St John's CHAMBERS

Family Affairs
Financial remedy update: Spring 2022

Bethany Scarsbrook and Sophie Smith-Holland,
St John's Chambers, Bristol

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As we venture beyond the tightest grips of the Covid-19 pandemic and exclusive remote working, a flurry of guidance has been issued. This serves to re-emphasize professional standards and efficiency improvements for practitioners. The guidance started with two President's Memorandums dated 10 November 2021. In **President's Memorandum: Drafting Orders,** McFarlane J observed that despite his warnings when speaking at the FLBA Conference in October 2021, a highly adversarial and confrontational process when drafting orders had continued. This was particularly so in the fields of financial remedies and private children work. This was leading to great delay and much unnecessary verbiage. An area rife with such behaviour is recitals. It is not necessary for a financial remedy order to record any background matters in recitals, although the court has discretion to permit the parties to do so. In this instance, such recitals must be drafted as concisely and neutrally as possible. Parties seeking to attribute views to the court which did not form part of the court's decision is a surprisingly prevalent practice which must cease. Furthermore, seeking to record a party's position before or during the hearing is again creating conflict and is wholly superfluous. Whilst the President did not consider that the Family Court requires a Practice Direction regulating professional standards in drafting at the present time, it will have to be considered if the principles within that memorandum are not observed and non-compliance continues. In the **President's Memorandum: Witness Statements**, a similar warning was issued. Many witness statements are prepared in breach of proper professional standards. Such breaches have already caused a highly prescriptive new Civil Procedural Rule to be passed. As with draft orders, the President warns that if the principles within this memorandum are not observed, the Family Procedure Rule Committee will have to consider whether the Family Court requires an equivalent Practice Direction.

In the same month, the updated Financial Remedy Court Organogram was published. Updating guidance on electronic bundles was issued on 18 February 2022, this should be read in conjunction with the guidance published on 29 November and 21 December 2021.

Significant changes which will impact all financial remedy practitioners were introduced on 11 January 2022 via the **Financial Remedies Court Efficiency Statement**. The notice was published by Mostyn J and HHJ Hess with the authority of the President of the Family Division. It is essential reading for all practitioners. Of particular note are the following points:

a. Position statements (including any attached schedules) should not exceed:
    a. 6 pages for a first appointment;
    b. 8 pages for any interim hearing;
    c. 12 pages for an FDR; and
    d. 15 pages for a Final Hearing.

   While these are statements of best practice, and do not derogate from the limits set out in PD27A, where a position statement for a hearing is intended to exceed these limits, it is a matter of good practice to seek permission from the court.
b. The day before the first appointment the applicant must file with the court:
    a. a composite case summary (using "Template ES1"); and
    b. a composite schedule of assets and income. This should use "Template ES2" unless wholly impractical.
c. 7 days before the FDR appointment, the applicant must file with the court:
    a. An updated composite case summary using "Template ES1";
    b. An updated composite schedule of assets and income, again using "Template ES2" unless wholly impractical to do so; and
    c. A composite chronology recording key relationship and litigation dates in neutral terms. Any unagreed items must be clearly denoted.

   The parties must collaborate prior to the hearing to produce these documents. It is unacceptable for the court to be presented with competing asset schedules or chronologies at an FDR and/or final hearing. Advocates may continue to produce their own 'net effect' schedules, which will count towards the overall page count of their position statement.
d. Position statements for each hearing must contain short details of the parties' efforts to negotiate openly, reasonably and responsibly. The parties will be warned that, whatever the size of the case, a failure to make reasonable attempts to compromise cases in open negotiation will be met by cost penalties.
e. If advocates without reasonable excuse fail to comply at the final hearing with the requirements for: (i) Provision of agreed asset schedules and chronology; or (ii) length and content of position statements; or (iii) the time for filing of position statements, then they will risk an order being made disallowing a proportion of their fees pursuant to CPR 44.11(1)(b) and/or section 51(6) Senior Courts Act 1981.

The tightening of professional standards and efficiency is also reflected in recent authorities. In particular, the importance of accurate time estimates for hearings (see **E v. B (Interim Maintenance Inaccurate Time Estimate) [2021] EWFC B90** below).

