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Albion Chambers FAMILY TEAM NEWSLETTER

Non-disclosure

What's to be done?

There is perhaps nothing which is likely to be closer to a litigant's heart than non-disclosure. In many cases such suspicions will be unfounded; but in others they will be borne out. In the latter case there may be a tension between a client who knows more about their former partner than they are able to prove and legal advisers who are wary of advancing points which they cannot substantiate.

The reasons for non-disclosure might seem obvious. In *Lykiardopulo v Lykiardopulo* [2011] 1 FLR 1427, Thorpe LJ memorably stated:

"Sadly the duty is as much breached as observed. The payer's sense of the obligation is distorted by the emotions aroused by the payee."

Perhaps a fuller statement is that the payer's perception of what he should disclose is inversely proportionate to his hatred of giving away money and in particular his hatred of giving it away to the other party. Hence the common experience of the family lawyer, who on warning their client of the danger of running-up costs, is told by their client: I would rather give my money to you than to that (so and so).

In *NG v SG* [2011] EWHC 3270 (Fam), Mr Justice Mostyn provided a helpful summary of a number of authorities. His Lordship concluded that in a case where the Court is satisfied that the disclosure by one party is materially deficient:

- The Court is duty bound to consider by the process of drawing of adverse inferences whether funds have been hidden;
- But such inferences must be properly drawn and reasonable. It would be wrong to draw inferences that a party has assets which, on an assessment of the evidence, the Court is satisfied he does not have;
- If the Court concludes that funds have been hidden it should attempt a realistic and reasonable quantification of those funds even in the broadest terms;
- In making its judgment as to quantification the Court will first look to direct evidence such as documentation and observations made by the other party;
- The Court will then look to the scale of business activities and at lifestyle;
- Vague evidence of reputation or the opinions of third parties is inadmissible in the exercise;
- The *Al-Khatib v Masry* technique of concluding that the non-discloser must have assets of at least twice what the Claimant is seeking should not be used as the sole metric of quantification;
- The Court must be astute that a non-discloser should not be able to procure a result from his non-disclosure better than that which would be ordered if the truth were told. If the result is an order that is unfair to the non-discloser it is better that than the Court should be drawn into making an order that is unfair to the Claimant.

His Lordship also noted that the Court should be careful to ensure that the cautious approach did not give rise to a "cheat's charter" or a "non-discloser's dividend". Whilst there is no doubt that this is a useful summary what many legal advisers will be faced with is a case in which they know from an early stage that the other side is being neither full nor frank. How are they to respond? The problem is particularly acute following the decision in *Tchenguiz v Immerman* [2010] 2 FLR 814 which limits the usefulness of the self-help remedy of seizing documents from the other partner. There are at least four possibilities:

1. Warn the other side about adverse inferences

This is an obvious and cost effective method of seeking to effect disclosure. A clear letter alleging non-disclosure and setting out an intention to ask a judge at a final hearing to draw an adverse inference will be a good foundation for later cross-examination and submissions.

2. Ask the court to list a preliminary issue

In an appropriate case an application could be made to the Court that the case be listed for a preliminary hearing for there to be oral examination as to discovery including cross-examination. This was the approach adopted by Coleridge J in *OS v DS* (Oral Disclosure: Preliminary Hearing) [2004] EWHC 2376 (Fam). Under Part 4 of The Family Procedure Rules the Court has the power to direct the separate hearing of any issue and direct the order in which issues are to be heard (4.1(3)(j),(k)). The upside of such an approach is a pre-trial opportunity to put the reluctant discloser on the spot. Such a hearing could provide a useful foundation for arguments based on non-disclosure at a final hearing. The potential downsides are clearly in costs. As well as bearing their own costs a party unsuccessful in eliciting useful information at such a hearing could be at risk of a costs order.

3. Ask the court to order an inspection appointment

In many cases the order sought will simply be an order for disclosure. However, in a case where the order sought is against a third party, e.g. some financially significant person, an inspection appointment could be sought. A good example of a target for this procedure might be an independent financial adviser since parties may have been very open with an IFA in order that that person could advise them in their interests. In *D v D* (Production Appointment) [1995] 2 FLR ▸

497 an order was made that the wife's accountant should attend and produce his files. Such an application would be made under Part 18 of the Rules.

