Southern Family Law Conference

12th September 2024

Financial Remedy Matters

"Hot Topics & Future Trends:
All the Cs: conduct, (non) court dispute resolution, (special) contribution, and (c)et aside"

A. Conduct

1) As Moor J observed in *R v B and Others* [2017] EWFC 33 at [85] *"[c]onduct features in section 25(2) without a gloss."* However as he also said at [81] "*[c]onduct is only relevant in a few cases".* In *AF v SF (Dynastic Trust: Needs-Based Award)* [2020] 1 FLR 121 the same judge succinctly summarised the position under MCA 1973 in the following way:

> [62] … To take [conduct] into account, I would have to be satisfied that [the husband's] conduct was such that it would be *'inequitable to disregard'* it. In *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186, Baroness Hale of Richmond approved the previous categorisation of this as a requirement that the conduct be *'gross and obvious'*.[1]

2) Conduct was considered in detail in *Tsvetkov v Khayrova* [2024] 1 FLR 937 per Peel J. At [43] he stated that at 'stage one' a party asserting conduct must prove:

> i) the facts relied upon;
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> ii) if established, that those facts meet the conduct threshold, which has consistently been set at a high or exceptional level; and
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> iii) that there is an identifiable (even if not always easily measurable) negative financial impact upon the parties which has been generated by the alleged wrongdoing. A causative link between act/omission and financial loss is required. Sometimes the loss can be precisely quantified, sometimes it may require a broader evaluation. But I doubt very much that the quantification of loss can or should range beyond the financial consequences caused by the pleaded grounds.

3) At [46] ii) Peel J stated the reason for this is:

> [a] party who seeks to rely upon the other's iniquitous behaviour must say so at the earliest opportunity, and in so doing should; (a) state with particularised specificity the allegations, (b) state how the allegations meet the threshold criteria for a conduct claim, and (c) identify the financial impact caused by the alleged conduct. The author of the alleged misconduct is entitled to know with precision what case he/she must meet.

4) At [46] vi) Peel J stated:

> The court should determine at the First Appointment how to case manage the alleged misconduct. In my judgment, in furtherance of the overriding objective and FPR 2010 1.4, the court is entitled at that stage to make an order preventing the party who pleads conduct from relying upon it, if the court is satisfied that the exceptionality threshold required to bring it within s25(2)(g) would not be met. The court should also take into account whether it is proportionate to permit the allegation to proceed, for a pleaded conduct claim usually has the effect of increasing costs and diminishing the prospects of settlement. Finally, the court should

[1] At [145] – *"It is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases."*

take into account whether the allegation, even if proved, would be material to the outcome.

5) It has been suggested that the court may not be able to make an order preventing a party who pleads a statutory factor (here conduct) from seeking to rely upon it given (i) the court has a statutory duty to consider all the s25 factors at a final hearing (emphasised in *Wyatt v Vince* [2015] 1 FLR 972 per Lord Wilson at [27] to be a *"meticulous duty"*); and (ii) rules contained in a statutory instrument (here the Financial Procedure Rules 2010) which allow a court to decide which issues need investigation and hearing and which do not (r1.4(2)(c)(i)) and/or exclude an issue from consideration (r4.1(3)(l)) cannot change substantive law unless permitted to do so by statute (*Dunhill (A Protected Party By Her Litigation Friend Tasker) v Burgin (Nos 1 and 2)* [2014] UKSC 18) and there is no such permission in the Matrimonial Causes Act 1973.

6) Peel J rejected this argument in *The Financial Remedies Court: A Year in Review* published by the Financial Remedies Journal on 27th September 2023:[2]

> Nor do I regard robust case management of this sort as akin to a strike out of a financial remedies claim of the sort regarded as impermissible by the Supreme Court in *Wyatt v Vince* [2015] UKSC 14; it is robust identification of relevant issues so as to enable the court to exercise its s 25 discretion in a focussed and proportionate way.

7) In *Goddard-Watts v Goddard-Watts* [2023] 2 FLR 735 Macur LJ at [70]-[74] considered whether the frauds perpetrated by the husband might constitute conduct within the meaning of s25(2)(g), and, if so, then how, if at all, that ought to bear upon the court's consideration of the case. She listed the authorities to which the court had been referred which included *OG v AG (Financial Remedies: Conduct)* [2021] 1 FLR 1105 where Mostyn J had said at [34] that *"[t]he authorities clearly indicate that [gross and obvious personal misconduct] would only be reflected where there is a financial consequence to its impact"*.[3] She observed at [71] that "*the principle and accepted view to be derived from these authorities is that the misconduct envisaged by section 25(2)(g) must necessarily be quantifiable in monetary terms rather than seen as a penalty to be imposed against the errant partner, and that the 'orthodox approach' to litigation misconduct is to be met by an award of costs"*. This is why (for example) in *KA v LE* [2023] EWFC 266 (B) Deputy District Judge Harrop observed at [72] that *"However one may feel about it, the case law at present is clear that personal misconduct will only be taken into account in very rare circumstances and only where it has had financial consequences …"* and referenced *OG v AG (Financial Remedies: Conduct)*.

8) Macur LJ concluded at [74] as follows:

> I agree with the husband that there is no direct financial consequence to his fraudulent conduct so as to enable its monetary evaluation. However, I take the view that the husband's fraud is 'conduct' for the purpose of subsection 25(2)(g) in that it provides 'the glass' through which to address the unnecessary delay in achieving finality of the wife's overall claim, including her unanticipated contribution to the welfare of the family post 2010.

9) Subject to what is said below, it is arguable that by these comments Macur LJ may have called into question the "*accepted view"* that conduct must be identifiable or quantifiable in monetary terms in order to be relevant.

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[2] https://financialremediesjournal.com/content/the-financial-remedies-court-a-year-in-review.2b6d5c48715f4d45ab6c641dbae20da4.htm

[3] At [71] Macur LJ noted that *OG v AG (Financial Remedies: Conduct)*, decided on 29th July 2020, *"had not been reported and was not cited in the latest Court of Appeal authority on the point, TT v CDS [2021] 1 FLR 996, decided in September 2020."*

10) Her Honour Judge Reardon may also have expressed similar reservations in *DP v EP (Conduct; Economic Abuse; Needs)* [2023] EWFC 6 (B), where W exploited H's vulnerably consequent upon his illiteracy. At [34] she stated that *"[r]ecent cases where it appears that conduct without a financially measurable consequence has impacted on the distribution exercise are rare, but exist"* referring to *K v L* [2010] EWCA Civ 125 (a refusal of permission to appeal by Wilson LJ (as he then was) where the husband had pleaded guilty to counts of sexually assaulting the wife's grandchildren, of taking indecent photographs of one of them, and of related offences). Later at [153] having referred to Mostyn J's observation in *OG v AG (Financial Remedies: Conduct)* that in order to sound in the ultimate distribution, s25(2)(g) conduct must have *"financially measurable"* consequences, Her Honour Judge Reardon stated at [155] that *"too narrow an interpretation of s 25(2)(g) would render the provision nugatory"* and *"[i]t is difficult to imagine a scenario in which consequences which are truly financially measurable have not already been taken into account under either s 25(2)(a) (resources) or s 25(2)(b) (needs)"* and concluded at [156] "*there must be some scope for conduct which has had consequences to be reflected in the ultimate division of assets, even where those consequences are not financially measurable."* Deputy District Judge Harrop's choice of words "*However one may feel about it, the case law at present is clear ..."* in *KA v LE* at [72] is also of note.

