

THE BANK OF MUM AND DAD



INTERVENOR'S CLAIM IN FINANCIAL REMEDY

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A recent survey by real estate company Zoopla revealed that 64% of parents whose adult children own a home contributed towards a deposit¹.

The 'Bank of Mum and Dad' is well known to be a great lender with long borrowing agreements, no interest to pay and flexible repayment schedules. This arrangement can change quite suddenly, however, when the child's marriage ends and what appeared to be a soft loan on generous terms becomes a hard debt due for repayment.

There is therefore provision within the Family Procedure Rules for third parties, like parents, to be joined to proceedings if it will assist the court in resolving the dispute.

A financial remedy order only will bind the parties to the proceedings. It can therefore be necessary to join a third party to the proceedings so they 'intervene' in the case.

Situations where the issue of the joinder of an individual may arise are:

1. Where a party to a marriage asserts that the other party is beneficially entitled to a property held in the name of a third party.
2. Second situation is where the third party asserts that they have a beneficial interest in a property held in the names of one (or both) of the parties.



The legal test

The test that the court must apply when considering whether to join a third party is set out in FPRr 9.26B(1): a person

or body may be added as a party to proceedings for a financial remedy if:

- a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
- b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

This test is not onerous. If there is an asset that is in dispute, then this hurdle will likely be overcome but with consideration of the overriding objective of dealing with cases justly.

It is also important to consider whether joinder of the third party is proportionate, given the inevitable increased court time and legal costs which will be involved. There will most likely be an added stage of the proceedings namely the 'preliminary issue' hearing which will determine the asset in question and until that exercise is undertaken, it is unlikely that an effective FDR can take place.

Procedure

The application for joinder is made under Part 18 using Form D11 supported by evidence of the proposed party's connection with the proceedings so a brief witness statement will suffice.

It is important that the application is made at an early stage, ideally at the First Appointment but certainly as soon as the relevant information comes to light.

The procedure is helpfully set out in the leading case of *TL v ML*²

The costs consequences

Beware of costs consequences. The court begins with a 'clean sheet', and the court can make such order as to costs as it thinks just (FPR, r 28.1).

Who can apply to join?

Where a spouse alleges that a property registered in the name of a third party is actually beneficially owned by the other spouse, the burden is on the claimant spouse to apply to join the third party to the financial remedy proceedings.

Where, however, a property is registered in the name of a spouse and that spouse alleges that it is beneficially owned by a third party, the burden of

applying for the joinder of the third party rests equally with the third party and with the spouse who alleges that the beneficial ownership differs from the legal ownership.

Remember that the court under FPR 2010, r 9.26B(4) enables the court, according to the rule, to join a third party as intervener, on its own initiative:



Common evidential problems

If there was very clear evidence as to who owns the property for example, then it would be unlikely that a claim would be pursued. However, on the vast majority of these cases, a lot will rest on oral evidence, on unwitnessed

conversations and there will often be a lack of independent evidence. Think creatively about what evidence might be available over and above the usual documentary evidence from the conveyancing file.

Conclusion

So in conclusion, consider:

Is the asset in question of significant value? This will be relative to the context of the case and the extent of the assets. These cases are very fact specific.

If it is found that the asset is beneficially owned by a party to the marriage, does that change the nature of what is available to the other party in any event? Consider the ultimate outcome if the disputed asset was found to be beneficially owned by a party to the marriage. Would the asset be considered as matrimonial or entirely non-matrimonial? If non-matrimonial, this may not be available for division in any event. However, if it is a needs-based case, the court would have the discretion to invade the non-matrimonial asset in so far as it is required to meet the parties' needs.

What would the potential consequences be if a third party was not joined?

Failure to litigate a third-party claim may have significant implications for one party's financial award upon divorce.

However, consider the delay, the increased costs and court time, a careful cost benefit analysis needs to be undertaken as part of any strategic planning at the start of a case as this route is not without risk. However, in many cases, the client may be left with no choice but to pursue this avenue.

With the increase of Bank of Mum and Dad loans to adult children, these cases may well be on the rise...

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