



No 18 Chambers

**Is the threshold for conduct in
financial remedy cases too high?**

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Scope & Objectives

- Rhetorical question that drives presentation
- Look at further proposals for reform
- Fairly deep dive into statutory provisions on conduct and case law history
- Particular emphasis on cases involving domestic abuse
- Look at some recent case law on it
- Try to stimulate some points for debate

What is conduct?

- In *OG v AG (Financial Remedies: Conduct)* [2020] EWFC 52 Mostyn J set out four distinct conduct scenarios:
- Gross and obvious personal conduct
- 'Add back' – where one party has wantonly and recklessly dissipated assets which would otherwise have formed part of the matrimonial pot.
- Litigation misconduct.
- Drawing inferences as to the existence of assets from a party's conduct where that party has failed to provide full and frank disclosure.

Resolution's Report on DA

- Scoping Report published on 8 October 2024
- Economic abuse defined at s. 1(4) of the DAA 2021 “any behaviour that has a substantial adverse effect on the victim’s ability to (a) acquire, use or maintain money or other property or (b) obtain goods or services”
- C. 80% of professionals don’t think economic abuse is sufficiently taken into account in FR proceedings.

Report Recommendations

- Change of FPR to ensure parties are safeguarded from ongoing domestic abuse.
- Including consideration of amendment to OO so that dealing with case justly includes ensuring parties are safeguarded from domestic abuse.
- An amendment to Part 9 so that every case management decision in applications for a financial remedy is conducted in a way that will safeguard parties from domestic abuse.
- Clarity that the duty of full and frank disclosure start to engage in NCDR or negotiations.
- Where there is ongoing economic abuse by a party's failure to disclose their finances within a reasonable timeframe, and/or a party does not have security...and there are allegations of ongoing domestic abuse the balance shifts away from NCDR continuing.
- Further consideration should be given to measures to help ensure that victim-survivors are financially supported between the time of separation, and the final outcome of a financial remedies application,

Report Recommendations

- Financial thresholds and requirements for legal aid should be reviewed, so that victim-survivors can more easily access legal aid in financial remedy, Schedule 1, and TLATA cases.
- Legal aid rates in these areas should also be increased to make it commercially viable for legal aid providers to act for victim-survivors
- Lead Judges and the legal profession should co-operate to ensure that the consequences of any non-compliance with a financial remedy order should be decided at the time of the making of the order, especially if enforcement proceedings seem likely
- Expanding enforcement methods
- New costs rules
- An explanatory Practice Direction should be issued, in consultation with Resolution and others, setting out the approach in financial remedy proceedings where there is ongoing, or where there are allegations of, domestic abuse

Original statutory wording

- Originally enacted s. 25(1)(f) required court to “place the parties so far as it is practicable and, having regard to their conduct just to do so, in the financial position they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations to the other”
- Minimal loss principle above removed

Lord Denning in *Wachtel*

- ***Wachtel v Wachtel*** [1973] Fam 72 CA
- “Gross and obvious..so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone’s sense of justice...But short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame”.
- ***Jones v Jones*** [1976] Fam 8 at 15 “conduct would not affect the order unless it was offensive to anyone’s sense of justice to ignore it”

Griffiths v Griffiths 1974 1 All ER

- In April 1973 the wife was granted a decree nisi of divorce, having satisfied the court under s 2(1)(b) of the Divorce Reform Act 1969 that the husband had behaved in such a way that she could not reasonably be expected to live with him
- Cross application for a petition and applications for financial relief
- 64-page judgment of Arnold J made the following summary of findings

