financial planning.



Ultimately it's up to you whether gender is a factor in who you choose as your wealth manager. Whilst gender is certainly not the only determinant in your choice, it could be a useful segmentation factor to help determine what your relationship with your wealth manager should look like. The most important factor is the trust between client and advisor and cultivating that relationship to ensure your financial goals are met.

Check Your Privilege

Confidential Communications Between Lawyer / Client and Litigation Lender

Adam Paterson &
Isabel Agudo

Privilege is a legal right that grants individuals and corporate entities the power to resist disclosure of confidential and potentially sensitive material. In basic terms, these rights ensure that a litigant can obtain advice and investigate their case without fear that the documents produced and advice obtained will need to be disclosed to another party or the Court at a later date.

There are various forms of privilege including:

– "Legal advice privilege" protects written or verbal communications between a lawyer and their client for the purposes of giving or obtaining legal advice.

– "Litigation privilege" protects written or verbal communications between a lawyer or their client on one hand, and a third party on the other, where adversarial legal proceedings are reasonably in prospect such as litigation, arbitration, or investigations.

– "Common interest privilege" allows a party to share material that is already privileged with another third party who has a common interest in the subject matter.

It is possible for a document or communication to be protected by more than one form of privilege.

Sharing Info with a Third Party Litigation Lender

It is of course crucial to the conduct of proceedings that information sent to us as a third party litigation lender are not going to be disclosed to the other party at a later date.

Much of the information shared with us by a client or solicitor is already privileged between them, such as counsel's advice for example. The privileged status is preserved when the document is disclosed to us. Even though the document has been disclosed outside of the lawyer-client relationship it remains protected because:
– Any waiver of confidentiality and privilege is for the limited purpose of seeking a litigation loan to fund proceedings.
– Arguably, there is a common interest between the client and us as the lender which means that the documents disclosed to us gain a new privileged status when sent to us for the purpose of initial or ongoing due diligence.

This means that we cannot be compelled to disclose various documents, for example application forms, asset schedules, counsel's submissions, expert reports, continued correspondence, telephone attendance notes, cost estimates and case updates among others.

Explaining the Threshold for Litigation Privilege

1. Unlike legal advice privilege, the scope of litigation privilege is wider in that it can protect communications not only with legal professionals, but also with non-legal advisers. Therefore, in addition to a third party lender, material produced by an accountant, a forensic expert, a surveyor, an estate agent, or an executor for instance, may be covered by litigation privilege.

2. Litigation must be afoot or ongoing. In a matrimonial case, even where the parties have yet to issue Form A, the divorcees are anticipating financial remedy proceedings in order for the court to determine how to fairly divide their assets. The same principle applies where a matter settles early and does not culminate in a Final Hearing.

3. Litigation must be the dominant purpose of the communications. The term "dominant" is described as the ruling, prevailing, paramount or most influential purpose. As a third party lender we are only concerned with information for which litigation is the main purpose and therefore this Is overwhelmingly likely to apply to information we are sent as part of an application for lending or information that we request as the case progresses.

General Data Protection Regulation (GDPR) vs. Privileged Data

Legal professional privilege is one of the exemptions to GDPR disclosure obligations. Personal data to which a claim to legal privilege could be maintained – such as litigation privilege – prevails over the right to be informed and the right of access as set out in the GDPR's key provisions.
Consequently, if the spouse or other family member of a client logged a subject access request for documentation that relates to them on the basis of GDPR, a third party litigation lender would have the right to deny this request by citing litigation privilege. We are legally permitted to withhold certain information from a spouse, family member or any other opposing party.

The Data Protection Act 2018 (the most recent data protection legislation) upholds this GDPR exemption.

At Schneider Financial Solutions we value confidentiality and protect communications with our partners and clients with careful information governance policies and procedures.