11) There are two other cases where conduct was found to be relevant and where there was (arguably and again subject to what is said below) no identifiable financial impact:

    a) *Al-Khatib v Masry* [2002] 1 FLR 1053 the court took into account the misconduct of the husband in abducting the children of the marriage. Munby J (as he then was) stated at [103] that *"[r]eferring to Rayden and Jackson Divorce and Family Matters (Butterworths, 17th edn), paras 21.60–21.62, Mr Mostyn asserts, and Mr Deacon does not dispute, that conduct under s 25(2)(g) of the 1973 Act does not have to have a financial consequence for it to be taken into account"* - and he agreed that *"the husband's conduct in abducting the children and depriving … them and the wife of that most basic human right, their mutual society, falls squarely within the class of case contemplated by Parliament"* when enacting the ancillary relief provisions; and

    b) *FRB v DCA (No. 2)* [2020] EWHC 754 (Fam) it was argued at [180] that conceiving *"a child by another man and keeping that secret (thus inducing the husband to commit both financially and emotionally to another man's child) was misconduct"*. Cohen J concluded at [193] that the wife's action in allowing the husband to bring up the child in the belief that he was the natural father was conduct (*"emotional damage to H of the sort inflicted by W"* at [197]) so egregious that it would be inequitable to disregard before stating that *"[h]ow I take it into account seems to me a much more difficult issue"* and at [196] that *"[t]here is no guidance in reported authority as to how this sort of conduct should be reflected."*

12) In *N v J* [2024] EWFC 184 Peel J at [1] *"address[ed] the difficult and sensitive topic of the interplay between domestic abuse and conduct in the context of financial remedy proceedings."* After citing in full paragraphs [43]-[46] of *Tsvetkov v Khayrova* he:

    a) at [25] quoted from The Law Commission report No 112 dated 14th December 1981 titled *"The Financial Consequences of Divorce"*;

    b) at [26] cited the *"four distinct scenarios"* of conduct in financial remedy proceedings in *OG v AG* per Mostyn J paragraphs [34-39];

    c) at [28] stated *"[t]here is no doubt, in my judgment, that personal misconduct, including domestic abuse, must be of a high degree of exceptionality to be capable of consideration"* citing *Wachtel v Wachtel* [1973] Fam 72 and *Miller/McFarlane* [2006] 1 FLR 1186;

d) at [29] stated *"[t]hat remains the law. The increasing awareness of the incidence of domestic abuse, and its harmful and pernicious effects, does not lower the conduct hurdle to be surmounted in financial remedy proceedings*";

e) at [30] considered Mostyn J's dictum in *OG v AG* that *"The authorities clearly indicate that such conduct would only be reflected where there is a financial consequence to its impact"* interpreting this *"as a direct impact on the resources (e.g. something which leads to a diminution in resources, including earning capacity) or something which necessarily has a financial impact on one of the other s25 criteria; for example, increased needs*";

f) at [31] stated that *"[a]lthough the words of the statute do not limit, or define, conduct in this way, nevertheless in the reported cases a financial consequence of the conduct is almost always discernible"* citing *Jones v Jones* [1976] Fam 8, *H v H (Financial Relief: Attempted Murder as Conduct)* [2006] 1 FLR 990, *Clark v Clark* [1999] 2 FLR 498, *AF v SF (Dynastic Trust: Needs-Based Award)* [2020] 1 FLR 121, *DP v EP (Conduct: Economic Abuse: Needs)* and *Seales v Seales (Ancillary Relief: Murder and Coercive Control as Conduct)* [2023] NI Master 6;

g) at [32] stated *"[i]t is, in fact, hard to find any cases where a financial impact is not discernible even if the judgments have not directly addressed the point"* stating:

   i) *K v L* was (i) a permission to appeal report after a short one sided hearing and therefore not ordinarily citable; (ii) although conduct was found to be relevant (unsurprisingly on the facts), it was not clear how it sounded in the overall award; and (iii) there were plenty of other factors justifying the ultimate order;

   ii) in *FRB v DCA (No. 2)* it was not hard to see how that may have caused the husband financial as well as emotional damage, as he paid for the child's upbringing, but on the facts of that case the conduct in fact was not reflected in the award save as a counterweight to the husband's non-disclosure; and

   iii) in *Al Khatib v Masry* conduct was reflected in the award principally by reference to provision of a £2.5m litigation fighting find for W to attempt to secure the children's return, which seemed to be an example of conduct generated need;

h) at [33] acknowledged that in *Goddard-Watts* there was a suggestion that Macur LJ departed from the orthodox approach requiring a financial consequence of misconduct but *"observe[d] that the case was strictly about financial non-disclosure, and not personal misconduct"*;

i) at [36] after citing Macur LJ's words at [74] *"suggesting that conduct was relevant even though there was no direct financial consequence, appear to contradict paras 70 and 71"* stated *"I confess to being unclear why the fact of fraudulent non-disclosure seems to have fallen into the category of personal misconduct. It seems to me to sit far more easily in litigation misconduct, one of the other categories listed by Mostyn J in OG v AG (supra). Furthermore, although it was argued that there had been no direct financial consequence on the wife, the original order was set aside because the wife had lost the opportunity of seeking a higher award which does seem to me of itself to have been at the very least a potential financial consequence; otherwise, why would the order have been set aside?"*;

j) at [37] stated that *"I tentatively take the view that the words at para 74 of Goddard-Watts do not in fact represent a new departure from the traditional view (endorsed by the Court of Appeal at paras 70 and 71) that financial consequence is invariably a necessary ingredient for conduct to be reflected in the award. In my judgment, there should be an identifiable financial impact*

even if it is not always easily measurable. And as I said in Tsvetkov v Khayrova there must be a causative link between the conduct and the financial consequence";

k) at [38] added the following further comments:

i) It is not altogether surprising that the authorities suggest a financial consequence is required. The s25 criteria (and their equivalent in the Civil Partnership Act 2004) are listed as signposts for the court in considering what financial remedy orders to make. In other words, they are taken into account by the court to the extent that they affect the distributive process under s23 and s24. It would be highly unusual to include a factor which has no financial consequence under the terms of an Act which is directed to reordering the finances of the parties.

ii) Even in those very rare cases where there is a possible financial consequence of the alleged conduct, the court must decide whether there is any need to litigate the allegations. It seems to me that in the great majority of cases, the impact on the alleged victim can and ordinarily will be taken into account by reference to the conventional criteria regardless of whether domestic abuse has in fact taken place. One example is behaviour which affects somebody's earning capacity. Courts routinely weigh in the balance diminished earning capacity (and of course earning capacity is a specific consideration under s25). It is hard to see why there would be any need to embark upon a lengthy and conflicted dispute about the cause of the diminished earning capacity. What matters is reflecting the limited earning capacity in the overall award. Another example might be behaviour which leads to additional needs such as medical costs. Again, it is hard to see how a court will be assisted by detailed inquiry into the cause of the need; what matters is the individual's requirements and the extent to which they should be met going forward. In other words, I doubt very much that domestic abuse would have a material impact on the vast majority of cases, such that it needs to be litigated.

iii) It is important to remember that the court has a duty to consider all the s25 criteria. It seems to me that ordinarily the court will be able to arrive at a fair and balanced decision by reference to the usual factors such as needs, resources, contributions**,** health, age, and duration of relationship without any reference to conduct. I struggle to envisage many situations where personal misconduct will have a material impact on the ultimate evaluation.

iv) It is not for the financial remedies court to impose a fine, a penalty, or damages upon a party for conduct. Nor is it for the financial remedies court to moralise or apportion blame in how the parties behaved towards each other during their time together. I consider such a task, looking at the whole history of the nuances and complexities of a relationship, would be fraught with difficulty, and one which is not generally required in the overall exercise of broad discretion which is entrusted to the court.

v) I do not find it easy to see how personal misconduct, with no adverse financial consequence, could readily be quantified in a principled manner. If the court increases the award because of misconduct, but in the absence of any identifiable financial impact, how is that added sum to be quantified?

