4 PAPER BUILDINGS

Financial Remedies Seminar

3 CPD – BTM/CHLS

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CHAIR

Michael Sternberg QC

TOPICS & SPEAKERS:

Pre and Post Acquired Assets – Non-matrimonial property
The New Battleground
Jonathan Cohen QC

Bankruptcy v Financial Remedies
Henry Clayton

How to prepare a simply brilliant Schedule 1 Children Act Claim
Samantha Woodham

Companies: Salomon's Veil and fairness
Charles Hale

4 Paper Buildings

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Section 1

4 Paper Buildings: About Us

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About Us

4PB has a distinguished history as a leading set of specialist family law barristers providing practical, expert legal advice, and including effective and assured advocacy, in all practice areas of family law. Our size, practice range, reputation and expertise are unrivalled and mark us out as unique amongst our competitors.

What the market says:

Chambers has won a large number of prestigious awards, including leading legal publisher, Jordan's 'Family Law Chambers of the Year Award' in 2011. Our work has been recognised by leading legal directories like the Legal 500 and Chambers & Partners as representing excellence, with 25 members recommended in all areas of family law.

Chambers & Partners 2012, for child law matters, says we are 'the best lawyers in London', as well as being 'the most experienced, specialist international set of chambers in the country, if not the world'. Our barristers are seen as 'able to handle high-net worth ancillary relief [claims] in divorces'.

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What we do:

We specialise in family law, and any relevant area of law that relates to family matters. Our barristers deal with all aspects of the law connected with relationship breakdown, including separation, divorce, civil partnerships, and their financial consequences, such as matrimonial finance, ancillary relief, family financial settlements, such as money and property.

We are also known for our work in child law, such as Children Act proceedings, and in children-related conflicts and disputes, such as child care, residence and contact issues, the international movement of children, and visitation rights to/for children living abroad.

Many of the most serious, sensitive and significant family cases are undertaken by members of 4PB, from all sections of society, and instructions are received from clients ranging from government departments and local authorities, to individuals, ranging from celebrities, to parents trying to prevent children from being taken into care.

Causes we support

A kidspace provides a child centred support service for children who are experiencing family breakdown. They run workshops specifically designed for children aged 7 – 16 and use creative and innovative activities in their workshops to encourage children to express their feelings.

akidspace
Supporting children through family breakdown

The London Legal Support Trust

Each year a team of walkers from chambers enters the London Legal Walk to raise money for the London Legal Support Trust, the Free Representation Unit and the Bar Pro Bono Unit.

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This year the 4PB team raised just over £2000.

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We are well located in attractive premises in an historic building in the Inner Temple. The Royal Courts of Justice, the Principal Registry of the Family Division and other London courts are easily accessible.

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Clare Bello, our excellent practice manager, is responsible for the administration, financial management, premises and facilities, IT and aspects of marketing.

BarMark as a sign of excellence

We were one of the first sets in the country to receive the Bar Council's quality assurance mark, BarMark, as a seal of excellence, which we continue to demonstrate in both administration and advocacy in our work as specialist family lawyers.

Memberships

Our barristers play a leading role in the development of our profession, and family law generally, through their membership of various specialist associations, including both the Family Law Bar Association and the Association of Lawyers for Children.

Members are also active in the Employment Law Bar Association and the Employment Lawyers' Association.

They are also active in the Commonwealth Legal Association, International Bar Association, and the International Academy of Matrimonial Lawyers.

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Our barristers write regularly for the legal, specialist, local authority and mainstream http://www.4pb.com/media, and provide insightful, practical, and relevant lectures of topical interest to solicitors, both in private practice or in-house, regional Resolution committees and family law groups.

Chambers has also established its own annual lecture series providing essential legal and procedural updates, as well as networking opportunities to meet our barristers on a more informal basis.

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Complaints and Discipline

Barristers and staff at 4PB always strive to maintain the highest standards of service. However, there may be occasions when a client is disappointed with our service. We take any cause for dissatisfaction seriously and it is our policy to investigate fully any complaint in accordance with BSB requirements. We aim to learn from any mistakes so as to improve our service in the future. To download our Complaints Policy, please click here.

Section 2

Pre and Post Acquired Assets – Non-matrimonial property

The New Battleground

Jonathan Cohen QC

PRE AND POST ACQUIRED ASSETS – NON-MATRIMONIAL PROPERTY

THE NEW BATTLEGROUND

1. Origin

   White [2000] 2FLR 981 at 994

   Plainly, when present, this factor [property brought into the marriage or acquired during it by inheritance or gift] *is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and the value of the property, and the time when and the circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in case where the claimant's financial needs cannot be without recourse to this property.*

2. Stellar Contributions

   (i) The decline of stellar contributions: Charman (No 4) [2007] 1 FLR 1246. Effectively limited to the super-big case and unlikely to give rise to greater than 66:33 differential between parties.

   (ii) Can a Stellar Contribution argument co-exist with a non-matrimonial asset argument? In my view, yes, but need always to cross-check against fairness.

3. The Assessment of the non-matrimonial asset

   (i) Gifts and inheritance
   (ii) Property – farms
   (iii) Business
   (iv) Pre-nups and what they say: AC v DC (No 2) [2012] EWHC 2420. Importance of obtaining a realistic valuation or running the risk of being hoist on one's own petard.

4. The Inherited Matrimonial Home: How is to be treated?

   (i) Baroness Hale in Miller [2006] 1 FLR 1186 at para 149
   (ii) I suggest treat with some caution: Munby J in P [2005] 1 FLR 576 (a farming case where no distinction drawn between the inherited farmland and the farmhouse). Likewise, Y [2012] EWHC 2063 (Baron J in an inherited landed estate case)
   (iii) Is there a difference if inherited money is used to buy a home? Does it make a difference if H puts it in joint names? Should there be a difference?

5. Relevant Factors to Sharing Non-Matrimonial Inherited Property

   In Y the following were identified as relevant [JC comments in square brackets]

(i) The nature of the asset: land, art, antiques etc – or cash and investments
(ii) Whether the assets have been preserved or realised or spent [does it really matter save as to intention?]
(iii) How long they have been in "the family"
(iv) The intentions of the donors of the assets and the spouse who received them
(v) Whether they have been mingled (eg put joint names) or mixed with assets generated during the marriage [why should this matter? In many cases done for tax efficiency]
(vi) The length of the marriage and the period over which they have been enjoyed by the other spouse
(vii) Whether the other spouse has contributed to the improvement or preservation of the inherited wealth [surely either spouse]

6. <u>The Two Differing Judicial Approaches</u>

(i) The mathematical approach cross-checked against fairness
(ii) The overall fairness approach on its own

7. <u>The Mathematical Approach</u>

(i) Jones [2011] 1 FLR 1723: Calculate the value at the date of marriage (or permanent cohabitation); increase to take into account passive growth – in that case by applying a relevant FTSE index. Deduct the sum from the current value and split the balance equally. Does "passive growth" create a problem?
(ii) Note para 35 where Wilson LJ prefers the mathematical approach "*particularly in circumstances in which a central valuation mandated by it has been crystallised by sale*".
(iii) FZ v SZ [2011] 1 FLR 64 Mostyn J approves the "logical rigour" of the two stage approach in which first the value of the non-matrimonial property is calculated. Note that in that case he did not adjust the value to reflect inflation, doubting that the non-matrimonial property would have increased in value. He adopted the same approach in N v F [2012] 1 FCR 139.
(iv) The approach was adopted by Sir Hugh Bennett in AC v DC (above).

8. <u>The Fairness Approach</u>

(i) Moylan J in a series of cases has declined to follow the mathematical approach and instead has looked just at fairness SK v WL [2011] 1 FLR 1471, J [2011] 2 FLR 1280, AR [2012] 2 FLR 1.
(ii) See also Sir Nicholas Wall P in Jones (above)
(iii) Note especially Moylan J in SK v WL at paras 27-30

> *"I do not see why the Family Division should enter the "dim world"* [where accountants' opinions are guesswork based on fictitious or unborn sales]. *Valuations, when required, should be based on real and known events".*

9. A Difference?

Does it actually make a difference which approach is adopted? It may as A validating B may not produce the same result as B validating A by way of cross-checks.

10. Davies [2012] EWCA Civ 1641

Is it a watershed case? The one case reported to date where an award is made out of inherited assets (significantly) in excess of needs.

(i) The valuer declined to value the inherited hotel business by reference to the date of marriage as being too speculative so that there was no firm evidence available.

(ii) The Wife therefore said that since the Husband had inherited one third of the business and bought two thirds from his siblings with assets created during the marriage she should have one half of what was purchased.

(iii) Both argument and judgment avoided around two points (a) that at least one sibling was bought out at a significant discount attributable to the pre-marriage arrangements; (ii) that the husband's one third inherited share was increased in value by the wife's very considerable efforts during the marriage.

(iv) Note the CA conclusion: that nothing less than the judge's award would be fair.

11. Post-Acquired Assets

In many ways a more difficult issue because of their potential dependence on what accrued during the marriage. Unsurprisingly, there have been fewer cases about post-acquired assets than pre-acquired assets.

(i) In Cowan [2001] 2 FLR 192 CA held that H's fortune generated post-separation was to be included. If H had lost money, W would have suffered and so she should share in the gain. But, this was pre Miller/McFarlane.

(ii) Rossi [2007] 1 FLR790, Mostyn QC at para 24(3):

Assets acquired or created by one party after separation may qualify as non-matrimonial if it can be said that the property was acquired or created...by virtue of his personal industry..and not by use of an asset created during the marriage and in respect of which the party can validly assert an unascertained share.

(iii) SK v WL:

It would be difficult for a business founded during the marriage to be entirely external to it, and in this case events post-separation did not mean that the success of the company post-separation did not derive from or originate from it development in the marriage. This was very much a springboard case, in which there was no need to define non-matrimonial property with precision. Furthermore, to seek to use business valuations based on a series of artificial and hypothetical assumptions to create a sharp line as at the date of separation was to seek to use a building block riven with uncertainties, which..... would give no more than spurious validity to the discretionary exercise.

The fact that the husband had been trading with the wife's notional share of family wealth.... was relevant.

(iv) A business set up since separation would be less likely to be deemed matrimonial, particularly if joint or marital funds are not used (advise your client to get external funding – eg borrow from parents). Note that the concept of earning capacity as an asset built up before or during a marriage as espoused by Mostyn QC in GW v RW [2003] 2 FLR 18 was specifically disapproved in Jones, so that a spouse who sought to argue that the new business was built up with skills developed during the marriage is not likely to succeed.

12. Bonus/Income Post Separation

(i) Mostyn QC in Rossi (24.4) would not allow a post-separation bonus to be classed as non-matrimonial unless it related to a period at least 12 months after separation.

(ii) This was disapproved by Charles J in H [2007] 2 FLR 548 as being unnecessarily restrictive and formulaic and pregnant with difficulty when the date of separation was in dispute or unclear. He ordered the wife to receive one third of the bonus for the year of (after) separation, followed by one sixth for year 2 and one twelfth for year 3. But note, this was in the context of a big money clean break case, NOT ongoing periodical payments. It was to recognise the proximity point and to ease the transition to independence.

(iii) Every case is very fact specific, but the following seem especially relevant in looking at bonuses in ongoing periodical payments cases:
   (a) The length of the marriage
   (b) The extent to which the salary from which periodical payments is ordered is in itself sufficient to meet needs generously construed
   (c) The ratio between salary and bonus
   (d) The size of the capital award and thus the likelihood of the wife having a need to accrue further savings
   (e) The extent to which the bonus is based on individual or company performance.

(iv) There seems to be widespread acceptance of a reducing sliding scale over a period of 3 years or so save in those cases which fall within (b) above, where an ongoing share will be likely to be necessary.

JONATHAN COHEN QC
4PB

Section 3

Bankruptcy v Financial Remedies

Henry Clayton

BANKRUPTCY V FINANCIAL REMEDIES

1. In the current economic climate it is more likely that bankruptcy issues will crop up in one's practice. In truth, the last thing you want to hear when taking on a new case is that one or other of the parties is bankrupt or at risk of bankruptcy. However, cases such *Young v Young* [2012] EWHC 138 (Fam) demonstrate that these issues crop up not merely in normal cases but potentially high value divorces as well.

2. This lecture will examine the following issues:
   (a) How bankruptcy operates;
   (b) The consequences in financial remedy proceedings if a bankruptcy order has already been made;
   (c) Circumstances in which a bankruptcy order can be set aside;
   (d) Consequences where a party to financial remedies proceedings becomes bankrupt after a final order;
   (e) Relevance to financial remedy proceedings if one party is at risk of bankruptcy.

[A] HOW BANKRUPTCY WORKS

3. A petition may be issued by either the debtor himself (Insolvency Act 1986 s.272) or creditors who are owed more than £750 as a result of the debtor's failure to comply with a court order or statutory demand (s.267).

4. Once the order is made the bankrupt's assets (subject to certain exceptions in s.283, such as domestic or personal items necessary for the bankrupt's business) vest initially in the official receiver until the appointment of a trustee in bankruptcy (usually an accountant) who will then administer the estate so as to satisfy the claims of the bankrupt's creditors who have so-called provable debts as best as he is able until such time as the bankruptcy order is discharged (s.305-306).

5. The bankrupt is obligated to inform the trustee in bankruptcy about any after-acquired property (s.333); the trustee may then claim this property for the estate.

6. If the bankruptcy order is made, all dispositions of property which take place after the presentation of the petition are void, save for those ratified by the bankruptcy court or dispositions made in good faith for value without notice (s.284).

7. Following discharge the bankrupt is no longer liable for the balance of the provable debts. Discharge does not affect liability for non-provable debts (s.281(6)) or secured debts (S.281(2)). Given the latter, it is often inadvisable for bankrupt clients to hang on to overcharged property in circumstances where the surplus mortgage may survive their bankruptcy. It may be better in those circumstances to face up to the need to sell the former matrimonial home.

8. The bankrupt's home will re-vest after 3 years from the date of the order unless the interest has been realised by the trustee in bankruptcy or an application made to do so (s.283A; Lewis v Metropolitan Property Realizations [2010] 1 FLR 86 (CA)).

9. It should be noted that subsequent discharge from bankruptcy does not release the bankrupt from a debt arising from an order in family proceedings or a CSA maintenance calculation without further direction of the court (Insolvency Act 1986 s.281(5)). In the case of *Hayes v Hayes* (2012) LTL 23/3/2012 the Husband unsuccessfully asked the Chancery Division to release him from a costs order made in family proceedings following his discharge from bankruptcy.

10. The trustee's professional costs (including any disbursements for legal representation) are paid out of the bankrupt's estate. This adds an extra layer of expense (coming out of the 'pot' in matrimonial proceedings) which would not otherwise exist.

[B] CONSEQUENCES OF BANKRUPTCY ON MATRIMONIAL FINANCE

Orders which can be made where one party is bankrupt

11. The trustee in bankruptcy is not a party to the marriage therefore orders cannot be made against him (*McGladdery v McGladdery* [1999] 2 FLR 1102).

12. Property adjustment orders cannot be made save for a residue of sale proceeds following discharge of the bankruptcy (see *Ram v Ram (No.2)* [2005] 2 FLR 75; *Yankah v Yankah*

[2011] EWCA Civ 921). In *Warwick (formerly Yarwood) v Trustee in bankruptcy of Clive Yarwood* [2010] EWHC 2272 (Ch) the husband was made bankrupt after the parties' solicitors reached agreement for division of the FMH sale proceeds but prior to the consent order being approved by the family court. It was held that the payment subsequently made to the wife was void (although, interestingly, it was suggested at [30] that such an agreement between the parties might be treated as enforceable prior to the court order being made).

13. Lump sums can only be ordered in respect of the residue of the estate once the bankruptcy is discharged provided the judge has a clear picture of what the assets will be in the future (*Hellyer v Hellyer* [1996] 2 FLR 579 (CA)) or where the lump sum is to be paid from income (*Re G (Children Act 1989 Schedule 1)* [1996] 2 FLR 171).

14. In *KK v MA & Others* [2012] EWHC 788 (Fam) the husband divested himself of shares after the bankruptcy petition had been presented. At a preliminary stage Charles J was faced with making findings about which assets had vested in the trustee in bankruptcy (and could be the subject of equitable tracing) then working out what the residue was likely to be after the creditors were satisfied and costs met.

15. Pensions rights do not vest in the trustee, therefore they will normally be available as the subject of pension sharing or attachment orders (Welfare Reform and Pensions Act 1999 s.11-12).