A second, but no less important, emerging theme within the Financial Remedy Court is transparency. Alongside the Report of the President's Transparency Review: **Confidence and Confidentiality: Transparency in the Family Courts**, a consultation was launched by Mostyn J and HHJ Hess, **The Consultation on a Proposal for a Standard Reporting Permission Order**

in Financial Remedy Proceedings. The consultation was published on 29 October 2021 with responses on the proposed Reporting Permission Order ('RPO') required by 26 November 2021. The RPO proposed does not seek to change any existing legal standards, but rather to codify and clarify the existing rules. It also seeks to address whether the current rules are arguably contradictory. In particular, where two restrictions effectively emasculate any journalist or legal blogger from being able to give a meaningful report of a case: the first being that financial information from the parties obtained under compulsion is protected and may not be referred to in a published report without leave of the court; and secondly, that a journalist/legal blogger is not allowed to see any documents without leave of the court.

Finally, it has been announced that all standard family orders are due to be reviewed in the upcoming months, with updated financial remedy templates due to be updated by Summer 2022.

In **BT v. CU [2021] EWFC 87**, Mostyn J addressed an issue which provided content for many financial remedy webinars early in the coronavirus pandemic: Covid-19 as a Barder event. The parties' financial remedy claims had been determined by DJ Hudd in October 2019. She ordered H to pay W a series of lump sums, commencing with £150,000 in November 2019 followed by four payments of £200,000 each November until 2023. This created an overall division of the total assets which was 58%:42% in H's favour. This departure from equality was justified by H retaining a business which provided school meals. In March 2020 all schools were closed. In April 2020, H applied to set aside parts of the final order pursuant to FPR r.9.9A. Mostyn J restated the four Barder principles as set down most recently in *Akhmedova v. Akhmedov & Ors (No 6) [2020] EWHC 2235 (Fam)* and *CB v. EB [2020] EWFC 72*. He further remembered the fifth condition: that the applicant must demonstrate that no alternative mainstream relief is available which can broadly remedy the unfairness of the new event.

When considering whether a new event which causes a major shift in asset value was unforeseeable, the court should focus principally on the economic impact of that event, rather than the cause or nature of it. The appropriate question is therefore "what chance do you see of a global financial crisis arising in 2020 which has the result of reducing this business's turnover by 10%?" rather than "what chance do you see of a global pandemic arising in 2020 which has the result of wiping out this business's operating profit?" Mostyn J concluded that H had therefore failed to satisfy the first Barder Condition. Mostyn J went on to consider whether there were alternative relief options open to H: Firstly, by way of the *Thwaite* jurisdiction, and secondly by applying for what was objectively a lump sum payable by instalments to be varied under s.31(2)(d) MCA 1973. (Whilst the payments had been described at first instance as a series of lump sums, Mostyn J described this as "camouflaging language". This was a lump sum payable by instalments.) Mostyn J respectfully suggested that a number of authorities had misread the provisions of s.31(1) & (2)(d) MCA 1973: the court does not have the power under s.31 to vary the overall quantum of a lump sum payable by instalments. Overall quantum, Mostyn J concluded, can only be altered, or set aside under the doctrine of *Barder*. Variation under s.31 can achieve no more than a recalibration of the payment schedule originally ordered. The list of mistaken authorities was formidable, including: *Tilley v. Tilley (1980) 10 Fam Law 89, CA*; *Hamilton v. Hamilton [2013] EWCA Civ 12, CA*; *Myerson v. Myerson (No 2) [2009] EWCA Civ 282, CA*; and *FRB v. DCA (No 3) [2020] EWHC 3696 (Fam)*. Mostyn J noted that in none of these authorities

was a variation of overall quantum ordered, with the exception of *Tilley*. He concluded therefore that the other statements are obiter dicta. Furthermore, he noted that the relevant Law Commission report, to which the origin of s.31(1) and its true construction can be traced, was not referred to in *Tilley*. As a result, he concluded there was no clearly expressed binding ratio decidendi. The emerging theme of transparency within financial remedy courts also appears within this decision. Whilst anonymity was granted in this case, Mostyn J was clear that his default position moving forward would be to publish financial remedy judgments in full without anonymisation (with the exception of children). Any arguments to derogate from this principle must be justified by specific facts, not reliance on generalisations.

