Butterworths Family and Child Law Bulletin

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Butterworths Family and Child Law Bulletin provides an immediate updating service for the main text of *Butterworths Family Law Service* and *Clarke Hall and Morrison on Children*. The Bulletin is published every month and sent to subscribers to those publications and is also available to download from LexisWeb (www.lexisweb.co.uk).

References to BFLS and CHM above each case are to the relevant paragraphs in *Butterworths Family Law Service* and *Clarke Hall and Morrison on Children*. References are also included, where relevant, to *Rayden & Jackson on Divorce*: these cross-references are to the bound volumes of *Rayden*, unless otherwise indicated, in which case they are to the looseleaf Noter-up Service.

Butterworths Family Law Service Please file *Butterworths Family and Child Law* Bulletin 198 immediately after the Bulletins guide card, and in front of Bulletin 197. **Remove Bulletin 186**. If desired, Bulletin 186 may be retained outside the binder for future reference. Binder 7 should now contain Butterworths Family and Child Law Bulletins 187–198.

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BUDGET 2015

Contributed by Sarah Deeks LLB FCA, tax editor of BFLS.

The following notes summarise the principal changes to the taxation of families announced by The Chancellor of the Exchequer, George Osborne in his Budget Statement on 18 March 2015.

Income tax

Digital tax accounts

BFLS 4A[4006.1]

Over the next Parliament the need for individuals and small businesses to complete annual tax returns will be removed. Digital tax accounts will start to be introduced from 2016. Most of the information required by HMRC (including details of employment, pension, benefits and savings income) will be automatically uploaded into the system. This means that millions of people will simply check the information online to see how much tax they owe. Those with more complex affairs will use the system to declare their income and pay tax in-year and by 2020 small businesses will be able to link their accounting software to their digital tax account giving them the option of paying tax as they go. The new system will deliver a joined-up tax management system enabling taxpayers to register, pay and update their information at any time of year. Taxpayers will still be able to use an agent to manage their digital account if they wish. The government will consult on amendments to the payments process to enable tax to be collected through the digital accounts rather than via self-assessment. Further details of the scheme will be published later this year.

Basic rate threshold 2016/17 and 2017/18

BFLS 4A[4014]

The basic rate threshold will increase from £31,785 in 2015/16 to £31,900 in 2016/17 and to £32,300 in 2017/18. This means that no one will pay higher rate tax unless their income is above £42,700 (2016/17); £43,300 (2017/18).

Further details of the income tax rates and thresholds for 2015/16 are detailed in Bulletin 194.

Savings income personal allowance – 2016/17

BFLS 4A[4015]

From 6 April 2016 an allowance will be introduced to remove tax on the first £1,000 of savings income for basic rate taxpayers and up to £500 for higher rate taxpayers. Additional rate taxpayers will not receive the allowance.

Miscellaneous loss relief

BFLS 4A[4023]

As described in Bulletin 194, Finance Bill 2015 will include rules to deny a person miscellaneous loss relief where the loss arises as a result of 'relevant tax avoidance arrangements'. From 2015/16 miscellaneous loss relief will only be available to be off-set against miscellaneous income of the same type as the loss.

Personal allowance – 2016/17 and 2017/18

BFLS 4A[4040]–4A[4046]

From 2016/17 there will only be one personal allowance regardless of an individual's date of birth. The personal allowance will increase to £10,800 in 2016/17 and to £11,000 in 2017/18. The comparative figures are shown in the following table:

	2015/16	2016/17	2017/18
	£	£	£
Personal allowance (born after 5 April 1938)	10,600	—	—
Personal allowance (born before 6 April 1938)	10,660	—	—
Personal allowance (irrespective of age)	—	10,800	11,000

For details of the other allowances and limits for 2015/16 see Bulletin 194.