16. Periodical payments can be ordered against a bankrupt, although the assessment of quantum is not binding on the bankruptcy court, which can make an income payments order that will override the periodical payments order. The income payments order must provide for the reasonable domestic needs of the bankrupt and his family. It can last until up to three years after the bankruptcy order is made (Insolvency Act 1986 s.310).

Additional consequences of bankruptcy

17. Practitioners have to be mindful that the existence of a bankruptcy order may mean that the former matrimonial home is sold at a lower price by a trustee in bankruptcy seeking to secure no more than necessary to satisfy the estate's creditors. This can effectively further diminish the 'pot' available for division, already having been reduced by its

liability for the trustee's costs. The court's considerations when facing an application to enforce a sale of the matrimonial home are different if there is a bankruptcy order in place. After one year, the interests of the creditors will outweigh all other considerations, unless the circumstances are truly exceptional (Insolvency Act 1986 s.335A(3)).

18. In *Mekarska v Ruiz* [2011] 2 FLR 1351 (discussed further below) what caused the trustee's costs to grow exponentially until they eclipsed the entire value of the estate was litigation between the wife and the trustee as to the sale price of the former matrimonial home. The difference in their valuations was £20,000. By contesting the sale at the lower price, the wife effectively wiped out her entire award. However, had there been no bankruptcy the wife's prospects of delaying a sale until she obtained the price she wanted would have been significantly better.

19. There is case law which suggests that lawyers have a duty of care to advise their clients of the risk that insolvency might affect their claim (*Burke v Chapman & Chubb* [2008] FLR 1207 at [67] – although in that case the failure did not cause the loss claimed).

[C] SETTING ASIDE BANKRUPTCY ORDERS

20. If the bankruptcy was unnecessary and the above limitations materially affect the award your client is likely to receive then the remedy is to apply to a court with bankruptcy jurisdiction for an annulment of the bankruptcy order. Matrimonial Causes Act 1973 s.37 does not apply and the existence of a freezing order does not prevent a bankruptcy order being made (*Woodley v Woodley (No.2)* [1993] 2 FLR 477 at 485).

When will the court annul a bankruptcy order?

21. S.282(1) of the Insolvency Act 1986 reads:

> *The court may annul a bankruptcy order if it at any time appears to the court –*
>
> *(a) that, on any grounds existing at the time the order was made, the order ought not to have been made, or*
>
> *(b) that, to the extent required by the rules, the bankruptcy debts and the expenses of the bankruptcy have all, since the making of the order, been either paid or secured to the satisfaction of the court.*

22. For practical purposes, family practitioners are likely to be concerned only with ground (a). It is important to note that the word 'may' in s.282(1) confers a discretion on the court whether to annul or not.

23. To summarise the principles set out in the relevant case law, in deciding whether to annul a bankruptcy order the court is likely to consider the following:

(a) Should the bankruptcy order have been made in the first place? (if the answer is 'yes' then that is the end of the matter);

(b) If not, should the court exercise its discretion not to annul, taking into account the following non-exhaustive factors:

i. Whether the bankruptcy was tactical or an abuse of process;

ii. Delay in making the application;

iii. Likely effect of the annulment on the Applicant and the bankrupt (who are unlikely to be the same person in a family law context);

iv. Whether the debtor will be able to meet his liabilities;

v. What provision is made for the trustee in bankruptcy's costs.

(a) Should the bankruptcy order have been made?

24. The first question is whether the order should have been made in the first place. The relevant ground for a bankruptcy order under s.272(1) of the Insolvency Act is that the debtor is unable to pay his debts. Some clarification was provided by Lord Justice Wilson (as he then was) in *Paulin v Paulin* [2009] 2 FLR 354 at [41]. Wilson LJ explained that the relevant test is not balance sheet insolvency (whether the bankrupt's liabilities outweighed his assets) but rather commercial insolvency (whether he could meet his liabilities as they fell due). Wilson LJ went on to quote David Oliver QC sitting as a deputy High Court judge in *Re Coney (A Bankrupt)* [1998] BPIR 333 at 335-336:

> *"Inability to pay one's debts, at least in the context of insolvency, has historically long been construed as an inability to pay one's debts at the time they are due… it would not normally be right to annul a bankruptcy order unless at least it is shown that as at the date of the order the debtor was in fact able to pay his debts, or had some tangible and immediate prospect of being so able…"*

25. Wilson LJ suggested that the burden of proof lies with the person seeking the annulment unless the bankrupt's assets outweighed his liabilities at the date of the bankruptcy.

26. In *Mekarska v Ruiz* [2011] 2 FLR 1351, although the value of the former matrimonial home vastly eclipsed the husband's debts, Peter Jackson J found that there was no tangible and immediate prospect of him being able to pay off those debts. His Lordship suggested that an immediate annulment application coupled with an acknowledgment that the former matrimonial home had to be sold rapidly might have altered this conclusion, but as things were there were no grounds upon which the court could annul (at [82]).

27. Similarly, in *Whig v Whig* [2008] 1 FLR 453 Munby J (as he then was) refused the wife's application for an annulment because he found that the only way the husband would have been able to discharge his debts was to sell the matrimonial home, and this was a course which the wife would have blocked (at [5]).

(b) Discretion whether to annul

28. Even if it is found that the bankruptcy order should not have been made, the court still retains a discretion not to annul. In *Paulin*, Wilson LJ sought guidance from the words of Mr Justice Walker in *Artman v Artman* [1996] BPIR 511:

> *"The statute does not lay down any particular matters to be taken into account in the exercise of the court's discretion, but the likely effect of any annulment order on the applicant, on the bankrupt where he is not the applicant, and on the bankrupt's other creditors must, it seems to me, be among the most important matters to be taken into account. So must any element of abuse of process in the obtaining …of the bankruptcy order."*

29. Other bankruptcy authorities suggest that a critical factor is whether the debtor would be able to meet his liabilities if the bankruptcy was annulled (e.g. *Owo-Sampson v Barclays Bank & Boyden* [2003] EWCA Civ 714 [2003] BPIR 1373 per Carnwath LJ at [35]).

30. One of the key questions is whether the bankruptcy was tactical. In *Paulin v Paulin*, a bankruptcy order which affected ancillary relief proceedings was annulled. In that case, the husband manufactured a debt in order to procure his own bankruptcy with the intention of defeating his wife's claims. In *F v F (Divorce: Insolvency: Annulment of Bankruptcy Order)* [1994] 1 FLR 359 the husband underplayed his assets so as to appear insolvent and the bankruptcy was set aside. The same result occurred in *F v F (S Intervening)* [2003] 1 FLR 911, in which Coleridge J found the husband's bankruptcy was "another device designed to derail the court's ability to deal with the wife's claim" (at 928G).

31. On the other hand, in *Mekarska v Ruiz* the judge found that the bankruptcy was not tactical but rather motivated by the husband's belated wish to put his affairs in order (at [82]).

32. Peter Jackson J held that, even if the initial hurdle in s.272(1)(a) had been overcome, he would not have exercised his discretion to annul. This was partly because the wife's resistance to the sale of the home caused 'a scale of expense that was beyond the normal powers of foresight', partly because the creditors would not be paid if there was an annulment, and partly because there was no basis on which to deprive the trustee of his costs and therefore any residue would be insufficient to re-house the wife and child in any case (see [84]).

33. Delay was also clearly an important factor. The wife's solicitors had threatened to apply to annul several months before the final hearing in the ancillary relief case. As it happened, the annulment application was not made until 18 months after the final hearing.

Trustee in Bankruptcy's costs after annulment

34. One of the most damaging effects of a bankruptcy order is that the trustee in bankruptcy's costs are deducted from the bankrupt's estate before any residue can be paid out to a spouse claiming a financial remedy. In *Mekarska v Ruiz* this caused the entire 'pot' to be wiped out (the costs were so high because the wife had resisted the sale of the matrimonial home which caused further litigation).

35. If the bankruptcy order is annulled it will normally be conditional upon the trustee's costs being paid from the estate.

36. Even where the person applying for the annulment has been wrongly affected by the order, any delay in making the application may result in the trustee's costs coming from the estate (e.g. *LB Redbridge v Mustafa* [2010] EWHC 1105 (Ch) [2010] BPIR 893, in which there was an 18-month delay). Moreover, the fact that the bankrupt spouse wrongfully obtained a bankruptcy order does not mean that the trustee should be denied

his costs (*Thornhill v Atherton* [2004] EWCA 1858 [2005] BPIR 437). What is required is that the bankruptcy was an abuse of process and the trustee himself acted improperly (see *Ella v Ella* [2008] EWHC 3258 (Ch) [2009] BPIR 441 for an example of an annulment without provision for the trustee's costs – in that case it was found that the trustees should have realised that the bankruptcy was likely to be an abuse of process).

37. It is worth noting that there is a means by which a person in the wife's position in *Mekarska v Ruiz* may challenge the scale of the trustee's costs: *Practice Statement: the Fixing and Approval of the Remuneration of Appointees* (2004) [BCC] 912) (referred to at [92A] of the judgment).

Procedure

38. The procedure for applying to annul a bankruptcy order is set out in the Insolvency Rules 1986 r6.206-212. An affidavit in support is required.

39. Often the most efficient way to proceed is for both the bankruptcy annulment application and the financial remedies case to be heard together in the Family Division. However, practitioners should be mindful of *Arif v Zar & Anor* [2012] EWCA Civ 986 in which Mostyn J transferred the wife's annulment application from the Chancery Division of his own motion despite a previous request being refused by the registrar. The Court of Appeal held that any challenge to the registrar's decision should have been made in the Chancery Division.

[D] BANKRUPTCY AFTER FINAL ORDER

Bankruptcy between final order and its implementation

40. Property adjustment orders confer an equitable interest from the time the order takes effect (making of Decree Absolute) – this is a manifestation of the maxim 'equity treats that as done which ought to be done' – which means the transferee is not affected by the transferor's bankruptcy after this time whether or not the order has actually been implemented: *Hill v Haines* [2008] 1 FLR 1192 (CA) at [7]-[8] (although, interestingly, it was suggested in *Independent Trustee Services v GP Noble* [2012] EWCA Civ 195 [2012] 3

FCR 1 by Patten LJ at [43] that setting aside a consent order does not automatically re-vest assets previously transferred by a party, so this principle may not cut both ways).

41. Lump sums work differently. The beneficial interest in the money which one party is ordered to pay does not pass at the moment the order takes effect (*Burton v Burton* [1986] 2 FLR 419 per Butler-Sloss J (as she then was) at 425). Although in *Re Mordant; Mordant v Halls* [1996] 1 FLR 334 (Ch D) money which had been paid to the husband's solicitors to satisfy a consent order, but not yet paid to the wife, did not vest in the trustee in bankruptcy.

42. The fact that orders made in family proceedings are provable (made so by the Insolvency (Amendment) Rules 2005) means that a spouse can use the threat of bankruptcy and the investigative powers of the bankruptcy court as a form of quasi-enforcement.

Applications by the trustee in bankruptcy to set aside consent orders

43. Even if the final order is made and implemented prior to the paying/transferring party becoming bankrupt that does not necessarily mean that the disposition is completely protected. The trustee in bankruptcy has two means of clawing back money for the benefit of the creditors:
    (a) Transactions at an undervalue (IA 1986 s.339);
    (b) Preferences (IA 1986 s.340).

44. S.339 states that "where an individual is adjudged bankrupt and he has at a relevant time entered into a transaction with any person at an undervalue, the trustee of the bankrupt's estate may apply to the court for an order under this section."

45. The relevant time is 5 years prior to the presentation of the bankruptcy petition, if at the time of the transaction the person was insolvent or became insolvent as a result of the transaction. Insolvency means unable to pay one's debts as they fall due (commercial insolvency) or liabilities exceeding assets (balance sheet insolvency) - these requirements are presumed to be met in the case of a transaction at an undervalue if entered into with an associate (s.341(2)); this includes a spouse or civil partner (s.435). In other cases,

where the bankrupt was not insolvent prior to or as a result of the disposition, the relevant time will be 2 years.

46. The definition of 'an undervalue' is (s.339(3)):

(a) "...a gift ……. on terms that provide for him to receive no consideration;

(b) ... a transaction …. for consideration the value of which, in money or money's worth, is significantly less than the value of… the consideration provided..."

47. S.340 applies "where an individual is adjudged bankrupt and he has at a relevant time given a preference to any person". Where the transferee is an associate the relevant time is 2 years. Where the transferee is not an associate the relevant time is 6 months (s.341(1)(b)(c)). It is also a requirement that the transferor was at that time insolvent or made insolvent as a result of the transaction.

48. If the trustee is successful in demonstrating the undervalue or preference then the court shall 'make such order as it thinks fit for restoring the position to what it would have been' (s.339(2); s.340(2)).

49. The court therefore has a discretion. Although not a divorce case, *Trustee in bankruptcy of Claridge v Claridge* [2011] EWHC 2047 (Ch) [2012] 1 FCR 388 is an example of a court finding that there was a transaction at an undervalue but deciding to make no order. Another is *Singla v Brown* [2008] 2 FLR 125 in which the bankrupt had accepted a notice from his partner reducing his beneficial interest in the couple's home, but in circumstances where he made no capital contribution or mortgage payments and had only been legal co-owner because the mortgagee required it.

50. An example of a divorce settlement being set aside as a transaction at an undervalue is *Segal v Pasram and another* [2008] 1 FLR 271 (Ch D). The husband and wife executed a deed purporting to transfer his half share in the matrimonial home to her for consideration of £1,000 and her giving up her ancillary relief claims (though divorce proceedings were not issued until years later). He was made bankrupt 8 months later. After a delay of 6 years the trustee in bankruptcy sought to have the transfer set aside. It was held that the limitation period for a recovery of real property by a trustee in bankruptcy is 12 years.

51. In *Hill v Haines*, it was clear at the time of the final hearing that the husband would become bankrupt. The District Judge made an order that the husband's share in the matrimonial home should be transferred to the wife within 7 days of Decree Absolute. He did not execute the transfer but he was made bankrupt shortly thereafter. The District Judge subsequently executed the transfer documents. The trustee in bankruptcy applied the following year for the transaction to be set aside as an undervalue. The trustee succeeded in the Chancery Division but the appeal was overturned by the Court of Appeal. It was held that:

(a) The disposition was made at the time the court order took effect (at [7]-[8]);

(b) The compromise of ancillary relief claims does amount to consideration (at [29]-[30]);

(c) Absent the usual vitiating factors of fraud, mistake or misrepresentation the compromise of a party's statutory rights would be balanced by the payment of money or transfer of property – ie. not an undervalue (at [35]);

(d) If the ancillary relief order was the product of collusion between the spouses designed to adversely affect creditors then the order would be set aside (at [46]; for what may amount to collusion see *Re Jones (A Bankrupt); Ball v Jones* [2008] 2 FLR 1969 – in which the argument that such a disposition would amount to a preference was also rejected);

(e) An agreement to compromise ancillary relief proceedings cannot constitute a transaction for the purposes of s.339 (at [31]).

52. The last point demonstrates how important it is, in cases where bankruptcy is a risk, to get an agreement approved by the court as soon as possible.

[E] RISK OF BANKRUPTCY

53. Family practitioners are used to drafting orders which provide for a party to have a deferred interest in real property – whether by chargeback, Mesher or Martin order – usually when a primary carer needs the use of additional capital during the minority of children of the family. Where there is a risk of bankruptcy this may be inadvisable.

54. The case of *Turner v Avis and another* [2007] EWCA Civ 748 [2007] 2 FCR 695 established that, where a party has a deferred interest in property and is subsequently made bankrupt,

the trustee in bankruptcy is entitled to apply for an order for sale before any of the trigger events in the order/deed/charge have occurred. What is worse, s.335A of the Insolvency Act 1986 applies so that after one year the interests of the creditors outweigh all other considerations unless the circumstances of the case are exceptional (see FCR at 705h). Clearly this could completely invalidate the basis upon which an order was made (but not likely to be in such a way as to amount to a *Barder* event).

55. It is worth noting that when the trustee in bankruptcy did make an application the order for sale was granted in *Turner v Avis* (reported as [2009] 1 FLR 74).

56. The risk of bankruptcy may arise out of facts such as one party carrying a lot of debt which they will struggle to pay out of income, or perhaps a gambling addiction. I suggest it does not necessarily mean balance sheet insolvency.

