

FINANCIAL REMEDIES UPDATE

FAMILY LAW WEEK TRAINING WEBINAR, 26 SEPTEMBER 2024

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INTRODUCTION

1. This webinar focusses on developments in the following topics:
 - **Non-Court Dispute Resolution [1-9]**
 - **Matrimonial and non-matrimonial assets [9-19]**
 - **Conduct [20-27]**
 - **Pensions [27-31]**
 - **Nuptial agreements [32-35]**
 - **Part III applications [35-41]**
 - **Schedule 1 applications [41-43]**
 - **Applications made post final order [44-47]**
 - **Costs [48-50]**
2. Cases and other source documents are hyperlinked.
3. Practitioners should also be aware of the **Transparency Reporting Pilot for Financial Remedy Proceedings** which currently covers Leeds, Birmingham and the Central Family Court. The Guidance from the President of the Family Division is available [here](#).

NON-COURT DISPUTE RESOLUTION

4. On 29 April 2024 important changes were made to promote the use of Non-Court Dispute Resolution (NCDR) in family cases.

Definition of NCDR

5. By amendment to [FPR 2.3\(1\)\(b\)](#), the definition of NCDR is extended:

‘non-court dispute resolution’ means methods of resolving a dispute other than through the court process, including but not limited to mediation, arbitration, evaluation by a neutral third party (such as a private Financial Dispute Resolution process) and collaborative law’

Case management- changes to Part 3

6. **FPR 3.3** now provides:

- (1) The court must consider, at every stage in proceedings, whether non-court dispute resolution is appropriate.
- (1A) When the court requires, a party must file with the court and serve on all other parties, in the time period specified by the court, a form setting out their views on using non-court dispute resolution as a means of resolving the matters raised in the proceedings.
- (2) In considering whether non-court dispute resolution is appropriate in proceedings which were commenced by a relevant family application, the court must take into account –
 - (a) whether a MIAM took place;
 - (b) whether a valid MIAM exemption was claimed was confirmed; and
 - (c) whether the parties attempted mediation or another form of non-court dispute resolution and the outcome of that process.

7. **FPR 3.4** – Timetabling proceedings: encouraging non-court dispute resolution:

- (1) Paragraph (1A) applies when the court considers that non-court dispute resolution is appropriate.
- (1A) Where the timetabling of proceedings allows sufficient time for these steps to be taken, the court should encourage parties, as it considers appropriate, to—
 - (a) obtain information and advice about, and consider using, non-court dispute resolution; and
 - (b) undertake non-court dispute resolution.
- (2) The court may give directions about the matters specified in paragraph (1A) on an application or of its own initiative.
- (2A) Subject to paragraph (2B), the court may give directions referred to in paragraph (2) at any time during the proceedings.
- (2B) In proceedings to which Practice Direction 12B applies, the court may give directions referred to in paragraph (2) at any time after the court has received the safeguarding letter or safeguarding report referred to in Practice Direction 12B.
- (3) Where paragraph (1A) applies, the court will give directions about the timing and method by which the parties must tell the court if any of the issues in the proceedings have been resolved.
- (4) If the parties do not tell the court if any of the issues have been resolved as directed under paragraph (3), the court will give such further directions as to the management of the case as it considers appropriate.
- (5) The court or court officer will –
 - (a) record the making of any directions to which this rule applies; and

(b) arrange for a copy of the directions to be served as soon as practicable on the parties.

(6) Where the court proposes to exercise its powers of its own initiative, the procedure set out in rule 4.3(2) to (6) applies.

8. **PD 3A** supports the changes in Rules 3. The following paragraphs are of particular importance:

10A. While the FPR do not give the court the power to require parties to attend non-court dispute resolution, the court does have a duty to consider, at every stage in proceedings, whether non-court dispute resolution is appropriate.

10B. The court will want to know the parties' views on using non-court dispute resolution as a way of resolving matters. To enable the court to obtain that information, the procedure set out in paragraph 10C applies in-

(a) proceedings for a financial remedy in which the MIAM requirement applies (see paragraph 13); and

(b) private law proceedings relating to children in which the MIAM requirement applies (see paragraph 12) where those proceedings are progressing on the online system referred to in Practice Direction 36ZD, unless the applicant claimed a MIAM exemption on the basis of domestic abuse (see paragraph 20) or a form C1A (allegations of harm and domestic abuse) has been filed with the court.

10C. Where this paragraph applies-

(a) each party must file with the court and serve on all other parties a standard form setting out their views on using non-court dispute resolution-

(i) at least 7 days before the first hearing in the proceedings which is held on notice to all parties, or

(ii) within such other period before that hearing as the court may direct; and

(b) if required by the court, each party must file with the court and serve on all other parties an updated version of that standard form –

(i) at least 7 days before a subsequent hearing; or

(ii) within such other period before a subsequent hearing as the court may direct.

The form referred to in this paragraph must be verified by a statement of truth.

10D It may be that there are gaps in time between hearings which the court considers the parties should use to attend non-court dispute resolution and the court should make it clear to the parties if this is the case (Rule 3.4). The court also has general powers to adjourn proceedings, which could be exercised for these same reasons (Rule 4.1), with the court using its discretion on a case by case basis to determine the appropriate length of any adjournment.

10E If the court allows time for parties to attend non-court dispute resolution, or adjourns the proceedings specifically for that purpose, any failure of a party, or parties, to then attend non-court dispute resolution will not affect any substantive decision the court makes in the proceedings. However, the court may take the parties' conduct in relation to attending non-court dispute resolution into account when considering whether to make an order for costs in relation to the proceedings: see Part 28 FPR.

9. These changes now allow the court to adjourn the case for the purposes of NCDR without the parties agreement (which had previously been required¹).

Costs - changes to Part 28

10. [FPR 28.3](#) has been amended to provide that, in deciding whether to make a costs order, the court will have regard to a failure to engage in NCDR without good reason:

(7) In deciding what order (if any) to make under paragraph (6), the court must have regard to –

(aa) any failure by a party, without good reason, to—

(i) attend a MIAM (as defined in rule 3.1); or

(ii) attend non-court dispute resolution;

(a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;

(b) any open offer to settle made by a party;

(c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;

(e) any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and

(f) the financial effect on the parties of any costs order.

Pre-action protocol

11. The [Pre-Action Protocol](#) annexed to FPR PD9A has been revised to take into account the changes to the Rules. The protocol sets out the key steps that the court will expect parties to take in relation to NCDR before starting court proceedings. The protocol places obligations on parties and legal representatives. Everyone is required to comply with protocol, including litigants in person.

12. Important elements of the protocol include:

2. This Protocol applies to all applications for a financial remedy as defined by rule 2.3. It covers all classes of case, including applications for periodical payments, lump sum, property adjustment and/or pension sharing orders. It applies whatever the size of the parties' assets and whether it is a so-called "needs" or "sharing" case. It applies whether the parties are legally represented or not.
4. Any legal representatives instructed should give a copy of this Protocol to all parties, and explain its meaning and implications to their client, before they start court proceedings.

¹ See observations of Mostyn J in *Mann v Mann* [2014] 2 FLR 928

6. To comply with this Protocol the court will usually expect the parties to have done the following:
 - a. attended a MIAM with an authorised mediator, unless a valid exemption applies;
 - b. considered, and unless there is good reason for not doing, proposed and engaged in appropriate non-court dispute resolution;
 - c. provided full disclosure (information relevant to the issues in dispute) to the other party, including appropriate financial disclosure;
 - d. clearly set out their position (including the orders they would wish the court to make were proceedings started); and
 - e. attempted negotiation (trying to agree the issues in dispute) by making reasonable proposals for settlement.
12. Although there is a place for constructive negotiation via correspondence between legal representatives, that alone shall not be a sufficient attempt at non-court dispute resolution for the purposes of this Protocol. Other forms of negotiation between legal representatives, such as round-table meetings, may be considered sufficient depending on when and how they took place.
14. Before starting court proceedings, the court will expect parties to have attended at least one form of non-court dispute resolution, unless there are safety concerns or there is another good reason not to do so.
15. Legal representatives should make the parties aware that if they have not attempted at least one form of non-court dispute resolution before starting court proceedings then the court (on being informed by a party that this is the case or by the court finding out of its own initiative) may (i) decline to commence the court timetable by the issue of a Form C (Notice of a First Appointment); or (ii) suspend the same and instead make such directions as it thinks appropriate to ensure that at least one form of non-court dispute resolution has been attempted before directions on Form C are given.
16. If one party is not willing to attend non-court dispute resolution, they should give reasons in writing so that (i) the other party is clear about their position and the reasons given for it; and (ii) if court proceedings are started the position is clear to the court when it is considering whether, and if so how, to encourage non-court dispute resolution.
18. If the parties are engaged in non-court dispute resolution, an application to the court should not be made until the process has concluded, unless there are good reasons, which could include, but would not be limited to, seeking orders from the court to prevent assets from being disposed of or dissipated.
19. Although there may be good reasons (for example, where there is a real risk one party may start competing proceedings in another jurisdiction or dissipate assets) to start court proceedings before attempting non-court dispute resolution, the court will still expect parties to attempt non-court dispute resolution to resolve other issues in dispute once the urgent issue which caused the party to start court proceedings has been resolved.

24. It is not acceptable for the costs of any case to be disproportionate to the financial value of the subject matter of the dispute. The principle of proportionality must therefore always be borne in mind. Proportionality is a factor the court will take into account when considering whether, and if so to what extent, to make an order for one party to pay the costs of the other party.
 25. Parties and legal representatives should be aware that where a court is considering whether to make an order requiring one party to pay the costs of another party, it will take into account (i) any open pre-application offers to settle; (ii) if a party did not attend a MIAM and was not exempt from doing so; (iii) the FM5; (iv) whether a party has provided appropriate financial disclosure and, if so, when; and (v) a failure, without good reason, to attend non-court dispute resolution or a premature and unjustified abandonment of ongoing non-court dispute resolution.
 32. If the parties give pre-application financial disclosure, they must provide full and honest disclosure to the other party of facts, information and documents which are material and sufficiently accurate and up-to-date to enable proper negotiations then to take place. Openness in all dealings is essential.
 33. Legal representatives must tell their clients in clear terms of this duty and of the possible consequences of providing false information without an honest belief in its truth.
13. Upon issue parties will receive a letter from the President of the Family Division setting out the benefits of NCDR and explaining the court's expectation that the parties will have tried to reach an agreement before coming to court and will continue to do so.

Consideration of the new Rules in case law

14. [X v Y \(Financial Remedy: Non-Court Dispute Resolution\) \[2024\] EWHC 538](#)

- a) Judgment of Gwynneth Knowles J given just prior to the implementation of the new rules.
- b) Of particular interest in respect of the court's approach and expectations of the parties in anticipation of the new Rules and consideration of the Court of Appeal decision in the Civil case of *Churchill v Merthyr Tydfil County Borough Council and Others* [\[2023\] EWCA Civ 1416](#).

The court's expectations

[2] ... "I consider it might be helpful for those involved in family proceedings, whether concerning money or children, to understand the court's expectation that a serious

effort must be made to resolve their differences before they issue court proceedings and, thereafter, at any stage of the proceedings where this might be appropriate.”

Consideration of Churchill v Merthyr Tydfil

[13] “Following extensive review of domestic and international case law, the Court of Appeal held that the court had the power to compel parties in civil proceedings to engage in non-court dispute resolution and/or stay proceedings to allow for non-court dispute resolution to take place. How a court should exercise its discretion to compel the parties was set out by the Court of Appeal in paragraph 65:

The court should only stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made does not impair the very essence of the claimant's right to proceed to a judicial hearing, and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost.”

[15] “It may be thought that the decision in *Churchill v Merthyr Tydfil* is of limited relevance to family proceedings. To make that assumption is unwise. The active case management powers of the CPR mirror the active case management powers in the FPR almost word for word and both the civil and the family court have a long-established right to control their own processes. The settling of cases quickly supports the accessibility, fairness and efficiency of the civil, and I emphasise, the family justice system. As Sir Geoffrey Vos, MR stated in paragraph 59 of *Churchill v Merthyr Tydfil*:

“...even with initially unwilling parties, mediation can often be successful. Mediation, early neutral evaluation and other means of non-court based dispute resolution are, in general terms, cheaper and quicker than court-based solutions. Whether the court should order or facilitate any particular method ... is a matter for the court's discretion, to which many factors will be relevant.”

Though the FPR rule changes due on 29 April 2024 do not go as far as compelling parties to proceedings to engage in non-court dispute resolution, the agreement of the parties to an adjournment for that purpose will no longer be required. Instead, the family court may – where the timetabling of the proceedings allows sufficient time for these steps to be taken – “encourage” the parties to obtain information and advice about and consider using non-court dispute resolution and “undertake non-court dispute resolution” (rule 3.4(1A) with effect from 29 April 2024). The accompanying Practice Direction 3A has been amended and makes clear that the court may also use its powers to adjourn proceedings to encourage the use of non-court dispute resolution (rule 4.1). In financial remedy cases, the power to encourage even unwilling parties will be reinforced by an amended rule 28.3(7) which will make the failure, without good reason, to engage in non-court dispute resolution a reason to consider departing from the general starting point that there should be no order as to costs.”

15. [NA v LA \[2024\] EWFC 113](#)

- a) Judgment of Nicholas Allen KC sitting as a Deputy High Court Judge
- b) Application of FPR 3.3 – stay for NCDR following urgent application for preservation of property (FPR 20.2(1)(c)). MIAM exemption no longer applicable.
- c) Rejection of W’s argument that NCDR could only take place after court directed financial disclosure.