4. Real Property: Ask the other side to consent to a search of the land registry against their name

The application would be to the land registry for a search of the Index of Proprietors' Names. The Registrar will only exercise his discretion in this way in limited circumstances hence the need for the other side to consent. The application should then be made using form PN1, see: http://www.landreg.gov.uk/FAQs/ownership/can-you-tell-me-which-properties-a-particular-person-or-organisation-owns. A refusal to cooperate could be followed up by an application for a court to order the land registry to do the same. Alternatively it could provide useful ammunition for cross-examination.

David Chidgey

Joint Tenancies and the Course of Dealing

Joint tenancies have been considered by the Appeal Courts recently in two relatively low-value cases, disproportionate to the value of the asset being litigated over, but where the results are far-reaching, and where there are lessons to be gleaned by the busy practitioner. The long-awaited Supreme Court judgment in *Kernott v Jones* [2011] UKSC 53 (joint legal ownership) was handed down on 9th November 2011 (in fact, we were kept waiting for the judgment for so long, Supreme Court, that we forgot what the case was originally about). Was it worth the wait? Well, I'm not sure it was. The (separate) judgments are very eloquent and beautifully crafted but with the greatest of respect to the Justices, I'm really not sure how helpful this is in the average 'tell me how much I'm going to get' case because the answer may now well be – *"well it depends on how well you give your evidence"*. The decision in *Oxley v Hiscock* [2004] EWCA Civ 546 [2004] 2 FLR 669 (sole legal ownership) led to long trials all about the course of dealing and what was fair. Practitioners repeated the rather unwieldy wording of 'in their course of dealing' ad nauseum to lend credibility to what they, or rather their client, considered was fair. For the Family or Chancery lawyer however, *Oxley v Hiscock* was great for business; arguments about courses of dealing and fairness could go on for days and often strayed far beyond considering the parties' dealings in relation to the property. We then had *Stack v Dowden* [2007] UKHL 17, [2007] 1 FLR 1858 (joint legal ownership) where the HL/SC stated that in identifying the extent of the parties' beneficial interests in a property, the Court was seeking to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property, in the light of their whole course of conduct in relation to it. For the practitioner, we were urged to forget fairness and look at how property was actually held – presumptions all round were the order of the day.

There then cropped up what seemed on the face of it to be a very ordinary little case of Mr. Kernott and Miss Jones, involving a property that was bought for a very modest sum and was worth £245,000 in 2008. Not a substantial sum and not small beer either – but perhaps not worth taking all the way to the Supreme Court. The legal title was in the parties' joint names but there was no statement as to how the beneficial interest would be shared, either in the TR1, or otherwise (you would think, would you not, that such cases would be a thing of the past? Clearly not dear reader, and that is because the parties usually see a conveyancing solicitor at the beginning of the process when everyone is happy and in love and a family solicitor at the end, when they are neither). When they separated, the parties agreed that at that stage they held the beneficial shares equally. That was in 1995 and what the Supreme Court said was that it was at this time that the parties' shares crystallised. Throughout the period following their separation, the Supreme Court said, their beneficial interests changed from that position.

The Court at First Instance (i.e. the poor old District Judge who must have had their tin hat on throughout the whole of this subsequent process), and the High Court both said a 90/10% division in favour of Miss Jones. The Court of Appeal said 50/50. The Supreme Court agreed with the 90/10% division. Those who awaited the Supreme Court's decision had hoped that this important area of the law would be clarified and the difficulties of inferring or imputing an intention in relation to respective beneficial interests could be put behind us. Not a bit of it. We are now back to 'course of dealings between the parties in relation to the property' arguments.

The presumption of joint beneficial ownership meaning equal shares still exists and was endorsed by the Court. However, *Kernott v Jones* is the second recent case where the Supreme Court has spoken about the presumption in dealing with jointly held property equally and then gone on to find that the parties held anything but – *Stack v Dowden* (65/35%) being another.

Now, once that common intention changes, the initial presumption of joint beneficial ownership is then displaced. The Court can now attribute an intention to the parties by imputing what they thought they must have intended by, of course, having regard to the whole course of dealing!

Rest assured, the ultimate search is still for what the parties intended when considering their words and actions but if not, the Court can impute what intentions it would have been reasonable for them to have, as fair and reasonable people, had they stopped and thought about it. If Miss Jones had been to see a family solicitor at the time of separation or, even better, at the time of purchase (cohabitation agreement; trust deed), she might have saved herself four trips to court. One is left thinking how much did all this cost? There cannot be much change left out of that £245,000 property but thank you Mr. Kernott and Miss Jones for giving us something to discuss and the bloggers to write about – with very mixed sentiments.