57. It may be better in that sort of case to accept a lower capital settlement, without the Mesher or chargeback, and strive for an immediate capital clean break.

CONCLUSIONS: POINTS TO WATCH OUT FOR

58. Practitioners and clients may wish to consider the following:
    (a) Once a bankruptcy order has been made against the owner of the FMH, it is inadvisable to litigate with the trustee in bankruptcy over the sale of the property as this may wipe out much or even all of the available equity;
    (b) Bankrupt clients who are desperate to remain in the FMH may be better advised not to do so if it is overcharged;
    (c) If a client disputes the validity of their (ex-)spouse's bankruptcy then the only way to challenge this is an application to annul – and this must be done promptly;
    (d) Practitioner's should insofar as possible advise their clients of the risks where one party is insolvent – and should keep a note of having done so;
    (e) Where there is risk of bankruptcy any transfer of the matrimonial home should be drafted so that the beneficial interest passes immediately;
    (f) Where the other party is the non-resident parent and is an obvious risk of bankruptcy a Mesher/chargeback is risky and should be avoided if possible.

Henry Clayton
4PB

Section 4

How to prepare a simply brilliant Schedule 1 Children Act Claim

Samantha Woodham

HOW TO PREPARE A SIMPLY BRILLIANT SCHEDULE ONE CHILDREN ACT CLAIM

INTRODUCTION: THE SOCIAL CONTEXT

1. For the first time ever, the percentage of cohabiting couples with children equals that of married couples with children[1].

2. An analysis of data from the Office for National Statistics points to a significant increase (34 per cent) in the number of cohabiting couples with dependent children in the ten years to 2011. According to the report, between 2001 and 2011, the total number of cohabiting families with dependent children increased by 292,000, whilst married couples with dependent children fell by 319,000. This, according to the report, suggests that increasingly, cohabitation is no longer seen as a 'trial run' before marriage and children, but as a replacement for marriage for both long-term relationships and the raising of children.

3. The research also highlights the extent to which cohabiting couples are seen as a socially acceptable family environment for children, with over half (52 per cent) of people believing that marriage is not important providing the parents are in a committed relationship. Only 27 per cent maintain the more traditional view that couples should be married before having children.

4. The result of this shift in attitude could account for the fact that in 2011, 38 per cent of cohabiting couples were parents – the same percentage as married couples with children – and 31 per cent of live births in 2010 were to women cohabiting with but not married to their partner, up from 25 per cent in 2001.

5. However, despite the increasing social legitimacy, the report acknowledges that cohabiting couple families continue to be less stable than married couple families. With a higher proportion of all family breakdowns involving young children from unmarried parents, the research reveals the potential for future issues with confusion over the legal rights of cohabiting couples compared to married couples. Of those questioned, over a

[1] Co-operative Legal Services report 2011 conducted by Dr Esmee Hanna and Dr David Grainger

quarter (26 per cent) of adults believe that cohabiting couples have the same rights as married couples when it comes to child custody, 22 per cent when it comes to property and 21 per cent when it comes to finances.

6. In 2006 the Economic and Social Research Council prepared a seminar entitled *Changing Household and Family Structures*[2]. It found that almost nine out of ten people thought that a cohabiting partner should have a right to financial provision if their relationship is a long term one, has involved prioritising one partner's career or includes children.

7. More than 70% of family lawyers surveyed stated that, in their experience, the law badly fails to protect the interests of cohabiting couples when they separate. The lack of any legal remedy, as well as costs and uncertainty of outcome were cited as the main reasons for this failure.

8. Few cohabitants take steps to safeguard their position. In 2006 one in seven (15%) had a written agreement about their share in the ownership of accommodation where one or both partners owned that property; one in ten (12%) had changed a will as a result of their cohabiting relationship; one in five (19%) had sought advice about their legal position.

9. The number of married couples in the UK fell by over 4% (0.5 million) between 1996 and 2006 to just over 12 million. Marriage rates in England and Wales have fallen to their lowest level since records began in 1862. The number of marriages registered in England and Wales in 2007 was the lowest number since 1895 (the year before the first modern Olympics in Athens!). The number of divorces has remained at around 120,000 divorces per year since 2008. Across England and Wales the proportion of children born outside of marriage had increased to 43.5% by 2006. There has also been a decline in marriage rates over the long term in many other European countries.

Reform: An Opportunity Lost

10. Following extensive consultation, the Law Commission published its report "***Cohabitation- the financial consequences of a relationship breakdown"*** to Parliament on 31 July 2007. The report concluded that there was a strong case for

[2] 'Changing household and family structures and complex living arrangements' was published by the ESRC to accompany a seminar in London on 18 May 2006- see www.esrc.ac.uk

remedies to be made available between unmarried couples who live together with children, i.e. as a family, for two principal reasons:

a. Where couples live together with one or more children as a family they generally adapt their original roles within the relationship in order to provide appropriate support for the children and each other, most notably where one partner gives up full time paid work to care for a young child in reliance on the other partner's financial contribution to the household. Given that cohabiting parents are likely to adopt money management practices similar to those of many spouses, it seems wrong that, where that has been a joint decision by a cohabiting couple to conduct their family life in this way, the long term financial "gains" and "losses" should simply lie as they fall on the basis of ordinary application of the laws of property.

b. More importantly, where there are children there is a recognisable public interest in their continuing welfare. Separation of cohabiting couples inevitably impacts on children who have been part of their parents' shared household. Schedule One affords the court the power to make a range of orders for the maintenance of a child. However, it has important practical limitations and the current law fails to address adequately the financial hardship experienced in many cases by women as the primary carers of children upon the break-up of cohabitation and this inevitably affects the quality of life of the children for whom that adult party continues to care.

11. The Law Commission proposed a scheme which would apply to all eligible cohabitants. Cohabitants who had had children together would automatically be eligible for the purposes of the scheme. The court would have discretion to make a variety of orders, including periodical payments, lump sums, property adjustment and settlement, orders of sale and pension sharing orders. In exercising its discretion, the court would have to be satisfied that either the respondent party had retained an economic benefit as a result of the contributions of the applicant party, or that the applicant party had suffered an economic disadvantage because of sacrifices made during the cohabitation. A carer who had sacrificed his/her career in order to look after the children would therefore have a claim based on the sacrifice made.

12. In September 2011 a written ministerial statement was issued on behalf of Government by Parliamentary Under-Secretary of State, Ministry of Justice, Jonathan Djanogly. The statement announced the Government's intention to not take forward the recommendations for reform during the current parliamentary term.

13. It therefore seems unlikely that there will be any legislative reform for the foreseeable future.

14. Children of course have no part to play in the decision whether their parents marry or not, notwithstanding that that decision might have profound impact upon their (financial) futures.

15. However, despite the sharp increase of cohabiting parents, Schedule One appears to be underused. In 2012, only 726 applications were recorded by HM Courts Service, a reduction from the previous year. There may be a variety of reasons for the reluctance to make Schedule One applications, some of which will be explored through the course of this lecture.

16. I have sought to express the law as it stand as at 16.05.2013.

THE LEGAL FRAMEWORK

17. Schedule One (by section 15) Children Act 1989 enables the Court to make financial provision for the benefit of the child. The Schedule re-enacts various pieces of previous legislation including:
    a. Guardianship of Minors Acts 1971 and 1973;
    b. Sections 15 and 16 of the Family Law Act 1987 which implemented two Law Commission reports on illegitimacy. The object of those reports was to remove the differences in the legal position of children based on whether their parents had been married or not;
    c. The Matrimonial Causes Act provisions relating to maintenance, lump sums, property transfer orders and secure provision are enacted in approximate, but not identical, terms.

Who may apply?

18. Those entitled to apply are set out in paragraph 1(1) of Schedule 1:
    a. A parent of a child;
    b. A Guardian or Special Guardian of a child;
    c. An adult child;
    d. Any person in whose favour a residence order is in force with respect to a child

19. The application may be made against either or both parents of the child.

20. Beware however of applications made by non-resident parents, as the recent case of ***N v C [2013] EWHC 399*** demonstrated, where the mother's application was dismissed and she was compelled to move out of a property owned by the father in circumstances where the parties' child had moved to reside full-time with the father and was refusing staying contact with the mother, although had regular visiting contact with her. In the circumstances HHJ Hayward Smith QC held that the father had no legal obligation to house or maintain the mother unless it would benefit the child which in this case it would not.

Who is a child?

21. A "child" is defined for the purposes of the Children Act 1989 as a person under 18.[3] However, subject to the Child Support Act 1991 (discussed further below), an adult child, whose parents are not living together in the same household and in respect of whom there was no periodical payments order in force before he reached 16, is able to apply for periodical payments or a lump sum if either he is receiving further education or training or there are special circumstances.[4]

Who is a parent?

22. "Parent" for the purposes of the Act includes any party to any marriage or civil partnership, whether or not subsisting, in relation to whom the child concerned is a child of the family.[5] Thus no relief may be sought by or against a 'cohabiting' step-parent:

    a. ***J v J (A Minor: Property Transfer) [1993] 2 FLR 56*** - The parties had lived together as man and wife for 10 years. The mother had a daughter from her previous relationship, who was treated as the respondent's child. The child took the respondent's name. The court held that Schedule 1 para 1 only permitted orders to be made against a parent. Harsh but consistent with the Act's purposes.

    b. ***Re B (Minors)(Parentage) [1996] 2 FLR 15*** - The circumstances in which a sperm donor can be deemed to be a parent for the purposes of Schedule 1:

        i. There must either be 'effective consent' to the use of the gametes under schedule 3 para 5 of the Human Fertilisation and Embryology Act 1990; or

[3] Section 105 Children Act 1989
[4] Schedule 1 para 2
[5] Schedule 1 para 16(2)

ii. The treatment must have been received 'jointly', i.e. joint attendance at hospital and involvement in gestation.

c. ***T v B [2010] 2 FLR 1966*** - an order cannot be made against a same-sex former partner where there is no biological relationship or civil partnership.

The Range of Orders available

23. The Court may make a variety of orders, including[6]:
    a. Periodical payments;
    b. Secured periodical payments;
    c. Lump sum orders[7];
    d. Settlement of property;
    e. Transfer of property

24. The concept of clean break does not apply to any Schedule 1 application, or indeed any other application relating to children, for good and obvious reasons of principle. An applicant may apply to vary maintenance orders and for further lump sum orders in an appropriate case. However, only one order for settlement or transfer of property may be made against the same person in respect of the same child:

    a. ***Phillips v Peace [2005] 2 FLR 1212*** - Here the applicant mother wanted a second lump sum to purchase a bigger house, having already been awarded a property adjustment order. Singer J held that such an order would be an abuse of the court process, as it would effectively circumvent the statutory prohibition on a second property adjustment order created by para 1(5)(b).

25. If an application is being made by an adult child, the Court cannot order transfer or settlement of property, but may order periodical payments and/or a lump sum to meet

[6] Schedule 1 para 1(2)(a) to (e)
[7] Schedule 1 para 5(1) "... may be made for the purpose of enabling liabilities or expenses (a) incurred in connection with the birth of the child or in maintaining the child; and (b) reasonably incurred before the making of the order, to be met"

their needs, e.g. for the payment of rent and deposit, provided of course the adult child is still in education or training or where are special circumstances justifying the making of an order, such as a disability which requires ongoing provision post childhood.

For the benefit of the child

26. Any order made must be to the child directly or to the applicant for the benefit of the child. This can include an allowance for the applicant's legal costs. The jurisdiction to order a costs allowance in Schedule 1 proceedings is now well-established: ***M-T v T [2007] 2 FLR 925***. Given than the applicant is in a representative or quasi-representative capacity, a payment in respect of the costs of bringing the case on behalf of the child is a payment for the benefit of the child. The power to award interim orders for periodical payments is found in paragraph 9 of Schedule One.

27. The remedy is discretionary. By analogy with the matrimonial jurisdiction, an applicant for a legal costs allowance must show that she could not reasonably procure legal advice by some other means (***Currey v Currey (no.2) [2007] 1 FLR 946***) and in particular that:

    a. She cannot deploy her assets directly or raise a loan to fund legal services;
    b. She cannot obtain legal services funding by the offer of a charge on ultimate capital recovery; and
    c. Public funding is not available.

28. If those hurdles can be cleared, the court may go on to consider the reasonableness of the applicant's stance in the proceedings and the merits of her claim[8]. Note that this will include an assessment of what the applicant is likely to recover in a final award, per Charles J in ***M-T v T [2007] 2 FLR 925***.

"…in exercising that discretion there is a need to take real care to ensure that the payor is not being put in an unduly difficult or oppressed position. As I have mentioned on earlier occasions, where there is a prospect that the applicant will receive nothing there can be a greater risk of that happening. Here, on my analysis, as the interim payment in respect of costs is one that is categorized as being for the benefit of the

[8] G v G (Child Maintenance: Interim Costs Provision) [2010] 2 FLR 1264

children, it seems to me, as I have indicated in my earlier judgment, that the payments can be taken into account in the substantive order made and this reduces the potential for unfairness to the respondent father."

29. Often courts will look to the schedule of costs produced by the payer as a benchmark for the appropriate level of award for the payee[9].

30. The provision may be made by way of lump sum as well as periodical payments (so can cover cases where the CSA has jurisdiction). In ***CF v KM (Financial Provision for Child: Costs of Legal Proceedings) [2010] EWHC 1754 (Fam)*** Charles J held that there was jurisdiction to make an 'interim' lump sum under Schedule One for the payment of legal fees. In that case the father was ordered to pay £20,000 to the mother's solicitors, on their undertaking to use it only in discharge of legal costs, referable to a forthcoming 3 day trial in the s.8 proceedings and Schedule One costs up to the FDR. The father's income was not such as would allow the court to make a maintenance order, being below the CSA upper limit, but lump sum provision was for the benefit of the child in ensuring the mother was properly represented. Charles J rejected the floodgates argument on the following grounds:

    a. An application would only have a sensible chance of success if the non resident parent had capital assets or financial resources from which a lump sum could be paid or which would warrant a settlement or property transfer order being made;

    b. In most cases where the CSA had jurisdiction this would not be the case, and so there would be no realistic claim under Schedule One for payment of legal fees out of capital;

    c. In any event provision for costs would only be made in limited circumstances, and in particular after the court had had regard to:

        i. Whether such an order would be unfair to the paying parent;

[9] PG v TW (No 1) (Child: Financial Provision: Legal Funding) [2012] EWHC 1892 (Fam)

ii. Whether there was a real prospect of a substantial award being made against the paying parent because of his financial resources; and
iii. The prospects of such costs being recouped by deduction from the award that the paying parent was ordered to pay, settle or transfer.

31. It is important to remember that the legal fees can be ordered to be repaid from the final award, provided this does not unduly impact on the child's needs. For instance, in the Charles J case of ***MT v OT [2007] EWHC 838 (Fam)*** the father had paid all the mother's legal costs amounting to circa £175k. The father had considerable wealth of circa £40m. In the final judgment Charles J indicated that he was still to hear argument from the parties as to the issue of costs but that his preliminary view was that the £175,000 should be deducted from the capital sum to be attributed to the purchase of the house to be provided for the children and there should be 'add backs' by reference to who should bear those costs. The Judge's view was that the mother should pay one third of her costs, so that her housing budget would effectively be reduced by circa £58,000. As Charles J put it at para 162:

"This is not a case where if that is done it would mean that the children would not be in a position to be perfectly adequately housed. What it could mean is that the house would be in a less pleasant location or street."

32. Also remember that you can apply for legal costs under Schedule One to cover the costs of Section 8 proceedings. Bodey J considered such an application in the case of ***R v F (Schedule One: Child maintenance: Mother's costs of contact proceedings) [2011] 2 FLR 991***. In that case the father, who was an internationally famous footballer, initially denied paternity until DNA testing confirmed that the child was his. Following a declaration of parentage, the court made a consent order concerning financial support for the child. Thereafter, the father had contact with the child on a number of occasions; however, all contact stopped when the child was about 6 years old. Ten months after the breakdown in contact the father issued contact proceedings. During the proceedings a judge found that the mother's attitude towards contact was unreasonable, but also criticised the father in a number of respects. The court subsequently ordered family

therapy. The child was about 9 when she eventually renewed contact with the father, but after only one session she refused to attend further contact, and, with the mother, stopped attending therapy sessions. Eventually the direct contact order was suspended, and the court ordered a report from a child psychiatrist.

