

1KBW

1KBW TALKS FOR
ASPIRING FAMILY LAW
BARRISTERS
FINANCE PROCEEDINGS

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BARRISTERS FINANCE PROCEEDINGS

Programme:

- » Chair – James Roberts QC (1KBW)
- » The scope of finance proceedings: Married couples, TLATA, Schedule 1 – Helen Pomeroy (1KBW)
- » Financial Remedy Proceedings: The First Appointment, FDR and final hearing – Max Turnell (1KBW)
- » Financial provision for married couples – Lauren Winser (guest speaker)
- » Matrimonial v Non Matrimonial Property: Has *WX v HW* [2021] EWHC 241 (Fam) changed what we view as 'non-matrimonial property'? – Tatiana Rocha (guest speaker)
- » Revisiting financial orders - Fatima Ismail (guest speaker)
- » Anonymisation in matrimonial finance proceedings: a step towards transparency or a tax on privacy? – Fleur Claoue de Gohr (guest speaker)
- » Q&A with the panel

The scope of finance proceedings: Married couples, TLATA, Schedule 1

Helen Pomeroy (1KBW)

- » Matrimonial Causes Act 1973: Part II
 - Section 21 - periodical payments, lump sum, property adjustment orders
 - Section 21A - pension sharing orders
 - Section 22 - Maintenance Pending Suit
 - Section 22ZA - orders for payment in respect of legal services
 - Section 23 - periodical payments, lump sum, secured orders, orders for the benefit of children

- » Trusts of Land and Appointment of Trustees Act 1996
 - Sections 14 & 15- applications for order declaring the nature or extent of a person's interest in property subject to a trust

- » Children Act 1989: Schedule 1
 - Paragraph 1(2) - periodical payments, lump sum, settlement of property, transfer of property

Financial Remedy Proceedings: The First Appointment, FDR and Final Hearing

Max Turnell (1KBW)

Family Procedure Rules 2010

- » Rule 9.15 - Duties of the Court at the first appointment:
 - Defining the issues and saving costs
 - Which questions must be answered
 - What documents must be produced
 - Directions - valuation of assets, expert evidence, parties' evidence
 - Listing the FDR (if the First Appointment has not been used as the FDR) or final hearing

- » Rule 9.17 - The FDR appointment
 - Discussion and negotiation
 - The FDR Judge must have no further involvement
 - Parties must 'use their best endeavours to reach agreement on matters in issue'

- » Final Hearing
 - Evidence
 - Submissions
 - Determination

Financial Provision for Married Couples

Lauren Winser (Guest Speaker)

- » The need for flexibility and bespoke financial settlements
- » Fact-specific approach to take into account individual needs
- » Section 25 Matrimonial Causes Act 1973
 - Section 25(1) – “have regard to all the circumstances of the case”
 - Catch-all provision
 - Wide scope for discretion
- » First consideration – the welfare of any children of the family
- » Section 25(2) – factors to which the court will have regard:
 - a) **Income, earning capacity, property, and other financial resources**
Calder v Calder (1976) (The Times, 29 June)
K v K [1990] 2 FLR 225
T v T [1998] 1 FLR 1072
 - b) **Financial needs, obligations, and responsibilities**
 - c) **Standard of living enjoyed by the family**
 - d) **Age of each party and duration of the marriage**
Attar v Attar (No 2) [1985] FLR 653
Miller v Miller [2006] UKHL 24
 - e) **Physical or mental disabilities**
 - f) **Contributions made to the welfare of the family**
White v White [2000] UKHL 54
 - g) **Conduct of the parties**
Wachtel v Wachtel [1973] 2 WLR 366
Kyte v Kyte [1987] 3 All ER 1041
Bailey v Tolliday [1982] 4 FLR 542
H v H [2005] EWHC 2911
FRB v DCA (No 2) [2020] EWHC 754 (Fam)
 - h) **Value of any lost benefit that a party will lose the chance of acquiring**

Matrimonial v Non Matrimonial Property - has WX v HW [2021] EWHC 241 changed what we view at 'non matrimonial property'?

