

Episode 4: Form E - Section 4 - Narrative Sections

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SUMMARY KEYWORDS

case, matrimonial, client, section, parties, terms, conduct, contributions, inheritance, important, links, matrimonial property, assets, set, detail, husband, dealt, marriage, include, type

SPEAKERS

Louise Tromans, Ciara Moore, Ali Granville



Ciara Moore 00:00

I'm a solicitor at Mills and Reeve and qualified in March 2017. Today I'm joined by Louise Tromans, a six and a half year qualified solicitor and colleague Milsom Reef, as well as Ollie Granville, a three year PQ solicitor at Newton Karen's. In this episode, we're going to be discussing how to grapple with section four of the form E, which you may hear sometimes referred to as the narrative sections. We're all familiar with section 25 of the Matrimonial Causes Act, which sets out the factors that the court must consider when making orders for financial provision. The purpose of the questions in Section four are to provide the court with an overview of how these factors apply to your client's case. The first question is at section 4.1, which asks for details of any significant changes in a party's assets or income as part of the section 25 exercise, the court must consider the resources available to parties. As such, the form requires parties to set out any relevant and noteworthy changes to their overall income or asset position, whether that occurred in the last 12 months or likely to occur in the forthcoming 12 months. Please bear in mind, the section does not require detailed narrative. A brief overview is more than sufficient. It's relevant to include depletion of capital, perhaps defined living expenses, purchases or sales or property distributions from a trust or recent or imminent inheritances or redundancy, it may be worth acknowledging in this section that markets are volatile. If that is the case, and despite anticipating fluctuation in the value of certain assets between the data before me and the overall disposal of the case. It's important to draft the form E with the final hearing in mind. And in the knowledge that if the case gets that far, its contents will be read. At that point by the judge trying the case, there is one common pitfall to keep in mind when acting for the economic strongest buys most commonly the husband. So often we see husbands predicting doom and gloom for their fortunes, be it their future income or their or, for example, the value and anticipated performance of their company or shareholding if acting for this type of client. Being aware of being too fatalistic as to how badly the client anticipates his company will perform, it will likely be more than 12 months from form E to any final hearing. And so any predictions made in the form E, will be tested against the reality of what has occurred in the passage of time. For example, a colleague of mine recalled a case where a husband said his company was likely to tank in the next 12 months. And by the time they finally hit hearing camera, and it had gone from strength to strength. Needless to say, it did nothing to help that individual's credibility. I think the credibility



L

Louise Tromans 02:40

point is incredibly important. I had a case where we saw get going there was issues with redundancy and in terms of the current markets and has been being made redundant. The final hearing was actually two years after the for me, and it still hadn't happened by that point. So by the time our clients they're giving evidence, it never happened. So it came to a point of his credibility and being pessimistic, so it's important to think about it when reading it within this section.

C

Ciara Moore 03:10

Thanks for being so completely agree. Turning to the SEO of inheritance, it's worth pointing out that one of the problems with including expectations under a will of a living person is that it can be tricky to assess their life expectancy. As we know there's no requirement for a testator to disclose their intentions, and these may well be amended by the testator from time to time it also may not necessarily be known to a party or your client the size of a potential benefit. However, if you find yourself dealing with a case with a connection to jurisdiction, where for instance, forced heirship laws apply, this could mean that you are able to determine future inheritance with some certainty. In such circumstances, we suggest the should be disclosed in the for me and could then be reasonably considered by the court as a financial resource. I'm going to turn to Section 4.2, which deals with the standard of living enjoyed during the marriage or civil partnership. As we know, as part of the section 25 exercise, the court will consider the standard of living enjoyed by the family before the breakdown of the marriage. Note that section 25 two refers to the standard of living enjoyed by the family before the breakdown of the marriage, not just the parties. This means the children's standard of living should also be taken into account. When approaching this question. I think it's helpful to bear in mind that standard of living is often only a magnetic factor in bigger money cases as there are seldom sufficient resources in the average money case for the divorcing spouses to seek to individually replicate the marital standard of living. In most cases, the resources that once funded one household, nine must fund a second. This means that there will in the average case, not be sufficient resources to maintain for either less low both parties, the standard of living enjoyed during the marriage, the court style approach to these cases is to seek to prevent one party standard of living, dropping significantly below that of the other. If you're acting in a bigger money case, you may be able to demonstrate that the parties could each maintain the lifestyle enjoy during the marriage. That said, it would only be in an unusual case where a judge will assess their needs, on the basis of maintaining precisely the same standard of living separately as they enjoy together. For example, replicating in the order the family home and Devin, the creditor in London and the Tuscan holiday home for the other spires. This is the case even were to do so what are the numbers be affordable, as it's simply unrealistic. Instead, the family wealth is utilised and divided between the parties in a manner which generously assesses their needs. The court refers to the marital standard of living as particularised in the formula in the first instance, as a marker of how generous that needs assessment should be. And approaching this question, the devil is really in the detail. Examples may include properties purchased details of any holidays, meals, and cars, guests I've worked on, I tend to add as much colour as is proportionate around the type of resorts. Because of air travel, for example, the frequency of any trips, how the family spent money on their lifestyle, the type of restaurants and leisure activities, all of which can really help paint a picture of how the family live, it could also be really helpful to add in detail around the quality service, and specific location or family properties anywhere in the world. Finally, taking into account the requirement to speak to the children standard of living details of the precise amount of school fees, the cost of any extras, musical tuition and extracurricular activities can all be really useful. Hopefully, this has provided a useful overview of the first two aspects of this section. Valley Granville is going to speak to sections 4.3 and 4.4.

