The recognition of money work as a specialty in the family courts by the creation of a national network of Financial Remedies Units.

Authors

Edward Hess was a District Judge (PRFD) and worked in the FRU at the Central Family Court until he became a Circuit Judge at Portsmouth Family Court in 2015

Joanna Miles is University Senior Lecturer in Law and Fellow of Trinity College, University of Cambridge, and an Academic Door Tenant at 1 Hare Court.

The recognition of money work as a specialty in the family courts by the creation of a national network of Financial Remedies Units.

THE PROBLEM

Absence of Judicial Specialty

Financial remedies (or money) work has a curious status in the family court.

Children cases in the family court are subject to a careful allocation and gate-keeping procedure, following detailed guidance from the President of the Family Division to determine whether the case should be heard at Lay Justice, District Judge, Circuit Judge or High Court Judge level. The existence of this guidance sensibly recognises that children cases come with a wide range of difficulty and complexity and that the family court should accommodate this in its allocation of judicial resources. A ticketing scheme for private and public children cases is carefully administered to ensure that any judge hearing a children case is appropriately experienced and trained by the Judicial College.

The same is not true of money work. There is no allocation or gate-keeping guidance or procedure. Almost all cases proceed at District Judge level. Allocation issues generally only arise if the case is a very rare one for which a High Court Judge may be needed (in which case reference needs to be made to the criteria in Mostyn J's "Statement on the Efficient Conduct of Financial Remedy Hearings Allocated to be heard by a High Court Judge"). With a few exceptions there is no recognition of the existence of a mid-tier of cases to be heard at Circuit Judge level and so this rarely happens. Money work has no judicial ticketing requirement, and so any Deputy District Judge or District Judge can be expected to take on a money case load with little or no experience and no specialist training (beyond the minimum general induction course which includes only a few hours of very basic money training). Many of the judges at District Judge level hearing these cases will have no prior professional experience in this area of work, and so will first be exposed to this specialist, technical jurisdiction as judges. Many will be civil practitioners and/or spend most of their judicial time doing civil work.

The fact that this state of affairs exists is probably the residue of the historic (pre-1969) situation where a High Court Judge would deal with the divorce (thought then to be the important issue) and adjourn "ancillary relief" or money issues to be dealt with by a Registrar as these issues were thought to be lesser matters. It looks increasingly anachronistic today where the main focus of the cost of divorce litigation will often be money issues and money cases which, if conducted by lawyers at all, are typically conducted by family lawyers who are specialist in money work. These specialists, and perhaps their clients, are frequently baffled and disappointed to find their case heard by a judge who has no such specialty. A significant number of these cases are, of course, now conducted by litigants-in-person. This creates a different, but perhaps even more serious scenario of nobody in the court having any experience of money cases.

Money work as a portion of work in the family court

This matters, partly because money cases make up a significant part of the family court case load. HMCTS data published on 31 March 2016 record that in 2015 37,924 financial remedy cases were started - this compares, for example, with 15,999 public law case starts and 43,390 private child case starts (all figures from Family Court Statistics Quarterly Q4 2015 publication – see further details in appendix below). Excluding the large number of matrimonial case starts (the vast majority of which are processed entirely on paper), money cases constitute 29% of all types of family court case starts. In 2015, 67% of financial remedy applications and 65% of financial remedy disposals were uncontested, dealt with as pure consent order applications that require (for the most part) simple paper approval – on this basis, rounding the figures and assuming for the purpose of this exercise that the rates applicable to disposals are roughly equivalent to completed cases, around 24,700 paper approvals per year are necessary (again, for further discussion of our methodology, see the

appendix). The remaining 35% of disposals (around 13,300 cases) require input from the court beyond the mere approval of a consent order. It is to be noted that financial remedy orders are made in a declining proportion of divorces, so that well over two-thirds of divorces now have no financial remedy at all: in 2003, 41% of all divorce cases started had a financial remedy order made, whilst in 2014, only 26.4% of cases did so. Even taking into account for this increased tendency for couples to resolve financial issues entirely privately (unwisely? Cf. *Wyatt v Vince* [2015] UKSC 14) without securing their agreement via a consent order, financial remedies cases nevertheless remain a significant part of the family court's business. They commonly require specialist assessment to ensure that they are fairly resolved, whether by consent or not.

