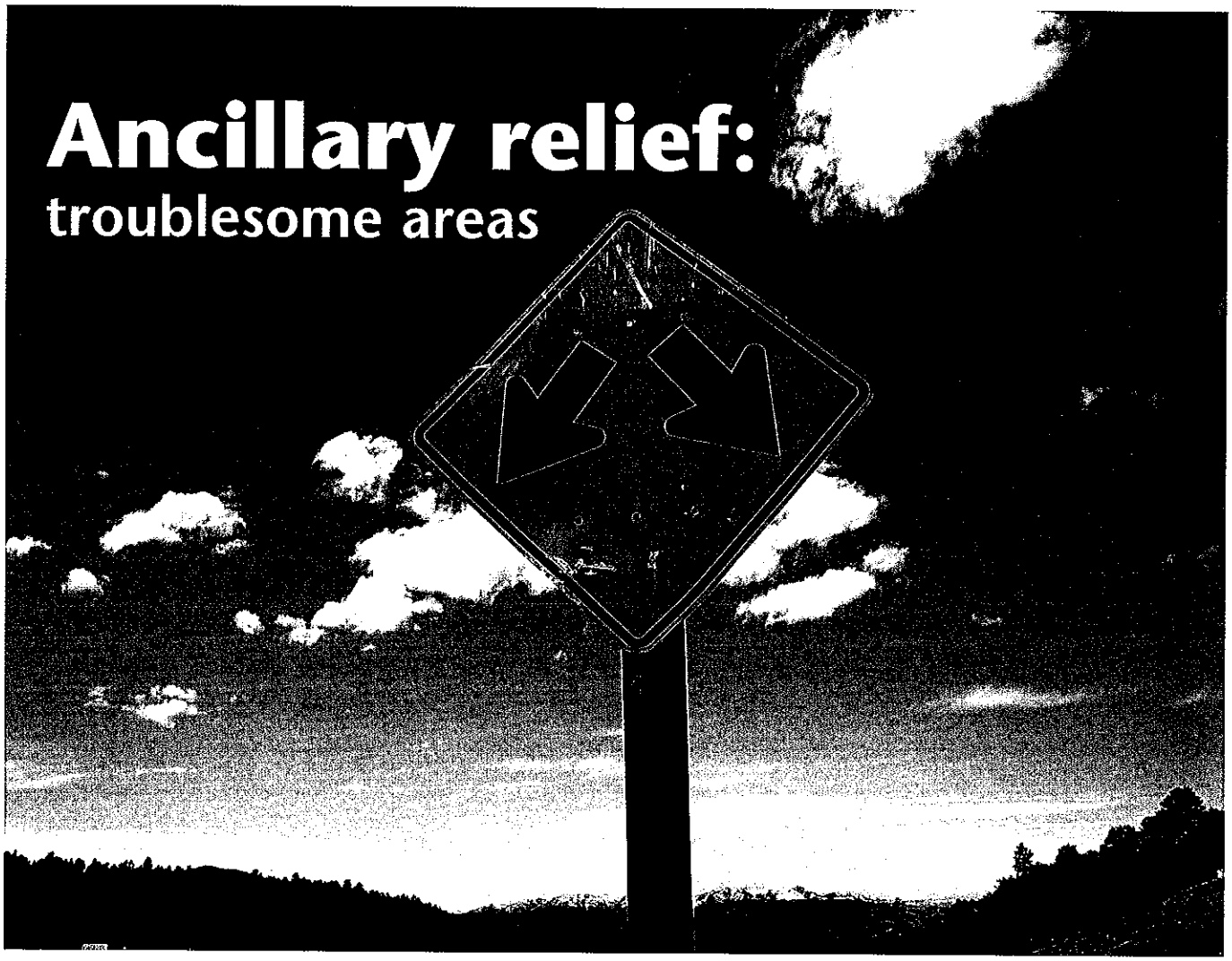
# Ancillary relief:
## troublesome areas



For many clients divorce is one of the most traumatic episodes in their lives. With emotional and vulnerable clients it is sometimes easy to drown in the detail and lose sight of the bigger picture. As a judge once told me, arguments in all family cases can be summarised as follows, *"all women are mad and all men are bad"*. This area, more than any other, requires the practitioner to step back and review the fundamentals. With that in mind I shall look at three troublesome areas in practice: pensions, bankruptcy and death.

