TOLATA Round Up

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For any TOLATA or Private Children or Finance practitioners who want to keep up to date with key decisions made in cases involving trusts and/or Schedule 1 claims, this is for you.

January – May 2025

1. Nilsson and Anor v Cynberg [2024] EWHC 2164 (Ch)

   In this highly divisive High Court case, featuring our very own Oliver Ingham, as Counsel for the First Respondent, Judge Pickering KC found that an express declaration of trust was conclusive unless varied by "*subsequent agreement*" or affected by proprietary estoppel. The term "subsequent agreement" did not mean only a formal agreement which complied with the requirements of the Law of Property (Miscellaneous Provisions) Act 1989, but could include an informal common intention constructive trust – such as an oral agreement.

   This case also discussed detrimental reliance with the judge finding that the wife's actions in taking over the mortgage repayments, paying for the home improvements, and not bringing ancillary relief proceedings, amounted to a detriment that was sufficiently great to establish either a constructive trust or proprietary estoppel.

   Comment: this judgment potentially has wide reaching effects as practitioners will likely seek to rely on this precedent, to persuade a court that subsequent understandings/agreements have been agreed between parties to displace an express agreement. However, Nilsson's effects are not yet binding precedent, given as though it is simply a High Court judgment and is seemingly at odds with the conclusions reached in Court of Appeal cases *Goodman v Gallant* [1986] 2 W.L.R. 236 and *Pankhania v Chandegra* [2012] EWCA Civ 1438

2. Savage v Savage [2024] EWCA Civ 49

   In this recent Court of Appeal case, the justices allowed an appeal by the appellant in relation to a question of interpretation of s 15(3) of the Trusts of Land and Appointment

of Trustees Act 1996 (TOLATA 1996). The justices found that the court was *obliged* to have regard to the circumstances and wishes of the *majority* beneficiaries by value. However, although there was *no obligation* for the circumstances and wishes of the *minority* to be considered, the court was *not prevented* from doing so if it thought fit.

This was a case involving a TOLATA order made in financial remedy proceedings between the appellant (H) and his ex-wife (W) concerning 3 parcels of land held on trust for H and his 4 nieces/nephews. The beneficiaries of the land could not agree between themselves how a sale should take place.

Comment: This case reinforces the discretionary nature of TOLATA claims and ultimately the court can make whatever order it "thinks fit". However *Savage* makes clear that where there are multiple beneficiaries, who may not agree on how to deal with land e.g to sell or not, the court will be guided by the majority, but can consider the minorities views and wishes.

PERMISSION TO APPEAL was refused by the Supreme Court on 11 September 2024.

3. *TK v LK* [2024] EWFC 71

This Schedule 1 application was brought by the father against the mother on exceptional facts, involving mother who was serving a long-term prison sentence for offences against the child, with father caring for the child.

Owing to the traumatisation of the child, father was hindered in his ability to work and thus obtain a mortgage. The mother had inherited a sum of money from her late father's estate and the father sought a housing fund and capital lump sum order. Father was granted £309,750 plus costs totalling the entirety of the estate, by Judge Chandler KC.

This case analyses the concept of conduct in Schedule 1 claims, stating particularly egregious conduct can be taken into account, stating that this case had passed the criteria set out in *Tsvetkov v Khayrova* [2023] EWFC 130 of (1) meeting the high conduct threshold and (2) having a causative link to finances. It was concluded that the conduct had created long-term dependency and need for the child in these special circumstances.

Comment: this case is a highly useful breakdown of Schedule 1 principles and the impact that conduct may have in extreme circumstances – whilst not generally considered as a factor in most Schedule 1 claims.

June – September 2025

1. Dervis v Deniz [2025] EWHC 902 (Ch)

In this High Court TOLATA case, Edwin Jonhson J sets out the circumstances in which a new claim can be pursued on appeal when pursuing a claim of 'releasing' one's beneficial interest in a property to the other joint co-owner.

This case involved a cohabiting couple, legal joint proprietors of a property who had entered into a declaration of trust with the TR1 form, stating the property was owned as beneficial joint tenants. There was a series of emails from the Respondent, suggesting that "I don't want the house it's yours it's always been yours!" and then a few days later, retracting such.

At first instance following a 3-day trial the judge found that the parties held the Property on trust as beneficial joint tenants. The content of the emails were not specifically dealt with on the basis of an intention by the respondent to dispose of his interest.

On appeal, the appellant argued that by way of the emails, the respondent had released his beneficial interest in the Property to the appellant relying heavily on *Hudson v Hathway* [2022] EWCA Civ 1648.