Absence of consistency of approach?

This matters also because there is evidence to suggest that the system may produce an unacceptable level of inconsistency. The Law Commission paper on "Matrimonial Property, Needs and Agreements" (Law Com No.343) concluded:

> *"so far as financial needs are concerned…there is evidence of significant differences in the way the law is applied, both between individual judges and between different areas of the country. In so far as this produces real inconsistency rather than fact-sensitivity, it is a cause for concern, particularly if it gives rise to forum shopping".*

Any problem of real inconsistency, rather than proper fact-sensitivity, may become more acute as the introduction of divorce centres across the country works its way through to outcomes.

Time was, the hard-pressed DJs and DDJs deciding these cases would get plenty of practice at doing money cases through their box work by dealing with consent order applications before they found themselves adjudicating a contested case. While making consent orders is in theory no less a judicial exercise than determining a contested case, the judge might – at least if one or both parties have had legal advice and assistance in preparing their consent order application – draw some reassurance from the fact that the application had already been through one or two legal professionals who could ordinarily be assumed to be satisfied that the proposed order was an acceptable one, at least given the constraints of the case (see *Dinch v Dinch* [1987] 1 WLR 252 but cf. more recently *Minkin v Landsberg* [2015] EWCA Civ 1152 on solicitors' duties in this context). Although the judge might approve the order as requested (the suggested judicial role being to act as a watchdog rather than a ferret: *L v L* [2008] 1 FLR 26) the new DJ or DDJ would perhaps be able to use the box work to "gauge the level" of this casework. But not anymore.

Unlike children cases, which are always handled separately from any connected matrimonial proceedings, financial remedy applications remain formally a matter "ancillary" to the divorce itself, the recommendation of the Financial Remedies Working Group that this be

changed having not been implemented. The advent of divorce centres means that pure consent applications are now ordinarily being dealt with as part of the bulk-processing now being done by those centres. Unlike the divorces themselves, the money cases require *judicial* input throughout – contrast the enhanced role of legal advisors in dealing with divorce petitions. Financial remedy applications are only sent for local attention at the applicant's preferred venue if a hearing is required or the case is contested. Add to this the fact that proceedings are increasingly likely to involve one if not two litigants in person, and the inexperienced DJ or DDJ in the local court with limited if any background in money work may forgivably feel rather stretched by his or her first forays into FDAs, FDRs and, in extremis, the contested final hearing. (Extrapolating from table 6 of the latest FCS release, we can see that in 2011, 53% of divorces with a financial remedy aspect involved parties who were both represented, compared with 45% in 2015.)

We think that all this, at very least, has implications for judicial training and ticketing. Even before the recent changes, it seems to us curious that money cases should not have been regarded as a specialist discipline meriting ticketing. Even low value cases may have complicated features, for example involving debts, companies, pensions and mortgage finance. Indeed, resolving complex issues appropriately in low value cases is arguably even more critical for those parties than the wealthy, who may be expected to emerge comfortably off whatever the detail of the outcome: for the low value case, inexpert handling of a difficult point may make a very real difference to the parties' future standard of living, and that of any dependent children of the family.

SOLUTIONS

A challenge to the use of Divorce Centres for money work

We think it important, first, to ensure that the handling of consent order applications in the divorce centres does not become unduly routinised. Researchers (including Stephen Cretney, 'From Status to Contract?' in Rose (ed) Consensus ad Idem (Sweet & Maxwell, 1996)) – and appellate courts (*Pounds v Pounds* [1984] 1 WLR 1535) – have previously expressed concern about how far the fairness of consent order applications can be properly adjudicated upon, not least given the limits of the paper-based application (though, alongside similar concerns, contrast the evidence of judicial intervention, in a few instances very robust, found by Hitchings, Miles and Woodward, *Assembling the Jigsaw Puzzle: Understanding Financial Settlement on Divorce* (University of Bristol, 2013)). It is not yet clear from research or anecdotal report how the divorce centres are handling these cases and what impact, if any, the new system has had on outcomes or likelihood of judicial intervention prior to the order being approved. From day 1 of the new regime, practitioners

