

Conduct: What? When? How?

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Matrimonial Causes Act 1973

Section 25 Matters to which the court is to have regard in deciding how to exercise its powers under ss23, 24, 24A, 24B and 24E

“(2) As regards the exercise of the powers of the court,... the court shall in particular have regard to the following matters:...

(g) The conduct of each of the parties, if that conduct is such that it would in the opinion of the court be **inequitable to disregard it.**”

OG v AG [2020] EWFC 52

[34 to 39] Conduct arises in financial remedy cases in four distinct scenarios:

1. **Gross and obvious personal misconduct.** “The authorities clearly indicate that such conduct would only be reflected where there is a financial consequence to its impact.” [34]
2. **Add-back jurisprudence.** “This arises where one party has wantonly and recklessly dissipated assets which would otherwise have formed part of the divisible matrimonial property.” [36]
3. **Litigation misconduct.** “Where proved, this should be severely penalised in costs.” [38]
4. **Drawing adverse inferences** from a party’s conduct in failing to give full and frank disclosure.

Litigation misconduct

Costs is in the discretion of the court (SCA 1981 s.51)

In financial remedy proceedings, general rule: no order as to costs (FPR 28.3(5))

The court may make a costs order at any stage of the proceedings **“where it is appropriate to do so because of the conduct of a party in relation to the proceedings”** (FPR 28.3(6))

There is a list of factors for the court to consider in FPR 28.3(7), including (e) any relevant aspect of a party’s conduct in relation to the proceedings. *And* (f) “the financial effect” of any costs order (see *HO v TL* [2023] EWFC 216 at [12])

Failure to openly, reasonably and responsibly negotiate will lead to consideration of costs orders (FPR PD28A 4.4). See *OG v AG* at [31].

Litigation misconduct going beyond costs?

There are cases where the substantive award may be affected, perhaps akin to the 'add-back'. E.g

Rothschild v De Souza [2020] EWCA Civ 1215 (also called TT v CDS)

DH v RH (No 3) (Final Hearing) [2024] EWFC 79

Adverse inferences

See *Moher v Moher* [2019] EWCA Civ 1482

The court should seek to determine the resources of the non-discloser, but not engage in 'pure speculation'. Inferences must be 'properly drawn and reasonable' including in light of the 'inherent probabilities'.

It may not be possible (and the court is not required) to make a *specific* determination as to a figure or bracket, but when faced with uncertainty better an order that is unfair to the non-discloser than the other party.

And more recently: *Faraj v Ahmad* [2026] EWCA Civ 962 (procedural fairness).

Also, keeping claims open (see *X v Y* [2022] EWFC 95 (B)).

Add-back jurisprudence

- “Wanton” dissipation of assets – *Vaughan v Vaughan* [2008] 1 FLR 1108
- “Reckless” dissipation of assets – *Norris v Norris* [2003] 1 FLR 1142
- “To put it colloquially, you have to take your spouse as you find him or her.” *MAP v MFP* [2015] EWHC 627 (Fam)
- “I venture to suggest that there were very few cases indeed which do not fall into the ‘big money’ category where arguments over addback are likely to be worthwhile.” – *ABX v SBX* [2018] EWFC 81

Personal misconduct

Wachtel v Wachtel [1973] 1 All ER 829

[836] “There will no doubt be a residue of cases where the conduct of one of the parties is in the judge's words ...'**both obvious and gross**', so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice.”

Miller v Miller; McFarlane v McFarlane [2006] UKHL 24

[65] “...In most cases fairness does not require consideration of the parties’ conduct. This is because in most cases misconduct is not relevant to the bases on which financial ancillary relief is ordered today. Where, exceptionally, the position is otherwise, so that it would be inequitable to disregard one party’s conduct, the statute permits that conduct to be taken into account.”

S v S [2006] EWHC 2793 (Fam)

Comprehensive review of the case law conducted by Burton J.

Origin of "the gasp factor".

The need for a financial consequence

OG v AG (Mostyn J)

N v J [2024] EWFC 184 (Peel J)

There must be a causative link between the conduct and an identifiable financial impact.

But if the financial impact exists, is there in fact any need to litigate the 'conduct' that led to it? Will consideration of the other s.25 factors be sufficient to do fairness?