vi) I occasionally have the sense that parties who wish to rely upon conduct do so in order to seek from the court validation and justification of their own sense of ill treatment at the hands of their partner during the marriage, and/or condemnation of the other party; in short, personal vindication. Whilst that may be understandable at a personal and human level, it is not the function of the court to make findings for the sake of it and simply to assuage one or other party's sense of grievance and injustice. I repeat, misconduct must be directly relevant to the distribution of finances to be entertained.

vii) As identified by the Law Commission report all those years ago: "Nor do we think that to expose the parties to this kind of remorseless investigation into the, sometimes distant, past would be helpful in encouraging them to come to terms with their new situation". To expose parties, in particular the alleged victim of domestic abuse, to unforgiving litigation which explores in detail that very domestic abuse, is not a step to take lightly.

viii) The task of the court in these cases is to look forward, not back; to set the parties as far as possible on the road to financial independence. To embark on a detailed inquiry into conduct seems to me to be a

retrograde step, particularly as divorces and dissolutions now proceed on a no-fault basis.

ix) If domestic abuse is routinely litigated as a conduct factor, there would undoubtedly be a proliferation of such cases, and a direct impact on court resources. Domestic abuse allegations are almost always disputed, and frequently met with cross allegations. Cases would need more hearings and longer time estimates. The need for Qualified Legal Representatives where the parties are litigants in person would expand dramatically. Applications for additional evidence (police, medical, psychiatric and so on) would ensue. Costs would increase markedly. It is hard to see how cases involving allegations of domestic abuse would settle before final hearing, given the charged nature of the subject matter. The implications for the system of financial remedies are profound.

l) at [39] concluded as follows:

i) The high bar to conduct claims established in the jurisprudence (cases referred to in this judgment are examples) is undisturbed by the recent focus on domestic abuse in society and the family justice system.

ii) I accept that the statute does not specifically refer to a financial consequence, and it is therefore wise not to rule out completely the theoretical possibility of conduct being taken into account absent such a financial impact. Nevertheless, as the review of authorities above suggests, such cases will be vanishingly rare.

iii) The preponderance of authority clearly militates firmly in favour of financial consequences being a necessary ingredient of a conduct claim. This applies as much to domestic abuse allegations as to other types of personal misconduct.

iv) The alleged conduct (even if it reaches the threshold and has a financial consequence) must be material to the outcome. In the vast majority of cases, a fair outcome is ascertained by reference to the other s25 criteria (including needs and impact on earning capacity) without requiring the court to examine conduct.

v) To inquire into conduct must be proportionate to the case as a whole;

m) at [40] he concluded *"In short, the dicta in both OG v AG (supra) and Tsvetkov v Khayrova (supra) which attempt to distil the learning on both the law and procedure, remain, in my judgment, sound. Courts should continue to case manage conduct allegations robustly at the earliest possible opportunity."*

13) In *A v R* [2024] EWFC 218 (B) District Judge Dodsworth after citing in full paragraphs [1]-[3] and [19]-[40] of *N v J* excluded the applicant's allegations of domestic abuse - which taken together would have constituted a pattern of coercive and controlling behaviour - from any further consideration in the case as they were not being of such exceptionality as to meet the conduct threshold, the court would be able to reach a fair distribution of the assets by weighing all the relevant factors, and it would also be disproportionate to litigate the same.

14) A helpful analysis of the present position can be found in *N v J: the Last Word on Domestic Abuse as Conduct?* by Samantha Hillas KC, Anita Mehta and Olivia Piercy published on the Financial Remedies Journal Blog on 24th July 2024.[4]

15) At [44] of *Tsvetkov v Khayrova* Peel J stated that if 'stage one' is established, at 'stage two' the court *"will go on to consider how the misconduct, and its financial consequences, should impact upon the outcome of the financial remedies proceedings, undertaking the familiar s25 exercise which requires balancing all the relevant factors."*

[4] https://financialremediesjournal.com/content/em-n-v-j-em-the-last-word-on-domestic-abuse-as-conduct.97c663553e724e758657fa38c505e938.htm

16) In *S v S (Non-Matrimonial Property: Conduct)* [2007] 1 FLR 1496 – the case from which the need for a 'gasp' rather than 'gulp' factor is derived – Burton J observed (at [41]) that *"[t]here is no real guidance as to what would be the effect if I concluded that there has been such conduct by the respondent as it would be 'inequitable to disregard'"*. He recorded that it had been "*described by [counsel for the applicant] Mr Mostyn QC as a "moral test involving no particular science".*" He noted that *"[t]he exercise of such a sweeping power, which could deprive a party of all entitlement, or multiply or magnify what would otherwise be the entitlement of the other party, is of concern to me"* and that it ought to be regulated by guidance.

17) Burton J then referred to the approaches of two first instance judges with the caveat that *"they may neither of them comply with what the court is intended to do under s25 of the 1973 Act"* namely:

    a) *Al-Khatib v Masry* where Munby J (as he then was) stated that 'conduct' could drive him to *"the very top end of the applicable discretionary bracket applicable to the case"*; and

    b) *H v H (Financial Relief: Attempted Murder As Conduct)* where Coleridge J stated at [44] that *"the court should not be punitive or confiscatory for its own sake"* but that the 'conduct' is *"a potentially magnifying factor when considering the wife's position under the other subsections and criteria. It is the glass through which the other factors are considered."*

18) In *S v S (Conduct: Pensions)* [2022] EWFC 176 His Honour Judge Robinson at [26] cited the above from *H v H (Financial Relief: Attempted Murder As Conduct)* – which continues *"[i]t places her needs, as I judge them, as a much higher priority to those of the husband because the situation the wife now finds herself in is, in a very real way, his fault*" - and stated that *"I entirely accept and apply this observation. My first priority is to consider the Wife's needs, and only consider those of the Husband when I am satisfied that hers have been met."* This is consistent with *TT v CDS* per Moylan LJ at [80] (albeit in relation to litigation conduct) "*I agree with Moor J in R v B [and Others) [2017] EWFC 33] when he said that, if required to achieve a fair outcome, the court 'must be entitled to prioritise the [needs of the] party who has not been guilty of such conduct'".*[5]

19) It may be that in *Goddard-Watts v Goddard-Watts* insofar as there is a material difference between the approaches advocated in *H v H (Financial Relief: Attempted Murder As Conduct)* to which the court was referred, and in *Al-Khatib v Masry*, to which it is not clear that the court was referred directly, Macur LJ's reference at [74] to conduct as a *"glass"* constitutes an expression of support for the former in preference to the latter and therefore provides to a degree the guidance that Burton J sought (although in *K v L* at [12] Wilson LJ stated that he did not think that the Court of Appeal *"would feel able or willing to give the sort of general guidance for which Burton J called"*).

<u>Conduct in CA 1989 Schedule 1 cases</u>

20) Paragraph 4(1) of Schedule 1 does not explicitly refer to the parties' conduct. It is however one of the factors the significance of which has been judicially developed as part of *"all the circumstances"*.

21) It is a consequence of the court's focus on the child's needs and requirements under Schedule 1 rather than those of their parents that conduct is even less likely to be relevant than it may be under MCA 1973 (see *A v A (A Minor: Financial Provision)* [1994] 1 FLR 657 per Ward J (as he then was) at p664 - *"Conduct, or more accurately, misconduct, which is not a specific factor in the para 4 checklist*

[5] At [85]. Moor J continued "A court can undoubtedly reduce the award from reasonable requirements generously assessed to something less … It may be that, unless there is no alternative, a court should not reduce a party to a *"predicament of real need"* (see *Radmacher v Granatino* [2010] 2 FLR 1900) but that is not suggested in this case."

as it is in the Matrimonial Causes Act, s 25, checklist, is therefore material only as a hazard light which will flash throughout my journey down the rest of para 4" - and *Re S (Unmarried Parents: Financial Provision)* [2006] 2 FLR 950 where Bennett J was criticised by the Court of Appeal at [15] for having lost sight of the child's needs due to his focus on the mother's conduct).