must have had to approach this on an "all bets are off" basis: where they might previously have felt confident that they knew what would get through their local court, they are now having to rebuild (what is no longer local) knowledge from scratch; even once they get some sort of "feel" for the mood of the divorce centres, they will presumably rarely know which judge might be signing off on their order when they send in the application. Quite aside from the practitioner experience, however, it is important to be confident that there is sufficient judicial resource – in terms of both quantity and quality – at the disposal of the divorce centres to ensure proper treatment of these applications.

Ticketing for money work

Turning to contested applications, we think it important that those handling these in the local courts have fuller training and expertise than is too often currently the case. This is vital to ensure that reliable and respected indications are given at FDRs to ensure a high settlement rate and at final hearings to ensure consistency and fairness. (The importance of good judicial conduct of FDRs to practitioners, clients and LIPs is evident from Hitching, Miles and Woodward's research findings: (2013) above, pp 75-8, 121-4.)

Accordingly, we consider that these cases merit ticketing and so handling by specialist judges, but we recognise that this reform on its own would be complicated and have resource implications, both in terms of the enhanced training that would be required for ticketing and then in terms of the burden this would place on listings officers to ensure adequate coverage of court business.

A national network of Financial Remedy Units

We consider that the best answer to all of the identified problems is to build on the initiative currently found at the Central Family Court in London – where money work is now conducted under the specialist facility known as the Financial Remedies Unit (FRU at the CFC). As an exception to the general rule, contested financial remedy applications can be issued directly in the FRU at the CFC (subject to a self-certification of complexity by the applicant) rather than to the divorce centre. The FRU sets out to employ Circuit Judges, Recorders, District Judges and Deputy District Judges who have a money specialty. More complex cases can be allocated to Circuit Judge level or full-time District Judge level as appropriate. Many of the problems we have identified should be avoided. There is a level of specialism in sui generis schemes in some limited parts of the country: for example, the Family Court in Manchester operates a "Money List" where a number of Circuit Judges who had a money specialty when in practice are allocated to hear unusually large or complicated

money cases and in Birmingham where there is a level of informal money ticketing for District Judges. But otherwise, specialism does not exist.

The desired level of specialisation could be achieved by the establishment of Financial Remedies Units around England and Wales. Plainly, a good deal of research would have to be done to ensure that the units were of the appropriate size to secure efficiency and specialism, and also in places which ensured a reasonable level of geographical access. The authors recognise the vital importance of ensuring that access to the FRUs is not so geographically difficult as to impede access to justice. To ameliorate this it should be possible in some instances for a judge from the Financial Remedies Unit to travel to a court outside the unit, if that were necessary for the convenience of the parties for a particular reason, for example that they could not travel or were geographically remote from the FRU, as might often be the case in parts of Wales, in particular: this issue would need to be addressed with particular care in rural and other parts of the country where public transport is inadequate and the roads are slow. Modernised court IT might also assist by permitting remote hearings, e.g. for directions appointments – but as all practitioners will say, the importance of both parties' physical presence in court on the day as an aid to settlement in many cases must not be forgotten. But it is suggested that something like twelve units around England and Wales staffed by c. 70 judge positions (including deputies, providing c 50 weeks' judicial work pa) would be needed (see appendix below for our methodology). These units could have judges with a money specialty allocated to them, which could be Circuit Judges or District Judges as appropriate, in the numbers necessary to deal with cases likely to arise in those areas. A particular judge might be able to choose to spend, say, between 50 to 100% of his/her judicial itinerary in a unit. Recorders and Deputy District Judges would need to establish money expertise to secure a sitting within a unit. There could be guidance on allocation as between different levels of judges within a unit. The financial consent orders currently dealt with in the divorce centres could be most efficiently placed in the units, which would be made easier if financial remedy applications were permitted to be independent of the divorce file, as was recommended by the Financial Remedies Working Group. Financial remedy applications would be issued within the units, who would have their own dedicated HMCTS staff. Money enforcement could be similarly rationalised within the units, with obvious advantages over the current system. The units could enhance consistency by exchanging data and policy views through a national network of FRUs, which could be presided over by a Family Division money judge.

