Family Affairs:

Review of Financial Remedy cases, June to October 2020

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Jurisdiction

What may appear to some as the Byzantine complexity of interjurisdictional rules arrived in the Supreme Court in ***Villiers v Villiers*** [2020] UKSC 30 concerning the right of a party to choose the jurisdiction, as between Scotland and England, in which to sue for maintenance. The parties were married in England in 1994 but lived almost the entirety of their married life in Scotland. Following their separation, W moved to England with the parties' daughter and issued a divorce petition in the English Courts. This was dismissed with W's consent in favour of the writ of divorce which H had issued in Scotland (but with no claim for financial relief). W also made an application under s. 27 MCA 1973 in England seeking maintenance from H. H applied to stay or dismiss this application on the basis that the English court did not have or should not exercise jurisdiction to hear the application. Parker J rejected the application holding that the English Courts did have jurisdiction and made an order that H pay W £2,500 per month in interim maintenance as well as £3,000 per month for legal funding. The Court of Appeal upheld this order. H appealed to the SC. The issues were (1) whether under s.27 an English court has jurisdiction to make any order for maintenance in a case with no international dimension; (2) if so, whether Schedule 6 Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 allows for an English court to retain its previous discretion to stay maintenance proceedings before it on the ground of *forum non conveniens*; (3) if not, whether the purported removal (by virtue of Schedule 6) of that discretion was outside the scope of the Secretary of State's powers in section 2(2) of the ECA 1972; and (4) if not, whether H's divorce proceeding in Scotland is a "related action" for the purposes of article 13 of the Maintenance Regulation (Council Reg (EC) No 4/2009) and the corresponding provision in Schedule 6 and, accordingly, whether the English court should decline jurisdiction in

respect of W's claim for a maintenance order under s.27. The appeal was dismissed (Lord Wilson and Lady Hale dissenting). As to (1) EU legislation governing jurisdiction in cross-border cases treats maintenance obligations and questions of marital status, including divorce, as separate matters for the purposes of jurisdiction. The Maintenance Regulation applies to inter-state jurisdictional issues and Schedule 6 to intra-state issues. Jurisdiction under s.27 does not require both to apply. (2) EU case law does not support any discretionary power to stay proceedings on *forum non conveniens* grounds, as a maintenance creditor (as the more vulnerable party) may choose her jurisdiction (subject to jurisdictional eligibility) and Schedule 6 replicates this regime in an intra-state case. (3) The 2011 Regulations were *intra vires*. (4) H's divorce proceedings in Scotland (concerning status) were not a "related action" (in respect of W's maintenance claim in England) within art 13 so the English court could not decline jurisdiction, this being consistent with the right of the maintenance creditor to choose jurisdiction. Lord Wilson would have held (on a broad common sense interpretation) that the English and Scottish proceedings were 'related' giving the English court power to stay or decline W's maintenance application.

Conduct

The background to ***Rothchild v De Souza*** **[2020] EWCA Civ 1215** is set out in *TT v CDS* [2019] EWHC 3572 (Fam). This was H's appeal against Cohen J's lump sum order of £225,000 which was to be enforced, if unpaid, against a property in Miami which, however, by the time of the appeal H had transferred to his mother. Cohen J had decided the case on a needs basis and H's appeal was predicated on the judge having focussed on W's needs to the exclusion of H's needs. There had been extensive and "destructive" litigation which had involved litigation misconduct for which H was very largely responsible. The judge had concluded that "W must be able to go forward in life without being excessively trammelled by debt. In so far as the resources are not there to enable H to have the same freedom, that is the inevitable result of statute requiring me to give first consideration to the children and because of the way that H has acted since the breakdown of the marriage which has been vindictive and irrational, and which has caused a huge and unnecessary haemorrhage of money to pay for this litigation." The judge divided properties between the parties and transferred the income generating business to W. "In so far as there is a departure from equality it is necessary so as to meet the needs of the children and to meet W's debts which he has created in significant part." In the CA Moylan LJ made clear that, while the general approach is that litigation