The other case I want to mention briefly is that of *Davis v Smith* 2011 EWCA Civ 1603. Even more modest than *Kernott v Jones*, the parties, who were married, bought their council house as joint tenants. They separated, and the joint beneficial tenancy was never formally severed; the issue was raised in correspondence but nothing was actually done. In an unfortunate turn of events, Mrs. Smith died before the financial issues were settled. Mr. Smith was on track to get the entire house under rights of survivorship. Mrs. Smith's executors had other ideas, and took the matter to court. The Court held that the tenancy had been severed by mutual agreement raised in the correspondence or failing that ...ah, you're ahead of me … through their course of dealing. The case raises important issues about how we should be advising our clients regarding the severance of the joint tenancy and how much should be committed to in the correspondence. *Kernott v Jones* did not commit enough to paper; *Davis v Smith* – too much.

Deborah Dinan-Hayward

Adoption, Dads and avoiding delay

In the last edition of our Albion Chambers newsletter I considered the Government's declared policy in relation to adoption which is to reduce the delay between the date of removal and the date placement of a child for adoption. Too few children are being adopted within their first year of life.

Since writing the article I have been involved in several cases involving Placement for Adoption. Meanwhile the BBC has broadcast its series "Protecting our Children" about Bristol's CYPD. In these programmes Social Work teams in the city were filmed dealing with children deemed to be at risk. Interestingly very little was said about the role of the Courts when to my personal knowledge the Courts were very much involved. It wasn't uncommon to find armies of BBC lawyers and members of the production team up on the fourth floor of the Civil Justice Centre making various applications with regard to what could and could not be shown on screen.

It was clear from watching the series that adoption seemed to offer closure although reaching that point took an eternity as chance after chance was given to parents. Sadly as time passed the parents lapsed into old habits – drugs, attachment to violent partners, neglect and so on – and proved that they were indeed incapable of caring for their children. Excellent camera work showed the seasons passing as the cases moved forward to a gradual conclusion.

Experience has shown that bringing the parents round to understand that caring for the child will simply be beyond them so that they recognise that the child's welfare needs require the child to be adopted is the most effective way to speed up proceedings. If that happens and consent is given – or more likely an order is not opposed – then significant amounts of litigation time can be saved and delay avoided.

A problem that can arise in Placement proceedings (often heard at the same time as the final Care application) is how best to deal with fathers or putative fathers.

Where the father does not have parental responsibility then his consent is not necessary and does not have to be dispensed with under S52 Adoption and Children Act 2002. It is provided by s52(6) that a "parent" means "a parent having parental responsibility".

However, the obtaining of responsibility is not really that difficult – as long as the Mother is in agreement failing which an application will need to be made by the father (s4 Children Act 1989) or second female parent (s4ZA Children Act 1989 as amended). If the parents are not married then being named on the birth certificate for a birth registered after 1st December 2003 confers PR, as does a Court Order or a parental responsibility agreement with the mother which has been appropriately made and filed with the Principal Registry.

Where the Mother does not want the Father to have PR (for example following an unwanted pregnancy/one-night stand) and seeks to have the child adopted the Court of Appeal in *Re C (A child) v XYZ County Council* [2008] 1 FLR 1294 held that there was no duty to make enquiries that were not in the interests of the child – including identifying and notifying the Father (or informing and involving the maternal family).

S1 (2) of the 2002 Act makes the child's welfare the paramount consideration and all the provisions s1 about decision making take effect subject to that consideration. Arden LJ stated at Para [17] "The Court is required to have regard to the specified matters 'among others'. It is not therefore an exhaustive list. Moreover, s1 still leaves a great deal to the discretion of the Court since it does not prescribe the weight which the Court or adoption agency must give to any particular matter". Without any express machinery for ascertaining any matter then it is only the avoidance of 'delay' which is prescribed – s1(3).

In *C v XYZ* Council it was held that exceptional circumstances could exist in which relatives, even the Father, of a child would remain in ignorance of the child's existence at the time of adoption but this result was consistent with other provisions of the 2002 Act and did not violate the right to family life. This approach is also in line with *Z County Council v R* [2001] 1 FLR 365 (extended family not told of the child's existence) and *Re M* (Adoption: Rights of Natural Father) [2001] 1 FLR 745 (very real danger of serious violence if the father were told).

The goal of the welfare of the child and the protection of the rights of mother and child would plainly justify interference with other Art 8 rights. In each case the Court will consider whether the father has in fact established "family life" with child for the purposes of ECHR Art 8.

