



IAFL Asia Pacific Chapter and Malaysian Bar Council Symposium

Burning Issues and Trends in International Family Law Kuala Lumpur, Malaysia

Tuesday 19 May 2026

What is HOT in Property Division in Cross-Border Disputes?

9.30-11.15 am

CONTENTS

- **Speaker profiles** Page 3-9
 - Kee Lay Lian (Singapore)
 - Kee Hui Yee, Co-Chairperson of the Family Law Committee, Malaysian Bar
 - Datin Paduka Evrol Mariette Peters, JCA (Malaysia)
 - Prawidha Murti (Indonesia)
 - Alexander Leuftink (Netherlands)
 - Elizabeth Hicks (England and Wales)
 - Kim Kieller (Canada)

- **Speaker papers**
 - What is hot in property division in cross-border disputes Page 10-30
 - Division of Matrimonial Assets (Malaysia), Mariette Peters Page 31-44
 - What is HOT in Property Division in Cross-Border Disputes? Page 45-55
The Position in England and Wales, Elizabeth Hicks

LAY LIAN KEE

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Lay Lian Kee graduated from the National University of Singapore in 1985. She specialises in Family Law, Adoption, Probate and Trust and has successfully dealt with many complex Family and contentious Probate and Trust cases. Lay Lian Kee is active in pro-bono work and has been a volunteer in the Armed Forces Association Legal Information Service since 2004 and a volunteer lawyer of the Legal Aid Bureau, Singapore and is also a Facilitator for Family Law and Wills, Probate and Administration courses of the Singapore Institute of Legal Education. She is an Associate Mediator of the Singapore Mediation Centre and helps with mediation in Small Claims Tribunal as a volunteer mediator. She is a Collaborative Family Practitioner, Parenting Co-ordinator and a member of Society of Estate and Trust Practitioners (STEP).

KEE HUI YEE

**Partner, Kanesalingam & Co.
Council Member, Malaysian Bar
Co-Chairperson, Family Law Committee
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Kee Hui Yee was admitted as an Advocate and Solicitor of the High Court of Malaya in 2019. Hui Yee is a Partner at Kanesalingam & Co and was elected to the Malaysian Bar Council in 2022 as its youngest member. She currently serves as Co-Chairperson of the Family Law Committee and the National Young Lawyers and Pupils Committee.

In her family law practice, she advises clients on cross-border matters involving asset division, financial arrangements, and issues concerning children. Her experience includes advising in disputes involving the estate of a billionaire with assets and testamentary instruments across multiple jurisdictions, as well as highly contentious corporate shareholder disputes involving family members.

She is an accredited mediator with the Malaysian International Mediation Centre, a trained collaborative lawyer with the International Academy of Collaborative Professionals, and a member of the Commonwealth Lawyers Association, LAWASIA, and the Inter-Pacific Bar Association.

**DATIN PADUKA JUSTICE EVROL
MARIETTE PETERS**

**Court of Appeal
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Justice Evrol Mariette Peters is a Judge of the Court of Appeal of Malaysia.

She obtained both her Bachelor and Master of Laws from the University of Malaya and later lectured at its Faculty of Law, where she taught Evidence and Jurisprudence. During this period, she authored several publications, including *The Law of Evidence in Malaysia*.

In 2002, she returned to legal practice, working first at a leading law firm in Kuala Lumpur before continuing in Singapore.

Justice Peters was appointed to the Bench in 2019 and later served at Kuala Lumpur Family Court in 2022. She was elevated to the Court of Appeal in July 2025.

She currently serves on the Judiciary's Committees on Family Law, Mediation, and the Judiciary Yearbook. She also chairs the ASEAN Standing Committee of Women in Law.

Her most recent publication is *Law and Practice of Family Law in Malaysia*, co-authored and published in August 2025.

PRAWIDHA MURTI

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Wida has been practising litigation for more than 18 years. Within this time she had handled many cross border corporate commercial disputes, bankruptcy, restructuring (PKPU / Suspension of Payment Obligation) employment disputes, International and domestic arbitration, and other various International Cross Border Disputes. She has been assisting in many foreign proceedings, courts and arbitrations. While doing these jobs, she gained experience in working with many prominent International Law Firms, Foreign and UK's Queen Counsels.

Within 18 years of experience she has expanded beyond commercial litigation to include cross-border family law, cross-border asset settlements and criminal proceedings, as well as a niche practice in anti-monopoly proceedings, including hearings before the Indonesian Competition Supervisory Authority (KPPU), Industrial Relation Courts for employment dispute. Her practice has also broadened as strategic advisor in bankruptcy and restructuring, employment contract, dismissal and redundancy, employment dispute in Industrial Court. Wida also has developed a strong background in the private wealth sector, advising on complex cross-border family law issues, succession planning, and asset protection.

ALEXANDER LEUFTINK (LLM)

**Partner, Lawyer, Divorce Mediator
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Amsterdam
The Netherlands**

**Email: aleuftink@linkadvocaten.nl
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Alexander Leuftink is a Netherlands-based family lawyer and accredited mediator with over two decades of experience in complex domestic and cross-border family law matters. Admitted to the Dutch Bar in 2005, he advises entrepreneurs, executives, and internationally mobile families on divorce and child-related disputes, with particular expertise in private international law and jurisdictional issues. He regularly acts in cases involving international child abduction, both Hague and non-Hague countries.

Alexander is a certified divorce mediator and a collaborative lawyer, combining strategic litigation capability with structured settlement techniques. For eight years he was a board member of the Dutch Association of Family and Succession Lawyers & Divorce Mediators (vFAS) acting four years as president of the association and has contributed to professional training and thought leadership within the field. During his presidency he was also a board member of the Dutch Mediators Federation (MfN) and he is a co-founder of the private international law training program.