Tatiana Rocha (Guest Speaker)

Miller v Miller; McFarlane v McFarlane [2006] UKHL 24

There are three stands of fairness:

1. Sharing the fruits of the marital partnership
2. Needs
3. Compensation for a relationship generated disadvantage

Definition of 'non-matrimonial assets'

[para 149-153] Baroness Hale drew a distinction between “family assets” and “business or investment assets”:

- » Family assets: “those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole”.
- » As to business or investment assets: “...If the assets are not 'family assets', or not generated by the joint efforts of the parties, then the duration of the marriage may justify a departure from the yardstick of equality of division.

[para 22] Lord Nicholls:

- » “(1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and
- » (2) other property. The former is the financial product of the parties’ common endeavour, the latter is not. The parties’ matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose...”

Where are we now?

Mrs Justice Roberts summarised the relevant principles when it comes to ‘sharing’ non-matrimonial assets in WX v WH (above):

- » [114] In S v AG [2011] EWHC 2637 (Fam), [2011] 3 FCR 523, Mostyn J said this in para [7]:- “Therefore, the law is now reasonably clear. In the application of the sharing principle (as opposed to the needs principle) matrimonial property will normally be divided equally (see para 14(iii) of my judgment in N v F). By contrast, **it will be a rare case where the sharing principle will lead to any distribution to the claimant of non- matrimonial property.** Of course, an award from non-matrimonial property to meet needs is commonplace, but as Wilson LJ has pointed out we await the first decision where the sharing principle has led to an award from non-matrimonial property in excess of needs.”

Revisiting final financial orders

Fatima Ismail (Guest Speaker)

» Key legal instruments

- s.31 of the Matrimonial Causes Act 1973
- s.31(F)(6) of the Matrimonial and Family Proceedings Act 1984
- Part 18, r30, 9.9A Family Procedure Rules 2010, (SI 2010/2955) r4.1(6)
- FPR PD9A, 30A (Application to set aside a Financial Remedy)

» Key Authorities

a) Material (Fraudulent) non-disclosure or misrepresentation/inadvertent disclosure

- Livesey v Jenkins [1985] AC 424
- L v L [2008] 1 FLR 26
- Sharland v Sharland [2015] UKSC 60
- Gohill v Gohill [2015] UKSC 61 at [18]
- CS v ACS and Another [2015] EWHC 1005 (Fam)
- AV v CD (Financial remedy consent order: non-disclosure) [2016] EWHC 10 (Fam)
- Norman v Norman [2017] EWCA Civ 120

b) Change in Circumstances

- Barder v Barder (Caluori intervening) [1987] 2 FLR 4980, HL
- Cornick v Cornick [1994] 2 FLR 530
- Myerson v Myerson (No 2) [2009] EWCA Civ 282
- Richardson v Richardson [2011] 2 FLR 244
- WA v The Estate of HA (Deceased) [2016] 1 FLR 1360
- FRB v DCA (No. 3) [2020] EWHC 3696

» Additional Resources

- Mr Justice Mostyn, Lewis Marks QC (QEB), Havin Smith (1HC), Joshua Viney (1HC), Henrietta Boyle (1HC), Financial Remedies Practice 2021-22, (10th edn Class Legal 2021).
- Alexander Chandler (1KBW), 'Is Coronavirus a Barder event?' (2020) Fam Law, 50(June), 701-712.
- Joseph Rainer (QEB), 'The Thwaite Jurisdiction - No Longer the Last Reserve of the Desperate?' <<https://www.familylawweek.co.uk/site.aspx?i=ed198563>>
- HHJ Hess, Peter Duckworth (29BR), Sally Max (29BR), Janine McGuigan (QEB), 'Dictionary of Financial Remedies' (2021), Class Legal at p.86.