22) However, it is clear that particularly egregious conduct can be taken into account. For example in *O v P (No. 2) (Sch 1 Application: Stay: Forum Conveniens)* [2015] 2 FLR 77 Baker J (as he then was) stated as follows:

> [127] Hanging over this whole case is the fact that the father has been convicted on two occasions of inciting the mother's murder. …
>
> [128] In contrast to the list in s 25 of the Matrimonial Causes Act 1973 to which a court must have regard in deciding how to exercise its powers to make orders for financial relief in divorce proceedings, the list in Sch 1 to the Children Act of matters to which the court is to have regard in making orders for financial relief under the Schedule does not expressly include the conduct of the parties. Paragraph 4 of Sch 1 does, however, require the court to have regard *"to all the circumstances"*. In my judgment, the father's conduct in this case, in particular his convictions for two offences of inciting the mother's murder, is plainly relevant. It would be not merely inequitable but also impossible to disregard it.
>
> [129] It is the mother's case that she remains in fear of the father and that as a result her life, including her employment and earning capacity, has been very severely restricted. …
>
> [132] These quotations from the evidence illustrate just how much the father's conduct is a relevant factor in this case, not because the conduct by itself justifies a higher sum being paid in respect of S, but because it has had a profound impact on the life and lifestyle of S and her mother. If the father had not incited others to kill the mother, and not been sent to prison for most of S's childhood, he would in all probability have been able to pursue a career which would have enabled him to support S in enjoying the sort of comfortable lifestyle which the father and mother enjoyed in earlier times. Furthermore, the mother would have been able to pursue her career as a nutritionist and make some substantial contribution to S's support. Instead, he has been incarcerated for the past fourteen years, and she has been living the life of a fugitive, unable (as I find) to work in her chosen career and forced to rely on her parents, and for a period X, for financial support.

23) Conduct (a criminal offence by M, the victim of which was the child, and which led to a long custodial sentence) was also taken into account in *TK v LK* [2024] EWFC 71 per Nicholas Allen KC sitting as a Deputy High Court Judge.

24) On 8th October 2024 Resolution will publish its report on *Domestic Abuse in Financial Remedy Proceedings* which will include proposals for reform.

B. Non-Court Dispute Resolution

25) FPR Part 3 has historically been underused. This is strange given that:

a) r1.4(1) provides that the court *"must further the overriding objective by actively managing cases"*; and
b) r1.4(2)(f) states that active case management includes *"encouraging the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure."*

26) Important revisions to both FPR Part 3 and Part 28 came into effect on 29th April 2024.[6]

27) There are no transitional provisions so the revisions apply to proceedings issued before that date.

28) The definition of 'non-court dispute resolution' ('NCDR') at r2.3(1)(b) has been widened to mean *"methods of resolving a dispute other than through the court process, including but not limited to mediation, arbitration, evaluation by a neutral third party (such as a private Financial Dispute Resolution process) and collaborative law"*.

Prior to issue

29) Mediators undertaking Mediation Information and Assessment Meetings (*'MIAMs'*) are now required by r3.9(2) not only to inform the parties attending of the other means of resolving matters than court, but to go through the other options available to the parties and indicate which one might be suitable to them, given their specific circumstances.

30) Some MIAM exemptions have been removed or amended either to reflect the current law (such as the change from *"domestic violence"* to *"domestic abuse"* to broaden the definition in line with the Domestic Abuse Act 2021) or to tighten up the use of the exemptions. For example r3.8(1)(c)(ii)(ad) has been amended to refer to *"significant financial hardship"* rather than *"unreasonable hardship"* and it is now more difficult to claim an exemption based on the availability of mediators by location given that most can (and often do) attend remotely (r3.8(1)(k)(ai)).

After issue

31) Pursuant r3.10(1) if a MIAM exemption has been claimed, the court will inquire into whether the exemption (i) was not validly claimed; or (ii) was validly claimed but is no longer applicable.

32) Pursuant to r3.10(2) if a court finds that the MIAM exemption was not validly claimed, or that it was validly claimed but is no longer applicable, the court will (i) direct the applicant, or direct the parties, to attend a MIAM; and (ii) if necessary, adjourn the proceedings to enable a MIAM to take place, unless the court considers that in all the circumstances of the case, the MIAM requirement should not apply to the application in question.

33) Pursuant to r3.3(2) in considering whether NCDR is appropriate the court must take into account whether (i) a MIAM took place; (ii) a valid MIAM exemption was claimed; and (iii) the parties attempted mediation or another form of NCDR and the outcome of that process. The court is also under the obligations in respect of active case management set out above.

34) A new r3.3(1A) allows the court to require parties to file and serve *"in the time period specified by the court, a form setting out their views on using non-court dispute resolution as a means of resolving matters raised in the proceedings"*. This is Form FM5.[7]

35) The making of an order under r3.3(1A) will be closely akin to the making of an *Ungley* order (so-called because it was first devised by Master Ungley to encourage the use of NCDR in clinical negligence cases), by which a court may require a party to file a statement to similar effect and thereafter make an adverse costs order if there have been no reasonable invitations made to engage in NCDR, or if such invitations have either been ignored or unreasonably refused. The only substantive difference is that whereas the statement filed pursuant to an *Ungley* order is *'without prejudice save as to costs'*,

[6] When the material parts of the Family Procedure (Amendment No. 2) Rules 2023 (SI 2023/1324) came into force. Other parts came into effect on 8th April 2024.

[7] Practice Direction Update No. 2 of 2024 amends PD5A - Forms which lists out the standard forms which must be used by court users in family proceedings. The Update amends PD5A to include references to the number (FM5) and name ('*Statement of position on non-court dispute resolution (NCDR)*)' of the new form.

the form filed pursuant to this rule will be open, meaning that the court will be aware, at all stages of the case, of the parties' positions regarding NCDR.

36) Details as to how the new Form FM5 will work in practice are set out in an amended PD3A.

37) An *Ungley* order was made in *Mann v Mann* [2014] 2 FLR 928 by Mostyn J. He also noted that what was then r3.3(1)(b), but later became r3.4(1)(b), permitted the court to adjourn for NCDR only *"where the parties agree"* and called for consideration to be given by the Family Procedure Rule Committee ('FPRC') to the removal of that proviso.[8]

38) That provision has now been deleted. An amended r3.4(1A) provides that where *"the timetabling of proceedings allows sufficient time for these steps to be taken"*, the court should *"encourage parties"* to *"undertake non-court dispute resolution"*. The parties' agreement to an adjournment for that purpose is therefore no longer required.

39) The court may give directions about the matters specified in r3.4(1A) on the application of a party or of its own initiative. Note that r3.4(6) states that *"[w]here the court proposes to exercise its powers of its own initiative, the procedure set out in rule 4.3(2) to (6) applies"* and r4.3(2) states *"… where the court proposes to make an order of its own initiative (a) it may give any person likely to be affected by the order an opportunity to make representations ..."*.

40) The accompanying PD3A has also been amended with effect from 29th April 2024.[9] It states:

    a) at 10A, that while the FPR does not give the court the power to require parties to attend NCDR, *"the court does have a duty to consider, at every stage in the proceedings, whether non-court dispute resolution is appropriate"*;

    b) at 10B, that the court *"will want to know the parties' views on using non-court dispute resolution as a way of resolving matters"*; and

    c) at 10C, that each party must serve on all other parties a standard form setting out their views on using non-court dispute resolution, i.e. an FM5:

        i) at least seven days before the first hearing in the proceedings held on notice (i.e. the First Appointment in financial remedy proceedings and the FHDRA in private law children proceedings) or within such other period before that hearing as the court may direct; and
        ii) if required by the court, at least seven days before a subsequent hearing or within such other period before a subsequent hearing as the court may direct. The form must be verified by a Statement of Truth.[10]

41) Paragraph 10D states that the court also has general powers to adjourn proceedings (r4.1) which could be exercised to encourage the parties to attend non-court dispute resolution.

