

## Articles

# Language Timothy: Jargon Uncovered

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We wish to pose three questions in this article:

- should we as practitioners encourage the usage of plain English?
- have we, however, become fixated, or indeed obsessed, by trends/phrases/soundbites?
- what would the man on the Clapham omnibus make of it all?

For example, a letter recently received by one of the authors:

'I have some *Hildebrand* documents I annex. I want to know early on – are you running RGD. For my part our case is about establishing marital acquiescence'.

The client, when this was copied to him, required an accompanying translation of each of the sentences.

Ancillary relief has always held a certain fascination for the authors but how many cases does it require to be decided and reported to clarify the application of s 25 of the Matrimonial Causes Act 1973? Do we stray too far from the 1973 Act when analysing how we 'put our case'? Rather like a recent edition of *Vogue* we consider what's 'in':

- (1) B is for 'building blocks'. In *J v J* [2009] EWHC 2654 (Fam) Charles J said:

'To my mind by the time of an FDR each side should have identified the building blocks of their respective case.'

- (2) C is for 'contingent interest in the form of potential sources of future income' or as more commonly known 'a pension'. The courts have struggled to categorise pensions, see *Maskell v Maskell* [2001] EWCA Civ 858, [2003] 1

FLR 1138 and David Salter's article, 'A Decade of Pension Sharing' in December [2010] Fam Law 1294.

- (3) F is for 'fairness' – that elusive concept. In *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900 the Supreme Court held that:

'[T]he court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.' (para [75])

What are the circumstances when it would not be fair to hold the parties to their agreement? Lord Phillips said:

'That leaves outstanding the difficult question of the circumstances in which it will not be fair to hold the parties to their agreement. This will necessarily depend on the facts of the particular case, and it would not be desirable to lay down rules that would fetter the flexibility that the court requires to reach a fair result.' (para [76]).

It was considered that matters such as the ages and maturity of the parties together with whether or not they had previously been married would affect the weight to be given to an agreement. Lord Phillips observed that:

'Of the three strands identified in *White v White* and *Miller v Miller*, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of

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the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned. Where, however, these considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from their agreement as to the regulation of their financial affairs in the circumstances that have come to pass. Thus it is in relation to the third strand, sharing, that the court will be most likely to make an order in the terms of the nuptial agreement in place of the order that it would otherwise have made.' (paras [81] and [82])

Do we anticipate litigation? Probably.

- (4) I is for 'irregularly obtained information' – the Court of Appeal having ruled that the *Hildebrand* rules have no basis in law and are unlawful – *Imerman v Tchenguiz and Others* [2010] EWCA Civ 908, [2010] 2 FLR 814. The practice of a party taking and copying their spouse's documents as long as they do not use force or retain the originals is not to be condoned. It is an actionable breach of confidence for a person, without authority, to examine, retain or copy such documentation. *Imerman v Tchenguiz* involved a husband who shared a work office and computer system with his wife's brothers. The wife commenced her divorce and ancillary relief proceedings and one of her brothers (query with the help of another) accessed and copied information and documents of husband from a server in the office. The Court of Appeal upheld the lower courts order but varied the order made by Moylan J in the Family Division. The wife was required to deliver the seven files of documents to husband's solicitors and retain no copies. Wife and her solicitors were restrained from using any information they might have gained

from reading the seven files. There is no change in the obligation of full and frank disclosure but people are not entitled to breach the right of a person to protect the confidentiality of their documents and information.

- (5) I is also for 'intentions'. In *Stack v Dowden* [2007] UKHL 17, [2007] 1 FLR 1858 the House of Lords gave guidance on property ownership disputes and considered it appropriate to 'ascertain the parties shared intentions, actual, inferred or imputed, with respect to the property in light of their whole course of conduct in relation to it'. What on earth does this mean? And further, 'An express or inferred common intention to support a constructive trust requires detrimental reliance'.
- (6) J is for 'jargon'. Even Ward LJ in *Robson v Robson* [2010] EWCA Civ 1171, [2011] 1 FLR 751 seems to have recognised the language exclusive to ancillary relief practitioners. Here the reference to 'jargon' was to the length of marriage in a case where the parties had married in September 1985 and separated some 21 years later which was classified as a 'long marriage'. This was a case where the Court of Appeal grappled with the concepts of 'the nature and value of the assets', 'lifestyle' including allegations of excessive and reckless spending and the division of wealth where substantial assets were of an inherited nature by the husband. Helpful guidance was given on inherited wealth including:
- concentrate on s 25 of the Matrimonial Causes Act 1973 . . . confusion will be avoided if resort is had to the precise language of the statute not any judicial gloss placed upon the words, for example by the introduction of 'reasonable requirements', nor 'generously interpreted';
  - weight must be given to each factor but where it is a relevant factor it must be placed in the scales and given its due weight;
  - flexibility is built into the exercise of discretion;
  - the objective to search for a result which is fair as between the parties;
  - need, compensation and sharing