A

Ali Granville 06:56

So looking at section 4.3. That is where we look at the particular contributions of either party. So the first thing for all Family Lawyers to think about is to be aware of the fact that there isn't in family law discrimination between each party's monetary and non monetary contributions. So this means that homemaking is considered as much of a contribution as breadwinning. And this has been the case for many years, and you'll likely have gone through this at law school. The first thing then consider once you've got once you've explained that to your client is whether you can distinguish between non matrimonial and matrimonial assets in this case. So, an example of a non matrimonial asset would be something like inheritance. And often parties are really keen to ring fence any funds that they can keep it out of the matrimonial pot. However, whether or not you can run a matrimonial versus non matrimonial property argument will be subject to the question of needs, which always takes priority, if you if you are of the position that all matrimonial all the assets are matrimonial property, then it is likely that all the assets will be shared subject to needs. Another point that we don't often look at in contributions is the question of a special contribution. So, this is really rare. And I've only had one case where we've looked at that. And this kind of thing is where one of the parties has made such an exceptional contribution. So, we're speaking genius that they shouldn't be subject to 5050 sharing. So I'd say generally, it's accepted that you need to be looking at wealth in excess of 200 million to be able to run a specials argument. And if you are able to show that kind of level of wealth, then you may be able to move away from the 5050 split, but only insofar as you'd be looking at more of a 3565 split at at the maximum. So somewhere in between the non special contributor getting 35% or 50%. And you're not going to do much better than that, I'd say. But what I would say about contributions is that people often want to go into quite a lot of detail about, you know, what they've done, support the family when the other person hasn't been and as I said at the beginning, non monetary contributions are just as valuable. So it's really a waste of time to detail anything that isn't to do with matrimonial property or matrimonial property. You don't want your clients to be out too much into a narrative that is only going to get the other side's hackles up. So now moving on to behaviour and conduct, which is section 4.4. Again, this is where clients really want a narrative of all the wrongs that the other spouse has ever done to them and what a terrible time they've had. But you really need to make clear to your client that actually, this is only very rare that it will be appropriate to sell in the conduct session. In the vast majority of cases, it is simply not appropriate to refer to conduct only where and this is the actual words, it would be inequitable for the court to disregard it, would you consider conduct lots from section 25 to G, some of the types of conduct that have been relevant and have been found in cases to be relevant are of such a level that they include the attempted murder of the wife. Another one is where a wife allowed the husband to believe that he was the biological father of a child when she knew that he wasn't. And so he was under that mistaken belief for many, many years. So that goes to dishonesty. I think Kara has has a recent case she had where there was conduct.

C

Ciara Moore 11:17

Yes, early I had a case recently with a client whose spouse had been in prison for conspiracy to defraud, and had had a significant proportion of the matrimonial assets recouped by the crime. And that case is in the attic for me stage. But I think that's the type of example and that would be relevant to include here.

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Ali Granville 11:38

And any kind of conviction or general dishonesty is probably worth detailing if they've got to the criminal stage because this shows the the party's character, but again, only in monetary terms only in terms of finances. So just put, you know, all the behaviour that someone's have a tonne in their whole life, it needs to be in relation to finances in terms of the marriage. Louise, you've got an example I believe about conduct case as well.

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Louise Tromans 12:08

Yeah, the only time that I've been successful in running a conduct case was when husband had built up significant debt due to gambling, which was unknown to wife until there was disclosure. And on that basis, we raised conduct and wife has given essentially the matrimonial home just on the base, that was the only capsule remaining and husbands contacted depleted conduct had depleted the assets.

A

Ali Granville 12:30

I also had a case where we it settled, so we didn't get to trial. But we were we threatened to conduct case in that we were going we said we were going to run an add back claim. An add back claim is where you is where one of the parties has dissipated assets in a in a way that is relevant to conduct. And so you make your request that that money is essentially handed back into the, into the matrimonial pot to the detriment of the of the party who's entered. So in my case, we had a party who had spent significant sums on sex workers, and it was in cash, it's going to be extremely hard for us to prove. But we suggested that we would go into looking at all the transactions and running in our back claim on that. And because of that, and putting that in the conduct session section, we were able to settle quite favourably for my client. And that's now going to pass on to Louise and section 4.5.

