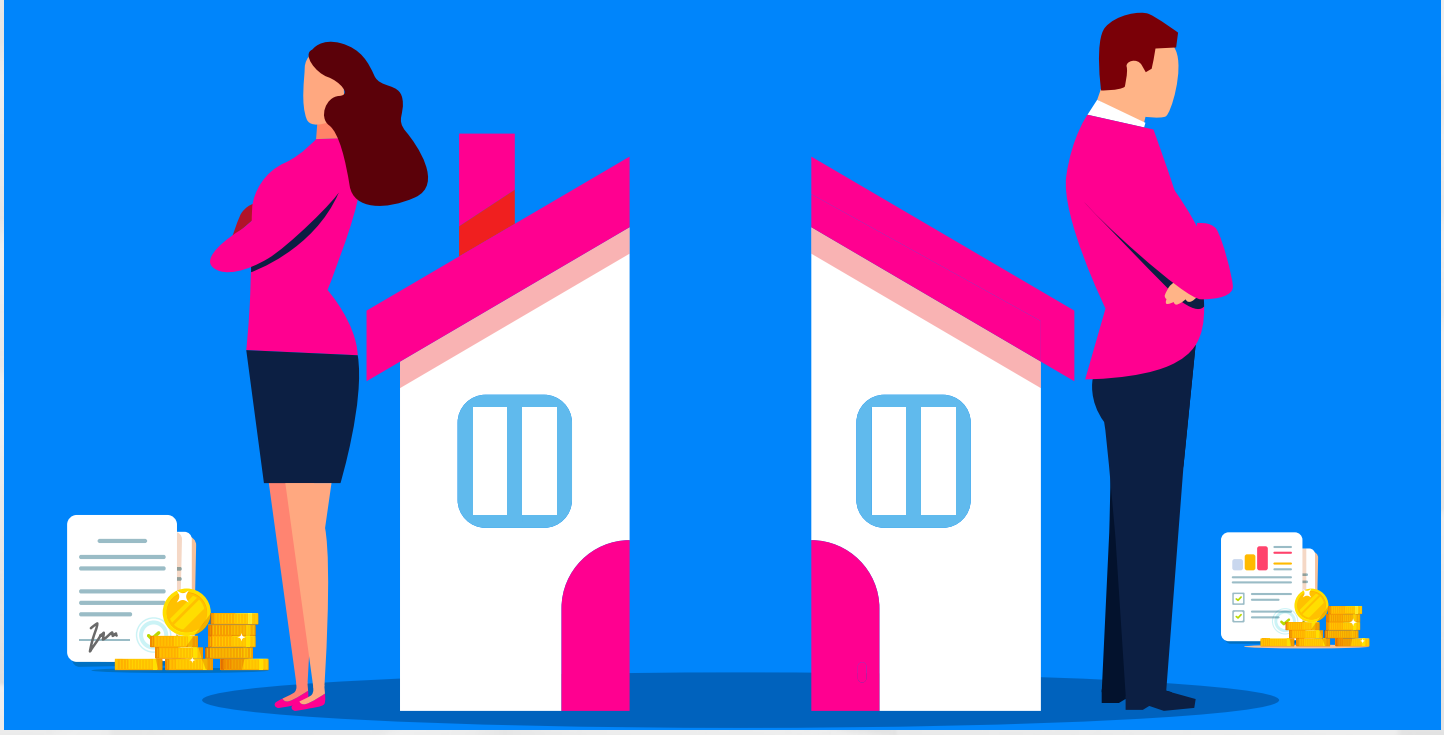
PROPOSED REFORMS: NON-DISCLOSURE, MANDATORY ADR AND COSTS CAPPING?



Authored by: Michael Allum (Partner) – International Family Law Group

The announcement on 4 April 2023 that the Law Commission has launched a review into the laws which determine how finances are divided on divorce has intensified the debate as to whether s.25 of the Matrimonial Causes Act 1973 ("MCA") should be reformed. There is a significant difference of opinion around the profession (including in the author's firm) between those content for the existing law to continue and those supporting the reform process. This article is the author's personal view and not reflective of the view of any business or organisation with which he is affiliated.

In WC v HC[1] Mr Justice Peel provided a helpful synopsis of the current law. Given the word limit for this article the summary is not repeated here in full. It will suffice to say the following. The court undertakes a two-stage process namely computation and distribution. The objective is to achieve an outcome that is as fair as possible having regard to the s.25 factors.

The three essential principles are sharing, needs and compensation, although in practice the latter is very rare.

Pursuant to the sharing principle (1) marital assets are usually shared equally and (2) non-marital assets are not distributed, unless required to meet needs. The applicant will usually receive the greater of their entitlement on a sharing and needs basis. Needs is an elastic concept for which the standard of living is relevant but not the loadstar. Most cases are decided on a needs basis. Absent duress, fraud, or misrepresentation a marital agreement freely entered into with a full appreciation of the implications should be upheld unless it would be unfair to do so. I would only add to this summary the equally famous exposition of the law on spousal maintenance contained in SS v NS[2].