Disclosure

[15] ... “There is no need for financial disclosure to be given prior to parties engaging in NCDR. NCDR will almost invariably provide for such disclosure to be given as part of the process. Many forms of NCDR also have ‘teeth’ if there is (say) a reluctant discloser. For example if parties enter the IFLA financial arbitration and a party disobeys the arbitrator’s order then pursuant to the Arbitration Act 1996 s42(1) (headed “Enforcement of peremptory orders of tribunal”), unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal. Additional court powers exercisable in support of arbitral proceedings are set out in s44 of the same Act.”

Stay

[24] “At least at this stage of the case the facts do not appear to be unusual. Further notwithstanding that it is seemingly a so-called ‘big money’ case nor does it appear that it may be unduly legally complex. On W’s behalf it was averred by Miss Bangay in her position statement that (i) the family home in London is worth £8m (and is mortgage-free); (ii) there is a second London property purchased for £6.5m and which is currently undergoing extensive renovations with a budgeted costs of a further £6.5m (and which is mortgage-free); (iii) there are other properties in this jurisdiction which OCEs state are held in the names of H’s family (albeit it is said may be beneficially owned by H); (iv) H is due to complete the purchase of a new build waterside apartment in Athens at a cost of €3m; (v) H has extensive non-UK based business interests; and (vi) H’s father is reputed to be a billionaire with extensive interests and H is understood to have interests in the family businesses and holds significant funds. By contrast W is said to have been a “conventional housewife”.

[25] “It may be that some or all of this presentation will be disputed on H’s behalf. However, there is nothing in this description that suggests the case will be unsuitable for NCDR. [31] “In my view and in compliance with my duties as set out above, this is a paradigm case for the court to exercise its new powers. I consider NCDR to be appropriate and I wish to encourage the parties to engage in the same. This would be to their emotional and financial benefit as well as to the benefit of their children.”

[32] “Pursuant to r3.4(2) I therefore make the following directions:
a. the financial proceedings in Form A dated 14th May 2024 shall be stayed with immediate effect;

- b. the Form C is not to be processed and no First Appointment is to be listed at the present time;
- c. pursuant to r3.4(3) the parties must tell the court (by way of a joint letter sent by email to my judiciary address) by 4 pm on 4th July 2024 (i) what engagement (if any) there has been with NCDR; (ii) whether any of the issues in the proceedings have been resolved; and (iii) in light of the foregoing their respective proposals for the way forward; and
- d. upon receipt of this letter I shall decide the appropriate way forward.”

MATRIMONIAL AND NON-MATRIMONIAL ASSETS

16. Standish v Standish [2024] EWCA Civ 567

- a) Court of Appeal – Lord Justice Moylan, Lady Justice King and Lord Justice Philips.
- b) Landmark decision on the issue of matrimonial v non-matrimonial property and matrimonialisation of assets – when does an asset which was initially non-matrimonial become an asset to which the sharing principle applies?
- c) Essential reading.

Facts:

- The parties married in 2005 and have two children of their relationship
- The marriage ended in 2020.
- Total assets of £132 million.
- At the date of the marriage H had very significant wealth including investments, savings, a farm and business in Australia (Ardenside Farm and Ardenside Angus).
- W’s pre-marital assets were much more modest.
- At first instance Moor J determined that £112m was matrimonial and £20m was non-matrimonial.
- The non-matrimonial property as found by Moor J was a farm in Australia – Ardenside Farm.
- Moor J found that the matrimonial property included assts which had been matrimonialised: (a) investment funds of £80 million which H had transferred to W in 2017; and (b) a farming business – Ardenside Angus – worth £8.6 m in which W had been given shared in 2017.
- Both transactions were part of tax planning schemes.
- Moor J determined that there should be an unequal division of the matrimonial assets – 40% to W as they were significantly pre-marital and only matrimonialised towards the end of the marriage.
- Both parties appealed.
- W argued:

- the property transferred to her by H was now her separate property and was non-matrimonial on her side;
- the ownership of the property (and not the provenance) is the critical factor in the application of the sharing principle. This gives proper effect to the parties' autonomy;
- matrimonial property was that generated during the marriage or brought into the marriage;
- matrimonial property must always be equally shared unless there is reason to depart from equal division – needs, compensation, special contribution, nuptial agreement; and
- As W had conceded at first instance that the assets should be shared equally, this had brought them into the marriage – the court was bound to do so as there was no reason to depart from equality.
- H argued:
 - the property transferred to W remained H's non-matrimonial (pre-marital) property;
 - title is not relevant to the application of the sharing principle because the court looks through title to determine whether assets are matrimonial; and
 - the concept of matrimonialisation should be applied cautiously (and perhaps not maintained at all).

Held:

- H's appeal allowed. W's appeal dismissed.
- It is the source of the asset rather than the title that is the critical factor.
- W's arguments in relation to autonomy were rejected and would be contrary to the objective of achieving a fair outcome.
- The concept of matrimonialisation should be applied narrowly.
- The 2017 assets did not become W's non-matrimonial property – she was not the source of the assets – at least 75% were the non-matrimonial property of H.
- W's award was reduced from £45m to £25m.
- The case was remitted for determination of the application of the needs principle if the parties could not agree.

Application of the sharing principle

[149] "In my view, it is clearly established that, in the application of the sharing principle, the source of an asset is the critical factor and not title. It can be seen from the cases cited above that title does not feature as a significant factor in contrast to the "source" of an asset which features prominently in explaining the court's approach to the application of the sharing principle and, in particular, the different approach to an asset which is the product of the parties' endeavours, namely matrimonial property, and property which is not. As submitted by Mr Bishop, the sharing principle is founded or based on each party, in accordance with the objectives of fairness, equality and non-discrimination, being entitled to an equal share of their matrimonial property, namely

the “fruits of the partnership” or the wealth built up by the parties’ endeavours during the marriage.”

[151] “It is clear to me that the approach proposed by Mr Todd not only runs counter to the principles established since *White* but it would also undermine the attainment of a fair outcome because it is based on ownership which is not a good guide to fairness. As the judge said, at [74]: “It has long been clear in this jurisdiction that you cannot benefit from keeping assets in your sole name”. Further, with all due respect to Mr Todd, his submissions, as referred to above, lacked cohesion perhaps because they looked at the court’s powers from a very narrow perspective, namely the perspective of the facts of this case. I am confident that he would not be making the same submissions if, for example, all the assets were in the husband’s sole name.”

“separate property” and autonomy

[153] “In addition, the matters relied on by Mr Todd in support of his case as to the significance of title are without substantive merit. He submitted that, to base an award on title, would give proper effect to the parties’ autonomy, on Radmacher principles, in that it would reflect and respect “how they chose to own their assets”. This, he also submitted, should be applied to “any agreement including oral expressions and agreements”. These submissions would require a very significant extension of the principles identified in Radmacher which, in my view, would be contrary to the objective of achieving a fair outcome and would be likely to lead to significant additional cost and uncertainty.

[154] As referred to above, Radmacher dealt with nuptial agreements which expressly sought to regulate the parties’ financial affairs on the breakdown of their marriage. The agreements being addressed clearly needed a sufficient degree of formality to constitute an agreement to which the court would potentially give effect. This required, for example, that each party: had “all the information that is material to his or her decision”; was “fully aware of the implications of” the agreement; and intended “that the agreement should govern the financial consequences of the marriage coming to an end”. There was no suggestion that the same approach would apply to conversations or oral discussions which might have taken place either before or during the marriage. Nor, of more relevance to Mr Todd’s submissions, was there any suggestion that it would apply to how the parties had held their assets or had “chosen to regulate their financial affairs” during their marriage. Indeed, it is very clear that it does not because it was only applicable to an agreement which was intended to govern what should happen on divorce.”

Matrimonialisation

[160] ... “the underlying principle is that fairness may require or justify treating property, which was not purely the product of the parties’ joint endeavours, as matrimonial property and, therefore, within the scope of the sharing principle. I should make clear that this is not to depart from what was said in *Hart* and other cases about the court’s approach to determining whether the parties’ assets include assets which might be said to comprise or reflect the product of non-marital endeavour. It is about when an asset or assets which were at one stage non-marital property might be included within the sharing principle. ...”

[161] “ Before addressing these issues, I propose briefly to deal with the question raised by both parties, namely whether the whole concept of matrimonialisation should no longer be applied. In my view, the answer is that it should continue to be applied.”

[162] As has been discussed in many cases, when setting out the principles applicable to the determination of financial remedy cases there is a balance to be struck between flexibility and certainty. The flexibility to achieve a fair outcome in the individual case and a sufficient degree of certainty as to the likely outcome. I consider that it would be wrong to state that, as a matter of principle, property which has a non-marital source can never be subject to the sharing principle. There may well be situations when, as referred to above, fairness justifies this. However because, as Mr Bishop submitted, it is a derogation from the principle that sharing applies to matrimonial property and does not apply to non-matrimonial property, it should be applied narrowly. This is so that it is not used by parties in a way which would undermine the clarity of the sharing principle, namely that it is the sharing of property generated by the parties’ endeavours during the marriage.

[163] In my view, therefore, it would be helpful to make clear, expressly, that the concept of matrimonialisation should be applied narrowly. This is not a hard and fast line but remains a question of fairness, reflecting, as Wilson LJ said in *K v L* at [18], that “the importance of the [non-marital] source of [an asset or assets] may diminish over time”. With some diffidence, I would propose the following slight reformulation of the situations to which Wilson LJ referred in *K v L*, having regard to the developments that have taken place since that decision as follows: (a) The percentage of the parties’ assets (or of an asset), which were or which might be said to comprise or reflect the product of non-marital endeavour, is not sufficiently significant to justify an evidential investigation and/or an other than equal division of the wealth; (b) The extent to which and the manner in which non-matrimonial property has been mixed with matrimonial property mean that, in fairness, it should be included within the sharing principle; and (c) Non-marital property has been used in the purchase of the former matrimonial home, an asset which typically stands in a category of its own.

[164] In the first example, the sharing principle would apply in conventional form. In (c), the court will typically conclude that the former matrimonial home should be shared equally although this is not inevitable as shown by cases such as *FB v PS*.

[165] The example in (b) requires a more nuanced approach similar to that referred to in *Hart*, at [96], when the evidence does not establish a clear dividing line between matrimonial and non-matrimonial property. As Mostyn J said in *JL v SL (No 1)* at [18], the underlying question is whether the asset or assets “should have the same character as those assets built up by their joint endeavours during the marriage, with the consequence that they should be shared ... on divorce”. I have deleted the word equally because that was simply a reference to what the District Judge had done in that case. Does fairness require or justify the asset being included within the sharing principle?

[166] The conclusion that it does, however, does not mean that it must be shared equally. The submission by Mr Todd that, once an asset is matrimonialised and treated as matrimonial property, it must be shared equally is unsupported by any authority and would be contrary to the objective of a fair outcome. This is because, again as Mostyn J said in *JL v SL (No 1)* at [19], it may be that the “non-matrimonial source of the moneys in

question” remains “a relevant consideration”. In its evaluation of all the relevant factors in the situation described in (b) above, it would be perverse if the court could not decide that the non-matrimonial source, in whole or in part, of an asset treated as matrimonial property could not justify an other than equal division. Another way of putting it, repeating what I said in *Hart*, at [86]:

“The court will have to decide, adopting Wilson LJ’s formulation of the broad approach in *Jones*, what award of such lesser percentage than 50% makes fair allowance for the parties’ wealth in part comprising or reflecting the product of non-marital endeavour”.”

17. [RM v WP \[2024\] EWFC 191 \(B\)](#)

- a) Judgment of HHJ Hess
- b) Consideration of whether a property that has become matrimonialised, by virtue of being the family home, can become ‘un-matrimonialised’.
- c) Unequal division of properties utilised as the family home for periods during the marriage.
- d) Application, by agreement, of the Galbraith Tables to ascertain estimate of CEV of a pension in payment.

Facts:

- Total assets of £1.8m
- W (52) and H (75) married in 2007 and separated in 2020. The parties had two children. Their young son sadly died.
- H owned four properties prior to the marriage and they remained in his sole name.
- W’s needs assessed at £657,000.
- W argued for 50% of all four properties which would be £979,636 on the basis that each property had been the family home for a period of time and had therefore become matrimonialised. She argued that once matrimonialised they could not become ‘un-matrimonialised’.

Held:

- There would be a departure from equality in H’s favour in the three homes which had been family homes.
- W was awarded the amount that met her needs.

Unequal division of the family homes

[36] ...”(i) The court should steer away from developing a new concept of ‘un-matrimonialisation’.

(ii) Instead, the court, in its search for fairness, should reflect on all the section 25 factors, and in circumstances such as this, should not disregard the unmatched

contributions of one party and also the length of the occupation of a particular property as a family home. If the mathematical consequences of treating the sequential occupations of different properties as family homes, where they have all been contributed by one party, produces an unfair result then the court should steer away from it and not feel bound by the application of an unbending formulaic approach.