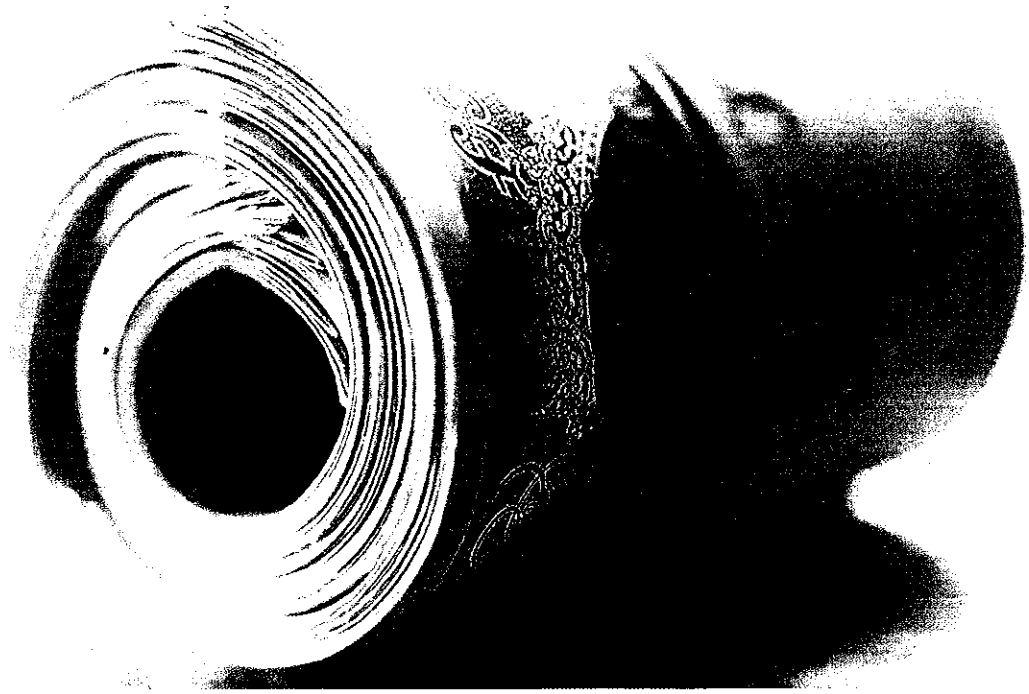
### Pensions

In many cases the two major assets are the matrimonial home and the spouse's pension. The latter is an extremely valuable asset. Given the complexity and variety of schemes this area is fraught with difficulty.

The key to this area is for the solicitor to obtain a copy of the scheme rules and understand the scheme within the factual matrix of the claim. With older spouses, generally the wife, ask the question – is it better for her to remain married? If so, although it may seem cynical, she could try to reconcile or perhaps petition for judicial separation. A note of caution though, the rules must be checked carefully; some schemes will not pay out when the parties are separated. Pension sharing is not available in judicial separation. Check the employment history. If the spouse had a number of jobs it should not be assumed that the pension provision simply rolled forward into the next scheme. Was there pre-marriage contribution? If significant this would enable a departure from equality. Similarly post-separation, should the spouse automatically be entitled to equally share in the assets?

Was the petition issued before 1 December 2000? If so, pension sharing is not an option, unless the proceedings can be manipulated, for example, by issuing a second petition post 1 December 2000: possibly a controversial route.

If your client has a claim on the pension, decree absolute should not be applied for until the ancillary relief claim is concluded.



There is a vast range of different schemes. In relation to state pension there are two types of arrangements: the basic state pension; and Additional State payment ('ASP') now S2P (State Second Pension) which replaced SERPS on 6 April 2002. If you earn over a prescribed level (2007/8 £4,524) you may contract out of the ASP and join a private scheme ie contracting out. The employer and employee pay a lower level of national insurance. Alternatively an employee can contract out by joining a stakeholder pension scheme or a personal pension scheme. If so, Revenue & Customs pay a rebate on national insurance directly into the pension fund. ASP is potentially valuable and should not be overlooked. As a matter of course a solicitor should obtain the value of the ASP: the Department of Work and Pensions ('DWP') will provide a statement of benefits. If the benefits are provided through a private pension scheme the valuation will include this element. The ASP can be subject to pension sharing and there are no costs.

