Financial Remedies

While you were sleeping...various developments since spring 2014

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Christopher Sharp QC provides a review of the developments over the last year. An edited version of this article appeared in the Summer edition of the FLBA's newsletter Family Affairs.

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It is impossible to be fully comprehensive, and there will inevitably be some selectivity, but here is a review of some of the developments over the last year. It has not been possible to include ToLATA or Sched 1 cases or (in the most part) Part III cases.

What's in a name?

While we were learning to call financial applications 'financial remedies' it now appears we are to return to the old name 'ancillary relief'. In *AB v CB* [2014] EWHC 2998 (Fam) Mostyn J indicated his intention to use "the old expression 'ancillary relief' rather than the neologism in the Family Procedure Rules of 'financial remedy', as ancillary relief is still the heading to that part of Part 2 of the Matrimonial Causes Act beginning at Section 22, where it sets out the powers of the Court and describes them as 'ancillary relief in connection with divorce proceedings'." This terminology seems now to be adopted (see eg per Munby P: *CS v ACS & Anor* [2015] EWHC 1005 (Fam)).

Procedure

Privilege

In *Bradford & Bingley v. Rashid* [2006] UKHL 37, [2006] 4 All ER 706 the House had to consider the question whether some letters were written in an attempt to compromise actual or pending litigation and, if so, whether it could be inferred from their terms and their whole context that they contained an offer in

settlement for which the party who made the offer can claim privilege. The critical question was whether it was clear from the surrounding circumstances that the parties were seeking to compromise the action and whether there was an attempt to compromise actual or pending litigation. Lord Mance, at paragraph 86, said this: "The existence of a dispute and of an attempt to compromise it are at the heart of the rule…. The rule does not of course depend upon disputants already being engaged in litigation. But there must as a matter of law be a real dispute capable of settlement in the sense of compromise (rather than in the sense of simple payment or satisfaction)." In ***SC v YD*** [2014] EWHC 2446 (Fam) Roberts J had to apply these principles where a woman sought to rely in her TOLATA claim on a document put forward by the man shortly before the separation, and when the parties were going through a rough patch, entitled "Agreement between SC and YD". Neither had party had at the time sought legal advice and the woman did not sign the document. While recognising the importance of protecting the public policy interest which is served by allowing a party (here the father) to attempt to compromise future litigation by making offers of settlement and balancing that against wrongly preventing the other party (here the mother) from putting her case at its best, the judge noted that such cases are very 'case sensitive', but she rejected any suggestion that all offers made in the context of a period of marital or relationship disharmony should be treated as attracting the privilege as a matter of public policy. On the facts here at the time neither party could be said to have been seeking to compromise actual or pending litigation. In the circumstances there was no discretion to be exercised. Either the document was privileged or it was not. It was not. Another example was ***BE v DE*** [2014] EWHC 2318 Fam where Bodey J rejected H's claim to privilege for a proposed agreement he put without warning to W during a dinner at a restaurant. He had not disclosed that he had issued a protective petition in another jurisdiction. She had issued a protective petition in this jurisdiction but had not issued a claim for financial remedies. The judge was not persuaded that there was as yet in existence a dispute or a sufficiently definable dispute between the couple which the law envisages and requires for the without prejudice protection to attach. Moreover, it was not clear from the surrounding circumstances that the parties were seeking to compromise any such

dispute. It was not a meeting in an office, nor with an agenda, and W said she had no advance notice of the likelihood of an offer. The husband, according to the wife, just produced 'the document' and then subjected her to pressure to sign it.

Appeals:

In ***re P*** *[2014] EWHC 2990 (Fam)* (the substantive case is **AB v CB** [2014] EWHC 2998 (Fam) and was considered by the CA as ***P v P*** [2015] EWCA Civ 447 and concerns whether a settlement was a nuptial settlement susceptible to variation under section 24(1)(c) of the Matrimonial Causes Act 1973 and the exercise of that power), Mostyn J advised that "in the future, in the field of ancillary relief at the very least, an application for permission to appeal must always be made to the judge at first instance before an approach is made to the Court of Appeal" citing the reasons why this practice is to be preferred, which appear in the White Book (para.52.3.4: namely: '(a) The judge below is fully seised of the matter and so the application will take minimal time. Indeed the judge may have already decided that the case raises questions fit for appeal; (b) An application at this stage involves neither party in additional cost; (c) No harm is done if the application fails. The litigant enjoys two bites at the cherry; (d) If the application succeeds and the litigant subsequently decides to appeal, they avoid the expensive and time-consuming permission stage in the Appeal Court; (e) No harm is done if the application succeeds but the litigant subsequently decides not to appeal'). He noted an additional "very good reason" namely: "The judge at first instance may very well be a specialist in this field" as he modestly suggested he might be, and whose observations the Court of Appeal may find helpful. However, when the issue came before the CA in ***P v P*** [2015] EWCA Civ 447 Jackson LJ confirmed that pursuant to the CPR r.52.3(2) and CPR PD 52A para.4.1, it was no longer mandatory in civil litigation for an appellant to have to apply to the lower court for permission to appeal. It was now merely a matter of good practice for the five reasons set out in the White Book.

Litigants in person are not entitled to any leeway and must comply with procedural rules. Ryder LJ has made this clear in a finance case: ***D v D*** [2015] EWCA Civ 181 and, in a children case, *Re D (Children)* [2015] EWCA Civ 409, McFarlane LJ makes the same point at para [40]. This is consistent with the approach in civil cases as exemplified by *Elliott v Stobart Group Ltd* [2015] EWCA Civ 449 per Tomlinson LJ at [39]: "In *Hysaj v Secretary of State for the Home Department* [2014] EWCA Civ 1633 this court took the opportunity to give

guidance on the approach that should be taken to applications for extensions of time for filing a notice of appeal, in the light of the decisions of the court in *Mitchell* and *Denton*. In each case before the court in *Hysaj* the applicant had failed to file a notice of appeal within the time prescribed by CPR 52.4 (2), which made it necessary for him to seek an extension of time. At paragraph 43 of the judgment of Moore-Bick LJ it was pointed out that in the modern world inability to pay for legal representation cannot be regarded as a good reason for delay. At paragraph 44 it was pointed out that being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the Civil Procedure Rules or, I would add, court orders."

Both *D v D* and *Re D* make the point that it is essential for the effective determination of an appeal that proper grounds of appeal are articulated and form the structure within which the case may be decided. In ***McHugh v McHugh*** [2014] EWCA Civ 1671 the Court of Appeal held that where permission to appeal is given on limited grounds it is not open to an appellant, nor another judge/court, to broaden the grounds.