In **Siddiqui v. Siddiqui [2021] EWCA Civ 1572**, the Court of Appeal refused to grant permission to appeal to the 41 year old applicant, who sought financial provision from his parents. The applicant had applied for financial provision pursuant to either: s.27 MCA 1973; Schedule 1 of the Children Act 1989; or the inherent jurisdiction. His application was dismissed at first instance by Sir Munby J, who held that there was a lack of jurisdiction, and further that the applicant could not rely on provisions within the ECHR (*FS v. RS and JS [2020] EWFC 63*). The applicant initially sought to appeal on four grounds, only two of which progressed to be considered at the oral hearing. The applicant argued that the court at first instance had been wrong: (i) when concluding that the subject matter does not fall within the ambit of a right protected by the ECHR (specifically Articles 6, 8 and A1P1); and (ii) secondly that any discrimination is not on a ground falling within the scope of Article 14. The applicant accepted that he did not fall within the provisions of s.23, s.29(3) nor s.27 MCA 1973, nor Schedule 1 CA 1989. Instead, submissions focussed on issues of ambit, status and justification in support of the argument that paragraph 2, Schedule 1 CA 1989 and s.27 MCA 1973 are discriminatory. Moylan LJ concluded that the applicant was unable to rely on Articles 6, 8 nor A1P1. For Article 14 purposes, only differences in treatment based upon a characteristic of status could lead to discrimination. Being an adult child of parents who live together in the same household is not such an identifiable characteristic or status; it does not define that child. Furthermore, the applicant was not in a relevantly similar situation to adult children whose parents were not living together or were divorced; meaning a difference in treatment between persons in relevantly similar situations was not present. When considering justification, there was a legitimate aim behind the statutory provisions: to address the financial consequences of the breakdown in a parental relationship. This is legitimate because society has a clear interest in addressing the financial consequences flowing from such a breakdown.

In **T v. T [2021] EWFC B67** HHJ Hess determined the first reported application to vary a pension sharing order. The parties' financial remedy dispute had progressed to a final hearing before DJ Thomas in late 2015. The judge had ordered a pension sharing order in W's favour in respect of 40% of H's pension with Company X. This was a broad-brush percentage which was fixed by reference to the overall division of the assets achieved rather than a precise calculation. DJ Thomas held that this percentage of pension share would provide an overall minor departure from equality in W's favour, which he assessed as fair and appropriate in all the circumstances. Following the court's determination there were delays in both agreeing a draft final order and the drafting of the Pension Sharing Annex. The latter included the original Annex being commented upon by the administrators, stating that the 'external transfer' box at paragraph F of the Annex should have

been ticked on the basis that the scheme did not permit internal transfers. H also sought permission to appeal against the final order. Certain aspects of the original order were varied by HHJ Redgrave in 2016, but not the pension sharing order. In late 2016, Company X provided a revaluation of H's pension. This produced a substantially increased CE of £1,795,362 compared to £826,125 at the time of the final hearing. (By the time this matter came before HHJ Hess in November 2021, the most recent CE for H's pension fund was £2,471,833.) Further complications arose in December 2016, when Company X announced that they would be substantially reducing CEs for external transfer purposes on the basis that the scheme was underfunded. By 2017 both parties were aware of the developments in H's pension valuation. W believed her only choice was an external transfer and she would incur a loss as a result. In the erroneous belief that W was obliged to take an external transfer under the pension sharing order made, W applied to court in July 2017 for a declaration that her 40% share in the Company X pension would also apply to the uplift in value of the policy. At the time of the hearing before HHJ Hess, W accepted that this was a misconceived application and that the court could not make such a declaration. In November 2017, while acting in person, H applied for a variation of the pension sharing order. H submitted that the pension sharing order should be valued downwards from 40% to 17% (in light of the increase in value). W opposed H's application; seeking for the pension sharing order of 40% to be implemented forthwith on the current value for H's Company X pension.