Transferrable tax allowance – 2016/17 and 2017/18

BFLS 4A[4040.1]

Finance Bill 2015 will amend ITA 2007 s 55B so that the transferrable tax allowance is 10% of the personal allowance. The comparative figures are shown below:

	2015/16	2016/17	2017/18
	£	£	£
Transferrable tax allowance	1,060	1,080	1,100

Pensions – lifetime allowance and annual allowance – 2015/16 and 2016/17

BFLS 4A[4284]

Individuals receive tax relief on pension contributions at their highest marginal tax rate subject to the annual and lifetime allowances. The lifetime allowance will decrease from £1.25m to £1m from 6 April 2016 subject to transitional protection. From 6 April 2018 the lifetime allowance will be indexed annually in line with the Consumer Prices Index (CPI). There are no changes to the annual allowance which remains at £40,000 for 2015/16.

Taxation of inherited annuities

BFLS 4A[4288]

From April 2015 the beneficiaries of individuals who die under the age of 75 with a joint life or guaranteed term annuity can receive any future policy payments tax free providing that no payments were made to the beneficiary before 6 April 2015. Joint life annuities will be able to be paid to any beneficiary. Where the deceased individual was over 75, the beneficiary will pay tax at their marginal tax rate.

Childcare payments

BFLS 4A[4290.25]

The parents of children with disabilities will be able to receive up to £4,000 per child to help pay for their childcare costs instead of the £2,000 applicable to other families.

Capital gains tax

Entrepreneurs' relief

BFLS 4A[4293.7]–4A[4293.8]

From 18 March 2015, entrepreneur's relief will be prevented on the disposal of personal assets used in a company or partnership unless they are disposed of in connection with a disposal of a shareholding of at least 5%, or a 5% share in partnership assets. Previously the 'associated disposal' rule allowed entrepreneur's relief to be claimed on personal assets when they were disposed in association with a full or partial withdrawal from the business. Furthermore there was no minimum requirement as to the size of the withdrawal. This measure means that entrepreneur's relief is now only available on personal assets where someone is significantly withdrawing from a business.

Entrepreneur's relief will also be denied for the disposal of shares on or after 18 March 2015 where the shares are in a company that is a non-trading company in its own right. This measure will prevent relief being claimed where people have only a small indirect stake in the trading company but will not affect shareholdings in companies whose investment in a joint venture is part of their own trade.

For details of changes to entrepreneur's relief effective from 3 December 2014 see Bulletin 194.

Rates of capital gains tax – 2015l16

BFLS 4A[4295]–4A[4296]

For 2015/16 the capital gains tax rate for individuals remains at:

10% — for gains eligible for entrepreneur's relief; otherwise

18% — up to the limit of the basic rate income tax band; and

28% — on gains above or straddling the basic rate income tax band.

The capital gains tax rate for trustees and personal representatives stays at 28%.

For details of the annual allowance for 2015/16 see Bulletin 194.

Non-uk residents disposing of uk residential property and principal private residence relief

BFLS 4A[4310]

From 6 April 2015 non-UK residents will be liable to capital gains tax on gains accruing on the disposal of UK residential property on or after that date. Principal private residence (PPR) relief may be available if the property is the person's only or main residence but measures in the Finance Bill 2015 will restrict the relief where a property is located in a jurisdiction in which the taxpayer is not tax resident. To qualify as a main residence for PPR purposes the person, or their spouse or civil partner, must meet a 90-day test for time spent in the property over the tax year but with no night counting twice. The occupancy test does not apply for any year that the owner's spouse or civil partner is UK resident and PPR then applies in the usual way.

Anti-avoidance

General anti-abuse rule (GAAR)

BFLS 4A[4305]

HMRC will introduce a tax-geared penalty for cases tackled by GAAR in a later Finance Bill.

Promoters of tax avoidance schemes

BFLS 4A[4308]–4A[4309]

HMRC will be able to issue Conduct Notices to a broader range of persons connected with a promoter under the Promoters of Tax Avoidance Scheme (POTAS) regime. The three-year time limit for the issuing of Conduct Notices for failure to disclose an avoidance scheme will apply from the date when the failure to notify is established. The Disclosure of Tax Avoidance Schemes (DOTAS) legislation will also be updated and the scheme will apply to inheritance tax in a wider range of circumstances.

Inheritance tax

Nil rate band

BFLS 4A[4489]

The nil rate band for 2015/16 remains unchanged at £325,000 and will remain frozen at this level until 2017/18.