In *C v XYZ Council* the Court went further in recommending the little used device of bringing proceedings under the 2002 Act without having Care Proceedings in tandem. The emphasis in the Children Act 1989 upon consultation with the wider family in order to plan for a child's future does not apply to cases considered under the 2002 Act. (The threshold still needs to be met – s22(1)(c) and (d)).

Even in cases where the father does not have PR but his identity is known Adoption Agencies (usually Local Authorities) will contact him to explain the proceedings and the effect of adoption where it is appropriate so to do as the Adoption Agency Regulations 2005 reg 14 (3) and (4) require it. Further the agency must seek his wishes and feelings about the child and views about post placement contact, PR and residence (informing him about applications he might want to make to the Court).

However, where there are doubts about the appropriateness of following the course required by the Regulations the agency may apply to the Court for directions on the issue before any proceedings are issued – FPR 2010 r 14.21 (application before proceedings) or Part 18 (application in pending proceedings).

More pre-issue litigation could prevent delay later in proceedings and of course avoiding delay remains a requirement under both the 1989 and the 2002 Acts.

Geraint Norris

Non-matrimonial assets

Personal Injury Awards

***Mansfield v Mansfield* [2011] EWCA Civ 1056**

In this case the Court of Appeal considered the treatment of assets that had derived from a substantial personal injury award. In 1998 the Husband had been awarded £0.5 million in respect of a personal injury claim. This was before he met the Wife. The Husband used the award to purchase a bungalow adapted for his own use and an investment flat. The marriage lasted for some six years and there were two children.

The District Judge decided that the Husband should pay a lump sum of £285,000 to enable her to meet her housing needs with an order for sale of the bungalow in default. The remainder of the assets would have left the Husband with approximately £320,000 according to the District Judge (or a broadly similar sum to that available to

the Wife on the Circuit Judge's calculations). In considering the law, the District Judge reminded herself of the case of *Wagstaff v Wagstaff* in which Butler Sloss LJ quoted Scarman LJ in *Daubney v Daubney*. She also referred to Pritchard v Cobden. The extracts of these cases selected focused on the principle of damages falling to be considered as part of the total assets. The DJ then stated 'In summary, as Counsel for the Wife said, the damages are available to the whole family and the needs are no different than any set out in s.25'.

The Court of Appeal found that the District Judge had misdirected herself in law. Thorpe LJ set out the full quotation of Bulter Sloss LJ in Wagstaff which explains that:

1) the fact that capital came by way of compensation does not exclude it from the Court's consideration; but

2) each case must be looked at on its facts, and in many instances the application of the general sharing rule must be tempered to reflect the particular needs of the recipient and the very nature of the acquisition of the capital, namely by way of compensation.

The Court of Appeal found that the District Judge had correctly noted the first point but omitted to apply the second. They did not interfere with the sum of £285,000 awarded to meet the Wife's housing needs. However, they provided for a charge-back in favour of the Husband equivalent to one third of the sum awarded to the Wife. The Court considered three factors in reaching the decision to provide for a charge which were:

- the need to give 'special reflection to the origin of the family capital and the special purposes for which it was provided';
- that the Wife's immediate need rested on her responsibility as primary carer for the children which had an obvious termination date; and
- that the termination of the Wife's immediate need is likely to coincide with the husband's need for return of his capital being augmented by the ordinary process of ageing, which is likely to accentuate his disabilities.

Lottery Wins

***S v AG* (Financial Remedy: Lottery Prize) [2011] EWHC 2637 (Fam)**

In S v AG Mostyn J observed that describing a lottery win as a windfall can enable an argument either way in relation to whether the money should be treated as the product of one party's contribution. Mostyn J stated that the price of the ticket is so inconsequential it can safely be disregarded; arguments that the £1 or £2 derives from the joint matrimonial economy are pure sophistry. He considered the Australian approach of generally treating a lottery win as a joint contribution before stating that the correct approach is highly fact specific. If the parties are acting in a syndicate, where both are aware that tickets are being bought and both agreed to the purchase it is easy to see the prize as a joint venture. On the other hand if one party is unilaterally buying tickets, from his or her own earned income, without the knowledge of the other party, it is easy to see the prize as a receipt of that party alone, akin to an external donation and therefore non-matrimonial property. This will be fortified if the party in question is buying the ticket as part of a syndicate with others and more so if the marriage has become troubled with the parties drifting into separate lives.

