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An honour and a privilege

Grant Cameron National Chair

It's a huge privilege to take over as chair of Resolution in this milestone anniversary year. 40 years old, well that's quite some achievement!

I have often wondered if, back in 1982, John Cornwell and the other pioneering 30 solicitors realised the major impact their idea would have on people like us in the four decades that followed and how their actions have helped improve the practice of family law, encouraging a constructive resolution of family disputes.

Remaining central to our ethos today, as it did 40 years ago, is the Code of Practice, adopted by our members, embodied in the Law Society Protocol and incorporated throughout our good practice guides. The Code has fundamentally changed the way family law is practised with a positive effect on individuals, couples and their children.

Over the last 40 years Resolution has achieved some major milestones – no-fault divorce, the introduction of new and innovative practices, the development of YRes and the continued development of our committees who offer a breadth of experience, producing exceptional guides and putting on invaluable events to increase our members' knowledge. It is also important to highlight that ED&I and wellbeing quite rightly have secured our central focus.

Resolution membership has been the backbone to my career. I have been a member of Resolution since the SFLA days, and it is with tremendous pride I have seen first-hand how the organisation has grown, changed and met the various challenges head on.

Sadly, we hear all too often of many stories of prolonged court battles and lengthy delays that many of our clients have had to experience, and we know it should not be like this, but as John Cornwell believed 40 years ago ... there must be "a better way".

My goal, as chair, is to campaign to ensure that as many families as possible get to benefit from practical, helpful, early legal advice; a goal shared by our current President. I also hope in my time as chair we will be able to forge stronger links with the FLBA and the ALC, amongst others.

I am excited by the more holistic approach taken by professionals these days and believe that will go from strength to strength and will be constantly developed.

One of the things I enjoy most about being a member of Resolution is the high level of support and encouragement we

can offer one another. As family professionals we understand the demands and pressures of our work and through the work of the organisation we can share our experiences. Last month's National Conference demonstrated this, highlighting the importance of taking a step back and applauding our efforts as a society in making divorce less confrontational, supporting professionals, and helping families find that Better Way.

None of this work would be possible without the support of our amazing National Committee members, and I'd like to thank all of them for their continued work to ensure the ship is steered in the right direction. In particular, I'd like to thank Helen Tulloch, Edward Cooke and Bina Modi for all of their hard work and commitment in their terms of service on National Committee.

I'd also like to congratulate Oluwapelumi Amanda Adeola, Laura Clapton and Marc Etherington on their election to National Committee, as well as extending a special welcome to our new vice chair Melanie Bataillard-Samuel, who I am looking forward to working alongside over the next couple of years.

It would be completely remiss of me at this stage to overlook our immediate past chair Juliet Harvey. Juliet joined Resolution in 2002 and we have shared similar journeys through Resolution, serving in different roles and on various other committees. Juliet served more time as chair than any of her predecessors, which is an achievement to be acknowledged.



New national chair Grant Cameron receives his crown, flanked by outgoing chair Juliet Harvey (left) and CEO Colin Jones (right)

As will be known by many of you, as well as her day job Juliet undertook so much work involving the court and portals, attending the various court forums and keeping in regular contact with the President, other members of the judiciary and key members of HMCTS.

But much more than court work, Juliet has been one of our most approachable and accessible chairs, and as our Chief Executive recently remarked, where the organisation finds itself today is in no small part down to Juliet's hard work, commitment, and dedication – so thank you, Juliet.

My key message in my first column as chair is that Resolution is not some distant body to be observed from afar. Resolution is its members. We have had an amazing first 40 years, and the challenge now is to ensure we deliver a successful future for all those working in the family justice system. The Code of Practice lives and breathes within each of our members. We continue to carry the flame lit 40 years ago in our everyday work, so let us be proud of our past and be part of our future.

chair@resolution.org.uk



A conference fit for our 40th anniversary celebration

Colin Jones Chief Executive



On 19-20 May we continued to build on the success of the last 40 years of Resolution, as more than 500 members came together for our biggest ever annual gathering of family justice professionals at the Hilton Brighton Metropole, for our 2023 National Conference.

National Conference is always the highlight of our events calendar, and we were delighted to be able to host an event that lived up to the grandeur of our 40-year anniversary.

The tremendous success of our conference points to the incredible work of our committees and staff who enable Resolution to continue to grow and develop despite the backdrop of political and economic uncertainty.

Conference was also the passing of the baton from our now past-chair, Juliet Harvey, to our incoming chair, Grant Cameron. Grant and I jointly opened the conference, reflecting Resolution's approach to leadership. During my time as Chief Executive, it has increasingly been a genuine partnership between the staff team I lead, and the National Committee, most recently under Juliet Harvey's stewardship and now led by Grant. It's through this partnership approach between your National Committee and your staff team at Resolution HQ that enables us to deliver the things we do for members.

The support and guidance provided by National Committee, Grant and Juliet, over these past few years is valued enormously by us all – the last 36 months have been extraordinarily challenging times for everyone, and I am beyond thankful to Juliet for her hard work, passion and unwavering support over the last three years as national chair of Resolution.

With the tireless help of our committees and regions, your staff have worked tremendously hard to ensure we were able to come out of the pandemic in a stronger position.

I am confident that despite the challenges of Covid-19 we have been able to put the foundations in place, to allow us to continue to build a Resolution that is fit for the future and continues to be the essential home for all family practitioners, regardless of personal or professional backgrounds, for the next 40 years and beyond.

At our AGM in May we also published our Annual Report for 2022. The report reflects on some of the key achievements and highlights from another jam-packed year for Resolution, including the launch of our Alumni Project, the introduction of Resolution Together and the work of our Equality, Diversity and Inclusion Committee in transforming how Resolution reaches out to previously under-represented groups.

As Resolution celebrates its 40th anniversary, this Annual Report details how we will continue to stand up for our members and their clients. We will push for reforms to improve the way family disputes are resolved, in line with our Code, and we will continue to build on our success, looking at further ways to improve the family justice environment in which you all work, to help you provide more support to the people you help every single day.

The next major celebration for our 40th anniversary will come at our inaugural Awards Gala Dinner. I hope many of you are able to join us in London, to celebrate our champions of family justice in September, recognising the rich contributions of our members to the family justice system.

The awards promise to be a wonderful celebration of Resolution family justice professionals and the incredible work you all do. Resolution is "the" organisation for all of you engaged in family work and so we really want to make the Resolution Awards "the" awards on the national landscape.

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A weekend at the Metropole...

On 19-20 May more than 500 members came together for the biggest annual gathering of family justice professionals, at the Hilton Brighton Metropole, for our 2023 National Conference.

National Conference is a highlight of the Resolution calendar, and we were delighted to be able to host an event that lived up to the grandeur of our 40-year anniversary.

Delegates were treated to a feast of insightful speakers, in-depth debates, and high-quality networking opportunities, to connect, share and learn from the community. This year we put on more interactive sessions, more workshop choices and more networking opportunities than ever before.

Keynotes from Sir Andrew McFarlane, President of the Family Division and Barbara Mills KC headed up an engaging and informative line-up of speakers, and we put on our biggest range of workshops, designed to develop delegates' practice, skills and knowledge, looking at key trends and topics on the future of family law.

Sir Andrew gave an update about his work and praised Resolution's National Conference, saying: "One thing that's particularly important for family lawyers, is that we need to have an understanding of each other. We should be creating

and attending occasions like today, where we can be together and have important conversations with our peers."

We also heard from Barbara Mills KC who discussed some of the pressures and challenges family lawyers face today, but implored delegates to embrace change. She said: "Change is good for us and good for the families we serve. My invitation to you is to use what we have now to make things better. It seems to me we must make an effort to resolve cases outside of the court arena."

Alison Bull and Philip Barnsley, delivering the Finance Update, gave delegates a review of significant changes over the past year. A poll held during the session found that 55% of delegates are planning to engage with one lawyer/two clients as a working model in the future.

On Friday afternoon, Elspeth Thomson and Samantha Little presented the Children Update, giving an overview of relevant developments over the past 12 months. The session covered the Domestic Abuse Act 2021, assessing risk of harm to children and private law fact finding hearings.

Delegates also had a choice of attending more than 20 workshops over the two-day event, looking at a wide range of topics, from Capital Gains Tax and divorce, practical tips for junior lawyers in high conflict children cases, and how to work with resistance.



Matthew Richardson
@mrichardsonlaw



This year's #ResConf23 was fantastic - where better to be than Brighton in the sunshine? Excellent speakers as usual and so lovely to catch up with old friends and make new ones. Next up - ice cream!
@ResFamilyLaw @CoramFamilyLaw



Claire Colbert
@ClaireMediates



Thinking about the right brain/left brain dynamics in great workshop by @AnnmarieCarvy @ResFamilyLaw



Nigel Shepherd
@topfamilylawyer



Important question from @EtheringtonMarc
#ResConf23 Question Time about striking balance between agile working/WFH & well being. @AmandaAdeola gave her experience of being the mentor to trainees and the difficulty of picking up on potential issues when working out of the office





Sam Little (left) and Elspeth Thomson (right) present the Children Update



Left to right: Colin Jones, Sir Andrew McFarlane, Recorder Barbara Mills KC, Jo O'Sullivan and new Resolution national chair Grant Cameron



Grant Cameron
@Grant_FamilyLaw



What a weekend! Thank you so much for everyone's support and kind words. Well done to everyone @ResFamilyLaw for organising another fantastic National Conference.
#ResConf23



Tristan Harvey
@TrisHarveyQEB



Over 70% of people at #resconf23 either doing one lawyer two client work or planning to in the future. Fantastic news for separating couples who want to avoid conflict and be advised together about possible outcomes. #ResolutionTogether



Melanie Bataillard-Samuel
@M_Bataillard



Always a pleasure hearing from Sir Andrew McFarlane, President of the Family Division. A great supporter of what @ResFamilyLaw and its members do for their clients, the profession and family law in general on a daily basis. #ResConf23



Davidson McDonnell
@DMcDSols



A wonderful opportunity to hear Sir Andrew McFarlane and Barbara Mills KC deliver the Keynote address at the Resolution National Conference in Brighton today.
Victoria Sterritt was delighted to join with over 500 other family lawyers
#ResConf23 #familylaw #ResolutionTogether



samantha little
@samanth75538822



... inspired to have listened to Lisa and Olivia from the Family Justice Young People's Board in a brilliant session this morning here in Brighton...lots to think about #ResConf23



TLT Family and Private Wealth
@TLTFamilyLaw



Really inspiring talk from @bmillsbarrister regarding the current state of the family justice system and the importance of out of court dispute resolution. #ResConf23



Meet the newly elected members of Resolution's National Committee

Each year the membership votes new members onto the National Committee, Resolution's board of directors. Voting in the elections is your opportunity to choose the people you want to play a key strategic role in leading our organisation.

At our AGM on Friday 19 May, Resolution welcomed three new volunteers to its National Committee.

The newest members of National Committee are Oluwapelumi Amanda Adeola, Laura Clapton and Marc Etherington.

Oluwapelumi Amanda Adeola has been a member of Resolution since qualifying as a solicitor. She currently sits as a co-chair of Resolution's Equality, Diversity & Inclusion Committee and prides herself on the ability to work collaboratively with others and appreciate the importance of diversity of thoughts and ideas. She says that "joining the National Committee is a way to not only increase my own knowledge, but also be a part of the decision making which will ultimately advance the growth and strategy of the organisation for the benefit of all members".

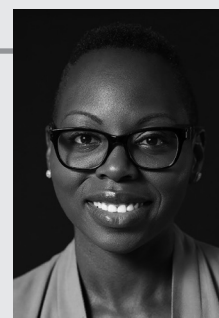
Laura Clapton is a family solicitor and accredited mediator. She co-founded a family law and mediation practice almost nine years ago. Laura has been a member of her local Resolution committee for over 12 years and was vice chair of YRes. Laura believes that "this is an incredibly exciting time for family practitioners who have the opportunity, through an array of offerings, to provide a more holistic approach, aimed at keeping separated families out of court".

Marc Etherington began working in family law as a paralegal in 2009 and qualified as a solicitor in 2012. He has worked for a range of law firms during this period, including a legal aid specialist, a high street practice and dedicated family law firms. He has been a member of Resolution since being a student and is actively involved as a member of the Parenting After Parting Committee. Marc says it is his belief "that every member of Resolution, regardless of their background, experience or geography, should have an equal voice within our organisation, mirroring the way we practice."

Oluwapelumi Amanda Adeola

Why did you apply to be on the National Committee?

Joining National Committee will allow me to contribute my skill and time to an organisation which has remained committed in ensuring that the landscape of family law not only works for members but also the communities that we serve.



What skills and experience will you bring to the National Committee?

I have practised Family Law since qualifying in 2009 and uphold Resolution's code of practice in my dealings with clients and other professionals.

I am committed to the objectives of Resolution and can influence others through reasoned arguments. I pride myself in the ability to work collaboratively with others as I understand and appreciate the importance of diversity of thoughts and ideas.

How have you been involved in and benefitted from Resolution as a member?

Being a member of Resolution has enabled me to advance my knowledge in my area of practice, meet/connect with many other family lawyers and share best practice with others. I am also an accredited member, which has assisted my practice.

Further information

Resolution's 2023 AGM was held at 9am on Friday 19 May at the Hilton Brighton Metropole. It was another excellent turnout at our AGM as members attended in person to confirm the election of members to the National Committee, receive the chair's annual report, adopt the Company's accounts for the 12-month period ending 31 December 2022, and to re-appoint Azets as auditors to hold office from the conclusion of the meeting to the conclusion of the next meeting.



David James Lister
@MLSTERLISTER



A big congratulations to @EtheringtonMarc @Laura_Consilia and @AmandaAdeola on being elected to @ResFamilyLaw National Committee. We are lucky to have such fantastic, hard working and human colleagues joining. Excited to work alongside you!



Zoe Fleetwood
@IAMZoeFleetwood



Congratulations to @Laura_Consilia @AmandaAdeola and @EtheringtonMarc for your nomination to @ResFamilyLaw National Committee. It was a really tough competition this year. I look forward to working with you. 🌟🌟🌟🌟🌟

Laura Clapton

Why did you apply to be on the National Committee?

I would like to support Resolution to further its objective of helping families stay out of court and promoting the benefits of DR. I would also like to further Resolution's efforts on shining the light on lawyer wellbeing and the need for changing firm cultures to support family practitioners.



What skills and experience will you bring to the role of National Committee member?

I can represent and understand the needs of smaller boutique family law practices and have an acute awareness of the challenges they face.

The wellbeing of my team is central to my practice, and I was proud to have won the Lexis Nexis Family Wellbeing award in 2021 and to be shortlisted again in 2022. Since 2020, my firm has implemented a four-day working week for our family lawyers and I would like to think of myself as forward thinking when it comes to working practices and culture.

How have you benefitted from Resolution as a member?

Resolution has been fundamental to my development since I was a trainee solicitor. I have benefitted from its training, guidance and its readiness to embrace new ways of working, including, most recently, the Resolution Together scheme.

Marc Etherington

Why did you apply to be on the National Committee?

I believe Resolution would benefit from new voices being elected to the committee. The regions are the heartbeat of Resolution and I want to explore how Resolution can support you more in your regions, including the YRes community. I would welcome the opportunity to continue the conversation with National Committee, building on our work to include barristers and accredited financial advisers as full members, and looking at which other professions may be eligible in the future.



What skills and experience will you bring to the National Committee?

I am an active Collaborative Lawyer, where I work alongside other family law professionals to ensure each family receives the right support – whether that is legal, emotional or financial. I hope to bring passion, determination, focus and a modern forward-thinking approach to the National Committee.

How have you been involved in and benefitted from Resolution as a member?

Resolution has allowed me to deliver workshops to members at a number of National Conferences. Resolution has shaped me in how I work in family law by aiming to reduce conflict, putting children first, treating everyone with respect and acting with honesty and integrity.



Remyhs Baker (She/Her)
@remyhsb



Congratulations to all the new members but particularly to @AmandaAdeola who has been working tirelessly to open doors for others, co-chairing the EDI committee.



Melanie Bataillard-Samuel
@M_Bataillard



Congratulations 🎉 and welcome to the newest NC members. I look forward to working with @AmandaAdeola @EtheringtonMarc and @Laura_Consilia 🌟



graeme fraser
@gsf1996



Congratulations from the Family Team at BBS Law to successful candidates @EtheringtonMarc @AmandaAdeola @Laura_Consilia and wishing them all the best on their election to @ResFamilyLaw National Committee #ResConf23 🥂🎉🌟🌟🌟



Ellen Wilkinson
@ellenlucas



Many congratulations Pelumi, Marc and Laura. Really looking forward to working with you! #ResConf23

My first time attending the Resolution Conference...

CONFERENCE 2023

Leora Taratula-Lyons *Burgess Mee Family Law*

I was lucky enough to be selected for one of the coveted places at the Resolution Conference this year, which took place in my hometown, Brighton. I attended with two fellow junior solicitors and two partners from my firm. One of the partners has been every year for the past eight conferences and the other is on Resolution's national committee, executive committee and drafting committee, so I was in the company of experienced #ResConf goers! I am also a new member of Resolution's drafting committee, so I was particularly excited to attend and experience the conference for the first time.

We arrived on Friday morning in time for the keynote speech from Sir Andrew McFarlane and Barbara Mills KC of 4PB. Having never been at a conference of this size before, it was impressive to see how many members were in a room all together. It was illuminating to hear the views of a top judge and barrister, both of whom acknowledged that achieving our collective goal of improving our family law justice system can be stymied by limited funding and political uncertainty. Barbara Mills KC advocated for the importance of DR passionately, and Sir Andrew set out one of his priorities for the remainder of his term: promoting and expanding the Pathfinder Project for private children proceedings, which focuses on the impact on the child and is being trialled in Bournemouth.