The rate of inheritance tax on the value of estates above the nil rate threshold is unchanged at 40%. The rate of inheritance tax is 36% where 10% or more of the net estate is left to charity.

Simplification of the inheritance tax rules for trusts

BFLS 4A[4500]

The government still intends to simplify the inheritance tax rules for trusts but the legislation is deferred to a future Finance Bill.

Deeds of variation

BFLS 4A[4508]

The government will review the use of deeds of variation for tax purposes.

Stamp Duty and Stamp Duty Land Tax

Shares and securities – 2015/16

BFLS 4A[4521]

The standard rate of duty on the transfer of shares and securities for individuals remains at 0.5%.

Land and buildings – 2015/16

BFLS 4A[4560]

The rates of stamp duty land tax (SDLT) on transfers of residential and commercial land and buildings were detailed in Bulletin 194.

Tax credits

Child and working tax credits – 2015/16

BFLS 4A[8032], 4A[8044] and 4A[8068]

For details of the child and working tax credit rates and thresholds for 2015/16 see Bulletin 194.

Self-employed claimants

BFLS 4A[8088]

From 6 April 2015 self-employed Working Tax Credit claimants must be undertaking an activity that is commercial, organised, regular and either profitable or working towards profitability (see SI 2015/605). A new test will apply to the working hours required to qualify as a self-employed or partnership claimant. From 6 April 2016 there will be a requirement for self-employed claimants to register their business with HMRC and to provide a Unique Tax Reference number.

CASE MANAGEMENT

Whether Court of Appeal erring in striking out application

Wyatt v Vince [2015] UKSC 14, [2015] All ER (D) 116 (Mar)

BFLS 4A[2121]–[2125]; Rayden Noter up [T16.6]

In 1981, the appellant wife and the respondent husband married. The husband treated the wife's daughter from a previous relationship as a child of the family. In 1983, their son, D, was born. In 1984, the parties separated. Then began the husband's life as a traveller, which was to continue for approximately eight years. The wife struggled to maintain a home for the children in circumstances of real deprivation. The husband's failure to pay maintenance reflected his inability to pay it. In 1992, a decree absolute was granted. The wife later had two more children with another man.

In the late 1990s, the husband set up a company which had, at the time of the present proceedings, a value of £57m. Therefore, it was only in the final years of D's minority that the husband was in a position to provide substantial maintenance for him. In 2001, D went to live with the husband. In 2011, the wife issued an application for financial orders, in particular, that the husband should make payment of a lump sum and that he should make interim periodical payments to her in sums equal to her estimated costs of the substantive application. The husband cross-applied for the wife's substantive application be struck-out, pursuant to the Family Procedure Rules 2010 (FPR 2010), SI 2010/2955, 4.4. The deputy judge dismissed the husband's cross-application and ordered the husband to make interim periodical payments, totalling £125,000, directly to the wife's solicitors (the costs allowance order). The husband appealed.

The Court of Appeal, Civil Division, set aside the orders of the deputy judge, struck out the wife's substantive application and made a repayment order, which required repayment by the wife to the husband of any of the sums paid under the costs allowance order above the actual solicitor's costs. In striking out the application, the Court of Appeal held, inter alia, that it was unfortunate that the FPR 2010 contained no rule equivalent to the Civil Procedure Rules 1998 (CPR 1998), SI 1998/3132, 24.2, which empowered the court in civil proceedings to give summary judgment. The effect of the omission, it held, could not be that an application for a financial order which had no real prospect of success had to proceed to trial and the solution lay in FPR 2010, 4.4(1)(b), namely, that an application which had no real prospect of success was an abuse of the court's process, and the wife's application was a classic example of it. The wife appealed.

The issues for determination were:

(1) The extent of the jurisdiction to strike out a spouse's application for a financial order under FPR 2010, 4.4 and whether, in light of the factors relevant to the determination of the wife's application, the Court of

Appeal had erred in having struck it out. If it had erred, it fell to be considered what case management directions would be proportionate to the unusual circumstances of the wife's application.