Anonymisation in matrimonial finance proceedings: a step towards transparency or a tax on privacy?

Fleur Claoué de Gohr

Overview

Is the recent judicial encouragement to public reporting of family finance proceedings the appropriate next step towards transparency of family justice or an unfair advantage to one party and lead to adverse consequences in the negotiation process?

Caselaw

- BT v CU [2021] EWFC 87

105. I no longer hold the view that financial remedy proceedings are a special class of civil litigation justifying a veil of secrecy being thrown over the details of the case in the court's judgment. [...] my default position from now on will be to publish financial remedy judgments in full without anonymisation, save that any children will continue to be granted anonymity. Derogation from this principle will need to be distinctly justified by reference to specific facts, rather than by reliance on generalisations.

- A v M [2021] EWFC 89

105¹. There seems to have been a certain amount of surprise caused by my decision in BT v CU to abandon anonymisation of my future financial remedy judgments. Views have been expressed that I have snatched away an established right to anonymity in such judgments. This is not so. I do not believe that there is any such right. My personal research tells me that before the 1939 - 1945 War, and indeed until much more recently, there was no anonymity in the Probate Divorce and Admiralty Division ('PDA'), children and nullity cases apart, and even then only sometimes.

S.1(4) of The Judicial Proceedings (Regulation of Reports) Act 1926

The court has the discretion to publish judgments. But are the judgments of BT v CU and A v M and the now seemingly blanket ban on anonymisation actually judicial law making?

Some Initial Questions

1. Why now?²
2. What is the transparency project? <https://www.transparencyproject.org.uk/>
3. Why the change? Sir James Munby (previous President of the Family Division):

“A judge is always entitled to revise his earlier thinking, not least to take account of changes and developments in the legal landscape. The question, put starkly, is whether he was right then, and is wrong now, or whether he was wrong then and is right now.”³

What are the merits and demerits to making financial remedy judgments public?

Positives	Negatives
Fear of publicity will strengthen encouragement to settle (in line with judicial costs criticisms ⁴ and new financial remedy procedures).	One party may want publicity and the other may fear it thereby creating very artificial bargaining chips and other impact on negotiations
First instance Cases decided with degree of discretion, what is in law deemed fair and just. Knowledge by the public should give trust and confidence in family justice.	Cases published in the High Court are normally decided by reference to principles of “sharing” and so not indicative of outcomes in most cases in the family courts.
Family cases are not in a special category. If other courts publish without anonymity, why should the family courts be any different?	Family court cases, contain details of the most personal nature. Confidentiality is important to give participants faith in the justice system.
Brings the jurisdiction of England and Wales in line with foreign compatriots. Australia: family courts are open to the public albeit strict bans on reporting which will identify and judgements anonymous.	England has incredibly intrusive media, cx many countries, and some leading decisions ⁵ have shown the difficulties of curbing publicity about family cases on social media and the Internet

² <https://www.judiciary.uk/wp-content/uploads/2021/10/Confidence-and-Confidentiality-Transparency-in-the-Family-Courts-final.pdf>

³ <https://classlegal.com/news/more-transparency-in-the-financial-remedies-court>

⁴ <https://www.lexisnexis.com/uk/legal/results/enhPerSrchHandler.do>

⁵ e.g. Re J (A child) 2013 EWHC 2694 per Munby P

<p>Why should someone found to have failed to give disclosure, evaded disclosure, or engaged in other conduct criticised at judicial final hearing be protected by anonymity?</p>	<p>Children will inevitably be identified through their parents if judgments are not anonymised</p>
<p>Court proceedings are a public service</p>	<p>The public does not need to know the personal details</p>

Conclusion

Ultimately the place of anonymisation is yet to be determined, and practitioners and judges alike welcome further guidance on the issue. For the time being the situation is uncertain and striking the balance between *confidence* and *confidentiality* remains difficult.

Fleur Claoue de Gohr
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