(iii) It is well established that, in the right circumstances, a court can depart from an equal division of matrimonial property, of even a family home, where fairness requires it. As Moylan LJ said in *Standish v Standish* [2024] EWCA Civ 567: “...the court will typically conclude that the former matrimonial home should be shared equally although this is not inevitable as shown by cases such as *FB v PS* [2015] EWHC 297...In its evaluation of all the relevant factors... it would be perverse if the court could not decide that the non-matrimonial source, in whole or in part, of an asset treated as matrimonial property could not justify an other than equal division”. In *S v AG (Financial Remedy: Lottery Prize)* [2011] EWHC 2637 Mostyn J said: “...even the matrimonial home is not necessarily divided equally under the sharing principle; an unequal division may be justified if unequal contributions to its acquisition can be demonstrated”.”

18. [HO v TL \[2023\] EWFC 215](#)

- a) Judgment of Peel J.
- b) Detailed guidance in respect of the factors that affect valuations of private companies.
- c) Consideration of ability to extract money from trusts, matrimonialisation of assets and needs.

Facts:

- W (56) and H (49) were married in 2003 and separated in 2020. They have three teenage children.
- Total assets of £22.445m.
- The parties founded a hotel group abroad with funding from H’s family (£4.1m). W’s family member invested and had a minority stake. The company was placed in H’s family trust.
- At the date of marriage H had substantial assets (present day value of £7.295m).
- H’s family trusts made loans to him of £4.45m during the marriage.
- H’s total pre-marital/family contributions were £16.145m and mainly went into the family business and family properties.
- W’s pre-marital contributions were £1.366m.
- Following separation H’s mother had died increasing his notional allocations in two trusts by £6.125m and providing a direct inheritance of £850,000.

Issues:

- The valuation to be attributed to the hotel business.
- The accessibility of funds held in the two trusts of which H was a beneficiary.
- Application of the sharing principle.
- W's needs.

Held:

- Business - Accepting the SJE valuation. Declining to apply an accountancy discount to the valuation to reflect risk and liquidity issues (see below) on the basis that the SJE considered the business and attractive one to purchase, the minority interest is less than 10%, the asset is only part of the overall wealth of the family and it is H's choice to retain it – he could sell it. Value - £9.598m. The risk associated in capital value and income can be taken into account in the section 25 exercise but should be relatively modest.
- Trusts – Trust X – value stands at 90.25% of the business. Trust Y and Trust Z (both full discretionary) – to be treated as 50% and 38% notionally allocated to H in accordance with his father's letters of wishes. Those funds are not distributed but notionally earmarked for H. The trustees would if requested be willing to assist H – the Charman test is satisfied and they should be treated as accessible resources. An order framed so as to require H to realise sums from the trusts would not amount to improper pressure upon the trustees.
- The business, and two properties although sourced with money from H's side are fully matrimonial.
- W's sharing award would be £6.45m.
- W's awarded £7.75m, on a needs assessment.

Business valuations

[21] "First, it is for the court to determine the value, not the expert.

[22] Second, valuations of private companies can be fragile and uncertain. In **Versteegh v Versteegh [2018] EWCA Civ 1050** Lewison LJ said at para 185:

"The valuation of private companies is a matter of no little difficulty. In *H v H* [2008] EWHC 935 (Fam), [2008] 2 FLR 2092 Moylan J said at [5] that "valuations of shares in private companies are among the most fragile valuations which can be obtained." The reasons for this are many. In the first place there is likely to be no obvious market for a private company. Second, even where valuers use the same method of valuation they are likely to produce widely differing results. Third, the profitability of private companies may be volatile, such that a snap-shot valuation at a particular date may give an unfair picture. Fourth, the difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious. Fifth, the acid test of any valuation is exposure to the real market, which is simply not possible in the case of a private company where no one suggests that it should be sold. Moylan J is not a lone voice in this respect: see *A v A* [2004] EWHC 2818 (Fam), [2006] 2 FLR 115 at [61] – [62]; *D v D* [2007] EWHC 278 (Fam) (both decisions of Charles J)."

[23] Third, I suggest that the reliability of a valuation will depend on a number of factors such as: (i) whether there are applicable comparables, (ii) how “niche” the business is, (iii) whether the business is to be valued on a net asset basis (for example a property company) or one of the recognised income approaches (such as EBITDA or DCF), (iv) the extent of the parties’ interests, and accordingly their level of control, (v) the extent of third party interests, (vi) the relevance of any shareholders’ agreements, (vii) whether there is a realistic market for sale, (viii) the volatility or otherwise of the figures, (ix) the reliability of forecasts, and (x) whether the assumptions underpinning the valuation are seriously in dispute.

[24] Fourth, in practice the choices for the court will be, per Moylan LJ in **Martin v Martin [2018] EWCA Civ 2866** at para 93: (i) “fix” a value; (ii) order the asset to be sold; and (iii) divide the asset in specie. The latter option (divide the asset in specie) is commonly referred to as Wells sharing (**Wells v Wells [2002] EWCA Civ 476**).

[25] Fifth, whether a business should be retained by one party, or sold, or divided in specie will depend on the facts of each case. Relevant features will include whether the business was founded during the marriage or pre-owned, whether it has its origins in one party’s non-marital wealth, whether the parties were both involved in its strategy and operation, the ownership structure of the business, whether Wells sharing is practical or realistic given that it will usually continue to tie the parties together to some extent, and how to ensure a fair allocation of all the resources in any given case.

[26] Sixth, as was pointed out in **Wells (supra)**, **Versteegh (supra)** and **Martin (supra)**, there is a difference in quality between copper-bottomed assets and illiquid/risk-laden assets. As Moylan said LJ at para 93 of **Martin (supra)**:

“The court has to assess the weight which can be placed on the value even when using a fixed value for the purpose of determining the award to make. This applies both to the amount and to the structure of the award, issues which are interconnected, so that the overall allocation of the parties’ assets by application of the sharing principle also effects a fair balance of risk and illiquidity between the parties. Again, I emphasise, this is not to mandate a particular structure but to draw attention to the need to address this issue when the court is deciding how to exercise its discretionary powers so as to achieve an outcome that is fair to both parties. I would also add that the assessment of the weight which can be placed on a valuation is not a mathematical exercise but a broad evaluative exercise to be undertaken by the judge”.

[27] Seventh, when deciding how to reflect the illiquidity or risk in a private company, the court has three choices:

- i) The business valuation may incorporate a discount for factors such as lack of control, lack of marketability, and lack of risk. This is particularly common where a party has a minority holding, or otherwise does not have overall control, and there are relevant third-party interests. In such circumstances, the court may simply adopt the business valuation as reflecting these matters. This I term an “accountancy discount”.
- ii) To step back when conducting the s25 exercise and, in the exercise of its discretion, to allocate the resources in such a way as to reflect illiquidity and risk. Conventionally, that would be to allocate to the party retaining the business a greater share of the overall assets to provide a fair balance. As Bodey J said in **Chai v Peng and Others [2017] EWHC 792 (Fam)** at para 140:

“It is a familiar approach to depart from equality of outcome where one party (usually the wife) is to receive cash, while the other party (usually the husband) is to retain the illiquid business assets with all the risks (and possible advantages) involved”.

It will be for the court to determine whether, and to what extent, to reflect this aspect in what might be termed a “court discount”. Of particular relevance, it seems to me, is whether the illiquid (or less liquid) business represents the principal asset in the case, in which event the distinction between liquid/illiquid assets may be sharper and require particular attention, or whether it is a relatively modest part of the overall assets.

iii) The court might, in the right case, take both the valuation, which includes an accountancy discount, and apply a further court discount i.e. an amalgam of (i) and (ii). Moylan LJ in **Martin (supra)** at para 94 considered that this would not be double counting: “...this is not...to take realisation difficulties into account twice”. It will all depend on the case. If, for example, the accountancy valuation includes a discount for a minority holding, but it is clear that there is no possibility of realisation of interest in the future by sale or otherwise, it seems to me that it would not be unfair to further take that factor into account when allocating assets.”

Accessibility of trust interests

[51] “I approach the legal principles as follows:

i) The test as set out in **Charman v Charman [2005] EWCA Civ 1606** at para 13 is: “...whether the trustee would be likely to advance the capital immediately or in the foreseeable future”.

ii) The court brings “a judicious mixture of worldly realism and of respect for the legal effects of trusts, the legal duties of trustees and, in the case of off-shore trusts, the jurisdictions of off-shore courts” (per Sir Mark Potter P in **Charman v Charman (No.4) [2007] 1 FLR 1246, CA** at para 57).

iii) “The question is not one of control of resources; it is one of access to them”; per Lewison LJ in **Whaley v Whaley [2011] EWCA Civ 617** at para 113.

iv) The court must look at the facts realistically; **Whaley (supra)** at para 114.

v) “The court will not put undue pressure on trustees to exercise their discretion in a particular way, but may frame an order which affords “judicious encouragement” to provide one spouse with the means to comply with the court’s view of the justice of the case: **Thomas v Thomas [1995] 2 FLR 668**”; **Whaley (supra)** at para 114 *ibid*.

vi) Continuing at para 114, Lewison LJ, referring to what was said in **Thomas**, stated that what would *not* be undue pressure would be if:

a) The interests of the other beneficiaries would not be appreciably damaged; and

b) The court decides that it would be reasonable for the husband to seek to persuade trustees to release more capital to enable him to make proper financial provision for his former wife.

vii) In the same paragraph, Lewison LJ added that “...if the court makes such an order the trustees are not bound to comply with the husband’s request; but it is plainly proper for the trustees to take it into account...and commonly it will be decisive”, citing Lewin on Trusts 18th ed.

viii) The court is not bound to accept the say so of trustees; **SR v CR [2009] 2 FLR 1083** per Singer J at para 60.

ix) Although overseas trustees may reasonably wish not to submit to the jurisdiction of the court, “it is hard to see why participation by the trustees in a helpful or meaningful way in the court’s inquiry qua witness could be construed as a submission to the

jurisdiction”; **BJ v MJ (Financial Remedy: Overseas Trusts) [2011 EWHC 2708 (Fam)]** per Mostyn J at para 21.

x) The ordinary rule of evidence is that the court is entitled to draw adverse inferences from the absence and/or silence of a witness who might be expected to have material evidence to give on an issue on the action; **Wisniewski (a Minor) v Central Manchester Health Authority [1998] EWCA Civ 596**, as applied by Moor J in **R v B [2017] EWFC 33**. In **Manzi v King’s College Hospital NHS Foundation Trust [2018] EWCA Civ 1882** Sir Ernest Ryder SPT made plain that there is no obligation to draw an adverse inference; instead,

the court has the discretion to do so. Whether it should will depend on the facts of the case; at the very least, the judge might be less inclined to attach full weight to what the trustees say if they decline to attend qua witness when they could offer considerable assistance on a particular issue.

xi) Relevant factors when determining whether the **Charman** test is met include:

- a) The nature and purpose of the trusts. Trust documents, including settlement deeds and letters of wishes, will be informative, but so too may be evidence within the family as to the working of the trust, and their expectations therefrom.
- b) Whether the husband or wife is a main or principal beneficiary, or merely one among many minor beneficiaries of similar standing.
- c) Whether distributions to a party would appreciably damage other beneficiaries.
- d) The history of distributions or loans to a party, including how often they have been made, for what purpose, and whether requests for funds have been turned down. Where loans have been made, the terms of repayment and security may require scrutiny.
- e) The value of the overall trust funds, and the quantum of monies sought to be provided from that source.
- f) Whether the trust funds are fully liquid (e.g. in investment portfolios) or tied up in private businesses and potentially difficult to realise.
- g) Whether the beneficiary has a close relationship with the trustees (or, protector, should there be one).
- h) The extent of explanation, information and documentation provided by the trustees, and whether they declined to attend court in a witness capacity.”

Needs

[77]”In **WC v HC [2022] EWFC 22** I said this about needs at para 21 (xii) – (xvi):

xii) Needs are an elastic concept. They cannot be looked at in isolation. In **Charman** (supra) at [70] the court said: “The principle of need requires consideration of the financial needs, obligations and responsibilities of the parties (s.25(2)(b)); of the standard of living enjoyed by the family before the breakdown of the marriage (s.25(2)(c)); of the age of each party (half of s.25(2)(d)); and of any physical or mental disability of either of them (s.25(2)(e))”.

xiii) The Family Justice Council in its Guidance on Financial Needs has stated that: “In an appropriate case, typically a long marriage, and subject to sufficient financial resources being available, courts have taken the view that the lifestyle (i.e. “standard of living”) the couple had together should be reflected, as far as possible, in the sort of level of income and housing each should have as a single person afterwards. So too it is

generally accepted that it is not appropriate for the divorce to entail a sudden and dramatic disparity in the parties' lifestyle."

xiv) In *Miller/McFarlane* Baroness Hale referred to setting needs "at a level as close as possible to the standard of living which they enjoyed during the marriage". A number of other cases have endorsed the utility of setting the standard of living as a benchmark which is relevant to the assessment of needs: for example, *G v G* [2012] 2 FLR 48 and *BD v FD* [2017] 1 FLR 1420.

xv) That said, standard of living is not an immutable guide. Each case is fact specific. As Mostyn J said in *FF v KF* [2017] EWHC 1093 at [18]; "The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise".

xvi) I would add that the source of the wealth is also relevant to needs. If it is substantially non-marital, then in my judgment it would be unfair not to weigh that factor in the balance. Mostyn J made a similar observation in *N v F* [2011] 2 FLR 533 at [17-19].

[78] The use of the standard of living as a benchmark will depend on all the facts of the case. The longer the duration for which needs are to be met in the future, the more likely it is that the court will not assess those needs at the marital standard of living throughout that period; *BD v FD* [2017] 1 FLR 1420 at paras 118, 119, and 122.

