An Introduction to Private Law Children Cases

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Janet Bazley

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Continuing Professional Development Lecture

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[Please note that this seminar does not cover applications under Schedule 1 of the Children Act].

GENERAL PRINCIPLES UNDER THE CHILDREN ACT 1989

s. 1(1) – The welfare principle (sometimes known as the "welfare test")
In deciding any question with respect to the upbringing of a child (administration of its property or the income arising out of it) the child's welfare shall be the paramount consideration.

The welfare checklist – s.1(3) and (4)
If the court is considering whether to make, vary or discharge a section 8 order and the making, variation or discharge of the order is opposed by any party to the proceedings or the court is considering whether to make, vary or discharge an order under Part IV, the court shall have regard in particular to:- (see s.1(3))
(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)
(b) his physical, emotional and educational needs;
(c) the likely effect on him of any change in his circumstances;
(d) his age, sex, background and any characteristics of his which the court considers relevant;
(e) any harm which he has suffered or is at risk of suffering;
(f) how capable each of his parents is of meeting his needs;
(g) the range of powers available to the court under this Act in the proceedings in question.

The "no order" principle – s. 1(5) –
The court shall not make an order under the Act unless it considers that doing so would be better for the child than making no order at all.

Delay – s. 1(2) –
In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the child.

Definitions – See Section 105

Procedure for applying for orders under the Children Act:-
See the Family Proceedings Rules 1991 (only a brief summary is given here)
Rule 4.3 – Application for leave to commence proceedings
Note that a child's application for leave should be made in the High Court, even if the proceedings are being or would be heard in a lower court.
Rule 4.4 – Application
1. File the documents referred to in 4.4(1A) – Forms C1- C4 or C51 and such of the supplemental Forms C10 or, where appropriate, a statement in writing of the order sought. Where the application relates to more than one child, include all the children in one application.
2. Serve the application and a form C6A on the relevant persons (see Appendix 3 to the rules)
3. Upon receiving the documents filed, the proper officer shall:-
(a) fix the date for a hearing or directions appointment, allowing time for service
(b) endorse the date fixed
(c) return to the applicant forthwith the relevant forms

Applications not on notice (formerly ex parte)

Rule 4.4 (4) provides that an application for
(a) a section 8 order
(b) an emergency protection order
(c) a warrant under s.48(9)
(d) a recovery order
(e) a warrant under s.102(1)
may be made not on notice.

The applicant must file the application in the form in Appendix 1 to the Rules –
(a) within 24 where the application is made by telephone;
(b) in any other case, at the time the application was made and
in the case of an application for a s.8 order or an emergency protection order, serve a copy of the application on each respondent within 48 hours of the making of the order.
If the court declines to make the order not on notice, it may direct that it be made on notice.
For guidance as to the making of not-on-notice orders, see:-
Re J (Children) (Ex parte orders) [1997] 1FLR 606 and
Re S (a child) (Family Division: without notice orders) [2000] 1FLR 308

Human Rights Act 1998 and the European Convention
Be aware of Article 6 – right to a fair hearing and Article 8 – the right to family life.
Bear in mind that the Children Act was drafted with an eye to the Convention and the Courts do not favour the wholesale quotation of European authorities.
The right to a fair hearing is an absolute right:-
Re L (Care: Assessment: Fair Trial) [2002] 2 FLR 730 – a care case but Munby J held that the right to a fair hearing is not confined to the judicial part of the proceedings but to all stages of the litigation.
It is settled European law that restrictions may be placed on the right of the parent to family life with the child where the interests of the child require it1. Similarly, where there is a conflict between the child's right to family life and that of the parent, the rights of the child are the paramount consideration:-
Yousef -v- Netherlands [2003] 1 FLR 210 See also Hoppe -v- Germany [2003] 1 FCR 176.
Be aware of and follow the Practice Direction at [2000] 2 FLR 429 on citation of authorities.

Practice, Practice Directions etc.
1. Generally – be aware of and, where possible follow, the Best Practice Guidance in Children Act cases of June 1997 (reproduced in most of the text books).
Note that the court in family proceedings closely controls the management of cases, through directions hearings, control of instruction of experts and the filing of evidence
generally. There is also control of court bundles.
2. Court documents – be aware of the Presidents Direction as to documents to be filed in advance of the hearing. See Practice Direction on Case Management [1995] 1 FLR 456 and the Presidents Direction of 10 March 2000 [2000] 1 FLR 429 (replacing paras 5 and 8 of the Case Management Practice Direction). If your case has been commenced or is transferred to the High Court, the President's Direction of 22nd March 2002 applies1. This provides for the allocation of the case to one judge of the Division and regulates the management of the case generally. Be familiar with the requirements of this Direction.
3. Experts – there are clear rules regarding the instruction of experts. Experts must be independent of the parties and should generally be jointly instructed, with one solicitor as lead in the instruction (almost always the Guardian's solicitor in care cases or where a Guardian has (unusually) been appointed in private law proceedings.
Care must be taken as to the choice of expert. Find out before you go to court which expert (if any) your solicitor would like to instruct and make sure you have copies of the experts CV and dates of availability. The court will make directions as to who is to be instructed, whether there is to be leave to see/examine the child and as to timetabling.
For guidance as to the instruction of experts, experts meetings/discussions see:-
Re G (Minors) (Expert Witnesses) [1994] FLR 291
Re CS (Expert Witnesses) [1996] 2 FLR 115
Re C (Expert evidence: Disclosure: Practice) [1995] 1 FLR 204
Re CB and JB (Care Proceedings: Guidelines) [1998] FLR 211
Re R(Care: Disclosure: Nature of Proceedings) [2002] 2 FLR 211
Re L (Care: Assessment: Fair Trial) [2002] 2 FLR 730

For a caution as to the care which needs to be taken with whom to instruct:
Re X (Non-Accidental Injury: Expert Evidence) [2001] 2 FLR 90

Which court/level of judiciary?

The Children (Allocation of Proceedings) Order 1991 regulates where proceedings may be commenced and deals with transfer between courts.
The Family Proceedings (Allocation to Judiciary Amendment) Directions 20022 allocates proceedings as between district judges, circuit judges and High Court judges.
Consideration of the transfer or allocation of the proceedings must be done as early as possible to avoid delay in timetabling.
As regards transfer from the Family Proceedings Court, the criteria in Article 7 of the Children (Allocation of Proceedings) order apply. The case may be transferred to link with proceedings in another court or if transfer will otherwise mean a quicker hearing. Usually, however, the application is made on the basis that the proceedings are "exceptionally grave important or complex" and regard is had to:-
(a) whether there is complicated or conflicting evidence about risk to the child's physical or moral well-being or about other matters relating to the welfare of the child;
(b) the number of parties;
(c) conflict with the law of another jurisdiction
(d) some novel or difficult point of law
(e) some question of general public interest.

Refusal to transfer and transfer between county courts
If the FPC refuses a transfer, application may be made to a care centre/divorce county court for an order transferring the proceedings to itself.
The county court will consider the checklist in Article 7 (above) and may, at the same time, transfer the proceedings to the High Court (under Article 12).
See Article 10 for transfer between county courts.

Transfer back to the FPC
Under Article 11(2) Children (Allocation of Proceedings) Order, the county court has the power to transfer private law proceedings back to the magistrate's court. Appeal against this decision is to a judge of the Family Division or, where the order was made by a district judge or a deputy district judge or the Principal Registry, when the appeal is to the circuit judge.

Some authorities on transfer
C -v- Sollihull MBC [1993] 1 FLR 290 (also useful on delay)
L -v- Berkshire CC [1992] 1 FCR 481
R -v- South East Hampshire FPC ex parte D [1994] 1 WLR 611
Re A & D (NAI: Subdural haematoma) [2002] 1 FLR 337

RESTRICTION ON FULL HEARINGS
Issue estoppel has limited application in children cases. However, the court may take into account findings of fact made in the past. In deciding whether (and to what extent) to do so, the court has an "entirely free hand"
Re S, S and A (care proceedings: issue estoppel) [1995] 2 FLR 244
Re S (discharge of care order) [1995] 2 FLR 639
Re B (Children Act proceedings) (issue estoppel) [1997] 1 FLR 285

Discretion as to conduct of proceedings
The court has a wide discretion as to how to conduct family proceedings. The judge is not obliged to hold a full hearing but may restrict the evidence and limit the scope of the proceedings:-
Cheshire County Council -v- M [1993] 1 FLR 463
W -v- Ealing LBC [1993] 2 FLR 788
Re N [1994] 2 FLR 992
Re B (minors: contact) [1994] 2 FLR 1
Re CB and JB [1998] 2 FLR 211

s. 91(14) orders
The section applies to both private and public family law proceedings and permits the court, when dealing with any application for an order under the Children Act 1989, to restrain future applications without leave of the court.
The power to make such order should be used sparingly and the order should usually only be made on notice, although the court may, in an exceptional case, make it without notice or even without application. Before making the order, the court must be satisfied that the welfare of the child requires a restriction on applications by the parent in question. It is usually only made where there have been repeated applications with little or no merit but, where there is cogent evidence that the child's welfare would be greatly adversely affected by a future application, the order may be made.

A s.91(14) order should normally be limited in time.
See especially:-
B -v- B [1997] 1 FLR 139, where Waite LJ said that s.91(14 should be read in conjunction with S.1.(1), which made the child's welfare the paramount consideration. He said:-
"The judge must, therefore ask him or herself in every case whether the best interests of the child require interference with the fundamental freedom of a parent to raise issues affecting the child's welfare before the court as and when such issues arise".

Re P (Section 91(14) Guidelines) [1999] 2 FLR 573 Butler-Sloss LJ (as she was then) reviewed the case law and extracted guidelines:-
(a) s.91(14)is to be read in conjunction with s.1(1);
(b) all relevant circumstances must be taken into account in considering whether to exercise the discretion;
(c) any exercise of the s.91(14) jurisdiction is a statutory interference with a person's right to access to the court. However, the section is HRA compliant since it does not bar access to the court but merely controls it.
(d) the exercise of s.91(14) requires great care and is to be considered the exception rather than the rule;
(e) generally the making of a s.91(14) order is a weapon of last resort in cases of repeated unreasonable application;
(f) there may be cases where there is no history of repeated applications but the child's welfare makes the order necessary;
(g) a further check is to consider whether there is a serious risk that the child or his primary carer will be subject to unacceptable strain if the order is not made;
(h) the order may be made without formal application or of the court's own motion provided the court is considering an application by one of the parties for an order under the Act1;
(i) the order may be with or without time limit;
(j) the order should specify the type of application being restrained and be no wider than necessary;
(k) without notice orders should only be made in very exceptional circumstances.
See also:-
Re M (Section 91(14) Order) [1999] 2 FLR 553
Re C (Prohibition of Further Applications) [2002] EWCA Civ 292 – wrong in principle, except in exceptional circumstances, to place a litigant in person in the position at short notice of confronting a s.91(14) order that barred him from dealing with any aspect of the case relating to his children, particularly contact.

Appeals in children cases.
Generally as of right from a decision of the magistrate's court to make or refuse to make an order – s. 94 Children Act
See Rule 4.22 FPR 1991 for the procedure for appeals either to the High Court under s. 94 or from any decision of a district judge to the judge of the court in which the decision was made.
Appeals from the county court or High Court to the Court of appeal (in respect of orders made after 2nd May 2000) are governed by CPR 1998, Part 52 and PD 52

Permission to appeal, where required, must be obtained either from the court at which the decision is made or the Court of Appeal (CPR, Pr 52.3(2))
Although an application for permission to appeal may be made to the appeal court even if no oral application has been made to the lower court (CPR Pt 52 para 4.7) permission should be sought at the end of the hearing if it is thought that a decision may be taken to appeal
The original court will almost always refuse permission:-
Re F (Minors) (Contact: Appeal) [1997] 1 FCR 523

Time limits
The time for filing of the appellant's notice is 14 days after the date of the decision appealed against, unless a longer period is ordered by the lower court (CPR 1998 Pt 52.1(3) and 52.4(2).
The appeal notice should be served within 7 days of the date on which it was filed (Pt 52.6 and PD 52, paras 5.2 to 5.4).

Stay, documents for the appeal, service of documents and skeleton arguments
All covered by CPR Part 52 and PD52

There is no appeal –
(a) where permission has not been granted
(b) against the granting of permission to appeal
(c) against the granting of an extension of time for appealing

(d) from the grant or refusal of an emergency protection order
(e) from the decision of magistrates to decline jurisdiction
(f) from the decision not to interview a child in private
(g) from an order transferring or refusing to transfer proceedings, except as provided for in the rules.

Note that appeals against interim orders are difficult and generally discouraged. Further, it is difficult to appeal a decision to refuse or grant an adjournment.
Appeals to resolve a dispute or issue of law as to which the parties have no real concern are likely to be regarded as an abuse of the process and the lawyers involved may be the subject of wasted costs orders
Re C (abused children: orders) [1992] 1 FCR
S -v- S (abuse of process of appeal) [1994] 2 FCR 941
Re N (Residence: Hopeless Appeals) [1995] 2 FLR 230

Appeal
Where it is said that the trial judge erred in law or in the exercise of his discretion, the proper course is to appeal.
If it is said both that an error occurred and that fresh evidence has come to light which undermines the basis for the decision, the proper course is to appeal and to seek to adduce the fresh evidence.
The appeal is technically a rehearing. However, only exceptionally is any oral evidence allowed.
Test on an appeal:-
G -v- G [1985] FLR 894
The Court of Appeal will not overturn a decision because it would have come to a different conclusion on the evidence available below. It must be satisfied that:
(a) the judge erred as a matter of law
(b) the judge took into account evidence which he should have ignored, or ignored evidence which he should have taken into account
(c) the decision is "plainly wrong"

The Court of Appeal will have in mind that there is often no "right" answer in children's cases.
Note that a judge is obliged to give reasons for his decision, particularly if rejecting expert evidence or the recommendation of the CAFCASS officer. Failure to do so may result in a successful appeal

Rehearing
If it is not contended that the judge erred on the evidence available to him but that important evidence has come to light, which undermines the basis for the decision, an application for a rehearing should be made to the trial judge. Such an application should be made on notice not more than 14 days after the date of the trial.
See CPR 1998, schedule 2

Discharge/variation
Such an application may be made where the circumstances have materially changed since the making of the original order.

PARENTAL RESPONSIBILITY ("PR")
Meaning – s.3 Children Act 1989
By s.3(1) – All the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property .
Also by s.3(2) – the rights, powers and duties which a guardian of the child's estate would have had in relation to the child's property.

By s.1(4) - the fact that a person has, or does not have, parental responsibility for a child shall not affect:-
(a) any obligation which he may have in relation to the child or
(b) any rights which, in the event of the child's death, he may have in relation to the child's property.

By s.1(5) A person who –
(a) does not have parental responsibility for a particular child but
(b) has the care of the child, may (subject to the provision of the Act) do what is reasonable in all the circumstances for the purpose of safeguarding or promoting the child's welfare.

Position of mother
The concept of pr does not apply to a child in utero: Re F [1988] 2 FLR 307

The mother automatically has pr on the birth of the child. There is therefore no provision for a mother to apply.
The mother's pr will continue unless specifically terminated by order of the court (such as an order freeing the child for adoption or on the making of an adoption order).
In the event that a mother loses pr, she may reacquire it by obtaining:-
(a) an order under the inherent jurisdiction revoking the freeing order;
(b) an order setting aside the adoption order
(c) an adoption order in respect of the child
(d) a residence order pursuant to s.8 Children Act 1989

Position of the father
Depends upon whether he was married to the child's mother at the time of the birth.
A married father acquires pr on the child's birth.
In the case of a father who was not married to the child's mother at the date of the birth, see –
s.4(1) –
(a) the court may, on the application of the father1, order that he shall have pr for the child;
(b) the father and mother may by agreement ("a parental responsibility agreement") provide for the father to have pr for the child.
s.4(2) – the pr agreement must be in the prescribed form – courts have these.

s.4(3) – provides that the father's pr (whether pursuant to an order or an agreement) may only be brought to an end by an order of the court made on the application of:-
(a) any person who has pr
(b) with the leave of the court, the child himself, such leave to be granted only if the court is satisfied that the child has sufficient understanding to make the application (see s. 4(4))
Note that a father's pr may not be determined whilst he has a residence order in respect of the child (s.4(3) and s.12(4)). A father's pr will come to an end if the child is freed for adoption or adopted or if the child's welfare requires it. Instances include conviction and imprisonment for sexual abuse and killing the mother in the presence of the children.
Parents may enter into a parental responsibility agreement in respect of a child in care:-
Re X (Parental Responsibility Agreement: Child in care) [2000] 1 FLR 517

The Adoption and Children Act 2002 will provide that an unmarried father will acquire pr if he is named as father on the child's birth certificate.

Position of others –
A person in whose favour a residence order pursuant to s.8 Children Act is made automatically acquires pr1. A shared residence order is sometimes used to confer pr on a person who would not otherwise have parental responsibility:-

G -v- F [1998] 2 FLR 700 was a case where a child had been born to a lesbian couple as a result of one of them being artificially inseminated. They had jointly cared for the child but had separated. Bracewell J. granted permission for the "absent" partner
to apply for a shared residence order as she had played and continued to play an important role in the life of the child.

Re D (Parental Responsibility: IVF Baby) [2001] 1 FLR 972 concerned a man and woman who, after a relationship lasting several years sought IVF treatment. They presented themselves as a stable couple and signed the consent form, which acknowledged that the man would be the legal father of any resulting child. The treatment, using sperm from an anonymous donor, was unsuccessful. The couple separated and the woman, who had commenced a new relationship, resumed treatment, without informing the clinic of her change of partner. Treatment, using anonymous donor sperm, resulted in a live birth. The original partner, who had signed the consent forms, applied for parental responsibility and contact, relying on his status, under the Human Fertilisation and Embryology Act 1990, s.28(3)2.
The judge assumed jurisdiction on the basis that the parties agreed that the man should be treated as the father. He ruled in favour of indirect contact, indicating that it would probably not be appropriate to make a direct contact order until the child was about three years old. The application for parental responsibility was adjourned generally on terms that any application by the mother to adopt the child would reinstate it.
The applicant "father" appealed on the basis that he should be granted pr (and direct contact) immediately. He was refused permission. In relation to pr, the Court of Appeal said that, applying the ordinary tests in relation to parental responsibility, this was a father who had demonstrated potential commitment and had genuine motives, but who had not had an opportunity to know the child. It was

proper, in the circumstances to defer his application to see if commitment was maintained. Further, the judge had taken steps to prevent the mother from making applications which might adversely affect the father's position.
Once pr is acquired, it continues unless specifically terminated3.

Determination of pr applications
The court will consider:-
(a) the degree of commitment shown by the father to the child
(b) the degree of attachment between the father and the child
(c) the reasons why the father is making the application
(d) all the relevant circumstances.

The court will also apply the welfare checklist in s1.3 of the Act
See:-
Re RH (Parental responsibility) [1998] 1 FLR 855
Re S (Parental responsibility) [1995] 2 FLR 648

Use of pr –
Must not be unilateral. For example, a person with pr must not decide to change a child's school without consulting any other person with pr1.
A parent must not change a child's surname without the consent of the other parent or the leave of the court2.
SECTION 8 ORDERS

1. Types of order available
s.8(1) Children Act 1989 provides that there are four different orders available:-

(a) "a contact order" – an order requiring the person with whom a child lives or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other;
(b) "a prohibited steps order" – an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court;
(c) "a residence order" – an order settling the arrangements to be made as to the person with whom a child is to live; and
(d) "a specific issue order" – means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.

2. Who may apply?
An application may be made either as of right or with the leave of the court. A section 8 order may also be made of the court's own motion. See s.10(1) for the court's power to make s.8 orders.

Applications without leave
s.10(4) provides that a parent or guardian of the child and any person in whose favour a residence order is in force has the right to apply for a Section 8 order.
s.10(5) adds to the category of those entitled to apply:-
(a) any party to a marriage(whether or not subsisting) in relation to whom the child is a child of the family;
(b) any person with whom the child has lived for a period of at least three years;
(c) any person who –
(i) in any case where a residence order is in force with respect to the child, has the consent of each of the persons in whose favour the order was made;
(ii) in any case where the child is in the care of the local authority, has the consent of that authority; or
(iii) in any other case, has the consent of each of those (if any) who have parental responsibility for he child.

s. 10(6) provides that a person who would not otherwise be entitled under sub-sections (4) or (5) to apply, may apply for the variation or discharge of a Section 8 order if –
(a) the order was made on his application; or

(b) in the case of a contact order, he is named in the order.

Applications with leave
Others may apply with leave:-
Persons other than the child concerned (including a child applicant who is not the child who is to be the subject of the order):-
s. 10(8) provides that, where the person applying for leave to make a section 8 application is not the child concerned, the court shall, in deciding whether or not to grant leave, have particular regard to –
(a) the nature of the proposed application for the section 8 order;
(b) the applicant's connection with the child;
(c) any risk there might be of that proposed application disrupting the child's life
(d) to such an extent that he would be harmed by it; and
(e) where the child is being looked after by a local authority –
(i) the authority's plan's for the child's future;
(ii) the wishes and feelings of the child's parents.

Note that applications for contact orders in respect of children who have been adopted will be subject to special considerations:-
Re E (Adopted Child: Contact:Leave) [1995] 1 FLR 57
Re S (Contact Application:Sibling) [1998] 2FLR897

Authorities –
Re A (Residence orders; Leave to Apply) [1992] Fam 182; [1992] 3 All ER 872
Re M (Grandmother's application for leave)[1995] 2 FLR 86
Re W (Contact Application: Procedure) [2000] 1 FLR 263
Especially: Re J (Leave to issue application for residence order) [2003] 1 FLR 114

The child as applicant –
s10(8) provides that, before granting permission, the court must be satisfied that the child has sufficient understanding to make the proposed application. The child must be considered to be able to understand the issues in the proceedings and give instructions – sometimes known as "Gillick competent".
The person who has to make the initial judgment is usually the solicitor whom the child wishes to instruct. The view of an experienced solicitor, who is a member of the Children's panel, will carry considerable weight. However, the fact that a child has sufficient understanding does not always mean that the application will be granted; the court has a discretion.
Note that the criteria under s.10(9) do not apply to an application by the child himself.
Although there has been some variance in the authorities, it seems that the child's welfare is paramount in reaching a decision.
Authorities:-
Gillick -v- West Norfolk & Wisbech Area Health Authority [1986] AC 112
Re A (A minor) (Residence Application: leave to apply) [1993] 1 FLR 425
Re H (Residence: Child's Application for Leave) [2000]1 FLR 780.

Consideration may have to be given for the representation of a child by a guardian:-
A -v- A (Contact: Representation of Child's Interests) [2001] 1 FLR 715

General principles in determining s. 8 applications – s.11 –
(a) Timetabling. s. 11(1) The court shall:-
(a) draw up a timetable with a view to determining the question without delay and
(b) give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that the timetable is adhered to.

(b) Provisions to prevent delay. s.1(2) – Rules of the court may –
(a) specify periods within which specified steps must be taken;
(b) make other provision for the purpose of ensuring, so far as is reasonably practicable, that such questions are determined without delay.
(c) "Interim" orders1. s.11(3) - Where the court has power to make a s.8 order, it may do so at any time during the proceedings, even though it is not in a position to finally dispose of the proceedings
(d) Joint/shared residence. S.11(4) – the court may specify the periods during which the child is to live in the different households concerned.
(e) Resumption of cohabitation – s.11(5) and 11(6) –
A residence (11(5)) and a contact order (s.11(6)) cease to have effect if the parents live together for a continuous period of six months.

(f) Directions and conditions – s. 11(7) –
A section 8 order may contain directions as to how it is to be carried into effect. Further, it may impose conditions, which must be complied with by the person in whose favour the order was made, a parent, a person with pr who is not a parent or a person with whom the child is living.

Restrictions on making s.8 orders
A s.8 order should not:-
(a) be made in respect of a child who is 16 or over
(b) be expressed to continue beyond the child's sixteenth birthday (except in exceptional circumstances);
(c) be made where a care order is in place or to be made (not so with a supervision order).
(d) be made in favour of a local authority.

Use of Child and Family Court Reporter and Reports under s.7 and s.37
Under s.7, a Cafcass officer is generally directed to investigate and report to the court on issues of residence and contact and in difficult applications for specific issue orders or prohibited steps orders (such as change of name, permanent removal from the jurisdiction).
The Cafcass officer should see the child with each parent in that parent's environment.
The report may contain hearsay evidence but, if so, the source of the evidence must be clearly spelt out.
The report often annexes a school report on each child.
The commissioning of a welfare report usually involves a delay of about 16 weeks. The court will consider the impact of any delay and may proceed without a report.
Although the report should always be taken into account, the ultimate decision as to what should happen in the case rests with the judge, who may reject the recommendation in the report. A judge should give reasons for so doing:-
S -v- Oxfordshire County Council [1993] 1 FLR 452
Re W (Residence) [1999] 2 FLR 390

s.7 also provides that the court may ask a local authority to prepare the report.
s.37 if the court considers that a care or supervision order may be necessary, it may direct that a report under s.37 be prepared by a local authority.

Conciliation
In the Principal Registry of the Family Division, applications for residence and contact must be referred for conciliation. Applications for specific issue and prohibited steps orders may be referred for conciliation at the request of the applicant.
Conciliation takes place before a district judge with a Cafcass officer present. The parties have an opportunity to attempt to reach an agreement with the help of the Cafcass officer. A consent order may be made if agreement is reached.
In other courts, there is often access to conciliation facilities and the court should consider whether conciliation would be an appropriate course.
Because the case may (or will) be referred for conciliation, no statements should be filed until the court has made the appropriate direction.

CONTACT ORDERS
Approach – there is a strong presumption in favour of contact.
The court will make a contact order in favour of the "absent" parent unless it is demonstrated that to do so would be contrary to the child's welfare:-
Re H (Minors: Access) [1992] 1 FLR 148
All applications are subject to the welfare principle and the welfare checklist.

Hostility to contact
The court has to consider the reasons for the hostility and how it should be dealt with. One issue is whether the hostility is "implacable":-
Re D (Contact: Reasons for Refusal) [1997] 2 FLR 48
In Re P (Contact: Discretion) [1998] 2 FLR 696 Wilson J. outlined three ways in which hostility to contact might arise and how it should be dealt with:-
(a) where there are no rational grounds – the court should only refuse contact where there is a risk of emotional harm to the child
(b) where the grounds are insufficient to displace the presumption in favour of contact – contact should be ordered.
(c) where the arguments are rational but not decisive
But see below – it is now recognised that a mother's hostility to contact may arise because of violence by the father. See below for approach in such circumstances.
See also:-

Re D (Contact: Mother's hostility) [1993] 2 FLR 1
Re C & V (Contact: Parental Responsibility) [1998] 1 FLR 392
Re P (Minors) (Contact: Discretion) [1998] 2 LFLR 696
Re K (Residence Order: securing contact) [1999] 1 FLR 583
Re K (Contact) (Mother's Anxiety) [1999] 2 FLR 703
A -v- N (Committal: Refusal of Contact) [1997] 1 FLR 533

Contact and domestic violence
Where there are allegations of domestic violence, the court must look at the conduct of each party towards the other and towards the children, the effect of the violence on both the resident parent and the children and the motivation of the party seeking contact.
Where there are allegations of serious domestic violence, the court is most unlikely to make an interim order for direct contact. The allegations will need to be investigated first and findings made.
There is no presumption that findings of domestic violence against the applicant parent will result in no contact. The court will assess the violence in the context of s.1(3) and weigh the risks involved and the impact of contact on the resident parent and the child against the positive factors, if any, of contact. The court will have regard in particular to whether the offending parent recognises his past conduct and his willingness and ability to change. See:-
Re S (Violent Parent: Indirect Contact) [2000] 1 FLR 481
Re L, V, M, H (Contact: Domestic Violence) [2000] 2 FLR 3341
Re M (Interim Contact: Domestic Violence) [2000] 2 FLR 377
Re L (Contact: Genuine Fear) [2002] 1 FLR 621
Re G (Domestic Violence: Direct contact) [2000] 2 FLR 865
Re J-S (Contact: Parental Responsibility) [2002] EWCA Civ 1028

There may be other circumstances in which it is appropriate for contact to be terminated. See, for example:-
Re H (Contact Order) (No. 2) [2002] 1 FLR
However, this is a discretion which should be exercised carefully:-
Re J-S (A Child) (Contact: Parental Responsibility) [2002] 3 FCR 433 CA

Form of the contact order
It is good practice for the order for contact to direct the resident parent to "make the child/children available for contact" as defined in the order. This is particularly important when it is felt that the resident parent may be resistant to contact.

Sanctions for refusal of contact without good reason
A penal notice may be attached to an order for contact. Make sure the order is in the above form. If it is not, amend it.
Where the hostility of the resident parent to contact frustrates the order, the court may consider a transfer of residence or committal to prison. Many judges are most reluctant to commit, particularly if the non-resident parent is not in a position to care for the child and it is a weapon of last resort:-
Re B (Contact) [1998]1 FLR 368
A & N (Committal: Refusal of Contact) [1997] 1 FLR 533
Re M (Contact Order: committal) [1999] 1 FLR 533

Note that conditions may be attached to contact orders:
Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124
Re M (Contact: Restrictive Order: Supervision) [1998] 1 FLR 721

Special precautions may also be taken by the court when permitting contact abroad in circumstances where there is risk that the child may not be returned:-
Re T (Staying Contact in Non-Convention Country) [1999] 1 FLR 262
Re A (Security for Return to Jurisdiction) (Note) [1999] 2 FLR 1
Re P (A child: Mirror Orders) [2000] 1 FLR 435

RESIDENCE ORDERS
Direct with whom a child is to live.
The general principles for the Children Act and for the making of s.8 orders apply.
See above re method of application and applications not on notice.
The court may make a residence order of its own motion. The order cannot be made in favour of the child himself.

Shared residence/joint residence
Arrangements whereby a child spends part of his time living with one parent and part with the other. Until recently these were seldom made and required special circumstances making a shared residence order desirable in the interests of the child. However, there is recent Court of Appeal authority to the effect that neither exceptional circumstances nor, probably, evidence of a positive benefit to the child is required. It need only be demonstrated that the order is in the interest of the child in accordance with the requirements of Section 1 Children Act 1989:-
D -v- D [2001] 1 FLR 495
One example is where it to confer parental responsibility on a non-parent with whom the child lives part of the time.
Shared care arrangements are most often arrived at by agreement, in which case the "no order" principle may well apply.
See also:-
A -v- A (minors) [1994] 1 FLR 669
Re H (shared residence: parental responsibility) [1995] 2 FLR 883
G -v- F (Contact and Shared Residence: applications for leave) [1998] 2 FLR 799

Enforcement of residence orders
See s. 14

PROHIBITED STEPS ORDERS
The prohibited steps order is an order empowering the court to restrain a person from an exercise of parental responsibility. This may relate to such issues as education (not to withdraw a child from a particular school, not to go to the child's school etc) and medical care (other than emergency treatment) or, for example, to restrain a threatened removal of the child from the jurisdiction. Note that a person with a residence order in respect of a child may, without the permission of the court or the other party, remove the child from the jurisdiction for a period of less that one month.
A prohibited steps order may be made prohibiting a non-parent from contacting children.1
Note that no court may make a prohibited steps order in any way which is denied to the High Court (by s.100(2)) in the exercise of its inherent jurisdiction. Similarly, no order will be made with a view to achieving a result which could be achieved by making a residence or contact order (s.9(5))

SPECIFIC ISSUE ORDERS
An application for a specific issue order is made in order that the court may decide a specific issue relating to the child.
The order may be made in conjunction with a residence or contact order or on its own.
The application may be made not on notice in an appropriate case.
Examples are issues about religious upbringing, circumcision, schooling, the surname by which the child is known and applications to remove a child from the jurisdiction (whether temporarily or permanently).

s. 13 regulates change of name and removal from the jurisdiction. It is an automatic condition of a residence order that no person will cause the child to be known by another surname or remove him from the jurisdiction (save under the automatic leave), without either the written consent of every person who has pr or the leave of the court.
Change of surname
See:-
Dawson –v- Wearmouth [1999[AC 308
Re C (Change of Surname) [1999] 2 FLR 656

Temporary removal from the jurisdiction
The welfare of the child is the paramount consideration.
Prima facie, the application should be granted if there is a sensible plan to visit relatives or enjoy a holiday. Reasons for refusal may be grounds for believing the parent may not return or, for example, the child being too young to undertake the journey.
Undertakings to return the child to the jurisdiction at the end of the holiday and, even, deposits of money may be required as a condition for the granting of leave.
Permanent removal from the jurisdiction
There is no difficulty if parents agree. A parent may remove a child permanently from the jurisdiction with the consent of all others who have pr.

It is a criminal offence to remove a child from the jurisdiction without the appropriate consents or leave.1
The court has said that applications for permanent removal require "profound investigation and judgment".

The issue is whether the plan is a reasonable and sensible one and, is it compatible with the welfare of the child, taking into account the impact upon contact with the other parent.
See:-
Re H (Application to remove from jurisdiction) [1999] 1 FLR 848
Re A (Permission to remove from jurisdiction: Human Rights) [2000] 2 FLR 225
Re C (leave to remove from the jurisdiction) [2000] 2 FLR 457

Each case is to be decided on its own facts:-
Payne -v- Payne [2001] 1 FCR 425

Janet Bazley
One Garden Court,
Temple,
London EC4

Recent Developments in Children Law

David Vavrecka

30 January 2003

Continuing Professional Development Lecture

CHILDREN LAW & PRACTICE
RECENT DEVELOPMENTS
30th January 2003

Speaker: David Vavrecka, Coram Chambers

Private Law Update

1. Judicial statistics 2001
112,000 private law applications in England & Wales (up 17%)

2. Ask trial judge for Permission to appeal

Re T (Contact: Permission to Appeal) [2002] EWCA Civ 1736
Court of Appeal stressed again importance of making application for permission to appeal to trial judge. See notes 52.3.4 – 52.3.6 in Part 52 CPR. Applications to Court of Appeal without prior application to trial judge where judgment handed down or client not available or had changed mind

3. Split hearings in relation to contact should be heard by same bench
M v A (Contact: Domestic Violence) [2002] 2 FLR 921
Parties separated prior to birth of child and communication and relationship resumed for 5 months once child 1 year old before ending in violence. Seven months later father applied for contact. Justices made findings on violence by mother on one occasion and threats by father over period. Also made findings about mother's motives for resisting contact. Later directions by a different bench and transfer to PRFD meant case came again to court one year after application made. Judgment highlighted need for same bench to hear final hearing as the preliminary hearing.

In the light of Re L/V/M/H (Contact: Domestic Violence) [2000]2 FLR 334 - view formed at factual inquiry informs approach to disposal. Identify transfer cases earlier

4. Costs
Q v Q (Costs: Summary Assessment) [2002] 2 FLR 668
Wilson J asked to consider who should pay costs after 13 interlocutory hearings (costs reserved in 10 of these) over number of years in bitter private law dispute. Order for father to pay, sum of £150k being a summary assessment of mother's costs. W actual costs 336K. Power to make summary assessment under PD Costs 13.1 had to be considered in every case and not just in special circumstances. Whilst no order is accepted starting point, on balance father's unjustified residence application, stance on educational issues and resistance to investigation of medical condition, meant appropriate that he pay significant share of costs on indemnity basis

5. Importance of Legal Representation in committal proceedings
Re K (Contact: Committal Order) [2002] EWCA Civ 1559
Unmarried mother of two was unrepresented when committed to prison for 42 days for contempt for failing to abide by repeated orders for indirect and supervised contact, part of which was for assessment by CWO. Trial judge also made residence order in father's father. Court of Appeal allowed the mother's appeal and stressed criminal nature of contempt proceedings entitled mother to at least protection of Art 6(3)(c) and effect of Article 8 on decision to separate mother from her children. Transfer of residence – unusual order and welfare and not punishment is paramount consideration

6. Importance of determining paternity
Re H and A (Paternity: Blood Tests) [2002] EWCA Civ 383
Mother and husband had 22 year old son when twin daughters born in 1997. Unbeknown to father, mother had relationship with another man around time of twins conception who she introduced to the twins and who had contact, unbeknown to the husband, who meanwhile had assumed primary care of the twins whilst the mother worked. The other man sought PR and contact when his affair with the mother ended which resulted in a consent order for DNA test and arrangement for supervised contact. Mother did not comply with DNA test or more than one contact. Mother concealed litigation from husband for a year but he accidentally found out and filed a statement indicating he would give up mother and twins if the other man were the father. Mother said she only had limited sexual relations with other man before probable period of conception and husband said he was 99% sure he was father. Judge refused DNA tests on basis of disastrous disintegrative effects of finding of paternity. Other man succeeded on appeal as Court of Appeal felt possibility of issue remaining a family secret not acceptable, which might result in twins at unpredictable future date finding out with shocking consequences. Paternity to be established by science not legal presumption or inference

7. Use of McKenzie friends
Re H (McKenzie Friend:Pre-Trial Determination)[2002]1 FLR 39
Thorpe LJ allowed an appeal against the refusal to allow Dr P to appear as father's McKenzie friend in contested contact proceedings, stressing 'presumption in favour of permitting a McKenzie friend is a strong one'

As to role of McKenzie friend: Re H (Chambers Proceedings:McKenzie Friend)[1999] 2FLR 434 – role to sit and advise and quietly to offer help

8. Disclosure to CAFCASS

Re M (A Child)(Disclosure to Children and Family Reporter) [2002] EWCA Civ 1199,CA, [2002] 2 FLR 893
CAFCASS office in course of inquiries told by mother and child of inappropriate behaviour by father. Officer asked judge for permission to disclose information to social services but he refused. Thorpe LJ held does not have to seek judge's permission to report concerns to Social Services; the rules do not prevent disclosure of material acquired in course of inquiries

9. Litigating the use of first names
Re H (Child's Name: First Name)[2002] EWCA Civ 190
Married parents separated when mother 6 weeks pregnant. Father visited on day of child's birth and five days later he registered child's birth choosing first name MI. Six days later mother registered child with first name H. Registrar of Births and Deaths ruled father's registration legal and mother's cancelled. Mother sought specific issue to determine by what first name child should be known. At the appeal, mother's counsel stated change of name not sought, rather that mother be permitted to use mane H when dealing with educational, health and other authorities. Court of Appeal allowed her appeal in basis that unlike surnames which have particular significance in indicating family to which a child belongs, given names have less concrete character and commonplace for different given names to be received after registration. Common sense mother as single parent and primary carer needs support in outcome of legal proceedings and in recognition of her liberty and judge plainly wrong to inhibit her use of name H providing she recognised child has series of immutable names by statutory registration

10. Courts approach to parental alienation evidence
Re S (Contact:Children's Views)[2002] EWHC 540 (Fam, [2002] 1 FLR 1156
Parents of three children aged 16, 14 and 12. All three lived with mother in England and father had visiting contact when he came over from Italy. In reporting to the court, the CAFCASS reported recommended no order in relation to the older two based in part on their expressed views. The father and his mother were convinced the mother had poisoned the children against the father. In making no order for contact in respect of the older two and an order that the father pay two-thirds of the costs, the judge dismissed as nonsense the father's claim that the children had been poisoned. The father had simply failed to realise his hectoring approach was counter-productive. Father's pursuit of litigation unreasonable, but punitive to make him pay all costs

11. but see also Re C (Prohibition on further applications [2002] EWCA Civ 292, [2002] 1 FLR 1136 where a father in person sought contact and residence in relation to daughters (claiming situation akin to parental alienation syndrome) In the Court of Appeal the President asked the expert to look at all issues, including issue of PAS, but commented that the father had 'seriously under appreciated the effect on the mother and four girls of the final parting in 1998'

12. No power to order residential assessment in private law proceedings
R v R (Private law proceedings: Residential Assessment) [2002] 2 FLR 953
Young child stayed with mother after separation. She claimed she had shaken baby. She later retracted this but social services arranged for child to stay with father. Mother was having supervised contact and following a recommendation in a social services report to the court, she sought an order authorizing a residential assessment of her and child. Father objected. Holman refused the application on basis there was no jurisdiction to order a residential assessment if one parent with the child against the wishes of the other. In the event a residual power existed in the exercise of the inherent jurisdiction, not appropriate to be exercised

13. Contact research
LCD research paper Safety and Child Contact analyses role of contact centres in context of domestic violence and concluded need for active screening and assessment in relation to domestic violence, greater support and advocacy for children and use of clearer terminology (high, medium or low vigilance), greater availability of centres

Joseph Rowntree Foundation in Making contact: How parents and children negotiate and experience contact after divorce In depth interviews based on 61 families demonstrated limited capacity of legal process to facilitate contact or reverse a downward spiral in contact relationships and advocated resources be redirected to more creative work or improving parental relationships

Feb 2002 saw publication of Children Act Sub-Committee's report to Making Contact recommending proper funding and role for CAFCASS including the strengthening of family assistance orders, more specialist contact centres,and publicly funded accredited lawyers to do children's cases. In Aug 2002 came the Government response to Making Contact Work in which it accepted recommendations in principle only, but

the core need to use family assistance orders via CAFCASS was rejected.

Public Law Update

14. Judicial statistics 2001
24,000 public law applications in England & Wales (up nearly 10%)

Care Proceedings
15. Practice direction on Judicial Continuity
Practice Direction issued by the President, 22/3/02 [2002] 2 FLR 367
Effectively all care order applications transferred to the High Court will be allocated a judge who should stay with the case, and after transfer a CMC (Case Management Conference) is fixed. Variety of documents required for this hearing.(LA 5 days before, respondents 2 days) Purpose of CMC to Identify issues, experts, twin-track planning, need for split hearing

16. The perils of ignoring the experts
Re M (Residence) [2002] EWCA Civ 1052, [2002] 2 FLR 1059
Care proceedings involving a family where the mother had died and the father of the youngest child age 3 (M) had been recalled to prison as his life licence was revoked. The oldest children, and the child of the father had gone to live with the maternal uncle. All the experts agreed all the children including M should stay with the uncle and agreed on the father being dangerous. Holman J did not find the threshold crossed and refused to make a residence order to the uncle on the basis that M should return to his father. Holman had formed his own assessment of the father in the face of the unanimous view of the experts and Court of Appeal ruled it was not open to him to reject their conclusions based on his own impression of the father or reject guardian's view without fuller reasons.

17. Re B (Non-accidental injury: compelling medical evidence) [2002] EWCA Civ 902
Mother, with 6 year old daughter had another child, and after his birth began to cohabit with another man. Subsequently the child suffered serious injury – 94 injuries in all, and dies a few months later. The older child moved to live with a relative and mother separated a year later from the man. At the preliminary hearing in the care order application in respect of the daughter, judge concluded the male partner was the perpetrator and mother could be exonerated and she had not failed to protect the son at any stage, On the local authority's appeal the Court of Appeal found the trial judge to be plainly wrong as his finding contrary to expert evidence. Either the mother or her partner perpetrated these injuries and the mother had failed to protect the child. A degree of heightened cogency was necessary to enable the judge to say injuries could not have been inflicted by the mother and that standard had not possibly been met

18. Findings to be incorporated into court order
Re M and MC (Care: Issues of Fact: Drawing of Orders) [2002] EWCA Civ 499
Findings should be set out in court order where court had directed determination of specific issues

Following trial and prelim findings of which of parents responsible, one of parents confessed – shd not be retrial but start disposal hearing with findings as foundation and adjust in light of developments

19. Care proceedings practice
Re R (Care: Disclosure : Nature of Proceedings) [2002] 2 FLR5
Five children from one family were the subject of care proceedings. Some of the children made allegations of sexual abuse against parents and other relatives. The local authority case was initially based on these allegations but after 13 days of the hearing dropped them and based the case on neglect and emotional harm. In his judgment Charles J gave a number of important points of guidance
(1) where local authority decided not to pursue allegations of sexual abuse and the threshold criteria satisfied on different basis, then at welfare/disposal stage the court cannot approach case on basis was sexual abuse or might have been sexual abuse
(2) local authority should identify as soon as possible allegations on which it relies, done by someone with appropriate knowledge and training
(3) all parties share duties in respect of evidence- to check full disclosure and proper instruction of experts
(4) most cases no restriction on disclosure
(5) local authorities and guardians should be more willing to exhibit notes rather than preparing summaries

(6) as soon as carer informs local authority child has made allegations of abuse, full history should be taken from that carer by person with relevant experience

20. Need for evidence of victim
Re D (Sexual Abuse Allegations: Evidence of Adult Victim) [2002] 1 FLR 635
Split hearing in care proceedings had to consider allegations as to the unsuitability of paternal grandfather as a potential carer; an alleged victim of inappropriate touching by him in 1985 (now an adult) did not make a witness statement or give oral evidence. Magistrates relied on social worker's account that she found victim believable and CAFCASS officer also gave evidence which magistrates treated as suggested alleged victim's account should be accepted. Grandfather consistently denied the allegations. Magistrates felt account probably true. On appeal the President allowed the appeal and ordered transfer to County Court. Court expected adult victim to give evidence and at least make a statement in line with dicta in Re H and R (Child Sexual Abuse: Standard of Proof) [1996] 1 FLR 80

21. Re L (Care: Assessment: Fair Trial) [2002] EWHC 1379 (Fam)
Munby J in a detailed judgment analyses the extent and scope of Article 6 and 8 rights within care proceedings. Mother's first child died of NAI aged 4 months and second child on register. Care proceedings commenced and child place din foster care. A psychiatrist was instructed jointly to decide whether to assess mother for possible rehab. After a 3 day assessment the psychiatrist advised residential assessment appropriate, but after a meeting from which the mother was excluded, the psychiatrist changed his decision. No minutes of this meeting were taken. The mother opposed the care plan of adoption and claimed there had been breaches of good practice and she had no had sufficient opportunity to argue her case. Although the mother's application for further assessment was dismissed, Munby explained that the mother's article 6 rights to a fair trial were absolute and were not limited just to the judicial stage of the proceedings – the failure to allow a litigant to examine and comment on documents or cross-examine witnesses then relied upon in producing a report was likely to amount to an article 6 breach. LA had duty to have transparent and fair procedures at all stages, in and out of court. Documents must be made available and crucial meetings conducted openly with parents having opportunity to attend or be represented. However generalised discovery not necessary or desirable. Earlier unfairness to mother in not being sufficiently involved overcome in later stages of process

22. Importance of representation in care and adoption proceedings
P., C. and S. v UK, [2002] 2 FLR 631
P and C were the parents of S. born in 1998. In 1994 P's child B was removed from her care due to concerns that she was suffering from Munchausen's Syndrome by Proxy (MSBP) which caused her to harm the child. P was subsequently convicted in a Californian court of a misdemeanour in relation to her harming the child and B lived with his father thereafter. In 1996 P met C, a social worker, researching a doctorate on women wrongly accused of MSBP – they married in 1997. In May 1998, S was born and was removed from her parents and placed with foster parents – less than 12 hours after her birth under an emergency protection order – a care order was subsequently obtained. The parents were allowed supervised contact and were seen to have developed a good relationship with C. At the final care hearing, P's lawyers were allowed to withdraw from the proceedings due to her unreasonable conduct and C withdrew from case In March 1999 a Court granted the care order and fixed a date for a freeing application one week later. P & C attended but did not have legal representation. The judge refused to grant an adjournment to allow P to obtain legal representation and made a freeing order Leave to appeal was refused and the child was adopted in March 2000. The applicants claimed a violation of Article 6(1) (fair trial) and Article 8 (the right to respect for family life).
Article 6
The E.Ct of HR noted that given the complexity of the case and what was at stake for the applicants and the emotive nature of the subject matter, the principles of effective access to court and fairness required that the mother P receive legal assistance. It found that the while the domestic courts tried in good faith to strike a balance between the interests of the parents and the welfare of S., the procedures adopted not only gave the appearance of unfairness but they prevented the applicants from putting their case forward in a proper and effective manner on issues which were important to them. It concluded that the assistance of a lawyer during the hearing of the two applications which had such crucial consequences for the applicants' relationship with their daughter was an indispensable requirement. Consequently the applicants did not have fair and effective access to court and there had been a breach of Article 6(1).
Article 8
Court noted that while there was legitimate cause for concern due to P having a previous conviction for harming a child, nonetheless, the removal of a child from its mother at birth required exceptional justification. It was not apparent why the child could have had some contact with the mother at the hospital. It concluded that there was no immediate risk to the child and the removal at birth was not supported by relevant and sufficient reasons and thus violated Article 8.
It also found that freeing the child for adoption breached Article 8 because of the lack of legal representation and the lack of any real time lapse between the proceedings. It concluded that given what

was at stake Article 8 was violated due to the parents not being involved in the decision making process to a degree sufficient to provide them with the requisite protection of their interests.

23. House of Lords and Starred Care Plans
Re S (Minors)(Care Order: Implementation of Care Plan; Re W(Minors)(Care Order: Adequacy of Care Plan) [2002] UKHL10, [2002] 1 FLR 185
The House of Lords did not uphold the Court of Appeals creation of starred care plans, a bold attempt to devise a way for care plans which were not being implemented coming back to court; instead they stressed the need for the government to urgently review this (see children reviewing officers under Children and Adoption Act – to refer to CAFCASS if appropriate)
- power of section 3 HRA limited, court must be mindful of outer limit. Interpretation upto courts but enactment and amendment matter for Parliament
- starred milestones departed substantially from Parliamentary intention

s3 so far as it is possible to do so, primary legislation ..must be read and given effect in a way which is compatible with convention rights

24. Challenging plans of local authority on human rights grounds
C v Bury Metropolitan Council [2002] EWHC 1438 (Fam), [2002] 2 FLR 868
Mother made applications under ss6 and 7 HRA on her own behalf and that of child for review of local authority care plan, which proposed residential school in distant part of UK. Mother had not been present at all meetings where plan discussed. The President did not find that the procedural flaws in the case management had a detrimental effect on mother's case nor had the child's rights been adversely affected. The decision of the local authority was proportionate and in child's best interests and no breaches of Article 8 upheld. Like in Re M (Challenging decisions by local authority)[2001]2 FLR 1300 the court entertained a freestanding HRA application. The President stated human rights applications should be heard in the Family Division, preferably by judges with experience of sitting in the Administrative Court
See also M (Care:Challenging Decisions by Local Authority) [2001] 2 FLR 1300,

25. Effect of failure to prove parent a perpetrator
Re O and N (Children) [2002] 3 FCR 418
In care proceedings, the local authority sought care orders on 2 children due to NAI on older child. Father admitted causing fractured skull and subdural haematoma but denied other injuries. At preliminary hearing, the judge found in the absence of acceptable explanation by either parent, neither parent exculpated and injuries caused by either or both. Judge also found mother had failed to protect elder child from harm. The Court of Appeal restated the established law as to burden of proof at threshold stage, remains on local authority, and same standard at disposal / welfare stage. Only finding open to judge on evidence was that LA failed to establish on balance of probability that mother had injured older child and proceeded on basis did not. However finding she failed to protect inevitable

26. Protection for parents making admissions to experts
Re AB (Care Proceedings: Disclosure of Medical Evidence to Police) [2002] EWHC 2198 (Fam)
Guidelines made by Wall J in case where he gave disclosure of expert medical evidence to police ; including (1) need to carry out balancing exercise Re C (A Minor)(Care Proceedings: Disclosure) [1997] Fam 76 (2) no presumption of disclosure (3) importance of frankness and protection of s98(2) (4) advice to parents not to cooperate in court's investigation of child abuse poor practice and likely to lead to inferences being drawn against parent (5) lawyers should not put pressure on expert as to how to conduct investigation (6) court more likely to refuse an application for disclosure to police where frank acknowledgment of responsibility by abusing parent

27. see also Re M (Care Proceedings: Disclosure: Human Rights) [2001] 2 FLR 1316
During care proceedings a mother admitted responsibility for serious shaking injuries to her child. During the hearing the mother wrote an account in which she admitted responsibility for the injuries and both parents made further written statements. Upon discovering the existence of this material (following unauthorized disclosure by a social worker to a case conference) the police applied for disclosure of mother's written account and statements and relevant parts of transcript. Judge refused the application giving greater weight to fairness to the mother and any danger of oppression, together with the importance of maintaining frankness and confidentiality in care cases, to that of the public interest of prosecution of serious crimes and punishment of offenders

28. Disclosure to Third Parties
Re C (Disclosure: Sexual Abuse Findings) [2002] EWHC 234

(Fam)
Judge in care proceedings found father a dangerous paedophile who posed a considerable risk to any child. A care order was made and local authority given leave to disclose copy of judgment to DOH and any social services or police force within area husband living. SS and police wishes to disclose certain findings made in the care proceedings to an identified housing association and to any future landlords. The judge allowed disclosure to housing association but refused an order to disclose to future landlords as difficulties of controlling the information if more widely disseminated and could lead to people going underground

29. Local authority desire to disclose information about sex offender not irrational
R (J and P) v West Sussex County Court and Wiltshire County Court [2002] EWHC 1143 (Admin) [2002] 2 FLR 1192
Local Authority concerned about grandmother who was seeing her grandchildren every few months. Her new partner had Sch 1 conviction for indecent assault on stepdaughter and has completed term of imprisonment. Risk he posed such that local authority decided there was pressing need to tell children's mother, even though grandmother willing to undertake he would not have any contact with her grandchildren. Sullivan J held substantial justification needed to interfere with grandmother's article 8 rights; but here real and cogent evidence of pressing need for disclosure

30. Parents entitled to have disclosure of files where LA seeking to rely on summary
Re B (Non-Accidental Injury)[2002] EWCA Civ 752
Care proceedings in relation to baby with subdural haemorrhages and no other injuries. Parents declined to give evidence at split hearing and judge held one or other of parents responsible. Evidence detailing fathers care of an older (17 year old) son in foster care had been summarised and were to be used in the disposal hearing. The judge refused parents application for disclosure of files in question. Court of Appeal held situation here unusual (would normally be some earlier litigation in which record of previous parenting established. Here files were best (probably only evidence) and even most careful summary may not be completely balanced and to ensure parents have confidence, should have access

31. Witness anonymity highly exceptional
Re W (Care Proceedings: Witness Anonymity)[2002 EWCA Civ 1626
Court of Appeal quashed findings based on social worker's evidence where given anonymously from behind screen. Threats of violence from parents in care cases an occupational hazard – anonymity reserved for exceptional cases

32. Jurisdiction to make interim order where child's father had diplomatic status
Re B (Care Proceedings: Diplomatic Immunity) [2002] EWHC 1751 Fam
The President sought to continue an interim care order obtained in respect of a 13 year old girl who was a Moroccan national and whose father was a driver in the Moroccan embassy, and where severe bruising seen at school found on examination to be serous and non-accidental. Following reasoning of Re R (Care Orders: Jurisdiction) [1995] 1 FLR 711,basis of jurisdiction habitual residence or physical presence at time of application. ICO fell within exception to Art 37(2) of Vienna Convention on Diplomatic Relations 1961 (Vienna Convention and so no procedural bar. Where threshold criteria crossed, Article 3 of European Convention breached and positive obligation on states to investigate

33. Difficulty of conflicting research in shaking baby cases
Re A and D (Non-accidental injury:subdural haematomas)[2002] 1 FLR 337
Questions of degree of force required for subdural haemorrhage to occur subject of conflicting medical opinions. Forces which lead to this occur when baby shaken ('shaken baby syndrome') Less force required than previously believed. More research needed

34. Recognition of role of grandparents to be considered in leave applications
Re J (Leave to Issue Application for Residence Order) [2003] 1 FLR 114
Care proceedings where mother unable to care due to mental ill-health and local authority assessment ruled out 59 year old grandmother due to volatile nature of mother's possible reaction. Trial judge refused grandmother's application for party status and leave to issue residence application. Court of Appeal emphasised importance of s10(9) checklist. Court anxious at application of decision in Re M (Care:Contact:Grandmother's Application for Leave)[1995]2 FLR 86 since whether applicant had a good arguable case applied to section 34(3) not 10(9) – anxiety heightened where applicants enjoyed Art 6 rights to fair trial and possibly Art 8 rights. Important role of grandparents to be recognised, particularly in relation to children of disabled parents.

Have regard to nature of proposed application, connection with child, risk proposed application disrupting

child's life to such an extent harmed by it, where looked after, authority plans for future and wishes and feelings of parents

Adoption

35. Importance of religious matching and the role of judicial review
Re C (Adoption: Religious Observance) [2002] 1 FLR 1119
Local Authority seeking care order with respect to almost 3 year old girl with plan of adoption. Child was to be placed with prospective adopters with a fairly strong Jewish identity but with a relatively low level of religious observance. On the basis that the only connection with Judaism was that the child's mother was Jewish by birth, the Guardian argued that the Jewish couple were unsuitable as the child's mixed heritage required placement in a religiously neutral environment from which exposure to different elements of her background could be developed, and opposed the care order and sought judicial review of the Adoption Panel's recommendation to match the child to the proposed couple. Wilson J in making a care order and approving the plan of adoption with the proposed adopters found the guardian's use of the judicial review procedure as misguided and held that the proper forum to challenge the plan was in the care proceedings. The approach of the guardian was described as inflexible and doctrinaire.

36. Identity of Adopters
Re X (Adoption: Confidential Procedure)[2002] EWCA Civ 828
Siblings removed and placed with foster parents with whom parents had good relationship. Foster parents wished to adopt but keep identity secret and filed serial number adoption. Guardian supported adoption. Parents opposed adoption. Parent's solicitor inadvertently learnt truth and applied for permission to disclose identity of adopters to parents. Refusal of judge to allow disclosure upheld on appeal on basis judge not plainly wrong as parent's case could still be presented. Interests of children in maintaining happy ands secure home now so great that outweighed problems associated with fair trial

Contact in adoption

37. Permission to refuse contact to father in care proceedings overturned where insufficient judicial analysis
Re G (Adoption: Contact) [2002] EWCA Civ 761
Ward LJ in the Court of Appeal allowed a father's appeal in a care case where the judge had given the local authority permission to refuse contact to the father where 4 children (2 sets of twins aged 3 and 18mths) were with foster parents who were going to adopt the children. The care proceedings in relation to 5 children arose of NAI where judge at trial unable to attribute responsibility for injuries between one or both of parents. Oldest child (aged 6) to remain with maternal grandmother. Judge granted s34(4) in relation to father , whilst allowing mother, uncle and aunt ongoing contact. Ward LJ allowed the appeal on the basis judge had not analyses the difference in treatment between mother and father given the exclusion of the father not based on finding he was perpetrator.

38. Foster care payments to relatives or friends
R v Manchester City Council [2001] EWHC Admin 707
Munby J viewed different rates of allowance to family and non-family foster carers as unlawful

39. Article 8 rights engaged in question of artificial insemination information
Rose v Secretary of State for Health and Human Fertilisation and Embryology Authority [2002] EWHC 1593 (Admin), [2002] 2 FLR 962
Claimants born as a result of artificial insemination by an anonymous donor judicially reviewing DOH . Scott Baker declared Article 8 rights engaged with regard to identifying and non-identifying information

40. Representing Children when no guardian appointed
Although issued to Panel solicitors, Law Society Guidance (Sept 2002) applicable: Advocate should represent child in furtherance of the best interests of the child (s41 Children Act & r4.13) While trying to act in accordance with child's best interests, not in a position to advise court what is in the child's best interests. Proper and appropriate to (a) critically appraise LA action and evidence in support of those actions, and seek directions to require filing of further evidence if appropriate, to test and probe case and ensure court has sufficient evidence on which to base its decisions and to test evidence of all parties at contested interims (b) at every opportunity seek appt of CAFCASS guardian and keep it under constant review (c) request and collate as soon as possible all relevant papers (d) should be generally aware of and play a leading role in case management and timetabling issues for benefit of the running of proceedings as a whole.

41. Adoption and Children Act
Royal assent 7/11/02

Biggest overhaul of adoption law for 25 years
Key concern is to increase adoption for looked after children being adopted
Major changes in adoption practice:
- contact. Moves towards openness addressed in explicit duty on court to consider arrangements for allowing any person contact with the child and requirement in section 1 to have regard to the child's relationships
s1 (4)(f) ct should have regard to ability and willingness of any of the child's relatives … to provide the child with a secure environment in which the child can develop, and otherwise meet the child's needs
- need for special support for those affected by adoption. Comprehensive duty placed on local authorities to provide adoption support
- placement orders - authorising placement by local authorities with prospective adopters
- introduction of special guardianship. Deals with need for permanence for children foe whom adoption is not appropriate
- new national adoption register to ensure faster matches
- independent review mechanism for prospective adopters who feel they have been turned down unfairly
- new facility for step-parents. Step-parents can acquire PR by agreement or PR without removing other parent's parental status by an adoption order

First phase of new adoption support framework to be implemented from April 2003 ahead of full implementation of Act currently planned to be in 2004

Key concerns: delay and resources

Government has set a public service agreement target: to increase by 40% the number of looked after children who are adopted, increase to 95% proportion of looked after children placed for adoption within 12 months of the best interest's decision

42. Delay
Further to Booth report on delay in 1996, LCD study in September 2002 Reducing Delays in Family Proceedings recommends more flexible transfer between courts, changes to format of written reasons, greater consistency by extending use of practice directions.

43. Guardians
Serious problems with CAFCASS continue

44. Victoria Climbie
Report published 28th January 2003. Full text on www.victoria-climbie-inquiry.org.uk

45. Useful websites

· www.courtservice.gov.uk/judgments/judg_home.htm (Judgments)
· www.official-documents.co.uk (Selected white/green papers)
· www.parliament.uk/ (Hansard from June 96)
· www.lawrepors.co.uk (Online summary of cases)
· www.hcch.net (Hague signatories and Intercountry adoption)
· www.incadat.com (Child Abduction Database)
· www.offsol.demon.co.uk (Child Abduction Unit)
· www.unicef.org/crc (UN Conv on Rights of Child)
· www.echr.coe.int (ECHR cases)
· www.coe.int (Council of Europe)
· www.doh.gov.uk/quality protects/index.htm (DOH material)
· www.lcd.gov.uk (Lord Chancellor's Department)
· www.alc.org.uk (Association of Lawyers for Children)

An Introduction to Ancillary Relief

Nicholas Cusworth

5 December 2002

Continuing Professional Development Lecture

AN INTRODUCTION TO ANCILLARY RELIEF

A. THE LAW

1. Basic Principles

1.1 Section 25 of the Matrimonial Causes Act 1973 applies in all cases whether the assets are large or small - welfare of the child(ren) is the first but not the paramount consideration

1.2 The section then sets out the criteria to be considered - broadly:-

(a) income, earning capacity, property and other financial resources;
(b) financial needs, obligations and responsibilities;
(c) standard of living;
(d) age of parties; duration of marriage;
(e) physical or mental disability;
(f) contributions (including to welfare of family both in past and in foreseeable future);
(g) conduct (but not very often);
(h) loss as a result of the divorce (nearly always pensions).

1.3 Two main aspects:
(i) Housing

M -v- B (ancillary proceedings: lump sum) [1998] 1 FLR 53, 1 FCR 213 - one of the paramount considerations in applying s25 criteria is to stretch what is available to cover the need for each spouse to have a home particularly where there are young children

But see - Piglowska -v- Piglowski [1999] 2 FLR 763, 2 FCR 481; House of Lords say no rule that spouses' housing needs are to be given greater weight than the other section 25 criteria although "sound sense" of remarks in M -v- B not doubted

But if insufficient for both to have a home - consider a deferred charge; to give the carer of the children all the (limited) capital might seem harsh

Clutton -v- Clutton [1991] 1 FLR 242, FCR 265 - a charge does not offend the principle of the clean break; but not a deferred charge that will simply leave the wife homeless when the children are adult (see, for

example, Carson -v- Carson [1983] 1 WLR 287, 1 All ER 478)

(ii) Maintenance

Campbell -v- Campbell [1998] 1 FLR 828, 3 FCR 62 - maintenance cases need to be evaluated on a broad perspective rather than to look with scrupulous care at every item in a budget; the court balances the wife's needs against the husband's ability to pay

1.4 Can a husband make a claim?

Yes, both parties come to the court as equals - Calderbank [1976] Fam 93, [1975] 3 All ER 333 although that does not mean that justice requires an equal division of the assets.

1.5 Is there a presumption of equality?

White v White [2001] 1 All ER 1, [2000] 3 FCR 555 The House of Lords refused to accept that there is a presumption of equality. However, before a final order, a judge should check his views against "the yardstick of equality" and equality should only be departed from "if, and to the extent that, there is good reason for doing so…."

The House of Lords did stress that the decision in White related principally to how assets should be divided in "big money" cases.

Where needs, and especially the requirements of children of the family, render anything approaching an equal division impossible, the approach of the courts has not been altered by the decision in White, or by the cases that have followed it.

1.6 What is meant by 'big money'?

Basically, when there is a significant sum of money left over after both parties and any children have been re-housed and are provided for by income in a similar style to that enjoyed up to the breakdown of the marriage.

