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The Review

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Covid-19: Updates, reports and guidance

The Domestic Abuse Bill: a once-in-a-generation opportunity?
F v H (Fact-finding): what needs to be done?
Some thoughts on the future of Schedule 1 awards
Resolution and diversity: our survey shines a light ahead

ISSUE 205 MARCH/APRIL 2020

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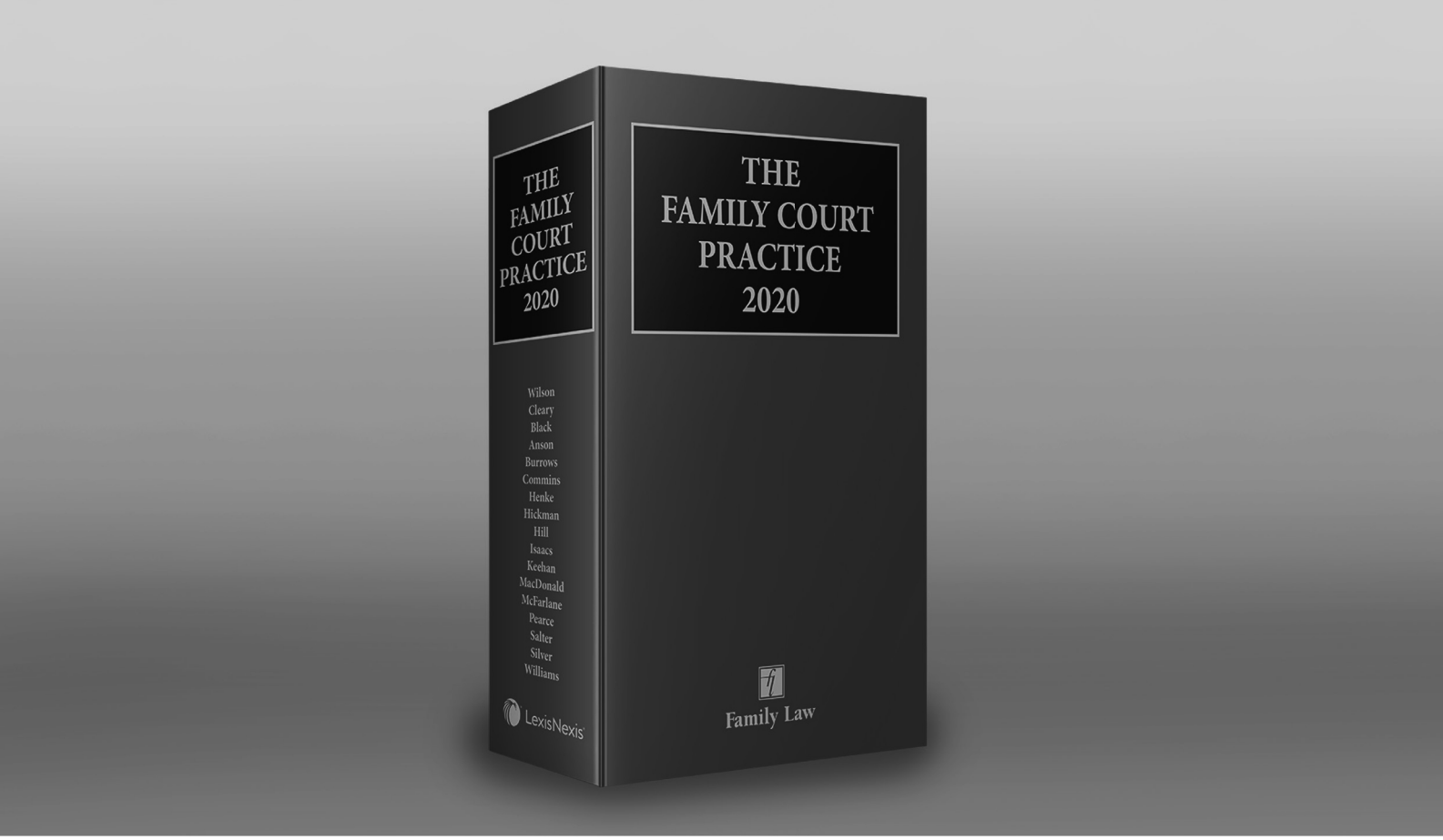

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May/Jun	6 May
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Cover image shows delegates at Resolution's Affordable Advice launch.

Contents

Issue 205 March/April 2020

A practical update for Resolution members *(And a huge hug of thanks for Sue Gunn)*

Margaret Heathcote *National Chair*
and Colin Jones *Chief executive*

At a time when hundreds of Resolution members should be recovering from having gathered in Brighton for our National Conference, we are instead all working from home, furiously washing our hands and practising social distancing under lockdown. These truly are unprecedented times, and the fallout from the coronavirus outbreak will no doubt have long-lasting implications in work and life for us all.

As with many workplaces, Resolution HQ is, at the time of writing, closed and all staff are now working from home. The team have risen to the challenge incredibly well and we hope that most members will not have noticed too much difference in terms of your interaction with Resolution. It will take time for all of us to adjust to new ways of working, but we are resolute in our determination to serve you through this period of national and global crisis. We wanted to let you know about some of the things we are doing to help you and your firm weather these uncertain times:

- Keeping you up to date with all the latest coronavirus related news, advice and guidance with our twice-weekly email bulletin.
- Creating resources and guidance to give you confidence to adapt to remote working.
- Surveying members and collating information to feedback to government on how measures are being felt by users of the Family Court.

"It will take time for all of us to adjust to new ways of working, but we are resolute in our determination to serve you through this period of national and global crisis."

- Taking suggestions on how we can support you and your firm during this time.
- Providing information to parents and families during the pandemic.
- Working with other organisations to share best practice and consolidate our efforts.

The Family Court

Coronavirus will have a serious and continuing impact upon all aspects of our lives, including the running, management and operation of the Family Court. Practice guidelines have been entirely rewritten or temporarily altered in order to accommodate the challenges we face. The President of the Family Division, Sir Andrew McFarlane, has released guidance notes for the Family Court to follow for the duration of the pandemic, as well as new advice for parents of children who are subject to child arrangement orders, or in international child abduction situations. There is a wealth of information on our dedicated webpage *www.resolution.org.uk/covid-19* and the President has invited us to speak with him regularly to be kept in the loop as things develop, and to feed back issues of concern.

A survey of family justice professionals – taken in association with the Family Law Bar Association, the Association of Lawyers for Children, the Legal Aid Practitioners Group and others – found that revised information and guidance from government was not being filtered across all courts. For example, the Lord Chancellor, Robert Buckland, confirmed on 19 March that fees on applications to adjourn hearings because of the coronavirus might be waived; we know, however, that this message did not filter through to all courts as promptly as it should. Continuous dialogue with you, our members, is especially critical at the moment in order fully to represent you and for us to be able accurately to feed back to government and others how any changes or temporary support measures are

being practically received and implemented on the ground across the country. Resolution's survey, "Covid-19 and the Family Court", will remain open for the foreseeable future so please make sure you complete it and keep us informed. The more information and insight you share with us, the better we can represent you. The survey, as with all our coronavirus information, can be found on our website.

During this challenging time we know many members will be making special arrangements with clients. There has been a huge surge in the use of remote video technologies as a way to replace face-to-face contact. The likes of Skype and Zoom will become essential, everyday tools to keep family justice operating. Resolution's head of standards, Angela Lake-Carroll, has written a useful Guidance Note, easily found on the website, for those who are new to using these technologies. Resolution will be producing more resources like this to help members through this unstable time, so keep an eye on our emails and our website for further links and guidance. Although the Family Court has utilised technology where it can, some essential hearings must still be heard in person and as a result HMCTS has consolidated its work into fewer buildings to maintain a core justice system while complying with public health advice.

The conference that never was

National Conference is a highlight of the Resolution calendar where hundreds of our brilliant members get to share their knowledge and passion for family law with other like-minded practitioners. It was hard, and very sad, that we had to cancel this year's event but, given the circumstances, it was of course the right thing to do. The speakers, workshop presenters and staff who had worked so hard to organise the conference are disappointed that it has not gone ahead, but we are aiming to share much of the learning material from the workshops on our online learning platform.

Given the current circumstances, with family justice professionals across the board facing unparalleled challenges, the National Committee and Executive Committee have agreed that the current officers will remain in place until a rescheduled AGM can take place later in the year. This will provide important continuity of leadership at this pressing time.

As a result, Margaret Heathcote will stay on as national chair until the AGM, at which point our current vice chair Juliet Harvey will become national chair, and National Committee member Grant Cameron will become vice chair. Grant will join the Executive Committee in the short-term as National Committee representative, and vice chair-elect.

Another very sad and unforeseen consequence of cancelling Conference is that members will not be able to give long-standing Resolution staff member Sue Gunn the send-off we had hoped (and which she undoubtedly deserves) as she leaves the organisation after an amazing near-25 years with us. As an NC and staff team, we will of course find ways to celebrate and mark Sue's time with Resolution, albeit via video calls for the time being! We will all miss Sue greatly and wish her all the best for the future.

"The current officers will remain in place until a rescheduled AGM can take place later in the year. This will provide important continuity of leadership at this pressing time."

Support for members

It's only natural for all of us to be feeling anxious at the moment. The massive level of disruption we are experiencing to every aspect of our personal and professional lives is unheard of. At last year's YRes conference we heard a lot about wellbeing and how being kind to yourself is good for you and your business alike. We will do well to remember this in the coming months. LawCare is a charity which provides free, independent and confidential emotional support to the legal community. If you are concerned about yourself or a colleague, they can help. They are available on 0800 279 6888, Monday to Friday, from 9am – 5.30pm. Alternatively, visit their website, *www.lawcare.org.uk*, for more information and support.

In addition SBA – The Solicitors' Charity, formerly the Solicitors Benevolent Association, is an organisation that offers financial aid to solicitors in difficult situations. We are already hearing reports of firms furloughing workers for the duration of the pandemic. SBA can provide support to solicitors who are in serious financial need as a result of illness, accident, redundancy or other adversity. If this sounds like this could be of help to you, please make contact with them via their website: *www.sba.org.uk*

Some good news

These are undoubtedly testing times, but we wanted to leave you with some positive, non-coronavirus news. The Divorce, Dissolution and Separation Bill has passed its final reading in the House of Lords, receiving only technical amendments by the government. All being well, the Bill will now go back to the Commons and should be passed into law, given that the previous, identical iteration of the Bill sailed through that House in double-quick time. This will be a huge victory for Resolution and our members who have been campaigning for more than 30 years to bring in this legislation. In these dark times, that is something to celebrate, and we would like to thank all members, past and present, who have played a role in making no-fault divorce an increasingly likely prospect in the near future.

Stay safe, and stay well. In the words of HM the Queen, we will meet again in happier times.

Margaret and Colin

Covid-19: Online resources for family practitioners

Jennifer Lee *Pump Court Chambers*

As family practitioners make a first set of emergency responses to the Covid pandemic, here are some pointers to the main issues and some sources of guidance

On 19 March 2020 guidance was issued by the Lord Chief Justice, which stated that:

> "The default position now in all jurisdictions must be that hearings should be conducted… remotely… It is clear that this pandemic will not be a phenomenon that continues only for a few weeks. At the best it will suppress the normal functioning of society for many months. For that reason we all need to recognise that we will be using technology to conduct business which even a month ago would have been unthinkable…"

Covid-19 will have far-reaching consequences for the justice system and the public. We know now that this will by no means be business as usual. To help family practitioners we thought it would be useful to collate some of the emerging resources. Readers will of course be aware that this is something of a moving target and Resolution's twice-weekly email will supply the latest info, but below is an overview of the landscape at the time of writing.

A raft of guidance has emanated from the judiciary at national and local levels. The latest national guidance can be found on the Courts & Tribunals website: *www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/*

Of particular note will be the detailed document issued by MacDonald J, "The Remote Access Family Court", dated 25 March 2020 (v.2) (*bit.ly/2RGADEW*), which identifies the problems which have arisen from the urgent need to move to remote hearings, and poses solutions. There are helpful appendices to the document, including a list of communication/IT platforms which are available in chambers in London and in the regions (appendix 3), and a template order which provide for hearings to be conducted remotely, and consequential directions (appendix 4).

The other document of note is the "Contingency Planning – Courts and Tribunals" announcement by the Lord Chief Justice on 27 March 2020 (*www.judiciary.uk/announcements/contingency-planning-courts-and-tribunals/*), which outlines the temporary consolidation of the work of courts and tribunals into fewer buildings, with 157 priority buildings open for essential face-to-face hearings (representing 42% of the 370 crown, magistrates, county and family courts and tribunals across England and Wales). Courts have been divided into three categories:

- open courts – these buildings are open to the public for essential face-to-face hearings;
- staffed courts – staff and judges will work from these buildings, but they will not be open to the public; and
- suspended courts – these courts will be temporarily closed.

These measures came into effect on 30 March 2020. The latest courts list can be found at *www.gov.uk/government/news/priority-courts-to-make-sure-justice-is-served*

Angela Lake-Carroll, Resolution's head of standards, has also written extensive guidance for family practitioners in this area in response to the current events – it can easily be found on the Resolution website. And see Aaron O'Malley's article, setting out more procedural detail, on page 10.

Impact on litigants/clients

There will undoubtedly be real challenges in implementing a remote access Family Court for the duration of the pandemic, particularly in the early stages. Many examples have emerged of remote hearings conducted successfully, even in difficult circumstances, though the lay client's perspective may differ quite markedly from those of the professionals – see Malvika Jaganmohan's Transparency Project article on page 14 for an example of a party's experience of digital hearings. That digital hearing took

place in the presence of the press, and involved five parties and eleven witnesses.

Despite the number of (broadly successful) remote hearings, many others will or have had to be adjourned, as the courts' resources become stretched and cases deemed non-urgent are removed from the list.

On a more basic level, and as discussed by Jaganmohan, not every litigant will have the ability to participate in remote hearings quite as effectively as one might hope, or at all. Litigants in person may well have difficulty with remote hearings, particularly where they have learning disabilities, mental health issues, or alcohol or drug misuse issues. A party may be homeless, or simply lack the necessary facilities to join in remotely.

In addition to the urgent move towards remote hearings, the social distancing measures imposed have also impacted on the general public in a great number of other ways. Weddings have had to be postponed, and those in relationships have had to take the plunge by commencing cohabitation in order to bypass social distancing measures. There are reports of a surge in domestic abuse cases, with many now trapped at home with their abusive partners/relatives and no recourse to protection. Philip Scott, the chair of Resolution's Domestic Abuse Committee, sets out some practical advice on the most pressing (and depressing) issues here.

"Despite the number of (broadly successful) remote hearings, many others will or have had to be adjourned, as the courts' resources become stretched."

Children from separated families and their parents have also had to grapple with the implications of the measures on their arrangements. Many parents were unclear about their ability to meet the requirements of child arrangement orders. The government's Stay at Home rules of 23 March have sought to clarify the situation, stating that "where parents do not live in the same household, children under 18 can be moved between their parents' homes". The President has also issued guidance on the issue, updated on 31 March, and found at *www.judiciary.uk/wp-content/uploads/2020/03/Coronavirus-public-guidance-updated-31-March.pdf*. The key message is that where the restrictions require the letter of a court order to be varied, the spirit of the order should nevertheless be delivered by making safe alternative arrangements for the child.

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Covid-19 and domestic abuse: the practical steps

Philip Scott *Denby & Co, chair of Resolution's Domestic Abuse Committee*

The Covid-19 lockdown is an incredibly dangerous time for survivors of domestic abuse. It has been widely reported that domestic abuse organisations have seen a huge increase in contact since the lockdown began. Refuge, for example, has reported an increase of online traffic to its National Domestic Abuse Helpline of 700%. Following media coverage of the helpline, calls and logs on 6 April 2020 were up by 120% compared to the previous day. Other organisations have seen a similar increase in the use of their services.

As members will be aware, domestic abuse is not always physical violence. It can include but is not limited to:

- coercive control and gaslighting
- economic abuse
- online abuse
- verbal and emotional abuse
- sexual abuse

In this short guide I am not going to cover the law relating to non-molestation, occupation and other remedies available, but look at the practical effects of the lockdown and what services we can offer our clients, although consideration will need to be given as to how a statement will be taken and signed if such applications are going to be made.

Legal aid is available, although eligibility and obtaining proof of means will still need to be considered. There is no need for an applicant for legal aid for a non-molestation order to provide evidence of domestic abuse, but for applicants with private law applications you should have knowledge of the range of gateway evidence requirements and the recent changes made. Do keep checking for the latest information from the LAA (*www.gov.uk/guidance/coronavirus-covid-19-legal-aid-agency-contingency-response#working-with-clients-and-making-applications*). It is hoped that requirements may be relaxed further during the current crisis to make it easier to apply for and obtain funding. Resolution is continuing to press for that.

"Our clients need to know that we are there to assist them and that specialist services are there for them. It is important to check what local services are operating, that they are not temporarily suspended, and how they can be contacted."

Survivors of domestic abuse may be feeling particularly vulnerable. The Home Secretary, Priti Patel, has pledged to crack down on those using this period of isolation to make survivors feel "especially isolated, vulnerable and exposed". Our clients need to know that we are there to assist them and that specialist services are there for them. It is important to check what local services are operating, that they are not temporarily suspended, and how they can be contacted. Don't forget that clients may need to be aware of the services offered in relation to a range of different types of abuse, including female genital mutilation, forced marriage, honour-based violence, financial abuse, human trafficking and modern slavery.

The promotion of online services and advice is more important at this time where a survivor in isolation with an abusive partner may not have the opportunity to call you direct. Clients will also need to know how to delete a search history and search the internet without fear of being discovered.

We must also be able to screen for possible domestic abuse with our clients where abuse is not directly referred to, and be able to give advice as appropriate and refer to those other agencies that can offer help and support.

Leaving or living with an abusive partner and deciding what to do can take time. Clients need to be supported in understanding their options in planning and knowing about specialist services in their community such as finding a refuge.

Although the measures to control the virus are widely reported in the media, the measures do provide for people leaving the home to avoid or escape risk of injury or harm. Clients should be advised to try to keep a mobile phone which them at all times if possible. The police are a key service for a client in immediate danger. Some firms are already publishing – either through their websites or social media – practical advice such as the Silent solution where a survivor may be afraid of further risk of harm if they are overheard when calling 999 in an emergency. If a call is made to the 999 service and the caller is not able to ask for help the call is referred to the police. If 55 is pressed the call will be transferred to the relevant police service as an emergency. See *www.policeconduct.gov.uk/sites/default/files/Documents/research-learning/Silent_solution_guide.pdf* for more information.