[79] I was referred to comments of Mostyn J in *SS v NS* [2014] EWHC 14:

"The essential task of the judge is not merely to examine the individual items in the claimant's budget but also to stand back and look at the global total and to ask if it represents a fair proportion of the respondent's available income that should go to the support of the claimant". That, however, concerned a case of ongoing spousal periodical payments. I do not think an approach by way of share of income is as pertinent where a clean break on the basis of a whole life Duxbury award is envisaged.

[80] Finally, I observe, for it is an issue in this case, that at para 31(b) of *Y v Y* [2012] EWHC 2063 (Fam) Baron J said this:

"When a marriage breaks down I doubt, in the normal course of events, that it will be unreasonable for a "country" spouse to seek to live in London or some other part of England and Wales"

I would add that on marriage breakdown it is not unreasonable per se for a spouse to wish to move from one country to another. It will all depend on the facts."

CONDUCT

19. Tsvetkov v Khayroya [2023] EWFC 130

- a) Judgment of Peel J
- b) A careful and helpful summary of the law on conduct.
- c) Clear guidance on the way in which conduct should be case managed.

Applicable principles

[40] "Conduct under s25(2)(g) of the Matrimonial Causes Act 1973 is to be taken into account if it is:

"such that it would in the opinion of the court be inequitable to disregard it".

[41] In **OG v AG [2020] EWFC 52** Mostyn J identified 4 situations where conduct is relevant, saying as follows:

"34. Conduct rears its head in financial remedy cases in four distinct scenarios. First, there is gross and obvious personal misconduct meted out by one party against the other, normally, but not necessarily, during the marriage. The House of Lords in *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618 confirmed that such conduct will only be taken into account in very rare circumstances. The authorities clearly indicate that such conduct would only be reflected where there is a financial consequence to its impact. In one case the husband had stabbed the wife and the wound had impaired her earning capacity. The impact of such conduct was properly reflected in the discretionary disposition made in the wife's favour. Mrs Miller alleged that Mr Miller had unjustifiably ended the marriage discarding her in favour of another woman. Therefore, she argued that Mr Miller should not be permitted to argue that their marriage was short. This argument was rejected by the House of Lords which held that the conduct in question, although greatly distressing to Mrs Miller, should not find independent reflection in the court's decision.

35. The conduct under this head, can extend, obviously, to economic misconduct such as is alleged in this case. If one party economically oppresses the other for selfish or malicious reasons then, provided the high standard of "inequitable to disregard" is met, it may be reflected in the substantive award.

36. Second, there is the "add-back" jurisprudence. This arises where one party has wantonly and recklessly dissipated assets which would otherwise have formed part of the divisible matrimonial property. Again, it will only be in a clear and obvious, and therefore rare, case that this principle is applied. In *M v M* [1995] 2 FCR 321 Thorpe J found that the husband had dissipated his capital by his obsessive approach to the litigation, which had included starting completely unnecessary proceedings in the Chancery Division. That dissipation was reflected in the substantive award. Properly analysed, that decision can be

seen as a harbinger of the add-back doctrine rather than a sanction reflecting a moral judicial condemnation.

37. In this case the sums loaned by the husband to TT will all be added back to the matrimonial pot at full value. The husband does not resist this.

38. Third, there is litigation misconduct. Where proved, this should be severely penalised in costs. However, it is very difficult to conceive of any circumstances where litigation misconduct should affect the substantive disposition.

39. Fourth, there is the evidential technique of drawing inferences as to the existence of assets from a party's conduct in failing to give full and frank disclosure. The taking of account of such conduct is part of the process of computation rather than distribution. I endeavoured to summarise the relevant principles in *NG v SG (Appeal: Non-Disclosure)* [2012] 1 FLR 1211, which was generally upheld by the Court of Appeal in *Moher v Moher* [2019] EWCA Civ 1482. In that latter case Moylan LJ confirmed that while the court should strive to quantify the scale of undisclosed assets it is not obliged to pluck a figure from the air where even a ballpark figure is in fact evidentially impossible to establish. Plainly, it will only be in a very rare case that the court would be unable even to hazard a ballpark figure for the scale of undisclosed assets. Normally, the court would be able to make the necessary assessment of the approximate scale of the non-visible assets, which is, of course, an indispensable datum when computing the matrimonial property and applying to it the equal sharing principle."

[43] "A party asserting conduct must, in my judgment, prove:

- i) the facts relied upon;
- ii) if established, that those facts meet the conduct threshold, which has consistently been set at a high or exceptional level; and
- iii) that there is an identifiable (even if not always easily measurable) negative financial impact upon the parties which has been generated by the alleged wrongdoing. A causative link between act/omission and financial loss is required. Sometimes the loss can be precisely quantified, sometimes it may require a broader evaluation. But I doubt very much that the quantification of loss can or should range beyond the financial consequences caused by the pleaded grounds.

This is stage one.

[44] If stage one is established, the court will go on to consider how the misconduct, and its financial consequences, should impact upon the outcome of the financial remedies proceedings, undertaking the familiar s25 exercise which requires balancing all the relevant factors.

This is stage two."

Case management

[46] "In my view, the following procedure should normally be followed when there are, or may be, conduct issues:

- i) Conduct is a specific s25 factor and must always be pleaded as such. It is wholly inappropriate to advance matters at final hearing as being part of the general circumstances of the case which do not meet the high threshold for conduct. That

approach is forensically dishonest; it impermissibly uses the back door when the front door is not available: para 29 of **RM v TM [2020] EWFC 41**.

ii) A party who seeks to rely upon the other's iniquitous behaviour must say so at the earliest opportunity, and in so doing should; (a) state with particularised specificity the allegations, (b) state how the allegations meet the threshold criteria for a conduct claim, and (c) identify the financial impact caused by the alleged conduct. The author of the alleged misconduct is entitled to know with precision what case he/she must meet.

iii) Usually, if relied upon, the conduct allegations should be clearly set out at Box 4.4 of a party's Form E which exists for that very purpose.

iv) The court is duty bound by FPR 2010 1.1 to have regard to the overriding objective:

(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.

(2) Dealing with a case justly includes, so far as is practicable –

(a) ensuring that it is dealt with expeditiously and fairly;

(b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;

(c) ensuring that the parties are on an equal footing;

(d) saving expense; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

v) In furtherance of the overriding objective, it is required to identify the issues and empowered to determine which issues should be investigated. At FPR 2010 1.4:

(1) The court must further the overriding objective by actively managing cases.

(2) Active case management includes—

(b) identifying at an early stage—

(i) the issues

(c) deciding promptly—

(i) which issues need full investigation and hearing and which do not; and

(ii) the procedure to be followed in the case;

(d) deciding the order in which issues are to be resolved;

vi) The court should determine at the First Appointment how to case manage the alleged misconduct. In my judgment, in furtherance of the overriding objective and FPR 2010 1.4, the court is entitled at that stage to make an order preventing the party who pleads conduct from relying upon it, if the court is satisfied that the exceptionality threshold required to bring it within s25(2)(g) would not be met. The court should also take into account whether it is proportionate to permit the allegation to proceed, for a pleaded conduct claim usually has the effect of increasing costs and diminishing the prospects of settlement. Finally, the court should take into account whether the allegation, even if proved, would be material to the outcome.

vii) Of course, in some instances alleged conduct may rear its head after provision of Forms E. One obvious instance is where a party wantonly dissipates monies in the lead up to trial. Should a party seek to advance a conduct claim, this must be brought before the court as soon as possible so that it can be case managed appropriately.

viii) Wherever conduct is relied upon, and the court permits it to be advanced at trial, it should be pleaded. It will be for the court to decide how best to manage the issue. Usually, an exchange of short, focussed narrative statements will suffice (page limits

are an indispensable tool in the judicial armoury and should be deployed) but such statements must set out in particularised detail (a) the facts asserted, (b) how such facts meet the conduct threshold, and (c) what consequential financial loss or detriment has occurred.

[47] Finally, and for the avoidance of doubt, this suggested procedural route will not be necessary or appropriate where a party relies only on litigation misconduct. The court will ordinarily be able to deal swiftly with costs at the hearing in time honoured fashion.”

20. N v J [2024] EWFC 184 (15 July 2024)

- a) Judgment of Peel J
- b) Detailed consideration of the law relating to domestic abuse as conduct in a case under the Civil Partnership Act 2004 with the principles being equally applicable to cases under the Matrimonial Causes Act 1973.

Facts:

- N (56) and J (60) entered into their civil partnership in 2012.
- N had negligible assets at the date of the civil partnership. J was a successful business man with substantial assets.
- At the time of the hearing the assets stood at circa £32 m.
- There may have been a partnership agreement providing for N to receive circa £2.6m.
- The parties separated in 2023. N issued his Form A. In this Form E he said that he reserved his position on conduct.
- The issue of conduct was put over to a post FDR directions appointment.
- N alleged that J lied about his cheating and infidelity and as a consequence N increasingly required treatment including hospitalisation, rehabilitation, medication and electroconvulsive therapy based on the false premise that he was paranoid, delusional and psychotic. In 2021 J admitted he had had paid sexual encounters with other men from 2011.

Held:

- N’s allegations of conduct should be excluded from the issues to be considered at trial.
- The magnetic feature was that the financial distribution can be fairly achieved by reference to the other section 25 criteria without any need to take account of conduct allegations. Conduct (if found) would make no material difference to the outcome.

Exceptionality criterion

[28] “There is no doubt, in my judgment, that personal misconduct, including domestic abuse, must be of a high degree of exceptionality to be capable of consideration under [the Act](#). In **Wachtel v Wachtel** [1973] Fam 72, at p.80, the Court of Appeal endorsed the words of Ormrod J who said that the conduct must be “both obvious and gross”, a formulation which was approved by Baroness Hale in **Miller, McFarlane** [2006] UKHL 24 at para 145:

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

[29] That remains the law. The increasing awareness of the incidence of domestic abuse, and its harmful and pernicious effects, does not lower the conduct hurdle to be surmounted in financial remedy proceedings.”

Financial consequence

[37] ... “In my judgment, there should be an identifiable financial impact even if it is not always easily measurable. And as I said in **Tsvetkov v Khayrova** there must be a causative link between the conduct and the financial consequence.

[38] To these observations, I add a few further comments:

i) It is not altogether surprising that the authorities suggest a financial consequence is required. The [s25](#) criteria (and their equivalent in the [Civil Partnership Act 2004](#)) are listed as signposts for the court in considering what financial remedy orders to make. In other words, they are taken into account by the court to the extent that they affect the distributive process under s23 and s24. It would be highly unusual to include a factor which has no financial consequence under the terms of an Act which is directed to reordering the finances of the parties.

ii) Even in those very rare cases where there is a possible financial consequence of the alleged conduct, the court must decide whether there is any need to litigate the allegations. It seems to me that in the great majority of cases, the impact on the alleged victim can and ordinarily will be taken into account by reference to the conventional criteria regardless of whether domestic abuse has in fact taken place. One example is behaviour which affects somebody’s earning capacity. Courts routinely weigh in the balance diminished earning capacity (and of course earning capacity is a specific consideration under [s25](#)). It is hard to see why there would be any need to embark upon a lengthy and conflicted dispute about the cause of the diminished earning capacity. What matters is reflecting the limited earning capacity in the overall award. Another example might be behaviour which leads to additional needs such as medical costs. Again, it is hard to see how a court will be assisted by detailed inquiry into the cause of the need; what matters is the individual’s requirements and the extent to which they should be met going forward. In other words, I doubt very much that domestic abuse would have a material impact on the vast majority of cases, such that it needs to be litigated.

iii) It is important to remember that the court has a duty to consider all the [s25](#) criteria. It seems to me that ordinarily the court will be able to arrive at a fair and balanced decision by reference to the usual factors such as needs, resources, contributions, health, age, and duration of relationship without any reference to conduct. I struggle to envisage many situations where personal misconduct will have a material impact on the ultimate evaluation.

iv) It is not for the financial remedies court to impose a fine, a penalty, or damages upon a party for conduct. Nor is it for the financial remedies court to moralise or apportion blame in how the parties behaved towards each other during their time together. I consider such a task, looking at the whole history of the nuances and complexities of a relationship, would be fraught with difficulty, and one which is not generally required in the overall exercise of broad discretion which is entrusted to the court.

v) I do not find it easy to see how personal misconduct, with no adverse financial consequence, could readily be quantified in a principled manner. If the court increases the award because of misconduct, but in the absence of any identifiable financial impact, how is that added sum to be quantified?

vi) I occasionally have the sense that parties who wish to rely upon conduct do so in order to seek from the court validation and justification of their own sense of ill treatment at the hands of their partner during the marriage, and/or condemnation of the other party; in short, personal vindication. Whilst that may be understandable at a personal and human level, it is not the function of the court to make findings for the sake of it and simply to assuage one or other party's sense of grievance and injustice. I repeat, misconduct must be directly relevant to the distribution of finances to be entertained.

vii) As identified by the Law Commission report all those years ago: "Nor do we think that to expose the parties to this kind of remorseless investigation into the, sometimes distant, past would be helpful in encouraging them to come to terms with their new situation". To expose parties, in particular the alleged victim of domestic abuse, to unforgiving litigation which explores in detail that very domestic abuse, is not a step to take lightly.

viii) The task of the court in these cases is to look forward, not back; to set the parties as far as possible on the road to financial independence. To embark on a detailed inquiry into conduct seems to me to be a retrograde step, particularly as divorces and dissolutions now proceed on a no-fault basis.

ix) If domestic abuse is routinely litigated as a conduct factor, there would undoubtedly be a proliferation of such cases, and a direct impact on court resources. Domestic abuse allegations are almost always disputed, and frequently met with cross allegations. Cases would need more hearings and longer time estimates. The need for Qualified Legal Representatives where the parties are litigants in person would expand dramatically. Applications for additional evidence (police, medical, psychiatric and so on) would ensue. Costs would increase markedly. It is hard to see how cases involving allegations of domestic abuse would settle before final hearing, given the charged nature of

the subject matter. The implications for the system of financial remedies are profound.”