(2) Second, irrespective of whether the Court of Appeal had erred in that respect, whether it had erred in having set aside the costs allowance order and/or in having made a repayment order.

Consideration was given to the Matrimonial Causes Act 1973 (MCA 1973), s 25(2).

The appeal was allowed on the basis that:

(1) The omission from the FPR 2010 of any rule analogous to CPR 1998, 24.2 had been deliberate. The objection to a grant of summary judgment upon an application by an ex-spouse for a financial order in favour of herself was not just that its determination was discretionary but that, by virtue of MCA 1973, s 25(1) it was the duty of the court in determining it to have regard to all the circumstances and, in particular, to the eight matters set out in MCA 1973, s 25(2). The meticulous duty cast upon family courts by s 25(2) was inconsistent with any summary power to determine either that an ex-wife had no real prospect of successfully prosecuting her claim or that an ex-husband had no real prospect of successfully defending it. Therefore, FPR 2010, 4.4(1) had to be construed without reference to real prospects of success. The touchstone was whether the application was legally recognisable.

(2) Therefore, the Court of Appeal had been wrong to have insinuated into the concept of abuse of process in FPR 2010, 4.4(1)(b) an application for a financial order which had no real prospect of success. The application did not represent an abuse of the process. Nor could it be said that the wife's application had failed to disclose either a legally recognised application or, in any other relevant sense, reasonable grounds for having brought it. However, although the wife's appeal against the strike-out should succeed and her application should proceed, the wife's application faced formidable difficulties, including that the marital cohabitation subsisted for scarcely more than two years, it had broken down 31 years ago and the wife had delayed in bringing the application. It was unclear, at the present stage, whether the wife would be able to sustain her claim on the basis of need. However, the wife had a point which might prove to be much more powerful, namely, that, in the discharge of its duty under MCA 1973, s 25, the court would be required, by s 25(2)(f) to have regard to the contributions which each of the parties had made, to the welfare of the family, including any contribution by looking after the home or caring for the family.

(3) As to the costs allowance order, in circumstances in which the wife already owed the solicitors about £88,000 for their work done on her behalf on an application in which her ultimate recovery from the husband was likely to be comparatively modest and conceivably even non-existent, it was unreasonable to consider that they would, still less

should, continue to act for her on an extended credit basis against an evidently litigious husband who had been causing substantial escalation of the interlocutory costs in a manner which clearly caused him no difficulty.

Accordingly, the deputy judge's costs allowance order would be restored and the Court of Appeal's repayment order set aside. The court directed the swift referral of the wife's application to a financial dispute resolution appointment before a judge of the Family Division, who, in the absence of settlement, would indorse or impose the time estimate of the substantive hearing and direct the fixing of dates for it. Subsequently, at the pre-trial review, the allocated trial judge would decide which issues needed full investigation and hearing and, in the light of his decision, would insert the time for cross-examination of each party into the template prepared in accordance with the *Statement on the Efficient Conduct of Financial Remedy Final Hearings*. It was suggested that the major issues requiring limited investigation by way of oral evidence seemed, at the present stage, to be the wife's delay on the one hand and the disparate contributions to the care of the children on the other.

Comment: A decision that was met with some surprise by practitioners and brings the following principles into sharp focus:

(1) There is no limitation on the amount of time that may elapse before a claim is made although a successful claim after a lengthy delay remains rare and the strength of a claim will diminish on the passing of time (per *North v North* [2007] EWCA Civ 760, [2007] 2 FCR 601 and *Rossi v Rossi* [2006] EWHC 1482 (Fam), [2006] 3 FCR 271). This is not a point that is novel to the FPR 2010, or indeed the instant case. In *Twiname v Twiname* [1992] 1 FCR 185 the parties had divorced in 1972 and the wife made a further application in 1989; the husband's appeal against refusal of his application to dismiss the wife's claim was unsuccessful on the basis that in the matrimonial jurisdiction there was no statute of limitation. The Supreme Court highlighted that the FPR 2010 provisions as to strike-out are not analogous to the CPR 1998 provisions as to summary judgment and are subject to the court's duty under MCA 1973, s 25.