42) Paragraph 10E states that if the court allows time for parties to attend NCDR or adjourns the proceedings specifically for that purpose *"any failure of a party, or parties, to then attend non-court dispute resolution will not affect any substantive decision the court makes in the proceedings."*

[8] In *WL v HL (Rev 1)* [2021] EWFC B10, [2021] 2 FCR 394 per Recorder Allen QC, an order was made under the original version of r3.4. The result was that the parties were able to find a solution that worked for them, rather than having one imposed, knowing that the court maintained an overview of the progress of their negotiations.
[9] Practice Direction Update No. 6 of 2023.
[10] Practice Direction Update No. 1 of 2024.

43) In financial remedies cases, the power to *"encourage"* at r3.4(1A) is now backed by an amended r28.3(7), which will expressly make a failure, without good reason, to attend NCDR a reason to consider departing from the general starting point that there should be no order as to costs. This point is repeated in para 10E of PD3A.

44) There is a similar amendment to the costs rules that apply to other family proceedings (for example CA 1989 Schedule 1 applications, interim applications and appeals) and to applications under the Trusts of Land and Appointment of Trustees Act 1996 and the Inheritance (Provision for Families and Dependants) Act 1975 by way of an amendment to CPR Part 44 with effect from 1st October 2024 when the Civil Procedure (Amendment No. 3) Rules 2024[11] enter into force. From that date there is an insertion within r44.2 (Court's discretion as to costs) at sub-rule(5)(e) so the conduct of the parties to which the court will have regard in deciding what order (if any) to make about costs will include *"whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution"* (as it is referred to in the CPR).

45) It has been held in the civil context (under CPR 1998 r3.1(2)(m)) that the consent of the parties is not necessary for a case to be referred to Early Neutral Evaluation (*Lomax v Lomax* [2019] EWCA Civ 1467 on appeal from *Lomax v Lomax (Referral to Early Neutral Evaluation)* [2020] 1 FLR 30).

46) In `Compulsory ADR' (a report of the Civil Justice Council published in June 2021) it was said that any form of compulsory ADR which is "*not disproportionately onerous and does not foreclose the parties' effective access to the court"* is lawful.

47) In *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416 the Court of Appeal sidestepped the decision in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 and determined that it is permissible in some circumstances for the court to order that the parties attempt to resolve their dispute via NCDR prior to seeking a judicial determination and/or stay proceedings to allow for NCDR to take place, although such a power must be exercised in a way which does not impinge on the Article 6 right to a fair hearing within a reasonable time by an independent tribunal and must be proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost.[12]

48) If applied to family proceedings, that element of the court's reasoning might be considered to pose an interesting question as to whether arbitration under the IFLA scheme is among the forms of NCDR which the court can *"encourage"*, almost to the point of mandation (arbitration being specifically referred to in the amended definition of NCDR). This may turn on whether the court's residual discretion, to decline to uphold an arbitral award which is subject to a successful challenge, tantamount to an appeal, provides sufficient access to a full judicial hearing.

49) The Court of Appeal did not set out any guidance as to how or at what stage in the litigation the court should decide to make such an order, with Sir Geoffrey Vos MR commenting that *"it would be undesirable to provide a checklist or a score sheet for judges to operate"* although some potentially relevant considerations were highlighted at [61] to [63].

50) In *X v Y (Financial Remedy: Non-Court Dispute Resolution)* [2024] EWHC 538 (Fam), Knowles J gave and published a ruling so as to ensure that those involved in family proceedings (at [4]) *"understand*

[11] https://www.legislation.gov.uk/uksi/2024/839/made

[12] Amendments to the CPR consequent on *Churchill* to clarify (expressly) that the court has the power to order parties to participate in NCDR come into effect on 1st October 2024 when the Civil Procedure (Amendment No. 3) Rules 2024 enter into force. Amendments/additions are made to r1.1, r1.4, r3.1(2)(o) – a new express power to *"order the parties to engage in alternative dispute resolution"* - r28.7(1)(d), r28.14(10)(f) and r29.2(1A) and Part 44 (as above).

the court's expectation that a serious effort must be made to resolve their differences before they issue court proceedings and, thereafter, at any stage of the proceedings where this might be appropriate", and to signal that *"at all stages of the proceedings, the court will be active in considering whether non-court dispute resolution is suitable"* and the changes to Part 3 "*will give an added impetus to the court's duty in this regard"*.

51) It was also said by Knowles J that to assume that the decision in *Churchill v Merthyr Tydfil CBC* was of limited relevance to family proceedings (at [15]) *"is unwise"* as *"[t]he active case management powers of the CPR mirror the active case management powers in the FPR almost word for word*[13] *and both the civil and the family court have a long-established right to control their own processes. The settling of cases quickly supports the accessibility, fairness and efficiency of the civil, and I emphasise, the family justice system."*

52) In *NA v LA* [2024] EWFC 113 per Nicholas Allen KC (sitting as a Deputy High Court Judge) the applicant had not attended a MIAM claiming an urgency exemption under r3.8(1)(c)(ae).[14] The court considered that the exemption (even if validly claimed) was no longer applicable. The court therefore stayed the financial remedy proceedings and required the parties to inform the court by a specific date what engagement had been made with NCDR.

53) In *HJB v WJB (financial remedies) (separation agreement - application to show cause)* [2024] EWFC 187 per Her Honour Judge Vincent, having determined as a preliminary issue that a separation agreement reached between the parties stood and would be *"presumptively dispositive"* when the court came to consider the s25 factors, said:

> [125] The parties will need some time to reflect on the decision and consider directions. In accordance with the changes to the Family Procedure Rules Part 3, Practice Direction 3A and Part 28 of the Family Procedure Rules, the Court will be seeking to focus the parties' minds on the potential for non-court dispute resolution of remaining issues between them as a next step and before further costs are expended in this litigation.

54) New paragraphs were added to the Standard Financial and Children Orders with effect from 21st May 2024 to reflect r3.4(1A).[15] Orders 1.1 (para 81), 1.2 (para 52), 7.0 (para 72), and 7.1 (para 7) require the parties to file the Form FM5. Orders enabling the court to adjourn so that the parties may attend NCDR are already incorporated at 1.1 (para 73), 7.0 (para 43) and 7.1 (para 14).

55) The financial remedies pre-application protocol (annexed to PD9A) has been rewritten by the FPRC (effective from 31st May 2024). A new pre-application protocol for private law children proceedings (Annex 2 PD12B) has been issued, also effective from 31st May 2024. Both protocols reiterate the provisions in respect of MIAMs in Part 3 before issuing a court application and detail the steps a party must have taken to engage in NCDR.

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[13] CPR 1998 r3.1(2)(f) (*"Except where these Rules provide otherwise, the court may … stay the whole or part of any proceedings or judgment either generally or until a specified date or event*") is mirrored exactly by FPR 2010 r4.1(3)(g) (*"Except where these rules provide otherwise, the court may … stay the whole or part of any proceedings or judgment either generally or until a specified date or event"*).

[14] *"(ae) irretrievable problems in dealing with the dispute (including the irretrievable loss of significant evidence)"*. In *Re K* [2022] 2 FLR 1064 Sir Geoffrey Vos MR who delivered the judgment of the court stated (in the context of an application for a child arrangements order under CA 1989) at [35] that *"[i]t is a matter of concern that a party can avoid the statutory MIAM requirement by simply asserting that a case is urgent and they need a without notice hearing."* He also observed in the same paragraph that *"[f]or the statutory MIAM requirement to be effective, it must be enforced*".