The government has published specific guidance for survivors of domestic abuse at *www.gov.uk/government/publications/coronavirus-covid-19-and-domestic-abuse/coronavirus-covid-19-support-for-victims-of-domestic-abuse*

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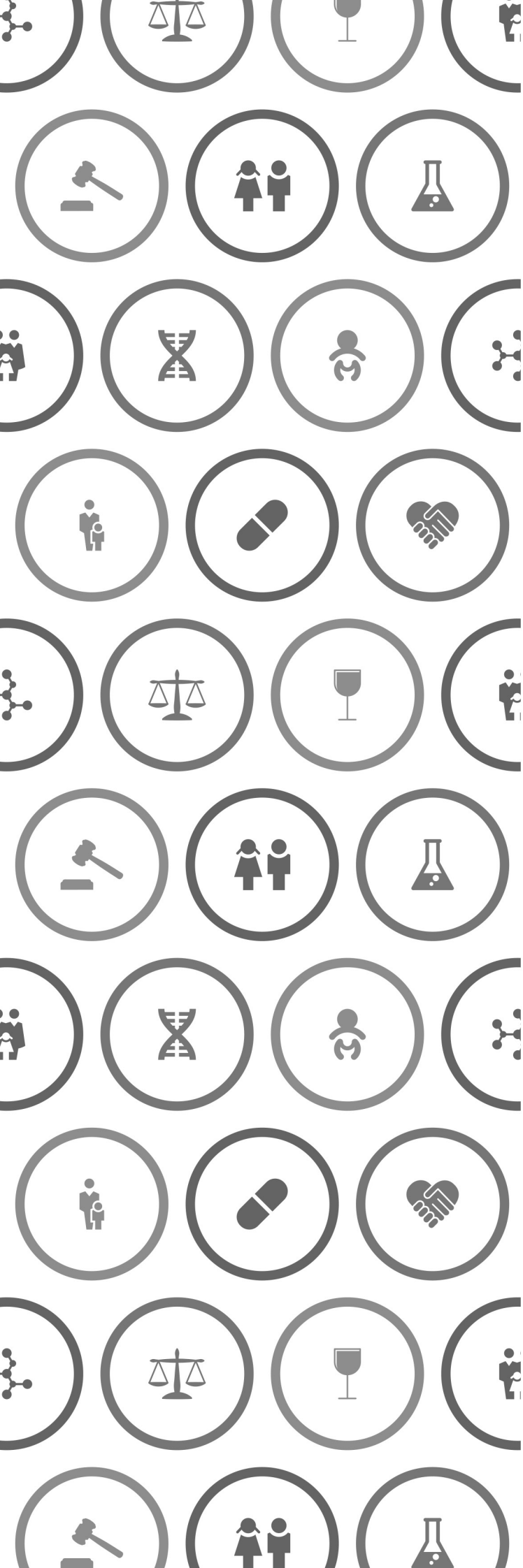
Note from the editor…

Readers will obviously understand that the advice in these opening pages is time-governed and may be of limited value arriving two or three weeks down the line, but we are going to press at a time when patterns and possible responses are starting to emerge, as our contributors set out here.

We hope readers will appreciate that events have necessitated some rather hectic reorganising of the pieces here in light of shifting concepts and procedures – a huge thanks from Resolution to the authors in this issue who have offered thoughts and practical advice at short notice. You may notice some differences of opinion on the success of digital hearings: we will try to weigh that up another day.

(You will also notice an annoying preponderance of *www.hardtoreadwebsite.addresses781xYG.com* which this magazine would normally and elegantly do without…)



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THE QUEEN'S AWARDS FOR ENTERPRISE: INNOVATION 2016

Social distancing for separated parents: Can I still see my child?

Mark Hands *Irwin Mitchell*

This article tries to answer some of the questions now faced by separated parents worried about how the current events and government advice will impact on their child arrangements – whether existing or sought. I have seen and read many social media comments about this topic. There seems to be a wide divergence of views from family lawyers up and down the country.

The law (briefly, I promise!)

The first (and perhaps obvious) thing to say is that there is no precedent for the treatment by the courts of the impact of Covid-19 on the movement of children across different households. In short summary, as a parent enforcing an order you must prove beyond all reasonable doubt (note the much higher criminal standard of proof) that there has been a breach of the order. The other parent may have a defence if they can prove, on the balance of probabilities (note the lower standard of proof) that they had a reasonable excuse for breaching the order.

"The law is clear. The starting point is that a parent must comply with an order. If they do not comply it may be possible for the other parent to enforce the order. The parent with the child may then successfully argue that they had a reasonable excuse for not complying with the CAO."

The question, therefore, is whether self-isolation with a child, in light of the coronavirus, amounts to a reasonable excuse to breach a child arrangements order (CAO)?

Cafcass

Prior to the introduction of the new measures imposed by the government on 23 March 2020, Cafcass helpfully issued this guidance:

www.cafcass.gov.uk/grown-ups/parents-and-carers/covid-19-guidance-for-children-and-families/

which made clear that, save for medical/self-isolation reasons, children should maintain their usual routines for spending time with their parents. Cafcass made clear that if there is a CAO in place this should be complied with unless to do so would put a child at risk (the reasonable excuse defence).

Updated government advice

The government has published further guidance. As readers will know, there are now much stricter measures for staying at home:

www.gov.uk/government/publications/full-guidance-on-staying-at-home-and-away-from-others/full-guidance-on-staying-at-home-and-away-from-others#fnref:1

The footnote at the bottom of this guidance makes clear that the movement of children between parents' homes is still permitted.

What to do?

No matter the circumstances, however unprecedented, we must go back to the law. The law is clear. The starting point is that a parent must comply with an order. If they do not comply it may be possible for the other parent to enforce the order. The parent with the child may then successfully argue that they had a reasonable excuse for not complying with the CAO. This, like many areas of family law, will undoubtedly be treated on a case-by-case basis, depending on the particular facts and the different approaches by judges. The government has not (yet) prohibited the movement of children across households where there are separated parents.

The practical reality is that the courts will be unimpressed by parents who are not able to come to an agreement in times of a national emergency.

In my view the following practical steps should be urged on clients:

1. Put aside any parental tension in order to apply a united front for your child. Even if they do not show it, they are likely to be feeling very anxious. They must be able to look to their parents for solidarity and support. This means that each parent has a legal (and ethical) duty to support a child's relationship with both parents during these times. They absolutely cannot be used as a source of conflict.

2. Covid-19 does not dilute parental responsibility. It is more crucial now than ever before to ensure that this legal concept is respected and followed.

3. Pursuant to the guidance of Cafcass, think creatively about using Skype and Facetime to support a child's relationship with the other parent, but also, think outside the box as long as it is safe.

4. Make a joint decision about self-isolation that is in the best interests of your child. As hard as it is for the other parent, it may be better for a child to self-isolate with the parent whose care they are currently in or, conversely, to move the child to the other parent's care. This is hard, but crucially the child's safety and wellbeing are absolutely paramount. In these circumstances, I am in no doubt that there would be an absolute expectation by the courts, and emphasis on the parent with the child, to apply point 3 above. Normally CAOs prescribe when the other parent can contact their child by Facetime or Skype. In my opinion, there should be a complete relaxation on any prescribed periods of non-direct contact between a child and other absent parent.

5. Communicate honestly with each other about exposure to the virus and any symptoms. Follow government and medical advice. This is so important.

6. Be mindful of the content of any messages or emails you send as these can all be used as evidence, now or in the future. Once all over, a parent risks a judge reviewing their conduct during this time and making orders at a later stage.

"Make a joint decision about self-isolation that is in the best interests of your child. As hard as it is for the other parent, it may be better for a child to self-isolate with the parent whose care they are currently in or, conversely, to move the child to the other parent's care."

I am aware that for some parents there will be dismay as sensible communication is simply not possible. There may be existing hostilities towards contact, such that they feel Covid-19 is being used tactically to deprive a parent with the time they should spend with their child.

The courts are still hearing cases and can do so remotely. In worst-case scenarios, and where the evidence suggests it is appropriate, it may be possible to seek urgent orders from the court. Such applications should, however, be regarded as a measure of last resort and only made where the evidence is clear and cogent. This is unchartered territory and the approach of the courts remains uncertain.

But the law has not changed. CAOs are still enforceable orders of the court.

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16 April update

The President of the Family Division has now produced some updated guidance at *www.judiciary.uk/announcements/coronavirus-crisis-guidance-on-compliance-with-family-court-child-arrangement-orders/*

The President has also provided the following links to resources that may be of assistance to parents in the present circumstances:

- *www.naccc.org.uk* – for information on supported contact centres.
- *www.nfm.org.uk/new-service-co-parenting-through-the-coronavirus-crisis/* – a new service from National Family Mediation.
- *www.relate.org.uk* – advice and tips for keeping relationships healthy during self-isolation and social distancing.

Covid-19 and the streamlining of financial remedy proceedings

Aaron O'Malley *Adler Family Law Solicitors LLP*

Changes to the financial remedy courts that had been planned before readers had heard of Covid-19 may turn out to have been quite spectacularly well-timed…

In February I was asked to write an article about the recent developments within the financial remedy courts. There have been developments taking place within the court system in order to make the process more efficient and user-friendly for the judges and practitioners – and ultimately the users of the service, ie our clients. Since being asked to write the article the pandemic of Covid-19 has come upon us with devastating speed. This will have affected all of my fellow practitioners and is having an impact on the way that we provide our services. It has been interesting to see how the court service has reacted to the pandemic in order to protect the court staff, practitioners and court users, and the structures which the new changes have brought about have helped the court system react – which they appear to have done admirably.

Background

All of you who are dealing with the courts will have noticed over the past few years a gradual slowing down to the point of frustration as we give our client's guidance that a divorce which may have previously taken four to five months may now take six to 12 months at least. The time which it takes to conduct financial remedy proceedings has also been elongated, with many months between the various hearing dates. The court service has been working in the background to address this and these efforts may have added to the current delays. The ability for individuals to apply online for a divorce started in 2017 and since then many new features have been added such as an online application for a *decree nisi* and acknowledgement of service. There has been £1bn of funding pumped into court system reforms, aiming to promote technology and modern ways of working to the court service. This article will concentrate on the financial remedy pilot project within the financial remedies court.

Since the summer of 2018 the Financial Remedy Court (FRC) has been testing a financial remedy service for legal professionals. I am hoping to summarise the developments for you.

The aim of the pilot is to cover an online form A application, online payment, online gatekeeping and allocation step with an auto referral to gatekeeping judges and the option to upload documents to the court file. Once the case has gone through the digital pilot it will then continue as normal and paper bundles are, for the moment, still required. I understand that the second phase of the pilot will then look at the possibilities regarding bundles and the generation of court orders. Given the response of the courts to the epidemic and the fact that we are now getting guidance regarding filing electronic bundles, it looks like the aim of the project is well served and it may be that the pandemic brings the conclusion of the project to a quicker conclusion.

As readers will be aware, the Family Court was introduced by the Crime and Courts Act 2013 in an effort to ensure greater consistency and greater flexibility in the family justice system and we have the Family Procedure Rules of 2010, which brought together a number of different sets of rules which had previously been used by the High Court, County Court and Magistrates Court. The inception of this came from Article 6 of the Human Rights Act 1998, which states that everyone has the right to a fair trial. The idea that each individual has the right to a fair hearing within a reasonable time by an independent and impartial tribunal is established by law.

The financial remedy courts have been established as a subsidiary structure working within the Family Court. Sir Andrew McFarlane, the president of the family division, has appointed a national lay judge and a deputy national lay judge to oversee the operation of the financial remedy courts. Under the overall structure of the financial remedy courts, there have been 11 zones created and a lead judge for each of those zones. Previously, practitioners would comment about the differing approach taken by local courts, so the idea of the new structure is to ensure that there is a degree of consistency throughout the country. The financial remedy courts have produced a couple of documents which assist, and they explain that the purpose

is to make sure that changes in practice and procedure are brought to the attention of all users of the service and then effectively implemented. The other ambitions are also to ensure the maintenance and building of good relationships with financial remedy practitioners working within the zone, and the overall aim is to streamline the financial remedy courts and ensure that financial remedy cases are dealt with by specialist financial remedy practitioners. At the moment it can be quite common to appear at an FDR in front of a judge who may have had little family law experience in the past, and the aim is to avoid that problem for our clients.

The above-mentioned documents set out the role of the lead judge and describe how every lead judge will have a designated financial remedy court zone which will cover an identified geographical area and identified courts. I urge all readers to review the two documents, which describe the "overall structure of the financial remedies courts and the role and function of the lead judge", in a document named as such. The other document is the "FRC Good Practice Protocol". It will be the responsibility of the lead judge to make sure that there is an effective and efficient administration of the financial remedy works in the zone which they are responsible for.

As a lawyer operating in Kingston upon Thames, I will use the Medway zone, which covers Surrey, Kent and Sussex and is under the jurisdiction of HHJ Farquhar, although we also handle cases in the Central Family Court which are under the remit of London, run by HHJ Martin O'Dwyer. It is understood that each leading judge will have a term of four years, which commenced on 1 January 2020. Not exactly Putinesque.

Since the pandemic has hit, we as a firm have received emailed guidance from HHJ Farquhar regarding the use of remote telephone conferencing and other methods to enable the FRC to cope during this time. The guidance which we have just received includes how IT systems are to be used for the efficient performance of the Financial Remedy Courts. Electronic bundles are currently acceptable during this turbulent time and the emailed guidance sets out the rules to adhere to.

The aim

The aim of the pilot itself is also to set out a list of best practices in order that all practitioners can co-operate in preparing for hearings which will hopefully avoid needless arguments that would only cause delay. The type of issues dealt with in the best practice guidance are, for example:

- questionnaires should not exceed four pages of A4;
- position statements (including the attached schedules) should not exceed five pages for a First Appointment, ten pages for a Financial Dispute Resolution Hearing, or 15 pages for a Final Hearing;
- the aim is that these should be lodged with the court and/or sent to the allocated judge by 2pm on the day before the working hearing or 11am if submitted in hard copy; and
- opposing advocates should work together to produce a single (if possible agreed) asset schedule, although this was in operation for some time, if seldom followed.

It will now be the norm for financial remedy courts to expect orders to be agreed before the parties leave the court building and in any event orders should be drafted and lodged there and then, or if that is not practical, within two working days of the hearing. This is obviously only appropriate if one or both parties have legal representation.

"Electronic bundles are currently acceptable during this turbulent time and the emailed guidance we have received from HHJ Farquhar sets out the rules to adhere to."

There is also guidance about acknowledging the wellbeing of advocates and the guidance is that hearings should not start before 10am and the court day should end between 4pm and 4:30pm. It is also in writing that there should be an expectation that any emails sent after 6pm to another practitioner should not be answered before 8:30am the following day. It is discouraged to send emails between those times. These guidelines may not be adopted in practice and this writer has heard anecdotally of chambers that are encouraging counsel to ignore the recommendations. It does us well, however, to remember that we can only serve our clients well if we look after ourselves and our colleagues, who operate in a challenging field. (I am aware that such a comment may sound petty in the face of the present challenges facing those in the NHS etc, and I am sure you will all applaud those on the front line with me for their heroic efforts. However, in "ordinary times" it stands).

Additionally, family remedy courts will endeavour to adopt environmentally friendly processes so that parties will, where possible be encouraged to carry out hearings on a paperless basis.

Allocation

The zones will operate an allocation procedure similar to the civil procedure. Parties will be encouraged to file an allocation questionnaire at the time of filing for a financial remedy. The good practice protocol sets out the form of questionnaire and it will require details such as:

- the hearing centre to which the financial remedy cases are to be transferred;
- the asset base; and

- whether there are particular issues of complexity, eg need for expert accountancy evidence, non-disclosure, pre-nuptial or post-nuptial agreements etc.

Most cases will be listed for a First Appointment of 30 to 45 minutes. However, if the case has been designated as complex, it will be listed for a First Appointment of 60 minutes.

Accelerated First Appointment procedure

There is also going to be an accelerated First Appointment procedure which will be appropriate where directions are agreed between the parties and when certain criteria are present. If that is the case an application can be made to the court for the First Appointment to be dealt with on paper and without the requirement of the parties to attend. This has already been in place at the Central Family Court since 2014 and the procedure is set out in Schedule 4 to the good practice protocol. We are being advised at the moment because of the pandemic to deal with First Appointments in this way if at all possible, as otherwise the hearings will take place by telephone or Skype (as the one approved service).

If appropriate, then the following will be needed:

- All of the required documents including an agreed directions order will be filed with the court by email at least 14 days in advance of the First Appointment.
- It is expected that a correctly filed application should be considered by a district judge and a response given by email at least seven days before the First Appointment, and if the request is rejected the district judge should give short reasons for declining to approve the order.
- Any questionnaires sought to be answered must not exceed four pages.
- The procedure cannot be used where parties wish to dispense of an FDR.

Ultimately this should assist with the streamlining of our service especially as we can now assure our clients that no case involving financial remedies should come before any judge who is not a Financial Remedy Court judge. It is however also expected that we should aim to assist the court by encouraging private means of resolving the matter.

It has become apparent whilst preparing this article that the implementation of the pilot has become essential for the court service to continue operating in this extremely unusual and concerning time.

The Accelerated First Appointment guidance is also going to be useful to deal with those Appointments which we have listed within the next two to three months (he says optimistically).

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LawCare 2019 figures: more lawyers seeking help and calls about bullying continue to rise

The number of legal professionals contacting the charity LawCare for emotional support continues to rise year on year, with 677 people seeking help in 2019.

The charity, which runs a helpline, webchat, email and peer support service for the legal profession, received over 900 contacts in 2019 and saw an 8% rise in the number of people seeking help compared to 2018.

The most common problems cited were stress (26%) and depression (12%). The number of lawyers contacting the charity about bullying continues to increase, from 47 callers in 2018 to 80 last year – now accounting for 12% of all contacts. 66% of those who contacted LawCare about this issue said they were being bullied by a manager or superior.

The majority of callers to the helpline were women (67%). 53% of all callers were trainees/pupils, or had been qualified less than five years, and a further 5% were law students.

Elizabeth Rimmer, CEO of LawCare, said:

> "We spent 304 hours providing support on the phone last year, answering a call every 2½ hours. Last year also saw the launch of our new webchat service enabling us to provide support to more people. The biggest trend we've noticed is the number of people contacting us about bullying and harassment, which is now one of the top three issues people contact us about, possibly because of a lot more attention on this issue in the media over the past couple of years. We will be undertaking more detailed research later this year to discover exactly how the culture of law is impacting on wellbeing and mental health, and we hope to use this to drive change in legal workplaces."

For support, call the helpline on 0800 279 6888, or for more information visit *www.lawcare.org.uk*

Will judicial encouragement of the use of virtual courts and private FDRs lend a steer to the new child arbitration extensions?

Suzanne Kingston *Mills and Reeve* *and Janet Bazley* *1GC*

On 17 March 2020 the Family Division noted in a statement that "there is an urgent need to increase the use of telephone and video technology immediately to hold remote hearings where possible. Emergency legislation is being drafted which is likely to contain clauses that expand the powers in criminal courts to use technology in a wider range of hearings. The Civil Procedure Rules and Family Procedure Rules provide for considerable flexibility. We also encourage you to work with your local court staff to identify work which could be done from home."

Mostyn J followed this up with some practical notes on implementation, aimed at the judiciary but obviously of relevance to all practitioners:

1. First appointments should be done wherever possible using the "accelerated" paper-only procedure in the fourth schedule to the FRC protocol… The terms of that schedule do not need to be followed strictly; judicial latitude is encouraged. Judges should accept consent orders dealing with first appointments routinely.

2. Parties should be encouraged to have their FDRs done privately. Such private FDRs should routinely be done remotely. Most barristers' chambers and solicitors' offices have facilities to enable FDRs to be done remotely.

3. The default position for other hearings is that they should be done either by Skype… or by telephone. The extension of the existing virtual courts project is being actively investigated.

4. Physical hearings should only take place where this is absolutely unavoidable.

5. The physical lodging and handling of documents should be avoided. The use of e-bundles should be virtually mandatory…

6. FRC judges should endeavour to do as much work as they possibly can from home.

The steer towards private FDRs comes, coincidentally, at the same time as the scope of family law arbitration scheme has been extended to include both temporary and permanent relocation to certain foreign jurisdictions.

Suzanne Kingston (Mills and Reeve) and Janet Bazley (1GC) have pointed out that delays in the court process had already had an impact on the take-up of arbitration and it may be that current developments will see further use of this process option for this kind of issue. Relocation, both temporary and permanent, is a single-issue determination, exactly the sort of decision suited to arbitration. It is expected that the take-up of arbitration in children cases, which has already seen a steady increase, will rapidly increase further.

