

Financial Remedies Update September 2024

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Non-Court Dispute Resolution

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

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’

Non-Court Dispute Resolution

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.

Non-Court Dispute Resolution

Costs - changes to part 28

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

Pre-action protocol

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.

Non-Court Dispute Resolution

NA v LA [2024] EWFC 113

“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.”

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

"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"

Matrimonial and non-matrimonial assets

Standish v Standish [2024] EWCA Civ 567

“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.”

“In my view, therefore, it would be helpful to make clear, expressly, that the concept of matrimonialisation should be applied narrowly.”

“Does fairness require or justify the asset being included within the sharing principle? ...The conclusion that it does, however, does not mean that it must be shared equally.”

Matrimonial and non-matrimonial assets

RM v WP [2024] EWFC 191 (B)

- Judgment of HHJ Hess
- Unequal division of properties used as family home for periods during the marriage.

HO v TL [2023] EWFC 215

- Judgment of Peel J.
- Detailed guidance in respect of the factors that affect valuations of private companies.
- Consideration of ability to extract money from trusts.
- Matrimonialisation of assets.

Conduct

Tsvetkov v Khayroya [2023] EWFC 130

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

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

- Judgment of Peel J
- 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.

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

Pensions

TW v GC [2024] EWHC 949 (Fam)

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

SP v AL [2024] EWFC 72 (B)

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

Galbraith Tables – version 2

Nuptial agreements

AH v BH [2024] EWFC

- Judgment of Peel J
- Consideration of pre-marital agreement which was not vitiated but did not meet W's needs.
- W's needs assessed and met to a lesser extent than if there had not been a PMA.

HJB V WPB [2024] EWFC 187

- Judgment of HHJ Vincent (sitting as a section 9 Deputy High Court Judge)
- Consideration of a notice to show cause why the parties should not be held to the term of a separation agreement.
- 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.'

Part III Applications

Potanina v Potanin [2024] UKSC 3

- Judgment of the Supreme Court – Lord, Lloyds-Jones, Lord Briggs, Lord Leggatt, Lord Stephen and Lady Rose.
- Absolutely essential reading for all practitioners involved in Part III cases.
- 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 demonstrating that 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.

Part III Applications

Potanina v Potanin [2024] UKSC 3

- 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.

TY v XA [2024] EWFC 96

- Judgment of Moor J
- The Supreme Court decision has not changed the test for the grant of leave.
- Unless agreed all applications for leave should be heard on notice.

Applications after a final (consent) order

H v GH [2023] EWFC 235

- Judgment of Simon Kolton KC sitting as a Deputy High Court Judge.
- Application to vary date for payment of a lump sum by two years – refused due to lack of statutory or inherent jurisdiction to do so.
- The inherent jurisdiction to vary the time for maybe is limited to a ‘modest extension of time’.

Rotenberg v Rotenberg & Ors [2024] EWFC 185

- a) Judgment of Peel
- 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. The jurisdiction should be used sparingly.

Schedule 1 Applications

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

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

“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.”

Schedule 1 applications

Galbraith-Marten v De Renée [2023] EWFC 253

- Judgment of Cobb J
- Consideration of the application of the Adjusted Maintenance Formula promoted by Mostyn J in James v Seymour [2023] EWHC 844 (Fam).

TK v LK [2024] EWFC 71

- Judgment of Nicholas Allen KC sitting as a Deputy High Court Judge.
- 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

HO v TL (Costs) [2023] EWFC 216

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

H v GH [2023] EWFC 235

- Costs - consideration of the application of the guideline hourly rates contained Guide to the Summary Assessment applicable in civil proceedings.

Questions