ELIZABETH ANNE HICKS

**Family Law in Partnership Ltd
London
England**

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Elizabeth Hicks has been admitted as a Solicitor in England and Wales since 1995. She first became a partner in a law firm in 2001 and is currently a Director and Shareholder in Family Law in Partnership in London (which she joined in October 2020).

Elizabeth is listed as an expert and leader in the field of family law in both Legal 500 and Chambers and Partners UK. She regularly acts for extremely wealthy individuals. She is a trained collaborative lawyer with substantial experience of international cases involving trusts and offshore assets. Elizabeth also regularly prepares multi million pounds international prenuptial agreements. She has a particular interest in complex private law children disputes and writes and lectures on all aspects of family law.

KIM KIELLER LL.B, LL.M, ACCFM

AGREE

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Kim has been a respected leader in family and estate litigation for over four decades. Kim's family litigation practice is primarily focussed on property issues including constructive and resulting trust claims as well as complex income and corporate property claims. Kim has consistently been voted by her peers to be included in "Best Lawyers" and "Lexpert" "best of" ratings for over a decade and is an often requested speaker at legal education programs. She has sat as an appointed Dispute Resolution Officer for over a decade. Kim holds a Masters Degree in Law, focussed on Dispute Resolution and is a member of the IAFL DR committee. As a sought after non profit board member, Kim focuses her efforts on governance issues.

Moderators: Kee Lay Lian
Kee Hui Yee

WHAT IS HOT IN PROPERTY DIVISION IN CROSS-BORDER DISPUTES

1

PANELISTS

Elizabeth Hicks (England and Wales)

Alexander Leuftink (Netherlands)

Kim Kieller (Canada)

Prawidha Murti (Indonesia)



2

TOPIC 1: PROPERTY REGIME & POOL

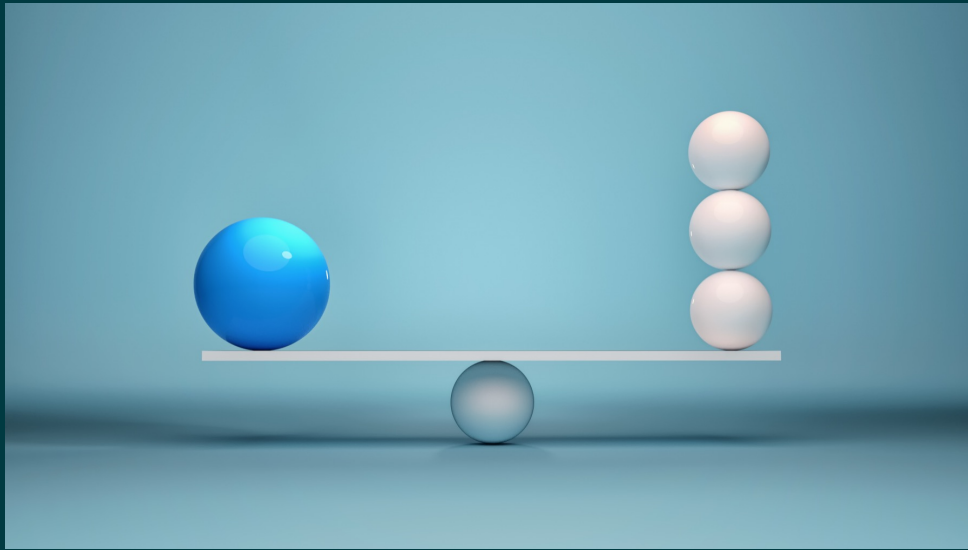
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Topic 1: Property Regime & Pool
Elizabeth Hicks (England and Wales)



4

Topic 1: Property Regime & Pool
Elizabeth Hicks (England and Wales)



7

Topic 1: Property Regime & Pool
Alexander Leuftink (Netherlands)



The
Netherlands
Marriage & Property law
in the Netherlands

Alexander Leuftink


"The Jewish Bride"
Rembrandt van Rijn 1665 – 1669
Rijksmuseum Amsterdam



Symbolises marriage and the historical unity of spouses' property

8

Topic 1: Property Regime & Pool
Alexander Leuftink (Netherlands)



General community of property until 1 January 2018

Scope of the community
All assets and liabilities of the spouses formed part of the matrimonial community, including:

- Assets and debts owned prior to the marriage
- Assets acquired during the marriage
- Inheritances and gifts, unless subject to an exclusion ("*uitsluitingsclausule*")

The community was comprehensive and automatic, unless excluded by a prenuptial agreement.



9

Topic 1: Property Regime & Pool
Alexander Leuftink (Netherlands)

Limited community of property (marriages from 1 January 2018)


Included

- Assets acquired during the marriage
- Income earned during the marriage
- Debts incurred during the marriage

Excluded

- Pre-marital assets
- Inheritances and gifts (unless stated otherwise)
- Pre-marital businesses and investments

Prenuptial agreements may deviate from this system



10

Topic 1: Property Regime & Pool
Kim Kieller (Canada)

The Canadian Family Law Regime(s)

- Unlike other countries, Canada is governed by two different foundational legal regimes. In the province of Quebec, the basic law is dealt with by the civil code (historically from France) and the balance of the country follows the common law
- Certain areas of family law are mandated federally (divorce, married parties issues surrounding parenting and child and spousal support.
- If the parties are not married then the relative provincial statutes govern parenting and child and spousal support.
- All property related issues are provincially governed through statute.

11

Topic 1: Property Regime & Pool
Kim Kieller (Canada)

Family Law PROPERTY regimes

- 13 different regimes – each province and territory – mostly the same. Focus here is Ontario (common law and statute). Certain indigenous rights and statutes as well.
- History – commenced in the early 70s and then revised in 1986
- The Family Law Act fixes a date of separation for the parties. Assets and liabilities are fixed as of the date of separation.
- Then each party calculates their "net family property" (see next page) as defined in the legislation. The parties then equalize (50% of the difference) and that amount becomes an enforceable payment.