[15] https://www.judiciary.uk/guidance-and-resources/update-to-standard-orders/

56) The amendments made to Part 3 represent the fruit of the FPRC's consultation on the early resolution of private family law arrangements.[16]

57) Time will tell whether the amendments will herald a change in culture and interest in NCDR in a similar fashion to how PD28A para 4.4 and recent case law has incentivised a culture change for the making of open offers.

58) The provisions go to the edge of but do not represent mandation of NCDR, which was the subject of an MOJ consultation which decided against mandation.[17]

59) Some, however, consider that the power of mandation *already* exists. In *Mediation: 50 years after Finer* 174 NLJ 8078 p9 David Burrows stated that the *"critical passage"* in *Churchill* at [58] – *"… as a matter of law, the court can lawfully stay existing proceedings for,* ***or order****, the parties to engage in a non-court-based dispute resolution process"* (emphasis added) - had been ignored in both *X v Y* and *NA v LA* and therefore *"[a]s matters now stand, we have two High Court judge decisions which overlook at Court of Appeal assertion as to ordering mediation."*

60) Given the more robust approach to the making of costs orders encouraged in financial remedy cases such as *OG v AG (Financial Remedies: Conduct)* [2021] 1 FLR 1105 per Mostyn J,[18] these rule changes, the recent judgments, and the revised/new pre-application protocols may well create conditions in which many parties will have to ask themselves whether they can really afford not to participate in appropriate NCDR.

C. <u>(Special) Contribution</u>

61) In *XW v XH (Financial Remedies: Business Assets)* [2019] 1 FLR 481 the parties' combined capital resources were £530m which principally consisted the proceeds received by the husband from the sale of company shares worth c. £490m net. The judge awarded W a lump sum of £115m which, when added to her own assets, gave her approximately £152m. The bulk of this award represented 25% of the growth in value during the marriage of H's shareholding in the company. In his judgment Baker J (as he then was) based his determination on four factors including that H's contribution to the "*growth in the value of his business assets during the marriage comes within the concept of special contribution*".

62) On appeal (reported as *XW v XH (Financial Remedies: Business Assets)* [2020] 1 FLR 1015) W challenged each of the four factors. In so far as they related to special contribution the grounds of appeal were that the judge (i) was wrong to find that H had made a special contribution; and (ii) failed to quantify how each of the four factors, in particular latent potential and special contribution, impacted on his award.

63) Moylan LJ, in a judgment with which King and Underhill LJJs agreed, concluded on the issue of special contribution that:

a) (at [119]) as identified in *Work v* Gray the focus is on disparity of contribution and whether there is a

[16] www.gov.uk/government/consultations/early-resolution-of-private-family-law-arrangements (The Consultation ran from 30th March 2023 – 25th May 2023).
[17] https://consult.justice.gov.uk/digital-communications/private-family-law-consultation/ (The Consultation ran from 23rd March 2023 – 15th June 2023 with the results published on 7th February 2024).
[18] [31] "*It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing.*"

sufficient disparity to make it inequitable to disregard;

b) (at [122]) *"the search for and analysis of whether a special contribution is established should be undertaken through a relatively general, or broad, assessment of the evidence .. a good reason for departing from equality is not to be found in the 'minutiae'"*;

c) (at [123]) *"it is of the very essence of special contribution that each party's contributions have to be balanced. The wife is not thereby using her contributions 'as a shield'. Nor does she have to claim that she has made a special contribution. In particular … when the court is determining 'whether there is sufficient disparity to make it inequitable to disregard' a party's contributions … balancing the wife's contributions including as a mother is at the very centre of this determination"*; and

d) (at [124]) *"following the identification of special contribution as a reason for departing from an equal division in Cowan v Cowan [2001] 2 FLR 192, the courts became aware of the scope for this issue significantly to undermine the non-discriminatory principle. Rapid retrenchment followed in Lambert v Lambert [2003] 1 FLR 139, Miller and Charman, confining the ability to argue special contribution to* ***very*** *exceptional circumstances"* [original emphasis].

64) At [151-155] Moylan LJ thereafter concluded that the judgment did not make clear that the judge applied the right approach because, in his critical assessment, the judge referred *only* to the husband's financial contribution. His focus was only on this, and not on the extent of any disparity in the parties' respective contributions. There was no balancing of the parties' contributions and, indeed, no reference to the wife's contributions at all. The judge had referred to W's contributions as *"incalculable"* but this was in the context of an overall assessment of fairness, not in the specific context, as required, of special contribution.

65) The appeal was therefore allowed and the Court of Appeal went on to substitute its own decision and concluded (i) it was fair to treat 60% of the wealth derived from the shares as matrimonial property (£293m) and 40% as non-matrimonial (£195m); and (ii) there was not such a disparity in the parties' respective contributions that it would be inequitable to disregard them when deciding what award to make. Although H's contributions had clearly been very significant, the necessary disparity was not present in this case.

66) An equal division of the total marital wealth of £296.7m (£293m + £3.7m) led to W receiving a lump sum of £145m (in place of Baker J's award of £115m) and the jointly owned property worth £3.7m, with the effect that W would have approximately 34.5% (£182.45m) of the parties' combined wealth and H would have 65.5% (£347.55m) rather than the division of 28.75% and 71.25% effected by the judge's award.

67) The most recent reported case in relation to special contribution is *DR v UG* [2024] 1 FLR 698 per Moor J. At [49] he stated that "*I accept that the concept does still exist and that it is likely to continue to do so until the Supreme Court says otherwise"* and referred to *Work v Gray*. Thereafter he stated that *"[t]he availability of the concept has, however, been significantly circumscribed over the years"* and said three elements were necessary (taken from *Work v Gray* at [14] but approved in this form by the Court of Appeal):

(i) The characteristics or circumstances which would result in a departure from equality have to be of a wholly exceptional nature such that it would very obviously be inconsistent with the objective of achieving fairness for them to be ignored …

(iii) Only if there is such a disparity in their respective contributions to the welfare of the family that it would be inequitable to disregard it should this be taken into account in determining their shares [thus if the court completely fails to undertake a comparative evaluation of each party's respective contributions [as Baker J failed to do in *XW v XH* [2020] 1 FLR 1015], a finding of special contribution will be flawed] …

(vi) The amount of the wealth alone may be so extraordinary as to make it easy for the party who generated it to claim an exceptional and individual quality which deserves special treatment. Often, however, he or she will need independently to establish such a quality, whether by genius in business or some other field … A windfall is not enough.

68) On the facts, at [67] Moor J stated that he had formed *"the very clear view"* that none of the three tests were satisfied.

69) Where does the argument go next? In *E v L (Financial Remedies)* [2022] 1 FLR 952 Mostyn J stated at [28] that the almost inevitable triggering of *"subconscious discriminatory practices"* is the reason *"that the doctrine of special contribution has to all intents and purposes been consigned to history"*. But has it? It is clear that in his judgment in *XW v XH* Moylan LJ sought to close the door left ajar in *Work v Gray* on the scope for argument based on a special contribution justifying a non-equal division of marital assets, by emphasising the need to compare both spouses' contributions in order to determine whether any disparity between them would be 'inequitable' to disregard (as distinct from a consideration as to whether or not a contribution is unmatched).

