SEPTEMBER 2019 CASE LAW UPDATE

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1. INTRODUCTION

1.1 This brief update covers some of the more interesting decisions over the last 3 months. It is no substitute for legal advice and simply provides a broad overview of the cases discussed.

1.2 July – September 2019 has seen the case of Moher v Moher reach the Court of Appeal; giving the justices the opportunity to take the dimmest of views of non-disclosure. Somewhat unusually a costs order was made on the indemnity basis against a mother in private law proceedings (another Court of Appeal case – Timokhina v Timokhin) and the High Court interpreted Waggott in O'Dwyer v O'Dwyer.

2. DISCLOSURE

- *Moher v Moher* [2019] EWCA Civ 1482 (Civ) (King LJ, Moylan LJ, Rose LJ)

2.1 This case is likely to be required reading in any case in which there is a suggestion of non-disclosure by one party or the other. It is a decisive and robust judgment which lends further weight to the familiar submission that a paying party cannot adopt the millionaire's defence and expect to get a positive result.

2.2 In this very strong sitting of the Court of Appeal, the justices revisited and summarised the relevant law regarding non-disclosure of financial resources in financial remedies cases.

2.3 H and W were married for over 20 years; with W looking after the home and H working. They had three dependent children. The judge of first instance awarded W £1.4 million lump sum – on the face of it a remarkable sum given that W asserted that H had net assets of £1.7 million. This gave her 82% of the pot. In addition she

was awarded periodical payments of £22,000 until either grant of a Get or payment in full of the lump sum plus interest.

2.4 H appealed. The core issue was whether in the event of non-disclosure the court had to give a precise figure or bracket for the undisclosed wealth before making a financial remedies order. It was held that non-disclosure created no such obligation: F v F (Divorce: Insolvency: Annulment of Bankruptcy Order) [1993] 10 WLUK 156 applied; Baker v Baker [1995] 4 WLUK 160 and Behzadi v Behzadi [2008] EWCA Civ 1070 followed.

2.5 There is therefore no requirement for the court to attempt quantification of non-disclosed resources – particularly where the evidence is insufficient to support such an exercise: NG v SG (Appeal: Non Disclosure) [2011] EWHC 3270 (Fam) applied. To impose such a requirement would be contrary to the overriding objective and would be likely to impede the court in its task of achieving a fair outcome.

2.6 The correct approach has three stages: (i) Seek to determine the extent of the undisclosed resources; (ii) draw such adverse inferences as may be justified, having regard to the nature and extent of the failure to properly engage with the proceedings; and (iii) where appropriate, draw an inference that resources are sufficient or are such that the proposed award represents a fair outcome.

2.7 This approach reflects the need for the court to ensure that the non-discloser does not obtain a better outcome than that which would have been ordered had they complied with their disclosure obligations.

2.8 On the principles concerning lump sums, the court held that the combined effect of MCA 1973 ss 23, 24, and 24B was that a lump sum order could be made on or after the grant of a decree nisi but did not take effect until decree absolute. It is advisable for a lump sum to make clear that it is payable on a specified date or upon pronouncement of decree absolute, whichever is the later: Robson v Robson [2010] EWCA Civ 1171 followed.

2.9 Ultimately, the Court of Appeal upheld the trial judge's award in full. They found that he had been entitled to conclude that there were sufficient resources to meet both W and H's needs – having undertaken a sufficient determination of the extent of the husband's resources and having had regard to the deficiencies in his evidence.

3. COSTS

- *Anna Timokhina v Alexander Timokhin* [2019] EWCA Civ 1284 (Underhill LJ, King LJ, Moylan LJ)

3.1 This case should remind us of the interrelation and overlap between the civil and family frameworks in relation to costs. As a general rule the principle that costs follow the event does not apply in family proceedings; this is a submission we will all have made at some point. However, that submission should always be riposted with emphasis being placed on it being a general rule which leaves the court with a residual discretion as to costs.

3.2 A mother appealed against a costs order made against her in private law proceedings. She was facing a bill of £110,000 including £67,500 of counsel's fees arising out of two hearings on 26 July and 2 October. She argued that because the order of 26 July was silent on costs, in line with CPR 44.10(1)(a)(i) the judge should not have made any costs order in respect of that hearing. She further argued that FPR 28 did not allow for retrospective costs orders.

3.3 The Court of Appeal held that 44.10 was a general, rather than an absolute rule; that the principle that costs followed the event did not apply in family proceedings. The intention of this general rule was to leave the court with a residual discretion. Furthermore, FPR 28 is an overarching provision which states, in terms, that the court might at any time make such order as to costs as it thought fit. There was no prohibition on the making of a retrospective order as asserted by W. These findings are uncontroversial and will not surprise practitioners. It perhaps contextualises why they went on to uphold the award of indemnity costs.

3.4 The Court of Appeal did reduce the costs bill by some £31,250 but assessing costs on the indemnity basis. The Court of Appeal considered that the mother's appeal had always been hopeless and as such it was plainly within the ambit of the judge's disretion to order costs on the indemnity basis: *Three Rivers DV v Bank of England* [2006] EWHC 816 (Comm) followed.

4. PROCEDURE

- *Roya Shokrollah-Babaee v Kambiz Shokrollah-Babaee* [2019] EWHC 2135 (Holman J)

4.1 This case reinforces the importance of compliance with the letter and spirit of the family procedure rules; dealing specifically with FPR 9.17(2) barring the FDR judge from have any further involvement in a financial remedies application.