HHJ Hess observed that this case gave an extreme example of 'moving target syndrome'. He further noted that in line with the 1996 Regulations, and contrary to both parties' previous erroneous beliefs, where a scheme is only offering reduced CEs on external transfers, they cannot insist on the non-member spouse taking this, and must first offer the non-member spouse an internal transfer using the full value of the member spouse's CE. When considering the legal test to be applied in an application to vary a pension sharing order, HHJ Hess agreed that the starting point should be s.31(7) MCA 1973. He was clear however that this was only a starting point. He accepted W's submission that variation of a pension sharing order should be considered alongside variation of other capital orders, such as lump sums by instalments. Despite the recent decision of *BT v. CU [2021] EWFC 87*, which HHJ Hess acknowledged, he adopted the approach taken by Bodey J in *Westbury v. Sampson [2002] 1 FLR 166*, ultimately concluding that H could only succeed in varying the pension sharing percentage if he could establish that the circumstances have changed "very significantly, and/or for cogent reasons rendering it quite unjust or impracticable to hold the payer to the overall quantum of the order originally made." Upon considering whether H had met this standard, HHJ Hess observed that nothing remarkable had changed in either parties' overall position since 2015. He concluded that the change in CE did not justify a variation to the pension sharing percentage. This was because:

(i) H's approach involved a fundamental misunderstanding of what the CE of a defined benefit fund represents: i.e. the actuarially calculated figure which shows the sum of money that would be needed to invest to produce the income benefits which the fund is obliged to meet for a set period. The change in market conditions between 2015 and 2021 meant that more money was needed to produce the same income benefits. H's position ignored the fact that if the wife's entitlement were to be fixed in accordance with the 2015 CE, the benefits she

received would be commensurately lower than those she would have received were the transfer to have been implemented in 2016;

(ii) H's argument ignored that in so far as having a higher CE was a windfall benefit, it was still one to be enjoyed more by H (retaining 60%) than it was by W if she received her 40% pension share as originally ordered by DJ Thomas. This is particularly important when remembering DJ Thomas' initial justification for that ordered percentage in the first place and the overall division it sought to achieve; and

(iii) overall it was H's actions which had prevented the pension sharing order taking effect for more than six years, thereby leaving himself open to the possibility of moving target syndrome.

Another first for reported family cases came in **MG v. AR [2021] 4 WLR 146** where Mostyn J determined an application for security for costs pursuant to FPR rr.20.6 and 20.7. The judgment helpfully considered where the family courts can take the same approach as the civil courts, and where they must necessarily differ. Mostyn J succinctly drew the threads together in a single paragraph, setting out the current steps to be followed and principles to be applied:

(i) the court must find as a fact which of the gateway conditions (FPR r.20.7(2)(a)-(d)). Conditions (a) and (c) are simple matters of concrete fact. Conditions (b) and (d) require some further determination beyond concrete fact, either as to the applicant's state of mind or other evaluative component;

(ii) the court must have regard to all the circumstances to determine whether it would be just to order security for costs. In making that determination the court will form a value judgment, until and unless it reaches the stage of quantifying the amount of security to be ordered, whereby the court's exercise becomes one of true discretion;

(iii) if the applicant has a meritorious case but is of limited means so that imposing an order for security would hinder or stifle their substantive application, then it would not normally be just to make such an order;

(iv) Subject to (iii), the court must have regard to the merits of the substantive application and the strength of the defence in addition to the means of the parties, so as to determine if the respondent has a good chance of being awarded costs at a final hearing. This requires the court to look harder at the merits than in a civil case. This is because of the differing starting point for costs rules in the two spheres and therefore the comparative rarity of a costs order being made in the family court;

(v) When assessing the applicant's ability to pay security for costs, the court should apply the principles set out in *TL v. ML [2005] EWHC 2860 (Fam)*, including making robust assumptions regarding ability to pay where the disclosure has been deficient;

(vi) If the court determines that the respondent has a good chance of succeeding, then it must be satisfied (by evidence adduced) that there is a real risk that they

would not be in a position to enforce a costs order against the applicant. It is not necessary to demonstrate a more than 50% probability when showing a real risk;

(vii) When determining if it would be just to make an order for security, the court will consider whether the application was made promptly. Historic costs may not be permitted if the application was made unduly late;