70) Is the doctrine *per se* discriminatory? The arguments against the concept were known from an early stage. As Thorpe LJ observed in *Lambert* at [45] *"the danger of gender discrimination resulting from a finding of special financial contribution is plain. If all that is regarded is the scale of the breadwinner's success, then discrimination is almost bound to follow since there is no equal opportunity for the homemaker to demonstrate the scale of her comparable success."*

71) In *Charman v Charman (No. 4)* [2007] 1 FLR 1246 the Court of Appeal said as follows:

[80] The notion of a special contribution to the welfare of the family will not successfully have been purged of inherent gender discrimination unless it is accepted that such a contribution can, in principle, take a number of forms; that it can be non-financial as well as financial; and that it can thus be made by a party whose role has been exclusively that of a home-maker. Nevertheless in practice, and for a self-evident reason, the claim to have made a special contribution seems so far to have arisen only in cases of substantial wealth generated by a party's success in business during the marriage. The self-evident reason is that in such cases there is substantial property over the distribution of which it is worthwhile to argue.

72) Was Jamie Cooper-Hohn discriminated against in her claim against Chris Hohn? She could not have done more to contribute within the marriage as Roberts J observed:

[273] It is really the third point which goes to the heart of the case which is being advanced on behalf of the wife. Given the extent of her involvement with the foundation (which I have already described earlier in this judgment); her obvious devotion to and prioritisation of the family's needs – a family of four children which included triplets; her role as homemaker and co-ordinator of all the children's social and other needs; what more, asks Mr Pointer, could she have done? What more should she be expected to have done in order to qualify for equal treatment with the husband in terms of financial outcome? As he rightly reminds me, she was not simply a 'working' wife; she was a wife who was fully engaged in fulfilling her role in the joint objective which had underpinned the marriage from its very inception. Her role in the foundation demanded of her the skills and qualities which would have been needed in any CEO at the top of an organisation. Until the time came when the 'job' grew too big for any one individual, she performed that role without remuneration and entirely for the benefit of the beneficiaries of its grants and programmes. I thought it slightly churlish on the husband's part to say, as he did, that he did not seek to control the amount of time which she spent at work and she more or less devised her own working programme around the needs of the home and the children. I am quite satisfied that there was not a spare moment of this wife's waking day when she was not actively engaged either in discharging her role in the home or working for the foundation. I heard, and accept, her evidence that her day would often start in the early hours to coincide with calls which needed to be made in different time zones. She was frequently still working in her study at home after midnight when the children no longer needed her attention.

73) However notwithstanding this she received one-third of the wealth of the assets of over £1bn. Indeed, there is no reported case of a wife's contribution being found to be exceptional or special.

74) The lack of the equal opportunity for the homemaker to demonstrate the scale of her comparable success were considered in *Lambert* by Thorpe LJ at [45]:

> Examples cited of the mother who cares for a handicapped child seem to me both theoretical and distasteful. Such sacrifices and achievements are the product of love and commitment and are not to be counted in cash. The more driven the breadwinner the less available will he be physically and emotionally both as a husband and a father. There is also some justification in Mr Mostyn's emphasis on the extent to which the homemaker frequently sacrifices her potential to generate assets by undertaking the domestic commitment to husband and children. At the same time she risks the outcome of failure and so earns her entitlement to share in the successful outcome.

75) Moylan LJ sought to address this issue in *XW v XH (Financial Remedies: Business Assets)* when at [123] he stated that the wife *"does [not] have to claim that she has made a special contribution"* and in determining whether there is a sufficient disparity in contributions *"the wife's contributions including as a mother is at the very centre of this determination."*

76) The question of discrimination *per se* was specifically addressed in *Work v Gray* [2017] 2 FLR 1297. It was answered in the negative. The analysis was as follows:

> [92] We turn next to consider whether the concept of special contribution, as (we emphasise) currently applied, is discriminatory. We would suggest that the fact that there has only been one reported case since *Charman* in which special contribution has resulted in an unequal division of matrimonial property[19] makes it difficult to sustain the submission that the manner in which it is being applied is discriminatory.
>
> [93] If the concept was being applied more broadly, there would clearly be a risk that it would be discriminatory. But, as Wilson LJ said in *K v L (Non-Matrimonial Property: Special Contribution)* [2011] 2 FLR 980 (at para [15]):
>
> '… the law does not abjure all discrimination. On the contrary it is of the essence of the judicial function to discriminate between different sets of facts and thus between different claims.'
>
> What is unacceptable discrimination is explained by Lord Nicholls of Birkenhead in *White* (at 605). Accordingly, the mere fact that one party has made a financial contribution and the other has not is of no significance in the s25 exercise.
>
> [94] However, the court is still mandated to consider the parties' respective contributions. In order to ensure fairness, for the reasons articulated, in particular, in *White* and *Miller*, the courts have confined the concept of special contribution so that it reflects a significant, substantive difference, which does not require extensive evidential investigation. Moreover, such a significant, substantive difference gives rise to a special contribution irrespective of whether the contribution has been made by the husband or the wife.
>
> [95] This is the short answer to the wife's argument based on Art 14 of the European Convention even if, which is by no means clear, the wife is able to show that a right to financial relief on divorce falls within A1P1.[20]
>
> [98] … It is not, therefore, clear, on the basis of the submissions before us, that A1P1 is engaged nor is it necessary for us to make such a determination.

[19] i.e. *Cooper-Hohn v Hohn* [2015] 1 FLR 745. The only other two reported cases since *Lambert* where a special contribution argument succeeded are *Sorrell v Sorrell* [2006] 1 FLR 497 and *Charman v Charman (No. 4)* [2007] 1 FLR 1246.

[20] Article 1 of Protocol No. 1 to the European Convention on Human Rights.

[99] Accordingly … the application of the concept of special contribution is confined to very narrow bounds and is not applied, in practice, in a manner which is discriminatory.

77) So where does the argument go next? Notwithstanding the Court of Appeal's conclusion in *Work v Gray* that the concept of special contribution does not infringe upon the European Convention on Human Rights there will be many who consider that until it is demonstrated that the contribution can be non-financial as well as financial and thus can (and has) been made by a party whose role has been exclusively that of a homemaker it will be an argument imbued with inherent gender discrimination. Will such a homemaker ever be found? Will it remain a doctrine confined to cases which are as rare as a white leopard? Or will a court (in the words of Thorpe LJ in *Lambert* at [46]) find a *"better path"* and *"banish the phenomenon"*? Watch this space …

D. (C)et Aside

78) The Family Court has power to *"vary, suspend, rescind or revive"* a final order using its powers under MFPA 1984 s31F(6); the power exists *"to vary an order with effect from when it was originally made"* (section 31F(6)(c)), and operates as an exception to the general rule that *"[e]very judgment and order of the Family Court is … final and conclusive between the parties"* (section 31F(3)).

79) These powers in turn are given relevant procedural effect by FPR 2010 r9.9A[21] in respect of financial remedy[22] orders (including those made by consent).

80) Rule 9.9A(2) provides that *"a party may apply under this rule to set aside a financial remedy order where no error of the court is alleged"*. If the applicant argues that the court was wrong in its decision on the facts or the law, the correct application is for permission to appeal. If the application is to vary an order amenable to variation under MCA 1973 s31, then a variation application should be made.

81) Rule 4.1(6)[23] is <u>not</u> the correct procedural route to set aside/vary final financial remedy orders (*Norman v Norman* [2017] EWCA Civ 120 per Eleanor King LJ at [49]).

82) Rule 9.9A(5) provides that:

Where the court decides to set aside a financial remedy order, it shall give directions for the rehearing of the financial remedy proceedings or make such other orders as may be appropriate to dispose of the application.

83) PD9A provides *inter alia* (emphasis added):

13.5: An application to set aside a financial remedy order should only be made where no error of the court is alleged. If an error of the court is alleged, an application for permission to appeal under Part 30 should be considered. The grounds on which a financial remedy order may be set aside are and <u>will remain a matter for decisions by judges</u>. The grounds <u>include</u> (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; (iv) a subsequent event, unforeseen and unforeseeable at the time the order was made, which invalidates the basis on which the order was made.