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Louise Tromans 13:35

So in terms of Section 4.5, this is essentially a capture section for all sections within the for me. So it provides space to elaborate on previous section. So it's important to ensure that this section is consistent with the formula as a whole. And 4.5. Specifically, links to Section 25 of the matrimonial causes act. So it's kind of a catch all. But consistency is key. Really, the first point is in terms of earning capacity. And you need to consider this for your client and their spouse. So it can work both ways. For example, was it a traditional marriage where, you know, husband, for example, was the main earner and wife stayed at home, which we have happen often? And this is again, something to address here.

C

Ciara Moore 14:23

Yeah. So if you're running a compensation argument for relationship generated disadvantage, or for loss of a chance, as a result of how the division of graduating and homemaking was a portion during your marriage, this would be the place to set out a brief summary of your position, I

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Louise Tromans 14:38

think, and you can link this new qualifications retraining. Traditionally, I suppose if you're acting for wife, how long it would take her to get back into the workplace, and again, link again to Section 15 looking at income and any changes and circumstances that you can see coming up in the future. It's important to put this in here. And for example, if you're self employed, this, again affects your earning capacity, the markets generally can also impact that. So it's essentially trying to capture as much as possible if you think things are going to change or will change in here, or if there has been any disadvantage built up during the marriage, then to consider disabilities. Again, there's links to section one of the for me, you may wish to provide some more information here, and also include medical evidence as well if you want to just to support any points in terms of ongoing medical issues. Or if you need to take medication, that kind of

thing, think about your client's needs here. And then in terms of inheritance, obviously, there is testamentary freedom and it would be speculation at this stage, but set it out here if it's relevant to your client or you think it will be, you can also assess out the position here if you're seeking to ring fence, any inheritance is non matrimonial or to counter argue if the other side are, for example, if they're seeking to ring fence some inheritance that was received, but you can set out here, if funds were used, for example, in terms of the matrimonial home, if there's been mingling, here's your chance here to set that out. Or if any inheritance falls in post separation, then coming to redundancy, which again, kind of links to the previous sections within section four generally, but link this also to Section 15. And include evidence here, set out the market conditions set out that you can provide updating disclosure, again, it can come back to haunt us to final hearing. So it's important to be truthful here and not too much on the pessimistic side. So it's more realistic rather than pessimistic. And, and this tends to be the section that again, comes in a cross examination at a later date. So really think about that in terms of redundancy points and earning capacity. Then also looking at retirement. Again, this links to pension shares that can link to spousal maintenance awards, says think strategically in terms of retirement investing are any retirement age, and the strategy as a whole. For example, if in the next 12 months, your client is due to retire, and there's links to receiving a tax free lump sum. Again, set this out here as it can be important, then also agreements. So this can relate to prenups and pays naps, you may wish to include it as an actual exhibit to your for me, and set out why it should or shouldn't determine the financial outcome as a whole. You can include background and circumstances in which the agreement was made and any update. So for example, if there's been any children of the marriage since the agreement was entered into, it's important to put in here, usually these are dealt with by way of statements from both parties. And normally you would seek a direction in this regard, either at the FDA hearing or an FDR hearings matters, don't settle. But it's still important to set out your pace at this point. And then in terms of plans to marry, this can be quite a contentious point. But the real point to take home is to be honest, and for your clients to be honest. And the same applies to cohabitation, it can become a bigger issue than it needs to be if it's not dealt with truthfully, now. So, you know, you can look towards in the future kind of satisfied or material non disclosure. So it's important that clients are aware that it's important to be truthful here. Then in terms of liabilities, again, this links to Section 2.9 of the for me, so make sure there's some consistency here. But it's it might be important to step out as to how debts been accrued, in terms of whether it's matrimonial or non matrimonial depending on what you're arguing, and set out the circumstances in respect of the debt builder and how you propose that this has to be dealt with in terms of settlement. If you know, this is going to be a point of contention. And then bringing on to Section 4.6, new partners financial information, again, linking to Section 4.5. First of all, what you want to think about is what is cohabiting, you've got the case of Kimber and Kimba, which sets out eight factors to consider. And one of the key points to take away from it is that there needs to be a degree of stability and permanence. So discuss this with your client and be truthful at this stage. And again, the big message is to be honest, it it can become a lesser issue if it's dealt with now rather than later on in the future and getting caught out. And actually it's it's good to remind your client that actually this section refers to what your client knows that the position so it's best to be honest if they do own a property for example, then the other side do searches at the land registry, for example, and then uncover it at a later date. Just be honest now. And it's and this is the type of issue that kind of features from the get go. So it can it can be addressed in questionnaires, position statements and cross examination. So it's important that this section is is answered if it applies, and deal with it now.

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Ciara Moore 20:21

That concludes Episode Four of the JR Family Law podcast on section four of the for me, thank you to Allie Granville and these chairman's for your contributions. We hope you enjoyed this episode.