The Finance and Children law updates were very useful (as are the notes). The 1.5 hour slot of the Finance update was punctuated with interactive polls for us all to contribute our view, which was a clever way of using technology to display the views of the audience in

real time, whilst also ensuring their focus did not wane too much.

We could choose which workshops we attended and one of the highlights from the event was the debate hosted by barristers of 29 Bedford Row and 1KBW. Rather than each chambers taking an opposing view of each matter, as I had expected, there was a barrister from each set on each team of two; a welcome and apt collaboration given the conference they were attending. The topical subjects of whether a formula should determine financial remedy awards, whether cohabitants should be able to bring financial claims on separation and whether mediation should be compulsory for Children Act cases were discussed with creative arguments and humorous asides employed by all. It was an entertaining discussion with camaraderie and sincerity at the heart and was a great way to see many barristers, from silk to junior level, in action in a short space of time.

The jovial energy of the debate carried through to the evening. It was clear that everyone was excited to network and have a good evening. It can be daunting trying to network in a room full of people and I found I stuck close to my colleagues at the start. By the Saturday lunchtime however, having bumped into the same faces a couple of times over the conference, I was in the swing of things and had forged new connections with barristers, other lawyers and financial advisers that I had not met before. It was also a welcome opportunity to catch up with old colleagues and other familiar faces outside of London.

I also attended the pensions workshop and the panel question time on the Saturday morning. These were less well attended but equally informative. The question time was a diverse panel of barristers and solicitors who offered their personal and professional perspectives that were motivating and, at times, poignant.

As the eager first time conference go-er I was, I took notes on my phone during the finance and children updates, pension workshop and question time and emailed them to myself. These notes, as well as the handouts prepared by the speakers, will be helpful resources for me to refer to in the coming year and beyond.

The conference used a phone application called Swapcard, which was especially useful for referring to the programme for times, location and notes but, given the size of the



Leora (middle) enjoying National Conference with two fellow newbies

hotel conference centre, a map would have been helpful to navigate the various levels and rooms. I did not find the place earmarked for first-time conference attendees to go to or the quiet zone. In my opinion, having a clear, separate space or opportunity for solicitors under 5 years' PQE and those at the conference for the first time to network during one of the breaks would only improve future conferences. It was great to find that the conference was almost entirely paperless, though more could always be done to ensure sustainability, such as reducing the amount of paper handouts by exhibitors and providing recycling bins.

The weekend's events left me feeling rejuvenated from experiencing the Resolution community's passion and power in setting out its aims for supporting separating families in innovative ways. The emphasis on encouraging DR and campaigning for cohabitants' rights was palpable and a welcome reminder to be engaged in a more active role in these conversations going forward. I left the conference accompanied by my new 1KBW water bottle, a few branded tote bags and a selfie light. I am looking forward to the next one!

leorataratulalyons@burgessmee.com



National Conference as an IFA

#ResConf23

Tamsin Caine Smart Financial

There was plenty for the financial community to learn at conference, and great networking opportunities – we just need more IFA members to attend!

I should start by saying that conferences on Fridays and Saturdays are rare in the financial services world. However, I am getting used to it, sort of! This is my second experience of National Conference, which this year was held in the eclectic city of Brighton. Whilst it doesn't seem a natural fit for a large group of mainly legal professionals, it certainly gave rise to a rousing speech about how Resolution is embracing diversity and inclusion from Jo O'Sullivan, who was perfect in her role as conference chair. This included some BSL and the confirmation that a hearing loop was also being used.

But, I am getting ahead of myself. National Conference began with the AGM. Huge thanks must go to Juliet Harvey for the sterling job she has done in chairing National Committee over the past three years. We welcomed the incoming chair, Grant Cameron, with the presentation of an inflatable crown! We also welcome Melanie Bataillard-Samuel as the new vice chair and three newly elected members of the committee: Marc Etherington, Oluwapelumi Amanda Adeola and Laura Clapton. Sadly, the financial advisory community are no longer represented, but as the number of IFA members increases (I believe 50 additions since our conference in March), hopefully this will change.

During the AGM, the treasurer's report covered membership numbers. Only 0.1% of the membership are Accredited Financial Profession, although the proportion of associate members who are financial planners is over 36%. I have to say I only managed to see four others from our profession in attendance, perhaps not surprisingly considering the content and proportion of the membership that we represent.

One of the most beneficial parts of National Conference is the opportunity to catch up with, or meet for the first time,

other divorce professionals. There is a sponsorship area offering giveaways from pens to water bottles, and the widely anticipated Only Mums Only Dads' fudge. Whilst not all of the sponsors are relevant to the financial advice community, this area is buzzing and an excellent place for networking.

Following Jo O'Sullivan's speech, the conference proper opened with keynote speeches from the President of the Family Division, Sir Andrew McFarlane and Barbara Mills KC. The President discussed the state of the family justice system and the shortage of judges, although he noted that the judiciary's diversity profile is slowly improving. He also commented on the huge increase in litigants in person since Legal Aid in the family courts was removed, other than in cases of domestic violence.

The issue of the need for change was continued as a theme by Mills. She focussed on the Alternative Dispute Resolution options, highlighting the issues in the title itself – as if couples were opting for something "alternative" and therefore out of the ordinary. I felt there was an opportunity to mention the valuable work of other professionals at this stage, forming divorce teams to assist clients in settling out of court; maybe next year!

Perhaps the most valuable sessions for us as financial professionals were the workshops, which took place on Friday late afternoon and Saturday morning. But as a panel member of two of these workshops, I would say that!

The first session I was involved in was organised by the Resolution Working Together Committee, of which I am co-chair. My partner in crime, divorce consultant Laura Rosefield, hosted the panel expertly, posing



questions to myself, mediator Sushma Kotecha, supervisor and psychotherapist Lesley Edelstein, family lawyer Katie Harding and divorce coach Tom Nash. The discussion was around how to work as a divorce team, utilising professionals to provide emotional, financial and legal support throughout and after separation. The conversation was lively and provided the committee with projects that we will be working on over the next 12 months, and beyond, to make it easier for legal professionals to bring us into the process, and select the right professional for the client's need. It was great to welcome fellow financial planners Andrew Johnston and Daniel Gornall to the session, and so I asked for their views. Andrew felt, "The session was thought-provoking and has raised a number of questions on how we can better support our clients through a 'team' approach." Daniel said of the workshop, "A nice interactive discussion of like-minded professionals who all appreciate the value of each other's area of expertise."

Saturday morning saw me join a panel of members of the Resolution DR Committee. Using a case study to highlight potential issues for discussion, myself, chair and family lawyer David Emmerson, mediator and arbitrator Tristan Harvey, and award-winning relationship therapist Adele Ballantyne discussed how even a potentially high conflict case could be kept out of the court. It was a lively session, with some particularly interesting discussion around safeguarding and how all professionals working in divorce should be trained in picking up the signs of abuse and coercive control.

All told, it was an entertaining, educational and enjoyable conference. It would be great to see more financial professionals, therapists, divorce coaches, mediators, etc at the conference next year!

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Reflections on National Conferences old and new...

CONFERENCE 2023

*Phil Barnsley Higgs LLP
and Alison Bull Mills & Reeve LLP*

As we left the Resolution National Conference 2023, we each reflected on our experiences both at the conference this year and also at conferences attended in previous years. The outcome resulted in many similarities, and this short article combines our thoughts.

We had never worked together before this year's National Conference, and it was a privilege to co-present the Finance Update. The level of preparation and work that goes into preparing for the Finance Update talk each year is frightening, but working so closely with someone who we respectively admire and respect develops a strong relationship and one where trust is quickly gained. It is fair

"We leave feeling reinvigorated and enthused, with a shared sense of purpose, a strong sense of community and both excited and slightly concerned about the future and what it might hold."

to say that we will be firm friends from this point onwards and we have thoroughly enjoyed working with each other.

A fully sold-out conference this year bodes well for the future and the mix of technical updates along with skills and personal development, shared amongst friends old and new appears to be a popular one.

There is certainly much more on offer at conference today than at our first conferences, back in 2006 and the late 1990s respectively. At the conferences in those days the content was mainly about legal updates, whereas today there is a variety of skills, commercial awareness and personal development offerings to practitioners, which we think leads to a much more varied and rich experience. The conference has retained a real sense of fun and collegiality. It still enables learning, meeting friends old and new, and putting faces to names. We leave feeling reinvigorated and enthused, with a shared sense of purpose, a strong sense of community and both excited and slightly concerned about the future and what it might hold.

Back in the 1990s, Forms E were new (who remembers the old "affidavits" supporting financial remedy applications, often full of vitriol and complaint about the other spouse and with very little useful financial information?).

Children were believed to be best left out of court proceedings about their arrangements – not so long before that they were expected to attend court. Now of course we have a much better understanding about the importance of children and young people having their voices heard.

Mediation was something to be considered for parents to talk about their children, but anything to do with financial matters should be dealt with by lawyers.

Legal aid still existed and vast swathes of the population were not ignored and unable to access professional support and help as is the reality now.

Domestic abuse and safeguarding were not well understood and certainly not integrated into mainstream legal practice as (hopefully) they are now.

Modern families didn't really feature.

There was no YRes, and there were no (or hardly any?) non-solicitor/ILEX members.

There have been a lot of improvements since those days:

- the emergence and growth of YRes has been one of the best things about Resolution and to see so many YRes members and former members at the conference this year was heartening and really encouraging
- attendees and speakers are from much more diverse backgrounds from all over the country (not all white and male – although of course we have had many superb lawyers who happen to be both white and male and have made a hugely valuable contribution)
- other disciplines being integrated into the Resolution community: eg barristers, financial advisers, family consultants and counsellors
- the importance of skills and an holistic approach being at least as important as “black letter law”
- there is a much greater understanding and acknowledgment of the toll that the challenges of family law can take on us
- “ADR” is now far from alternative, with Resolution Together providing an opportunity for all members to expand their skillset where necessary (at relatively low cost in time and training) to start working with separating couples to reduce conflict further
- of 600+ attendees, over 100 newbies
- the governance and management of the organisation have become hugely professional and effective as we have grown

As an organisation, of course we need to continue to evolve and improve, become more inclusive, never forget the most vulnerable of society, whilst also ensuring members' interests



Alison and Phil present the Finance Update at National Conference

and the families we serve are centre stage. Sometimes this evolution takes longer than many of us would like. However, the organisation will continue to develop, improve and innovate in accordance with the ethos of the original founders of Resolution 40 years ago, and should go from strength to strength given the wealth of fantastically committed, dedicated, clever and caring members.

What could be done perhaps to improve conference?

- Some form of reflective practice amongst members – where practitioners may voice areas of concern that they have, or share lessons that they have learnt and areas of best practice in a supportive and non-judgemental environment. Others may then learn from their insights and experiences as a learning tool for their own practice.
- How about incorporating the best elements of the other conferences? Eg the round table coffee chats from the former DR conference.
- Running more YRes and financial advisers' sessions in tandem.
- Ideally make it more accessible in terms of cost and location (recognising this is very difficult to do).
- Incorporating more comparative law content so we can learn from other jurisdictions.
- Ensure that public law and legal aid practitioners' interests are represented.
- Ask those who don't attend what might persuade them to do so.

The pandemic robbed us of National Conference for a number of years in person, and as an organisation and a group of members we were clearly poorer for it. Creating supportive networks is a more valuable and timely exercise now than at any point in our long careers in the law (nearly three decades each!) and if Resolution can continue to be at the centre of achieving that, as it has been throughout our careers, then this surely has to be a good way forward.

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Ethnicity in the family justice system

#ResConf23



Beverley Barnett-Jones MBE

associate director (practice and impact)

and Dr Charlotte Edney

Nuffield Family Justice Observatory



National Conference gave us the chance to present for the first time the results of our research into varying outcomes for children in the family courts

Resolution kindly invited Nuffield Family Justice Observatory (Nuffield FJO) to attend its national conference in May and provide a workshop on what is known about ethnicity in the family justice system.

There is growing recognition that there are deep inequalities in children's social care. Research suggests that children from Black and some Mixed or multiple ethnic groups are most likely to be in care, while children from Asian ethnic groups are the least likely. White children sit somewhere in the middle of the two.

For family justice to be just and equal, it is important to expose, address and act on any disparities faced by families. And if progress is to be made, it is essential for practitioners and policymakers working in this area to understand the factors that shape inequalities.

But research on ethnic disparities within the family justice system remains relatively scarce, and studies have focused almost entirely on social care intervention, with few examining care proceedings. We know next to nothing about the part played by the family court and judiciary – and, crucially, whether they amplify existing inequalities within children's social care or mirror them.

Our Resolution National Conference workshop largely focused on Nuffield FJO's current research on ethnicity; data gaps and future research requirements; and our work supporting an anti-racist family court initiative. The workshop took place on the morning after the conference's black-tie dinner and dance, but if it had been a late night for the participants, they didn't show it – they arrived enthused and highly engaged in our session (and in the smorgasbord of other workshops on offer).

We began the workshop by asking attendees whether they agreed or disagreed with four different statements. The

statements were purposefully provocative, and did not reflect the nuances found in the research. The intention was to encourage attendees to reflect on their own assumptions before considering the research evidence.

They were:

1. Black and other racialised minority groups have higher levels of intervention by way of final orders made in the court than their White counterparts.
2. Black and other racialised minorities' disparity in outcomes starts at the door of children's services.
3. The family court cannot be a corrective for the societal failures of racial inequality.
4. The family court provides equal treatment to families journeying through family proceedings.

As one attendee pointed out, the room was split, with participants disagreeing on various points – but we navigated this in line with Nuffield FJO's spirit of promoting problem solving and collaboration.

A summary of our previously published research on ethnic diversity in the family justice system in England and Wales was then provided. The analysis showed disparities between the proportions of different ethnic groups appearing in both public and private law proceedings compared to the general population – echoing previous studies – as well as variation in diversity across regions.

The presentation led to very interesting and thoughtful reflections on the key findings. There was particular concern about the over- and under-representation of Black and other racialised minoritised groups in private and public law.

Deprivation, income inequality and culturally uninformed decision-making across the system (legal, social and judicial) was seen as placing these groups at a further disadvantage.

Attendees certainly felt that with its national and regional overview, the research raised serious social and access to justice questions that are worth pursuing.

A key question was raised as to whether the changes to Legal Aid brought about by LASPO – which, according to Law Society figures (2023) have resulted in a reduction in initial help (falling from almost a million in 2009/10 to just 130,000 in 2021/22) – are having a disproportionate discriminatory impact on Black and other racialised minorities and whether an Equality Act assessment had been undertaken in the last 10 years of the impact of this legislation on vulnerable and protected groups.

We then moved on to a presentation and close examination of Nuffield FJO's newly published "hot off the press" briefing paper on the ethnicity of children in care and supervision proceedings in England – it was our first formal presentation of the research to external stakeholders.

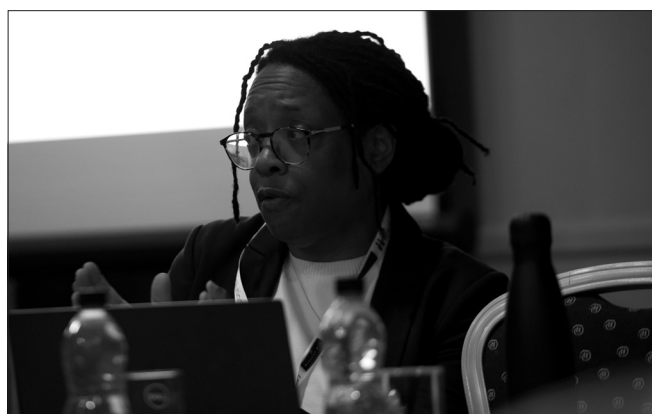
The paper is based on new research carried out in collaboration with the Centre for Child and Family Justice Research at Lancaster University. It aims to increase awareness of the inequalities that exist across ethnic groups in the family justice system, and how we can use data to monitor and measure them. As this is recently published research, with new and significant findings, we will, for the benefit of readers, summarise the information that was shared.

Using population-level data from Cafcass England, held in the Secure Anonymised Information Linkage (SAIL) databank at Swansea University, the study examined differences in the demographic characteristics of children from different ethnic groups who appeared in care proceedings for the first time between 2016/17 and 2021/22 (and where the case had concluded by the end of the observation period) – this comprised 105,334 children. It has only recently been possible to carry out this type of analysis, as information on ethnicity was not routinely collected in Cafcass data prior to 2017.

The research also analysed the legal outcomes for the children; how long it took to get to a final order; and whether their parents returned to court with a new child after the final order was made.

One of the key findings in terms of demographic characteristics was that Black and Asian children are, on average, older than White and Mixed or multiple ethnicity children upon entering care proceedings for the first time. The large disparities in age are striking, but we do not yet have reliable evidence to ascertain if the state is intervening too early or too late.

Black and Asian children in the study also lived within more deprived local authorities, although the deprivation levels in the local neighbourhoods where they were living were similar to those of White children and children from Mixed or multiple ethnic groups in the study.



Beverley Barnett-Jones MBE presents the research findings at Conference

In terms of legal orders, the research shows Black and Asian children are less likely to be on an adoption/placement order than children from White and Mixed or multiple ethnic groups. The likelihood of being placed for adoption generally depends on age, being in care proceedings with a sibling and location (among other factors) – however, we looked at various sub-samples for different ages, sibling groups and regions, and the differences in order outcomes still remained – suggesting ethnic disparities in adoption/placement orders do not appear to be related to demographic differences.