4.2 The matter came before the court of first instance for enforcement. It transpired part way through the hearing that the judge had heard the FDR some 18 months prior. In spite of both parties urging the judge to waive FPR 9.17(2), he declined to do so and stopped the hearing.

4.3 Rule 9.17(2) states that the judge hearing the FDR appointment "must" have no further involvement with the application. Had it said "should" there might have been some discretion but it was held that "must" imputed a mandatory requirement and excluded any such discretion. "Application" within the rule included not just the making of a financial order but extended to subsequent applications to vary. This had to be the case given that "financial remedy" means, among other things, a financial order; a financial order includes by definition a variation order.

4.4 If the mandatory requirement could be waived, that could seriously undermine the guarantee of confidentiality in the FDR and the requirement in the Family Justice Council's best practice guidance on FDR appointments to explain the privileged and without prejudice nature of the FDR. Such discretion could only be imparted by it being written into the rule.

4.5 It is unlikely therefore in any circumstances that a judge who has heard the FDR should entertain sitting at all after the conclusion of that FDR.

5. STATUTORY DECLARATIONS

- *James Patrick Power v Maria Eugenia Vidal* [2019] EWHC 2101 (Fam) (Mostyn J)

5.1 Parties married in 1987. H issued a petition for divorce in 1994. Decree nisi was pronounced in late 1996 with decree absolute following in early 1997. H wished to remarry in January 2018 but could not find the decree absolute. As is usual, he applied to the county court which granted the decree to obtain a copy. However, upon applying he discovered that in breach of data retention policy HMCTS had destroyed the original decree absolute in 2013; it was nowhere to be found. W was able to locate and send a certified copy of her decree absolute.

5.2 H applied to the High Court for a declaration that the wife had provided an authentic and accurate copy of a certified copy of the original decree absolute; and that the marriage was dissolved in January 1997.

5.3 The court held that it was necessary to make the declarations sought to put the parties on a footing as close as possible to that which they would have been had the file not been destroyed and the original decree absolute lost. The court did so within the remit of its "inherent declaratory jurisdiction" and a statutory power to grant declarations, conferred by the Senior Courts Act 1981, section 19; *Egeneonu v Egeneonu* [2017] EWHC 43 (Fam) applied. Declaration granted.

6. QUANTIFYING A BENEFICIAL INTEREST

- *Lawrence John Hallman v Tracy Harkins* [2019] UKUT 245 (Martin Rodger QC)

6.1 This case confirms that it is not for the FTT to express views on quantum of beneficial interests. Indeed, to do so creates confusion because such views are non-binding and in any event there is a statutory basis on which a referral can be made. The FTT should refuse to express non-binding views on the quantum of beneficial

interests even if requested to do so, though in an appropriate case it could make a direction under LRA 2002 section 110(1).

6.2 Mr Hallman appealed against the decision of the First-Tier Tribunal (Property Chamber) determining that his former partner had a beneficial interest in a residential property registered in his name. Ms Harkins had applied to enter a restriction on the property and this was opposed by Mr Hallman. In addition to entering a restriction, the FTT sought to quantify Ms Harkins' interest. In quantifying her interest at 35%, the FTT told the parties that its decision on the extent of the beneficial interest would not be binding upon them.

6.3 It was held on appeal that the FTT was entitled to find that the respondent had a beneficial interest in a property which should be protected by a restriction. However, that Court exceeded its jurisdiction in the judgment of the appeal court; it had no jurisdiction to determine the extent of that beneficial interest and its determination of that interest was not binding on the parties.

6.4 In land registration proceedings, the FTT can only determine matters referred to it under the Land Registration Act 2002, section 73(7). It cannot determine questions which the registrar has no power to refer. The FTT had been wrong to embark upon quantification of the beneficial interest, even subject to their disclaimer that the decision would not be binding on the parties. Upon receipt of a referral from the registrar under section 73(7), the question for the FTT was whether in the light of Mr Hallman's objection to restriction it was necessary or desirable to enter the restriction for any of the purposes set out in LRA 2002, section 42(1). That question requires the court to identify whether or not a beneficial interest existed; but it does not require the court to go further and quantify the extent of such an interest (*Inhenagwa v Onyeneho* [2017] EWHC 1971 (Ch) followed).

7. MARITAL STATUS

- *Francis Shara Ogunware v Funmilayo Shara Ogunware* [2019] EWHC 2428 (Fam) (Holman J)

7.1 In this case H sought a declaration that he was not married to W pursuant to the Family Law Act 1986, section 55(1). It was his case that in fact he was never married to W; this proved important to the manner in which Holman J interpreted the statute.

7.2 The court determined that H had been habitually resident in England & Wales for many years and accordingly pursuant to FLA section 55(1)(c) the court had jurisdiction to make a declaration. However, that declaration was refused because it did not fall within any of the forms of declaration as to marital status that the court was empowered to make under the FLA 1986, section 55(1). In particular the court considered that the word "subsist" within section 55(1)(c) implied in ordinary English language the continuation of something that existed in the first place. Given that H maintained that there was never any marriage in the first place it followed that no marriage on his case could have been said to "subsist". The court went on to discount the other bases on which a declaration might be made under section 55(1) and refused H's application.

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