The Pensions Act 2007 intends to abolish contracting out on a money purchase basis ie defined contributions.

There are a range of private pension schemes, for example: occupational pensions, public service pension (armed forces, police, judiciary, teachers, public sector workers), stakeholder pensions etc. Any pension scheme involving public sector employees should be considered carefully. For instance, a police officer's Cash Equivalent Transfer Value ('CETV') will exponentially increase just before retirement.

Paragraph 2.13 of Form E and Form P should be completed correctly. Form P is a prerequisite where pensions are an issue in the case. It will set out how the CETV was calculated and whether the receiving spouse must opt out of the pension scheme. If the pension is sizeable it is normally advisable to instruct an actuary, who will need the information contained in Form P.

Valuation is a huge problem area. The value of a stakeholder pension relates to the amount that the provider can invest and the value of its assets. Final salary schemes are a particular difficulty. The CETV values the scheme as if the member was leaving at that date. Accordingly, some valuable benefits such as early retirement provisions, inflation protection and sickness benefits are not included in the calculation. Others may be undervalued, for example, death in service, promotion prospects, high salary increases. The fund itself may be underfunded and that can be reflected in the CETV. The solicitor should consider whether the CETV is a fair value. Any issue – instruct an actuary.

The court may make any order or orders under sections 24C and D, 25B-D of the Matrimonial Causes Act 1973 ('MCA'). Historically, pension provision was regularly off set against other assets. With the advent of pension sharing there is a decline in that practice. However it may still be appropriate. Again the use of an actuary may be vital.

Pension earmarking or attachment was introduced in 1996. It has significant disadvantages. For example, it only pays on retirement of the member, payment is contingent on the availability of the fund to meet the benefits, periodical payments do not survive death or remarriage and the lump sum is variable. Pension sharing was introduced by the Welfare Reforms and Pensions Act 1999 and enables a spouse to become a member of the scheme in their own right or take a transfer of a specified amount into their own external pension. A pension sharing order may only be made if the proceedings commenced after 1 December 2000.

## Bankruptcy

Is there a risk that a spouse will go bankrupt? If so it may be important to progress ancillary relief claims as quickly as possible. However any ancillary relief order, whether by compromise or after trial, may be susceptible to orders in the bankruptcy court under sections 339 to 340 of the Insolvency Act 1986. Any transfer to a spouse within the 5 years preceding the presentation of the bankruptcy petition may constitute a transaction at an undervalue or a preference and therefore be set aside.

In *Hill v Haines* [2007] EWCA Civ 1284, a trustee appealed against the dismissal of his application to set aside a transfer

of property order made in ancillary relief proceedings. The matrimonial home was transferred on the payment of a lump sum. Pelling J held that it did not matter whether the hearing was contested or the order made following a compromise agreement, the transfer was a transaction at an undervalue and the trustee's application should have been allowed. Fortunately that decision was reversed on appeal. The Court of Appeal held that the Judge was wrong to hold that parties to an order for ancillary relief did not give consideration for the purposes of section 339 of the 1986 Act. Of course if there has been collusion between the parties prejudicing the creditors or vitiating factors such as fraud, mistake or misrepresentation are present, then an order may be susceptible. However if every ancillary relief order was automatically subject to nullification at the behest of the Trustee in Bankruptcy that would be contrary to Parliament's intentions and the objectives of the MCA.

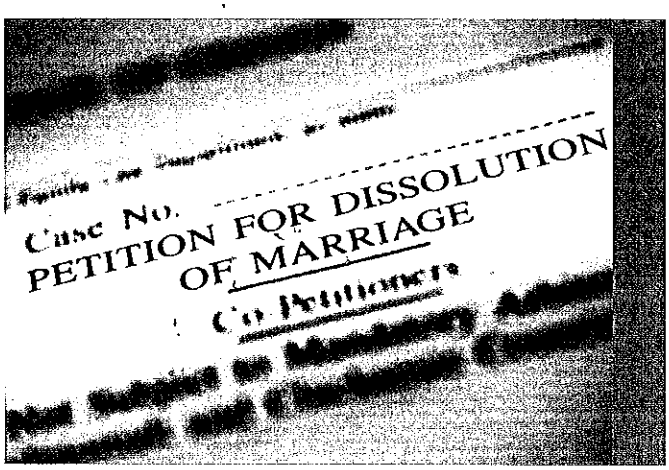
Upon the making of a bankruptcy order the spouse's estate vests in the Trustee in Bankruptcy. As an example, if the matrimonial home is owned jointly the tenancy will be severed and the non-bankrupt spouse will hold the property jointly with the trustee. If the matrimonial home is in the bankrupt's sole name the entire interest ostensibly passes to the Trustee. The non-bankrupt spouse is not automatically a party to the bankruptcy proceedings and similarly the Trustee is not automatically a party to the ancillary relief proceedings.