Mrs. White got about 40%. Most wives in the 'big money' category were getting about 40% as well (See eg. Cowan v Cowan [2001] 2 FLR 192; N v N (Financial Provision: Sale of Company) [2001] 2 FLR 69). However, the very recent decision in a case called Lambert v Lambert in the Court of Appeal (14th November 2002) suggests that very few husbands will be able to plead 'exceptional contribution', as Mr. Cowan did successfully, in future. Far more long marriages with children will in future be the subject of 50/50 division in big money cases after the figures have been adjusted for issues like liquidity and inheritance. For the first recent example of the post Lambert approach in practice – see the even more recent decision of Bennett J. of 28th November 2002 (probably to be reported as N v N).

2. Initiating the application

2.1 Ancillary Relief Rules - all applications in Form A
If seeking a Pensions Act order, must say so in application; trustees/managers must be served
Leave required if claim not made in Petition [Rule 2.53(2)]
Applications against yourself - Dart [1996] 2 FLR 286, [1997] 1 FCR 21

2.2 Claim must be made before remarriage - section 28(3)
but can be adjudicated upon thereafter
Claim in Petition sufficient - Jackson [1973] Fam 99, 2 All ER 395

2.3 No final order until Decree Nisi - otherwise void

Munks [1985] FLR 576

2.4 Only one substantive order for ancillary relief - Coleman [1973] Fam 10, [1972] 3 All ER 886 and de Lasala [1980] AC 546, [1979] 2 All ER 1146
No power to vary property adjustment or lump sum orders
- eg. Carson [1983] 1 WLR 287, 1 All ER 478 - unless lump sum order is pursuant to the Pensions Act or is for payment by instalments
also see Sandford -v- Sandford [1986] 1 FLR 412

2.5 Section 31(7B) of the MCA 1973 - a wife can apply to capitalise her periodical payments even where there has already been a dismissal of her capital claims

2.6 Pension Sharing came into force for all Petitions filed after 1st December 2000 (see below). Pension attachment (formerly earmarking) under the Pensions Act 1995 has survived but is unlikely to be used as often. It remains a useful tool whilst there are still pre-December 2000 Petitions coming up for final hearing.

2.7 Maintenance pending suit until Decree Absolute; thereafter, interim periodical payments
See Rule 2.69F for procedure
Highly unusual to have oral evidence on an application for mps - court invariably proceeds on the basis of the (short) Sworn Statements (or Forms E)

2.8 Child periodical payments - jurisdiction if:-

(i) school fees;
(ii) top up only if reached maximum and assessment already made;
(iii) step-parent;
(iv) variation of existing order (including nominal order obtained by consent)
(v) consent order;
(vi) tertiary education;
(vii) overseas element.

but you should prepare a CSA calculation so that the court knows what would be ordered if a CSA case (see E -v- C (child maintenance) [1996] 1 FLR 472, 1 FCR 612).

From an undetermined future date, current CSA calculation will be replaced by simpler calculation, whereby absent parent will pay 15% of net income for one child (20% for 2 children and 25% for 3 or more children)

3. Enforcing the order obtained

3.1 Periodical payments

Maintenance Enforcement Act 1991 s1 - the court can direct that an order for pps (including mps) is paid by standing order and make an Attachment of Earnings Order at the time of making the pps order or at any time thereafter
s8 - the Magistrates Court can order interest on arrears

3.2 Sale of a matrimonial home

3.2.1 The order itself
MCA s24(A) - can order a sale at the same time as the order for ancillary relief or at any time thereafter
s24(A)(ii) - can make "such consequential or supplementary provisions as the court thinks fit" eg directing sale at a particular price or to a particular individual

3.2.2 A recalcitrant spouse
FPR Rule 2.64(3) applies to RSC Order 31(1) to ancillary relief proceedings - the court can order possession against a recalcitrant spouse

SCA 1981 s39; CCA 1984 s38 - DJ can execute transfer documents if a spouse refuses or neglects to do so

3.2.3 A trap to avoid
If equity being divided - do so on a percentage basis if possible to avoid problem in Heard -v- Heard [1995] 1 FLR 971

3.2.4 Interim orders for sale and distribution

Wicks -v- Wicks [1998] 1 FLR 470, 1 FCR 465 -

(i) no power to use FPR Rule 2.64(3) to obtain an interim order for sale (Green -v- Green [1993] 1 FLR 326 disapproved)
(ii) no power of appropriation to deal with net proceeds of a sale in interim (Barry -v- Barry [1992] Fam 140, 3 All ER 405 disapproved)

Can apply for a sale pursuant to Married Women's Property Act 1882 [in the suit - FPR 3.6(2)] or Trusts of Land and Appointment of Trustees Act 1996 (if time) but NB. cannot direct use of the proceeds of sale to buy an alternative property in the interim

Need to await implementation of s22A(4) - interim lump sums - but this not on the horizon at present.

3.3 Lump sum

3.3.1 MCA 1973 s 23(3)(c) - payment by instalments
s31(2)(d) - unlike single lump sums, can be varied (Tilley -v- Tilley [1980] 10 Fam Law 89)

3.3.2 Variation as to timing
Masefield -v- Alexander [1995] 1 FLR 100, 2 FCR 663

3.3.3 Interest
The County Courts (Interest on Judgment Debts) Order 1991
MCA 1973 s23(6)
L -v- L (lump sum: interest) [1994] 2 FLR 324, [1995] 1 FCR 60

3.3.4 Adjourning the claim
M-T -v- M-T [1992] 1 FLR 362, [1991] FCR 649

3.4 Judgment Summons

3.4.1 No legal aid in County Court and very restricted orders for costs

3.4.2 FPR 7.4(10) - Suspended committal orders

3.4.3 The Debtors Act 1869 s5(2) - "must prove to the satisfaction of the court that the person making default either has or has had .... the means to pay ... and has refused or neglected or refuses or neglects to do so"

3.4.4 Standard of proof - criminal (Woodley -v- Woodley [1992] 2 FLR 417, [1993] 1 FCR 701)

3.4.5 Maximum imprisonment is 6 weeks and cannot be imprisoned twice for the same debt although other means of enforcement can be used

3.4.6 Can enforce undertaking in this way provided "integral to the order" (Symmons -v- Symmons [1993] 1 FLR 317)

3.4.7 Can enforce school fees order by Judgment Summons even if quantum of school fees not included in the order (L -v- L (payment of school fees) [1997] 2 FLR 252, 3 FCR 520) but not an order for costs (B -v- B (injunction: restraint on leaving jurisdiction) [1997] 3 All ER 258, 2 FLR 148)

3.4.8 The use of Judgment Summons now likely to be severely curtailed following Practice Direction: Committal Applications [2001] (16/3/01) which applies the Human Rights Act 1998 (esp. Art. 6) to the Judgment Summons process, and Muburak v. Muburak [2001] 1FLR 698, 1FCR 193 - the creditor not only has to prove ability to pay, but also particularise the default.

4. The effect of cohabitation

4.1 If a wife has "earned her share" by contributions during a long marriage, she will not lose that share just because she is cohabiting (Duxbury -v- Duxbury [1992] Fam 62, [1990] 2 All ER 77)

4.2 Maintenance will not automatically cease on cohabitation - it depends on the circumstances of the cohabitant (Atkinson -v- Atkinson [1988] Fam 93, FCR 356 and another case called Atkinson at [1995] 2 FLR 356 and [1996] 1 FLR 51)

4.3 The definition of cohabitation - see Kimber -v- Kimber [2000] 1 FLR 78

5. Termination of maintenance

Note the Court of Appeal cases to the effect that great caution needs to be exercised before terminating periodical payments orders in cases where there is no established earning capacity eg

Flavell -v- Flavell [1997] 1 FLR 353, 1 FCR 332 - lady in her mid 50s
G -v G (periodical payments: jurisdiction) [1997] 1 FLR 368, 1 FCR 441 - lady in her mid 40s with teenage children
C -v- C (financial provision: short marriage) [1997] 2 FLR 26, 3 FCR 360 - lady in her early 40s with very young child

6. Short marriage cases

Putting the applicant back in the position he or she occupied before the marriage
S -v- S [1977] Fam 127, 1 All ER 56
Attar -v- Attar (No. 2) [1985] FLR 653
but cf position where there are children eg C-v-C above

7. The Legal Aid Charge

Practice Direction (statutory charge: form of order of court) [1991] 3 All ER 896, 2 FLR 384
See also Piglowska (above) - should be taken into account but not entitled to make a greater award to one spouse than would otherwise be proper in order to ensure that the charge is postponed

8. Pension Sharing

An order only available in cases where the proceedings (ie. The Petition) were issued after 1.12.2000.
Introduced by WRPA 1999, inserting ss.21A & 24B into MCA 1973
Not available in JS - only divorce or nullity
The parties may agree to rescind a Decree Nisi to enable the court to have pension sharing powers under a new petition (S v S [2001] 1FLR 457).
Though a husband is entitled to decline a proposal by the wife to the filing of a fresh petition in these circumstances, that he has failed to consent may be one of the circumstances to be taken into account (Rye v Rye [2002] 2 FLR 981)

9. Costs

Note the new (penal) rules on costs - Rule 2.69B - D
Gojkovic -v- Gojkovic (no2) [1991] 3 WLR 621, FCR 913
A -v- A (costs: appeal) [1996] 1 FLR 14, 1 FCR 186
The need for a costs estimate (to include how much paid)
The difference between standard and indemnity costs

B. THE PRACTICE

Fundamental changes made by the Ancillary Relief Rules.

(i) The overriding objective;
(ii) Exchange of Forms E (now with the requirement to exhibit a number of specified documents);
(iii) Preparation of Questionnaire (if necessary), Chronology, Statement of Issues and Form G (can First Appointment be used as FDR) 14 days before First Appointment;
(iv) Judicial control of litigation at First Appointment;
(v) Concept of Financial Dispute Resolution hearing with all offers, proposals and responses available to Judge;
(vi) Need for costs estimates at all times and possibility of wasted costs orders if non-compliance with rules;
(vii) Need for client attendance at all hearings unless otherwise directed
(viii) Need for open proposals before final hearing;
(ix) No Sworn Statements without direction (although see W -v- W [2000] Fam Law 382/473);

10. Preparing Questionnaires

10.1 See the New Rules - the Questionnaire must be drafted with reference to the Statement of Issues [(Rule 2.61(b)(7)(c)]; in some cases, there will be no need for a Questionnaire at all

10.2 Stick to relevant questions (eg do not ask refuse collectors for details of their offshore trusts)

10.3 Credit card statements - highly unlikely to need more than one year (holidays, standard of living)

10.4 Bank statements - one year's statements should be annexed to Form E; if appropriate, ask for identification of specific credits and debits; look for transfers to undisclosed accounts or payments for non-disclosed policies

10.5 When answering a Questionnaire, always ensure the Reply includes the Question

11. Preparing the bundles

11.1 See Practice Direction: Court Bundles [2000] 1 FLR 536 - applies to all hearings of 1/2 day or more and any hearings in the High Court/RCJ

11.2 The bundle must be paginated (numbered) throughout and placed in a ring binder or lever arch file (no more than 350 pages in each)

11.3 Note the order of the documents - (a) applications and orders; (b) statements and affidavits; (c)

expert's reports; (d) other documents

11.4 Try not to include documents disclosed in reply to a Questionnaire unless they are likely to be referred to in court

11.5 Rule 3.1 - the bundle should commence with (a) a summary of the background to the hearing; (b) a statement of the issue(s) to be determined; (c) a summary of the order sought; (d) a chronology if a final hearing or (a) above is insufficient; (e) skeleton arguments as appropriate with copies of authorities relied on

11.6 In all but the most simple case, a Schedule of Assets will also be vital (bringing the content of the 2 Forms E together).

11.7 The bundles should be filed 2 clear days prior to the hearing

See Re CH (family proceedings: court bundles) [2000] 2 FCR 193 for the penalties for non-compliance

12. Preparing for the final hearing

12.1 Highlighters and "post-its" are invaluable for finding documents/important passages

12.2 When reading the papers, jot down points for cross-examination bearing in mind that they need to be relevant to section 25 factors

13. Ascertaining the assets

13.1 Joint experts now far more likely but, if not, the experts must talk to each other to attempt to agree values prior to the date of the hearing

13.2 An accurate redemption statement should be obtained for all mortgages or charges

13.3 Surrender values (or sale values) for all endowment policies plus dates of maturity with projected maturity values

13.4 Pensions - transfer values and projections

14. Alternative property particulars

14.1 Get a good spread but not hundreds of particulars

14.2 Provide a map with the properties identified plus the matrimonial home, children's school, etc

14.3 Your client should view all particulars (to point out the power station behind the garage etc) and take pictures if possible

15. Earning capacity

15.1 Client should keep a list of all applications, rejection letters, etc

15.2 On the other side, general questioning is not particularly effective. Get details of relevant courses, copies of job advertisements, etc. In an appropriate case, an Employment Agency may be able to provide

a Statement

16. Submissions

16.1 The New Rules require "open" offers prior to the hearing; in any event, you must always know what order you are asking for and why - the DJ may ask you at the conclusion of your opponent's opening

16.2 Final submissions can much more effective in writing but this is not always possible. NB - don't prepare them before your client's evidence - you may find your case changes!

Nicholas Cusworth
1 Mitre Court Buildings
Temple
London
EC4Y 7BS

24 February 2003

The Human Rights Act 1998 - An Introduction for Family Practitioners

Stewart Leech

10 April 2003

Continuing Professional Development Lecture

THE HUMAN RIGHTS ACT 1998
AN INTRODUCTION FOR FAMILY PRACTITIONERS

by
Stewart Leech, Queen Elizabeth Building
10th April 2003

PART I: BACKGROUND

A. THE HUMAN RIGHTS ACT 1998 – SCOPE AND SCHEME

1. Bringing Rights home
1.1. The Act, which came into force on 2 October 2000, enjoys a unique position on the statute book. Rights have been "brought home" in the sense that individuals are now able to rely on their fundamental rights and freedoms as protected by the European Convention in their relations with the state in all its manifestations. In terms of litigation they no longer have to exhaust their domestic remedies then bring a case in Strasbourg: they are able to raise Convention arguments in any court in the land. [Note, however, that if all else fails a new "slimmed down" Strasbourg remains the ultimate tribunal in terms of human rights.]

2. The Two key features of the Act
2.1. A strong interpretative section.
2.2. A new cause of action for breach of statutory duty.

3. Interpretation of legislation
3.1. All primary and secondary legislation, whenever enacted, must (so far as it is possible to do so) be read and given effect in a way which is compatible with the rights and fundamental freedoms set out in those parts of the European Convention on Human Rights which have been enacted .

3.2. Where a court or other tribunal is determining any question which arises in connection with a "Convention right", it must take into account any Strasbourg jurisprudence which, in the opinion of the court or tribunal, is relevant to the question which has arisen .

3.3. Declarations of Incompatibility
Where a higher court (the High Court and above) is satisfied that a provision in primary legislation is incompatible with a Convention right it may make a declaration of incompatibility . Similarly, a higher court may make such a declaration in respect of subordinate legislation which it considers incompatible where the primary legislation under which it is made prevents removal of the incompatibility . Where the court takes the view that the relevant primary legislation does not prevent removal of the incompatibility, it may simply quash the subordinate legislation.

3.4. Note that the government is entitled to notice in any case in which the court is considering making a declaration of incompatibility so that it may intervene .

3.5. Note also that parliamentary sovereignty is preserved in that, irrespective of any declaration, incompatible legislation remains fully in force (pending any remedial action being taken by the relevant Minister) . It follows that a declaration of incompatibility is not binding on the parties to the proceedings in which it was made .

3.6. The interface between interpretation and incompatibility
Since the 1998 Act come into force the family courts have shown themselves to be very reticent in terms of making a declaration of incompatibility. The preferred approach is to stretch the construction of a statutory provision (for examples of this in action see Re K (Secure Accommodation Order: Right to Liberty) where the President said "the duty of the English court under the Human Rights act 1998 is to attempt to find a compatible interpretation. If a compatible interpretation can be found there is no justification for a declaration of incompatibility". The President went on to quote with approval an extra-judicial observation of Lord Cooke who said "Section 3(1) will require a very different approach to interpretation from that to which the United Kingdom courts are accustomed. Traditionally the search has been for the true meaning, now it will be for a possible meaning that will prevent the making of a declaration of incompatibility." See also Re W and B; Re W (Care Plan) where Hale LJ stressed that "the Human Rights Act 1998 was carefully designed to promote the search for compatibility rather than incompatibility between primary legislation and the Convention rights."

3.7. R v A (No 2)
This was perhaps the 'high water mark' in terms of stretching interpretation to avoid incompatibility. The case centred on s41 of the Youth Justice and Criminal Evidence Act 1999 which severely limited the circumstances in which a complainant in a rape case can be cross-examined about her sexual history. Lord Steyn stated that section 3 of the HRA 1998:
"places a duty on the court to strive to find a possible interpretation compatible with Human Rights. Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further… In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve reading down the statute but also the implication of provisions."
3.8. Lord Irvine stated that the decision in R v A (No.2) "was an expansive use of section 3" and that "it appears to have been the most extreme use of the interpretative power" .

3.9. The House of Lords appears to have backtracked somewhat in the family case of Re S in which it was held that the provisions of the Children Act 1989 rendered the court functus once a care order had been made and could not be interpreted in such a way as to permit ongoing supervision by the court of the implementation of a care plan. Lord Nicholls, at para. 40 of his speech, stated:
"For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and

amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate."

4. Acts of public authorities
4.1. It is now unlawful for a public authority to act in a way which is incompatible with a Convention right (although it is a defence if the public authority could not have acted differently due to primary legislation or is acting pursuant to primary legislation which cannot be read compatibly). "An act" includes a failure to act . A new statutory cause of action is therefore created against all public authorities, with the exception of either House of Parliament (apart from the House of Lords acting in a judicial capacity).

4.2. The definition of public authority is extremely wide and includes:
(a) a court or tribunal
(b) any person certain of whose functions are functions of a public nature (eg NSPCC).

4.3. Horizontal effect in family proceedings
The effect of the Act in terms of public law and the relationship between the individual and the State (in the form of local authorities, the police etc) is obvious. The Act does not make it unlawful for a private individual to act in a way which interferes with another's Convention rights. The Act does, however, have an impact on private law disputes in two ways. First, the Strasbourg organs have long recognised that there may be positive obligations on a State to take measures designed to secure respect for, for example, private or family life even in the sphere of the relations of individuals between themselves (see the quotation from X and Y v The Netherlands set out below). Secondly, once a court becomes seized of a private dispute the court (qua public authority) must act compatibly with the Convention rights of all the individuals concerned . It cannot sanction one party's interference with another's rights unless such an interference is permissible under the Convention itself. (For an example of this horizontal applicability in action see Payne v Payne , a leave to remove case, where Thorpe LJ said that the view expressed by Buxton LJ in an earlier case to the effect that the Convention had no place in private disputes was not sustainable).

5. Procedure
5.1. See FPR r10.26 (inter alia you should plead human rights points in your originating process) and note President's Direction 24 July 2000 Human Rights Act 1998 [2000] 2 FLR 429 (list of 'human rights' authorities to be lodged 2 clear days before the hearing).

B. THE EUROPEAN CONVENTION

6. The Relevant Articles
6.1. Not all of the provisions of the European Convention have been incorporated into the 1998 Act. Those that have been are as follows (the key Articles for family lawyers are in bold):

· Article 2 Protection of life
· Article 3 Inhuman and Degrading Treatment
· Article 4 Forced or Compulsory Labour
· Article 5 Liberty and Security of the Person
· Article 6 Right to a Fair Trial
· Article 7 Retrospective Criminal Law
· Article 8 Respect for Family and Private Life
· Article 9 Freedom of Conscience
· Article 10 Freedom of Expression
· Article 11 Freedom of Association
· Article 12 Right to Marry and Found a Family
· Article 14 Freedom from Discrimination

Protocol 1
· Article 1 Enjoyment of possessions
· Article 2 Right to Education
· Article 3 Free Elections

Protocol 6
· Article 1 Abolition of the Death Penalty

· Article 2 Death Penalty in Time of War

7. The nature of rights
7.1. The Rights protected by the Convention fall into two categories: absolute rights which permit of no derogation or qualification (eg Article 3 “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”) and non-absolute rights the enjoyment of which may be qualified in some way (eg Article 8 “Everyone has the right to respect for his private and family life, his home and correspondence. There shall be no interference by a public authority with the exercise of this right EXCEPT …”

7.2. Note that Article 14 is a dependant right. It is not a free-standing anti-discriminatory provision. The would-be complainant must first demonstrate that one of the substantive rights set out in the Convention is engaged in the sense that the matter of which (s)he complains falls within the ambit of a substantive right . It is not necessary, however, to establish a breach of the substantive right. Note, however, that not all differences in treatment amount to unlawful discrimination. A difference in treatment will not be considered to be contrary to Article 14 if it has an objective and reasonable justification. This means that: (i) it must be in pursuit of a legitimate aim and (ii) there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved .

8. Key Principles of Construction

8.1. A living instrument
The convention is often referred to as a “living instrument” requiring a “dynamic” interpretation. Human rights standards as embodied in the Convention must be interpreted in the light of changing circumstances and values in a developing society. What is or is not acceptable has to be re-evaluated as times change : this has obvious implications for the Common Law system of precedent.

8.2. Autonomous Concepts
Human rights are to be considered as autonomous concepts. A government cannot opt out of its obligations under the Convention by re-classifying obligations in domestic law. So, for example, the UK government will not be able to avoid its obligations in respect of quasi criminal matters such as committals by classifying them as “civil matters”.

8.3. The Margin of Appreciation
Strasbourg, as an international court, has long recognised that domestic authorities may be better placed to determine certain issues, particularly where there is a number of possible views or approaches and where moral or social issues are concerned. A doctrine has therefore emerged whereby domestic authorities are given a certain latitude or “margin of appreciation”. This doctrine has been subject to criticism from within and outside the Court and reliance on it in some cases can be interpreted as a “fudge” or, worse, as a desire to reduce human rights standards to the lowest common denominator. Practitioners should be wary of setting too much store by cases which are resolved on the basis of the margin of appreciation. Note that the margin is a concept which is unique to international law and it is not open to our domestic courts to import such a doctrine into the application of Convention Rights here.

PART II: ISSUES ARISING OUT OF ARTICLE 8 (RIGHT TO RESPECT FOR FAMILY LIFE) AND ARTICLE 6 (RIGHT TO A FAIR TRIAL)

9. ARTICLE 8
9.1. Article 8 of the Convention reads:
1. Every body has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

10. Applicability
10.1. The Convention applies to children (from the moment of birth) as it does to adults. There is no explicit presumption that the welfare of the child is the paramount consideration in resolving disputes. Nevertheless, the ECHR has found that the best interests of the child may be the paramount factor in

determining custody . The Commission, too, has referred to the child's interests being dominant, saying: "Where there is a serious conflict between the interests of the child and one of its parents which can only be resolved to the disadvantage of one of them, the interest of the child must prevail."

10.2. Moreover, the Court has observed that:

".... the parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development."

10.3. And in a more recent case the Court has reiterated that:
"… in judicial decisions where the rights under Article 8 of parents and those of a child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail."

10.4. It seems that as far as the English Court of Appeal is concerned, our domestic "paramountcy principle" is in no way in conflict with the Convention - see eg Thorpe LJ in Payne v Payne "the jurisprudence of the European Court of Human Rights inevitably recognises the paramountcy principle albeit not expressed in the language of our domestic statute".

10.5. The Strasbourg authorities have been reticent in terms of setting out what factors domestic courts should take into account in determining what is in the best interests of the child although they have signified the importance of continuity of development or consistency in the child's upbringing. They have yet, however, to insist that the child's wishes be taken into account although clearly an award of, say, residence to a parent in the face of strong opposition from a mature child would raise issues of arbitrariness .

11. Family life
11.1. Although the European Convention contains no definition of "family life" the Court and Commission have interpreted the notion widely and the concept has evolved to take stock of changes in society.

11.2. Essentially, the existence of "family life" is a question of fact to be resolved by taking account of all the circumstances of a given case. Some family relationships, however, attract the protection of Article 8 automatically. In particular where marriage is involved. Thus, a child born to parents who are lawfully married will be part of that relationship from the moment of and by the very fact of his/her birth . Similarly, the relationship between a mother and her child appears to attract the provisions of Article 8 automatically, irrespective of marriage .

11.3. Unmarried fathers
Family life will normally be found to exist between unmarried fathers and their children where they live or have lived together (although the European Court has frequently stressed that cohabitation is not a sine qua non of family life). In the absence of cohabitation, however, Strasbourg jurisprudence has, historically at any rate, sought evidence of some sort of constancy in the parental relationship or of some commitment from unmarried fathers seeking to invoke Article 8, whether in the form of contact or financial support for their children. More recent cases hint at a relaxing of this approach, however, particularly in the context of immigration . In the case of Söderbäck v Sweden family life was found to exist between an unmarried father and his child despite the fact that they had never lived under the same roof and had not enjoyed regular contact. For a recent domestic decision where a difference was found to exist between two unmarried fathers in respect of whether they had a right to family life with children who were being placed for adoption see Re H; Re G (Adoption: Consultation of Unmarried Fathers) .

11.4. It should be noted, however, that ECHR jurisprudence has dealt with the wider issues involving unmarried fathers on a case-by-case basis and there is room for some perhaps surprising results. In Keegan v Ireland , which concerned the placement of a child for adoption without the unmarried father's knowledge or consent, the court held that the relationship between the applicant and the mother had the hallmark of family life and therefore the placement for adoption amounted to an interference with the father's right to respect for his family life with the child. In McMichael v UK , on the other hand, the unmarried father whose child was placed in care and freed for adoption complained that, under Scots law, unlike the mother, he had no parental rights from the child's birth, no legal right to custody and no right to participate in proceedings. His complaint was rejected by the Court, which held that the aim of the relevant legislation which was to provide a mechanism for identifying "meritorious" fathers was legitimate

and that the conditions imposed on natural fathers for obtaining recognition of their status were proportionate to that legitimate aim. The notion that it may be legitimate to treat married and unmarried fathers differently has recently been restated by the European Court in B v UK (a case concerned with international child abduction) - although contrast that with Sahin v Germany .

11.5. The extended family
The convention has been held to extend to relations between grandparents and grandchildren , siblings and uncle and nephew . Each case depends on its facts and on the nature of the bond between the child and the person claiming to have a right to family life with him/her. Family "ties" do not in themselves constitute family life and a complainant may need to substantiate the reality of an actual and subsisting family life, regardless of blood or other ties.

11.6. Atypical family structures
Atypical units may also fall within the concept of family life if the de facto reality of their situation is to all appearances indistinguishable from the traditional family unit. Thus in X, Y and Z v UK the Commission accepted the existence of family life where a child was born by artificial insemination by anonymous donor to a woman living in a long-term stable relationship with a female to male transsexual.

With same-sex couples, however, the Commission has found that a stable homosexual or lesbian relationship does not fall within the ambit contemplated by "family life", even where there is a sharing of a parental role, although issues can arise with regard to respect for private life (also protected by Article 8) . The position of same-sex couples in Europe is evolving, however, and it may be that where, for instance, both parent and partner have joint residence orders (thereby conferring parental responsibility on the partner) family life will exist between the partner and the child – a point that the UK government conceded in the X, Y and Z case. Note that our domestic courts may well take a more enlightened approach in terms of accepting that "family life" extends to same-sex couples – see, for example, the comments by Singer J in Re W (Adoption: Homosexual Adopter) where he said in relation to a child whose adoption was in dispute "the family in question comprises two women living together in a lesbian relationship" and the views expressed by the majority of the House of Lords in Fitzpatrick v Sterling Housing Association Ltd .

11.7. Family life exists between within adopted families and, depending on the facts, may also exist within foster families. However, a natural parent who donates sperm or an egg for the purpose of AID does not acquire a right to respect for family life solely by virtue of that fact .

12. Ending family life
Once established, family life does not come to an end on divorce or on the end of cohabitation, even if the relationship broke down and the parties ceased to cohabit prior to the birth of the child . Nor is family life in these circumstances terminated by a decision to place a child in care although subsequent events such as adoption may, in exceptional circumstances, end it .

13. Justifiable interference with family life
13.1. As noted above, the rights set out in paragraph 1 of Article 8 are not absolute.

13.2. Paragraph 2 permits interferences subject, however, to the provisos set out in that paragraph.

13.3. "... in accordance with the law"
The first proviso is that any interference must be in accordance with the law. This does not simply mean that there must be a statutory provision or other legal basis (eg common law) permitting the interference. ECHR jurisprudence has established that:

(a) the legal basis for the interference must be sufficiently precise in its formulation to allow the citizen – with appropriate professional advice if necessary – to foresee, to a degree that is reasonable in the circumstances, the consequences which his or her acts might entail.

(b) the scope of any discretion conferred by the law and the manner of its exercise should be indicated with sufficient clarity to protect the individual against arbitrary interferences.

13.4. "... necessary in a democratic society..."
The second proviso is that any interference must be "necessary" in a democratic society. The word "necessary" has been interpreted to mean that there must be a "pressing social need" for the measure in question. To be legitimate, an interference must also be proportionate. The means that:
· there must be a reasonable relationship between the means employed and the ends envisaged
· the interference should impair as little as possible the right or freedom in question
· any measures adopted which may or will interfere with that right must be carefully designed to meet the objectives in question
· the interference should not be based on arbitrary, unfair or irrational considerations.

13.5. The pursuit of a legitimate aim
Thirdly, the interference must pursue one of the legitimate aims set out in paragraph 2. Ordinarily, measures interfering with family life will be aimed at protecting the health or the rights and freedoms of other members of the family, particularly children. In other contexts (such as in immigration/deportation cases where families may be broken up) the interference may be in pursuit of other legitimate aims such as the economic well-being of the country or the prevention of crime.

14. Example
14.1. In W v UK , a case dating from 1987, a man and his wife who had experienced difficulties voluntarily placed their child in the care of the local authority. The local authority subsequently assumed parental rights and took steps to place the child for adoption with a termination of contact. There followed proceedings in wardship but by the time the case came on for final hearing the trial Judge felt he had no practical alternative but to leave the child with his foster carers in view of the time that had elapsed since the child last had contact with his natural parents. Eventually, the child was adopted.

14.2. The father brought a complaint before the ECHR. There was no issue that the local authority had acted in accordance with the law and in pursuit of a legitimate aim. The heart of the matter was whether the procedures adopted by the authority were "necessary in a democratic society". The applicant father and his wife had not been informed or consulted in advance about the parental rights resolutions nor, apparently, about the proposed placing for adoption and termination of contact. The ECHR held that they had not been sufficiently involved in the decision-making process and that there were insufficient procedural guarantees for them which meant that the interference in their family life could not be regarded as "necessary in a democratic society".

15. Failures to act
15.1. There may also be a breach of the right to family life even where there has been no obvious "interference" within the meaning of paragraph 2. A failure to take positive action (whether by the legislature, courts, or other public authorities) may in certain circumstances amount to a failure to meet the obligations imposed by article 8. In X and Y v Netherlands the Court said:
"(Article 8 does not merely compel the State to abstain from ... interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life.... These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."

15.2. Examples of failures to meet this positive obligation within the context of article 8 may be found in Marckx v Belgium , where the Court concluded that the state had failed to take appropriate action in fulfilment of its positive obligation under article 8 in particular by failing to recognise a child born outside marriage as a member of her mother's family, thereby preventing the applicants from leading a normal family life, and in Hokkanen v Finland where the court found that the state had failed to take sufficient steps to enforce contact orders and had failed to make reasonable efforts to reunite parent and child. (Note, however, Glaser v UK where the court said that while national authorities must do their utmost to facilitate cooperation in respect of contact, any obligation to apply coercion must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account.)

15.3. On this latter point, it is important to note the emphasis placed by the Strasbourg authorities in this case and many others on trying to encourage reunification of families and the fostering of real contact with a view to achieving that end in cases where children are placed with alternative carers. In Johansen v Norway the ECHR indicated that if at all possible the taking of a child into care should be a temporary measure and that the termination of contact (a fundamental aspect of family life) could only be justified in exceptional circumstances and where the best interests of the child required it. So too, in Eriksson v Sweden the Court was particularly concerned that the unsatisfactory situation appeared to stem in large measure from the authorities' failure to ensure any meaningful contact between a Mother and her child

with a view to reuniting them.

16. Suggested approach to potential article 8 issues

1. Is article 8 engaged? (ie has the applicant/complainant established a private/family life/home/correspondence to be respected?)
2. Has there been an interference?
3. If so, was the interference in accordance with the law?
4. If so, was it in pursuit of one of the legitimate aims set out in Art 8(2)?
5. Was it "necessary in a democratic society"? (was it proportionate)
6. Is it non-discriminatory (in terms of Art 14)?

17. ARTICLE 6
17.1. Article 6(1) of the Convention provides:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

17.2. Article 6 requires that parties to litigation have access to a fair, adversarial procedure. There should be "equality of arms" between them. The principle was described thus in Dombo Beheer v Netherlands : "It is clear that the requirement of 'equality of arms', in the sense of a 'fair balance' between the parties, applies in principle to 'cases concerning civil rights and obligations' as well as to criminal cases. The court agrees with the Commission that as regards litigation involving opposite private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-a-vis his opponent."

This might mean, for example, that parents should have access to relevant documents, such as social reports, that have been lodged at Court .

17.3. The right is a right of effective access to court. This has implications in respect of those areas in which certain authorities or individuals enjoy immunity from suit and in relation to the availability or non-availability of legal aid for certain proceedings .

17.4. The right to appear in person is implied in the notion of a fair trial and it is arguable that parties ought to be able to give/challenge oral evidence in cases where they traditionally do not do so (eg child abduction cases which are usually disposed of summarily with no oral evidence , ex parte proceedings such as EPOs and many interim care orders). Note, however, the recent case of Re B and T (Care Proceedings: Legal Representation) where the Court of Appeal restated the principle that, in deciding whether anyone has been deprived of a fair hearing the court must look at the entirety of the proceedings; it was not fair to extract part of the process and look at that in isolation.

17.5. Article 6(1) also requires that cases be heard within a reasonable time and the Strasbourg authorities have held that what is "reasonable" will vary according to the complexity of a given case and to the way in which the parties have conducted themselves in terms of the litigation . Reasonableness is also to be measured in terms of what is at stake for the parties and any others affected by the proceedings and by whether the effectiveness or credibility of justice may be impinged. Delay in cases involving children – especially where there is a removal of children from the care of their parents and/or a cessation of contact pending a final hearing – is an area where there is a very real prospect of breaching article 6.

17.6. Article 6(1) provides that everyone is entitled to a public hearing and to public pronouncement of the judgment. The first entitlement is subject to certain exceptions, most notably where the interests of juveniles (not defined in the Convention) or the private lives of the parties so require. In B v UK; P v UK the European Court sanctioned our domestic practice in respect of children's cases. It has also held that excluding the public from divorce cases is justifiable as being necessary in terms of protecting the private

lives of the individuals concerned . It remains to be seen whether the practice of hearing ancillary relief cases in private will continue. As far as the English Court of Appeal is concerned, however, the position is "no change" - see Allan v Clibbery .

18. WHERE CAN I FIND OUT MORE?
The best way to get a feel for this area is to read the reports as they appear in the FLR (subject heading "Human Rights") or the EHRR if you have access to them. The EHRLR contains many specialist articles (including one by me!).

The "usual" text books are as follows:-
Law of the European Convention on Human Rights, Harris, O'Boyle and Warbrick (1995)
The European Convention on Human Rights, Jacobs and White (1996)

See also European Human Rights Law, Starmer (1999) and
Human Rights Practice, Simor and Emmerson (looseleaf)

The main specialist family book is Family Law and the Human Rights Act 1998, Swindells et al (1999)

The best tool for researching caselaw from the European Court is to go to the HUDOC website. To do this go to www.echr.coe.int, click on "HUDOC", then click on "Access HUDOC" and that will take you to the search engine.

Good luck!

STEWART LEECH
Queen Elizabeth Building
Temple
London
EC4Y 9BS

April 2003

Domestic Violence Injunctions

Joanne Brown

13 March 2003

Continuing Professional Development Lecture

DOMESTIC VIOLENCE INJUNCTIONS

Non-molestation orders (Family Law Act 1996) Occupation orders (Family Law Act 1996)
Who may apply An associated person (s62(3))· They are or have been married· They are cohabitants or former cohabitants (s62(1))Crake v Supplementary Benefits Commission [1982] 1 All ER 498Re J (Income Support: Cohabitation) [1995] 1 FLR 660 G v G (Non-molestation Order: Jurisdiction) [2000] 2 FLR 533· They live or have lived in the same household, otherwise than merely by reason of one of them being the other's employee, tenant, lodger or boarder (s62(3)(c))· They are relatives (s63(1))· They have agreed to marry each other (whether or not that agreement has been terminated) (s62(3)(e))· In relation to a child both persons are parents or have or have had parental responsibility for the child· They are parties to the same family proceedings Is property a dwelling house?Did the parties occupy it, or intend to occupy it as their home?Are the parties associated?If yes, yes and yesS33 application if entitled, or married to respondent, or divorced but retaining matrimonial home rights by virtue of court orderS35 if entitled and former spousesS36 if entitled and not former spousesS37 if the property is the present or former matrimonial home of spouses or former spousesS38 if the property is the home where the parties

last lived together and they are cohabitants or former cohabitants

Without notice applications

FPR r3.8(5)- sworn statement must state reasons for no notice having been given

Section 45(1)
Guidelines set out in section 45(2)
– all the circumstances +
· Any risk of significant harm to the applicant or relevant child attributable to conduct if the order is not made immediately
· Whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately
· Whether reason to believe that the respondent is deliberately evading service and that the applicant or a relevant child will be seriously prejudiced by delay involved in effecting service (magistrates' court) or in effecting substituted service (any other case)

Re S (Ex Parte Orders) [2001] 1 FLR 308 – "Munby's Rules"
· Duty to make full, candid, frank disclosure of all relevant circumstances
· Under an obligation to bring to the attention of the respondent, at the earliest practicable opportunity, the evidential and other persuasive materials on the basis of which the without notice injunction was granted
· It is appropriate for the court to require the applicant (and, where appropriate, the applicant's solicitors) to give the following undertakings:
o where proceedings have not yet been issued, to issue and serve on the respondent either by some specified time or as soon as practicable
o where an application has been made otherwise than on sworn evidence, to cause to be sworn, filed and served on the respondent as soon as practicable an affidavit or affidavits substantially in the terms of the draft affidavit(s) produced to the court or, as the case may be, confirming the substance of what was said to the court by the applicant's counsel or solicitors; and
o subject to the above, to serve on the respondent as soon as practicable (i) the proceedings, (ii) a sealed copy of the order (iii) copies of the affidavit(s) and exhibit(s) containing the evidence relied on by the applicant and (iv) notice of the return date including details of the application to be made on the return date
· A person who finds himself unable to comply timeously with his undertaking should either (i) apply for an extension of time before the time for compliance has expired or (ii) pass the task to someone who has available the time in which to do it
· Whether or not express undertakings as set out above have been given, but subject to any orders to the contrary, an applicant who obtains without notice injunctive relief is under an obligation to the court, and the solicitor acting for the applicant is under an obligation both to the court and to his lay client, to carry out the various steps set out above
· A without notice order containing injunctions should set out either by way of a recital or schedule, a list of all affidavits, statements and other evidential materials read by the judge
· Persons injuncted without notice are entitled to be given, if they ask, proper information as to what happened at the hearing and to be told, if they ask (i) exactly what documents, bundles or other evidential materials were lodged with the court either before or during the course of the hearing (iii) what legal authorities were cited to the judge
· Applicant's legal representatives should respond forthwith to any reasonable request from the respondent or his legal representatives either for copies of the materials read by the judge or for information about what took place at the hearing.
· It is prudent for those acting for the applicant to keep a proper note of the proceedings

Non-molestation orders

How will the court exercise its discretion?

Section 42(5) – matters to which the court must have regard – "to all the circumstances including the need to secure the health, safety or well-being" of the applicant, the person for whose benefit the order would be made and of any relevant child.

Length of non-molestation order

Section 42(7) - “a non-molestation order may be made for a specified period or until further order”

Power of arrest

S47(2) where “(a) court makes a [non-molestation or occupation order]; and (b) it appears to the court that the respondent has used or threatened violence against the applicant or a relevant child it shall attach a power of arrest to one or more provisions of the order unless the court is satisfied that in all the circumstances of the case the applicant or child will be adequately protected without such a power of arrest”

Re H (Respondent under 18: Power of Arrest) [2001] 1 FLR 641 – can attach a power of arrest when the respondent is under 18.

Duration of power of arrest – s47(4) and (5) Re B-J (Power of Arrest) [2000] 2 FLR 443 – can be shorter than the duration of the injunction.

Applications for occupation orders under section 33

Has the applicant established that she, or a relevant child, is likely to suffer significant harm attributable to conduct of the respondent if an order is not made. (s33(7) and s63)

Yes No

Has the respondent established that he or any relevant child is likely to suffer significant harm if the order were made? s33(6) factors

Yes

Balance of harm test.

Duration of orders – s33(10)

Chalmers v Johns [1999] 1 FLR 392
B v B (Occupation Order) [1999] 1 FLR 715
G v G (Occupation Order: Conduct) [2000] 2 FLR 36

Remember s40 Nwogbe v Nwogbe [2000] 2 FLR 744

Applications for occupation orders under section 35

· S35(6) sets out matters to which the court must have regard when considering orders under s35(3) or (4) (includes lapse of time since separation and since dissolution of the marriage)
· S35(7) sets out matters to which the court must have regard when considering orders under s35(5)

Don’t forget subsection (8) – if an order is to be made, the court shall include a subsection (5) provision unless the respondent or any relevant child is likely to suffer significant harm if the provision is included in the order and …balance of harm…test

S v F (Occupation Order) [2000] 1 FLR 255

Duration of orders (s35(9) and (10)) – for no longer than six months, any number of extensions can be ordered.

Applications for occupation orders under section 36

Note the differences at s36(6)(e) to (h) and s36(7)

Duration of orders (s36(9) and (10) – for no longer than six months, only one extension can be ordered.

Applications for occupation orders under section 37 and 38

Note the different factors under section 38(4)

Duration of orders (s37(5) and s38(6)) – for no longer than six months, only one extension can be ordered

Undertakings
· S46
· Power of Arrest cannot be attached to an undertaking
· The court shall not accept an undertaking where a power of arrest would be attached to an order

Procedure:

Recording of undertaking In Form N117 – should be explained to the respondent by the judge and the respondent asked to sign it

Mutual undertakings Two separate forms

Service of undertakings Court must provide a copy to the person giving the undertaking.

Service – by handing a copy to him before he leaves the court building (court clerk must record the way in which delivery was effected in the relevant box on back of form), by posting him a copy, through solicitor or by personal service.

Judge's responsibility 1. to approve the terms of the undertakings
2. to ensure giver understands meaning of undertakings and consequences of breach
3. to consider whether giver should sign undertaking
Committal

President's Direction (Committal applications and proceedings in which a committal order may be made) [2001] 1 FLR 949
Hale v Tanner [2000] 2 FLR 879 and A-A v B-B [2001] 2 FLR 1– guidance on sentencing
Potential pitfalls
1. Without notice applications
a. explanation as to why the application is being made without notice MUST be included in the sworn statement

b. Respondent MUST be PERSONALLY SERVED with:
i. copy of the order made
ii. copy of the application
iii. copy of the sworn statement
iv. notice of the date of the full hearing

2. Application for an occupation order and notice in Form FL416 MUST be served by FIRST CLASS POST on the mortgagee or landlord.

3. Tenancies
a. An order for a transfer of a tenancy under any statutory provision needs to be made before the tenancy has come to an end

b. An application for a transfer should be made as soon as possible

c. Consider whether an application for an injunction preventing the outgoing tenant serving a notice to quit on the landlord should be made (mandatory injunction to maintain the rights created by the tenancy and injunction not to serve a notice to quit pending the determination of the substantive application (see Bater v Greenwich London Borough Council [1999] 2 FLR 993).

d. If the Respondent "agrees" to leave the property – will be intentionally homeless if the order is made by consent and will not be rehoused.

4. Is the order compatible with any current or future contact arrangements?

5. The Respondent is unrepresented:
a. Stay the right side of the explanation/advice line

b. Should you agree contact arrangements?

c. Should you agree arrangements for collection of belongings?

6. The Applicant is publicly funded and the Respondent is working – should an application for costs be made?

7. Cross-undertakings.

What else should I know?

1. Contact
Remember:
· Allegations of domestic violence should be heard and adjudicated upon before a final section 8 order is made.
· There is no presumption against direct contact in cases involving domestic violence

2. Trusts of land

3. Schedule 1 of the Children Act 1989

4. Ancillary relief application

What happens next?

1. Evidence
a. medical report
b. telephone records
c. tape recordings
d. text messages
e. statements from friends and family

2. Tell the client
a. What has happened
b. What order has been made
c. When the order takes effect
d. What happens to the Power of Arrest
e. How the order will be served
f. What to do if there is a breach of the order
g. What may happen at the next hearing

The final word - literary comforters
The Family Court Practice
Domestic Violence and Protection From Harassment (4th Edition) – Roger Bird
Emergency Remedies in the Family Courts

Joanne Brown
12 March 2003
Chambers of Lionel Swift QC
4 Paper Buildings
Temple

Public Child Law

Judith Rowe QC

23 October 2003

Continuing Professional Development Seminar

ADOPTION

Re G (Adoption: Contact) (2003) 1 FLR 270 CA

A local authority brought care proceedings in respect of 5 children, three of whom had sustained injury. In those proceedings the Judge found that the mother and/or the father of the youngest 4 children had caused the injuries, but he could not make a finding against one parent rather than the other. The eldest child was settled with her grandmother, but the local authority applied in respect of the youngest 4 children for orders freeing them for adoption (with a plan that they be adopted by their foster carers) and orders permitting the authority to terminate contact with both parents. The Judge approved the plan of adoption by the foster carers, but he refused to free the children for adoption as the foster carers would be making their won adoption application. He proceeded nonetheless to decide the issue of contact. He refused a s34(4) order in respect of the mother, saying that some limited contact to her would benefit the children, but granted it in respect of the father. The only factual distinction between the parents was that since the mother would be seeing the eldest child and that eldest child would be seeing her younger siblings, the Judge felt it was logical for the mother also to see the younger children. Reading between the lines it may be that the Judge felt that the father was more likely to have injured the children than the mother but since this was not a finding he had made it could not justify treating the parents differently.

The CA allowed the father's appeal against the s34(4) order saying that it was not clear on the merits why the distinction was made between the parents, and the Judge did not give any adequate reasons for the differentiation.

The Court also expressed the view that the Judge should not have made a s34(4) at this point in any event having refused to free the children. The right time to consider what kind of contact natural parents are to have with children being adopted was on the occasion adoption was under consideration: Ward LJ at 275[17].

Re J (Adoption: Contacting Father) (2003) 1 FLR 933 FD (Bennett J)

A young mother fell pregnant during a fleeting relationship with a young man who knew

nothing of her pregnancy or of the birth of the child J. The mother wanted the child to be adopted without the father being notified. She did give the father's details to the local authority but only after the authority assured her that they would not contact him. The position changed when J was diagnosed as suffering from severe cystic fibrosis, and the authority sought declarations enabling them lawfully to contact the father notwithstanding the mother's objection.

Bennett J in fact declared that it was lawful for the authority not to tell the father and further that it was lawful for the authority to place J for adoption without informing him.

In the circumstances of the parents' relationship there was no "family life" for the purposes of Article 8 ECHR. Further, the exceptional facts of the case took it out of the general rule that fathers should be informed of such applications. The child had nothing to gain whereas the mother had a great deal to lose. The father was unlikely to have wished for involvement in J's life. Further the mother had only revealed the father's identity in the belief that he would not be told.

Bennett J also considered that the failure to inform the father that he may be a carrier of cystic fibrosis was not an interference with his right to respect for private life under Article 8 his brother is a carrier, so, reasoned the Judge, he must know in any event and can take appropriate steps to inform himself of whether he is also a carrier) [938/939].

Re M (Adoption: International Adoption Trade) (2003) 1 FLR 1111 FD (Munby J)

A British couple adopted a baby, M, from a US couple paying a substantial amount of money to the birth parents and to the professionals helping them through the process. They commissioned a home study from a British "independent social worker" called Jay Carter whose home study was found by Munby J to be deeply flawed in its omission of many critical problems with the prospective adopters. M was adopted in the US and placed with the adopters but, as was in fact all but inevitable, the placement went wrong and the baby was placed in foster care. The local authority sought to free M for adoption whilst the birth parents sought the child's return to the US. They were assessed as unable to care for her.

Munby J freed M for adoption, commenting that the adoption should never have been allowed to take place. He sympathised with the claim of the birth family, but had no choice but to reject their application for M's return.

The " independent social worker" had committed criminal offences under s11 and s57 Adoption Act, and the Judge alerted the DPP and the AG to what had happened. He took the unusual step of naming the "isw" to alert others who might come into contact with her of the views of the court in this and other similar cases. He encouraged any authority alerted to a situation like this in the future to voice its concerns "clearly, loudly and explicitly" to the relevant foreign court.

Frette v France (2003) 2 FLR 9 ECHR

A single homosexual male applied to adopt a child. Assessments found that he would be a good parent, but his application was rejected on the basis that there was no maternal role model.

Held by a majority that Article 8 was applicable but that there was no discrimination for the purposes of Article 14. Article 6(1) had been breached

· The application was rejected squarely on the basis of the applicant's homosexuality;

· Since there was no cross-Europe uniformity on approaching applications by homosexuals indicating that the law was in a transitional phase, there had to be a wide margin or appreciation

· It was legitimate and reasonable for national authorities to consider that the applicant's right to adopt was limited by the interests of the children eligible to be adopted – given the scientific differences over the effect on a child of being adopted by one or more homosexual parents, the justification was objective and reasonable and the difference in treatment complained of was not discriminatory for the purposes of Article 14

· The applicant had been denied a fair trial before the domestic appeal tribunal due to the lack of notice of the hearing or of the grounds argued against him

The 2 dissenting Judges felt that having given single applicants the chance to apply to adopt, France was then obliged to implement the system in a non-discriminatory way. The domestic court had failed to assess the particular individuals in this particular situation.

PRACTICE AND PROCEDURE

Re J ((Leave to Issue Application for Residence Order) (2003) 1 FLR 114 CA

Within care proceedings a grandmother was assessed and rejected by the local authority as a carer for one child. The grandmother applied for leave to apply for a residence order. The Judge rejected her application on the basis, put forward by the authority and guardian, that while the grandmother's application was understandable, it was not a realistic option meriting judicial consideration.

The CA allowed her appeal and reviewed the appropriateness of the test set out in the earlier case of Re M (Care: Contact: Grandmother's Application for Leave) (1995) 2 FLR 86. The CA emphasised the need to give the statutory checklist at s10(9) its proper recognition and weight. It is not appropriate to substitute the test "has the applicant established that he or she has a good arguable case" for the test set out by Parliament in s10(9). Further, bearing in mind the rights of the applicants under ECHR Articles 6 and 8 Judges must be careful not to dismiss an application without "full enquiry".

It is important to remember what grandparents can offer their grandchildren.

Re M and MC (Care: Issues of Fact: Drawing of Orders) (2003) 1 FLR 461 CA

Two children suffered injuries and care proceedings were issued. At the fact finding hearing the Judge made findings about the injuries and, inter alia, expressed no confidence in either the mother or Mr C but fixed liability more firmly on Mr C than on the mother. Before the second stage of the proceedings took place, the mother purported to admit causing some of the injuries, and her "admissions" were put in a statement. Counsel for both parents applied to the Judge for a rehearing of the causation issues in the light of this development. The Judge refused on the basis that as he had already expressed a lack of confidence in either adult, he did not consider it necessary to rehear the issues merely on their "say so".

The mother's appeal succeeded in part. The court emphasised that the normal ruled of issue estoppel are at least "more flexible" in children proceedings (Neuberger J 466[24]). On the other hand the notion that the first trial should effectively be torn up as if it had not happened was plainly unlikely to succeed. Thorpe LJ favoured the "obvious" middle way whereby at the disposal hearing the initial findings were treated as the foundation, to be adjusted if and as necessary to reflect any subsequent developments rigorously tested through the process of evidence in chief and cross examination (including any further medical evidence from experts asked to look at and report further in the light of those developments) (464[14]).

The Court also took this opportunity to stress the need for Court orders to record fully exactly what happens at the relevant hearings. The court stressed the importance of recording specific findings of fact on the face of the order.

Re W (Care Proceedings: Witness Anonymity) (2003) 1 FLR 329 CA

In care proceedings in respect of 2 children, the local authority's concerns centred upon the extreme violence of the father. When an independent social worker recommended a residential assessment of the children with the mother IF she had absolutely no contact to the father, the court ordered such an assessment. Before it could start, however, a social worker involved earlier with the mother saw the mother in a car with a man. She had never met the father but identified him as the driver when she was shown a photocopy of a photograph of the father. The authority returned to court asking the court to revisit the s38(6) order. At that hearing, the Judge allowed the social worker to give evidence anonymously and accepted her identification evidence.

The Court of Appeal allowed the mother's appeal, holding that the Judge should not have permitted anonymity and anyway should not have made a finding on identification on the basis of the evidence she gave.

The CA was referred to the approach of the criminal courts to witness anonymity. The CA was of the view that there were clear parallels with public law cases such as care proceedings – certainly the consequences for the parents of the court admitting and accepting anonymous evidence such as this were as dire as for defendants in criminal proceedings. Anonymity should be given to a professional social worker witness in care proceedings only in highly exceptional cases. The threat of violence from parents was a professional hazard of social work and was not exceptional.

NB: there have been significant changes in the approach of the criminal courts to vulnerable witnesses

Re AB (Care Proceedings: Disclosure of Medical Evidence to Police) (2003) 1 FLR 579 FD (Wall J)

In care proceedings based on the death of the subject child's 2 younger brothers, a Consultant Paediatrician was instructed to provide a paediatric overview for the causation hearing. The practice of this expert includes interviewing the parents. The mother sought a number of conditions as to confidentiality to which the expert did not agree, however the expert agreed to make it clear on the face of his report that he would never agree to the disclosure of his report to the police. On a subsequent application by the police for disclosure of the report the Court did order disclosure.

Wall J reasserted that the application fell to be decided by carrying out the discretionary balancing exercise laid down by Re C (A Minor)(Care Proceedings: Disclosure) (1996) 2 FLR 725 CA. Absolute confidentiality for what a parent tells the court, an expert, the local authority and the guardian within care proceedings is impossible. Wall J emphasised that the case of Re C did not create any presumption in favour of disclosure.

S98(2) was not limited to statements or admissions made in oral evidence but extended to cover statements made to expert witnesses who were, for these purposes, analogous to guardians. What this mother had said to the expert was inadmissible against her in the criminal proceedings.

The court stressed that it is not acceptable practice for lawyers representing parents to try and put pressure on expert witnesses to conduct their investigations in a particular way in order to protect the parents' position

The conclusions of the case appear in a useful checklist at 612/3 paragraph [134].

President's Direction: HIV Testing of Children (2003) 1 FLR 1299

Decides venue for the hearing of such rare applications (county court in the usual way) and defines the role of CAFCASS

Re Y and K (Split Hearing: Evidence) (2003) 2 FLR 273 CA (Thorpe and Hale LJJ)

In this case the CA allowed the appeal of the local authority against a Judge's rejection, at first instance, of the evidence of sexual abuse adduced by the authority during the first stage of a split hearing. The CA emphasised the need not to be over adversarial at the first stage. It also stressed the importance of considering the statements of a child in their totality – taken together, the child's statements indicated a pattern which could not be dismissed as giving rise to no concern.

The CA considered per curiam the issue of the compellability of the parents in these proceedings. Thorpe LJ expressed his gratitude to Hale LJ who pointed out that he had been wrong on this issue in a previous reported case [281]! Hale LJ then pointed out [283 paragraph 34] that

Parents can be compelled to give evidence in care proceedings; they have no right to refuse to do so; they cannot even refuse to answer questions which might incriminate them. The position is no different in a split hearing from that in any other hearing in care proceedings. If the parents themselves do not wish to give evidence on their own behalf, there is, of course, no property in a witness. They can nevertheless be called by another party if it is thought fit to do so, and the most appropriate person normally to do so would be the guardian acting on behalf of the child.

Protocol for Judicial Case Management in Public Law Children Act Cases (June 2003) (2003) 2 FLR 719

Re B (Appeal: Lack of Reasons) (2003) Fam Law 716 CA

At the conclusion of a 5 day care case, the Judge reserved judgment and then gave a judgment which was criticised by the parents' representatives inter alia for its lack of clear reasoning.
On appeal the CA adjourned the appeal and remitted the case to the trial judge with an invitation to provide additional reasons for his decision in four areas.
In taking this course, as suggested by Hale LJ when she gave permission to appeal, the CA followed the practice outlined in the case of English v Emery Reimbold & Strick (2002) 1 WLR 2409 CA.
The CA took a very practial approach to the case and urged that where a judgment is criticised for lack of reasons, advocates as a matter of good practice seek to set up an oral hearing at which any matter arising from the judgment can be ventilated, thus avoiding unnecessary appeals.
Postscript: in this case once the further reasons were given, the appeal was abandoned.

In re S (a Child)(Identification: Restrictions on publication) (The Times 21.07.03)

This case has an interesting discussion about the extent of the inherent jurisdiction of the High Court to restrain the publication of information arising in criminal proceedings (a murder trial of a mother for poisoning her son) in order to protect the privacy of her son who was the subject of care proceedings.
Although the court accepted that there was jurisdiction to make the order sought restraining publication of the identity of the defendant and her victim, by a majority the court decided that when balancing the child's right to respect for his family and private life against the right of the press to freedom of expression, reporting restrictions on the identity of the defendant and victim ought not to be imposed. Hale LJ's was the dissenting voice.

In re W (Children)(Care proceedings: Disclosure) (The Times 11.07.03) (Wall J)

A local authority having issued care proceedings placed the child with the mother. They were then provided by the police with confidential information to the effect that a suspected drugs supplier was living at the mother's address. Disclosure of the information to any family members risked both a large scale police operation and the informant's life. The authority wanted to tell the mother about this and sought guidance from the court on disclosure.
Wall J reminded himself that the weight of authority reinforced by Article 6 ECHR made it clear that only in the face of a compelling case could information in care proceedings not be disclosed to all parties. He took the view that this mother had to know the substance of the police information and her advisers were entitled to know the wider picture and that the process had been fair (OS v K (1965) AC 201 and In re M (Disclosure)(1998) 2 FLR 1028) and to see the information placed before the court provided they undertook not to pass to the mother anything other than the substance of the information without the court's permission.
He said that it was vital that the police passed on such information and equally vital that the authority could then use it in a way which protected the children. There needed to be a structure within the local authority which could properly process the information and decide how it should be acted on preferably in consultation with the police.

In re O and Another (Children: Care proceedings evidence) (The Times 14.08.03) (Johnson J)

As a general rule where a parent declined to answer questions or give evidence in care proceedings the court ought usually to draw the inference that any allegations against the parent were true unless there was "some sensible reason to the contrary".

CARE PROCEEDINGS

Re B (Care Proceedings: Diplomatic Immunity) (2003) 1 FLR 241 FD (The President)

An ICO was made on a 13 year old child who had sustained serious non-accidental injury. The family were foreign nationals and the father was a driver with a foreign embassy. The ICO had been made without reference to the issue of the diplomatic status of the father and the family.

The President held that whilst the father enjoyed certain privileges accorded to administrative and technical staff of an embassy under the Diplomatic Privileges Act 1964, such employees were not immune from civil proceedings relating to acts performed outside the course of their duties.

The father and his family were thus susceptible to care proceedings, however that did not necessarily solve the problem of enforcement due to the family's diplomatic immunity and the inviolability of their home.

In fact in this unusual case, a request had been submitted to the relevant foreign country to waive diplomatic immunity and an answer was awaited. These proceedings were only at the interim stage. There was no submission that the court was without jurisdiction to hear the care case. The real submission was whether it should do so if any order made would be unenforceable. The President was very keen that the proper structure be put in place on an interim basis to protect the child concerned whilst the way forward was addressed through negotiation rather than confrontation.

Re D, L and LA (Care: Change of Forename) (2003) 1 FLR 339 FD (The President)

Three children were placed in foster care and were not to return to their parents. The eldest and youngest, placed together, were in due course to be adopted by their carers. The middle child, functioning at the mental age of a baby, remained with long term foster carers. The carers for the two children changed the forename of the youngest child since they did not like his original forename. The carer of the middle child also cared for another child of the same name, so she used the child's middle name. In neither case had the parents agreed to any change of name and in each case the local authority, on realising what had happened, told the carers to revert to the children's original names. Neither of the carers agreed to stop using the forename of their choice, and so the guardian for the children started proceedings on the basis that the changes of name infringed Article 8 ECHR in that persons without parental responsibility changed the names of children in their care.

The President dealt pragmatically with the actual applications before her (the younger of the children placed together was by now adopted and so the carers had acquired sole PR for her, whilst it was too late to revert back in the case of the child placed alone).

She then gave guidance on the general issue of change of name, as it emerged that this situation is far from unique (and needs, she said, to be nipped in the bud). She made or noted the following points:-

· The limits of their role must be made clear to all authority carers from the outset of every placement. Authorities must not just wait to pick up the pieces once things have gone wrong when, as in this case, it might be too late to put things right;

· The DOH were aware of this case and indicated to the Judge that they intended to bring the issue – and the court's judgment – to the attention of all directors of social services.

· The ability of prospective adopters to change children's names prior to adoption is wrong just as if the prospective adopters are merely foster carers. The DOH intends in the longer term to cover this issue in the guidance supporting the delivery of the National Adoption Standards;

· Local authority's must advise foster carers that if for some good reason they do wish to call a child by a different name then they are not entitled to take the initiative however good their case if as they do not have parental responsibility for the child. They must go straight to the social worker and take the matter up through them.

The case is useful for the President's brief summary of why a child's given name is so important, and a change so sensitive. Whilst the points are fairly obvious, this is a useful summary

To change a child's name is to take a significant step in a child's life. Forename or surname, it seems to me, the principles are the same in general. A child has

roots. A child has names given to him or her by parents. The child has a right to those names and retains that right, as indeed, the parents have rights to retention of the name of the child which they chose. Those rights should not be set aside other than for good reasons…. [346E].

For good measure, the President did also add a pragmatic note acknowledging that in reality names do change [346H].

R v CAFCASS (2003) 1 FLR 953 QBD (Charles J)

The issue in this judicial review was the extent of the duty and obligation of CAFCASS with respect to Guardians to be appointed in specified proceedings under the Children Act. The applications were pursued because of the lapse of time in CAFCASS providing guardians in 2 cases although the relevant court orders had been made.
Charles J concluded that the relevant provision was s12(2) Criminal Justice and Courts Services Act 2000. For several reasons he concluded that this provision did not impose a duty on CAFCASS to provide a guardian immediately, but, rather, to provide a guardian as soon as practicable after the request had been made. This there could be a gap in time between court order and appointment.
Charles J at the end of his judgment [977/978] recorded CAFCASS's acceptance of the importance of the children's guardian in specified proceedings and the fact that the sooner a guardian is appointed to promote the welfare of subject children, the better for those children. Charles J expressed his hope that CAFCASS would receive sufficient funding to enable it to act accordingly.

Re O and N; Re B (2003) 1 FLR 1169 HL

In these two joined cases, the HL was required to look at the familiar situation of children injured in homes whilst in the care of two adults, where there is no independent evidence permitting the court to identify one as the perpetrator rather then the other.
In one case, at first instance the court exonerated one of the adults whilst in the CA the court held that it was not possible to exclude either adult as a possible perpetrator and anyway at the least a non injuring adult failed to protect. In the other case, at first instance the court of first instance refused to exonerate either parent and further found that a non injuring adult would have failed to protect. In this case the CA allowed the mother's appeal saying that as it had not been established on the balance of probabilities that she had injured the child, she must be treated as if she had not, though she had failed to protect.
The HL refused the first appeal and allowed the local authority's appeal in the second.
The HL said that where a child suffered significant harm but the court was unable to identify which parent had been the perpetrator – or whether both had been – the court should proceed at the welfare stage on the footing that each parent was a possible perpetrator. Any other approach would be "grotesque". Transcripts of the findings should be readily available to Judges at the welfare stage.

Read for a useful general discussion and some thoughts on the issue of risk of harm in private proceedings (Re M and R considered)

Useful articles
· On O and N: by Ernest Ryder QC Fam Law (2003) 741;
· on cases of serious injury to children by Dr Peter Dale, Independent Social Worker: Fam Law (2003) 668

North Yorkshire County Council v SA (2003) 2 FLR 849 CA (The President, Thorpe and Clarke LJJ)

In this case of non accidental injury to a child, the court considered the possibility that the child was injured by either parent, a grandmother or a night nanny. The Judge at first instance could not identify a perpetrator to the H&R standard. He then went on to consider whether he could exclude any of these four adults. Applying the test that there was "no possibility that the relevant person injured the child" he did not exclude anyone.

