

# When three's a crowd: how to navigate third-party claims in divorce and financial proceedings

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In many cases where there are disputes about the ownership of assets within divorce and financial proceedings, litigating couples are likely to encounter background noise from third parties – the extent of which may depend on the value or type of asset.

Third party involvement in proceedings or the threat of involvement can add an additional layer of stress and upset in what can already be a very complex and emotionally charged situation for those who are going through a divorce.

One spouse may claim that an asset (for example shares in a business, a trust or a property) is matrimonial and therefore should be available for distribution upon divorce. This claim may be disputed by the opposing spouse or, indeed, a third party to try and keep the asset out of the matrimonial pot.

In certain situations where a third-party interest needs to be defended or challenged, and the court agrees, that third party should be added to the existing financial proceedings at the earliest opportunity to enable the court to determine the veracity of

the third party's claim and therefore the extent of the resources available for distribution between a divorcing couple as part of an overall fair financial settlement.

Section 24 of the Matrimonial Causes Act 1973 gives the family court jurisdiction for one party to transfer to a party of the marriage, property which the other party of the marriage is 'entitled, either in possession or reversion'. To enable the court to determine whether the party of the marriage is 'entitled' to such property, r 9.26B of the Family Procedure Rules 2010 allows the court to direct for a third party to be added to existing financial proceeding if 'it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings'; or if 'there is an issue involving the new party and an existing party . . . and it is desirable to add the new party so that the court can resolve that issue'.

In the case of *TL v ML and Others (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263, a pathway was set out by Nicholas Mostyn QC (as he then was) sitting as a Deputy High Court judge for how such cases should ordinarily proceed:

1. the third party should be joined to the proceedings at the earliest opportunity;
2. directions should be given for the issue to be fully pleaded by the points of claim and points of defence;
3. separate witness statements should be directed in relation to the dispute; and
4. the dispute should be directed to be heard separately as a preliminary issue, before the financial dispute resolution appointment.

The clear precedent set out in case law as to how litigated third-party disputes should play out means that a cautious and creative approach to such litigation is imperative. The very nature and extent of what could be available in the pot for distribution between divorcing parties can be up for determination at the early stage of what could be very lengthy financial remedy proceedings. Such preliminary decisions can impact the rest of a matrimonial case and the outcome can have serious knock on effects for all parties involved.

### Who are the third parties and how can they be joined to proceedings?

Third parties (for example parents, siblings, trustees or corporate entities) can be joined to financial proceedings in, predominantly, two sets of circumstances:

1. When a third party is asked to be joined to existing proceedings by one spouse who claims that the other spouse is beneficially entitled to an asset held in that third party's name so that the third party can be challenged about the legitimacy of their interest.

#### *Example*

The husband claims that the wife's parents, who hold shares in a family company, are in fact holding such shares on trust for the wife and that she is therefore beneficially entitled to the shares. The husband may want to join the wife's parents to the existing proceedings in order to argue that they are holding the shares on trust.

2. When a third-party claims a vested interest in matrimonial assets already in dispute between a husband and wife and subsequently seeks to be joined to the proceedings to defend their interest. This third party is known as an intervener. This third-party claim may or may not be supported by either the husband or the wife.

#### *Example*

The wife's parents provided a substantial sum of money to enable the parties to purchase a family home and they wish to assert and protect their

beneficial interest in the property and seek to be re-paid when the property is sold. The wife's parents may want to intervene in the proceedings to lay claim to their interest in the property.

A third party who is seeking to be joined or has been asked to join existing proceedings will need to be separately represented. Usually, there will be a preliminary hearing where a court will consider the merits of any claim and decide whether that third party should be joined or not. It is by no means automatic for a third party to be joined to the proceedings and a court will need to determine whether they should be and will first consider the extent of the third party's claimed interest and the merits of it. The court can also invite interested parties to intervene should they consider this necessary. Once a third party is joined to the proceedings, a court will list a hearing to determine the beneficial ownership of the asset.

### Whose responsibility is it to join third parties to proceedings?

Failure to join a third party to proceedings can run a negligence risk for solicitors and so it is important to consider who should be doing what at an early stage of the proceedings.

In *Fisher Meredith v JH and PH (Financial Remedy: Appeal: Wasted Costs)* [2012] EWHC 408 (Fam), [2012] 2 FLR 536, Mostyn J confirmed that in cases where one spouse (Spouse A) is claiming that the other spouse (Spouse B) holds the beneficial interest of an asset legally held by a third party, it is Spouse A's responsibility to join the third party at an early stage.