The appellate judge refused the appellant permission for the new claim relying on the emails on the basis that *"a case need not be exceptional for a new point to be raised on appeal, and that there is a spectrum. At one end are the cases in which a new point raised on appeal would have changed the course of evidence given at trial, and/or require further factual inquiry; at the other end are those cases where the point being sought to be pursued is a 'pure point of law' (Singh v Dass [2019] EWCA Civ 360 and Notting Hill Finance Ltd v Sheikh [2019] EWCA Civ 133).*

In this matter, Edwin Johnson J concluded that the case fell on the former end of the spectrum and as the matter had not been examined at first instance, it could not therefore be raised on appeal. Consequently, he did not seek to answer the question of whether the emails amounted to a release of the beneficial interest.

Comment: this is a very useful case in highlighting the importance of raising arguments relating to post-transfer communications at the first instance trial – in order to be able to run the point at appeal. The case gives helpful clarity on cases that may be distinguished from *Hudson,* based on their individual facts and attempted points to be raised on appeal.

2. W v X [2025] EWHC 1696 (Fam)

In this Schedule 1 'big money' case before Mr Justin Warshaw KC (sitting as a deputy High Court judge), interesting dicta arose regarding costs where both parties were found to be 'unsatisfactory' witnesses as well as some thoughts on the "conduct" in Schedule 1 cases.

M applied for provision concerning their child, C, aged 8, who had an ADHD diagnosis that required medication and a chaperone at school. F's business ventures were described at 'phenomenally successful'.

Warshaw J held that

i) **Housing**: C should continue living at the family home with M and F to both meet the rental payments

ii) **Child periodical payments**: F to pay M maintenance/HECSA of £225,000 p.a. CPI linked to continue to the end of C's secondary education or conclusion of first degree including a gap year (the term was previously agreed in open offers);

iii) **Other capital:** F to pay C's school fees and extras (previously agreed). F to pay M a lump sum of £559,000 for liabilities. The G Wagon car to be transferred from F to M, claimed to be worth £140,000.

iv) **Costs**: F to pay M's costs, with the acknowledgement that M had already contributed £140,000 to her costs from the sale of a watch.

The learned judge made the following comment in dismissing F's allegations of conduct:

'I find it difficult to see how in any Schedule 1 case dealing with the claim of a child that the conduct of one parent to the other could have any bearing on the outcome of that child's claim, unless that conduct had a bearing on the party's ability to care for the child and additional expenses were thereby incurred.'

Comment: This was a case where the judge was ultimately unimpressed with the evidence provided, the costs spent (totally £825,000), where largely many terms of the agreement were reached, but the parties chose to spend time raising irrelevant issues. These included: the parties' engagement, the creation of wealth and the length and quality of the parties' relationship, which provides useful guidance for practitioner to remember not to plead a Schedule 1 case like a financial remedies case under MCA 1972 and to advise clients not to use these types of applications as a means of raising conduct against the other side, when focus ought to be solely on provision for the child.

3. Re P (A Child) (Financial Provision: s 423 Insolvency Act 1986) [2025] EWHC 1460 (Fam)

In this action-packed Schedule 1 application and connected application under s 423 Insolvency Act 1986 brought by M in respect of provision for 7 year old child shared with F, Harrison J made findings regarding F's disposition of assets, where F maintained he had no funds to meet M's claim as he had disposed of his assets into a trust, which was founded by F's father.

It was ordered that F pay M:

i) **Housing** fund of £960,000, which M and child would live in the house rent-free until P completed tertiary education, at which point the property would revert to F

ii) **Other capital**: F was to pay a lump sum of £29,250 for P's other capital needs; £173,500 in respect of M's liabilities, and the order should provide for the purchase of a new car every five years with the trade in of the old car.

iii) **Child periodical payments**: £5,050 pm was to be paid by F and he was also ordered to pay M's rent of £1,500 pm. Harrison J also made a school fees order, including provision for reasonable extras.

iv) **Security**: as F was in breach of various court orders and in substantial arrears in meeting the legal services order thus security of £600,000 was put in place security for maintenance and school fees.

v) **s 423**: Harrison J had made findings that dispositions made by F were for the "the purpose … to defeat the claims of creditors, including the mother' and that M was a victim of these transactions, but did not actually make any orders under s423.

Comment: a case showing the utility in raising a s423 application where a party is reliant on a Trust to suggest no assets are available. High penalties were given in this case owing to F's breaches of previous legal services order and F's overall conduct, providing a cautionary tale for those who do not comply.

September 2025

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