The CA allowed the appeal and substituted a finding which excluded the grandmother or the nanny as perpetrators.

The CA said that the test of "no possibility" was too wide and could include even people who had had fleeting contact with a child during the relevant timeframe. The test which was first applied in the case of Re B (Non-Accidental Injury: Compelling Medical Evidence) (2002) 2 FLR 599 CA was not a test of "no possibility" but was "no real possibility". Where there is insufficient evidence positively to identify the perpetrator of injuries using the balance of probability test, the test to be applied was "is there a likelihood or a real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?"

The Court emphasised the importance of the Protocol which will require a careful – early – analysis of the relevant issues including the identity of all possible perpetrators. The CA also considered whether it might in some cases be inappropriate to direct a split hearing even if in the event there needed to be an adjournment at the end of the hearing for further assessment.

Re J (Care Proceedings: Disclosure)(2003) 2 FLR 522 FD (Wall J)

This case concerned a local authority who misled both a natural mother and the court.

A foster child moved placement on the arrest of the foster father in connection with enquiries into child pornography. The authority told the mother that the move was for "personal reasons" and secured her consent to a "welfare medical". Further, at an application for an interim care order the real reason for the move was withheld from the court. When a guardian subsequently appointed sought discovery of further documentation the justices made an order under s42 CA – which the authority disobeyed. In a subsequent hearing the authority relied on PII arguing that they wished to preserve the confidentiality of the foster parents. When the case returned to court on the guardian's application, the truth emerged. The justices through their clerk complained to the local head of children's services as a result of which an independent enquiry was commissioned into these events. The report of the independent enquiry was then not disclosed to the guardian or to the court.

Held that the report and other documents sought came within s42 Children Act in which case PII did not arise in connection with the guardian's examination of them. The authority had a duty to be open and frank with the court, and the authority's resistance to the guardian's application had been wrong from beginning to end. [with costs implications].

Re M and J (Wardship: Supervision and Residence Orders) (2003) 2 FLR 541 FD (Charles J)

Throughout care proceedings 2 little boys remained living with their mother. At the final hearing the mother conceded the threshold criteria and agreed that one boy should live with the father and one with the maternal grandmother, in line with the psychological advice.

An agreed threshold document was filed with the court. The recital to it recorded that the mother did not accept the extent of the harm alleged in the psychologist's reports and that they took issue with a number of factual issues in the report. The local authority (who did not entirely accept the psychologist's report either) recommended residence and supervision orders and, further, said that if the court were minded to make care orders, then there would need to be further assessment which might lead to alternative placements for the boys.

The Judge did made residence orders and supervision orders, but also made wardship orders in respect of each boy with orders as to contact.

On the threshold criteria, Charles J found that the stage had been reached where the court should say that the factual basis for the order to be made is established and there is no realistic point in going on to decide outstanding issues of fact.

In principle, the court should make orders within the statutory scheme of the Act rather than retreating into the area of inherent jurisdiction.

To make public and private orders and to continue wardship is to take an exceptional course. That course was justified in this case because of the degree and nature of the harm suffered by these children and the familial situation generally. This combination of orders provided the best solution for the medium to long term welfare of the children.

Re M (Intractable Contact Dispute: Interim Care Order) (2003) 2 FLR 636 FD (Wall J)

This is an extremely interesting case in which Wall J used Part IV Children Act to resolve an "intractable contact dispute" in private law proceedings. The mother had gone to extraordinary lengths to deny the father contact to two children, falsely alleging through two separate trials that he had sexually abused them. Contact was ordered but the mother disobeyed the order – leading to the court making a committal order which was then not implemented pending a further hearing. The elder child, aged 13, then made her own application for permission to apply for a prohibited steps order against contact. All matters were consolidated and transferred to the High Court and the mother's committal was stayed. An officer of CAFCASS legal was appointed the children's guardian and the two children (aged 13 and 10) were joined as parties.

Wall J ordered a s37 investigation resulting in care proceedings being issued by the local authority, the removal of the children from the mother on interim care orders and, subsequently, residence orders to the father with a 2 year supervision order.

In a consolidated judgment Wall J explains his reasons. He discussed at length the circumstances in which the use of Part IV in these circumstances may be appropriate [638/639]. He emphasised that a local authority required to investigate a case under s37 needed to know the findings of the court in respect of allegations made by the parent opposed to contact. The reasons for requesting s s37 report must be spelled out in a judgment of which either a transcript or a full note must be provided to the authority and the report should preferably be supported by professional expert advice.

He stressed that children should be separately represented in private law proceedings where all contact has ceased and the issue of contact has become intractable.

Finally Wall J emphasised that judicial continuity is essential so that the judge can keep a tight control on progress and ensure that, through a system of review, the children's relationship with both parents is preserved.

Re B (Care: Interference with Family Life) (2003) 2 FLR 813 CA

This is a curious case in which a local authority having been alerted to possible sexual abuse within a family, applied to the High Court within wardship proceedings rather than applying under Part IV of the Children Case. By the date of the hearing the LA had decided to apply for an interim care order, though as a result of their not having taken this course previously, the children were not represented and they did not have a guardian. The Court made an interim care order in respect of the 6 children, provided the authority would give the parents 48 hours notice if they decided to remove the children thereby giving the parents the opportunity to apply to court for a "judicial veto".

The CA granted the parent's appeal against the order and instead adjourned the application for an interim care order with liberty to apply on short notice to the parents.

The CA did not agree with the appellants that the threshold had not been crossed. They allowed the appeal on the basis that the Judge in granting the order had not considered, having once found the threshold to have been crossed, gone on to consider the right order to make. Particularly given the effect of Article 8 ECHR, there is a critical judicial task between finding the threshold to have been met and endorsing the making of a care order.

The Judge should have put the burden on the authority to apply to remove the children rather than on the parents to veto such a move.

HUMAN RIGHTS

Venema v The Netherlands (2003) 1 FLR 552 ECHR

Doctors who suspected the mother of a young baby of suffering from MSBP made their suspicions known to the Child Welfare Board (duties similar to the statutory duties of

local authorities under the Children Act) who advised them to discuss their fears with the parents. The doctors did not do so. Further suspicions led to medical reports being submitted by the hospital to the CWB which immediately applied for a supervision order and an order requiring the baby girl to be placed away from her parents. The application was heard and the orders made without the parents having any knowledge of the doctors' fears, of the applications or of the hearing. Provisional orders were extended and the baby was away for her parents for 5 months before further reports concluded without reservation that she should return home.

The European Court declared that there had been a violation of Article 8 of the Convention. The essence of the parents' case was that they were at no stage prior to the making of the provisional order consulted about the concerns being relied on nor were they given the opportunity to contest the reliability of the information being compiled on them. The court did not accept the explanation for the lack of openness that the parents were likely, if involved, to act unpredictably, especially as the baby was safe in hospital at the time of the applications to court. The court found that it was crucial for the parents to be able to put forward at some stage before the making of the provisional order their own point of view.

Re G (Care: Challenge to Local Authority's Decision) (2003) 2 FLR 42 FD (Munby J)

Care orders were made on the basis of rehabilitation. Those care plans were later changed in the face of concerns expressed by the local authority staff at a meeting to which the parents were not invited. Once notified of the new plan, the parents – unable to obtain copies of the minutes of the meeting – applied to the court for revocation of the Care Orders and orders under s7 HRA preventing the removal of the children from their care. Although the LA continued to fail in its duty to provide relevant minutes, it did eventually revert to rehabilitation plans which were acceptable to the parents and the guardian.

Granting permission to the parents to withdraw their applications, Munby J emphasised that Article 8 afforded protection to parents not only substantively in respect of inappropriate state interference, but also procedurally. It was critical that local authorities involve parents in the decision making process – and enable them to be involved effectively. It should ensure that clear balanced coherent minutes are kept of decision making meetings which can then be disseminated to all concerned.

Parents in the position of these parents have an effective remedy available under the HRA for the breach by the LA of either the substantive or the procedural requirements of Article 8 ECHR

Re L (Care Proceedings: Human Rights Claims) (2003) 2 FLR 160 FD (Munby J)

In care proceedings before the FPC the LA had eventually decided on a care plan of adoption. The mother of the little boy L wished to challenge the care plan and so she applied for the proceedings to be transferred to the High Court where she invited the court to exercise its inherent jurisdiction to compel the LA to change its care plan or to provide a remedy under the HRA. Only this element of the application was transferred up; the substantive care proceedings remained listed for hearing in the FPC.

Munby J found that the mother's application could be granted only in either JR or HRA applications. The FPC had jurisdiction under the HRA and the proceedings should not have been transferred to the High Court.

He emphasised the distinction to be drawn between those cases in which care proceedings had come to an end where freestanding applications under s7(1)(a) HRA were appropriate and those cases where care proceedings were ongoing where s7 provided an appropriate remedy within the care proceedings themselves. These should be dealt with in the care proceedings in the court hearing the care proceedings and not as a discrete issue separated from the rest.

He stressed that the reason why it is critical to use the correct procedure is so that any delay in the hearing of the substantive application is avoided.

JUDICIAL REVIEW

Re M (Care Proceedings: Judicial Review) (2003) 2 FLR 171 QBD (Munby J)

Learning that a local authority planned to remove their baby at birth (contrary to an earlier indication that it would pursue a residential assessment of parents and child together), parents via judicial review sought an injunction restraining the authority from commencing emergency protection or care proceedings.
Such an application was surely doomed to failure.
Munby J duly rejected the application. He found that
· Given the background in this particular case it would not be possible to argue that the issue of proceedings was unreasonable;
· The parents' remedy was to defend those proceedings;
· It was necessary to be extremely cautious about using judicial review to prevent the commencement of what were on the face of it proper proceedings in a court with jurisdiction to hear those proceedings
· The removal of a baby at birth was however draconian requiring exceptional justification and where the parents are entitled to prior notice;
· If a baby is removed, then at a minimum the authority should provide extremely generous contact

R (W) v Leicestershire County Council (2003) 2 FLR 185 |QBD (Wilson J)

A foster mother wished to adopt twins placed with her. Before she could do so the LA removed the twins from her care. She could not then apply in her own right for an adoption order and so she sought permission to apply for judicial review of the decision to remove the children on the basis that there had been insufficient consultation and that the removal was intended to prevent her adoption application rather than to further the children's best interests.
Wilson J refused her permission to apply. He found that no court could say that the decision to remove the twins was not welfare based, and there had been sufficient consultation.
As Wilson J noted in his judgment, it is very hard for foster parents to challenge decisions made by the local authorities which have placed the child with them [191]

Ancillary Relief Costs

Nicholas Cusworth

2 October 2003

Continuing Professional Development Seminar

ANCILLARY RELIEF COSTS

Norris, Haskins & the Future

1. The Past

'My observation that there was no difference in principle between the failure of the payer in family cases to meet the sum awarded by the court and the failure to reach the payment into court in civil proceedings is to be seen as applicable to the Gojkovic (No. 2) situation of only one offer and no opportunity to counter-offer. I am somewhat dismayed to learn that it may have been taken far more broadly by the legal advisers, thereby ignoring the significant importance of the need for a counter-offer and for genuine negotiation by both parties. As I said, in the passage set out above, the starting point is the offer by the paying party but the absence of a counter-offer may well be reflected in costs.'

Per Dame Elizabeth Butler-Sloss P. in Norris/Haskins, at para. 14

1.1 So, by that passage, we have all learned definitively what must have been increasingly clear to us as time has passed since the decision in White, and proportionate division in entitlement based cases has become the order of the day: namely that the approach to costs in ancillary relief cases where funds were available was going to be in for a thorough overhaul.

1.2 What perhaps we could not have foreseen, is that we had all been misapplying the landmark case of Gojkovic (No. 2). That case should never have been taken as authority for the proposition that the husband who doesn't offer enough pays costs in most circumstances. How could we all have got is so wrong (and with us the judges of the Family Division, circuit judges, district judges and deputies)?

1.3 The answer lies in a careful reading of Gojkovic (No. 2), a study of the ancillary relief rules which have sought to follow that judgment, consideration of the impact of the CPR, and the changing approach to responsibility in ancillary relief cases in the 3 years that have followed the House of Lords decision in White.

1.4 Gojkovic (No. 2) [1992] Fam. 54. It should always be remembered that in Gojkovic, the husband disclosed late and offered even later. Ward J. at first instance found it not unreasonable for the wife not to have made a counter-offer in the circumstances. All that the President went on to say in that judgment has to be seen in that context. When the husband's team (lead by Nicholas Wall QC) brought up the lack of counter-offer in the court of Appeal, they were firmly squashed by reference to that finding.

1.5 What Butler-Sloss LJ. (as she then was) actually said was:
'But the starting point in a case where there has been an offer is that prima facie, if the applicant receives no more or less than the offer made, she/he is at risk not only of not being awarded costs, but also of paying he costs of the other party after communication of the offer and a reasonable time to consider it...I cannot for my part see why there is any difference in principle between the position of a party who fails to obtain an order equal to the offer made and pays the costs, and a party who fails by the offer to meet the award made by the court. In the latter case prima facie costs should follow the event, as they would do in a payment into court, with the proviso that other factors in the family division may alter that prima facie position.'

1.6 The 2 positions being compared are:

1) A party who rejects a successful Calderbank, and

2) A party whose best offer is less advantageous to the other side than the Court's award.

1.7 Of course, if this analysis is referred to the facts of Gojkovic (No. 2), then –

· When only one side has offered,
· and the other side has been found not unreasonable in not responding,
· and, if the only offeror is short of the mark,
· then he (as he did) must pay.

1.8 In effect, because of the husband's late disclosure and offer the wife was deprived of the chance to negotiate. She is therefore spared the need to make an offer in terms of the award sought. It is assumed for her that she would have done so. In effect, she is awarded 'a penalty try.'

2. Family Proceedings Rules 1991

2.1 Soon after Gojkovic (No. 2) came the FPR 1991.

2.2 So soon indeed that when the original Rule 2.69 was drafted, it simply applied CCR Order 11 rule 10 to ancillary relief proceedings in a county court. O.11 r.10 permitted the court to take Calderbank letters into account in the exercise of its discretion.

2.3 R.2.69 simply obviated the requirement to file the offer at court. The lawyers were thus left unhelped by the rules to do their best with the interpretation of authority.

2.4 In the era of reasonable requirements, when wives got what they needed, and not, despite trying sometimes, what they wanted – costs orders against husbands (that is against wealthy men who hadn't offered enough) were usually fair enough. So the dictum in Gojkovic became a convenient peg on which to hang the practice that husband's who didn't beat their own offer should pay.

2.5 Mrs. Gojkovic hadn't made an offer. Butler-Sloss LJ. had found her husband liable to pay her costs because he had offered too late and because hadn't offered her enough. The above cited passage was easily interpreted to require any husband whose offer proved insufficient as liable to pay, regardless of the wife's negotiating position.

2.6 In the era of reasonable requirements, no one was brave enough to throw good money at the Court of Appeal to challenge that interpretation.

2.7 To this scenario was then added (almost unnoticed by most family practitioners) the advent of the CPR, as applied by FPR r.10.27, with effect from 26th April 1999:

FPR 10.27 Costs

(1) Order 38 of the County Court Rules 1981[5] and Order 62 of the Rules of the Supreme Court 1965[6] shall not apply to costs in family proceedings, and CPR Parts 43, 44 (except rules 44.9 to 44.12), 47 and 48[7] shall apply to costs in those proceedings, with the following modifications -
(a) in CPR rule 43.2(1)(c)(ii), "district judge" includes a district judge of the Principal Registry of the Family Division;

(b) CPR rule 44.3(2) (costs follow the event) shall not apply.

CPR 44.3 Court's discretion and circumstances to be taken into account when exercising its discretion as to costs
(1) The court has discretion as to –
(a) whether costs are payable by one party to another;
(b) the amount of those costs; and
(c) when they are to be paid.
(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –
(a) the conduct of all the parties;
(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).
(Part 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part.)
(5) The conduct of the parties includes –
(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;
(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.
(6) The orders which the court may make under this rule include an order that a party must pay –
(a) a proportion of another party's costs;
(b) a stated amount in respect of another party's costs;
(c) costs from or until a certain date only;
(d) costs incurred before proceedings have begun;
(e) costs relating to particular steps taken in the proceedings;
(f) costs relating only to a distinct part of the proceedings; and
(g) interest on costs from or until a certain date, including a date before judgment.
(7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).

3. Ancillary Relief Rules

3.1 First introduced as 'the Pilot Scheme' the new rules sought to front load ancillary relief costs with 2 results.

(1) A lot more cases settled.
(2) Lawyers tended to get paid more for cases that were always going to settle.
(3) Lawyers got paid less for cases that would have previously fought to the door of the court but now settled at the FDR.

3.2 The old rule 2.69 disappeared, to be replaced with a new rule designed to give teeth to the Calderbank process, with effect from 5th June 2000. In order to effect this, the draftsman (I think pretty clearly) went back to the leading authority (Gojkovic No.2).

3.3 And this is what he produced:

FPR 2.69 Offers to settle
(1) Either party to the application may at any time make a written offer to the other party which is expressed to be 'without prejudice except as to costs' and which relates to any issue in the proceedings relating to the application.
(2) Where an offer is made under paragraph (1), the fact that such an offer has been made shall not be communicated to the court, except in accordance with rule 2.61E(3), until the question of costs falls to be decided.
2.69A [Repealed (24.2.03) – interpretation of Base Rate]
2.69B Judgment or order more advantageous than an offer made by the other party
(1) This rule applies where the judgment or order in favour of the applicant or respondent is more advantageous to him than an offer made under rule 2.69(1) by the other party.
(2) The court must, unless it considers it unjust to do so, order that other party to pay any costs incurred after the date beginning 28 days after the offer was made.
2.69C [Repealed (24.2.03) – where both applicant and respondent have made offers and one party has beaten his, he may apply for interest/indemnity costs. NB – this power in addition to powers under 2.69B]
2.69D Factors for court's consideration under rule 2.69B
(1) In considering whether it would be unjust, or whether it would be just, to make the order referred to in rule 2.69B, the court must take into account all the circumstances of the case, including –
(a) the terms of any offers made under rule 2.69(1);
(b) the stage in the proceedings when any offer was made;
(c) the information available to the parties at the time when the offer was made;
(d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated; and
(e) the respective means of the parties.

3.4 Remember the 2 cases posited by Butler-Sloss LJ. –
i) a party who fails by the offer to meet the award made by the court – r.2.69B -other party gets costs (unless unjust) as from 28 days after offer made.
ii) a party who fails to obtain an order equal to the offer made and pays the costs – r.2.69C - as above, with potential for indemnity assessment and interest.
3.5 But of course, by closely following the analogy in Gojkovic, the draftsman has not taken into account the fact that there was no counter-offer, or need of a counter-offer in that case. r.2.69B works perfectly if there an onus only on one party to make an offer, and he fluffs it.
3.6 But as we remember, Butler –Sloss LJ. was at pains to point out in that case that in the usual run of things there is a duty to negotiate on both parties. How then can r.2.69B be applied?
3.7 This was the problem that Mr. Mostyn QC and Mr Marks QC were wrestling with in GW v. RW [2003] 2 FCR 289. As Mr. Mostyn said:
'83. Thus we are left only with Rule 2.69B which appears to contemplate the position where one party alone has made a Calderbank offer. Where the position is (as here) that each party has made such an offer, the rule becomes unworkable. I agree with Mr Marks' submission that
The surviving rule 2.69B is incomprehensible. It is impossible to divine what the draftsman had in mind. Very often in a case such as this the order ends up between the offers – in which case, under the rule, both parties pay "the costs".

3.8 With impeccable timing, these rules then came into force just 4 months before the House of Lords delivered judgment in White, and of those months 2 were the summer vacation. These rules were sculpted (rather too closely) around the old leading authority – but though the rule was new, would the authority

upon which it was erroneously based survive the era of entitlement and the yardstick of equality?
3.9 The answer initially was undoubtedly yes. Indeed, in the two cases under appeal in June, both judges had made it clear at first instance that they considered that the principle that the husband who has not offered enough pays was still unimpeachable law.
3.10 Mr. Blair QC in Haskins at first instance went as far as to say:
'So, pursuant to the conventional, one could almost say axiomatic, principle (and I have in mind in particular such decisions as Gojkovic v. Gojkovic (No. 2)) the husband being offeror, the wife offeree, and his offers in their entirety being well short of that which has been ordered, the wife is entitled in justice to her costs.'
3.11 Bennett J. in Norris at first instance responded to the 'simple submission' by the wife's counsel (Tim Scott QC) that the judge's order had comfortably beaten the Calderbank offer, by saying: 'I am with you'.
So, what happened next?

4. Norris v. Norris / Haskins v. Haskins [2003] EWCA 1084 –
Judgment 28th July 2003.
4.1 The first point of note is that both appellant husbands were unsuccessful. But do not take from this that the interpretation of Gojkovic (No. 2) adopted by the judges at 1st instance has emerged triumphant. Far from it.
4.2 Second, although Mrs. W (of GW v. RW fame) withdrew her appeal against the failure of Mr. Mostyn QC to make a costs order in her case, (in effect an appeal from the other side to those in the two cases which were heard,) she is unlikely to be cursing herself for doing so, even though Mr. Mostyn takes a fair amount of stick in the judgment.
4.3 Thirdly, although Mr. Mostyn's name appears in the judgment more often (I suspect) than any other counsel or deputy judge, he did not appear in the court of appeal nor was his decision the subject of one of the appeals – truly a case of 'Hamlet without the prince'.
4.4 Indeed, his ears must have been burning. In commenting on the passage from his judgement in GW v. RW cited above, Butler Sloss LJ. said (at para.21):
'In any event it is not for judges to deem a rule or a section of an Act of Parliament incomprehensible or unworkable. If passed by Parliament, whether it be primary or secondary legislation, it is the duty of the court to do its best to make sense of it. Judges do not have the right to dump the awkward passage wholesale. In my judgement, therefore, Mr. Mostyn QC in his judgement in GW v. RW (above) was wrong to treat the rule as incomprehensible and to substitute his own approach by making a decision which was not based on the existing rules.'
4.5 And to Thorpe. LJ. (para.62):
Thus I do not consider that Mr Mostyn was right to reject the Rules as being incomprehensible or unworkable and develop from a clean sheet a new code. The courts must continue to determine costs applications in accordance with the Rules. However within the broad discretion that the Rules confer the judge is of course entitled to give due weight to the general evolution signalled by Mr Mostyn's decision in GW v RW and the report of the sub-committee.

4.6 So how should the existing rules be applied? Per the President (para.24):
Rule 2.69D and its effect on rule 2.69B merits closer consideration. In rule 2.69D the court must take into account all the circumstances of the case including the list set out therein. This includes, in (a), the terms of any offers. That must include counter-offers. It also requires, in (e), the court to take into account the respective means of the parties. In my view, (e) enables the court to look at the whole position of the parties after the order has been made and see whether costs may fall disproportionately on one party rather than the other. It may enable a judge or district judge to mitigate, to some extent, the uncomfortable consequences of a Calderbank situation in a case where there is some but not a substantial amount of property and/or money to divide and costs will have to be paid from the available capital. The judge, in such a case, may make an order, often just enough to buy a suitable property for the wife, and then find that effect of the Calderbank offers may totally destabilise his order. Equally, of course, the Calderbank process must have teeth which can bite. Both parties are under an obligation to engage in genuine negotiation with the other side, otherwise one party may have to be penalised in costs. In medium asset cases I do not underestimate the difficulties. Rule 2.69D does however give the court a greater latitude in making costs orders than may so far have been widely recognised.

4.7 So, the court must look to see if costs 'may fall disproportionately on one party', when deciding whether it is just to make an order for costs against a party whose Calderbank is insufficient. This will be important especially if money is tight.
4.8 Also, and importantly, the court must consider the terms of any counter offers before deciding whether it is just to make an order for costs. So, if one is judging the sufficiency of an offer which has fallen just short of the mark, and the terms of the wife's counter offer indicate that she was a lot further from the target area than the husband – it may well not be just to make the order against him.
4.9 When one considers the wife's offer in that situation, where she is a lot further from the mark than the

husband, her defence may not be as strong – she may need to fall back on arguments of disproportionality.
4.10 Per the President again (para.25):
In my judgment, therefore, rules 2.69B and 2.69D can be managed and, where the court considers it unjust to apply rule 2.69B, it can make a different costs order to reflect the justice of the case. Mr Pointer QC, in his thoughtful and comprehensive skeleton argument, sets out in a bar chart a series of permutations arising from a court order to a wife of £1 million. I take one hypothetical situation. If a husband offers £800,000 and the wife asks for £1,200,000, neither has achieved the figure of the order and each is wide of the mark by the same amount. In broadly comparable situations, not tied to exact percentages since each case must be decided on its own facts, the result might be termed, as Mr Cusworth for Mr Norris suggested, a draw. In my view, in some offer and counter-offer cases, the proper approach might well be, under the present procedure, to make no order as to costs and leave each party to pay his/her own costs.

4.11 Here, the court considers the draw. This situation, where each is broadly equally close is one where 'the proper approach might well be, under the present procedure, to make no order as to costs'
4.12 The FPR only cater for costs oncle a Calderbank has been made. The President goes on at para.26:
A complication in sub-rule 2.69B(2) is that the order for costs dates from 28 days after the (relevant) offer was made. Neither judge in the two cases before us had his attention drawn to that part of the sub-rule. It seems to me, however, that the costs prior to the relevant offer are to be dealt with in the exercise of the court's discretion.

4.13 So, in dealing with costs incurred before the offers are made, the court's discretion is to be applied, and that discretion is exercised in the light of the relevant provisions of the CPR. This, from Thorpe LJ. at para.61:
Whilst I am in complete agreement with the direction that Mr Mostyn sought to take in his costs judgment in the case of GW v RW I cannot agree his route. As a matter of principle the determination of any question of costs in ancillary relief proceedings must be governed by CPR 44.3 together with FPR 2.69 in its current form, namely 2.69, 2.69B and 2.69D. The harmonious integration of these separate codes is in my judgment best achieved by treating CPR 44.3 as covering all cases. If in a specific case no Calderbank offer has been written then the judge will apply CPR 44.3 without more. In a case in which a Calderbank offer or offers are relied upon then I consider that the judge should apply CPR 44.3 notionally inserting into the exercise FPR 2.69 in substitution for CPR 44.3(4)(c).

4.13 The president expressly agrees with this paragraph at para.27, and continues:
The exercise which the court undertakes under CPR 44.3(4) requires consideration of all the circumstances, including the parties' respective conduct and success and, under subsection (4)(c), any offers made. In so far as the court is looking at a Calderbank type case, the exercise under subsection (4)(c) is better dealt with under the fuller provisions to be found in FPR rules 2.69, 2.69B and 2.69D. Reading the two sets of rules together, the court has a general and wide discretion to depart from the starting point of 'winner takes all'.

The Present
5.1 So what for the moment does that mean for the incidence of costs in affluent ancillary relief cases?
5.2 Until the first appointment
5.2.1 CPR 44.3 will apply (see above) – generally a discretion exercisable in the light of all the circumstances.
5.2.2 Circumstances include the conduct of the parties (CPR 44.3(4)(a))
5.2.3 Conduct includes the extent to which the parties have followed any relevant pre-action protocol, reasonableness in and manner of raising or contesting any particular issue, and whether a successful claim has been exaggerated (CPR 44.3(5))
5.2.4 Plenty to argue on costs at a first appointment, especially as by CPR 44.3 (6)(d) the court can make an order in relation to costs incurred before proceedings have begun
5.2.5 Generally, where both have acted appropriately up to that point – before any Calderbank can be considered – no order will be a frequent order (or perhaps reserved to await answers to questionnaire).
5.2.6 Costs in the application may well be a less popular order at this stage, as paying parties will want to distinguish later between the costs incurred up to this point and the costs incurred once negotiations have begun.
5.2.7 See here the very recent decision of Charles J. dealt with below re determining who should pay costs at an early stage (Stop Press p.16).

5.3 From first appointment to the outset of negotiations
5.3.1 Again, CPR 44.3 will apply, as above, and no order until the end of the discovery process is likely to

be the most frequent order provided the discovery process goes smoothly (and subject to the remarks of Charles J. – as to which see below).

6 From the start of negotiations to the point when one party makes a sufficient offer, or to trial if no such offer is made

6.1 CPR 44.3 will again apply, but once Calderbanks can properly be exchanged – ie. between the answering of questionnaires and the FDR, both parties are prima facie at risk on costs if they don't make a sufficient offer, either from 28 days after they make an insufficient offer (FPR2.69B), or if they make no offer at all when it is reasonable for them to do so – see eg. The President at para.24 – 'Both parties are under an obligation to engage in genuine negotiation with the other side, otherwise on party may have to be penalised in costs'.

6.2 In deciding whether to make an order for costs as a result of an unsuccessful Calderbank offer, the court considers (FPR 2.69D):

6.2.1 the terms of any other Calderbank offers;

6.2.2 the stage when any offer was made; the information available when any offer was made;

6.2.3 conduct re giving or refusing information for the purposes of enabling the making or evaluating of any offer;

6.2.4 and the respective means of the parties.

6.3 In other words, if a Calderbank is insufficient because the other side have given inaccurate or incomplete disclosure, or because it is made too early and is undermined by subsequent unforeseeable developments, it may well not be penalised in costs; similarly, if such an order would have a disproportionate financial effect it may not be made.

6.4 If both have got their offer slightly out but both have had a fair stab, and are reasonable proximate by the final hearing, then no order throughout may well be the appropriate order – para.25 of the President's judgement above.

6.5 If the margin of error differs markedly, or by reference some other factor referred to in FPR 2.69D, the court determines to make a costs order of some sort, then by CPR 44.3(6) it can make an order for any of the following:

6.5.1 a proportion of the costs;

6.5.2 a stated amount;

6.5.3 costs from a certain date;

6.5.4 costs incurred before proceedings;

6.5.5 costs re particular steps taken in the proceedings;

6.5.6 costs re a distinct part of the proceedings;

6.5.7 interest from or until a certain date, which may be before judgment.

7 From the making of a sufficient offer until trial

7.1 FPR 2.69B does not apply to this situation (FPR 2.69C, which did, was repealed with effect from 24th February 2003 – and provided for interest or indemnity costs in this situation.)

7.2 CPR 44.3(2)(a) – the general rule that an unsuccessful party will be ordered to pay – is disapplied in family proceedings by the Family Proceedings (Miscellaneous Amendments) Rules 1999, r.4(1)(b).

7.3 By CPR 44.3(4)(c), in deciding what order to make about costs the court must have regard to all the circumstances including any admissible offer to settle by a party which is drawn to the court's attention.

7.4 At the same time, the court must consider the parties' conduct – CPR 44.3(4)(a), conduct as defined in CPR 44.3(5) – see above – and whether or not a party has succeeded on part of his case, even if not wholly successful – CPR 44.3(4)(b).

7.5 Although FPR 2.69C has gone, the power in CPR 44.3(6)(g) to order interest on costs remains, in the right case.

8. Stop Press

8.1 New Decision by Charles J. – judgement date 14.8.03

8.2 Effectively a gloss on Haskins/Norris – to be reported in anonymised form

8.3 The judge proposes 'a practical approach in many cases'

8.3.1 To ask who would or should have paid the costs if agreement had been reached at an early stage (the judge sees the answer as determining who should pay prima facie up to a certain point).

8.3.2 To identify the issues not in dispute at trial.

8.3.3 To identify the issues in dispute and consider their impact on costs – time taken on each/ who won/ nature of issues and of award

8.3.4 Consider the Calderbank offers and apply FPR 2.69

8.3.5 Consider the matters in CPR 44.3

8.3.6 Consider how the costs of both parties have been affected by the disputed issues

8.3.7 Remember the court's broad judicial discretion

9. The future

9.1 Per The President – para.28 of Norris/Haskins

The difficulties which undoubtedly arise from rule 2.69, set out by Mr Mostyn with clarity in his judgment in GW v RW, do now urgently require a rethink and it is time for further amendments to the rules governing awards of costs in ancillary relief cases. The present rules may affect disproportionately the payers in big money cases. The effect of costs is however to be felt across all ancillary relief claims. Although I have criticised Mr Mostyn for the cavalier way in which he dismissed the Family Proceedings Rules, his approach to the reconsideration of costs requires careful thought, and I agree with the overall direction of his judgment for the future.

9.2 Letter received from the Senior Costs Judge by the President on the 27th January 2003:

"…The purpose of this letter is to suggest that it may be worth giving serious thought to doing away with fee shifting in family proceedings. The Family Proceedings (Miscellaneous Amendment) Rules 1991 disapply CPR 44.3(2) (costs follow the event). It is therefore a relatively short step to providing that in family proceedings no order for costs will be made unless a particular party has behaved in such an unreasonable manner that the court feels that a sanction should be imposed. I would suggest that if this idea were to be adopted the court making such an order should decide what amount should be paid by way of costs there and then.

The level of venom in detailed assessment in family proceedings is such that I am firmly of the view that the removal of costs as an area of conflict would have an overall beneficial effect. If costs were never in issue the heat would be taken out of the situation far more quickly and any incentive to legal representatives to pursue remedies over vigorously in the hope of recovering greater costs would also disappear."

9.3 President's Advisory Committee on Ancillary Relief:

9.3.1 Terms of reference for their report

'What changes (if any) in the rules relating to costs in ancillary relief proceedings are necessary or desirable to reflect developments in principles and practice in the light of developments in civil litigation'

9.3.2 The problems identified as being caused by the present rules

9.3.2.1 Difficult to specify the event that costs should follow – Gojkovic from the era of reasonable requirements – now inappropriate

9.3.2.2 Court assistance in reorganising finances should not of itself imply blame on either party

9.3.2.3 FPR 2.69B unworkable where both parties have made offers, so of little value

9.3.2.4 The Calderbank process requires the parties to bet on the result of a case, which can seem simply unfair

9.3.2.5 In low value cases costs orders can have a disproportionate effect

9.3.2.6 Costs orders can increase acrimony, and obscure the fact that parties are spending their own money

9.3.3 Their Conclusions

9.3.3.1 Costs following the event is no longer appropriate and should be abandoned

9.3.3.2 If replaced, the new principle should be either each party bear their own costs, or all costs paid from assets (before division)

9.3.3.3 Must be a residual power to make an order against a party who has acted unreasonably

9.3.3.4 Without prejudice offers should not be taken into account when deciding costs – all offers should be open. Without prejudice correspondence no longer admissible.

9.3.3.5 Reasonable costs in future to be included as part of assets and liabilities – with schedules exchanged for comment and decision on a summary basis. Costs orders could then be made as part of main judgement.

9.3.4 Proposals

Australian practice contained in s.117 of their Family Law Act 1975 – basic 'no order' regime, but with jurisdiction to make an order where one party has acted unreasonably, to be taken as starting point with modifications.

The proposed new rule (to replace all existing rules)

[See Annexure].

NICHOLAS CUSWORTH
1 HARE COURT
1st October 2003

Ancillary Relief Update

Philip Moor QC

16 October 2003

Continuing Professional Development Seminar

THE SECTION 25 MATRIX RELOADED – RECENT DEVELOPMENTS IN ANCILLARY RELIEF

1. The case of Mr Agent Smith

Mr Agent Smith has instructed you to represent him in his divorce proceedings from Mrs Agent Smith. They married in June 1995, having cohabited since the late 1980s. They have two children, aged 10 and 8.

You are told that there are only really three assets in the case. The first is the former matrimonial home, which is worth some £500,000 but is subject to a mortgage of (£325,000). The second asset is the pension fund, with a CETV of £225,000. The third is the shares in the family business, the Neo Company, which specialises in computer games.

Mr Agent Smith tells you that he owns all the shares in the Neo Company. The company was set up after he started to cohabit with his wife but before they married. His wife is a director and did some book keeping work for the company in the early years but has had no involvement since the birth of the children. The company was valued at £2,250,000 a year ago, when consideration was being given to flotation on the Alternative Investment Market ("AIM"). It has since suffered from real problems as a computer game on which great hopes were riding has "bombed" in the shops and a second one has had serious production difficulties. He doubts whether the shares are now worth £500,000.

He tells you that he has worked 70 hours per week in the business for the last ten years. A friend of his, who is a Judge, told him a year ago that he wouldn't have to pay half as he had made a "stellar contribution" and that the company was quite safe from his wife's clutches.

The company owns some land in Morphew Lane, from which it trades. His wife is convinced that it is worth many millions due to the possibility of obtaining planning permission to build executive homes. Mrs Agent Smith has a report from a planning adviser, Mr Trinity, which says that there is no prospect of planning permission at present as the land is in the Green Belt, although that might change in about ten years time, as the Local Authority may need to build a new school in the area by then and might be prepared to grant planning permission for 1,000 new homes in exchange for the developers building the school. Mr Agent Smith dismisses this suggestion as being "pure fantasy".

His bank manager, Mr Cypher, has written a letter saying that there is no liquidity in the business at all.

Finally, Mr Agent Smith read on the front page of the Times that the law had changed to make everything fair. He is pinning great hopes on this.

Mr Agent Smith asks you the following questions:-

(a) Has he made a stellar contribution sufficient to reduce the wife's share to less than 50%? If not, what

would he have to do make his contribution stellar?

Cowan -v- Cowan [2001] 2 FLR 192 – per Thorpe LJ:-

"…fairness certainly permits and in some cases requires recognition of the product of genius with which one only of the spouses may be endowed" – Paragraph [67].

Lambert -v- Lambert [2003] 1 FLR 139 – per Thorpe LJ:-

"Having now heard submissions, both full and reasoned, against the concept of special contribution save in the most exceptional and limited circumstance, the danger of gender discrimination resulting from a finding of special financial contribution is plain. If all that is regarded is the scale of the breadwinner's success, then discrimination is almost bound to follow since there is no equal opportunity for the homemaker to demonstrate the scale of her comparable success." – Paragraph [45].

The House of Lords dismissed the husband's appeal in Lambert and the wife's renewed appeal in Cowan on the same day.

However, note that in Lambert, Thorpe LJ does say at Paragraph [46] that:-

"special contribution remains a legitimate possibility but only in exceptional circumstances…In the course of argument, I suggested it might more readily be found in the generating force behind the fortune rather than the product itself. A number of hypothetical examples were canvassed ranging from the creative artist via the superstar footballer to the inventive genius who not only creates but also develops some universal aid or prescription. All that seems to me to be more safely left to future case-by-case exploration."

(b) Is the length of the marriage a reason for departure

In GW –v- RW [2003] 2 FLR 108, Nicholas Mostyn QC awarded a wife 40% of the assets. One of his reasons for justifying departure from equality was the length of the marriage. The court could not ignore the fact that section 25 specifically requires the court to have regard to the duration of the marriage. He said at Paragraph [40]:-

"It seems to me that the assumption of equal value of contribution is very obvious where the marriage is over 20 years. For shorter periods, the assumption seems to me to be more problematic. I am not attracted to a formulaic solution, as suggested by John Eekelaar, but I do in essence accept his proposition that the entitlement to an equal division must reflect not only the parties' respective contributions but also accrual over time."

(c) Does the period of cohabitation count?

Again, see GW -v- RW [supra] at Paragraph 33:-

"where a relationship moves seamlessly from cohabitation to marriage without any major alteration in the way the couple live, it is unreal and artificial to treat the periods differently. On the other hand, if it is found that the pre-marital cohabitation was on the basis of a trial period to see if there was any basis for later marriage, then I would be of the view that it would not be right to include it as part of the "duration of the marriage".

(d) What about inherited assets?

Norris -v- Norris [2003] 1 FLR 1142, Bennett J at Paragraph [67]:-

"..if the inherited assets of the wife are to be taken into account as part of her contribution to the marriage and the family, which, in my judgment, they must, then there is no reason to exclude them from the wife's assets when performing the discretionary exercise. For to do so would mean the wife could

have her cake and eat it. She gets credit for her contribution from the inherited assets and further credit if the value of the inherited assets are deducted from the total of her assets before division. That would be tantamount to double counting and thus unfair."

On the other hand, money which had been recklessly overspent by the husband, amounting to £250,000 was added back into his assets, prior to the equal division.

But compare the approach in H -v- H [2002] 2 FLR 1021, where Peter Hughes QC excluded from the pool of assets to be divided equally an American inheritance of the husband's which was kept separate and apart and not drawn on, the husband saying that he saw it as something to pass on to his children.

(e) What about earning capacity acquired before the marriage?

In GW -v- RW [supra], Nicholas Mostyn QC said at Paragraph [51]:-

"H also brought to the marriage a developed career, existing high earnings and an established earning capacity. I cannot see why this should not be treated as much as a non-marital asset as the provision of hard cash. In argument, I suggested that H here was in terms of his career "fledged" at the time of the marriage, rather than being the fledgling, which is so often the case. Mr Marks said that his client was far more than fledged. He was fully airborne. I tend to agree and in this aspect also I fond that H made a contribution unmatched by any comparable contribution by W."

(f) Is liquidity relevant?

In Cowan -v- Cowan [supra], per Thorpe LJ at [66]:-

"…had the wife brought her claim to trial shortly after the final separation, the majority of the family's assets would have been tied up in the private companies and, in assessing the wife's entitlement, the judge would have had to have regard to what cash could be withdrawn from the trading companies without jeopardising their continuing trade"

See also Singer J in F –v- F [2003] 1 FLR 847 – illiquidity was an extremely relevant factor when carrying out the s25 exercise, not to be disregarded any more than the non-availability as free capital of the bulk of a pension fund. The illiquidity of assets, even very considerable assets, might make it unfair and unjust to impose the clean break favoured by section 25A of the MCA. As the husband would, in effect, be trading with part of the wife's share, the maintenance order could be looked on in part as a dividend to her for the use of the capital by the husband.

(g) Is it unfair to give the wife the liquid assets and allow the husband to retain the illiquid ones?

See Wells –v- Wells [2002] 2 FLR 97; Thorpe LJ at Paragraph [24]:-

"Had the marriage survived, the family would undoubtedly have shared adversity as it had shared prosperity…But the future years look hazardous…In principle, it seems to us that the separation of the family does not terminate the sharing of the results of the company's performance…In [a clean break case], sharing is achieved by a fair division of both the copper-bottomed assets and the illiquid and risk-laden assets."

(h) Should the wife receive shares in the husband's business?

This has been done in two cases. First, in G -v- G [2002] 2 FLR 1143, Coleridge J awarded a wife some shares in the husband's property company to ensure broad equality of both assets and risk. Second, in C -v- C [2003] 2 FLR 493, the same judge varied a trust to award a wife 30% of the husband's shares (15% of the company) in a private pharmaceutical company. He relied on the potential value of the company and the part the wife had played and wanted to continue to play in it. These considerations had to be balanced by the fact that the husband played the leading role in the company's formation and the fact that

the wife would be having the security of the whole of the matrimonial home.

However, such solutions run completely counter to the whole ethos of the divorce court over the last thirty years. The aim has been to "separate" spouses, both physically and financially, in situations where their marriages have failed. If the wife did not have shares in the husband's business whilst they were happily married, is it really a good idea to give her such shares following their divorce? It runs the risk of further litigation (eg by an oppressed minority in the Companies Court). What is to stop the husband simply putting the company into liquidation; offering no warranties to a prospective purchaser and starting again?

Indeed, in this regard, note that in Parra -v- Parra [2003] 1 FLR 942, Thorpe LJ said at [27]:-

"As a matter of principle, I am of the opinion that judges should give considerable weight to the property arrangements made during marriage…"

If there is to be a transfer of shares between spouses, see the Inland Revenue Note "Capital Gains: Transfer of Assets Under A Court Order – Restriction of Gift Hold-Over Relief" [August 2003]. As from 31.07.02, transfers of business assets will be free of any immediate capital gains tax consequences provided the Court makes an order which results in the transfer of assets between the spouses. The transferee spouse will then inherit the transferor's base cost for the purpose of CGT on any future disposal of the asset.

(i) Could Mrs Agent Smith get more than half?

Charles J had awarded a wife 54.3% of the assets in the case of Parra -v- Parra [supra] as a result of his assessment that the husband's future prospects were better than those of the wife.

The Court of Appeal allowed the appeal and divided the assets equally. Thorpe LJ thought the case "fundamentally simple". The parties had owned everything jointly, including the company shares and the land from which the company traded. Either it should all be sold or the husband should buy out the wife's share but there was no justification for her getting more than half, particularly when she was going to be receiving liquid assets whereas he was likely to be saddled with debt. The court should not adjust the division on the basis of speculation as to what each may or may not achieve in the years ahead.

Moreover, as everything was being divided equally, the parties should each pay one-half of the children's school fees.

(j) Should Mrs Agent Smith have any sort of charge in case the land is eventually developed?

In Parra –v- Parra [supra], Charles J gave the wife a charge for half of the net gain resulting from any future residential development value of the land. The Court of Appeal thought such an order highly exceptional and inconsistent with the clean break provisions of section 25A. Although the prospects of development were remote, if it occurred, the windfall would be huge. The husband had accepted in evidence that it would be fair for the wife to benefit if it ever occurred. The provision was therefore retained.

Note - The husband clearly had second thoughts. He immediately put the land on the market for sale. When it failed to reach its reserve, he bought it back himself. In doing so, he managed to avoid making any payment pursuant to the charge.

If you need expert evidence on the value of land or any other important issue, note the Practice Direction re: single joint experts at [2003] 1 FLR 431.

(k) Does Mr Agent Smith have any prospect of obtaining a Mesher order?

In B -v- B [2003] 2 FLR 285, the marriage lasted less than a year, but there was a child. The Deputy District Judge awarded the wife £175,000 to purchase a house but declined to give the husband any deferred interest such as a Mesher order. Munby J dismissed the husband's appeal. He rejected the suggestion that a Mesher order would leave the wife in fear of constant observation by the husband.

However, such an order would still be wrong as the wife had only a small prospect of generating capital in the years ahead due to her commitment to the child, whereas the husband would be likely to generate such capital. The advantage to the husband of the Mesher order would be modest, whereas the burden to the wife would be significant.

(l) Is there a presumption of no order as to costs?

First, the Family Proceedings (Amendment) Rules 2003 repeals Rule 2.69C (indemnity costs/penal interest on lump sum if you have beaten your own Calderbank offer).

Norris -v- Norris; Haskins -v- Haskins – Court of Appeal [28.07.03] – there is no presumption at present of no order as to costs. Rule 2.69B applies until the rules are changed or amended. Any injustice can be mitigated by use of Rule 2.69D, which gives a general and wide discretion to depart from the starting point of "winner takes all". You cannot avoid Rule 2.69B by not making any offers as there is an obligation to engage in serious negotiation. The Court of Appeal was attracted to the idea of a starting point of "no order as to costs", particularly if the assets are being divided equally but referred the matter back to the Rules Committee for further consideration.

(m) Has the law changed or is it about to change?

Financial Provision on Divorce – Clarity and Fairness; Proposals for Reform by The Law Society's Family Law Committee is a very useful set of proposals to improve the operation of ancillary relief work. The Times, however, got it completely wrong in June 2003 when the front page of the paper said that the law had changed.

The Report makes a number of recommendations. In particular, it proposes that section 25 be amended to incorporate guidelines as to how the discretion should be exercised to give greater certainty and clarity. The draft makes a distinction between those cases where the assets exceed needs and those where it does not. In the latter situation, housing the minor children must be the first priority of the court.

There are also proposals to reform procedure; to permit interim lump sums and to allow pre-marital contracts.

2. The case of Mrs Jean Grey

Mrs Jean Grey comes to see you in some distress. She married her husband, Mr Rogue Grey in 1990. They have one child, who lives with Mrs Grey. The marriage broke down in 1999 and Mrs Grey presented a Petition that year. A Decree Nisi was pronounced but it has never been made Absolute.

The former matrimonial home is known as Wolverine. It is a property worth around £350,000 but is subject to a mortgage of £150,000. It is held in Mr Grey's sole name.

Over the years, Mr Grey has had all sorts of business interests, some of which have succeeded and some of which failed. He claims to have no other assets, apart from a pension fund with a CETV of £95,000.

Unfortunately, he has been involved in importing televisions into this country on which he did not pay the VAT. The Customs and Excise have made a claim against him.

His most recent venture was with his girlfriend, Magneto, and was known as Cerebro. It failed last year. He claims there were lots of debts, but Mrs Grey assures you that Magneto is very wealthy and paid them all off. He then obtained a job working for a local crook called Stryker, selling a children's toy, called the Cyclops. He was still working for Stryker when the ancillary relief was heard. He told the District Judge

that he did not think the job would last as the Cyclops was “imported rubbish”.

The District Judge rejected Mr Grey’s evidence about virtually everything. In particular, he made a finding that there were no debts from the business, Cerebro. An order was made transferring the matrimonial home to Mrs Grey and giving her maintenance.

Just as Mrs Grey’s previous solicitors were about to get the home transferred, Mr Grey made himself bankrupt, relying on a number of “very dodgy debts”. The trustee now says that the property will have to be sold to discharge the debts.

The house has gone up in value dramatically. Moreover, Mr Grey has lost his job. He has told Mrs Grey that he intends to apply to the court to set aside the order, as there has been such a huge change in circumstances.

Since he lost his job, he has not been paying the maintenance. Mrs Grey’s previous solicitors issued a Judgment Summons but she has just received a letter from Mr Grey’s solicitors saying that they are applying to dismiss as it was issued on the wrong form.

Mr Grey told his wife, off the record, that Stryker has a new venture afoot. He wants to “cut Mr Grey in” but only if Mr Grey is “free of any matrimonial problems”. To this end, Stryker would be prepared to pay some capital to Mr Grey to enable him to pay Mrs Grey, but only if there is a clean break. She told him she would like a clean break but he would have to pay off the mortgage on her home as well as giving her enough to live on.

Mrs Grey was told by her friend, Mr Xavier, that her previous solicitors, Messrs Storm & Co, were negligent as they should have applied to rescind the Decree Nisi and get her a pension sharing order. Mr Grey’s response was to say that he would immediately apply for Decree Absolute.

There have been six different hearings so far and they have all been heard by different judges. Mrs Grey is very upset by this. She wants the nice Judge that heard the case the last time to deal with it in future. Mr Grey objects as, apparently, the Judge called him a “rogue”, rather than Mr Rogue.

She asks:-

(n) Can she rescind the Decree Nisi, so as to obtain a pension sharing order?

S -v- S [2002] 1 FLR 457 - Singer J held that there was no difficulty in rescinding a decree nisi that had not been made absolute where both parties agreed, even if the object was to achieve a pension sharing order following the later petition

But in H -v- H [2002] 2 FLR 116 – Bodey J held that recission was not possible unless both parties consent. To do otherwise, would be contrary to the will of Parliament that there should be a clear date (01.12.00) before which pension sharing was not available.

In Rye -v- Rye [2002] 2 FLR 981, Charles J decided that the court was entitled to have regard to the fact that the husband was not prepared to co-operate in reducing the long term risks for the wife by allowing there to be a pension share. This justified transferring the matrimonial home to her to improve her security.

Finally, in W -v- W [2002] 1 FLR 1225, Bodey J found that the operative date was the date of the husband’s petition. The fact that a cross-petition was dated after 01.12.00 did not assist as it did not constitute separate proceedings.

(o) How will the court respond to Mr Grey’s application to make the Decree Absolute?

See Re: G [2003] 1 FLR 870 – to prevent an application to make a decree absolute, a wife has to make out a case that she would be prejudiced by its grant. The mere fact that the ancillary relief proceedings had not yet been determined was not sufficient of itself. Equally, a husband did not have to show that he

would be prejudiced by delay in obtaining the decree.

(p) Is it possible to set aside the bankruptcy?

In Couvaras -v- Wolf [2002] 2 FLR 107 – Wilson J annulled a bankruptcy order and dismissed the bankruptcy petition, having found that it was a sham. The petition had been devised by the husband to enable him to avoid paying a lump sum to the wife, when he was not genuinely insolvent.

Also note Cartwright -v- Cartwright [2002] 2 FLR 610 – a foreign periodical payments order could not be regarded as final and conclusive. It was therefore a debt unenforceable at common law in England and not provable as a bankruptcy debt. A foreign lump sum order, which did not contain any element of capitalised periodical payments, was not variable and could therefore be enforced at common law. Arden LJ repeated the invitation to the Insolvency Rules Committee to allow an English lump sum order to be provable in bankruptcy (NB – the decision of Rimer J at [2002] 1 FLR 919 was overturned).

But see The Enterprise Act 2002 – the period for discharge of bankruptcy has been reduced to only 12 months to "encourage honest risk takers", although the Official Receiver can apply for various restrictions, eg on the ability to obtain credit, being engaged in business on his own account or acting as an insolvency practitioner!

(q) If not, will the trustee be bound by the ancillary relief order?

Mountney -v- Treharne [2002] 2 FLR 930 – a property adjustment order, which ordered a husband to transfer his interest in the matrimonial home to the wife, conferred an equitable interest on her at the moment the order was effective, ie on decree absolute. The trustee in bankruptcy therefore took subject to her interest under the order and the wife was entitled to enforce the order against the trustee. Again, note that [2002] 2 FLR 406 is no longer good law.

See also, F -v- F [2003] 1 FLR 911 – Coleridge J set aside a number of charges placed on property by an intervenor on the basis that the husband had failed to rebut the presumption that he had agreed to the charge with the intention of defeating the wife's claim. Equally, the bankruptcy order made against the husband was set aside as his assets exceeded his liabilities by some £310,000. The intervenor did have a one-third interest in the various properties but, so far as the matrimonial home was concerned, realisation of the interest was postponed until such time as it was no longer required to house the children.

(r) Can Mr Grey set aside the order on the grounds that he has lost his job?

Maskell -v- Maskell [2003] 1 FLR 1138 – unemployment is not an unforeseen and fundamental supervening event, sufficient to justify an appeal based on Barder -v- Caluori [1988] AC 20. However, the judge had given the wife the equity in the matrimonial home on the base that the husband retained a pension fund of roughly equal value. This was fundamentally flawed as the court should not confuse present liquid capital with future pension rights, given the restrictions on such pensions.

Rose -v- Rose (No 2) [2003] 2 FLR 197 – the court has jurisdiction to strike out an unmeritorious application to set aside a consent order, if the court is satisfied that no useful purpose would be served by reopening matters. The husband's delay was an additional reason why the application should not be allowed to proceed any further.

See also Shaw –v- Shaw [2002] 2 FLR 1204 – given the overriding importance of finality to litigation, any application to set aside should be made promptly. Delay should be censured. Moreover, the wife's relationship with her boyfriend had been fully investigated at the trial. The fact that the relationship persisted thereafter, did not give the husband the right to reopen the process, particularly when the wife's award was based on entitlement rather than needs.

(s) If the husband was able to launch an appeal, on what basis would it be determined?

Family Proceedings (Amendment) Rules 2003 – Rule 8.1(3):-

"the appeal shall be limited to a review of the decision or order of the district judge unless the judge considers that, in the circumstances of the case, it would be in the interests of justice to hold a rehearing"

Oral evidence or evidence not before the District Judge may be admitted if it is in the interests of justice to do so.

(t) What will happen to the Judgment Summons?

See the Family Proceedings (Amendment) Rules 2003 which amend FPR Rule 7.4 to make the rules Mubarak [2001] 1 FLR 673 compliant. A new Form M17 has been introduced which must be used.

And Corbett -v- Corbett [2003] 2 FLR 385 – the new form does not dilute or obscure the need to give the respondent clear particularity of the case he has to meet before he has to respond. Remember that the court can consider variation of the original order (including retrospectively) even where an application has not been made. If there is to be an application to vary, it should be determined first and should investigate motivation and good faith as well as means.

(u) Are there any other means of enforcement?

Oral examination – see Mubarak –v- Mubarak (No 2) [2003] 2 FLR 553 – Hughes J. Although Order 48 does not specifically authorise a freestanding process of specific discovery, the rules do permit the examination to be adjourned from time to time. Orders can be made for the production of documents, provided they are relevant to the means of paying. A document could be sought even if it was not in the physical possession of the debtor provided he had a clear and enforceable right to obtain it in his personal capacity, rather than merely as a director of a company.

Field –v- Field [2003] 1 FLR 376 – Wilson J. The court has no power to make a charging order on entitlements under a pension scheme. Section 37(2) of the MCA could not be used to obtain a mandatory injunction, requiring a husband to take his pension lump sum immediately. The section only enables the court to make prohibitory orders, not mandatory ones. Finally, the court could not appoint a Receiver as the husband's rights in the pension scheme were not of such a nature as to make his interest assignable.

(v) Will the Customs & Excise be able to apply to recover their debt?

Re: MCA; HM Customs and Excise Commissioners and Long -v- A [2003] 1 FLR 164; dismissing an appeal by HM Customs and Excise from Munby J at [2002] 2 FLR 274. There was nothing in either the confiscation provisions of the Drug Trafficking Act 1994 or the MCA 1973 to indicate that one statute took priority over the other; both statues conferred discretion on the court. There was therefore jurisdiction for a court to transfer the matrimonial home to the wife, notwithstanding a confiscation order against her husband's assets in a case where she was wholly innocent of any wrongdoing, ignorant of her husband's criminal activities and the property itself was untainted by the drug trafficking.

See also CPS -v- Grimes [2003] 2 FLR 510 – Wilson J. The house was in the husband's sole name; a confiscation order was made against him for more than the net equity. Nevertheless, the court awarded half the equity to the wife, following a declaration that she was an equal owner in equity. In the alternative, the court could order a lump sum under the MCA equal to half the equity, given the wife's contributions; the fact that she had not participated in, or had any knowledge of, the husband's criminal activities and her state of health and poor financial position. On the other hand, the husband's illicit income had also contributed to the costs of the home and, given the confiscation order, the other half should go in partial satisfaction of the order.

(w) On what basis would the court capitalise the maintenance. Could Mrs Grey get the mortgage discharged?

Pearce -v- Pearce – Court of Appeal [28.07.03] - when capitalising periodical payments pursuant to MCA

section 31(7B), the court should not reopen capital claims. Hence, the lump sum cannot be increased to enable a wife to discharge her mortgage at the husband's expense. Cornick –v- Cornick (No 3) [2001] 2 FLR 1240 disapproved. The court's objective should be to substitute for the periodical payments order such lump sum as will fairly compensate the payee and at the same time complete the clean break.

W -v- W – Nicholas Mostyn QC [08.09.03] – imposing a Duxbury rate of 3.75% on a claimant spouse exposes her to a considerable risk of the money running out. An older wife deserves greater security than the standard Duxbury calculation. The eventual lump sum equated to a rate of return of 3.25% or a standard rate of return plus a further £25,000 for "the exigencies of life, death and markets".

(x) Should there be judicial continuity?

The Practice Direction on Judicial Continuity [2002] 2 FLR 368, which deals primarily with children's cases in the High Court, does not formally apply to ancillary relief cases but judicial continuity will be observed whenever possible (save for the FDR). Note that there is a provision in the Practice Direction for applying to a DJ prior to the First Appointment for transfer to the High Court in a suitable case.

3. The case of Mr Johnny English

Mr Johnny English is an old client of your senior partner, Mr Bough, and you have been asked to help out on his case. You agree to have lunch with Johnny. He comes from a very wealthy family, who have maintained Johnny throughout his life to a very high standard.

Unfortunately, Johnny has got himself into a number of unfortunate scrapes over the years. He met a woman called Lorna Campbell and they had a son. They never married, nor did they live together. Lorna has brought a claim against him under Schedule 1 of the Children Act. She says that she wants to live in Chelsea, as that is the only suitable area for the son of an English.

At the same time, Johnny was married to a French lady, Madame Sauvage. Madame Sauvage has instituted proceedings here. Johnny instituted them in France, on the advice of your wily Senior Partner. When you look at the documents, it appears his Petition was three days earlier than Madame Sauvage's English Petition.

Madame Sauvage has brought a claim for maintenance pending suit here. It includes a claim that Johnny pays her costs. Johnny says that his Papa and Aunt are frightfully miffed about the whole thing and have decided to cut him off without a penny. Indeed, just at this moment, the bill for lunch arrives and, after fishing about in his pockets, he grins and passes it over to you.

Although it was a short childless marriage to Madame Sauvage, they do have one asset. Johnny set up a business selling bugging devices to his friends. Apparently, they work rather well. His papa put in £25,000 but Madame Sauvage put in £35,000. The business is now worth £75,000 and he would like to sell it to his great mate, Jimmy Bond.

He asks you the following questions:-

(y) How will the court deal with Lorna's wish to live in Chelsea in her application pursuant to Schedule 1 of the Children Act 1989

In K –v- K [2003] 1 FLR 120, Rodger Hayward-Smith QC allowed £1.2 million for a house in Central London. A child of parents between whom there was a great disparity of wealth was entitled to be brought up in circumstances which bore some sort of relationship to the current resources and standard of living of the wealthier parent. The length of the marriage was irrelevant in this context.

Re P (Child) – Court of Appeal [24.06.03] is the first case where a Schedule 1 application has been considered by the Court of Appeal. Again, the father was very wealthy, but the parents had never lived

together. The Court of Appeal allowed the mother's appeal. A settlement of property order was made to enable the mother to buy a property in Central London for £1 million, with reversion to the father. The justification was very much as per K -v- K. A further sum of £100,000 was ordered to enable it to be furnished suitably.

The groundbreaking part of the order, though, is the size of the periodical payments order for the three year old child, namely £70,000 per annum. Thorpe LJ said at [48]:-

"Thus there is an inevitable tension between the two propositions, both correct in law, first that the applicant has no personal entitlement, second that she is entitled to an allowance as the child's primary carer. Balancing this tension may be difficult in individual cases. In my judgment, the mother's entitlement to an allowance as the primary carer (an expression which I stress) may be checked but not diminished by the absence of any direct claim in law."

And at [49]:-

"Thus in my judgement, the court must recognise the responsibility, and often the sacrifice, of the unmarried parent (generally the mother) who is to be the primary carer for the child, perhaps the exclusive carer if the absent parent disassociates from the child. In order to discharge this responsibility, the carer must have control of a budget that reflects her position and the position of the father, both social and financial."

The judgment seems to suggest that just about the only things deducted from the budget were pension contributions, endowment policies and the ability to put money away for a rainy day.

(z) Given the proceedings in France, with the English court entertain the application for maintenance pending suit?

In Ghoth -v- Ghoth [1992] 2 FLR 300, a wife obtained a modest maintenance pending suit order prior to her petition being dismissed on the basis that she was not domiciled here. She appealed and the Court of Appeal gave her some Mareva protection in respect of maintenance pending suit pending her full appeal.

In Wermuth -v- Wermuth (No 2) [2003] 1 FLR 1029, the Court of Appeal discharged a maintenance pending suit order on the basis that it was not a protective or provisional measure under Art 12 of Brussels II. The whole purpose of Brussels II was to eliminate superfluous and expensive litigation. There was a strong presumption that the court of first issue was the court first seized under Brussels II. The other jurisdiction should merely "hold itself in waiting" just in case the apparent priority should be disproved or declined.

(aa) If the court did deal with the application for maintenance pending suit, how would it react to the family's refusal to support Johnny?

In M -v- M [2002] 2 FLR 123, Charles J awarded interim maintenance of £330,000 pa in a case where the husband claimed that his father was withdrawing financial support. The court was not bound to accept this contention and did not have to proceed on the basis of what the husband said as to his present resources. The court would consider the principles and guidance in Thomas -v- Thomas [1995] 2 FLR 668.

Equally, in G -v- G [2003] 2 FLR 71, Charles J held that, in deciding whether or not to accept H's assertions as to his means and ability to pay, the court had to consider his explanation of his financial position and the quality of the disclosure he had provided. The court did not have to accept his contentions at face value if he had failed to provide full disclosure. If the resulting order was too high, he could always provide the missing disclosure and then apply to vary.

(bb) If the ancillary relief proceeds here, how will the court divide the proceeds of sale of the business?

Foster -v- Foster [2003] 2 FLR 299 – there is no justification for discriminating between spouses on the basis of differences in income earned during the marriage. The District Judge was right, in a short, childless marriage to return to the parties what he or she had brought into the marriage and divide the profits made during the marriage equally between them. Where there was no issue as to housing needs, the profits accruing during the marriage amounted to the proceeds of a joint enterprise, to which both had contributed. The net result was a division 61% to the wife and 39% to the husband.

(cc) Madame Sauvage make an application here pursuant to Part III of the 1984 Act?

A -v- S [2003] 1 FLR 431 - international comity strongly indicated that Part III could not be used in the vast majority of cases where a foreign court had dealt with an ancillary relief claim. However, in this instance, the Texan court had not determined the relevant issues of fact, namely whether or not the husband had promised the wife an interest in their English property. As the court felt that the outcome in Texas (wife to get nothing) was not just, Part III could be used to right the wrong. However, the English court would intervene only to the minimum extent required to remedy the perceived injustice.