12

Topic 1: Property Regime & Pool
Kim Kieller (Canada)

How Net Family Property is calculated – Married couples only

- The parties each add up all their assets on valuation date. Joint property is usually (but not always) equally divided.
- They then calculate the amount of debt they each have or is joint on the valuation date.
- The value of the assets (or debt) on the date of marriage is then placed into the equation.
- The net amount of each party is equalized with the higher property valued spouse paying the “equalizing” amount to the lower valued spouse. This is called the NFP amount (net family property payment)

13

Topic 1: Property Regime & Pool
Kim Kieller (Canada)

Special Circumstances

- In the event that a party has received a gift, inheritance, MVA action damages and certain other payments during the marriage and is able to trace the money/asset from the date of receipt to the valuation (separation date) the whole asset may be “excluded” from the NFP calculation.
- Trusts – if there is a family trust or, for example, a testamentary trust where the individual is alive these assets may not be included in the calculation
- Equitable trusts (resulting and constructive trusts) – very complicated but the Ontario Act and its interpretation have most other provinces and territories have restrictions on their use for married parties.

14

Topic 1: Property Regime & Pool
Kim Kieller (Canada)

Common Law Parties

- The Family Law Act does not apply to non married parties.
- Certain sections in the Act (support and domestic contracts) do apply, however
- For jointly owned property the registration of the property is usually binding (joint tenancy or tenancy in common).
- If not on title the only manner to receive a property division is in the equitable claims of a constructive or resulting trust (which terms are beyond where we are in this presentation)

15

Topic 1: Property Regime & Pool
Prawidha Murti (Indonesia)

Default Regime + Pool

Indonesia — Matrimonial Property Regime (Default)

- Default: Joint property (Harta Bersama) for assets acquired during marriage (Law No. 1 of 1974)
- Separate property (Harta Bawaan):
 - owned before marriage
 - inheritance/gifts received individually
- No formal elective regime (community vs separate) — unless modified by agreement

Pool

- Included: income, savings, real estate, business interests acquired during marriage
- Excluded: premarital assets; individual inheritance/gifts; assets excluded by prenup/postnup

16

Topic 1: Property Regime & Pool
Prawidha Murti (Indonesia)

How Courts Divide

Division Approach

- General rule: equal division (50/50) of joint property
- Needs: may affect use/occupation (e.g., home for custodial parent), not ownership split
- Contribution: presumed equal; no formal weighting of financial vs non-financial
- Compensation: rarely applied

Cross-border practical note

- Orders most effective for assets in Indonesia; overseas assets may require separate steps/recognition.

17

TOPIC 2:
DOES CONDUCT /
VIOLENCE / MAINTENANCE
AFFECT DIVISION?

18

Topic 2: Does conduct / violence / maintenance affect division?
Elizabeth Hicks (England and Wales)



19

Topic 2: Does conduct / violence / maintenance affect division?
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20

Topic 2: Does conduct / violence / maintenance affect division?
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21

Topic 2: Does conduct / violence / maintenance affect division?
Alexander Leuftink (Netherlands)



22

Topic 2: Does conduct / violence / maintenance affect division?

Kim Kieller (Canada)

Conduct of Parties (DV)

- In Canada there is a "no fault" routine pursuant to the Divorce Act. A period of separation (one year without reconciliation) is sufficient to obtain a divorce. The cruelty and adultery grounds still exist on paper but are very rarely used.
- As the understanding of domestic violence and corrosive control literature and its consequences grows, most family law legislative action have been updated to consider the law regarding parenting time, spousal support and an unequal division of net family property.
- We are waiting for a decision from the Supreme Court of Canada as to whether Canadian (provincial) will allow damages by tort for the act of domestic violence – the hearing was last fall and this will be a foundational decision.

23

Topic 2: Does conduct / violence / maintenance affect division?

Prawidha Murti (Indonesia)

Conduct Factors Generally Don't Shift Division

Do violence/misconduct/disadvantage affect property division?

- Generally no. Joint property still divided 50/50; separate property stays with owner
- Family violence: relevant to divorce grounds/custody; not asset shares
- Spousal maintenance: ongoing post-divorce spousal maintenance generally not recognised; child support enforceable
- Economic disadvantage: not used to adjust property division
- Bad conduct (adultery/abandonment): may ground divorce; no punitive redistribution

Takeaway: conduct and hardship mostly affect divorce/custody/support, not the property split.

24

TOPIC 3: CONTRACTING OUT (PRENUPS / POSTNUPS)

25

Topic 3: Contracting Out (Prenups / Postnups)
Elizabeth Hicks (England and Wales)



26

Topic 3: Contracting Out (Prenups / Postnups)
Elizabeth Hicks (England and Wales)



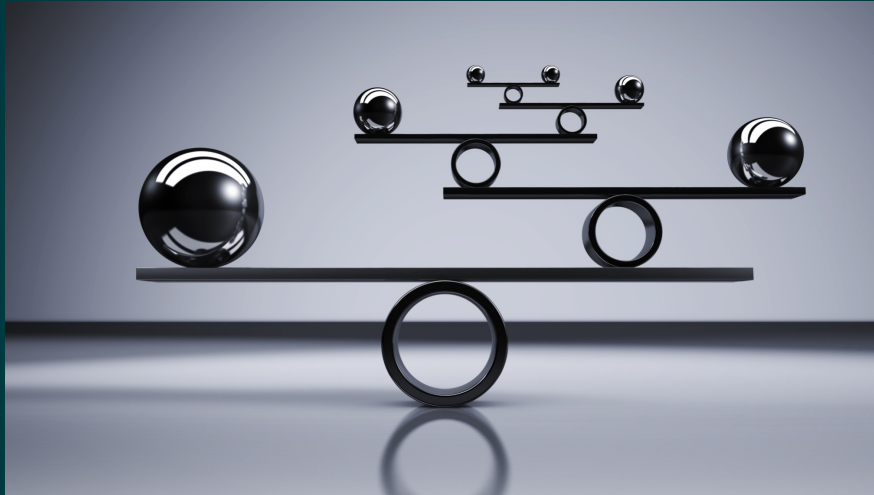
27

Topic 3: Contracting Out (Prenups / Postnups)
Elizabeth Hicks (England and Wales)



28

Topic 3: Contracting Out (Prenups / Postnups)
Elizabeth Hicks (England and Wales)



29

Topic 3: Contracting Out (Prenups / Postnups)
Alexander Leuftink (Netherlands)

Prenuptial agreements



Dutch law

Section 1:114 of the Dutch Civil Code (“**DCC**”) stipulates that prenuptial agreements may be made by future spouses before their marriage or by spouses during their marriage.