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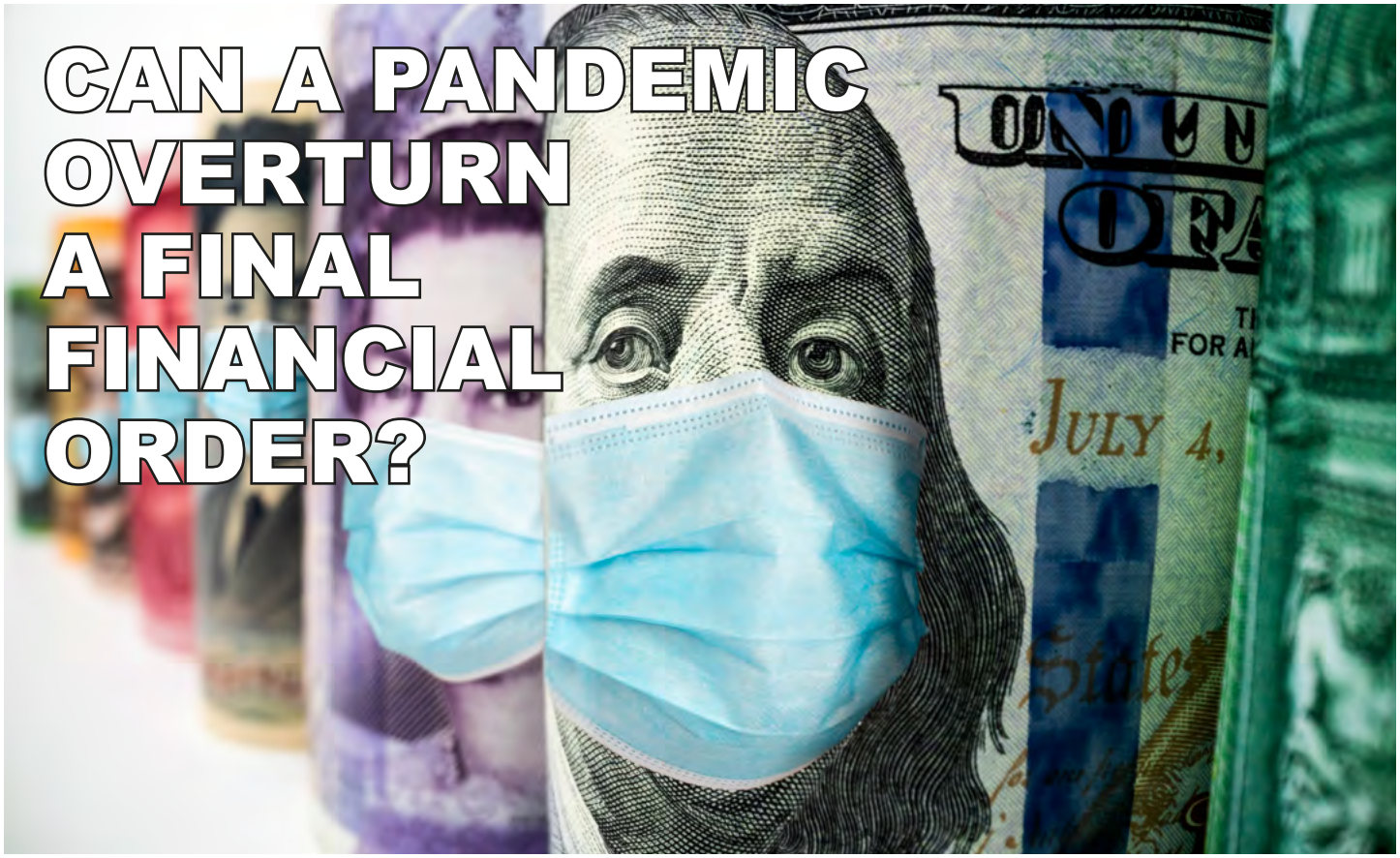
CAN A PANDEMIC OVERTURN A FINAL FINANCIAL ORDER?



Authored by: Lucy Greenwood - The International Family Law Group LLP

This article considers whether the arrival of the pandemic just as a substantial final financial order was made, was enough to warrant a review.

Synopsis

Sometimes people wonder if their final financial orders can be reopened or varied.

Some types of orders can be varied (maintenance, lump sums payable by installments, orders for sale of property and pensions if the application is made prior to implementation and Decree Absolute or it is a deferred lump sum order.

There are very limited and case specific circumstances where undoing any other types of orders in a final order might be possible. (They are often referred to as Barder[1] events after a case where an order was made for the husband to transfer the matrimonial home to the wife who cared for the parties' two children, but shortly afterwards the wife killed the two children and committed suicide. It was held that this was a new event that invalidated the basis, or fundamental assumption, on which the order was made).

Background

At the beginning of the outbreak of Covid family law clients were anxious about the impact the pandemic would have on their financial family law matters.

Whole industries were closing and furloughing all or most of their staff, travel and tourism was severely restricted, insurance companies were fearful of huge pay outs, recruitment fell, and commercial property took a heavy hit. This was followed by a steep decline in the stock market.