(viii) If the court makes an order for security for costs, the quantum will be fixed in a broad brush manner utilising the court's wide discretion;

(ix) The court may, when determining the quantum, reflect future litigation uncertainties as well as potential reductions on detailed assessment;

(x) In line with the principles set out in *Rubin v. Rubin [2014] EWHC 611 (Fam)*, security should only be provided up to FDR in a financial remedy case or PTR (or equivalent) in a children case in the first instance;

(xi) Before making an order for security, the court must finally stand back and satisfy itself that the order it is going to make is just. While the paramountcy principle would not be directly in operation in a children case, justice and the overriding objective require the court to be satisfied that what it is proposing is consistent with the children's best interests, or at least not contrary to those interests;

(xii) If an applicant defaults on a security for costs ordered, an automatic strikeout of the claim should not follow. Instead, the family court should adopt the same approach as the commercial court: with the respondent entitled to apply urgently for a hearing to consider the appropriate measures in light of the default.

In **A v. M [2021] EWFC 89** the court determined W's application for financial remedies. H set up two private equity funds. The court was dealing with the division of carried interest ("carry") and investments in those funds. Mostyn J decided that for each fund, the marital element of the carry should be calculated linearly over time and the marital carry in each fund should be shared equally. W's sharing claim to H's carry in both funds was quantified and expressed as a 48.53% share in his Fund 1 carry to minimise the extent of *Wells* sharing (Fund 2 had been established later and had a longer term to run). W's argument that she should be entitled to share in carry generated by H after the date of trial was described as "completely untenable". Mostyn J also held that the co-investments in both funds should be shared equally. W was to receive her share of the carry and co-investments by way of contingent lump sums against H. Mostyn J also again referred to there not being a "right" to anonymity and considered how the practice of anonymising judgments had developed over time. He confirmed that his approach moving forwards would be to publish his financial remedy judgments without anonymisation, save as to the identity of children and derogations from the default position would have to be distinctly justified.

JM v. KK [2021] EWFC 54 provided a paradigm and timely reminder that small money cases can be "infinitely more difficult than cases involving larger sums" where "it is impossible to find a solution that can leave both parties happy." The observations of Cohen J were particularly poignant in this case, as he considered that the decisions each party took as the marriage broke down had been "hugely detrimental financially" to both parties. A feature of the case was that it was reserved to be heard by Cohen J after he determined the second element of the children proceedings. In those proceedings Cohen J determined that H's application for his costs of

c.£39,000 was meritoriously justified but adjourned the matter to be dealt with within these financial remedy proceedings as he had insufficient knowledge at the time as to the parties' means. H, aged 50, was a British national. W, aged 41, was an Indian national. The parties had been married for 14 years. There was one child of the marriage ('N' aged 13). The parties spent the latter parts of the marriage living in a variety of countries in the Gulf until separation in December 2019. H had worked as an in-house recruiter/HR advisor. As an expatriate worker he commanded a high salary with minimal tax. Cohen J determined that there were total realisable assets (excluding pensions) of £154,000. This was made up of the net equity in three properties: one in South East England and two in India. The parties had already spent approximately £150,000 on legal proceedings by the time of this final hearing, which had the financially disastrous consequences of exhausting the parties' savings and more. A second component of Children Act proceedings brought about by W's attempt to initiate proceedings in Bahrain also had the consequence of H losing his employment in Bahrain. At the time of final hearing, H was living in England and W in India. N lived in India with W but was to spend two months per year with H in England and such other times as he was able to visit India. W argued that she had debts of £58,000. The court assessed W's debts to be £43,200, with £10,000 being imminently payable. When considering debts, Cohen J notes that if W had not taken the actions she had, there would have been a further £39,000 plus what she paid to her lawyers for the additional proceedings to be shared between the parties. Cohen J said that he did not intend to make a precise arithmetical deduction in respect of this sum, but that it was a factor taken into account as influencing the overall award. W argued that the court must: (i) compute the assets; (ii) deduct the debts; and (iii) divide the balance by two. W submitted that this strictly arithmetical approach should be followed as the court was bound by Article 3(c) EU Maintenance Regulations, Counsel Regulation (EC) No 4/2009 (the divorce petition having been filed 8 days before the European Regulations ceased to apply). Cohen J disagreed with W's proposed approach. In particular, he concluded that: (i) the division of the matrimonial assets is governed by reaching a fair outcome in all the circumstances of the case. Whilst this may sometimes mean equality is appropriate, this is not always the case; (ii) the court's discretion is not removed, requiring an arithmetical result even if that result is unfair; (iii) a departure from equality was justified in this case. Not least because it was in N's interest to ensure that both parties have proper housing that they can use for care for N when she it with them.