On average, Black and Asian children also receive legal orders that we class as "less interventionist" than their White counterparts. Adoption is the most intrusive form of state intervention in family life, and therefore this is defined as the most interventionist – followed by secure accommodation/deprivation of liberty (DoL) orders, care orders, special guardianship orders (SGOs), child arrangements orders, supervision orders, other orders, and no order. Legal orders made for Black and Asian children are more likely to be at the lower end of the scale. They are both more likely to have a supervision order and to not receive an order than children who are White or from Mixed or multiple ethnic groups. Black children are less likely to have a legal order for an SGO than White and Mixed or multiple ethnicity children. Asian children are even less likely to have an order for an SGO.

An exception to this finding is secure accommodation/DoL orders. Black and Asian children have the highest proportion of these orders: 1.3 per cent of both Black and Asian children in the study were on a secure accommodation/DoL order compared to 0.5 per cent of White children and 0.6 per cent of Mixed or multiple ethnicity children. While we acknowledge the sample size is small, it indicates that some racially minoritised groups are more likely to be subject to these orders. Recent Nuffield FJO analysis of DoL applications also found similar suggestive evidence.

Cases involving Black and Asian children also took longer to conclude than cases for White children. A further finding was that White and Mixed children are more likely to have at least one parent who comes back to court with a new child, compared to children of Black and Asian ethnicity.

The presentation of these findings sparked an enriched and passionate debate about the differences in outcomes for some ethnic minority children. There was real concern ➤

about the picture of adoption and Black children and the over-representation of Black and Asian children in secure accommodation/DoL orders. There was also a discussion about how well, and how appropriately, these children are being represented, taking into account all their identity and cultural needs.

Attendees then reflected on how factors such as the age of children when they enter care proceedings and the duration of cases might play out on their trajectory through proceedings and order outcomes.

The limitations of the data were also addressed. For example, the study only captures children in court – we don't know anything about their previous interactions with children's social care. We also don't know whether the orders granted were what the local authorities applied for/to what extent the legal order made by the judge differed from the order applied for – and whether this differs by ethnicity.

We are also missing evidence on care orders and placements – that is, whether children are placed in the care of family and friends or returned to their parents' care – which makes the interpretation of differences in legal orders by ethnicity challenging. Due to the coding in Cafcass data, it is impossible to distinguish between where, and with whom, children will be living when they are placed on a care order. Cafcass is making improvements to its data collection and progress has certainly been made, but it remains a challenge to draw robust conclusions and an understanding of how the placement of children differs by ethnicity. Of course, this is a limitation of using administrative data (which is primarily designed for the purpose of operations) for research purposes.

There was definite agreement in the workshop that a basic next step would be to at least ensure that the wide range of applications issued in care proceedings record the ethnicity of the parties. There is, however, a need to think about which other sources of data and data linkages are necessary in order to further explore the issues raised. It is also worth mentioning that while the quality and completeness of data on ethnicity of parents and children in Wales is much improved, unfortunately it does not enable us to replicate the analysis for Welsh care proceedings.

The research has provided a basis for future work, with many questions remaining unanswered and under-investigated. We covered some of the areas that require further analysis in the workshop, and, encouragingly, many of the practice reflections tallied with the questions we believe need answering in future studies.

Research on the factors that drive the different experiences of children and families in the family justice system, and the reasons behind variations in age and final legal outcomes for children of different ethnicities (including how interventionist they are and how long cases take to conclude) is particularly needed.

We also believe future work should investigate the impact of disparities on children, their families and communities

(including what happens to them following the order); whether individual or institutional biases are affecting decision-making and outcomes; and whether there is any evidence of adultification bias in the family court as there is in the criminal justice system. Research suggests that Black children are most likely to experience adultification bias – when notions of innocence and vulnerability are displaced by notions of responsibility and culpability – resulting in their rights being diminished or ignored and hindering child protection responses.

In the data used in our study, children's ethnicity was coded into five high-level ethnic group categories used in the 2021 census in England – Asian or Asian British; Black African, Caribbean or Black British; Mixed or multiple ethnic groups; White; and Other ethnic group. More in-depth analysis that goes beyond these categories is needed. For example, it's important to ascertain whether intervention rates differ between Black African and Black Caribbean ethnic groups.

We will be presenting and discussing this research and our recommendations for future work in a webinar being held on 21 June 2023, 4.30-5.30pm. The presentation will be followed by a panel discussion – where will be joined by Bibi Badejo, a barrister at Four Brick Court; His Honour Judge Bedford, the Designated Family Judge for Sussex; and Millie Kerr, Anti-Racist Lead Practitioner at Brighton & Hove City Council. By the time you read this it may be too late, but if not, you can register and submit questions for the panel on the Nuffield website.

During the workshop, we also discussed the Anti-Racist Family Justice Network, which Nuffield FJO convenes. The initiative was inspired by the work of The Howard League and the anti-racist work of Sussex QC and Sussex LFJB, which produced an Anti-Racist Family Court Statement in 2021, revised in 2022 with input from the FJYPB. Nuffield FJO is bringing together a wide coalition of groups and individuals with a focus on the promotion of anti-racist initiatives across the family justice system, convening space for organisations and practitioners to promote anti-racist practice in the family court and hold people to account to act.

Among the workshop attendees, there was clear agreement that despite improvements in how the family justice system is attempting to address questions of ethnicity and culture and disadvantage, it is not providing equal treatment for all families. Participants felt the drivers and factors for the differences highlighted by the research and the impacts of disparities needed to be grappled with and understood by lawyers and the judiciary as a matter of urgency. We are hugely encouraged that attendees left the workshop with a determination to share their learning and to seek opportunities for wider dissemination of the research in their regions.

We sincerely thank Resolution for the opportunity to host this vitally important workshop.

For further information, please visit www.nuffieldfjo.org.uk 

Non-legally binding marriages: national and international perspectives in practice

CONFERENCE 2023

Graeme Fraser *BBS Law*

Nazia Rashid *Rayden Solicitors*

and Naheed Ghauri *University of London, Birkbeck*

Non-legally binding marriages have been a key issue for family law practitioners dealing with religious marriages and the ability to make a claim for financial relief, mainly between Muslim couples. This workshop aimed to broaden understanding of the issues and focus on how recent academic findings might intersect with family law in practice, and ways in which the impact of “non-qualifying ceremony status” might be minimised. This article summarises the themes that were discussed during the workshop. A case study accompanied the workshop presentation, and is available on the Resolution website.

The importance of the Law Commission’s work

The Law Commission reported on cohabitation and weddings law in 2007 and 2022 respectively. Having consultations headed by the Law Commission is essential as it allows policy makers and the public to have a say in how our laws are reformed instead of being led by judicial decisions confined by the facts of the case before the judges. It is also an opportunity for our plural society to be reflected in our laws. Our future laws must be fit for purpose and meet the needs of our diverse and evolving society.

Validity of religious marriages conducted in England & Wales

The main issue for questionable ceremonies is the status of the ceremony. When considering a ceremony, we need to consider whether there is valid marriage that comes under our marriage laws, mainly the Marriage Act 1949, and satisfies all the required formalities; or if there is a void marriage which also comes under the 1949 Act but fails to satisfy all the necessary formalities and is therefore void under s11 of the Matrimonial Causes Act 1973. This often occurs when the parties reasonably believe they have done everything necessary under the Marriage Act but have not.

For void marriages, the parties are entitled to the same family law financial remedies that divorcing couples have in a valid marriage.

Parties in a non-qualifying ceremony are not entitled to any of the legal protections of void (nullity) or valid marriages. They can rely only on the remedies flowing from contract, property, or trust law. If the ceremony is based on a religious-only marriage conducted in England & Wales, the parties might have to resort to non-state, non-binding religious forums to resolve issues flowing from the breakdown of the marriage.

The Church of England is the only religious body whose own buildings, ceremony, and celebrants are automatically qualified to create and register opposite-sex marriages. All other communities must involve an additional civil element, and the place of worship may have to be separately registered to celebrate valid marriages.

The diagram on page 17 shows the complexity of the existing structural law of the formation and dissolution or annulment of marriages contracted in England & Wales, and was produced at paragraph 62 of Mostyn J’s judgment in *Tousi v Gaydukova* [2023] EWHC 404 (Fam).

Routes to valid marriage

Recognised ceremonies often go down a hybrid route whereby civil preliminaries are followed by such form and ceremony as the parties wish, and in a place of worship registered for the solemnisation of marriage.

Importance of status

If the marriage is held to be valid or void, the financially weaker party can apply for financial relief from the family court. If not, then they are left to rely on the



mixture of property, contract, and trust law available to cohabitants, which can result in a lack of financial security, inadequate pension provision and a lack of automatic inheritance rights.

The role of the ISC and the MAT

If a divorce is not granted by the husband following a Muslim religious ceremony or there is some form of domestic abuse then women may turn to Shariah Councils, including the Islamic Shariah Council (ISC) and Muslim Arbitration Tribunal (MAT), the only Muslim religious tribunal, for an Islamic divorce. Muslim family law permits three types of divorce: *Talaq* initiated by the husband; *Khula* initiated by the wife and a *Faskh* usually pronounced by a Shariah Council panel. The ISC mainly deals with *Faskh* cases. It also deals with the recovery of *Mahr*, a Muslim pre-nuptial/ marriage gift. (Siddique Patel sets out more detail in this area on page 31).

Research by Warwick Law School and the University of Exeter for the Nuffield Foundation

This study, which helped inform the Law Commission's work on wedding law, specifically looked at why non-legally binding ceremonies were taking place, including 88 participants who had gone through such a ceremony. Although most had also had a legal ceremony, 16 had not, of whom 14 were Muslims who had entered into a *Nikah*, a Muslim religious wedding ceremony. Most participants viewed the *Nikah* as more meaningful and the point at which they felt "married". Muslim couples tended to have their religious ceremony first and for there then to be a longer delay before the legal wedding took place in comparison to other faith-based couples. Reasons for avoiding a legally binding marriage included financial considerations where one party wished to ring-fence their assets; avoiding the process of legally divorcing (for those with previous experience of this) and the perceived flexibility in obtaining a religious divorce; not being able to get married legally; a lack of awareness that the religious ceremony was not legally recognised; or a simple lack of desire to be legally married.

A helpful three-minute video, which can be found at tinyurl.com/42jxevmz, explains the consequences of a *Nikah* being a non-legally binding wedding and is useful for promoting the raising of public awareness of this particular issue.

Clients with international connections

It is very important to ensure that a client with international connections takes foreign legal advice to decide which jurisdiction is best to deal with the divorce. The foreign legal system might not follow strict Islamic principles; might be influenced by the geographical customs and culture; or might apply different rules of law depending on if one is a Muslim or not.

How could cohabitation reform assist those in non-legally binding marriages?

In non-legally binding ceremonies involving a religious ceremony, the couple and their community will see them as being married and not as cohabitants. While some cohabitants seek legal recognition, others cohabit to avoid legal rights and obligations. Some couples in religious only marriages want their marriage to be recognised by the law, while others have deliberately chosen the option of non-recognition. Where this autonomy flows from an informed choice, it should be respected.

In the Law Commission's 2007 report on "Cohabitation: The Financial Consequences of Relationship Breakdown", it recommended that to be eligible for its proposed scheme of financial relief, cohabitants must either have had a child together or have lived together for several years, suggested to be between two and five years.

In its 2022 report, "A New Weddings Law", non-legally binding religious marriages would still be permitted without penalty or mandatory requirement for a civil registration, but the eligibility criteria could be extended to cover those who have undergone a non-legally binding ceremony of marriage (either faith based or non-faith based), where that ceremony is an overwhelming event of importance, to demonstrate commitment to one another.

In the context of Muslim religious marriages, this would place a distinction between those couples cohabiting without a ceremony, and those who have gone through a ceremony which is not granted legal recognition and have not had a child or lived together for the specified duration.

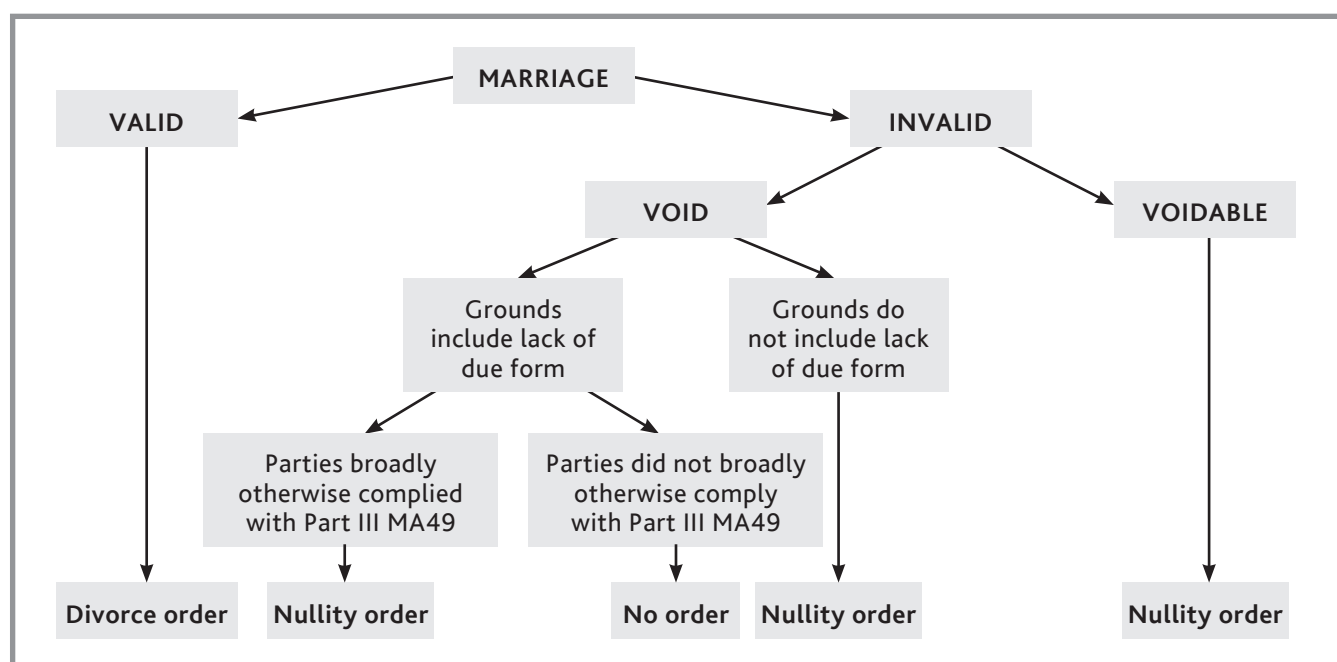
How about marriages that may not be legally binding outside England & Wales?

In *Tousi v Gaydukova* an Iranian national and a Ukrainian national had an Iranian marriage in the Iranian embassy in Kyiv. As Ukraine treats embassies as being part of the "host state", the marriage had to comply with Ukrainian law. The single joint expert was clear there was no valid marriage.

Mostyn J decided that despite the couple having over 20 years of genuine belief in good faith that a valid marriage had been created, because no relief would be available in Ukraine, there should be no relief in England & Wales. The husband is now appealing the decision.

Mostyn J criticised the current law as follows at paragraph 90 of his judgment:

"These are not rare and remote outliers. There are many religious (usually Islamic) marriages solemnised in private dwellings in gross disregard of our laws (or the host country's laws) concerning the due form for such ceremonies... the situation is a disreputable mess and urgently needs to be definitively clarified both substantively and procedurally."



Conclusions

The problems which can arise when parties have had a Muslim religious ceremony in this country but have not had a civil ceremony has been highlighted by case law in recent years, including *The Attorney General v Akhter and Khan* [2020] EWCA 122. Family law professionals need to have heightened awareness of the following:

- when the relationship ends, the parties are in the same position as any other cohabitants, ie they do not fall within the provisions of the Matrimonial Causes Act 1973
- in cases involving international aspects, foreign legal advice will usually be required
- case law continues to evolve the judicial approach to these issues
- the government is currently considering the Law Commission's 57 recommendations in its Weddings Law Report, in consequence of which new legislation may follow

Acknowledgments

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<https://resolution.org.uk/event/national-conference-2023-on-demand-package/>

"Onward!" Keynote speakers at National Conference 2023 reflect on 40 years of Resolution and the challenges ahead for the family justice system

#ResConf23

Catherine Campbell *Burgess Mee Family Law*

This year's Resolution National Conference, held in Brighton, marked 40 years since the organisation's founding by John Cornwell and 30 other family law practitioners. Four decades on, keynote speakers President Andrew McFarlane and Recorder Barbara Mills KC delivered their addresses at the beginning of the Conference to an audience of over 500 family practitioners, the conference's highest ever attendance.

The keynote speeches offered an opportunity to reflect not just on Resolution's work today, but on the progress that has been made in the family justice system of England and Wales since its inception. Speaking first, the President commented that Resolution had been able to provide a support network between practitioners and improve professionalism in the sector, in doing so creating better outcomes for families. As a result, there is now a general understanding that the maxim "do unto others as you would have them do unto you" applies in family law practice.

While that sentiment may feel obvious to practitioners today, the President reminded the room that this had not always been the case, and that John Cornwell and his compatriots had been pioneers in that approach. In the intervening years, Resolution had not rested on its prior achievements, but had picked up the torch and carried it forward, continually generating fresh ideas for improving family justice.