It is respectfully submitted that this is not complicated. Once the court has concluded the computation process there is clear guidance as to how the available resources should be distributed. This does, however, rely

1 [2022] EWFC 22 (para 21)

2 [2014] EWHC 4183 (Fam) (para 46)

on obtaining an accurate picture as to the financial resources in a timely and efficient manner. That brings me on to the first suggested change: meaningful penalties for failure to give clear, frank, and honest disclosure.

As Mostyn J said in NG v SG[3], non-disclosure is a plague on the financial remedy process. It generates huge costs, clogs up the court system and risks unfair outcomes. Despite a concerted move towards making costs orders where one party is guilty of litigation conduct, in practice the court is still often too soft when one party fails to give full disclosure. The court can draw adverse inferences but must be careful not to give the applicant more than they would have received had the respondent given full disclosure. Often the only risk to the guilty party is being penalised in costs which some litigants will see as a calculated risk worth taking when compared with the potential upside if the court fails to discover the true extent of their wealth or the applicant runs out of energy/money to pursue a fair outcome. For a recent example of where one of the most blatant refusals to give full disclosure only resulted in a costs order see Tsvetkov and Khayrova[4] where a costs order of £748,632 was made in the context of an overall award of £24,259,239. Is that likely to provide much disincentive? Probably not.

It is submitted that the courts should therefore be much tougher on non-disclosure. It is understandable that committal should remain a last resort, but why shouldn't the court make a punitive financial order when faced with persistent and substantial non-disclosure. The court is required to take the conduct of the parties into account if it would be inequitable to disregard it. Why should contempt of court in persistently failing to give full disclosure not fall within this category. It would serve as a disincentive to respondents who might otherwise hide assets and compensate the wronged party if they are put to the time, cost and stress of protracted proceedings seeking to establish the true financial position.

Once the computation stage has been completed, the court turns to distribution. In most cases this starts and ends with needs. Whilst any attempt to move towards a more rigid set of rules may increase certainty, the almost inevitable knock-on effect would be an increase in cases where the court is restricted from making an order that – given more flexibility – it would have made to achieve an outcome that it considers as fair as possible in all the circumstances of the case.

But do we really need a more rigid set of rules? After all, in the vast majority of cases parties are already able to agree a settlement without the need for a court to impose a decision. This often involves a proportionate amount of involvement from specialist family lawyers who – once the computation state has been completed – are able to identify the range of likely outcomes and advise clients accordingly. What is needed is access to specialist advice. This brings me on to my second recommended reform: bring back properly funded legal aid.

Although not often seen by practitioners in the HNW sphere, most people getting divorced up and down the country have modest financial resources. Many simply cannot afford legal advice. It would be wrong to focus from our ivory towers exclusively on HNW cases without considering reforms which would help the majority of people getting divorced.

The difference a specialist lawyer could make, even by having just a couple of hours to help with each of: (1) the completion of the Form E; (2) reviewing the other party's Form E and preparing a questionnaire; (3) drafting directions; and (4) advising as to the range of likely outcomes and drafting proposals for settlement, would be enormous. This could perhaps take the form of vouchers similar to those issued for mediation to enable solicitors to provide this advice but at properly funded rates.

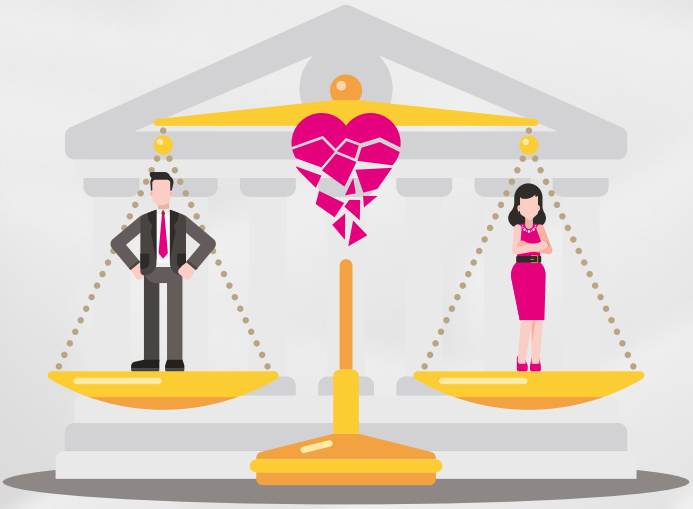
There are of course some cases where the parties need more help. There is often a broad range of potential outcomes and finding the middle ground is not always easy. In these circumstances the default position, at least in Central London, has become to attend a private neutral evaluation (often referred to as a Private FDR). The range of benefits of Private FDRs are almost endless and well known to everyone practising in this area but include being able to select an evaluator with a particular specialism in the issues in the case, the evaluator having sufficient time to read the papers in advance and the evaluator being able to devote the whole day to assist the parties reach a settlement. The settlement rates are incredibly high. This brings me on to recommended change number three: give the courts the power to order parties to engage in ADR (including attending a Private FDR).