In **L v. L [2021] EWFC B83** the key issue was whether H should emerge from the marriage with more wealth than W because the business that generated their wealth was acquired by him from his father before the parties' met. The parties had restructured the business so that they would receive from it a fixed amount of wealth and the profit and capital growth would be given to their children. The dynastic nature of the arrangements put in place were referred to as the "most decisive factor in this case". This represented the destiny of the initial non-marital contribution of H and so it would be unfair for H to then receive more than W. The court decided the parties should emerge as equals, but that H would be left with the opportunity to enhance his wealth.

P v. Q [2022] EWFC B9 is a judgment of HHJ Hess following a contested final hearing. It is a clear and practical judgment in many ways, but particularly helpful in:

(i) responding to arguments advanced by both parties that each should benefit from a departure from equality in their favour. Before finally concluding that the parties' respective arguments for a departure from equality broadly balanced each other out in this case, he commented that: "As a starting point in the division of capital after a long marriage it is useful to observe that fairness and equality usually ride hand in hand and that…the court should be slow to go down the road of identifying and analysing and weighing different contributions made to the marriage"; and

(ii) Summarising the family court's approach to whether sums should be considered gifts or loans, and thereafter analysis of their 'softness'/'hardness' and whether they should be included within the computation exercise.

Austin v. Haynes [2021] EWCA Civ 1919 provides a useful reminder about the status of recitals in court orders. The court confirmed that a recital can be enforced as if it had been an order provided the court would have had jurisdiction to make an order in like terms.

The takeaway learning objective from **Loggie v. Loggie [2022] EWFC 2** can be summarised succinctly despite it sadly coming after nine years of litigation between the parties. W applied for H to indemnify her against the outstanding sums sought by a Single Joint Expert. As it so happened, such an indemnity was intended to be part of a variation agreement reached in 2019 in any event. It could therefore be provided pursuant to the slip rule (FPR r.29.16(1)). Mostyn J was clear however as to the moral of the tale: parties must ensure that the court is asked, prior to the instruction of a Single Joint Expert, to place a cap on the Expert's costs pursuant to FPR r.25(12)(5).

LS v PS [2021] EWHC 3508 (Fam) concerned an application by a litigation funding provider (Q) intervening in financial remedy proceedings. W's debt to Q with accrued interest was almost £1million. Q applied for disclosure of material and information subject to 'without prejudice' privilege within its overarching application to set aside a consent order. Documents sought included without prejudice offers and counsel's notes and schedules for the private FDR. Q alleged that the settlement reached was deliberately structured by the parties to leave W with no assets or entitlement to property or liquid funds from which her debt to Q could be met. Q wished to use the privileged information in its set aside application and claims for relief under the Insolvency Act 1986 (IA 1986). Roberts J noted the privileged nature of the FDR hearing as an essential stage of the financial remedy process. At the heart of the case was PD9A para 6.2 which Sir James Munby concluded in *V v W [2020] EWFC 84* operated as an 'absolute bar' to an attempt by a party in that case using anything said or done at the FDR, in civil proceedings. She considered the exceptions to without prejudice privilege and the important status of Q as a professional corporate lender offering bespoke services to enable litigants to participate in litigation. Q's application was unsuccessful as Roberts J considered that there was ample evidence already available to the court in the absence of the privileged material to determine the set aside application at the substantive hearing. In the footnote to the judgment, Roberts J suggested that given the importance of litigation funding to the system, the Family Procedure Rules Committee may wish to consider whether the potential issues raised in the case requires some reconsideration of when and in what circumstances the 'absolute bar' in para 6.2 PD9A might be lifted.