Setting aside:

An area which has exercised the courts for decades (see eg *B-T v B-T (Divorce: Procedure)* [1990] 2 FLR 1) has again provided further judicial pronouncement, this time, and unsurprisingly to some, arising from the final sentence of PD30A para 14(1) which provides: "The rules in Part 30 and the provisions of this Practice Direction apply to appeals relating to orders made by consent in addition to orders which are not made by consent. *An appeal is the only way in which a consent order can be challenged*". In *MAP v RAP* [2013] EWHC 4784 (Fam), Mostyn J had concluded (para 20) that:

> "the appeal route is mandatory in respect of a consent order made by a district judge where there is no real challenge to the validity of the consent order per se. So, for example, if a challenge is being made under the famous case of *Barder v Barder*, then it seems to me that the Practice Direction fully applies and the appeal route is the only available route …
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> 21 I believe that it is right also to characterise an appeal which is based on non-disclosure as being one that falls on the side of the line where an appeal is the appropriate route, although I accept that two views could be taken as to whether the fact of non-disclosure if proved in fact destroys any consensual element to the order under attack."

In ***Chapman v Kawash*** [2014] EWHC 4481 (Fam) W sought to appeal a consent order where she had, prior to the agreement, believed H held undisclosed assets (land in Jordan) which H denied. W subsequently acquired confirmation of the

asset (which H subsequently admitted) valued at £1.6m, which was significant in the context of the case where the consent order was presented on the basis that the parties had negligible capital. Although it will not necessarily follow that permission to appeal will be granted where a party suspects an asset has not been disclosed but "takes a view", here there had been potentially significant non-disclosure, and the appeal had a realistic prospect of success. Contrast, however, *Edmonds v Edmonds* [1990] 2 FLR 202, CA where H (rightly) believed his property was worth more than the figure adopted by the court but failed to call evidence and failed in his appeal when the sale proved him right.

In ***CS v ACS & Anor*** [2015] EWHC 1005 (Fam) Munby P had to address H's argument that the W seeking, on the grounds of non-disclosure, to substitute a substantive maintenance order for the original nominal provision in a consent order made by a district judge, was limited by para 14(1) to an appeal, which would require permission (whereas an application to a judge at the same level to set aside would not). Munby P held that the last sentence in para 14(1) had been *ultra vires* and that section 31F(6) of the Matrimonial and Family Proceedings Act 1984 (as amended by the Crimes and Courts Act 2013) and rule FPR 4.1(6) allowed the court to vary or revoke an order. This puts district judge finance orders on a par with orders by other judges (see eg *In re F (A Child) (Return Order: Power to Revoke)* [2014] EWHC 1780 (Fam), a decision of Mostyn J in a children case.) It means that a party seeking to set aside a consent order does not have first to seek permission (as would be required for an appeal), and it may have a different effect upon the duty of disclosure, in light of the doubt expressed by McFarlane LJ in ***N v N*** [2014] EWCA Civ 314 that the duty of full and frank disclosure may not persist into the appeal process, as opposed to the first instance process.

Practitioners are now by now aware that the appeals in two cases involving applications to set aside, namely ***Sharland v Sharland*** [2014] EWCA Civ 95 and ***Gohil v Gohil (No 2)*** [2014] EWCA Civ 274 were heard together by the Supreme Court (comprising seven Justices) on 8th and 9th June 2015. The essential issue is whether it is necessary to show that the dishonest non-disclosure has been material in order for an order to be set aside. Judgment is eagerly awaited.

In *Gohil v Gohil (No 2)* [2014] EWCA Civ 274 W was seeking to set aside a 2004 consent order on the grounds of non-disclosure, fraud and misrepresentation by H. The judge (in 2012) set aside that part of the order preventing W from seeking further capital provision and did so relying on fresh evidence admitted on the principles of *Ladd v Marshall.* The case was governed by the FPR 1991. The CA held that while there was no statutory exception for ancillary relief cases to s.17(1) Senior Courts Act 1981, which provides that any challenge to an order of

a High Court judge in existing proceedings should be to the CA, the Court recognised a longstanding alternative (in the High Court at least) to an appeal in the form of a fresh action to set aside for fraud or material non-disclosure (*Livesey v Jenkins* [1985] AC 424 and *Sharland* (supra)). The Court treated the case (notwithstanding some debate about procedure) as if the judge had been hearing a fresh application to set aside. However, the first instance judge in family proceedings could not set aside a financial relief order solely on the basis that there was fresh (untested) evidence sufficient to satisfy the guidelines which applied to the admission of fresh evidence in the Court of Appeal. There were two stages: (1) a finding, as fact, that there had been material non-disclosure and (2) determining whether the original order should be set aside. In *Sharland*, despite the husband's deliberate and dishonest non-disclosure, because of the rather unusual circumstances there were good reasons for concluding that it had not resulted in an order significantly different from that which the court would otherwise have made at the conclusion of the proceedings, so (Briggs LJ dissenting) the order stood. Meanwhile, it is understood that the Family Procedure Rule Committee is considering the introduction of a new draft rule providing for the court's power to set aside a final order in specified circumstances.

In ***Critchell v Critchell*** [2015] EWCA Civ 436, Black LJ stressed that it is rare for a case to come within the *Barder* principles, but where a consent order had included a *Mesher* charge in favour of H so that he could in time employ his share of the FMH to redeem the mortgage and loan from his father which he had needed to buy a house, and within a month his father died so that his inheritance enabled him to discharge those debts, the CA held that whereas the fundamental assumption at the time of the consent order was that the husband needed his capital from the former matrimonial home at a future date to discharge his debts in relation to his home, his inheritance meant that that was no longer so. It was not that the assets had increased but rather that there had been a fundamental change in the needs for which provision had to be made.

Strike out:

Vince v Wyatt [2015] UKSC 14 will be the subject of comment elsewhere in this issue but the finding that FPR 4.4, giving the power to strike out, does not incorporate a consideration of 'real prospects of success', but only applies if an application is not legally recognisable (4.4.(1)(a)), or is an "abuse of process" falling within Rule 4.4(1)(b), has given rise to a decision by Mostyn J (***Dellal v Dellal*** [2015] EWHC 907 (Fam)) in a claim under the Inheritance (Provision for Family and Dependants) Act 1975 applying the same principles to the Civil Procedure Rules, ruling that 'real prospect of success' has a limited meaning under the strike out rule in CPR r3.4(2)(a), and is restricted to 'a claim which is

legally unrecognisable'. 'Serious arguments about real prospects of success' should be reserved for summary judgment applications. For a decision under FPR 4.4(1)(c) where a breach of directions was not made out but where Holman J held the remedy would in any event be disproportionate: see ***Abuchian v Maksoud*** [2014] EWHC 3104.