In other cases where the spouse who holds the legal title is claiming that the asset is held on trust for a third party it is more ambiguous as to who should be responsible for joining the third party. In *Fisher Meredith*, Mostyn J suggested that the spouse asserting that a third party is the beneficial owner of the asset should be responsible for joining such third party to the case or, alternatively, that the third party

themselves should apply to intervene in the proceedings so as to defend their beneficial interest from being part of the matrimonial pot.

### Strategic planning

In many cases, a third-party claim needs to be determined before the court can consider the financial outcome between a husband and wife. This may result in a contested hearing where a third party will need to give evidence on their claim before any further substantive hearings in the main financial proceedings are even heard. This can be very stressful, time-consuming and expensive for all parties involved and careful consideration must be undertaken by any party, be it the husband or wife seeking to join a third party, or a third party themselves wanting to, or being asked to, intervene in proceedings.

Strategic planning at the outset of a case with third-party or potential third-party claims is key. It is important to consider the following:

#### ***Is there a significant asset where legal ownership does not reflect beneficial ownership?***

‘Significant’ is likely to be entirely relative to the context of the case and the extent of the assets. What is important to note from the very start is that third-party claims and intervener cases are expensive and will ultimately delay the determination of a financial remedy by the court, potentially by many months. Divorcing parties must consider whether it is proportionate to litigate the issue through the court or to pursue a different route outside of the court realm (for example, mediation or a without prejudice round table meeting between lawyers) that may ultimately save considerable costs and delay for both parties.

#### ***If it is found that the asset is beneficially owned by a party to the marriage, does that change the nature of what is available to the other party as part of a financial settlement?***

It is important to consider what the ultimate outcome would be if the disputed asset was found to be beneficially owned by a party to the marriage. Would the asset be considered a matrimonial resource or entirely non-matrimonial, set aside throughout the duration of the marriage and unmingled? If the latter, then ultimately the asset may be carved out from the assets available for distribution and not be available on a sharing basis in any event, although in a needs based case the court would have the discretion to invade the non-matrimonial asset in so far as it is required to meet the parties’ needs.

#### ***What would the potential consequences be if a third party was not joined to the financial proceedings?***

Failure to litigate a third-party claim may have significant implications for one party’s financial award upon divorce. If that third party has not been joined to the proceedings, they are not necessarily bound by any finding of the court, which would cause significant difficulty when trying to enforce any order against the third party at a later stage. Joining a third party or giving them permission to intervene potentially quashes the third party’s option to litigate in an alternative forum.

In addition, once a third party has been joined or intervened in the proceedings, the court can make onerous disclosure orders against them, which may well be a big deterrent to some potential third parties.

#### **Alternatives to joining third parties to proceedings**

In the knowledge that third-party involvement will almost certainly increase legal costs significantly, a careful cost benefit analysis needs to be undertaken as part of any strategic planning at the onset of a case.

## In Practice

Alternatives to court should therefore be considered to see if the matter can be resolved in a more proportionate and cost-effective manner.

In most cases, third-party disputes are ultimately a matter for evidence, which can mean that a court is really the sole forum for this to be resolved if no agreement can be reached. However, one should consider whether a potential third party who would otherwise be joined can give evidence within the existing financial proceedings rather than being formally joined. In these circumstances, the court would not be able to bind the third party to comply with an order but it would still provide the court with the opportunity to consider where ownership of an asset may lie.

In addition, it is important to assess whether the third party could be invited to a private FDR hearing where the matter can be considered on a without prejudice basis. Although, of course no binding determination will be provided by the court, this option can give some scope for either party to consider the risks and benefits of seeking to join the third party after a court FDR hearing.

### Costs

Costs are dealt with differently in intervener cases compared to the position within

financial remedy proceedings. Family Procedure Rules, r 28.1 states that ‘the court may at any time make such order as to costs as it thinks just’ so, ultimately, the court has complete discretion when it comes to costs within third-party litigation. However, where there is ultimately a clear ‘winner’ and ‘loser’ in third-party litigation, the costs position is likely to be assessed differently by the court. As determined in *Baker v Rowe* [2009] EWCA Civ 1162, [2010] 1 FLR 761 the ‘winner’s’ success ‘will often properly count as the decisive factor in the exercise of the judge’s discretion’. Therefore in the majority of third-party litigation – costs will follow the event. Third party cases therefore carry a far greater costs risk to the parties involved but, that said, ‘without prejudice save as to costs’ offers, known as *Calderbank* offers, are accepted in these cases which can offer some protection.

### Conclusion

Recognising and understanding the issues and strategy required to defend and contest third-party claims are vital for those representing both a divorcing party and a potential third party. The stakes are high for all involved and, with the majority of third-party claims, litigation risk underpins any action taken and ultimately there is no course of action that does not have potential drawbacks.