Section 1:115(1) DCC provides that a prenuptial agreement must be concluded by **notarial deed**, subject to being declared void.

It is not possible to exclude entitlements towards spousal maintenance in a prenuptial agreement.

The Netherlands has a **public matrimonial property register**.

Prenuptial agreements are registered with the registry of the District Court in the district where the marriage was solemnised.

COUNCIL REGULATION (EU) 2016/1103 of 24 June 2016

Article 22

1. The spouses or future spouses may agree to designate, or to change, the law applicable to their matrimonial property regime, provided that that law is one of the following:

- a) the law of the State where the spouses or future spouse, or one of them, is habitually resident (...)
- b) The law of a state of nationality of either spouses or future spouses (...)

Article 23

Formal validity of the agreement on a choice of applicable law.

1. The agreement referred to in Article 22 shall be expressed in writing, dated and signed by both spouses. (...)

2. If the law of the Member State in which both spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.

3. If the spouses are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

4. If only one of the spouses is habitually resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.

30

Topic 3: Contracting Out (Prenups / Postnups)
Kim Kieller (Canada)

AGREEMENTS

- Agreements between parties are allowed only by statute. The parties agreement must honour the provincial legislation (in Ontario, the Family Law Act).
- The agreement must (a) be in writing and (b) witnessed by a third party. If not, it is not enforceable. In the event financial disclosure has not been properly and fully provided the agreement whole or part of the agreement may be unenforceable.
- There are many types of agreements; Marriage contracts (that may be executed before or during the marriage), cohabitation agreements (common law spouses) and paternity agreements. Cohabitation Agreements become binding on marriage unless the agreement is terminated or another agreement or amending agreement is finalized.
- If an Agreement is binding under the statute the terms (parenting time and decision making, support and issues associated with support and property terms) may be court enforced.

31

Topic 3: Contracting Out (Prenups / Postnups)
Prawidha Murti (Indonesia)

Prenups + Postnups — Available

Can parties contract out? Yes (for property regime).

- Prenup (Perjanjian Perkawinan): recognised under Art 29, Marriage Law
 - made before marriage + legalised by registrar
 - often used in mixed marriages / asset separation
- Postnup: permitted following Constitutional Court Decision No. 69/PUU-XIII/2015
 - enforceable if notarised + registered

32

Topic 3: Contracting Out (Prenups / Postnups)
Prawidha Murti (Indonesia)

Formalities + Limits

Requirements

- written + notarized
- registered (to bind third parties)
- must not violate public order/morality/mandatory rules

Limits

- cannot contract out of child custody/support
- no “penalty clauses” for misconduct
- cross-border recognition depends on foreign rules

Takeaway: agreements can change property regime, but not custody/support outcomes.

33

TOPIC 4: **TIMING & INTERIM RELIEF**

34

Topic 4: Timing & Interim Relief
Elizabeth Hicks (England and Wales)



35

Topic 4: Timing & Interim Relief
Elizabeth Hicks (England and Wales)



36

Topic 4: Timing & Interim Relief
Elizabeth Hicks (England and Wales)



37

Topic 4: Timing & Interim Relief
Kim Kieller (Canada)

Timing in our Courts

- It is almost impossible to have any efficient court intervention.
- Even with designated family law courts the back log is inefficient. One will not see a Judge in my area for the first time for 6-8 months. Interim motions (needing a conference prior to the hearing unless a defined circumstance (per precedent) has occurred).
- Trials are at least 3-4 years after the commencement of the action.
- This delay has lead to different ways for justice in the court system (lawyers assisting, etc) and Dispute Resolution (mediation, mediation- arbitration, parenting coordination and collaborative law.

38

Topic 4: Timing & Interim Relief

Kim Kieller (Canada)

Other “HOT” topics

- Foreign domestic agreements are enforceable if the agreement complies with the law of Ontario.
- Section 58 of the Family Law Act is a choice of law provision titled "Contracts made outside Ontario". It states that the manner and formalities of making a domestic contract, along with its essential validity and effect, are governed by the proper law of the contract. However, a contract whose proper law is from a jurisdiction other than Ontario is also valid and enforceable in Ontario if it was entered into in accordance with Ontario's internal law (*Jasen v. Karassik*)
- The dispute is where the Mahr fits into the Net Family Property Statement. The court adopted the approach from recent decisions, including *Nasrollahzadeh v. Akhtari*, 2025 ONSC 3028 (CanLII), determining that the Mahr should be included as both an asset and a debt/liability as of the date of marriage and the valuation date. The court reasoned that the Mahr creates a debt payable immediately upon marriage and its contingent nature does not disqualify it as property under the Family Law Act.

Notably, the Court did indicate: If the parties consented to the Mahr not being included in the NFP calculation before this court or to allow the Mahr matter to be adjudicated in an Iranian court, I would not have interfered with that agreement. However, there is no such agreement between the parties.

39

Topic 4: Timing & Interim Relief

Timing & Interim Relief

- Typical timeframe for property division orders in practice
- Whether interim measures available (e.g., interim support, preservation/freezing, partial division)
- Practical enforcement issues where assets are overseas

40



41



Division of matrimonial assets (Malaysia)

Mariette Peters
Judge of the Court of Appeal
Malaysia

1

Law Reform (Marriage & Divorce Act) 1976

Section 76 – Power for court to order division of matrimonial assets

(1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

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What are “matrimonial assets”

Before...