(2) Further, that the decision of the Supreme Court highlights the importance of bringing finality to financial claims rather than leaving matters open on divorce and following this decision practitioners should specifically bring the possibility of a claim after a long delay to the attention of their clients.

The decision should however be considered in the context of the amount of wealth involved (considerably more than the average case) and that the wife was described as having a 'real prospect of comparatively modest success'. Also of note is the court's approach to the legal services order (costs allowance), applying *A v A (maintenance pending suit: provision for legal costs)* [2000] All ER (D) 1627 a case that pre-dates the legal services order provisions inserted into the MCA 1973 by way of s 22ZA, with effect from 1 April 2013, which Mostyn J stated in *BN v MA* [2013] EWHC 4250 (Fam)

did no more than to codify the principles already set out in case law regarding costs allowances – a view the Supreme Court appears to concur with.

LEAVE TO REMOVE

Impact of relocation on contact

***Re B* (*a child*) (*relocation: Sweden*) *[2015] EWCA Civ 286, [2015] All ER* (*D*) *297* (*Mar*)**

BFLS 3A[1217]; CHM 2[619]; Rayden 1(1)[T5.75]

N was five years old. Her mother, the respondent, was born in Sweden. She moved to England and began a relationship with the appellant father. In 2010, N was born. The parents' relationship broke down. In 2012, the mother applied for permission to relocate to Sweden. She believed that she could offer N a much better way of life in Sweden and said she was totally isolated in England, which would not be the case in Sweden.

The judge had evidence from, among others, a Cafcass officer, who recommended that the mother's application be dismissed and a social worker, whose principal objection to the mother's move centred around her 'lifestyle'. He also considered a letter from, a psychologist who had been treating the mother, who said, inter alia, that he considered that being compelled to live in England would precipitate a substantial decline in her emotional well-being and, consequently, long-term counselling might be necessary. The judge made an ordering permitting the mother to remove N permanently from England to live in Sweden. The judge found that, from about April 2013 to the middle of 2014, the mother's life had been very disturbed and disordered. The excessive drinking and the formation of at least one highly inappropriate and unsuitable relationship imperilled her and N. However, he found, inter alia, that, in the second part of 2014, stability seemed to have taken hold. The judge further found that, notwithstanding the fractures and rifts within her family in Sweden, a return to Sweden would bring welcome stability and security into the mother's life, and would give her a sense of purpose and of responsibility. In respect of the father, the judge found, inter alia, that he had not altogether been able to separate his own personal needs from an objective assessment of N's best interests. Further, his impression was that, if the present situation or anything like it continued, the father would not be able to control himself from monitoring every aspect of the mother's life, her sense of being beleaguered would continue, and the judge foresaw endless further complaints and allegations.

The father appealed and submitted that the judge had: (i) failed to give proper weight to the views of the Cafcass officer and social worker, and to give sufficient reasons for not following their advice; (ii) been wrong to have found that the mother's disturbed and disordered life in England had been a symptom of her unhappiness, and that a move to Sweden would improve matters whereas, in fact, the move would give rise to risk for N, and he had wrongly relied upon the maternal family to support the mother and safeguard N, when it was itself troubled; (iii) been wrong in his assessment of the

father, and had failed to consider the father's protective role in N's life; and (iv) failed to take into account the impact of the relocation on N's relationship with her father and the risk that the mother and her family would not promote N's relationship with him.

The appeal was dismissed on the basis that:

(1) Having given full weight to the great advantage that the judge had had by virtue of having presided over the hearing with oral evidence, it had not been demonstrated that he had been wrong in the approach that he had taken to the material before him or in the decisions that he had made. The judge's treatment of the social worker's evidence in his judgment had been brief, but it had not been shown that he had been wrong to have declined to put weight on her views. In respect of the Cafcass officer, the judge had been well aware of her assessment of the matters as his judgment showed. However, he had been entitled to differ from her, and his reasons for doing so were clear and valid.