Philip Moor QC
1 Hare Court
Temple
London
EC4Y 7BE

28 October 2003

Private Law Developments in Children Cases

Andrew McFarlane QC

30 October 2003

Continuing Professional Development Seminar

PRIVATE LAW DEVELOPMENTS IN CHILDREN CASES
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Welfare Issues

ECHR: definitive statement that welfare of the child is paramount consideration under Art 8
In the context of a private law dispute between parents, a father took proceedings to achieve legal recognition of his status as 'father'. He was unsuccessful and complained to the ECHR, which, on the facts, dismissed his complaint.
In the course of its judgment the ECHR recorded:
'The court reiterates that in judicial decisions where the rights under Art 8 of parents and those of a child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail.'
Yousef v The Netherlands [2003] 1 FLR 210

Court should respect the wishes of older children
HH Judge Tyrer paid due regard to the clear wishes and feelings of a 16 and a 14 year old. If young people are to be brought up to respect the law, the law has to respect them and their wishes, even to the extent of allowing them, as occasionally they may do, to make mistakes.
Re S (Contact: Children's Views) [2002] 1 FLR 1156

Court should take account of the different role and function of men and women
The Court of Appeal (Thorpe LJ) refused permission for a father to appeal a residence order made in

favour of the mother. The mother, who was a City high flyer, proposed to give up her career to care for the two young children. The father's proposed appeal was on the basis that if the genders were reversed and as father proposed to give up a lucrative employment so that the whole family suffered financial he would have no chance of success. Thorpe LJ observed that that submission ignored the realities, namely the very different role and function of men and women.
Re S (Children) [2002] EWCA Civ 583

Importance of grandparents / test for application for leave
Plan for adoption of child whose grandmother sought to care for her. Local authority and guardian rejected grandmother's proposals on the basis that at 59 bringing up a child would be too great a burden. Grandmother's application for party status and to make a residence application refused.
Court of Appeal [Thorpe LJ Ferris J] allowed the appeal holding that Re M (Care: Contact: Grandmother's application for leave) [1995] 2 FLR 86 had served a valuable purpose in its day but it was not appropriate to substitute the test "has the applicant satisfied the court that she has an arguable case" for the test in CA 1989, s 10(9) namely the nature of the application, the applicants connection with the child, risk of disrupting the child's life and the wishes and feelings of the parents and plan of the local authority. Applicants under s 10(9) now enjoyed rights under Arts 6 and 8 and the minimum essential protection meant that judges should be careful not to dismiss such an application without full inquiry. It is important that judges should recognise the greater appreciation that had developed of the value of what grandparents had to offer.
Re J (Leave to issue application for residence) [2003] 1 FLR 114

Residence Orders

Shared residence should only be made if there is an element of 'residence'
A shared residence order was made at first instance in order to recognise the equal status of each parent. On appeal, the Court of Appeal [Hale and Rix LJJ] held that where the child was not only not going to reside with the other parent, but was not even going to visit him, a residence order was not appropriate. Shared orders were not, however, necessarily exceptional orders.
Re A (Shared Residence) [2002] 1 FCR 177

Shared residence order is not precluded by adverse findings against one parent
The Court of Appeal [Thorpe LJ and Wilson J] dismissed a father's appeal against the making of a shared residence order. The fact that the judge had been critical of the mother did not preclude making a shared order, nor the fact that the parties may live in different parts of the UK.
A shared order was not confined to cases where a child spent equal times in each home. If the home offered by each parent is of equal status and importance to the child an order for shared residence can be valuable.
Re F (Shared Residence Order) [2003] EWCA Civ 592; [2003] 2 FLR 397.

Residence order: conditions limiting movement of family [1]
A judge made a residence order providing for a child to continue to reside with her mother. The judge added a condition requiring the child to continue to reside in her present location (and not move to Cornwall as the mother intended) unless ordered by the court. The Court of Appeal (Thorpe and Clarke LJJ) allowed the mother's appeal and remitted the case for rehearing. In determining the residence issue the court should evaluate the mother's proposals as a whole, including the likelihood that she may move out of the current location. The court should not limit a parent's ability to move within the jurisdiction. Conditions under s 11 should be confined to situations where there were specific concerns about a parent's ability to provide good enough care. There was a need for a consistent approach between those cases where a parent sought to remove a child from the jurisdiction (for example Payne v Payne) and the present type of case where the parent sought liberty to move within the jurisdiction.
Re S (A Child) (Residence Order: Condition) [2001] EWCA Civ 846; [2001] 3 FCR 154

Residence order: conditions limiting movement of family [2]
The Court of Appeal (Thorpe LJ and Astill J) dismissed a father's appeal from an order granting him residence, but imposing a PSO preventing the child's permanent removal to Northern Ireland. N Ireland is within the UK and therefore s 13(1)(b) did not apply. In the 'highly exceptional' circumstances of this case, where the medical evidence indicated that the effect of a move away from the area where the mother lived would be devastating to the children, such a condition was justified. These facts therefore justified a different course from normal approach described in Re S (above).
Re H (Children) (Residence Order: Condition) [2001] EWCA Civ 1338; [2001] 2 FLR 1277

Residence order: conditions limiting movement of family [3]
The case of Re S ([1] above) returned to the Court of Appeal (Butler-Sloss P, Waller and Laws LJ). At the second county court hearing the court had heard evidence of the impact upon the mother and her family of preventing a move to Cornwall (a key flaw in the first hearing). The judge once again imposed a condition preventing removal to Cornwall. The judge held that the child's special characteristics (Down's Syndrome and heart problem) combined with the risk of suffering serious emotional harm were highly exceptional circumstances which justified the imposition of a condition.

The Court of Appeal held that the judge had been entitled to treat the case as exceptional and his conclusion could not be faulted. Appeal dismissed.
Re S (A Child) (Residence Order: Condition) (No 2) [2002] EWCA Civ 1795; [2003] 1 FCR 138.

Contact Orders

Time spent in recognisance may be desirable before refusing contact
A judge made no order for direct contact to a father, who, 3 months earlier, had threatened to kill himself and his children. The Court of Appeal allowed the father's appeal to the extent that the making of a final decision in such a case only 3 months after the event was premature. An adjournment of 6 months would have allowed a proper assessment of any continuing risk.
The case was remitted for hearing before Wall J who held that where the need to preserve the physical and mental health of the primary carer was the most important consideration, that factor could outweigh the wishes of the children to maintain contact.
Re H (Children) (Contact Order) [2001] 1 FCR 49 (CA)
Re H (Contact Order) (No 2) [2002] 1 FLR 22 (FD)

Dominant factor is the need to protect the primary carer
Father who had Huntington's disease, a disorder leading to adverse effects on mood and personality having generous contact with the children made a plan to kill the children and commit suicide. Prevented by a passer by. Application for contact refused on the basis that the court had to consider the fundamental need of the children to have an enduring relationship with both parents balanced against the harm that would be suffered if contact was ordered. The overriding consideration was the need to protect the mother, the primary carer who was suffering PTSD.
Per curiam: where contact issues are as difficult as these, consideration should be given to separate representation for the children
Re H (Contact Order)(No 2) [2002] 1 FLR 22

Court should consider the medium and long-term consequences of terminating contact
The Court of Appeal [Ward, Clarke LJJ and Sir Martin Nourse] allowed a father's appeal from an order terminating his contact to his 4-year-old son. The mother terminated contact after the father had made referrals to social service alleging neglect and abuse by the mother and her boyfriend. The judge held that the referrals were unjustified and had been used by the father to harass the mother and found that the father had put false ideas into the child's mind about being hit by the boyfriend. The judge held that these factors were sufficiently cogent reasons to justify terminating contact. Ward LJ held that the judge had ignored the established attachment between father and son and the harmful effect severance of that would have. It was necessary to look at the medium and long-term effects of termination and as a result the judge's conclusion was plainly wrong.
Re J-S (A Child) (Contact: Parental Responsibility) [2002] 3 FCR 433.

Domestic violence: preliminary hearing on factual issues – bench to retain case thereafter
Where a court (in this case an FPC) holds a preliminary fact finding hearing on issues of domestic violence within the compass of a contact dispute (such a step being entirely appropriate), the same bench should then continue to be seized of the case and treat it as part heard for all future substantive hearings.
M v A (Contact: Domestic Violence) [2002] 2 FLR 921.

Indirect contact even with genuine and intense phobia
Father had history of violence. Stabbed mother, he solicitor and her boyfriend. During relationship there had been extreme domestic violence and thereafter harassment and stalking. Mother had phobia of the father which was genuine and intense. Direct contact would be profoundly destabilising. Nevertheless indirect contact was containable and outweighed in the balance by the potential benefit to the child of retaining some awareness of the father.
Re L (Contact: Genuine Fear) [2002] 1 FLR 621

Transfer of residence not to be used as punishment for contempt

The Court of Appeal [Peter Gibson, Mance and Hale LJJ] allowed a mother's appeal from an order committing her to prison for 42 days and her appeal against a residence order made in favour of the father following the mother's failure to abide by contact orders.
On the issue of residence, Hale LJ held that when a court makes a s 8 order the paramount consideration should be the welfare of the child, and not a desire to punish the mother or provide a way of enforcing the contact order. Transfer of residence is sometimes appropriate and can work very well in securing contact, but the two little girls had not lived with the father for many years and a transfer of residence was not justified on welfare grounds.
Re K (Contact: Committal Order) [2002] EWCA Civ 1559; [2003] 1 FLR 277.

Duty on court to assess origins of apparent alienation and make findings
There was a long-standing history of litigation over contact, during which successive orders had been made for full staying contact. The child, now 11, in contrast to his previous approach to the father, began to show hostility towards him and towards contact. The judge attributed the child's alienation to the father's long-standing drug and alcohol problems and did not make any express findings concerning the mother's potential role in the development of alienation. The judge made an order for interim indirect contact.
On appeal, the Court of Appeal [Thorpe, Rix and Arden LJJ] set aside the order and directed the joint instruction of a child psychiatrist. The judge should have considered whether the mother and her family were, at least unwittingly, an agent of the child's malignity. The obligation to investigate the origins of alienation stems from our domestic law.
However, ECHR cases suggest that the methods and levels of investigation that our courts have conventionally adopted when assessing issues of alienation may not meet the requirements of Art 6 and Art 8:
- should judges see children to ascertain wishes and feelings?
- to what extent should separate representation of the child occur?
- what services can CAFCASS provide in this regard?
[Note: the three ECHR cases relied upon [Sahin, Sommerfield and Hoffmann v Germany] have since been amended in their effect by the Grand Chamber]
Re T (Contact: Alienation: Permission to Appeal) [2003] 1 FLR 531

Intractable contact dispute: use of care proceedings and change of residence
Two children aged 13 and 10 years had been the subject of long running contact proceedings. Contact stopped when, as the court found, the mother had falsely persuaded the children that the father and his parents had physically and sexually abused them. Contact was ordered but mother disobeyed the order. Further allegations of sexual abuse were found to be untrue and had been made as a result of the mother emotionally manipulating the children. Case transferred to the High Court.
Over a number of hearings Wall J:
- ordered a s 37 investigation
- care proceedings having been issued, removed the children from mother under an ICO
- subsequently made a residence order to father and a 2 year supervision order.
S 37 was justified in that the children were suffering significant harm because of the residential parent's false and distorted belief system about the other parent. 'The procedure is not a panacea and comes with strong health warnings.' The consequences must be fully thought through before embarking on this course.
Where there are serious factual allegations made, the court must adjudicate upon them and those findings should inform any LA assessment.
Children should be separately represented in private law proceedings where all contact has ceased and the issue of contact has become intractable.
Judicial continuity is essential.
Re M (Intractable Contact Dispute: Interim Care Order) [2003] EWHC 1024 (Fam); [2003] 2 FRL 636.

Contact: ECHR Cases

Three Strasbourg decisions on contact

First Instance (The Chamber) Decision:
In three cases against Germany decided on the same date the ECtHR considered the approach of the German courts to contact applications by unmarried fathers. The German law at the time made a distinction between the rights of fathers who were married to the child's mother and those who were not. The ECtHR held that the law amounted to discrimination in breach of Art 14.

Under Art 8 the ECtHR held that consideration of what lies in the best interest of the child is of crucial

importance in every case of this kind. A fair balance has to be struck between the interests of each parent and those of the child and that in doing so particular importance must be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent. In particular, a parent cannot be entitled to have such measures taken as would harm the child's health and development.

At no stage in the process in one of the cases had the 5 yr old child been heard in court. The expert had not asked the child about her father for fear that the child might gain the impression that her replies were decisive. The ECtHR held that this revealed an insufficient involvement of the applicant in the process. It is essential that the court has direct contact with the child. The regional court should not have been satisfied with the expert's view. Correct and complete information on the child's relationship to the applicant as the parent seeking access is an indispensable prerequisite for establishing the child's true wishes and thereby striking a fair balance between the interests at stake.

In the second case, a failure to order a psychological report on the possibilities of establishing contact revealed that the father had not been sufficiently involved in the process.
Sahin v Germany; Sommerfield v Germany; Hoffmann v Germany [2002] 1 FLR 119 [1st Instance]

Grand Chamber Decision (ref Sahin and Sommerfield):
The Grand Chamber considered two of the cases and rowed back from the Chamber's decision in some respects:
(a) it is going too far to say that domestic courts should always hear evidence from a child in court on the issue of access or that a psychological expert should be involved. The German courts had proceeded reasonably in both cases and the procedural requirements in Art 8 had been met;
(b) the distinction in treatment before the courts with respect to unmarried, as opposed to divorced, fathers was unjustified and there had been discrimination under Art 14;
Sahin v Germany; Sommerfield v Germany [2003] 2 FLR 671

No violation of Art 8 where reduction in contact is justified in child's interests
Where it had been held that extensive contact to the father exposed a young child to a conflict of loyalty between the parents with which the child could not cope, the German court had limited the father's contact and held that the father had failed to show concern for the child's psychological welfare by refusing to accept the restriction.
The ECtHR held that the decision clearly engaged Art 8, but that the actions of the domestic courts were based on reasons that were relevant and sufficient to meet Art 8(2).
The ECtHR stated:
'Undoubtedly, consideration of what lies in the best interests of the child is of crucial importance in every case of this kind. … A fair balance must be struck between the interests of the child and those of the parent and that, in striking such a balance, particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent.'
Hoppe v Germany [2003] 1 FLR 384.

Need for adequate enforcement of private law orders
Austrian wife took her 1 yr old daughter from USA to Austria without consent. The father obtained an order for summary return under the Hague Convention. An enforcement order was made and executed by bailiffs and police, but they could not locate the child. The mother appealed 8 months after the return order. Enforcement order was set aside and the return order was referred for further consideration in the light of the passage of time. The courts then went on to find that the situation had changed, the child's welfare was paramount and removal from the mother would expose the child to serious psychological harm. The husband complained to the ECHR:
Held that there had been a violation of Art 8: one of the positive obligations on public authorities under Art 8 is to take measures to enforce a parent's right to be reunited with his child. The obligation is not absolute and the interests and freedoms of all parties had to be taken into account.
Necessary steps to achieve enforcement should be taken quickly after an order is made: this is particularly so in Hague Convention proceedings. A change in circumstances might exceptionally justify not enforcing a return order, but the court would have to be satisfied that this change and not brought about by the State's failure to take all reasonable measures. In this case the Austrian authorities have failed to take adequate measures promptly.
Sylvester v Austria [2003] 2 FLR 210.

Removal from the jurisdiction

Importance of risk of thwarting primary carer's plans when determining leave to remove

Johnson J granted an application for a mother to remove her two children to the USA, despite evidence from three professional witnesses to the effect that the eldest child, who had moderate learning disability, would be disadvantaged by the move. The judge held that insufficient weight had been attached by the professionals to the disadvantage to the whole family if the move did not go ahead. These were sensible plans, not motivated by a desire to reduce contact, the arrangements were at least adequate and the mother was exceptionally committed to the children's care.
L v L (Leave to Remove Children from Jurisdiction: Effect on Children) [2003] 1 900.

No presumption that a reasonable proposal to move abroad will be granted
Charles J granted an application by a Singaporean mother to take the two children to live in Singapore. Following Payne v Payne [2001] 1 FLR 1052, there is no presumption that once a proposal to move abroad is shown to be reasonable it will be granted. That is the first hurdle. Thereafter there must be a welfare evaluation, in which the effect of refusal on the mother's care of the children (if detrimental) would be likely to outweigh other factors. Usually the harm that would flow from a reduction of contact to the other parent will not outweigh factors in favour of a move.
Re C (Permission to Remove from Jurisdiction) [2003] EWHC 596 (Fam); [2003] 1 FLR 1006

Application to move after remarriage in order to be with new husband/stepfather
Mother in Re B divorced and then married a successful and affluent S African business man, despite trying to do so, he could not run his business interests from the UK and she applied to move to S Africa with the two children. Her application was refused.
In Re S the mother divorced and now intended to marry a successful citizen of the Philippines who worked in W Australia. Her application was also refused.
The Court of Appeal [Thorpe, Judge and Sedley LJJ] allowed both appeals and granted orders for leave to remove from the jurisdiction.
The impact of a refusal had to be carefully assessed, this was particularly so when the new relationship was with a foreign national. The welfare of children is best served by being brought up in a happy, secure family atmosphere. Where the stepfather is a foreign national, the court risks jeopardising such a family unit if leave to remove is refused. Sedley LJ: the policy of CA 1989 has placed more emphasis on the importance to children's welfare of a stable and viable family unit in which to grow up.
Re B (Removal From Jurisdiction), Re; S (Removal From Jurisdiction) [2003] EWCA Civ 1149; [2003] 2 FCR 673

Specific Issue Orders

First names can be chosen by primary carer
Parents separated before child born and had no contact with each other during pregnancy. On child's birth father registered the birth with names MI. Mother went to register birth in the name of H. This registration was later cancelled leaving registration in the names MI. Mother sought a declaration that she could use the name H without representing that this was the registered name. Held : No order of the court could prevent the mother using the name of her choice – the given name that is customary in the primary home. Too much emphasis should not be placed upon the process of registration or the fortuitous fact that the father's registration was first in time
Re H (A Child) [2002] EWCA Civ 190; [2002] 1 FLR 973

Carer without PR should not change names
Foster carers decided to use middle names for three children in their care and in respect of two of whom they eventually adopted. Held: following adoption they were entitled to change names but in respect of other child they should not do so but after two years of so doing would not now be required to change the name back. Change of name is an important matter and should be treated with appropriate seriousness. The limit of the power of a foster carer should be made clear to them. If a foster carer wishes to change a name they should consult the local authority and the parents views should be sought. If necessary an application should be made to court (under the inherent jurisdiction).
Re D, L and LA (Care: Change of forename) [2003] 1 FLR 339

Choice of school
The Court of Appeal [Hale and Keene LJJ] dismissed an appeal against a county court order that permitting a mother to move all three children to the state school that was local to her home. The father wanted one of the children to remain at private school.
Hale LJ stressed the importance of considering the effect on any change on children: the court will normally require compelling reasons for making an order that will further disrupt the life of a child.
Each child's interests had to be looked at separately. Overall the judge's decision could not be criticised.
Re W (Children) (Education: Choice of School) [2002] EWCA Civ 1411; [2002] 3 FCR 473.

Wrong to delegate power to one parent
Parents unable to agree on choice of private school. Judge ordered that older child attend school as proposed by mother and then that future issues as to the children's schooling be determined by mother following consultation with the father. Appeal allowed. Held: the order amounted to a failure to adjudicate. The parents had a right to judicial determination and the court could not abdicate its fundamental duty to decide the issue.
Re P (Parental Dispute: Judicial Determination) [2002] EWCA Civ 1627 [2003] 1 FLR 286
MMR decision
Sumner J heard two separate applications from fathers to determine whether their children should have MMR vaccinations. Having heard extensive medical evidence, the judge decided that the medical argument was in favour of the MMR being administered. Despite the firm opposition of both of the mothers, Sumner J held that it was in the best interests of the children to have the vaccinations and he therefore made orders directing that they should be carried out.
Re C (Welfare of Child: Immunisation) [2003] EWHC 1376 (Fam).
[Note: The Court of Appeal dismissed the mothers' appeal on 30th July 2003: [2003] EWCA Civ 1148; (2003) Times, August 15]

Paternity and PR

Paternity should be established by science and not by legal presumption
The mother of twin girls was married to R, but had had a sexual relationship during the marriage with A. Two years after the birth of the twins the mother's relationship with A ended. A applied for contact and parental responsibility. The mother disputed his paternity. R had been throughout in ignorance of the relationship between his wife and A. R had always regarded himself as the genetic father. The judge refused to order scientific tests because of the potentially disastrous effects on the family of a finding that A was the father.
The Court of Appeal [Butler-Sloss P and Thorpe and Kay LJJ] [per Thorpe LJ] questioned the relevance of the presumption of legitimacy in the early part of the 21st century. The presumption arose at a time when science had little to offer and the stigma of illegitimacy was great. Now both the advancement of science and the expansion in the number of children born outside marriage means that 'the paternity of any child is to be established by science and not by legal presumption or inference'.
Re H and A (Children) [2002] EWCA Civ 383; [2002] 2 FCR 469

Parental responsibility order refused where it will be of no benefit
Father allowed indirect contact only. Prevented from making application for residence without leave. Father does not know where the child lived or went to school and has no direct contact with the mother. Giving him parental responsibility would cause distress to the mother and not identify any positive benefits to the child. It would be regarded as a symbol but would not in this case confer status
Re L (Contact : Genuine fear) [2002] 1 FLR 621

Using correct test to determine PR application
Judge refused to grant Father PR on the basis that he would use it to undermine Mother's care of the child and cause her stress. Appeal allowed and PR order made. Court of Appeal (Ward, Clarke LJJ and Sir Martin Nourse) held: Judge did not have the proper test in mind. He should have applied the criteria of Re H (Illegitimate Children: Father: Parental Rights (No 2) [1991] 1 FLR 214 namely the degree of commitment, the degree of attachment and the reasons for applying. It is possible that a father can behave so irresponsibly to be denied PR. Those cases are collected in the judgment of Hirst LJ in Re P (Parental Responsibility) [1997] 2 FLR 722. They are far removed from this case. This father had played an important part in his son's life and should be granted PR. [Note such a father would be automatically given PR once the A+CA 2002 is implemented].
Re J-S (Contact: Parental Responsibility) [2002] EWCA Civ 1028 [2003] 1 FLR 399

Embryo: partner not biologically related to embryo only 'father' if implantation in 'course of treatment' to them couple together
An unmarried couple attended for IVF treatment whereby the sperm of an anonymous donor was mixed with the woman's eggs. The man signed a form acknowledging that he would be treated in law as the father of any resulting child. The implantation of three of the embryos was unsuccessful. The remaining embryos were stored by the clinic. Some months later the woman requested the implantation of a further three of the embryos. By this time she had parted company from her partner. He did not know she was attending the clinic and she did not tell the clinic that they had separated. Following the birth of a child, the man, who had no biological connection with the child, claimed he was the 'father'.
HFEA 1990, s 28(3) provides that such a man is to be regarded as the father if the embryos had been placed in the mother 'in the course of treatment services provided for her and the man together.' At first instance Hedley J held that this was indeed the case and made a declaration of paternity in the man's

favour.
On appeal the Court of Appeal [Sir Andrew Morritt VC, Hale and Dyson LJJ] allowed the mother's appeal and set aside the paternity order overturning the 1st instance decision reported as B and D v R (by her guardian) [2002] 2 FLR 843 (Hedley J). The key time when the factual question of whether the man and woman are in receipt of treatment together is the date of implantation of the embryos. This man could not be said to have been receiving treatment at that time. While it is clearly in a child's interest to have a legal father if possible, the 1990 Act expressly provides for situations were that is not the case.
Re R (IVF: Paternity of Child) [2003] EWCA Civ 182; [2003] 1 FLR 1183.

Effect of mistake during embryo treatment on position of 'father'
In a much publicised case two couples attended a hospital for sperm injection treatment to mix the husband's sperm with the wife's egg in each case. By mistake the sperm of Mr B was mixed with the egg of Mrs A. Mrs A in due course gave birth to twins. All parties agreed that the children should remain in the A family and a residence order was made. There was then a hearing to establish paternity.
Dame Elizabeth Butler-Sloss P held that the common law presumption of legitimacy during marriage was displaced by DNA that showed Mr B as the biological father. Mr A was not to be treated as the father of the child under HFEA 1990, s 28(2) because he had not consented to the actual treatment that had been provided to his wife (ie using sperm from another man).He could not retrospectively consent. The hospital's mistake was fundamental and went to the root of the consents that had been given. The embryo had been created without the consent of either mother or her husband. HFEA 1990, s 28(3) (a couple being treated together) was not intended to apply to husbands and in any event, due to the mistake, did not apply here.
Leeds Teaching Hospitals NHS Trust v A [2003] EWHC 259 (QB); [2003] 1 FLR 1091.

Representation of Children in Private Law Proceedings

Increased use of guardians for children in private law proceedings
Contact proceedings were pending. The mother relied on allegations of sexual abuse of the child and his siblings. The mother approached NYAS who sought leave to intervene and to act as the child's guardian ad litem. The judge refused the application and NYAS appealed. The Court of Appeal [President, Hale and Potter LJJ] allowed the appeal holding it was appropriate for the child to be separately represented in the light of the problems facing both parents, the allegations of sexual abuse, and the potential conflict of interests between the parents and the child. The HRA 1998 was likely to lead to an increased use of guardians in private law proceedings. [nb the CAFCASS amendments to the FPR require the welfare officer to specifically consider separate representation]. In order to avoid any perception of bias resulting from the fact that NYAS had been brought in by the mother, the OS would be appointed to act as guardian ad litem.
A v A (Contact: Representation of Child's Interests) [2001] 1 FLR 715

Application by child to intervene in residence application
Application by a 12 year old to intervene in the residence dispute within divorce proceedings. Solicitor instructed was satisfied that he had the necessary understanding. The boy wanted to make sure that his wishes and feelings were fully argued before the court. Johnson J refused the application on the ground that there was no argument that could be addressed to the court on behalf of the child that would not be addressed on the father's behalf (there being a unity of interest in their respective cases). There was no advantage to the child or to the court in having separate representation.
On a second point, the child, who was the subject of a s 8 contact order, was not entitled to apply to vary the order as he was not a person 'named in the order'.
Re H (Residence Order: Child's Application for Leave) [2000] 1 FLR 780.

Where child is too young to instruct, it is inappropriate to appoint a solicitor for him
The Court of Appeal held that a judge had been wrong in s 8 proceedings, to join a 2-year-old child as a party and to appoint a solicitor to act for him under FPR, r 9.2A without a guardian ad litem. The judge should have sought to appoint a guardian ad litem under r 9.5, having (pre CAFCASS) invited the OS to act. If the solicitor had been appointed to act as guardian ad litem, rather than solicitor, that would not have been inappropriate. The objections to this process should have been made at the time and not only on appeal.
Re N (Residence: Appointment of Solicitor: Placement with Extended Family) [2001] 1 FLR 1028

Best practice: approach CAFCASS Legal before appointing any other guardian ad litem
The Court of Appeal held [The President, Ward and Keene LJJ – in November 2001] that a county court had been wrong to appoint a local solicitor to represent at 7 year old child in contact proceedings with the welfare input being provided by an independent social worker instructed by the solicitor.
The proper course in such cases is for a Child + Family Reporter's report to be requested. Only if that

report was inadequate would the question of separate representation arise. If separate representation was sought, then CAFCASS Legal should be invited to represent the child (as a Rule 9 guardian ad litem). If CAFCASS declined the invitation, 'a local guardian and local solicitor' could be approached.
Re W (Contact: Joining Child as Party) [2001] EWCA Civ 1830; [2003] 1 FLR 681.

Separate representation justified where contact issue is difficult
Wall J observed that in a difficult contact case consideration should be given to the child being separately represented and, where appropriate, expert evidence being sought on their behalf. In such cases children frequently have particular interests and standpoints which do not coincide with or can be adequately represented by the parents.
Re H (Contact Order) (No 2) [2002] 1 FLR 22

Test for child acting without a guardian ad litem: 'sufficient understanding to participate'
In long running contact proceedings, the three children were represented by a solicitor appointed as guardian ad litem under FPR 1991, r 9(2)A. The oldest child, aged 11¼ yrs, sought to discharge the GAL in order to oppose the judge's plan for the reintroduction of contact and in order to apply to lift a prohibition on therapy at a particular unit that the trial judge had imposed. The issue was determined by a different judge, Coleridge J, who held that the test in relation to discharging the present guardian, and the test for leave to defend the proceedings under CA 1989, s 10(8) were effectively the same, namely 'sufficient understanding to participate as a party/make the proposed application'.
The essential question was not whether the child was capable of articulating instructions but whether the child was of sufficient understanding to participate as a party, in the sense of being able top cope with all the ramifications of the proceedings and giving considered instructions of sufficient objectivity.
The court should have regard to:
- the nature of the proceedings
- length of time the proceedings had already been before the court [2 years]
- likely future conduct of the proceedings
- likely applications and future applications that would need to be made.
This child lacked sufficient understanding and to give instructions that were fully considered as to their implications. He would undoubtedly become totally embroiled in the detail of the dispute and it was inconceivable that at his age he could appreciate the totality of the complex issues.
Re N (Contact: Minor Seeking Leave to Defend and Removal of Guardian) [2003] 1 FLR 652.

New Practice Direction on separate representation
Following a consultation process over the summer, The President is expected to issue a Practice Direction during the autumn giving guidance upon the circumstances that are likely to lead to a court directing that a child should be made a party to private law proceedings and afforded representation.
The Practice Direction is likely to be accompanied by guidance from CAFCASS.

Representation of Children: Adoption and Children Act 2002 amendment

122 Interests of children in proceedings
(1) In section 41 of the 1989 Act (specified proceedings)-
(a) in subsection (6), after paragraph (h) there is inserted-
"(hh) on an application for the making or revocation of a placement order (within the meaning of section 21 of the Adoption and Children Act 2002);",
(b) after that subsection there is inserted-
"(6A) The proceedings which may be specified under subsection (6)(i) include (for example) proceedings for the making, varying or discharging of a section 8 order."
(2) In section 93 of the 1989 Act (rules of court), in subsection (2), after paragraph (b) there is inserted-
"(bb) for children to be separately represented in relevant proceedings,".

GENERAL

Jurisdiction: Birth following a surrogacy agreement
English surrogate mother entered into a surrogacy agreement in California with a US married couple. Egg from anonymous donor, fertilised by the husband. The mother was found to be carrying twins. Declaration of the Californian court that the on birth the US couple would have full custody rights and that the surrogate mother did not have any parental responsibility or rights.
The surrogate mother returned to England and refused to give up the children after their birth in England. Hague Convention proceedings brought by the US couple failed and they therefore sought an order that the twins be summarily sent to California.

Hedley J ordered summary return to California on the grounds that that was the most convenient jurisdiction for the determination of the merits of the future care of the twins. It was where the biological father and wife lived, the agreement had been made there and, significantly, there had already been litigation there at the suit of the surrogate mother. In making the order Hedley J made a number of observations intended to assist the US court.
W and H v H (Child Abduction: Surrogacy) No 2 [2002] 2 FLR 252.

Wrong in principle to face litigant in person with s 91(14) order at short notice
The Court of Appeal [Butler-Sloss P, Thorpe and Kay LJJ] held that a judge who at short notice made an order under CA 1989, s 91(14) prohibiting a litigant in person from making any further applications relating to residence or contact for three years was wrong. Such an order should not be made against a litigant in person at short notice unless the circumstances are exceptional.
Re C (Prohibition on Further Applications) [2002] 1 FLR 1136

Fundamental that any expert report commissioned in CA 1989 case must be disclosed
It is absolutely fundamental in CA 1989 proceedings that any expert report commissioned must be made available in the litigation even if it is contrary to the interests of the party who commissioned it. It must be disclosed to the other side, the court and any other expert.
Re A (Change of Name) [2003] EWCA Civ 56; [2003] 2 FLR 1.

Strong presumption in favour of allowing a McKenzie Friend
The Court of Appeal [Thorpe and Keene LJJ] allowed a father's appeal from a judge's refusal to allow him to have Dr P as a McKenzie Friend at a contested contact hearing. Thorpe LJ stressed that the presumption in favour of granting a McKenzie friend was a strong one. Thorpe LJ took the opportunity to record that he had never himself seen Dr P act other than in an entirely helpful way both to the person being assisted and to the court.
Re H (McKenzie Friend: Pre-trial Determination) [2001] EWCA Civ 1444; [2002] 1 FLR 39

Contempt proceedings for publicising confidential information about case
A father placed details of his contact proceedings on the Families Need Fathers website. There was no application to commit, but the judge found the father to be in contempt and sentenced him to 14 days suspended for 6 months and made a PSO prohibiting further publicity. The father appealed.
The Court of Appeal [Butler-Sloss P, Mummery and May LJJ] allowed the appeal setting aside all the orders and findings. A county court has jurisdiction to commit for contempt in the face of the court or disobedience of a court order, any other contempt in connection with proceedings in the county court is punishable only by an order for committal made in the QBD. Practice Direction (Family Proceedings: Committal) [2001] 1 WLR 1253 para 1.1 is therefore incorrect.
Committal on the court's own initiative is an exceptional course and should normally be adjudicated upon after time for due reflection.
The procedure of hearing the matter where the father was not represented, not permitted an adjournment to get representation, cross examined without being warned that he was not obliged to give evidence was seriously flawed and should be set aside. The hearing was wrongly held in private.
Re G (Contempt: Committal) [2003] EWCA Civ 489; [2003] 2 FLR 58.

Parental order made despite payment for surrogacy
Couple paid £12,000 to surrogate mother (using AID). Application for parental order under HFEA 1990, s 30 which prohibits such an order if there has been payment (other than expenses reasonably incurred) "unless authorised by the court". Wall J held that there had been payment but gave retrospective authorisation.
In the matter of C (A Child) [2002] EWHC 157 (FAM) 22.2.02

Legality of morning after pill
Society for the Protection of the Unborn Child sought a declaration that a woman who takes the morning after pill is potentially committing a criminal offence under OAPA 1861 because there is a requirement that two doctors should certify the conditions in the Abortion Act 1967 apply. Munby J reviewing the whole area of law refused the application. The costs of the entire proceedings were to be paid by the SPUC.
R v Sec of State for Health and Schering Health Care Ltd and Family Planning Assn
[2002] EWHC 610 [2002] 2 FLR 146

Court lacks power to direct residential assessment (if contested) in private proceedings
Holman J (following Birmingham CC v H [1992] 2 FLR 323) held that in private law proceedings the court did not have the power (which is present in s 38(6) in public law cases) to direct a residential assessment of the child with one parent against the will of the other parent.
R v R (Private Law Proceedings: Residential Assessment) [2002] 2 FLR 953

Judge should not depart from expert assessment of personality and stability
The Court of Appeal allowed an appeal in a residence case where the judge had substituted his own assessment of the party's personality and stability for that of the experts who had carried out an assessment. Given the unanimity of expert view, it was not open to the judge to reject the experts' assessment.
Re M (Residence) [2002] 2 FLR 1059 (sub nom Re N-B [2002] 3 FCR 259)

Family Division has power to order summary assessment of costs
Wilson J held that the Family Division has jurisdiction to make a summary assessment of costs and will do so in a significant minority of long cases. Costs do not follow the event in child cases. The welfare of the child is not the paramount consideration, but is a factor.
Q v Q (Costs: Summary Assessment) [2002] 2 FLR 668

Approach to jointly instructed experts
Regard should be had to new guidance on the approach to a jointly instructed expert in ancillary relief proceedings. It is suggested that the same approach should apply to children cases.
Of particular note, the best practice requires:
'Any meeting or conference attended by the JE should normally be with both parties and/or their advisers. Unless both parties have agreed in writing, the JE should not attend any meeting or conference which is not a joint one.
Best Practice Guide for Instructing a Single Joint Expert [2003] 1 FLR 573.

President's Direction: HIV testing of children
Previous guidance @ [1994] 2 FLR 116 has been revised and updated where there is a need to test a child for the presence of HIV. The need to make an application will be rare. An application should be made, or transferred to, a county court. The High Court should only be involved if there are pending proceedings there or there is a need to use the inherent jurisdiction.
Where a child of sufficient understanding opposes the application, reference to the court is necessary. If there are no pending proceedings, then application should be made to the High Court under the inherent jurisdiction. Notice should be given to CAFCASS Legal (as it should if the application is urgent and the parents lack legal representation).
President's Direction: HIV testing of children [2003] 1 FLR 1299.

Disclosure of Information

Balance required when considering disclosure of documents
Appellant convicted of 5 counts of rape and 6 of indecent assault on wife's cousin (aged 8) and family friend with severe learning difficulties. Application for contact refused. Application for permission to use documents (including welfare report, psychologist report on children and psychiatric report on Appellant) for proposed civil proceedings, leave to appeal his conviction and for a further psychiatric report as to his own state in relation to his own treatment in prison. Judge refused application without judgment. Court of Appeal [Hale and Latham LJJ] allowed appeal matter sent back to county court to consider which documents should be disclosed.
The factors that the court must consider on an application for disclosure are: the interests of the children concerned; the interests of the good conduct of children cases generally in preserving confidence in those who give evidence or information to or for the purposes of those proceedings; the interests of the administration of justice and the interests of children generally (for example that perpetrators of abuse are brought to justice). Here there was an appearance of unfairness and the matter should be remitted for consideration.
Re R (children: disclosure) [2003] EWCA Civ 19; [2003] 1 FCR 193

No need for C+F reporter to obtain court's leave to report possible abuse to LA
The Court of Appeal [Thorpe LJ and Wall J] allowed an appeal against a judge's direction that the CAFCASS officer appointed as child and family reporter should not report allegations of possible sexual abuse to the LA. The investigations of the reporter were not protected by FPR, r 4.23 (confidentiality of documents). Further, a discussion between a CFR and a social worker in the course of their professional duties does not constitute 'publication' for the purposes of breaching the privacy of the CA proceedings.

National guidance to the effect that once an allegation has been referred by the CFR to the LA the reporter should suspend his/her investigation pending further direction from the court was held to go 'too far'. The decision to suspend any enquiry must be for the judge and not the CFR. The relationship between judge and CFR is collaborative. The Court of Appeal gave detailed guidance on the approach to be adopted in

practice.
Re M (Disclosure: Children and Family Reporter) [2002] EWCA Civ 1199; [2002] 2 FLR 893

Bar on 'publication' of information
The Court of Appeal [Butler-Sloss P, Thorpe and Rix LJJ] allowed an appeal against a widely drawn order prohibiting a father from disclosing any papers filed in the proceedings to either of two named, or any other, expert in parental alienation syndrome or to FNF or a similar organisation. The Court of Appeal preferred a less widely drawn order and, following Re G [2003] 2 FCR 231, limited the prohibition to any document held by the court, any note of judgment and any order made.
Thorpe LJ also questioned whether a litigant in person would need the leave of the court before taking his case to FNF, who in other cases have provided a great deal of helpful advice. The same applies to a McKenzie Friend.
FPR 1991, r 4.23 has shortcomings and needs to be revisited.
Re G (Child) [2003] EWCA Civ 1055; (2003) Times, July 31.

Should the court disclose information of adult inter-sibling incest to police and LA?
In private law contact proceedings Hedley J found that the father was engaged in 'a sexually active' relationship with his half sister. Such a relationship is a criminal offence. The guardian ad litem [presumably FPR 1991, r 9.2A] sought leave to disclose this information to the police and social services. Hedley J held that the effect of FPR 1991, rr 4.11+4.23 was that the guardian was not entitled to disclose the information without the leave of the court. In determining the issue, the court should give weight to the need to encourage frankness in private law proceedings. Other factors are the gravity of the offence, any risk to children and issues of public policy. Regard is also had to the child's welfare and to the guidelines in Re C (Care Proceedings: Disclosure) [1997] Fam 76 (sub nom Re EC [1996] 2 FLR 725). Leave to disclose to the police was refused (interest in encouraging candour outweighed interest in prosecution) leave to disclose to local authorities was granted.
Re D and M (Disclosure: Private Law) [2003] 1 FLR 647.
[Note: Re C/Re EC has recently been affirmed with respect to care proceedings in the detailed judgment of Wall J in Re AB (Care Proceedings: Disclosure of Medical Evidence to Police) [2003] 1 FLR 579]

Strong presumption for disclosing material from family court to assist criminal defence
Father charged with murder and wounding after driving car at mother's relatives and neighbour. Father's relatives applied for private law orders relating to the children. His relatives told the father that the mother's witness statement in s 8 case was materially different from her police statement. Father applied for access to the statement for use in his criminal defence.
Munby J allowed the application. It would be an exceptional case where the family court could deny a defendant facing such a serious charge access to material that might [and that's the test] assist his defence. It was in the interests of the children that there was no miscarriage of justice and that the truth became known. There is no necessity for applications of this sort to be heard in the High Court.
Re Z (Children) (Disclosure: Criminal Proceedings) [2003] 1 FLR 1194.

DOH Guidance on law of confidentiality
In May 2003 the DOH issued guidance designed to explain the law of confidentiality, the Data Protection legislation and the HRA 1998 as it applies to an individual who receives information that suggests that a child may be being abused.
The key concept is disclosure on 'a need to know' basis to a professional who also has a duty to keep information confidential and only, in turn, pass it on on the 'need to know' basis.
The guide is intended to be very widely available: see
www.doh.gov.uk/safeguardingchildren/index/htm
'What to do if You're Worried A Child is being Abused'

Appeals

Trial judge to have opportunity to correct 'lack of reasons' before appeal launched
Where application for permission to appeal is made to the trial judge on the ground of lack of reasons, the judge should consider whether this is a defect in the judgment and, if necessary set out to remedy the defect by provision of additional reasons.
If such an application is made to the Court of Appeal, that court will consider remitting the case to the trial judge with an invitation to provide additional reasons.
In some cases it is the duty of the advocate to draw the attention of the court to omissions in the judgment.
Finally, where judgment is handed down, any application for permission to appeal should be made at that time to the judge in order that he/she can set out reasons for granting or rejecting the application for

permission on the requisite form.
Re T (Contact: Alienation: Permission to Appeal) [2002] EWCA Civ 1736; [2003] 1 FLR 531 [see Arden LJ @ para 37]

G v G applies even where no evidence is heard
House of Lords allowed appeal against decision of the Court of Appeal to set aside an adoption order made by Bracewell J in favour of unmarried father. The order was one that was open to the Judge to make on the evidence before the court and interpretation of the statute. There was no indication that she misdirected herself or was manifestly wrong. Hearing witnesses is not an essential ingredient of the circumstances in which the principle in G v G (Minors: Custody Appeal) [1985] 1 WLR 647 applies.
Re B (Adoption: Natural Parent) [2001] UKHL 70; [2002] 1 FLR 196

AMENDMENTS TO THE CHILDREN ACT 1989 FROM THE ADOPTION AND CHILDREN ACT 2002

111 Parental responsibility of unmarried father (1) s.4 of the 1989 Act (acquisition of responsibility by the father of a child who is not married to the child's mother) is amended as follows.
(2) In subsection (1) (cases where parental responsibility is acquired), for the words after "birth" there is substituted ", the father shall acquire parental responsibility for the child if-

(a) he becomes registered as the child's father under any of the enactments specified in subsection (1A);
(b) he and the child's mother make an agreement (a "parental responsibility agreement") providing for him to have parental responsibility for the child; or
(c) the court, on his application, orders that he shall have parental responsibility for the child."
(3) After that subsection there is inserted-

"(1A) The enactments referred to in subsection (1)(a) are-
(a) paragraphs (a), (b) and (c) of s.10(1) and of s.10A(1) of the Births and Deaths Registration Act 1953;
(b) paragraphs (a), (b)(i) and (c) of s.18(1), and ss.18(2)(b) and 20(1)(a) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965; and
(c) sub-paragraphs (a), (b) and (c) of Article 14(3) of the Births and Deaths Registration (Northern Ireland) Order 1976.
(1B) The Lord Chancellor may by order amend subsection (1A) so as to add further enactments to the list in that subsection."
(4) For subsection (3) there is substituted-

"(2A) A person who has acquired parental responsibility under subsection (1) shall cease to have that responsibility only if the court so orders.
(3) The court may make an order under subsection (2A) on the application-
(a) of any person who has parental responsibility for the child; or
(b) with the leave of the court, of the child himself,
Subject, in the case of parental responsibility acquired under subsection (1)(c), to s.12(4)."

(5) Accordingly, in s.2(2) of the 1989 Act (a father of a child who is not married to the child's mother shall not have parental responsibility for the child unless he acquires it in accordance with the provisions of the Act), for the words from "shall not" to "acquires it" there is substituted "shall have parental responsibility for the child if he has acquired it (and has not ceased to have it)".

(6) In s.104 of the 1989 Act (regulations and orders)-
(a) in subsection (2), after "section" there is inserted "4(1B),", and
(b) in subsection (3), after "section" there is inserted "4(1B) or".

(7) Paragraph (a) of s.4(1) of the 1989 Act, as substituted by subsection (2) of this section, does not confer parental responsibility on a man who was registered under an enactment referred to in paragraph (a), (b) or (c) of s.4(1A) of that Act, as inserted by subsection (3) of this section, before the commencement of subsection (3) in relation to that paragraph.

112 Acquisition of parental responsibility by stepparent

After s.4 of the 1989 Act there is inserted-

"4A Acquisition of parental responsibility by step-parent
(1) Where a child's parent ("parent A") who has parental responsibility for the child is married to a person who is not the child's parent ("the step-parent")-
(a) parent A or, if the other parent of the child also has parental responsibility for the child, both parents may by agreement with the step-parent provide for the step-parent to have parental responsibility for the child; or
(b) the court may, on the application of the step-parent, order that the step-parent shall have parental responsibility for the child.
(2) An agreement under subsection (1)(a) is also a "parental responsibility agreement", and s.4(2) applies in relation to such agreements as it applies in relation to parental responsibility agreements under s.4.
(3) A parental responsibility agreement under subsection (1)(a), or an order under subsection (1)(b), may only be brought to an end by an order of the court made on the application-
(a) of any person who has parental responsibility for the child; or
(b) with the leave of the court, of the child himself.
(4) The court may only grant leave under subsection (3)(b) if it is satisfied that the child has sufficient understanding to make the proposed application."

113 s.8 orders: local authority foster parents

In s.9 of the 1989 Act (restrictions on making s.8 orders)-
(a) in subsection (3)(c), for "three years" there is substituted "one year", and
(b) subsection (4) is omitted.

114 Residence orders: extension to age of 18
(1) In s.12 of the 1989 Act (residence orders and parental responsibility), after subsection (4) there is inserted-

"(5) The power of a court to make a residence order in favour of any person who is not the parent or guardian of the child concerned includes power to direct, at the request of that person, that the order continue in force until the child reaches the age of eighteen (unless the order is brought to an end earlier); and any power to vary a residence order is exercisable accordingly.
(6) Where a residence order includes such a direction, an application to vary or discharge the order may only be made, if apart from this subsection the leave of the court is not required, with such leave".

In s.9 of that Act (restrictions on making s.8 orders), at the beginning of subsection (6) there is inserted "Subject to s.12(5)". (3) In s.91 of that Act (effect and duration of orders), in subsection (10), after "9(6)" there is inserted "or 12(5)".

The Adoption and Children Act 2002

(amendments to the Children Act 1989)

115 Special guardianship

(1) After s.14 of the 1989 Act there is inserted-

"Special guardianship
14A Special guardianship orders
(1) A "special guardianship order" is an order appointing one or more individuals to be a child's "special guardian" (or special guardians).
(2) A special guardian-
(a) must be aged eighteen or over; and
(b) must not be a parent of the child in question,
and subsections (3) to (6) are to be read in that light.
(3) The court may make a special guardianship order with respect to any child on the application of an individual who-

(a) is entitled to make such an application with respect to the child; or
(b) has obtained the leave of the court to make the application,
or on the joint application of more than one such individual.
(4) s.9(3) applies in relation to an application for leave to apply for a special guardianship order as it applies in relation to an application for leave to apply for a s.8 order.
(5) The individuals who are entitled to apply for a special guardianship order with respect to a child are-
(a) any guardian of the child;
(b) any individual in whose favour a residence order is in force with respect to the child;
(c) any individual listed in subsection (5)(b) or (c) of s.10 (as read with subsection (10) of that section);
(d) a local authority foster parent with whom the child has lived for a period of at least one year immediately preceding the application.
(6) The court may also make a special guardianship order with respect to a child in any family proceedings in which a question arises with respect to the welfare of the child if-
(a) an application for the order has been made by an individual who falls within subsection (3)(a) or (b) (or more than one such individual jointly); or
(b) the court considers that a special guardianship order should be made even though no such application has been made.
(7) No individual may make an application under subsection (3) or (6)(a) unless, before the beginning of the period of three months ending with the date of the application, he has given written notice of his intention to make the application-
(a) if the child in question is being looked after by a local authority, to that local authority, or
(b) otherwise, to the local authority in whose area the individual is ordinarily resident.
(8) On receipt of such a notice, the local authority must investigate the matter and prepare a report for the court dealing with-
(a) the suitability of the applicant to be a special guardian;
(b) such matters (if any) as may be prescribed by the Secretary of State; and
(c) any other matter which the local authority consider to be relevant.
(9) The court may itself ask a local authority to conduct such an investigation and prepare such a report, and the local authority must do so.
(10) The local authority may make such arrangements as they see fit for any person to act on their behalf in connection with conducting an investigation or preparing a report referred to in subsection (8) or (9).
(11) The court may not make a special guardianship order unless it has received a report dealing with the matters referred to in subsection (8).
(12) Subsections (8) and (9) of s.10 apply in relation to special guardianship orders as they apply in relation to s.8 orders.
(13) This section is subject to s.29(5) and (6) of the Adoption and Children Act 2002.

14B Special guardianship orders: making

(1) Before making a special guardianship order, the court must consider whether, if the order were made-
(a) a contact order should also be made with respect to the child, and
(b) any s.8 order in force with respect to the child should be varied or discharged.
(2) On making a special guardianship order, the court may also-
(a) give leave for the child to be known by a new surname;
(b) grant the leave required by s.14C(3)(b), either generally or for specified purposes.

14C Special guardianship orders: effect

(1) The effect of a special guardianship order is that while the order remains in force-
(a) a special guardian appointed by the order has parental responsibility for the child in respect of whom it is made; and
(b) subject to any other order in force with respect to the child under this Act, a special guardian is entitled to exercise parental responsibility to the exclusion of any other person with parental responsibility for the child (apart from another special guardian).
(2) Subsection (1) does not affect-
(a) the operation of any enactment or rule of law which requires the consent of more than one person with parental responsibility in a matter affecting the child; or
(b) any rights which a parent of the child has in relation to the child's adoption or placement for adoption.
(3) While a special guardianship order is in force with respect to a child, no person may-
(a) cause the child to be known by a new surname; or
(b) remove him from the United Kingdom,
without either the written consent of every person who has parental responsibility for the child or the leave of the court.

(4) Subsection (3)(b) does not prevent the removal of a child, for a period of less than three months, by a special guardian of his.
(5) If the child with respect to whom a special guardianship order is in force dies, his special guardian must take reasonable steps to give notice of that fact to-
(a) each parent of the child with parental responsibility; and

(b) each guardian of the child,

but if the child has more than one special guardian, and one of them has taken such steps in relation to a particular parent or guardian, any other special guardian need not do so as respects that parent or guardian.

(6) This section is subject to s.29(7) of the Adoption and Children Act 2002.

14D Special guardianship orders: variation and discharge

(1) The court may vary or discharge a special guardianship order on the application of-

(a) the special guardian (or any of them, if there are more than one);

(b) any parent or guardian of the child concerned;

(c) any individual in whose favour a residence order is in force with respect to the child;

(d) any individual not falling within any of paragraphs (a) to (c) who has, or immediately before the making of the special guardianship order had, parental responsibility for the child;

(e) the child himself; or

(f) a local authority designated in a care order with respect to the child.

(2) In any family proceedings in which a question arises with respect to the welfare of a child with respect to whom a special guardianship order is in force, the court may also vary or discharge the special guardianship order if it considers that the order should be varied or discharged, even though no application has been made under subsection (1).

(3) The following must obtain the leave of the court before making an application under subsection (1)-

(a) the child;

(b) any parent or guardian of his;

(c) any step-parent of his who has acquired, and has not lost, parental responsibility for him by virtue of s.4A;

(d) any individual falling within subsection (1)(d) who immediately before the making of the special guardianship order had, but no longer has, parental responsibility for him.

(4) Where the person applying for leave to make an application under subsection (1) is the child, the court may only grant leave if it is satisfied that he has sufficient understanding to make the proposed application under subsection (1).

(5) The court may not grant leave to a person falling within subsection (3)(b)(c) or (d) unless it is satisfied that there has been a significant change in circumstances since the making of the special guardianship order.

14E Special guardianship orders: supplementary

(1) In proceedings in which any question of making, varying or discharging a special guardianship order arises, the court shall (in the light of any rules made by virtue of subsection (3))-

(a) draw up a timetable with a view to determining the question without delay; and

(b) give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that the timetable is adhered to.

(2) Subsection (1) applies also in relation to proceedings in which any other question with respect to a special guardianship order arises.

(3) The power to make rules in subsection (2) of s.11 applies for the purposes of this section as it applies for the purposes of that.

(4) A special guardianship order, or an order varying one, may contain provisions which are to have effect for a specified period.

(5) s.11(7) (apart from paragraph (c)) applies in relation to special guardianship orders and orders varying them as it applies in relation to s.8 orders.

14F Special guardianship support services

(1) Each local authority must make arrangements for the provision within their area of special guardianship support services, which means-

(a) counselling, advice and information; and

(b) such other services as are prescribed,

In relation to special guardianship.

(2) The power to make regulations under subsection (1)(b) is to be exercised so as to secure that local authorities provide financial support.

(2) At the request of any of the following persons-

(a) a child with respect to whom a special guardianship order is in force;

(b) a special guardian;

(c) a parent;

(d) any other person who falls within a prescribed description,

a local authority may carry out an assessment of that person's needs for special guardianship support services (but, if the Secretary of State so provides in regulations, they must do so if he is a person of a prescribed description, or if his case falls within a prescribed description, or if both he and his case fall within prescribed descriptions).

(4) A local authority may, at the request of any other person, carry out an assessment of that person's needs for special guardianship support services.

(5) Where, as a result of an assessment, a local authority decide that a person has needs for special guardianship support services, they must then decide whether to provide any such services to that

person.
(6)If-
(a) a local authority decide to provide any special guardianship support services to a person, and
(b) the circumstances fall within a prescribed description,
The local authority must prepare a plan in accordance with which special guardianship support services are to be provided to him, and keep the plan under review.
(7) The Secretary of State may by regulations make provision about assessments, preparing and reviewing plans, the provision of special guardianship support services in accordance with plans and reviewing the provision of special guardianship support services.
(8) The regulations may in particular make provision-
(a) about the type of assessment which is to be carried out, or the way in which an assessment is to be carried out;
(b) about the way in which a plan is to be prepared;
(c) about the way in which, and the time at which, a plan or the provision of special guardianship support services is to be reviewed;
(d) about the considerations to which a local authority are to have regard in carrying out an assessment or review or preparing a plan;
(e) as to the circumstances in which a local authority may provide special guardianship support services subject to conditions (including conditions as to payment for the support or the repayment of financial support);
(f) as to the consequences of conditions imposed by virtue of paragraph (e) not being met (including the recovery of any financial support provided);
(g) as to the circumstances in which this section may apply to a local authority in respect of persons who are outside that local authority's area;
(h) as to the circumstances in which a local authority may recover from another local authority the expenses of providing special guardianship support services to any person.
(9) A local authority may provide special guardianship support services (or any part of them) by securing their provision by-
(a) another local authority; or
(b) a person within a description prescribed in regulations of persons who may provide special guardianship support services,
and may also arrange with any such authority or person for that other authority or that person to carry out the local authority's functions in relation to assessments under this section.
(10) A local authority may carry out an assessment of the needs of any person for the purposes of this section at the same time as an assessment of his needs is made under any other provision of this Act or under any other enactment.
(11) s.27 (co-operation between authorities) applies in relation to the exercise of functions of a local authority under this section as it applies in relation to the exercise of functions of a local authority under Part 3.
14G Special guardianship support services: representations
(1) Every local authority shall establish a procedure for considering representations (including complaints) made to them by any person to whom they may provide special guardianship support services about the discharge of their functions under s.14F in relation to him.
(2) Regulations may be made by the Secretary of State imposing time limits on the making of representations under subsection (1)
(3) In considering representations under subsection (1), a local authority shall comply with regulations (if any) made by the Secretary of State for the purposes of this subsection."
(2) The 1989 Act is amended as follows. (3) In s.1 (welfare of the child), in subsection (4)(b), after "discharge" there is inserted "a special guardianship order or". (4) In s.5 (appointment of guardians)-
(a) in subsection (1)-
(i) in paragraph (b), for "or guardian" there is substituted ", guardian or special guardian", and
(ii) at the end of paragraph (b) there is inserted "; or
(c) paragraph (b) does not apply, and the child's only or last surviving special guardian dies.",
(b) in subsection (4), at the end there is inserted "; and a special guardian of a child may appoint another individual to be the child's guardian in the event of his death", and
(c) in subsection (7), at the end of paragraph (b) there is inserted "or he was the child's only (or last surviving) special guardian".

International Children

Michael Nicholls

6 November 2003

Continuing Professional Development Seminar

FAMILY LAW BAR ASSOCIATION

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INTERNATIONAL CHILDREN

6 NOVEMBER 2003

Michael Nicholls

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1. Conflicts of Conventions

Until relatively recently, the international horizon above the family lawyers' parapet was the 1980 Hague Abduction Convention and, to a lesser extent, the Council of Europe's 1980 Custody Convention. There were a few overseas adoptions, but very few Convention adoptions, and immigration and asylum issues were hardly visible.

But there are now new instruments created by new players, and their application and their relationship with the older conventions and with each other is now becoming the focus of attention – "conflict of conventions" is replacing "conflict of laws".

One effect of this conflict is to restrict the choice of remedies. And an immediate example is to be found in Art 37 of Brussels II, which provides that as between member states of the EU (but not Denmark), it takes precedence over a number of international conventions, including the 1980 European Custody Convention. So if the order you want enforce falls within the definition of "judgment", in Brussels II, you can use the 1980 Hague Abduction Convention (free legal aid), but not the 1980 European Custody Convention (free legal aid). You have to use Brussels II (no Central Authority, no free legal aid). Except if the order was made in Denmark. So that's clear, then.

2. Brussels II

Interpreting Brussels II

When considering and interpreting Brussels II, it has to be remembered that EU regulations are directly effective. Direct effect means that domestic legislation has to be read alongside (rather than instead of) a regulation and will not, so far as is possible, repeat its provisions. The Council Regulation was originally in the form of a draft convention known as "Brussels II" because it was Brussels I was seen as a general convention and the proposed Brussels II convention as a "lex specialis", following its principles as far as possible . So, as the Borras Report (the explanatory report on the proposed Brussels II Convention) explains, identical terms in Brussels I (now Council Regulation (EC) 44/2001) and the Council Regulation must be given the same meaning. Concepts like habitual residence and the service of documents will therefore be defined by the jurisprudence of Brussels I, not domestic law, although in the Council Regulation "domicile" has the same meaning as it has under the law of the United Kingdom and Ireland . The ECJ case-law on the meaning of articles, words and phrases in Brussels I will have to be taken into account, because they will have the same meaning in the Council Regulation. It may also be necessary to have regard to the text of Brussels I (and now Council Regulation (EC) 44/2001), the Jenard Report on Brussels I and material relating to the Council Regulation itself, including the Borras Report.

Brussels II – The Effect on Jurisdiction in Private Law Children's Cases in England and Wales

The effect of Brussels II coming into force is not only to restrict remedies, but also to expand the jurisdictional schemes relating to private law disputes about children:

i. where jurisdiction is conferred because their parents are involved in matrimonial proceedings under the Council Regulation;
ii. children whose parents are involved in matrimonial proceedings other than by way of the Council Regulation;
iii. those whose parents are not involved in matrimonial proceedings at all .

The private law orders subject to statutory jurisdictional rules are original orders under Children Act 1989 s 8 and orders made within the High Court's inherent jurisdiction with respect to children in so far as they give the care of a child to a person or provide for contact with, or the education of, a child . Only original orders, not variations of previous orders, are "Part I orders" and subject to the jurisdictional rules in the Council Regulation and Part I of 1986 Act .

So for jurisdictional purposes, children's cases are divided into four classes:

i. where both of the parents are involved in matrimonial proceedings relating to their marriage in England and Wales;
ii. where both of the parents are involved in matrimonial proceedings relating to their marriage elsewhere in the United Kingdom;
iii. where both of the parents are involved in matrimonial proceedings relating to their marriage elsewhere in the EU (with the exception of Denmark) and
iv. all other cases, including those in which only one of the parents is involved in matrimonial proceedings, whether in England and Wales or elsewhere in the United Kingdom or the EU, cases in which one or both parents are involved in matrimonial proceedings in Denmark or outside the EU and cases in which the parents are not involved in matrimonial proceedings at all.

In the first case, the English courts can exercise jurisdiction either:

i. under the provisions of the Council Regulation, provided that the children are habitually resident in England and Wales or are habitually resident in another Member State, one of the parents has parental responsibility for them and the jurisdiction of the court is accepted by both parents and is in the best interests of the children or, if the Council Regulation does not apply ,
ii. under the 1986 Act on the basis that there are matrimonial proceedings "continuing" in England and Wales in respect of the marriage of the parents of the child concerned .

The significant differences are that:

a. the jurisdiction conferred by the Council Regulation over the children comes to an end when the decree nisi is made absolute or, if the application in relation to the children is still pending, when that application is determined , whereas the jurisdiction under the 1986 Act continues until the children reach the age of 18 ;
b. only an order made under the Council Regulation will fall within its rules for recognition and enforcement. Orders made other than under the Council Regulation can only be recognised and enforced under the 1980 European Custody Convention.

Where there are matrimonial proceedings between the parents in progress elsewhere in the United Kingdom, the English courts may not entertain an application for a section 8 order unless the court in which the matrimonial proceedings are continuing considers that it would be appropriate for it to do so , but if the children are present within England and Wales the High Court can exercise its inherent jurisdiction for their immediate protection .

If there are matrimonial proceedings between the parents in progress elsewhere in the EU (with the exception of Denmark) before a court which has jurisdiction over the children the English courts must decline jurisdiction unless they only intend to take provisional, including protective, measures .

In the cases where only one of the parents is involved in matrimonial proceedings in England and Wales or elsewhere in the United Kingdom or the EU, or cases in which one or both parents are involved in

matrimonial proceedings in Denmark or outside the EU and cases in which the parents are not involved in matrimonial proceedings at all, the English courts can exercise jurisdiction under the 1986 Act on the basis of the children being either habitually resident or present within England and Wales on the "relevant date" . If the children are present within England and Wales, but are habitually resident elsewhere in the United Kingdom, only the High Court can exercise its inherent jurisdiction for their immediate protection . If the children are present within England and Wales, but are habitually resident somewhere other than in the United Kingdom, the court may stay the proceedings on the basis that it would be more appropriate for the matter to be determined elsewhere

3. Relocation

How do you deal with Payne v Payne? See Re C (Permission to Remove from Jurisdiction) [2003] 1 FLR 1006. It is not that a reasonable plan will succeed, but that a reasonable plan is the first hurdle. After the reasonable plan comes the welfare evaluation, in which one of the most significant factors is the effect of refusing to accept the reasonable plan is likely to have on the parents' care of the children. (And see Re B (Removal from Jurisdiction), Re S (Removal from Jurisdiction) [2003] 2 FCR 673 on the importance of not jeopardising a new family unit).

4. Child Abduction

The New Orders

Passport, Location and Collection Orders. Note that there is no restraint on applying for travel documents in the injunctions.

Linking the Limbs of Art 13b

Re S (Abduction: Custody Rights) [2002] EWCA Civ 908; [2002] 2 FLR 815 at 827

"There seems to us, therefore, to be considerable international support for the view that there is a link between the limbs of Art 13(b). In our judgment, the proper approach for the court considering a defence alleging a grave risk of exposure to physical or psychological harm should be to consider the grave risk of that harm as a discrete question but then stand back and test the conclusion by looking at the Article in the round, reflecting whether the risk of harm is established to an extent which would lead one to say that the child will be placed in an intolerable situation if returned."

Child's Objections – the New Art 13b

The reunite Mediation Pilot Scheme

5. Coming Soon

A decision on the scope of s 5 of the Child Abduction and Custody Act 1985

A decision on the scope of Brussels II.

Brussels IIbis

"Brussels IIbis", which is intended to provide for the recognition and enforcement of all orders relating to children, both public and private, marital and non-marital, it will also deal with child abduction within the Member States of the European Union. The substance of Brussels IIbis has received political approval, although the text needs perfecting, and it will be applied from 1 March 2005. So there will be three ways of dealing with international child abduction under international instruments, one within the EU (with the exception of Denmark), one involving non-EU states who are parties to the 1980 Hague Abduction Convention (including Denmark) and one under the 1980 European Custody Convention.

1996 Hague Convention

If the United Kingdom does become a party to the 1996 Hague Convention on jurisdiction, applicable law,

recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, its courts may, exceptionally, apply or take into consideration the law of another state “with which the situation has a substantial connection.”