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What are “matrimonial assets”

Today...



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Inheritance and gifts

- ▶ **Matrimonialise/ commingling**
- ▶ **What is the meaning of matrimonialise**

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No bifurcation

- ▶ (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.



No bifurcation between divorce and division of matrimonial asset

Division of matrimonial assets must be done upon pronouncement of the divorce

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Questions

- ▶ During period of separation, who has to pay for the upkeep of property before it is divided
- ▶ Can the payer spouse be reimbursed by the non-payer spouse according to the percentage which is ultimately decided by the court?
- ▶ Epstein credits and Watts charges (from the US (California) cases of *In re Marriage of Epstein* (1979) and from *In re Marriage of Watts* (1985))

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“...any assets...”

- ▶ (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

Within or beyond
Malaysia



8

8

Identifying assets abroad

- ▶ Discovery
- ▶ Interrogatories
- ▶ Injunctions
- ▶ Follow paper trail
- ▶ Investigations and forensic accounting
- ▶ Specific countries = specific routes



9

9

Identifying assets abroad

Hague Conference on Private
International Law (HCCH)

Convention on the Law Applicable to
Matrimonial Property Regimes.

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“...during marriage...”



(1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

Married couples only

Cohabitees?

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Section 76 – Power for court to order division of matrimonial assets

(2) In exercising the power conferred by subsection (1) the court shall have regard to –

(a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets or payment of expenses for the benefit of the family;

(aa) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;

(b) any debts owing by either party which were contracted for their joint benefit;

(c) the needs of the minor children, if any, of the marriage;

(d) the duration of the marriage,

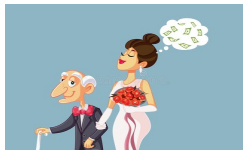
and subject to those considerations, the court shall incline towards equality of division.

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Apportioning percentage – DINC v SINC

- Acquirer
- Non-acquirer
 - Home
 - Children
 - Domestic image
 - Status enhancement
 - Section 76(2)



13

Apportioning percentage

Non-acquirer



Home care service



Nanny



Tutor

14

14

How to divide



- ▶ **Asset Offset**
- ▶ **Obtain value and divide based on percentage apportionment**

15

15

How to divide



- ▶ **Obtain value and divide based on contribution**
 - ▶ **50:50 – Percentage**
 - ▶ **200,000 – Value of asset**
 - ▶ **50,000 – Loan outstanding**
 - ▶ **Equity/ Realisable value?**
 - ▶ **Value apportioned by percentage?**
 - ▶ **Entitlement?**

16

16

How to divide



- ▶ Obtain value and divide based on contribution
- ▶ Asset purchased in 2011 by H
- ▶ **Marriage in 2014**
- ▶ Divorce in 2026
- ▶ 60:40 – Percentage
- ▶ 200,000 – Value of asset
- ▶ 50,000 – Loan outstanding
- ▶ 150,000 - Equity/ Realisable value
- ▶ Value apportioned by 60:40%?
- ▶ Entitlement of non-acquirer = $\frac{12}{15} (0.8) \times (\text{Value apportioned by percentage})?$

17

17

How to divide



- ▶ Obtain value and divide based on contribution
- ▶ Marriage and purchase of property in 2014
- ▶ Separation in 2021 but W continues to live in property to the exclusion of H
- ▶ Divorce in 2026
- ▶ 60:40 – Percentage
- ▶ 200,000 – Value of asset
- ▶ 50,000 – Loan outstanding
- ▶ 150,000 – Equity/ Realisable value
- ▶ H pays for mortgage during period of separation – $1,500 \times 60 \text{ months} = 90,000$
- ▶ 60,000 – Value based on 40%
- ▶ Money owed to H for the mortgage repayment based on percentage apportionment?
- ▶ Entitlement = ?

18

18

Question

Are the factors in section 76(2) exhaustive?

- ▶ Conduct of parties
- ▶ Cause of breakdown of marriage
- ▶ Provisions of maintenance
- ▶ Sources of income of claimant
- ▶ Spousal maintenance set-off

19

19

Court of Appeal case

Annathurai Venkidasalam v. Vani Welluven [2023]

There is no prohibition on the court to also take into account other relevant or appropriate circumstances because the aforesaid factors have not been expressly specified in s. 76(1) and (2) LRA as exclusive and/or exhaustive.

20

20

Section 78 – Assessment of maintenance

In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

21

21

Marital agreements

- ▶ Pre-nuptial
- ▶ **Post-nuptial**
- ▶ Settlement agreements



22

22

Marital agreements

- ▶ *Lim Thian Kiat v Teresa Haesook Lim Nee Teresa Haesook Dean & Anor* – 1997, HC
- ▶ *HLC v. PTL & ANOR* – 2024, HC

23

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Section 56 – Rules to provide for agreements to be referred to court

Provisions may be made by rules of court for enabling the parties to a marriage, or either of them, on application made either before or after the presentation of a petition for divorce, to refer to the court any agreement or arrangement made or proposed to be made between them, being an agreement or arrangement which relates to, arises out of, or is connected with, the proceedings for divorce which are contemplated or, as the case may be, have begun, and for enabling the court to express an opinion, should it think it desirable to do so, as to the reasonableness of the agreement or arrangement and to give such directions, if any, in the matter as it thinks fit.

24

24

***Lim Thian Kiat v Teresa Haesook Lim
Nee Teresa Haesook Dean & Anor***

The RHC, O. 33 r. 2 renders sufficient jurisdiction to enable the parties in a matrimonial dispute to refer to the court any agreement or arrangement they have entered for consideration as provided under s. 56 of the Act. Thus the court had sufficient authority to entertain the application of the petitioner on the validity of the deed.