Aldouki v. Abdullah [2021] EWHC 3086 (Fam) is the first known reported case where jurisdiction has been founded solely on an interest in a matrimonial home in England and Wales (s.15(1)(c) Part III MFPA 1984). This case concerned W's applications under ToLATA 1996 and MFPA 1984. There had already been a financial award made to W in Kuwait but she said it did not deal with her sharing claim or needs. There were three properties held in joint names. There was a dispute in the proceedings about whether a Power of Attorney executed in H's favour gave him control over the beneficial interests in the properties or whether he had to act in all times in W's best interests. W sought a declaration that the properties were held legally and beneficially equally but wanted the court to transfer to her H's share of the two matrimonial homes. H said that they were held by the parties on trust for him absolutely so the court should so declare, transfer the properties to him and dismiss W's claim on the basis that the Kuwait court had been fully seized and the English court had no jurisdiction. The court held that the properties were held on trust for both parties as joint tenants and there was no common intention that the properties would be held for H. The court heard expert evidence in respect of the Power of Attorney and held that H was not permitted to act in conflict with W's interests. The court ordered that the properties were sold with the net proceeds divided equally, save that W was to pay half of the capital payment H had made towards a mortgage. The Judge then exercised his discretion under Part III to return that sum to W meaning that the parties received equal amounts from the equity in the properties.

Her Royal Highness Haya Bint Al Hussein v. His Highness Mohammed Bin Rashid Al Maktoum [2021] EWFC 94 concerned applications made by HRH against HH under Schedule 1, Part III MFPA 1984 and MWPA 1882. The case may have little relevance to other cases as the "exceptional wealth" of the family and "remarkable standard of living… takes this case entirely out of the ordinary" but, the court's consideration of HRH's security budget is interesting. Very serious findings had been made against HH, including that he had abducted two of his other children, hacked HRH's phone and the phones of her associates using Pegasus software and had attempted to purchase the property next door to HRH. This conduct was extremely relevant to the applications and the need for HRH and the children to have water-tight security. The "magnetic feature" was that the payer himself was the main threat to the payee and so it would be wrong for the security payments to be made over many years by the source of the main threat. The court concluded it would be "intolerable" for HRH to be dependent on ongoing provision; she was entitled to know that her security budget was written in stone and she could direct how to use it without fear or concern of continuing oversight by HH or his advisers. For her personal security, HRH was awarded the capitalised sum of £11m p.a. until 2030, reducing then to £8.25m until end of 2034 when it would reduce to £5.5m.

In **UD v. DN (Schedule 1, Children Act 1989; Capital Provision) [2021] EWCA Civ 1947** F appealed against a settlement of property order made in favour of two of his children, aged 19 and 14. The trust was to end on the first to occur of several events, including the date on which the youngest reached the age of 18 or 6 months after they completed full-time tertiary education. Then, at the end of the trust period, 6.5% of the gross sale price or market value of the family home "shall be held on trust for the benefit of the children… absolutely". F argued that 1) the court did not have the power to make an order for financial provision once a child has attained

the age of 18, 2) the court did not have the power to make a property transfer order or lump sum order to a child who will be over 18 when it takes effect or will be paid and 3) in any event, the Judge was wrong to make an order where the children would receive capital provision when they were adults and not in full-time education, because there were no special circumstances justifying the award. The Court of Appeal held that the court does have the power to make orders after children are 18 when the application was issued before they turned 18. Further, an order takes effect at the time it is made, even if the contingent interest would be realised at the end of the trust period. The authorities show the court has the power to make orders for financial provision which will benefit a child when he/she is over 18, if they are in education or training or if there are special circumstances. The key part of the decision was whether the court was right to award the children a deferred absolute interest in the family home. The power to order financial provision in favour of an adult child who is not in education or training is limited to "special" or "exceptional" circumstances "relating to the children" such as physical or mental disability, which create a financial need. Here, there were no special circumstances. The Judge had been concerned that the father would not provide financial support for the children in the way he considered most wealthy fathers would and in the way he had for his older children. The Judge's general observations about the effects on the children of F's abuse were not sufficient to establish any specific consequences for the children that would support the exercise of the powers. Therefore, the long-term capital provision made by the order was set aside.