21. Applied by District Judge Dodsworth in [A v R \[2024\] EWFC 218 \(B\)](#) – determined that W’s allegations should be excluded from consideration at trial.

Non-disclosure and litigation misconduct

22. [VS v OP \(Litigation misconduct, quasi-inquisitorial approach and inferences\) \[2024\] EWFC 190 \(B\)](#)

- a) Judgment of Recorder Chandler KC.
- b) Illustrating an approach to be taken where there has been repeated and ongoing non-disclosure, non-attendance at the final hearing and breach of penal notices so that the court does not have the full picture.
- c) Case management directions not complied with.

Non-disclosure

[3] ... “The overarching objective is a fair outcome having regard to the s.25 factors, in pursuit of which the takes a ‘quasi-inquisitorial’ role. This means that the court is not “...confined within the tramlines of adversarial pleadings” (Baker LJ in *Re HW* [2023] EWCA Civ 149 at [37]), but has a duty to independently “...investigate issues which he considers relevant to outcome even if not advanced by either party” (Thorpe LJ in *Parra v Parra* [2002] EWCA Civ 1886 at [22]),

[4] In cases of non-disclosure, following the Court of Appeal’s decision in *Moher* [2019] EWCA Civ 1482, the court still has to evaluate the parties’ resources and provide a reasoned explanation of the award. Where a party has failed to give full and frank disclosure, inferences may be drawn provided they are properly drawn and reasonable (*NG v SG* [2011] EWHC 3270 (Fam)). The court should not engage in speculation, or reverse-engineering when it comes to filling evidential gaps, however convenient such an approach might be.

[5] The court’s ‘quasi-inquisitorial’ role can be easier said than done. There is a marked difference between the position at an attended hearing, where the court raises new points with experienced advocates who are on top of the legal and factual issues, and the position where one or both parties are litigants in person, unfamiliar with the law, the court’s powers, or what point a judge might want to explore. In this case, the Husband is a litigant in person who can no longer afford representation, and the Wife, who is in breach of a series of orders for disclosure, has, once again, failed to attend.”

No court bundle

[9] “I have considered adjourning this final hearing so that a proper bundle can be prepared. On one hand, this would have alleviated the judicial task: the provision of a paginated bundle containing the most important documents is, after all, a basic requirement of court procedure. But on the other, in terms of the visible assets, this is a

low asset case which has already involved an inordinate number of hearings (six) including three ineffective Financial Dispute Resolution appointments before Recorder Cowton KC. In light of the Wife's persistent non-compliance, I think it unlikely that an adjournment would produce the disclosure which she has been ordered on provide on four earlier hearings.

[10] In the circumstances, with some reservations, I have decided to proceed with this final hearing, mindful that I do not have the full picture because of (a) the wife's non-disclosure and litigation misconduct, (b) the husband's failure to provide the court with a bundle, (c) the non-attendance of the Wife, who, for the record, I am satisfied was notified of its listing. Ultimately, all litigation must come to an end, and it would in my view be grossly disproportionate to allow this case to proceed to a further, eighth, hearing when in all probability the court will again be presented (with due respect to the Husband) with badly prepared, where the Wife has failed to comply with orders and disclosure and might again not attend.

[12] I do not regard the Husband's failure to provide a bundle as litigation misconduct and I will not reflect it in my award. However, in my judgment it is no defence for him to say he hasn't provided a bundle because he is a litigant in person:

(a) Moore-Bick LJ commented in *R (Hysal) v SS for Home Department* [2014] EWCA Civ 1633, Moore-Bick LJ commented at [44] that: "...Litigation is inevitably a complex process, and it is understandable that those who have no previous experience of it should have difficulty in finding and understanding the rules by which it is governed. The problems facing ordinary litigants are substantial and have been exacerbated by reductions in legal aid. Nonetheless, if proceedings are not to become a free-for-all, the court must insist on litigants of all kinds following the rules. In my view, therefore, being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules."

(b) Lord Sumption commented in *Barton v Wright Hassall LLP* [2018] UKSC 12 at [18] "...Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take."

PENSIONS

23. TW v GC [2024] EWHC 949 (Fam)

- a) Judgment of Cusworth J.
- b) Appeal on the ground, inter alia, that the Judge had applied a needs based approach to capital but sharing to pensions.

Facts:

- Total non-pension assets - £10.1m of which £3.6m were matrimonial.
- Total pension assets - £1.4m of which £284,816 were matrimonial.
- The Judge found that W's needs could not be met by her sharing claim in respect of non-pension assets.

- She was awarded capitalised maintenance of £2.36m.
- H appealed on the basis that the Judge had assessed W's needs in relation to non-pension assets but had approached pensions on the basis of sharing as if they were separate from the assessment of W's needs.

Held:

- The two bases of assessment (needs and sharing) are separate and distinct and cannot be applied to different classes of asset within the same award.
- Once an award has been assessed on a needs basis it cannot be added to with 'additional sharing' if sharing has already been found to be inadequate.
- Pension sharing order set aside.
- W's pension to be taken into account as an income producing asset in the calculation of her lifetime Duxbury award.

Interaction of sharing and needs

[41] "The reason for this was articulated by the Court of Appeal in *Charman v Charman* [2007] EWCA Civ 503, by Sir Mark Potter P, where he said at [73]: Then arises a difficult question: how does the court resolve any irreconcilable conflict between the result suggested by one principle and that suggested by another? ...in cases in which it is irreconcilable, the criterion of fairness must supply the answer. It is clear that, when the result suggested by the needs principle is an award of property greater than the result suggested by the sharing principle, the former result should in principle prevail: per Baroness Hale in *Miller* at [142] and [144]... It is also clear that, when the result suggested by the needs principle is an award of property less than the result suggested by the sharing principle, the latter result should in principle prevail: per Lord Nicholls in *Miller* at [28] and [29] and Baroness Hale at [139].

[42] The consequence of this distinction was then made clear in *Waggott v Waggott* [2018] EWCA Civ 727 by Moylan LJ, where he said at [131]: In my view it is clear from *Miller* and *Charman* alone that, as a matter of principle, the court applies the need principle when determining whether the sharing award is sufficient to meet that party's future needs. ...there must be a means of determining whether, and if so how, the sharing award does or does not meet the applicant's needs. There is no suggestion that the question of needs for these purposes is to be determined by reference to a different need *principle*, or more broadly, by means of a different approach. Indeed, any other approach would be inconsistent with the observations made by both Lord Nicholls and Lady Hale, that there is no rule about where the court starts the exercise, and inconsistent with *Charman* (para 73) in which the sufficiency of the award by reference to the sharing principle is directly assessed by the award "suggested by the needs principle".

[43] Thus, the 2 bases of assessment are separate and distinct, and cannot be applied to different classes of asset within the same outcome to an application for a financial remedy. Once an award has been calculated so that it meets the applicant's needs, there can be no principled basis for adding to it with additional sharing, if the applicant's sharing claim has already been determined to be of lesser value. The award then is likely to become unfair to the respondent, who is left making provision greater than the assessment on either individual basis. Once an applicant's sharing claim has been

subsumed by their needs, small bits of the former claim cannot thereafter be resurrected to supplement the needs award.”

24. SP v AL [2024] EWFC 72 (B)

- a) Judgment of HHJ Hess.
- b) Consideration of the Second Report of the Pensions Advisory Group (PAG 2).
- c) Approach to treatment of pensions including apportionment and equality of income v equality of CEV approaches.

PAG 2

[37] “In my judgment in *W v H* [2020] EWFC B10 I drew attention to the document known as the PAG 1 Report, or more formally “*A Guide to the Treatment of Pensions on Divorce: The Pension Advisory Group Report*” (July 2019) and suggested that it had the support of the Family Justice Council and the President of the Family Division and should be treated as being “*prima facie persuasive in the areas it has analysed, although of course susceptible to judicial oversight and criticism*”. ([Footnote:10](#)) I am not aware of any subsequent judicial departure from this proposition and I would suggest that it stands as the proper approach, now applying to the second edition of the PAG Report, published in January 2024, often known as the PAG 2 Report. ([Footnote:11](#))

[38] A number of the issues arising in this case can be assisted by the guidance in the PAG Report (second edition) – the PAG 2 Report.”

Treating pensions separately

[39] “**In seeking fairness in relation to the division of pensions should the court, if possible, disaggregate the pensions in the case and promote a discrete and fair division of the pensions as opposed to attempting to execute an offset against other assets?** The orthodox view, encouraged by Thorpe LJ in *Martin-Dye v Martin-Dye* [2006] 2 FLR 901, is that pensions should be dealt with separately and discretely from other capital assets. The PAG 2 Report offers a similar view: “*try, if possible, to deal with each asset class in isolation and avoid offsetting - a discrete solution which equalises pensions by pension sharing orders and which equalises non-pension assets by lump sum or property adjustment orders*” (page 42). Sometimes the facts of a case mean that an off-setting solution has to be followed, but if it can be avoided, as in the present case, that is generally desirable.”

Apportionment

[40] “**In seeking fairness in relation to the division of pensions, to what extent should the court exclude a portion of the member spouse’s pension accrued other than in the span of the marriage’s duration?** The answer to this question will depend on the extent to which the case is a ‘needs case’ or a ‘sharing case’. The PAG 2 Report suggests that “*Generally in a ‘needs case’ it would be wrong to apportion pensions so as to exclude the non-cohabitation/marriage element. By contrast, in a ‘sharing case’, where the assets and future pension benefits exceed the parties’ needs, such apportionment may be appropriate*” (page 24); but the report goes on to suggest that the categorisation of a case will depend on other section 25 factors, most obviously the

duration of the marriage: *“Thus, the court will have regard to the length of seamless cohabitation/marriage when determining the extent to which it is fair and reasonable to divide the ‘non-matrimonial’ element of any capital or any pension. All cases will be determined upon their own facts. The ‘marital’ element of any pension will usually be shared equally. For the reasons set out above, in needs-based cases, the timing and source of the pension saving is not necessarily relevant, but the Court will nevertheless have regard to the length (or shortness) of the seamless cohabitation/marriage in determining the extent to which the needs of the claiming party will justify a division of the pre-cohabitation/marriage element of the pension...The requirement of a nexus between the relationship and a financial need to be met by a matrimonial claim has long been recognised by the case law”* (page 26). In the present case, involving a medium length marriage in more mature years, where the parties have entered the marriage with significant assets acquired earlier in their adult lives, and where the case in terms of pension income sits more easily in the category of a ‘sharing case’ (the wife has not argued that she should have more based on a need claim), the fair answer is likely to be provided by focusing on a division of the pensions accrued in the span of the marriage’s duration, that is to exclude the sharing of pensions outside this category on the basis that they represent non-matrimonial property. The report by Mr Conlon in this case has been targeted towards identifying the mathematical consequences of this principle and its conclusions should therefore be followed in the search for fairness.”

Income v Capital

[41] **“In seeking fairness in relation to the division of pensions, to what extent should the court seek an answer based on an equal income solution as opposed to an equal capital solution?** I make the following comments on this question:-

(i) In my judgment in *W v H* (supra) I sought to answer that question by saying:-
“There is no ‘one size fits all’ answer to this question. There are undoubtedly scenarios where the fair solution is probably to divide pensions by CE value. For example, where the CEs are relatively small in themselves or as a portion of the assets overall. For example, where the parties are relatively young and any projections about the future income-producing qualities of the pensions are likely to be speculative or unreliable. For example, where all the pensions are simple defined contribution funds so that the CE values can be regarded as reasonably reliable and simple predictor of future income streams...There are, however, scenarios where a simple division of CEs may well not represent a fair solution.”

(ii) In the present case a simple division by CE is unlikely to be fair because the pensions involved are mostly defined benefit schemes and the parties ages are seven years apart and in my view it was correct here to seek the assistance of a PODE report.

(iii) The PAG 2 Report goes on to give a steer as to what question the PODE report should be seeking to answer:-

“Where the CE is considered to potentially be an inappropriate valuation for divorce purposes, the question then arises as to whether the pensions should be shared according to their potential income value or a capital value other than their CE... Given that the object of the pension fund is usually to provide income in retirement, it will often be fair (where the pension asset is accrued during the marriage, including cohabitation seamless to marriage) to implement a pension share that provides equal incomes from that pension asset. This is particularly the case where the parties are closer to retirement... An important practical

point is that the exercise undertaken to arrive at the figures needed to divide pensions according to their likely income value in retirement will ensure that any valuation quirks inherent in the pension are properly understood and factored into the calculations.” (page 35).