The parties in *S v AG* were married for 19 years. The Husband was 55 and the Wife, 51. There were two adult children. The parties earned modest incomes; the Husband worked as a caretaker and the Wife worked as a chambermaid. Four years prior to the end of the marriage the Wife entered into a written syndicate agreement for the National Lottery Big Draw 2000 with a friend. The ticket won £1 million, the Wife receiving her share of £500,000. She purchased a property in her sole name with the winnings and spent significant costs on renovation works. The family moved into the property. Four years later the parties separated. The Wife had remarried by the time of the final hearing.

Mostyn J concluded that the Husband was wholly ignorant of the Wife's participation in the lottery. The cost of the winning ticket came from the Wife's earnings.

By the time of the final hearing the net assets (including the monies transferred to a third party) were £426,000. Mostyn J judged the initial receipt of the lottery prize to be non-matrimonial property. However, when the Wife purchased the family home she converted that part of her non-matrimonial assets into matrimonial property. Given that the source of the matrimonial property was not joint endeavour but rather non-matrimonial property of the Wife's and given the relatively short period that the Husband lived in the property, Mostyn J did not feel that the Husband was entitled to anything like an equal share of it. The Judge felt that sharing of 15-20% would be fair. Taking into account sharing and needs the Judge concluded that a lump sum award of £85,000 was the correct result.

Gifts & Inheritance

***AR v AR* [2011] EWHC 2717**

In AR v AR Moylan J dealt with a case involving assets of £21-£24 million which mostly reflected resources received by the Husband by way of gift and inheritance. Including a period of cohabitation, the parties had been married for 25 years. The Husband was 66 and the Wife, 54. The parties had one adult child and the Husband had three adult children from his first marriage.

The Wife sought an award in excess of her needs on the basis that she was entitled to an additional award by reference to the sharing principle. In addition she contended for a sum in excess of a Duxbury sum referring to Duxbury as a tool rather than a rule and so as to give her a greater level of income security. The Wife relied upon the use of the non-matrimonial wealth during the marriage, the length of the relationship, the quality of her contributions and the standard of living. The Wife's total claim was for £7m.

The Husband argued that the sharing principle had no application to the case because the bulk of the wealth was non-matrimonial property. With reference to cases such as *K v L*, he sought an award based on the Wife's housing need in addition to her income needs capitalised by reference to a Duxbury calculation. The Husband sought a lump sum award to the Wife in the sum of £2.3m.

The Judge determined the Wife's capital need for housing to be £1.1m and her income needs to be £115,000 pa excluding discretionary items.

Moylan J rejected the contention that as a matter of principle, non-matrimonial assets were only to be invaded to the extent justified to meet needs unless one of the exceptions identified by Wilson LJ in *K v L* applied. He felt that this submission sought to impose too rigid a framework. With reference to Charman and Robson, Moylan J highlighted that the sharing principle can apply to non-matrimonial property if such an approach is justified by the circumstances of the case. He stated that the Court should not apply the guidelines identified in Miller and McFarlane with undue rigidity because fairness requires a broader approach. Moylan J pointed out that to limit the exercise of the Court's discretion to the assessment of needs would risk re-imposing the ceiling identified as resulting in unfairness in White and Miller and McFarlane. The question for the Court was whether the application of the sharing principle would enhance the Wife's claim or whether the award should be limited to a generous

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Children giving evidence in family proceedings

Case law and guidelines

In December 2011 the Family Justice Council published their 'Guidelines in relation to children giving evidence in family proceedings.' A working party had been commissioned following a referral from the Court of Appeal in *Re W* [2010] Civ 57.

To refresh the memory, the case of *Re W* concerned an appeal by a father against an order in care proceedings that a girl (who was fourteen years of age) should not be called to give oral evidence in relation to allegations she had made of sexual abuse against the father. Wilson and Wall LLJ, in their joint judgment, considered the relevant authorities and concluded that they were bound, as had the judge at first instance, by the existing jurisprudence so that she was not plainly wrong. Rimer LJ indicated that initially he had been persuaded to allow the appeal but had come to accept, after re-reading the authorities, that the appeal should be dismissed. He endorsed the suggestion by Wilson and Wall LLJ that the matter required further attention and that the President should be sent the judgments for consideration. Wilson and Wall LLJ stated *'that the time had come for consideration to be given to the possibility of some change in the approach to the giving of oral evidence by children in family proceedings'*. Commencing the discussion they went on to pose a number of questions that such a consideration may raise, such as whether the premise behind the current jurisprudence was an overstatement of the likely damage to children of giving evidence, is it possible to reduce the likely damage and if so how, who should take responsibility to ensure the procedure is carried out correctly, is there a need for training or guidance in relation to form and limit of cross examination, how should the evidence be best given, if changes were to be implemented would they lengthen or shorten the proceedings and if, being the former, should this be tolerated?