(2) As to the assessment of the mother, in the circumstances, the judge had been entitled to rely upon the psychologist. It could be seen that he had compared the psychologist's view with what he had seen of the mother himself when she had been in the witness box and had found it confirmed. Further, the judge had set out his impressions of the maternal family in the judgment. It had not been demonstrated that the judge's findings in that regard had not been open to him and there was no reason to interfere with them. The judge's finding about the stability and security that the move to Sweden would bring had been a key finding, and he had made it having known about the fractures and rifts in the family in Sweden.

(3) The judge's adverse findings about the father had also played a key part in his decision. The father had been cross-examined for two-and-a-half hours, during which time it had been put to him that he had not, in fact, been a protective influence, but an undermining influence on the mother. Nothing had been said which persuaded the court that the conclusions which the judge had reached, after having had that direct opportunity to assess the father, had not been open to him. The judge's findings had detracted significantly from any protective influence he might have. However, the consequence of the judge's finding that the mother's problem behaviour in England had resulted from her isolation and unhappiness, which would be cured by a return to Sweden, had been that the question of protection had faded into the background anyway. In the circumstances, issues of protection had not been determinative or even necessarily of any real weight at all.

(4) The judge had had in mind the impact of the move on the father's contact. Apart from the issue of the father's protective role, the present case had been in line with most relocation cases, in that distance would inevitably impair the ability of one parent to participate in the child's day-to-day life. The judge had commented upon that in his judgment and had obviously been acutely aware of it in having made his decision.

> He had proceeded, as he had been entitled to do, upon the basis that the contact provisions could be enforced in Sweden and he had warned the mother of the possible consequence of failing to adhere to them. His approach to that aspect of the case did not provide any more fruitful ground for challenge to his overall decision than the other matters advanced.

The decision of Mostyn J ([2014] All ER (D) 176 (Dec)) was affirmed.

Comment: A decision in line with *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FCR 425 on an application for leave to remove in non-shared care cases. Payne established the court's wide discretion to grant an application to relocate unless it concludes that relocation is incompatible with the welfare of the children. Any exercise of the court's discretion is dependent on the facts however and no two cases are identical.

In the instant case the judge at first instance departed from the recommendations of the Cafcass office and social worker, an approach supported by the Court of Appeal in accordance with the maxim 'the expert advises; the judge decides' (per *Re AB (a minor) (child abuse: expert witnesses)* [1995] 1 FCR 280). Per *Re FS (minors) (care proceedings)* [1996] 1 FCR 666 the judge should always give reasons for disagreeing with the expert's conclusions or recommendations (see also the recent decision in *Re D (a child)* [2015] EWFC 4, [2015] All ER (D) 190 (Jan)).

A central point in the instant case was also the impact of relocation on the father's contact with the child. In *K v K (children) (removal from jurisdiction)* [2011] EWCA Civ 793, [2011] 3 FCR 111 (a shared care case) Black LJ took the view that everything considered by the court in reaching its determination as to the welfare of the child (which is paramount, per Payne) should be put into the balance with a view to measuring the impact on the child.

MARITAL AGREEMENTS

Effect of post-nuptial agreement

***Gray v Work [2015] EWHC 834* (*Fam*), *[2015] All ER* (*D*) *302* (*Mar*)**

BFLS 4A[866.1]; Rayden Noter up [T16.129]

The relationship and marriage between the husband and lasted 20 years, prior to ending in divorce. At its outset both parties were in their early to mid-twenties. They had similar modest incomes and no capital. The parties were in their mid to late forties when they divorced. Entirely during the marriage, the husband earned considerable wealth. His net wealth was around US $225,000,000, or about £144,000,000. During the 20 years, the wife was a good wife and a good mother to their two children. She loyally moved with the husband to live in Japan where he was to generate the wealth in the space of eight years. In October 2000, the parties both signed post-nuptial agreement(s). The agreement was negotiated between Texan

lawyers, and the wife flew to Texas to sign it. One clear purpose and effect was to 'partition' the parties' separate property, that was, to terminate any community of property under Texan or American law, and to provide that the property, including future earnings, of each of them was kept separate and distinct and was the property respectively of him or her alone. That was done in anticipation of implementing the husband's decision to 'expatriate', that was, to renounce his American citizenship, which he did purely in order to avoid or save tax.