Both speakers also looked back on the impact of the Covid-19 pandemic on the family justice system. While Covid had been "hideous", Recorder Mills KC expressed how grateful it made her now to be able to meet in person in such large numbers. The President also cited Resolution as an invaluable source of support at the outset of the initial lockdowns, as there was already a pre-existing network across the family justice system capable of meeting the challenges of sudden remote working.

Despite the quantum leaps forward in technology and the ability to work more flexibly in the aftermath of the pandemic, both keynote speakers expressed concern about the impact of less face-to-face work. Recorder Mills KC reminded the room that it was Mental Health Week, and emphasised the need, in a profession dealing with "the most dreadful things", to look after ourselves, and treat ourselves and others with kindness. In some respects, working remotely made that more difficult, she said, as it was harder for managers to see others struggling, and harder for junior practitioners to ask for help. The President encouraged



President Andrew McFarlane delivered his keynote address to an audience of over 500 National Conference attendees in Brighton

listeners to "deliberately create professional hangouts" to enable the kind of informal chats which do not happen nearly as often in remote working.

Of course, both keynote speeches touched on the significant structural challenges facing the family justice system, many of which predate the pandemic but have been exacerbated by it. This included the now (sadly) standard delays in court listing, which Recorder Mills KC described as "unacceptable". She cited the stark figures, recently released by HMCTS, that there are now approximately 110,000 open family law cases (86,000 of which are private children law cases), most of which are taking more than 12 months to resolve. The President also commented that the removal of Legal Aid from private children law cases had been "highly detrimental" and said that early legal advice, such as that available previously through the Green Form scheme, would be of benefit in many cases.

As an example of ongoing attempts to avoid this “tramline of conflict”, the President had previously in his address highlighted the Pathfinder Project, currently being piloted in Bournemouth, which attempts to deal with private children law cases more holistically. One of its key features is to draw parents’ attention at an early stage to the impact that prolonged private law proceedings can have on children, with the hope that this will encourage parents to seek an early resolution. However, Recorder Mills KC commented that despite such efforts and new schemes, without a proper investment strategy to alleviate the current overwhelm of the court system, things would likely stay as they were. Both speakers strongly encouraged those in attendance to take part in ongoing government consultations on the future of the family justice system, with the President saying that now is a time when those in “government are interested” and looking for practitioners to express their views.

The President also emphasised the need for more judges in the family courts, saying simply that “we haven’t got enough” and asking Resolution members to speak to members of their local judiciary about what being a judge is like if they might be interested. Despite the need for more members, the President said that “bit by bit”, the judiciary was becoming younger and more diverse in ways that often defied the public’s expectations.

Naturally, there was a strong focus in both speeches on ways to encourage the early resolution of family law disputes outside of the court system. The President lauded recent efforts to think creatively when dealing with separating couples, such as the Divorce Surgery and the new “one lawyer, two clients” model. Recorder Mills KC touched on the merits of dispute resolution formats such as mediation, early neutral evaluation/private FDRs, and arbitration. In particular, she recommended expanding the types of cases which can be dealt with via arbitration, as arbitrators are currently prohibited from dealing with cases where there are safeguarding elements, despite many arbitrators also sitting as judges, in which capacity they regularly deal with similar cases.

At the beginning of Recorder Mills KC’s keynote speech, she described her recent attendance at a family law conference at the University of the Western Cape in South Africa. Alongside other members of her chambers, Recorder Mills KC was there to present a training programme on arbitration in the family justice system in England & Wales to an audience of senior legal practitioners from other jurisdictions where there is either currently no arbitration in the family court system, or even where there are no existing separate family courts. Those in attendance sought to learn more about how alternative dispute resolution practices work in England and Wales, and the Resolution Code of Practice, with its emphasis on integrity and respectful engagement, is highly regarded internationally.

So much of the current DR landscape in England & Wales is a product of Resolution and its committed members working together and thinking creatively about how to achieve the best outcomes for clients and to improve family justice. Hearing how well-regarded those efforts

are internationally at the Resolution National Conference was a reminder of our significant collective achievements, and that despite the current challenges facing our family

“The President lauded recent efforts to think creatively when dealing with separating couples, such as the Divorce Surgery and the new ‘one lawyer, two clients’ model. Recorder Mills KC touched on the merits of dispute resolution formats such as mediation.”

justice system, our jurisdiction’s reputation is something of which we can all be proud. Recorder Mills KC described a sense of “excitement and possibility” among attendees at the conference in South Africa and invited the room at the National Conference to also “imagine being enthusiastic about family justice”. From the response of those hundreds in attendance in Brighton, it did not seem a hard thing to imagine at all.

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Recorder Mills described current court delays as ‘unacceptable’ but said that without proper investment the situation was unlikely to improve

Is there a formula for fairness?



Rosalyn O'Donnell-Teelan

Teelan & Silwal Family Law

The Law Commission is reviewing the law of finances on divorce/dissolution. But can certainty and fairness be achieved together?

I am happy to report that soon there will be a programme where divorcing couples or those ending a civil partnership can input their personal and financial details, then hit the red button, and it will automatically generate a draft Consent Order with the settlement split all worked out. Fascinating. Apart from limited circumstances there will be no need for family lawyers anymore as all the work will be done by machines. However, they are going to choose six family lawyers for those limited circumstances and all others will need to find new professions.

Just kidding... this utopian and *Matrix* (as in the movie) kind of world is what immediately sprang to mind when I read that the Law Commission had launched a project to determine how effective the current law is in dealing with the division of finances on divorce and delivering a fair and certain outcome for divorcing couples.

The project will provide the basis for any future detailed financial remedies reform project. It will also review the laws in this country and other countries (including Scotland, other common law jurisdictions, and civil law jurisdictions which operate a choice of matrimonial property regimes). The Commission aims to publish a scoping document in September 2024 to use as the basis for a full review and future financial remedies reform.

The Commission will consider whether the recommendation contained in its 2014 "Matrimonial Property, Needs and Agreements" review need to be expanded.

As part of the project the Law Commission will consider:

- the financial orders that may be made by the courts on divorce; and
- the considerations to which the court must have regard when making such orders

The Commission will consider the current legal and socio-economic research on the operation of the existing law, including the outcome of the Nuffield Foundation's "Fair shares? Sorting out money and property on divorce" project, which is looking at how divorcing couples negotiate

financial arrangements, and is due to be completed in September 2023.

The Law Commission aims to identify:

- "(1) Any problems in the current law of financial remedies on divorce, and whether there is a case for law reform.
- (2) Possible models on which future reform of financial remedies law could be based.
- (3) The necessary parameters for further detailed technical and legal policy work relating to financial remedies law.
- (4) A range of questions that would likely need to be considered in detail at any consultation phase.
- (5) Any policy choices that the government would need to make to enable a revised scheme of financial relief to be designed."

The Law Commission will also consider specifically whether there is scope for reform in relation to the following areas:

- "(1) The discretionary basis of the current law, and whether it allows for sufficient certainty as to legal outcomes.
- (2) Whether there may be ways to structure the discretionary basis of the current law with a clear set of underpinning principles, in order to create more certainty as to outcomes.
- (3) Whether there should be wider powers for the courts to make orders in respect of children of the family who have already attained the age of 18.
- (4) The operation of 'conduct' as a factor to which the court must have particular regard when deciding to make financial remedies orders.

- (5) The treatment of pensions on the division of parties' assets on divorce.
- (6) Potential maximum periods for spousal periodical payments orders.
- (7) The principles underlying s25A of the Matrimonial Causes Act 1973."

The Commissioners also identify a number of "policy aspirations", saying the law relating to financial remedies should:

- (a) provide fair outcomes
- (b) provide sufficiently certain outcomes
- (c) have regard to the position in which financially vulnerable parties might find themselves on divorce
- (d) be straightforward and easy for parties to a divorce or dissolution to understand, where possible equipping parties to reach agreement without the court's assistance and without needing to expend large sums on legal fees
- (e) minimise risk of conflict between parties to a divorce or dissolution
- (f) apply effectively, including in relation to cases involving parties with limited financial means
- (g) be capable of adapting over time to socio-economic changes

The project will not consider child maintenance as governed by the Child Support Act 1991, provision for children under Schedule 1 to the Children Act 1989, rights of cohabitants, Part III of the Matrimonial and Family Proceedings Act 1984, financial provision on nullity, claims of an unmarried former spouse making a claim under the Inheritance (Provision for Family and Dependents) Act 1975 or enforcement.

I assume that the intention is to streamline, codify and simplify the process and in turn to reduce the pressure on the courts. I can imagine if there was a more certain version of what the likely outcomes would be then the client would attend their solicitor's office, the solicitor would tell the client the outcome and then there would be a settlement. But can it be that simple?

As stated above the Law Commission lists two of the aspirations of the project as "fairness" and "certainty". But the terms of reference also state that these aspirations will be taken into account "insofar as is possible, accounting for potential tensions between the aspirations". The Commission clearly knows that it will be difficult to have fairness and certainty as the outcome in all cases. Which will they choose?

If we adopted, say, a Scottish-style regime which is more restricted and largely limited to property built up during the marriage, then of course there would be



Andrew Newbury (Hall Brown) identifies the top ten areas for reform, guidance or definition

Whether the Law Commission proposes that we adhere to a discretionary system, albeit with greater certainty,

or whether there is a fundamental overhaul, the following is a list of what are arguably the ten most common issues in financial remedy proceedings and which require greater clarity and certainty. Each of the following issues can potentially be a bar to parties achieving an early resolution of their dispute. The list is broadly set out in descending order of importance:

1. Treatment of matrimonial and non-matrimonial assets

Since the House of Lords' decision in *White* in October 2000, this has been unquestionably the principal area of dispute over the last 22 years and the treatment of non-matrimonial assets has evolved with case law during that period. Clearer guidelines are required on what constitutes non-matrimonial property, circumstances in which it can lose its identity and other factors which may impact upon the treatment of such property, such as the length of the marriage.

2. Quantifying non-matrimonial property

This is distinct from the first point – even if non-matrimonial property can be identified, how is it quantified? For example, arguments regarding the springboard effect of pre-acquired property or the difference between active or passive growth during a long period post-separation.

3. Quantum and term of spousal maintenance

After the issue of non-matrimonial property, this must be the most common basis for marital disputes. Further guidance is required on quantifying needs, what fixes an appropriate term and when the court should be directing a clean break.

4. Needs

Arguably the most important factor in the majority of divorces, yet needs is an extremely elastic concept, as many judges have noted. Should there be clear criteria for establishing needs, both in terms of housing and periodical payments?

(continues on the next page...)

5. Pension offsetting

An issue which is commonly raised, albeit with very little by way of guidance. When is offsetting, as opposed to sharing, appropriate? If offsetting is to be adopted as an option, how is it to be quantified?

6. Length of the marriage

Although it is now established in case law that pre-marital cohabitation is to be included, the circumstances can still vary widely from case to case. More specific guidance would assist, to include identifying what constitutes a separation and how periods of separation are to be treated.

7. Treatment of debts and legal fees

In light of recent case law, it has become more difficult to ensure that soft debts are included as genuine liabilities; however, the reality of the situation for many is that borrowing from friends or family is their only option. In a similar vein, there needs to be consistency as to how the court should treat legal fees, particularly where there has been an imbalance in legal fees incurred, leading to a potentially unfair outcome.

8. Resources and the treatment of third parties

It is indicative of how society has changed over recent years, but financial remedy proceedings concerning financial support from third parties, such as parents, have become increasingly common. There needs to be consistency as to how third parties should be viewed as a resource and the court's powers in that regard.

9. Wells sharing

With increasing numbers of people becoming self-employed, the number of private limited companies or businesses appearing in divorces is increasingly common. The applicability of the Wells sharing approach would be assisted by further guidelines.

10. Treatment of adult children

This is specifically mentioned in the terms of reference document. The ability of adult children to bring claims or for a parent to bring a claim on behalf of an adult child is an extremely complex and technical area. Some codification between the Matrimonial Causes Act and the Children Act would be of assistance.

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fairness – are feelings which can only be obtained when knowing all of the individual facts and circumstance. To take away or limit the discretion of a judge deciding on very human issues when there can be so many variables may be the opposite of what fairness is – “to deny our own impulses is to deny the very thing that makes us human” (as Mouse put it in *The Matrix*). On the other hand, you will come across some clients who prefer to pay a fixed fee, even though it might be higher, opposed to paying by the hour because they prefer the certainty. No doubt there will be some divorcing people who would prefer this. Possibly one might say that those people would have entered into a nuptial agreement or attempted to settle matters by DR if they wanted certainty.

The issue about having a formula in a non-finance related family law case was considered recently in *A v B & anor* [2023] ALL ER (D) 18 (Apr), which involved abuse in private proceedings. The court rejected the need to apply consistent definitions of rape, sexual assault and consent on the basis that such a framework would provide a too-narrow prism through which to investigate the true nature of an adult relationship. This could be correct as we are dealing with not just money but morals, right and wrong, human rights and human relationships. I find this interesting because at the very heart of a marriage/civil partnership will be a relationship and finance in itself can form part of a coercive, controlling, detrimental and abusive relationship. Compared to, say, contract law, there are going to be more grey areas when it comes to families, relationships etc, and the complications which come with that, and it is a hard task to create formulae which will provide a one-size-fits-all solution.

However, Mr Justice Mostyn took a different view in *James v Seymour* [2023] EWHC 844 (Fam) when he set out guidance for a formula in respect of top-up applications for child maintenance. Again, it is the concept of inputting the information and printing out the answer so to speak. He does note that there are limitations – eg, it's not suitable if there are more than four children for which maintenance needs to be paid, the paying party earns over £650,000 or income is from capital or is largely unearned, or dealing with the variation of an existing child maintenance order. This shows that it is very difficult to predetermine all aspects of a family law case. (*James v Seymour* is discussed in full by Elinor Feeny on page 23.)

I suspect that the Law Commission's consideration of what would seem like isolated areas of the finances, like pensions, conduct, children already 18 years old, maintenance term etc, would form part of the overall picture in the attempt to achieve fairness or certainty.

It is difficult to know what the outcome would be if there was a shake-up of the system to achieve both fairness and certainty, which may or may not be in equal measures, so we will need to wait and see. As Morpheus said, “Neo, sooner or later you're going to realise just as I did that there's a difference between knowing the path and walking the path”.

more certainty (although I assume there will be limited exceptions) but will the outcome always be fair in all cases?

With the risk of sounding like a hippy lawyer, I do think right and wrong when it comes to humans – and ultimately

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Calculating top-up child maintenance: set formula or budget driven?



Elinor Feeny *Hanne & Co*

Mostyn J's formula is "a new starting point", but more case law will be needed to iron out the edges

Calculating child maintenance can be a minefield. With around 629,000 taxpayers now earning more than £150,000, the number of applications for child maintenance that fall outside of the statutory boundary will no doubt have increased.

To this end, Mostyn J has introduced an "Adjusted Formula Methodology" (AFM) for calculating top-up awards for those with an income exceeding the statutory limit of £156,000 up to the upper limit of £650,000.

To remind ourselves of the basics, child maintenance is where payments are made to a resident parent (RP) – the parent who has the child live with them most of the time – from a non-resident parent (NRP) for the benefit of a child or children. This applies where the parents are married or unmarried. If the parties are married, an NRP could also be entitled to spousal maintenance. The Child Maintenance Service (CMS) has jurisdiction to deal with child maintenance instead of the courts, up to a maximum annual income of the NRP of £156,000. It applies a rigid formula using a set percentage and deductions to take into account the number of nights a year the children reside with the NRP. The government calculator at www.gov.uk/calculate-child-maintenance deals with the detail.

"The Child Maintenance Service (CMS) has jurisdiction to deal with child maintenance instead of the courts, up to a maximum annual income of the NRP of £156,000."

Because parties do not need to go formally through the CMS and can instead reach their own agreement based on the calculation, having a set formula is usually helpful in providing certainty to the parties as to what the amount should be.

If someone earns over the maximum income, then the court has jurisdiction for "top up" child maintenance cases and there are also other limited circumstances where the courts have jurisdiction instead of the CMS, such as where the child is resident abroad.

As the CMS only has jurisdiction up to the first £156,000, in high earner cases an RP (or NRP) could apply to court for a top-up child maintenance award under Schedule 1 to the Children Act 1989. The parties need to have a maximum assessment from the CMS first, and the court has to be satisfied that ordering extra payment is suitable.

Since the CMS threshold was brought in around 10 years ago, the number of taxpayers above this threshold has increased 2.3 times to an estimated 629,000, meaning top-up cases are becoming increasingly common.

How is top-up child maintenance calculated?

There has been a plethora of recent cases regarding how to calculate appropriate child maintenance in a top-up case and in *James v Seymour* [2023] EWHC 844 (Fam) Mostyn J has sought to provide more clarity to his new so-called "Mostyn formula".

This was established in the case of *CB v KB* [2019] EWFC 78 [49], where Mostyn J set out his view that he believed it would be an appropriate starting point for top-up cases ➤

that the set formula continue on income of over £156,000 up to £650,000. For cases with earned income of over £650,000 the starting place would be the formula up to £650,000 but with “full discretionary freedom to depart from it having regard to the scale of the excess”. This starting principle was then followed in a number of subsequent cases, eg *G v T* [2020] EWHC 1613 (Fam), *W v H (Divorce: Financial remedies)* [2020] EWFC B10 and *OG v AG* [2020] EWFC 52 [101].

“Mostyn J makes clear in his judgment that his formula is a ‘starting place’ and hopes it will be used by parties to settle the growing number of top-up child maintenance cases.”

However, his formula came under criticism, including in *CMX v EJX (French marriage contract)* [2022] EWFC 136, where Moor J felt following the *CB v KB* approach would be in excess of the wife and children’s need, and so made an order based on the wife’s own budget which resulted in an order of less than half of what the formula would have provided.