Arbitration can be a useful process option both for represented parties and self-representing parties. It can be a face-to-face process, obviously, but can also be done by Skype, Microsoft Teams, Zoom, Lifesize etc. Of course there will be issues that need to be considered, particularly around privacy and security, but these issues are now in play across the legal spectrum and are not specific to arbitration.

In less complex cases, parties may agree to a determination on the papers only.

Scope

After much consideration it was felt that the rules should extend to cover jurisdictions which have ratified and acceded to either the 1980 Hague Convention on civil aspects of international child abduction or the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children. As between members of the EU however, Brussels II bis (Council Regulation (EC) No 2201/2303) displaces the 1996 Hague Convention. Accordingly, the rules are further amended to include within scope, while the UK remains bound by Brussels II bis, relocation to the jurisdiction of another member of the EU to which Brussels II bis applies.

The limitations to the scope of the children scheme are covered by Article 2 of the children scheme rules. The fourth edition of the rules, which will give effect to the expansion of scope of the scheme, continues to provide that relocation is outside scope but, by the new Article 2.2(a) will give effect to the expansion of scope of the scheme by providing an exception where relocation

is to a jurisdiction which has ratified and acceded to the 1980 or the 1996 Hague Convention.

Further, the rules have been amended to include specific points in respect of relocation cases by a revised Article 13.5 which states:

> "Where the subject matter of the dispute includes an issue as to the permanent relocation of any child to any of the jurisdictions identified in article 2.2(a), the parties to the arbitration and the arbitrator shall identify the steps necessary to give full effect to the terms of the relocation in the proposed jurisdiction including in particular contact to the applicant remaining in the jurisdiction. Such steps may include the appointment of an independent social worker to assist in ascertaining and recording the wishes and feelings of the child concerned by an appropriate finding in the determination. If a determination is made to which Brussels II bis applies to the proposed relocation, the arbitrator shall attach to the determination a certificate in the form of and complying with Annex 111 to Brussels II bis."

In a future issue of *The Review* we will set out the full detail and thinking of child arbitration and its new scope. For now, we can note Kingston and Bazley's assessment:

> "As the court process becomes more lengthy and difficult, arbitration is in the ascendancy and now the amended rules provide for even greater scope. We hope that practitioners will think seriously about arbitration in both financial and children cases, making it clear to their clients the numerous advantages on offer."

Now, more than ever, transparency matters

Malvika Jaganmohan *St Ives Chambers, and Core Group member of The Transparency Project*

With Covid-19 shifting cases overnight to digital-only, there is an urgent need to consider transparency issues, as well as ensuring our clients are not being left behind in the new processes

Much has changed since The Transparency Project last wrote a piece for *The Review* in summer 2019. The legal blogging pilot is now over a year old. The President of the Family Division, Sir Andrew McFarlane, has finally announced the launch of the long-awaited Transparency Review. Most significantly, the justice system is responding to the unprecedented challenges posed by the worldwide coronavirus pandemic.

Shortly before Covid-19 became the main subject line of most people's recent panicked emails, the family justice system was under intense scrutiny. The judgment of Russell J in *JH v MF* [2020] EWHC 86 (Fam) sparked discussions across the profession, and nationally, about the treatment of rape and domestic abuse by the judiciary. Publication of the judgment and the subsequent heated media coverage was a prime example of transparency and accountability at work. (For a fuller discussion of this controversy, see Anna-Laura Lock and Selena Arbe-Barnes's article on page 24.)

Hot on the heels of the judgment, the President announced the call for evidence for the Transparency Review in February 2020. Just when The Transparency Project team was patting itself on the back for having almost concluded a wide-ranging response to the call for evidence, the family justice system was brought to a grinding halt with the outbreak of coronavirus.

With family practitioners scrambling to cope with the crisis, transparency issues may not be at the top of anyone's priority list. Does the senior judiciary really have time to think about reporting restrictions and publishing judgments when cases are being adjourned indefinitely *en masse*, diaries empty and legal professionals self-isolate in increasing numbers?

In fact, this is a fascinating and critical time for those interested in transparency issues. As hearings are swiftly moved to online platforms such as Skype for Business and

Zoom, there is a real risk of appropriate measures not being put in place to safeguard the public interest in the inner workings of the family courts.

Accredited members of the press rely on court listings to find out when and where particular matters are being heard. Will court listings make clear that a remote hearing is taking place? How will journalists "dial in" during the hearing? If so, what safeguards are in place to prevent unauthorised persons from accessing a private hearing?

There are a whole host of other issues to consider. Family court proceedings are routinely recorded and it is imperative that remote hearings are as well. This poses a problem for Her Majesty's Courts and Tribunals Service. Are there appropriate centralised storage mechanisms to allow large-scale audio recordings to be kept safely for future access?

More broadly, while the courts and legal professionals may be able to become digitally literate swiftly, what about members of the public? I write this article shortly after taking part in a paperless working session run by the Family Law Bar Association with some 500 participants joining in via Zoom. We, as lawyers, have the support networks in place to weather this transition into fully digital working. But we run the risk of excluding large swathes of vulnerable litigants from engaging fully in the legal process if they don't have a laptop or a phone. We have to make sure that in our new-found enthusiasm for various forms of fancy software, we don't forget that we have to communicate with clients.

It's impossible to do much more than identify these issues in this article. The reality is that we don't know and won't know the answers any time soon, and much of this will feed into our response to The Transparency Review. But we do need to be thinking about these issues. Happily, Mr Justice MacDonald's "The Remote Access Family Court" makes clear that transparency is on the agenda as we move our processes online. He observes that it remains "highly desirable, *particularly* at a time of national crisis, that the operation of the Family Court is as transparent as possible in the circumstances" (para 5.16, emphasis added).

Open justice sceptics may respond that we have far more to worry about during the present crisis. To them, I would say that transparency is essential to the rule of law; without accountability, public trust in our legal system crumbles. Perhaps no one puts it better than Toulson LJ in *R (On the application of Guardian News and Media Limited) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420:

> "Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age-old question. *Quis custodiet ipsos custodes* – who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse."

When the social distancing measures were first announced, Mostyn J presided over a Court of Protection trial that was the talk of legal Twitter: *A Clinical Commissioning Group v AF & ors* [2020] EWCOP 16. The case concerned AF, who had a stroke in 2016. Doctors had inserted a feeding tube directly into his stomach and the court was concerned with whether clinically assisted nutrition and hydration was in his best interests. Over three days, with eleven witnesses and three experts, the hearing was conducted entirely over Skype for Business. Notably, for our purposes, two journalists also joined the hearing. Feedback was very positive, with one of the journalists reporting that "she was able to perform all the tasks [they] would usually perform in person to ensure the fair, accurate and contemporaneous reporting of proceedings", as noted by MacDonald J in the Remote Access report (para 2.1).

"As hearings are swiftly moved to online platforms, there is a real risk of appropriate measures not being put in place to safeguard the public interest in the inner workings of the family courts."

This feedback does need to be treated with caution. Celia Kitzinger supported AF's daughter, "Sarah", in a voluntary capacity at the hearing and has written a post for The Transparency Project blog ("Remote Justice: a family perspective", 29 March 2020) which presents a very different view of the trial from Sarah's perspective:

> "It felt like a second-best option. It didn't feel professional. It didn't feel like justice. It felt like a stop gap to ensure a box was ticked – rather than a serious and engaged attempt to make decisions about my Dad."

I wrote in a piece also published for The Transparency Project blog that "Sarah's experience of the trial is so far-removed from the feedback of lawyers and journalists at the same trial, that you might be forgiven for thinking two completely different hearings are being described". I warned that while we have all been desperately trying to get cases up and running remotely, we haven't really had the time to think about how to do this well. (See "Remote hearings: a gulf between lawyers and lay parties?", 29 March 2020.)

The *AF* experience goes to show that while the present crisis is not an insurmountable obstacle to open justice, we do have to think more carefully about how to prevent families from becoming marginalised and alienated by remote hearings. We must also be cautious not to become trapped in our self-congratulatory legal echo chambers. There seems to be a chasm between lawyers' and lay parties' 

perceptions of remote hearings and we need to think about how that can be bridged.

At the webinar launch of His Honour Clifford Bellamy's "The Secret Family Court: Fact or Fiction" on 26 March 2020, guest speaker Sir James Munby observed that lack of transparency breeds discontent, misunderstanding and cynicism. He warned against the move to electronic hearings leading to the unintended (or worse, the intended) consequence of closing "the public gallery". We shouldn't take that warning lightly.

As we navigate a rapidly changing legal landscape, we aren't necessarily going to get it right. In fact, some things will almost certainly go wrong. When the dust settles, we can consider whether the hastily assembled new ways of working have impacted justice for better or worse. Transparency and open justice is essential to this exercise; had it not been for accounts such as Celia Kitzinger's, practitioners and the wider public may never have heard "Sarah's" story.

So much progress has been made in terms of opening up the family courts and promoting open justice in recent years. It is imperative that in the coming weeks and months, we don't undo all of that hard work.

You can read more about the work of the project at *www.transparencyproject.org.uk* or by following us on *@seethrujustice*.

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For more detailed discussion of the issues raised in this article, Dr Judith Townend has written a blog for The Transparency Project, easily found on its website.

Covid-19: set aside and Barder events

Ellie Foster, Philip Way and Frances Bailey *Mills & Reeve*

With so many people's financial positions likely to change suddenly, what are the chances of setting aside or varying an order made in more stable times?

With the global economic markets in turmoil, valuations being undermined immediately, many businesses on the edge of an abyss, the housing market effectively frozen and widespread furlough leave and redundancies, there cannot be a more difficult time for financial remedy practitioners to advise clients on the merits (or not) of pursuing or settling financial claims.

It is hoped that the following will provide a helpful distillation of the likely scenarios facing family lawyers and the possible solutions.

Should you settle?

If parties are within the court process then, subject to listings being maintained by the court, there may be little option but to continue conducting the financial claim, conceivably with a final hearing occurring during this volatile period. Whether a final hearing can be conducted fairly in the current climate is ultimately a case management decision for the tribunal, but there is every chance that it would proceed remotely if the technology is available to all parties. So it is exceptionally unlikely that, if a judge wishes to proceed, one or both the parties will have any power of veto to suspend the proceedings.

Where one party is dragging their heels and seeks to delay the proceedings generally in the light of adjournments and/or limited listing slots, then remember the court's general case management powers under Part 3 of the FPR 2010. Specifically, under r3.4(1):

> "If the court considers that non-court dispute resolution is appropriate, it may direct that the proceedings, or a hearing in the proceedings, be adjourned for such specified period as it considers appropriate –
>
> (a) to enable the parties to obtain information and advice about, and consider using, non-court dispute resolution; and
>
> (b) where the parties agree, to enable non-court dispute resolution to take place."

Given the court's express endorsement of the use of private FDRs, the mention of a possible paper application for a direction for a private FDR may prompt co-operation.

If both parties wish to maintain some degree of control over the timetable, potentially delaying the process post-pandemic, then opting for an alternative forum such as arbitration could be pursued whereby, with the agreement of the arbitrator, a more relaxed timetable or postponement of a final arbitration hearing could be arranged for when markets have stabilised and conceivably recovered. Of course, this requires mutual agreement and co-operation; it may not be in the interests of one party to delay. Financially stronger parties may be keen to press on to a resolution sooner rather than later whilst investment and business values are suppressed.

If court proceedings are to continue, advocates should:

- make the appropriate application(s) for up-to-date disclosure, updated valuations and/or expert evidence as may be necessary; and

- seek to persuade the court that appropriate protective mechanisms (some of which are discussed below) should be reflected in the judgment and ultimate order.

Which leads us on to a discussion as to whether fair financial settlements can be negotiated at present and, if so, what safeguards can be included to minimise the chances of one party being unfairly affected or indeed the prospect of the settlement being challenged at a later date.

For many families the obvious advice will be to delay settlement discussions until normality resumes and their financial picture is clearer. Client expectations need to be managed accordingly. Although frustrating, clients need to understand that it may not, for example, be unreasonable for the other party to insist upon any discussions being put on hold for now, until the situation has settled down. But if discussions are to be postponed don't forget about any live divorce or dissolution proceedings. One party may be prejudiced by the making of a *decree absolute* or final order in the meantime, so steps should be taken to secure agreement or undertakings (as appropriate) not to make such applications.

However, some parties may have personal reasons for wishing to press on, for example new relationships and families. Others may wish to avoid the potential duplication in legal and expert fees of a delay. Each case needs to be addressed on its merits and the advantages and disadvantages of proceeding clearly explained to clients in writing.

Assuming a client wishes to proceed, the following issues should be considered to try to "recession-proof" an agreement as far as possible:

Disclosure and valuation

Ensure disclosure is as up to date as possible:

- Revisit assets schedules to check the extent to which balances and values are out of date and seek updated disclosure where necessary. That said, with ongoing market volatility even fresh valuations will likely be out of date as soon as they are received, making it difficult to assess the effect of any proposed terms of settlement.

"For many families the obvious advice will be to delay settlement discussions until normality resumes and their financial picture is clearer. Client expectations need to be managed accordingly."

- Keep an eye on currency fluctuations and update asset schedules regularly.

- Revisit mortgage-raising capacity and the cost of borrowing, which may have increased or been withdrawn.

- Disclose immediately any impact on earnings, which is also relevant for the interim financial position. Jobs may be lost or furlough leave imposed, job offers may be taken off the table and earning capacities and/or employment prospects may change quickly.

Equally, historic expert valuations such as for properties, businesses and pensions will likely have been undermined by economic uncertainty, leaving reliance on them dangerous and potentially negligent without them being revisited or clients being otherwise content to reflect movement in value by way of auto-adjustment or other safeguards in an order.

Clients will need to be informed in writing of the risks of entering into settlements based on existing valuations or valuations obtained during such a volatile period. If a client is determined to go down the route of settlement at this stage, they will need to be specifically advised about the impact of *Myerson v Myerson (No 2)* [2009] EWCA Civ 282 (see below).

Possible safeguards

The following is a non-exhaustive list of possible options to mitigate the impact of market volatility, provide as much certainty for clients as possible in the current circumstances, and to try to ensure that the overriding principle of fairness is achieved.

Exercise care in cases where there is a proposed unequal division of the "copper-bottomed" and "risk-laden" assets. Is this now appropriate given market volatility? To what extent is a business still viable both now and in the future? Can it ride out the current economic turmoil? In line with the Court of Appeal authority of *Wells v Wells* [2002] EWCA Civ 476, can the uncertainty be addressed by the parties

retaining, or transferring, shares in a family company so that they each benefit from (or bear) fluctuations in the market?

If one party is insistent on retaining the entirety of a shareholding then clear written advice needs to be given as to the inherent risks, such as the danger of overpaying to buy out the other spouse; and the fact that an informed decision to retain the shares during the current pandemic, which subsequently become worthless, will likely not justify a Barder application (see below).

To guard against one party being prejudiced by the bottom dropping out of the property market, express the division of proceeds of a property sale in percentage terms rather than a fixed lump sum, perhaps with a guaranteed minimum for a party in need.

"To guard against one party being prejudiced by the bottom dropping out of the property market, express the division of proceeds of a property sale in percentage terms rather than a fixed lump sum."

Include self-adjustment provisions for lump sums (or reverse lump sums) reliant on asset or investment values with ancillary disclosure obligations linked to the date of payment.

With possible job insecurity, to avoid the prospect of an early variation, express periodical payments on a percentage, and therefore self-adjusting basis, perhaps with a minimum receipt linked to needs as well as a cap. Ancillary disclosure obligations would be required, such as payslips, P60s and tax returns.

For pensions, it is fairly standard advice from PODEs that CEs are updated just prior to the submission of a consent order so that any calculations can be tweaked to cater for market movement (although fund values may not have recovered). In any event, market volatility and "moving target syndrome" is a well-known phenomenon in the pensions-on-divorce world, where a percentage must be specified in the annex and the Hallam formula (*H v H* [2009] EWHC 3739 (Fam)) to try to circumvent this requirement to provide for the certainty of a fixed sum is not permitted. Instead, parties could consider a reverse contingent lump sum (or mutual undertakings) to cater for any difference between the CE relied on in negotiations and resultant expected pension credit as against the value actually utilised for implementation. PODE input would be advisable.

Finally, what about live negotiations?

Practitioners would be well advised to review all live cases and consider whether any offers made, either on an open or a without prejudice basis, should be withdrawn, especially if they are based on pre-pandemic valuations or assumptions.

What are the options for clients where an order has already been made?

There are two main routes to consider pursuing where an order has been undermined or is no longer affordable: set aside and variation.

Set aside

Under r9.9A of the Family Procedure Rules 2010 and para 13 of PD9A, a party can apply to set aside all or part of a financial remedy order (including a consent order) where no error of the court is alleged. No permission is required. The Part 18 procedure applies. Once the grounds for set aside have been established (or admitted) the court can give directions for rehearing or, if it is satisfied that it has sufficient information to do so, make such other orders as may be appropriate to dispose of the application.

PD9A, at para 13.5, sets out the possible grounds for an application:

The grounds on which a financial remedy order may be set aside are and will remain a matter for decisions by judges. The grounds include (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; (iv) a subsequent event, *unforeseen and unforeseeable* at the time the order was made, which invalidates the basis on which the order was made (emphasis added).

In the context of the current pandemic, it is ground (iv) that is most relevant, being one of the previous criteria specified in *Barder v Barder* [1987] 2 FLR 480 for an appeal out of time, which has now been consolidated in the rules for set aside. The remaining Barder criteria are (in summary) that:

a) the event must have occurred within a relatively short time of the order being made (the House of Lords did not specify a particular timescale but postulated that it was unlikely that this could be as much as a year and in most cases would be no longer than a few months);

b) the application must be made reasonably promptly; and

c) the set aside must not prejudice third parties.

The Barder criteria were explored in the subsequent cases of *Cornick v Cornick* [1994] 2 FLR 530 and *Myerson v Myerson (No 2)* [2009] EWCA Civ 282, specifically as to the foreseeability (or not) of price fluctuation. The latter was in the context of the global economic meltdown in 2008 so when contemplating whether the coronavirus pandemic is likely to be interpreted as a Barder event, *Myerson* is arguably the most relevant authority.

Mr Myerson entered into a consent order in March 2008, the effect of which was to divide the matrimonial assets as to 57% in his favour. When his application to set aside

was lodged, asset values had plummeted so drastically that the effect of the consent order was to alter this percentage to 14%. By the time of the hearing in the Court of Appeal in 2009, it had reduced further to minus 5.2%. He argued that this dramatic collapse constituted a Barder event and asserted that forces within the global economy and the collapse in the share price of his company rendered the consent order both unfair and unworkable.

Mr Myerson's argument was rejected. The Court of Appeal was of the view that in agreeing a consent order, he had willingly elected to take the risk-laden assets. It was also relevant that other remedies were available in that he could pursue a variation of the lump sum payable to the wife by instalments. The judgment of Hale J (as she then was) in *Cornick* was central to the Court of Appeal's decision. Hale J held, at para 537, that "for a Barder principle to apply, it is a *sine qua non* that the event was unforeseen and unforeseeable". She proposed three possible causes of a change in asset values post-settlement or order, and how the court should address each such scenario, which may be distilled as follows:

1. Where there is natural price fluctuation of an asset which was taken into account and correctly valued at the date of the hearing, the court should not allow a "disguised power of variation" which is not provided for in statute; this scenario is not a Barder event.

2. Where a wrong value was put on that asset which had it been known about at the time would have led to a different order, and provided that it is not the fault of the person alleging the mistake, set aside is possible.