25

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Section 47 – Principles of law to be applied

Subject to the Provisions contained in this Part, the court shall in all suits and proceedings hereunder act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings.

Radmacher v Granatino [2010] UKSC 42

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Marital agreements

“Investing in a prenup is like buying life insurance – you buy it with the hope that you will never benefit from it.”

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NOTES FOR IAFL SYMPOSIUM IN KUALA LUMPUR ON THE POSITION IN ENGLAND AND WALES

By Elizabeth Hicks, Director at Family Law in Partnership Ltd

1. How the Court deals with the division of assets on divorce in England and Wales

England and Wales does not have a marital property regime. The court's starting point is to assess the assets available to the parties, including those in which they have a beneficial ownership and assets situated outside the jurisdiction and to divide them to achieve 'fairness'.

The statute

The legal framework governing the division of the assets on divorce in England and Wales is set out in the Matrimonial Causes Act 1973. Part II sets out the court's powers to make financial orders on divorce (mirrored for the dissolution of civil partnerships by the Civil Partnership Act 2004). This includes orders for:

- the payment of lump sums
- the transfer of property
- the creation of a settlement of property,
- the variation of a settlement
- maintenance to be paid for a spouse/children
- security for maintenance

Section 25 Matrimonial Causes Act 1973 sets out the specific factors the court has to consider when deciding how to exercise its jurisdiction when making a financial order. The guiding principle is to achieve fairness. In determining the outcome there is no formula to be applied. The court will look at all the circumstances of the case and must give first consideration to the welfare of any children under the age of 18 years.

The statutory factors set out in s.25 Matrimonial Causes Act 1973 require specific consideration of the following:

- a. the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
- b. the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

- c. the standard of living enjoyed by the family before the breakdown of the marriage;
- d. the age of each party to the marriage and the duration of the marriage;
- e. any physical or mental disability of either of the parties to the marriage;
- f. the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
- g. the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
- h. in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

No one factor takes precedence over another and in pursuit of fairness, it is acknowledged that there can be no discrimination between the husband and wife and their respective roles.

The Court operates a discretionary process dependant on the facts of every case.

The case law

The law in England and Wales is based on statute and case law.

The ultimate objective of 'fairness', requires consideration of three elements: needs, compensation and the sharing principle.

1. Needs

The judge will want to be satisfied that the financial arrangement will meet the respective needs of each person with the children's needs being prioritised. Needs is a subjective and nebulous concept – what is one person's need is another person's luxury. Party's needs are assessed by reference to the standard of living during the marriage and this will be particularly important in a long marriage.

Most cases start and end with needs.

2. Compensation

'Compensation' is relevant where one spouse has suffered economic disparity as a result of financial and career sacrifices made during the marriage. It may be relevant where the resources are significant and where one party has sacrificed their career for the benefit of the family, freeing up the other to command a significant ongoing

income. A further adjustment may be made in favour of the home-making spouse to ensure fairness.

However, in practice, this is hard to prove and the loss is often factored into a case when considering needs rather than a standalone claim. The concept of compensation has only rarely featured in case law.

3. The Sharing Principle

On the face of it, parties to a marriage are entitled to share equally the capital assets that have been built up during the marriage (with 'marriage' usually including any period of cohabitation that leads seamlessly up to the marriage).

As a starting point, the following are excluded from being marital property:

- what was brought into the marriage, having been built up before it;
- assets that were inherited or gifted to one person during the marriage and
- assets built up after separation, but before the assets are divided up, but only where there has been a significant delay and these assets are a new enterprise.

However, this categorisation is subject to what the original owner of the assets intended. The Supreme Court has recently given guidance (*Standish -v Standish July 2025*) that judges shouldn't just consider who holds the assets in question but should consider whether the dealings between the parties show an intention to convert what was separate property into something that was to be shared between them. If so, the separate assets are *matrimonialised* which means they become joint assets and form part of the marital property. As such they will usually (but not inevitably) be shared equally.

Clean break

There is also a 'statutory steer' to a 'clean break' in s.25A MCA 1973. The courts aspire towards finality and where possible, the court will make a financial award to bring the financial claims that exist between the separating couple, to an end as soon as possible. This might mean for example that a financially dependent spouse is awarded a bit more of the pension(s) or a larger share of the assets from which to meet their needs, so that the court can terminate the spousal maintenance claims. It is not possible for the court to end child maintenance arrangements which are entirely independent from the marriage and arise from parenthood.

2. What impact does domestic abuse or conduct have when dividing assets?

Under s.25 Matrimonial Causes Act 1973, at subsection (g) is the requirement for the court in England and Wales to take into consideration:

‘the conduct of each of the parties, if that conduct is such that it would, in the opinion of the court, be inequitable to disregard it’

The statute does not provide any guidance on what would amount to ‘conduct’ and we must therefore look to our case law for the detail.

In the case of **OG v AG [2020]** Mostyn J attempted to codify the law and identified four types of conduct:

- gross and obvious personal misconduct requiring a financial consequence if it is to be reflected in the award. This includes cases of financial conduct and also, personal misconduct that has a financial consequence.
- Wanton and reckless dissipation of assets leading to add-back.
- Litigation misconduct leading to a costs order.
- Non-disclosure leading to inferences being drawn about the extent of the assets

Obvious and Gross Personal (Mis)Conduct

The recognition, or lack of recognition of the impact of personal (mis)conduct in the context of financial remedies law has received interest from academics and the family law profession in recent years.

Resolution, the umbrella body for family law professionals in England and Wales, undertook a surveyed in 2024 reporting findings that 80% of the respondents (to the survey) considered domestic abuse and specifically economic abuse was not taken into account sufficiently in financial remedy proceedings. 75% of respondents said that domestic abuse was present in at least 20% of their cases.

The Law Commission Scoping Paper published in December 2024, identified a number of potential reforms identifying the need for clarity in the law as to what forms of behaviour would be considered conduct and the impact that would have on financial claims. We are still awaiting a response from the government.