33. The mother then asked the father to pay her legal costs of the contact proceedings, both the costs she had incurred but not yet paid, about £113,000, and her future costs, estimated at £95,000. When he refused to do so, the mother applied to court under Schedule One of the Children Act 1989 for either a lump sum or an increase in the periodical payments for the benefit of the child (currently being paid at the rate of £70,000 pa) in respect of those legal costs. The mother argued that without the additional funds she would be unable to afford legal representation for the forthcoming 5-day hearing; her solicitors were not prepared to act for her unless the outstanding fees were paid.

34. The father resisted the mother's application, arguing that: (i) such an order would not be for the benefit of the child; (ii) it was not clear that the mother lacked funds with which she could reasonably pay her costs; (iii) the mother's stance in the contact proceedings was unreasonable.

35. Bodey J ordered the father to pay a lump sum of £113,000 to the mother's solicitors in respect of their outstanding fees, subject to a 'solicitor own client' assessment requiring any overpayment to be restored to the father and further ordered the father to pay a second lump sum of £25,000 in respect of future costs (rather than the £95,000 sought), against invoices rendered by the mother's solicitors for work actually done.

36. The judge emphasised that Schedule One was not a costs jurisdiction, but a financial relief jurisdiction exercised for the benefit of the child. Cases of this sort required a careful analysis of the benefit to the child by way of the representation of the applicant parent at the expense of the respondent parent, and of the broad merits of the applicant parent's case in the relevant proceedings. When considering the reasonableness of the applicant parent's position, it was almost always simplistic to suggest that one party or the other was independently to blame for the underlying relationship problems that generated 'high conflict' contact cases. In complex cases even a parent who had been criticised in the past might be able to show merit in the proper representation of his or

her views to the court, where this was in the overall interests of the child, and also merit in being properly represented against adversarial criticism. In particular, it would not be in the child's best interests for the child or the applicant parent to perceive the ongoing contact proceedings as 'unfair'. However, he did emphasise to the mother that the court would (quite rightly) from now on be considering the mother's ongoing progress in complying with expert advice at each stage.

37. Bodey J also gave some guidance as to how such applications should be dealt with. He stressed that if an application for legal costs was going to be necessary, it should be issued without delay: the existence of costs already incurred had the potential to complicate the issue and to make it more difficult for the court to maintain a measure of incremental control over the quantum and accrual of the costs.

38. He also emphasised that such applications should not turn into the equivalent of full-on disputed finance hearings with full discovery, cross-examination and findings of fact, which would not be proportionate, and that the court ultimately had to make a broad assessment of the financial situation.

39. Note that the statutory framework for Legal Services Orders brought in by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 does not affect Schedule One.

Duration

40. Orders for periodical payments or secured periodical payments may begin from the date of the application but shall not extend beyond the child's seventeenth birthday in the first instance, and in any event shall not extend beyond the child's eighteenth birthday, save where the child is undergoing training for trade, profession or vocation, or where there are other special circumstances.[10] Note that special circumstances has been narrowly defined and relates to the child's own special circumstances (disability etc):

[10] Schedule 1 paras 3(1) and 3(2). Consider also the case of ***N (A Child) [2009] EWHC 11 (Fam)*** where Munby J reaffirmed that unless there were exceptional circumstances then any capital settlement under Schedule One should be expressed as terminating upon the child attaining the age of 18 or completing tertiary education, a provision which attempted to extend the provision to the child's 21st birthday, without linking it to further education, was impermissible.

a. ***T v S (Financial Provision for Children) [1994] 2 FLR 883***- Here the applicant unsuccessfully argued that the court should treat the respondent father's failure to properly disclose his means as a 'special circumstance' enabling the court to extend the duration of the periodical payments order.

b. ***C v F (Disabled Child: Maintenance Orders) [1998] 2 FLR 1***- expenses attributed to a child's disability should be taken into account in the broadest sense.

41. The practical consequence is that maintenance orders may be made for the benefit of children during their secondary and tertiary education, and since the Child Support Act ceases to have effect in any event after the child's nineteenth birthday, Schedule One will have unfettered supremacy from that date.

42. Orders may be made in favour of one parent who still lives with the other, but will cease to have effect if that cohabitation continues or if they subsequently resume cohabitation for a period of more than 6 months. An unsecured order will cease to have effect on the death of the payer, whereas secured orders may (and usually are) secured through dates and times in the child's life, rather than that of the parents.

Jurisdiction

43. This is founded on the habitual residence of the child in England and Wales. When the child lives outside England and Wales the Court may make a periodical payments order or secured periodical payments order where the Court has jurisdiction pursuant to Council Regulation (EC) No 4/2009[11]. There used to be no power to make lump sum orders or transfer property where the child was resident outside England and Wales- ***B v R [2010] 1 FLR 563***.

44. However the recent case of ***PG v TW (No 2) (Child: Financial Provision)*** has confirmed that the restriction of the court's powers was uncapped by the EU Maintenance Regulation 2011 (Regulation no.4/2009 of 18th December 2008) giving

[11] Schedule 1 para 14

effect from 18th June 2011 to a directive of the European Union made in 2008 which removed all restrictions on an application by an overseas resident against a respondent resident in England and Wales. Applications can now be made for lump sum and property adjustment orders if the payer is resident in England and Wales even if the child is not.

REPRESENTATION OF THE CHILD?

45. In exceptional cases, consideration should be given to separate representation of the child[12]. This follows the current theme in various areas of family law, led by the child abduction authorities, for the child's voice to be heard.

    a. ***Re S (Unmarried Parents: Financial Provisions) [2006] 2 FLR 950***- the child was aged 9 and the mother was seeking full financial relief for the child under Schedule 1. The mother and child currently lived in Kensington, near the child's school, and the mother was seeking to remain there at a cost of £1.6-2m. The father proposed a (much cheaper) move to Fulham for £500-550k. Bennett J at first instance was highly critical of the mother, regarding her wish to remain in Chelsea as an example of her egocentricity, being her own selfish need dressed up as the child's best interests. The judge awarded the mother £800,000 for housing to be held on trust. She appealed. Thorpe LJ held that the first instance judge had not focused on the needs of the child as separate and distinct from the needs of the mother. Given the extent of the father's fortune, was it necessary for the child to move from the familiar, from friends and from school. The real focus of the judge's appraisal should have been on the child's needs- they were distinct from the mother's and not tainted simply because the mother's presentation was tainted:

    "The authorities show that it has not been the practice in these cases for children to be separately represented, but the present case is in my opinion a neat illustration of the advantages of ensuring separate representation for the child in some cases is brought under s. 15 of the Children Act 1989. Here there was an intense and bitter battle between two adults; the mother striving to harm the father by extracting the maximum investment fund, the father striving to worst the mother by concealing the extent of his fortune. It is easy to see how, in such circumstances, the real crux of the case can be lost to view unless there is some advocate there to urge constantly the needs and interests of the child. For that, in the end, is what the award is largely designed to satisfy."

[12] Also refer to FPR rule 9.11 which sets out when children must be separately represented in Schedule One cases.

46. In practice separate representation of a child in Schedule One proceedings is rare, given the consequential funding issues.

CHILD SUPPORT

47. The power of the court to make maintenance orders under Schedule 1 is restricted by sections 8(1) and 8(3) of the Child Support Act 1991 which provide:

> *"…in any case where the Secretary of State would have jurisdiction to make a maintenance calculation with respect to a qualifying child and a non-resident parent of his on an application duly made (or treated as made) by a person entitled to apply for such a calculation with respect to that child….no court shall exercise any power which it would otherwise have to make, vary or revive any maintenance order in relation to the child and the non-resident parent concerned."*

48. Section 8(6) provides:

> *"This section shall not prevent a court from exercising any power which it has to make a maintenance order in relation to a child if:*
>
> *(a) a maintenance calculation is in force with respect to the child;*
>
> *(b) the non-resident parent's net weekly income exceeds the figure referred to in paragraph 10(3)*- i.e. the maximum which is currently £2,000 net per week*; and*
>
> *(c) the court is satisfied that the circumstances of the case make it appropriate for the non-resident parent to make or secure the making of periodical payments under a maintenance order in addition to the child support maintenance payable by him in accordance with the maintenance calculation."*

49. The practical effect of these provisions is that in the majority of applications where the Child Support Act applies, the relief sought will be lump sum provision and/or deferment of the respondent's interest in the family home (usually combined with an application under the Trusts of Land and Appointment of Trustees Act). Applications for periodical payments will only be made where either:

a. The respondent is very wealthy and has an income exceeding the maximum prescribed by the CSA (£104,000 net pa) [13]; or
b. The child or one of the parents are habitually resident abroad and so the CSA does not have jurisdiction; or
c. The child is over the age of 20 and remains in education or special circumstances apply[14].

50. A real difficulty is the self-employed father who either has a variable income which sometimes dips over the CSA maximum or the more calculating sort who deliberately pays himself less than the CSA maximum. In such cases the applicant will have to make a variation application before a CSA tribunal to bring the case into the top up regime and Schedule One.

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51. The Court is alive to applicants who try and get around the Child Support Act:

a. ***Phillips v Peace [1996] 2 FLR 230*** (The first bite at the cherry!)The father was a successful businessman living in a house worth £2.6m. The mother was a model and singer in receipt of income support and housing benefit. She made an application to the CSA for support, but the CSA having applied its statutory formula found that the father had no income and thus assessed his liability as nil. The mother applied to the court for an order for a lump sum to provide regular support for the child. The court held that where the Child Support Act applies, the power to make a lump sum order is not to be exercised in such a way as to provide for the regular support of a child, which would ordinarily have been provided by way of an order for periodical payments. The proper order which the court had jurisdiction to make was to make a property adjustment order to enable the mother to buy a house for herself and the child.

b. However note the case of ***DE v AB [2010] EWHC 3792 (Fam)*** where Baron J allowed a lump sum to pay for income expenses such as mortgage arrears where

[13] Although note that any resulting top up order will be vulnerable to an application to the CSA for an assessment after one year- s.4(10)(aa) Child Support Act 1991
[14] S.55 Child Support Act 1991

the CSA had carried out an assessment but it was found to have been woefully deficient (discussed further below)

PRINCIPLES TO BE APPLIED

52. In deciding whether to exercise its powers, and in what manner, the court must have regard to <u>all the circumstances</u>, including a number of the obvious section 25 MCA factors. However, certain of the MCA factors are not specifically included in the wording of Schedule One para 4(1). They are:
    a. standard of living;
    b. the age of each party and the duration of the marriage;
    c. any physical or mental disability of either of the parties to the marriage;
    d. contribution;
    e. conduct.

53. What was Parliament's intention when it specifically included certain factors and specifically excluded others? Should the excluded factors be completely ignored, or simply given less weight?

    a. ***Re P*** and ***F v G*** (discussed later)- both the Court of Appeal and Singer J took into account both the standard of living of the family and the contributions and sacrifices made by the primary carer.

    b. ***N v D [2008] 1 FLR 1629***- held that the length of a relationship (here 17 years of cohabitation) was relevant where it had accustomed a child to a particular standard of living.

54. There is no reference in Schedule One to the child's welfare. The MCA puts welfare as the 'first consideration'- how then should it be treated under Schedule One?
    a. ***J v C (Child: Financial Provision) [1999] 1 FLR 152***- Hale J- the child's welfare is a relevant, if not paramount, consideration

    b. ***P (A Child)(Financial Provision) [2003] 2 FCR 481***- Thorpe LJ- although not paramount, the child's welfare is a '*constant influence on the discretionary outcome'*

c. ***N v D[2008] 1 FLR 1629*** followed the dicta in Re P as to welfare

Authorities relating to the discretionary exercise

55. In ***J v C (Child: Financial Provision) [1999] 1 FLR 152***, Hale J (as she then was) set out a number of principles in respect of Schedule One. In particular:

a. There should be no great significance attached to the issue of whether a pregnancy was planned or otherwise. There was nothing in private law to distinguish between wanted and unwanted children; as a general proposition an irresponsible or uncaring attitude on the part of the parent should not be allowed to prejudice a child.

b. Under Schedule One, the welfare of the child was not the court's paramount consideration. Nonetheless, the welfare of the child is a relevant consideration even if not paramount or the first consideration.

c. A child is entitled to be brought up in circumstances which bear some sort of relationship with the father's current resources and his present standard of living, as parents are responsible for their children throughout their dependency. The fact that such riches come after the break up of the relationship cannot affect that (in this case a lottery win).

d. The court must guard against unreasonable claims made on the child's behalf, but with the disguised element of providing for the mother's benefit rather than for the child.

56. ***Re P (A Child)(Financial Provision) [2003] 2 FCR 481*** concerned an exceptionally wealthy father who famously told the court that a capital order of £10 million against him would not affect his financial position or lifestyle at all. The parties never lived

together and the father had other girlfriends. The trial judge found that the mother had rented a property in Cavendish Mews as a device to increase her award and that she actually lived not in Central London at all, but in Berkshire.

57. The Court of Appeal awarded the mother £1m for a central London property (on trust), £100,000 to refurbish the property and £70,000 pa by way of maintenance, not particularised as between the carer's allowance and the child's needs.

58. Thorpe LJ reviewed the previous case law and set out the following principles:

    a. Although not paramount, the child's welfare is a '*constant influence on the discretionary outcome'*.

    b. In making the assessment of periodical payments the court should recognise the responsibility and often sacrifice of the primary carer and a generous approach to the calculation of the carer's allowance is not only permissible but also realistic.

    c. The financial needs of the child include the need to be cared for by a mother who is in a position both financially and generally to provide that care.

    d. The mother should be able to live with the child in circumstances that bear some relationship to the father's resources and way of life.

    e. She should have control of a budget that reflects her position and that of the father both socially and financially. The object of the budget should be to provide her with sufficient funds to discharge her proper parental responsibilities without financial anxiety. The object is not, though, to meet her aspirations, which fall outside her reasonable needs as the child's carer, or to provide her with surplus funds to set aside for her own future.

    f. Judges should adopt a broad-brush approach in setting the mother's budget.

59. Should any of us be lucky enough to be troubled by such a case, Thorpe LJ also gave guidance in relation to cases which lie somewhere on the spectrum from affluent to fabulously rich:

    a. Determine the nature of the housing need;

    b. Determine the lump sum required for furnishing and equipping the home, the cost of a family car and any other reasonable chattels for the child's benefit;

    c. Determine the mother's reasonable requirements to fund her expenditure in maintaining the home and its contents, her other reasonable expenditure outside the home and, of course, the child's direct needs.

60. In ***F v G (Child: Financial Provision) [2005] 1 FLR 261***, Singer J applied the principles set out in ***Re P***. The case concerned a wealthy older man who was, however, considerably less wealthy that the father in ***Re P*** with capital assets of circa £4m and an income of £500,000pa. The parties had a much more settled relationship than their counterparts in ***Re P***, having cohabited for 2 or 3 years and discussed marriage and the mother had a job which paid £35,000 pa.

61. Singer J awarded the mother £60,000 pa by way of maintenance plus school fees and medical expenses, the father to pay the service charges and other outgoings on the property purchased in trust. That property was to be up to £900,000, together with all reasonable costs of purchase (agreed at £40,000). This was between the parties' two positions, M seeking to remain in the £1.35m family home and F offering a budget of £700,000.

