Chapter 6 update: September 2021

This update covers four issues:

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- 6.4.4: The Pension Advisory Group's *Guide to the Treatment of Pensions on Divorce*
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6.2: Covid-19 and the family economy – women taking the hit

Surveys have confirmed what many women already knew: that women have taken the brunt of the economic hit from the pandemic in the UK, not least given its differential impact across different sectors of the economy and the suspension/disruption of childcare and schooling. For example, one IFS study shows that:

- mothers were more likely to have left or lost their job, or to have been furloughed, since the start of lockdown;
- mothers were spending less time than fathers on paid work and more time on domestic responsibilities
- the average mother was doing only 35% of the number of uninterrupted work hours compared to the average father, down from nearly 60% (so still not good!) in 2014/15
- the gender disparity in quantity of childcare provided existed in all families, even where both were still working for pay and where mothers were the higher-earning before the lockdown.

The good news was that fathers – whilst still doing less than mothers – were doing *more* childcare than previously. But the question for the long-term is how much this will 'stick'. With women dominating Covid-vulnerable sectors such as retail and hospitality, women's lifetime earnings (and pension savings) are likely to be damaged in the longer-term. And some researchers are cautioning that we're rolling back the years to 1950s-style family arrangements.

The IFS has cautioned that this could have significant long-term effects, further entrenching various inequalities. For us, as family lawyers concerned primarily about the impact of patterns in the family economy on how that then plays out on relationship breakdown, we need to consider what this means – or should mean – for the allocation of economic resources on divorce.

6.4.4: The Pension Advisory Group's *Guide to the Treatment of Pensions on Divorce*

At 6.4.4, we noted the work of the interdisciplinary Pension Advisory Group that has been working for the last two years to provide guidance for judges, legal and other professionals involved in financial remedy cases on divorce that involve pension assets. The Group's guidance was published in July 2019, and can be read in full or in summary form here: https://www.nuffieldfoundation.org/pensions-divorce-interdisciplinary-working-group The guidance suggests key practice points for relevant professionals and, in the absence of any significant case law in this area, substantive guidance about how best to approach pension assets, bearing in mind the different types of pensions that exist and the various complexities that may commonly arise, particularly in efforts to value the assets at stake. The guidance notes the experience of professional negligence practitioners that most pension-related actions against family lawyers involve unwise 'off-setting' arrangements, i.e. cases in which rather than seek a pension sharing order the parties have agreed to allow the pension-holder to retain that asset in return for the other spouse receiving a larger share of other assets. Failure properly to understand the true value of what the non-pension-holder is giving up in such cases will leave (usually) wives under-provided for following divorce and facing potential poverty in old age.

6.4.5: *RC v JC* [2020] EWHC 466 – a rare compensation case

The existence of compensation for relationship-generated disadvantage as a distinct principle has been confirmed by Moor J in *RC v JC.* The case involved the husband-partner of law firm and his wife, who was also a qualified solicitor but who had not practised as such for some years and was now a homemaker and primary carer for the couple's two children, now aged 10 and 8. Their relationship last around 10-11 years. The wife had been doing extremely well in her City firm, and – as the judge found – 'might well have become a partner with the huge financial rewards that would have brought'. But that did not happen:

***RC v JC* [2020] EWHC 466**

MOOR J:

52. … It is agreed that the Husband did not want her to remain at the firm if they were to marry and she accepted that she could not remain. I am satisfied that, by the time the decision was taken to leave, she had formulated her plan which involved both marriage and, hopefully, children. She viewed herself as the parents who would take primary responsibility for the children. The Husband's career took precedence. She therefore rejected any suggestions of trying to establish herself at another magic circle firm, in favour of a move to the legal department of the bank. I am clear that the Husband was fully supportive of this decision.

53. There is a stark difference between the remuneration of managing associates and partners at law firms… It is clear that the remuneration on offer at the bank was broadly akin to that of a managing

associate at the firm at the time … The Wife did, therefore, give up the chance, as opposed to the certainty, of far higher remuneration. I further accept that the Wife understood the bank would allow her to go part-time in the legal department … once she had children. When it came to the crunch, such a role was not available. Rather than return full-time, she chose to give up her legal career. At the very least, the Husband went along with that decision. … I accept that it is unusual to find significant relationship generated disadvantage that may lead to a claim for compensation, but I am clear that this is one such case. The Wife gave up her legal career, with the support of the Husband. The effect that this has on the outcome is, of course, an entirely different matter.