- will always inform and usually guide the search for fairness;
- inherited wealth must be taken into account;
  - the fact that wealth is inherited and not earned justifies it being treated differently from wealth accruing as the so called marital acquest;
  - duration of the marriage and duration of the time the wealth has been enjoyed by the parties will also be relevant;
  - no formula and no resort to percentages will provide the right answer.
- (7) M is for 'matrimonial assets'. In *Jones v Jones* [2011] EWCA Civ 41, [2011] 1 FLR 1723 the Court of Appeal approved the approach that when applying the sharing principle to the case the courts should:
- '[E]ffect a division into the part reflective of non-matrimonial assets and that reflective of matrimonial assets. But in doing so we should remember that, as Lord Nicholls stressed in *Miller/McFarlane* at [26], we are unlikely to need, still less to achieve, a precise division.' (para [33])
- (8) N is for 'need generously interpreted' – Charles J again in *J v J* – not a statutory phrase but a reference to need assessed with flexibility, having regard to and applying to terms of the statute.
- (9) O is for 'occupation rent'. In *Amin and Another v Amin and Others* [2009] EWHC 3356 (Ch), having determined beneficial ownership of a property, the court went on to consider the question of an occupation rent and applying *Re Pavlou (A Bankrupt)* [1993] 2 FLR 751 considered that:
- 'A court will enquire into and order payment of occupation rent not only where the co-owner has ousted the other. It will do so wherever it is necessary to achieve equity between the parties.'
- Equitable principles provide that an occupation rent should be paid where a party has been excluded.
- (10) P is for 'parent' – a simple enough word but what is the definition of parent? Considered extensively by Moylan J in *T v B (Parental Responsibility: Financial Provision)* [2010] EWHC 1444 (Fam), [2010] 2 FLR 1966 where a same sex couple who had never entered into a civil partnership made a joint application for one party to receive treatment for artificial insemination. That party, T, gave birth to a child in 2000 and when the parties separated in 2007 a shared residence order was made. T applied for financial provision from B under Sch 1 to the Children Act 1989 and the court carefully considered whether such provision was allowable because did B fall within the definition of a parent? No she did not. The court concluded that:
- for the purposes of Sch 1 a parent has to have the legal status of parent;
  - the attribution of legal parentage had not changed since 1992 save as a result of statutory reform;
  - legal parentage was attributed only to a biological parent or such other person who was a parent by the operation of law;
  - having parental responsibility or being a 'social or psychological parent' did not make one a parent.
- (11) R is for 'relationship generated disadvantage'. Perhaps not as 'in' following the decision in *Hvorostovsky v Hvorostovsky* [2009] EWCA Civ 791, [2009] 2 FLR 1574 when Thorpe LJ said that convoluted arguments on this point did not impress him.
- (12) S is for 'settled cohabitation' – *Grey v Grey* [2009] EWCA Civ 1424, [2010] 1 FLR 1764 – a case concerning spousal periodical payments where wife put forward a fake case. If settled cohabitation be established then, as a matter of ordinary practice, that ought to lead to no substantive maintenance order being made.
- (13) U is for 'unjustifiable extravagance'. Time spent endlessly poring over an income needs schedule to see if an exception can be established to bring down the total of a 'wish list'. In *S v S* [2008] EWHC 519 (Fam), [2008] 2 FLR 113, in a case involving an 11 year childless marriage, it was considered that if the husband's income were to

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take a dip, the wife's passion for horses may be seen as an unjustifiable extravagance.

**Conclusion**

Do these reported decisions help or hamper? In December 2009 Baroness Deech said in 'What's a Woman Worth?' [2009] Fam Law 1140: 'the more judgements there are, the greater the confusion about the principles to apply because case law is dominated by the stubborn and the wealthy'. In *Jones v Jones* (above) at para [69] the President appears to agree with the views of the Baroness when he observed that:

'[I]t seems to me unfortunate that our law of ancillary relief should be largely

dictated by cases which bear no resemblance to the ordinary lives of most divorcing couples and to the average case heard, day in and day out, by district judges up and down the country. The sums of money – including the costs – involved in this case are well beyond the experience and even the contemplation of most people. Whether the wife has £5 or £8 million, she will still be a very rich woman and the application of the so called "sharing" and "needs" principles may look very different in cases where the latter predominates and the parties' assets are a tiny percentage of those encountered here.'