The matter then proceeded to the Supreme Court, *Re W* (Children) [2010] UKSC 12. There the appeal was unanimously allowed and the matter remitted for the question of whether the child should give evidence, and if so how, in light of principles set down in their judgment.

The Court acknowledged that there are real risks to the welfare of children which the Court must be careful to take into account in any reformulation of the current approach. The present law creates a presumption against a child giving evidence which requires to be rebutted by anyone seeking to put questions to that child. That, it concluded, cannot be reconciled with the approach of the European Court of Human Rights, which always aims to strike a fair balance between competing Convention rights. The object of the proceedings is to achieve a fair trial in the determination of the rights of everyone involved. When considering whether a child should give evidence, the Court will have to weigh two considerations: the advantages that that will bring to the determination of the truth and the damage it may do to the welfare of this or any other child. In weighing up the advantages the Court will need to look at several factors, namely the issues the Court has to decide in order to properly determine the case; the quality of the evidence the Court already has; the age and maturity of the child and the length of time since the events in question.

The latter two factors will also be relevant to the second limb of the inquiry, which is the risk of harm to the child. The support the child has from family or other sources may also be a factor. The willingness of a child to give evidence will also need to be taken into consideration, the Court endorsing the view that an unwilling child should rarely, if ever, be obliged to give evidence. The question of delay would need to be considered, as well as the specific risks of harm to the particular child. However, when considering both sides of the equation the Court must consider what steps can be taken to improve the quality of the evidence, as well as to decrease the risk of harm to the child.

With regard to private proceedings the same approach should be taken by the Court, whilst taking into account the specific risks that relate to the nature of those proceedings.

The Court noted that the considerations it had outlined may be seen as simply an amplification of the current position but without the starting point. It stated that the essential test was to be whether justice could be done to all parties without the need for further questioning.

Returning to the guidelines, it is noted within them that, post the decision of the Supreme Court, the number of applications for children to give evidence may be increasing and the aim of the guidelines is to provide advice as to what matters should be taken into consideration in such situations. In relation to the balancing exercise that the Court should carry out, the guidelines set out 22 matters that the Court should have regard to, noting those set out in paragraphs 25 and 26 of the Supreme Court judgment. They note that expert evidence is not necessarily required in order to assess the risk of harm. They also advocate for a close liaison between the respective parties and allocated judges if there are concurrent or linked criminal proceedings.

The views of the Police/CPS should be obtained before any decision is made. Alternatives to the child giving live evidence, such as the possibility of further questioning being put to the child at an occasion distinct from the substantive hearing, should be considered at the earliest opportunity. If the Court consider that a child is required to give evidence then the guidelines go on to outline matters the Court and advocates should have in mind with regard to practical considerations both at the pre and hearing stages and on examination of the child.

Although some may feel that the matters outlined in the guidelines may appear obvious, it would be unwise not to see them as essential reading to any advocate who is preparing a case where a child is being called to give evidence.

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assessment of needs.

Moylan J felt that the principle which best guided him in the exercise of his discretion under s.25 to the determination of a fair award was that of need. He did not consider that the sharing principle justified any additional or enhanced award as submitted on behalf of the Wife.

The Judge concluded that the bulk of the wealth was non-matrimonial and there were no factors which substantively undermined the weight to be attributed to that factor or which merited the Wife receiving a greater share than that which she would receive by the application of the principle of need.

Moylan J was satisfied that the sharing principle would not guide him to make any greater award as he was satisfied that the result suggested by the needs principle was sufficient to eclipse any award that might be justified by the application of the sharing principle.

Duxbury was described by the Judge as 'a tool not a rule', which, whilst desirable as a starting point, is not determinative of the discretionary exercise with reference to Holman J in *F v F*, Lord Nicholls in *White v White* and Thorpe LJ in *Dharamshi v Dharamshi*. Moylan J stated that the Court's objective is fairness not certainty; when justified by the circumstances of the case, a flexible application of Duxbury will better achieve justice, with sufficient predictability, than the narrow approach advanced on behalf of the Husband.

Gemma Borkowski