Mr Justice Mostyn himself has sought to clarify that it is not a rule but a starting point, and in *Collardeau-Fuchs v Fuchs (Rev 1)* [2022] EWFC 135 suggested that *CB v KB* was focused on cases where child maintenance is a subsidiary claim, not the main claim. The reported cases above almost exclusively dealt with the court making a child maintenance order as part of a wider order on finances rather than a stand-alone top-up maintenance claim as part of a Schedule 1 claim.

The historic case reports of stand-alone top-up maintenance often involved big money cases and largely these were done with reference to the NRP and child’s needs. Due to the high costs involved in court proceedings, there are therefore a scarcity of reported cases dealing with modest assets, which is why they are much more likely to be reported as part of a matrimonial case when other assets and disputes are also in issue.

However, Mostyn J has now sought to address these issues, and provide his much-desired certainty to the issue of top-up maintenance in *James v Seymour*. In this judgment he has introduced an AFM for calculating top-up awards for paying parties with an income exceeding the threshold of £156,000 up to the upper limit of £650,000. This methodology is intended to give what he called a “Child Support Starting Place” (CSSP). Tables are set out in the appendix and the first step is to calculate what he called the paying parent’s “exigible income”. To calculate this, he has provided a formula:

$$E = (G \times (1-Z)) - P - (S/0.55)$$

Where:

E = exigible income

G = gross income per P60/tax return

Z = the reducing factor due to the number of children living in the paying party’s household

P = the amount of pension payments currently being paid

S = the amount of school fees and extras currently being paid

This shows a marked refinement from his previous proposal of just continuing the set formula as this now provides for a deduction of school fees or other extras for the children being paid. This also sits at odds with the CMS formula, which does not deduct these amounts. This therefore could lead to the strange situation of a paying parent earning £155,000 then paying less maintenance once they go over the £156,000 threshold as they can then apply deductions.

Once the exigible income is calculated this is then applied to the AFM table in the judgment, which provides columns depending on the amount of shared care discount that should be applied due to the number of nights the NRP has care up to, and including it appears, equal shared care.

As noted, Mostyn J also makes clear in his judgment that this is a “starting place” and hopes it will be used by parties to settle the growing number of top-up child maintenance cases. He also recognises that even this new, refined, formula, is not suitable for every situation and in particular says he does not expect it to apply where:

1. there are four or more children
2. the exigible income is over £650,000
3. the paying party income is largely unearned, or
4. the paying party has no income and lives on capital

In those circumstances he sets out clearly that child maintenance should be worked out from the principles in s25(3) Matrimonial Causes Act 1973 and Schedule 1 to the Children Act 1989, and it is therefore likely to involve a more budget-focused approach. There are also further situations where it is unlikely to be appropriate, for example when a child has a disability.

So all in all, while Mostyn J’s attempt to provide certainty to parties is welcome, it is likely there are still a number of issues that will need to be ironed out and so further test cases are likely. At present, however, there is a new “starting point” and where parties are amicable and wish to avoid expensive litigation, this is likely to be welcomed. Those more complex cases, whether they fall under Mostyn J’s exceptions or not, are still likely to require particular expertise to resolve.

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Options for protecting maintenance awards



Harish Patel IDS Financial Services

How can we help our clients ensure their financial security in the event of non-payment of maintenance?

It is all very well being able to secure a maintenance payout for your clients, however they can be left in a precarious position if the payer was to die prematurely or to fall ill with no means of being able to continue to make future payments.

The role of having a safety net for the recipient is vital and where protection can play its part. Your clients may already be financially vulnerable and the unexpected can upend any hard-won payouts. The area of financial literacy is also another concern for clients, as the majority of the financial decisions may have been taken by their ex-partner.

The matter is best introduced in the early stages when maintenance payments are being discussed along with the possible risks of non-payment. This may also be a good opportunity to introduce an independent financial adviser (IFA) into meetings.

There are various types of policies which pay out on death, ranging from convertible term, reviewable term, renewable term, relevant life term to whole of life policies. The most familiar are decreasing term assurance (DTA) plans, which are typically used to cover mortgage borrowing and level term assurance (LTA) plans, which provide the policyholder's family with a lump sum in the event of premature death during the policy term. Traditionally, this type of plan will be used to provide the surviving family with a lump sum, which can then be used to help maintain the family's standard of living or invested to provide an income. However, the concern is that it may be mismanaged, and the money is used too quickly.

Providing a lump sum can be costly depending on the amount of life-cover benefit being sought and may also require additional medical underwriting usually involving doctor's reports and nurse screening appointments.

A more cost-effective option is the little used Family Income Benefit (FIB) plan. FIB policies provide an income (tax free) for the rest of the term of the contract if the plan holder (life assured) dies during the policy term. Premiums remain level

throughout and should the person assured survive the policy term, there will be no benefit. As this type of contract only provides cover in the event of death there is no surrender value, so if you stop paying the premiums at any time, the cover will cease. Where maintenance payments are being made this can be an effective way of ensuring that the payments will continue should the payer die prematurely. The use of trusts can further protect the recipients/beneficiaries if the plan is placed into a flexible/discretionary trust. The plan can also be written on the "life of another" basis and the plan holder is the mother for example, and the father is the "life assured". This would alleviate any concerns about the plan premiums being kept up to date.

"FIB policies provide an income (tax free) for the rest of the term of the contract if the plan holder (life assured) dies during the policy term."

This area of protection is probably best introduced when discussions around maintenance payments start, as it can help allay any fears or concerns of payments stopping should the unexpected happen. We touched on the topic of financial vulnerability in a recent article (issue 222, Jan/Feb 2023) and this is an area of growing significance in the financial advice arena. As finances are increasingly stretched, a low-cost solution to protecting maintenance payments and ensuring continuity would be most welcome. Hopefully this is some food for thought!

As always, please signpost clients to an IFA who will be able to provide the necessary advice and suitable solutions.

Finally, a word about perceptions on life insurance. The Association of British Insurers (ABI) reported that the



average pay-out on death was over £79,000 in 2020. Over £18m was paid out every day on average for protection policies to either policyholders or their families during 2021 (ABI). A little-known fact is that over 98% of protection claims presented were paid during 2021, which is in sharp contrast to public perception.

Any questions, please contact me via...

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Harish Patel is a member of Resolution's Standards Committee

The ins and outs of Mortgage Capacity Reports



Nicola Jennings *Just Mortgages*

A detailed mortgage report offers a full picture of a client's future options, and as such can help produce fairer, faster and better-tailored outcomes

When a couple look to divorce or separate, during this stressful and demanding time in their lives, determining how to divide property and assets is one of the issues at the top of the agenda. The family home is one of the most important assets to consider. Conversations and decisions need clarity to decide who will remain in the family home and to work out if, in fact, it is affordable. Such decisions can lead to further uncertainty and mental and emotional strain, as it can be extremely difficult to make well-informed and fair decisions about the family home under such testing conditions.

From the outset, there needs to be a clear path and direction for all parties involved, to understand each spouse's ability to afford a mortgage on their own merits.

To mitigate the decision-making process and minimise the likelihood of legal dispute, a Mortgage Capacity Report (also known as a Mortgage Capacity Assessment) can help alleviate common problems. Often a solicitor will request a report on behalf of their client. The report will show the viability of changing the joint mortgage into a sole mortgage, ie into one party's name. Equally, if a client is not on the mortgage deeds, the report can show whether obtaining a mortgage solely in their name would in fact be achievable.

A Mortgage Capacity Report offers a clear and objective assessment of each spouse's ability to afford a mortgage. The report is a detailed analysis of a client's mortgage options after divorce or separation. It can therefore provide a transparent understanding of each spouse's financial

situation, to help ensure that decisions about the family home are fair and financially sound. It can be a starting point for discussions about financial settlements and will often be used in family court proceedings.

Once the report has established the client's overall financial position, it outlines the amount and type of mortgage a client might be eligible for after a divorce or separation. It is an in-depth report that will be based on a spouse's specific and individual circumstances.

The report considers each spouse's individual income, expenses, debts and credit history, which can help guide decisions about how to best divide assets and property. It is important that the report is clear and concise and is drawn up by an FCA-qualified mortgage adviser. All mortgage advisers work differently in terms of fees, service offering and time frames.

The mortgage adviser will collate the required information on behalf of a solicitor and a client, to complete a detailed, accurate and unbiased report. Documentation typically requested is proof of identification, the latest bank statement, the latest payslip, a budget planner, and a credit report. It is also important for mortgage advisers to remember to offer a supportive and seamless report service, whilst being sympathetic, and understanding what the client is going through.

The report typically includes information regarding income, current debts, current and known future financial commitments, the outstanding mortgage, the current

property value and the property's equity, savings and investments, children, and dependants.

After conducting detailed research, the mortgage adviser will then be able to include the specifics of any mortgage arrangements that the client would qualify for. The mortgage information would include the amount of mortgage loan achievable, repayment method and term, the most cost-effective overall total cost loan interest rate, monthly repayment figure, mortgage and related fees, and an affordability assessment.

The report findings typically are only valid on the day the report is completed. Mortgage rates change frequently across the lending market and occasionally lenders will adjust their lending criteria, which in turn can affect the client's lending affordability and the mortgage loan amount.

The report can also be affected by changes in a client's own circumstances and the final divorce settlement.

It is important to remember that all mortgage applications are subject to full credit scoring and underwriting by lenders on an individual basis. Reports are completed without such assessments.

Report types include a single mortgage capacity report, a joint mortgage capacity report, and a no mortgage capacity report (which can be due to low income, high debt, unemployment, or other factors).

With regards to adverse credit, this area of lending can be complex. On a case-by-case basis, a client can secure a mortgage with adverse credit. Adverse credit includes clients who have experienced property repossession, bankruptcy, an IVA, County Court judgments (CCJs), defaults, and missed and overdue payments. Such adverse factors can and do affect mortgage lender options and, in turn, typically come with associated higher mortgage rates, higher fees, and higher monthly mortgage payments, compared to the rest of the lending market. Additionally, exceeding authorised overdraft limits can affect lending too. It is therefore important for a mortgage adviser to check a client's credit report, especially at times when clients are not aware there is adverse information on their credit file.

Scenarios can be added to both the single and joint mortgage capacity reports. A mortgage adviser can go through scenarios, also known as variations, of a spouse's situation after the divorce or separation. The solicitor may also have specific requests, which they would like to add to the report, depending on the final settlement.

The scenarios could include the amount of deposit available, childcare costs and maintenance payments. The amount of mortgage deposit will directly affect the size of loan, the loan-to-value, and in turn the mortgage rate and the monthly mortgage cost. Childcare costs need to be considered as this financial commitment could impact a client's mortgage affordability and in turn the loan amount. For a client who makes maintenance payments, this amount will also be considered as part of their affordability. Equally, for the client who receives the maintenance payments, they should be able to include this income payment as part as their overall income.

Every report is different and typically produced within a reasonable time frame outlined by the mortgage adviser on engagement. Typically, an express service is offered too, for reports which need to be completed promptly, subject to a mortgage adviser's diary availability.

Once the report is completed and issued to the client, it is often shared between solicitors and may even be used in court proceedings.

If a solicitor uses the report as evidence in court during the financial settlement process, it will aid the court to understand a client's financial situation and make a fair decision about the division of assets and property. The report would provide a concise appraisal of a client's borrowing capacity and the impact this would have on their finances.

Use of a mortgage adviser's report can help negotiate a settlement by providing a clear and objective opinion of the ability to afford a mortgage. It can therefore also help to avoid disputes and to reach an agreement that is financially sound for both parties.

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Resolution policy briefing for Spring 2023 available online

A policy briefing for Spring 2023 is available at resolution.org.uk/news/policy-briefing-spring-2023/. It contains an update on Resolution's Vision for Family Justice, which seeks to shape Resolution's campaigning and lobbying activities and its wider vision for family justice. More than 1,000 members completed our survey.

A key takeaway from the survey was the state of the courts, and how delays and lack of resources impact on children and their families. Members clearly see the need for more resources and a joined-up government approach to help families access early support and to steer more cases away from the family justice system – where appropriate and safe.

We will be in touch later this year with a full report from our Vision for Family Justice survey, as we seek to advise government on a better way for separating families. Keep an eye on our website and your inboxes for future updates, events and reports.

DB's dozen

David Burrows @dbfamilylaw

Family case law summaries: April to May 2023

Re C, D And E (Care proceedings: Adequacy of reasons) [2023] EWCA Civ 334 (30 March 2023) – Where omissions are such that make it impossible to understand the judge's decision, or where analysis seen as deficient in other respects, it will be better to apply for permission to appeal than to seek clarification.

Re J (Children: Reopening findings of fact) [2023] EWCA Civ 465 (28 April 2023) – Stepfather's appeal against a judge's re-opening of findings as to his alleged abuse of his step-daughter. **Re E (Children: Reopening findings of fact)** [2019] EWCA Civ 1447, [2020] 1 FLR 162 (14 August 2019) applied. Narrower grounds proposed by Mostyn J in **RL v Nottinghamshire County Council** [2022] EWFC 13, [2022] 2 FLR 1012 are not allowed.

A v B (Practice Note) [2023] EWCA Civ 360, [2023] WLR(D) 171 (5 April 2023) – Knowles J had been correct in holding that the Family Court ought to hold back from introducing and developing its own definitions of rape, sexual assault and consent.

"In Lewis v Cunningtons [2023] damages of £400,000 were awarded to W inadequately advised by solicitors (especially in relation to pension-sharing) on a financial order settlement with her former H."

Cummings v Fawn [2023] EWHC 830 (Fam) (14 April 2023), Mostyn J – H's failure to disclose an inheritance from his parents when terms were agreed and a consent order submitted to the court was fraud. The order made on the consent terms was set aside, with costs to W.

James v Seymour [2023] EWHC 844 (Fam) (19 April 2023), Mostyn J – Former W and mother's appeal dismissed and permission to appeal refused on remaining two grounds; guidance on treatment of income using child support maintenance as the starting point. See Elinor Feeny's article on p23.

Williamson v The Bishop of London & ors [2023] EWCA Civ 379 (5 April 2023) – Any proceedings issued by a claimant subject to a civil restraint order, are limited by the terms of that order. Proceedings issued without prior permission cannot be cured and are a nullity.

Lewis v Cunningtons [2023] EWHC 822 (KB) (31 March 2023) HHJ Coe KC (as a High Court judge) – Damages of £400,000 awarded to W client inadequately advised by solicitors (especially in relation to pension-sharing) on a financial order settlement with her former H.

Re A (Children) [2023] EWCA Civ 437, [2023] 4 WLR 38 (26 April 2023) – Allegations against mother (M) of A (7) and her partner (Y) that separately or individually they had infected A with gonorrhoea were outside the local authority's case. M and Y had not been given a reasonable opportunity to respond. Features of a fair hearing had been absent.

Re T (Fact-finding: Second appeal) [2023] EWCA Civ 475 (5 May 2023) – Care order made by a DDJ; appealed successfully to a circuit judge. That decision was appealed against to the Court of Appeal who restored the DDJ's order: '[58] ... Whilst [the circuit judge] correctly identified the proper approach of an appellate court to findings of fact by a court of first instance, he regrettably failed to follow it.'

EBK v DLO [2023] EWHC 1074 (Fam) (5 May 2023), Mostyn J – Claimant father's application for permission to bring contempt proceedings against his former partner and mother of his child, for breach of s12(1) Administration of Justice Act 1960 by showing documents from continuing s8 CA 1989 proceedings. Permission refused.

Deutsche Bank AG v Sebastian Holdings Inc [2023] EWCA Civ 191, [2023] 1 WLR 1605 (24 February 2023) – Permission to appeal is not needed for a committal order; but permission is needed to appeal against for a finding of contempt.

R (SO) v Thanet District Council (re Costs) [2023] EWCA Civ 526 (16 May 2023) – For applicants (A) for a payment on account of a costs order: A must lodge costs schedules (for High Court and in the Court of Appeal). The respondent had permission to serve comments. In the absence of agreement as to amount the court would make an order.

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The role of IDVAs and ISVAs



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Some thoughts on the new Practice Guidance: Independent Domestic Violence Advisers and Independent Sexual Violence Advisers (Family Courts)

Since the Domestic Abuse Act 2021, The Harm Report and cases such as *Re H-N* [2021] EWCA Civ 448, there is emerging a greater appreciation of the impact of domestic abuse in all of its forms (including sexual abuse/assault) and an awareness that as a family justice response, we have much to learn about how to get it right for victims, including children.

The role of independent domestic violence advisers (IDVAs) was introduced by Co-ordinated Action Against Domestic Abuse (CAADA) in 2005 when the first nationally accredited training programme was produced by them, along with the introduction of MARACs (Multi Agency Risk Assessment Conferences) in 2006, and these moves were widely welcomed by practitioners working with victims as the start of something good.

Also in 2005, the role of independent sexual violence advisers (ISVAs) were introduced to support victims of sexual offences through criminal proceedings. The funding was largely provided by police and crime commissioners, local authorities, charities and NHS England, who also funded the new Sexual Assault Referral Centres, or SARCs. (See "The Role of Independent Sexual Advisors: Essential Elements", Home Office, September 2017.)

In 2007 the House of Commons Select Committee on Home affairs considered written evidence from CAADA, noting that since 2005 Home Office funding had allowed funding for 360 IDVAs to be trained.

The role of both sets of independent advisers has grown exponentially, and there is no doubt that their role in the experiences of victims across both areas has been extremely beneficial. Those on the front line, however, trying to allow the support of the IDVA or ISVA to attend court with their client, have often faced a Hard No.