3. Something *unforeseen and unforeseeable* had happened since the date of the hearing which has altered the value of the assets so dramatically as to bring about a substantial change in the balance of assets brought about by the order. If so, and provided that the remaining three Barder conditions are fulfilled, set aside is possible.

The case law, taken as a whole, does not suggest that the natural processes of price fluctuation, whether in houses, shares or any other property, and however dramatic, fall within this principle. For example:

- In *Cornick* itself, the value of the husband's shareholding had soared since settlement. Hale J rejected the wife's application to set aside, saying: "Nothing has happened since then other than a natural albeit dramatic change in the value of the husband's shareholding."

- In *Walkden v Walkden* [2010] 1 FLR 174 the wife argued that the fact certain shares had subsequently been sold by the husband at a substantially higher value than, she said, had been anticipated was a Barder event. Thorpe LJ held that "it could not possibly be said that the sale of the husband's shares was either unforeseen or unforeseeable", and Elias LJ held that "it was plainly foreseeable that an asset of this nature might fluctuate dramatically".

- Similarly, in *Maskell v Maskell* [2001] EWCA Civ 858 the husband's unemployment post-order was not unforeseen and unforeseeable.

The questions that arise when considering whether the coronavirus pandemic represents a Barder event are these:

1. Is the pandemic a subsequent event?

Clearly this is case- and time-specific, dependent on the date of the order and underlying negotiations or hearing.

"In Walkden*, Thorpe LJ held that 'it could not possibly be said that the sale of the husband's shares was either unforeseen or unforeseeable'."*

2. Is the pandemic "unforeseen and unforeseeable"?

This is the key issue from PD9A para 13.5 (ground (iv)) and *Cornick*.

How will the requirement of "foreseeable" be interpreted? It is of note that in *DB v DLJ* [2016] EWHC 324 (Fam) at para 41 Mostyn J commented that "In my opinion 'unforeseeable' cannot mean one thing in the Queen's Bench Division and another in the Family Division", thus the interpretation in civil cases may be relevant. He reviewed certain civil authorities, commenting on the numerical (probability) and linguistic approaches. His comments at paras 36 and 40 are of particular interest:

> "36. I turn to the question of (un) foreseeability. Before I consider the Barder cases on this topic I allow myself a short excursion into this area as it arises in the civil sphere. Whether an event was reasonably foreseeable is a key question in deciding whether damages are recoverable in an action for negligence for breach of contract, negligence or nuisance, or whether they are too remote and therefore irrecoverable. The question is not whether a future event is literally incapable of being imagined. The capacity of homo sapiens to imagine fictive things is vast. The question is posed by the court standing retrospectively in the shoes of the actors and asking itself whether the then future, but by now past, event could reasonably have been predicted. The answer is generally given by linguistic tropes rather than by numeric assessments of future probability."

And commenting on the decision in *Wagon Mound (No 2)* [1967] 1 AC 617, Mostyn J added:

> "40. … The risk may have been very small indeed but it was not such that a reasonable man would brush it aside as far-fetched. This points up just how unlikely a future event must be before it can be classed as 'unforeseeable'."

"(Un)foreseeability will be case and date specific. A settlement or order made after the imposition of the government isolation and lockdown, for example, is unlikely to justify challenge."

(Un)foreseeability will be case and date specific. A settlement or order made after the imposition of the government isolation and lockdown, for example, is unlikely to justify challenge. However:

- Is the pandemic distinguishable from the financial crisis of 2008? Is it in effect a "known unknown" to use the language of Mostyn J in *DB v DLJ* at para 47 making it "very difficult to satisfy the test of unforeseeability"?
- Is the economic impact of the pandemic on a party to a matrimonial order such as to take their position beyond the natural processes of price fluctuation, however dramatic?
- Is the economic impact of the pandemic on a party likely to be a temporary blip or is there a drastic and fundamental reversal of fortune? In 2008 the systems in the financial sector collapsed with consequent impact on business, savings and investments. In the current climate is it in contrast the structure that remains intact with operation temporarily affected but with the workforce returning in future and goods/services renewing?

3. **Does the subsequent event invalidate the basis on which the order was made?**

Again, this will be case specific. Whether the case turned on the sharing principle or an assessment of needs may be relevant.

Mr Myerson found the court unsympathetic to his situation in March 2009. There might just be a party to a recent order who feels that the effect of the pandemic on their circumstances merits an attempt at set aside but they will have to be bold. With the delays and adjournments in court listings and the relative low priority of financial remedy cases to HMCTS at present, it is entirely possible that by the time a case is heard the pandemic may be on the wane, the economy could be on the up and the applicant's situation recovered. Barder cases are "rare" (as noted by Thorpe LJ in *Richardson v Richardson* [2011] EWCA 79), and the courts may well be reluctant to open the floodgates and permit a torrent of set aside claims.

In any event, parties should proceed with caution in activating (or indeed opposing) a set aside application given that it does not constitute "financial remedy proceedings" under r28.3(4)(b) FPR 2010, and the "no order" costs principle under r28.3(5) does not apply, potentially leading to significant costs exposure for an ill-advised application.

Variation

Variation may be a more viable option, although only certain orders are capable of variation under s31 of the Matrimonial Causes Act 1973. In the present circumstances, the court's powers to vary periodical payments orders, the mechanics of an order for sale and lump sum orders payable by instalments are likely to be the primary lines of attack. For example:

- periodical payments could be varied downwards if the payer's income has ceased or there is a sustained reduction, making the original order unaffordable. However, a temporary reduction in income, especially where the payer has alternative capital resources to meet ongoing payments is unlikely to justify variation;
- a property sale could be deferred, especially in circumstances where the market has effectively frozen; and/or
- a lump sum payable by instalments could be varied to adjust the timing or quantum of individual instalments, although an attempt to vary the underlying capital award may not be viewed positively by a court.

Again, an application for variation is not to be undertaken lightly as the court is obliged to consider all of the circumstances of the case again and the overriding consideration is fairness. Unless there has been a significant change of circumstances then there are unlikely to be grounds to vary. Equally, a variation application should not be used as a way for a dissatisfied litigant to attempt to appeal an order by the back door, using the pandemic as an excuse.

What about settlements not yet converted to orders?

There may be cases where an agreement, and even the form of a draft consent order, has been reached pre-pandemic but where the order has not yet been submitted to court for approval, or indeed sealed.

In accordance with the well-known authority of *Xydhias v Xydhias* [1999] 1 FLR 683, heads of agreement or a clear exchange of agreed proposals in solicitor correspondence will be evidence of an agreement. As such, if one party seeks to resile from the agreement in the light of coronavirus then a notice to show cause application could be issued. Of course, the parties cannot oust the jurisdiction of the court, which has a statutory duty to consider the factors in s25 of the Matrimonial Causes Act 1973, and its approval is not a rubber stamp. However, recognising the autonomy of the parties, the court will likely be slow to interfere with an agreement reached between the parties unless, for example, as promulgated in *MacLeod v MacLeod* [2008] UKPC 64, there has been an important change of circumstances, unforeseen or overlooked at the time of making the agreement, rendering the agreement unjust. This brings us back to the question as to whether the coronavirus pandemic is unforeseeable in a way that the global economic crash in *Myerson* was not.

It is also worth remembering that before perfecting an order the court has the jurisdiction to "change its mind" per *Re Barrell Enterprises* [1973] 1 WLR 19. The requirement in *Barrell* for "exceptional circumstances" was criticised and expanded by Hale LJ in *Re L-B (Children) (Care proceedings: Power to revise judgment)* [2013] UKSC 9, where she held that there was no such limitation on the jurisdiction of the judge "to revisit his own decision at any time up until his resulting order is perfected". She was of the view that the "overriding objective must be to deal with the case justly".

Summary

None of the above scenarios are clear cut in terms of practitioners being able to provide definitive advice for clients. Even if the coronavirus constitutes an unprecedented event, does that mean it is "unforeseeable" in the context of Hale J's test in *Cornick*? It will be a brave, or potentially reckless, litigant who is prepared to be the test case.

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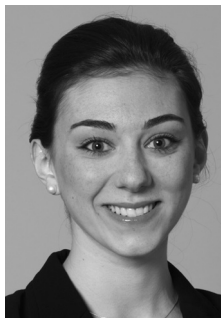
Once in a generation?

Julia Townend *Barrister at 4 Paper Buildings*



Is the Domestic Abuse Bill the rescue craft sought by the family justice system?

"Often we see the same images and stereotypes on TV: housing estates, working-class families, drunk men coming home from the pub, women surrounded by children, and a sequence of shouting, followed by immediate physical violence or assault. But soap opera scenes tend to focus only on one or two aspects of a much bigger and more complex picture. Domestic violence has many faces, and the faces of those who survive it are varied too… Abuse is not just about noticeable physical signs. Sometimes there are no bruises." These were the powerful words of Rosie Duffield MP as the Domestic Abuse Bill underwent its second reading in the House of Commons on 2 October 2019.

They will come as no surprise to family lawyers, many of whom witness the plight of vulnerable litigants, from all walks of life, with depressing regularity. Many practitioners know horror stories about how the workings of the family justice system have facilitated abuse and so the reform to domestic abuse legislation remains eagerly awaited.

A long and winding road

It has not been a smooth pathway for the Domestic Abuse Bill. Its initial introduction led to first and second readings in the House of Commons on 16 July 2019 and 2 October 2019 respectively. The progress of the Bill was delayed by Brexit and the September 2019 unlawful prorogation of Parliament. As the Bill navigated the House of Commons committee stage, on 6 November 2019 Parliament was dissolved in advance of the general election of 12 December 2019.

On 19 December 2019 the Queen's Speech confirmed that the Domestic Abuse Bill would return to the

legislative timetable. The first reading in the House of Commons during the new Parliamentary session occurred on 1 March 2020. The momentum with which the Bill may now progress has been thrown into further question by the Covid-19 epidemic. Unfortunately, the early suggestions from charities are that the social distancing and isolation ramifications of the coronavirus create a higher risk of domestic abuse occurring.

Defining domestic abuse

The Bill proposes to introduce the first statutory definition of domestic abuse in England & Wales, recognising its more nuanced forms. There had been some steps in the right direction in the criminal and family jurisdictions. (On 3 March 2015 a new offence of controlling or coercive behaviour in intimate or familial relationships was introduced by s76 of the Serious Crime Act 2015; on 2 October 2017 Sir James Munby issued a revised Practice Direction for child arrangements proceedings which referred to a broader category of "domestic abuse" instead of "domestic violence" (paragraph 3 of Practice Direction 12J to the Family Procedure Rules 2010). Domestic abuse comprises abusive behaviour (including physical or sexual abuse, violent or threatening behaviour, controlling or coercive behaviour, economic abuse, or psychological, emotional or other abuse – whether a single incident or a course of conduct – between two people aged 16 or over who are "personally connected". The meaning of "personally connected" includes those who are, or have been, married, civil partners, engaged, in a civil partnership agreement, in an intimate personal relationship, relatives, or there is a child in relation to whom they each have a parental relationship.

A rescue craft for cross-examination

For family law practitioners, the most significant proposed reform within the Domestic Abuse Bill is the prohibition of cross-examination in person in family proceedings. Under the current law, where a party self-represents in the family court, a dilemma is often encountered whereby procedure may lead to a domestic abuse victim being questioned directly by the alleged perpetrator, and vice versa. Not only can this be traumatic – it may constitute a continuance of the domestic abuse.

There have been judicial calls for reform since 2006 (see *H v L & R* [2006] EWHC 3099 (Fam)). Having previously described the situation as a "stain on the reputation of our family justice system" (in *Re A (A minor) (Fact finding; Unrepresented party)* [2017] EWHC 1195 (Fam)), Mr Justice Hayden called for Parliamentary intervention in *PS v BP* [2018] EWHC 1987 (Fam), identifying, amongst other things, a need for "ground rules" hearings, the possibility of the child being represented by a lawyer who could conduct cross-examination, and the possibility of questions being written down and submitted to the judge to question the witness. These were referred to as a "forensic life belt until a rescue craft arrives". The approach has been incongruous with the protections available in the criminal courts – for example, s36 of the Youth Justice and Criminal Evidence Act 1999 prohibits the accused from cross-examining particular witnesses.

The Domestic Abuse Bill may offer that rescue craft. The reform would prevent a perpetrator of abuse who has been cautioned, convicted or charged with a specified offence, or who has been made subject to an on-notice protective injunction, from directly cross-examining the accuser or directly being questioned by them. Beyond this, the family courts would have a general discretionary power to prevent cross-examination where the statutory "quality" or "significant distress" conditions are met and it would not be contrary to the interests of justice to impose such a prohibition.

If questioning is disallowed, the court must consider if there are satisfactory alternative means for obtaining the evidence. If not, the court would be required to invite the litigant to arrange for a lawyer to act on their behalf for cross-examination. If declined, but the court considers cross-examination "necessary" in the interests of justice, the court must meet the costs of a lawyer out of central funds.

Further highlights of the Domestic Abuse Bill

The proposed reforms would also include the following:

- Provision for a new civil order – the Domestic Abuse Protection Order – to replace the Domestic Violence Protection Order introduced nationally in 2014. In the first instance a Domestic Abuse Protection Notice would be given. Currently, to secure such protection there needs to be "violence" or "threatened violence". The proposed broader requirement is "abuse", thus avoiding the difficulties faced by police and courts in deciding whether certain types of behaviour are sufficiently violent to meet the threshold. The new protective measures would supplement existing remedies, including bail conditions and restraining orders in the criminal justice system and non-molestation orders, occupation orders and undertakings in the family courts.

- Placement on a statutory footing of the guidance supporting the Domestic Violence Disclosure Scheme, rolled out across England & Wales in 2014. This scheme, also known as Clare's Law, authorises police to disclose to individuals the details of their partner's abusive past, where lawful, proportionate and necessary.

- Duties on local authorities to provide support to victims of domestic abuse and their children in refuges and other safe accommodation.

- A statutory presumption that alleged victims of domestic abuse are eligible for special measures in the criminal courts.

- Controversially, that domestic abuse offenders are subjected to polygraph testing as a condition of their licence following their release from custody.

Does the proposed legislation go far enough?

The definition of domestic abuse in the Bill omits express reference to various specific but established forms of abuse (including female genital mutilation, forced marriage, honour-based crimes, modern slavery and exploitation and coercive control related to immigration status). Age UK has called for those in trusted positions (friends, neighbours and others providing unpaid care) to be included within the definition of "personally connected", as such abuse often affects the elderly.

The proposed legislation does not recognise that certain criminal offending is a direct consequence of domestic abuse. Often the abuse suffered by such offenders is significantly worse than the crimes which they are accused of committing and their previous experiences are often disregarded. The Prison Reform Trust and the Criminal Bar Association have proposed the creation of a statutory defence for those whose offending is driven by their experience of domestic abuse.

There is concern that the currently drafted prohibition of cross-examination in person in family proceedings does not go far enough and may be applied inconsistently. Many victims will not receive mandatory protection (as a result of a conviction, caution, charge or injunction) and will be reliant on the discretionary ground. Solutions to this could include extending the mandatory ban to apply where there is a court finding of fact or other documentary evidence of abuse (as in the legal aid regime threshold – see the first report of session 2017-19 of the Joint Committee on the Draft Domestic Abuse Bill, 11 June 2019, paragraph 173). Publication of clear national guidance as to what circumstances satisfy the discretionary ground to ensure uniform application may assist. Resolution, in supplementary written evidence, suggested that a more effective way to address the issue may be the extension of legal aid for representation of both victims and perpetrators. It has also been suggested (in written evidence submitted by the Law Society) that the prohibition on the cross-examination of witnesses by the perpetrator should be extended to third parties, such as a child of the relationship.

Reform is still required in relation to protecting migrant women. Those with an insecure immigration status may face the stark choice of remaining in an abusive relationship or escaping but becoming destitute due to a lack of knowledge about obtaining help or a risk of detention and deportation, which may constitute a breach of Article 4(3) of the Istanbul Convention. Evidence presented to the Joint Committee on the Draft Domestic Abuse Bill suggested that immigration authorities had taken enforcement action against victims at a time when they required protection and support. It may be that clear Home Office policy is required to determine the correct approach, and a firewall could be introduced to separate reporting of crime and access to support services from immigration control, as suggested by the Step Up Migrant Women campaign.

A once-in-a-generation opportunity

The latest figures from the Crime Survey for England and Wales show that in the year ending March 2018 an estimated two million adults aged 16 to 59 experienced domestic abuse. Theresa May, in her first speech to the House of Commons after resigning as Prime Minister, hailed the draft statute as a "once-in-a-generation opportunity". Clearly a multi-agency commitment to addressing domestic abuse is essential to support statutory reform and it is hoped that the Domestic Bill will remain at the forefront of the legislative agenda.

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National Committee and AGM news

The results of Resolution's 2020 National Committee elections are in. Sharon Kay and Helen Tulloch will join the National Committee for the first time, alongside Edward Cooke and Bina Modi, who have been successfully re-elected. Our congratulations go to Sharon, Helen, Edward and Bina; and thank you to all those who voted. Particular thanks go to those who put themselves forward for election but were unsuccessful on this occasion.

Annual General Meeting

As set out in Margaret and Colin's introduction to this issue, Resolution has postponed the 2020 AGM. We are currently working to identify a future date on which to hold this, and will let you know as soon as this is set.

National Committee Members and Officers of the Company

Given the current circumstances, the National Committee and Executive Committee have agreed that the current Officers will remain in place until the AGM takes place, in order to provide continuity of leadership at this time. As a result, Margaret Heathcote will retain her post as national chair until the AGM, at which point current vice chair Juliet Harvey will be elevated to national chair, and National Committee member Grant Cameron will become vice chair. Grant will join the Executive Committee in the short-term as National Committee representative, and vice chair-elect.

F v H (Fact-finding) [2019] – lessons to be learnt

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The fallout from the controversial judgment in F v H *and what it will mean for judicial training*

As family law practitioners, we would all like to think that we are part of a forward-thinking sector that is fair to all and meets the needs of families up and down the country. The uncomfortable truth is that public confidence in the family justice system, and private children law proceedings (the focus of this article), is extremely low. Of course, in the absence of extensive academic research into the experience of litigants, this assessment is made from a purely anecdotal basis.

In an address in February 2020 by Sir James Munby, published on the Transparency Project's website, he alluded to a dichotomy that is symptomatic of the "crisis" in private children law. On the one hand he points to arguments that judges who hear private law cases do not believe, understand or sufficiently protect victims of domestic abuse (and their child/ren). On the other hand, the criticism is that judges believe these allegations too readily and are not sufficiently alive to the alienating behaviours of (generally) mothers.

Therefore when the appeal of *F v H (Fact-finding)* [2019] EWFC B80 made headlines in the national press earlier this year, pillorying the trial judge for his outdated (and frankly incorrect) views on consent and rape, it was a much needed wake-up call to family law practitioners that our revered system simply isn't doing as good a job as it needs to.

The appeal concerned a judgment at first instance made following a one-day finding of fact hearing in private Children Act proceedings. The mother had made allegations agaist the father of coercive and controlling behaviour and two incidents of rape. The trial judge did not make findings of rape on the basis that she had not physically struggled with the father, nor had she made life difficult for him. His approach to these findings perpetuated a number of outdated myths surrounding rape. There were also a number of major procedural irregularities in how the proceedings were conducted (on which, see below).

The mother appealed the decision, and it was overturned by a High Court judge in January 2020. Given the concern generated by the trial judge's approach to the proceedings, the appeal judgment explained that a formal request to the Judicial College had been made by the President of the Family Division "for those judges who may hear cases involving allegations of serious sexual assault in family proceedings to be given training based on that which is already provided to criminal judges" (para 59, *JH v MF* [2020] EWHC 86 (Fam)).