In ***Taktouk v Semaan*** [2015] EWHC 652 (Ch) Richard Snowden QC summarily dismissed H's application for equitable relief based on an alleged breach of W's fiduciary duty in selling the FMH (to a company owned by her new partner) to realise a sum to meet the lump sum she was awarded in divorce proceedings. The judge held H was barred by issue estoppel arising from a previous decision by Coleridge J but also indicated that he would have stayed the claim pending the payment by H of the costs of the original application (pursuant to *Investment Invoice Financing Ltd v Limehouse Board Mills Ltd* [2006] 1 WLR 985), dismissing H's arguments that such an order would infringe his Article 6 rights .

In **N v N** [2015] EWHC 514 Bodey J stressed that, although in the Family Court strict adherence to the rules is not always required, the 'striking out' of a variation application for child maintenance is a serious matter. Pursuant to Rule 4.3.3, each party likely to affected by the order must be given at least five days' notice of the hearing. Where no such notice was given the judge allowed an appeal from the DJ's strike out order. In **D v D** [2015] EWCA Civ 181 Ryder LJ made it clear that the power to strike out an appeal should be used sparingly and only for compelling reasons so that the outcome of the use of the power is not unjust.

Costs, procedure, experts and bundles:

J v J [2014] EWHC 3654 (Fam): Mostyn J used this case in which the costs of £920,000 amounted to 31.9% of their assets, to comment on aspects of the conduct of ancillary relief cases. Practitioners (and litigants) must scrupulously comply with FPR, PD27A, in particular that, subject to a specific prior direction from the court at the Pre-Trial Review, the size of the trial bundle should be limited to a single file containing no more than 350 pages. Failure to do so may well result in sanctions (and see the strong comments of the President in ***In re L (A Child)*** [2015] EWFC 15). Further, that directions for expert evidence should almost invariably be for Single Joint Experts (as opposed to partisan experts) in the first instance. Somewhat controversially he raised the possibility of fixed price costing and judicial costs capping. However, in light of the judicial howls of protest at the costs incurred in cases like *Young* (Moor J), and *Chai Peng* (Holman J), this is not a topic which will die.

Orders for costs have been evident in cases of litigation misconduct. In ***Colborne v Colborne*** [2014] EWCA Civ 1488 Black LJ concluded, in a case where H's

compliance with directions, replies to questionnaires and disclosure were all deficient and he had dealt with properties during the course of the proceedings, while failing adequately to account for the proceeds, the trial judge was entitled to be sceptical about his explanation and to assume he still had some of it. The CA declined to interfere with the judge's attribution of an extra £800,000 to H. Some adjustments had to be made (the judge had not taken into account £222,274 of CGT) but ultimately W's award of £1.8m was substantially upheld, being less than 50%. The judge was entitled not to distribute the assets according to *Wells v Wells* principles as H could not be trusted to repatriate assets from Morocco. The judge had awarded 100% of W's costs against H but the CA took the view that even had he co-operated W would have had some costs and reduced this to 80%. In ***Thiry v Thiry*** [2014] EWHC 4046 (Fam) Sir Peter Singer ordered H to pay W all of her costs (£465,000 – which H had inflated by his conduct), plus a £500,000 fighting fund against any future litigation against H (H could apply to vary that order and argue the figure was excessive or bind himself that there would be no future litigation requiring W to meet such expenditure (*Al-Khatib v Masry* [2001] EWHC 108 (Fam) and *Minwalla v Minwalla* [2004] EWHC 2823 (Fam)). W was awarded a substantive lump sum of around £17 million, the judge exercising what was described as "restorative justice" where W had advanced substantial sums to H's businesses. The judge characterised H as "an unprincipled rogue who has acted in a financially predatory fashion to prey on his wife for his own profit and to her substantial detriment". He also failed to disclose the complete circumstances of financial dealings in which he had engaged and had been the subject of two penal notices and after his continued failure to comply with court directions, he was committed to prison for four months (which he never served as he, perhaps wisely, remained out of the jurisdiction).

A warning that "the court can have no truck with litigants who ignore reasonable, well-pitched open offers, proceed to trial at huge cost and then lose" came from Moor J in ***SR v RS*** [2014] EWHC 4305 where, at an FDR, H was advised the order would be a lump sum of £20-30,000 and W subsequently made an open offer for £30,000. H pursued a claim predicated on capital needs of £825,000 and annual income needs of over £200,000. The final award was £25,000 which the judge directed to W, to partially reimburse her for the £150,000 she had spent in costs. See also ***JP v NP*** [2014] EWHC 1101 (Fam), below, on the unwise pursuit of meritless litigation. In ***MAP v MFP*** [2015] EWHC 627 (Fam) Moor J also observed that with the passing of *Calderbank* offers, parties should be encouraged to make open proposals as early as possible that are designed to encourage settlement."If the other party spurns such an offer, the court is entitled to ignore it completely and decide the case entirely on the merits. I will have no hesitation in a suitable case in awarding an applicant more than an open offer he or she has made if that is justified."

On the issue of expert evidence, Ryder LJ's comments in ***Cooper-Hohn v Hohn*** [2014] EWCA 896 must be noted, both in respect of his interpretation of "necessary" (he adopted the President's interpretation in *Re H L (A Child)* [2013] EWCA Civ 655) but also that in relation to the timing of the wife's application, highlighting FPR r 25.6 which provides the mandatory timetable for seeking expert evidence: "...parties must apply for permission... as soon as possible; (d) in proceedings for a financial remedy, no later than the first appointment...". He stressed the importance of compliance. Moreover, and having regard to the development in the civil jurisdiction following *Mitchell* he made this observation (in bold type):

"[44] A sanction or a refusal to allow relief against a sanction in the Rules can be inferred where a party shall not be permitted to do something if the Rule is not complied with. Parties to financial remedy litigation should expect that approach to be followed as much in their cases as it is in children cases and civil litigation generally."

You have been warned.

Non-compliance

The cases above reflect a party's non-compliance with orders, but ***Cherwayko v Cherwayko*** [2014] EWHC 4252 provides guidance on the execution of a warrant for a suspended committal order. W had only received two thirds of a first instalment of a lump sum award and H had been directed to serve a statement explaining his non-compliance, setting out proposals for compliance and his current financial circumstances with which he failed to comply. The order provided that service of the order should be effected by email and first class post to the respondent's solicitors, which Mostyn J said was permitted by FPR 37.8(2)(b). W applied to commit H to prison for his breach. Although he had notice of the committal hearing H failed to comply with the order or attend the hearing. Mostyn J observed that "a committal order has two elements, namely coercion and punishment, and the two elements have to be carefully balanced. It is for this reason that, whilst there is no principle that the court should normally not move straight to direct committal but should halt at the stop marked "suspended order", there is certainly a practice to that effect." Despite H's "blatant and defiant contempt", it was not proportionate to direct immediate imprisonment for 6 months and the appropriate order was a suspended committal order, making the court's displeasure at the scale of H's contempt clear. The warrant for H's arrest would be stayed, providing that he paid £500,000 to W by 4pm on 17 December and complied with the disclosure order.