62. Singer J's approach seems to have been:

    a. ***Re P*** is the guiding authority;

b. There should be a generous approach to the carer's allowance;

c. A sense of financial independence and self respect for the mother is important, i.e. the money should be paid to her and she should decide how to spend it, including taking responsibility for the nanny. He expressed no enthusiasm for receipts (NB Consider the more recent case of ***Re N***, discussed below, in respect of the need for receipts);

d. The mother's own income was borne in mind, but did not reduce maintenance pound for pound (or anywhere near);

e. A recognition that the mother would have to plan for her own future- allowing her to retain her own modest capital and as much of her income as she wished. The nanny was agreed at £24k pa, leaving the mother £36k general maintenance in addition to the mother's income. She could give up work and dismiss the nanny and live off £60k pa or keep on working. It was her choice;

f. Although standard of living was not one of the specific considerations listed in para 4(1), the extent to which the unit of primary carer and child had become accustomed to a particular level of lifestyle could impact legitimately on an evaluation of the child's needs:

"I am … anxious that my award should, to an extent which I regard as reasonable in all the circumstances of the case, mitigate the disparity which inevitably will remain between the father's spending power and that of the household where S will grow up. I can do that by adopting a level of award which should ***enable the mother to provide S with a fabric of home life not too brutally remote from that which the father's hard work enables him to sustain****."*[15] (emphasis added)

63. And what of a **holiday home**? In ***Re C (Financial Provision) [2007] 2 FLR 13*** the father was worth circa £100m. The mother was a model with little independent capital. They separated before the birth of their child, who was now aged 4. The mother argued

[15] Para 38

for a second property abroad, in her home country. DJ Million refused the second home fund but granted a holiday allowance as part of the maintenance:

"As for the mother's second home, there may well be circumstances in this class of case where the cost of a second home would be justified. It is a question of life style, rather than any narrowly defined issue of 'need'. The father's own family arrangements include three homes in this country, as well as expenditure (by way of example) of £,100,000 shared between two families for the charter of a large yacht for the summer holidays. However, on the evidence, I am not satisfied that the mother and C have (since December 2004), spent much time at the property abroad, nor that they are likely to in the future. In those circumstances the expense of a second home is not justified. Of course the mother is not from England. The child has a connection with her country as well as the father's. His maternal grandfather lives in the mother's home country. The mother and C should, therefore, have the means within their budget to visit and holiday in that country regularly"[16]

64. One other issue which arose in that case was whether the property the father was to fund in England should be purchased on trust or rented. The mother proposed that the father fund her current rental property, where she said the child was settled and familiar. The landlord of that flat was her new boyfriend, a wealthy married businessman, who the father claimed was a significant financial support. Unsurprisingly the father was not keen to pay rent to the new boyfriend, and proposed purchasing a property on trust. The mother argued she would thereby be 'controlled' by the father.

65. DJ Million did not agree with the mother's argument. He accepted that there may well be cases where it would be appropriate to require the father to finance a rental property, and there is no rule that the property should always be held on trust. However, in the instant case there was no requirement for a rental. There was no rational basis for objecting to a trust purchase of property on the ground of the father's control of the mother's life, particularly as the father was content for the mother to have the choice of the appropriate trustees. The welfare reasons advanced by the mother were not sufficiently strong to overcome the apparently strong reasons for choosing the conventional trust purchase route to the provision of a home. A trust purchase offered the child greater

[16] Paras 71-72

security and stability in the future and the mother had exaggerated the child's degree of attachment to his present home. There was no reason why the trust document should not include the ability to move home and reinvest the proceeds in another suitable property should the circumstances of the mother and child warrant it in future.

66. Again on the issue of how the property is to be held, in ***MT v OT [2008] 2 FLR 1311*** the father argued that either the mother should rent on the open market, with him funding the rent, or that he should purchase a property and act as the landlord. He did not want to settle a property on trust for tax reasons. Charles J rejected the suggestion that the mother should rent on the open market as involving too much uncertainty and potential moves for the children, but accepted that the distinction between the rental option with the father being the owner and the trust option was so small that the choice should be left to the father. The Court and/or the mother should not dictate how he manages his financial affairs.

67. An interesting application of the principles on a smaller money case is ***DE v AB [2010] EWHC 3792 (Fam)***. The child was born in March 2008 after a brief relationship. Before meeting the father, the mother had purchased a 3 bedroom property in London. Her basic salary had been £70,000 gross, but with bonus in her best year was £140,000 gross. Prior to the Schedule One proceedings the mother had lost her job. The property was worth £725,000 but had an outstanding mortgage of £600,000 which was in arrears. In addition the mother had debts amounting to £112,000. The Court found that her earning capacity was £60,000pa, with a mortgage capacity of only £150,000.

68. The father had been made redundant from his city job in 2004 and received just under £1m. Most of this was now gone- he had sunk around £500,000 in a South African game reserve on land which was about to be compulsorily purchased. He had a London house, worth £1.2m, but with net equity of only £358,000. His drawings from his business were assessed by the CSA as £28,000pa, but at first instance the DJ considered the CSA analysis was flawed and that his earnings were in fact circa £100,000pa.

69. At first instance the father was ordered to pay a lump sum of £85,000 and provide a housing fund for the child's housing during his minority of £250,000. The father paid

only £40,000 and appealed against the remainder of the lump sum and the housing fund. He argued that the total award of £335,000 was plainly excessive when his only capital was circa £358,000. He said the mother should rent and the lump sum was excessive and included provision for revenue items.

70. Baron J heard the appeal. She reduced the lump sum to £40,000, however the full level of the housing fund was not reduced. Her conclusions were:

    a. The first instance judge was absolutely justified in his award that the father should contribute £250,000 towards a housing fund. Given the net equity in his property was £358,000, Baron J felt the award was completely unappealable and was surprised that concession was not made on behalf of the father at the appeal. She noted that in reality the sum was a long-term loan which would be recovered in due time and would provide the child with a secure house from which to reach his full potential as he grows to adulthood.

    b. The court can assess the amount of a lump sum in a broad brush manner, without specifying the precise amounts of each category of the claim, and without having to audit the claim;

    c. The argument about double counting on revenue costs might be a good one if the father had truly been making a significant contribution via the Child Support Agency, particularly given the findings as to the true level of his earnings. However he was not. He only ever paid minimal sums: at the time of the appeal he was paying £22 per week;

    d. The father argued that the judge was only entitled to make lump sum provision in respect of specific purchases for the direct benefit of the child. Baron J did not agree. The statute is widely framed. Mortgage payments and general running costs are recoverable because they are for the direct benefit of the child. Obviously, such payments cannot be double counted, but where there was a flawed CSA calculation, which resulted in inadequate provision, then the court would be entitled to supplement such expenditure by way of capital provision, if merited on the facts.

71. This case has some interesting repercussions:

    a. It is now arguable to seek a housing fund even where this might deprive the respondent of most of his capital, especially where he has a good mortgage capacity and has been cavalier in depriving himself of other capital;

    b. A lump sum can be ordered to pay for revenue expenses such as mortgage interest if the Court considers that the CSA has made an incorrect assessment. Surprisingly, the Court did not require the applicant to appeal or vary the CSA assessment, but rather sidestepped the CSA jurisdiction.

72. In terms of the payment of debt, much will of course depend on how the debt was incurred. In ***MT v OT [2008] 2 FLR 1311*** the mother had run up £281,000 of debt which she said was due to the father's reduced payment of maintenance. The father was worth circa £40m and it appears from the judgment that when relations between the parties were good he was paying circa £300k pa as maintenance, when relations soured and Court proceedings were underway this was reduced to circa £130k pa. Charles J had very little sympathy for the mother. He made a number of findings as to her lack of credibility and referred to her evidence as a 'cross-examiner's paradise'. He made no allowance for a lump sum for those debts to be paid:

"In my judgment, the mother has failed to prove the causal link between her bank loans and credit card payments and the withdrawal of support and late payments by the father. In my judgment, it is obvious from the level of periodical payments the mother has received over the period of the two sets of proceedings – notwithstanding the late payments from the father – that ***with only a modicum of sensible financial planning she could easily have lived within her means****, and could easily, and quickly, have repaid any borrowing needed because the father did not pay anything for a period of time between October 2002 and March 2003 when she was in fact in Nigeria, and/or because of his late payments. The mother has done nothing, in my judgment, to dispel the force of the submission made on*

behalf of the father that given the level of the financial support he was providing for her before, she had a fairly substantial war chest by the time October 2002 had arrived"[17] (emphasis added)

73. In the recent case of ***FG v MBW [2011] EWHC 1729 (Fam)*** it was again confirmed that ***Re P*** should be the primary recourse for practitioner in a big money case.

74. In the case before Charles J the mother was applying for provision for her and the father's 11 year old son Luc. This was the mother's third application under Schedule One; the first had been withdrawn when the father was made redundant and the second had resulted in a consent order. The mother made an application to set aside the consent order for non-disclosure and issued a fresh application. The father was a high earner but with an erratic income pattern. The father and mother only had one child together, but the father had other children (one with his former wife and one with his new partner) and had recently concluded financial remedy proceedings related to the divorce. The mother was publicly funded, not working and in debt.

75. It was agreed that this was a 'top up' case. The mother sought periodical payments at £4,000 per month, backdated (totaling £35,000), school fees and extras to cover private education and then boarding school, provision for tertiary education, a lump sum payment of £34,500 plus her costs and an adjournment of her claim for a housing fund.

76. The father said he could not nearly afford the sums the mother was seeking. He was working on a consultancy basis, with uncertain future income prospects.

77. Charles J ordered the father to pay periodical payments of £28,000 pa, index linked, plus school fees and extras. It was not reached on a mathematical or formulaic approach but rather on a consideration of the all the relevant circumstances, the statute and reference to ***Re P***:

> *"Re P confirms that the welfare of the child is a constant influence on the exercise of the broad judicial discretion conferred by the statute and that the award for the benefit of the child can include an allowance for the primary carer which recognises the commitment, responsibility and often the sacrifice of that carer."*

[17] Para 54

78. The learned judge considered the standard of living during the relationship and also the standard of living the father provided and was likely to provide in the future for himself and his other children.

79. Of particular note is the emphasis the Court placed on the consent order which had been reached in the father's financial proceedings with his former wife in terms of its impact on the child of the marriage, Jack. The Court noted that there was a safety net in terms of Jack's future periodical payments that was not available in respect of Luc.

80. Charles J considered that a carer's allowance would be appropriate, however there was a complicating factor in that the mother was dependent on benefits. Provision was made for the allowance to reduce when the mother obtained paid employment (which the court felt she should).

81. This case is also useful as it deals with the issue of whether it is appropriate to make a lump sum award when the application is publicly funded (although given the changes to the availability of legal aid, sadly of less relevance now). It considered that there was no principle that it was not appropriate, but that the Court must be aware that the imposition of the statutory charge might destroy the purpose of the order. Similarly, the Court must take into account the mother's access to housing benefit to assist with the payment of rent when considering whether or not to make a capital award. In any event, the Court found that a lump sum in this case would be unaffordable to the father.

82. Similarly, it was common ground that the father was not currently in a position to fund the purchase of a home for his son (and the mother) but it could not be said that the arguments in favour of such a home being brought in the future would have no prospect of success. The Court therefore adjourned the mother's application in that regard. Because of the father's uncertain income prospects, the Court ordered that there should be a hearing to determine schooling from 13 if necessary, and a review of the level of periodical payments at that time.

83. Despite the mother's allegations, the Court was unable to make findings of non-disclosure against the father. However, the Court did consider that the father's evidence had been "*inconsistent and self-serving*" and made orders ensuring that the father and mother

should keep each other informed of their respective financial positions (by way of provision of tax returns, information about investments, employment efforts and, for the mother, entitlement to benefits).

84. The key 'take away' points from the judgment are:

    a. Re P is still the 'go to' case for high net worth individuals;
    b. The court will take into account not only the payer's standard of living, but also the standard of living of their other children;
    c. The Court will be proactive in reviewing the financial provision over time as the child's needs develop, in this case there was a review set down in two years' time;
    d. The duty to provide full and frank financial disclosure can be required as an ongoing duty for both parents.

85. The case of ***N (A Child) [2009] 1 FLR 1442*** is a salutary reminder to ensure that an applicant appropriately spends all the money awarded as a lump sum. In that case the father had been ordered to pay a lump sum of £20,000 to the mother for the benefit of the child. Munby J held that the mother did have a duty to account to the father for how the money was spent and should provide receipts for all items costing more than £10. Any of the monies not applied by the mother for their designated purpose (including a much larger sum of £220,000 which was a housing fund) would automatically revert to the father.

86. In terms of provision of receipts, compare the approach of Munby J with the approach taken in ***Re C (Financial Provision) [2007] 2 FLR 13*** where the notion of the mother producing detailed accounts for the father's scrutiny was held to be "*almost always unhelpful and counterproductive*".

87. The economic circumstances of the payer will be scrutinised: where he cannot afford to pay out of income but uses capital and borrowing to provide himself with a good lifestyle, maintenance can be awarded to be paid from capital resources- ***SW v RC [2008] 1 FLR 1703***.

88. The very recent decision of HHJ Horowitz QC in ***PG v TW (No 2) (Child: Financial Provision) [2012]*** not only dealt with jurisdictional aspects to Schedule One claims

(discussed above) but also gave really helpful guidance on the level at which an applicant should pitch an international case with a wealthy father.

89. In that case the father was a professional footballer. The parties were both African nationals, and their relationship was based in Africa. They had a 4 year old daughter. After separation the father moved to England and there had been concurrent African proceedings. The mother and child were to remain in Africa but, insufficient financial provision having been made in the African proceedings, the mother pursued her Schedule One application in England. The parties' respective positions were miles apart:

    a. The mother proposed:
        i. A housing budget of £300,000 for a three bedroom home with staff quarters in a secure and high end development in the capital city of the country in Africa where she lived;
        ii. £71,428 as a lump sum to fit out the property;
        iii. £9,000 pm periodical payments (inclusive of the carer's allowance) to decrease to £6,500 in tertiary education of which £1,500 to be paid directly to the child;
        iv. £87,500 car fund to provide for a new car at circa £30,000, such as a BMW one series, to be replaced every 3 years;
        v. School fees (agreed);
        vi. A trust fund estimated at £1.83m to be established as security;
        vii. All her costs of the English and African proceedings on an indemnity basis.

    b. The father proposed:
        i. A housing budget of £128,500, only until the child was 18 and any third parties other than grandparents living there would have to pay occupation rent;
        ii. £15,000 as fit out costs;
        iii. £857pm in periodical payments (the African rate) with ideally no carer's allowance (as the concept is not recognized in Africa) or, if there was to be a carer's allowance, a further £857pm;
        iv. School fees (agreed);

v. A one year old Toyota Yaris or Ford Fiesta at £12,000 replaced every 5 years;
vi. No order as to costs or if that failed father to pay on the standard basis.

90. HHJ Horowitz provided for the following award:

i. Housing budget: £300,000 to the end of tertiary education (mother's proposal);
ii. Fitting out budget: £50,000 (compromise between the two)
iii. Periodical payments: £4,821pm index linked (compromise between the two positions);
iv. Car budget: Mother's proposal adopted- *"[the father's] pride in his own collection of expensive and desirable cars did not, as he recognized, place him in any strong position to qualify let alone criticize the mother's choice"*;
v. Legal costs: Father to pay mother's African costs as a debt and her English legal costs on an indemnity basis. The mother had no assets at all and enforcement of costs could bankrupt her. By the final hearing the combined costs of both sides were £600,000.
vi. Security: no trust fund to be establish provided the father sought dismissal of the African proceedings.

91. Some key points made in the judgment are:

a. The dicta in Re P was repeated and endorsed;

b. There was no place for the 'Millionaire's Defence' in Schedule One given that the court must have some regard to avoiding too gross a disparity between the standard of life of the father as compared with the mother. The court requires a broad assessment of the financial position, and parties should not, however, entertain a disproportionate and detailed enquiry into, for example, every bank credit and debit over £1,000;

c. The father's legal team had sought to argue that this was an African case and the English courts should approach the case by making the sort of order that would be made in Africa. This was rejected as being wrong in law. The English Court will apply English law whilst taking into account the purchasing power of the local African currency and the fact that the mother will find herself in a prosperous African suburb rather than Hampstead;

d. The concept of the carer's allowance as a distinct allowance is 'past its utility'. The periodical payments award should take into account the mother's modest income and the need for back up child care and housekeeping to enable her to work without anxiety during the day, through inevitable child illnesses and school holidays.

TRANSFER OF THE HOME

92. Although the courts have been generous with regards housing budget and maintenance, the trend is still for the property to revert to the father once the child reaches 18 or completes tertiary education and no arguments so far have displaced that principle:

    a. ***A v A (Financial Provision) [1994] 1 FLR 657***- Even where one parent is incredibly wealthy, the court will not usually order an outright transfer of the home to the parent with care of the child (followed in ***T v S***, ***J v C*** and ***Re P***)

    b. In ***MT v OT [2008] 2 FLR 1311*** the mother sought to argue before Charles J that due to the father's huge wealth and lavish lifestyle, the beneficial interest in the property purchased should vest in the children and the mother should have a life interest. Charles J rejected that approach, adopting the reasoning in Re P. He emphasised that it is only in special circumstances that capital provision should be made for a child after dependency. Those special circumstances do not include the wealth of the [father]; nor do they include a point that the child might not benefit on the death of the father.

93. The mother can therefore be left in a position of living a life of relative opulence whilst the children live at home but being left with no income or capital once they leave home. Singer J in ***F v G*** went some way towards addressing the point by providing that the mother's income should not reduce her maintenance on anything like a pound for pound basis, effectively offsetting the mother's income against the cost of the nanny and allowing her to keep any surplus for herself to put towards pension provision if she so wished.