Largely the objection has come from the person accused in each case, on the basis that this would give the supported person an unfair advantage. This objection fails to take into account the often unfair advantage of the power imbalance between the accused and accuser, often intimately known to each other, and where coercive control can be a significant part of the equation. Instead, these highly

trained professionals have often been characterised as 'self-interested do-gooders', who are incapable of holding the professional line. Often their presence was refused because the court feared an appearance of bias towards the victim. (See "Assessing the Risk of Harm to Children and Parents in Private Family Law Proceedings", Ministry of Justice, June 2020, p120.)

The MoJ Harm Report recommendations, amongst other things, raised a four-point plan for greater involvement of IDVAs (and by extension ISVAs) and said mental health support workers should be allowed into courts "as a matter of course"; relevant Directions and Guidance should be introduced; and that such professionals should be consulted in assessing the vulnerability of a party for the purposes of PD 3AA (*ibid* p178).

"The MoJ Harm Report recommendations, amongst other things, raised a four-point plan for greater involvement of IDVAs (and by extension ISVAs) and said mental health support workers should be allowed into courts 'as a matter of course'."

Unfortunately it takes a long time for recommendations such as these to be considered by working groups, pilot tested and assessed, but better late than never, and on 6 April 2023 the President of the Family Division issued "Guidance" – not rules – to IDVAs and ISVAs. Simultaneously, they were to be consolidated into the FPR 2010 Part 27 Practice Direction 27C, to alert both advisers and family practitioners of the new reality. ➤

Now there is an expectations of "The Right To Reasonable assistance" by an IDVA or ISVA for vulnerable parties, at every tier of the Family Court, though the caveat states clearly they are not advocates or there to conduct litigation, but to provide support, help and advice before, during and after a hearing.

They will:

- i) provide practical, emotional or moral support for a litigant
- ii) provide assistance and support to engage with the court process as well as with out of court discussions; and
- iii) help in dealing with authorities or other support services.

They will not assist in preparing the case, or make submissions or, in fact, have any right of audience.

The court has the right to refuse to allow the adviser to attend the hearing if it believes it is in the interests of justice. This may be if the independent adviser oversteps the mark, for example, or it may be that they do to be called as a witness by one or other party.

Other parties still have the right to object to the presence of such an adviser. It is for the objecting party to say what those objections are, but the supported party will have the right to reply, and once permission to attend is given the IDVA or ISVA should not be excluded – except, presumably, where there are new grounds to object.

Where an IDVA or ISVA is excluded, the judge "should give a short judgment setting out the reasons why it

has curtailed the right to support during a hearing". Reasonable grounds might be because the case is simple (eg directions only, or case management, although this would presumably be challengeable on the basis of the party's vulnerability). Or where the adviser is not able to maintain confidentiality.

Under its inherent jurisdiction the High Court can impose restraints on any adviser who is a serial offender and who impacts on administration of justice.

One reason given in the guidance to justify exclusion is "the proposed IDVA or ISVA belongs to an organisation which promotes a particular cause". This, it can be assumed, is the rub: the claim has always been "she works for Women's Aid, so she is bound to support X, and she has her own agenda".

It is going to be up to the advisers and legal practitioners to expound that suggestion. For example, in a medical negligence case, one would never expect to hear an application to exclude a treating cardiologist on the basis of "look at where he works, he is bound to say she has had a heart attack, isn't he?".

The supported party will be allowed to share information with the adviser in order for the correct level of support to be given.

It remains to be seen how much kick back and opposition there will be to new personnel in court. Speculation suggests we have interesting times ahead.

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Parenting through separation

This guide aims to give parents access to information and support that helps them throughout their parenting journey, through separation, divorce and beyond.

The Parenting After Parting Committee have prepared this booklet for members to give to their clients in order to help them and their children through the separation process.

Resolution's booklet can help your clients to focus on the needs of their children. It covers a range of topics about the separation process, how children are affected and how they can be helped.

Resolution members can download the booklet as a pdf or order a box of 10 copies for £30 from our website.

Please visit <https://resolution.org.uk/professional-development/publications-books/>



Retain in fairness or release nicely...



Siddique Patel Gunner Cooke

The refusal to give Talaq and the link to controlling and coercive behaviour

I often come across situations in practice where Muslim husbands refuse to give *Talaq* to their wives. It is a very specific situation and the parties involved often confine their understanding of the issue to the problem of separation between husband and wife, ie due to the husband's refusal, the wife cannot move on with her life and remarry. Often in those scenarios, I am instructed by the wife to assist in obtaining the *Talaq*.

As a private law children practitioner, I also regularly deal with allegations of controlling and coercive behaviour. When acting for Muslim clients in disputes relating to child contact arrangements where the allegation of controlling and coercive behaviour was an issue, I noticed how often the issue of the husband refusing to give *Talaq* was not being referred to as an example of that controlling and coercive behaviour.

To really link the two, it is first important to gain an understanding of the different methods of *Talaq*, what *Talaq* actually is, and how we define controlling and coercive behaviour in the context of private law family and criminal law proceedings in England and Wales.

For the different types of the *Talaq* and Islamic separation, what it actually is, and the different methods of pronouncing *Talaq*, see my previous articles in issues 214 September/October 2021 and 217 March/April 2022.

For the definition of controlling and coercive behaviour, we will be looking towards the definition as outlined in the Family Procedure Rules 2010, Practice Direction 12J (FPR 2010 PD 12J) and case law. We will also be looking at the legal criminal definition of controlling and coercive behaviour.

A reminder about *Talaq*

By way of simple summary, this form of separation provides for the husband to pronounce *Talaq* upon the wife. There are

different methods of pronouncing *Talaq* which can be done verbally but better if written and with witnesses. The wife can also pronounce *Talaq* upon herself if the couple have agreed beforehand. This is called *Tafwidh*.

The difficulty arises when the wife wants to separate and the husband refuses to give *Talaq*. This is very clearly against Islamic principles. Islam is very explicit in directing husbands that they should retain their wives in kindness, or they should let them go in kindness. This is specifically mentioned in the *Qur'an* (*Surah Al-Baqarah* – 2:229):

طَلَّقْ مَرَّتَانِ فَإِمْسَاكَ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسَنٍ

"Divorce is twice; then either to retain in all fairness, or to release nicely."

So, when the principles of *Nikah* (Islamic marriage) are not being fulfilled and there is no future in the relationship, the husband should pronounce *Talaq*. If he refuses to do so, he is going against the teachings of Allah.

In his seminal *Ma'ariful Qur'an* (*The Meanings of the Noble Qur'an*), the great Islamic scholar of *Tafsir* (the field of interpretation and explanation of the *Holy Qur'an*), Mufti Muhammad Taqi Usmani writes in explanation of the verse above:

"By this verse, a cruel practice prevalent in Arabia was eliminated. In pre-Islamic Arabia, a husband had the power to divorce his wife innumerable times, and then revoke the divorce each time. This power brought misery to the women whose husbands divorced them, but when the period of *Iddah* came near (waiting period after pronouncement of *Talaq*), they revoked the divorce, and after some time divorced her again, and so on. Thus they neither maintained her as their wife, nor... leave her to



marry someone else. By the present verse, the power of husbands was restricted to divorcing twice only. The verse means that the proper way of divorcing one's wife is that the divorce is pronounced twice at the most. So long as the number of divorces is not more than two, it is open for the husband to revoke his divorce during the period of *Iddah*, in which case they may resume their marital relations without entering into a new marriage, and even after the expiry of *Iddah*, they may enter into a fresh marriage by mutual consent. But it should be done in all fairness with *bona fide* intent to restore a just marital life. This is meant by the words, '*either to retain in all fairness*'. But if the marital relations are broken so badly that their restoration is not intended, then the husband should not revoke the divorce, and after the expiry of the period of *Iddah* the woman will be released to contract marriage with someone else if she so wills. This release too should be in a proper and graceful way without causing any impediment for the woman. This is the purport of the words, '*or to release nicely*'." (Emphasis added)

It is important to remember that like any of the other Abrahamic faiths, the basic principles of Islam encourage kindness, decency and equitable behaviour between human beings. Islam encourages and teaches that we should be really fair and equitable with one another, but Islamic teachings also go further and state that should a wrong be done unto you, then instead of becoming angry, we should be even more merciful and kind to the aggressor unless to do so would be injurious to oneself.

Clearly, when the principles of *Nikah* are not being fulfilled and the husband refuses to pronounce *Talaq* at the request of the wife, he is in contravention of the principles of kindness, decency and equitable behaviour, and is considered to be unjust and oppressive in his refusal.

Putting aside the unfairness and extreme emotional impact upon the wife for just one moment, the reader should be aware that this then puts the wife in an extremely difficult position to obtain the Islamic dissolution of that marriage. If a Muslim woman finds herself in this position, in England & Wales, she is forced to seek redress through the process of obtaining a dissolution by application to a Sharia Council. There is no unified or central organisation and there are a number of different Sharia Councils dotted around the UK with various different interpretations of the same procedure.

Controlling and coercive behaviour – the criminal law definition

In September 2012 the government published guidance to assist criminal prosecutors to better understand the nature and features of controlling or coercive behaviour.

Domestic violence and abuse is defined as:

"Any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse

between those aged 16 or over who are or have been intimate partners or family members, regardless of gender or sexuality. This can encompass, but is not limited to, the following types of abuse: psychological, physical, sexual, financial and emotional."

The definition is supported by the following explanatory text:

"This definition, which is not a legal definition, includes so called 'honour' based violence, female genital mutilation (FGM) and forced marriage, and is clear that victims are not confined to one gender or ethnic group."

The government's definition also outlines the following:

- Coercive behaviour is an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.
- Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape, and regulating their everyday behaviour.

Section 76 of the Serious Crime Act (SCA) 2015 created a new offence of controlling or coercive behaviour in an intimate or family relationship. Prior to the introduction of this offence, case law in criminal proceedings indicated the difficulty in proving a pattern of behaviour amounting to harassment within an intimate relationship.

The new offence, which did not have retrospective effect, came into force on 29 December 2015.

An offence is committed by A if:

- A repeatedly or continuously engages in behaviour towards another person, B, that is controlling or coercive; and
- at the time of the behaviour, A and B are personally connected; and
- the behaviour has a serious effect on B; and
- A knows or ought to know that the behaviour will have a serious effect on B.

A and B are "personally connected" if:

- they are in an intimate personal relationship; or
- they live together and are either members of the same family or they live together and have previously been in an intimate personal relationship with each other.

There are two ways in which it can be proved that A's behaviour has a "serious effect" on B:

- if it causes B to fear, on at least two occasions, that violence will be used against them (s76 (4)(a)); or
- if it causes B serious alarm or distress which has a substantial adverse effect on their day-to-day activities (s76(4)(b)).

Controlling and coercive behaviour – the family law definition

A full definition of how the family courts categorise and define domestic abuse, which includes controlling and coercive behaviour, can be found at FPR 2010 PD12J. As practitioners will be aware, this is the practice direction which deals with how cases are to be managed where there are allegations of domestic abuse and harm in applications for child arrangements.

However, a more useful and current analysis of "controlling and coercive behaviour" in the family courts can be found in the words of Hayden J in his seminal judgment in *F v M* [2021] EWFC 4, which followed a two-week fact-finding hearing of domestic abuse allegations centred on controlling and/or coercive behaviour. His view was endorsed by King LJ and Holroyde LJ in the recent case of *Re H-N & ors (Children) (Domestic abuse: Finding of fact hearings)* [2021] EWCA Civ 448. I think it is helpful to set out one of the central paragraphs of Hayden J's judgment (referred to at paragraph 29 in *Re H-N*):

"4. In November 2017, M [the mother] applied for and was granted a non-molestation order against F [the father]. That order has been renewed and remains effective. The nature of the allegations included in support of the application can succinctly and accurately be summarised as involving complaints of 'coercive and controlling behaviour' on F's part. In the Family Court, that expression is given no legal definition. In my judgement, it requires none. The term is unambiguous and needs no embellishment. Understanding the scope and ambit of the behaviour however, requires a recognition that 'coercion' will usually involve a pattern of acts encompassing, for example, assault, intimidation, humiliation and threats. 'Controlling behaviour' really involves a range of acts designed to render an individual subordinate and to corrode their sense of personal autonomy. Key to both behaviours is an appreciation of a 'pattern' or 'a series of acts', the impact of which must be assessed cumulatively and rarely in isolation. There has been very little reported case law in the Family Court considering coercive and controlling behaviour. I have taken the opportunity below, to highlight the insidious reach of this facet of domestic abuse. My strong impression, having heard the disturbing evidence in this case, is that it requires greater awareness and, I strongly suspect, more focused training for the relevant professionals."

"The succinct analysis provided by Hayden J clearly places the husband's refusal to pronounce Talaq at the request of the wife as 'controlling behaviour' designed to render her subordinate and corrode her personal autonomy."

Refusal to pronounce *Talaq* is strong evidence of controlling and coercive behaviour

When considering the criminal and family law definitions of controlling and coercive behaviour set out above against what we know about the rules of *Talaq*, the intention of the husband when refusing *Talaq*, and the impact upon the wife of the husband's refusal, it is clear that if raised in court with sufficient evidence of the refusal and impact upon the wife, it may be accepted as a compelling feature of the common characteristics of controlling and coercive behaviour. It is argued that the succinct analysis provided by Hayden J clearly places the husband's refusal to pronounce *Talaq* at the request of the wife as "controlling behaviour" designed to render her subordinate and corrode her personal autonomy. The definition in criminal proceedings at s76(4) (a) and (b) SCA 2015 is equally helpful in putting the refusal to pronounce *Talaq* within the realms of those definitions. In family proceedings the threshold is much lower.

Aside from the legal definitions which leave no room for doubt, it is also my strong belief that refusal by the husband to pronounce *Talaq* to the wife is unjust and unfair. The reader will see that it is clearly against the explicit written rules of Islam as set out in the *Qur'an*. It is also against one of the fundamental principles of an Islamic way of life, which is that no one party should act in an unjust and unfair manner towards another party. Further, it is noted by Islamic scholars that when the husband acts in such a manner, his behaviour is deemed "tyrannical" and "oppressive" against the wife.

This sort of behaviour however is not to be taken on its own. It is a feature of controlling and coercive behaviour in private law children cases that they must be or should form a pattern of controlling and coercive behaviour for a finding to be made. No doubt the reader will note the recent case law whereby the courts have recognised that incidents which may constitute controlling and coercive behaviour may well be numerous and indeed quite discrete individually, but when taken together as a whole, may cross the threshold for a finding of controlling and coercive behaviour to be made. This has to be distinguished from simple bad behaviour, which may not cross the threshold and which a family court may not be able to rule upon. A helpful illustration of this is once again provided by the judgment in *Re H-N*, where at paragraph 32 the court endorses the approach taken by Peter Jackson LJ in



Re L (Relocation: Second appeal) [2017] EWCA Civ 2121 (paragraph 61):

"Few relationships lack instances of bad behaviour on the part of one or both parties at some time and it is a rare family case that does not contain complaints by one party against the other, and often complaints are made by both. Yet not all such behaviour will amount to 'domestic abuse', where 'coercive behaviour' is defined as behaviour that is 'used to harm, punish, or frighten the victim...'

and 'controlling behaviour' as behaviour 'designed to make a person subordinate...' In cases where the alleged behaviour does not have this character it is likely to be unnecessary and disproportionate for detailed findings of fact to be made about the complaints; indeed, in such cases it will not be in the interests of the child or of justice for the court to allow itself to become another battleground for adult conflict."

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Civil and family proceedings: is it the same common law?



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The recent case of Owen v Black Horse Limited is a reminder of the curious relationship between the CPR and the FPR

Parts of the Family Procedure Rules 2010 (FPR 2010) are not easily understood without reference to their parallels in their older – and more generally tried and tested – sibling, the Civil Procedure Rules 1998 (CPR 1998). The cross-over between the two sets of rules demands a little history; and, before that, a declaration of interest (of sorts). Resolution commissioned me to do a commentary on the then new FPR 2010 as their date of coming into force approached 12 years ago; and *The Review's* present editor edited the book which emerged. John Cornwell provided a foreword and explained why he personally "examined [the rules] only when I was absolutely forced to".

And a little history? For reasons which remain obscure the makers of the CPR 1998 decided that those new rules should not apply to family proceedings (r2.1(2) CPR 1998). The more or less universal application to all civil proceedings pre-1998 (ie the Rules of the Supreme Court 1965 and the County Court Rules 1981) would continue in ghosted form for family cases till April 2011 when FPR 2010 took over for most mainstream family breakdown proceedings, excluding family breakdown proceedings under the Trusts of Land and Appointment of Trustees Act 1996 and the Inheritance (Provisions for Family and Dependents) Act 1975, which by most would be regarded as family proceedings, but which remained – generally as proceeding under the CPR 1998.

Family proceedings were ghettoised (as they are still). It remains the case that both sets of rules regulate the same common law and much of the same statute law. For example, CPR 1998 Part 32 and FPR 2010 Part 22 regulate the same rules of evidence and Parts 25 and 20, respectively, the same interim remedies. Concepts of case management are the same for all civil proceedings respectively under CPR 1998 Part 3 and FPR 2010 Part 4.

As I write, *Owen v Black Horse Limited* [2023] EWCA Civ 325 (24 March 2023) has just been published, asking in civil proceedings whether a claimant (C) who is absent at a hearing where only C's legal representative turned up should see their case automatically dismissed. The Court of Appeal said no and allowed C's appeal. Mine is a summary only here: much thought is needed; but if rules can only reflect or codify the common law the first question must be: is *Owen* common law; and second, if it is, does it apply to family proceedings? Are a number of demands in the FPR 2010, including that parties attend court in person, *ultra vires* the rule makers?