The procedure would be for the judge to authorise the execution of the warrant on receiving an affidavit sworn by W or her solicitor on 18 December stating that H had not complied with the terms of the suspension.

In **Arif v Anwar** [2014] EWHC 4669 (Fam) Norris J employed the *Hadkinson* principle to impose on a party a condition of his continued defence of proceedings where he was in default under an order of the court. The question was whether the contempt impedes the course of justice. The context in which that test was framed has generally been one of procedural default, but the judge held it is equally applicable to contempt arising from non-payment of money due under Maintenance Pending Suit orders. The course of justice was impeded both because W was not receiving the mps to which she was entitled and also because that was compromising her ability to fund her representation

ADR

Attendance at a MIAM is now required before issuing an application for financial remedy (see *section 10 Children & Families Act 2014 and Part 3.6(2)(b) and PD3A*), subject to exemptions (*FPR 2010 Part 3.8*). Following the President's guidance with respect to the implementation of arbitration awards in ancillary relief claims (S v S [2014] EWHC 7 (Fam)), it is clear that arbitration and ADR will be very relevant considerations in the conduct of ancillary relief claims. The Financial Remedies Working Group Final Report (Jan 2015) repeated its recommendations in respect of Arbitration made in the interim report (see below). Engagement (or lack of it) with ADR will sound in costs. In ***Mann v Mann*** [2014] EWHC 537 (Fam) Mostyn J commented on the consequences of not engaging in mediation: 'I cannot compel the parties to engage in the mediation. But I can robustly encourage them with an Ungley Order'. For subsequent developments in *Mann* see below.

Reform

The Financial Remedies Working Group, established by the President of the Family Division and chaired by Nicholas Mostyn J and Stephen Cobb J, published its interim report in July 2014 and a Final Report in January 2015. Its task was to improve accessibility to the system for litigants in person and to identify ways of further improving good practice in financial remedy cases. To that end a number of proposals have been advanced, although their implementation may well be frustrated by the demands of IT. Among the proposals are:

- that there should be a single unified procedure for all financial remedy applications (eg whether post divorce, under Part III Matrimonial and Family Proceedings Act 1984 (once permission has been obtained), or under Schedule 1 of the Children Act – see also the President's "View" No 13). The adoption of a unified procedure should enable a substantial rationalisation of the confusing array of prescribed FR application forms. The group's view is that there should be only one form of financial statement: the Form E (a suggested draft is set out in Annex 1 to the Report) instead of the current confusing Forms E, E1 and E2;
- stream lining Part III applications (including a recommendation that an application under Part III of the MFPA 1984 should normally be made without notice, with the court having power to direct that it be heard on notice). They also recommend amendment to the Rules to enable a Part III case to be transferred to an appropriate Family Court location once the leave stage had been completed (as directed by Holman J in ***Barnett v Barnett*** [2014] EWHC 2678 (Fam));
- rationalising the (former) Magistrates' Court jurisdiction;
- enhancement of the role of the FDR: including rule changes to encourage the FDR being conducted at the first hearing, with parties being obliged to attend the First Appointment prepared to treat it as an FDR, on the basis that the judge may reject their reasons for seeking further disclosure etc before the FDR takes place, and impose an FDR;
- adoption of standard orders.

A welcome proposal is that there should be no need for the separate issue of Forms A simply for dismissal purposes and that once a Form A has been issued then, save if the application is expressly stated to be limited to the seeking of a particular remedy, all possible applications by both parties are deemed to have been made and may be granted or dismissed by the court without further application.

In passing, a similarly flexible approach is noted in ***JP v NP*** [2014] EWHC 1101 (Fam) in which Eleanor King J held that an order which was not to take effect until after decree nisi (the DN not having been made at the time of the order)

was not a nullity for want of jurisdiction (albeit an order purporting to take effect before decree nisi would be a nullity). Applying and explaining *Pounds v Pounds* [1994] 1 WLR 1535 she held that in financial remedy proceedings a judge had power, under FPR r 29.15, to direct that a judgment should take effect from such later date as the court might specify. That power applied equally to a contested matrimonial matter resulting in a judgment as it did to consent orders since rule 29.15 applied to all family proceedings, including financial remedy proceedings, with no distinction being made as to whether by consent or otherwise. Costs followed the event before King J and below as H had pursued the point "dancing on a jurisdictional pinhead" which was a luxury the family could not afford.

Also to be welcomed in the FRWG Report is the resistance to the HMCTS proposal to prevent a party from choosing the location of the court dealing with the financial application (especially choosing the Central Family Court).

It is proposed that the *Statement on the efficient conduct of financial remedy final hearings allocated to be heard by a High Court judge whether sitting at the Royal Courts of Justice or elsewhere,* dated 5 June 2014 [http://www.judiciary.gov.uk/wp-content/uploads/2014/08/report-of-the-financial-remedies-working-grp-annex3.pdf] and issued by Mostyn J, should be adopted for all final hearings in the Family Court of financial remedy applications listed for three days or more.

Periodical payments

Murphy v Murphy [2014] EWHC 2263 provides a useful practical example of the approach to stepped orders and deferred clean breaks. An agreement at the FDR resulted in an order covering final capital apportionment, including a pension sharing agreement, and also periodical payments for W and the 3½ year old twins on the basis that the husband would pay the current nursery fees. W wanted to return to work but when, and at what level, was speculative. H secured an agreement that periodical payments should reduce by 50p per £1 (net) earned by W. Agreement was not reached on whether there should be a step down in financial provision and whether periodical payments payable to the wife should at some point terminate, and these discrete issues were set down before Holman J. The judge in effect had his hands tied because there was no power left to him to make any further or alternative capital adjustment at all, to compensate W if her maintenance was to be reduced or stopped. He did

however make some observations on the issue of stepped orders at para [22]: "The Matrimonial Causes Act 1973 does not itself make express statutory provision as to so-called "step down", although, of course, the flexibility and width of the language of section 23(1)(a) is such that a court can, as it routinely does, make orders for periodical payments which may go up or down at various defined points to reflect anticipated future circumstances and, in particular, anticipated gain of employment. It is, of course, the statutory duty of the court under section 25(2)(a) of that Act to have express regard not only to actual income but also "earning capacity", and "including, in the case of earning capacity, any increase in that capacity which it would in the opinion in the court be reasonable to expect a party to the marriage to take steps to acquire." So undoubtedly in a situation in which the court is of the opinion that it would be reasonable to expect a party to the marriage to take steps to acquire an increase in his or her earning capacity, then that circumstance and opinion operates to influence future levels of maintenance and, most probably, some identified step down. But the court still has to form that necessary opinion." Similarly, in respect of a termination of periodical payments, pursuant to s.25A(2) he observed that "the court has to be able to form an opinion that by the end of the selected term the payee will be able to adjust without undue hardship to the termination". The judge observed that "What, frankly, the arguments by the husband overlook is that the having of children changes everything." In the circumstances, given the speculative aspect of her prospective earnings, her limited capital and her precarious financial position, looking after the children if she had no support from H, there would be neither a step down nor a deferred clean break. For a case where modest capital was divided equally after a short marriage and a term order was upheld despite there being a young child (aged 3 years), but where on the facts it was held appropriate (and in any event there was no s.28(1A) bar so she could apply to vary) see *Chiva v Chiva* [2014] EWCA Civ 1558.