94. But what about the mother who does not work? Thorpe LJ specifically stated in ***Re P*** that no slack could be provided in a maintenance assessment to allow the recipient to fund a pension or an endowment policy or put money away for a rainy day. Stark

contrast then to the situation in financial remedy claims, see Munby J in ***B v B (Mesher Order) [2003] 2 FLR 285*** as relied upon by Baroness Hale in Miller/MacFarlane.

95. Indeed, Baroness Hale has talked of the imbalance as "***the one remaining black hole under present family law***" (see "Unmarried couples in family law"- Family Law June 2004).

96. Beware of asking for any housing fund to be paid to trustees. The ***Re N*** saga (see ***Re N (Payments for Benefit of Child) [2009] EWHC 11*** through to ***G v A (No 3) [2011] EWHC 2377 (Fam***)) highlights:

    a. You cannot obtain a charging order to enforce an order which requires the respondent to settle a sum on the applicant/trustees for the benefit of the child;

    b. Until the trust deed is finalised and trustees appointed, no one can give the respondent a receipt for his monies and so the obligation to pay the sum cannot arise until that point;

    c. HHJ Horowitz recommends the much simpler option of having the terms of the trust in the order rather than requiring a separate trust deed;

    d. The court has the power under Schedule One to order a transfer of jointly owned property into one party's sole name with a charge back to the respondent (see ***Re S [2002] EWCA Civ 168***). This is often the solution when you are dealing with consolidated Schedule One and Trusts of Land Act applications.

MAINTENANCE AGREEMENTS

97. The court has already held that it is in children's best interests to have certainty, and that therefore where parents have a voluntary working agreement, it is still in the child's best interests for a court order to be made regulating the arrangement. The 'no order' principle does not apply to Schedule One- ***K v H (Child Maintenance) [1993] 2 FLR 61***.

98. Until the case of ***Morgan v Hill [2006] EWCA Civ 1602***, no reported case had dealt with the court's approach to pre-existing written agreements in respect of financial provision for the children of unmarried parents. Para 10 of Schedule 1 provides that the court may alter a maintenance agreement where it is satisfied that:

    a. There has been a change in circumstances in light of which the financial arrangements should be altered; or

    b. The agreement does not contain proper financial arrangements with respect to the child.

99. The facts of Morgan are worthy of consideration. The parties had one 5 year old child together (Mark) as a result of a three year relationship. They never cohabited and the relationship broke down shortly after the child's conception. The father was very wealthy and helped the mother to buy a cottage. The mother also had a child from a previous relationship (Mary) and received £12k pa periodical payments from Mary's father as well as school fees. Negotiations for a financial settlement, through highly regarded solicitors, began shortly before the child's birth and a concluded agreement was reached in August 2001.

100. The agreement was expressed to be comprehensive and to make provision for the foreseeable future. Neither party pressed for it to be converted into a court order.

101. Three years after the agreement, the mother moved to a newly built house worth £382,500. To enable her to do so she invested her share of the proceeds of the cottage and took out a larger mortgage of £225k. This resulted in her holding a 65% share in the property as opposed to father's 35% share. However, the combination of moving costs and the burden of a large mortgage drove her into debt. Her debts at trial amounted to £96,503. She brought her application despite the agreement.

102. At first instance she was awarded a settlement of property worth £700,000 for the child's minority, the judge accepting that the family's passion for riding meant that they needed a house in the country with paddocks and stabling. The father was ordered to pay a lump sum of £100k to cover the mother's debts and her periodical payments were increased to £60k and car allowance increased to £25k. The father remained liable for the school fees. The mother therefore received £72k pa (including the pps from Mary's father) and school fees and child benefit on top.

103. The father appealed and sought to rely on well known Edgar principles. It was argued there was no vitiating factor enabling either party to resile from the agreement. The effect of the first instance decision was to confer a benefit on Mary as well as Mark therefore relieving Mary's father of his financial responsibilities.

104. The father also pointed out that the mother had a flat in Paris which she rented out at a loss. Were she to sell that flat she would be able to clear her debts. In addition, since the flat was being let at a loss, part of the father's periodical payments were in effect subsidising it.

105. The Court of Appeal stressed that paragraph 10 of Schedule One gave the court wide powers to make alterations to maintenance agreements where **no order** of the court had been sought. The fact that the mother applied under paragraph 1, rather than paragraph 10, did not circumscribe the court's powers. A pre-existing agreement was just one of the circumstances of the case and the weight it would be given would vary from case to case.

106. Thorpe LJ considered that in this case the first instance judge had been correct to hold that the existing agreement was inadequate in terms of the mother's future earnings, the remarriage or cohabitation clause, Mark's housing need and the level of periodical payments (albeit as the mother's Counsel confirmed, this was an award at the top end of

the bracket!). Thorpe LJ confirmed that the judge had been acting within his broad discretion. However, the court was satisfied that the mother's move to a bigger home was driven by Mary's needs as much as Mark's and therefore Mary's father should shoulder half the responsibility of the debts the mother had incurred in the move. The lump sum award was therefore reduced to £50k.

107. In his judgment, Thorpe LJ stated that in considering pre-existing agreements, the first hurdle is to establish that the agreement is either unenforceable given the circumstances surrounding its creation, or, as in this case, inadequate in its extent. Keene LJ stressed that **the agreement will ordinarily be the starting point, and the finishing point**, of the litigation, unless there is established one of the grounds set out in paragraph 10 for varying it.

108. The conversion then of agreement to Order is essential. It will not protect against future claims increasing the level of periodical payments or for another lump sum, but it will protect against the potentially huge expense of upgrading the child's home.

109. There have not been any reported decisions as to maintenance agreements in Schedule One cases since the decision in Radmacher. It will be interesting to see whether this has any impact on how strictly maintenance agreements are upheld in Schedule One cases. Arguably it should not, since the question for the Court is whether the agreement makes adequate provision for the child, and a child should not be held to a 'bad bargain' made by its parents.

110. In terms of mothers with children by two different fathers, Thorpe LJ stressed that judges should not shirk away from separating out costs and expenses relating to each child. Where two different fathers are involved, their respective liabilities should be established at a consolidated hearing. Hughes LJ recognised that where the means of two fathers are very different there will continue to be real problems of quantum but that those issues will need to be resolved on a case by case basis.

111. The court also considered the father's arguments as regards the mother's Paris flat. The court took the opportunity to reiterate the principle from ***F v G*** that a mother must be able to plan for her own financial future and in doing so retain her own capital. There is no rule or principle which obliges the mother to contribute her own capital.

SCHEDULE ONE FOLLOWING ANOTHER FINANCIAL REMEDY APPLICATION?

112. There is no bar to pursuing a Schedule One claim where a final order has already been made in ancillary relief/ financial remedy proceedings.

113. In ***MB v KB [2007] 2 FLR 586*** the ex-wife issued Schedule One proceedings seeking to move to a better standard of accommodation than had been provided in the ancillary relief proceedings which had been compromised by consent. The ex husband sought to strike out the application on the basis that the issue of housing need had already been resolved. Baron J refused the application to strike out, on the basis that a child's needs are not set by some form of 'res judicata'. No adult compromise could oust the court's jurisdiction relating to the protection of the child.

114. In the recent case of ***PK v BC (Financial Remedies: Schedule 1) [2012] 2 FLR 1426*** the mother and father were married for 8 years and had an 8-year-old child together. When they divorced the mother received £950,000 on a clean-break basis in order to provide for income and housing. The husband was also to pay £15,000 per annum for the child together with school fees and extras. The husband subsequently lost his job and applied to the Child Support Agency (CSA) for an assessment of his maintenance obligations in relation to the child. The CSA, which assumed jurisdiction, assessed the appropriate level of maintenance at £8,468 pa but he continued to pay the school fees and extras. The husband's income was below the CSA maximum level of £104,000 pa. The mother made an application under Schedule One to recoup the difference in the two maintenance determinations in order to better her standard of living in relation to housing and also to purchase a new car.

115. Moor J dismissed her application and ordered that she pay half the father's costs (but imposing a costs cap). The judge held that:

a. On the basis of ***MB v KB*** the court had jurisdiction to consider the question of whether or not to award a further lump sum pursuant to Schedule One even where there had been a clean break in divorce proceedings but the circumstances had to be <u>exceptional</u>. It was a very high hurdle for the mother to overcome in

order to bring a further application for financial provision by way of housing. Given the authorities it would be for a settlement of property rather than a lump sum.

b. In this case the mother's application was entirely misconceived and it was impossible to see how the mother could make a further claim for housing when she already owned a property worth £572,500 mortgage-free. The only way she could make the application was if she wished to release some equity in the property in order to provide maintenance for herself but that also gave rise to significant problems where she had already received a capital sum on a clean-break basis which ended her claim for financial provision for herself.

c. The court had no jurisdiction to make an order to provide a car or, if it had jurisdiction, it should decline it. Provision for a car regularly featured in Schedule One orders, but this was a case in which there was a consent order for financial provision in divorce. Any provision for cars would either have been encompassed in the lump sum of £950,000 that the mother accepted on a clean-break basis, or it would be incorporated in the maintenance provision that was ordered in favour of the child.

PROCEDURE AND PRACTICAL TIPS

- Applications for financial provision under Schedule 1 may be made to the High Court, County Court or Family Proceedings Court. All orders may be applied for in the High Court and County Court.[18] However, the powers of the Family Proceedings Court are limited to ordering periodical payments and lump sums,[19] and the amount of lump sum may not exceed £1,000.[20]

- The procedure for Schedule One applications is now governed by Part 9 of the Family Procedure Rules 2010. A Schedule One claim is now a 'financial remedy' and as a result:

    - An applicant should comply with the two Pre-Application Protocols annexed to PD 9A (first letter, disclosure, general principles, identifying issues early) and PD 3A (mediation);

    - Parties will need to exchanged Forms E1 (NOT Forms E) and complete PD documentation (PD 9A para 4.1);

    - Proceedings will follow the financial remedy structure of FDA, FDR and final hearing.

- However some differences remain between Schedule One and the remedy formerly known as ancillary relief:

    - Form E1, a shorted financial statement, is used;

    - A Schedule One claim does <u>not</u> come under the classification of financial remedy proceedings on costs (PD 28A para 4.2), so:

[18] Schedule 1 para 1(1)(a)
[19] Schedule 1 para a(1)(b)
[20] Schedule 1 para 5(2)

- The governing regime is CPR Part 44 but without the starting point of the unsuccessful party paying, so a general discretion taking into account all the circumstances (FPR 28.1 and 28.2)[21];

- Calderbank letters are still admissible in Schedule One

- Bear in mind the new rules on experts (FPR Part 25 and PD 25A to 25F) which significantly increase the amount of work which should be undertaken before the FDA in identifying experts, making enquiries of them, agreeing with the other side or if necessary making a written application.

- Don't limit your imagination when it comes to lump sums. As discussed in the cases above, the courts have interpreted their powers broadly, for example:
  - Clearing the mother's debts from moving house (Morgan v Hill)
  - A family car (H v C)
  - Moving costs (re N)
  - Reimbursing mortgage payments (DE v AB)
  - Reimbursing legal costs and funding future costs (R v F and CF v KM)
  - Internal decoration (Re P)
  - Furnishing a home, hospital costs and nursing costs (Philips v Peace)

- Where there are applications made under both TOLATA and Schedule One, as a matter of sensible management both matters should be considered by the same judge and at the same time as conjoined applications unless there is some special reason that it is not desired. See ***W v W (Joinder of Trusts of Land Act and Children Act applications) [2004] 2 FLR 321***. However, the pleadings of any dual case should be carefully thought through to ensure that the Schedule 1 claim is put in the alternative to the TOLATA claim. The mother may be arguing 100% share of the property in the TOLATA claim but needs to establish for her Schedule 1 claim that the father has an interest in the property she is seeking to be transferred to her.

[21] In KS v ND (Schedule 1: Appeal: Costs) [2013] EWHC 464 (Fam) Mostyn J indicated that Schedule One cases should start with a 'clean sheet' with respect to costs

- In the event that a father earns more than £104,000 net pa and lives in the jurisdiction he should be asked to concede at an early stage that the Court has jurisdiction to adjudge the quantum of child periodical payments. It should be noted with real caution that a father can always withdraw that consent (see ***V v V (Child Maintenance) [2001] 2 FLR 799 Per Wilson J***) so the father's consent in writing and a nominal order made by the court is imperative.

- If the father will not make this concession the mother must apply to the Child Support Agency seeking a maximum assessment. This should be done prior to the commencement of proceedings (only if the father consents or the CSA have made a maximum assessment does the Court have the power to make "top up" provision in section 8(6) Child Support Act 1991).

- In the very big money cases, a huge amount of time and expense can be saved by asking the father to agree that he can meet any award the court is likely to make. However, even then, evidence of the father's lifestyle and housing will be required[22].

- As the housing fund is likely to be a big issue, it is critical to obtain some estate agents' particulars of properties which the mother has seen and regards as appropriate. In particular, if acting for the applicant, consider the following:
    - Ensure you have cogent reasons for the properties and areas chosen. Are the properties near the applicant's support network, place of work or the child's school?
    - Ensure the size of housing will be appropriate for the whole of the child's minority- what is suitable for a toddler will be different from the space needed by a teenager.
    - Ensure the housing fund is big enough to allow for relocation if necessary- try not to choose an area which is so cheap that it will prove very difficult for the applicant to relocate should she need to in the future.

[22] PG v TW (No 2) (Child: Financial Provision) [2012]

- Be sure to include costs of purchase, particularly stamp duty, conveyancing costs, renovation costs and furnishing costs, when calculating the housing fund.
- Ensure provision is made for the sharing of buildings and contents insurance and maintenance costs.

- If acting for the respondent, ensure that he produces his own list of properties, taking into account the following:
  - Consider cheaper properties in the same area that the applicant has suggested which still meet the needs of the child;
  - Remember that the property will revert to the respondent in the future, so there is little point in selecting a property that is so undesirable it will prove difficult to sell;
  - Finding a properties which are managed by a freehold company can be a good way of maintaining some assurance that the common parts and building will be appropriately maintained;
  - Ideally find properties in the catchment areas of good state or grammar schools to have a better chance of averting any potential future claim for school fees;
  - Whilst it will not be possible to restrict the applicant to remain in the property for the whole of the child's minority, the courts can be open to a clause requiring a minimum term of occupation of say five years, to ensure some stability for the child.

- If the mother is contending for a high budget, the father must be entitled to discovery of her accounts etc to support her claimed spending. Beware of putting in items which do not benefit the child and are not part of a carer's allowance. Some salutary examples from ***N v C [2013] EWHC 399***:

  - Driving lessons for the mother when she had been learning on and off for years and had failed her test four times;
  - Cranial therapy and yoga for the mother, when the child had never attended with her;
  - £1,000pa for petrol, when the mother could not drive and did not have a car.

- Where the applicant has a statutory claim against more than one father the court should ensure that the applicant establishes their respective liabilities at a consolidated hearing or at consecutive hearings. See ***Morgan v Hill [2006] EWCA Civ 1602***.

Samantha Woodham

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Section 5

Companies: Salomon's Veil and fairness

Charles Hale

Companies

Salomon's Veil and Fairness...

Charles Hale

Petrodel Resources Ltd and others v Prest and Others [2012] EWCA Civ 1395 CA

- In the Supreme Court on the 5 and 6 March 2013 with no date set for a judgment yet.
- After an uncomfortably divided Court of Appeal judgment.
- 6 man and 1 women Court! Judgment assumed to be in favour the Court of Appeal position, but you never know...

Petrodel Resources Ltd and others v Prest and Others [2012] EWCA Civ 1395 CA

Facts

- Husband and wife married in 1993; they had four children and an affluent multinational lifestyle. The husband was prominent and successful in international oil development and trade. In financial proceedings following the breakdown of the marriage, the wife claimed that the husband was worth tens if not hundreds of millions of pounds and sought an overall award of £30.4m. The husband claimed that his liabilities exceeded his assets by £48m and proposed a £2m package for the wife.
- The husband repeatedly breached his duty to give full and frank disclosure, was obstructive in the proceedings, breached multiple orders, and failed to pay costs awarded against him.
- Moylan J awarded the wife £17.5m.

