

The Review

CHANGING FAMILY LAW FOR CHANGING FAMILIES

National Conference 2015



Brighton 2015: conference round up

YRes goes national: launch coverage
Introducing our new online guide to international issues
Wright v Wright: the great debate
Team up for collaborative law
Member news and much more

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Front cover shows Roger Bamber and Felicity
Shedden receiving their John Cornwell awards
from National Chair Jo Edwards

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Assessing employability and earnings potential

Keith Carter *Keith Carter & Associates*

In financial remedy cases the evidence on earning capacity from the parties may not be considered impartial or may need to be tested. So where can the court obtain independent information?

The employment prospects and earning capacity of parties, even if not in dispute, are something the courts often need to determine. But where does independent information with regard to the labour market come from? The two examples below look at how an employment expert can assist the court in determining employability.

Example 1

In *Wright v Wright* [2014] EWFC B17 HHJ Lynn Roberts recorded that Mrs Wright should start to contribute to her own support and undertake training in order to return to work. In the appeal ([2015] EWCA Civ 201) Pitchford LJ stated Mrs Wright should find a job and that she had no right to expect an income for life from her ex-husband.

The details of this case are covered by Sally Stanway on page 30, but for the purposes of this article the summary facts are as follows: Mr and Mrs Wright divorced in 2008 – at this time it was ruled he should pay maintenance. In 2014 he appealed to the High Court stating that his income had been generally going down and he wanted to reduce his payments as he was nearing retirement age. HHJ Roberts ruled that the payments should reduce until 2019, when they would cease.

It was also recorded that Mrs Wright should start to contribute to her own support and undertake training in order to return to work, with which, as noted, the Court of Appeal concurred.

It was further noted that there is a general expectation that once children are aged 7 mothers can begin part-time work and make a financial contribution. But is that right? What do women returners do? What retraining might be available/appropriate and would any earnings meet the wife's needs?

There is considerable information on this topic, but one study – *Newborns and new schools: critical times in women's employment*, Mike Brewer and Gillian Paull, 2006 – carried out by the Institute for Fiscal Studies on behalf of the DWP in 2006, shows that approximately half of women return to

work within a year of childbirth, with another 25% returning within five years, and only 10% of women remain at home for up to eight years after the birth.

Given the above it would seem the judgment reflected statistical trends. But counsel may reply "my client is not a statistic". This will of course be true, but a review of the market and the individual's transferable skills helps put the "statistics" into context.

An example of the assistance available in returning to work is the right to request flexible working, eg job sharing, part-time working, working from home, compressed hours, flexitime etc. Retraining (upgrading skills) may also be considered, as referred to by HHJ Roberts, but here the current requirements of the market have to be assessed, as does the time necessary to achieve a marketable qualification.

Once in employment earnings can be evaluated by using a number of different indicators. One of the most useful tools in assessing both the availability of work and earnings is to undertake a snapshot of advertised vacancies with an assessment as to why they match the party's skills and experience. It may, however, especially in respect to women returners, be useful to look at earnings in two or indeed three stages, for example: on entry; once established; and career potential. The timeframe to move between the stages would not be the same in every case or every career. It can be assessed by looking at the individual's specific circumstances; sector trends; and in this case the party's marketable skills.

With indicators such as the above a picture as to the timescale for a return to work and earnings can be made, which the court can then match against the party's needs.

Example 2

In *JL v SL* [2015] EWHC 360 (Fam), which involved a chief financial officer who at 52 years of age had been made redundant, Mostyn J decided that he needed independent

employment evidence to assess employability, and so instructed the parties to engage a single joint employment expert.

The issue arose as to whether at 52 years of age the respondent would obtain a similar position or would for the future remain unemployed. Mostyn J felt he needed more information before he could exercise the discretion anew and directed an SJE report concerning the husband's future employment prospects be obtained. The SJE investigated and commented upon a number of headings including: the market; the husband's marketable skills; and the availability of suitable vacancies. The report also looked at the husband's earnings in future employment using primary and secondary data. This included advertised positions matched against the respondent's skills; FTSE finance director's remuneration; AIM finance director's remuneration packages; and secondary salary surveys for the finance sector.

The SJE concluded that the husband would not in the future secure employment at a similar level to that which he had held prior to redundancy. He was not, however, of the view that the husband would never work again. The evidence was that the husband had a realistic chance of securing employment at a chief financial officer/group finance director level with earnings in line with the London average, which was included in the report.

In his judgment Mostyn J found that the husband would be in a position to secure employment "without undue difficulty" and with earnings at the level suggested by the SJE, which he felt would meet the respondent's needs.

Conclusions

Instructing an independent employment expert will obviously not be appropriate in every case. Where there are complex employment issues however, or where one party claims (because of age, skill fade, or market conditions etc) that they cannot find work despite their job-finding efforts, an independent assessment can be of assistance.

Age discrimination legislation and the removal of the default age of retirement (with access to state pension being put back to 68) means someone in their mid/late 50s will not (as can often be suggested) be barred from finding work.

The headings of "employment" and "earnings" can be ones where there are inflated views as to what might be achieved. They are also ones where there can be negative and pessimistic expectations. Experience of the labour market, recruitment and remuneration can help inform the court as to actual trends, opportunities and earnings.

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Pension "freedom" and divorce

Ross Glanfield *LIFT Financial*

The new pension freedom rules are likely to have a profound effect on financial settlements in separation cases



The complexity of the new pension legislation demands an enhanced level of due diligence which could test the most technically adept members of the legal profession, not to mention their lay clients. For those at or approaching retirement age, the new pension rules will turn previously inaccessible income-bearing assets into cash, but the temptation to use the proceeds to broker a separation could have disastrous and irreversible consequences.

The most complex legislation surrounds final salary pensions, of which there are 11 million members in the UK, excluding those in superannuation. At the last reckoning in April, these schemes were only 67% funded on a wind-up basis, which means that one third of cash equivalent transfer values (CETVs) offered by scheme trustees are likely to have been discounted and will not reflect the true value of the

preserved benefits (source: The Purple Book 2014 issued October 2014).

The calculation of a CETV is complex and the scheme actuaries are given a great degree of flexibility in the way they calculate the transfer value. However, the basic principles are the same: the current value of the benefit is projected to normal retirement date; the cost of buying an annuity to cover the liability is calculated; and this is discounted back to give the CETV.

In this calculation, earnings increases are usually taken from readily available statistical data, and annuity rates will be provided by the scheme's provider, so the main variable is the discount rate. If a scheme is under-funded, it is likely to be invested in higher-risk assets, which means that