conduct *within* the financial remedy proceedings will be reflected, if appropriate, in a costs order, litigation misconduct *can* be taken into account under section 25(2)(g), partly because money spent on legal costs is no longer available to meet the parties' needs or to be shared between them, and such depletion of the matrimonial assets will plainly not be remedied by an order for costs which simply reallocates the remaining assets between the parties. Contrast *OG v AG* (below) where the remaining assets were sufficient to meet the parties' needs and therefore the redistribution of those assets to meet litigation costs still allowed for a fair outcome. The general rule (of no order for costs: FPR r.28(3)) is designed to avoid a carefully crafted needs award being jeopardised by the subsequent disclosure of a Calderbank offer. However, r.28(3) only deals with costs in the financial remedy proceedings and does not take into account the dissipation of assets through the costs of other proceedings (as here) and which can fall within s.25(2)(g). While a notional reattribution of dissipated assets does not generate a resource from which a party can meet his needs, it can still impact on a needs based award. The court "must be entitled to prioritise the [needs of the] party who has not been guilty of such conduct" even to the extent that it may be fair that the innocent party is awarded all the matrimonial assets, because to exclude that option "would be to give a licence ... to litigate entirely unreasonably". The judge did not accept that conduct cannot lead to a party receiving less than their needs. This depends on the circumstances of the case and while it must be justified having regard to *all* the s.25 factors, it plainly can be justified. In the instant case the needs of the children (which H could not be relied on to meet) further justified the award. While reiterating what he said in *Moher v Moher* about the need for every financial remedy judgment clearly to set out how the award has been calculated, (and accepting that it would have been better if this had been expressed more clearly and combined with a reasonably structured analysis of its effect on the ultimate award) Moylan LJ rejected the necessity for a detailed structured approach quantifying the financial consequences of the husband's litigation conduct that the judge was taking into account.

The case can be contrasted with ***OG v AG*** **[2020] EWFC 52** where Mostyn J discussed the categories of conduct and litigation misconduct and their impact in this "sharing" case where the net assets were £16.37m and costs exceeded £1m. But for H's conduct the case was a paradigm case for equal sharing. However, H's conduct in covertly realising joint assets in Dubai which he then channelled into a business in Europe, the ownership of which he dishonestly denied, and which he set up to compete with the family business of which W had retained control in the UK, justified a reduction in the value of the

business to be shared. The reduction (30%) would be applied only to the trading value (not the underlying asset value) of the business. In addition, a further reduction of 10% to the trading value would be applied to reflect the impact of Brexit and Covid-19. However, H's egregious litigation misconduct was reflected in a substantial adjustment to the outcome to reflect an award of 90% of W's costs until shortly after the PTR on an indemnity basis. Nevertheless, W too had been responsible for inflating costs and was penalised (by way of a reduction in the costs for which H should indemnify her) for non-disclosure, unnecessary applications and in particular for not making a realistic offer once H's financial situation became mostly clear, albeit this was only after the PTR and less than a month before the final hearing. In an observation which will have even greater relevance following the new rules (r.9.27A) requiring open offers 21 days after unsuccessful FDRs, and referring to PD 28A paragraph 4.4, Mostyn J observed: ""It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing." The departure from equality was limited to the business assets but represented £870K which the judge hoped would "serve as a lesson to any future litigant who is tempted to behave in the same way." Child maintenance (H being resident abroad) was assessed at £27,000 pa using the statutory child support formula as a starting point and adding half the school fees (*CB v KB* [2019] EWFC 78).

Rose Orders

***G v C* [2020] EWFC B35 (OJ):** a 'Rose' order (*Rose v Rose* [2002] 1 FLR 978: one that is *'final and binding notwithstanding the fact that it still requires perfection and sealing'*) was made during a FR final hearing in October 2019. The parties were unable to agree the perfection of the order and W sought to employ the *Thwaite* jurisdiction to insert numerous terms in the order to protect herself and €8m of funds from litigation in Italy. The Recorder reviewed the authorities and described this as an inherent jurisdiction to make a fresh order for ancillary relief, if it would be inequitable not do so, where the original order remains executory and in light of a significant change of circumstances, upon the basis of which it was made. The circumstances justifying intervention are likely to be met where an order remains executory as a result of one party frustrating its implementation. The jurisdiction should be approached cautiously and conservatively, must be contained and, so far as possible, should reflect the underlying intention of the original order. On the facts the judge concluded the order remained executory but that

there had been no change in circumstances which could not have been foreseen, that he was unable to conclude that it would be inequitable to hold W to her agreement and in any event he would not grant the relief sought by W nor the relief sought by crossclaims by H. The judge also noted that he had been sent a significant number of emails by the parties' solicitors since the hearing, which he regarded as inappropriate and to be deprecated.