Facts cont…

- The judge ordered the husband to **'transfer or cause to be transferred'** to the wife four London properties and an interest in a fifth all held in the name of Petrodel Resources Ltd and two London properties held in the name of V Petroleum Ltd. The companies were incorporated in the Isle of Man. **The judge found that the husband was the only effective shareholder of these and other companies, that he exercised sole control over the companies, that all the assets held within the companies were effectively the husband's property and that he was (conservatively) worth some £37.5m.** Moylan J **rejected** the assertion that there had been **impropriety** on the husband's part in setting up the company structure, which had been established for conventional reasons including wealth management and tax avoidance.
- He therefore rejected that there was any **sham.**

Facts cont…

- The judge purported to make his order under s 24(1)(a) of the Matrimonial Causes Act 1973, which provides that a party to the marriage may be ordered to transfer to the other party 'such property as may be so specified, being **such property as the first mentioned party is entitled, either in possession or reversion'.**
- The husband's appeal was struck out because of his failure to comply with conditions of court orders. The companies appealed, arguing that the husband was not entitled to the properties in question within the meaning of s 24(1)(a).

Held — Allowing the appeal (Thorpe LJ dissenting)

- (1) **Salomon v A Salomon and Co Ltd [1897] AC 22** provided the highest authority for the principle that a company duly incorporated was a legal entity wholly separate from its corporators, with rights and liabilities of its own. A company's assets belong beneficially to the company and its corporators have no interest in them. Such assets cannot be looked to in order to satisfy the personal obligations of the corporators. **It made no difference to the fact of a company's separate entity that a single individual controlled all its shares.** The judge's reasoning that '**power equals property**' had been wrong. It was heretical to suggest that the total control which a single individual was and always would be entitled to exercise over the affairs of his one-man company resulted in the company's assets becoming assets to which that individual was entitled.
- (2) In the present context, **save in cases where it was legitimate to pierce the corporate veil, the separate corporate identity of a company is a fact of legal life that all courts are required to recognise and respect, whatever jurisdiction they are exercising.** It is not open to a court, simply because it regards it as just and convenient, to disregard such separate identity and appropriate the assets of a company in satisfaction either of the monetary claims of a corporators' creditors or of the claims of a corporator's spouse.

Held — Allowing the appeal (Thorpe LJ dissenting) cont…

- Salomon precludes any such approach and the Salomon principle must apply equally in all jurisdictions. The obiter dicta in **Nicholas v Nicholas [1984] FLR 285** to different effect were inconsistent with Salomon and should not be followed.

- (3) Authorities including **Woolfson v Strathclyde Regional Council (1978) SC (HL) 90, Ben Hashem v Al Shayif [2009] 2 FLR 115 and VTB Capital plc v Nutriek International Corp [2012] 2 BCLC 437 showed that there may be factual circumstances in which it will be legitimate for the court to pierce the corporate veil and, to an appropriate extent, to disregard the fact of its separate identity from that of its corporators.** However, that could be done only in limited circumstances, central to which is the demonstration of relevant impropriety in the corporators' use of the company. That jurisdiction is an exceptional one. There was no rational ground to regard family courts as exempt from the need to be satisfied as to the conditions affirmed in **VTB Capital v Nutriek International Corporation** before piercing the corporate veil. Inconsistent dicta in **Nicholas v Nicholas** should no longer be regarded as of any authority.

Held — Allowing the appeal (Thorpe LJ dissenting) cont…

- (4) In this case, once the judge had rejected the impropriety assertion, **he had no choice but to reject the claim that the companies' London properties were or could be regarded as properties to which the husband had any entitlement**. He had no jurisdiction under s 24(1)(a) to make the orders he did in relation to those properties. **Insofar as he was suggesting that s 24(1)(a) enabled the court to treat a company's property as belonging to its 100% owner, he was wrong.** Section 24(1)(a) do no more than confer a jurisdiction to make a transfer order **in respect of property to which the respondent spouse is beneficially entitled.** Whether such spouse is or is not so entitled will be a question of fact, to be answered in the same way as it would regardless of the making of an application under s 24(1)(a).

Per Thorpe LJ dissenting:

- The simple question was whether an individual is entitled to property within the meaning of s 24(1)(a). Family Division judges with particular expertise in this field have on many occasions stressed **the need to get to the reality in determining the assets to which a spouse is entitled (the "reality approach").** The judge had found a complete absence of boundaries between the husband and his companies; the companies were wholly owned and controlled by him and there were no third party interests. On the exceptional facts of this case, the judge had been entitled to order the husband to transfer or cause to be transferred to the wife the assets which he did.

Comment

- The majority and (the) minority judgments in the Court of Appeal reveal the starkest of difference in approach to the application of general principles of property and company law in financial proceedings in the Family Division.
- First Immerman and now Prest? Is this a theme?
- Thorpe LJ (the senior member of the Court of Appeal on this occasion) endorsed the '**reality**' approach adopted by some Family Division judges – the husband was using his companies to stymie his wife's claims: ***'If the law permits him to do so it defeats the Family Division judge's duty to achieve a fair result.'***
- By contrast, Rimer LJ's judgment (endorsed by Patten LJ) insists that the established principles of legal and beneficial ownership and of company law must be applied uniformly – and strictly – **across all divisions of the High Court. Patten LJ concluded his short judgment with these observations on the dicta in Nicholas v Nicholas: *'They have led judges of the Family Division to adopt and develop an approach to company owned assets in ancillary relief applications which amounts almost to a separate system of legal rules unaffected by the relevant principles of English property and company law. That must now cease.'***

Comment cont…

- Rimer LJ's analysis may be unimpeachable in law but how can it be fair and where should fairness play a part? Look then to White and to the statute.
- The difficulty which arises in the context of family proceedings is where all the assets are (as here) held in corporate structures (albeit wholly controlled by a spouse). Strict application of company law principles (and **probably property law principles**) in reality deprives the family court of the power to make effective orders in favour of the other spouse. Funds derived (per Thorpe LJ '***milked***') from corporate structures may of course be taken into account as resources within the terms of s 25(2)(a), but that may be of limited efficacy where there are no other funds on which an order can 'bite'.
- The Supreme Court have now retired to consider the extremely important issues the case raises. Baroness Hale and Lord Wilson – are expected to toe the Thorpe LJ line. BUT they will need to convince at least two other Supreme Court Justices to cross the floor of the House if family law is to retain the protection of Nicholas when dealing with companies.
- The SC (recent)decision in **VTB v Nutritek** does not support the wife in Prest.

What Advice then for Client/Wives?

- Don't rest on your laurels? Just because he says the properties are tax efficient in the hands of companies does not mean he will share if it goes wrong.
- Take advice during the marriage?
- Pre nups/Post nups and understanding what/who owns what.
- There must be evidence of *sham* if the corporate veil is to be broken. How to obtain?
- Understanding the true beneficial ownership of properties? What the case does not mean?
- Wait for the SC to deliver its wisdom before taking next steps. Discussion, what are the other practical issues? Joinder/S.37 apps/costs?

Section 6

Speakers Profiles

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Michael Sternberg QC

"He is everything one could want in a QC. Intelligent, precise and thoughtful, he is a joy to work with." Chambers and Partners

Experience

Year of Call: 1975
Year of Silk: 2008

Education

MA LLM (Cantab) MCIArb
Fellow of the International Academy of International Lawyers
Fully Qualified Family Law Arbitrator
Qualified Collaborative Lawyer
Qualified Mediator
Fellow of the Royal Society of Arts

Languages

Basic French

Profile

Michael Sternberg's practice covers the two main areas of family work - financial remedy and child cases. He has a substantial practice in high-value financial cases and is instructed by a number of the top London firms. He regards negotiation as of great importance in getting the best result in the speediest time at the lowest cost to the client. So many of his cases settle avoiding the costs and publicity of what would otherwise be high profile contests. The financial work involves not only the latest developments in family law, but also a high degree of expertise in company law and valuation, farming divorce cases, prenuptial agreements, tax law and cases where there is a conflict of jurisdiction.

Unusually Michael also has extensive experience in difficult child cases. He was instructed consistently in the past not only by the Official Solicitor, and Cafcass Legal, but also by local authorities in highly demanding cases in the High Court, Court of Appeal and House of Lords, which have raised difficult questions of fact and law.

Michael is an expert in contests between England and Wales and other jurisdictions as to which should decide the divorce - both in respect of Brussels II (revised) and generally - also in relation to injunctions to prevent a party from proceeding with divorce in a foreign jurisdiction. He has lectured on the topic.

Michael has acted as an advocate to the court in a series of reported decisions. He succeeded against the UK Government in relation to a breaches of Articles 8 and 12 of the ECHR, on behalf of a post-operative transsexual, heard by the Grand Chamber in Strasbourg (I v UK [2002] 2 FLR 518). Michael was previously listed as a leading junior in the relatively small list of practitioners in London within The Legal 500 since 2001. Chambers Guide to the UK Legal Profession also for many years rated him as one of the few leading juniors. Michael is a member of the Family Law Bar Association and he was the Assistant Secretary from 1986 - 1988.

Michael is also the author of two chapters in David Davidson’s book “Pensions and Marriage Breakdown “ 3rd Edition (published by the Law Society in 2005).

Michael was in 2009 nominated by the Chairman of the Bar to chair a joint tribunal set up by the Bar Council and the Law Society / OSS to

resolve major dispute between a leading junior Barrister and a prominent firm of solicitors.

Michael was one of only 3 Leading Counsel to be invited to appear as a principal speaker on issues of spousal support after divorce, at the Butterworths Lexis Nexis Matrimonial Finance and Divorce National Conference on 28th April 2010.

On 4th February 2011 Michael chaired a day conference on advanced ancillary relief topics at the RAF Club attended by over 100 solicitors at which 5 QC's spoke.

He chaired a similar financial remedy day conference for the White Paper Company in January 2013.

Michael is a Qualified Mediator and Collaborative lawyer. In September 2011 he attended the first course run by The Chartered Institute of Arbitrators to become one of the first Family Law Arbitrators.

In March 2013 Michael chaired a Lexis Nexis webinar on all aspects of ADR.

Michael is the Chair of the Trustees of the Three Faith Forum – the country's leading active interfaith charitable agency, which since 1997 has been generating understanding, goodwill and friendship between Muslims, Christians and Jews, as well as people of other faiths and in the wider society.

Professional Memberships

Family Law Bar Association
International Academy of Matrimonial Lawyers
Three Faiths Forum Legal Group (founder member)
Gray's Inn
Inner Temple
Affiliate Member of Resolution

Directories

The "meticulous" Michael Sternberg QC has a broad family law practice and is highly rated for his work in both the children law and matrimonial finance spheres. He is regularly instructed in high-value ancillary relief cases and complex child abduction matters, and is an accredited mediator and collaborative lawyer.
Recommended as a Leading Family Silk in Chambers & Partners **2013**

'If battle is required', Michael Sternberg QC is 'your chosen gladiator'.
Recommended as a Leading Family Silk in The Legal 500 **2012**

Michael Sternberg QC's outstanding practice continues to cover both complex international children matters and ancillary relief cases. Sources say: "He is everything one could want in a QC. Intelligent, precise and thoughtful, he is a joy to work with."
Recommended as a Leading Silk in both Children and Matrimonial Finance in Chambers and Partners **2012**

Michael Sternberg QC 'thinks outside the box and is a great strategist'.
Recommended as a Leading Family Silk in The Legal 500 **2011**

Michael Sternberg QC now focuses primarily on matrimonial finance work and is often instructed in cases with cross-jurisdictional issues. Commentators note that "he thinks out detailed strategies and is always popular with clients."
Recommended as a Leading Silk in Chambers and Partners**2011**

Michael Sternberg QC has a mixed practice but won most support from the market for his children work. His recent cases include D v D, R v R, and S v S, all of which were contested children and ancillary relief cases where millions of pounds were at stake.
Recommended as a Leading Silk in Chambers and Partners **2010**

Michael Sternberg QC 'provides a first-class service and often comes up with creative solutions to difficult problems'.
Recommended as a Leading Family Silk in The Legal 500 **2010**

New silk Michael Sternberg QC is a "meticulous and detailed" barrister who carries out both ancillary relief and children-related matters. He has a particular interest in cases with an international dimension.
Recommended as a Leading Family Silk in the area of Children in Chambers & Partners **2009**

Michael Sternberg QC who has 'excellent attention to detail', and is 'very good at cross-examination'.
Recommended as a Leading Family Silk in The Legal 500 **2009**

Michael Sternberg is "first choice for anything with an international dimension - be it Hague Convention, forum shopping or money matters." He is still best known for his varied work with children.
Recommended as a leading junior in Family/Children in Chambers & Partners **2008**

Michael Sternberg has a more varied practice and undertakes a mixture of both children and finance work. He is "particularly supportive of clients and is extremely conscientious" managing to maintain a "delightful manner in the most difficult cases."
Recommended as a leading junior in Family/Children in Chambers & Partners **2007**

Michael is also recommended as a Family Leading Junior in The Legal 500 **2006**

Practice areas

- Financial Remedies
- Private Law

Dispute resolution

- Collaborative Lawyer
- Mediation
- Early Neutral Evaluator
- Arbitration

Direct Access

- Direct Access

Cases

Re M (A Child) Sub Nom Re M (Adoption: International Adoption Trade) (2003)
[2003] EWHC 219 (Fam)

Field v Field
[2003] 1 FLR 376

I v United Kingdom
[2002] 2 FLR 518

Re B (Adoption by one Natural Parent to Exclusion of other)
[2001] 1 FLR 589

Re AGN (Adoption: Foreign Adoption)
[2000] 2 FLR 431

Re AMR (Adoption: Procedure)
[1999] 2 FLR 807

Re M (Sexual Abuse Allegations: Interviewing Techniques)
[1999] 2 FLR 92

Re S (Removal from Jurisdiction)
[1999] 1 FLR 850

S v S (Judgment in Chambers: Disclosure)
[1997] 1 WLR 1621

Re M (Petition to European Commission of Human Rights)
[1997] 1 FLR 755

Note H v H (Residence Order: Leave to Remove from Jurisdiction)
[1995] 1 FLR 529

R v Plymouth Justices Ex Parte W
[1993] 2 FLR 777

Re F (A Minor) (Blood Tests: Parental Rights)
[1993] 3 WLR 369

Re F (A Minor: Paternity Test)
[1993] 1 FLR 598

H v H (Financial Provision: Capital Allowance)
[1993] 2 FLR 335

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Jonathan Cohen QC

Jonathan has for many years been recommended as a leading silk in both finance and children cases. "He earns the respect of judges with his measured and strategic approach"

Experience

Year of Call: 1974
Year of Silk: 1997

Education

BA (Kent)

Appointments

Recorder
Deputy High Court Judge (Family Division)
President of the Mental Health Review Tribunal

Profile

Jonathan has been Head of Chambers 2003-2012. He acts in difficult financial cases and is praised for his measured, strategic and commercial approach. His children practice encompasses both public and private law cases. He acts also in professional negligence cases arising out of family work. He sits as a Judge in both children and money cases and acts in and conducts out of court discussions and settlement meetings. His very wide experience is called upon by clients from all over the country.

Professional Memberships

Fellow of International Academy of Matrimonial Lawyers
Family Law Bar Association
Professional Negligence Bar Association
Member of the Chartered Institute of Arbitrators

Directories

Jonathan Cohen QCis a "wonderful" family law practitioner and a deputy High Court judge in the family division. Highly adept at children cases, he is further noted for his matrimonial finance practice, and is an expert in high-value ancillary relief cases.
Recommended as a Leading Family Silk in Chambers & Partners 2013

Jonathan Cohen QC has ‘a calm, reassuring manner that endears him to court and clients alike’.
Legal 500 - 2012
Recommended as a leading Silk in the areas of Children and Family (divorce and ancillary relief) Law

Jonathan Cohen QC is one of the set's few matrimonial finance specialists. He also handles children work, and solicitors go to him "for those cases where you really need the judge to listen to the strength and simplicity of your main points."
Recommended as a Leading Family Silk in Chambers & Partners 2012

Head of chambers Jonathan Cohen QC is a highly experienced silk with a mixed finance and children practice. He earns the respect of judges with his measured and strategic approach.
Recommended as a Leading Family Silk in Chambers & Partners 2011

Jonathan Cohen QC is ‘highly intelligent, numerate and commercial’
Recommended in Legal 500 2011 as a Leading Family Silk in the areas of Children Law (including public and private law) and Family Law (including divorce and ancillary relief).