In early 2013, the wife formed an emotional, and soon a sexual, attachment with a man, Mr H, who was the parties' personal physiotherapist. The husband was very shocked and very hurt by his wife's infidelity and affair. In May 2013 the husband presented a petition for divorce. The wife applied to the court of England and Wales for financial remedies pursuant to the Matrimonial Causes Act 1973 (MCA 1973). The husband put, and left on the table for about six months, an offer to pay $71 million (total sum payable) but by instalments of about $11.5 million per annum. The wife did not accept the offer, as essentially she considered that in fairness she was entitled to half. The application came before the court.

The issues were: (i) the meaning and impact of the post-nuptial agreements which both parties had signed about five years after the marriage; (ii) whether or not the husband had made a 'special contribution' such that the amount payable to the wife should be less than it otherwise might have been. MCA 1973, s 25(2)(f) required the court to have regard to 'the contribution 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'. The husband's case was that he had made a particular contribution by earning and amassing so much wealth, and by the acumen and drive with which he had done so, which, it was submitted was unmatched or not balanced by the contributions which the wife made to the welfare of the family. The husband claimed that that should be reflected by his retaining more and her receiving less of the overall wealth.

The court ruled that:

(1) It was established principle that effect should be given to a nuptial agreement 'unless in the circumstances prevailing it would not be fair to hold the parties to their agreement'. The circumstances of the parties often changed over time in ways or to an extent which either cannot be or simply was not envisaged. The longer the marriage has lasted, the more likely it is that this will be the case.

(2) On the facts under the agreement, the wife was free to make a clear and unambiguous election whether to accept the sum offered by the husband or to seek alternative relief. It was common ground that the Form A issued by the wife, which was served upon the husband in January 2014, amounted to her express affirmative election to seek alternative relief from the court. The wife was fully entitled, under the terms of the agreement, to elect not to accept the husband's offer but to pursue a real and not an illusory claim for a range of statutory remedies against

all the husband's assets, and the agreements had not in any way limited or impacted upon the powers and discretion of the court. For those reasons, the agreements did not in any way limit or impact upon the wife's right to seek, and the court's unfettered power (and indeed duty) to make, discretionary award.

(3) A successful claim to a special contribution required some exceptional and individual quality in the spouse concerned. Being in the right place at the right time, or benefiting from a period of boom was not enough. Hard work alone was not enough. Many people worked extremely hard at every level of society and employment. Hard work alone lacked the necessary quality of exceptionality. Further, to attach special weight to hard work in employment risked undervaluing in a highly discriminatory way the hard work involved in running a home and rearing children. On considered reflection, the court was not satisfied that the husband had established an unmatched special contribution of the kind and to the extent required.

(4) Fairness and an overall appraisal of the MCA 1973, s 25 factors required an equal division of the assets and the final outcome had to achieve that effect.