It is acknowledged that the establishment of these units would have a financial cost in terms of the loss of flexibility of judicial deployment. To some extent, we would hope that the increased efficiency associated with the use of specialist judges – who might be expected, for example, more often to crack cases at FDR stage – would help recoup the costs associated with the Units' establishment. However, were those savings not sufficient of themselves to cover the costs, one might contemplate the creation of a carefully graduated fee system for contested hearings, designed to encourage settlement, in place of the single

(modest) fee currently charged for applications. While this is not a central aspect of our proposal, it seems necessary to make some effort to tackle it here in order to anticipate an obvious objection to our main idea.

We do not feel that the fee for consent order applications should be raised – it is clearly important not to deter parties who have reached agreement from having that agreement enshrined in a court order. But parties who commence contested litigation of their financial issues, certainly if they get as far as an FDR appointment, might be expected to pay increased costs at that stage, and at Final Hearing stage, in recognition of the additional court time being taken. It would be essential that income from this source be ring-fenced for the operation of the FRUs: there is no reason why these litigants should be subsidising other parts of the court system (or Treasury more generally).

In making this suggestion to raise court fees, we are conscious that the current fee for contested financial remedy applications of £255 is very modest in comparison to fees charged for money claims in the civil courts (though this is on top of the £550 now charged for divorce petitions, a figure well in excess of the cost to the court system of processing the average divorce: the Justice Select Committee has recently recommended that it be reduced to its former level). It seems to us surprising that, by way of contrast, issue fees for money claims are now graduated based on the value of the claim (with an eye-wateringly high issue fee for £10,000 for claims worth more than £200,000) whilst a money claim of any size or complexity in the family court, however much court time is used, attracts a fee of only £255. We would not commend an *issue* fee for financial remedy cases: issuing Form A can itself be an effective tool for prompting settlement. Nor would we commend an approach based (exclusively) on the value of the case: (i) valuation can sometimes itself a heavily contested matter that may not be resolved until late in the case; and (ii) given the geographical variation in house prices, it would not be fair to set fee-levels in such a way that where one lived of itself dictated a higher or lower fee when the nature and complexity of the issues at stake were identical to other, much lower-value cases from elsewhere in the jurisdiction. And so we wonder whether some way might be found to scale fees for FDRs and then Final Hearings in a way that reflected the time-estimate for the case, or perhaps a combination of that and the value at stake (with thresholds set in such a way as to minimise the chances of difference in fee being based largely on location). It could perhaps be a case management decision for the judge at First Appointment to classify the case for these purposes.

Such a scheme would more accurately reflect the demand of the case on the court's resources and provide an extra (if modest) incentive for parties to settle at each stage. Acknowledging that complexity can be a feature of low value cases, it would be important to ensure that applicants in such cases were not prevented from pursuing a case by a disproportionately high fee, and so an appropriate waiver system might be needed at the lower end. Costs rules could, of course, be used to ensure that applicants did not end up

bearing these costs where it was the unreasonable conduct of the respondent which caused the case to be contested and to continue through the court.

Closing remarks

We are grateful to professional colleagues who commented on an earlier draft of this article and who raised with us a number of points which we hope to have gone at least some way to address in revising the piece for publication. We are conscious that whilst there might be support for the principle of ticketing in this area, there are a number of practical difficulties and risks which would need careful navigation for the proposed scheme to produce its intended benefits. We would welcome further feedback from readers of *Family Law*.

Note by the President

Further significant reform of the practice and procedure in relation to both divorce cases and financial remedy cases – which I continue to believe need to be 'un-coupled' and handled separately in future – is unavoidable and in any event highly desirable. Edward Hess and Joanna Miles, with their great experience of these matters, have identified what they see as the problem in relation to our present handling of financial remedy cases and, even more important, they have suggested solutions. Their analysis is compelling and their proposals attractive. They are to be thanked for having initiated an important debate, in which, I hope, everyone will participate. I suspect that many will agree the pressing need for change. Our present arrangements are probably untenable. It may be that the only real question is what different arrangements we should have in future. Be that as it may, and some perhaps will disagree, what is surely important is that we all give the most careful attention to what Hess and Miles are saying.