(iv) The PAG 2 Report also endorses similar sentiments expressed in the Family Justice Council’s report “ *Guidance on Financial Needs on Divorce* ” (2018 edition) where it is stated:-

“In bigger money cases, where needs are comfortably met, the courts are now likely to be less interested in drawing a distinction between pension and non-pension assets than hitherto. This is partly because other assets will also be deployed for income production so the distinction is less obvious, but more because the “pension freedoms” introduced by Taxation of Pensions Act 2014... In small to medium money cases, however... a more careful examination of the income producing qualities of a pension may well be required” (page 25).

(v) In my view it is clear in the present case, following the steer from the PAG 2 Report (which does not differ in this respect from the PAG 1 Report) that the fair division of the pensions was provided by the answer that produced an equal level of income on retirement from the relevant pensions, that is a pension sharing order at 9.2%.

(vi) I have noticed that it is not uncommon for PODEs to be asked to provide an answer not only based on equal incomes, but also alternatively based on an equal capital approach. Indeed, this happened in the present case. It may be that the reason this happens is because the specimen letter of instruction in the PAG Reports (page 106) includes both approaches in its text, but it should be remembered that these are options provided in the specimen letter and it is not necessary for both of them need to be included in the actual letter sent to the PODE. In the notes accompanying the specimen letter it is stated that *“equalisation of benefits by reference to projected income will in most circumstances be the appropriate approach”*. There may be cases where, for particular reasons, equality of capital is a suitable measure; but in my view these are uncommon and thought should be given to what is the appropriate question before the PODE report is commissioned, if necessary with the judge at the First Appointment determining the issue, and that in most cases the only question which needs to be asked is what level of pension sharing order will produce an equal level of income on retirement. Asking more questions than are necessary will certainly add to the cost of the exercise and almost inevitably lead, further on down the line, to each party advocating the figure most helpful to themselves (as happened in the present case) and making compromise less likely.”

25. Galbraith Tables – version 2

- a) [Updated version released](#) in April 2024.
- b) The tables facilitate the placing of a “ballpark” value on pension rights for the purpose of offsetting.
- c) Detailed notes are provided with the tables available at the link above.

MARITAL AGREEMENTS

26. AH v BH [2024] EWFC

- a) Judgment of Peel J
- b) Consideration of pre-marital agreement which was not vitiated but did not meet W's needs.

Facts:

- Total assets of £50m.
- W's assets circa £291,000.
- 5 ½ year marriage during which the parties had two children for whom W is the primary carer.
- The PMA provided W with £818,025. H sought that the PMA be adhered to and W provided with £1.9m for housing to revert to H at the end of the children's tertiary education. H to pay child maintenance and school fees.
- W argued that the PMA did not meet her needs.
- W sought a transfer of the FMH (£5m), income fund of £1.8m plus child maintenance and school fees.

Held:

- The PMA is a constant influence on the case, signed as it was with full knowledge of its meaning and with the benefit of legal advice.
- A magnetic factor and counterweight to the PMA is that W will be the primary carer for the children. W is no longer an independent woman with her own home.
- W's housing needs assessed at £2.75m plus costs of purchase and stamp duty. Her income needs assessed at £110,000 p.a. – capitalised to £710,000.
- The outcome gives appropriate weight to the PMA, whilst reflecting W's ongoing responsibilities to the children, relationship generated impact on her wealth and the standard of living. W and the children's needs met to a lesser extent than would have been the case absent the PMA.
- Indication that this is a 'no order for costs' case.

Law on PMAs

[43] "I refer to what I said **HD v WB [2023] EWFC 2** at para 44 onwards, with some adaptations.

[43] The court's overarching duty is to achieve a fair outcome, taking into account the s25 criteria, and bearing in mind that the children are the court's first consideration.

[44] There is no doubt that a PMA is one of the relevant criteria, but it is not the only one. The terms of a PMA must be seen in the context of the s25 factors. The extent of the weight to be attributed to a PMA will vary from case to case.

[45] The leading authority is, of course, **Radmacher v Granatino [2010] UKSC 42** from which the following propositions can be drawn:

- i) If an ante-nuptial agreement, or indeed a post-nuptial agreement, is to carry full weight, both the husband and wife must enter into it of their own free will, without undue influence or pressure, and informed of its implications (para 68).
- ii) “What is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end” (para 69).
- iii) “The first question will be whether any of the standard vitiating factors: duress, fraud or misrepresentation, is present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it” (para 71).
- iv) The court may take into account a party’s emotional state, and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would have happened had he or she not been under those pressures. The circumstances of the parties at the time of the agreement will be relevant. Those will include such matters as their age and maturity, whether either or both had been married or been in long-term relationships before. For such couples their experience of previous relationships may explain the terms of the agreement, and may also show what they foresaw when they entered into the agreement. What may not be easily foreseeable for less mature couples may well be in contemplation of more mature couples. Another important factor may be whether the marriage would have gone ahead without an agreement, or without the terms which had been agreed. This may cut either way (para 72).
- v) It is to be assumed that each party to a properly negotiated agreement is a grown up and able to look after himself or herself (para 51).
- vi) “The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties’ agreement addresses existing circumstances and not merely the contingencies of an uncertain future” (para 78).
- vii) “The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.” (para 75).
- viii) Where the ante-nuptial agreement attempts to address the contingencies, unknown and often unforeseen, of the couple’s future relationship there is more scope for what happens to them over the years to make it unfair to hold them to their agreement. The circumstances of the parties often change over time in ways or to an extent which either cannot be or simply was not envisaged (para 80).
- ix) “Of the three strands identified in *White v White* and *Miller v Miller*, it is the first two, needs and compensation, which can most readily render it unfair to

hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned” (para 81).

x) “Where, however, these considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from their agreement as to the regulation of their financial affairs in the circumstances that have come to pass. Thus, it is in relation to the third strand, sharing, that the court will be most likely to make an order in the terms of the nuptial agreement in place of the order that it would otherwise have made” (para 82).

xi) It is the court that determines the result after applying the Act (para 83).”

Assessment of needs

[50] “What is the meaning of “predicament of real need” referred to at para 81 of **Radmacher (supra)**? ...

[51] The evaluation carried out by judges since **Radmacher** in these cases demonstrates that, as foreseen by the Supreme Court, hard and fast rules are not appropriate.

[52] In respect of housing needs, for example, a number of different approaches have been taken in the balancing exercise weighing up the agreed PMA terms on the one hand, and the needs of the parties on the other. Thus:

- i) A Schedule 1 type housing award whereby the payee is entitled to occupy the property until the children finish tertiary education was made in **Radmacher** itself (albeit Baroness Hale in a dissenting judgment said that she would have varied the terms of the housing fund to a Martin style arrangement), and also in **Backstrom v Wennberg [2023] EWFC 79**.
- ii) A Schedule 1 type award with a partial outright payment whereby the property was to be sold upon the children finishing tertiary education and the payee was to receive a proportion of the sale proceeds outright: **Luckwell v Limata [2014] 2 FLR 168**, and **AH v PH (Scandinavian Marriage Settlement) [2014] 2 FLR 251**.
- iii) A Martin style arrangement whereby the payee is entitled to occupy a property for life such as in **WW v HW 2016 2 FLR 299** (albeit subject to a step down upon the children reaching their majority), **HD v WB (supra)**, **BL v OR 2023 EWFC 229** and **Xanthopolulos v Rakshina 2024 EWCA Civ 84**.
- iv) An outright payment enabling the payee to purchase a property for himself/herself with no reversionary terms, as in **KA v MA (Pre-Nuptial Agreement: Needs) [2018 EWHC Fam 499]**, **SA v PA (Pre-Marital Agreement: Compensation) [2014] 2 FLR 1028** and **Z v Z (No 2) (Financial Remedy: Marriage Contract) [2012] 1 FLR 1100**.

[53] It is of note that, so far as I am aware, there is not a single reported PMA case where a primary carer of the children, with no significant assets of his/her own, has not received a sum of money for housing outright. After a draft judgment was sent to the

parties, H's legal team referred me to **BN v MA [2013] EWHC 4250 (Fam)** where, it is suggested, such an order was made. I do not think that case in fact assists H as it concerned a Maintenance Pending Suit hearing where the judge fixed the award at the level of maintenance set out in the PMA; the outcome in respect of housing at final hearing was not in issue.

[54] As for an income fund, courts have not shied away from a capitalised maintenance sum. To reflect a PMA, that sum can be limited by the level of maintenance or the length of term. Thus, in **Radmacher (supra)** the capitalised maintenance sum was intended to last to the end of the children's minority but not beyond. By contrast, in **KA v MA (supra)** and **BL v OR (supra)** the capitalised fund was on a whole life basis."

27. **HJB v WPB [2024] EWFC 187**

- a) Judgment of HHJ Vincent (sitting as a section 9 Deputy High Court Judge)
- b) Consideration of a notice to show cause why the parties should not be held to the term of a separation agreement.
- c) Listed as a preliminary issue originally defined as question that could be determinative of proceedings – 'whether the parties should be held to the term of the separation agreement ... and those terms incorporated into a final order of the court.'
- d) HHJ Vincent determined that the proceedings could not be fully resolved at the preliminary stage, inter alia, because

"the ultimate question for the Court in this case is what the financial arrangements should be for the parties upon divorce. If the settlement agreement is held to be binding on the parties, that will give rise to a presumption that the ultimate outcome should be in line with the terms of the agreement, but the Court must still consider all the circumstances, having regard to all the section 25 factors."
- e) Held that the agreement stands and is "presumptively dispositive" therefore the court's enquiry will be narrower than if W had succeeded in arguing that it should be disregarded completely or given little weight.

PART III APPLICATIONS

28. **Potanina v Potanin [2024] UKSC 3**

- a) Judgment of the Supreme Court – Lord, Lloyds-Jones, Lord Briggs, Lord Leggatt, Lord Stephen and Lady Rose.

b) Absolutely essential reading for all practitioners involved in Part III cases.

Facts:

- Parties married in Russian in 1983 and lived there throughout the marriage. They divorced in Russia in 2014.
- During the marriage H accumulated wealth of circa \$20b held in various trust and companies.
- In 2007 (the date the Russian courts found the parties had separated) H transferred \$76.1m.
- In 2018 the Russian courts awarded a further \$41.5 to W.
- W obtained a UK investor visa in 2014 and bought a property in London. Her case was that London was her permanent home from 2017.
- October 2018 – W made an ex parte application for leave to bring her claim which was granted by Cohen J.
- H applied to set aside the grant of leave on the basis that the Judge had been misled about the facts of the case, Russian law and the applicable English law.
- Cohen J found that there had been three categories of misrepresentation and set aside the grant of leave:
 - Factual – incorrect information about child maintenance and strength of connection with England.
 - Russian litigation – Judge was not given copies of the Russian law of judgment and was not told that W had not made a needs-based claim in Russia; and
 - English law – not being sufficiently referred to the key paragraphs in *Agbaje v Agbaje* [2010] UKSC 13.
- W appealed the decision to set aside.
- The Court of Appeal found that the Judge had applied the wrong test and adopted the wrong procedure when setting aside the grant of leave.
- The conditions on an application to set aside were:
 - First - the power to set aside may only be exercised if there is some compelling reason to do so – where a decisive authority has been overlooked or the court has been misled;
 - Second – unless the applicant can demonstrate a ‘knock-out blow’ the set aside application should be heard with the substantive application for financial relief.
- The Court of Appeal determined that instead of determining whether, if he were in possession of the correct information, he would have granted leave the Judge should have listed a short hearing to decide whether H was able to demonstrate a ‘knock-out blow’ per *Agbaje*.
- The deficits identified by the Judge were not sufficiently material to justify setting aside the grant of leave.
- H appealed to the Supreme Court.

Held:

- Majority 3:2 – H’s appeal allowed.
- Judgment of Lord Leggatt with which Lord Lloyd-James and Lady Rose agreed.
- The test on an application for leave:
 - Section 13(1) - No application for an order for financial relief shall be made under [Part III] unless the leave of the court has been obtained in accordance with rules of court; and the court shall not grant leave unless it considers that there is substantial ground for the making of an application for such an order.
 - The threshold is higher than satisfying the court that the claim is not totally without merit or abusive.
 - The closest test by analogy is that applicable on an application for summary judgment – whether the claim has a “real prospect of success”.
 - The (higher) test of “good arguable case” is not applicable.
- The test on an application to set aside a grant of leave:
 - The law as it presently stands is not applied by the Court of Appeal.
 - The right to apply to set aside an order made without notice pursuant to FPR 18 is unconditional.
 - There is no requirement that there be ‘some compelling reason’, that a decisive authority has been overlooked, the court was materially misled or that a ‘knock-out blow’ can be delivered. Such a requirement would not be in accordance with the overriding objective to ensure that the parties are on an equal footing.

Opening lines

[1] “Rule one for any judge dealing with a case is that, before you make an order requested by one party, you must give the other party a chance to object. Sometimes a decision needs to be made before it is practicable to do this. Then you must do the next best thing, which is - if you make the order sought - to give the other party an opportunity to argue that the order should be set aside or varied. What is always unfair is to make a final order, only capable of correction on appeal, after hearing only from the party who wants you to make the order without allowing the other party to say why the order should not be made.”

Leave application

[86] “In para 33 of the judgment in *Agbaje*, Lord Collins also commented on the test which must be satisfied before the court may grant leave under section 13. He said:

“In the present context the principal object of the filter mechanism [in section 13] is to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse. The threshold is not high, but is higher than ‘serious issue to be tried’ or ‘good arguable case’ found in other contexts. It is perhaps best expressed by saying that in this context ‘substantial’ means ‘solid’.”