In the event, Moor J settled on a prima facie equal share of the extensive assets, all classed as matrimonial. That share (£4.85 million) would have been regarded as sufficient to cover the wife's equal sharing entitlement and needs, the latter – owing to her economic disadvantage – on a whole-life basis. But for the compensation element, he would have stopped there:

MOOR J:

63. In terms of needs, there is no doubt that the Husband will be able to meet his needs. So far as the Wife is concerned, [counsel for H] has urged the length of the marriage on me as a reason to say that the Wife should not receive an award that encompasses her needs for the rest of her life. I disagree. The relationship-generated disadvantage is relevant to this aspect as well. If it had not been for this marriage, she would have retained her career in the law and, potentially, very high earning with it. I am satisfied, therefore, that a whole-life award is reasonable.

[He determines that the equal share is ample to do this, and goes on…]

65. Finally, I turn to compensation for relationship generated disadvantage. I have found quantification of this claim very difficult…

Here, having regard, amongst other things, to the husband's likely being four years from retirement (after 20 years as a partner), the desirability of a clean break (not least to avoid future litigation), the fact that the wife had already benefited from his earnings to date during the marriage and by way of the equal sharing award, and the fact that the wife would likely have been earning at least £100K pa for herself now but for the marriage (and excluding the chance of her attaining partnership), he settled on a figure of £400K – i.e. £100K pa for each of the next four years, but paid now as a departure from equal sharing from the proceeds of sale of the FMH. He concluded:

72. Exceptionally, in this case, I have found there to have been relationship generated disadvantage sufficient to justify an award of compensation. I continue to be of the view that such cases will be very much the exception rather than the rule. It is rare to be able to make the findings of fact that I have made in this case. Even having done so, I have been clear that the case remains a suitable one for a clean break with, by the standards of such cases, a relatively modest additional award. …[I]n many of these cases, the assets will be such that any loss is already covered by the applicant's sharing claim. In other cases, the assets/income will be insufficient to justify such a claim in the first place. It follows

that litigants should think long and hard before launching a claim for relationship generated disadvantage and they should not take this judgment as any sort of "green light" to do so unless the circumstances are truly exceptional.

6.7.4: *Brack v Brack* [2018] EWCA Civ 2862

This appeal decision considered the scope of discretion that a judge enjoys to decide on provision to be made under s 25 MCA in a case where the parties had reached a pre-nuptial agreement that is valid – i.e. affected by none of the sort of vitiating factors identified by the Supreme Court in *Radmacher v Granatino* [2010] UKSC 42. It is tempting to summarize the effect of *Radmacher* with the neat proposition that the effect of a valid pre-nup is to exclude the sharing principle, but leave scope for needs and/or compensation based provision. However, the Court of Appeal in *Brack*, apparently in agreement with both parties to that litigation, disrupts that tidy conclusion and so introduces more uncertainty into the law:

***Brack v Brack* [2018] EWCA Civ 2862**

KING LJ:

102. It is undoubtedly the case that since the Supreme Court's decision in *Radmacher*, and up to and including Roberts J's judgment in *KA v MA* [extracted at 6.7.4 of the main text] the courts at first instance have resolved cases where there is a valid prenuptial agreement which does not meet the needs of the wife by interfering with the agreement only to the extent necessary to ensure that those needs are satisfied. In doing so, the courts have honoured the sentiment in *Radmacher* [75] by respecting the autonomy of the parties and by giving effect to the nuptial agreement which has been freely entered into to the extent that it is fair to do so.

103. In my judgment, *in the ordinary course of events,* where there is a valid prenuptial agreement, the terms of which amount to the wife having contracted out of a division of the assets based on sharing, a court is likely to regard fairness as demanding that she receives a settlement that is limited to what which provides for her needs. *But whilst such an outcome may be considered to be more likely than not, that does not prescribe the outcome in every case.* Even where there is an effective prenuptial agreement, the court remains under an obligation to take into account all the factors found in s 25(2) MCA 1973, together with a proper consideration of all the circumstances, the first consideration being the welfare of any children. Such an approach may, *albeit unusually*, lead the court in its search for a fair outcome, to make an order which, contrary to the terms of the agreement, provides a settlement for the wife in excess of her needs. It should also be recognised that even in a case where the court considers a needs-based approach to be fair, the court will as in *KA v MA,* retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs.

This decision will disappoint spouses keen to rely on their pre-nup to protect their assets from sharing-based claims. It also differentiates the current law more from the Law Commission's recommendations for statutory reform, which would clearly only permit needs-based provision in the face of a qualifying nuptial agreement.