Disclosure (CPR 1998 Part 31) is a little different, I accept; but that difference – disclosure of information as well as documents – is defined by the common law for financial order proceedings (ie *Livesey* (formerly *Jenkins*))

v Jenkins [1985] AC 424, [1985] FLR 813) backed up in the idiosyncratic way only family lawyers could do, with Forms E, Forms A and its own form of alternative dispute resolution (the FDR).

CPR 1998: frequently reproduced in FPR 2010

Many of the particular rules in the CPR 1998 are reproduced – sometimes word for word – in the FPR 2010. Obvious examples are CPR 1998 Part 23 and FPR 2010 Part 18 (interim applications: see below) and FPR 2010 Part 37 alongside CPR 1998 Part 81 (contempt applications). On costs (Part 44 et seq) and Court of Appeal appeals (Part 52), the family proceedings rule-makers incorporated the CPR 1998 versions directly into family proceedings (with bits of the CPR 1998 disapplied from family proceedings). That remains the position today; though to confuse things needlessly the Family Procedure Rules Committee developed a separate set of rules for appeals within the Family Court (FPR 2010 part 30). If the statute and common law and the rules are the same, why reproduce them in another format? Parties to family proceedings – or more probably their advisers – have to cross-refer to Civil Procedure (the “White Book”), and to go without the help of practice directions, which accompany CPR 1998 Part 52.

An important element of the then new CPR 1998 was the ability of courts to make orders “without a hearing” (r23.8, replicated in r18.9 FPR 2010). The court can dispose of an application where the judge thinks “a hearing would be [in] appropriate”. Where the court does that it must tell the respondent that they have seven days to apply to set the order aside (rr23.9 and 23.10 replicated in rr18.10 and 18.11). The Court of Appeal’s view of this procedure was explained in *Raja v Van Hoogstraten* (No 9) [2008] EWCA Civ 1444 [2009] 1 WLR 1143. In my book on the FPR mentioned above, Raja was discussed in this context (at para 8.38), citing the important – still important – passages from that case (ie [82] – [84]). Raja’s conclusion is that generally a set aside application of the without hearing order will be allowed on review (conclusion to [84]). This conclusion is as relevant to family as to mainstream civil proceedings.

The important thing is that if a party wants to take part – that is, does not consent to the without notice order – that party must have the chance to reply. The court must hear both sides; *audi alterem partem*. In a civil proceedings case, and often cited in family Part 20 proceedings, this was emphasised by Lord Hoffmann in *National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Jamaica)* [2009] UKPC 16, [2009] 1 WLR 1405:

“[13] ... There appears to have been no reason why the application for an injunction should have been made ex parte [not on notice], or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion of the judge, *audi alterem partem* is a salutary and important principle.... A judge should not entertain an application of which no notice has been given unless

either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act... Even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none.”

“The important thing is that if a party wants to take part – that is, does not consent to the without notice order – that party must have the chance to reply.”

Human Rights Act 1998 claims

The right of a party to be heard is of the essence of a fair trial; and that leads inexorably to the European Convention on Human Rights 1950 Art 6.1. Taking the subject more widely than Art 6.1 and to the Human Rights Act 1998 (HRA 1998) itself, it will be recalled that it is unlawful for a public authority to act in a way “incompatible with a [European Convention 1950] right” (s6(1) HRA 1998). A claim under s6(1) can be brought by judicial review or in existing proceedings (s7(1) and (2) HRA 1998) against for example HM Courts and Tribunals Service, the Legal Aid Agency, inferior courts, and the Upper Tribunal (subject to what is said in *Cart v The Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663, [2012] 1 FLR 997)).

The FPR 2010 does not provide well for the family law litigant in terms of how to proceed under ss7 and 8 of the HRA 1998 (judicial remedies). The main source of a free-standing section 7 HRA 1998 claim is judicial review under CPR 1998 Part 54 (and see CPR 1998 PD16 para 15.1 and PD54A para 5.3); though instead of three months to apply (as for most judicial review applicants), the section 7 applicant has one year (s7(5)). The need to apply by judicial review takes the prospective applicant back to CPR 1998 Part 54; and that is based procedurally on CPR 1998 Part 8 (the old originating summons procedure, now reproduced for family proceedings generally in FPR 2010 Part 19). To have kept all that in one set of rules would surely have been easier for lawyer and lay person alike.

Production of documents and disclosure

Many would say – civilian and family lawyer alike – that proper disclosure between parties is central to most civil litigation. Plainly it is central to much matrimonial and civil partnership financial order proceedings. Despite this assertion, the FPR’s Part 21 deals with “disclosure” in only ➤

two operative rules (both lifted directly from the CPR) and a two-paragraph practice direction. The same subject in the CPR's Part 31 has 32 rules and three practice directions. The Family Procedure Rules Committee take the view that that is all right: the common law for family proceedings takes care of what is not in the two rules, the Committee says.

“Committal to prison for contempt threatens anyone who breaches the confessional concept of the Family Court private hearing.”

And where best to find the common law summarised? Well a good starting point is CPR 1998 Part 31 – see eg comments of the Court of Appeal in *Vernon v Bosley (No 2)* [1999] QB 18, [1998] 1 FLR 304; and of Moylan J in *Tchenguiiz-Imerman v Imerman* [2012] EWHC 4047 (Fam), [2014] 1 FLR 232. Also see the abundant case law – two family cases in March, for example – on release of court documents: the most arresting is *Re Z (Disclosure to Social Work England: Findings of domestic abuse)* [2023] EWHC 447 (Fam) (2 March 2023), Knowles J.

Disclosure is a massive subject in law; and the procedural aspects inevitably are rife. For example:

1. What disclosed documents can be released by a party to a third party – eg the press, HMRC or a family member: see eg r31.22 CPR 1998; *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 – a solicitor (now an MP) handing documents to a *Guardian* journalist; and *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38, [2019] 3 WLR 429 (release – or not – of court documents to an asbestosis support group).
2. What duty does a party have to disclose during the continuation of proceedings, for example after a Form E has been filed: see eg r31.11 CPR 1998; *Vernon v Bosley* (documents in an appeal which had a bearing on the outcome of the appeal); and *Burns v Burns* [2004] EWCA Civ 1258, [2004] 3 FCR 263, CA (continuing duty of candour to disclose). Plenty is there in the common law; much of which is codified in Part 31 of the CPR.

To follow the law on release of court documents, reference to r5.4C CPR 1998 (considered fully in *Cape Intermediate*) is essential. There is nothing to match it in the FPR. That and an understanding of the subtleties of the Supreme Court judgment and its sequelae in the High Court are not undertakings for the ill-equipped litigant in person. Surely rule makers could have helped parties – so many are now in person and will have no, or but limited, access to case law – by codifying some of that into rules for family proceedings?

Open court and hearings in private

Most lawyers who are not family lawyers will be amazed at the twisting discussions of family lawyers as to when a

Family Court should sit in private, as to when parties' names should be anonymised (or not), as to when court documents can be released and so on. This is important. Committal to prison for contempt threatens anyone who breaches the confessional concept of the Family Court private hearing (see eg s12(1) Administration of Justice Act 1960), provided it is lawfully defined as “in private” (a simple term which requires a text book for confident definition, in many cases).

The common law position is best summarised by Toulson LJ in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] QB 618:

“[1] 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. Jeremy Bentham said in a well-known passage quoted by Lord Shaw of Dunfermline in *Scott v Scott* [1913] AC 417, 477: ‘Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.’”

The public, if willing to turn up, will keep an eye on judges; or the press will do it for them, says Toulson LJ. Most courts are open, so the public or press – if so moved – can turn up. As I noted in chapter 2 of my book on *Open Justice and Privacy in Family Proceedings* (The Law Society, 2021), the family proceedings rule-makers have asserted that all proceedings under FPR 2010 are to be in private. I argue that this is rule-makers overriding the common law; and if that is correct, what the rule makers are seeking to do is literally unlawful – that is, again, *ultra vires* (beyond their powers).

Rule 39.2(3) of the CPR has a helpful sub-paragraph which codifies or summarises the common law. It says (of private court hearings, with anonymity tacked on):

“(3) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice –

- (a) publicity would defeat the object of the hearing;
- (b) it involves matters relating to national security;
- (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;

- (d) a private hearing is necessary to protect the interests of any child or protected party;
 - (e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;...
 - (g) the court for any other reason considers this to be necessary to secure the proper administration of justice.
- (4) The court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that person.

Anonymity and "transparency"

Rule 39.2(3) of the CPR deals with privacy where ordered (eg in most children cases; and some private money cases) and r39.2(4) with anonymity. Both represent substantial bones of contention amongst lawyers, some of their clients (such as Earl Spencer: *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416, Munby J), campaigners and a few parents. Mostyn J recently declared his Damascene conversion on anonymity in *Xanthopoulos v Rakshina* [2022] EWFC 30 (12 April 2022). He spent 70 paragraphs of a total of 142 explaining how, little by little, the scales were falling

from his eyes. Other judges have mostly not followed suit. The recent *MN v AN* [2023] EWHC 613 (Fam) (10 March 2023) of Moor J mentioned anonymity not at all.

Anonymity is only one aspect of family case open justice ("transparency" is a family lawyer's euphemism for the default "open justice" position of all UK courts). The others are (1) release of documents before proceedings; (2) release after a hearing (see above); and (3) open court hearings. For anyone concerned with openness of family cases, anonymity is surely the least pressing, for all the judicial ink spilled on the subject (and unless, of course, it is your case with your name on it that is in Mostyn J's firing line).

Family lawyers do not – mostly – have a nice simple list like that in r39.2(3) above. There is a r39.2(3) list for the tiny number of what will be called "disputed cases" (see r7.1(3) FPR 2010: "disputed" divorce and civil partnership cases). This is for hearing of such "disputes": see r7.30(3) FPR 2010 for the family law open justice list. For this infinitesimal batch of family cases open justice applies in the ordinary common law way. Surely – I address myself to rule makers – this open justice worm could be allowed to wriggle its way into many more parts of the family proceedings system, subject to s12(1) of the Administration of Justice Act 1960 and to the exceptions meticulously set out in r70.3(3)?

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Securing cohabitation reform: building a movement and why collaboration matters



Graeme Fraser *BBS Law*

Dr Andy Hayward *Durham Law School*

Resolution's long-standing campaign for cohabitation reform and the new academic-led Family Law Reform Now aim to increase public awareness and change the law



We know that families come in different shapes and sizes. Marriage is statistically on the decline and an increasing number of couples are choosing, for a variety of different reasons, not to marry. But despite the prevalence of cohabitation and it now being the fastest-growing family

form in England and Wales, the law remains complex, outdated and unfair.

Many members of Resolution will be all too aware of the law's deficiencies. Unlike spouses and civil partners,



cohabitants cannot have their property divided fairly by the court, nor can they claim maintenance. Instead, any relationship-generated disadvantage must be addressed by the general law of property, trusts and contract, which in most instances is inadequate as it was never developed with cohabitants in mind. This aspect is not merely a concern for academics. The law has real life impact for couples too, as shown by a 2017 Resolution member survey where 98% of respondents believed they were unable to help their cohabitant clients owing to the lack of legal protections.

“A survey led by Professor Anne Barlow in 2019 revealed that 47% of the population were under the incorrect impression that cohabitants have a common law marriage giving them the same legal rights as if they were married.”

Most recently, these issues were spotlighted by the Women and Equalities Committee of the UK Parliament, which in 2021 undertook an inquiry into the Rights of Cohabiting Partners. Informed by a public consultation, the Committee recommended increased public awareness and the introduction of an opt-out regime along the lines of the scheme proposed by the Law Commission in 2007. Drawing upon oral evidence provided by Graeme Fraser to that Committee on behalf of Resolution, the report recognised that the law was simply not fit for purpose and that reform was needed as a matter of urgency. Unfortunately, in November 2022 the government largely rejected the Committee’s recommendations and has paused any consideration of this issue until the Law Commission’s recently announced review of financial remedies law has been completed.

For us, cohabitation reform simply cannot wait that long. It has been 40 years since the infamous *Burns v Burns* [1984] Ch 317 case exposed the unfairness of the law and not much has happened since. We continue to use the problematic concept of common intention as the basis for determining property ownership and financial contributions to the home remain prioritised over non-financial ones. Public awareness of the issue has not improved either. A survey led by Professor Anne Barlow in 2019 revealed that 47% of the population were under the incorrect impression that cohabitants have a common law marriage giving them the same legal rights as if they were married. Despite attempts to educate the public about these issues, it is clear the message is not getting through. It is time for action.

Introducing Family Law Reform Now

This need for change provided the impetus behind Family Law Reform Now (FLRN). Led by Dr Andy Hayward, the Cohabitation Project of FLRN brings together academics, practitioners, and policymakers to strategise, collaborate, and push for much-needed reform in this field. The Cohabitation Project is supported by Dr Sharon Thompson (Cardiff Law School) and Dr Ellen Gordon-Bouvier (University of Exeter) and is part of a broader network of FLRN initiatives co-ordinated by Dr Charlotte Bendall and Dr Rehana Parveen, both based at the University of Birmingham.

The Cohabitation Project started work with a hybrid conference held at the Inner Temple in January 2023. Bringing together over 150 delegates, the one-day conference heard from leading academics and practitioners in the field with a view to exploring ways of securing reform. Comparative family law took centre stage with delegates hearing from the Scottish Law Commissioner, Kate Dowdalls KC, on their recent reform proposals and from Dr Kathryn O’Sullivan (University of Limerick) on the workings of the Irish regime. Preliminary findings of a large comparative study by Professor Jens Scherpe and Dr Andy Hayward were outlined prior to their publication later this year by Intersentia as a book entitled *The Legal Status of De Facto Relationships*. The book explores cohabitation in 38 jurisdictions spanning six continents. A particular highlight of the conference was a presentation by former chair of Resolution and chair of its Family Law Reform Group, Jo Edwards, who offered reflections on Resolution’s high profile and successful campaign to secure no-fault divorce.

In November 2022, building on their successful campaigning work around no-fault divorce, Resolution asked its members to share their views about the changes they would like to see to family justice. This research seeks to shape Resolution’s campaigning and lobbying activities and its wider vision for family justice. More than 1,000 members completed the survey. Members identified legal rights for cohabitants on separation as a top priority for future campaigning.

Cohabitation reform will therefore form a key part of the full report from Resolution’s Vision for Family Justice survey, due to be published later this year, to help make Resolution’s campaigning and lobbying work even stronger in 2023 and beyond, as Resolution seeks to advise the government on a better way for separating families.

In the meantime, in addition to setting out Resolution’s position on cohabitation reform at the FLRN Cohabitation conference in January, Graeme Fraser also presented at Edinburgh Napier University in April, where interest from Scottish practitioners about the position in England & Wales remains high. Cohabitation featured as a key theme at the recent Five Jurisdictions Conference, also held in Edinburgh.

Resolution’s position on cohabitation reform can be summarised as follows:

- Resolution calls for a legal framework of rights and responsibilities when couples who live together

(without being married or civil partnered) split up to provide some legal protection and secure fair outcomes at the time of their separation.

- Once eligibility criteria are met indicating a committed relationship, Resolution proposes that the court be able to make similar orders as they do on a divorce or dissolution but on a very different and more limited basis unless the couple chooses to opt out.
- The court would have flexibility to adjust property rights. The court would be allowed to tailor provision to the cohabitants' particular circumstances.
- Awards might also include payments for childcare costs to enable a primary carer parent to work.
- Cohabitants should be able to apply for maintenance to reflect the economic advantages or disadvantages caused by the relationship. Maintenance would be for a limited period to enable a cohabitant to adjust to the loss of financial support before becoming self-supporting.
- In addition, extending the range of orders and the criteria to be considered under Schedule 1 to the Children Act 1989 could provide a better legislative safety net for children of those left most vulnerable on relationship breakdown.
- Upon death, the surviving cohabiting partner should have entitlement under the intestacy rules, subject to conditions. Resolution supports the introduction of the draft Inheritance (Cohabitants) Bill annexed to the Law Commission's 2011 recommendations to reform intestacy and financial provision claims.
- Cohabitants should be treated the same as married couples and civil partners for tax purposes on death to enable them to benefit from the same exemptions in relation to Inheritance Tax.

For the campaign for cohabitation reform to ultimately succeed, we need to accept that more of the same is no longer enough. We need to take the action necessary to reset the campaign for legal reform and cohabitation law. We need to recognise our responsibility as family lawyers to do the right thing. It's our duty to raise public awareness to protect individuals, especially women and children. Educating and informing the public will be key to achieving

this, with a particular focus placed on marginalised and vulnerable groups most impacted by the unfairness of our current laws. Dispelling myths and correcting misinformation are the best way for an informed public to be able to hold the UK government accountable for laws that are no longer fit for purpose.

“Dispelling myths and correcting misinformation are the best way for an informed public to be able to hold the UK government accountable for laws that are no longer fit for purpose.”

We will also need to re-energise ourselves and re-engage key stakeholders such as MPs, the media, and other lawyers. This will require both strategic and creative thinking, and an integrated, multi-channel approach. It requires collaboration too. Indeed, one of the key aims of FLRN is to offer a forum to academics and practitioners, especially Resolution members, to share their experience, insights, and wealth of expertise. This connection not only allows us to build momentum among individuals committed to cohabitation reform but also ensures that future reform proposals fully appreciate how the law might operate in practice.