General murmurings started within the family law fraternity about the risks of settling financial matters during a worldwide pandemic owing to the uncertainty of the economy (here and abroad, particularly for international clients or those with businesses or assets abroad).

However, overtime and as the stock markets bounced back (in some instances to levels higher than pre-Covid) people have become more relaxed and have accepted that the risks associated with Covid, like all commercial risks, just need to be considered carefully.

Similar anxieties were raised in the immediate aftermath of the 2008 financial crisis, but the court deemed the financial crisis per se was not sufficient to mean a financial order should be reviewed.

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1 Barder v Barder (Caluori Intervening): CA 1987 FRB and DCA (No.3) [2020] EWHC3696 (Fam) [4]

Is a Pandemic reason enough to overturn a final financial order?

In this context an UHNW family had a final financial hearing in January – February 2020. (The hearing lasted some three weeks). Their case was recently reported in the Law reports on an anonymised basis.

Whilst some of the facts of the case are set out below, this article focuses on explaining:

- How high the bar is set for reviewing or overturning a final financial order
- The importance of professional advice when assessing the quantum of any final award, but also the liquidity of various assets, particularly business assets; and
- What insights can be learned to help others

What Is required in law to reopen final financial orders?

- The new event needs to be sufficient to invalidate the basis for the order and if appealed, that appeal would be certain, or very likely, to succeed
- The new event should have happened within a relatively short period of time after the order was made
- The application to review the order should be made promptly
- It needs to be demonstrated that granting leave to appeal would not prejudice innocent third parties if the outcome were changed; and
- The event must have been unforeseen and unforeseeable at the time the order was made

Very broad outline of the recently reported case

The husband and wife had one child.

Whilst the extent of the husband's wealth was not disclosed in the case report, the wife was awarded £64million by the Family Court.

The Husband owns land in various countries, two care home businesses in England, a London property and no less than 25 businesses many of them related entities, as well as plant machinery, office equipment and vehicles.

The wife's award comprised:

- A matrimonial home (£15million mortgage free)
- A lump sum of £49million payable by 3 installments of: £12million (to repay the mortgage on the family home); £30million within 6 months of the order; and £19million within 18 months of the Order
- Interest at 4% on any late payments; and if any of the instalments were missed then the whole balance would become payable immediately

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- Spousal periodical payments at the rate of £720,000 pa to be reduced pro-rata by the proportion of the amount of the £49million which had been paid
- Child periodical payments (£5,000 pm) and school fees

Importantly, the timing of these cash installments was proposed by the husband.

During the course of the hearing the Judge had expressed concerns about the paucity of information/advice the husband had received or presented about liquidity.

The Judge also made some condemnatory findings about husband's honesty/credibility.

Procedural setting

- Feb - March 2020 - Final Hearing
- 23 March 2020 - England goes into first lockdown
- 27 March 2020 - a hearing to discuss the exact wording/terms of the order (The Husband also invites the judge to defer handing down his/the judgement owing to the Pandemic)
- 30 March 2020 - The judge hands down his judgment to the Parties (in the terms cited above).
- The husband appeals the Order
- 18 August 2020 - The Court of Appeal refuses the husband's application for permission to appeal the substantive order
- 28 September 2020 - (just before the first instalment was due) Variation applications were issued:
  - The husband applies to vary the order both as to overall quantum and as to the time for payment and produces a statement in support
  - The wife seeks to vary her maintenance to £2.5million per annum, increase the interest rate on missed instalments to 8% and an order for her legal costs of £1.4million (for various aspects of the proceedings)

Around this time the concerns about the stock market were diminishing as the markets were improving.

What happens at the hearing to vary the final financial order?

As part of his evidence for the variation application the husband filed a statement.

The Judge found the husband's statement vague and that it dealt mainly with the macro-economic impact of the pandemic without specifics about the husband's changed financial position, including an absence of:

- Trading figures
- Profit and loss accounts
- Underlying documentation or valuations; or
- Any indication of his current overall wealth

The husband also sought to revalue all his businesses and other assets (the estimated fee for which was c. £300,000 - £400,000 plus taxes) and estimated it would take about six months to complete them.

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- Trading figures

- Profit and loss accounts

- Underlying documentation or valuations; or

- Any indication of his current overall wealth

The judge said the husband had not set out sufficient evidence to support his case that there was a need for a full review but was also unconvinced any information the husband would supply to the valuers would be impartial.