2003 Contact Convention

The Council of Europe has produced a Convention on Contact Concerning Children, adopted by the Committee of Ministers on 3 May 2002 and opened for signature on 3 May 2003, which sets out the principles to be applied to contact orders and fixes safeguards for the return of children after visiting a parent in another state.

6. Work in Progress

The Hague Conference

A global convention on the recovery of maintenance, dealing primarily with the administrative problems.

Special Commissions on the operation of the Adoption Convention (October 2004) and the Abduction Convention (2005)

A Training Institute

The Council of Europe

Revision and updating of the European Convention on the Adoption of Children

Sucession

The European Union

Harmonisation of Substantive Law (residence, tax, succession, social security)

See draft Article 111-170 of the proposed Treaty of the European Union.

1. The Union shall develop judicial co-operation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extra judicial cases. Such co-operation may include measures for the approximation of the laws and regulations of the Member States.

Brussels III (financial relief on divorce and separation)

Rome III (divorce and other matrimonial suits)

7. Trouble Ahead

There are few, if any, formal agreements with Islamic states and the Caribbean. There are still conflicts of jurisdiction and conflicts of orders, even within the United Kingdom. Current international instruments still do not deal very effectively with access. They are either too prescriptive or the way that they have been interpreted means that they lack power and flexibility. Continuing to differentiate, as the EU has done in Brussels II, between on the one hand, the children of spouses, and on the other step-children or children born out of wedlock will still lead, for the time being, to the prospect of partial recognition of orders and continuing injustice for some unmarried fathers who have failed to obtain parental responsibility. It is also questionable whether the strict interpretation of Art 13b of the 1980 Hague Abduction Convention by the courts of the contracting states, especially the English courts, is truly in the best interests of children. Nearly three-quarters of “abductors” are mothers who are the primary carers of their children. A significant number are trying to escape from violence or exploitation, or have husbands or partners involved in organised crime or corruption, from which even the most sophisticated countries are unable to guarantee protection. So proceeding on the footing that all removals are axiomatically harmful, and all

returns beneficial, in the face of all evidence and experience to the contrary and the expressed wishes of the children is not calculated to enhance public confidence.

6 November 2003

Offshore Trusts

Timothy Scott QC

13 November 2003

Continuing Professional Development Seminar

OFFSHORE TRUSTS

Timothy Scott Q.C.

Introduction

1. The law of trusts is a dangerous area for ancillary relief practitioners. Trusts crop up in a wide range of cases, not only big money cases. Indeed trusts in big money cases are often less worrying for us because trust law advice may be obtained by our instructing solicitors either in-house or from specialist counsel. It is the cases in which trusts play a significant role but where the available resources do not make it practicable to obtain specialist advice where we have to wrestle with the problems ourselves.

2. It would be quite impossible (both for lack of time and for lack of expertise) to try to give an overview of the law relating to offshore trusts. The purpose of this talk is to mention some of the issues which ancillary relief practitioners most frequently encounter, and to try to give guidance with a view to avoiding the worst pitfalls.

Variation of trusts: S24 Matrimonial Causes Act 1973 (as amended)

3. Since the power to vary trusts under S24 is the power with which ancillary relief practitioners will generally be concerned, it is worth setting out those parts of the section which deal with trusts:-

"(1) On granting a decree of divorce, a decree of nullity of marriage or a decree of Judicial Separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after that decree is made absolute), the court may make any one or more of the following orders, that is to say –

...

(b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;

(c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement(including such a settlement made by will or codicil) made on the parties to the marriage, other than one in the form of a pension arrangement (within the meaning of section 25D below);

(d) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement, other than one in the form of a pension arrangement (within the meaning of section 25D below);

...

(2) The court may make an order under subsection 1(c) above notwithstanding that there are no children of the family."

4. The variation of trusts aspects of S24 can be traced back to S.5 Matrimonial Causes Act 1859. Accordingly cases on the predecessor statutes are likely to be relevant to any issues arising under S24.

Is the trust a post-nuptial settlement?

5. This is usually the first question which has to be addressed, whether the trust is onshore or offshore. The law relating to post-nuptial settlements was reviewed by the House of Lords in Brooks v Brooks

[1995] 2 FLR 13. At p.19 Lord Nichols said:
"In the Matrimonial Causes Act 'settlement' is not defined, but the context of s.24 affords some clues. Certain indicia of the type of disposition with which the section is concerned can be identified reasonably easily. The section is concerned with a settlement 'made on the parties to the marriage'. So, broadly stated, the disposition must be one which makes some form of continuing provision for both or either of the parties to a marriage, with or without continuing provision for their children.

(T)he authorities have consistently given a wide meaning to 'settlement' in this context, and they have spelled out no precise limitations. This seems right, because this approach accords with the purpose of the statutory provision. Financial provision that is appropriate so long as the parties are married will often cease to be appropriate when the marriage ends. In order to promote the best interests of the parties and their children in the fundamentally changed situation, it is desirable that the court should have power to alter the terms of the settlement. The purpose of the section is to give the court this power. The object does not dictate that settlement should be given a narrow meaning. On the contrary, the purpose of the section would be impeded, rather than advanced, by confining its scope. The continuing use of the phrases "ante-nuptial" and "post-nuptial" does not point in the opposite direction. These expressions are apt to embrace all settlements in respect of the particular marriage, whether made before or after the marriage…. One feature of the power of the court under the section is to be noted. The section gives the court power to vary a settlement. Inherent in this provision is the notion that the court's jurisdiction extends to all the property compromised in the settlement. Thus it includes any interest the settler may have in the settled property by virtue of the settlement. Further, the court's power is not confined to varying the interests of the parties to the marriage under the settlement. The power includes, for instance, the interests in the settled property of the children or, more widely, of others under an old fashioned protective trust."

6. Thus a wide range of trusts will be susceptible to variation under S24. However, the phrase "all settlements in respect of the particular marriage" is to be noted. A trust will not have the necessary 'nuptial' element just because spouses of beneficiaries are in general terms also potential beneficiaries unless the particular spouse was in the contemplation of the settlor. Thus if H's father has settled a trust which includes his children and their spouses as actual or potential beneficiaries, this will not be susceptible to variation under S24 if the settlement was made before H and W had met.

7. In certain cases questions may arise not only as to whether a trust has a sufficient nuptial element, but whether the entity in question is a trust for the purposes of English law. Civil law jurisdictions with no tradition of trust law have nevertheless evolved a number of institutions which bear a strong resemblance to trusts and may be treated as such by English courts. The stiftung and the anstalt are examples of such entities. Consideration of whether any such creatures are trusts capable of being varied will require detailed examination of their terms, usually with the assistance of a lawyer from the country in question, and in the light of the Recognition of Trusts Act 1987.

Recognition of Trusts Act 1987
8. This brings into effect in UK law the 1986 Hague Convention on the law applicable to trusts and on their recognition. The Convention aims to "establish common provisions on the law applicable to trusts and to deal with the most important issues concerning the recognition of trusts". A trust is defined in the Convention as the legal relationship created, inter vivos or on death, by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose (Article 2(1)). The Convention applies only to trusts created voluntarily and evidenced in writing (Article 3).

9. The Convention is primarily concerned with the law applicable to trusts. Article 6 provides that the trust shall be governed by the law chosen by the settlor. Article 7 provides a checklist for determining the proper law if the settlor has not made a choice. However, Dicey & Morris (13th Ed.) suggests (29-019) that the 1987 Act should not affect the powers of the court under S24.

10. Probably the principal importance of the 1987 Act for ancillary relief practitioners is that (as the Lord Chancellor put it in introducing the Bill into the House of Lords) the Convention "allows us to export to Civil Law countries, first the concept of a trust; secondly our rules laying down the law which governs such a trust, and, thirdly, the circumstances in which it should be recognised". It is vital to have the Convention in mind especially when considering whether a particular type of civil law trust-like entity is or is not a trust for the purposes of English law in general and S24 in particular.

Should the trustees be joined?
11. Once it is established that a trust is capable of being varied, the next key question which will usually

arise is whether to apply to join the trustees as a party to the proceedings. The obvious disadvantages of joining the trustees are the additional costs of a further party and the likely delay. On the other hand trustees when joined can be required to give discovery and will be bound by any order the court may make.

12. This is often a difficult call and no general guidance can be given. Reasons not to seek to join the trustees would be:-
· If the assets are limited and the costs of a third party would be disproportionate.
· If the claim can be met without having to attack the trust assets.
· If the trustees have indicated that they will cooperate without being joined.

13. A range of issues about joining offshore trustees was considered by Wilson J in T v T (Joinder of Third Parties) [1996] 2 FLR 357. In that case Jersey trustees had been joined under an order made ex parte and were applying to set aside that order. They had undertaken to hold £5m. to the order of the Jersey court but not to the order of the English court. Wilson J considered the provisions of RSC O15 r6(2)(b) (still in force in relation to ancillary relief proceedings) and refused the application to set aside the order. It is implicit in the Judgement that if the trustees had agreed to hold an appropriate sum to the order of the English court, their application would at least have been much more likely to succeed.

14. In some case the trustees may be content to be joined or may even apply for this. If trustees are concerned about their position, and in particular about the propriety of spending trust assets on legal costs, they can apply to the court for directions and a Beddoe order: see Re Beddoe [1893] 1 Ch 547.

Joining other parties
15. In some cases it may be appropriate to join someone other than the trustees. In one unreported case concerning a network of 13 trusts, the adult son of the parties, who was the principal beneficiary of the trusts successfully applied to be joined. The proceedings turned into a three cornered fight in which the son backed his mother (notwithstanding that it was his father who had made him the principal beneficiary of the trusts).

Disclosure
16. The rights of beneficiaries and the powers of the courts to require disclosure of documents by trustees were considered by the Privy Council (on appeal from the Isle of Man) in the important new case Schmidt v Rosewood Trust Ltd [2003] UKPC 26. The principal issue under debate was whether a beneficiary's right to demand production of trust accounts and other documents arises on a proprietary basis: i.e. because the beneficiary is the true owner of the documents as they are held for his benefit. This proprietary basis had been widely adopted in earlier cases.

17. However, the Privy Council took a different approach. Their Judgement (delivered by Lord Walker) has a number of perceptive observations about the reasons why trusts are established in a modern context, and also about the shoddy drafting of many offshore trusts. However, the key passage on the approach to disclosure is to be found at Paragraph 51:-
"Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion."

18. The approach is therefore discretionary. The court will weigh up the reasons why disclosure of a particular document or class of documents is sought and will balance that against any reasons advance against disclosure: e.g. confidentiality, the position of other beneficiaries etc. A beneficiary with vested rights will normally be in a stronger position than a mere discretionary object, but will not be able to assert a claim as of right on proprietary grounds.

Protectors
19. One feature of offshore trusts who is seldom to be found in onshore trusts is the protector. Although the term had some limited use in English trust and land law (cf Fines and Recoveries Act 1833), the modern usage is largely as a creature of the offshore trust industry. However, it is not a term of art and may have different meanings in different contexts. The protector is not a trustee, but is given a watchdog

role in respect of the trustees' administration of the trust.

20. The protector will of course have such powers as are conferred by the trust deed and any other relevant trust documentation. Typically the protector's consent may be required to the exercise of specified powers by the trustees. The protector is usually able to appoint and remove trustees. However since (as we shall see) the court has power under S24 to write the protector out of the trust, the refinements of the role will not normally be very important in ancillary relief cases.

Varying foreign trusts

21. A number of authorities both in the context of matrimonial finance and otherwise confirm the jurisdiction of the court to vary trusts notwithstanding that they are subject to a foreign proper law; and/or that the assets of the trust are abroad; and/or that the trustees are foreign.

22. In Nunneley v Nunneley (1890) 15 App Cas 186 settlements executed in contemplation of marriage were respectively English and Scottish. Sir James Hannen P. said:
"The language of the Act [of 1859] is exceedingly wide. I am clearly of the opinion that the power conferred thereby extends to a settlement though made in another country and according to the law of that country. It is clear that the present respondent who was up to the time of her marriage a Scotchwoman, by marrying an Englishman acquired her husband's domicil and became subject to the law of England. I have no reason to doubt that I have power to make the desired variation in the marriage settlement in question".

23. In Forsyth v Forsyth [1891] P 363 the court was again concerned with an application to vary trusts in Scotland. Jeune J said (at 366):
"Nunneley v Nunneley seems to me to go the whole length of deciding that whatever be the law applicable to the settlements, the effect of s.5 of the (Matrimonial Causes Act 1859) is to give this court power to vary the settlements in its discretion according to the principles laid down in that section….the principle of his (Sir James Hannen P.'s) decision was that s.5 of the (1859 Act) gave power to vary the settlement although it was Scotch and was to be interpreted according to Scotch law."

24. In Goff v Goff [1934] P 107 Sir Boyd Merriman P. was concerned with a New York trust. He said (p111):
"It is clear from the decisions in Nunneley and Forsyth that this court has the power to vary a settlement inter partes even though it comprises property out of the jurisdiction and the trusts are administered by trustees out of the jurisdiction and the settlement is governed by foreign law."

25. Goff is also significant in that the question arose of whether any order which the court might make would be effective; and, if not, whether it should make an order. Evidence from a New York lawyer satisfied the court that the trustees had not been properly served under New York law. The court therefore set service aside, but without prejudice to the Petitioner's right to apply to dispense with service on the trustees. The principle set out by Sir Boyd Merriman P. (at p114) was:-
"Ultimately what matters in these proceedings to vary is not whether in certain circumstances it may be impossible to make an effective order against the trustees, but whether it is possible to make an effective order against the spouse. It may be possible to make an effective order against the husband."

26. The courts have also made orders varying the provisions of foreign trusts outside the context of variation of trusts in matrimonial proceedings. In Ewing v Orr Ewing (1883) 9 App Cas 34 the House of Lords considered the jurisdiction to vary foreign settlements, being the will trusts of a testator who died domiciled in Scotland. The assets of the trust were located in Scotland and the proper law of the trusts was Scottish. An infant beneficiary brought an action to administer the trusts in England. The Earl of Selbourne L.C. said:
"The Courts of Equity in England are and always have been courts of conscience operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or ratione domicilii within their jurisdiction. They have done so as to land, in Scotland, in Ireland, in the Colonies, in foreign countries. A jurisdiction which is not excluded ratione rei sitae as to land cannot be excluded as to moveables because the author of the trust may have had a foreign domicil; and for this purpose it makes no difference whether the trust is constituted inter vivos or by a will or mortis causa deed. Accordingly it has always been the practice of the English court of Chancery to administer as against executors and trustees personally subject to its jurisdiction, the whole personal estate of testators or intestates who have died domiciled abroad by decrees like that now in question."
The speech of Lord Blackburn was in similar terms.

27. In re Ker's Settlement Trusts [1963] 1 Ch 553 Ungoed Thomas J was concerned with an application to vary a Northern Ireland trust under the Variation of Trusts Act 1959. He said (556):
"I was referred to Forsyth v Forsyth which was a decision on the power to vary settlements conferred by s.5 of the Matrimonial Causes Act 1859. It was there decided that under s.5 of that Act the court could vary settlements whatever be the law applicable to them… in the absence of indication to the contrary, there is no reason for limiting to English settlements a power conferred on an English court to vary the trusts of a settlement. And I can see no reason for reading any such limitation into the statute in this case."

28. More recently, in Chellaram v Chellaram [1985] 1 Ch 409 Scott J was concerned with trusts subject to the laws of India and Bermuda respectively. He said (at 427B):
"Current authority establishes that the court does have a discretion to decline jurisdiction on forum conveniens or forum non conveniens grounds. But the principle that the English court has jurisdiction to administer the trusts of foreign settlements remains unshaken. The jurisdiction is in personam, is exercised against the trustees on whom the foreign trust obligations lie, and is exercised so as to enforce against the trustees the obligations which bind their conscience. The jurisdiction I hold the court enjoys embraces, in my view, jurisdiction to remove trustees and appoint new ones… the courts of this country, having jurisdiction to administer the trusts of the two settlements, have jurisdiction ancillary thereto to remove the trustees."

Powers of the Court
29. The powers which the court can exercise under s24(1)(c) are very wide-ranging. The court will not interfere with a trust more than is necessary to achieve justice, but subject to that principle the powers of the court to vary a trust are in effect unlimited.

30. E v E (Financial provision) [1990] 2 FLR 233 concerned a discretionary offshore trust. The husband's father (who strongly disapproved of the wife's claim for ancillary relief) was the protector. Ewbank J:-
· Carved £250,000 out of the trust fund for the benefit of the wife.
· Removed the husband's father as protector.

31. There was an issue in E v E as to whether the court could and/or should remove the trustee company as trustee. Ewbank J said (at 250E):
"The trustees here are not personal trustees. It is a trust company and there is no question of suggesting that the trustees have exercised their powers wrongly. On the other hand, in my judgment, it will be in the interests of the beneficiaries that there should be a change. I do not agree that this Division cannot deal with that on a variation of post-nuptial settlement. In fact, I am clearly of the view that it can and should. So I propose to order that there should be such a change."
Scott J also ordered removal of trustees in Chellaram.

32. If necessary the court could also exercise the power conferred by s. 41(1) Trustee Act 1925 to order the appointment of a new trustee "whenever it is expedient to appoint a new trustee… either in substitution for or in addition to any existing trustee". Although this power would normally be exercised in the Chancery Division, a Practice Direction at [1973] 1 WLR 627 provides that any division of the High Court has power to grant any relief or remedy notwithstanding that proceedings for such remedy or relief are assigned to another division.

33. The most important limitation on the powers of the court is whether they can be exercised effectively. The court will decline to exercise its powers where any order it might make would be wholly ineffective: Tallack v Tallack [1927] P 211; Goff v Goff (see above); and Wyler v Lyons [1963] P 274. In Re Paget's Settlements [1965] 1 WLR 1046 (a case under the Variation of Trusts Act 1964) it was said that where there were substantial foreign elements in the trust, the court should consider carefully whether it was proper to exercise its jurisdiction.

34. However, in ancillary relief cases, the critical point is likely to be whether the underlying assets of the trust (or any significant part of them) are situated in England and Wales. If there are, the English court will be able (and often willing) to sidestep the foreign elements of the trust by varying its terms so as to enable orders to be made in respect of the English assets.

Vesting orders
35. S51 Trustee Act 1925 confers on the Court a power to make an order "vesting the right to transfer or call for a transfer of stock …in such person as the court may appoint." One of the circumstances in which the power is exercisable is if the trustee entitled to the stock is out of the jurisdiction of the High Court: S51(1)(ii)(b). S56 provides that the power to make vesting orders "shall extend to all property in any part

of Her Majesty's dominions except Scotland."

Prenuptial Agreements

Nicholas Francis QC

27 November 2003

Continuing Professional Development Seminar

Pre-Nuptial AgreementsNicholas Francis Q.C.

Thursday 27th November 2003FLBA Continuing Education Seminar This course qualifiesFor 1.5 CPD hours

1. Definition
1.1. Not easy to find references to the subject at all in the text books.

1.2. Rayden devotes precisely 1 of its 2000 odd pages to the subject. There we see ante nuptial agreements defined as "a contract by which a man and a woman, prior to marriage, seek to regulate their financial liabilities and responsibilities the one towards the other in the event of a divorce". Pre nuptial agreements are not maintenance agreements (by definition they are not entered into by parties who are husband and wife (Matrimonial Causes Act 1973 s34(2)). Nor are they ante nuptial settlements, which are settlements in contemplation of marriage, not divorce. Ante nuptial settlements must confer a benefit or benefits on spouses in their capacity as husband and wife, not former spouses.

1.3. There are 3 references in Duckworth.

2. The traditional view
2.1. Rayden paragraph 19.14 states in bald terms that ante nuptial agreements are unenforceable in English law.

2.2. Duckworth says that Britain has a rule of public policy that agreements made in contemplation of future separation are contrary to public policy and void as weakening the institution of marriage.

2.3. The traditional view was expostulated in Hyman [1929] AC 601 where the HL said in terms that it is a matter of public policy that the parties cannot by agreement oust the jurisdiction of the court. Any covenant not to claim is void.

2.4. We all speak of the section 25 factors. There is no reference to pre nuptial agreements. Courts have on occasions tried to give it relevance by calling it "conduct" (Brockwell v Brockwell (1975) 6 Fam Law 46) or, more recently, one of the "circumstances of the case".

2.5. In Edgar it was said that men and women of full age, education and understanding, acting with competent advice available to them, must be assumed to know and appreciate what they are doing. The courts have generally upheld separation agreements, subject to important safeguards such as the need for legal advice, (inequality of bargaining power; Xhydhias etc) whilst stressing that agreements are not contractually binding but are always subject to the approval of the court, underlined the desire to hold parties to their agreements.

2.6. Agreements between a couple before their marriage are enforceable in the following variety of circumstances:
2.6.1. if they are pre-nuptial settlements
2.6.2. if they are deeds of gift
2.6.3. if they are declarations of trust

2.6.4. if they constitute any other agreement complying with the general law of contract and not interpreted by the court as being contrary to public policy.

2.7. But the courts have generally adopted a different approach to pre-nuptial agreements, saying that substantial weight will not be given to them. This view was stressed in F v F (ancillary relief: substantial assets) [1995] 2FLR 45 ("in this jurisdiction they must be of very limited significance").

3. The wind of change
3.1. In S v S (Divorce: staying proceedings) [1997] 2FLR 100 the judge determined an application for a stay of divorce proceedings upon the contents of a pre-nuptial agreement.

3.2. More recently in N v N (Jurisdiction: pre-nuptial agreement) [1999] 2FLR 745, Wall J recorded that the attitude of the English courts to pre-nuptial agreements are perceived as contrary to public policy for undermining the concept of marriage as a life long union. But he went on to hold, in the special circumstances of this case, that, whilst unenforceable, pre-nuptial agreements could have evidential weight when the terms of the agreement were relevant to an issue before the court in subsequent proceedings for divorce. The existence of the agreement, and the weight to be given to it, were both factors to be taken into account in the overall balance when the court was deciding, on the facts of the individual case, whether or not to exercise its discretion under s25 of the Matrimonial Causes Act 1973 to make orders for financial provision under sections 23 and 24.

3.3. But it is important to note the particular facts of N v N, where the relevant clause of a pre-nuptial agreement addressed issues relating to the obtaining of a Get from the Beth Din.

3.4. The Court of Appeal had cause to consider the issue in the unreported case of Wyatt-Jones v Goldsmith (28th June 2000), but the facts of that case are exceptional and wholly outside the facts of any average case.

4. White v White
4.1. In an article in the April 2001 edition of Family Law, Simon Bruce argued that the decision of the House of Lords was likely to make pre-nuptial agreements more popular with spouses who wish to avoid an equality of distribution. He also argued that respecting outcomes envisaged by pre-nuptial agreements would increase a trend towards litigation truly becoming the lesser alternative method of problem solving.

4.2. In M v M [2002] 1 FLR 654, Connell J did allow the existence of a pre-nuptial agreement significantly to affect the award that he made to the wife. He said that it did not matter whether the court treated the pre-nuptial agreement as a circumstance of the case or as an example of conduct which it would be inequitable to disregard. Under either approach, while the court was not in any way bound by the terms of the pre-nuptial agreement, the court should look at it and decide in the particular circumstances what weight should, in justice, be attached to the agreement. This agreement did not dictate the wife's entitlement, but had been borne in mind as one of the more relevant circumstances of the case and had tended to guide the court to a more modest award than might have been made without it. It would have been as unjust to the husband to ignore the existence of the agreement and its terms as it would have been to the wife to hold her strictly to those terms. In the post White era, the issue that Connell felt he needed to address was why he should depart from equality.

5. "Supporting Families"
5.1. The complex issue of the family was considered by the new Labour government in 1998 in the government Green Paper "Supporting families" dated 4th November 1998. There is a list of 6 circumstances in which it was suggested that such an agreement would not be legally binding.

· Where there is a child of the family, whether or not that child was alive or a child of the family at the time the agreement was made

· Where under the general law of contract the agreement is unenforceable, including if the contract attempted to lay an obligation on a third party who had not agreed in advance

· Where one or both of the couple did not receive independent legal advice before entering into the agreement

· Where the court considers that the enforcement of the agreement would cause significant injustice (to

one or both of the couple or a child of the marriage)

· Where one or both of the couple have failed to give full disclosure of assets and property before the agreement was made

· Where the agreement is made fewer than 21 days prior to the marriage.

5.2. No legislation has yet followed the Green Paper. It is interesting to consider:
Ø the relevance (if any) of a Green Paper on the decision of a court;
Ø the extent to which courts should impose what government has separately considered, but failed to introduce.

6. K v K
6.1. On 5th July 2002, Rodger Hayward Smith QC (sitting as a deputy judge of the family Division) delivered judgment in the case of K v K (as yet unreported, but noted in December 2002 Family Law).

6.2. The facts of the case summarised
The following findings of fact were made:
1. The wife was aged 28 and has assets in the region of £1m. The nature of the trust within which those assets were held meant that the capital should be treated as a source of income rather than capital available for the purpose of her housing.
2. The husband was aged 39 and had built up substantial assets by way of property dealing and was worth at least £25m, to which the wife had made no contribution.
3. The wife was intelligent but not well versed in financial matters.
4. The wife's position, on discovering that she was pregnant, was that she did not want to be a single mother bringing up a child alone. Either they should marry or she would seek to have the pregnancy terminated. She loved the husband and thought that their marriage would be successful.
5. The husband was wholly opposed to termination but did not feel that they were ready to marry.
6. At the end of a 5 week holiday, the husband proposed, but on the basis that they would not marry for some time, and certainly not until after the baby was born. The wife agreed.
7. The wife's family put them both under pressure to marry before the baby was born.
8. The husband and the wife's father met and were both in favour of a pre nuptial agreement.
9. The wife's father saw a pre nuptial agreement as a carrot to persuade the husband to marry the wife before the baby was born.
10. At no time did the husband tell the wife that he would not marry her without a pre-nuptial agreement.
11. The husband did not put the wife under any pressure to sign the agreement.
12. The wife understood the agreement but did not really care about it and was not interested in it.
13. The husband and the wife were advised that a pre nuptial agreement would not be strictly binding on a court, but in the event of divorce would be taken into account. Having said that, it would be less relevant the longer the marriage went on for, and if children were involved it was not likely to be of significant value but may still be of some evidence as to intention. To maximise the influence, both parties should take independent legal advice.
14. The husband, the wife and the wife's advisors all knew that the wife was pregnant.
15. The husband indicated that he wished fully to provide for any children and a clause was inserted to that effect.
16. There was not full disclosure of assets, although the decision not to press for values came from the wife's side and it was known that the husband was very wealthy.
17. The pre-nuptial agreement was signed the day before the parties married.
18. After the marriage the husband and the wife lived comfortably but they did not live the lifestyle of the ostentatious rich and neither of them have ever done so, apart from expensive holidays.
19. It was always intended by the parties that they would eventually move to a very grand property purchased by the husband and worth upwards of £11m.

6.3. The test set out by the court:
The judge was referred to the authorities, including those set out above, and said that he distilled from the authorities the following questions to be asked in determining the issue whether as against the wife the agreement is binding or influential in any of the decisions that he had to make:

1. Did she understand the agreement?
2. Was she properly advised as to its terms?
3. Did the husband put her under any pressure to sign it?
4. Was there full disclosure?
5. Was the wife under any other pressure?

6. Did she willingly sign the agreement?
7. Did the husband exploit a dominant position, either financially or otherwise?
8. was the agreement entered into in the knowledge that there would be a child?
9. has any unforeseen circumstance arisen since the agreement was made that would make it unjust to hold the parties to it?
10. What does the agreement mean?
11. Does the agreement preclude an order for periodical payments for the wife?
12. Are there any grounds for concluding that an injustice would be done by holding the parties to the terms of the agreement?
13. is the agreement one of the circumstances of the case to be considered under section 25?
14. Does the entry into this agreement constitute conduct which it would be inequitable to disregard under section 25(2)(g)?

6.4. He then went on to pose the question whether he was breaking new ground by holding the wife to the capital terms of the agreement, to which he said the answer was "no", referring to Wilson J in S v S and to Connell J in M v M.

6.5. The judge gave effect to the capital part of the pre-nuptial agreement by awarding the wife the £100,000 plus 10% per annum for which they had contracted. He interpreted the phrase "reasonable financial provision for the child" to mean in the facts of this case a lump sum of £1.2m for a suitable house for the wife and child, to be held in trust until the child finishes full time education, together with the agreed £15,000 pa periodical payments for the child. He also ordered the husband to make periodical payments to the wife in the sum of £15,000 pa during the period of the trust.

7. Issues posed by the judgment
7.1. The wife was advised that the agreement would not be binding, especially if there were children. It is hard to see how that advice could have been wrong at the time that it was given. In the event, the agreement was largely upheld.
7.2. The judge effectively ignored the Green Paper, saying that he applied the law as it is now, and not as it may or may not be after discussion and consultation elsewhere. This arguably ignored the fact that the whole point of the Green Paper was to try and change the law as to pre-nuptial agreements. Arguably, what the judge did was to apply the law as it might have been after the Green Paper, had it emerged into legislation. It is interesting to note that, even if the Green paper had become an Act of Parliament, the pre-nuptial agreement in this case would not have been binding, given that:
(a) it was signed fewer than 21 days before the marriage
(b) there was a child
(c) full disclosure was not given.

7.3. The judge found that the wife was not under pressure to sign the agreement. Perhaps she was not under inappropriate pressure from the husband, but the fact that she was already 5 months pregnant, that she wanted a termination if they did not marry and that the husband was utterly opposed to termination may be thought by some to amount to pressure.

7.4. On his own admission (although at times he tried to back track from this) the husband was a wealthy man who could afford any order that the court might make. In these circumstances, it is a matter for debate whether the wife was fairly treated. The only career she ever had was as a model, which she ceased when she became pregnant. There was no credible evidence that she would return to this career. She had no qualifications. Her primary task for the next 20 years will be the care of the parties' child, whereafter she will return the family home to the husband who, unless his fortunes have drastically reduced, will have no requirement for that money. Maybe the judge assumed that she will inherit, or re-marry: as to the former, there was no evidence save for a general statement that the wife had a wealthy father. What if he were to re-marry, or squander his fortune, or live to a ripe old age, or prefer others in his will? As to re-marriage, what if the wife were so in love with the husband that she could not contemplate another marriage? In any event, why should she have to re-marry to be properly housed having devoted her middle years to child care?

8. Insurance Issues
8.1. The usual minimum BMIF cover is £2.5m. This tends to work out at about 1% of gross fee income, although it varies according to practice areas.

8.2. For PI claims, the relevant period of cover is NOT the year when you are negligent, but the year of claim. Pre nuptial agreements therefore raise worrying insurance issues.

8.3. This year, the cost of top up insurance was :
In excess of £2.5m:
Limit Premium
2.5 460
5 935
7.5 1,320
12.5 2,060
17.5 2,750
22.5 3,430
27.5 4,110
32.5 4,795
38.5 5,480

8.4. What happens when you are asked to draft a pre nuptial agreement for a fabulously wealthy client? What are the insurance ramifications? I recently learned that most attorneys in California won't draft pre nuptial agreements because the insurance position renders them unprofitable.

8.5. Should we as a profession be taking steps to limit liability, and to what extent would this be enforceable?

8.6. Does this mean that we need greater knowledge of other jurisdictions, and in any event to what extent is a jurisdiction clause likely to be valid?

8.7. What is the position at the bar where we don't even have a contract with our lay clients?

9. The future
9.1. Where next? There can be no doubt that the mood is presently in favour of paying more attention to pre nuptial agreements than was formerly the case. Like so many other areas of the law, the present situation is unclear and we cannot easily advise clients what lies ahead. Few would probably doubt now that future developments will go in broadly the same direction.

9.2. The "old law" in big money cases has been re-written (or, as we should say, the law has been "re-stated"). In the old days, a wife got her reasonable requirements (albeit generously interpreted in the bigger cases). Now that there is no limit (other than, perhaps, 50%), wealthy spouses can now be expected to take steps to protect their wealth. It is suggested that pre nuptial agreements will have greatest effect in "mature marriages" between older couples where children are not part of the plan and money has already been made. KvK, of course, was far from one of those cases.

9.3. Is there a need for legislation? Even if there is such a need, is it likely to happen?

Nicholas Francis QC

November 2003

Brussells II

Nicholas Mostyn QC

31 January 2004

Rome Conference

ENGLAND 0 ITALY 2
A BRUSSELS II CASE STUDY
1. Consider the facts of the following fictitious case (which is in fact modelled on a real case argued before the High Court in London, but where identities have been obscured and other facts changed in order to

preserve confidentiality).
2. The wife (W) was born English. The husband (H) was born Italian. On the parties' marriage in 1975, W moved permanently to Italy where the parties spent their entire married life together. By virtue of her marriage W acquired Italian citizenship which she maintained (as well as her British citizenship) throughout the de facto duration of the marriage. The marriage produced three sons all now over 18 years of age. Prior to the marriage the parties entered into an Italian marriage contract providing for separation of property.
3. The parties never lived in England, only in Italy. Whenever the parties came to England to visit W's family, they used to stay with W's sister at her home, or in hotels.
4. The marriage was entirely Italian. The marital home was in Italy.
5. The parties separated in 1999. In January 2001 the parties jointly applied in Rome for a legal separation, which order was made by the Tribunale di Roma in February 2001. That order provided (by approving the separation report) that the marital home in Rome should be awarded to W, child maintenance awarded for the youngest son, and alimony for W.
6. In the Summer of 2002 W moved back to England.
7. In November 2002 the wife filed a petition for divorce in the English court.
8. The question that arises is which is court is “first seised” for the purposes of Article 11 of Brussels II ?

SCOPE OF APPLICATION OF BRUSSELS II: THE RATIONE MATERIAE ISSUE
9. Art 11 is entitled Lis Pendens and Dependent Actions. According to Paragraph 53 of the Borras Report, Art 11(1) contains the traditional lis pendens rule (the exclusive jurisdictional rule of prior temporis, i.e. first seised), for cases in which the subject-matter and cause are the same between the same parties. It provides
Where proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
10. Art 11(2) extends this rule to what are called in the Regulation “dependent actions”. Dependent actions are proceedings not involving the same cause of action but which are proceedings for divorce, annulment or judicial separation between the same parties. Art 11(3) sets out the consequences of the acceptance of jurisdiction by the court first seised: the court second seised shall decline jurisdiction.
11. Art 11(2) provides:
Where proceedings for divorce, legal separation or marriage annulment not involving the same cause of action and between the same parties are brought before the courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
Art 11(3) provides:
Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court. In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.
12. Jaffey on the Conflict of Laws (2nd ed, Butterworths, 2002) provides, at p 387, an illustration of the operation of Art 11(2) :
So, if a French court is seized of proceedings for legal separation, an English court must decline jurisdiction if divorce proceedings are commenced here.
13. The authors go on to observe that Art 11(2) of Brussels II is in fact tighter than the analogous Art 28 of Brussels 1 under which the court has a discretion to decline jurisdiction where there are related proceedings pending in another member state: no such discretion is afforded by Art 11(2) of Brussels II. Of course, Art 11(2) is itself limited to the situation where the proceedings in the two counties are for divorce, annulment or legal separation.
14. In my article at [2000] IFL 162, republished updated and slightly amended at [2001] Fam Law 359, I submitted that the Regulation was clearly referring to the situation that obtains here, namely where different matrimonial causes have been commenced in different countries.
15. That view, it is suggested, is conclusively affirmed by the terms of Paragraphs 53 to 57 of the Borras report, and the terminology of the Italian, Spanish and French texts of the Regulation. These texts refer to proceedings for divorce, legal separation or marriage annulment, neither having the same “oggetto, objeto, objet” (object) nor the same “titolo” (title) (Italian) or “causa/cause” (cause) (Spanish and French). This makes it clear that Article 11(2) and (3) applies in a case such as this.
16. Furthermore, the effect of Article 11(2) and (3) on the facts of our case is to prevent the wife for ever from petitioning for divorce in any other contracting state other than Italy. This is what I opined in my article at [2001] Fam Law 365. This is wholly consistent with the policy of the Regulation, namely that the court first seised should have exclusive jurisdiction. For these purposes it has been agreed by the member states that those countries that only allow divorce after a period of separation should be put on an equal

footing to those that permit instant divorce. In the latter type of jurisdiction the filing of a petition, will prevent, for ever, once jurisdiction is established, the pursuance of a later petition in another contracting state. It is therefore logical and right that an equivalent rule should apply to those countries that only permit divorce after a period of separation.

15. The policy underlying the relevant Convention provisions is explained in the Borras Report, especially Paragraphs 52 and 54. Their purpose is to accommodate differences between Member States in relation to the availability of relief by way of divorce, annulment and legal separation. As the Report points out, some national laws make no provision for separation or annulment, but only for divorce. Further, the very notion of lis pendens differs between Member States. Some require the same subject-matter, same cause of action and same parties, whereas others require only the same cause of action and the same subject matter. According to Paragraph 54 of the Borras Report, Art 11(2) is designed specifically to deal with the differences between the various Member States on the admissibility of proceedings for separation, divorce or marriage annulment. The solution arrived at avoids 'retaining the force of attraction of the jurisdiction producing the greatest effects...'

16. Therefore merely because it would be open to either party to petition for divorce in Italy in February 2004, three years having elapsed by that date since the order for legal separation, it does not follow that the wife (or the husband for that matter) can petition on that date in some other contracting state which might otherwise have jurisdiction. The effect of Art 11(2) and (3) is precisely the opposite.

17. In our case W argues that because there is no existing lis between the parties, once the Italian court had validated their consensual separation, the case is taken out of Article 11, and therefore the English Court is first seised. The answer to this is first that Lis pendens is the juridical notion employed by, and confined to Art 11(1) of Brussels II, which is not relevant here. This case concerns Art 11(2), which deals with the altogether distinct juridical notion of what are in the English text described as 'dependent actions', but, having regard to the Italian, French and Spanish texts are perhaps better described as 'related', 'connected' or 'associated' actions. The term is connessione in Italian, dependentes in French and dependientes in Spanish. Cassells Italian Dictionary translates connessione as "connection".

18. Does Article 6 aid W's argument that there must be a continuing lis? Article 6 provides:

Without prejudice to Article 2, a court of a Member State which has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of the Member State so provides.

19. W asks why is Article 6 worded as it is? Why is the jurisdiction created by Article 6 expressed to be "without prejudice to" and therefore additional to Article 2? In the same way, why is there "also" this jurisdiction? W contends that if H is correct Article 6 should read:

"Without prejudice to Notwithstanding Article 2, a court of a Member State which has given a judgment on a legal separation shall also have exclusive jurisdiction for converting that judgment into a divorce, if the law of the Member State so provides."

20. Therefore W argues that the very existence of Article 6, and its wording, must mean that where earlier separation proceedings have been concluded it is open to a party to those proceedings to travel to another member state, and provided that they satisfy the jurisdictional rules under Article 2, commence proceedings there, which will trump any later proceedings in the courts of the country which ordered the separation.

21. H's response to this is that the object of Article 6 is clearly to permit the later conversion of a legal separation into a divorce in circumstances where by that later date there is no primary jurisdiction under Article 2. It supplies a limited extension to the jurisdictional rules under Article 2. The Borras Report (see Paragraph 43) is tolerably clear on this point.

22. In any event, the relevant provisions of Italian domestic law make it clear, I believe, that the Italian court remains seised of the parties' separation in the context of a change in their personal status. I gather that under Italian law, formal judicial approval is necessary to give the parties' consensual separation an initial legal effect: see Italian Civil Code, Art 158(1). Where divorce is based on separation, the court must be satisfied that the separation has continued uninterrupted for at least three years from the date when the spouses appeared before the court in the separation procedure: Law No 898 of 1 December 1970.

23. Accordingly there is, in fact, a continuing lis in Italy, if this is to be implied as a condition of Art 11(2). But such a condition should not be implied for it would make a nonsense of Brussels II for those countries that require an order of separation followed by a period of separation before a divorce can be obtained. Italy and Portugal are such countries. Ireland requires a period of 4 years separation, but does not require a decree of Judicial Separation at the commencement of the period. But imagine that an Irish decree of Judicial Separation had been obtained and that 3½ years of separation had thereafter elapsed. Is it seriously to be argued that in such circumstances an English petition could be filed which robbed the Irish court of jurisdiction to pronounce a divorce in 6 months' time? It is submitted that this would so fundamentally encroach into the intent of the Regulation as to require attention by the European Court of Justice.

24. In this case the English judge posed a hypothetical question concerning the application and operation of Art 11(2) in the situation where a country 'countenances separation but not divorce'. I replied that no such country exists, but speculated that if it did, then a party would be unable to get divorced in the EU and would have to seek a divorce elsewhere.

25. It is now to be noted, as a matter of interest, that the learned judge's hypothetical question will

become reality in the near future. Malta will join the EU from 1 May 2004, and at present permits no divorce. So where judicial separation proceedings have been commenced on the Island, a Maltese spouse will have to seek her or his divorce in the sunnier climes of, say, Nevada.

SCOPE OF APPLICATION OF BRUSSELS II: THE RATIONE TEMPORIS ISSUE

26. A fundamental issue is that of the scope of application of Brussels II. For Article 11 to apply, the proceedings must be within the scope of Brussels II ratione temporis (as well as ratione materiae).

27. Here the judicial separation proceedings in Italy occurred before 1 March 2001(the date on which the Convention entered into force) and the filing of the divorce petition in England after that date. Art 42 states:

The provisions of this Regulation shall apply only to legal proceedings instituted...and to settlements which have been approved by a court in the course of proceedings after its entry into force

28. The question is: does the Regulation catch cases where the dependent actions (to use the terminology of Art 11) straddle the date on which the Regulation came into force?

29. The Regulation applies in this situation. Such a conclusion is supported by the plain words of Art 11, by authority, and by a common sense and purposive construction of the Regulation as a whole.

30. Art 11(2) and (3) require the court second seized to stay its proceedings or to decline jurisdiction where another court of a Member State has been first seised of a dependent action. In our case, in the literal sense of the ordinary plain meaning of the words employed (the first principle of statutory construction), proceedings have - as a factual matter - been brought before courts of different member states. The English court is incontrovertibly - as a factual matter - second seised, and has become second seised on a date after the entry into force of the Convention. There is no justification for construing these provisions in a technical way which would require being 'seised' to be confined to the situation where both courts are seised after the date of entry into force of the Convention. The focus of Art 11 is the staying or declining of jurisdiction by the court second seized. It is the date on which that court becomes seised which is crucial. Provided the second court was seised after 1 March 2001, it matters not that the first court was seised before that date.

31. Any other construction would produce results which are manifestly absurd. All cases which straddled 1 March 2001 would be excluded from the Convention, which cannot have been the intention.

32. As stated, Art 42 (1) (transitional provisions) states that ‘the Regulation shall apply only to legal proceedings instituted...after its entry into force’. However, that provision does not expressly state that all relevant proceedings must have been instituted after that date in order for Convention to apply.

33. The issue of the scope of application of ratione temporis in a case of straddling proceedings has been determined by the European Court of Justice in the context of Brussels I as amended by Art 29 of the San Sebastian Convention 1989 (the Accession Convention of Spain and Portugal) in Von Horn v Cinnamond [1997] ECR I - 5451 [1998] QB 214.

34. The reasoning in Von Horn is directly applicable by analogy in the present case, notwithstanding that different Conventions were involved in the two instances. In Wermuth v Wermuth (No 2) [2003] 1 FLR 1029 the Court of Appeal in London had express recourse to authorities decided under Brussels I in the interpretation of Brussels II. The rationale is that the latter Convention is modelled on the former.

35. The outcome in Von Horn confirms that the English court is obliged to decline jurisdiction in W’s proceedings, provided that the Italian court assumed jurisdiction in the judicial separation proceedings on the basis of a rule which accords with the provisions of Chapter II of Brussels II. This was the case, in that the assumption of jurisdiction by the Italian court was on the basis of the spouses’ habitual residence in Italy, and their Italian nationality.

36. Von Horn was a case which concerned the sale of shares, where the two relevant proceedings straddled the date of the coming into force of Brussels I between Portugal and the UK.

37. The convention of 26 May 1989 on the accession of Spain and Portugal to Brussels I (‘the San Sebastian Convention’) entered into force between Portugal and the UK on 1 July 1992. In August 1991 C (domiciled in the UK) brought proceedings in Portugal for a declaration that he did not owe VH (domiciled in Portugal) a sum claimed by her in relation to the sale of shares; VH counterclaimed for a declaration to the opposite effect and for an order for payment. In November 1992 VH brought an action against C in the High Court in England for payment of the sum claimed and damages. C issued a summons for a declaration that the High Court lacked jurisdiction, relying on Art 21 of Brussels I as amended by the San Sebastian Convention. A Master stayed the English proceedings, but the High Court subsequently allowed VH’s appeal against that decision. The Court of Appeal dismissed C’s appeal. The House of Lords gave C leave to appeal. The House of Lords considered that an interpretation of the relevant provisions of the Brussels and San Sebastian Conventions was necessary to enable it to give judgment, and referred the ratione temporis question to the European Court of Justice. The Commission, through the opinion of the Judge Rapporteur, suggested that the English court was not required to decline jurisdiction but had discretionary power to do so.

38. However, the Advocate-General opined, and the ECJ held, on the reference that on the true Construction of Art 29(1) of the San Sebastian Convention, when proceedings involving the same cause of

action and between the same parties were pending in two contracting states, the first proceedings having been brought before the date of entry into force of Brussels I between those states and the second proceedings after that date, the Court second seised was to apply Art 21 of the Brussels Convention if the court first seised had assumed jurisdiction on the basis of a rule which accorded with the provisions either of Title II of Brussels I or of another convention in force between those states. It further held that in its deliberation the court second seised was to assess the jurisdiction of the court first seised not in the light of the law peculiar to its own state but having regard only to the rules of Brussels I or any other convention between the states, which were of common application.

39. The application of the ECJ's ruling on the reference in Von Horn to our case would require the English court to decline jurisdiction on W's English petition, as it is clear that the Tribunale di Roma assumed jurisdiction on the basis of the parties' habitual residence in Italy and their Italian nationality, which accords with the provisions of Chapter II of Brussels I (the equivalent to Title II of Brussels I). The transitional provision of Brussels II (Article 42) is worded in the same way as Art 29 of the San Sebastian Convention, the interpretation of which was in issue in Von Horn.

40. This interpretation accords with the purposive construction of the Convention adopted by the ECJ, and applied here by the Court of Appeal to Brussels II by the decision of Wermuth v Wermuth (No 2).

41. The policy underpinning the decision of the ECJ in Von Horn is the avoidance of irreconcilable judgments being delivered in different States in the EU: see [1998] QB 214 at 240C – H. That policy readily translates to the circumstances of the present proceedings.

42. You will probably want to know the result of the real case. There never was one, because the parties settled all their differences the day before the judge was due to give his judgment!

Nicholas Mostyn QC
21 November 2003

The Judge in Proceedings under the Children Act 1989

Judge David Harris QC and Judge Maureen Roddy

31 January 2004

Rome Conference

THE JUDGE IN PROCEEDINGS UNDER THE CHILDREN ACT 1989

by

JUDGE DAVID HARRIS QC
and

JUDGE MAUREEN RODDY

QUEEN ELIZABETH II LAW COURTS, LIVERPOOL

1. INTRODUCTION: The object of this paper is (i) to identify certain important aspects of the nature, ethos, and procedural management of litigation under the Children Act 1989 relating to the welfare of children, and (ii) to discuss the impact which these features have on the role of the judge hearing such cases.

2. THE INVESTIGATIVE NATURE OF CHILDREN ACT PROCEEDINGS: The Children Act 1989 is the most important statute ever enacted in the field of English family law. It covers both (i) the intervention of the

State in the child's family life, primarily, though by no means exclusively, through care or supervision proceedings ('public law' cases), and (ii) other conflicts as to future arrangements for the child, mainly, but not entirely, within the child's family ('private law' cases). The main area of law which is not covered by the 1989 Act is adoption, which is regulated by a different statutory code. In the field of private law, the 1989 Act replaced the regime of custody and access orders under the Matrimonial Causes Act 1973 with orders for residence and contact, reinforced by the concept of parental responsibility for the child. Custody orders in particular were considered to be indelibly associated in the public perception with outdated concepts of proprietorial rights over or interests in the child, which impaired the ability of parents to concentrate on the child's essential welfare interests, and were productive of parental conflict. In the field of public law, the Children Act substituted a new coherent and accessible code for the previous bewildering array of different statutory provisions, regulating the circumstances in which the State could remove a child from parental care or supervise the exercise by the parents of their parental responsibility.

Section 1 (1) of the Children Act provides that when a court determines any question with respect to the upbringing of a child, "the child's welfare shall be the court's paramount consideration". Although the paramountcy principle had existed in statutory form since 1925, the Children Act provides for the first time in one statute a comprehensive framework of legal principles, designed to safeguard and promote in practice the welfare and protection of children. In determining the arrangements which will best promote the child's welfare, the court must consider in particular a number of specified issues, known as 'the welfare checklist'. These factors include, by way of example, (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding), (b) his physical, emotional and educational needs, and (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting of his needs. Section 1 (2) provides that "In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the children". Accordingly, one of the major responsibilities of a judge hearing a Children Act case is to monitor with care the progress of the litigation, and drive it forward proactively to avoid unnecessary delay. Obviously, however, the capacity of the judge to expedite the proceedings is dependent on a number of factors outside his/her control, such as (a) the intrinsic difficulties and requirements of the litigation, (b) the availability of suitable expert witnesses, (c) the resource constraints of CAFCASS (the Children and Family Court Advice and Support Service), (d) the availability of any necessary health and social services resources and (e) the pressure on court time. We will return to the question of delay when we consider the Protocol for Judicial Case Management in Public Law Children Act Cases, which applies inter alia to all applications issued on or after 1st November 2003.

In Oxfordshire County Council v. M it was held by the Court of Appeal that proceedings under the Children Act relating to the welfare of a child are essentially investigative and non-adversarial in nature. The duty of the court is "to investigate and seek to achieve a result which is in the interests of the welfare of the child" . In In re L (A Minor) (Police Investigation: Privilege) , the House of Lords confirmed this fundamental principle , and at page 31 Lord Nicholls summarised its essential consequences as follows:
"In practice the application of the paramountcy principle requires a judge, in the fashionable jargon, to be proactive and not merely reactive. It means that in family proceedings as defined in the Act, the court is not concerned simply to decide an issue between the parties and to do so on the basis of the evidence the parties have chosen to present. The court is concerned to protect the child and promote the child's welfare. The court is not confined to the issues, or the evidence, the parties have brought forward. Nor is it confined to the alternative courses proposed by the parties … During the proceedings the court may at any time, of its own motion, take steps which it considers necessary or desirable to protect the child or promote the child's welfare. The judge may call for more evidence or for assistance from other parties or instigate applications for appropriate orders".
In these respects, the investigative nature of Children Act proceedings, and accordingly, the functions of the judge, differ fundamentally from the normal model of English adversarial proceedings, such as applies in criminal cases and the majority of civil litigation. In adversarial proceedings in English law, the parties in the main determine the issues to be decided by the court, and (subject to a degree of judicial control based on relevance, admissibility, and efficient case management) decide the nature and extent of the evidence to be placed before the court. Accordingly, rules of evidence and procedure, which derive from and support the adversarial model, have in general been abandoned in Children Act proceedings.

3. ETHICS, PRACTICE AND PROCEDURE SINCE THE IMPLEMENTATION OF THE CHILREN ACT: In the period of only twelve years since October 1991, when the Children Act came into force, the senior family law judiciary in England has succeeded in redefining the ethos and practice applicable to cases involving the welfare of children, in order to ensure, to the maximum extent practicable, that family courts are in a position to make informed, appropriate, and expeditious decisions about the best interests of the children before them. The changes have been profound, not only in terms of

the individual principles laid down, but even more importantly in revolutionising the philosophy and

expectations as to how cases involving the welfare of children should be conducted. The dominant philosophy is now 'transparency'. The English family courts require parties and their professional teams to conduct children cases in an open, cooperative, efficient, and restrained manner, which will best promote the ascertainment of the truth and the determination of the child's best welfare interest. Tactical manoeuvrings are deplored. The approach which now prevails was described by the former President of the Family Division, Sir Stephen Brown, as follows:

"The Courts of this country are particularly anxious that in children cases those representing them and who are representing the parties in children cases should be specially experienced … The whole ethos, following the coming into force of the Children Act, is that these cases must not be carried on as battles in the old adversarial system, but should be carried out much more discreetly having regard to the overriding interests of the children. It is not in their interests that battles should be fought" .

Of course, the modern approach does not mean that Children Act disputes are not firmly and thoroughly contested. It is necessary to an effective investigation of all issues which bear upon the child's welfare requirements that such issues should be properly explored and tested through cross-examination and opposing evidence. Nevertheless, there is now an important responsibility on the lawyers, and an important obligation on the judge, to ensure that the litigation is conducted in the open and restrained manner described. Should a lawyer substantially fail to comply with the expectations that the case should be conducted openly and cooperatively, with all cards on the table at the earliest possible time, the lawyer may well find that his/her publicly funded costs are partly or even completely disallowed, and if the default results in delay or in unnecessary expenditure, the offending lawyer may find him/herself the subject of a wasted costs order. The judge, therefore, exercises an important function in ensuring that the case before him/her is conducted in the open, restrained, and responsible way described.

How open must the conduct of a party and his/her legal representatives be? The investigative nature of proceedings under the Children Act, in conjunction with the critical importance of achieving an outcome which will best promote and secure the child's welfare, have led to the expectation that parties to such proceedings will make voluntary disclosure of all information and material in their possession relevant to the issues before the court, even if disclosure might damage the disclosing party's case . In In re L, the House of Lords was invited to consider whether the dicta by judges of the Family Division, asserting the existence of a duty to make full and frank disclosure, represent good law. Lord Jauncey, with whose speech Lords Lloyd and Steyn agreed, felt it unnecessary to decide whether the suggested legal duty exists, but observed that "It may well be that this further development of the practice in cases where the welfare of children is involved is to be welcomed". On the other hand, Lord Nicholls, with whom Lord Mustill agreed, expressed "grave doubts" whether the dicta asserting the duty are correct. The issue has still not been authoritatively decided, but, notwithstanding the reservations of the minority in In re L, in our experience many English family law practitioners are now strongly influenced by the ethical principle that a person, claiming a role in the child's life, has a responsibility to assist the court to reach the best conclusion for the child by making a frank disclosure to the court of relevant material and information, and will give strong advice to that effect to his/her client. If the client declines to accept the advice, and in effect insists that relevant but damaging information be withheld by the court, then, depending on the importance of the information, the legal representative may feel obliged to withdraw. This is, however, a grey area, in which the response of family lawyers varies.

It would be idle to suggest that every case in England is conducted with rigorous regard for the principles and philosophy we have discussed. Some practitioners remain wedded to the old ways and at times judges may be less than effective in controlling the conduct of proceedings. Nevertheless, there has in general undoubtedly been a fundamental cultural change amongst the family judiciary, family lawyers, and expert witnesses, which assists the court to make a properly informed determination of the child's welfare interests, concentrating on the real issues and undistracted by tactical ploys. The judge self-evidently has an essential role in achieving this desirable state of affairs.

4. JUDICIAL CASE MANAGEMENT GENERALLY: Following the implementation of the Children Act in October 1991, the English family courts gradually developed very extensive powers to control the preparation and conduct of hearings in the interest of the efficient and cost-effective discharge of their investigative functions. In part, this important development was achieved through statements of principle and practical guidance formulated by family judges of the High Court and Court of Appeal in the course of their judgments in specific cases. This developing jurisprudence on judicial case-management was reflected and elaborated in Practice Directions to the judiciary published by the President of the Family Division of the High Court and in the early years of the Children Act, by the guidance produced by the now sadly defunct Children Act Advisory Committee. The jurisprudence was developed principally in public law cases, but the guidance on best practice formulated by the judges in public law litigation applies also to private law cases. In Re G (Case Proceedings: Split Trials) , Lady Justice Hale observed: "We have had timetabling and active case management in care cases for a very long time now. We are proud in the Family Division that we embarked on that process long before it was embarked upon in other areas of the

civil law".

The best practice in judicial case management is reflected, and enormously elaborated, in the Protocol for Judicial Case Management in Public Law Children Act Cases, mentioned above. The President's Practice Direction, to which the Protocol is annexed, contains a further annex, containing a number of 'Principles of Application', which are intended to govern the operation of the Protocol. Paragraph 2.1 of the Practice Direction provides that "The purpose of the Practice Direction, Principles and Protocol is to ensure consistency in the application of best practice by all Courts dealing with care cases and, in particular, to ensure: (a) that care cases are dealt with in accordance with the overriding objective; (b) that there are no unacceptable delays in the hearing and determination of care cases; and (c) that save in exceptional or unforeseen circumstances every care case is finally determined within 40 weeks of the application being issued" (emphasis added). Paragraph 3.1 defines the 'overriding objective' in the following terms: "The overriding objective is to enable the Court to deal with every care case (a) justly, expeditiously, fairly and with the minimum of delay; (b) in ways which ensure, so far as is practicable, that (i) the parties are on an equal footing; (ii) the welfare of the children involved is safeguarded; and (iii) distress to all parties is minimised; (c) so far as is practicable, in ways which are proportionate (i) to the gravity and complexity of the issues; (ii) to the nature and extent of the intervention proposed in the private and family life of the children and adults involved". Paragraph 3.3 requires the parties to help the Court to further the overriding objective.

The Protocol and its associated documentation comprise 95 pages, which cannot be effectively summarised for the purpose of this paper. A key objective is to ensure continuity of judicial case management by the early appointment of one, and certainly no more than two, case management judges, who will undertake the proactive and informed management of the case through its various judicial stages to the Final Hearing. Where practicable, the Final Hearing should also be undertaken by the, or one of the, case management judge(s). The Protocol provides for three principal intermediate hearings in preparation for the Final Hearing: (i) an Allocation Hearing which, in the County Court, must take place no later than the 11th day after the commencement of the proceedings, (ii) the very important Case Management Conference which, in the County Court, must take place between the 15th and 60th days after the commencement of proceedings, and (iii) the final directions hearing which must be listed by week 37, although it can be dispensed with, should it be unnecessary. Other intermediate hearings may be listed, if required by the needs of the individual case. At each hearing, the Judge is expected to consider and, if appropriate, determine a substantial number of defined issues or considerations, and to give appropriate directions for the preparation of the case, utilising standard or 'standard variable' forms. The Protocol expects that there will also be continuity on the part of the advocates, and requires the arrangement of Advocates Meetings, to be attended by the parties' lawyers and by any unrepresented party prior to the Case Management Conference and the Final Directions Hearing. The process of achieving efficient and consistent management of public law cases by the judiciary is intended to be facilitated by the use of detailed, structured, standard form questionnaires and checklists.

A further important and laudable objective of the Protocol is to reduce the enormous volume of documentation, which has conventionally been generated in any public law case of even moderate complexity. By way of example, it was commonplace for the relevant history and essential chronology to be reproduced in each main social work statement, and each medical and mental health report. In addition, vast quantities of social work and medical records were frequently lodged with the Court, few of which were actually deployed during the hearing. The Protocol seeks to avoid this costly and time-consuming exercise by (i) limiting the core documentation, and (ii) the use of supporting records.

It is too early to assess whether the Protocol will achieve the efficient, focused, proactively managed, and expeditious conduct of public law cases, which is its essential object. From the judicial perspective, the case management judge can only rigorously control the proceedings, as contemplated by the Protocol, if he/she has sufficient time, in advance of the hearing, to (a) read the relevant papers which, even if the Protocol is properly applied, will be extensive, (b) consider the parties' proposals for the further management of the case in their completed questionnaires, and (c) determine whether the case can be more efficiently progressed by some other directions, not contemplated by the parties. Not infrequently, however, the volume of work before the Judge in any given day may be too great for the Judge to carry out the pre-reading contemplated by the Protocol or to conduct the hearing in the detail required by the Protocol. Should this occur, as is not infrequently the case, the proactive and rigorous case management expected of the Judge by the Protocol may be significantly compromised. It is to be hoped that as the Protocol gradually achieves the slimming-down of public law cases, judicial time will be released which can then be devoted to the degree of pre-reading and proactive management contemplated by the Protocol. Should the Protocol prove successful, it is likely that the principles, practices, and ethos of the Protocol will gradually be applied, to the extent that they are relevant, to private law proceedings. This process will

inevitably be driven by the judges in their case management of private law disputes.

5. JUDICIAL CASE-MANAGEMENT AND EXPERT EVIDENCE: Appendix C to the Protocol comprises a 'Code of Guidance for Expert Witnesses in Family Proceedings'. The Code reproduces case law on the management of expert evidence, which has been developed by the senior judiciary since the implementation of the Children Act, and is of equal importance in private law cases. It is now well-established in public proceedings that the role of the expert is to assist the court with a responsible and balanced opinion, and not to adjust or distort his/her report and/or evidence in a manner designed to promote the client's case. The expert must not mislead by omission, and must not fail to discuss material matters which detract from his/her concluded opinion or may be inconsistent with his/her client's position. The expert should give essentially the same opinion, regardless of the client by whom he/she is instructed. An expert witness who substantially defaults on these responsibilities is likely to find him/herself criticised by the judge in a reported case, and hence have his/her authority damaged, at least as an expert witness. The insistence by the family judiciary during the last decade or so that experts should fulfil their obligations to the court as described above has effected a radical change in the conduct of professional witnesses in family proceedings, with far more objective, carefully considered and child centred reports and evidence.

The insistence by the court on good quality and objective expert evidence is reinforced by judicial control through the court's case management power to approve of the selection and instruction of experts, the timetabling of expert reports and evidence, and the meeting of experts in order to identify the areas of agreement and disagreement amongst them. Amongst the features most relevant to the ambit of this paper are the following:

(i) A lawyer, seeking leave to instruct an expert, must support the application with details of the expert's curriculum vitae, including area of specialisation and forensic experience, the relevance of the opinion of the expert to the matters in issue, and (to cite the Code of Guidance) "the specific questions upon which it is proposed that the expert should give an opinion". The lawyer must also ascertain the time required by the expert to furnish a report, together with the availability of the expert to give evidence at the time the case is likely to be listed.

(ii) Should the Judge consider, in the light of his/her experience, that the expert's opinion is unnecessary for the proper determination of the issue in question, the Judge will refuse permission for the expert's opinion to be obtained. It is not uncommon, for example, in a public law case for one of the parties (normally a parent) to apply for a psychological opinion on the quality of the attachment between the child and that parent. If, however, there is no unusual dimension to the child's attachment to the parent, the assessment of the attachment may well be within the expertise of the local authority's key social worker and the child's Guardian, who will also be trained in social work. In such circumstances, the Judge may properly decide that the additional report of an independent child psychologist is unnecessary to the determination of the issues in the case, and refuse that party's application.

(iii) Should the Judge conclude that he/she would be assisted by the opinion of the proposed expert, or of some other expert of the same specialty, the Judge will then consider whether it is appropriate to allow the applicant party to instruct the expert him/herself, or alternatively whether the expert should be instructed by all parties acting jointly, or instructed on behalf of the child alone, if the child is separately represented. In recent years, joint instruction of an expert has become increasingly common, even in complex cases. Self-evidently joint instruction may well avoid the proliferation of experts on a particular issue, and prevent unnecessary delay and avoidable expenditure of scarce public funds. But recent experience in England has demonstrated the potential fallibility even of experts of high reputation, and it is open to question whether this experience will result in a reconsideration of the common practice of courts of insisting upon the use of jointly instructed experts.

(iv) Experts who are to give evidence at the trial must be kept up-to-date on relevant developments, including further expert reports, witness statements, and medical records. In addition, a party seeking to cross-examine an expert on material which he/she has not previously considered is obliged to bring that material to the expert's notice prior to the hearing. Any failure to comply with this practice which results in delay is likely to be visited by a wasted costs order. The English courts will not tolerate cross-examination by ambush.

(v) Save where the experts are plainly in agreement, the Judge will direct at the Case Management Conference that the experts should confer with each other in order to discuss and explore the issues, and to identify those matters on which agreement can be reached and those which remain in dispute, together with the nature of and reasons for disagreement. The discussion, which may be wholly or in part by

telephone or video link, should be chaired by the solicitor for the child (if available), and in a case of any complexity, an agenda should be prepared and circulated in advance of the hearing. A minute of the meeting, together with a statement of concurrence and disagreement, should be prepared, served on the parties and filed with the court. All these matters will be the subject of directions by the Judge at the Case Management Conference.

6. JUDICIAL CASE MANAGEMENT AND SPLIT HEARINGS: In many public, and some private law cases, an issue may arise as to whether a child has been physically or sexually abused and, if so, by whom. Issues of this type will often be highly contentious and complex. The outcome may well depend, not only on the credibility of the lay evidence, but on vigorously disputed medical evidence as to the nature and significance of physical findings by the doctors. Is an injury to a young baby, for example, the result of abuse, the stresses of the birth process, or some natural condition? If it was caused by an abusive act, what is the time bracket during which the injury must have occurred, and which of the relevant adults had the care of the child in that period? Until issues of this sort have been determined, it may be difficult for a definitive assessment to be made of the risks to the child in the care of each parent. It may sometimes be convenient, therefore, for the factual issues relating to the alleged abuse to be decided, at the earliest possible stage, so that the assessment and determination of the child's consequential welfare needs can then proceed with greater focus and expedition.