Mann v Mann [2014] EWCA Civ 1674 – a somewhat convoluted procedural history during which the wife sought and obtained the capitalisation of a maintenance order, the husband defaulted on the payment of the resulting lump sum, there were a number of compromised appeals, further defaults by H and a failed mediation and ultimately W sought to enforce a lump sum. Mostyn J

ordered H to pay 'interim periodical payments' later re-characterised as "a scheduled court directed part payment of the outstanding lump sum". H appealed and, in short, the issue was whether the judge had jurisdiction to order H to make payments to W, other than after the determination of W's enforcement proceedings in accordance with FPR 2010 R 33.16 (1) or (2). The short answer was 'no'. FPR 2010 R 20.2 lists the orders for interim remedies which may be granted by a court "at any time". They do not include interim payments, save for "the payment of income from relevant property until an application is decided". W had initiated enforcement proceedings in relation to an outstanding lump sum. The outcome awaited due process. There was no interim relief that could be provided in the absence of orders capable of application for variation. The Court directed that another judge should try the matter.

In **SS v NS (Spousal Maintenance)** [2014] EWHC 4183 (Fam) Mostyn J, having divided the capital (£3.3m) equally indulged in some wide ranging and entertaining discussion as to the justification for maintenance: why, how much, how long? Challenging many assumptions along the way, he concluded with a summary of his perception of the law and the principles that apply to a spousal maintenance claim as follows:

i) A spousal maintenance award is properly made where the evidence shows that choices made during the marriage have generated hard future needs on the part of the claimant. Here the duration of the marriage and the presence of children are pivotal factors.

ii) An award should only be made by reference to needs, save in a most exceptional case where it can be said that the sharing or compensation principle applies.

iii) Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship.

iv) In every case the court must consider a termination of spousal maintenance with a transition to independence as soon as it is just and reasonable. A term should be considered unless the payee would be unable to adjust without undue hardship to the ending of payments. A degree of (not undue) hardship in making the transition to independence is acceptable.

v) If the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former.

vi) The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence.

vii) The essential task of the judge is not merely to examine the individual items in the claimant's income budget but also to stand back and to 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.

viii) Where the respondent's income comprises a base salary and a discretionary bonus the claimant's award may be equivalently partitioned, with needs of strict necessity being met from the base salary and additional, discretionary, items being met from the bonus on a capped percentage basis (see also *B v B* [2014] EWHC 4545 (Fam) and *H v W* [2013] EWHC 4105 (Fam))

ix) There is no criterion of exceptionality on an application to extend a term order. On such an application an examination should to be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve and, if so, why.

x) On an application to discharge a joint lives order an examination should be made of the original assumption that it was just too difficult to predict eventual independence.

xi) If the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party.

He then suggested that prioritising the interests of the children meant providing for their maintenance and school fees out of H's basic salary before looking at what was left for W's maintenance, and awarding her a capped share of his (banker's) bonus for a limited period, with a longer term on spousal maintenance.

Wright v Wright [2015] EWCA Civ 201 received a lot of coverage in the popular press for the suggestion that the wife should get out and get a job once her child was in year 2. In fact, on an application for permission to appeal, Pitchford LJ merely found that there was no real prospect of successfully challenging the

circuit judge's scaling down of W's maintenance over 5 years in circumstances where the original district judge had expected W to be working within 2 to 3 years, W had made no attempt to retrain or get work since 2008 and H's circumstances had changed, he had already deferred his retirement, and the circuit judge concluded the husband should no longer be expected to make any provision for the wife during his postponed retirement.

MPS

BD v FD [2014] EWHC 4443 (Fam) Moylan stressed that mps is designed to meet the immediate needs of a party. The purpose of an interim hearing is simply to ensure that one party has sufficient resources to meet their interim needs and to meet them in a way which does not prejudice their longer term position or place them at a significant disadvantage. It was an opportunity to transform the applicant's standard of living and here W's budget was manifestly exaggerated. An award was made in the sum currently paid by H. Moylan J was keen to discourage contested applications for mps and criticised the costs of £80-90,000 as a disproportionate use of the parties resources, and the proceedings as a disproportionate use of the court's resources.

Departure from equality

Cooper-Hohn v Hohn [2014] EWHC 4122 (Fam) - the judgment following the final hearing in this extensive litigation runs to 310 paragraphs. The net assets were a little under $1.5 billion within a complex structure. The tax issues and the history are complex. Manifestly a short note cannot do the matter justice, however, the core issues were helpfully identified by Roberts J at para 7 as follows:

i. What is the extent of the assets available for distribution as between the husband and the wife (the computation issue)?
ii. To what extent do those assets fall to be considered as part of the marital acquest or, alternatively, to what extent have they been generated (or

added to) in the period between separation and the date of trial (the marital acquest or post-separation accrual issue)?

iii. What percentage of the overall available wealth should each party receive at the end of the marriage? In particular, is a departure from equality justified on the facts by either or both of (i) post-separation accrual and/or (ii) special contribution on the part of the husband (the distribution issue)?

iv. In either event, should there be a *Wells* sharing of any or each of the various categories of assets, to include any goodwill value which I find to exist in the TCI entities over and above the value of the assets they currently hold?"