Griffiths v Griffiths 1974 1 All ER

- “that the marriage was not notably unhappy or unsuccessful, nor the conduct of either party substantially blameworthy between July 1948 and December 1962 and between the end of 1964 and the summer of 1971;
- secondly, that during the periods from December 1962 to October 1963 and from December 1971 to April 1972 the husband behaved to his wife with callous unkindness, and on a substantial number of occasions, brutality;
- thirdly, that this conduct was occasioned by a desire to punish her for what he thought her unwifely conduct towards him, and to bring her into a condition to continue the marriage on his terms, and not from any determination to break up the marriage;
- fourthly, that during these periods the wife's conduct, so far as blameworthy at all, is insignificantly blameworthy in comparison with the husband's.
- fifthly, that during such other periods of the marriage as were marked by disputes and storms, there is to be found little disparity of conduct between the parties;
- and sixthly, that until 1970, when business misfortunes overtook him, the husband strove hard to provide materially for the family, and on the whole strove successfully”

Griffiths v Griffiths 1974 1 All ER

- 'My conclusion was that of 24 years between the date of the marriage and the practical final break-up of the marriage in April 1972, 21 years were tolerably happy; that for two periods aggregating 16 months the husband's behaviour was callously unkind and on a substantial number of occasions brutal; and that for the remaining period aggregating about 19 months there was not much to choose between the spouses. I also said that the husband for the first 22 years of this marriage provided well materially for his family. Of course, one cannot measure the extent of misconduct by a comparison of the length of good times and bad times. **Very bad conduct over a relatively short period could, I think, disqualify a spouse from relief in the terms of the judgment of the Court of Appeal. But, as emerges from that judgment, length of time is a factor to be taken into account; and, badly as this husband has behaved on occasions, I do not think it would be right to refuse him all relief.** This aspect of the matter must be taken into account and this may, in my judgment, fairly be done by taking care to apply a somewhat strict limit to the husband's claims so as to ensure that the level of relief is firmly within the bounds of what s.5 dictates.'

Significant post-84 cases

- New section 25(2)(g) MCA 1973 giving greater statutory emphasis
- ***Duxbury v Duxbury*** [1992] Fam 62n Alkner LJ said s. 25 is a “financial not moral” exercise
- ***Kyte v Kyte*** [1988] Fam 145, CA – Purchas LJ – conduct should only be penalised where imbalance of conduct one way or another made it inequitable to disregard

Significant post-84 cases

- In *Evans v Evans* [1989] 1 FLR 351, CA – COA upheld discharge of PP's when W incited murder of H
- *H v H (Financial Provision: Conduct)*[1994] 1 FLR 345 – brutal conduct in assaulting W taking into account
- *A v A (Financial Provision: Conduct)*[1995] – assault taken into account but not so as deprive H of all of his capital

N v J [2024] EWFC 184

- Peel J - it is unlikely that domestic abuse would have a material impact on the vast majority of financial remedy cases
- Conduct has to be “gross and obvious” remains the law [28]
- Increasing awareness of the incidence of DA does not lower the conduct hurdle [29]

N v J [2024] EWFC 184 para 38

1. Section 25 criteria are listed as signposts for the court to consider what orders to make. It would be highly unusual to include a factor which has no financial consequence under the terms of an Act which is directed to reordering the finances of the parties.

2. In the great majority of cases, the impact on the alleged victim can and ordinarily will be taken into account by reference to the conventional criteria regardless of whether domestic abuse has, in fact, taken place. It is doubtful that domestic abuse would have a material impact on the vast majority of cases, such that it needs to be litigated.

N v J [2024] EWFC 184 para 38

3. Personal vindication is not the function of the financial remedies court. Misconduct must be directly relevant to the distribution of finances to be entertained.
4. Courts should not expose an alleged victim of domestic abuse to a remorseless investigation into that very domestic abuse.
5. Courts need to look forward and not back, and where possible set the parties on the road to financial independence. A detailed inquiry into conduct is a retrograde step, even more so in the era of no-fault divorce.
6. If courts were to determine allegations of domestic abuse in financial remedy cases – the implications on the system of financial remedies would be profound

N v J [2024] EWFC 184 para 38

7. The s 25 factors will enable the court to arrive at a fair and balanced decision by reference to the usual factors such as needs, resources, contributions, health, age, and duration of relationship without any reference to conduct. It is unlikely that personal misconduct will have a material impact on the ultimate evaluation.