[89] I would not wish to cast any doubt on the primary guidance given in *Agbaje* that in the context of section 13 the word “substantial” means “solid”. Nor would I suggest that courts which have applied the test as stated by Lord Collins have applied the law incorrectly. But I think that some clarification is called for of what was said in the first two sentences of the passage quoted at para 86 above. It should be made clear that the threshold is higher than merely satisfying the court that the claim is not totally without merit or abusive. It does not seem to me necessary, or advantageous, to further explain the test by comparing it with tests applied in other procedural contexts. If any such comparison is to be made, however, as it was by Lord Collins, the closest analogy seems to me to be with other contexts in which a court has to decide whether a claim should be allowed to proceed to a full hearing or should be dismissed summarily. In ordinary civil proceedings such a question arises when an application is made for summary judgment against a claimant; or to set aside a judgment entered in default; or (as mentioned above) in deciding whether a claim is of sufficient merit that the court should permit service of the proceedings on a foreign defendant. In each of these contexts the test applied is whether the claim has a “real prospect of success”. That is also in substance the test which the court applies in deciding whether to give permission for a claim for judicial review to proceed to a full hearing.

[90] By contrast, the more demanding test of a “good arguable case” does not seem to me apposite....

[91] A comparison with the well-established approach in ordinary civil proceedings to deciding whether a claim has sufficient merit to avoid summary dismissal and proceed to trial may also assist in clarifying the scope of the inquiry in determining whether leave should be granted under section 13. It would, I think, be difficult to improve on the explanation given by Lord Hope of Craighead in *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16; [2003] 2 AC 1, para 95:

“The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way ...”

[92] Applying this approach to applications for leave under section 13, the judge will need to consider whether, on the factual basis alleged unless it is clearly without substance, there is a substantial (in the sense of solid) basis for saying that in all the circumstances of the case, and having regard in particular to the matters specified in section 16(2), it would be appropriate for an order for financial relief to be made by a

court in England and Wales. In making this assessment, it will be necessary to take into account whether there is a real prospect that further material supporting the applicant's case would emerge, through disclosure or otherwise, if the case were to proceed to a substantive hearing."

Set aside application

[31] "First and foremost, to deny the party adversely affected by an order any opportunity to say why the order should not be made is patently unfair. It is contrary to what I referred to at the start of this judgment as rule one for judges.

[32] Second, as well as being patently unfair, such a procedure is also foolish. For obvious reasons, judges make better decisions if they hear argument from both sides rather than from one side only. This is one of the main benefits of an adversarial process.

[33] Third, a procedure which, while otherwise preventing a party from objecting to an order, allows that party to do so if he can show that the court was materially misled at a hearing held in his absence achieves the worst of both worlds. It encourages the party who will otherwise be denied a hearing to make allegations that the other party misrepresented or failed to make full and frank disclosure to the court of material facts. Such allegations are calculated to raise the temperature even higher in litigation of a kind in which there is typically no love lost between the parties and to lead, as happened here, to court time which could have been used to hear argument about whether the order should be made being occupied instead by argument about what was or should have been said at the earlier without notice hearing. Given the high burden of demonstrating that the judge was not only misled but was misled on matters which were "sufficiently material to the issues informing the grant of leave" (the test applied by the Court of Appeal), such a proceeding is almost bound to be an expensive waste of time and money, as it was here. It would be difficult to devise a worse system than this for dealing with leave applications."

Length of inter partes leave hearings

[93] "Although the length of time allocated to inter partes leave hearings is not a matter for this court, I cannot refrain from commenting that the suggestions made in *Agbaje and Traversa v Freddi* that such hearings should as a rule be listed for as little as 20 or 30 minutes, or at most 60 minutes, do not strike me as realistic. They evince the same triumph of hope over experience as the similar suggestions made in *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* [1987] AC 460, 465 (per Lord Templeman), and repeated in later cases, about the resolution of disputes in ordinary civil proceedings about whether England and Wales is the appropriate forum for a trial. The problem in both situations is that the court is not provided with clear simple rules to apply but instead is required to make an evaluative assessment of a broad range of factors with little in the way of principled guidance about what weight they should be given. I do not think that in such circumstances it is reasonable to expect counsel or first instance judges to confine the argument to a period measured in minutes rather than hours."

[96] "In deciding what limits to place on written and oral submissions in leave applications, a critical consideration must be proportionality. Since 2013, Part 1 of the Civil Procedure Rules has expressly defined the overriding objective as being to deal with cases justly and "at proportionate cost." The latter requirement is further specified in CPR rule 1.1(2)(c) as including "dealing with the case in ways which are proportionate

– (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party.” No equivalent amendment has been made to the Family Procedure Rules 2010; but the importance of proportionality in family proceedings, particularly where the case is about money, cannot be doubted. I note that proportionality is described in Financial Remedies Practice 2022/23, para 1.8, as a “key facet of the overriding objective”; and that in *B v B* (Financial Orders: Proportionality) [2013] EWHC 1232 (Fam), para 54, Coleridge J observed that “proportionality is the name of the game when costs are so high and court time is more and more at a premium” - a statement which had been seen and approved by the President (see para 55).”

29. TY v XA [2024] EWFC 96

- a) Judgment of Moor J
- b) Second application to set aside the grant of leave (consequent on the Supreme Court decision in *Potanin v Potanina* (see above).

Facts:

- W was granted leave ex parte in April 2023.
- In July 2023 H’s application to set aside was refused on the *Agbaje* principles i.e. a ‘knock-out blow’ was required. H was permitted to reapply if the Supreme Court decided that test was incorrect.
- H therefore reapplied after the Supreme Court judgment was given.

Held:

- The Supreme Court decision meant that the Moor J had applied the wrong test in July 2023.
- The Supreme Court decision has not changed the test for the grant of leave.
- H’s application to set aside the grant of leave was refused.
- Unless agreed all applications for leave should be heard on notice.

The leave application

[34] “The decision of the Supreme Court in *Potanin* has not changed the basic test for the grant of leave to apply for financial relief under Part III. That remains as set out at section 13 of the Matrimonial and Family Proceedings Act 1984 as interpreted in *Agbaje v Agbaje*. The prospective applicant must establish that he or she has a substantial, which means ‘solid’ ground for bringing a claim for financial relief. It has removed part of the *Agbaje* guidance that said that the principal object of the leave filter mechanism was to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse (Lord Leggatt at [89]).

[35] Lord Leggatt JSC emphasises, at paragraph [89] of his judgment, that he casts no doubt on the primary guidance given in *Agbaje* to that effect. He does give some clarificatory guidance about the threshold of the test for leave, in the subsequent paragraphs. He indicates that an application for leave should only fail if it is of

insufficient merit to avoid a summary dismissal. To put it another way, the court should perform a reverse summary judgment. The threshold test is whether the prospective applicant can show a real prospect of success, but, at the same time, the court must continue to guard against the leave or set-aside hearing becoming a proxy for the final trial.

[36] It follows that a summary dismissal of a Part III claim, which means a refusal of leave to apply, will only happen in circumstances where either the court concludes that, as a matter of law, even if the prospective applicant were to prove all the disputed facts in her favour, the claim would be bound to fail, or that the factual basis for the claim is fanciful because it is entirely without substance or conflicts with the underlying documents in the case.”

The set aside application

[37] “The test to be performed on a set-aside application is exactly the same as on an initial application. It was wrong to apply a test based on 'compelling reasons' or 'knock-out blow'. It follows that the burden of proof is on the Wife to satisfy me in this case that it is a suitable one for grant of leave. Indeed, it seems tolerably clear to me that, in the absence of consent, all initial applications in future will be heard on notice to the respondent.”

30. WXT v HMT (leave to claim financial relief following overseas divorce) [2024] EWFC 136 (B)

- a) Judgment of HHJ Vincent.
- b) Application of the test for leave.
- c) Leave granted for W’s application for financial relief.

APPLICATIONS AFTER A FINAL (CONSENT) ORDER

31. H v GH [2023] EWFC 235

- a) Judgment of Simon Kolton KC sitting as a Deputy High Court Judge.
- b) Application to vary date for payment of a lump sum.
- c) Costs - consideration of the application of the guideline hourly rates contained Guide to the Summary Assessment applicable in civil proceedings (see below).

Facts:

- Consent order dated 10 December 2018 required payment of a lump sum of £1.1m by 19 June 2023.

- On 3 October 2023 H applied to vary the date to for payment to 30 June 2024 and then to 30 June 2025.
- The lump sum was secured by mortgage over a property. W sought and obtained possession of the property and a judgment in the sum of £1.1m. H sought to appeal that money judgment.
- W applied to strike out the variation application.

Held:

- There is no statutory power to vary a lump sum order.
- The inherent jurisdiction to vary the time for maybe is limited to a 'slight' or 'modest extension of time'.
- The period of time sought – 2 years – is not 'slight' or 'modest'.
- Variation application therefore struck out due to lack of jurisdiction.
- It was not improper for H to seek the extension in order to rely on it in the County Court proceedings for possession.

Inherent jurisdiction to vary time for payment

[16] ... "The Court of Appeal held that the power exists to extend the time for payment of a lump sum ordered pursuant to section 23(1)(c) of the 1973 Act.

i) Butler-Sloss LJ held, based on earlier decisions, that it was *"necessary to look at the purpose and effect of the application to extend time to see whether in truth it is intended to strike at the heart of the lump sum order or whether it is a slight extension... of no great importance, which does not go to the main or substantive part of the order"*.

ii) Butler-Sloss LJ noted that *"It has long been recognised that the courts have the right to regulate their own proceedings"*, citing Lord Denning in *R v Bloomsbury & Marylebone County Court, ex parte Villerwest Ltd* [1976] 1 WLR 362 where he spoke of the *"very wide inherent jurisdiction... to enlarge any time which a judge has ordered"*.

iii) As Butler-Sloss LJ also held:

"It is a matter for the discretion of the court. It is not, however, an invitation for spouses to delay payment of lump sums or avoid compliance with strict timetables. In the majority of cases it would not be right for the court to intervene, particularly in the case of a consent order freely entered into by the parties".

iv) Turning to the facts of the case, she continued:

"Whether it is right to extend time is a matter of the exercise of the court's discretion, but the application to extend time does not, in my view, go to the substance of the order, and therefore does not contravene either the statutory prohibition or the spirit of the legislation. The purpose of the omission of lump sums from s 31 is to prevent two bites of the cherry, and to provide for certainty and a determination of the issues between the parties. To extend time for a month or so when the money is available within a reasonable time on the facts of this case does not in itself affect those considerations, although the objections of the wife have in themselves created considerable additional litigation which cannot be entirely laid at the door of the husband in making the original application."

[17] In *Hamilton v Hamilton*, Baron J in the Court of Appeal at [31]-[33] approved as a statement of the law that if there was no power to vary under section 31, then the court could not extend the time for payment of a lump sum under section 23(1)(c) by "any significant period".

[18] The Supreme Court confirmed the existence of this jurisdiction in *Birch v Birch* at [26]. Lord Wilson JSC there described the inherent jurisdiction "to direct a modest extension of the time" for payment.

[19] In *BT v CU* [2021] EWFC 81, [2022] 1 WLR 1349, Mostyn J at [37] cited the language of Butler-Sloss LJ in *Masefield v Alexander*, holding,

"Clearly an application for a modest extension of time to pay an individual lump sum would not strike at the heart of the order and would be, if granted, of no great importance, particularly if compensatory tapering periodical payments are being made in the meantime".

32. [Rotenberg v Rotenberg & Ors \[2024\] EWFC 185](#)

- a) Judgment of Peel J
- b) Factually complex and long-running litigation.
- c) Thwaite jurisdiction: an executory order may be reframed where the landscape on the ground was very different to that envisaged at the time of the order.
- d) The jurisdiction should be used sparingly. The facts of the case were exceptional thereby justifying the order – the assessment of W's needs in her part III application had been founded upon her and the children remaining in the UK. That factual basis fundamentally changed when she and the children left the UK and did not return.

Existence of the Thwaite jurisdiction

[55] ... "Although doubt has been expressed by Mostyn J as to the existence of the Thwaite jurisdiction in **SR v HR [2018] EWHC 606 (Fam)**, I have not heard argument on the point and am inclined to accept, for the purposes of this case, that the jurisdiction does indeed exist, although it should be used sparingly. The essence of the jurisdiction is that the court may adjust an executory order (i.e before it has been complied with) if it would be inequitable not to do so, most commonly where there has been a significant and necessarily relevant change of circumstances since the order was made."

SCHEDULE 1 APPLICATIONS

33. A v B (Schedule 1: Arbitral Award: Appeal) [2024] EWHC 778 (Fam)

- a) Judgment of Cobb J.
- b) Appeal from decision of HHJ Evans-Gordon not to convert an arbitral award into a court order (LT v ZU [2023] EWFC 179).
- c) Central issue of whether the court has the power to compel a party to borrow money in order to purchase a property.

Facts:

- By virtue of a child arrangements order the children spent equal time with each parent.
- At the time of the arbitration it was agreed that the mother would move out of her property in which she was living with the children.
- The Arbitrator found that the mother's housing needs were £1.1-1.3m and that a joint mortgage should be raised to achieve the purchase of the property alongside a capital contribution by M and the equity in the current property.
- H challenged the award.
- The Judge found that an order requiring a party to borrow money for the purposes of a settlement or transfer may only be ordered in respect of property to which either party is entitled in possession or reversion.
- The Judge did not regard it as relevant that F had offered to borrow monies by mortgage to purchase a new home.