Back in our ivory towers it is easy to forget that most Private FDRs are still only undertaken in higher value money cases and often in London. Currently the court's powers are limited to adjourning proceedings to enable the parties to obtain information about, and consider using, non-court dispute resolution[5]. The court only has the power to order parties to engage in non-court dispute resolution where the

3 [2011] EWHC 3270 (Fam)

4 [2023] EWFC 130 (substantive judgment) and [2023] EWFC 131 (costs judgment)

5 Rule 3.4(1)(a) Family Procedure Rules 2010

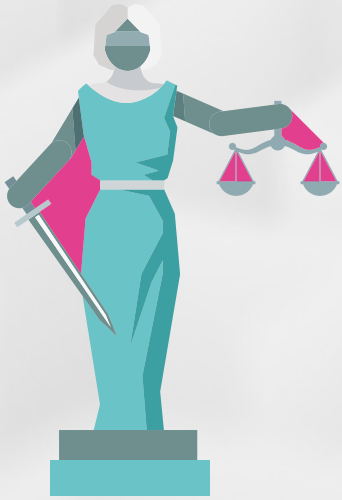


parties agree[6]. In Mann v Mann[7] Mostyn J suggested that the Family Procedure Rule Committee consider amending FPR 3.4(1)(b) to enable the court to direct parties to engage in non-court dispute resolution where one or both of them did not agree, but that change has not been made.

For a good example of where the court considered that the costs of the litigation were disproportionate to the issues between the parties and brought about a settlement by doing the best that it could – namely directing that the proceedings be adjourned to enable the parties to obtain information about and consider engaging in non-court dispute resolution – see the decision of Recorder Allen KC in WL v HL[8].

There will, of course, always be some case where it is not possible to reach a settlement and the court is required to make the decision for the parties. The majority of cases (usually not reported) up and down the country are conducted in a way that is reasonable and proportionate to the financial resources involved. For the few cases (which are more likely to be reported) which generate costs which are disproportionate, the court already has some power to address in the form of costs orders where one party incurs significantly more in legal fees than the other (see HHJ Hess in YC v ZC[9] and DDJ Hodson in P v P[10] where the court in effect added back the disparity in spending).

For cases where both parties seem intent on incurring unreasonable costs that are disproportionate to the issues involved, the court should have the power to cap the costs the parties are allowed to incur during various stages of the proceedings. For an example of where the courts endorsed costs capping in respect of experts' fees see Loggie v Loggie[11] where Mostyn J held that the court should be asked to place a cap on the fees of experts being jointly instructed pursuant to FPR 25.12(5) on the basis the expert could apply for the order imposing a cap on the fees to be varied in the event circumstances change and further work is required.



I am not suggesting that costs should be capped in every case. In the vast majority the parties and lawyers can be trusted to resolve disputes in a way that is reasonable and proportionate to the issues involved. But in the minority of cases – frankly often in London in the HNW sphere – where the costs being incurred are completely disproportionate, I suggest the family court should have power to cap the costs one or both parties is able to incur as part of their case management powers.

It should also be borne in mind that substantive reform risks causing – at least in the short to medium term – all the uncertain, litigation and costs it is hoped they will avoid.

We all know, for example, how long it took the profession to work out what the Lord of Lords meant by the yardstick of equality following White v White[12] and what the Supreme Court intended when it said that a marital agreement should be upheld unless it would be "unfair" to do so in Radmacher v Granatino[13]. The same wave of litigation would be likely again if s.25 MCA 1973 is overhauled.

The above examples are not intended as an exhaustive list of potential reforms. There will certainly be many other helpful reforms and blue sky thinking and discussion is required within the profession. Although codification is not in itself a justification for reform it would certainly be helpful if a summary of the law was made more readily accessible for the public. If this could incorporate data from the revised D81 that would be helpful. But it is submitted that a more robust approach to ensure full disclosure, the re-introduction of properly funded legal aid, the ability to require the parties to attend a Private FDR and costs capping in appropriate cases would make a much greater impact than wholesale reform of s.25 MCA 1973.

6 Rule 3.4(1)(b) Family Procedure Rules 2010
7 [2014] 2 FLR 928
8 [2021] EWFC B10
9 [2022] EWFC 137
10 [2022] EWFC 158
11 [2022] EWFC 2
12 [2000] UKHL 54
13 [2010] UKSC 54