8. It is not the job of the financial remedies court to impose a fine, a penalty, or damages upon a party for conduct. Nor is it for the financial remedies court to moralise or apportion blame for how the parties behaved towards each other during their time together.

N v J [2024] EWFC 184 para 38 - 39

- There is a two-stage test for conduct in financial remedies proceedings – *Tsvetkov v Khayrova*, [3].
- Courts should continue to case manage conduct allegations robustly at the earliest possible opportunity; [40].
- Paragraph [39]:
 - The high bar to conduct claims is undisturbed by the recent focus on domestic abuse in society and the family justice system.i
 - The statute does not specifically refer to a financial consequence; nevertheless, such cases will be vanishingly rare.
 - Financial consequences are a necessary ingredient of a conduct claim. This applies as much to domestic abuse allegations as to other types of personal misconduct. (See also para [37], where Peel J states there must be a causative link between the conduct and the financial consequence.
 - (iv) The alleged conduct (even if it reaches the threshold and has a financial consequence) must be material to the outcome. In the vast majority of cases, a fair outcome is ascertained by reference to the other s 25 criteria (including needs and impact on earning capacity) without requiring the court to examine conduct.
 - (v) To inquire into conduct must be proportionate to the case as a whole.

Tsvetkov v Khayrova [2023] EWFC

130

1. Form E Box 4.4 should be used to set out any allegations of conduct clearly and in line with the two-stage test. Reserving your position on conduct or recounting a litany of prejudicial comments are practices that should be abandoned.
2. Courts should, at the First Appointment, case manage any alleged misconduct. The court is entitled to make an order preventing a party who pleads conduct from relying upon it, if the court is satisfied that the threshold required to bring it within s 25(2)(g) would not be met. The court should consider proportionality and whether, if proved, it would be material to the outcome.
3. Conduct that arises after the exchange of Form Es should be brought before the court as soon as possible so the case can be managed properly

LP v MP [2025] EWFC 473

- The court found that the marriage was founded on deception and fraud, where the wife made false claims of being a High Court Judge.
- The court also found that there had been coercive, controlling and abusive behaviour perpetrated by the wife towards the husband.
- At the time of the final hearing, the husband had assets of c.£22 million, the wife had a property, and there were two matrimonial homes held in joint names totalling £7.2 million.
- Cusworth J reduced the wife's share, assessed her needs restrictively, and decided that she was not entitled to a replication of the marital standard of living.
- Cusworth J explained that whilst *the impact of coercive and controlling behaviour may be hard to measure, that does not mean the impact will not be present*, considering that there is a real risk of unfairness to victims of such behaviour if it is ignored as a result. His Lordship determined that the wife's conduct would be the glass through which the court would assess fairness

A v R (Financial Remedy: NCDR)

2024 EWFC 218 (B) 5 August 2024

- A alleged domestic abuse that prevented recovery from medical condition with consequent financial impact
- A's allegations against R were that he:
 - Undermined and belittled A's career.
 - Limited her social activities and those of the children.
 - Took steps to alienate the children including involving them in the financial settlement.
 - Invaded A's privacy, using cameras to spy on her, monitored her phone, email and text messages.
 - Accessed privileged information passing between A and her solicitor and also deleted evidence from her phone.
 - Alleged that A lacked capacity and that he had thought of killing himself and A.
 - Removed A's ill health retirement pension lump sum and critical illness money from the parties' joint account. He then went on to encash A's Hargreaves and Lansdown shares without her consent

Food for thought

Possible Pros	Possible Cons
Ongoing financial impact could be addressed?	Moral not financial considerations?
Chance of greater awareness?	Risk of false allegations?
Personal vindication possible?	Greater use court resources?
Possible earlier settlements	Increased costs?
Preventative effect?	Punitive approach?

Any Questions?

N^o 18

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