Rule 4.14 of the Family Proceedings Rules 1991 confers on the court the power to give, vary or revoke directions for the conduct of the proceedings. It has been common in public law cases for the court to utilise this power, in the exercise of its case management functions, to direct a preliminary hearing of factual issues, such as (i) the nature and extent of any injury suffered by the child, (ii) whether such injuries or any of them were non-accidental in causation, (iii) if so, the probable mechanisms by which the injuries were caused and the likely perpetrator, and (iv) the extent of any failure by the parent who did not inflict the injury to anticipate and protect the child against the risk of injury from the perpetrator. It has in the past been readily considered that this split hearing procedure will promote the most expeditious and efficient resolution of the dispute.

More recent experience, however, has suggested that the benefits of split hearings may be outweighed by their disadvantages. In the first place, it is difficult in advance of the hearing to define the evidence which is likely to be relevant to the issues which fall to be determined. It may well be, for example, that features in the family dynamics and context are relevant to the determination whether an injury is non-accidental and, more particularly, the identity of the perpetrator. If, for example, there is some dysfunction in the relationship of a particular parent with the child, or one of the parents is subject to a level of stress which he/she is finding it difficult to cope with, or one of the parents has demonstrated in the family context a particular difficulty in anger management, such factors may assist in the determination, on the balance of probabilities, of the perpetrator of any identified non-accidental injuries, and even (although more rarely) whether the injury was non-accidental. It may well be inappropriate, therefore, to seek to decide the issues mentioned above on the basis of one part of the evidence only. In addition, the use of split trials may be attended by delay. For these reasons, in very recent times there has been a reduction in the use of split trials, although they continue to be directed in private law cases where there are disputed issues of domestic violence and/or drug abuse.

7. POST-SCRIPT: We very much hope that this brief review of some of the practical and case-management issues which frequently arise in proceedings under the Children Act 1989 will be of interest to our Italian colleagues, and give you some impression of the virtues and (no doubt) deficiencies of the English family law system.

21 January 2004

An Introduction to Ancillary Relief

Rebecca Carew Pole

20 May 2004

New Practitioners Programme 2004

AN INTRODUCTION TO ANCILLARY RELIEF

A. THE LAW

1. Basic Principles

1.1 Section 25 of the Matrimonial Causes Act 1973 applies in all cases whether the assets are large or small - welfare of the child(ren) is the first but not the paramount consideration

1.2 The section then sets out the criteria to be considered - broadly:-

(a) income, earning capacity, property and other financial resources;
(b) financial needs, obligations and responsibilities;
(c) standard of living;
(d) age of parties; duration of marriage;
(e) physical or mental disability;
(f) contributions (including to welfare of family both in past and in foreseeable future);
(g) conduct (but not very often);
(h) loss as a result of the divorce (nearly always pensions).

1.3 Two main aspects:
(i) Housing

M -v- B (ancillary proceedings: lump sum) [1998] 1 FLR 53, 1 FCR 213 - one of the important considerations in applying s25 criteria is to stretch what is available to cover the need for each spouse to have a home, particularly where there are young children. Bear in mind that most judges will strain to see the child(ren) with a roof over their head(s) and in practice you will find this is the driving force behind many cases.

But N.B. - Piglowska -v- Piglowski [1999] 2 FLR 763, 2 FCR 481; House of Lords say no rule that spouses' housing needs are to be given greater weight than the other section 25 criteria although "sound sense" of remarks in M -v- B not doubted.

If there is insufficient for both to have a home - consider a deferred charge: to give the carer of the children all the (limited) capital might seem harsh. For the arguments for and against Mesher – type charges see Elliott –v Elliott [2001] 1 FLR 477, CA and B –v- B [2002] EWHC 3106 [Fam]; [2003] 2 FLR 285 (Munby J).

Clutton -v- Clutton [1991] 1 FLR 242, FCR 265 - a charge does not offend the principle of the clean break; but not a deferred charge that will simply leave the wife homeless when the children are adult (see, for example, Carson -v- Carson [1983] 1 WLR 287, 1 All ER 478).

(ii) Maintenance

Campbell -v- Campbell [1998] 1 FLR 828, 3 FCR 62 - maintenance cases need to be evaluated on a broad perspective rather than to look with scrupulous care at every item in a budget; the court balances the wife's needs against the husband's ability to pay

N.B. the Court of Appeal's decision (awaited) in the conjoined appeals Parlour and McFarlane dealing with how to assess spousal periodical payments in high net income cases.

1.4 Can a husband make a claim?

Yes, both parties come to the court as equals - Calderbank [1976] Fam 93, [1975] 3 All ER 333 although that does not mean that justice requires an equal division of the assets.

1.5 Is there a presumption of equality?

White v White [2001] 1 All ER 1, [2000] 3 FCR 555 The House of Lords refused to accept that there is a presumption of equality. However, before a final order, a judge should check his views against "the yardstick of equality" and equality should only be departed from "if, and to the extent that, there is good reason for doing so…."

The House of Lords did stress that the decision in White related principally to how assets should be divided in "big money" cases.

Where needs, and especially the requirements of children of the family, render anything approaching an equal division impossible, the approach of the courts has not been altered by the decision in White, or by the cases that have followed it.

1.6 What is meant by 'big money'?

Basically, when there is a significant sum of money left over after both parties and any children have been re-housed and are provided for by income in a similar style to that enjoyed up to the breakdown of the marriage.

Mrs. White got about 40%. Most wives in the 'big money' category have been getting about 40% as well (See e.g. Cowan v Cowan [2001] 2 FLR 192; N v N (Financial Provision: Sale of Company) [2001] 2 FLR 69). However, in Lambert v Lambert [2002] EWCA Civ 1685; [2003] 1 FLR 139, where Mrs Lambert got 50%, the Court of Appeal said that very few husbands will be able to plead 'exceptional contribution', as Mr. Cowan did successfully, in future. "Special" contributions remain a legitimate possibility, but only in exceptional circumstances. In a marriage which has subsisted for many years with the parties performing different roles, those different roles are, save in exceptional circumstances, to be regarded as of equal value (although note that equality of contributions does not necessarily mean equality of outcome).

2. Initiating the application

2.1 Ancillary Relief Rules - all applications in Form A
If seeking a Pensions Act order, must say so in application; trustees/managers must be served
Leave required if claim not made in Petition [Rule 2.53(2)]
Applications against yourself - Dart [1996] 2 FLR 286, [1997] 1 FCR 21

2.2 Claim must be made before remarriage - section 28(3)
but can be adjudicated upon thereafter
Claim in Petition sufficient - Jackson [1973] Fam 99, 2 All ER 395

2.3 No final order until Decree Nisi - otherwise void
Munks [1985] FLR 576

2.4 Only one substantive order for ancillary relief - Coleman [1973] Fam 10, [1972] 3 All ER 886 and de Lasala [1980] AC 546, [1979] 2 All ER 1146
No power to vary property adjustment or lump sum orders
- eg. Carson [1983] 1 WLR 287, 1 All ER 478 - unless lump sum order is pursuant to the Pensions Act or is for payment by instalments
also see Sandford -v- Sandford [1986] 1 FLR 412

2.5 Section 31(7B) of the MCA 1973 - a wife can apply to capitalise her periodical payments even

where there has already been a dismissal of her capital claims

2.6 Pension Sharing came into force for all Petitions filed after 1st December 2000. Pension attachment (formerly earmarking) under the Pensions Act 1995 has survived but is unlikely to be used as often. It remains a useful tool whilst there are still pre-December 2000 Petitions coming up for final hearing.

3. What you will be asking for

3.1 Maintenance pending suit until Decree Absolute; thereafter, interim periodical payments.
See Rule 2.69F for procedure
Highly unusual to have oral evidence on an application for mps - court invariably proceeds on the basis of the (short) Sworn Statements (or Forms E).

Provision for legal fees can be allowed as part of the budget for maintenance pending suit, although note that the reported cases are big money (see A –v- A (Maintenance Pending Suit: Provision of Legal Fees) [2001] 1 FLR 377; M –v- M (Maintenance Pending Suit) [2002] 2 FLR 123).

3.2 Lump sums - MCA 1973 s 23(3)(c) - payment by instalments
s31(2)(d) - unlike single lump sums, can be varied (Tilley -v- Tilley [1980] 10 Fam Law 89). Section 31(1) of the MCA 1973 empowers the court not only to re-timetable and/or adjust the amounts of individual instalments (see Masefield -v- Alexander [1995] 1 FLR 100, 2 FCR 663) but also to vary, suspend or discharge the principal lump sum itself. This latter power is to be used extremely sparingly and only where there has been a significant change of circumstances (see Westbury –v- Sampson [2001] EWCA Civ 407; [2002] 1 FLR 166).

3.2.1 Adjourning the claim
M-T -v- M-T [1992] 1 FLR 362, [1991] FCR 649; D –v- D (Lump sum: Adjournment of Application) [2001] 1 FLR 633, FD; Re G (Financial Provision: Liberty to Restore Application for Lump Sum) [2004] EWHC 88 (Fam).

3.3 Child periodical payments – the court only has jurisdiction if:-

(i) consent order;
(ii) top up only if CSA calculation is in force and the payer is deemed to have the maximum assessable income (currently £2,000 net per week);
(iii) step-parent (in respect of a child of the family);
(iv) variation of existing order;
(v) school fees;
(vi) tertiary education;
(vii) overseas element.

Remember that parties can no longer oust the jurisdiction of the CSA forever by agreeing to submit to the jurisdiction of the court. Even where there is a court order, either party can apply to the CSA to deal with child maintenance after one year, whereupon the court order lapses. You should always prepare a CSA calculation so that you know what the figure is (see GW –v- RW [2003] All ER (D) 40 (May)).

Since March 2003, the complicated old CSA formula has been replaced (for new cases) with a simpler percentage-based approach: 15% of net income for one child (20% for 2 children and 25% for 3 or more children). N.B. the reduction that applies depending upon the number of overnight stays the relevant child(ren) has with the paying parent.

4. The effect of cohabitation

4.1 If a wife has “earned her share” by contributions during a long marriage, she will not lose that share just because she is cohabiting (Duxbury -v- Duxbury [1992] Fam 62, [1990] 2 All ER 77)

4.2 Maintenance will not automatically cease on cohabitation - it depends on the circumstances of the cohabitant (Atkinson -v- Atkinson [1988] Fam 93, FCR 356, recently confirmed by the Court of Appeal in

Fleming –v- Fleming [2003] EWCA Civ 1841; [2004] 1 FLR 667).

4.3 The definition of cohabitation - see Kimber -v- Kimber [2000] 1 FLR 78

4.4 Note the effect of pre-marital cohabitation when considering the weight to be accorded to the length of the marriage. See GW –v- RW [2003] All ER (D) 40 (May) and C –v- C (Ancillary Relief: Pre-marriage cohabitation) [2004] EWHC 287 (Fam).

5. Termination of maintenance

Note the Court of Appeal cases to the effect that great caution needs to be exercised before terminating periodical payments orders in cases where there is no established earning capacity.

Flavell -v- Flavell [1997] 1 FLR 353, 1 FCR 332 - lady in her mid 50s
G -v G (periodical payments: jurisdiction) [1997] 1 FLR 368, 1 FCR 441 - lady in her mid 40s with teenage children
C -v- C (financial provision: short marriage) [1997] 2 FLR 26, 3 FCR 360 - lady in her early 40s with very young child

6. Short marriage cases

Putting the applicant back in the position he or she occupied before the marriage
S -v- S [1977] Fam 127, 1 All ER 56
Attar -v- Attar (No. 2) [1985] FLR 653
but cf position where there are children eg C-v-C above

7. Pension Sharing

An order only available in cases where the proceedings (ie. the petition) were issued after 1.12.2000.
Introduced by WRPA 1999, inserting ss.21A & 24B into MCA 1973
Not available in JS - only divorce or nullity
The parties may agree to rescind a Decree Nisi to enable the court to have pension sharing powers under a new petition (S v S [2001] 1FLR 457).
Though a husband is entitled to decline a proposal by the wife to the filing of a fresh petition in these circumstances, that he has failed to consent may be one of the circumstances to be taken into account (Rye v Rye [2002] 2 FLR 981)

8. Costs

See Norris –v- Norris; Haskins –v- Haskins [2003] EWCA Civ 1084; [2003] 2 FLR 1124.
The need for a costs estimate (to include how much paid)
The difference between standard and indemnity costs

B. THE PRACTICE

Governed by the Ancillary Relief Rules (FPR 1991 r.2.51B – 2.70).

(i) The overriding objective;
(ii) Exchange of Forms E (note the requirement to exhibit specified documents);
(iii) Preparation of Questionnaire (if necessary), Chronology, Statement of Issues and Form G (can First Appointment be used as FDR?) 14 days before First Appointment;
(iv) Judicial control of litigation at First Appointment;
(v) Financial Dispute Resolution hearing with all offers, proposals and responses available to Judge;
(vi) Need for costs estimates at all times and possibility of wasted costs orders if non-compliance with rules;
(vii) Need for client attendance at all hearings unless otherwise directed
(viii) Need for open proposals before final hearing;
(ix) No Sworn Statements without direction.

9. Preparing Questionnaires

9.1 Questionnaire must be drafted with reference to the Statement of Issues [(Rule 2.61B (7)(c)]; in some cases, there will be no need for a Questionnaire at all

9.2 Stick to relevant questions (eg do not ask refuse collectors for details of their offshore trusts)

9.3 Credit card statements - highly unlikely to need more than one year (holidays, standard of living)

9.4 Bank statements - one year's statements should be annexed to Form E; if appropriate, ask for identification of specific credits and debits; look for transfers to undisclosed accounts or payments for non-disclosed policies

9.5 When answering a Questionnaire, always ensure the Reply includes the Question.

10. Preparing the bundles

10.1 See Practice Direction: Court Bundles [2000] 1 FLR 536 - applies to all hearings of 1/2 day or more and any hearings in the High Court/RCJ

10.2 The bundle must be paginated (numbered) throughout and placed in a ring binder or lever arch file (no more than 350 pages in each)

10.3 Note the order of the documents - (a) applications and orders; (b) statements and affidavits; (c) expert's reports; (d) other documents

10.4 Try not to include documents disclosed in reply to a Questionnaire unless they are likely to be

referred to in court

10.5 Rule 3.1 - the bundle should commence with (a) a summary of the background to the hearing; (b) a statement of the issue(s) to be determined; (c) a summary of the order sought; (d) a chronology if a final hearing or (a) above is insufficient; (e) skeleton arguments as appropriate with copies of authorities relied on

10.6 In all but the most simple case, a Schedule of Assets will also be vital (bringing the content of the 2 Forms E together).

10.7 The bundles should be filed 2 clear days prior to the hearing

See Re CH (family proceedings: court bundles) [2000] 2 FCR 193 for the penalties for non-compliance

11. Preparing for the final hearing

11.1 Highlighters and "post-its" are invaluable for finding documents/important passages

11.2 When reading the papers, jot down points for cross-examination bearing in mind that they need to be relevant to section 25 factors

12. Ascertaining the assets

12.1 Joint experts now far more likely but, if not, the experts must talk to each other to attempt to agree values prior to the date of the hearing

12.2 An accurate redemption statement should be obtained for all mortgages or charges

12.3 Surrender values (or sale values) for all endowment policies plus dates of maturity with projected maturity values

12.4 Pensions - transfer values and projections

13. Alternative property particulars

13.1 Get a good spread but not hundreds of particulars

13.2 Provide a map with the properties identified plus the matrimonial home, children's school, etc

13.3 Your client should view all particulars (to point out the power station behind the garage etc) and take pictures if possible

14. Earning capacity

14.1 Client should keep a list of all applications, rejection letters, etc

14.2 On the other side, general questioning is not particularly effective. Get details of relevant courses, copies of job advertisements, etc. In an appropriate case, an Employment Agency may be able to provide a Statement

15. Submissions

15.1 Open offers required prior to the hearing; in any event, always know what order you are asking for and why - the DJ may ask you at the conclusion of your opponent's opening

15.2 Final submissions can much more effective in writing but this is not always possible. NB - don't prepare them before your client's evidence - you may find your case changes!

Rebecca Carew Pole
1 Hare Court
Temple
London
EC4Y 7BE

21 May 2004

An Introduction to Public Law Children Cases

David Vavrecka

27 May 2004

New Practitioners Programme 2004

PUBLIC LAW CHILDREN
RECENT DEVELOPMENTS

27th May 2004

Speaker: David Vavrecka, Coram Chambers

Judicial Statistics
1. Most recent statistics from DCA:
Public law applications between 1992 – 2002 tripled: 2,263 to 6,335 (165.9%)
Adoptions in same period; fell from 8894 to 4400
Private law in same period 52,924 – 94,548

Care Proceedings
2. Practice direction; the Protocol
Protocol for Judicial Case Management in Public Law Children Act Cases (June 2003) [2003] 2 FLR 719
- Implemented as from November 2003; longest practice direction (85 pages) ; 5 step protocol
- Attempt to produce standardised procedure for public law cases
- Central purpose to achieve speedier and more efficient resolution of process for the benefit of child
- Applicable to every level of court
- Collaborative effort

- Aim is to transform the culture

3. Is the Protocol the servant or the master?
Re G (Protocol for Judicial Case Management) [2004] EWHC 116 (Fam)
Protocol case where LA placed child with MGP. On the hearing where it was decided to transfer to care centre, LA sought ICO with plan of removal. MGP sought to be joined to proceedings to oppose the application (which was based on evidence involving them). Justice refused to hear them stating they were required so to act by Protocol. Hedley J allowed MGP appeal: HELD
- every court in approaching Protocol had to keep in mind its terms as well as its purpose. If pursuit of purpose (overriding objective at para 3.1 of Practice Direction) required departure from terms of Protocol, proper reasons hade to be given
- order made contravened spirit and purpose of Protocol
- Protocol a 'tool' to help secure best interests of children

4. Medical Evidence: Roy Meadows & the Implications of R v Cannings
R v Cannings [2004] EWCA 1 (Crim) Court of Criminal Appeal made clear
- need for particular care in looking at medical evidence when reputable experts disagree
- danger of misinterpreting rarity of events
- expressly endorsed legitimacy of concluding an injury or condition unexplained or unknown
- highlighted need to reject dogma of experts where not supported by research
- need to be alert to developments in understanding and research in medical science

5. Reaction to Cannings
On 21 January 2004 Harriet Harman Solicitor General announced urgent review of cases of woman convicted of killing their babies. The President of the Family Division alerted Judges of arrangements for any applications arising out of decision in R v Angela Cannings. In February 2004 Margaret Hodge asked LA to immediately review 'current' cases, and within 12 weeks 'past' care orders (excluding those where adoption orders made) to discover whether any of them relied upon flawed medical evidence; if in child's best interests LA should apply to discharge order or encourage parents to do so

6. Re LU and LB [2004] EWCA (Civ) 567; 14th May 2004
The President gave the judgment of the court; these are the first two post Cannings appeals. Both appeals were dismissed.

In reviewing the standard of proof she cited extensively from the key recent decisions; including the most recent family case on this issue (Re ET), which was expressly disapproved by CA:

Re ET (Serious Injuries: Standard of Proof) [2003] 2 FLR 1205 -
Care proceedings on seriously injured baby involved great deal of medical evidence around timing of injuries (whether before or after taken to hospital) Bodey J considered the issue of the proper approach to the standard of proof in cases involving very serious allegations;
- burden of proof rested on LA. If the court remained uncertain, then the particular point had not been established to requisite standard required for s31
- standard of proof was civil standard on balance of probabilities, remembering always the more improbable the event, the stronger the evidence must be before its occurrence could be held to have been established. Applying that standard did not mean that where a serious allegation was in issue, the required standard of proof was higher. It required bearing in mind the dicta of recent authorities that the difference between the civil and criminal standards of proof was largely illusory
- recent case law reviewed B v Chief Constable of Avon and Somerset Constabulary [2001] 1 WLR 340 and R (McCann) v Crown Court at Manchester [2002] 3 WLR 1313]

7. Conclusion so far as the standard of proof
In Re LU and LB at para 13 the suggestion that the distinction between criminal and civil standards was largely illusory was said to be mistaken. "The standard of proof to be applied in Children Act cases is the balance of probabilities and the approach to these difficult cases was laid down by Lord Nicholls in Re H. That test has not been varied or adjusted by the dicta of Lord Bingham or Lord Steyn who were considering applications made under a different statute. ….In our judgment therefore Bodey j applied too high a standard of proof in the case of Re ET and the principles set out by Lord Nicholls should continue to be followed…

8. Conclusions as to effect of Cannings on family proceedings
Court adopted the following at para 23
- cause of an injury or an episode that cannot be explained scientifically remains equivocal

- recurrence is not in itself probative
- particular caution is necessary in any case where the medical experts disagree; one opinion declining to exclude a reasonable possibility of natural cause
- court must always be on guard against the over-dogmatic expert, the expert whose reputation or amour proper is at stake or an expert who has developed a scientific prejudice
- the judge in care proceedings must never forget that today's medical certainty may be discarded by the next generation of experts or that scientific research will throw light into corners that are at present dark

9. At paragraph 29 "In summary the decision of the court in R v Cannings has no doubt provided a useful warning to judges in care proceedings against ill-considered conclusions or conclusions resting on insufficient evidence. The extent of the retrospective effect remains to emerge. However practitioners should be slow to assume that past cases which have been carefully tried on a wide range of evidence will be readily reopened

10. Standard of Proof; yet another authority
Re T (Children) [2004] EWHC Civ 558; CA
LA and Guardian appealed against the decision that the threshold had not been met (and care proceedings dismissed) in relation to 2 children where 3 year old examined and found by a consultant to have a perineal tear, anal fissures and an anal tag. Photographs were taken of the injuries and children moved to MGP and ICO made. Differing opinions between 3 doctors (partly as a result of different sets of photos being viewed) One of doctors at court changed his opinion. Judge found medical evidence insufficient to hold child sexually abused and threshold had not been crossed. On appeal it was argued that (1) judge applied wrong standard of proof by requiring standard equal to criminal standard (2) misinterpreted medical evidence (3) failed to analyse parent's evidence and to make findings about the lack of explanations about child's injuries. The Court of Appeal reiterated that Re ET mistaken, and judge should have taken an overview of the totality of the evidence. Local protocols should be devised to enable all photographs to be released to all relevant experts when they received instructions. Case transferred to High Court for rehearing.

11. Use of Photographs
Re Y (Evidence of Abuse: Use of Photographs) [2003] EWHC 3090 (Fam), [2004] 1 FLR 855
Girl aged almost 3 reported that her stepfather had hurt her in the genital area. Anogenital examination carried out and photos taken; 2 doctors felt digital penetration had occurred. In subsequent care proceedings, further medical exams, drawings and pictures, led to 4 medical experts agreeing evidence suggested sexual abuse. At fact finding hearing, 5th doctor advanced another hypothesis explaining difficulties other four doctors under. Proceedings dismissed, but reinstated by CA before different judge. Joint examination of child ordered and conclusion reached previous photos unreliable and misleading, as were current ones. American expert said original examination misread. LA withdrew its application. Holman J invited to give some comments
- he questioned whether guidance of Royal College in relation to reliance on of 2nd opinions on video or still photos (obtained by colposcope) needed revision (see Royal College of Paediatric and Child Health and the Association of Police Surgeons Guidance on Paediatric Forensic Examination in Relation to Possible Child Sexual Abuse (2002)
- further examination, although intrusive, sometimes preferable to potential grave miscarriage of justice

12. Disclosure
Re W (Care Proceedings: Disclosure) [2003] EWHC 1624 (Fam), [2003] 2 FLR 1023
5 children were with MGP under ICO until moved by LA to live with their M, still under ICO (who had criminal record and history of drug use) LA received information that drug dealer living at M address but told not to inform any family member, as this would prejudice operation and out informer's life at risk. LA applied to court and Wall J granted them permission to disclose info to M. M had to be informed of substance of allegations against her, as LA needed to establish threshold (presence of drug dealer in her home) and non-disclosure of relevant info the exception rather than the rule. Where clash between protection of police activities and protection of children to that extent that confidentiality must be breached, it must be right for a local authority to seek guidance from the court

13. Child giving evidence
Re O (Care Proceedings: Evidence) [2003] EWHC 2011 (Fam)
In care proceedings concerning teenage boy and girl, LA concerns arose out of incidents of violence by M to younger girl, one of which involved striking a severe blow with flex on an outstretched hand, The boy claimed to be responsible. Both children fostered. 4 years earlier M had pleaded guilty to criminal charges relating to assault with electric flex. M denied these allegations but gave no oral evidence and judge (DJ Million) attached no weight to her statements. The boy who supported M denials was ordered to be separately represented and given leave to file a statement about the allegations and issue of his oral

evidence was reserved to trial. Later DJ refused application to give evidence (not appealed). Findings later made against M which she appealed. Johnson J dismissed appeal. HELD
- DJ should not have attached no weight to statement but failure to give evidence sought usually allowed court to draw inference that allegations true – no room for the no comment interview
- Decision of DJ not to hear from boy within his discretion

14. Human Rights Claims and other challenges
Re V (Care Proceedings: Human Rights Claims) [2004] EWCA Civ 54, [2004] Fam Law 310
During care proceedings (F Schedule 1 offender, M history of relationship with offenders and previous 2 children placed for adoption – in previous proceedings ,parents attended various assessments but not at therapy sessions recommended to them.) LA took stance no assessment or treatment appropriate. Parents claimed LA failed in duty to take positive steps to reunify family. At start of final hearing, Judge adjourned proceedings and ordered parents applications regarding alleged breaches of ECHR be transferred upto High Court. . LA appeal allowed by LA, and Judge's order set aside
- alleged breaches of ECHR by LA can and should be dealt with in care proceedings in court hearing the care case; not necessary to transfer up merely because breach of convention right alleged
- applications for transfer to be strongly discouraged, and may amount to breach of process – should not have been done at such a late stage, and failure to refer judge to case law reprehensible.
- only declarations of incompatibility reserved to High Court (see Practice Direction: Human Rights Act 1998 [2000] 2 FLR 429

15. In Re S (Habeas Corpus); S v Haringey LBC [2003] EWHC 2734 (Admin)
Munby J dealt with JR and habeas corpus applications by a mother in person, in relation to the removal from her care of 4 children. In dismissing both sets of proceedings he held
- proper forum for challenging issues while care proceedings ongoing almost always in the care case even at FPC level even if HRA issues or of a kind that might otherwise be subject of JR
- habeas corpus deprecated where care proceedings on foot; child in any event not in detention but living with foster carers
- this case reiterates what said in Re C (Adoption: Religious Observance) [2002] 1 FLR 1119 and Re L (Care Proceedings: Human Rights Claim) [2003] 2 FLR 160

16. Residential assessments
Re G (Interim Care Order: Residential Assessment) [2004] EWCA Civ 24, [2004] 1 FLR 876, CA
8 month old baby looked after by mother since birth. M's 2nd child (by previous father) died 4 years earlier and neither M nor father of that child exculpated. After birth and ICO issued, parents made s38(6) application and admitted to Cassel Hospital (therapeutic community hospital) At a review, Johnson J ordered further 6 weeks assessment and 2nd review. At 2nd review, extended stay recommended in light of significant change in mother. LA plan was ultimately rehabilitation, child to live with paternal grandmother and father in meantime. Johnson J invited LA to file evidence in relation to funding and set a further hearing. At that hearing, LA thought only a directions hearing and filed sparse financial info. Johnson proceeded to determine issue rather than waiting until further full hearing. He dismissed parents application for an extension to assessment and held he had no jurisdiction to extend s38(6) assessment, but even if he did, would not in these circumstances. Parents appeal allowed, and CA made further s38(6) assessment. HELD
- essential question for court was whether or not what was sought could broadly be classified as an assessment so as to enable the court to obtain the info necessary for its own decision. However, what court saw as an assessment may well be experienced by the family as therapy – in present case, psychotherapeutic engagement with family over an extensive period was an essential element of the assessment
- artificial and legalistic to label first period of admission assessment and second referral as therapy – Johnson wrong to hold he lacked jurisdiction
- application under 38(6) potentially engaged Arts 6 & 8 and her parents were denied a fair hearing on this issue of funding. M entitled to test wider budgetary implications of residential assessment – breach of Art 6 rights
- CA disapproved of guidelines of Holman J in Re M (Residential Assessment Directions) [1998] 2 FLR 371 and instead restated the importance of the broad purposive approach analysed in Re C (Interim Care Order: Residential Assessment) [1997] 1 FLR 1
- this appears to move away from assessment vs. therapy distinction (for which see Re D (Jurisdiction: Programme of Assessment and Therapy) [1999] 2 FLR 632; Re B (Psychiatric Therapy for Parents) [1999] 1 FLR 701; Re B (Interim Care Order:Directions) [2002] 1 FLR 545

17. Principle of fairness; proper involvement of parents
Re L (Care: Assessment: Fair Trial) [2002] EWHC 1379 (Fam), [2002] 2 FLR 730
Although not a recent case, Munby J decision still a vital case;

In his (as usual) detailed judgment, he analyses the extent and scope of Article 6 and 8 rights within care proceedings. Mother's first child died of NAI aged 4 months and second child on register. Care proceedings commenced and child place din foster care. A psychiatrist was instructed jointly to decide whether to assess mother for possible rehab. After a 3 day assessment the psychiatrist advised residential assessment appropriate, but after a meeting from which the mother was excluded, the psychiatrist changed his decision. No minutes of this meeting were taken. The mother opposed the care plan of adoption and claimed there had been breaches of good practice and she had no had sufficient opportunity to argue her case. Although the mother's application for further assessment was dismissed, Munby explained that the mother's article 6 rights to a fair trial were absolute and were not limited just to the judicial stage of the proceedings – the failure to allow a litigant to examine and comment on documents or cross-examine witnesses then relied upon in producing a report was likely to amount to an article 6 breach. LA had duty to have transparent and fair procedures at all stages, in and out of court. Documents must be made available and crucial meetings conducted openly with parents having opportunity to attend or be represented. However generalised discovery not necessary or desirable. Earlier unfairness to mother in not being sufficiently involved overcome in later stages of process

18. The ignorant & absent Father; to serve or not to serve?
Re AB (Care Proceedings: Service on Husband Ignorant of Child's Existence) [2003] EWCA Civ 1842
A married woman shortly prior to birth of child asked LA to take the child for adoption as she said the pregnancy was due to rape and her pregnancy was unknown to her husband. Baby girl placed immediately in foster care and within subsequent care proceedings N sought to exclude her husband from any knowledge of the proceedings. LA asked or directions. Deputy HC Judge found M wholly and deliberately untruthful and concluded in favour of notifying H of child's existence and of the proceedings. CA dismissed the M appeal and held the court would be exceptionally slow to grant a relaxation of the rules of service in any circumstances, other than the most extreme. M should have followed the route of s55A of Family Law Act 1986 (declaration as to parentage)

19. Designating the appropriate authority; Northamptonshire revisited
Re H (Care Order: Appropriate Local Authority) [2003] EWCA Civ 1629
Child who was originally (but briefly) in care of Norfolk CC was moved to Oxford with his mother when aged 2 ½ . It was here that police had to remove him due to NAI for which mother and her partner held responsible. Oxford CC obtained ICO but Wall J decided child should return to Norfolk to be looked after by grandparents, where he has remained. F obtained PR and an order restraining M from approaching home children were in and reduced her contact to three times a year. Care order made to protect placement Consideration was given to making residence (to grandparents) and supervision orders which Norfolk would have accepted, but that the care order should be designated to Oxford. Hogg J found compelling reasons to depart from the established authorities and designated Norfolk under the care order.
Thorpe LJ upheld her order, whilst maintaining Northamptonshire County Council v Islington LBC [2001] Fam 364 and C (A Child) v Plymouth County Council [2000] 1 FLR 875 still good law. However in this case, once child returned from foster family to the birth family in Norfolk (living under section 23(6), he was no longer being provided with accommodation by Oxford (within meaning of s105(6)) and was ordinarily resident in Norfolk; duty now fell on Norfolk as the disregard provision did not apply

20. Asylum law meets Family Law
Re A (Care Proceedings: Asylum Seekers) [2003] EWHC 1086(Fam)
Munby J's analysis of the separate functions of the Secretary of State and the family court are required reading
Parents and two children came to UK in 2002 and applied for asylum, This was refused and all subsequent appeals by F rejected. F taken into custody and reported by asylum team to be extremely distressed and concern he would kill himself and children. M took overdose but discharged from hospital next day. LA granted an ICO for both children but subsequent investigations showed no concerns, but parents nonetheless sought to continue the proceedings. Munby discharged IC) and dismissed the proceedings as no risk of harm and no basis for saying parents could not parent effectively in country of origin (to which would be deported)
- for the court, child welfare paramount, whereas Secretary of State did not

21. The test at interim hearings
Oxfordshire CC v S [2003] EWHC 2174 (Fam), [2004] 1 FLR 426
Justices gave written reasons for dismissing ICO application and stated they were not satisfied that there were reasonable grounds for believing children were suffering or likely to suffer. They went on to day they were not satisfied that the threshold criteria had been met and concluded the children do not appear to be presently suffering or likely to suffer significant harm. LA appealed and argued Bench applied wrong test. Munby overturned the justices and reiterated mandatory nature of r21(5) and (6). Court must

where it makes a finding of fact state such a finding and complete Form C22 and state the reasons for the court's decision. In this case, not possible to conclude justices had correctly identified relevant legal principles (and applied right test)

Adoption

22. Care & Freeing Orders

Re M (Care Order: Freeing for Adoption) [2003] EWCA Civ 1874, CA, [2004] 1 FLR 826

18 month old child placed with foster parents when a few days old. Parents had mental health difficulties and their older (three) children lived with grandparents. LA plan was for adoption and applied for freeing. The mother reluctantly agreed to adoption but father withheld consent. Foster parents approved as adopters. Late in the proceedings paternal cousins came forward as possible carers but LA and Guardian felt too late. F sought and granted adjournment of care/freeing proceedings and directed assessment of cousins, and psychological report of child's attachment to foster parents. Guardian's appeal allowed, and CA made care and feeing orders. HELD

- care and freeing applications separate & distinct applications – judge should deal with care order first, and only if granted, go on to consider freeing
- child's attachment to foster carer totally secure and adoption had every prospect of success and would secure welfare during minority. Not open to find F refusal to agree reasonable simply because he was free of blame and his mental health prevented him from caring for child
- CA assimilated test of Hale LJ in Re C and B (Care Order: Future Harm) [2001] 1 FLR 611 at p621 (cutting off ties only justified by overriding necessity of the interests of the child) and the established jurisprudence that natural family should not be displaced without cogent reasons, which is to be determined by the child's welfare

23. Duty of care of adoption agency to adopters

A v Essex County Council [2003] EWCA Civ 1848

LA placed a boy and his younger sister with prospective adopters. In foster care prior to this placement, boy noted to be aggressive by foster mother and recommendation of child psychiatrist for child guidance not followed. Adopters had stated they did not want child with physical or mental disability or special educational needs. A medical led to a doctor concluding child might have special educational needs and might need child guidance and respite. Doctors concerns documented but letter not recorded as being sent to adopters. Adopters were refused access to childcare files. Soon after adoption orders made, adoptive mother became pregnant and hospitalised as precaution against boy's violence. When info as to his history received, adopters described this as bombshell and claimed for damage to their home and psychiatric injury through LA negligence in not fully informing them. Judge found LA adoption agency liable to claimants in negligence for failing to provide them with all relevant info about the children, but only liable for injury and loss between tome of placement and date of adoption orders. Claimants appeal dismissed

24. Adoption/Freeing: Placement abroad

Re G (Adoption:Ordinairy Residence) [2002] EWHC 2447 (Fam)

2 children placed by LA with uncle and aunt in states while under care orders, but ongoing issue was legal; framework under which the two girls were to remain there. Aunt and Uncle applied under section 55 for an order vesting PR in them

Re B (Children) [2004] EWCA Civ 515;CA

Parents appealed against a dismissal of their application to revoke freeing orders made in relation to 2 of their children. LA had originally placed all 4 of the couple's children with prospective adopters who lived abroad. Placement only partially successful and 2 of children returned and placed with foster parents in UK. This placement was done without authority under Sch II of the Children Act or section 55/56 of Adoption Act. The parents submitted that this application was unlawful and was a criminal offence. The Court of Appeal accepted the illegality of the initial placement but given the placements were in the children's best interests and time for prosecuting expired, it was an effective placing for adoption under section 20(1)(b) of the 1976 Adoption Act

Other developments and issues more generally of interest to Public Law Children Practitioners

25. Good Practice in Child Care Cases

Law Society recent guidance in Good Practice in Child Care Cases sets out general principles, and extensive advice on good practice

26. Representing Children when no guardian appointed

Although issued to Panel solicitors, Law Society Guidance (Sept 2002) applicable: Advocate should represent child in furtherance of the best interests of the child (s41 Children Act & r4.13) While trying to

act in accordance with child's best interests, not in a position to advise court what is in the child's best interests. Proper and appropriate to (a) critically appraise LA action and evidence in support of those actions, and seek directions to require filing of further evidence if appropriate, to test and probe case and ensure court has sufficient evidence on which to base its decisions and to test evidence of all parties at contested interims (b) at every opportunity seek appt of CAFCASS guardian and keep it under constant review (c) request and collate as soon as possible all relevant papers (d) should be generally aware of and play a leading role in case management and timetabling issues for benefit of the running of proceedings as a whole.

27. Obtaining passports for children in absence of signature of person with PR
President's office guidance in Jan 2004 is helpful for children being looked after who may wish to go on holiday with carers; an order from the court is required which states (a) parent should not use their PR to veto the application (b) that the court considers it in the best interests of the child that a passport be issued

28. Communicating with Passport Service and Home Office
President's office guidance in November and December 2003 provides a mechanism for obtaining information; forms on which requests must be channelled through court available from Ms Ananda Hall, Family Division Lawyer, President's Chambers, Royal Courts of Justice, Strand, London WC"A 2LL, Tel 020 7947 7197, or Ananda.Hall@courtservice.gsi.gov.uk

29. Adoption and Children Act
Royal assent 7/11/02
Biggest overhaul of adoption law for 25 years
Key concern is to increase adoption for looked after children being adopted
Major changes in adoption practice:
- contact. Moves towards openness addressed in explicit duty on court to consider arrangements for allowing any person contact with the child and requirement in section 1 to have regard to the child's relationships
s1 (4)(f) ct should have regard to ability and willingness of any of the child's relatives … to provide the child with a secure environment in which the child can develop, and otherwise meet the child's needs
- need for special support for those affected by adoption. Comprehensive duty placed on local authorities to provide adoption support
- placement orders - authorising placement by local authorities with prospective adopters
- introduction of special guardianship. Deals with need for permanence for children for whom adoption is not appropriate
- new national adoption register to ensure faster matches
- independent review mechanism for prospective adopters who feel they have been turned down unfairly
- new facility for step-parents. Step-parents can acquire PR by agreement or PR without removing other parent's parental status by an adoption order
- consultation regarding regulations still ongoing

First phase of new adoption support framework to be implemented from April 2003 ahead of full implementation of Act currently planned to be in 2004/5

Key concerns: delay and resources

Government has set a public service agreement target: to increase by 40% the number of looked after children who are adopted, increase to 95% proportion of looked after children placed for adoption within 12 months of the best interest's decision

30. Guardians
July 2003 saw the Select Committee report on CAFCASS; the response came in October 2003 in the report of Constitutional Affairs Committee (CM 6004) (2003) CAFCASS continues to be exposed to a large number of difficulties. As a result of mass resignations, CAFCASS now has a different chair and board;

31. Children Bill
Published March 2004; comes out of Green Paper Every Child Matters, Cm 5860 (2003)
Aims to
- encourage partnership working and accountability
- children's commissioner (voice for children & young people at national level)
- better integrated planning, commissioning and delivery of children's services

- duty on LA to arrange local agency cooperation
- new duty of LA to promote educational achievement of looked after children
- statutory local safeguarding children boards (to replace child protection committees
- creation of databases holding info on children and young people
- LA in England to put in place a Director of Children's Services, to be accountable for education & SS insofar as relate to children
- Integrated inspection framework
-

32. The bill draws on the conclusions of Lord Laming's inquiry into death of Victoria Climbie. Report published 28th January 2003. Full text on www.victoria-climbie-inquiry.org.uk

33. Education of Children in Care – as highlighted by Children Bill
Difficulties of children in care also highlighted in Social Exclusion Report A Better Education for Children in Care (2003)
8% those in care for over 1 year gained 5 or more GCSE's as against 50£ of all young people
42% sit not sit GCSE or GNVQ (as opposed to 4% of al children
Obvious link between poor education and subsequent social exclusion
10 times more likely to be excluded if in care

34. Combined Family Courts- the way forward?
Birmingham has integrated the FPC, County Court and High Court in one building providing one stop shop for family cases, allowing flexibility of listing and rapid response

35. Useful websites

· www.courtservice.gov.uk/judgments/judg_home.htm (Judgments)
· www.official-documents.co.uk (Selected white/green papers)
· www.parliament.uk/ (Hansard from June 96)
· www.publications.parliament.uk Children's Bill
· www.lcd.gov.uk/judicial/cap/index.htm Protocol
· www.cafcass.gov.uk Report on CAFCASS
· www.dfes.gov.uk/consultation Consultation by Department of Education & Skills on Adoption & Children Act
· www.lawrepors.co.uk (Online summary of cases)
· www.lawsociety.org.uk Law Society Good Practice
· www.hcch.net (Hague signatories and Intercountry adoption)
· www.incadat.com (Child Abduction Database)
· www.offsol.demon.co.uk (Child Abduction Unit)
· www.unicef.org/crc (UN Conv on Rights of Child)
· www.echr.coe.int (ECHR cases)
· www.coe.int (Council of Europe)
· www.doh.gov.uk/quality protects/index.htm (DOH material)
· www.lcd.gov.uk (Lord Chancellor's Department)
· www.alc.org.uk (Association of Lawyers for Children)

Children Act Update (Public Law)

Judith Rowe QC

6 October 2004

CPD Lectures Autumn/Winter 2004

CHILDREN ACT UPDATE

PUBLIC LAW

Judith Rowe Q.C.
6th October 2004

ADOPTION

Re G (Adoption: Contact) (2003) 1 FLR 270 CA
A local authority brought care proceedings in respect of 5 children, three of whom had sustained injury. In those proceedings the Judge found that the mother and/or the father of the youngest 4 children had caused the injuries, but he could not make a finding against one parent rather than the other. The eldest child was settled with her grandmother, but the local authority applied in respect of the youngest 4 children for orders freeing them for adoption (with a plan that they be adopted by their foster carers) and orders permitting the authority to terminate contact with both parents. The Judge approved the plan of adoption by the foster carers, but he refused to free the children for adoption as the foster carers would be making their won adoption application. He proceeded nonetheless to decide the issue of contact. He refused a s34(4) order in respect of the mother, saying that some limited contact to her would benefit the children, but granted it in respect of the father. The only factual distinction between the parents was that since the mother would be seeing the eldest child and that eldest child would be seeing her younger siblings, the Judge felt it was logical for the mother also to see the younger children. Reading between the lines it may be that the Judge felt that the father was more likely to have injured the children than the mother but since this was not a finding he had made it could not justify treating the parents differently.

The CA allowed the father's appeal against the s34(4) order saying that it was not clear on the merits why the distinction was made between the parents, and the Judge did not give any adequate reasons for the differentiation.

The Court also expressed the view that the Judge should not have made a s34(4) at this point in any event having refused to free the children. The right time to consider what kind of contact natural parents are to have with children being adopted was on the occasion adoption was under consideration: Ward LJ at 275[17].

Re J (Adoption: Contacting Father) (2003) 1 FLR 933 FD (Bennett J)
A young mother fell pregnant during a fleeting relationship with a young man who knew nothing of her pregnancy or of the birth of the child J. The mother wanted the child to be adopted without the father being notified. She did give the father's details to the local authority but only after the authority assured her that they would not contact him. The position changed when J was diagnosed as suffering from severe cystic fibrosis, and the authority sought declarations enabling them lawfully to contact the father notwithstanding the mother's objection.
Bennett J in fact declared that it was lawful for the authority not to tell the father and further that it was lawful for the authority to place J for adoption without informing him.

In the circumstances of the parents' relationship there was no "family life" for the purposes of Article 8 ECHR. Further, the exceptional facts of the case took it out of the general rule that fathers should be informed of such applications. The child had nothing to gain whereas the mother had a great deal to lose. The father was unlikely to have wished for involvement in J's life. Further the mother had only revealed the father's identity in the belief that he would not be told.

Bennett J also considered that the failure to inform the father that he may be a carrier of cystic fibrosis was not an interference with his right to respect for private life under Article 8 his brother is a carrier, so, reasoned the Judge, he must know in any event and can take appropriate steps to inform himself of whether he is also a carrier) [938/939].

Re M (Adoption: International Adoption Trade) (2003) 1 FLR 1111 FD

(Munby J)

A British couple adopted a baby, M, from a US couple paying a substantial amount of money to the birth parents and to the professionals helping them through the process. They commissioned a home study from a British "independent social worker" called Jay Carter whose home study was found by Munby J to be deeply flawed in its omission of many critical problems with the prospective adopters. M was adopted in the US and placed with the adopters but, as was in fact all but inevitable, the placement went wrong and the baby was placed in foster care. The local authority sought to free M for adoption whilst the birth parents sought the child's return to the US. They were assessed as unable to care for her.

Munby J freed M for adoption, commenting that the adoption should never have been allowed to take place. He sympathised with the claim of the birth family, but had no choice but to reject their application for M's return.

The " independent social worker" had committed criminal offences under s11 and s57 Adoption Act, and the Judge alerted the DPP and the AG to what had happened. He took the unusual step of naming the "isw" to alert others who might come into contact with her of the views of the court in this and other similar cases. He encouraged any authority alerted to a situation like this in the future to voice its concerns "clearly, loudly and explicitly" to the relevant foreign court.

Frette v France (2003) 2 FLR 9 ECHR

A single homosexual male applied to adopt a child. Assessments found that he would be a good parent, but his application was rejected on the basis that there was no maternal role model.

Held by a majority that Article 8 was applicable but that there was no discrimination for the purposes of Article 14. Article 6(1) had been breached

· The application was rejected squarely on the basis of the applicant's homosexuality;

· Since there was no cross-Europe uniformity on approaching applications by homosexuals indicating that the law was in a transitional phase, there had to be a wide margin or appreciation

· It was legitimate and reasonable for national authorities to consider that the applicant's right to adopt was limited by the interests of the children eligible to be adopted – given the scientific differences over the effect on a child of being adopted by one or more homosexual parents, the justification was objective and reasonable and the difference in treatment complained of was not discriminatory for the purposes of Article 14

· The applicant had been denied a fair trial before the domestic appeal tribunal due to the lack of notice of the hearing or of the grounds argued against him

The 2 dissenting Judges felt that having given single applicants the chance to apply to adopt, France was then obliged to implement the system in a non-discriminatory way. The domestic court had failed to assess the particular individuals in this particular situation.

Re G (Adoption: Ordinary Residence) (2003) 2 FLR 944 FD (Wall J)

In this case children lived with their American mother and had contact with their English father. Contact ended when the mother alleged sexual abuse by the father. The mother subsequently became unable to care for the children who were made the subject of care orders and placed with an aunt and uncle in the USA – very successfully. The father applied for contact but the court allowed the cross application of the aunt and uncle for an order under s55 Adoption Act (transferring PR in advance of a pending adoption application in the US).

Held that there was no jurisdiction to make s8 orders in respect of children habitually resident abroad. Hab res is to be determined on the facts of each case. It is distinct from "ordinary residence" under s105(6) CA which is a term used primarily to facilitate the ordinary administrative and jurisdictional responsibilities of local authorities within the CA and cannot be exported or

transformed into “habitual residence” for the purposes of the FLA 1986.

Re M (Care Order: Freeing Application) (2004) 1 FLR 826 CA
The CA considered the proper approach when care and freeing applications are issued for hearing together.
At the final hearing, relations of the father asked to be considered as possible carers for the toddler. On the father’s application, the court adjourned both the care and freeing proceedings to permit the couple to be assessed.
Held, on appeal, that the two applications should have been dealt with as separate and distinct applications, requiring individual assessment. The proper course where both applications are being heard at the same hearing is to deal with the care order first; only if the care order is made will the court proceed to deal with the freeing application. [In this case, on the merits, the CA made the orders sought by the LA]

Re S and J (Adoption: Non-Patrials) (2004) 2 FLR 111 FD Bodey J
This is an example of adoption orders being made despite extremely deceitful conduct on the part of the applicants. The outcome was based squarely on the best interests of the “boys”, aged rising 18 and rising 16.
The applicants had brought the 2 boys to the UK having allegedly found them begging on the streets of Bangladesh. It later emerged that the boys were relatives of the male applicant. The applicants later pleaded guilty to immigration offences. The HO initially indicated an intention to deport the boys, however files were lost, the HO did nothing until a very late stage in the proceedings when suddenly it obtained leave to intervene and opposed the making of adoption orders.
Bodey J deprecated the behaviour of the applicants but found that they genuinely wanted to make a legal family for the boys; the application was no mere immigration sham. The HO had, through inactivity, encouraged the family to believe the applications would not be opposed; it was debatable whether the HO was in breach of Article 8 in its 11th hour volte face.

Re A (Adoption: Placement Outside Jurisdiction) (2004) 2 FLR 337
Following the making of freeing orders in respect of 4 children, the children were placed outside the jurisdiction. Two of the children were subsequently removed and placed back within the jurisdiction. The parents challenged the legality of the foreign placement as the LA had not prior to placing the children obtained the consent of the court pursuant to s55 Adoption Act. This, they argued, rendered the placement illegal under s56. Because the placement was illegal there was not a “placement for adoption” within the meaning of s20(1)(b).
The CA dismissed the appeals stating that
· The Adoption Act should not be construed in isolation but read together with the Children Act;
· S56 of the Adoption Act did apply to local authorities acting as adoption agencies, and the placement abroad without court approval had infringed s56 and been unlawful
· Nonetheless, the children had been “placed for adoption” within the ordinary meaning of the words. On balance given the relevant statutory provisions, decided cases and policy objectives, a placement should not cease to be an effective placement for the purposes of s20(1)(b) by virtue of the fact that it was unlawful under s56(1).

Re F (Adoption: Welfare of Child: Financial Considerations)(2004) 2 FLR 440 FD Black J
A LA sought freeing orders in respect of 3 boys placed in an agency foster placement. The boys could not be adopted in the foster placement because the foster carers would not give up the generous allowances they received for fostering the boys. The LA’s case, initially, was that it could not continue funding the agency placement long term in any event at £131,000 pa, and so it planned to move the boys initially to a bridging placement (with psychological support) and then on to an adoptive home. The plan was opposed by the guardian, child psychologist and the independent social worker all of whom advised that the boys should stay where they were.
The Judge refused freeing orders, declining to dispense with the consent of the mother whose refusal to consent was based on these professional expert views. The LA in fact conceded that if the Court found that this placement was in the best interests of the boys

long term, even if it wad a foster home rather than an adoptive home, then the LA would have to reconsider the funding of the placement.

SECURE ACCOMMODATION

S v Knowsley Borough Council (2004) 2 FLR 716 FD Charles J
This case considered whether the role of a local authority during the currency of a secure accommodation order, in particular its duty to review the continued legality of the placement, was amenable to judicial review.
Charles J decided that the LA's role was amenable to judicial review and furthermore that in most cases judicial review was likely to be the most appropriate remedy as it could be combined with points made under the Human Rights Act 1998. The requirement of permission was a safeguard against local authorities having to deal with unarguable points.
In this case the applicant, a troubled girl of 17, failed to demonstrate that what was proposed by the LA was outside the band of decision properly open to it.

PRACTICE AND PROCEDURE

Re J ((Leave to Issue Application for Residence Order) (2003) 1 FLR 114 CA
Within care proceedings a grandmother was assessed and rejected by the local authority as a carer for one child. The grandmother applied for leave to apply for a residence order. The Judge rejected her application on the basis, put forward by the authority and guardian, that while the grandmother's application was understandable, it was not a realistic option meriting judicial consideration.
The CA allowed her appeal and reviewed the appropriateness of the test set out in the earlier case of Re M (Care: Contact: Grandmother's Application for Leave) (1995) 2 FLR 86. The CA emphasised the need to give the statutory checklist at s10(9) its proper recognition and weight. It is not appropriate to substitute the test "has the applicant established that he or she has a good arguable case" for the test set out by Parliament in s10(9). Further, bearing in mind the rights of the applicants under ECHR Articles 6 and 8 Judges must be careful not to dismiss an application without "full enquiry".
It is important to remember what grandparents can offer their grandchildren.

Re M and MC (Care: Issues of Fact: Drawing of Orders) (2003) 1 FLR 461
CA
Two children suffered injuries and care proceedings were issued. At the fact finding hearing the Judge made findings about the injuries and, inter alia, expressed no confidence in either the mother or Mr C but fixed liability more firmly on Mr C than on the mother. Before the second stage of the proceedings took place, the mother purported to admit causing some of the injuries, and her "admissions" were put in a statement. Counsel for both parents applied to the Judge for a rehearing of the causation issues in the light of this development. The Judge refused on the basis that as he had already expressed a lack of confidence in either adult, he did not consider it necessary to rehear the issues merely on their "say so".
The mother's appeal succeeded in part. The court emphasised that the normal ruled of issue estoppel are at least "more flexible" in children proceedings (Neuberger J 466[24]). On the other hand the notion that the first trial should effectively be torn up as if it had not happened was plainly unlikely to succeed. Thorpe LJ favoured the "obvious" middle way whereby at the disposal hearing the initial findings were treated as the foundation, to be adjusted if and as necessary to reflect any subsequent developments rigorously tested through the process of evidence in chief and cross examination (including any further medical evidence from experts asked to look at and report further in the light of those developments) (464[14]).
The Court also took this opportunity to stress the need for Court orders to record fully exactly what happens at the relevant hearings. The court stressed the importance of recording specific findings of fact on the face of the order.

Re W (Care Proceedings: Witness Anonymity) (2003) 1 FLR 329 CA

In care proceedings in respect of 2 children, the local authority's concerns centred upon the extreme violence of the father. When an independent social worker recommended a residential assessment of the children with the mother IF she had absolutely no contact to the father, the court ordered such an assessment. Before it could start, however, a social worker involved earlier with the mother saw the mother in a car with a man. She had never met the father but identified him as the driver when she was shown a photocopy of a photograph of the father. The authority returned to court asking the court to revisit the s38(6) order. At that hearing, the Judge allowed the social worker to give evidence anonymously and accepted her identification evidence.

The Court of Appeal allowed the mother's appeal, holding that the Judge should not have permitted anonymity and anyway should not have made a finding on identification on the basis of the evidence she gave.

The CA was referred to the approach of the criminal courts to witness anonymity. The CA was of the view that there were clear parallels with public law cases such as care proceedings – certainly the consequences for the parents of the court admitting and accepting anonymous evidence such as this were as dire as for defendants in criminal proceedings. Anonymity should be given to a professional social worker witness in care proceedings only in highly exceptional cases. The threat of violence from parents was a professional hazard of social work and was not exceptional.

NB: there have been significant changes in the approach of the criminal courts to vulnerable witnesses

Re AB (Care Proceedings: Disclosure of Medical Evidence to Police) (2003) 1 FLR 579 FD (Wall J)

In care proceedings based on the death of the subject child's 2 younger brothers, a Consultant Paediatrician was instructed to provide a paediatric overview for the causation hearing. The practice of this expert includes interviewing the parents. The mother sought a number of conditions as to confidentiality to which the expert did not agree, however the expert agreed to make it clear on the face of his report that he would never agree to the disclosure of his report to the police. On a subsequent application by the police for disclosure of the report the Court did order disclosure.

Wall J reasserted that the application fell to be decided by carrying out the discretionary balancing exercise laid down by Re C (A Minor)(Care Proceedings: Disclosure) (1996) 2 FLR 725 CA. Absolute confidentiality for what a parent tells the court, an expert, the local authority and the guardian within care proceedings is impossible. Wall J emphasised that the case of Re C did not create any presumption in favour of disclosure.

S98(2) was not limited to statements or admissions made in oral evidence but extended to cover statements made to expert witnesses who were, for these purposes, analogous to guardians. What this mother had said to the expert was inadmissible against her in the criminal proceedings.

The court stressed that it is not acceptable practice for lawyers representing parents to try and put pressure on expert witnesses to conduct their investigations in a particular way in order to protect the parents' position

The conclusions of the case appear in a useful checklist at 612/3 paragraph [134].

President's Direction: HIV Testing of Children (2003) 1 FLR 1299

Decides venue for the hearing of such rare applications (county court in the usual way) and defines the role of CAFCASS

Re Y and K (Split Hearing: Evidence) (2003) 2 FLR 273 CA (Thorpe and Hale LJJ)

In this case the CA allowed the appeal of the local authority against a Judge's rejection, at first instance, of the evidence of sexual abuse adduced by the authority during the first stage of a split hearing. The CA emphasised the need not to be over adversarial at the first

stage. It also stressed the importance of considering the statements of a child in their totality – taken together, the child's statements indicated a pattern which could not be dismissed as giving rise to no concern.

The CA considered per curiam the issue of the compellability of the parents in these proceedings. Thorpe LJ expressed his gratitude to Hale LJ who pointed out that he had been wrong on this issue in a previous reported case [281]! Hale LJ then pointed out [283 paragraph 34] that

Parents can be compelled to give evidence in care proceedings; they have no right to refuse to do so; they cannot even refuse to answer questions which might incriminate them. The position is no different in a split hearing from that in any other hearing in care proceedings. If the parents themselves do not wish to give evidence on their own behalf, there is, of course, no property in a witness. They can nevertheless be called by another party if it is thought fit to do so, and the most appropriate person normally to do so would be the guardian acting on behalf of the child.

Protocol for Judicial Case Management in Public Law Children Act Cases (June 2003) (2003) 2 FLR 719

Re B (Appeal: Lack of Reasons) (2003) 2 FLR 1035 CA

At the conclusion of a 5 day care case, the Judge reserved judgment and then gave a judgment which was criticised by the parents' representatives inter alia for its lack of clear reasoning.

On appeal the CA adjourned the appeal and remitted the case to the trial judge with an invitation to provide additional reasons for his decision in four areas.

In taking this course, as suggested by Hale LJ when she gave permission to appeal, the CA followed the practice outlined in the case of English v Emery Reimbold & Strick (2002) 1 WLR 2409 CA.

The CA took a very practial approach to the case and urged that where a judgment is criticised for lack of reasons, advocates as a matter of good practice seek to set up an oral hearing at which any matter arising from the judgment can be ventilated, thus avoiding unnecessary appeals.

Postscript: in this case once the further reasons were given, the appeal was abandoned.

In re S (a Child)(Identification: Restrictions on publication) (2003) Fam Law 818 CA

This case has an interesting discussion about the extent of the inherent jurisdiction of the High Court to restrain the publication of information arising in criminal proceedings (a murder trial of a mother for poisoning her son) in order to protect the privacy of her son who was the subject of care proceedings.

Although the court accepted that there was jurisdiction to make the order sought restraining publication of the identity of the defendant and her victim, by a majority the court decided that when balancing the child's right to respect for his family and private life against the right of the press to freedom of expression, reporting restrictions on the identity of the defendant and victim ought not to be imposed. Hale LJ's was the dissenting voice.

In re W (Children)(Care proceedings: Disclosure) (2003) 2 FLR 1023 FD (Wall J)

A local authority having issued care proceedings placed the child with the mother. They were then provided by the police with confidential information to the effect that a suspected drugs supplier was living at the mother's address. Disclosure of the information to any family members risked both a large scale police operation and the informant's life. The authority wanted to tell the mother about this and sought guidance from the court on disclosure.

Wall J reminded himself that the weight of authority reinforced by Article 6 ECHR made it clear that only in the face of a compelling case could information in care proceedings not be disclosed to all parties. He took the view that this mother had to know the substance of the police information and her advisers were entitled to know the wider picture and that the process had been fair (OS v K (1965) AC 201 and In re M

(Disclosure)(1998) 2 FLR 1028) and to see the information placed before the court provided they undertook not to pass to the mother anything other than the substance of the information without the court's permission.
He said that it was vital that the police passed on such information and equally vital that the authority could then use it in a way which protected the children. There needed to be a structure within the local authority which could properly process the information and decide how it should be acted on preferably in consultation with the police.

Re A (Care Proceedings: Asylum Seekers) (2003) 2 FLR 921 FD (Munby J)
Asylum seeking parents sought to continue care proceedings which the LA and guardian no longer thought necessary – effectively in order to stave off the removal of the father from the country, his attempts to secure permission to remain having failed.
Munby J held that apart from proceedings under the Adoption Act, whatever jurisdiction he may be exercising, a judge of the FD could not make an order which had the effect of depriving the Sec of State of his powers to remove a child or any other party to the proceedings.
Discusses the differences between the court's functions under the Children Act and under the Immigration Act 1971
The only task of the court in care proceedings was to see if there was some "solid advantage" to the children in continuing the proceedings.
These were devoted parents. The issue of risk to the children in their country of origin was not a question for the care proceedings – there was no evidential basis for the assertion that the parents would be unable to parent effectively if they were returned to their home country.

Re O (Care proceedings: Evidence) (2004) 1 FLR 161 FD
As a general rule where a parent declined to answer questions or give evidence in care proceedings the court ought usually to draw the inference that any allegations against the parent were true unless there was "some sensible reason to the contrary".
General practice was not to hear oral evidence from children in care proceedings; the DJ's decision in this case was upheld in respect of children in their early teens.

Oxfordshire County Council v S (2004) 1 FLR 426 FD
An appeal from the Justices' initial refusal to make an interim care order was allowed where they had, it appeared, fallen into the trap of making a final determination under s31 rather than interim under s38. There was no duty on Justices to read out verbatim the whole of their reasons, although they had to comply with the duty under r21(6) FPC(CA1989)R 1991. Any departure of substance from their written reasons would almost inevitably lead to the decision being quashed.

P v BW (Children Cases: Hearings in Public)(2004) 1 FLR 171 FD Bennett J
This was a private children case but it dealt again with the issue of whether the provisions of the ECHR compel courts to hear such cases in public. The Judge refused an application for a declaration of incompatibility of s97(2) Children Act with Articles 6 and 10 ECHR and refused permission to the father to apply for judicial review.

Re AB (Care Proceedings: Service on Husband ignorant of child's existence)(2004) 1 FLR 527 CA
A pregnant married woman, mother of two children, approached a local authority saying that she wished her pending baby to be taken by them and adopted at birth. She has kept the pregnancy concealed from her husband and children. She said that the baby was the result of rape, and she did not wish her husband to know about the baby. The LA issued care proceedings and sought directions on whether in accordance with the rules, they should serve the husband with notice of the proceedings. The Judge disbelieved the mother's evidence about conception and concluded that the husband should be served.
The CA agreed
The Court held that the responsibilities of a public authority, the rights of the child and the rights of the husband and the mother's other children could not be minimised or suppressed. It was manifest that the court would be exceptionally slow to grant a

relaxation of the rules of service in any circumstances other than the most extreme.

CARE PROCEEDINGS

Re B (Care Proceedings: Diplomatic Immunity) (2003) 1 FLR 241 FD (The President)

An ICO was made on a 13 year old child who had sustained serious non-accidental injury. The family were foreign nationals and the father was a driver with a foreign embassy. The ICO had been made without reference to the issue of the diplomatic status of the father and the family.

The President held that whilst the father enjoyed certain privileges accorded to administrative and technical staff of an embassy under the Diplomatic Privileges Act 1964, such employees were not immune from civil proceedings relating to acts performed outside the course of their duties.

The father and his family were thus susceptible to care proceedings, however that did not necessarily solve the problem of enforcement due to the family's diplomatic immunity and the inviolability of their home.

In fact in this unusual case, a request had been submitted to the relevant foreign country to waive diplomatic immunity and an answer was awaited. These proceedings were only at the interim stage. There was no submission that the court was without jurisdiction to hear the care case. The real submission was whether it should do so if any order made would be unenforceable. The President was very keen that the proper structure be put in place on an interim basis to protect the child concerned whilst the way forward was addressed through negotiation rather than confrontation.

Re D, L and LA (Care: Change of Forename) (2003) 1 FLR 339 FD (The President)

Three children were placed in foster care and were not to return to their parents. The eldest and youngest, placed together, were in due course to be adopted by their carers. The middle child, functioning at the mental age of a baby, remained with long term foster carers. The carers for the two children changed the forename of the youngest child since they did not like his original forename. The carer of the middle child also cared for another child of the same name, so she used the child's middle name. In neither case had the parents agreed to any change of name and in each case the local authority, on realising what had happened, told the carers to revert to the children's original names. Neither of the carers agreed to stop using the forename of their choice, and so the guardian for the children started proceedings on the basis that the changes of name infringed Article 8 ECHR in that persons without parental responsibility changed the names of children in their care.