Incidentally, the husband had also just bought a leasehold of an apartment in one of the most prestigious and expensive blocks in Monte Carlo

Conclusions

- No case had been made by the husband to show the husband's wealth had been impacted severely by the pandemic
- The timings of the instalment payments of the £49million lump sum could be reviewed
- The wife's interim periodical payments were increased to £1.2m pa backdated to the date the first instalment of the lump sum was due to be paid
- Most of the wife's legal costs were awarded (without potential recourse for the husband to challenge them)
- No increase in the interest payment and no interest on the late repayment of the lump sum equivalent to pay off the mortgage on the family home, (as the husband was still paying the mortgage)

Insights for future clients

- The court is very unlikely to interfere with a final financial order.
- On two occasions (The 2008 financial crisis and the current pandemic) the courts have deemed external events alone are not enough to cause financial orders to require review.
- It is essential when making any final settlement to consider liquidity and which assets are shared. Whilst there is often a desire to pay in cash because it is cleaner and quicker, it is also far harder to raise should be the businesses or other assets diminish.
- In this case the capital sums were payable by instalments (hence variable). In many cases the opposite objective of absolute finality and set lump sums being paid is sought.
- The bar is set very high indeed to undo final financial orders which would not ordinarily be variable.
- If somebody elects to retain less-liquid or business assets, they must take on the economic risk associated with that election. That is why it is sometimes better to share different types of assets on a % basis to pay an overall award (so the risk is shared).
- The importance of transparency in financial disclosure cannot be overstated.
- Both parties need for advice, prior to the conclusion of a case or final settlement, not only about family law but also about how any settlement is going to be afforded, structured, paid and when.

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THE DUTIES AND ROLES OF JERSEY AND GUERNSEY TRUSTEES DURING DIVORCE PROCEEDINGS

Authored by: Rupert Morris, Nigel Sanders and Kathryn Macken - Walkers (Jersey & Guernsey)

It has been widely reported that the stresses and pressures of the global pandemic have led to an increase in relationship breakdown and divorce. Where wealthy couples are divorcing and one or both of the partners are beneficiaries of a Jersey or Guernsey law-governed trust (or where their children are beneficiaries) trustees are likely to be drawn into disputes over assets.

The disputes are unlikely to be straightforward. When the divorcing couple are both beneficiaries, even the most experienced Jersey or Guernsey trustee may struggle to follow a neutral line through the emotionally heightened dynamics of an acrimonious break-up.

Yet assistance from the side-lines and neutrality between the couple can often be in the interests of the wider class of beneficiaries and thus the safest and most sensible course for a trustee to adopt. That said, the priorities of the divorcing couple and the focus of the (typically) English family court may not align with the trustee's duties to the beneficiaries, and particular care should be taken when the beneficial class is wider than the couple and their children or when the couple's objectives differ.

Every case will present with their unique facts and the spectrum of issues is wide-ranging, but below are some practical pointers, on some common themes, to assist a trustee through the split.

Requests for Information

A typical starting point will be a request for information. Even at this juncture there are different options for a trustee to weigh in how they could respond and so a careful and documented decision should be taken. A neutral trustee that provides disclosure to its beneficiaries through an exercise of discretion will not automatically engage any off or onshore judicial process. An exercise of discretion can be cast as distinct from responding to a request arising from divorce proceedings. The trustee should also give due consideration to its duty of confidentiality to and between the parties.

Trustees are often well placed to understand the financial situation of their clients, but typically, the number of requests will be greater for the party who has taken a passive role in the establishment and running of the structure. Communications received from the couple's divorce lawyers may be hostile in tone, but a measured and neutral response will set the right course for the trustee and others hopefully to follow.

Behind the outward communications should be a supporting bank of tightly drawn trustee resolutions with one eye on potential judicial scrutiny of reasonableness. While the judiciary may be reluctant to intervene in the decisions of trustees, the recent Jersey case of B v Erinvale PTC Limited and Ors [2020] JRC 213 is a reminder of the Court's supervisory jurisdiction when considering how a trustee has exercised their discretionary powers. In Erinvale the trustee's decision not to add a divorcing spouse to the beneficial class in her own right was set aside.

A disclosure request may quickly turn into a disclosure or discovery order and a trustee's status within the divorce proceedings will determine the framework of any response. The Jersey Court has consistently held that it will be important for a foreign divorce court to make decisions based on accurate and complete information regarding assets that might be considered to be a resource of the marriage. If a trustee's decision to comply or not with a disclosure request or order is referred to the Court for blessing, it is very likely that that principle will be followed.