Arbitration

In ***Haley v Haley*** **[2020] EWCA Civ 1639** the CA disapproved *J v B* [2016] EWHC 324 (Fam) and *S v S* [2014] EWHC 7 (Fam) which limited challenges to an arbitral award in family cases to the statutory challenges found under the Arbitration Act 1996 (ss.67-69) or mistake or supervening event, and explained that, while in civil and commercial arbitration the parties bind themselves to accept the factual determination of the arbitrator and concepts of fairness have little role, in the family context arbitration cannot oust the jurisdiction of the court which "has a discretion as to whether, and in what terms, to make an order." (para 6.5 of ARB1 FS). In contrast to civil proceedings, where a consent order derives its authority from the contract between the parties, an order under the MCA 1973 derives its authority from the order of the court. Without the appropriate orders being made, under the MCA 1973, following an arbitral award, the parties' rights will remain legally undetermined and unenforceable. The court may decline to make an order in the terms of the arbitral award, as it may decline to make a consent order, or enforce an ante- or post-nuptial agreement, if it concludes an injustice will be done. Fairness remains the lodestar of FR cases. Given that the orders determining the enforceable legal rights of the parties following divorce are made under the MCA 1973 and not under the AA 1996, there is no requirement for the discontented party first to make an application under s.57, s.68 or s.69 AA 1996 before asking the Family Court to decline to make an order under the MCA 1973 in the terms of the arbitral award. While parties who submit to arbitration should understand that, all other things being equal, the award made at the end of the process will thereafter be incorporated into a consent order, nevertheless when presented with a refusal on the part of one party to agree to the conversion of an arbitral award into a consent order, the court should, at an initial stage, 'triage' the case with the reluctant party having to 'show cause' on paper why an

order should not be made in those terms. Such approach would be similar to the permission to appeal filter (FPR rule 30(7)) where the trial has taken place under the MCA 1973. If the judge is of the view that there is a real prospect of the objecting party succeeding in demonstrating that the arbitral award is wrong (not 'obviously wrong' or 'so blatant' that it 'leaps off the page'), then the matter can be set down for a hearing. That hearing will, as with an appeal, be confined to a review and will not be a rehearing. If the court at the triage/paper stage considered that the objection would not pass the permission to appeal test, it could make an order in the terms of the arbitral award and penalise the reluctant party in costs. The triage process may be allocated to either the specialist circuit judges who hear FR appeals or to the High Court as appropriate.

LSPO

LP v AE **[20230] EWHC 1668 (Fam)** concerned an unmarried mother's claim for a LSPO to fund ongoing private law proceedings in respect of her 6 year old child in respect of whom a fact finding hearing had resulted in the rejection of her allegations of sexually inappropriate conduct by the father. There were ongoing hearings for a CAO. Cohen J allowed an appeal from HHJ Tolson QC (who had rejected the application for the LSPO) on the basis that the judge's approach and reasoning to the issue was one which involved him taking into account matters which he should not have taken into account and ignoring matters that were plainly relevant. The case is largely fact specific but principles of broader relevance include the need to apply for such an order in good time (not at the last moment), that in general terms there should be equality of arms, that (notwithstanding and distinguishing *Rubin v Rubin* [2014] 2 FLR 1018) historic unpaid costs may legitimately be the subject of an order in ongoing (as opposed to concluded) proceedings where the court is satisfied that without such a payment the applicant will not reasonably be able to obtain in the future appropriate legal services for the proceedings. That the applicant's solicitors have not actually 'downed tools' is not required.

Children

In ***S v C [2020] EWHC 2127 (Fam)*** H and W had settled their FR proceedings in 2016 but there remained a question of how to administer a fund deriving from a clinical negligence claim for the obstetric treatment given to W resulting in their child (A's) disability. H and W (not A) were claimants and the claim was settled in 2019 for £5m, on the basis of the increased costs to which the parents would be put, looking after a disabled child. In the FR proceedings there had been provision made for the administration of the proceeds of the claim to be subject to review and agreement, but their relationship had broken down. Ultimately it was agreed that the parents each had a beneficial ownership in 50% of the fund and they agreed to preserve these funds until the resolution of W's application for financial remedy orders under s.23 (lump sum, child maintenance and secured child maintenance) with which Roberts J was concerned. A spent time with both parents. There is insufficient space to provide details of the order made which balanced W's concern for the security of the funds in H's hands and respect for H's autonomy and need for a home where A could stay, but the judge ordered (*inter alia*) H to pay maintenance (£2,000 pm) which was secured by a sum of £150,000 from which W would draw the maintenance. A charge of £900,000 in favour of A would be retained over any property bought by H.

Moutreuil v Andreewitch & Anor **[2020] EWHC 2068 (Fam)** concerned a dispute between a former cohabiting couple concerning the ownership of the shares in a company which owned the family home. The Claimant had also made an alternative claim under Schedule 1 Children Act 1989. Having reviewed the law from *Stack v Dowden* on, the judge held that D (upon whom the burden fell to prove that equity did not follow the law and that C did not hold both the beneficial as well as the legal title) had failed to do so. D's purported transfer of shares to his son's name was not effective. There was therefore no need to consider the Schedule 1 claim.

In ***FS v RSA and JS*** **[2020] EWFC 63** Sir James Munby described an application by an adult son for financial provision from his still married and cohabiting parents (under s.27 MCA 1973, alternatively under Sched 1 Children Act 1989 or the inherent jurisdiction) as 'novel'. The application was dismissed.

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