Case Law

Over the years the bar for conduct that would be recognised in a financial remedy award, has been high:

- **Evans v Evans** [1989] 1 FLR 351: incitement to murder H
- **Clark v Clark** [1999] 2 FLR 298: a 40-year-old wife's bullying behaviour towards her 80-year-old husband (spending his money and moving her lover into the home, whilst he lived in the caravan).

- **Al-Khatib v Masry** [2002] EWHC 108 (Fam) – abduction of the parties’ children and Munby J stated that a finding of conduct could have a general effect of inflation on an award – potentially driving it to ‘the very top end of applicable discretionary bracket applicable to the case’.
- **H v H** (Financial Relief: Attempted Murder as Conduct) [2005] WEHC 2911, H was imprisoned for 12 years and where Coleridge J said that ‘it is the glass through which the other factors are considered’.
- **S v S** (Non-Matrimonial Property: Conduct) [2006] EWHC 2793 – cumulative misconduct by H such as repeated ‘low level’ assault (not causing permanent disability) and persistent damage to household chattels
- **K v L** [2010] EWCA Civ 125, H was found guilty and imprisoned for sexually assaulting W’s grandchildren (here H received a modest fraction of assets to rehouse but without provision for a capitalised fund to bring his income above the minimum state pension level – however he was expected to receive an inheritance).

There has been wide discretion:

Burton, J. in S v S stated:

‘There is no real guidance as to what would be the effect . . . the exercise of so, such a sweeping power, which could deprive a party of an entitlement, or multiply or magnify what would otherwise be the entitlement of the other party, is of concern to me. In the cases I have referred to above, substantial increases and decreases of entitlement have been made without particular justification.’

*‘The financial remedy courts is no longer a court of morals. Conduct should be taken into account not only where it is **inequitable to disregard** but only where its impact is **financially measurable**. It is unprincipled for the court to stick a finger in the air and arbitrarily to fine a party for what it regards as immoral conduct’.*

Recent cases

In the 2023 case of **DP v EP (Conduct: Economic Abuse: Needs)** [2023] EWFC 6 the Judge’s findings on conduct justified the wife’s award falling towards the lower end of the bracket. In this case the wife had abused a financial power imbalance against her effectively illiterate husband. She had purchased properties and siphoned off rental income into her own accounts and made investments ‘*in a deliberate effort to put them out of H’s reach*’.

In **Tsvetkov v Khayrova** [2023] EWFC 130, Peel J the lead judge in England & Wales for Financial Remedy Courts, told us that the alleged conduct should have an identifiable negative financial impact. A causative link must be established.

However, conduct is not always successfully run. In the case of **N v J [2024] EWFC 184**, one party (N) underwent electroconvulsive therapy for morbid delusional jealousy caused by believing his spouse, J was unfaithful to him. J who was fully involved in the treatment assured N repeatedly of his faithfulness, but this turned out to be a lie. Peel J said that lying about infidelity was not exceptional and the deceit by J was not linked to N's mental deterioration.

In this case Peel J didn't rule out a situation where conduct might be taken into account in the absence of a financial consequence, but said that this would be '*vanishingly rare*'.

More recently in the case of **LP v MP [2025] EWFC 473**, Cusworth J recognised the impact of coercive and controlling behaviour recognising that whilst it might be '*hard to measure, that does not mean the impact will not be present*'

In this case the wife's coercive and controlling and abusive behaviour towards the husband was acknowledged and her share of the assets restricted to needs. She was not entitled to a replication of the marital standard of living.

In **Wei-Lyn Loh v Ardal Loh-Grainger [2025] EWFC 483**, Cusworth J considered the husband's behaviour in relation to the prenuptial agreement and management of the wife's assets. The judge concluded that the husband's behaviour was deplorable including taking significant sums from joint accounts and placing the money into his sole name. Looking at the phrase '*inequitable to disregard*' this was no more than '*unfair*' or '*unjust*'.

3. How do Pre Nuptial Agreements work in England and Wales?

Recognition and Enforceability

Prenuptial agreements are not automatically binding in England and Wales but they are a '*significant step*' and have been given '*magnetic weight*'. Under English & Welsh law the courts have overall discretion to determine a fair outcome, taking into account all the circumstances of the case.

The existence of a prenuptial agreement is one of these circumstances, but not the only one. The terms of an agreement must be seen in the context of the s.25 factors and the extent of any weight to be attributed to it will vary from case to case.

The case of **Radmacher v Granatino [2010]** is the key case dealing with prenuptial agreements, where the Supreme Court said:

"the Court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement,"

More recently in a case in 2023, **MN v AN** [2023] it was said:

“[85] Litigants must realise that it is a significant step to instruct top lawyers to prepare a PNA prior to marriage. It is highly likely they will be held to these agreements in the absence of something pretty fundamental that vitiates the agreement. These agreements are intended to give certainty. Those signing them need to know that the law in this country will provide that certainty. Litigants cannot expect to be released from the terms that they signed up to just because they do not now like what they agreed.”

Supreme Court Guidance

In the 16 years since **Radmacher** was decided the courts in England and Wales have continued to follow the guidance of the Supreme Court. A helpful summary of how the court in England and Wales consider prenuptial agreements (“PNA”) can be found in the decision of Peel J in the case of **AH v BH** [2024] EWFC 125:

- If a PNA is to carry full weight, both H and W must enter into it of their own free will, without undue influence or pressure and informed of its implications (R v G 68)
- ‘What is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end’ (69)
- ‘The first question will be whether any of the standard vitiating factors: duress, fraud or misrep is present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it’ (71)
- The circumstances of the parties at the time of the agreement will be relevant.
- It is to be assumed that each party to a properly negotiated agreement is a grown up and able to look after himself or herself (51)
- ‘The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement’ (75)
- “Of the three strands identified in *White v White* and *Miller v Miller*, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it

unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned" (para 81).