Held:

- There is no express power in Schedule 1 to order sale or direct a new property to be purchased but this is how housing provision is routinely made by the court.
- The court has the power to require a settlement to be made to its satisfaction.
- In most cases it is likely that the parties will need to borrow funds by way of mortgage in order to purchase or settle a property for the benefit of the children.
- Appeal allowed.
- Remitted for rehearing of the parties' cross applications: F's application to challenge the award; M's notice to show cause why an order should not be made in the terms of the award.

Power to require a party to borrow

[105] "In my judgment, the Judge in the instant case wrongly limited her evaluation to the 'four corners' of Schedule 1, and ignored the essential purpose of Schedule 1, and the ancillary steps which can be taken to give effect to an order made under its provisions. As Mr Amos argued, and I agree, in proceedings of this kind a parent can be compelled into a joint property purchase, into an insurance contract and to discharge or indemnify for debt for which they are not contractually responsible. These are essential

ancillary powers for carrying property adjustment into effect, though none are expressly set out within the statute.”

34. [Galbraith-Marten v De Renée \[2023\] EWFC 253](#)

- a) Judgment of Cobb J
- b) Consideration of the application of the Adjusted Maintenance Formula promoted by Mostyn J in [James v Seymour \[2023\] EWHC 844 \(Fam\)](#).
- c) Following a successful application to set aside a consent order based upon the pre-James v Seymour “guideline” promoted by Mostyn J directly to the parties in this case.

Benefits of a formula

[20] “The use of an arithmetic formula as a guideline for periodical payments awards in cases like this under Schedule 1 CA 1989 can be traced back to *GW v RW* [\[2003\] EWHC 611 \(Fam\)](#) (and see also, for completeness, *Re TW & TM (Minors)* [\[2015\] EWHC 3054 \(Fam\)](#) at [7], and *CB v KB* [\[2019\] EWFC 78](#)). The adoption of formula was said then to be prompted by the policy of making awards of child maintenance susceptible to abrogation and replacement by a maintenance calculation by the then Child Support Agency ('CSA') (see *GW v TW* at [74]). The durability of the formula approach since 2003 can perhaps be attributed to the following:

- i) The formula is pegged to the payer's gross exigible income; this mirrors the statutory computation by the CSA and (since 2012) by the Child Maintenance Service ('CMS'), and references directly paragraph 4(1)(a) of Schedule 1 CA 1989;
- ii) It reflects the payer's responsibility to other children in his/her household (i.e., other financial obligations); this also coincides with the statutory computation by the CSA and (since 2012) by the CMS, and references directly paragraph 4(1)(b) Schedule 1 CA 1989;
- iii) The formula has been adopted by many separating parties to apparently good effect for many years; judges of the Financial Remedies Court have found it useful, and it has the advantage of achieving consistency and efficiency in decision-making;
- iv) It would be unhelpful and somewhat arbitrary if the computation of child maintenance below the CMS regime were radically different from the computation undertaken by a court under Schedule 1 CA 1989 (or section 23 of the Matrimonial Causes Act 1973);
- v) A formula provides certainty and clarity, predictability, and accessibility; it is both rational and transparent.”

Limitations of a formula

[21] “On the other hand, I suggest that there are reasons why the court should be cautious about using a formula. These reasons were not in fact discussed in this hearing or in the filed documents, as both parties supported the 'calculative' approach to financial support now and in the future. I pause here to observe that it is not insignificant that this is the only issue on which the parties are agreed. Any court will need to bear in mind that:

- i) No formula can displace the obligation on the court to undertake its statutory discretionary review when deciding how to exercise its powers, as provided for in paragraph 4 of Schedule 1 CA 1989;

- ii) The *James v Seymour* formula is not purely algorithmic; there is an element of judicial subjectivity built in to it: ("I consider that for an exigible income of £650,000 a reasonable figure of Child Support Maintenance ('CSM') for each of two children would be about £25,000. A single child would cost more, perhaps £27,000 (an 8% increase). A family unit with three children would have the benefit of economies of scale and the sharing of indirect costs suggesting that the figure for such a child should be in the region of £23,000 (a saving of 8% compared to the two-child family)" (Mostyn J at [7] of the Appendix to the judgment in *James v Seymour*: emphasis by underlining added);
- iii) The formula will inevitably create anomalies (see [14]-[19] of the Appendix to the judgment in *James v Seymour*: "That eyebrows are raised for the figures produced by a few cases near the frontier of each cohort does not mean that the rule overall is irrational": [19]);
- iv) There is no obvious rationale (as far as I can tell) for fixing the maximum income level at £650,000 in the 'formula' approach.

[22] Moreover, there are acknowledged areas where the formula will not be appropriate at all, such as:

- i) In a case where there are four or more children for whom CSM is to be paid; (*James v Seymour* at [41]);
- ii) If the exigible income is more than £650,000, (*ibid.*);
- iii) If the father's income is largely unearned, (*ibid.*);
- iv) If the father lives on capital, (*ibid.*);
- v) If the court is concerned with a variation application under paragraph 6 of Schedule 1 CA 1989, where the application is founded on a "change in any of the matters to which the court was required to have regard when making the order", and where the focus will be on what the change of circumstance is, and what impact the change has on the original award; (see *James v Seymour* at [34(iii)], and [42]);
- vi) Where the Schedule 1 CA 1989 claim is the 'centrepiece' of the financial dispute between the parties (not subsidiary to a claim for post-divorce financial relief for a child under the Matrimonial Causes Act 1973); in those circumstances, a Household Expenditure Child Support Award may be more appropriate (see *Collardeau-Fuchs v Fuchs* [2022] EWFC 135 at [120] - [121] and *Re Z (No.4) (Schedule 1 Award)* [2023] EWFC 25 at [21])."

Interaction of the formula with the statutory criteria

[27] "That all said, no formula can or should replace the exercise of statutory discretion mandated by paragraph 4 of Schedule 1 CA 1989. Mostyn J makes this point very clearly in *James v Seymour* at [43], and I also emphasised it at [39(i)] of my August 2023 judgment. Formula or no formula, it is incumbent on the court to review the statutory criteria in the context of 'all the circumstances' before making any award under Schedule 1 CA 1989. Furthermore, when parties present a consent order (whether based on a formula or not), the court does not merely wield a rubber stamp and make the order as requested, it has the duty to scrutinise the proposal by reference to the statutory criteria; the court has the power to refuse to make the order even though the parties may have agreed it. As Thorpe LJ said in *Xydhias v Xydhias* [1999] 1 FLR 683 in an equivalent context:

"... The court conducts an independent assessment to enable it to discharge its statutory function to make such orders as reflect the criteria listed in section 25 of the Matrimonial Causes Act as amended the purpose of negotiation is not to finally

determine the liability (that can only be done by the court) but to reduce the length and expense of the process by which the court carries out its function.”

Decision

[28] “I have considered with care the written and oral arguments of the parties at the hearing on 12 December; I have examined their filed evidence with particular regard to the factors set out in paragraph 4 Schedule 1 CA 1989. I have had a firm eye on A's welfare. It is clear that the parents are in significantly disparate financial situations; the father is earning very well as a successful barrister whereas the mother is out of paid employment with no immediate prospects. The father has significant assets; the mother has significant debt. This disparity in itself warrants an award of periodical payments for A which exceeds her basic needs which I set out at §17 above. Having regard to the foregoing, I have reached the clear conclusion that the CSSP of £1957.18 provides not just an appropriate 'starting point' (*James v Seymour* [43]) but a reasonable overall result in this case. This figure (as I mentioned above) is also within a similar territory of the figure representing the 2018 award as adjusted by the RPI. One of the benefits of adopting the *James v Seymour* formula in this case (as in other similar cases) is that it can be applied anew each fiscal year to calculate the fair quantum of periodical payments with specific reference to the payer's income reflected in his/her tax return. This is perhaps particularly valuable in a case where the payer, as here, is self-employed.

[29] This case, I hope, to some extent demonstrates the inherent reliability of the AFM set out in *James v Seymour*, and underlines its potential value in cases of this kind. There is a great deal to be said for promoting higher degrees of consistency in judicial decision-making to applications under Schedule 1 CA 1989; I endorse without reservation the ambition of Mostyn J, Moor J, and others in seeking to reduce uncertainty and unpredictability of outcome for the very large numbers of unrepresented litigants who populate our Financial Remedy courts, and the very many who seek solutions away from the courts.”

35. [TK v LK \[2024\] EWFC 71](#)

- a) Judgment of Nicholas Allen KC sitting as a Deputy High Court Judge.
- b) Jurisdiction following a clean break under the MCA 1973, conduct, reversion of capital and costs.
- c) Factually unusual case in which it was found that M's conduct in committing a criminal offence against the child should be taken into account as it met the high threshold and had impacted F financially due to the child's trauma.

COSTS

36. HO v TL (Costs) [2023] EWFC 216

- a) Judgment of Peel J
- b) For substantive decision see above.
- c) Both sides sought costs against the other.
- d) Costs order made against W notwithstanding that hers was a needs based award.

Held:

- There were three particularly relevant considerations.
- First – H was ‘somewhat legalistic and evasive about his trust interests’. A significant amount of time and money was spent. ‘Ordinarily this would justify a costs order.’
- Second – W did not formally pursue conduct but was personally critical of H in her documents. Ordinarily this might justify a costs order.
- Third – W did not negotiate reasonably until late in the day.
- W to pay to H £100,000 (to be deducted from her overall award).

Unreasonable open position

[10] “Parties must understand that to run an untenable case risks adverse costs orders being made.

[11] Perhaps more importantly, lawyers must advise their clients accordingly. Of course, they act on instructions, but it is, in my view, incumbent on the legal team to explain clearly that a failure to negotiate reasonably on an open basis carries costs risks. If the party persists in an unreasonable stance, they can have no complaints if they are on the receiving end of a costs order.

[12] Litigation is expensive and personally demanding for lay clients. I see no reason why the court should not visit a costs order if one party makes unreasonable open offers. The authorities make plain that a costs order may be made even if it reduces the needs as found by the court. These comments apply particularly to big money cases, although I take the view that in smaller value cases the court should also be willing, in the right case, to make an award for costs, even if only in a modest amount, to register condemnation of the party whose open proposals are far removed from the eventual outcome. The message must get across that although the starting point is no order as to costs, the courts are increasingly willing to depart from that so as to do justice to the party who has been put to unnecessary costs by the other party’s overstated proposals.”

37. [H v GH \[2023\] EWFC 235](#)

- d) Judgment of Simon Kolton KC sitting as a Deputy High Court Judge.
- e) Application to vary date for payment of a lump sum (see above for substantive decision).
- f) Costs - consideration of the application of the guideline hourly rates contained [Guide to the Summary Assessment of Costs](#) applicable in civil proceedings.

Costs

[47] “In the course of this assessment, I raised the question as to the relevance, or not, in the Family Court, of the guideline hourly rates published as part of the 'Guide to the Summary Assessment of Costs'.

[48] In *Samsung Electronics Co Ltd v LG Display Ltd (Costs)* [\[2022\] EWCA Civ 466](#), [\[2022\] Costs LR 627](#) Males LJ (with whom Snowden and Lewison LJ agreed) held at [6]:

"If a rate in excess of the guideline rate is to be charged to the paying party, a clear and compelling justification must be provided. It is not enough to say that the case is a commercial case, or a competition case, or that it has an international element, unless there is something about these factors in the case in question which justifies exceeding the guideline rate."

[49] In *Athena Capital Fund SICAV-FIS S.C.A. v Secretariat of State for the Holy See* [\[2022\] EWCA Civ 1061](#), [\[2022\] Costs LR 1119](#), Males LJ (with whom Birss and Peter Jackson LJ agreed) held:

"6. This court has recently held that, in the case of solicitors' fees, if a rate in excess of the guideline rate is to be charged to the paying party, a clear and compelling justification must be provided: Samsung Electronics Co Ltd v LG Display Co Ltd [2022] EWCA Civ 466. No such justification has been advanced in this case.

7. Counsel's fees are not subject to guideline rates in the same way that solicitors' fees are, but it is nevertheless important to stress that, whatever clients may be prepared to pay their own counsel, only a reasonable and proportionate fee may be recovered from the other side..."

[51] “Counsel were unable to assist me with the question whether these guideline hourly rates apply in family proceedings, although I think their consensus view was that they did not, and they had never heard of the rates being applied in family proceedings. It seems to me that, strictly speaking, the guideline rates do not apply in the Family Court: the 'Guide to the Summary Assessment of Costs' is promulgated by the Master of the Rolls, and does not form part of those Civil Procedure Rules which, by FPR 28.2, apply to family proceedings, nor part of the Practice Directions supplementing those rules. Nonetheless, it would be a very odd result if hourly rates which, in civil proceedings, could not be recovered absent a "*clear and compelling justification*", can readily be recovered in family proceedings. It is also undesirable that the benefits of guideline hourly rates (consistency, proportionality, and predictability) should be lost in the assessment of costs in family proceedings.

[52] For these reasons, I conducted the summary assessment of costs on the basis that, while I was not bound by the guideline hourly rates, the level of those rates provide a good indicator of what costs were proportionate for the receiving party (the Wife) to recover, in the absence of some clear or compelling justification why those rates should be exceeded.”

Siân Smith
42BR Barristers
26 September 2024