N v J [2024] EWFC 184

Peel J excluded issues of conduct from trial.

Described cases where there is a possible financial consequence of personal misconduct as “very rare”.

Doubted domestic abuse would have a material impact in the “vast majority” of cases.

Financial remedies courts are not to ‘fine’, ‘penalise’, or ‘apportion blame’, the task is forwards-looking. The impact on the courts of routine conduct litigation would be significant.

Some case examples

S v S [2006] EWHC 2793 at [38] and [39]

K v L [2010] EWCA Civ 125

FRB v DCA (No 2) [2020] EWHC (Fam)

Clark v Clark [1999] 2 FLR 1053

Crowther v Crowther [2021] EWFC 88

Al Khatib v Masry [2002] EWHC 108

DP v EP [2023] EWFC 6 (B)

Gross and obvious personal conduct cont.

LP v MP [2025] EWFC 473

[43] “In my judgment, where a party has been found responsible for coercive controlling behaviour within a marriage, especially when that behaviour includes a significant element of violence, the negative financial impact may well not be easily measurable, and any loss will only usually be capable of a very broad evaluation at best. That does not however mean that such an impact will not be present. ...Nonetheless, I consider that there is a real risk of unfairness to victims of violent or coercive controlling behaviour, if the lack of readily quantifiable financial loss prevents the courts from even considering the fairness of taking their assailant's behaviour into account in determining the outcome of a financial remedy application.”

Gross and obvious personal conduct cont.

Wei-Lyn Loh v Ardal Loh-Gronager [2025] EWFC 483

[60] “I also acknowledge that the higher courts have sought for policy reasons to limit to only the most serious instances those occasions when first instance judges will alter the outcome of a financial remedy application by the application of s.25(2)(g). However, when the implementation of a nuptial agreement has been in issue the application of the principle of fairness has not noticeably been so constrained. In this case, however, I am satisfied that the husband's behaviour, as I have found it to have been, comfortably crosses the threshold for the application of s.25(2)(g). I need not therefore go on to consider any possible tension between the application of the tests in these different areas.”

Is there a case for reform?

Resolution published 'Domestic Abuse in financial remedy proceedings' in October 2024

A multi-disciplinary working party considered the interplay between domestic abuse and the division of finances on divorce/dissolution.

On s.25(2)(g) and case law, flags that the approach may be too restrictive, but no final recommendations on what is a complicated issue without any immediate clear way forward.

Tsvetkov v Khayrova [2023] EWFC 130

1. A party asserting conduct has to prove:
 - i. The facts relied upon.
 - ii. If established, that those facts meet the conduct threshold, which has been consistently set at a high or exceptional level;
 - iii. That there is an identifiable negative financial impact on the parties which has been generated by the alleged wrongdoing. A causative link between act/omission and financial loss is required.
2. If stage one is established, the court will go on to consider how the misconduct, and its financial consequences, should impact upon the outcome of the financial remedies proceedings.

Tsvetkov v Khayrova [2023] EWFC 130 cont.

Paragraphs [45] and [46]:

1. Conduct must be pleaded at the earliest possible opportunity, usually in the Form E.
2. A party seeking to rely on conduct should:
 - a. State the allegations;
 - b. State how they meet the threshold criteria for a conduct claim;
 - c. Identify the financial impact of the alleged conduct.
3. The court should determine at the First Appointment how to case manage the alleged misconduct.

Tsvetkov v Khayrova [2023] EWFC 130 cont.

4. The court is entitled at that stage to make an order preventing a party relying on conduct if the court is satisfied the exceptionality threshold would not be met.
5. Where conduct occurs after Forms E, the matter must be brought before the court as soon as possible so that it can be case managed appropriately.
6. In terms of pleadings, usually, an exchange of short, focused narrative statements will suffice.

How to do it well?

See conduct in the context of your case as a whole

Ensure clients understand the Peel J (N v J) line of thought

Know the limits (e.g costs vs affecting distribution)

Plead early and clearly (or as promptly as you can)

Consider carefully, and promptly progress, your evidence-gathering

Document disclosure / non-disclosure, non-compliance carefully

Questions