We are looking to expand the Cohabitation Family Law Reform Now network. If Resolution members would like to hear more about our activities and future events, email Dr Andy Hayward on the address below to join our mailing list. We very much hope the Cohabitation FLRN Project can follow in the footsteps of the successful campaign for no-fault divorce and finally secure reform.

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Dr Andy Hayward is an associate professor in family law at Durham Law School, and was specialist adviser to the Women and Equalities Committee Rights of Cohabiting Partners Inquiry. Graeme Fraser chairs Resolution's Cohabitation Committee.

Marital Agreements

The Drafting Committee have used their collective knowledge to pull together the most useful and effective precedents for creating pre and post nuptial agreements – online and print

<https://resolution.org.uk/publications-books/221705/>



Disclosure to the police from proceedings relating to children



Liam Hurren and Rebecca Smart

Kingsley Napley LLP



EBK v DLO [2023] is a timely reminder of the “minefield of potential contempts and crimes”

The recent case of *EBK v DLO* [2023] EWHC 1074 (Fam) has shone a light on the potential difficulties and conflicts which can be found in those cases that cross-over from the family court into the criminal and wider civil realms. The case concerned an application in the family court for permission to bring contempt proceedings. The respondent mother had disclosed documents from proceedings under s8 of the Children Act 1989 to the police in support of her complaint of harassment against the applicant father. In his judgment Mostyn J considered the applicable law relating to privacy in proceedings concerning children and the rules around disclosure to the police of information from such proceedings, highlighting the illogical and arbitrary nature of the law in this area. Mostyn J stated:

“Parties to section 8 proceedings seem to be forced to walk across a minefield of potential contempts and crimes if they seek the assistance of the police while the proceedings are ongoing. It has taken me many hours to get to the bottom of the exact scope of the rules. It is unacceptable that something so important should be so obscure, impenetrable, arbitrary and illogical.”

In cases where there are either concurrent or consecutive family and criminal proceedings, it may be advantageous to use documents and information filed in one set of proceedings to strengthen a party’s case in the other, and vice versa. However, the interplay between the family and criminal courts can be complex. Many family practitioners may well share Mostyn J’s frustration and it is clear that there needs to be procedural clarity for practitioners and, more importantly, litigants in person, as the case of *EBK* shows.

Privacy in proceedings relating to children

It has long been a principle of law that the identity of any children who are subject to court proceedings must be

protected. Under s12(1) of the Administration of Justice Act 1960, the publication of information relating to children proceedings (including those under the Children Act 1989 or Adoption of Children Act 2002) is contempt of court and therefore prohibited.

Although s12 has been used to ensure children’s privacy is maintained, this is not in fact its main focus. As explained by Munby J in *Kelly v British Broadcasting Corp*n [2001] Fam 59, the purpose of s12 is to protect the documents on the court file and the evidence that has been put before the judge. It may therefore come as a surprise to many that disclosure of the following is not caught by the scope of s12: the name, address or photograph of the children and the parties; the nature of the dispute; and orders made during hearings. Mostyn J referred to this list in *EBK* as the *Re PP* “taxonomy”, from his earlier decision in *Re PP (A child: Anonymisation)* [2023] EWHC 330 (Fam).

The prohibition in s12 was later amplified by s97(2) of the Children Act 1989, which makes it an offence to publish to the public at large or any section of the public any material which is intended, or likely, to identify any children being involved in any proceedings under the Children Act 1989 or the Adoption of Children Act 2002, or the address or school of any such children while proceedings are ongoing. If neither the 1989 Act nor the 2002 Act are engaged, or such proceedings have concluded, s12 operates alone.

Disclosure to the police

Where there is a criminal allegation which overlaps with proceedings relating to children, material obtained from the family court can be invaluable to the police. Parties are required to be open and candid in family proceedings, which may well be contrary to their interests in criminal proceedings should the same evidence be admitted. Key material the police may therefore wish to obtain from the family proceedings will include: expert reports;

transcripts of evidence; witness statements; and transcripts of judgments where findings are made. In many cases, a complainant will also be eager to share this information with the police if they believe it supports their allegations in the concurrent criminal proceedings.

The prohibitions under s12(1) and s97(2) would seemingly prevent such disclosures being made. However, there are a number of circumstances in which disclosure to the police is specifically permitted:

- Under r12.73(1)(viii) FPR 2010, a party is able to share information from children proceedings with “a professional acting in the furtherance of the protection of children”, the definition of which includes a police officer removing and accommodating a child in an emergency, or serving in a child protection unit or a paedophile unit of a police force (r2.3(1) FPR). In collective terms, it could be said that disclosure can therefore be made to a “specialist” police officer.
- Additionally, and separately, PD 12G paragraph 2.1 provides that a party is also permitted to disclose to any police officer the text or summary of the whole or part of a judgment given in children proceedings for the purposes of a criminal investigation.

While there is no obvious authority to confirm this, s97(2) may not actually assist a party seeking to show that a disclosure to the police was unlawful, as the intention of the provision seems to prevent disclosure to the general public, as opposed to those acting in an official capacity. Section 12(1) does however provide the overarching prohibition to prevent documents being passed to the police, other than those expressly permitted by r12.73(1)(viii) FPR and PD 12G.

A technical breach of “arbitrary” rules

In *EBK* the parties had been engaged in proceedings commenced by the father’s application for a child arrangements order. The mother had made a number of allegations, and a fact-finding hearing had been held. However, during the proceedings, she reported the father to the police for harassment and handed to the attending police officer a number of documents, including the father’s C100, the independent social worker’s report, and the father’s position statements.

Applying the rules on privacy and disclosure set out above, Mostyn J concluded that by providing documents from children proceedings to a non-specialist police officer, the mother was in contempt of court. By contrast, the mother could have disclosed documents from the children proceedings to a specialist police officer, or disclosed the judgment from the proceedings to a non-specialist police officer for the purpose of a criminal investigation, and both of these actions would have been lawful. For the finding of contempt to turn simply on the type of police officer a party happens to disclose information to appears entirely arbitrary. It is, however, important to make clients aware of this distinction if they are speaking candidly with the police,

and advice from a specialist criminal lawyer may be needed to understand the next steps a police officer is likely to take in this scenario.

Mostyn J admonished the mother for her breach but accepted that this was technical in nature, relating to rules which are spread across multiple sources, and from which no lay person would be easily able to understand what they are permitted to share and to whom. The lack of clarity is particularly stark given the potentially serious repercussions of a breach, and clients should therefore be advised very carefully of their obligations. Mostyn J did, however, refuse permission for the contempt application to proceed on the basis of other factors, including that the issue was being litigated separately in defamation proceedings which would give the father sufficient relief.

Mostyn J called on the Family Procedure Rules Committee to review this area urgently.

Obtaining permission from the court

The cautionary tale from *EBK* is that parties must not simply pass documents from family proceedings to the police without considering whether a court order is required. Applications of this nature can be made pursuant to r12.73(1)(b) and (c) FPR and the factors the court will consider are set out in *Re C (A minor) (Care proceedings: Disclosure)* [1997] Fam 76 and *Re M (Children) (Care proceedings: Disclosure)* [2019] EWCA Civ 1364 (paragraph 29). These include: the welfare, interests and privacy of the children concerned; the importance of encouraging frankness from parties in children cases; the public interest in the administration of justice; the gravity of the alleged offence and the relevance of the disclosure sought; and the desirability of co-operation between various agencies concerned with the welfare of children.

Applications must be made on notice to all parties in the relevant proceedings. Parties who wish to oppose the disclosure of the documents to the police may attend the hearing and submit any representations to the court as to why the documents should not be disclosed. It is also worth noting that the costs are borne by the party bringing the application, which is likely to be a deterrent to many private applicants or public bodies with limited funds, in addition to any significant delay which the timing of an application may have on resolving a criminal investigation.

While the consideration of the *Re C/Re M* factors is well-established in care proceedings, HHJ Vincent in *Thames Valley Police v F* [2023] EWFC 28 expressed uncertainty as to whether they would also be used in the context of disclosure sought from private law children proceedings. In this case, the police were investigating an allegation of strangulation and the criminal proceedings overlapped with the family proceedings, the latter of which contained social services’ assessments, position statements detailing the mother’s allegations and the father’s responses, and CCTV footage. The police applied to the family court for “disclosure of statements, documents and as appropriate, testimony that refers to any covert



recordings obtained, and threat of harm and also request under practice direction 12G a copy of the final judgement made in the family proceedings”.

The court made clear that an application must be supported by evidence (which was absent in that case) in order for the balancing exercise to be undertaken. It weighed heavily on the court that any disclosed documents would likely end up in the public domain by virtue of the criminal proceedings, and would be likely to impact the welfare of the child and their mother.

It is important to be aware that where an order is obtained for family court documents to be disclosed to the police (or the prosecution), the admissibility of those documents in the criminal court would remain subject to a successful bad character application in accordance with s101 Criminal Justice Act 2003 (ie that the documents show “reprehensible behaviour” on the part of the defendant). This will therefore be a relevant consideration for both family and criminal lawyers together, before the application is made for the disclosure.

While the most common scenario may be where the police seek family court documents, there may also be circumstances in which a defendant in criminal proceedings wishes to obtain this material (for example, to challenge the credibility of the complainant). A defence lawyer’s approach would likely be to invoke the requirements imposed on the prosecution and police under the Criminal Procedure and Investigations Act 1996 to obtain all relevant documents regarding the allegations from the family proceedings. In practical terms, this means that where the prosecution accepts their obligations under CPIA 1996 or the court directs the disclosure of the documents, the prosecution will be required to make the application for disclosure on the defendant’s behalf. Again, however, the admissibility of this disclosure will usually depend on the success of a bad character application in respect of the complainant. It is

therefore key to obtain specialist advice on the chances of success of such an application.

Disclosure from criminal proceedings

In the reverse scenario, where family proceedings are foreshadowed by a criminal investigation, parties in these proceedings may wish to adduce material obtained by the police which may assist their case in the family court.

Material held by the police is ordinarily subject to the Data Protection Act 2018, the Human Rights Act 1998 and a common law duty of confidentiality. Nevertheless, where that material is necessary to enable the court to make a decision relating to the welfare of children or to the protection of vulnerable people, the material will be disclosed by the police in accordance with Schedule 2, Part 1, paragraph 5 DPA 2018 unless there is good reason to withhold it. Where the information relates directly to the party requesting it, they may also submit a subject access request to the police themselves, though a response is likely to take a number of months.

It is of crucial importance that both family and criminal practitioners bear in mind the impact any evidence submitted within their respective sets of proceedings may have on the other. In cases with concurrent family and criminal proceedings, decisions taken as part of a client’s criminal case may not necessarily be favourable to their strategy in the family court, or vice versa. While the rules regarding sharing information with the police are arbitrary, successful applications to the family court may result in documents being shared between the respective courts, therefore a collaborative approach between family and criminal teams is essential from the outset.

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Introducing... the Parenting After Parting Committee’s new podcast featuring Sir James Munby

The Resolution Parenting After Parting Committee has published a special edition podcast in which Edward Cooke interviews Sir James Munby, who was President of the Family Division from 2013 until his retirement in 2018, and psychotherapist and counsellor Adele Ballantyne.

Since his retirement, Sir James has continued to play an active role in family justice, including as the current chair of the Nuffield Family Justice Observatory, which aims to improve the lives of children and their families by putting data and evidence at the heart of the family justice system and highlighting areas where change will have the biggest impact and collaboration can make that change happen.

In the podcast Adele, Sir James and Edward discuss a range of problems facing Resolution members, and set out key areas ripe for reform. While making “no criticism of all the heroic people working in the system”, Sir James says it is “grotesquely under-resourced, and is trying to do with inadequate resources, both financial and human, an immense amount of work with case load it simply cannot cope with”.

A key topic of discussion is the Family Solutions Group’s 2020 recommendations as to where improvements could be made the system to better support parents and families, which Sir James described as “a comprehensive analysis, which needs to be accepted and applied” in its entirety. While warning about the risk of cherry-picking the cheapest and easiest

recommendations, he says some of the most important points made by the Group are the need for much better information out there for parents and separately for their children, explaining what the problems are, explaining what the process is, and explaining how situation can actually be cured.

Secondly, Sir James agrees with the recommendation that a lot of cases should be taken out of court all together, with a fundamental reappraisal of the process: "we've got to distinguish between two classes of case. On the one hand cases which involve welfare safeguarding issues of children and cases which involve domestic abuse, and they require a court process. The other block of cases shouldn't be in court at all. And we've got to do everything in our power to produce systems which keep them out of court."

For those cases which should be in court, the two big messages are that the children have got to have a proper voice, which they don't have at present, and there has to be, "which there isn't presently, whatever the theory may be, proper judicial case management, proper judicial supervision".

Sir James goes on to discuss the lack of focus on children in central government, with various departments covering various angles, and "the amazing turnover we've seen in the last decade of both secretaries of state and junior ministers".

Adele, Edward and Sir James also cover the use of language around family proceedings, the adversarial system, and the lack of understanding by parents and children experiencing divorce of what the court process means, does or is trying to do. They also discuss the voice of the child and failures in the current system to properly make time for the child's views to be heard. If you can only listen to parts of the podcast, be sure to catch Sir James's description of a judicial conference on the Northern Circuit, where 200 judges heard from four young people who had "all been through bits of the system". Sir James said the

effect was "absolutely extraordinary. The more we went on, the more one saw scales falling from judges' eyes. They began to realise just what these children were saying and I could see what a complete revelation it was to them. After the session finished, when we were having coffee, the tone completely changed to 'this is absolutely eye-opening', 'I wish I'd known this years ago', 'This is so important'."

Sir James also makes some very interesting observation on MIAMS, David Norgrove's report on them, and the "pernicious and utterly foreseen and foreseeable consequences of LASPO".

In the second half of the podcast they discuss what the E&W system could learn from other jurisdictions. Adele sets out some key thinking on working with children in proceedings, or to avoid proceedings, and strategies parents can use to manage the situation more effectively, and more emotionally. It is also worth tuning in to hear Sir James's remarks on the way judges' interaction with children or teenagers in court is often affected by the developmental stage of their own children – by the time judges are commonly hearing the difficult cases, "their children are no longer teenagers and their grandchildren are not yet teenagers. So in fact judges are not currently familiar dealing with children of that age group. That's why we need to involve children in the process much more and much earlier." This leads the discussion into the area of judicial training, experts, and some strong remarks on safeguarding training from Adele.

All in all, this fascinating podcast covers an enormous amount of ground, with real insights in every area: highly recommended!

Login to the podcast: In conversation with ... Sir James Munby on...<https://resolution.org.uk/podcast-in-conversation-with-sir-james-munby/>

Member news

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

From the Shard to the Shore – Resolution member Edward Cooke walks the old Roman Way to help Ukrainian families rebuild in the UK

Fifteen months after the Russian invasion, Resolution member Edward Cooke walked (with a few miles of kayaking and cycling thrown in on the last day!) 90 miles from the London Shard to the Sussex coast to raise funds for a small but transformational charity helping Ukrainians live safely and sustainably in the UK.

From 29 May to 3 June, Edward – serial Resolution committee member and managing director of Edward Cooke Family Law – walked with his friend, Royal Naval doctor Adrian Hamilton, following a route they had created to closely follow Stane Street, the ancient Roman road linking the capital with beautiful West Wittering beach. ➤



Dr Adrian Hamilton and the founder of Opora at the Shard at the start of the walk

Their goal? To support the vital work of Opora, a UK charity dedicated to assisting Ukrainian families with rebuilding their lives and – in particular – to help Opora recruit a full-time Ukrainian mental health specialist.

Opora managing director Stan Beneš said being approached by Edward to be beneficiaries of the walk was particularly heartening, not least as Edward was prompted by a Ukrainian friend to support the charity. He added: "The past year has been incredibly traumatic for the Ukrainian population. There's a need for Ukrainians to be able to access appropriate mental health resources which cater to their experiences, and in a language in which they feel comfortable expressing themselves. We hope to provide a consistent and sustainable level of support in this area and to amplify this through our technology-focused approach. However, in order to be able to do this, we need to raise £30,000."



Edward, centre in blue, with Adrian and Ukrainian friends on the final leg of their trip by bike to West Wittering beach

Edward said: "Hopefully, we can raise enough to really make a difference to mental health support for people living through the unimaginable horrors of war. Our home-town Chichester has welcomed the highest proportion of refugees from Ukraine in the country. In fact, my wife is part of the team at our local secondary school which supports a significant number of Ukrainian students and their families. We've made some wonderful Ukrainian friends – but it's almost impossible to wrap our minds around what they have to deal with on a daily basis. We're incredibly grateful for the generous support of our friends and colleagues so far."

Anyone wishing to donate to Edward's fundraising walk for Opora can still do so at www.justgiving.com/page/shardtoshore

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Oxfordshire Resolution launches ED&I sub-committee with first-ever Ramadan Iftar

Oxfordshire Resolution has launched an Equality, Diversity and Inclusion sub-committee with an event attended by local professionals and a member of the judiciary. We combined our launch with also hosting our first-ever Ramadan Iftar, on 13 April 2023.

Our Ramadan Iftar was hosted by RWK Goodman LLP at their offices in Oxford, and the event was a great success. The speakers were Adam Kayani (Harcourt Chambers), Jennifer Lee (Pump Court Chambers) and myself. HHJ Vincent attended the event along with local family lawyers and professionals.

The new ED&I sub-committee is made up of Eleanor Moodey (Pennington Manches Cooper), Farzana Iqbal (RWK Goodman LLP), Fareen Mohmood (Pennington Manches Cooper), Rashi Dawson (Clifton Ingram LLP) Irrum Shah (HMG Law) and myself.



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Members of the newly formed Oxfordshire Resolution ED&I group