[21] See also the accompanying FPR 2010 PD9A paras 13.1–13.9. The rule came into force on 3rd October 2016 (SI 2016/901). Prior to that date, the *Barder* jurisdiction was exercised by way of an application to appeal.
[22] 'Financial remedy' is defined in FPR 2010 r2.3 and includes a financial order (relief under MCA 1973) and an order made pursuant to CA 1989 Sch 1.
[23] *"A power of the Court under these Rules to make an order includes a power to vary or revoke the order."* The rule mirrors CPR 1998 r3.1(7).

13.6: The effect of rules 9.9A(1)(a) and (2) is that an application may be made to set aside all or only part of a financial remedy order, including a financial remedy order that has been made by consent.

84) The application is made pursuant to FPR 2010 Part 18 and requires an application notice and a draft of the order sought (r18.7).

85) The court starts from the proposition that the order being challenged is an order that was properly made. The court must first consider whether any ground to challenge the order is established. Even if a ground is established, the court has a residual discretion as to whether a set aside should actually be ordered. If the order is set aside, the court will then proceed to the disposition phase, to decide what replacement order it should make (FPR 2010 PD9A, para 13.8 and *BT v CU* [2022] 2 FLR 26 per Mostyn J at [5] and [10]).

86) The court has considerable discretion and its full range of case management powers to manage the litigation proportionately. The application to set aside may be struck out or summarily disposed of (FPR 2010 PD9A para 13.8).

87) In *AB v CD* [2022] EWFC 116 Roberts J considered whether para 13.8 is compatible with the decision in *Vince v Wyatt* [2015] 1 FLR 972, concluding that, whilst there is no equivalent in family law to the *"real prospects of success"* test for summary judgment in the civil courts (CPR 1998 Part 24), *"the court is entitled, pursuant to the wide discretion mandated by para 13.8 of FPR 2010 PD9A, and positively encouraged, through application of the overriding objective, to conduct its enquiries and reach its conclusions within the context of "some form of abbreviated hearing following a provisional evaluation of the issues""* (at [78]).

88) In *Cathcart v Owens* [2021] EWFC 86, Mostyn J conducted a summary disposal of the husband's set aside applications in half a day of written and oral submissions without oral evidence.

89) In the event that the court agrees to set aside the original order, the court has a wide discretion as to how to conduct the disposition phase. A full rehearing, starting completely afresh, may be justified, for example, if third party interests are affected or the court does not have all the information it needs and/or the issues are wide-ranging. Alternatively, the court may proceed to determine the original application at the same time as setting aside the financial order, or may give directions for some form of abbreviated process.

90) Where there had been non-disclosure of a discrete part of the husband's assets, generating an unfairness that could be cured by one simple enlargement in an order that had otherwise already been fully implemented, the court confined the process to a proportionate enquiry and an order for a further lump sum, in *Kingdon v Kingdon* [2011] 1 FLR 1409, an approach endorsed in *Sharland v Sharland* [2015] 2 FLR 1367. However, whilst the court has a wide flexibility how to deal with such cases and the approach taken in *Kingdon* is one possible approach, the process must be fact specific and bespoke. In *Goddard-Watts v Goddard-Watts* [2023] 2 FLR 735 the Court of Appeal held that the husband's fraudulent non-disclosure was so far-reaching that it required the judge to consider the entire financial landscape anew.

<u>What are the grounds on which a financial remedy order may be set aside?</u>

91) In *Akhmedova v Akhmedov (No. 6)* [2021] 1 FLR 667 Gwynneth Knowles J expressed the view at [131] that "*Whilst the categories of cases in which r. 9.9A can be exercised are not closed and limited to those identified in paragraph 13.5 of PD9A, the jurisdiction to set aside is to be exercised with great caution, not least to avoid infringing upon the finality of judgments, subverting the role of the Court of Appeal, and undermining the overriding objective by permitting re-litigation of issues".*

92) In *CB v EB* [2021] 2 FLR 257 Mostyn J disagreed with this approach, rejecting any argument that MFPA 1984 s31F(6) and FPR 2010 r9.9A provide the court with an almost unfettered power to set aside any order of the court where exceptional circumstances justify such a conclusion. Although PD9A at para 13.5 states that *"the grounds on which a financial remedy order may be set aside are and will remain a matter for judges…",* this does not per Mostyn J extend the bases for set aside beyond (i) fraud or mistake; (ii) material non-disclosure; (iii) a *Barder* event; (iv) to the extent an order contains undertakings; or (v) if the order remains executory (the so-called *Thwaite* jurisdiction).

93) In *De Renée v Galbraith-Marten* [2024] 1 FLR 589 Cobb J stated:

> [20] The four numbered 'grounds' listed in PD9A para.13.5 … are sometimes called the 'traditional grounds'[24] (see Munby J as he then was in *L v L* [2008] 1 FLR 26 at [34], and see *CB v EB* [2020] EWFC 72 at §21 below) …
>
> [21] Mostyn J considered these statutory set-aside provisions, and the accompanying Practice Direction, in *CB v EB* (citation above); this was a case in which a husband sought to set aside two consent orders in financial remedy proceedings. Of PD9A para.13.5, Mostyn J said this at [49] (emphasis added):
>
> > … saying that the grounds *"remain a matter for decisions by judges"*, and that they *"include"* the traditional grounds, suggests that its author appears to have contemplated, at least theoretically, a possible expansion of the permitted territory by creative judges".
> >
> > But he went on vigorously to dismiss the possible expansion of the *"permitted territory"* …
>
> And at [55] and [57] he added:
>
> > [55] My historical excursus above demonstrates that the set aside power in section 31F(6) was not a brand new break with the past. It did not usher in a brave new world. It was no more than a banal replication of a power vested in the divorce county courts from the moment of their creation in 1968. That power had been confined by the law to the traditional grounds for decades.
> >
> > [57] In my judgment the language of FPR PD9A para 13.5 is misleading. It should not be read literally. There is no lawful scope for imaginative judges to unearth yet further set aside grounds. The available grounds are the traditional grounds, no more, no less.
>
> [22] I would like to make a few miscellaneous but important points to those discussed above …
>
> iii) The court's power under section 31F(6) of the 1984 Act (and I suggest, by analogy, rule 4.1(6) FPR) is not *"unbounded"*: per Baroness Hale in *Sharland v Sharland* [2015] UKSC 60 at [41];
>
> iv) The discretion afforded to a court to vary/set aside should (as I said recently in *Re D (Costs of Appeal: Application to Vary or Revoke Order)* [2023] EWHC 1244 (Fam) at [39]) be exercised in accordance with the overriding objective (rule 1 FPR 2010), that is to say, "*enabling the court to deal with cases justly, having regard to any welfare issues involved*".
>
> [35] If I have stretched the 'traditional grounds' (§20 above) beyond comfort, then I fall back, alternatively, in relying on the language of para.13.5 of PD9A. This appears to contemplate grounds for set aside of a financial remedy order *other than* the 'traditional grounds' (*"… a matter for decision by judges. The grounds include …."*). While there is controversy at first instance about whether grounds *other than* the 'traditional grounds' can be relied on to achieve the set aside of an order (Gwynneth Knowles J in *Akhmedov* thought that other grounds could be relied on, albeit with 'great caution', although Mostyn J disagreed with this in *CB v EB* (citation above) at [56]), it seems to me that *if* as yet undefined grounds can be relied on beyond the 'traditional grounds' for setting aside a financial remedy order (and I incline to Gwynneth Knowles J's view on this), then in order to

[24] As also so described in *Bezeliansky v Bezelianskaya* [2016] EWCA Civ 76.

achieve a just and fair result in this case, in fulfilment of the overriding objective, I can 'with great caution' assert them here …

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31st August 2024