In brief the answer to (i) was a little under $1.5 billion (excluding the further $4.5 billion in charitable foundations) all of which had been generated during the marriage, but there had been substantial growth after the separation in 2012 (according to H by some 93%). H contended W should receive no more than one third of the assets at separation plus one half of one third of the post-separation accrual, or some 25% of the available assets. W sought an equal share. H sought departure from equality therefore on the grounds of post separation accrual and special contribution. While valuing the assets at the date of trial, and having reviewed the case law (including *Cowan v Cowan* [2001] 2 FLR 192, *Rossi v Rossi* [2007] 1 FLR 790, *H v H* [2007] 2 FLR 548 and *Jones v Jones* [2011] 1 FLR 1723) Roberts J recognised that not all of the current value could be included in the martial acquest. However "notwithstanding the exponential increase in the growth of the Fund post-separation, its genesis as a matrimonial asset is a factor of considerable significance. That factor must, in my view, find its reflection in the overall quantum of the financial award she will receive at the conclusion of these proceedings. It goes to the heart of what I consider to be fair in the overall context of the case." So far as 'special' or unmatched contribution was concerned the judge rejected the attack on the admissibility of the concept mounted by W. W had made a very full contribution (at one point bringing up 4 children under 5 while still working) and had been closely engaged in the activities of the Foundation. However, applying the principles from *Charman* (as

well as *Cowan* and *Lambert*), and rejecting the suggestion that it involved gender discrimination, Roberts J concluded the concept survives and observed that: "There are two stages to consider in respect of a case involving special contribution. First, has the party claiming to have made a special contribution unmatched by the other made out his or her case on the facts and within the law? Secondly, if the answer to that question is yes, what is the range of extent of the departure from a position of equality?" And to address the first issue she posed the following questions to all of which the answer was affirmative:

"i. Can it properly be said that [the husband] is the generating force behind the fortune rather than the product itself?

ii. Does the scale of the wealth depend upon his innovative vision as well as on his ability to develop those visions?

iii. Has he generated truly vast wealth such that his business success can properly be viewed as exceptional?

iv. Does he have a special skill and effort which is special to him and which survives as a material consideration despite the partnership or pooling aspect of the marriage?

v. Would it, in all the circumstances, be inequitable for me to disregard that contribution?"

However, she also noted that H would be able to make up the value of the funds that he paid to W within a comparatively short period. In the event, and having balanced the factors, using the cross-check of overall fairness (*White v White [2000] UKHL 54*) and run through s.25(2), while acknowledging some degree of arbitrariness in her assessment of the percentage, she awarded W 36% ($530m) of the assets (with provision for tax held back for a period until the liabilities were resolved).

The difficulty of establishing a special contribution was illustrated in ***Gray v Work*** [2015] EWHC 834 (Fam) where H had amassed a fortune of £300m (with

other unrealisable paper assets). Holman J held that H had failed to establish a special contribution: he had been in the right place at the right time and while he had taken full advantage, worked very hard and developed successful methodologies, his contributions were not of a "wholly exceptional nature" and it would not be "very obviously" inconsistent with fairness for them to be ignored. Further, they were not unmatched in the circumstances where W had made significant sacrifices, moving countries and bringing up the children. It was important not to discriminate against the home maker

In *Cooper-Hohn* the judge had recognised the convention of taking the value of the assets at trial, but ***B v B*** [2015] EWHC 210 (Fam) illustrates that the rule is not immutable. The liquid and pension assets had been divided equally but H held loan notes and shares which were not transferable but they had been acquired during the marriage and W should be entitled to share in them when redeemed or realised (by H paying her a lump sum or series of lump sums), as to 50% in respect of the loan notes and 40% in respect of the shares (whose value would be affected by H's post separation performance) at their eventual value and not the subscription price at which they were valued at the hearing. The argument that this militated against finality did not succeed on the basis of 'fairness' and since in any event there was ongoing maintenance and management of a school fees fund.

SJ v RA [2014] EWHC 4054 (Fam), illustrated a departure from equality where H retained an (illiquid) interest in the family business. W received £12m of the parties' £30m of assets which included H's shares in the business valued at £16m and W's shares of £1.8m. The business had been built up by their son with whom there was a non-binding agreement that he would in future acquire their shares (his claim that H's shares were held on trust for him failed) and the son's role was recognised by the court. It was recognised H was most unlikely to realise the value of his shares. W received 35% of the value of H's shares, her shares were bought by the company and she received 50% of their joint assets.

In ***S v S*** [2014] EWHC 4732 (Fam) Bodey J while initially adopting the approach in *Jones v Jones* [2011] 1 FLR 1723 [CA] and *N v F* [2011] 2 FLR 533 [Mostyn J], in excluding the assets of a non-matrimonial origin and dividing what was left,

stressed that the use of such an approach was discretionary, that the objective was to achieve fairness, and that an assessment of W's needs, which led to an award amounting to 22% of the total assets, would not be met by an equal division of the 'matrimonial' assets. The real question was not whether the award matched some conventional or intuitive percentage of the total, for example "about a third", but whether it was fair as between the parties in all the circumstances, which included their respective contributions, and the extent to which the introduced wealth became part of the 'fabric' or 'backbone' of family life (although it was not 'mingled' in the strict sense of being transferred at any stage from H's sole name into joint names).

JL v SL (No 1) [2014] EWHC 3658 (Fam) was an appeal to Mostyn J where the relevant issue was the treatment of W's inheritance received towards the end of the marriage. The judge disagreed on the evidence with the DJ's conclusion that the monies had been treated as being put into the matrimonial pot. In any event he repeated his view (see *N v F* [2011] 2FLR 533) that the fact that there had been some mingling of monies, in the sense that here some of the monies had been placed in the husband's name, does not mean that the non-matrimonial source of the monies in question is destroyed as a relevant consideration. A consequential unequal division of the pool of assets would mean that W would *ex hypothesi* have more money to invest, and so her need for spousal maintenance would be *pro tanto* reduced. Circumstances had changed for H also with the sale of shares in a company for £1.1m gross and then his redundancy. A new trial was directed, the judgment from which is reported as ***JL v SL (No 2)*** [2015] EWHC 360 (Fam). At the rehearing Mostyn J found the H had previously been guilty of clear and indefensible non-disclosure in respect of the shares which would have justified setting aside the previous order, and penalised him in costs (notwithstanding he subsequently found the windfall not to be matrimonial property). On the substantive issues, the judge reviewed the law relating to matrimonial and non-matrimonial property, preferring his approach and that in *Jones* (identify what is non-matrimonial and divide the rest equally, subject to need) to the more "intuitive" (some might say flexible) approach of other judges. In his view only very exceptionally will sharing of non-matrimonial property be found to be fair. On post-separation accrual he again preferred the approach of determining the share of matrimonial property before post separation accrual (usually subject to equal sharing) before going on to determine the share of the post separation growth (usually subject to unequal sharing) to that of adjusting the overall percentage of division on an intuitive basis to reflect post separation accrual (which he criticised as being a lawless science and an unreasoned

expression of instinct and intuition). He adopted Roberts J's categorisation (in *Cooper-Hohn*) of *"Continuum versus new ventures"* and in "continuum" cases a difference between passive accrual in value on matrimonial assets (leading to equal sharing) and accrual on such assets due to "active" growth which may be shared unequally. New ventures, however, with no connection to the matrimonial partnership or its assets should be considered as non-matrimonial property. In the event, H's share sale was in the latter category as the shares had not been acquired until after separation, while W's inherited money he had already so categorised. The matrimonial assets were divided equally, and there was a clean break.