Jonathan Cohen QC is popular, he is "a thorough and effective financial specialist".
Recommended as a Leading Family Silk in Chambers & Partners 2010

Recommended in Legal 500 2010 as a Leading Family Silk in the areas of Children Law (including public and private law) and Family Law (including divorce and ancillary relief).

Jonathan Cohen QC is part of a sizeable contingent of members at the set who receive briefs in both financial and children-related matters. Commentators note that he "doesn't have the aggression of some barristers," deciding instead to deploy a "steady and clear" style of advocacy: "When he speaks people listen."
Recommended as a Leading Family Silk in the areas of Children and Matrimonial Finance in Chambers & Partners 2009.

The 'formidable' Jonathan Cohen QC
Recommended in the Legal 500 2009 as a Leading Family Silk in the areas of Children Law (including public and private law) and Family (including divorce and ancillary relief).

As head of chambers, Jonathan Cohen QC epitomises the set in being best known for his work with children but also having a respected practice in matrimonial finances. “A very civilised man who relates well to prickly clients,” in the courtroom he is “a good and convincing advocate who is excellent at persuading judges of the rightness of his cause.”
Recommended as a Leading Family Silk in the areas of Children and Matrimonial Finance in Chambers & Partners 2008 Jonathan Cohen QC is also recommended in The Legal 500 2008 as a Leading Family Silk.

Practice areas

- Financial Remedies
- Private Law
- Public Law
- International

Dispute resolution

- Collaborative Lawyer
- Mediation
- Early Neutral Evaluator
- Arbitration

Direct Access

- Direct Access

Cases

D v D (2012)
[2012] EWCA Civ 1641

L v L [2011]
[2011] EWHC 2207 (Fam)

Re B (Children) (2009)
[2009] EWCA Civ 1499

Hvorostovsky v Hvorostovsky (2009)
[2009] 2 FLR 1574 : [2009] 3 FCR 650 : [2009] Fam Law 1019 : (2009) 106(31) LSG 18 : (2009) 153(30) SJLB 28 : [2009] EWCA Civ 791

I v I (2009)
[2009] EWCA Civ 412

Re F (Abduction: Removal outside jursidiction)
[2008] EWCA Civ 854

I v I (Ancillary Relief: Disclosure)
[2008] EWHC 1167 (Fam)

RE C (DIVORCE: FINANCIAL RELIEF) [2007] EWHC 1911 (Fam)
[2008] 1 FLR 625

S v S (ANCILLARY RELIEF: IMPORTANCE OF FDR) [2007] EWHC 1975 (Fam)
[2008] 1 FLR 944

Re D (Paternity)
FLR 2007 2 26

Re X (Emergency Protection Orders)
[2006] 2 FLR 701

Prazic v Prazic
[2006] 2 FLR 1128

Re G (Interim Care Order: Residential Assessment)
[2006] 1 FLR 601

Re G (A Minor) (Interim Care Order: Residential Assessment)
[2005] Daily Cases

Re G (A Minor) (Interim Care Order: Residential Assessment)
[2006] 1 AC 576

H v H (Lump Sum: Interest Payable)
[2006] 1 FLR 327

S v B (Ancillary Relief: Costs)
[2005] 1 FLR 474

Re G (Interim Care Order: Residential Assessment)
[2004] 1 FLR 876

Re C (Welfare of Child: Immunisation)
[2003] 2 FLR 1095

North Yorkshire County Council v SA
[2003] 2 FLR 849

Re C (Welfare of Child: Immunisation)
[2003] 2 FLR 1167

M v L (Financial Relief After Overseas Divorce)
[2003] 2 FLR 425

Parra v Parra
[2003] 1 FLR 942

A v Times Newspapers Ltd
[2003] 1 FLR 689

B County Council v L & Ors (2002)
[2002] EWHC 2327 (Fam)

Re B (Care Proceedings: Diplomatic Immunity)
[2003] 1 FLR 241

Re B (A Child) (Care Proceedings: Diplomatic Immunity)
[2203] 2 WLR 168

Re B (A Child) (Care Proceedings: Diplomatic Immunity)
[2003] Fam 16

P v P (Financial Provision: Clean Break: Costs Schedule and Schedule to Judgement)
[2002] 2 FLR 1075

Westbury v Sampson
[2002] 1 FLR 166

Re G (Care Proceedings: Spilt Trials)
[2001] 1 FLR 872

Re B-M (A Child) (Adoption) (2000)
LTL 25/7/2000 EXTEMPORE

N v N (Jurisdiction: Pre-Nuptial Agreement)
[1999] 2 FLR 745

Piglowska v Piglowski
[1999] 1 WLR 1360

Re T (Staying Contact in Non-Convention Country) (Note)
[1999] 1 FLR 262

Piglowska v Piglowski
[1999] 2 FLR 763

C v C (Financial Relief: Short Marriage)
[1997] 2 FLR 26

Re AW (Adoption Application)
[1993] 1 FLR 62

M v Lambeth Borough Council (No. 3)
[1985] FLR 1167

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Henry Clayton

Experience
Year of Call: 2007

Education
University of Oxford (Modern History)
BPP law school (BVC)
Harmsworth Scholar (Middle Temple) 2006
Semi-finalist English Speaking Union national mooting competition 2006

Profile

Henry's work covers all aspects of family law, with an emphasis on matrimonial and non-matrimonial financial disputes, difficult contact cases and Court of Protection work.

Henry has experience of more unusual types of finance-related work, such as schedule 1 cases, CSA appeals, bankruptcy, variation of a foreign maintenance order and costs-only proceedings in the Supreme Court Costs Office.

Before coming to the bar Henry worked for a commercial solicitors' firm, which has given him a good foundation in business terminology and structures which arise in matrimonial finance cases.

In his spare time Henry enjoys playing tennis, football and going to the gym.

Professional Memberships
FLBA
Middle Temple

Practice areas
- Financial Remedies
- Private Law
- Public Law
- International
- Court of Protection

Direct Access
- Direct Access

Cases
Re E (A Child) [2011]
[2011] EWHC 3521 (Fam)

Mekarska v Ruiz and Boyden [2011]
[2011] EWHC 913 (Fam)

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Samantha Woodham

Experience
Year of Call: 2006

Education
MA Law Cambridge University
Qualified Collaborative Lawyer

Languages
French, Spanish

Profile
Samantha is regularly instructed in financial remedy and trusts of land applications, as well as complex private law children cases. Before being called to the Bar Samantha qualified as a solicitor at a magic circle law firm. Her experience at a corporate law firm developed her skills as an efficient and thorough practitioner, which she combines with a friendly and approachable style.

Professional Memberships
Middle Temple

Practice areas
- Financial Remedies
- Private Law

Dispute resolution
- Collaborative Lawyer

Direct Access
- Direct Access

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Charles Hale

Charles Hale is an ‘exceptional performer’ who is ‘outstanding at both children and money work’...
‘a formidable advocate, particularly in cross-examination’.
Legal 500

Experience
Year of Call: 1992

Education
LLB (Hons)
Blackstone Scholar
Middle Temple

Appointments
Elected member of the Bar Council of England and Wales

Profile
Charles is a family advocate with particular expertise in all aspects of matrimonial finance and Schedule 1 (financial remedies) and private law children work. He is regularly instructed in international family disputes, leave to remove and child abduction cases involving international law, Brussels I and II and international treaties. He has provided advice and Affidavits of Laws in French and Australian divorce cases. In domestic cases, Charles has a reputation for dealing with the most complex cases involving financial disputes as well as intractable and alienated parent cases, vulnerable adult/child cases and also cases arising out of same sex/alternative family disputes.

As one of the few recognized leading juniors in both matrimonial finance and children work, Charles is often instructed to represent clients in all issues arising out of their separation. Regularly acting for parents and divorcing spouses, Charles has also been instructed on behalf of Cafcass Legal and Guardians for specialist advice and advocacy. Charles is also qualified to receive Direct Access instructions from foreign lawyers and professional lay clients.

Charles is a member of the Family Law Bar Association and is a national committee member since 2004. He has previously taught at Kingston University and regularly lectures to practitioners, Resolution and writes articles in leading journals including a regular political/legal column in Counsel Magazine. Charles was elected as a member of the Bar Council in 2004, and was a past Chairman of the Public Affairs Committee. He is a member of the General Management Committee of the Bar. His Bar Council/FLBA work regularly involves interplay between the government, the Bar and family justice.

Professional Memberships
Family Law Bar Association
Association of Lawyers for Children
South Eastern Circuit
Middle Temple
Member of the International Association of Matrimonial Lawyers (IAML)

Directories

Charles Hale climbs the rankings for both children law and matrimonial finance matters, and receives strong plaudits for his work pertaining to international children disputes and high net worth divorces. Sources reveal that he "never takes a bad point," while adding that he is a "smart advocate" who is "good at finding solutions to intractable problems."
Recommended as a leading Family Junior in Chambers & Partners **2013**
(Band 1)

The ‘impressive’ Charles Hale, who is ‘a number-one choice for complicated children cases as well as financial issues’.
Recommended as a Leading Junior in the areas of Children Law (including public and private law) and Family Law (including divorce and ancillary relief) in The Legal 500 **2012**

Charles Hale "is very good at both money and children cases," and is thus a popular choice amongst solicitors for cases that contain both elements. He has a "very conciliatory approach and is extremely popular with clients," say sources.
Recommended as a Leading Junior for Children and Matrimonial Finance in Chambers and Partners **2012**

Charles Hale is an ‘exceptional performer’ who is ‘outstanding at both children and money work’. Charles Hale is ‘a formidable advocate, particularly in cross-examination ’.
Recommended as a Leading Junior in the areas of Children Law (including public and private law) and Family Law (including divorce and ancillary relief) in The Legal 500 **2011**

Charles Hale is a popular choice among many of London's leading solicitors. He is equally adept at children and matrimonial finance work. Sources note that "his jovial character enables him to forge strong relationships with clients."
Recommended as a Leading Junior Chambers and Partners **2011**

Recommended as a Leading Junior in the areas of Children Law (including public and private law) and Family Law (including divorce and ancillary relief) in The Legal 500 **2010**

Charles Hale who undertakes both leave-to-remove cases and matrimonial finance matters. Hale is "a tremendously hard-working barrister who always has a very keen sense of his cases."
Recommended as a Leading Junior Chambers and Partners **2010**

The 'brilliant' Charles Hale is recommended as a 'pleasure to work with'.
Recommended as a Leading Junior in the areas of Children Law (including public and private law) and Family Law (including divorce and ancillary relief) in The Legal 500 **2009**

Charles Hale brings his "straight-talking approach" and "excellent attention to detail" to a practice that combines children-related matters with matrimonial finance work. He is regulalry briefed, as is a "careful, vigorous and balanced advocate."
Recommended as a Leading Family Junior in the areas of Children and Matrimonial Finance in Chambers and Partners **2009**

Charles has a broad practice embracing public and private law ancillary relief and child abduction. “Clients love him”, reported one solicitor, “because he is one of the few barristers prepared to give them a little TLC”
Recommended as a Leading Family Junior in the areas of Children and Matrimonial Finance in Chambers and Partners **2008**

Charles Hale is known primarily for his children work, although he does have a sound financial practice. "Exceptionally helpful and reassuring", he is a "delightful fellow."
Recommended as a Leading Family Junior in the areas of Children and Matrimonial Finance in Chambers and Partners **2007**

Practice areas

- Financial Remedies
- Private Law
- Public Law
- International
- Court of Protection

Direct Access

- Direct Access

Awards

Family Law Awards 2012
JUNIOR BARRISTER OF THE YEAR

Cases

N v C [2013]
[2013] EWHC 399 (Fam)

T (Children) [2012]
[2012] UKSC 36

A v B and C [2012]
[2012] EWCA Civ 285

Re R (A Child) sub nom DE L v H (2009)
[2010] 1 FLR 1229 : [2010] Fam Law 328 : [2009] EWHC 3074 (Fam)

De L v H [2009]
[2009] EWHC 3074 (Fam); [2010] 1 FLR 1229

D v S sub nom Re E (A Minor) (DOB 19 May 2000) : S v D (2008)
[2008] EWHC 363 (Fam); (2008) 2 FLR 293

Hammerton v Hammerton (2007)
[2007] EWCA Civ 248

Re G (Interim Care Order: Residential Assessment)
[2006] 1 FLR 601

Re G (A Minor) (Interim Care Order: Residential Assessment)
[2005] Daily Cases

Re G (A Minor) (Interim Care Order: Residential Assessment)
[2006] 1 AC 576

Re G (Interim Care Order: Residential Assessment)
[2004] 1 FLR 876

B County Council v L & Ors (2002)
[2002] EWHC 2327 (Fam)

Michael Andrew Gayle v Julie Nwamara Gayle (2001)
[2001] EWCA Civ 1910

Re L (Removal from Jurisdiction: Holiday)
[2001] 1 FLR 241

Section 7

Members of Chambers

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Barristers

4 Paper Buildings has an ‘unrivalled collection of senior and junior barristers in the field. Predominantly known for its children work, but also has some ’really excellent people for matrimonial finance cases’. Legal 500 2011

Barristers

Alex Verdan QC
Call: 1987 | Silk: 2006
Head of Chambers

Jonathan Cohen QC
Call: 1974 | Silk: 1997

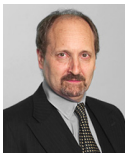
Baroness Scotland QC
Call: 1977 | Silk: 1991

Henry Setright QC
Call: 1979 | Silk: 2001

Marcus Scott-Manderson QC
Call: 1980 | Silk: 2006

Kate Branigan QC
Call: 1985 | Silk: 2006

Jo Delahunty QC
Call: 1986 | Silk: 2006



Michael Sternberg QC
Call: 1975 | Silk: 2008

Catherine Wood QC
Call: 1985 | Silk: 2011

Rex Howling QC
Call: 1991 | Silk: 2011

Teertha Gupta QC
Call: 1990 | Silk: 2012

David Williams QC
Call: 1990 | Silk: 2013

Harry Turcan
Call: 1965

Amanda Barrington-Smyth
Call: 1972

Robin Barda
Call: 1975

Jane Rayson
Call: 1982

Mark Johnstone
Call: 1984

Elizabeth Coleman
Call: 1985

Alistair G Perkins
Call: 1986

Christopher Hames
Call: 1987

Stephen Lyon
Call: 1987

Jane Probyn
Call: 1988

James Shaw
Call: 1988

Mark Jarman
Call: 1989

Sally Bradley
Call: 1989

Barbara Mills
Call: 1990

Joy Brereton
Call: 1990

Joanne Brown
Call: 1990

Sam King
Call: 1990

Alison Grief
Call: 1990

David Bedingfield
Call: 1991

John Tughan
Call: 1991

Cyrus Larizadeh
Call: 1992

Charles Hale
Call: 1992

Michael Simon
Call: 1992

Justin Ageros
Call: 1993

Rob Littlewood
Call: 1993

Paul Hepher
Call: 1994

Cliona Papazian
Call: 1994

Judith Murray
Call: 1994

Ruth Kirby
Call: 1994

Sarah Lewis
Call: 1995

Nicholas Fairbank
Call: 1996

James Copley
Call: 1997

Justine Johnston
Call: 1997

Oliver Jones
Call: 1998

Lucy Cheetham
Call: 1999

Hassan Khan
Call: 1999

Cleo Perry
Call: 2000

Harry Gates
Call: 2001

Rebecca Foulkes
Call: 2001

Katie Wood
Call: 2001

Rhiannon Lloyd
Call: 2002

Kate Van Rol
Call: 2002

Ceri White
Call: 2002

Matthew Persson
Call: 2003

Dorothea Gartland
Call: 2004

Samantha Woodham
Call: 2006

Laura Morley
Call: 2006

Nicola Wallace
Call: 2006

Michael Gration
Call: 2007

Jacqueline Renton
Call: 2007

Andrew Powell
Call: 2008

Henry Clayton
Call: 2007

Jasper Baird-Murray
Call: 2008

Sophie Connors
Call: 2009

Michael Edwards
Call: 2010

Harry Nosworthy
Call: 2010

Rachel Chisholm
Call: 2010

Julia Townend
Call: 2011

Door Tenants

Paul Hopkins QC
Call: 1989 | Silk: 2009
Door Tenant

Professor Marilyn Freeman
Call: 1986
Door Tenant

Susan Baldock
Call: 1988
Door Tenant

Elizabeth Couch
Call: 2003
Door Tenant

Belle Turner
Call: 2003
Door Tenant