Many were understandably appalled by the trial judge's approach. The first instance and appeal judgments throw up an array of questions and have already been the subject of much legal commentary. This article aims to examine what lessons can be learned by exploring the following themes:

- What the training for family judges hearing cases with allegations of serious sexual assault might entail.
- The link between flawed finding of fact hearings and the proliferation of self-representing litigants.
- The possibility that similar outcomes to *F v H* might be avoided if there is greater diversity in the family judiciary and/or enhanced transparency in the family justice system.

The decision at first instance and appeal

The facts of *F v H* may sound familiar to children law practitioners. In 2013 the parties entered into a relationship and they had a son, born in January 2015. They first came to the attention of the police in 2014, and complaints of domestic abuse by the father towards the mother were made periodically throughout their relationship (by the mother and third parties). In August 2016 the mother made a further report to the police, and fled the family home with their son to a women's refuge. The father was arrested and interviewed under caution in relation to allegations of coercive and controlling behaviour and of sexual assault.

Bail conditions were imposed on him, but by September 2017 the police decided not to take any further action. Over a year later, in October 2018, the father made an application for a child arrangements order. The father was a litigant in person, with assistance from a McKenzie Friend, while the mother benefitted from legal aid and was therefore represented.

A finding of fact hearing to determine the mother's allegations took place in August 2019. Ultimately, the judge did not make the findings she sought, a decision which she then appealed.

The first instance judgment caused alarm in a number of respects:

1. The hearing was conducted in a way which had complete disregard of the safeguards that exist to protect victims of domestic abuse. Despite the mother having been identified as a vulnerable witness, Part 3A of the Family Procedure Rules (FPR) was ignored by the trial judge entirely, without him giving reasons as to why he was doing so. The mother was denied the use of screens, gave her evidence from counsel's bench (which meant the judge could not hear her evidence clearly, something which he then criticised her for) with the father also giving evidence from counsel's bench (and therefore benefitting from assistance from his McKenzie Friend, despite having been sworn in).

2. There was a complete failure to apply the definitions and principles of Practice Direction 12J of the FPR, relating to domestic abuse and harm in the context of child arrangement orders.

3. The trial judge was primarily occupied with the parties' oral testimonies, and failed to balance the evidence before him and take into account matters that were relevant to the history of their relationship. In particular, he did not take account of police disclosure (which he had himself ordered), which evidenced that the parties had been known to the police since June 2014. The disclosure also revealed a history of domestic abuse (including a conviction) between the father and previous partners. Third-party reports were also dismissed. Also, the mother had put forward evidence of sexually explicit and threatening messages sent by the father. The judge dismissed these as "sexting" and chose not to give them any weight, even though the father had put forward no such case.

4. The judge preferred the father's evidence without explaining why, save for describing him as "straightforward" and "forthright".

5. The judge concluded that the mother was "anxious" and "neurotic", without any forensic expert evidence before him to reach such a conclusion. (There was also a failure to appreciate that the reason for the mother's anxious presentation might have been because she was the victim of abuse and having to face her alleged abuser in court.)

6. Findings were made about the mother that she had been aggressive, despite this allegation having never been put to her in evidence.

7. The trial judge appeared to have difficulty applying the correct standard of proof. His comments suggested that he was applying a higher standard than the binary "balance of probabilities" test, as he was entertaining the idea that an allegation "might" have happened.

"The trial judge in JH v MH was primarily occupied with the parties' oral testimonies, and failed to balance the evidence before him and take into account matters that were relevant to the history of their relationship."

8. What seems to have shocked the most was the judge's approach to the issue of consent, which the appeal judge deemed "manifestly at odds with current jurisprudence, concomitant sexual behaviour, and what is currently acceptable socio-sexual conduct" (para 21, *JH v MF*). Specifically, the mother's failure to physically stop the father from having sexual intercourse led to the conclusion that the intercourse must have been consensual.

The appeal judge therefore determined that the trial judge's "approach to the fact-finding is so flawed as to lead to the conclusion that it is unsafe and wrong" (para 17) and ordered a re-trial. As noted above, she announced the additional training for those family law judges determining cases where there are allegations of serious sexual assault based on that which is provided to criminal judges, and also commented on the need for a congruence of approach between the criminal and family jurisdictions.

What might the training for judges hearing cases with allegations of serious sexual assault entail?

In her judgment, the appeal judge drew on Sir Andrew McFarlane's decision in the case of *Re R (Children)* [2018] EWCA Civ 198, namely that "it is fundamentally wrong for the Family Court to be drawn into an analysis of factual evidence in proceedings in relation to the welfare of the children based on criminal law principles and concepts" (para 67). *Re R* made the point that, while criminal proceedings are "concerned with culpability and, if guilty, punishment" (para 62), in family proceedings the court is determining "what has gone on in the past, so that that knowledge may inform the ultimate welfare evaluation where the court will choose which option is best for a child with the court's eyes open to such risks as the factual determination may have established" (para 62).

This is an important distinction but, as the appeal judge concluded, it cannot be that family proceedings adopt a completely different approach to that which would be taken in the criminal jurisdiction. It also cannot be a justification for attitudes which have been determined to be wrong in both the criminal jurisdiction and accepted public opinion to be adopted in family proceedings. This is not the first time a "congruence of approach" between the two jurisdictions

"In 2014 Sir James Munby advised that there was no need to reinvent the wheel, and that the extensive work undertaken by the criminal courts could be adapted for use in the family courts."

has been endorsed; for example in 2014, when addressing how far the family justice system lagged behind its criminal law counterpart in dealing with vulnerable parties and witnesses, Sir James Munby advised that there was no need to reinvent the wheel, and that the extensive work undertaken by the criminal courts could be adapted for use in the family courts.

Criminal judges have had to grapple with complex issues, including consent and the vulnerability of victims of abuse and sexual abuse, ensuring that they keep pace with evolving societal views. It has been recognised that outdated and stereotypical views remain embedded in peoples' psyches, and this has therefore been addressed in the approach taken by the police, the Crown Prosecution Service and the judiciary to these cases. Unfortunately, it cannot be said that such a comprehensive approach is taken by those involved in the family justice system.

What training and guidance is there within the criminal jurisdiction that might be drawn upon?

Responsibility for all judicial training sits with the Judicial College. In the criminal justice system, judges authorised to try serious sexual offences must attend the appropriate seminar at least once every three years, with any failure to do so without good reason referred to the senior judiciary. (Incidentally, the same applies to judges hearing public law family cases.)

According to the Judicial College prospectus (of April 2019 to March 2020), the training for this category of criminal judges aims to enable them to "try these cases with sensitivity and confidence" and to ensure that the trial process is "fair and appropriate to the needs of all parties and witnesses". The contents of the course specifically address the topic of vulnerability. The format of the course encourages discussion and sharing of judicial experiences and identified issues of concern, with the aim that judges talk with and learn from their colleagues. The induction courses for newly authorised judges go further, and train judges to deal with the psychology of victims of these offences and to learn how they impact on their subsequent behaviour.

Given the overlap in the complex issues involved in private family law proceedings, it is no great leap to suggest that family law judges hearing cases involving domestic abuse and sexual abuse should be subject to the same mandatory training schedule to provide the same knowledge and skills.

Further details about the training and guidance given to criminal judges can be seen from the contents of the "Crown Court Compendium (CCC), Part 1: Jury and Trial Management and Summing Up" (Judicial College December 2019), which is disseminated to criminal judges by the Judicial College to provide guidance on directing and managing juries and sentencing. It includes sample directions to "counter the risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct", so that juries "approach the evidence without prejudice".

Interestingly, many of the issues identified in the CCC were in play in the first instance judgment in *F v H*, including:

- that people react differently to the trauma of serious sexual assault both at the time of the incident and at a later date (including while giving evidence);
- that a delay in reporting an assault and inconsistency of accounts does not necessarily affect the veracity of what has been alleged;
- the distinction between submission and consent in terms of sexual activity between partners (on which see below); and
- the fact that use of force, physical struggle or signs of injury are not a requirement for there to be a finding that someone has been raped.

The guidance deals with specific assumptions or scenarios, many of which appear in the current case, including the importance of drawing a distinction between consent and submission. Namely that:

> "if a person decides not to struggle or gives up struggling, that is not the same thing as consent. A person can in some circumstances simply let the sexual activity take place because they feel they cannot act to stop it or because that is the only way in which they see that the incident will conclude. Such actions or inactions are not an agreement by choice." (pages 20-9)

The guidance also emphasises the importance of juries looking at all the evidence to decide whether a party's evidence is true. Arguably (and of course without having heard all the evidence

and facts in the case) it could be said that if the approach suggested by this guidance had been followed by the trial judge, particularly the reminder to look at all of the evidence, a different decision might have been made.

Following the appeal decision and reaction to it, the President of the Family Law Division and the Lord Chief Justice have confirmed that an online resource is being developed, overseen by the chair of the Judicial College, for family judges dealing with issues of consent and stereotypes in sexual cases. Induction and refresher courses at the Judicial College will also be updated to address these topics. It seems both sensible and logical for it to draw on the CCC guidance, as well as the seminars already in place for criminal judges, to prevent any flagrant incongruence in approach.

Whilst family judges are not tasked with determining culpability, or even looking to establish the same standard of proof, they have the tools and evidence available to them to make a wider assessment of the factual matrix of family circumstances. In *F v H*, if applied correctly, this may have enabled a decision that focused less on whether a rape did or didn't happen and more on whether the allegation made was part of a wider pattern of abusive behaviour at the hands of the father.

Much comment has been made about whether training alone will fix the problem, not least in the open letter to the judiciary from family and human rights lawyers and women's rights organisations dated 19 February 2020. As the appeal judge identified, the Judicial College already provides "comprehensive training". The government's paper setting out its commitment to reform of domestic abuse law corroborated this, confirming that all family court judges received training from the Judicial College throughout 2016 to 2018 on "how to address the challenges faced by vulnerable persons in the courts, including those who are victims of domestic abuse". (Transforming the Response to Domestic Abuse Consultation Response and Draft Bill, January 2019). Despite this, the experience of many parties to private law proceedings (and especially litigants in person) is that there are wider systemic issues, including some lack of understanding of domestic abuse and serious sexual assault, and a failure to apply the practice directions to afford victims a fair trial.

Flawed finding of fact hearings and the proliferation of self-representing litigants

Finding of fact hearings can be complex and delicate, and the task of the judges adjudicating them challenging. In *F v H* the trial judge went into some detail about the difficulties he faced in having to make a decision as to findings (and the risk that he might get it wrong). He asked: "How do I find out precisely what happened behind the closed doors of a family home years after the event, based only on the evidence of the parties, neither of whom can be said to be independent?" (para 9). It is an unenviable task. (Although in the present case, the judge did have the benefit of additional, corroborative evidence.) When having to carry out this balancing exercise with parties that are unrepresented, and in a tight timeframe, the task becomes all the more challenging.

LASPO 2012 has meant that the number of litigants appearing in person and without legal advice in family law proceedings has soared. With it, the task of judges and their caseload has transformed. With parties that don't have advocates to guide them through complex hearings, judges have to actively manage cases, including sometimes carrying out cross-examination of parties.

"In F v H *the appeal judge warned: 'This case is yet another example of the difficulties encountered by litigants when public funding is not available to the party against whom complaints are made.'"*

Having to play the role of advocate and arbiter is not without its problems, and can lead to a partisan approach, as in *F v H*. Indeed, the appeal judge warned: "This case is yet another example of the difficulties encountered by litigants when public funding is not available to the party against whom complaints are made; and of the way in which justice or a fair trial is compromised when the judge is required to enter the arena" (para 1).

In this case the mother had legal advice; she could be informed by those representing her of the errors in law and procedural irregularities in how the hearing had been conducted, and respond accordingly. But what would have happened had she been representing herself? Would she have known that she had legitimate grounds to appeal the decision? Would she, and others in a similar situation, be hesitant to seek protection from the courts? These were precisely the concerns raised by domestic abuse survivor and women's rights organisations upon publication of the judgment. They described this mother's experience as being the tip of the iceberg, pointing to numerous other women who had come forward sharing similar experiences of the family courts (including at the hands of the trial judge).

What practical solutions might there be to level the playing field?

One solution might be that, where one party has legal-aid-funded representation as a result of having made allegations of domestic abuse, the other party to the proceedings is also provided with legal aid. This would stop judges being drawn into cross-examination of parties (and also put an end to the cross-examination of individuals by the ex-partners they have accused of abuse, which the draft "enhanced" Domestic Abuse Bill aims to automatically prohibit in any event).

Another solution, proffered in the open letter sent in February 2020 referred to above, might be for trained domestic abuse champions to be appointed in each family court with the task of:

- aiding judicial understanding of domestic and sexual abuse, particularly in relation to minority and other vulnerable women;
- ensuring correct procedures are followed, consistent with PD12J; and
- ensuring accountability and monitoring where there are procedural errors and correct definitions are not properly applied.

Part 3A and PD12J of the FPR need not be rewritten; they simply need to be properly followed. More extensive judicial training will go some way to addressing this but is unlikely to be sufficient on its own. So the involvement of domestic abuse champions could be an effective means of addressing this. They could perhaps become involved at the early stages of proceedings being issued, at the same point that Cafcass does, to ascertain whether domestic abuse is a relevant factor and therefore whether special measures are applicable. This would amount to an effective check and balance on the court, by preventing cases from slipping through the net and monitoring whether the correct procedures are being followed.

As for the announcement in the Chancellor's budget in March 2020 that £5m would be earmarked for the rolling out of domestic abuse courts (which will hear family and criminal matters alongside one another) only time will tell how this might have a bearing on private children proceedings and cases such as *F v H*.

A brief word should be given as to the timings of the fact find. The evidence was heard, closing submissions made and judgment given all in a single day. The mother's counsel's closing submissions commenced at 16.45 (and were repeatedly interrupted and then cut short by the trial judge), no submissions were made by the father and judgment was given at 17.18. It begs the question of whether, had the listing been longer, the parties would have been able to present their cases in a way that was fairer, and the trial judge could have taken proper time to reflect on all the evidence before making his decision.

Delay was clearly something that preoccupied the judge, having expressed regret in his judgment that the parties were only just at a fact find in August 2019, when the father had issued proceedings over nine months earlier, in October 2018. The time allowed for the hearing also has to be viewed against the backdrop of the courts' resourcing being squeezed ever tighter, although dealing with matters expeditiously should never result in judgments being rushed in a way that compromises the fairness of the conduct and outcome of proceedings.

In view of the above, it is perhaps unsurprising (although not excusable) that the sheer number of litigants in person might lead to flaws in the approach and decision making in finding of fact hearings. The private nature of family proceedings may mean that any similarly flawed decisions may never be exposed to scrutiny.

Would similar outcomes to *F v H* be avoided if there were greater diversity in the family judiciary, and/or enhanced transparency in the family justice system?

Public perception and confidence in the family justice system is at an all-time low. This is clear from the steady stream of articles in the national press with scathing reports of significant failings in both private and public children law cases, and is fed by the sharing of anecdotal evidence by litigants and the experiences of journalists and bloggers attending family proceedings. Most concerning is Sir James Munby's acknowledgement in his address referred to above that "the attacks on our private law system have much less to do with the law and are much more focused on the alleged failing of the judges".

The fallout of *F v H*, and reporting of family cases more generally, indicates that, sadly, the experience of the parties in this case was not an isolated incident. It also appears that the views and stereotypical assumptions attributed to the trial judge have been seen previously by other judges. In the Law Society's written response to the Joint Select Committee scrutinising the Domestic Abuse Bill, there is further acceptance that judges may be getting it wrong; it acknowledged that judicial practice in dealing with cross-examination of vulnerable witnesses was "inconsistent" and said there was a need for "adequate training and education for the judiciary in order to avoid relying on gendered or stereotyped interpretations of the party's behaviour in determining whether cross examination will indeed cause stress".

Addressing gendered views of the judiciary

Much of the reporting of this case has blamed its failings, repeated in numerous other cases (although the extent to which is unknown), on misogynist and sexist views held by family judges. It is therefore relevant to consider to what extent the diversity of the family law judiciary (or lack thereof) might have a bearing on the decisions it makes. The judicial diversity figures as at 1 April 2019 (not solely in relation to family law) reveal that only 32% of judges in courts in England and Wales are women. Broken down in terms of seniority, this reveals the following percentages of female judges: Court of Appeal (23%), High Court judges (27%), circuit judges (31%), and recorders (21%).

At district judge (42%) and deputy district judge (39%) level – ie those who will primarily hear the private law cases similar to *F v H* at first instance – the figures are more positive. It is clear, however, that the lack of representation of women in the judiciary is a real issue. Further, only 8% of all judges are BAME and 76% are aged over 50. *[In this context, readers may wish to see the pieces by Jo O'Sullivan and DJ Howard Kemp elsewhere in this issue, Ed]*.

On a positive note, there are signs that steps are being taken to redress the imbalance, with women making up 45% of judges appointed to a senior judicial role in 2018/19. In the same period, 44% of deputy district judges appointed were women. The statistics also show that 46% of judges aged under 50 are women.

Of course it is not as simple as blaming the flaws in the family justice system on a lack of representation, but if the judiciary was comprised of a wider section of society, it might ensure that its decisions were less at odds with the views of modern society. While issues of gender certainly have some bearing, the criticisms levelled at private children proceedings do not come exclusively from female litigants, which demonstrates that the issues are much wider.

How might greater transparency contribute to the solution?

Demands for greater transparency in relation to family proceedings have been growing, with the intention that it will promote public awareness and understanding, and open up decisions to public scrutiny. Those looking in from the outside consider that the family courts are operating under a veil of secrecy, with the individuals making and influencing critical decisions about the lives of parents and children shielded from view. It is for this reason that successive Presidents of the Family Division have promoted greater public access to the practice and procedure of family law. This has happened through the admittance of journalists to family proceedings, the introduction of guidance to promote the publication of judgments, and guidance to enable journalists and bloggers to report more easily from family proceedings.

Despite this, there is a collective concern that there exists insufficient information and empirical evidence about what is happening on a daily basis in private family law proceedings. The fallout from *F v H*, and from other examples, indicate a pressing need for the public to have greater confidence in the system; in order to do so, those involved in private children law need to understand what isn't working so that changes can be made.

What is being done to address these concerns?

The establishment of a panel made up of members of the judiciary, academia, social care, policy makers and third sector organisations was announced on 21 May 2019 by the Ministry of Justice. The panel made a public call for evidence from professionals and individuals with experience of private law cases involving allegations of domestic abuse and other serious offences, in order to understand their experiences and "identify any systemic issues and build a more robust evidence base to inform improvements". The outcome of that review is still awaited.

Sir James Munby's view, given in his February 2020 address, is that any issues in the private law justice system can only truly be identified and addressed following a "detailed programme of rigorous, independent research". Some of the work suggested by him is covered by the Ministry of Justice review but, in addition, he proposes the completion of a time-limited survey by judges to capture data about what is actually happening in the family courts.

The publication of judgments in family cases also has a significant part to play in opening up access to family courts. Insufficient numbers of judgments are being published, especially from district judges, deputy district judges and magistrates (to whom the current guidance encouraging publication does not apply). Although the decision of *F v H* was within the category of cases to which the guidance regarding publication of decisions applies, it was only following the appeal (and outcry) that the judgment was eventually made available.

"The publication of judgments in family cases also has a significant part to play in opening up access to family courts. Insufficient numbers of judgments are being published."