Needs

Chandok v Chandok [2014] EWCA Civ 1597 The parties had been living beyond their means, supported, it was suggested, by H's parents. The suggestion that they would and should continue to do so had not been put to them at the trial and could not now be pursued. The CA criticised W for putting forward an inadequately analysed budget and stressed the need for her to have put an alternative realistic case to her extravagant claim to maintain the parties' unrealistic lifestyle. Contrast ***AM v SS*** [2014] EWHC 865 in which Coleridge J did rely on the probability that H's father (who had a history of supporting H) would make up the shortfall on the award which was, however, directed to W and the child's needs after a short marriage.

Compensation and *Duxbury*

In ***H v H*** **[2014] EWHC 760 (Fam)** Coleridge J was dealing with H's wish to terminate and capitalise a periodical payments order and a wife who presented her case on the basis that she had made a considerable sacrifice by giving up work and this had allowed the husband to generate very significant assets. While the judge agreed with the recent pronouncements about the dangers inherent in attributing special weight to arguments about compensation, nevertheless he noted that there remains a very small number of cases where it stares the court in the face and to ignore it and simply approach the case on the basis of the more simplistic "needs" arguments does not do full justice to a wife who has sacrificed the added security of generating her own substantial earning capacity, as the wife in this case, he held, undoubtedly did. While Coleridge J doubted that the wife was worse off financially (as her investment in the family had enabled the husband to generate enormous returns in which she participated) he noted that the building up of a secure earning capacity over a working life is a greater security to an individual spouse rather than merely being dependent on the future income generating resources of a former partner, however successful they

were. He therefore attempted to reflect the compensation element in the way in which W's capital was treated, taking only part of her home as income generating, not requiring it all to be amortised, not including a step down in income in later life and ignoring savings made. W, however, successfully appealed: ***H v H*** [2014] EWCA Civ 1523. There were two main challenges: (1) that the judge employed a 3.75% net return in assessing her lump sum rather than the 3.75% gross return (after an assumed 3% inflation) employed in the *Duxbury* tables and apparently employed in submissions; (2) that his assessment of the value of the assets was opaque. On the first point, Ryder LJ makes plain that there is no 'industry standard' even less an acknowledgement by the Family Division judges that there is, or should, be a rate of 3.75% gross and that each case will be fact specific but adopts Holman J's comment in *F v F (Duxbury Calculation)* [1996] 1 FLR 833 at 849 where he rejected, on the facts of that case, rates of return above and below the then Duxbury assumed rate for the purposes of a Duxbury calculation. He opined that there may be particular facts that required higher or lower assumed rates of return which might justify expert evidence in support. Ryder LJ concluded that if the parties do not agree a rate, the rate chosen by the judge must be reasoned. Subsequently in ***JL v SL (No 3)*** [2015] EWHC 555 (Fam) in the absence of any evidence adduced as to why the views of the Duxbury Committee should not be followed, Mostyn J "preferred, inevitably, to use the customary formula". He sets out a defence of the *Duxbury* assumptions (in particular a gross performance of 6.75%) by reference to actual market performance over 30 years and observes that against that experience, 6.75% is "a very reasonable guess". While accepting there is, of course, no "standard" rate in the sense that the economic assumptions underpinning the formula are written in marble from which there can be no deviation, he observes that "the Duxbury tables are used in countless cases. Their underlying methodology and assumptions are widely accepted as the usual starting point, and where there is no countervailing evidence, the usual finishing point. In that sense they do represent an "industry standard"." On point (2) in *H v H*, Coleridge J's assessment of the asset values, Ryder LJ accepted the appellant's criticism. Without deciding the issue of compensation Ryder LJ reviewed the authorities and appropriate approach and said "I have no problem with the judge saying that he applied the compensation principle in the way that he did i.e. by the four ways he identified, the key element of which was the important aspect of non amortisation of the capital fund. What I question is whether that was adequate given the overall asset distribution between the parties (the element that regrettably is opaque so that I cannot express a view) and the arguably discriminatory nature of the requirement on the wife to downsize. What was necessary in this case was a comparison of both parties' assets, income and needs positions. That is after all what these cases are about. That did not occur,

with the consequence that one cannot cross check the fairness of the overall award." The case has been remitted for retrial by a different judge.

In ***SA v PA*** [2014] EWHC 392 (Fam) Mostyn J rejected W's claim for a compensatory maintenance award since W had no appreciable track record by the time she gave up work and it was not known what her earnings were. At paras 15-37 the judge sets out his "difficulties" with the concept of compensation and having observed that it was hard to identify any case where compensation has been separately reflected as a premium or additional element, he took the opportunity to restate his views (para 36):

i) It will only be in a very rare and exceptional case where the principle will be capable of being successfully invoked.

ii) Such a case will be one where the court can say without any speculation, i.e. with almost near certainty, that the claimant gave up a very high earning career which had it not been foregone would have led to earnings at least equivalent to that presently enjoyed by the respondent.

iii) Such a high earning career will have been practised by the claimant over an appreciable period during the marriage. Proof of this track-record is key.

iv) Once these findings have been made compensation will be reflected by fixing the periodical payments award (or the multiplicand if this aspect is being capitalised by Duxbury) towards the top end of the discretionary bracket applicable for a needs assessment on the facts of the case. Compensation ought not to be reflected by a premium or additional element on top of the needs based award.

Addback

In ***MAP v MFP*** [2015] EWHC 627 (Fam) Moor J considered the issue of addbacks where H had spent extensively on cocaine, failed rehabilitation treatment, prostitution and extravagant building works to Spanish villas. W's claim to an add-back was rejected on the basis that the expenditure was not with the intention of reducing W's claim but was due to defects in his personality. The

spending on the villas was due to perfectionism, the rehab treatment was to try to remedy his addiction, the cocaine and prostitution were due to his flawed character. "A spouse must take his or her partner as he or she finds them ... it would be wrong to allow the Wife to take advantage of the Husband's great abilities that enabled him to make such a success of the company while not taking the financial hit from his personality flaw that led to his cocaine addiction...It may have been morally culpable. Overall, it was irresponsible. But I find that this was not deliberate or wanton dissipation. It would be wrong to add it back."
In the event after a 40 year marriage during which all the assets had been built up and W had worked in the company (with a 5% share against H's 95%) she received one half of the £25m assets payable in 2 tranches by 2018.