James Munby, PFD

4 October 2016

APPENDIX

Methodology for attempting to calculate number of FRU / fte judges required

This is not an easy exercise, and much more detailed work would be needed that we are able to provide here. But to try to give a ballpark sense of the likely requirement, we offer some rather rough and ready calculations on the back of which we have attempted to suggest roughly how many judge positions and how many FRUs would be needed.

All figures on which we have made our calculations in this article and its appendix are taken from the tables for Family Court Statistics Quarterly Q4 2015, available at https://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2015. All figures regarding applications must be regarded as estimates as there is a known problem with the family case management system undercounting money applications by around 10%; most missing cases are thought to be consent applications.

There are more applications and disposals each year than there are cases, and it might be assumed that contested cases will involve more, and more contested, disposals than other cases. But for the purposes of the discussion in the text above and here we have adopted the percentages for disposals by consent or otherwise (calculated from HMCTS figures for 2015 in table 10 of the source cited above) as a basis for (what is necessarily) rough calculation of case-equivalents. In the process, we may therefore over-estimate how many cases ultimately require a contested final hearing.

If we take the national 2015 figure of 37,924 financial remedies cases (rounded to 38,000), and further assume (by reference to the HMCTS rates for types of *disposals*) that around 65% of these (24,700) are pure consent application cases, this leaves 13,300 contested cases. Research by Hitchings, Miles and Woodward (based on court files with a final order in financial remedy proceedings on divorce in four courts taken from the period 2011-12, pre-LASPO therefore: *Assembling the Jigsaw Puzzle…* University of Bristol, 2013) suggests that a significant minority of cases resolve without needing a First Appointment (in their study, around 16% of all initially contested cases settled at that very early stage). Those findings cannot be assumed to be nationally representative (and only included cases that did conclude with a final order), but if applied to the national total could see around 2,000 of the 13,300 cases settle without needing a substantive court appointment (other than perhaps using the FA fixture to approve the consent order). But we shall assume here, very conservatively, that all of these 13,300 cases would at least be listed for a First Appointment, but anticipate that in practice a significant number of these appointments would be vacated or turned into an approval hearing. We shall further assume, by reference to Hitchings et al's findings, that 55% of these 13,300 initially contested cases (c.7,300) would require an FDR, a significant further number of cases settling before the FDR (in some

such cases, the FDR fixture might again turn into an approval hearing). As for final hearings, the HMCTS data for *disposals* indicate that 9% of these in 2015 were fully contested, but as we note above, in view of the fact that the disposals total is greater than the cases total and since one might assume that fully contested *cases* might have more *disposals* during their lifetime than other cases, to assume that 9% of *final hearings* will be contested may well be an over-estimate; for example, just 5% of cases in Hitchings et al's study of cases with a final order were fully contested. On the other hand, given the likelihood that cases contested at any stage may have more contested disposals within them, the higher figure may help cover that element of the work associated with litigation in financial remedy proceedings. So taking the more conservative 9% figure (of all cases; c.25% of initially contested cases) might produce around 3,400 final hearings (or 3,400 total hearings, including both final hearings and contested interim/ancillary matters).

Translating these figures into judge requirements is complicated by the fact that the court time taken to hear final hearings will hugely differ, perhaps between one day and many days, and also noting that the figures do not include other interim hearings (MPS applications, Section 37 applications, Costs allowance applications etc.). Assuming one judge position (including deputy cover) could on average deal with one final hearing, 6 FDR/First Appointments as well as other interim applications and consent orders each week for, say, 50 weeks per year then approximately 70 FRU judge positions (including deputy cover) nationally should be able to deal with the case load (70 x 50 final hearings = 3,500, 70 x 300 FDR/First Appointments = 21,000). This might equate to 12 FRUs containing 6 judge positions in each FRU, although the balance of numbers would have to be shifted in favour of regions with higher or more complex caseloads – the FRU at the CFC currently has 8 judge positions.