Joinder and Submission to a Foreign Family Court

A trustee may also receive notification of a party's intention to join the trustee to divorce proceedings. Indeed a trustee may be joined to proceedings in their absence, but that does not equate to submission to the foreign court's jurisdiction. This distinction between joined and submitted has legal significance when it comes to enforcement of any order made by the foreign court directly over the trustee.

Trustees are well versed about the family courts' prioritisation of the divorcing couple's interests over a trustee's duty to administer a trust in the interests of the entire beneficial class. In consequence submission is often resisted to avoid giving the onshore court the power to enforce its judgments directly against the trustee (potentially to the detriment of other beneficiaries[1] and ultimately with the risk of conflict with an offshore court) outside of the foreign jurisdiction. Once a decision to not submit has been taken, every action or inaction undertaken by the trustee thereafter, should be carefully chosen to reinforce and avoid unintentional submission by its subsequent conduct. There are many traps for the unwary trustee to fall foul of and unwittingly submit.

If all, or a significant part of the trust assets are located within the jurisdiction of the family court, local advice should be taken on the orders that might be made by the family court which could put those assets at direct risk. Whilst trustees will typically not submit, an exception could be where there is merit in the trustee "defending" the trust assets before the family court. Trustees will face a much more difficult decision where a smaller proportion of the trust assets are within the jurisdiction of the family court.

Enforcement/ Implementation and the Domestic Court

Once a divorce settlement has been agreed or a final order made the trustee will next consider how or whether to give it effect. Every case will have its own variables but some key points are:

Has the trustee submitted? Decisions from foreign courts where the trustee has not submitted are not automatically enforceable against a Guernsey or Jersey law trust. Instead, an application to implement a foreign order before the domestic court may be expected from the enforcing party. The case of A and C v PQ, RS and T Trustees Limited, [2019] GRC013 in the Guernsey Royal Court confirmed that orders made in the English High Court are not automatically binding on the trustee and instead an application to the Royal Court will be needed should the parties wish to put the terms of the foreign order into effect. However, English orders which enshrine commitments made by the on-shore parties will often be highly influential over the offshore courts when considering how the Trustee should later act in response. In A and C, whilst the trustee had not submitted to the English proceedings, ultimately, the Royal Court saw fit to implement commitments made between the onshore parties and vary the terms of the trust.

Has the trustee been joined? An application to enforce is also to be expected where a trustee has been joined as a party but has not submitted. For a trustee, the consequence of being joined to English proceedings is limited to action that may be taken in England, for example against English sited trust assets. Any action required of the joined trustee outside of England may result in an application to the local court if enforcement is resisted.

A trustee may apply for directions or a blessing[2] if the trustee is minded to make a decision which has the effect of compliance with the settlement agreement or final order and that decision is momentous. Such an application can be made at many other points in a complex divorce process, to provide a trustee with a measure of protection. An alternative option may be for a trustee to agree terms through wide ranging and carefully drafted instruments and indemnities.

Firewall Legislation in both Guernsey and Jersey renders orders from another court that have been made other than by applying Guernsey or Jersey law (for example which may amount to an alteration or invalidation of the local trust) unenforceable. Instead, challenges about validity, administration and dispositions are to be determined by the local court applying domestic law (Article 9 of the Trusts (Jersey) Law 1984 and s.14 of the Trusts (Guernsey) Law.

Conclusion

There is no one size fits all approach when dealing with divorcing beneficiaries, as the personalities and assets involved will set the tone of each divorce, and there are many other issues beyond the scope of this article to be considered.

While it is likely to be an uncomfortable process, with many pitfalls, there are some fail-safes for a trustee to adopt. Careful consideration and

documentation of trustee decisions through tightly drawn trustee resolutions should be prepared with the expectation of judicial scrutiny.

An early decision should be taken about submission and rigorously adhered to in all steps and communications that follow. A neutral trustee that provides disclosure to its beneficiaries through an exercise of discretion will not automatically engage any off or onshore judicial process. Yet for some trustees and some circumstances, a blessing from their local court (for example where the issue of submission is balanced in view of the location of trust assets or where decisions as to disclosure could be particularly contentious) should provide the most comfort and certainty to both traverse and conclude the split.

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1 Re H Trust [2006] JLR 280
2 Public Trustee v Cooper [2001] WTLR 901

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Founder / Director
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email Paul

Chris Leese
Founder / Director
020 7101 4151
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Danushka De Alwis
Founder / Director
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