- "Where, however, these considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from their agreement as to the regulation of their financial affairs in the circumstances that have come to pass. Thus, it is in relation to the third strand, sharing, that the court will be most likely to make an order in the terms of the nuptial agreement in place of the order that it would otherwise have made" (para 82).
- It is the court that determines the result after applying the Act (para 83).

In **Radmacher** (supra), at para 76 thereof, in its introduction to possible circumstances justifying departure from the PMA, the Supreme Court said:

"That leaves outstanding the difficult question of the circumstances in which it will not be fair to hold the parties to their agreement. This will necessarily depend upon the facts of the particular case, and it would not be desirable to lay down rules that would fetter the flexibility that the court requires to reach a fair result" [emphasis added].

Recent Case law

Versteegh v Versteegh [2018]:

- The Judge reached a firm and clear conclusion that the wife had understood the prenuptial agreement and clearly felt bound by it, even though she had not received legal advice.
- The parties were Swedish and the wife had lived her entire life in Sweden prior to the marriage. Prenuptial agreements were commonplace and binding in Sweden and the document signed by wife was standard form in Sweden.

Ipekci v McConnell [2019]:

- The lack of legal advice and understanding of the agreement's implications led the court to disregard the agreement.

Helliwell v Entwistle [2024] Court of Appeal:

- The wife had deliberately not disclosed assets, having included a clause in the agreement that there had been full disclosure.

FO v PN [2025] EWFC 327:

- The husband and wife had entered into a prenuptial agreement at the time of their marriage in June 2012, with full legal advice and disclosure.

- When the parties experienced marriage difficulties in 2020, the wife described her unhappiness with the terms of the prenuptial agreement.
- The parties entered into negotiations which concluded in April 2022 with them signing a Deed of Revocation. Again, this was with full legal advice but this time it provided for equal division of assets on divorce.
- In February 2023 the Wife applied for divorce. The husband argued that no weight should attach to Deed. He said there had been undue influence, manipulation and the provisions were unfair. The judge did not agree, preferring the wife's presentation that the newly signed agreement was a 'magnetic factor'.

Next: draft Nuptial Agreements Bill: Qualifying Nuptial Agreements back on the agenda?

The Law Commission's Scoping Report highlighted PNAs.

62 Our draft Nuptial Agreements Bill would limit the court to exercising its powers under the MCA 1973 in favour of a spouse only to the extent necessary to meet the needs of either spouse or the children. It would not permit the court to make an award based on sharing.

For now, to make a PNA as effective as possible, both parties should provide full and frank disclosure of their assets (attached to the PNA), both parties should obtain legal advice on the PNA and it should be entered into at least 21 days before the wedding. It should also ensure that the needs of the financially weaker party are met by the contents of the PNA.

4. Financial Orders in practice and interim issues.

In the context of financial remedies, the English & Welsh Court has two main options for interim relief; Maintenance Pending Suit ("MPS") and Legal Services Payment Orders.

Section 22 MCA 1973 gives the court the power to make orders for maintenance during the matrimonial proceedings. The general rule of 'no order as to costs' is suspended for MPS applications.

Guidance can be found in the case of **TL v ML and Others (Ancillary Relief: Claim against Assets of Extended Family)** [2005] 2860 from Mostyn J:

- (i) The sole criterion is 'reasonableness' which is synonymous with 'fairness'
- (ii) The marital standard of living is an important consideration in this determining 'fairness'.

- (iii) A specific MPS budget that excludes capital and long term expenditure is (usually) required (see *Rattan v Kuwad* [2021] EWCA Civ 1 when Moylan LJ confirmed this was not always the case).
- (iv) Where Form E disclosure is deficient, the court is not confined to the 'say-so' of the payer, in such a situation the court should err in favour of the payee
- (v) Where the position is unclear or ambiguous, this may justify an assumption that established third party support will continue to final hearing

The courts' statutory power to make legal services orders was introduced on 1 April 2013 under new provisions ss22ZA and s22ZB MCA 1973.

Clear guidance is again provided thanks to Mostyn J and can be found in the case of **Rubin v Rubin [2014] EWHC 611**, and building on the foundations of *TL v ML*, and the pre-existing case law, it was stated that:

- (i) The court cannot make an order unless it is satisfied that without payment the applicant would not be able to obtain appropriate legal services for the proceedings.
- (ii) In determining whether the applicant can reasonably obtain funding from another source, the court would be unlikely to expect the applicant to sell or charge their home or deplete a modest fund of savings.
- (iii) Evidence of refusals from two commercial lenders is usually required and a statement of refusal by the applicant's solicitors to continue to act without funding (the applicant can't secure legal services on a *Sears Tooth* basis (by granting their lawyers a charge over their award).
- (iv) If a litigation loan is only available at very high interest then it would be unreasonable to expect an applicant to take it.
- (v) There is an expectation of a detailed costs estimate to show prospective costs covering the period, in financial remedy proceedings to the FDR and monthly instalments are preferred to a single lump sum.

There are some tricky aspects to the case law:

1. Work undertaken before the LSPO is granted

The court expects timely applications in proceedings and until the order is made, solicitors are at risk on costs. In addition, if the client changes firms then any costs would not be recoverable on an interim basis (because their non-payment does prevent ongoing representation).

2. Notional standard basis of assessment

Although not universally applied by the judiciary, many judges have applied a discount to the costs budget for incurred and future costs supplied by the applicant.

This has ranged from 30% to 15% reduction being applied to reflect ‘a rough computation of a standard basis of assessment’.

3. Staying on budget

Once granted, the onus is on the solicitors to manage the budget and any ‘overspend’ may not be funded by the respondent.

The above is a summary of the position in England and Wales and should not be relied on for specific advice in a case. It is prepared solely for the IAFL symposium in Kuala Lumpur in May 2026 and no permission is granted for it to be replicated elsewhere.

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