There may be little point in pursuing ancillary relief until the spouse is discharged. Indeed a bankruptcy court may stay family proceedings. Particular problems can occur in practice with the matrimonial home. Solicitors should be aware of possible remedies. For example a Trustee may have no interest in progressing matters if the non-bankrupt spouse is occupying the property and paying the mortgage. Could the non-bankrupt spouse satisfy the debt and seek an annulment of the bankruptcy order? Can an agreement be reached with the Trustee? What if he or she thereafter does nothing? Should the solicitor make an application under section 303(1) of the Insolvency Act 1986?

## Death

Are either of the parties ill and likely to die before conclusion of the application? Should you serve a notice of severance in respect of any jointly owned property or is it in your client's best interest not to serve such a notice and acquire the property under the doctrine of survivorship?

Under section 23(5) of the MCA an order for periodical payments, secured periodical payments or a lump sum cannot take effect unless the decree has been made absolute. This is also the case under section 24(5) of the MCA in relation to property adjustment orders. In *McMinn v McMinn* [2003] 2 FLR 823, HC, there was a contested ancillary relief hearing and the judge sent out a written judgment. Prior to the order being drafted, the husband killed the wife. The Judge found that the sending out of the judgment constituted the making of an order. However the application of section 23(5) meant that the executors were unable to establish that at the date of the wife's death there was an extant cause of action that they could take over.




What if the prayer in the divorce petition included all forms of relief and constitutes a valid application for ancillary relief for the purposes of rule 2.53 of the Family Proceedings Rules 1991? If decree absolute has been pronounced can it be argued that a cause of action vested in the deceased at the date of her death? In *Barder v Barder (Calouri Intervening)* [1988] AC 20, HL, Lord Brandon of Oakbrook reviewed the authorities on the effect of death on a divorce suit and stated that,

> *"...there is no general rule that, where one of the partners to a divorce suit has died, the suit abates, so that no further proceedings can be taken. ...the real question in such cases is whether, where one of the parties to a divorce suit has died, further proceedings in the suit can or cannot be taken. ... the answer to that question depends in all cases on two matters and in some cases three matters. The first matter is the nature of the further proceedings sought to be taken. The second matter is the true construction of the relevant statutory provision or provisions, or of a particular order made under them, or both. The third matter is the applicability of section 1(1) of the* [Law Reform (Miscellaneous Provisions)] *Act of 1934."*

Is the solution different if there is a concluded agreement? Even if the court accepts that it has jurisdiction to entertain an application by the estate do not assume that it will simply make an order in the terms of the concluded agreement. In most cases the foundation of the agreement will be to provide for the rehousing needs of one or both parties.

Note the recent case of *Soulsbury v Soulsbury* [2007] EWCA Civ 938. The husband was ordered to pay periodical payments to the wife. No lump sum or property adjustment orders were made. They remained on friendly terms and agreed that the husband would leave the wife £100,000 in his will rather than pay her maintenance and that she would forgo any claim against him. On the morning of the husband's death he remarried K, thereby revoking his will. K refused to pay £100,000 to the wife. Properly construed, the agreement was to pay £100,000 subject to conditions subsequent, namely the death of husband, and the wife not having enforced any arrears or applied for further matrimonial relief. Those events had been fulfilled and the obligation crystallised on the husband's death. In those circumstances the jurisdiction of the court had not been ousted and the agreement did not fall foul of the principles established in *Hyman v Hyman* [1929] 1 P 1: the agreement between the wife and husband was not a compromise of an application for ancillary relief and an attempt to oust the jurisdiction of the court. It was a perfectly valid agreement, his estate was in breach of an agreement binding upon it and the wife was entitled to her damages.

In conclusion, at a time of high emotion clients turn to their lawyer as an emotional prop and sounding board. The risk of claims in this highly charged environment will remain high. The solution is to remain detached, to step back and evaluate.

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