The President is currently undertaking a Transparency Review looking at the existing arrangements that regulate access to and reporting from the family courts. Pending the outcome of this, and a radical change to the existing law to allow greater reporting from family proceedings, the publication of judgments from all levels of judges in an anonymised form will provide the greatest access (and scrutiny of) family proceedings. Malvika Jaganmohan discusses these issues in detail on page 14.

Summing up

There appears to be a consensus that judicial training alone, whilst important, is not going to solve the issues identified in *F v H* and in other private children law proceedings. Indeed, the problems in this case could have been avoided by a proper application of the existing rules and judicial training already in place. If anecdotal evidence is to be believed, the experience of litigants is that the system is not properly serving their interests or, more importantly, those of their children. More information is needed in the way of data collection and research to learn and then address what is going wrong. Such research would also reveal what is functioning well and would also highlight the significant pressures on judges and the system as a whole as a result of the cuts to legal services.

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Financial case digest: *CB v KB* [2019] EWFC 78 (Fam)

Simon Sugar *1 Garden Court*

This case highlights a number of issues, including the approach to valuing/capitalising income streams, the importance of the valuer's market knowledge, and discounts to capitalised figures to reflect non-matrimonial source of income stream. It also shows the encouragement of amortisation and step down, and involved the phenomenon of "hot-tubbing" experts

In this case, decided by Mr Justice Mostyn, H was 41 and W 45. The parties began their relationship in 1998, married in 2003, separated in 2017 and decree absolute was pronounced in 2018. There were six children of the marriage aged between 20 and 7. H had remarried and was expecting a new child.

H was a bass player in a well-known band. Virtually every song had been written by another band member, "LS". H had written three songs. The main computational issue between the parties related to the capitalisation of H's income streams.

H received income from music-making in five different ways:

- Publishing or composition royalties in respect of the three songs that he had written (stream 1).
- Equitable remuneration in respect of broadcasts of the band's songs on radio and TV. The right to equitable remuneration was not assignable (stream 2).
- A right to 8.33% of LS's publishing or composition royalties (stream 3).
- H also received a one-third share of recording royalties that were paid through a company, T Ltd, which was owned equally by the band members (stream 4).
- Finally, H received a share of ticketing and merchandising income generated by touring (stream 5).

Streams 1-3 were paid into P Limited, a company wholly owned by H. The parties were agreed as to the value of stream 1 and were agreed that stream 5 should not be capitalised because it represented pure future earnings.

Quantification of child maintenance was also in issue.

Outcome

Streams 1 to 4 were valued at £4,450,693 net of tax. The total assets were £10,220,000. The equal sharing principle resulted in W receiving £5,110,000. This was enough to meet her needs on a clean-break basis. W also received £12,600pa for each of the four minor children who made their main home with their mother.

Comment

The judgment in this case contains a number of fascinating insights and recommendations. It was noted that answering questions directly was an important, perhaps the most important, hallmark of witness credibility.

Each side instructed their own expert accountant and their evidence was given concurrently under a procedure known as "hot-tubbing", with witnesses occupying the witness box together and questioned topic by topic so that relevant evidence on each topic was given contemporaneously. Where competing valuers give evidence, it was recommended that this process should be considered for use in financial remedy cases.

The main computational dispute related to applicable multipliers. In respect of stream 2 the differences were marked. One valuer used a low multiplier to reflect the legal position that the right to equitable remuneration was not assignable. Another valuer used a multiplier of 14 because he was aware of transactions that included the right to equitable remuneration notwithstanding its legal non-assignability. Mr Justice Mostyn adopted a multiplier of 14 on the basis that the evidence of real-world transactions trumped the formal legal position. It follows from this approach that an appropriate line of enquiry when identifying appropriate experts is whether they have practical experience of relevant industry sales.

Stream 3 represented an income stream that had a significant element of gratuity attached to it. There was no initial obligation upon LS to share his income with H. In the circumstances the capitalised value of the income stream was reduced by 25% to reflect the non-matrimonial source of the income.

Perhaps the most significant aspect of this case was the manner in which child support was calculated. Following on from his judgment in *Re TW & TM (Minors)* [2015] EWHC 3054, where the CMS formula was said to supply a starting point, the learned judge went on to suggest that "in every case where the gross annual income of the non-resident parent does not exceed £650,000, the starting point should be the result of the formula ignoring the cap on annual income at £156,000. For gross incomes in excess of £650,000 I suggest that the result given by an income of £650,000 should be the starting point with full discretionary freedom to depart from it having regard to the scale of the excess." H earned £639,000pa gross. On the application of the CMS formula, he had to pay £12,567 for each child. The learned judge had regard to W's budget referable to the children and could not see any reason to materially depart from the starting point. The sums to be paid were rounded up to £12,600pa per child. This approach is likely to guide and facilitate settlement and provide greater predictability of outcome both following divorce but also in Schedule 1 proceedings.

The next question for determination was whether W would have sufficient income to meet her needs with net assets of £5,110,079. The learned judge noted that in the past he had stated that it is almost a truism that someone living in the Home Counties with assets of £3m has sufficient to meet needs. A *fortiori* if you have just over £5m. A more detailed analysis was, however, required by law. Despite W's relatively young age, it was reasonable to work on the whole life provision implicit in the Duxbury formula, given that this was a long relationship with six children.

It was held that it was pre-eminently reasonable for W to be required to amortise capital. As a matter of principle, it was suggested that it was difficult to conceive of any case where it could be tenably argued that it was reasonable for a party not to spend their own money to meet needs. Such an approach suggests a more liberal application of amortisation post-*Waggott*. An assumption was made that W would sell her very large house when she was 60, releasing equity of £1.5m and at the same point in time her spending would reduce by a third. An earning capacity of £25,000 was attributed to W until 60. Applying those factors to a Duxbury calculation, it was found W had sufficient to meet her needs.

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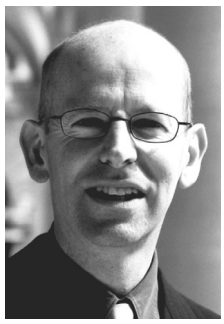
The shape of things to come in Schedule 1

James Pirrie *Family Law in Partnership*

Reflections arising from Simon Sugar's presentation for Resolution, January 2020



The Schedule 1 application generally arrives at our door in febrile form, almost always wrapped in a compelling story of injustice. Of course there are many, many sorts of situation and it is wrong and dangerous to start to perceive them through the categorisation of stereotypes. However, if I could charge only a fiver for the stories that involve at an early stage phrases such as: "He told me he was leaving his wife…", "He said we would get married…", or "She told me she was taking protection…".

(Of course the level of provision is likely to be similar even in the long-relationship-but-never-married cases).

The three parts of the family losing out

The unfortunate reality of unplanned pregnancies is one of massive fall-out for all concerned, not least the child who has been born into a household that is often under-resourced in terms of emotional support for the carer (or care itself when the carer feels forced into an early return to work) or financial resources for the carer to rely upon, or both.

The respondent will face profound ramifications in any established parallel relationship (it is hard for marriages to stand up when there is an unplanned extra-marital

arrival). In any event, there will be a really significant level of financial obligation extending for a couple of decades into the future. On top, there is the question of how to navigate the relationship with the child.

The ripples of challenge and potential hurt and loss will spread wide. And then there is the child's main carer…

"The reality is that with some laudable exceptions where truly child-friendly policies are promoted, holding down a lucrative career and one that offers meaningful progression is a challenging proposition anyway. Doing it as a sole carer is a further quantum leap from that."

The position of the child's carer

There may come a time when our society provides well for parents. It feels as though we have a long way to go at this stage. Workplace support and the norm of flexible working may be massively improved on where they were even a decade ago, but we are still a long way behind our Scandinavian cousins, for example (and one wonders whether, exiting the EU, we are likely now to fall behind more rapidly still).

The reality is that, with some laudable exceptions where truly child-friendly policies are promoted, holding down a lucrative career and one that offers meaningful progression is a challenging proposition anyway. Doing it as a sole carer is a further quantum leap from that.

Unless the carer is already at a point of earning sufficient to fund serious childcare support at a highly competent level and for extensive periods, or perhaps where they have re-partnered, care and career are difficult bed-fellows.

Often one will see Schedule 1 claimants being cross-examined by female barristers with children and it seems a powerful point that the barrister can manage career and child, so why can't the Schedule 1 applicant? The answer generally lies in the fact that such barristers are often highly successful and well-paid, and they are also often in relationships, and so can share care and pool resources to fund professional help for the care that can't be shared.

It felt for a while as if our courts were trying to do something to fill the gap where a person had committed to the partnership of a relationship, had children and affected their financial independence

The risk of well-intentioned professional help

Advisors can make things worse for this trio of unfortunates (child, carer, respondent to claim) where we are swept up in the fairness story. So often, we will find the background account compelling and, eager to offer support, risk charging into a fight to argue, strongly, the cause… generally running straight into someone equally motivated by the equal and opposite client-presentation rushing in from the opposite direction.

With little clear direction from the court as to the correct approach for the bulk of cases, a long fight with high cost is the hardly surprising outcome – all of which exacerbates the losses for those involved.

As advisors we would often be of more use if we could at least be clearer with our client as to where things were going to end up… (whether they might like it or not). Of course, one can present a more forceful/aspirational case and see how far we can get but if we were all better at anchoring our estimates of outcome in the most realistic of zones, then:

- more cases would be more likely to find their way to conclusion at an earlier stage;
- clients would be less disappointed by what we have secured for them (set against what we had sought for them); and
- costs would be lower and parties would get on with their lives earlier.

An early trip to counsel will usually pay strong dividends.

Intimate relationships can have consequences…

One of the classic quotes in most of the academic guides is that from Baron J in *DE v AB* [2011] EWHC 3792 (Fam):

> "46 Neither of these parties seems sufficiently to have considered or expected that a sexual relationship would lead to the birth of a child. However, that is a known consequence. If a child arrives, then parenthood brings with it significant financial and other responsibilities. Both these parties have to make a continuing contribution in that regard for the good of their son. Both will suffer financially because the new circumstances will mean that they do not have the freedom and the financial flexibility that they once had. But that is a consequence of their own actions. As adults, they have to bear responsibility for such. Statute provides that the child must be protected and that is why my order is, as I have explained, fair."

I had always seen these comments of Baron J as directed primarily to the respondent: the father should have realised the way that he was exposing himself to financial

obligation… but listening to Simon Sugar's presentation for Resolution this January made me realise that these words should be read at face value – they are intended very much to cut both ways. In effect, Baron J is also saying to the mother… "yes there are real financial consequences for you too, through electing to involve yourself with someone who might not commit to the family you chose to have, either financially or emotionally/practically".

If you look back over the history of Schedule 1 cases, it is easy to see a direction of travel: steadily increasing levels of provision and, surely for applicants, it has been a question of pushing and waiting for the increased level of support that will surely follow.

Simon Sugar – straw-spotting seer?

But now there seems to be something else. Simon Sugar is one of the handful of really experienced barristers spending significant time on this area of work. He referred in his London Resolution talk to Mostyn J's comment in the summer edition of *Family Affairs* and quoted him as saying this:

> "… strangely in nearly 10 years here, I have never done a Schedule 1 case. This is an area which I think needs attention. The present authorities seem to allow a form of quasi-non-spousal maintenance which was surely never the intention of the framers of the legislation."

Patch this together with – an acknowledgment here to Sally Max, one of the other top-line go-to counsel in this work, for her thoughts and insight – Mostyn J's run of cases from *GW v RW* [2003] EWHC 611 (Fam), *Re TW & TM* [2015] EWHC 3054 and now *CB v KB* [2019] EWFC 78 (Fam), and a very different direction of travel emerges from the ever-larger level of provision we have seen till now.

For Mostyn J, clearly the CMS formula is likely to provide the start – and very often also the end – point for the discussion as regards the level of child support. So even for those earning above the £156,000 CMS cap, one simply applies the uncapped formula percentages for most cases.

(Mostyn J suggested at para 49 of *CB v KB* that for those with incomes of up to £650,000 gross income, the formula determines child maintenance levels. That is, for one child only, generating an award of £51,200pa without overnight stays and for two children then £68,270. There is no suggestion in his judgments that a different approach be taken for the Schedule 1 case). Simon Sugar discusses this further in the previous article.

The new era

It is difficult to avoid the sense that we are just one (Mostyn J) judgment away from one of those *SS v NS*-style statements where Mostyn J encapsulates a view of the law with such clarity, brilliance and precision (as ever) that it becomes magnetic guidance for most courts dealing with these cases. Given that this is an area where contested cases are rare and experience may be at a lower level, one can imagine how compelling that summary will be for a judge thirsty for guidance (in the absence of regular case experience or relevant other case-law guidance as to quantum of child maintenance awards).

This *CB v KB* approach may not be entirely consistent with the other authorities, may be a gloss and may not be consistent with the outcomes of other superior-court cases (where the awards are not guided by the CMS formula) but it may well be what is about to land. And I guess that it will land, even though it will mean that children lose out by being brought up in households that are more likely to see the carer returning to work earlier and which are less well-resourced generally.

But if this is right then the era during which the courts seemed to be seeking to progress towards some sort of financial acknowledgment for the carer-parent for the impacts on her life of providing care for the child may well be ending and, as lawyers providing advice, we will need to be clear – and quickly so – as to the new likely landing point of the eventual award.

It may be also that, in consequence, the norm of long and hard-fought cases is about to end too – that might be one positive to come from this new – harsh – clarity.

New uncertainty to manage

Of course there will be an initial period of perhaps even greater turbulence whilst the "new normal" is established.

It seems likely that there would still have to be higher levels of provision for the very early years in many situations, simply because the main carer will not be in a position to return to work to make any sort of contribution, though perhaps Mostyn J does not even anticipate that.

But if we are looking at a clear new approach then (if there were higher provision in the early years) we should presumably anticipate a step downwards in the financial provision for the child to correspond with when the carer can reasonably be expected to be taking a step up in their earnings, and thus ability to contribute. And perhaps this step will be at a much earlier stage than the "starting secondary school", which seemed to be an unwritten guide, certainly in the London courts, a few years back.

And, finally, one is left to wonder whether the other sorts of support that would meet the needs of children in this situation are really in place and whether our wider society is ready for children to be cut loose by this change in the tide.

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An uncapped formula calculator is available from the writer

DB's dozen

David Burrows *@dbfamilylaw*

Family law case summaries: February-March 2020

***Lancashire County Council v E & F* [2020] EWHC 182 (Fam)** (4 February 2020), Lieven J – Judicial concern at the poor level of safeguarding of children amongst Jehovah's Witnesses. Refusal to set aside witness summonses for two elders to whom the mother had spoken. Claims to confidentiality did not extend to elders: the public interest in overriding confidentiality will be strong where best interests of children are concerned.

***Re C (Lay advocates)* [2019] EWHC 3738 (Fam)** (13 December 2019), Keehan J – Order that HM Courts and Tribunal Service pay the fees of lay advocates to assist vulnerable parents and in addition to the funds payable to the parents' lawyers on legal aid. May prove controversial: Parliament has long guarded its right alone to spend taxpayers' money (see eg *K and H (Private law: Public funding)* [2015] EWCA Civ 543, [2016] 1 FLR 754; *HB v A local authority* [2017] EWHC 524 (Fam), [2018] 1 FLR 538, MacDonald J)

Ainsworth v Stewarts Law [2020] EWCA Civ 178 (19 February 2020) – "Points of dispute" for a detailed assessment (r47.9(1) CPR 1998) should be briefly and clearly set out per CPR 1998 PD47 para 8.2: "The receiving party [must] be able to reply to the complaints [and] the court to deal with the issues raised in a manner which is fair, just and proportionate" ([38]).

***HM Attorney General v Akhter* [2020] EWCA Civ 122** (14 February 2020) – A *nikah* wedding, without more, was a non-qualifying ceremony – ie outside the Marriage Act 1949 and could not be brought within the terms of the MCA 1973 by being declared void (s11(a)(iii)). Watch this space for more marital status litigation alongside divorce reform law…

***Haskell v Haskell* [2020] EWFC 9** (13 February 2020), Mostyn J – H had an extravagant lifestyle, but claimed that he was restructuring his business and was therefore without assets. Mostyn J accepted this to the extent of postponing for two years the order for payment of most of the lump sum (£5.181m); ordering arrears of interim periodical payments and capitalised periodical payments over two years (£647,732); and periodical payments for each of three children (£2,000pm per child).

***AB v EM (Jurisdiction: Foreign custody order)* [2020] EWHC 549 (Fam)** (12 March 2020), MacDonald J – The parties' (Lebanese resident in UK) child M (4) is a British citizen, currently in Egypt having been taken there by the father and said to be with paternal relatives. Father said this was entirely lawful, pursuant to an order of a Sharia court. Removal was without the mother's consent. Held: the court has jurisdiction for M; the most appropriate forum to determine issues between the parties was E&W. Summary return from Egypt ordered.

***Re G (A child)* [2020] EWCA Civ 282** – Child (3 months) had unexplained injuries. Interim care order. Mother's application for assessment order, with liberty to the local authority to apply if police disclosure (then awaited) justified it. Peter Jackson LJ: "[16]… this court should give considerable latitude to the judge's evaluation and can only intervene if her conclusion is one that she could not reasonably have reached". For child protection reasons the court felt the judge was wrong and allowed the local authority appeal.

***Re A (Children)* [2020] EWCA Civ 448** (25 March 2020) – Serious injuries to a child. The care order judgment was to be released to the police, *Re C (A minor) (Care proceedings: Disclosure)* [1997] Fam 76, [1996] 2 FLR 725 remained the basis for ordering disclosure under r12.75 FPR 2010 and s98(2) CA 1989.

***Re K (Forced marriage)* [2020] EWCA Civ 190** (21 February 2020) – Forced marriage protection under s63A Family Law Act 1996: (1) What is the court's jurisdiction where the order is on an adult (in this case, 35) who does not lack mental capacity; and (2) the issue is time-limiting (if any) of a passport orders as part of an FMPO. The court continued the FMPO, but allowed the appeal as to the indefinite passport order: review by December 2022.

***Al M (Publication)* [2020] EWHC 122 (Fam)** (27 January 2020), Sir Andrew McFarlane P – Third judgment concerning publication of two earlier judgments: "fact-finding" and "assurances and waiver" (unsuccessfully offered by the sheikh father). Two children, daughter (12) and son (8), of ruler of the Emirate of Dubai and prime minister of UAE. Princess Haya, his former wife, is their mother. They left Dubai and came to England in April 2019. The children were warded on sheikh's child arrangements application. McFarlane P found a variety of misdemeanours by the sheikh in relation to his older daughters and a press campaign against the mother. Extensive reporting was permitted; though privacy remained for the children's private life (s97(2) CA 1989) pending the outcome of the father's continuing contact case.

***Al M (Children)* [2020] EWCA Civ 283** (28 February 2020) – The sheikh's appeal concerning the above was refused. The human rights balance was correctly struck: between Art 8 (the right to respect for private life) and Art 10 (freedom of expression). The court repeated what was said, especially per Lord Steyn, in *Re S (Identification: Restrictions on publication)* [2004] UKHL 47, [2005] 1 AC 593 at [17]. The human rights balancing exercise is akin to an exercise of judicial discretion. It will normally only be capable of appellate challenge if it can be shown to be plainly wrong said the court.

***Taylor v Rhino Overseas Inc* [2020] EWCA Civ 353** (10 March 2020) – Where findings of fact are challenged on appeal, this must not be pleaded in the grounds of appeal; but must be set out clearly in the skeleton argument (PD52C para 5). Grounds must plead that a decision is "wrong" etc; and "(2) The reasons why the decision under appeal is wrong or unjust must not be included in the grounds of appeal and must be confined to the skeleton argument."