The President dealt pragmatically with the actual applications before her (the younger of the children placed together was by now adopted and so the carers had acquired sole PR for her, whilst it was too late to revert back in the case of the child placed alone).

She then gave guidance on the general issue of change of name, as it emerged that this situation is far from unique (and needs, she said, to be nipped in the bud). She made or noted the following points:-

· The limits of their role must be made clear to all authority carers from the outset of every placement. Authorities must not just wait to pick up the pieces once things have gone wrong when, as in this case, it might be too late to put things right;

· The DOH were aware of this case and indicated to the Judge that they intended to bring the issue – and the court's judgment – to the attention of all directors of social services.

· The ability of prospective adopters to change children's names prior to adoption is wrong just as if the prospective adopters are merely foster carers. The DOH intends in the longer term to cover this issue in the guidance supporting the delivery of the National Adoption Standards;

· Local authority's must advise foster carers that if for some good reason they do wish to call a child by a different name then they are not entitled to take the initiative however good their case if as they do not have parental responsibility for the child. They must go straight to the social worker and take the matter

up through them.

The case is useful for the President's brief summary of why a child's given name is so important, and a change so sensitive. Whilst the points are fairly obvious, this is a useful summary

> To change a child's name is to take a significant step in a child's life. Forename or surname, it seems to me, the principles are the same in general. A child has roots. A child has names given to him or her by parents. The child has a right to those names and retains that right, as indeed, the parents have rights to retention of the name of the child which they chose. Those rights should not be set aside other than for good reasons…. [346E].

For good measure, the President did also add a pragmatic note acknowledging that in reality names do change [346H].

R v CAFCASS (2003) 1 FLR 953 QBD (Charles J)

The issue in this judicial review was the extent of the duty and obligation of CAFCASS with respect to Guardians to be appointed in specified proceedings under the Children Act. The applications were pursued because of the lapse of time in CAFCASS providing guardians in 2 cases although the relevant court orders had been made.

Charles J concluded that the relevant provision was s12(2) Criminal Justice and Courts Services Act 2000. For several reasons he concluded that this provision did not impose a duty on CAFCASS to provide a guardian immediately, but, rather, to provide a guardian as soon as practicable after the request had been made. This there could be a gap in time between court order and appointment.

Charles J at the end of his judgment [977/978] recorded CAFCASS's acceptance of the importance of the children's guardian in specified proceedings and the fact that the sooner a guardian is appointed to promote the welfare of subject children, the better for those children. Charles J expressed his hope that CAFCASS would receive sufficient funding to enable it to act accordingly.

Re O and N; Re B (2003) 1 FLR 1169 HL

In these two joined cases, the HL was required to look at the familiar situation of children injured in homes whilst in the care of two adults, where there is no independent evidence permitting the court to identify one as the perpetrator rather then the other.

In one case, at first instance the court exonerated one of the adults whilst in the CA the court held that it was not possible to exclude either adult as a possible perpetrator and anyway at the least a non injuring adult failed to protect. In the other case, at first instance the court of first instance refused to exonerate either parent and further found that a non injuring adult would have failed to protect. In this case the CA allowed the mother's appeal saying that as it had not been established on the balance of probabilities that she had injured the child, she must be treated as if she had not, though she had failed to protect.

The HL refused the first appeal and allowed the local authority's appeal in the second.

The HL said that where a child suffered significant harm but the court was unable to identify which parent had been the perpetrator – or whether both had been – the court should proceed at the welfare stage on the footing that each parent was a possible perpetrator. Any other approach would be "grotesque". Transcripts of the findings should be readily available to Judges at the welfare stage.

Read for a useful general discussion and some thoughts on the issue of risk of harm in private proceedings (Re M and R considered)

Useful articles

· On O and N: by Ernest Ryder QC Fam Law (2003) 741;
· on cases of serious injury to children by Dr Peter Dale, Independent Social Worker: Fam Law (2003) 668

North Yorkshire County Council v SA (2003) 2 FLR 849 CA (The President, Thorpe and Clarke LJJ)

In this case of non accidental injury to a child, the court considered the possibility that the

child was injured by either parent, a grandmother or a night nanny. The Judge at first instance could not identify a perpetrator to the H&R standard. He then went on to consider whether he could exclude any of these four adults. Applying the test that there was "no possibility that the relevant person injured the child" he did not exclude anyone.

The CA allowed the appeal and substituted a finding which excluded the grandmother or the nanny as perpetrators.

The CA said that the test of "no possibility" was too wide and could include even people who had had fleeting contact with a child during the relevant timeframe. The test which was first applied in the case of Re B (Non-Accidental Injury: Compelling Medical Evidence) (2002) 2 FLR 599 CA was not a test of "no possibility" but was "no real possibility". Where there is insufficient evidence positively to identify the perpetrator of injuries using the balance of probability test, the test to be applied was "is there a likelihood or a real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?"

The Court emphasised the importance of the Protocol which will require a careful – early – analysis of the relevant issues including the identity of all possible perpetrators. The CA also considered whether it might in some cases be inappropriate to direct a split hearing even if in the event there needed to be an adjournment at the end of the hearing for further assessment.

Re J (Care Proceedings: Disclosure)(2003) 2 FLR 522 FD (Wall J)

This case concerned a local authority who misled both a natural mother and the court.

A foster child moved placement on the arrest of the foster father in connection with enquiries into child pornography. The authority told the mother that the move was for "personal reasons" and secured her consent to a "welfare medical". Further, at an application for an interim care order the real reason for the move was withheld from the court. When a guardian subsequently appointed sought discovery of further documentation the justices made an order under s42 CA – which the authority disobeyed. In a subsequent hearing the authority relied on PII arguing that they wished to preserve the confidentiality of the foster parents. When the case returned to court on the guardian's application, the truth emerged. The justices through their clerk complained to the local head of children's services as a result of which an independent enquiry was commissioned into these events. The report of the independent enquiry was then not disclosed to the guardian or to the court.

Held that the report and other documents sought came within s42 Children Act in which case PII did not arise in connection with the guardian's examination of them. The authority had a duty to be open and frank with the court, and the authority's resistance to the guardian's application had been wrong from beginning to end. [with costs implications].

Re M and J (Wardship: Supervision and Residence Orders) (2003) 2 FLR 541 FD (Charles J)

Throughout care proceedings 2 little boys remained living with their mother. At the final hearing the mother conceded the threshold criteria and agreed that one boy should live with the father and one with the maternal grandmother, in line with the psychological advice.

An agreed threshold document was filed with the court. The recital to it recorded that the mother did not accept the extent of the harm alleged in the psychologist's reports and that they took issue with a number of factual issues in the report. The local authority (who did not entirely accept the psychologist's report either) recommended residence and supervision orders and, further, said that if the court were minded to make care orders, then there would need to be further assessment which might lead to alternative placements for the boys.

The Judge did made residence orders and supervision orders, but also made wardship orders in respect of each boy with orders as to contact.

On the threshold criteria, Charles J found that the stage had been reached where the court should say that the factual basis for the order to be made is established and there is no realistic point in going on to decide outstanding issues of fact.

In principle, the court should make orders within the statutory scheme of the Act rather than retreating into the area of inherent jurisdiction.

To make public and private orders and to continue wardship is to take an exceptional course. That course was justified in this case because of the degree and nature of the harm suffered by these children and the familial situation generally. This combination of

orders provided the best solution for the medium to long term welfare of the children.

Re M (Intractable Contact Dispute: Interim Care Order) (2003) 2 FLR 636
FD (Wall J)

This is an extremely interesting case in which Wall J used Part IV Children Act to resolve an "intractable contact dispute" in private law proceedings. The mother had gone to extraordinary lengths to deny the father contact to two children, falsely alleging through two separate trials that he had sexually abused them. Contact was ordered but the mother disobeyed the order – leading to the court making a committal order which was then not implemented pending a further hearing. The elder child, aged 13, then made her own application for permission to apply for a prohibited steps order against contact. All matters were consolidated and transferred to the High Court and the mother's committal was stayed. An officer of CAFCASS legal was appointed the children's guardian and the two children (aged 13 and 10) were joined as parties.

Wall J ordered a s37 investigation resulting in care proceedings being issued by the local authority, the removal of the children from the mother on interim care orders and, subsequently, residence orders to the father with a 2 year supervision order.

In a consolidated judgment Wall J explains his reasons. He discussed at length the circumstances in which the use of Part IV in these circumstances may be appropriate [638/639]. He emphasised that a local authority required to investigate a case under s37 needed to know the findings of the court in respect of allegations made by the parent opposed to contact. The reasons for requesting s s37 report must be spelled out in a judgment of which either a transcript or a full note must be provided to the authority and the report should preferably be supported by professional expert advice.

He stressed that children should be separately represented in private law proceedings where all contact has ceased and the issue of contact has become intractable.

Finally Wall J emphasised that judicial continuity is essential so that the judge can keep a tight control on progress and ensure that, through a system of review, the children's relationship with both parents is preserved.

Re B (Care: Interference with Family Life) (2003) 2 FLR 813 CA

This is a curious case in which a local authority having been alerted to possible sexual abuse within a family, applied to the High Court within wardship proceedings rather than applying under Part IV of the Children Case. By the date of the hearing the LA had decided to apply for an interim care order, though as a result of their not having taken this course previously, the children were not represented and they did not have a guardian. The Court made an interim care order in respect of the 6 children, provided the authority would give the parents 48 hours notice if they decided to remove the children thereby giving the parents the opportunity to apply to court for a "judicial veto".

The CA granted the parent's appeal against the order and instead adjourned the application for an interim care order with liberty to apply on short notice to the parents.

The CA did not agree with the appellants that the threshold had not been crossed. They allowed the appeal on the basis that the Judge in granting the order had not considered, having once found the threshold to have been crossed, gone on to consider the right order to make. Particularly given the effect of Article 8 ECHR, there is a critical judicial task between finding the threshold to have been met and endorsing the making of a care order.

The Judge should have put the burden on the authority to apply to remove the children rather than on the parents to veto such a move.

Re ET (Serious Injuries: Standard of Proof) Note (2003) 2 FLR 1205

Where very serious allegations are made within care proceedings, the standard of proof to be applied at the fact finding stage is the civil standard of proof. Bodey J observed however that in such a case the difference between the civil and criminal standards of proof is largely illusory.
NB: this case has now been disapproved: see Re U; Re B below

Re S (Identification: Restrictions on Publication) (2003) 2 FLR 1253 CA
The issues in this case were
(1) whether as a matter of principle the court's inherent jurisdiction could be used to prohibit identification of the defendant in a criminal trial (in this case the mother) for the sake of the child (brother of the murder victim); and

(2) if so, how to balance Article 10 Freedom of Expression and the child's rights under Article 8

The issues arose within care proceedings in which the court found that the mother had killed one of her children by the administration of salt. The orders under consideration were sought to protect the surviving child from publicity during the mother's murder trial. The Judge at first instance made orders permitting the press to report the criminal proceedings including the name of the mother. On appeal
Held (Hale LJ dissenting) that the High Court did have such a power and considered factors likely to affect the exercise of that power. Relevant factors included: whether the publicity was directed at the child; whether the care proceedings would be adversely affected; the effect of publicity on the child; any effect on the ability of the court to carry out its obligations to the child in the care proceedings; a public interest in the ability of the press to publish full and fair reports on the criminal proceedings. Noted that in the balancing exercise the child's best interests were not the court's paramount consideration.

Re H (Care Order: Appropriate Local Authority) (2004) 1 FLR 534 CA
A Norfolk born child came into care in Oxfordshire but was placed (against Oxfordshire's wishes) with family in Norfolk. The relatives sought a care order in order to obtain more support in the placement and the Judge made a care Order to Norfolk. Norfolk appealed arguing that the correct authority was Oxfordshire as, under s105(6), Oxfordshire were providing the child with accommodation The appeal was dismissed as the child was not being provided with accommodation by Oxfordshire under s105(6) since he was placed with family members in Norfolk pursuant to Oxford's duty under s23(6). The statutory provisions were considered.

London Borough of Redbridge v Newport City Council (2004) 2 FLR 226
David Hershman QC
In this case the court considered which of 2 authorities should be designated to hold interim care orders. The issue arose because a family had moved, during the currency of proceedings and with the children placed at home with mother, from Redbridge to Newport in Wales.
The court considered: which periods should be disregarded for the purpose of assessing "ordinary residence"; the proper moment in time to consider "ordinary residence" (at the time the matter was being considered by the court, not the commencement of the proceedings); and the fact that if the children acquire "ordinary residence" in the new area by the time of the final hearing then the new authority might be designated to hold the final orders.

Re Y (Evidence of Abuse: Use of Photographs)(2004) 1 FLR 855
In care proceedings based on allegations of sexual abuse a number of experts gave evidence based on the use of photographs rather than their own examination of the girl in question. When eventually (after twists and turns in the chronology of this case) a further joint examination of the girl took place the experts changed their views, stating that the photographs were not reliable.
The Judge took this opportunity to observe that whilst the aim of minimising intimate examinations of children is a very important one, medically, psychologically and ethically, further such examination may nonetheless be preferable to a potential grave miscarriage of justice and irreparable harm to the child and parents concerned.
Colposcope photographs should be treated with caution; courts must appreciate that intimate examinations may have to be repeated.

Re G (Interim Care Order: Residential Assessment) (2004) 1 FLR 876 CA
The CA considered the principles to be applied on a s39(6) application in proceedings where a local authority agreed that it would be appropriate for a family – including a young baby – to stay at the Cassell Hospital, but could not commit to funding.
The proper approach to s38(6) was that set out in Re C (A Minor)(Interim Care Order: Residential Assessment) (1997) AC 489. The essential question should always be can what is sought be broadly classified as an assessment to enable the court to obtain the information necessary for its own decision? Assessment of the

child means assessment within the family.
The decision of Holman J in Re M (Residential Assessment Directions)(1998) 2 FLR 371 should not be treated as a guidelines case. S38(6) applications potentially engage Articles 6 and 8 ECHR. If the LA relies on funding as an argument then it must provide specific evidence.

Re G(Protocol for Judicial Case Management in Public Law Children Act Cases: Application to Become a Party in Family Proceedings)(2004) 1 FLR 1119 FD
A LA applied for an interim care order to remove a child from placement with her grandparents. The LA applied for an immediate transfer of the case to the County Court. The grandparents applied for permission to be joined as parties to oppose the application but the Justices refused, stating that the terms of the Protocol prevented them from dealing with the grandparents' application.
Held on appeal that the Protocol was purposive; if the pursuit of the stated purpose required departure from the terms of the protocol then that should be done, with the reasons being clearly stated. This was a serious intervention in the life of a child; to exclude the child's carers from the process was unfair.
The protocol was a tool to improve family justice not, in the quest for speed and consistency, to impair it.

Re B (Threshold Criteria: Fabricated Illness) (2004) 2 FLR 200 FD
Bracewell J
This is one of the two cases subsequently considered by the Court of Appeal which decided the impact of the case of R v Cannings on family cases (Re U; Re B)
A child had suffered rigors whilst in hospital, and the case for the LA was that the mother had caused the rigors by inducing an infected substance into the child's system via a cannula.
There was a wealth of expert evidence from 6 doctors, all of whom concluded that infection was the most likely cause of the rigors and two of who concluded that deliberate interference with the cannula was the most likely cause.
The Judge found the threshold to have been crossed by taking together the medical evidence, the non-medical evidence (including the mother's history of self harm and depression) and her assessment of the mother's credibility (that she had none). She concluded that there had been deliberate harm on the part of the mother.
NB: the subsequent appeal failed, however the CA differed from Bracewell J on the evaluation of the expert evidence.

Re B)A Child)(Disclosure)(2004) 2 FLR 142 FD Munby J
This was further litigation in the same case of Re B above and in the CA. Munby J was deciding issues around publicity generally and in particular whether to permit the mother to disclose certain matters into the public domain.
Munby J observed that to proceed on the blinkered assumption that there had been no miscarriages of justice in the family justice system would be deleterious. The issue had to be addressed with honesty and candour if the family justice system was not to suffer further loss of public confidence. Open and public debate in the media was essential.
In this case there had been persistent unauthorised disclosure by the mother and indeed by her solicitor. Nonetheless for the reasons above, the Judge did permit the mother to talk to and be interviewed by the media if she wished and to put certain facts into the public domain so long as there was no identification of the child, the mother, the child's carers and the two doctors against whom the mother had issued a complaint to the GMC.

Re U; Re B (Serious Injury: Standard of Proof) (2004) 2 FLR 263 CA
Two issues of principle were considered in this appeal: the standard of proof to be applied at the fact finding stage of care proceedings; and the impact on family law of the criminal appeal of R v Cannings.
The Court decided that there may have been a tendency in some quarters to over-estimate the impact of the judgment in R v Cannings in family proceedings. The two processed are entirely different. Nonetheless the case was doubtless a timely warning of the dangers of reaching ill advised conclusions based on inadequate evidence. The Court adopted the

following principles from Cannings into the family process:-
· the cause of an injury or episode that cannot be explained scientifically remains equivocal;
· recurrence is not in itself probative
· particular caution is necessary in any case where the medical experts disagree, one opinion declining to exclude a reasonable possibility of natural cause
· the court must always be on guard against the over-dogmatic expert, the expert whose reputation or amour proper is at stake, or the expert who has developed a scientific prejudice;
· the judge in care proceedings must never forget that today's medical certainty may be discarded by the next generation of experts or that scientific research will throw light into corners that are at present dark.
The Court also considered the correct standard of proof. With little difficulty the CA rejected any gloss on the test well established in the case of H&R. In particular the CA described as "incorrect" any attempt to treat the difference between the civil and criminal standard of proof as largely illusory [ie the Re ET test] Both appeals failed, and in Re U, the CA refused permission to appeal. By contrast in Re B permission was granted though the appeal failed. In this latter case the CA differed from Bracewell J in the approach to the medical evidence. The CA decided that the two experts who had concluded that there had been deliberate interference with the child had gone beyond their medical remit and taken into account non medical evidence to reach their views. That, said the CA, was the job of the Judge and not the expert. Nonetheless, putting the equivocal medical evidence alongside the non medical evidence and her conclusions on the mother's credibility the Judge was entitled to reach the conclusions that she did.

A Local Authority v S, W and T (By his Guardian) (2004) 2 FLR 129
In this first instance decision at the end of the fact finding stage of care proceedings, Hedley J put the conclusions of Re U; Re B into effect.
He was considering various injuries to a baby where the baby's father had already been acquitted of manslaughter in criminal proceedings.
Considering the differences between the criminal and civil proceedings, Hedley J observed that it was possible for a judge in a care hearing to give a different answer to the one given by a jury in a criminal hearing as to the causes of injury to a child.
He noted that given the controversy about some medical issues, it was not surprising to find differences between experts on causation. He stated that such disagreement did not absolve the family judge from the responsibility of making a decision, applying the civil standard of proof.
In this case the experts agreed that absent a reasonable explanation, the most probable cause of the child's head injury was non accidental injury. They disagreed as to whether the father's explanation could be reasonable. Considering how to set the medical and non medical evidence side by side Hedley J observed that had the court been satisfied as to the reliability of the father's evidence it would have been more difficult (though not impossible) to find that this was a non accidental injury. Since the father accepted that he had lied on various key issues in the past, the court did not find his evidence to be reliable, and therefore the adverse finding was made in this case.

INHERENT JURISDICTION

Re W and X (Wardship: Relatives Rejected as Foster Carers)(2004) 1 FLR 415 Hedley J
A LA brought care proceedings in respect of 4 children. The LA wished to leave the 3 eldest children placed with their grandparents pursuant to a Care Order. The LA had however rejected the grandparents as foster carers and the combined effect of the CA 1989 and the Fostering Services Regulations 2002 would be to oblige the LA to remove the children immediately a CO was made! The LA therefore invited the Court to make Residence Orders to the grandparents with supervision orders, bolstered by a written agreement between LA and the grandparents..
Hedley J made s8 orders in relation to the 3 eldest children, granted supervision orders and made the children wards of court. Given the lacuna created by the relevant legislation, use of wardship would contravene neither the letter nor the spirit of s100. It was therefore justifiable to invoke the wardship jurisdiction which, together with the other orders, would provide the best available solution for the children.

HUMAN RIGHTS

Venema v The Netherlands (2003) 1 FLR 552 ECHR

Doctors who suspected the mother of a young baby of suffering from MSBP made their suspicions known to the Child Welfare Board (duties similar to the statutory duties of local authorities under the Children Act) who advised them to discuss their fears with the parents. The doctors did not do so. Further suspicions led to medical reports being submitted by the hospital to the CWB which immediately applied for a supervision order and an order requiring the baby girl to be placed away from her parents. The application was heard and the orders made without the parents having any knowledge of the doctors' fears, of the applications or of the hearing. Provisional orders were extended and the baby was away for her parents for 5 months before further reports concluded without reservation that she should return home.

The European Court declared that there had been a violation of Article 8 of the Convention. The essence of the parents' case was that they were at no stage prior to the making of the provisional order consulted about the concerns being relied on nor were they given the opportunity to contest the reliability of the information being compiled on them. The court did not accept the explanation for the lack of openness that the parents were likely, if involved, to act unpredictably, especially as the baby was safe in hospital at the time of the applications to court. The court found that it was crucial for the parents to be able to put forward at some stage before the making of the provisional order their own point of view.

Re G (Care: Challenge to Local Authority's Decision) (2003) 2 FLR 42 FD
(Munby J)

Care orders were made on the basis of rehabilitation. Those care plans were later changed in the face of concerns expressed by the local authority staff at a meeting to which the parents were not invited. Once notified of the new plan, the parents – unable to obtain copies of the minutes of the meeting – applied to the court for revocation of the Care Orders and orders under s7 HRA preventing the removal of the children from their care. Although the LA continued to fail in its duty to provide relevant minutes, it did eventually revert to rehabilitation plans which were acceptable to the parents and the guardian.

Granting permission to the parents to withdraw their applications, Munby J emphasised that Article 8 afforded protection to parents not only substantively in respect of inappropriate state interference, but also procedurally. It was critical that local authorities involve parents in the decision making process – and enable them to be involved effectively. It should ensure that clear balanced coherent minutes are kept of decision making meetings which can then be disseminated to all concerned.

Parents in the position of these parents have an effective remedy available under the HRA for the breach by the LA of either the substantive or the procedural requirements of Article 8 ECHR

Re L (Care Proceedings: Human Rights Claims) (2003) 2 FLR 160 FD
(Munby J)

In care proceedings before the FPC the LA had eventually decided on a care plan of adoption. The mother of the little boy L wished to challenge the care plan and so she applied for the proceedings to be transferred to the High Court where she invited the court to exercise its inherent jurisdiction to compel the LA to change its care plan or to provide a remedy under the HRA. Only this element of the application was transferred up; the substantive care proceedings remained listed for hearing in the FPC.

Munby J found that the mother's application could be granted only in either JR or HRA applications. The FPC had jurisdiction under the HRA and the proceedings should not have been transferred to the High Court.

He emphasised the distinction to be drawn between those cases in which care proceedings had come to an end where freestanding applications under s7(1)(a) HRA were appropriate and those cases where care proceedings were ongoing where s7 provided an appropriate remedy within the care proceedings themselves. These should be dealt with in the care proceedings in the court hearing the care proceedings and not as a discrete issue separated from the rest.

He stressed that the reason why it is critical to use the correct procedure is so that any delay in the hearing of the substantive application is avoided.

Re V (Care Proceedings: Human Rights Claims) (2004) 1 FLR 944 CA
The CA restated the proper procedure to be followed when a human rights claim emerged in the course of care proceedings.
In this case, at the final hearing in the care proceedings the father applied – successfully – to adjourn the proceedings to permit a discrete claim under the HRA to be argued in the High Court. The substantive proceedings were held up for some months in the process. Their Lordships confirmed that the wrong procedure had been applied. The proper approach in such a situation was that set out in the case of Re L (Care Proceedings: Human Rights Claims)(2003) 2 FLR 171. Such claims should normally be dealt with within the care proceedings and in the court seized of them. The issues raised by the parents (a failure of the LA to provide the necessary sexual offending therapy) were manifestly capable of being dealt with in the county court care proceedings.

Gorgulu v Germany (2004) 1 FLR 894
A mother gave birth to a child and gave the baby up for adoption all without the knowledge of the natural father. By the time the father found out, the baby had been placed for 3 months with prospective adopters. The domestic courts successively confirmed the child's place within the prospective adoptive family and terminated the father's rights of access.
Held that there had been a violation of Article 8. It was in the child's interests for his family ties to be maintained, as severing such ties meant cutting a child off from his root, which could be justified only in very exceptional circumstances; there was no evidence of such exceptional circumstances in this case.

Haase v Germany (2004) 2 FLR 39 ECHR
This was a complaint by parents that their Article 8 rights had been violated. The ECHR found breaches established. The local authority had taken extreme measures, in particular the summary removal of a newborn baby from hospital, which were not justified: there were no extraordinarily compelling reasons for this intrusion into the family's life. The parents had not been sufficiently involved in the decision making process.

JUDICIAL REVIEW

Re M (Care Proceedings: Judicial Review) (2003) 2 FLR 171 QBD (Munby J)
Learning that a local authority planned to remove their baby at birth (contrary to an earlier indication that it would pursue a residential assessment of parents and child together), parents via judicial review sought an injunction restraining the authority from commencing emergency protection or care proceedings.
Such an application was surely doomed to failure.
Munby J duly rejected the application. He found that
· Given the background in this particular case it would not be possible to argue that the issue of proceedings was unreasonable;
· The parents' remedy was to defend those proceedings;
· It was necessary to be extremely cautious about using judicial review to prevent the commencement of what were on the face of it proper proceedings in a court with jurisdiction to hear those proceedings
· The removal of a baby at birth was however draconian requiring exceptional justification and where the parents are entitled to prior notice;
· If a baby is removed, then at a minimum the authority should provide extremely generous contact

R (W) v Leicestershire County Council (2003) 2 FLR 185 |QBD (Wilson J)
A foster mother wished to adopt twins placed with her. Before she could do so the LA removed the twins from her care. She could not then apply in her own right for an adoption order and so she sought permission to apply for judicial review of the decision to remove the children on the basis that there had been insufficient consultation and that the removal was intended to prevent her adoption application rather than to further the

children's best interests.
Wilson J refused her permission to apply. He found that no court could say that the decision to remove the twins was not welfare based, and there had been sufficient consultation.
As Wilson J noted in his judgment, it is very hard for foster parents to challenge decisions made by the local authorities which have placed the child with them [191]

Re S (Habeas Corpus); S v Haringey London Borough Council (2004) 1 FLR 590 QBD Munby J
Munby J had little difficulty in dismissing applications for habeas corpus and JR issued by a mother in person in circumstances where a local authority had issued care proceedings and obtained interim orders. In such cases, said the Judge, the proper forum for litigating issues that arise whilst the care proceedings are on foot will almost always be the court where those proceedings are being tried.

Re T (Judicial Review: Local Authority Decisions concerning Child in Need)(2004) 1 FLR 601 QBD
The claimant a boy of 14 was accommodated by a LA who had, in planning for the boy, obtained a risk assessment report which recommended a specific type of residential placement to address the risk posed by and the risks to the boy. The relevant decision making body of social services – the accommodation management group –decided to place the boy in the short term in a children's home whilst twin track planning for a tri partite funded placement in accordance with the recommendation in the risk assessment report. The boy's solicitors appealed that decision on the grounds of delay, and on hearing this appeal, the AMG changed its position and decided to place the boy in house in a local children's home.
The court quashed the decision of the AMG on the grounds that it was made without obtaining a statement of special educational needs and without reference to the boy's wishes and feelings.
The duty of the authority to accommodate the boy and to safeguard and promote his welfare under s22(3)(a) was, however, a general duty which did not require a particular course of action. The LA was not under a mandatory duty to follow the recommendation in the risk assessment and the court could not direct the LA to provide that placement for him. The limit of the court's power was to quash and direct a reconsideration in accordance with the court's judgment. This was the direction given.

R(G) v Barnet LBC; R(W) v Lambeth LBC; R(A) v Lambeth LBC (2004) 1 FLR 454 HL
The HL considered the duty of a LA under s17(1) – to children in need – in the context of housing.
On a correct analysis, the duties under s17 were of a general character intended to be of benefit to all children in need in the area in general. The specific duties which followed in the Act were to be performed in each individual case by reference to these general duties. The assessment of a child's needs did not crystallise the general duty under s17(1) so that it became a specific duty owed to the child as an individual.
Housing was not a primary purpose of the Children Act; it was the function of the local housing authority. A LA providing a child with accommodation was not under a duty to accommodate the child's family as well.

Children Act Schedule 1 Recent Developments

Philip Cayford QC

14 October 2004

CPD Lectures Autumn/Winter 2004

FLBA Lecture 14.10.04
Children Act 1989 Schedule 1 – recent developments
Philip Cayford Q.C.

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1. Introduction / overview
2. Jurisdiction – extent of Court's power – what should be taken into consideration?
3. CSA
4. Authorities / principles
5. Questions and problems
6. Lateral thinking
7. Back to the future

1. Introduction / overview

If 40% of all children in England and Wales are born to unmarried parents, if 1 in 6 cohabitants in opposite sex relationships are unmarried and if 80% of all births outside marriage are now registered, it is clear that a social revolution has overtaken England and Wales since the Second World War. It is also clear that marriage centred financial relief in the event of a relationship breakdown cannot satisfactorily cover the wide range of permutations resulting from these statistics.

The Child Support Agency was created mainly for the purpose of preventing the children of unmarried parents from suffering undue financial hardship at the hands of absent or irresponsible parents. But if the CSA was aimed principally at one sector of the population, there is an obvious need for provision in the terms offered by Schedule 1, Children Act 1989. Under Schedule 1, save where prohibited by the Child Support Act 1991, maintenance is payable for the benefit of any child, whether to married parents or otherwise. There are further provisions for lump sum and property transfer orders, unlimited in scope. The practice and procedure has developed over the past 10 years to mirror approximately that applied under the Matrimonial Causes Act, to the extent of Forms E, interim orders, full disclosure of means, affidavits, fully contested hearings and of course, costs orders. Schedule 1 applications would appear to be a growth industry and the profession, unsurprisingly, is looking for guidance as to the correct principles to be applied in each case, whether of limited or unrestricted means.

It is tempting to wonder, during the course of any Schedule 1 application, whether an Applicant mother today is fortunate or otherwise with the state of the current law. On the one hand the old stigmas and shame once heaped upon the unmarried mother are now consigned to history, and unmarried mothers have wide remedies available to them to provide for their "illegitimate" children, whether conceived in a broom cupboard or as part of a long term relationship of cohabitation.

On the other hand, is the law in the midst of a state of evolution, aiming at the final destination of discretionary justice for all applicants, married or unmarried, available at the conclusion of any relationship, child producing or not?

This paper is intended to be a practical look at the current state of the law in England and Wales and the principles now applicable to any Schedule 1 application, together with a speculative look at the direction in which the courts and judges are heading, and what they may reasonably expect to achieve during the foreseeable future.

2. Jurisdiction

Schedule 1 (by section 15) Children Act 1989 enables the Court to make financial provision for the benefit of a child. Schedule 1 re-enacts previous legislation including the Guardianship of Minors Acts 1971 and 1973 and in particular sections 15 and 16 of the Family Law Act 1987, which itself implemented the recommendation of two Law Commission reports, both recommending that the differences in the legal positions of children, legitimate or illegitimate, should be removed. It enacts in approximate, but not identical, terms the MCA provisions relating to maintenance, lump sums, property transfer orders and secure provision. The relief is given to the Applicant (normally the mother), effectively on behalf of the

child. Thus maintenance and secured periodical payments are payable to the Applicant, as maybe the capital provision, although normally the Applicant will hold on behalf of the child.

Who may apply?
An application may be made by the parent or Guardian of a child or by any person in whose favour a residence order is in force, and such application may be made against either or both parents of the child. The latter do not need to have parental responsibility for the child under s2 of the Children Act as a precondition of liability to maintain the child. “Parent” also includes any present or former stepparent who has treated the child as a child of the family and there is no obligation upon an Applicant to apply against any particular parent. (Economic considerations may dictate the choice of respondent)

Subject to the provisions of the Child Support Act 1991, the Court may order [Sch 1 (1) (2)]
(i) periodical payments;
(ii) secure periodical payments;
(iii) a lump sum order or orders;
(iv) a settlement of property order;
(v) a transfer of property order to the Applicant on behalf of the child or to the child himself.

The concept of clean break does not apply to any Schedule 1 application, or indeed any other application relating to children, for obvious reasons of principle. It is therefore open to any Applicant to apply to vary maintenance orders and for a further lump sum order in an appropriate case.

The Court also has the power to make costs orders in the normal way.

Duration
Orders for periodical payments may begin from the date of the application but shall not extend beyond the child’s seventeenth birthday in the first instance, and in any event shall not extend beyond the child’s eighteenth birthday, save where the child is undergoing training for trade, profession or vocation (“whether or not he also is, will or would be in gainful employment” or where there are other special circumstances (see paragraphs 3(1) and 3(2))).

The practical consequence of the above is that maintenance orders may be made for the benefit of children during their secondary and tertiary education, and since the Child Support Act ceases to have effect in any event after the child’s nineteenth birthday, Schedule 1 will regain its unfettered supremacy from that date in a child’s life.

“Special circumstances” has been narrowly defined and relates principally to the child’s own special circumstances (disability etc.). Orders may be made in favour of the one parent who still lives with the other, but will cease to have effect if that cohabitation continues or if they subsequently resume cohabitation for a continuous period of more than 6 months. An unsecured order will cease to have effect upon the death of the payer, whereas secured orders may (and usually are) secured through dates and times in the child’s life, rather than that of the parents. The Court may vary, suspend, revive or revoke maintenance orders and may order a lump sum on an application for a variation. The lump sum is theoretically available for security, but not for capitalisation of maintenance except in the most unusual cases (e.g. assets or absent parent off shore)

A child over the age of 18 may himself apply for a variation or a revival of an order as he can under the MCA.

Principles to be applied
The Schedule 1 application is in many ways similar to that under Part II of the MCA . The Court must have regard to all the circumstances, including a number of the obvious s25 factors. Those MCA factors not specifically “included” in the wording of Schedule 1, paragraph 4(1) are:

(a) the standard of living enjoyed by the family during the marriage;

(b) the age of each party and the duration of the marriage;

(c) any physical or mental disability of either of the parties to the marriage;

(d) the contribution which each of the parties has made or is likely to make in the future for the welfare of the family, including any contribution by looking after the home or caring for the family;

(e) the conduct of the parties if it will be inequitable to disregard it.

There is a curious tension between the expression “all the circumstances” and those that are included / excluded. Is Parliament’s intention that the excluded factors should be given no weight, or less weight or equal weight than the “included” factors, subject always to the Judge’s discretion? Is it a misuse of that discretion to give more weight to an “excluded” factor than some of the “included” ones? If not, what is the point of the emphasis, if it be such, of the included factors? (For the answer, see Re P and F v G)

Similarly, there is no reference in Schedule 1 to the child’s welfare (cf MCA where the first consideration is welfare). What effect, if any, should the absence of reference to “welfare” affect the Court’s consideration of a Schedule 1 application? (For the answer, see J v C et seq).

3. Child Support Agency

Most unmarried mothers are excluded from a maintenance claim under Schedule 1 by virtue of CSA 1991, Section 8(3) “No Court shall exercise any power which it would otherwise have to make, vary revive any maintenance order in relation to the child and non-resident parent … in any case where the Secretary of State would have jurisdiction to make a maintenance calculation with respect to a qualifying child and a non resident parent of his own an application duly made (or treated as made) by a person entitled to apply for such a calculation with respect to that child”.

Under s8 (6) “This section shall not prevent a Court from exercising any power which it has to make a maintenance order in relation to a child if (a) a maintenance calculation is in force with respect to the child, (b) the non resident parent’s net weekly income exceeds the figure referred to in paragraph 10(3) [i.e. the maximum currently £104,000 per annum net] and (c) the Court is satisfied that the circumstances of the case make it appropriate for the non resident parent to make or secure the making of periodical payments under a maintenance order in addition to the child support maintenance payable by him in accordance with the maintenance calculation.”

The net effect of the above is that most Respondents to a Schedule 1 maintenance application will have to be the subject of a maintenance calculation in excess of the current maximum. Alternatively, the CSA will have to be disapplied in some other way e.g. by the foreign residence of the Respondent and nb that practitioners must consider the need to apply to the CSA prior to issuing proceedings.

In practice further, the reported Schedule 1 decisions reveal varying degrees of difficulty to bring each one out of the CSA and into Schedule 1. In Re P, for example, the Respondent “earned” some £50,000 per annum, although he received substantial and regular payments (by way of “loan”) from an offshore Trust. The Applicant was obliged to seek a departure application (now a variation application); the parties ultimately had to attend the CSA Appeal Tribunal before the Applicant achieved a determination that a maximum assessment was appropriate, thus bringing the case into the top up regime and Schedule 1.

The self-employed father with a variable income (genuine or otherwise) presents considerable problems to an Applicant mother. Either a father may fluctuate above and below the current statutory maximum, or he may choose to pay himself less than the maximum, asking (if appropriate) for a revision from the CSA. In these circumstances the timetable for a full hearing before an assessment Tribunal (if the father wants to contest figures and hence jurisdiction) may result in considerable delay and unfairness to an Applicant mother in such circumstances.

4. Authorities/ principles

Prior to Re P the principle authorities were Hartonian v Jennings [1980] FLR 62 (which established, if it were necessary, that a mother’s carer’s allowance fell within the definition “benefit of the child”). T v S [1994] 2 FLR 883 (support for children may extend to the end of minority or education – secondary or tertiary if applicable – but in the absence of special circumstances (relating to the child) or disability, not

thereafter; A v A [1994] 1 FLR 657, in which Ward J favoured the settlement of property route rather than an outright transfer of property, and where he suggested that the mother's care allowance should be "almost certainly much less than the father would have to pay were he to be employing staff" – [expressly disapproved in Re P] and where Ward J. did not think it right to compare the standard of living of the father with that of the child and mother – expressly disapproved in J v C and Re P. In Re G (1996) 2 FLR 171 Singer J held that an order could properly be made against a bankrupt.

In J v C [1999] 1 FLR 152, Hale J. set out a number of principles based upon the rationale of the Law Commission behind the wording of Schedule 1. In particular:

(i) There should be no great significance attached to the issue of whether a pregnancy was planned or otherwise. There was nothing in private law to distinguish between wanted and unwanted children; as a general proposition an irresponsible or uncaring attitude on the part of the parent should not be allowed to prejudice a child.

(ii) Under Schedule 1, the welfare of the child was not the Court's paramount consideration, s1 (1) of the 1989 Act not applying to a Section 15, Schedule 1 application. Nonetheless, the welfare of the child was a relevant consideration even if not paramount or the first consideration.

(iii) The child was entitled to be brought up in circumstances which bore some relationship to the father's current resources and the father's present standard of living. Public policy required that where a parent could provide resources which reduced or excluded the need for that child to be supported by public funds, he should be obliged to do so.

(iv) The Court must guard against unreasonable claims made on the child's behalf, but with the disguised element of providing for the mother's benefit rather than for the child.

Prior to Re P the allowance for actual child maintenance was invariably decided on budgets which bore more resemblance to a CSA calculation (maximum award for one child £15,600 per annum) than the high flying lifestyles subsequently sanctioned by the Court of Appeal, although maintenance was not considered in J v C by reason of the applicability of the Child Support Act.

Re P (2003) 2FLR 865
Following these authorities, counsel for F in Re P felt able to argue in the Court of Appeal for a reasonable middle class level of provision (put on a par with trial Judge's decision - £450,000 for a property, on Trust, £30,000 to furnish it, £20,000 for a car, school fees and a maintenance order of £35,000 (£26,000 for M's services and £9,000 for the child's expenses) reducing by £9,000 on the child's seventh birthday.

The factual matrix of Re P is now well known and need not be summarised here. Suffice it to say that the parties never lived together and F had other girlfriends. F told the Court that a capital order of £10 million against him would not affect his financial position or lifestyle in any obvious way. It is also worth noting that the trial judge found M to have rented a property in Cavendish Mews as a device to increase her award and that she actually lived not in Central London at all, but in Berkshire.

The Court of Appeal overturned the trial Judge, more than doubling his various awards. M received £1 million for a central London property (on trust), £100,00 to refurbish that property and £70,000 per annum by way of maintenance, not particularised as between the carer's allowance and the child's needs.

Thorpe LJ gave general guidance in relation to future Schedule 1 applications as follows:

(a) Determine the nature of the housing need;

(b) Determine the lump sum required for furnishing and equipping the home, the cost of a family car and any other reasonable chattels for the child's benefit (computers, musical instruments etc.);

(c) Determine the mother's reasonable requirements to fund her expenditure in maintaining the home and its contents, her other reasonable expenditure outside the home and, of course, the child's direct needs.

As to the housing need in that particular case, Thorpe LJ drew upon his professional experience of wealthy families to conclude that £1 million was appropriate for reasonable central London accommodation and

that £100,000 was a reasonable capital sum to furnish and equip such property. Thorpe LJ, while criticising the professionally produced wish list budget, took what he described as a broad brush approach to fix a global maintenance level of £70,000. He expressly disapproved Ward J's approach to the carer's allowance describing as "realistic" a more generous approach than that taken in A v A. On the other hand, none of the judges in Re P expressed any rationale for the figure of £70,000, nor how much of that should represent the carer's allowance.

In F v G (Child: Financial provision) [2004] EWHC 1848 (Fam), a decision of Singer J on 30th July 2004, the Re P principles were considered and applied to the following facts. F was a well-known businessman, worth (per his Form E) £4.6 million net and earned around £550-£575,000 per annum net. He was 52 years old, had been previously married with three children, whom he supported along with their mother. M was 35 and had never married. She is a buyer in the same line of business as F. The parties met in 1999 and cohabited within a year. There was intermittent talk of marriage throughout their relationship; M wanted to get married and had reason to believe F did too, but F seems to have blown hot and cold over the issue; M became pregnant in Spring 2000, giving birth to a girl in January 2001. Later that year F bought two adjoining flats and turned them into a luxurious home in which the parties cohabited, later valued at £1.3 million. M had £60,000 capital from a flat she had owned plus some jewellery given to her by F.

F has embarked upon a major enterprise which he hopes will bring him considerable wealth, and which he says may not. M continues to work, she says extremely reluctantly, earning £36,000 net on a five day week (£25,000 per annum net for a three day week).

M was awarded £60,000 per annum by way of maintenance, F to pay the service charges and other outgoings on the property purchased in trust. That property was to be up to £900,000, together with all reasonable costs of purchase (agreed at £40,000).

In his judgment Singer J. considered the statutory provisions, the significance of J v C and Re P, the reasonable extent of the housing budget, M's reasonable standard of living requirements and the relevance of (a) M's income, and (b) M's capital.

The differences between F v G and Re P were
(a) Mr G was considerably less wealthy than Mr T;

(b) Mr G's lifestyle was expansive and generous but not of the same conspicuous extravagance of Mr T;

(c) F and G cohabited for two or three years and discussed marriage between them, whereas P and T did not cohabit; Miss F had genuinely lived in central London during her adult life, whereas Miss P was found by the trial Judge to be based essentially in Berkshire;

(d) Miss F had a job which paid her £35,000 per annum, whereas employment did not seem to feature on Miss P's list of priorities.

Singer J's approach seems to have been:

(i) Re P is now the guiding authority;

(ii) There should be a generous approach to the carer's allowance;

(iii) A sense of financial independence and self respect for M was important, i.e. the money should be paid to her and she should decide how to spend it, including taking responsibility for the nanny. He expressed no enthusiasm for receipts.

(iv) M's own income was borne in mind, but did not reduce maintenance pound for pound (or anywhere near).

(v) A recognition that M would have to plan for her own future – allowing her to retain her own (modest) capital and as much of her income as she wished. The nanny was agreed at £24,000 per annum leaving £36,000 general maintenance in addition to M's income. M was therefore at liberty to cease working, dispense with the nanny and receive global maintenance of £60,000 plus the property costs, if she so

wished. It was her choice.

Two other recent authorities are - W v J (Child: Variation of financial provision) [2004] 2 FLR 300 Bennett J – no jurisdiction to make an order providing for future litigation costs relating to forthcoming applications for residence, leave to remove and financial provision. The Judge held that the relief sought was not "for the benefit of the child" but for the benefit of the parent (the mother) seeking the order (A v A and G v G distinguished as applying to spousal maintenance claims. He went on to find that on the merits (if he had to go that far) the application should fail, and it was this ground which defeated M's attempt to appeal.

W v W (Joinder of Trusts of Land Act and Children Act applications) [2004] 2 FLR 321 CA – desirable for any case brought under TLATA and Schedule 1 to be heard together by the same Judge.

5. Resulting issues

How much clarity has Re P actually brought to Schedule 1? Some difficult questions remain.

¨ Quantum. How is a budget to be fixed? A broad brush has considerable merit but how is it to be wielded? If the professionally produced wish list is to be avoided, upon what evidence does the Court base its decision? In Re P Thorpe LJ disregarded the rival contentions (£155,000 and the first instance judgment of £35,000 to substitute £70,000 without, as the report would indicate, any more than a reference to his own experience of the exceptionally affluent cosmopolitan society "with which much of my professional life has been concerned".

Does this tend to disqualify judges without similar experience from hearing such applications?

¨ Miss P's maintenance was said by the Court of Appeal to include "a substantial element of re-establishment cost … as an interim arrangement M may wish to rent and the establishment element within the periodical payments should allow her to do so". But how long should the "establishment element" (clearly significant if it would allow M to rent a flat in central London) be permitted to continue? Should it reduce after she completed "her establishment"? If not, why not, as it presumably must constitute an element over and above reasonable child maintenance and one which changes in nature from establishment to increased carer's allowance.

¨ Downward variation (although apparently built in to the "establishment" award) will presumably be highly problematical for a father since M has every incentive to spend every penny she receives, whether or not she keeps records. What change of circumstances would justify a downward variation in any event? Cohabitation with another man? Employment? An inheritance?

¨ The carer's allowance is hard to quantify. Bodie J refers to M "as the carer of the child" not being entitled to as much as wives and mothers. Thorpe LJ disapproves the reference to Norland Nannies, but has not offered alternative formulation. Most, if not all, mothers in Schedule 1 territory can demonstrate comfortably that any carer's allowance thus far awarded is well under their reasonable expectations.

¨ M's contribution to income and capital. If M has some capital of her own, or a job or income potential, should she be expected to use either that capital or income in part satisfaction of the child's reasonable needs? Many fathers may consider it offensive that if a mother's position permits her to do so, she is not thus obliged. But M's genuine problem may well be that she needs to provide for herself (and later life) during the child's minority. If not, she may end up at age, say, 45 / 50 with no property, no savings and no pension – and no further claim against F. Without the child, however desirable and satisfying it may be, her options may have been greatly increased. In these circumstances should she be expected to contribute from her own income to the reasonable broad brush maintenance the Court will have fixed? In F v G Singer J. accepted the point, up to a point.

¨ Can individual Appeal Court judgments be confined to their facts? In Re P May LJ explicitly confined the case to its own special facts, as did the Court of Appeal in Parlour and Macfarlane. Even in White v White, Lord Nicholls emphasised the particular nature of the case (i.e. one in which the assets exceeded reasonable needs.

Experience suggests that despite such injunctions, principles from the bigger cases inevitably filter down

to all levels where applicable, which means that increasingly generous, MCA comparable, orders are likely in the future.

¨ Lifestyle of father can be confusing until understood as another factor to increase quantum, rather than check or reduce the award. In Re P, F was extremely rich, he lived a lavish and public lifestyle and he wanted to see the child. In M v P (unreported order by consent dated 8.10.04) F had been in prison since 2001, had not seen the child or had any contact with M since 1997 / 8 and showed no particular enthusiasm to do so. The judge nevertheless approved an order of £80,000 per annum for a 12 year old boy, secured by a cash deposit of £950,000. Would the award have been reduced by the Judge to reflect the present and future, rather than the past?

¨ M v P highlighted another, perhaps inevitable difficulty for the payer. F had bought M two properties in M's home town in Germany. M had exhausted the entire equity in bank loans, taken out by her to play the stock market, wholly unsuccessfully. The question was therefore whether the loss of rental income (or, had she chosen to live in one of the properties, the lack of need for further accommodation) would have been taken into account? Her argument, predictably, was based on the child's welfare and the actual here and now. To take into account her losses would, she argued, penalise the child.

6. Lateral thinking

If judicial intention is to produce fairness in cases where statute does not permit, how may it be done?

1. Property based solutions.
TLATA provides many mothers with some relief in respect of the roof over the children's head – almost inevitably in the cohabitation situation. It is common sense and now High Court authority that dual TLATA / Schedule 1 applications should be heard together by the same Judge in the Family Division (or County Court).

Oxley v Hiscock may well have far reaching consequences for the unmarried cohabitant, whose claim now falls to be judged at the end of the relationship rather than by reference to the parties' deduced intentions some years later.

2. Judicial interpretation. Courts have recently been straining within the confines of their own (perceived) shackles to achieve the fair result. Hence Thorpe LJ has
- Extended the carer's allowance to "generous".

- Held that a child's lifestyle should bear some relationship to that of the absent parent.

- Has sanctioned on ongoing maintenance for a child with some not insignificant slack built into it.

- Has accepted that a country girl who aspires to a central London lifestyle may have one, provided F can afford it.

- Has elevated the welfare principle to "not just one of the relevant circumstances but, in the generality of cases, a constant influence on the discretionary outcome" and hence, it can be assumed, the concept of "happy mother, happy child".

3. The experience of other Commonwealth countries of judicial flexibility and creativity leading directly to a change in the law ("legitimate expectation" in New Zealand; "unconscionable conduct" in Australia and "unjust enrichment" in Canada – all used to justify direct financial provision for "common law wives" including pension orders). See too Le Foe (2001) 2FLR 970, approved at various seminars by Thorpe LJ.

7. Back to the future

Pressure for law reform to provide for unmarried (opposite sex) partners continues. 20 years after the failure of Mrs Burns [(1984) Ch 317] to establish any form of common law wife relief,

¨ The SFLA cohabitation committee published its proposals for reform in 2001, calling for a change in the

law to enable capital and maintenance awards between cohabiting partners.

¨ The government (currently concerned with the CPB) has considered the matter without expressly ruling out such change. The sanctity of marriage, and a final dissolution of its status vis-à-vis unmarried partners, is a delicate issue. Some feel any further erosion of the Christian principles underpinning the MCA is highly undesirable. Some feel that MCA ss 24/25 relief should be available to anyone emerging from a broken relationship. There are different views as to the trigger mechanisms, e.g. the minimum length of any such relationship, the merits of "opting in" or "opting out" of any such scheme.

¨ The FLBA have no official view on these matters but my straw poll would indicate a range of mixed views.

¨ Individual judges experienced in this field are known to favour an equity based family Court with the power to administer justice and fairness to all, married or not.

¨ Is it likely, viewed from above, that we currently lie in no man's land? That sooner or later, justice will come for Mrs Burns, along with the other common law wives and mothers who have, in many cases, devoted far more of their time and lives to a partner and their children, and yet do not have the personal remedies available in the shortest of marriages?

PHILIP CAYFORD Q.C.
14TH October 2004

Ancillary Relief Update

Philip Moor QC

28 October 2004

CPD Lectures Autumn/Winter 2004

THE DAY AFTER TOMORROW –
Coping with the ever changing face of
Ancillary Relief

Philip Moor QC

(A) The strange case of Princess Fiona in the Far Away Land County Court

You are instructed in a new case by an aristocractic lady by the name of Princess Fiona. She has been married to a strange individual called Shrek since 10th January 2000 but had cohabited since 1990. There is one child, Pinnocchio (aged 8). They separated 18 months ago.

Shrek owns his own company, known as "Fairy Godmother Products Ltd" which makes potions and spells. He founded it in 1985 before they met but it grew substantially during the marriage and has really taken off in the last year due to the development of a new love potion. Princess Fiona has 20% of the shares. Shrek was to have 80% but he placed his in an offshore settlement run by the Prince Charming Trustee Company. The Trustees tell you that they have excluded both Shrek and Princess Fiona as beneficiaries.

Shrek argues that he developed his huge knowledge of potions from his previous work in the field for the Ugly Stepsister and that his earning capacity was "fully airborne" by the time he started "Fairy Godmother

Products Ltd".

It appears that £1,000,000 was invested in "Fairy Godmother Products Ltd" by a mysterious financier, Puss in Boots, via a second offshore trust. Shrek says that he has received a demand for immediate repayment of this money. Princess Fiona tells you that Mr Boots is a pauper who Shrek met on his original journey to Far Away Land and that any money must have originated from Shrek's bonuses when working for the Ugly Stepsister.

Shrek previously instructed a firm of well known solicitors, Big Bad Wolf & Co. but has now sacked them and is being very difficult about disclosure. Mr Wolf has told you that Shrek gave him plenty of information but he cannot disclose it to you as it is privileged.

The parties did sign a Pre-Nuptial Agreement the day before the marriage. Princess Fiona says she was bullied into it by Shrek. There was no disclosure and no provision for Pinnocchio. The Agreement simply said that Princess Fiona would have no claim against Shrek or Fairy Godmother Products Ltd in the event of a divorce.

The matrimonial home, Gingerbread House, is owned jointly by Shrek and Princess Fiona. The property cost £400,000 but was bought from the trustee in bankruptcy of Princess Fiona's mother, Queen Lillian, who has resided at the property ever since and claims that she was promised that she could live there for life. It is now worth £800,000 and is the only obvious liquid asset. It is mortgage free. The purchase price came from dividends from Fairy Godmother Products Limited.

You are very worried about costs. The Accountants investigating "Fairy Godmother Products" say it will cost many thousands of pounds to deal with the numerous issues in the case. Is one way out for Shrek to admit that he can meet any reasonable order the court might make?

Your client asks you the following questions:-

1. What is the relevance of the pre-marital cohabitation?

In GW –v- RW [2003] 2 FLR 108, Nicholas Mostyn QC included a period of cohabitation when calculating the length of the relationship, on the basis that the relationship had moved seamlessly from cohabitation to marriage.

This approach has since been endorsed by Coleridge J in CO –v- CO [2004] 1 FLR 1095 and Baron J in M –v- M [2004] 2 FLR 236. In CO –v- CO, Coleridge J held that committed, settled relationships outside marriage must be regarded as every bit as valid as those where parties have made the same degree of commitment but recorded it publicly by marriage. This observation is, however, entirely dependant on the parties having eventually made that very public statement by marrying.

In M –v- M, Baron J drew no distinction between the years of cohabitation and those of marriage, again aggregating the two when calculating the length of the relationship.

2. Is Shrek likely to succeed in his contention that there are good arguments available for departure from the yardstick of equality?

There have been few cases in the past year concerning reasons for departure from the yardstick of equality. It would, however, be naïve to think that the parameters are now so well set that there will not be further decisions in this area in the future.

GW -v- RW [supra] suggested four reasons for departure:-

(i) pre-acquired assets;
(ii) pre-acquired earning capacity;
(iii) post-separation assets; and

(iv) the relationship lasting less than twenty years.

Baron J in M –v- M [supra], on the other hand, did not view post-separation assets as a reason for departure because the litigation had not been unduly protracted and the parties had been financially linked throughout. This has echoes of Thorpe LJ's observation in Cowan –v- Cowan [2002] Fam 97 at Paragraph [70] that, if the husband was investing the wife's entitlement, she was entitled to share any profit from that investment.

Also in M –v- M, Baron J decided that the wife's ongoing contribution in respect of a child with special needs merited a modest adjustment in her favour. Again, compare this with what Thorpe LJ said in Lambert –v- Lambert [2003] Fam 103 at Paragraph [45] – "such sacrifices and achievements are the product of love and commitment and are not to be counted in cash."

Note that Baron J also decided that the husband's future earnings were not marital assets, which fell for division. This decision is therefore now subject to an appeal following on from McFarlane/Parlour [2004] 2 FCR 657.

3. Does the court have jurisdiction to vary the offshore settlement?

Charalambous –v- Charalambous [2004] 2 FCR 721 – on appeal from Wilson J. If the English court had jurisdiction to hear the divorce, it had jurisdiction to vary a Post-Nuptial Settlement, even if the Settlement provided for the trust to be subject to the exclusive jurisdiction of the Jersey court.

Obiter observations of the Royal Court in Jersey in a case called Rabaotti –v- Rabaotti suggest that the Royal Court may take a different view but the point was not argued fully in Rabaotti and it is irrelevant anyway if the assets of the Settlement are in this jurisdiction.

Charalambous is also authority for the proposition that "once post nuptial, always post-nuptial". The Settlement did not cease to be variable just because the husband engineered the removal of himself and his wife as beneficiaries. It is to be noted, however, that this might be different if the Trust ceased to exist entirely (subject to applications under section 37 to set aside dispositions designed to defeat the court's jurisdiction).

Note also, Coleridge J in J -v- V [2004] 1 FLR 1042. Sophisticated offshore structures were very familiar nowadays in ancillary relief proceedings and did not impress, intimidate or fool anyone. If spouses used such structures to avoid disclosing their true wealth, they could expect to pay the costs of the case, notwithstanding any offers that had been made as, without reliable disclosure, the applicant would be unable to judge the merits of the offers.

3. Will the court transfer shares in the company to Princess Fiona?

In C -v- C [2003] 2 FLR 493, Coleridge J varied a trust to award a wife 30% of the husband's shares in a private pharmaceutical company. He relied on the potential value of the company and the part the wife had played and wanted to continue to play in it.

It is clear, however, that this solution will only be appropriate very occasionally. It runs completely counter to the aim of separating parties financially when their marriages have broken down. In the vast majority of cases, it would be a recipe for further litigation and discord. Moreover, as a solution, it does not comply with the observations of Thorpe LJ in Parra -v- Parra [2003] 1 FLR 942 at [27]:-

"As a matter of principle, I am of the opinion that judges should give considerable weight to the property arrangements made during marriage…."

4. Should the case be transferred to the companies court?

Taylor –v- Taylor The Times 06.09.04 – it is inappropriate to refer a dispute in ancillary relief proceedings

to the Companies court, even where the issue involved the manner in which the proceeds of sale of various company assets had been dealt with.

5. How will the court deal with the demand for repayment by Puss In Boots?

George –v- George [2004] 1 FLR 421 – it was not right for a judge to anticipate the outcome of related proceedings. The ancillary relief proceedings should either be adjourned to await the outcome of the other claim or the cases should be heard in tandem by the same judge.

6. Will the court require Mr Wolf to disclose financial documents in his possession?

Kimber –v- Brookmans [2004] 2 FLR 221 – a solicitor was ordered to produce all documentation, which might assist the wife in quantifying or locating the husband's assets or in establishing the husband's whereabouts. Coleridge J said that the husband had forfeited any entitlement to retain the cloak of legal privilege by his non-disclosure and breach of court orders.

Given the absolute nature of legal professional privilege (see R –v- Derby Magistrates ex parte B [1995] 3 WLR 681), a better justification might be that financial disclosure can never be privileged (see, by analogy, Hawick Jersey -v- Caplan The Times 11.03.88).
6. How will the court approach the Pre-Nuptial Agreement?

Coleridge J held in J -v- V [supra] that a pre-nuptial agreement was of no significance when it:-

(a) purported to prevent the wife claiming against the husband's assets;
(b) had been signed on the eve of the marriage without full legal advice and without proper disclosure; and
(c) made no allowance for the arrival of the children.

7. Does Queen Lillian have a claim and, if so, how should it be dealt with?

Baron J in H –v- M [2004] 2 FLR 16 – in order for an interest to arise under a constructive trust, it was necessary to show (a) an express agreement, arrangement or understanding that the parents would have a beneficial interest or a direct contribution to the purchase price, from which such an intention could be inferred; and (b) that the claimants had acted to their detriment in reliance on such understanding. On the facts, the parents had not acted to their detriment and therefore had no beneficial interest.

8. What is the likely approach to costs?

Norris -v- Norris [2003] 2 FLR 16 - there is no presumption at present of no order as to costs. Rule 2.69B applies until the rules are changed or amended. Any injustice can be mitigated by the use of Rule 2.69D, which gives a general and wide discretion to depart from the starting point that "the winner takes all".

For a practical approach to dealing with a difficult costs decision, see Charles J in C -v- C [2004] 1 FLR 291, who balanced the fact that the wife, as paying party, had lost on the issue of the amount of periodical payments whereas the husband had lost on the two main factual issues at the hearing. Applying a broad judicial discretion, the fair and just solution was no order as to costs.

cf, CPS –v- Grimes [2004] 1 FLR 910, where the Court of Appeal overturned the decision to make no order as to costs below ([2004] 1 FLR 910). The general rule was that an unsuccessful party should have to pay the successful party's costs. The CPS had lost and had not made any offers to settle. The wife had not behaved improperly. She was entitled to her costs.

However, all this is soon to change. The draft Family Proceedings (Amendment) Rules 2004 propose to:-

(a) end the role of Calderbank offers in ancillary relief proceedings by removing Rules 2.69, 2.69B and

2.69D;
(b) establish a clear general rule that the court should make no order as to costs unless there has been unreasonable conduct by one or more parties by adding a new Rule 2.71;
(c) amend Rule 2.61F(2) to provide that, not less than 14 days before the final hearing, both parties must file and serve full particulars of all costs incurred to date and expected to be incurred to the end of the trial, so as to enable the court to take account of the parties' costs liabilities when deciding what order to make.

Although consultation is proposed, the draft paper says that it is hoped to bring the new rules into force in January or February 2005. The explanatory note identifies a number of problems with the current system:-

(i) the de-stabilising effect of costs orders on carefully constructed financial settlements;
(ii) the current system of closed offers introduces an undesirable element of gambling into the proceedings;
(iii) it is often difficult to identify clear winners and losers nor is it desirable to do so in most cases; and
(iv) Calderbank offers are now too often used in a highly tactical manner.

The draft Rule 2.71 does permit the court to take into account:-

(i) the conduct of the parties;
(ii) any failure to comply with a previous order of the court;
(iii) whether a party has been wholly or substantially unsuccessful in the proceedings or a particular issue; and
(iv) any open offer to settle.

See also Baron J in Denton -v- Denton [2004] 2 FLR 594; an agreement that payment of costs would be deferred until the conclusion of the case, whilst making it clear that the wife would be liable for any costs incurred that were not payable by another party, did not amount to a conditional fee agreement.

9. Surely, the millionaires defence is a non-starter following White –v- White?

Not necessarily so. In J –v- V [supra], Coleridge J said that there may still be a role for such concessions in cases where the marriage was of short to medium length and the wealth had largely come from sources other than the efforts of the respondent during the course of the marriage. Even in longer marriage cases, applicants might be prepared to compromise over precision, provided some sensible admissions were made at an early stage, to avoid acrimonious, lengthy and very expensive proceedings.

B. The case of Peter Parker

You are instructed by a man by the name of Peter Parker. He married his childhood sweetheart, Mary Jane Watson in July 1987. They had two children, now aged 15 and 13. They separated in 2002 and a court order has just been made.

The matrimonial home, Spider Cottage, was transferred to Mary Jane. The District Judge gave Peter a charge on the property for 50% of the net equity but it was only to be enforced in the event of remarriage or death. Peter feels very aggrieved and wants to appeal although he has heard that the law is about to change to make appeals impossible.

Peter was ordered to pay Mary Jane periodical payments of £12,000 pa. There was a term order for eight years but no section 28(1)(a) direction. Peter is upset by this as well, as he tells you that he intends to retire in four years time.

He also informs you that Mary Jane has been cohabiting for over a year with Jonah Jameson, who works full time on the local newspaper. Mary Jane denies that there is any cohabitation, saying that the relationship has recently broken down.

Peter has just come into a windfall as the result of the death of his godfather, Dr Otto Octavius. Mary Jane has intimated that she would like to capitalise her periodical payments, to include an element to discharge the mortgage on Spider Cottage. Peter had reached an agreement with Mary Jane that he would capitalise the periodical payments if he ever inherited from Dr Octavius.

Peter has failed to pay the periodical payments. Mary Jane's solicitors have applied for a Judgment Summons against him and for an order for oral examination. The application has been adjourned with an order that he produce documents about the inheritance.

Peter had a short relationship after the breakdown of the marriage with a woman known as Betty Brant. They had a child, Harry. There has been constant litigation between Peter and Betty about contact. Betty has now made an application for financial provision under Schedule 1 of the Children Act. She seeks an order for a lump sum to cover her costs of the litigation.

Peter is paying periodical payments to Harry pursuant to a CSA order. He says it is a breach of his human rights and he wants to challenge the CSA's jurisdiction.