As referred to above, in **E v. B *(*Interim Maintenance Inaccurate Time Estimate*)* [2021] EWFC B90** the court made general observations about common problems with interim applications, including inadequate time estimates, dense witness statements, bundles exceeding 350 pages, unclear/unreasonable expectations for judicial pre-reading and the length of oral submissions bearing no resemblance to the time estimates. Recorder Chandler said that judges should not be put in the position he had been in that case and noted that "wellbeing is a two-way street". This case concerned W's applications for interim maintenance and a costs allowance. H was already voluntarily paying £1000 pm and paying for their child's nursery and private medical cover for W and the child. The court made robust assumptions about H's ability to provide financial support. Assessing W's need for maintenance was difficult for a number of reasons: her budget had not been updated, her actual income position was confused and there was no convincing explanation as to why W was not receiving the rental income she was entitled to from properties she owned with her mother. The court found that H could afford to pay more, and some adjustment should be made to the sum sought by W to reflect her entitlement to the rental income. The court dismissed W's application for a costs allowance as W had not produced the requisite evidence.

When determining W's Maintenance Pending Suit application in **Collardeau-Fuchs v Fuchs [2022] EWFC 6**, Mostyn J considered the previous authorities which describe the court's approach in such applications as a broad assessment, which is "rough and ready" in nature (including the Court of Appeal's recent judgment in *Rattan v Kuwad [2021] EWCA Civ* 1, which in turn referred to previous decisions in *BD v. FB [2016] 1 FLR 390*, *F v F (1983) 4 FLR 382*; and *Moore v. Moore [2010] FLR 1413*). He was clear however that in citing these previous authorities, he did not believe Moylan LJ intended an MPS application to be treated with any less degree of care than any other interlocutory claim. Indeed, when substantial sums such as those available in this case

turned on the decision, as much care should be taken as it would be in determining a claim for an injunction or interim damages. Mostyn J concluded that in light of the quantum at stake, the court should try to "paint its decision with a fine sable rather than a broad brush, where it has the ability to do so." However, he did go on to acknowledge that, "in most cases the court will not have either the time or the material to conduct an exhaustive investigation and so the exercise will perforce be rough and ready."

In addition, the recent months have also seen two pertinent judgments on the recognition of divorces: **Al Saleh v. Nakeeb [2021] EWHC 3186 (Fam)** was concerned with the recognition of divorces in Syria and England and Wales. The parties were validly married in Syria in 2000. In 2010, H pronounced talaq in Syria and divorce documents were issued but the parties reconciled and returned to England. In 2014, H pronounced talaq again. W did not accept that this was an effective divorce. W petitioned for divorce in England and applied for a declaration that the parties remained married pursuant to the FLA 1986. Shortly after, the Syrian court revoked the 2010 divorce. H successfully applied to the Syrian court for recognition of the 2014 talaq. He then applied to the English court to recognise the same. His application was dismissed. W's application for a declaration was successful and the court confirmed that the 2010 divorce was not effective, meaning that the parties were still married in 2016 when W commenced divorce proceedings. H appealed. His case was that although the 2010 divorce was revoked with retrospective effect in 2017, it "remained valid and effective" in 2016 when W filed her petition, meaning there was no marriage capable of being recognised under the FLA 1986. The Judge commented that the paradox raised by H's appeal was that the parties were simultaneously both married and divorced. The court found that the parties were still married when W petitioned as the 2010 talaq was revoked and the 2014 talaq was not capable of recognition in this jurisdiction under s.44 FLA 1986.

Randhawa v. Randhawa (Divorce: Decree Absolute, Set Aside, Forgery) [2022] EWFC B7 was an unusual case where W applied to set aside decree absolute alleging that the divorce proceeded without notice to her, the acknowledgement of service was never signed by her and any signature on it purporting to be hers was forged. HHJ Moradifar heard evidence from a handwriting expert, the parties, and other witnesses. The handwriting expert's view was that there was very strong evidence to suggest that the signature was not written by W but there was no reliable evidence to accurately assess if H wrote it. After considering all the evidence, the Judge found that the signature was forged by or on behalf of H. Therefore, W had no notice of the divorce proceedings and as the signature was a forgery, the decree of divorce was set aside.