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Prenuptial agreements: A decade since *Radmacher* (part 2)

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In the conclusion of a two-part article on the modern law of pre-nups, we explore how the law has developed with respect to pre-nuptial agreements since Radmacher *and reflect on what this may mean for the future*

As discussed in part 1, nuptial agreements with respect to division of matrimonial property on divorce highlight a tension between the desire to respect individual autonomy and the protection of the financially weaker party under the law. As acknowledged by Lord Phillips at paragraph 78 of his lead judgment in *Radmacher v Granatino*:

> "The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best."

In part 2, we consider the approach taken by the English court since *Radmacher* to civil law marital property regimes, to the need for each party to be legal advised and to the treatment of "needs" and "fairness" in this context.

Treatment of marital property regimes

The cases of *Z v Z (No. 2)* [2011] EWHC 2878 (Fam); *B v S (Financial remedy: Marital property regime)* [2012] EWHC 265 (Fam); *AH v PH (Scandinavian marriage settlement)* [2013] EWHC 2873 (Fam), [2014] 2 FLR 251; *XW v XH* [2017] EWFC 76; and *Versteegh v Versteegh* [2018] EWCA Civ 1050 concerned civil law marital property regimes and the weight they should be given when parties divorce in this jurisdiction.

In *Z v Z* the parties had entered into a marriage contract under the "*separation de biens*" regime in France, before two notaries and in accordance with French law, approximately one week before the wedding. There was no dispute that the agreement had been entered into freely by both parties, was in the proper form and would have been binding if the divorce had proceeded in France. It was also accepted that the husband would not have married the wife had the agreement not been entered into. At the time of the divorce, all the assets (c£15m) were characterised as matrimonial property which would, but for the agreement, have been equally shared. Moor J found that when entering into the agreement the wife did fully understand the expectations of it. He rejected all the arguments raised to say that it would not be fair for the English court to uphold the prenuptial agreement in so far as it excluded sharing. He stated that his view might have been different had the agreement also purported to exclude maintenance claims in the widest sense. On

account of the agreement, Moor J confined the wife's award to her needs, generously assessed at £6m (40% of the overall assets). He expressed the view that the requirement of "a full appreciation of its implications" did not carry with it a requirement to have received specific advice as to the operation of English law on the agreement in question. He noted that were this the case then every agreement made

> *"In* XW v XH *Baker J was not satisfied that the wife understood the legal implications on divorce of her election into the* separazione dei beni *regime and found that she was unfamiliar with the language of the regime when it was entered into."*

at a time when living in England & Wales was not on the horizon would be discarded. He said that for an agreement to have influence in this jurisdiction, it must mean that the parties intended the agreement to have effect wherever they might be divorced, and most particularly were they to be divorced in a jurisdiction that operated a system of discretionary equitable distribution. He sounded a note of warning though that usually the parties will need to have received legal advice to this effect and will usually need to have made mutual disclosure for the agreement to have influence.

B v S concerned a Catalonian matrimonial regime of separate property adopted by the parties on their marriage. In considering the correct approach, Mostyn J went the opposite way to Moor J in *Z v Z*. Mostyn J referenced the Law Commission Consultation Paper No 198 "Marital Property Agreements" (11 January 2011) and its conclusions with respect to civil law systems (para 5.38). The Law Commission's view was that any analogy to the European civil law system with respect to prenuptial agreements was flawed because in jurisdictions with a system of immediate community of property or of deferred community, marriage agreements are made against the background of a default matrimonial property regime with a choice to adopt another regime. Conversely, with common law agreements people are opting out of a discretionary regime and into certainty. Mostyn J noted that in *Radmacher* the prenuptial agreement was a bespoke agreement for that marriage which went much further than a mere prescription of a particular property regime. It was thus an agreement which had much more in common with a bespoke "common-law pre-nup". He found that neither party had been aware of the full implications of the agreement or the default matrimonial regime under which they married, and distinguished civil law matrimonial property agreements from negotiated "common law" prenuptial agreement. As a result, he disregarded the agreement entirely in the assessment of the award.

The case of *AH v PH* concerned the treatment of a Scandinavian marriage settlement in the context of a short marriage and where all of the assets were non-matrimonial as they were inherited by the husband prior to the marriage. Moor J held that, subject to the relevance of the marriage settlement, the case was quintessentially one that fell to be considered on the basis of consideration of the wife's reasonable needs, generously assessed. Key to Moor J's decision in this case was expert evidence provided to the court suggesting that the marriage settlement would not be upheld in the country of origin because it included an advanced agreement for the distribution of assets, which was not permitted. Although not vital to the validity of such an agreement, the marriage settlement had also not been judicially registered in the country of origin. Moor J concluded that where a party was not fully aware of the implications of a marriage settlement, because they lacked all the material information, it would depend upon the circumstances of the case as to how much weight the agreement should be afforded. Moor J concluded that even where it would not be fair to hold a party to a nuptial agreement in all respects, it may still be right to pay some regard to the agreement as one of the circumstances of the case. Finding that the wife did not have a full appreciation of the implications of the marriage settlement, Moor J held that it would be disregarded in most respects but that it was relevant in so far as it protected the husband's inherited wealth, which was only to be invaded to meet the wife's housing needs and her need for capitalised maintenance. This was also a case where Moor J accepted that in the absence of the marriage settlement he would likely have reached the same conclusions by virtue of the short marriage, the age of the parties and the origin of the husband's wealth. The judge made a capital award to the wife of £7,775,000 on a clean-break basis and on the basis that the husband would have a charge on the wife's London property in the amount of £2m, to be exercisable on Mesher terms, when both the children had completed tertiary education. To put this in context, the husband was the main beneficiary of trusts worth around £76m.

In *XW v XH* the parties had signed an Italian *separazione dei beni* agreement at the time of the marriage. During the marriage the husband's assets exceptionally increased from ordinary levels to £500m. Baker J agreed with and adopted the observations made by Mostyn J in *B v S* and by Moor J in *AH v PH* in respect of a civil law matrimonial property agreement being different in character and objective to a "common law" prenuptial agreement. The court accepted that there would be cases where it would be appropriate for the court to uphold an agreement contained in the election of a matrimonial property regime but considered that in many more cases it would not be fair to hold the spouse to such an agreement. Baker J was satisfied that the wife understood in basic terms the nature and effect of the *separazione dei beni* regime. However, he was not satisfied that she understood the legal implications on divorce of her election into the regime and found that she was unfamiliar with the language of the regime when it was entered into. Baker J held that in the circumstances it would be manifestly unfair to hold the wife to the agreement and therefore attached no weight to the agreement in determining the division of the matrimonial assets.

The Court of Appeal considered marital property regimes in *Versteegh*. In *Versteegh*, the parties signed a Swedish marital agreement the day before their wedding which took place in Sweden. The wife argued at first instance that while she had been willing to sign the pre-marital agreement that she had thought it only covered non-matrimonial assets, she had not received legal advice and claimed that she had not even read through the agreement before signing it. The judge at first instance found that throughout the marriage the wife had known of and had understood the impact of the pre-marital agreement. This finding was not appealed. On appeal, King LJ held at [65]:

> "In my judgment, when an English court is presented with a PMA such as the present one; signed in a country where they are commonplace, simply drafted and generally signed without legal advice or indeed disclosure, it cannot be right to add a gloss to *Radmacher* to the effect that such a spouse will be regarded as having lacked the necessary appreciation of the consequence absent legal advice to the effect that some of the countries, in which they may choose to live during their married life, may operate a discretionary system."

The Court of Appeal preferred Moor J's analysis in *Z v Z* rather than the Mostyn J analysis in *B v S* in this respect. The Court dismissed the wife's appeal and upheld the Swedish pre-marital agreement. The Court of Appeal in *Versteegh* emphasised the "sea change" that *Radmacher* had represented when it came to the court's approach to prenuptial agreements: not only are prenuptial agreements no longer considered contrary to public policy, but where a party has a full appreciation of its implications, the court should now give effect to such an agreement, unless it would be unfair to do so.

Key to the court upholding a marital property regime agreement is that the spouses understood the full implications of the agreement. For this understanding to be found to exist, both parties do not have to have been legally advised and in particular do not have to have been advised on the implications of the agreement in different jurisdiction where they might live during their marriage. Where the agreement entered into is signed in a country where the signing of such agreements is commonplace, drafted simply and where such agreements are commonly signed without legal advice or disclosure, the decision in Versteegh suggests that they are likely to be upheld. Noting Baker J's decision in *XW v XH*, it is also likely to assist if the agreement is drafted in a language that both parties are familiar with and understand. While it appears following *Radmacher* and *Versteegh* that a lack of legal advice will not necessarily be fatal to a court upholding a civil law marital agreement, it cannot be escaped that the receipt of independent legal advice will provide clear evidence of a full understanding and is advisable wherever possible.

Legal advice

The cases of *V v V* [2011] EWHC 3230 (Fam); *Kremen v Agrest (No.11) (Financial remedy: Non-disclosure: Post-nuptial agreement)* [2012] EWHC 45 (Fam); *WW v HW* [2015] EWHC 1844 (Fam), [2015] All ER (D) 167 (Jul); *KA v MA (Prenuptial agreement: Needs)* [2018] EWHC 499 (Fam); and *Ipekci v McConnell* [2019] EWFC 19 concerned the weight that should be attributed to bespoke nuptial agreements in light of legal advice received. In *Radmacher*, Lord Philips' approach to legal advice was that it was "desirable" but not essential. These cases emphasise the need for both parties to understand the implications of the agreement entered into on divorce. Ensuring both parties have received appropriate legal advice can assist in protecting agreements from challenge later on.

V v V concerned a prenuptial agreement entered into three months before the marriage of an Italian investment banker and Swedish homemaker. It was drawn up by a Swedish lawyer who was known to the wife's family and provided that all property owned by the husband at the time of the marriage (value circa £1m) would be excluded from future sharing, as would all property that either party inherited or received under a will, or as a gift. On appeal, Charles J found that at first instance the judge had erred in law by adopting a pre-*Radmacher* approach to the prenuptial agreement. He noted that, following *Radmacher*, the court is required to respect individual autonomy where there is a valid agreement, even where this might alter what might otherwise have been considered to be a fair result. Charles J found that – albeit the wife had received no advice concerning the agreement or as to its effect in England & Wales (where the parties lived at all material times) – she had understood the agreement's purpose. The parties had intended for it to be effective and there were no vitiating factors. In light of the prenuptial agreement there should be a charge back in the husband's favour to reflect the encroachment into his personal property (as described in the prenuptial agreement) that was required to satisfy the basic housing requirement of the wife and the children. The wife's needs-based award for a home should be on Mesher terms rather than awarded outright.

Prior to the marriage in *WW v HW*, the parties entered into a bespoke prenuptial agreement. At the time of the marriage the wife had substantial inherited assets of c£16m. The husband asserted that he had assets of a little over £1m but was later found to have deliberately misled the wife and that he had significantly less at the time of the marriage. This conduct was taken into account in the income award. The husband asserted that he did not have a full appreciation of the implications of the agreement when he signed it because on being advised in 2002 that prenuptial agreements were not legally enforceable, he had "switched off". The court rejected this submission and found that both parties, each having been advised by well-known specialist family solicitors, understood the agreement and intended it to be binding. Applying *Radmacher*, the court had no difficulty in finding that the agreement should be given effect and that significant weight should be attached to it. The court in this case suggested that when assessing a party's needs a valid agreement "may feature prominently as a depressing factor" in the award. On the facts of this case, the judge granted the husband a housing fund, subject to the terms of the prenuptial agreement which

provided him with a lifetime grant and reversion of the property to the wife's estate upon his death and a one-off balancing income payment of £215,000.

"In Kremen v Agrest *the wife had not freely entered into the agreement with a full appreciation of its implications; there was a material absence of independent legal advice and disclosure."*

In *Kremen v Agrest* the husband was found to have pressured the wife to enter into a post-nuptial agreement that was highly disadvantageous to her. The wife had not freely entered into the agreement with a full appreciation of its implications; there was a material absence of independent legal advice and disclosure. Mostyn J held that in the circumstances it would be "grossly unfair" to hold the wife to an agreement which deprived her of her fair share of a fortune estimated at circa £100m (to the formation of which she had equally contributed), did not provide for her reasonable needs and prejudiced the needs of the children. In these circumstances the agreement was accorded no weight whatsoever and was discarded from the assessment of the fair award to be made in the wife's favour.

In *KA v MA* the wife tried to argue that she could not be taken to have intended to be bound by the terms of the agreement when she signed because her solicitors had told her that it was unenforceable as a matter of English law. As in *WW v HW*, the court rejected this submission. This was a second marriage for both parties, they had each received legal advice (the wife having ignored legal advice not to enter into the agreement) and had intended to be bound by the agreement's terms. The husband's position that there would be no marriage without the prenuptial agreement was not found to have amounted to duress or exploitation of a dominant position. Roberts J concluded that the assessment of the wife's housing and income needs must reflect the fact that she had agreed to restrict the ambit of her financial claims should the marriage end in divorce by the prenuptial agreement, and due weight was given to this. The wife's housing need was assessed in the global sum of £1.35m and her income needs by a Duxbury fund of just under £1.6m.

In *Ipekci* Mostyn J refused to uphold a prenuptial agreement that was subject to New York state law. The husband, a hotel concierge, was not found to have had a full appreciation of the implications of the agreement signed with a wealthy American heiress. An English solicitor, who had previously advised the wife on her divorce, had been sourced to give the husband independent legal advice but this solicitor had no competence to advise on New York law. The husband was found therefore to have received no legal advice at all about the impact of New York law on his rights. As the solicitor had previously acted for the wife, this was also found to be a clear situation of apparent bias. The court also accepted expert evidence which suggested that the agreement suffered from a fatal defect under New York law, and in New York would have "minimal weight, if any". In these circumstances it was thought that it would be wholly unjust to attribute weight to the agreement when under the law that the parties elected it would be afforded no such weight. Finally, the effect of the terms of prenuptial agreement was that the husband was to get nothing. The court determined the case on the basis of needs, awarding the husband a lump sum of £1,333,500, which included a Duxbury fund of £445,500 and £750,000 to fund a house purchase, in respect of which £375,000 would be subject to a charge-back to the wife.

What this body of cases highlight is how desirable legal advice for both parties resulting in a full appreciation and understanding of the implications of an agreement is, to take Lord Phillips at his word in *Radmacher*. While legal advice may not be essential, the receipt of legal advice will weaken any argument that the implications of an agreement were not fully understood. As can be seen from *KA v MA* and *WW v HW* receipt of legal advice can also protect an agreement from an argument that a party expected that the agreement would not be legally enforceable. What can be taken from the decision in *Ipekci* is that in circumstances where the financially stronger party is paying for the financially weaker party to receive legal advice that this advice should be independent and must ensure that that party leaves with a full understanding of the impact of the agreement in the jurisdiction where the agreement is to take effect / under whose law it has been drafted. Unlike in *Versteegh* where the wife had not received advice about the impact of the agreement in other jurisdictions, in *Ipekci* the husband had not received advice as to the effect of the law that the agreement was itself purportedly subject to.

Needs and fairness

The treatment of "needs" and "fairness" by the court when it comes to nuptial agreements is an area where the law seems to have moved some distance from the decision in *Radmacher*. In *Radmacher*, Mr Granatino was left in what could be argued as a position of real need and able only to make a Schedule 1 claim. The Supreme Court considered Mr Granatino's future earning capacity in light of his qualifications and experience and stated at [119]:

> "… the question of the fairness of the agreement can often be subsumed in the question of whether it would operate unfairly in the circumstances prevailing at the breakdown of the marriage, and this is such a case. Had the husband been incapacitated in the course of the marriage, so that he was incapable of earning his living, this might well have justified, in the interests of fairness, not holding him to the full rigours of the ante-nuptial agreement. But this was far from the case. On the evidence he is extremely able, and has added to his qualifications by pursuing a D Phil in biotechnology."

In *Kremen v Agrest*, Mostyn J quoted from paragraph 119 of *Radmacher* and following this stated that "need" may

be interpreted as "that minimum amount required to keep a spouse from destitution" (at [72]). However, in *Ipekci* Mostyn J appears to move away from his previous understanding of *Radmacher* and stated at [27]:

> "I do not take the language used by the Supreme Court, namely 'predicament of real need' as signifying that needs when assessed in circumstances where there is a valid prenuptial agreement in play should be markedly less than needs assessed in the ordinary circumstances. If you have reasonable needs which you cannot meet from your own resources, then you are in a predicament. Those needs are real needs."

This understanding of a predicament of real need appearing to contradict the decisions both in *Radmacher* and in *Kremen v Agrest* with respect to an assessment of needs where there was a valid prenuptial agreement.

The cases of *Luckwell v Limata* [2014] EWHC 502 (Fam), *DB v PB (Pre-nuptial agreement: Jurisdiction)* [2016] EWHC 3431 (Fam) and *Brack v Brack* [2018] EWCA Civ 2862 concern valid nuptial agreements but where an assessment of needs nevertheless required that non-matrimonial property be encroached upon. In the case of Brack the Court of Appeal held (setting aside a decision of Mr Justice Francis that by virtue of a valid pre-marital agreement he was unable to make an order in respect of the wife's unmet needs) that "the fact of a valid prenuptial agreement does not necessarily (but may) lead inexorably to a solely needs-based outcome" (at [78]). Case law since *Radmacher* now appearing to provide that even where a valid prenuptial agreement exists, the court may step in to alleviate unfairness and is not limited in these circumstances to only meeting needs.

In *Luckwell* a prenuptial agreement was entered into shortly before the marriage and there were two subsequent postnuptial agreements concerning gifts from the wife's wealthy family. The prenuptial agreement set out that the parties intended to retain separate property and would not make claims against each other's property. It was common ground that without the original agreement there would have been no marriage and that without the supplement agreements there would have been no gifts provided by the wife's family. When the matter came before Holman J neither party was working and the total assets in the case amounted to the equity in a Connaught Square property of £6.74m held in the wife's sole name and gifted to her by her family under one of the postnuptial agreements. Holman J, finding no vitiating factors, considered that great weight should be given to the agreements. However, a weakness or unfairness of the agreements was that they provided nothing at all for the husband, irrespective of how long the marriage lasted or how great his need was on divorce. At the time of the proceedings, the husband was found to be in a "predicament of real need" while the wife enjoyed a "sufficiency or more". Holman J reminded himself that the court must be "scrupulous to avoid gender discrimination or gender bias… or any stereotypical view that a wife may be dependent upon her husband but not vice versa". He also considered the husband's age (compared to Mr Granatino) and the fact that his capacity to make provision for his old age was in doubt. As a result of the husband's needs, the court found that the wife's property (as set out in the agreements) would have to be invaded to provide for the husband. This avoiding the children seeing their mother living in relative luxury and their father living in relative penury. The wife was ordered to purchase a property worth £900,000, from the sale proceeds of Connaught Square,

"As a result of the husband's needs, the court in Luckwell *found that the wife's property would have to be invaded to provide for the husband. This avoiding the children seeing their mother living in relative luxury and their father living in relative penury."*

in which the husband would live until the youngest child turned 22 years. At that point, the property would be sold and divided 55% to the husband and 45% to the wife. This would allow the husband to purchase a smaller home. The wife was also ordered to provide the husband with £300,000 to furnish the home, buy a car and clear debts.