Second Spouses

In ***Bromfield v Bromfield*** [2015] UKPC 19 reviewed the legislation governing financial provision in Jamaica. Deprecating reliance on the MWPA 1882, the Board noted that the Jamaican courts now have limited redistributive powers following divorce, in relation to the family home and wider such powers in relation to other property, conferred by the Property (Rights of Spouses) Act, "(which also, and enviably, confers rights on certain non-marital cohabitants)" having taken into account a wide menu of factors. The Board also found that Jamaican law reflected the principle, which it found necessary to restate, that in English law "although it should not go so far as to give priority to the claims of the first wife, it should certainly not give priority to the claims of the second wife" (*Vaughan v Vaughan* [2010] EWCA Civ 349, para 38). The Board rejected the local court's view, in a case where the parties had divorced in 1998 and were in their 70s and H had a teenage son to fund through college, "he could not ordinarily be required to maintain his first wife indefinitely and that in such circumstances there could not be a lifetime award." The case was sent back for re-hearing (not withstanding the variation application had taken 6 years to get to the Privy Council).

Nuptial contracts

While there have been several examples of disputes involving what may be described generically as nuptial contracts, they have tended to exemplify the application of the principles set out in *Radmacher v Granatino*.

SA v PA (Pre-marital agreement: Compensation) [2014] EWHC 392 (Fam). H sought to rely on a Dutch pre-nuptial agreement which made provision for division of capital but made no provision for maintenance. Mostyn J held that

contrary to W's contention she was fully aware of the contents of the agreement, had attended the notary's firm in The Hague, and that the notary had witnessed and executed the deed putting the agreement into effect. The wife knew precisely what she was signing up to, she had seen all of the drafts of the agreement and, applying the principles in *Radmacher*, it was therefore clear that the parties had intended to enter into a binding agreement. The agreement as to capital division would therefore be implemented as the parties had intended. As noted above the judge rejected the compensation argument in assessing maintenance.

Y v Y (Financial Remedy - Marriage Contract) [2014] EWHC 2920 (Fam): Roberts J was concerned with the impact of a French marriage contract on W's claim to a full share of the marital acquest of £12m, after a 22 year marriage and three children, the youngest still 15. The parties were French nationals, marrying in France (when W was already pregnant) and while moving to London shortly after, they retained property, fiscal and social ties to France, as well as French domicile. 48 hours before the marriage they entered into a *contrat de mariage* which contained a specific election of the *séparation de biens* property regime which would be binding if the divorce were in France. H contended this marriage contract should be given a central and magnetic prominence, excluding any sharing of the marital acquest and that W should leave the marriage with no more than a 'needs' based award. After a detailed review of the circumstances surrounding the agreement the judge concluded that, at the time she entered into the marriage contract, W (who had had no independent legal advice) was fully aware, and intended (as did H) that the marital property regime they had elected would regulate and govern the manner in which they operated their finances <u>during</u> the subsistence of the marriage; but unlike H, she had no understanding and was unaware (and thus never intended) that its provisions should apply to a division of their marital estate in the event of either death or divorce (whenever and wherever that divorce might be adjudicated), or that she would be confined to a financial outcome which resulted in a significant divergence of equality between the parties. There was no choice of law clause and so English law applied and the agreement remained one of the s.25

circumstances whose weight must be assessed. That led Roberts J to conclude that, subject to W's needs, the non-matrimonial property owned by either of the parties should be excluded from any entitlement to share. The case was resolved on a sharing basis which amply covered W's needs.

L v M [2014] EWHC 2220 (Fam) was an application by W for H to show cause as to why he should not be held to a concluded separation agreement reflected in a draft consent order signed by both parties. The parties met in 2006, married in 2008 and separated in 2010 when the separation agreement was concluded. Both parties were financially extremely aware and knowledgeable and well aware of each other's respective financial circumstance, having a transparent approach to finances during their relationship. While initially complying with the terms of the agreement, by 2012 he had defaulted and sought to avoid the agreement contending (a) insufficient financial disclosure at the time of the Agreement; (b) lack of any legal advice rendered to him as to the terms or implications of the Agreement or Consent Order (c) the fact that there were elements of the Consent Order which were beyond the Court's jurisdiction; (d) the brevity of the marriage made the settlement unfair; and (e) in any event that he was simply not in a financial position to make the payments agreed. H did not engage in the trial . The judge found (a) and (e) were not made out. As to (d) the settlement was not at a level which would offend judicial sensibility so far as to render it intrinsically unfair, still less when it is borne in mind that fairness has to be judged with one eye focused on the fact of the parties' consensus and further that H was content with the agreement's provisions at the time which had been part performed. Some variations were effected to meet (c). As to (b) the judge rejected H's case that he did not have legal advice but in any event concluded that the Agreement was freely entered into by H with a full appreciation of its implications. The judge's summary of the law is at paras 66-70. He noted from Lord Phillips' speech in *Radmacher* that while sound legal advice and full disclosure are obviously desirable "if it is clear that a party is fully aware of the implications of an ante-nuptial agreement and indifferent to detailed particulars of the other party's assets, there is no need to accord the agreement reduced weight because he or she is unaware of those particulars. 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." further noting the importance of individual autonomy. He also referred to Ld Phillips' comment that "The fact of the agreement is capable of altering what is fair. It is an important factor to be weighed in the balance."

Hopkins v Hopkins [2015] EWHC 812 (Fam) provides another example of the application of the *Radmacher* principles. H applied for W to show cause why an order should not be made in terms of a post nuptial agreement (PNA). After an on/off relationship over 40 years during which they had one child (now adult) but did not marry until 2009, and separated in 2011, the parties entered into a PNA, despite clear advice to W from both her solicitor and counsel not to do so. Now she sought to contend that the PNA was "vitiated by duress; alternatively unconscionable conduct such as undue pressure (falling short of duress); alternatively other unworthy conduct, such as exploitation of a dominant position to secure unfair advantage" and asked the court to take her "emotional state and what pressures she was under to agree" into account. Alternatively she argued that the effect of the PNA was unfair. The court rejected her primary case. The judge summarised the law at paras 34-37, applied the principles from *Radmacher*, noted the approach of Holman J in *Luckwell v Limata* [2014] EWHC 502 (Fam) at [130], and concluded that while 'real need' might militate against the enforcement of a PNA, real need in this context is not to be equated to 'reasonable need', as the decision in *Radmacher* made clear. Despite the great imbalance between their respective financial situations, the judge concluded that the PNA together with a sum of £200,000 offered by H met her needs, which was the basis upon which she had entered into the agreement.

In ***Gray v Work*** [2015] EWHC 834 (Fam) Holman J dismissed the post nuptial agreement as irrelevant in that it was executed for tax reasons to assist with his "expatriation" from the US, and was supplemented by an addendum agreement which demonstrated that W was not to be limited to the first agreement's terms on divorce. Alternatively, if the agreement had the meaning for which H contended in providing nothing for W, as she had rejected an offer of provision equivalent to that set out in the PNA, then W did not have a full appreciation of the agreement's implications, and further if the PNA had the effect for which H contended it was not fair in the circumstances.

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