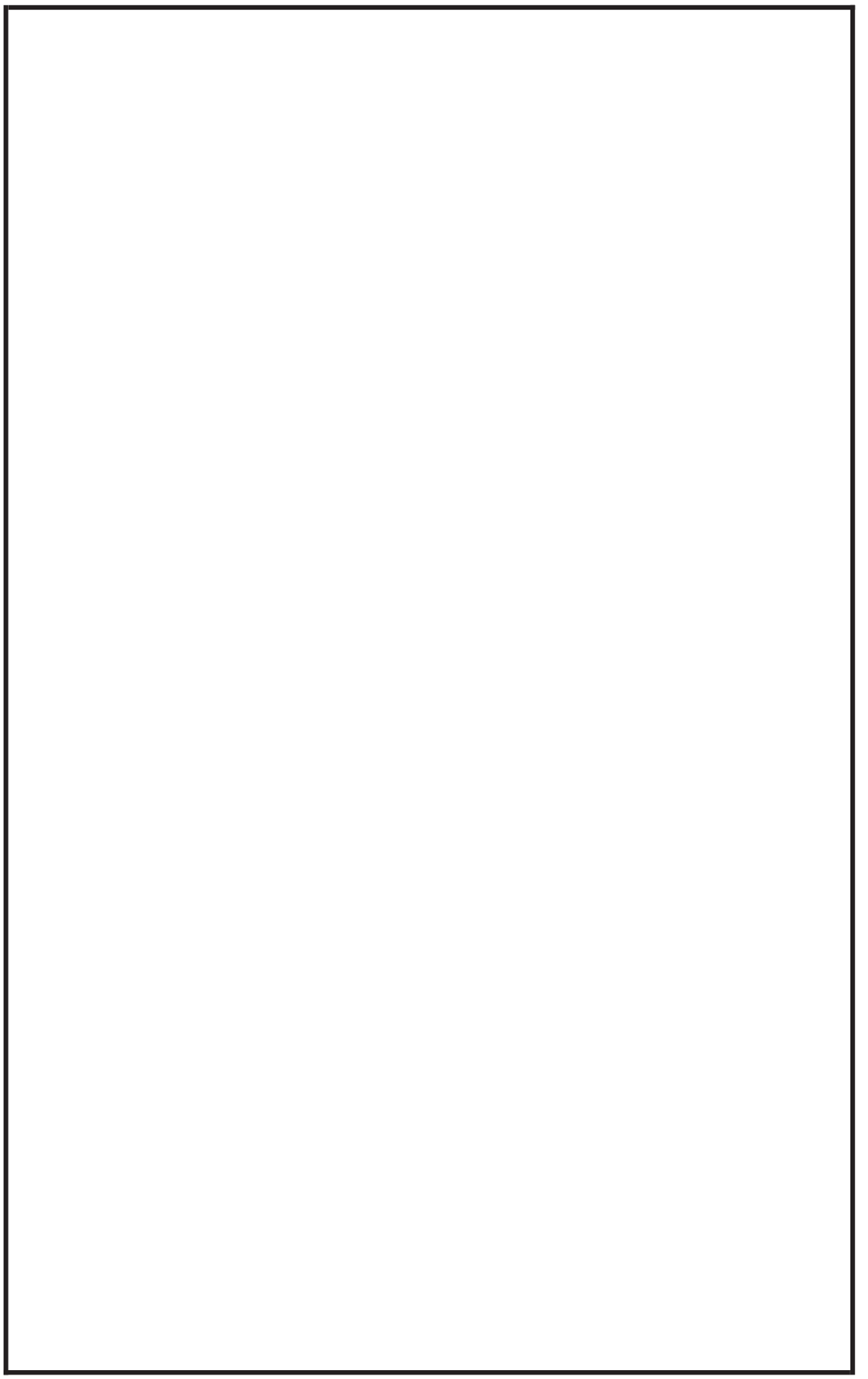
Comment: The two key issues were:

(1) Were the provisions of the post-nuptial agreements such so as to exclude the discretionary exercise under MCA 1973, s 25?

(2) Was the husband's contribution 'stellar' to an extent that would displace an equal division of assets?

On the first issue, the court heard extensive evidence as to the agreements entered into, including evidence from Texan lawyers, one for the wife and the other for the husband. Of particular significance were the surrounding circumstances as to why the agreements were entered into. The wife's position was that the agreements related to tax planning. The agreements were reproduced in full in the judgment and had provoked significant discussion. An addendum agreement and jurisdictional issues also came into play. Ultimately Holman J 'unhesitatingly and firmly' held that the agreements did not in any way limit or impact upon the wife's right to seek, and the court's unfettered power (and indeed duty) to make, discretionary awards. In addition consideration was given to para 80 of the Supreme Court judgment in *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, [2010] 3 FCR 583, ie that 'The circumstances of the parties often change over time in ways or to an extent which either cannot be or simply was not envisaged.'

On the issue of a 'stellar' contribution, the instant case serves as a reminder that such a contribution cannot be determined on the level of wealth alone (in this case substantial) but that regard must always be had to 'genius' and that such an argument will only succeed in 'the most limited and exceptional circumstances' (per Bennett J in *Sorrell v Sorrell* [2005] EWHC 1717 (Fam), [2006] 1 FCR 75.



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