DB v PB concerned two Swedish and one American prenuptial agreements entered into during a 20-year marriage. The agreements contained a property clause whereby each party was to retain his or her separate property on divorce, meaning that the wife would not be entitled to any capital payment from the husband. Of the total assets valued around £10.86m only a half-share of the former matrimonial home was in the wife's name and this was not considered to be sufficient to meet her needs. The wife had been advised by a lawyer not to sign the American agreement. The wife argued that the agreements should not be upheld, on the basis of a misrepresentation by the husband that they would never be implemented, and unfairness. The court found no vitiating factors with respect to the agreements and that the wife had received independent legal advice which she had chosen to ignore. The court did accept that on three separate occasions the wife had signed an agreement imagining it to be irrelevant and its provisions to have no impact. A prorogation clause in each of the agreements was valid within the Maintenance Regulation (EC No 4/2009), and the court's jurisdiction to make orders for maintenance was therefore excluded and was confined to dealing with rights in property arising out of the matrimonial relationship. Francis J upheld the agreements but found that it would be unfair after a marriage of this length, in light of the wife's contributions and the children, for the wife to be left with almost nothing and in a predicament of real need while the husband was left with almost everything. While it was the court's duty to step in to alleviate unfairness, this did not mean restoring the parties to the position that they would have been in absent the agreement. He held that the husband's separate property was required to be invaded to meet the housing needs of

the wife and children and made a Schedule 1 to the Children Act 1989 order in conventional terms settling a property on the children until the end of their tertiary education and allowing the wife to invest her share of the equity in the former matrimonial home to save for the future. The £95,000pa awarded to the wife as maintenance pending suit earlier in the proceedings was seen as a fair sum to order for the wife's carer's allowance and to meet the children's needs.

In *Brack* the parties had entered into three separate prenuptial agreements. These agreements provided first that each party retain the property that each acquired independently prior to, or during, the marriage; second, that there be no maintenance following separation; and the third specified jurisdiction (the City Court of Stockholm, Sweden). At first instance, Francis J found that the three prenuptial agreements were valid, that there were no vitiating factors but that they were unfair and insufficiently provided for the wife's/the children's needs. On this basis Francis J limited himself to meeting the wife's needs only when making his award. The wife appealed and the Court of Appeal held that Francis J had been wrong to restrict his discretion in applying the section 25(2) MCA 1973 factors after finding that there was a valid, yet unfair, prenuptial agreement. Lady Justice King clarified that the existence of a valid prenuptial agreement does not necessarily lead to a needs-based outcome. The effect of *Z v Z* and *Luckwell* did not mean that the wife had inevitably "lost" her sharing claim by reason of the prenuptial agreement. A prenuptial agreement remains as one of the factors to balance in the round and the court remains under an obligation to take into account all the factors found in s25(2) MCA 1973. King LJ stated that while a valid prenuptial agreement that contracted out of a division of the assets based on sharing might make a settlement limited to a provision of needs more likely, that outcome is not prescribed in every case. She also noted that even where the court considers a needs-based approach to be fair, the court (as in *KA v MA*) retains a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs.

Conclusion

A decade after *Radmacher*, the court's treatment of prenuptial agreements on the breakdown of a marriage remains uncertain. While they are no longer considered to be contrary to public policy, the treatment of them by the court does not appear to have moved much further forward that that they are one of the factors for the court to balance in the round when determining a financial application. Where there are no vitiating factors and the parties entered into the agreement with a full appreciation of the implications on divorce, the court on the one hand appears to be emphasising respect for agreements reached whilst assessing the financially weaker parties' "needs" irrespective of the agreement in what can only be described as a fairly elastic way. This elasticity is arguably not wholly dissimilar in character from the court's discretion where there is no valid agreement and does seem to fly in the face of the autonomy that nuptial agreements seek to provide couples.

It is clear that a bespoke agreement reached between parties is likely to carry more weight than an agreement that is "off the peg" or even potentially a civil law matrimonial regime. The authorities emphasise in respect of matrimonial regimes that the parties must have intended it to have effect wherever they divorced. In *Versteegh* the Court of Appeal upheld a Swedish matrimonial regime in circumstances where it was culturally usual for parties to enter into such agreements and where it was held that the wife fully understood the purpose of it. This is distinguishable from the common law agreement that was entered into in *Ipekci* where the husband was found not to have had a full understanding or appreciation of the implications.

It remains impossible to advise a client with any certainty as to the extent that an agreement will be upheld by the court dealing with the financial proceedings. A clear touchstone and thread running through all the authorities is achieving fairness at the time of separation or divorce. Even where the court finds that great weight can be placed on an agreement, such as in *Luckwell*, the court will not allow a party to be left in a predicament of real need. The courts will, however, consider how Mesher orders or other charges over property might be used to meet needs and achieve fairness in light of the agreement. All the authorities emphasise the need to ensure that both parties have a full appreciation of the implications of an agreement and intend to be held to it wherever they divorce. As set out in our tips in the previous issue, it may be worth recording this understanding as recitals to an agreement. While *Radmacher* suggests that legal advice is only "desirable" and not essential, *Ipekci* demonstrates the importance of relevant and appropriate legal advice being obtained and how this might protect an agreement. This, arguably, is but another criterion of fairness. *Brack* confirms that where there are valid agreements, awards are not limited to meeting needs. While a needs-based award may be the more likely outcome, King LJ noted the court's power to assess needs generously in the appropriate case.

Prenuptial agreements are now very much within the public's general consciousness. For many couples without assets in excess of needs, prenuptial agreements will continue to be inappropriate. For these couples, an awareness of nuptial agreements may simply prompt a frank discussion about finances in advance of a wedding. For other couples, prenuptial agreements are an increasingly attractive means of asserting some autonomy over marital finances in the event of a future divorce or separation.

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Guides to Good Practice update

Debra Frazer *Gaby Hardwicke and Resolution Standards Committee*

The Good Practice Guides (GPGs) and Guidance Notes provided by Resolution have evolved and grown over the years so that there are currently 16 Guides to Good Practice, which can be accessed by both members and the public alike, as well as 12 Guidance Notes which are only available to members and which offer advice on practice and procedure.

Their use is enshrined in the Code of Practice:

> "Resolution membership is about the approach we take to our work, this means Resolution members will: … Use the Resolution Guides to Good Practice in my day-to-day work."

They were also specifically referred to by the then President of the Family Division, Sir James Munby, sitting in the Court of Appeal, in *Owens v Owens* [2017] EWCA Civ 218, where he said, at paragraph 96 of his judgment:

> "Resolution in its 2016 Guide to Good Practice on Correspondence has, as an example of good practice and how correspondence can be constructive, a form of letter beginning divorce proceedings…"

As a result of the growth of the GPGs, and the potential for their continued expansion, Resolution has decided to overhaul them completely so that there are now seven "core" GPGs, which represent the key elements of the Code of Practice, ie putting children first and adopting a non-confrontational approach to family disputes.

Therefore, the new GPGs are:

- Correspondence
- Communication
- Working with litigants in person
- Working with clients
- Social media
- Domestic abuse cases
- Working with vulnerable clients

These are available both to members as well as the public.

In addition, we now have a number of Guidance Notes that are only available to members, as follows:

- Working with the Bar in family cases
- Fertility cases
- Cohabitation cases
- Funding options
- Drafting documents
- Female genital mutilation
- Service of documents
- International issues
- Referrals to contact centres
- The use of video and other technology
- Safeguarding children and young people
- Instruction of accountant experts to assist with tax and company valuation questions
- Helping clients put children first
- Surrogacy
- Court bundles
- Preparing pre- and post-marital agreements
- Disclosure in financial order cases
- Instructing experts in proceedings involving children
- Documents following the Family Procedure Rules 2010
- Instructing experts in applications for a financial order
- Dealing with Financial Dispute Resolution Appointments

Resolution has also recently published the following new Guidance Notes:

- Modern Families
- Religion & Family Law

All of the GPGs and Guidance Notes can be found on Resolution's new website, *www.resolution.org.uk*

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MEMBER NEWS

Hampshire law firms merge

Hampshire law firms Phillips Solicitors and Brain Chase Coles have merged. The combined firm is now known as Phillips Solicitors incorporating Brain Chase Coles.

The firm will be based at Phillips' Town Gate offices in London Street, Basingstoke.

Understanding our community, part 2

Jo O'Sullivan *O'Sullivan Family Law and interim chair of the Resolution EDI Committee*

With the results of our all-member diversity survey now analysed, a clearer picture is emerging of how we can make Resolution as inclusive an organisation as possible

As interim chair of the Equality, Diversity & Inclusion Committee (EDI), I wrote in the July/August 2018 edition of *The Review* about discrimination faced by BAME, LGBT and disabled people, and how important it is for Resolution to understand the make-up of our membership so we can be an inclusive, welcoming and supportive orgainsation to current and future members.

The EDI Committee is pleased to report that, following the all member diversity survey, we now know a whole lot more about the Resolution community and are beginning to shape recommendations for how we can make improvements.

The survey was sent to our 6,500 members and 3,100 members anonymously completed it – this is an overwhelming 48%. Such a significant number of respondents means that we can be confident that we have a statistically strong set of data to rely on. 75% of our members are solicitors and so we have compared our data with the Solicitors Regulatory Authority (SRA) and, where appropriate, the Office for National Statistics Labour Force Survey to ensure we get the best possible comparison.

I want to share with you some of the key highlights from the survey:

- We are 73% female and 27% male. This compares to the general solicitor population which is 48% female and 52% male.
- Just under half of us have caring responsibilities for children, the elderly or someone with a disablility.
- 7.5% of us identify as having some form of disability compared with 12% of workers in the UK generally and 3% of solicitors.
- The ethnic background of Resolution's membership broadly reflects the ethnic background of the whole UK workforce, it does not, however, reflect the population of lawyers. Resolution members are disproportionately white.
- Over 30% of members identified as having no religious affiliation, 53% of members state they are Christian. Compared with the population of all lawyers, those affiliated with the Muslim faith are most under-represented in the Resolution membership. To a lesser extent, so too are the numbers of those who told us they are Hindu, Buddhist and Jewish.
- Our members are a bit older than the SRA-held data too – with just 20% of us aged between 25 and 34, compared to 29% of the lawyer population generally.
- The lesbian, gay, bisexual and transgender (LGBT) membership is also similar to the general population; but more of our members are gay or bisexual than across the wider lawyer population

The EDI committee, with 12 newly recruited members swelling our numbers, met on 9 December 2019 and began to consider the following:

1) What are the steps we need to take to encourage younger practitioners to join Resolution?
2) What can we do to support members with disabilities?
3) How can we ensure Resolution membership is attractive and inclusive to members from all ethnic backgrounds and increase their representation on our committees and working groups across the country?
5) Can we do more to support our members who are carers and improve access to the services we provide?
6) How can we become more involved in sector-wide initiatives to improve the diversity of our organisation to

benefit current and future members and the clients they serve?

As a practical and essential first step Resolution is working with The Diversity Trust to roll out training to the Resolution staff team, the National Committee, chairs of all Resolution's Committees, and, of course, the EDI Committee.

During 2020 the EDI Committee will make recommendations to National Committee based on the survey. With the staff team and external support we will draw conclusions to help shape a strategy with activities to create as inclusive an organisation and membership as we possibly can.

I'm delighted to tell you that to help practitioners working with minority groups Resolution has also published Guidance Notes covering disability, modern families, and religion and culture.

"Resolution is working with The Diversity Trust to roll out training to the Resolution staff team, the National Committee, chairs of all Resolution's Committees, and, of course, the EDI Committee."

The EDI committee will update you as our work progresses. Your thoughts and views have and will continue to shape our work, so please do get in touch if you'd like to know more or have any ideas or suggestions.

jo@osullivanfamilylaw.com

Member news

Member news stories should be emailed to euan.mackinnon@resolution.org.uk

Me? A district judge? Really?

Howard Kemp, district judge

Let's think this through. You studied hard to get your degree. You studied hard to pass your professional exams. You worked your socks off as a trainee, being at the beck and call of your firm and principal to lug bundles to and from court, to sitting in on client meetings then being given carrier bags of copying, before being given the responsibility of your own clients, and either straightforward court applications or being thrown to the wolves (or at least a DJ) for those which no right-minded qualified solicitor would touch.

Your family and friends looked on proudly as you earned the right to be called a Solicitor of the Supreme Court, and you basked in that limelight.

And then the real work began – juggling caseloads, acting as advisor, tissue supplier and motivator to those that sought your learned advice and guidance. Whilst all the time, subconsciously picking up on the strengths (and weaknesses – maybe) of the members of the judiciary in front of whom you may have trembled when you started out, before growing in stature and confidence and feeling bold enough to challenge them in their decision making.

Time to take stock? Question how all that experience and knowledge can be channelled in other ways?

I will tell you. Tackle the (sadly tortuous) application form and seek appointment as a deputy district judge.

What lies ahead can be a rewarding and challenging career as you become a decision maker, not a decision advisor. Learning something new every day. Seeing things very much from a unique perspective but applying your skills in ways that may not have been obvious earlier in your career.

Be under no illusion however. It can be demanding work with a great deal of mental gymnastics to be had, which though obviously not physical, can still be exhausting.

If you are appointed that can lead to a certain amount of kudos to your firm, with the added benefit of CPD points without charge when undertaking training!

There is a recruitment crisis in the judiciary, and particularly at District Bench level. There may be many factors behind that but one is common – the misguided belief that "I could not do that".

You. Yes. Really.

DJ.Howard.Kemp@ejudiciary.net

Patrick Myers introduces the DWP's Reducing Parental Conflict programme

I am really pleased to be given the opportunity to share with you the work that I am currently involved with at the Department for Work and Pensions (DWP). I am an Assistant Director from Dorset Council Children's Services Department seconded to work on the government's Reducing Parental Conflict programme, and I want to share with you the aims of the government's work to reduce parental conflict, as well as the scale of the issue. Having been involved in the early pilot work with DWP and now the roll out of the national programme, I know that the programme has been built around strong evidence and as such will have a clear impact on family dynamics and improve children's lives and outcomes.

Inter-parental conflict that is frequent, intense and poorly resolved is obviously not good for children and can result in negative outcomes that can be felt across the life course. It can affect their early emotional and social development, their educational attainment and later employability – limiting their chances to lead fulfilling, happy lives.

Our goal is to reduce conflict between parents, and we know that this is important whether the child's parents are together or separated. We know that sometimes separation can be the best option for a couple, but even then, continued co-operation and communication between parents is better for their children.

Backed by up to £39m, the Reducing Parental Conflict programme is encouraging councils and their partners across England to integrate evidence-based services and approaches to addressing parental conflict that work for their local families.

The government has already announced plans to transform the way we think about and tackle domestic violence and abuse, and the focus of the Reducing Parental Conflict Programme is on conflict below that threshold. Parental conflict can range from a lack of warmth and emotional distance, right through to swearing and shouting.

And we also know that this is a significant issue. Where a child lives with both parents in the same household, more than one in ten children have at least one parent who reports relationship distress – and children living in workless families are three times more likely to experience parental conflict than in families where both parents are in work.

The poor outcomes for children exposed to parental conflict can also lead to increased pressure on public services, and yet we know that support to reduce parental conflict is not yet fully reflected in the local services offered to families.

Early pilot work with 12 local authorities has informed the various strands of the programme. There are four primary strands.

- Funding to support strategic leadership across local authorities' footprints to make effective plans with partners to address the issues related to inter-parental conflict.
- Practitioner training across all 149 local authorities to equip frontline staff with skills and knowledge to help families where conflict is evident.
- Four areas (31 local authorities) piloting a range of interventions to reduce inter-parental conflict with the express intention of improving children's outcomes.
- Specialist training in those pilot interventions should they prove to be effective.

"The Reducing Parental Conflict programme is encouraging councils and their partners across England to integrate evidence-based services and approaches to addressing parental conflict that work for their local families."

In addition, the department is collaborating with Public Health England and the Department for Health and Social Care on the Innovation Fund for Children of Alcohol Dependent Parents, which has provided nine areas with support to work in this challenging area.

And our £2.2m RPC Challenge Fund has funded 10 innovative projects to support families who face particular disadvantages, as well as digital support to reduce parental conflict.

For further information, please contact me.

patrick.myers@dwp.gov.uk

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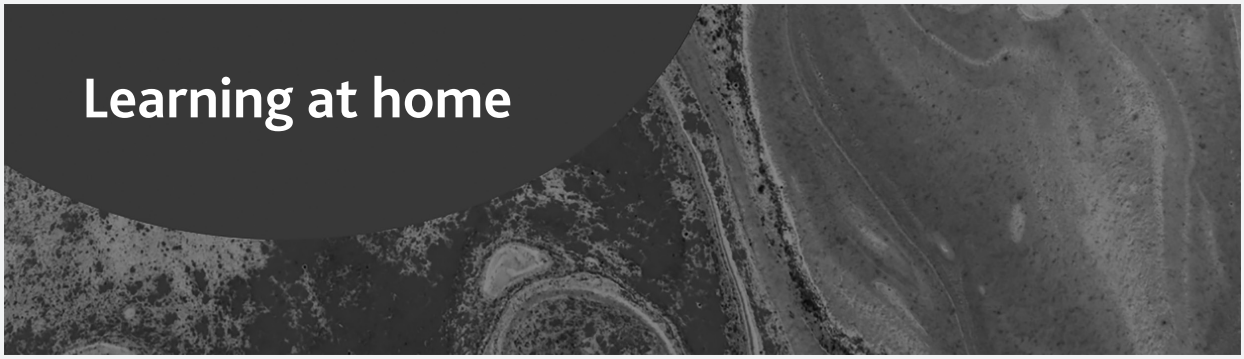
Training News

Visit www.resolution.org.uk/trainingandevents for further details of Resolution training courses, conferences and packs



We bring together a selection of digital resources and learning materials that can be accessed to learn at home

With the current situation following the coronavirus outbreak, we've had to postpone or cancel our face-to-face courses and events in the first half of this year.

We aim to use this challenging time as an opportunity in our ongoing exploration of how to best use digital technology to deliver training and learning.

We've created a dedicated page for this called 'Learning at home': *resolution.org.uk/learning-at-home*

You'll find upcoming online courses and webinars – along with recordings and materials from previous events.

Please take a look and let us know what you think.

Webinar: Remote access and paperless working

This webinar is designed to share with you the skills the speakers have learned when working paperlessly and when getting to grips with a remote working platform.

This webinar was run on 6 April 2020 by FLBA's Paperless Working and Technology Sub-Committee: Darren Howe QC, Matthew Maynard and Elizabeth Isaacs QC.

It addresses two urgent issues:

a) Remote working using video conferencing, and

b) Paperless working, specifically the skills required to comply with the Financial Remedies Court Ebundles Protocol issued on 3 March 2020 and the ebundle requirements of the Remote Family Court protocol issued on 23 March 2020.

Webinar: Moving forward with arbitration

Part 1: Arbitration – how does it actually work in practice – a step-by-step guide

Suzanne Kingston and Karin Walker take you through a simple step-by-step guide to make everything clear for both financial and children arbitration.

Part 2: Negotiate, mediate, arbitrate – the Certainty Project

Nadia Beckett, Julian Bremner, Margaret Kelly and Karin Walker explain all about this innovative way of working and how it can assist your practice at this time of change.

Webinar: Access to family justice internationally during the Covid-19 crisis

This webinar considered family court closures internationally across six jurisdictions in the response to Covid-19 and how each is providing access to justice.

Chaired by Sarah Lucy Cooper, speakers include: Wong Kai Yun – Singapore, David Truex – Australia, Diana Carrillo – Spain, Patricia Williams – Argentina, Natalia Ołowska-Czajka – Poland, and Fernanda Machado Moreira – Brazil.

All webinar recordings can be viewed on the Resolution website.

If you'd like to sign up to Learn Resolution visit: learn.resolution.org.uk