Peter asks you to advise on the following points:-

1. Is the law about to change to make appeals more difficult?

Yes – the draft Family Proceedings (Amendment) Rules 2004 proposes that:-

(a) all financial appeals from District Judges be heard by a single High Court Judge rather than a Circuit Judge;
(b) permission to appeal is necessary before an appeal can proceed; and
(c) Part 52 of the CPR to apply to ancillary relief appeals, subject to certain modifications.

The explanatory note identifies the lack of expertise of the Circuit Bench in ancillary relief work and refers more than once to the relatively low number of appeals. It also says that there is no point in the FPR duplicating work where serviceable CPR rules already exist and are suitable for use in the family jurisdiction.

2. If he does appeal, how will the court deal with the trigger events for a sale of the property?

In B –v- B [2003] 2 FLR 285, the marriage lasted less than a year but there was a child. The Deputy District Judge awarded the wife £175,000 but declined to give the husband any deferred interest such as a Mesher order. Munby J dismissed the husband's appeal, relying on the wife's small prospect of generating capital in the years ahead due to her commitment to the child, whereas the husband would be likely to generate such capital. The advantage to the husband of the Mesher would be modest, whereas the burden to the wife would be significant.

Munby J now quotes this case as an example of how dangerous it is to place too much emphasis on such authorities. The wife began to cohabit shortly afterwards and the husband lost his job.

See also Sawden –v- Sawden [2004] 1 FCR 776. Two adult children continued to live in the matrimonial home. The order gave the husband a charge for 45% but only to be enforced on the wife's remarriage, cohabitation or death. On a second appeal, the Court of Appeal added a condition that the property be sold in the event of both children leaving the property and settling independently in homes of their own. However, even this trigger would not occur if one of the children remained there indefinitely.

3. If cohabitation is proved, how will it affect the quantum of maintenance?

In Fleming –v- Fleming [2004] 1 FLR 667, the husband had been ordered to pay £1,000 pm to the wife

for 4 years. The wife applied to extend the term, notwithstanding that she had been cohabiting for 5 years and that the combined means of the wife and her cohabitant were sufficient to discharge their living expenses. The Court of Appeal restated that cohabitation was not to be equated to marriage and that Atkinson –v- Atkinson [1988] Fam 93 remained good law. However, in this case, the expectation had been that the order would come to an end after 4 years. An application to extend the term required exceptional justification, which did not exist. There would be no substantial financial hardship and the term should not be extended.

4. How will the court approach Peter's pending retirement?

D –v- D [2004] 1 FLR 988 – Coleridge J. Where there had been an equal division of the assets, a periodical payments order should not extend beyond the husband's retirement in ten years time. There would not, however, be a section 28(1)(a) direction as, if unforeseen events created financial embarrassment for the wife in the interim, the court should be able to consider the matter again.

5. If Mary Jane applies to capitalise, how will the court deal with the application?

Pearce –v- Pearce [2003] 2 FLR 1144 – when capitalising periodical payments pursuant to MCA s31(7B), the court should not reopen capital claims. Hence, the lump sum cannot be increased to enable the wife to discharger her mortgage at the husband's expense. The court's objective should be to substitute for the periodical payments order such lump sum as will fairly compensate the payee and at the same time complete the clean break.

See also Nicholas Mostyn QC in W –v- W [2004] 1 FLR 494 – it was not inevitable that a periodical payments order would reduce on the husband's retirement as the court would look at the totality of his resources in assessing his ability to pay, not merely his pension and investment income.

6. What is the relevance of the agreement?

G –v- G [2004] 1 FLR 1011 – the Court of Appeal held that the normal concerns about an agreement being reached at a time when emotional pressures were high and judgment likely to be clouded were balanced by the consideration that both husband and wife had previous experience of marital breakdown and had from the outset of their relationship elected to have their future affairs regulated contractually. When a case had highly unusual facts, the ambit of the trial judge's discretion was correspondingly enlarged.

7. Will Mary Jane succeed in her Judgment Summons and her application for the production of the documents?

The new form M17, designed to make the rules more Human Rights Act compliant, must be used for Judgment Summonses. In particular, the respondent must be given clear particulars of the case that he has to meet.

It is clear from Corbett –v- Corbett [2003] 2 FLR 385 that the court will always consider variation of the order and remission of arrears (even if the debtor has not made an application) first. The Debtors Act would not come into play at all unless the court was not satisfied of the debtor's good faith and responsibility.

For an alternative means of enforcement, see Hughes J in Mubarak –v- Mubarak [2003] 2 FLR 553 – an order can be made for the production of documents during adjournments of an oral examination, provided they are relevant to the husband's means. This can include documents that are not in the physical possession of the debtor provided he has a clear and enforceable right to obtain them in his personal capacity, rather than merely as a director of a company.

8. Is Betty Brant likely to succeed in her claim for costs of the Schedule 1 application?

W -v- J [2004] 2 FLR 300 – Bennett J held that the court had no jurisdiction pursuant to Schedule 1 to order one parent to make a payment to the other to cover the latter's legal fees in relation to litigation concerning the parties' children. The words "for the benefit of the child" in Paragraph 1(2)(a) of Sch 1 were not wide enough to include costs as that was a benefit for the parent and not the child.

But note that there now seems to be no doubt that the court does have jurisdiction to include an element for costs in a maintenance pending suit order. It is tolerably clear that the decisions of Holman J in A -v- A [2001] 1 FLR 377 and of Charles J in G –v- G [2003] 2 FLR 71 have been approved by Thorpe LJ in McFarlane/Parlour [supra] where he reviews these cases, without criticism.

9. Can Betty get maintenance for herself pursuant to Schedule 1

Re: P [2003] 2 FLR 865 – a periodical payments order was made for a three year old child in the sum of £70,000 pa. Thorpe LJ said at [48]:-

"Thus there is an inevitable tension between the two propositions, both correct in law, first that the appellant has no personal entitlement, second that she is entitled to an allowance as the child's primary carer. Balancing the tension may be difficult in individual cases. In my judgment, the mother's entitlement to an allowance as the primary carer (an expression which I stress) may be checked but not diminished by the absence of any direct claim in law".

And at [49]:-

"Thus, in my judgement, the court must recognise the responsibility, and often the sacrifice, of the unmarried parent (generally the mother) who is to be the primary carer for the child, perhaps the exclusive carer if the absent parent disassociates from the child. In order to discharge this responsibility, the carer must have control of a budget that reflects her position and the position of the father, both social and financial".

10. Has anyone ever successfully challenged the CSA's jurisdiction?

No – see R (Kehoe) -v- Secretary of State for Work and Pensions [2004] 1 FLR 1132, where the Court of Appeal held that it was a deliberate feature of the child support legislation that it was for the Secretary of State to assess and enforce the maintenance obligation owed by the non-resident parent to the child. The mother's civil rights under Article 6 were, therefore, not engaged. The appeal from Wall J at [2003] 2 FLR 578 was therefore allowed.

Yet the CSA remains deeply flawed. The recent 3rd Report (July 2004) of the House of Commons Work & Pensions Select Committee on Child Poverty was scathing in its condemnation of the colossal administrative and equipment inefficiencies that have led to huge backlogs (170,000 cases, increasing at 30,000 per quarter) and numerous "stuck" cases going nowhere for a variety of reasons.

C. The case of Detective Del Spooner, deceased

You are instructed by the brother of Detective Del Spooner, who was tragically killed on duty whilst serving as a police officer.

Del had been previously married to Dr Susan Calvin. They had a joint life policy worth £100,000. The insurance company are intending to pay the proceeds to Susan. Del's brother wants the money to go into

Del's estate as his disabled son, Del's nephew, is the beneficiary of Del's will.

An order had been made two months before Del's death for the sale of their matrimonial home and payment to Susan of 75% of the net proceeds. Susan is threatening to appeal this order on the basis that the court had not foreseen Del's death and that the District Judge would have given her the entire property had he known.

Before the property could be transferred to Susan, Del was made bankrupt as a result of heavy gambling debts. The Trustee is now refusing to allow Susan to receive anything above 50% of the net equity. The Trustee is also seeking an occupation rent from Susan for the time she has occupied the property since the bankruptcy order was made.

Del also had a pension. As the Petition had been issued before Pension Sharing came into force, the District Judge had earmarked for Susan half his death in service benefit. The Trustee is arguing that this order is unenforceable and that he can enforce against the entire benefit.

You are asked to advise:-

1. Who is entitled to the proceeds of the life policy?

Murphy –v- Murphy [2004] 1 FCR 1 – the plain inference to be drawn was that the death benefit was intended to be paid to the survivor for his or her exclusive benefit. They could not have intended that the right to the benefit was to be defeasible by a notice of severance. Hence, the former wife was entitled to the lump sum.

2. Can Susan appeal against the consent order on the basis that Del's death had not been foreseen?

In Reid –v- Reid [2004] 1 FLR 736, Wilson J decided that a wife's death of a heart attack two months after an order was made did amount to a new event. The wife had been aged 74 and had disclosed that she was registered blind, had high blood pressure and high cholesterol and that she was diabetic. Although it was always possible that she would die at any time, the parties had not dealt with the case on the basis that this was a significant possibility. The husband's needs required the court to intervene and provide for him less restrictively than was necessary had the wife lived.

3. Would it have made any difference if Susan had murdered Del?

In McMinn –v- McMinn [2003] 2 FLR 823, a district judge sent out a written judgment which provided that the husband transfer £80,000 to the wife. Before Decree Absolute was pronounced and the order drafted, the husband stabbed the wife to death. The executors failed to enforce the order as section 23(5) of the MCA fixed the Decree Absolute as the event that rendered an ancillary relief order effective. On the other hand, the lack of the perfected order would not have been a problem as the written judgment was equivalent to an order of the court.

4. Is the Trustee in bankruptcy entitled to half the net proceeds of the house or can Susan claim 75%?

In Mountney –v- Treharne [2002] 2 FLR 930, the Court of Appeal held that a property adjustment order, which ordered a husband to transfer his interest in the matrimonial home to the wife, conferred an equitable interest on her at the moment the order was effective, ie on decree absolute. The trustee in bankruptcy therefore took subject to her interest under the order which the wife was entitled to enforce.

However, now see Treharne & Sand -v- Forrester [2004] 1 FLR 1173 where Lindsay J in the Chancery Division set aside just such a property adjustment order on the ground that such a disposition was void pursuant to section 284 of the Insolvency Act 1986 as being a disposition made by the person adjudged bankrupt. The order could not have been made by the court as the court had no legal or equitable

interest in the property and therefore must be a disposition by the bankrupt.

These cases can be reconciled by the fact that in Mountney -v- Treharne, the bankruptcy petition was not presented until after the ancillary relief order was made, whereas in Treharne & Sand -v- Forrester, the bankruptcy petition had been presented before the ancillary relief order was made. Pursuant to Section 284(3), any disposition is void if made after the presentation of the bankruptcy petition.

5. Can the Trustee obtain an occupation rent from Susan?

Yes – it was decided in Re Gorman (A Bankrupt) [1990] 1 WLR 616 and Re: Pavlou [1993] 1 WLR 1046 that a wife, whose husband had left the matrimonial home, was entitled to credit for mortgage interest payments but the trustee in bankruptcy was entitled to a set off for an occupational rent.

This principle has been extended to apply to cases where the parties remain happily married and the bankrupt remains living in the home with his wife – see Byford –v- Butler [2004] 1 FLR 56.

6. Is the earmarking order enforceable?

See Re: Nunn [2004] 1 FLR 1123 – an order that a husband pay his former wife one half of his pension lump sum did not give the wife an equitable interest in the proceeds of the pension lump sums. Equally, the order did not give her security as the court had no jurisdiction to order security for a lump sum payable at some time in the future. It followed that the order was ineffective to impose a trust on one half of the funds in issue, which instead formed part of the husband's estate in bankruptcy.

D. Other cases of note

1. How does the court approach illiquidity?

In R -v- R [2004] 1 FLR 928, Wilson J held that a District Judge was wrong to order a lump sum on the basis that the husband could borrow against his shares in a family farming business where there was no evidence that he could do so.

However, it was wholly contrary to public policy for the husband to exit the marriage with £448,000 while the wife exited with only £30,000. It would also be a resolution of last resort to condemn her to a life-long relationship with the husband's family company by making her reliant on a tenancy or licence of a property owned by the company.

The solution was to order the husband to make a lump sum payment by 240 instalments to enable her to discharge a mortgage of £225,000 over 20 years. This would have the added advantage that the order would survive the wife's remarriage. She would be given security over the husband's shares in the family business as a form of judicious encouragement to the company to provide the husband with the means to comply. As it was a lump sum by instalments, the order remained variable to deal with any unforeseen problems.

2. Does the English Court take into account the foreign cultural background of the parties?

Yes – see Baron J in A -v- T [2004] 1 FLR 977 - where the foreign cultural background of the parties was a dominant factor, the court could consider how the matter would be dealt with in that foreign country in accordance with the decision in Otobo –v- Otobo [2003] 1 FLR 192. After a seven week marriage, the husband was ordered to pay £35,000 to the wife but, if he did not grant her a Talaq divorce, she would receive the sum of £60,000, which she was entitled to under Iranian law, as that was the sum provided

for in the marriage contract.

3. How would the court approach an application for a lump sum where the husband had received a large inheritance but the wife had remarried?

In Re G [2004] 1 FLR 997, a court had adjourned the wife's lump sum application as the husband was likely to inherit significantly on the death of his uncle and/or his father. By the time he inherited £2.1 million, the wife had remarried but that marriage had broken down. She had spent all her assets on educating the children. She was living in rented accommodation and had debts of £50,000. The children had also inherited and were beneficiaries under a trust, which now paid their school fees.

Singer J awarded her £460,000 on the basis that, although her remarriage was relevant, it did not affect or diminish her ongoing contribution to the welfare of the children. She had a reasonable need for a lump sum to repay her debts, allow her to purchase a car and to cover the purchase of suitable accommodation. It would be debilitating and demeaning for her to have to be dependant on the goodwill of the children to house her in the long term.

Philip Moor QC
1 Hare Court
Temple
London
EC4Y 7BE

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(i) Costs in Ancillary Relief Proceedings: The New Regime; (ii) The Land Registration Act 2002: Protecting The Claim By Notices and Restrictions

Nigel Dyer

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CPD Lectures Autumn/Winter 2004

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(i) Costs in Ancillary Relief Proceedings: The New Regime

(ii) The Land Registration Act 2002: Protecting the Claim by Notices and Restrictions

Nigel Dyer, 1, Hare Court, Temple

Costs in Ancillary Relief Proceedings: The New Regime

1. Significant changes will be made to the Family Proceedings Rules (FPR)`within the next four months which will alter the approach that the Court takes to making orders for costs following contested ancillary relief proceedings.

2. The Department of Constitutional Affairs (DCA) published a consultation paper in October 2004 seeking the views of consultees on proposals to amend the FPR on costs (and also appeals in family proceedings). A draft statutory instrument (SI) has been drafted (see doc 1), and following the consultation, a SI will be laid before Parliament. It is likely to be in force around Easter 2005.

3. Why are changes needed to the existing regime ?

4. The existing regime is to be found at FPR 2.69 B – D and 10.27 which applies (with modifications) CPR Parts 43, 44, 47 and 48. In practice, the following general principles are applied:

a. The court has a wide discretion in making orders for costs;
b. As a starting point, costs prima facie follow the event, but that general rule may be displaced more easily than it is the the QBD or Ch D; (Gojkovic v Gojkovic (No 2) [1992] Fam 40)

c. In guiding the exercise of the court's discretion, and it determining who has won or lost, Calderbank offers play an important part in the adversarial process. They "..should influence but not govern the exercise of the discretion " (Ormrod LJ in McDonnell v McDonnell [1977] 1 All ER 766 at 770), but they are often determinative of an award for costs. Beating your own Calderbank can result in costs being awarded on an indemnity basis.

10. One of the problems in dealing with costs is that it is difficult to know where to place the costs paid, and costs outstanding, on an asset schedule. There is no uniformity of approach. If you treat the costs paid as a liability then you are pre-judging the determination of the costs issue before the case has started. Leadbeater v Leadbeater [1985] FLR 789 tried to provide a solution by adding the costs spent

back in to a party's assets before the adjudication, but this often produced more problems and it was disapproved of in Wells v Wells [2002] 2 FLR 97, CA.

11. The DCA's Consultation paper identifies three significant problems with the current costs regime in ancillary relief proceedings.

12. The first is the de-stabilising effect that costs can have on financial settlements that have been carefully constructed by the court. Having considered the facts and circumstances of a case the court arrives at a settlement that, in its judgment, does justice between the parties. At the conclusion of some cases it is revealed to the court that one party has failed to reach the high water mark of a Calderbank offer. The consequences of failing to 'beat' a Calderbank offer by an order to pay the others side's costs can undermine completely the substantive order for ancillary relief than the court has just made.

13. The second problem is that the system of closed offers has introduced a degree of procedural gamesmanship. This, in turn, leads to uncertainty and has, in effect, also introduced an undesirable element of gambling into ancillary relief proceedings. Calderbanks have been likened (see GW v RW [2003] 2 FCR 289) to a form of spread betting. In big money cases, falling short of a Calderbank offer by a relatively small amount, say a few thousand pounds, makes that party liable for the costs of the other side which can run into tens of thousands of pounds. This is disproportionate and, in some cases, has produced unfairness. Alternatively, in cases with modest resources, the requirement for one party to pay the costs of the other side can produce real financial hardship and undermine the court's division of the matrimonial assets. This can be a particular problem where the assets cannot comfortably stretch to establishing two new households.

14. Making orders for costs which involve a detailed assessment can result in expensive satellite litigation. Delay and further costs are incurred, and yet more Calderbanks are written, this time to protect a party on the outcome of the assessment.

15. The force for change was fuelled by the decisions following White v White [2001] 1 AC 596 where awards provided for an equal, or near equal division, of the assets. In such cases it was asked: if there has been an equal division why should one party have to pay the other's costs ? The costs issue was considered by Costs Sub-Committee of the President's Ancillary Relief Advisory Group (PARAG) in 2003. The recommendations of the Costs Sub-Committee were endorsed by the President in Norris v Norris and Haskins v Haskins [2003] EWCA Civ 1084. These recommendations have now been distilled into the draft SI (see)

16. The new costs regime. The proposed new changes will abolish the existing FPR in relation to costs and provide a new rule, 2.71, in terms that:

a. There will be a general rule that the court will not make any orders about costs.

b. The court may make an order for costs because of the unreasonable conduct of a party in relation to the proceedings (NB– not marital conduct) and see the draft SI for the circumstances that the court will consider in deciding if it is going to make an order for costs. Orders can be made whether there has been a failure to comply with an order (eg for disclosure), where a party has been wholly or substantially unsuccessful in the proceedings or in respect of an issue, or because of the terms of an open offer made. This is not exhaustive as the court considers all the circumstances etc.

c. Costs will be part and parcel of the substantive application and considered as a liability that a party has. The extent to which it was reasonable for a party to have incurred high, disproportionate or unnecessary costs will become an issue to be pursued in evidence. A new Form H (see Doc 2) has to be filed and served 14 days before the final hearing setting out full particulars of costs incurred and to be incurred. Counsel should therefore be able to consider before the hearing whether to attack the level of costs incurred by the other side as being unreasonable or unnecessary, with a view to contending that the Court should not treat such costs as a legitimate liability. (Eg – (i) H relies on expensive expert evidence on the value of his shares in his company which is misleading and partisan; W submits that H has wasted money on such an expert and therefore the costs wasted should be notionally added back as an asset and not treated as a liability of H's. (ii) W alleges H is a non discloser and embarks on a costly discovery exercise which produces nothing. H says W has wasted costs on a pointless exercise and therefore the costs wasted should be notionally added back as an asset and not treated as a liability of W's).

d. Costs will not be a separate issue to be determined at the end of the case. As the court will be able to take the costs of the parties into account when considering the most appropriate order for ancillary relief, there is no need for costs to be determined after judgment.

e. Calderbank letters will be abolished. The only offers that will be referred to will be open offers. (Strict without prejudice offers can still be written but they cannot be referred to except at an FDR). Obviously the earlier a well pitched open offer is made the more prospect there is of displacing the general rule of no order for costs as an open offer is a factor in the court's consideration as to whether or not to make an order for costs. A failure to negotiate in a timely manner 'out in the open' could expose a party to an order for costs as the failure could be viewed as conduct in the proceedings. No sanctuary can be claimed by producing a Calderbank offer as they will no longer exist.

f. In short, the new changes will enable the judge during the substantive hearing to come to an informed view on the level of costs incurred by both parties. Either he will simply treat the costs incurred as liabilities to be paid by each side, or, he might make notional adjustments to the assets to reflect costs issues (see c. above). The judge will not be placed in the invidious position of finding his adjudication is ambushed and derailed by the Calderbank correspondence.

17. When are the new rules coming in ? No date set but likely April 2005.

18. Will they apply to existing proceedings ? No. Any Form A issued before the date the SI comes into effect will be subject to the old regime. Any Form A issued after that date will be subject to the new rules.

19. The purpose of the new regime. It is hoped that abolishing Calderbanks and emphasising a 'no order for costs' principle in ancillary relief proceedings will act as a powerful incentive for parties not to run up costs unnecessarily because, except in cases of misconduct, there will be no one else to pay their costs. A regime requiring each party to bear their own costs and to make open offers should be more likely to encourage the parties to be reasonable and focus on settlement, rather than having a game of 'Calderbank cat and mouse' which holds out the prospect of recovering costs from the other side.

20. On the other hand, in the ever changing world of ancillary relief where clear judicial guidance and certainty are concepts from the former days of reasonable requirements, a party might well try their luck in going to court knowing that they all they may risk is having to pay their own costs if they fail.

The Land Registration Act 2002: Protecting the Claim by Notices and Restrictions

1. The Land Registration Act 2002. The Land Registration Act 2002 came into force on 13 October 2003; it provides two new types of entry for the protection of third party interests affecting registered estates and charges in the land register, viz: notices and restrictions. Save for transitional provisions, the previous class of entries (cautions, inhibitions etc.) that could be made in the land register under the provisions of the Land Registration Act 1925 have been abolished and so has the 1925 Act. Notices entered in the register under the Land Registration Act 1925 continue to have effect under the 2002 Act. The revised system of title registration introduced by the 2002 Act aims to make the register a complete and accurate reflection of the state of the title to a registered estate at any given time. The Act only applies to registered land.

2. The proprietor of a registered estate can make a disposition of almost any kind permitted by law, and someone dealing with the proprietor can assume that his powers are unlimited except for any restriction reflected by an entry in the register or imposed by or under the 2002 Act itself (see s 26 LRA 2002). Where more than one party has an interest in a registered estate or charge, the general rule that decides the priority of each party's claim is that each interest ranks in accordance with the date of its creation. Someone with an existing interest will not be affected by a later disposition see s 28(1) LRA 2002. However, there is one important exception. Someone who acquires a registrable disposition for value will, by registering his interest, postpone the priority of any other interest that has not been protected by the entry of a notice in the register (s 29 LRA 2002): ie he will not be affected by interests (unless they have 'overriding status') that have not been noted in the register.

3. Preserving a claim against a legal estate, in particular the matrimonial home if it is not in the spouses' joint names, can be done by registration of the claim in the appropriate register. Land Registry Practice Guides and a schedule of prescribed application forms and standard form restrictions are available from

www.landregistry.gov.uk. This is an excellent web site and it should be the first port of call.

4. Notices and restrictions.
a. A notice entered in the register in respect of a third party interest will protect its priority against that of a subsequent disposition for value.
b. A restriction, by preventing the registration of a subsequent registrable disposition for value, will prevent the priority of a third party interest from being postponed.
The entry of a notice or a restriction are not mutually exclusive: in order to protect the claim in the circumstances of a particular case it might be appropriate to apply for the entry of a notice and a restriction.

Notices

5. Notices. A notice is an entry made in the register in respect of the burden of an interest affecting a registered estate or charge (s 32 LRA 2002). Thus a spouse who claims a proprietary interest in a registered legal estate can apply to enter a notice in the register. A notice entered in the register in respect of a third party interest will only ensure that the priority of the interest protected will not be automatically postponed on the registration of a subsequent registrable disposition for value, if the interest is valid. In other words the notice protects an interest in registered land where it is intended to bind any person who acquires the land. If the intention is to prevent a spouse from disposing of, charging or dealing with a legal estate the appropriate course is to apply for a restriction and not a notice.

6. Agreed notice and unilateral notices. An application for entry of a notice may either be for an agreed notice or a unilateral notice (s 34(2) LRA); all notices are entered in the Charges Register. There is no difference in priority between a unilateral notice and an agreed notice although there are different procedures for entering agreed notices and unilateral notices.

7. The matrimonial home and agreed notices. Where a spouse has matrimonial home rights in a dwelling house which the other spouse is entitled to occupy by virtue of a legal estate the title to which is registered and the other spouse (or a trustee on his behalf) is registered as the proprietor, the matrimonial home rights constitute a charge on the estate which can be protected by the entry of an agreed notice (s 31(10)(a) FLR 1996 as amended by s 133 LRA 2002). The terminology is confusing as the application for the notice is unlikely to be 'agreed' between the spouses but this is the category of notice to which such rights have been assigned by the 2002 Act.

8. Why do rights of occupation need to be registered ? Protection of matrimonial home rights is not required in cases where the matrimonial home is held jointly, both legally an beneficially, by both spouses. However, if the property is owned by one spouse, in the case of registered land, it is expressly declared that the other spouse's matrimonial home rights are not capable of being an overriding interest, even if the spouse is in occupation (s 31(10)(b) FLA 1996). Accordingly, a purchaser for value takes the estate free from the charge unless it is duly protected by an entry in the register (s 29 LRA 2002).

9. Protecting an interest in the matrimonial home if title is registered in the name of one spouse only. An application for the entry of an agreed notice in the register is by prescribed Form MH1 (see annex 1) and sent to the Land Registry office serving the area in which the matrimonial home is situated.
a. No fee is payable.
b. A spouse's right's of occupation may only be protected in respect of one matrimonial home (whether the home is held under a registered or unregistered title) at any one time.
c. A spouse's rights of occupation continue only for so long as the marriage subsists, save that the court may make an order during the subsistence of the marriage directing that those rights are not brought to an end by the termination of the marriage.
d. Notice of the application for an agreed notice is always served on the registered proprietor.
e. An application to cancel an agreed notice is by prescribed Form MH4.

10. Unilateral notice: property not the former matrimonial home. Save for the hybrid category of agreed notice for the matrimonial home, in the context of protecting a claim for ancillary relief in respect of other property, an application for a unilateral notice will be more relevant as unilateral notices are entered without the consent of the registered proprietor. In terms of procedure:
a. An application for a unilateral notice must be made on form UN11, accompanied by the fixed fee;
b. Details of the nature of the interest claimed must be set out on form UN1 and given in the form of a statutory declaration.

c. The relevant proprietor is not notified of the application until after the entry has been made in the register.
d. The registered proprietor can apply at any time to cancel the notice and require proof of the validity of the interest claimed.
e. An application to cancel a unilateral notice must be made on form UN4. Notice of the cancellation application is served on the claimant who then has a set period of 15 business days in which to object to the application. If no objection is made within this period, or any extension to it, the notice is cancelled. If a dispute arises about whether the notice should be cancelled and it cannot be resolved by agreement, it will be referred to the Adjudicator to HM Land Registry.

11. Matrimonial home: registered or unregistered land. If it is not known whether a spouse's estate or interest in the matrimonial home is registered, an application for an official search of the Index map should be made to the appropriate Land Registry office using Form SIM1.

12. Protecting an interest in the matrimonial home if the title is unregistered but held in the name of one spouse only. Where a spouse has matrimonial home rights in a dwelling house which the other spouse is entitled to occupy by virtue of a legal estate the title to which is not registered but which is held by the other spouse (or by a trustee on his behalf), the matrimonial home rights constitute a charge on the estate which is registrable in the Land Charges Department as a Class F land charge against the name of the estate owner – (s 2(7), Land Charges Act 1972). To be effective, registration of the land charge must be made against the owner's full and correct names. Failure to register will mean that the charge will be void against a purchaser who for valuable consideration acquires an interest in it. Further, when a claim is made for a property adjustment order in respect of the matrimonial home or other legal estate which is not registered, protection may be sought by registering the claim in the register of pending actions which will give priority over subsequent transactions. (Whittingham v Whittingham [1979] Fam 9, [1978] 3 All ER 805, CA; Perez –Adamson v Perez-Rivas [1987] Fam 89, [1987] 3 All ER 20, CA.)

Restrictions
13. Restrictions. A restriction is an entry in the Proprietorship Register that prevents or regulates the making of an entry in the register in respect of any disposition or a disposition of a specified kind (s 40 LRA 2002).
a. A restriction freezes the register, it does not confer priority.
b. A restriction to regulate the disposition of a registered estate is entered and it makes it apparent that the powers of the registered proprietor to dispose of the property are limited by the restriction.
c. The prohibition may be indefinite or for a specified period and it may be absolute or conditional. Once entered a restriction will remain in the register until it is either cancelled or withdrawn.
d. NB -Such restrictions do not have any effect on existing registered charges or the powers of the registered chargee, so the equity in a property can still be diminished by the effect of an all monies charge in favour of a bank.
e. A restriction can be obtained on application to the Land Registry, or on application to the court.

14. Application to the Land Registry. A person may only apply for the entry of a restriction if he (inter alia) "…has a sufficient interest in the making of an entry" In an application for ancillary relief where orders for property adjustment and/or lump sum are being claimed, and in circumstances where the legal estate concerned is a material asset in the case which requires to be protected pending the court's adjudication on the claim, the applicant is a person who has a sufficient interest in the making of an entry of a restriction.
a. Application is by Form RX1 (see annex 2); the application must contain full details of the restriction applied for, an address for service on anyone upon whom notice must be served, and (where the application is not made with the consent of the relevant proprietor) details of the interest in making the application. If evidence can be provided in support of the claim then it can be lodged with the application

b. Restrictions are entered at the registrar's discretion: he may enter a restriction if it appears to him that it is necessary or desirable to do so for the purpose of "…. preventing invalidity or unlawfulness in relation to dispositions of a registered estate or charge ……or protecting a right or claim in relation to a registered estate or charge ".
c. the registered proprietor is notified before the application for a restriction is processed and he has 15 business days to objection to the application. If a dispute arises from an objection to an application made within that period and it cannot be resolved by agreement, it will be referred to the Adjudicator to HM Land Registry.

15. Court's power to order the entry of a restriction. If it appears to the court that it is necessary or desirable to do so for the purpose of protecting a right or claim in relation to a registered estate or charge,

the court may make an order that requires the registrar to enter a restriction in the register – (s 46 LRA 2002)
a. the court means the High Court or a County Court (quaere PRFD ? Jurisdiction needs to be clarified - if unclear use the High Court)
b. If the court orders a restriction to be entered the registered proprietor is not notified before the application for a restriction is processed.
c. the order is be addressed directly to the Chief Land Registrar (a formal application on form AP1 should be made for the restriction to be entered)
d. Forms AA to HH are the standard form restrictions that the court is most likely to order the registrar to enter;
e. The court may direct that the terms of the restriction must take priority over that afforded by any official search with priority that is pending whilst the application for the restriction is being processed s 46(3) LRA. The restriction will then be entered immediately even if there is an unexpired priority period arising from an official search to protect the priority of a disposition that has not yet been lodged. This direction may be appropriate if there is a risk that somebody may apply for an official search with priority before the restriction can be entered so that they can register a disposition of the property without being caught by the terms of the restriction.
f. See example of order made (see annex 3).

Children Act Update (Private Law)

Andrew McFarlane QC

CPD Lecture Autumn/Winter 2004

PRIVATE LAW DEVELOPMENTS IN CHILDREN CASES
Andrew McFarlane QC

Residence Orders

Clear evidence needed before status quo with mother to be upset at interim stage
A father retained the care of three children at end of a contact visit. At an interim hearing the judge directed that the children should not return to their mother, despite reject evidence that the mother was a bad mother and noting difficulties with the interim placement at the paternal grandparents. The Court of Appeal [Thorpe LJ and Evans Lombe J] held that the judge was in error and, on the basis of CA 1989, s 1 he could not have sanctioned the continued separation of mother and children.
Re O (Children) (Residence) [2003] EWCA Civ 1915; [2004] 1 FCR 169

Shared Residence Orders

Shared residence should only be made if there is an element of ‘residence’
A shared residence order was made at first instance in order to recognise the equal status of each parent. On appeal, the Court of Appeal [Hale and Rix LJJ] held that where the child was not only not going to reside with the other parent, but was not even going to visit him, a residence order was not appropriate. Shared orders were not, however, necessarily exceptional orders.
Re A (Shared Residence) [2002] 1 FCR 177

Shared residence order is not precluded by adverse findings against one parent

The Court of Appeal [Thorpe LJ and Wilson J] dismissed a father's appeal against the making of a shared residence order. The fact that the judge had been critical of the mother did not preclude making a shared order, nor the fact that the parties may live in different parts of the UK.
A shared order was not confined to cases where a child spent equal times in each home. If the home offered by each parent is of equal status and importance to the child an order for shared residence can be valuable.
Re F (Shared Residence Order) [2003] EWCA Civ 592; [2003] 2 FLR 397.

Use of shared residence order when parents incapable of working in harmony
Following a history of acrimony and failed contact between the father and his two children, Wall J moved the residence of the children to the father pending a final hearing. By the time of the final hearing the children were spending 50% of their time with each parent. The children (age 11 and 9) were separately represented by NYAS. At the final hearing Wall J made a shared residence order based on the time spent in each home and the need for the importance of each parent to be recognised. There was a risk that a sole residence order would be misinterpreted as giving one parent more control.
A v A (Shared Residence) [2004] EWHC 142 (Fam); [2004] 1 FLR 1195

Conditions attached to Residence Orders

Residence order: conditions limiting movement of family [1]
A judge made a residence order providing for a child to continue to reside with her mother. The judge added a condition requiring the child to continue to reside in her present location (and not move to Cornwall as the mother intended) unless ordered by the court. The Court of Appeal (Thorpe and Clarke LJJ) allowed the mother's appeal and remitted the case for rehearing. In determining the residence issue the court should evaluate the mother's proposals as a whole, including the likelihood that she may move out of the current location. The court should not limit a parent's ability to move within the jurisdiction. Conditions under s 11 should be confined to situations where there were specific concerns about a parent's ability to provide good enough care. There was a need for a consistent approach between those cases where a parent sought to remove a child from the jurisdiction (for example Payne v Payne) and the present type of case where the parent sought liberty to move within the jurisdiction.
Re S (A Child) (Residence Order: Condition) [2001] EWCA Civ 846; [2001] 3 FCR 154

Residence order: conditions limiting movement of family [2]
The Court of Appeal (Thorpe LJ and Astill J) dismissed a father's appeal from an order granting him residence, but imposing a PSO preventing the child's permanent removal to Northern Ireland. N Ireland is within the UK and therefore s 13(1)(b) did not apply. In the 'highly exceptional' circumstances of this case, where the medical evidence indicated that the effect of a move away from the area where the mother lived would be devastating to the children, such a condition was justified. These facts therefore justified a different course from normal approach described in Re S (above).
Re H (Children) (Residence Order: Condition) [2001] EWCA Civ 1338; [2001] 2 FLR 1277

Residence order: conditions limiting movement of family [3]
The case of Re S ([1] above) returned to the Court of Appeal (Butler-Sloss P, Waller and Laws LJ). At the second county court hearing the court had heard evidence of the impact upon the mother and her family of preventing a move to Cornwall (a key flaw in the first hearing). The judge once again imposed a condition preventing removal to Cornwall. The judge held that the child's special characteristics (Down's Syndrome and heart problem) combined with the risk of suffering serious emotional harm were highly exceptional circumstances which justified the imposition of a condition.
The Court of Appeal held that the judge had been entitled to treat the case as exceptional and his conclusion could not be faulted. Appeal dismissed.
Re S (A Child) (Residence Order: Condition) (No 2) [2002] EWCA Civ 1795; [2003] 1 FCR 138.

Residence order: conditions limiting movement of family [4]
Sally Bradley QC (as deputy HCtJ) made a residence order to the mother with a condition attached requiring the mother and child to remain living in a defined period of southern England until further order. The mother had sought to move to Newcastle, but the judge held that the mother was so hostile to contact and to the father that she could not be relied upon to promote contact. She had misled the court and the father on a number of important issues. The mother had made two applications to go to Australia with the prime motive of getting away from the father. Such a move would take the child away from all that she knew. The mother's plans lacked clarity and lacked purpose.
The restriction was not permanent, but was what was needed now. This was 'a highly exceptional case'.

B v B (Residence: Condition Limiting Geographical Area) [2004] 2 FLR 979

Contact Orders

Domestic violence: preliminary hearing on factual issues – bench to retain case thereafter
Where a court (in this case an FPC) holds a preliminary fact finding hearing on issues of domestic violence within the compass of a contact dispute (such a step being entirely appropriate), the same bench should then continue to be seized of the case and treat it as part heard for all future substantive hearings.
M v A (Contact: Domestic Violence) [2002] 2 FLR 921.

Transfer of residence not to be used as punishment for contempt
The Court of Appeal [Peter Gibson, Mance and Hale LJJ] allowed a mother's appeal from an order committing her to prison for 42 days and her appeal against a residence order made in favour of the father following the mother's failure to abide by contact orders.
On the issue of residence, Hale LJ held that when a court makes a s 8 order the paramount consideration should be the welfare of the child, and not a desire to punish the mother or provide a way of enforcing the contact order. Transfer of residence is sometimes appropriate and can work very well in securing contact, but the two little girls had not lived with the father for many years and a transfer of residence was not justified on welfare grounds.
Re K (Contact: Committal Order) [2002] EWCA Civ 1559; [2003] 1 FLR 277.

Duty on court to assess origins of apparent alienation and make findings
There was a long-standing history of litigation over contact, during which successive orders had been made for full staying contact. The child, now 11, in contrast to his previous approach to the father, began to show hostility towards him and towards contact. The judge attributed the child's alienation to the father's long-standing drug and alcohol problems and did not make any express findings concerning the mother's potential role in the development of alienation. The judge made an order for interim indirect contact.
On appeal, the Court of Appeal [Thorpe, Rix and Arden LJJ] set aside the order and directed the joint instruction of a child psychiatrist. The judge should have considered whether the mother and her family were, at least unwittingly, an agent of the child's malignity. The obligation to investigate the origins of alienation stems from our domestic law.
Re T (Contact: Alienation: Permission to Appeal) [2003] 1 FLR 531

Intractable contact dispute: use of care proceedings and change of residence
Two children aged 13 and 10 years had been the subject of long running contact proceedings. Contact stopped when, as the court found, the mother had falsely persuaded the children that the father and his parents had physically and sexually abused them. Contact was ordered but mother disobeyed the order. Further allegations of sexual abuse were found to be untrue and had been made as a result of the mother emotionally manipulating the children. Case transferred to the High Court.
Over a number of hearings Wall J:
- ordered a s 37 investigation
- care proceedings having been issued, removed the children from mother under an ICO
- subsequently made a residence order to father and a 2 year supervision order.
S 37 was justified in that the children were suffering significant harm because of the residential parent's false and distorted belief system about the other parent. 'The procedure is not a panacea and comes with strong health warnings.' The consequences must be fully thought through before embarking on this course.
Where there are serious factual allegations made, the court must adjudicate upon them and those findings should inform any LA assessment.
Children should be separately represented in private law proceedings where all contact has ceased and the issue of contact has become intractable.
Judicial continuity is essential.
Re M (Intractable Contact Dispute: Interim Care Order) [2003] EWHC 1024 (Fam); [2003] 2 FLR 636.

Use of psychological assessment to make progress in intractable case
The judge found that the mother was responsible for the failure of contact and had no intention of making it work, however refused an application for psychological assessment and ordered indirect contact. The Court of Appeal (President, Thorpe and Carnwath LJJ) allowed an appeal holding that the abandonment of all efforts at contact, where the child was aged 7 and father was genuinely motivated, was premature. A broad psychological assessment of the family (and not just the child) was a possible key to progress. The judge had been wrong to impose a CA 1989, s 91(14) order preventing future applications.

Re S (Contact: Promoting Relationship with Absent Parent) [2004] EWCA Civ 18; [2004] Fam Law 400.

Reforming law relating to contact

Need for reform: judge speaks out [1]

Munby J gave judgment in open court at the conclusion of a five year series of court hearings where "a wholly deserving" father had failed to establish contact with his 7 year old daughter. Munby J considered that there is much that is wrong with the family justice system and that it is time to recognise that fact. The judge criticised the all too frequent response of the courts facing a significant difficulty in contact, to list the matter for directions, reduce contact in the meantime and obtain expert reports. By the time the matter comes back to court it is often intractable. Where allegations are made, the court should grasp the nettle and get on and decide the factual issues without delay.
Re D (Intractable Contact Dispute: Publicity) [2004] EWHC 727 (Fam); [2004] 1 FLR 1226.

Need for reform: judge speaks out [2]

Bracewell J, when considering a case where a mother had consistently undermined contact, stated that there was a need for legislation to give the judiciary powers to enforce orders for contact. The judge suggested that courts should have power to refer the parties to mediation or a psychiatrist at any stage; to place a parent on probation with a condition of treatment; to impose a community service order and to award financial compensation (for example when a holiday is lost). In the case in point, Bracewell J held that the only way in which to allow the child to have a relationship with the father was to transfer residence to him.
V v V (Contact: Implacable Hostile) [2004] EWHC 1215 (Fam); [2004] 2 FLR 851.

Important for parents to accept responsibility for breakdown of contact

Wall J, giving a father permission to withdraw his contact application, stressed the importance of parents taking their share of responsibility for the state of affairs they had created. The father's attitude made it impossible to achieve any change and so the proceedings came to an end. It was not enough for parents to blame the system, they had to accept responsibility themselves.
Re O (Contact: Withdrawal of Application) [2003] EWHC 3031 (Fam); [2004] 1 FLR 1258.

Contact: oral hearing needed to ventilate issues

The Court of Appeal [Lord Woolf CJ and Wall LJ] criticised a judge who had refused to hear oral evidence from the parties and brought the proceedings to an end on the basis that the s 7 report of the social worker was so compelling that no order for contact would be possible. The social worker had concluded that the father had a predatory and obsessive nature and that he would pose a real risk to his daughters. The social worker's recommendations went beyond her area of expertise. The court should have commissioned a psychologist to report on the father.
Re U (Children) (Contact) [2004] EWCA Civ 71; [2004] 1 FCR 768

Court should not abandon attempt at contact until it was clearly without hope

The Court of Appeal [Butler-Sloss P, Thorpe and Carnwath LJJ] allowed a father's appeal from a recorder's refusal to allow a psychological assessment of the child and refusing direct contact with a s 91(14) order for a year.
A child and adolescent psychiatrist would be jointly instructed to assess the family and report on contact. It is important that the attempt to promote contact between parent and child should not be abandoned until it was clear that the child would not benefit from continuing the attempt.
The court was in error in imposing a s 91(14) order, there was no evidence that the case went beyond the common situation.
Re S (Contact: Promoting Relationship with Absent Parent) [2004] EWCA Civ 18; [2004] 1 FLR 1279.

Persistent refusal to permit contact: suitable for transfer to the High Court

The Court of Appeal (Thorpe LJ and Bennett J) held that where a father had had very little contact with his son for a period of seven years there should have been major judicial input in that period to attempt to rescue the relationship between father and child. In such a case the proceedings should have been transferred to the High Court. Further, a refusal by a mother to re-engage in family therapy could result in an adverse inference being drawn against her. It was appropriate for NYAS to be invited to intervene.
Re S (Unco-operative Mother) [2004] EWCA Civ 597; [2004] 2 FLR 710

President's initiative to set up conciliation in all county courts

In July 2004, The President announced a new Framework for Private Child Law and directed all county court family hearing centres to establish a procedure for a CAFCASS officer to work with a district judge at

the first s 8 appointment in order to attempt to resolve issues by conciliation. The hearing should take place between 4 to 6 weeks of an application being issued.
This has been followed in November 2004 with the promulgation of the President's Private Law Programme.
If conciliation is not successful the court will then draw up an order requesting a report from a (different) CAFCASS officer directed to the specific matter that is in issue. The order will give detailed case management directions.
There should be judicial continuity and continuity of CAFCASS officers whenever possible.
Access to the allocated judge for an urgent hearing to review and where necessary enforce private law orders within 10 days of a request for such a hearing from the CAFCASS officer.

New Conciliation Direction for PRFD
The compulsory referral scheme at the PRFD, which has been in place for some years, has now been extended to all s 8 and s 13 orders. Children of 9 years and above must attend – note that this does not seem to be a feature of the nationwide county court framework.
District Judge's Direction: Children: Conciliation [2004] 1 FLR 974.

Family Resolutions Pilot Project
The DFES is coordinating a Family Resolutions Pilot Project which will run in Brighton County Court, Sunderland County Court and the Inner London Family Proceedings Court.
At first directions hearing the judge will decide if the case is suitable for reference to the project (domestic violence cases or solely residence issues will be excluded).
If referred to the Project parents attend (separate) group meetings with other parents. At the first they will see a video in which children talk of their experience following parental separation, followed by discussion. In the second session the focus will be on managing family conflict after separation. Thereafter the couple attend together to work on establishing a flexible set of arrangements for the children.
The project will be evaluated and government will decide in the spring of 2006 whether or not to roll the project out nationally.

Green Paper: "Parental Separation: Children's Needs and Parents' Responsibilities"
In July 2004 the Government issued a Green Paper in response to 'Making Contact Work'. The key proposals are:
- information sharing between courts (ref domestic violence)
- implement Adoption and Children Act 2002 changes to definition of 'harm' in January 2005
- revise the Parenting Plan material to include templates for contact arrangements and reissue with wide promotion in April 2005
- redistribute legal aid in order to focus on early resolution
- pressure from the courts for couples to agree to use mediation
- in court conciliation scheme
- revamp Family Assistance Order
- encouraging the court to use its powers to attach conditions to contact orders and to enforce those conditions
- support for Contact Centres
- referral of a defaulter to a variety of resources
- requiring attendance at a course or programme
- imposition of community based orders (eg Community Service)
- awarding financial compensation from one parent to another.

Consultation closed on 1 November 2004.
Copies available on DCA website and the DfES website.

Contact: ECHR Cases

Three Strasbourg decisions on contact

First Instance (The Chamber) Decision:
In three cases against Germany decided on the same date the ECtHR considered the approach of the German courts to contact applications by unmarried fathers. The German law at the time made a distinction between the rights of fathers who were married to the child's mother and those who were not. The ECtHR held that the law amounted to discrimination in breach of Art 14.

Under Art 8 the ECtHR held that consideration of what lies in the best interest of the child is of crucial

importance in every case of this kind. A fair balance has to be struck between the interests of each parent and those of the child and that in doing so particular importance must be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent. In particular, a parent cannot be entitled to have such measures taken as would harm the child's health and development.

At no stage in the process in one of the cases had the 5 yr old child been heard in court. The expert had not asked the child about her father for fear that the child might gain the impression that her replies were decisive. The ECtHR held that this revealed an insufficient involvement of the applicant in the process. It is essential that the court has direct contact with the child. The regional court should not have been satisfied with the expert's view. Correct and complete information on the child's relationship to the applicant as the parent seeking access is an indispensable prerequisite for establishing the child's true wishes and thereby striking a fair balance between the interests at stake.

In the second case, a failure to order a psychological report on the possibilities of establishing contact revealed that the father had not been sufficiently involved in the process.
Sahin v Germany; Sommerfield v Germany; Hoffmann v Germany [2002] 1 FLR 119 [1st Instance]

Grand Chamber Decision (ref Sahin and Sommerfield):
The Grand Chamber considered two of the cases and rowed back from the Chamber's decision in some respects:
(a) it is going too far to say that domestic courts should always hear evidence from a child in court on the issue of access or that a psychological expert should be involved. The German courts had proceeded reasonably in both cases and the procedural requirements in Art 8 had been met;
(b) the distinction in treatment before the courts with respect to unmarried, as opposed to divorced, fathers was unjustified and there had been discrimination under Art 14;
Sahin v Germany; Sommerfield v Germany [2003] 2 FLR 671

No violation of Art 8 where reduction in contact is justified in child's interests
Where it had been held that extensive contact to the father exposed a young child to a conflict of loyalty between the parents with which the child could not cope, the German court had limited the father's contact and held that the father had failed to show concern for the child's psychological welfare by refusing to accept the restriction.
The ECtHR held that the decision clearly engaged Art 8, but that the actions of the domestic courts were based on reasons that were relevant and sufficient to meet Art 8(2).
The ECtHR stated:
'Undoubtedly, consideration of what lies in the best interests of the child is of crucial importance in every case of this kind. … A fair balance must be struck between the interests of the child and those of the parent and that, in striking such a balance, particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent.'
Hoppe v Germany [2003] 1 FLR 384.

Need for adequate enforcement of private law orders
Austrian wife took her 1 yr old daughter from USA to Austria without consent. The father obtained an order for summary return under the Hague Convention. An enforcement order was made and executed by bailiffs and police, but they could not locate the child. The mother appealed 8 months after the return order. Enforcement order was set aside and the return order was referred for further consideration in the light of the passage of time. The courts then went on to find that the situation had changed, the child's welfare was paramount and removal from the mother would expose the child to serious psychological harm. The husband complained to the ECHR:

Held that there had been a violation of Art 8: one of the positive obligations on public authorities under Art 8 is to take measures to enforce a parent's right to be reunited with his child. The obligation is not absolute and the interests and freedoms of all parties had to be taken into account.

Necessary steps to achieve enforcement should be taken quickly after an order is made: this is particularly so in Hague Convention proceedings. A change in circumstances might exceptionally justify not enforcing a return order, but the court would have to be satisfied that this change and not brought about by the State's failure to take all reasonable measures. In this case the Austrian authorities have failed to take adequate measures promptly.
Sylvester v Austria [2003] 2 FLR 210.

Duty on state to enforce contact orders

After lengthy proceedings, the Turkish authorities failed to take any measure to enforce contact to a mother. They failed to seek assistance from social services, psychologists or psychiatrists. No steps had been take to locate the children. Realistic coercive measures against the father should have been taken. Although measures against children obliging them to reunite with a parent were not desirable, such action could not be ruled out in the event of non-compliance by the other parent.
Hansen v Turkey [2004] 1 FLR 142.

Removal from the jurisdiction

Importance of risk of thwarting primary carer's plans when determining leave to remove

Johnson J granted an application for a mother to remove her two children to the USA, despite evidence from three professional witnesses to the effect that the eldest child, who had moderate learning disability, would be disadvantaged by the move. The judge held that insufficient weight had been attached by the professionals to the disadvantage to the whole family if the move did not go ahead. These were sensible plans, not motivated by a desire to reduce contact, the arrangements were at least adequate and the mother was exceptionally committed to the children's care.
L v L (Leave to Remove Children from Jurisdiction: Effect on Children) [2003] 1 900.

No presumption that a reasonable proposal to move abroad will be granted

Charles J granted an application by a Singaporean mother to take the two children to live in Singapore. Following Payne v Payne [2001] 1 FLR 1052, there is no presumption that once a proposal to move abroad is shown to be reasonable it will be granted. That is the first hurdle. Thereafter there must be a welfare evaluation, in which the effect of refusal on the mother's care of the children (if detrimental) would be likely to outweigh other factors. Usually the harm that would flow from a reduction of contact to the other parent will not outweigh factors in favour of a move.
Re C (Permission to Remove from Jurisdiction) [2003] EWHC 596 (Fam); [2003] 1 FLR 1006

Application to move after remarriage in order to be with new husband/stepfather

Mother in Re B divorced and then married a successful and affluent S African business man, despite trying to do so, he could not run his business interests from the UK and she applied to move to S Africa with the two children. Her application was refused.
In Re S the mother divorced and now intended to marry a successful citizen of the Philippines who worked in W Australia. Her application was also refused.
The Court of Appeal [Thorpe, Judge and Sedley LJJ] allowed both appeals and granted orders for leave to remove from the jurisdiction.
The impact of a refusal had to be carefully assessed, this was particularly so when the new relationship was with a foreign national. The welfare of children is best served by being brought up in a happy, secure family atmosphere. Where the stepfather is a foreign national, the court risks jeopardising such a family unit if leave to remove is refused. Sedley LJ: the policy of CA 1989 has placed more emphasis on the importance to children's welfare of a stable and viable family unit in which to grow up.
Re B (Removal From Jurisdiction), Re; S (Removal From Jurisdiction) [2003] EWCA Civ 1149; [2003] 2 FLR 1043.

Care genuinely shared between parents: leave to remove from jurisdiction refused

In a case where the child lived with each parent on an almost equal basis, the mother's application to remove the child to the USA (her home country) failed. Hedley J held that the case fell outside the usual authorities on this area of law. The course least detrimental to the child was to continue the status quo. [Note: if this is right, what is to be the approach to case of a shared residence order giving equal status to each parent, but where the time is nevertheless on a more conventional split of, say 30/70%?]
Re Y (Leave to Remove from Jurisdiction) [2004] 2 FLR 330.

Specific Issue Orders

Carer without PR should not change names

Foster carers decided to use middle names for three children in their care and in respect of two of whom they eventually adopted. Held: following adoption they were entitled to change names but in respect of other child they should not do so but after two years of so doing would not now be required to change the name back. Change of name is an important matter and should be treated with appropriate seriousness. The limit of the power of a foster carer should be made clear to them. If a foster carer wishes to change a name they should consult the local authority and the parents views should be sought. If necessary an application should be made to court (under the inherent jurisdiction).

Re D, L and LA (Care: Change of forename) [2003] 1 FLR 339

MMR decision

Sumner J heard two separate applications from fathers to determine whether their children should have MMR vaccinations. Having heard extensive medical evidence, the judge decided that the medical argument was in favour of the MMR being administered. Despite the firm opposition of both of the mothers, Sumner J held that it was in the best interests of the children to have the vaccinations and he therefore made orders directing that they should be carried out.

Re C (Welfare of Child: Immunisation) [2003] EWHC 1376 (Fam); [2003] 2 FLR 1054.

[Note: The Court of Appeal dismissed the mothers' appeal on 30th July 2003: [2003] EWCA Civ 1148; [2003] 2 FLR 1095]

Circumcision and religious upbringing

In a soon to be reported decision of Baron J, the court considered a dispute between a Jain Hindu father and a Muslim mother over the question of whether or not their 8 year old son should be circumcised and whether both children should be brought up in the Muslim religion.

On the facts, the court decided that the mother's applications for circumcision and for a Muslim upbringing should be rejected.

Re S (Specific Issue Order: Religion: Circumcision) [2004] EWHC 1282 (Fam); [2004] Fam Law 773.

Paternity and PR

Unmarried father will have PR if named in birth certificate after 1st December 2003

As a result of amendments to CA 1989, s 4 an unmarried father whose name is included in a child's birth certificate after 1st December 2003 will automatically acquire PR for the child. His PR may be revoked by an order of the court under CA 1989, s 4(2A).

Adoption and Children Act 2002 Commencement Order SI 2003/3079

Embryo: partner not biologically related to embryo only 'father' if implantation in 'course of treatment' to them couple together

An unmarried couple attended for IVF treatment whereby the sperm of an anonymous donor was mixed with the woman's eggs. The man signed a form acknowledging that he would be treated in law as the father of any resulting child. The implantation of three of the embryos was unsuccessful. The remaining embryos were stored by the clinic. Some months later the woman requested the implantation of a further three of the embryos. By this time she had parted company from her partner. He did not know she was attending the clinic and she did not tell the clinic that they had separated. Following the birth of a child, the man, who had no biological connection with the child, claimed he was the 'father'.

HFEA 1990, s 28(3) provides that such a man is to be regarded as the father if the embryos had been placed in the mother 'in the course of treatment services provided for her and the man together.' At first instance Hedley J held that this was indeed the case and made a declaration of paternity in the man's favour.

On appeal the Court of Appeal [Sir Andrew Morritt VC, Hale and Dyson LJJ] allowed the mother's appeal and set aside the paternity order overturning the 1st instance decision reported as B and D v R (by her guardian) [2002] 2 FLR 843 (Hedley J). The key time when the factual question of whether the man and woman are in receipt of treatment together is the date of implantation of the embryos. This man could not be said to have been receiving treatment at that time. While it is clearly in a child's interest to have a legal father if possible, the 1990 Act expressly provides for situations were that is not the case.

Re R (IVF: Paternity of Child) [2003] EWCA Civ 182; [2003] 1 FLR 1183.

NOTE: The House of Lords has given permission to appeal this case. Hearing in early 2005

Effect of mistake during embryo treatment on position of 'father'

In a much publicised case two couples attended a hospital for sperm injection treatment to mix the husband's sperm with the wife's egg in each case. By mistake the sperm of Mr B was mixed with the egg of Mrs A. Mrs A in due course gave birth to twins. All parties agreed that the children should remain in the A family and a residence order was made. There was then a hearing to establish paternity.

Dame Elizabeth Butler-Sloss P held that the common law presumption of legitimacy during marriage was displaced by DNA that showed Mr B as the biological father. Mr A was not to be treated as the father of the child under HFEA 1990, s 28(2) because he had not consented to the actual treatment that had been provided to his wife (ie using sperm from another man).He could not retrospectively consent. The hospital's mistake was fundamental and went to the root of the consents that had been given. The embryo had been created without the consent of either mother or her husband. HFEA 1990, s 28(3) (a couple being treated together) was not intended to apply to husbands and in any event, due to the mistake, did not apply here.

Leeds Teaching Hospitals NHS Trust v A [2003] EWHC 259 (QB); [2003] 1 FLR 1091.

Representation of Children in Private Law Proceedings

New Practice Direction concerning representation of children
On 5th April 2004 The President issued a Practice Direction concerning the representation of children in non-section 41 specified proceedings. The following are key points:
- making the child a party should only be undertaken in the minority of cases where there is an issue of significant difficulty;
- before joining the child, other routes should be considered (eg CAFCASS officer to do further work, referral to social services or instructing an expert);
- the list of factors set out in the Direction should be considered before the court exercises its discretion to join the child. The factors are only offered as guidance as circumstances which may justify the making of an order:
§ CAFCASS officer has notified the court that in his opinion the child should be made a party;
§ where the child has a standpoint or interests which are inconsistent with or incapable of being represented by any of the adult parties;
§ where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute;
§ where the views and wishes of the child cannot be adequately met by a report to the court;
§ where an older child is opposing a proposed course of action;
§ where there are complex medical or mental health issues to be determined or there are other unusually complex issues that necessitate separate representation of the child;
§ where there are international complications outside child abduction, in particular where it may be necessary for there to be discussions with overseas authorities or a foreign court;
§ where there are serious allegations of physical, sexual or other abuse in relation to the child or there are allegations of domestic violence not capable of being resolved with the help of a CAFCASS officer;
§ where the proceedings concern more than one child and the welfare of the children is in conflict or one child is in a particularly disadvantaged position;
§ where there is a contested issue about blood testing.

- joining the child may result in delay;
- when a child is joined and a guardian ad litem is to be appointed, consideration should be given to appointing a CAFCASS officer to that role before any other avenue is considered;
- at the same time as considering the joinder of a child, the county court may consider that the case should be transferred to the High Court.
The Practice Direction is accompanied by a new Practice Note from CAFCASS, which replaces the earlier Note dated March 2001.
Practice Direction (Family Proceedings: Representation of Children) [2004] 1 FLR 1188+1190

CAFCASS Legal: new address
The new address for CAFCASS Legal is:
8th Floor
Wyndham House
189 Marsh Wall
London
E14 9SH
Phone: 0207 510 7000

Best practice: approach CAFCASS Legal before appointing any other guardian ad litem
The Court of Appeal held [The President, Ward and Keene LJJ – in November 2001] that a county court had been wrong to appoint a local solicitor to represent at 7 year old child in contact proceedings with the welfare input being provided by an independent social worker instructed by the solicitor.
The proper course in such cases is for a Child + Family Reporter's report to be requested. Only if that report was inadequate would the question of separate representation arise. If separate representation was sought, then CAFCASS Legal should be invited to represent the child (as a Rule 9 guardian ad litem). If CAFCASS declined the invitation, 'a local guardian and local solicitor' could be approached.
Re W (Contact: Joining Child as Party) [2001] EWCA Civ 1830; [2003] 1 FLR 681.

Separate representation justified where contact issue is difficult
Wall J observed that in a difficult contact case consideration should be given to the child being separately represented and, where appropriate, expert evidence being sought on their behalf. In such cases children

frequently have particular interests and standpoints which do not coincide with or can be adequately represented by the parents.
Re H (Contact Order) (No 2) [2002] 1 FLR 22

Test for child acting without a guardian ad litem: 'sufficient understanding to participate'
In long running contact proceedings, the three children were represented by a solicitor appointed as guardian ad litem under FPR 1991, r 9(2)A. The oldest child, aged 11¼ yrs, sought to discharge the GAL in order to oppose the judge's plan for the reintroduction of contact and in order to apply to lift a prohibition on therapy at a particular unit that the trial judge had imposed. The issue was determined by a different judge, Coleridge J, who held that the test in relation to discharging the present guardian, and the test for leave to defend the proceedings under CA 1989, s 10(8) were effectively the same, namely 'sufficient understanding to participate as a party/make the proposed application'.
The essential question was not whether the child was capable of articulating instructions but whether the child was of sufficient understanding to participate as a party, in the sense of being able top cope with all the ramifications of the proceedings and giving considered instructions of sufficient objectivity.
The court should have regard to:
- the nature of the proceedings
- length of time the proceedings had already been before the court [2 years]
- likely future conduct of the proceedings
- likely applications and future applications that would need to be made.
This child lacked sufficient understanding and to give instructions that were fully considered as to their implications. He would undoubtedly become totally embroiled in the detail of the dispute and it was inconceivable that at his age he could appreciate the totality of the complex issues.
Re N (Contact: Minor Seeking Leave to Defend and Removal of Guardian) [2003] 1 FLR 652.

General

Length of s 91(14) ban should be compatible with aim of reunification
In a difficult contact case, where the father had not abused the family justice system, the judge had been wrong to make a s 91(14) order that would run for the remainder of a 9 year old child's minority. The Court of Appeal (Thorpe and Scott Baker LJJ) held that the length of the ban should be compatible with the primary objective of the court to restore the relationship between father and child.
Re B (Section 91(14) Order: Duration) [2003] EWCA Civ 1966; [2004] 1 FLR 871.

Fundamental that any expert report commissioned in CA 1989 case must be disclosed
It is absolutely fundamental in CA 1989 proceedings that any expert report commissioned must be made available in the litigation even if it is contrary to the interests of the party who commissioned it. It must be disclosed to the other side, the court and any other expert.
Re A (Change of Name) [2003] EWCA Civ 56; [2003] 2 FLR 1.

Strong presumption in favour of allowing a McKenzie Friend
The Court of Appeal [Thorpe and Keene LJJ] allowed a father's appeal from a judge's refusal to allow him to have Dr P as a McKenzie Friend at a contested contact hearing. Thorpe LJ stressed that the presumption in favour of granting a McKenzie friend was a strong one. Thorpe LJ took the opportunity to record that he had never himself seen Dr P act other than in an entirely helpful way both to the person being assisted and to the court.
Re H (McKenzie Friend: Pre-trial Determination) [2001] EWCA Civ 1444; [2002] 1 FLR 39

Contempt proceedings for publicising confidential information about case
A father placed details of his contact proceedings on the Families Need Fathers website. There was no application to commit, but the judge found the father to be in contempt and sentenced him to 14 days suspended for 6 months and made a PSO prohibiting further publicity. The father appealed.
The Court of Appeal [Butler-Sloss P, Mummery and May LJJ] allowed the appeal setting aside all the orders and findings. A county court has jurisdiction to commit for contempt in the face of the court or disobedience of a court order, any other contempt in connection with proceedings in the county court is punishable only by an order for committal made in the QBD. Practice Direction (Family Proceedings: Committal) [2001] 1 WLR 1253 para 1.1 is therefore incorrect.
Committal on the court's own initiative is an exceptional course and should normally be adjudicated upon after time for due reflection.
The procedure of hearing the matter where the father was not represented, not permitted an adjournment to get representation, cross examined without being warned that he was not obliged to give evidence was

seriously flawed and should be set aside. The hearing was wrongly held in private.
Re G (Contempt: Committal) [2003] EWCA Civ 489; [2003] 2 FLR 58.

General practice: no order for costs in child case in absence of unreasonable behaviour
Despite a mother acting unreasonably in failing to disclose existence of proceedings in Portugal, her actions had not added significantly to the costs and the general practice of not making an order for costs should be followed.
C v FC (Children Proceedings: Costs) [2004] 1 FLR 362

Approach to jointly instructed experts
Regard should be had to new guidance on the approach to a jointly instructed expert in ancillary relief proceedings. It is suggested that the same approach should apply to children cases.
Of particular note, the best practice requires:
'Any meeting or conference attended by the JE should normally be with both parties and/or their advisers. Unless both parties have agreed in writing, the JE should not attend any meeting or conference which is not a joint one.
Best Practice Guide for Instructing a Single Joint Expert [2003] 1 FLR 573.

President's Direction: HIV testing of children
Previous guidance @ [1994] 2 FLR 116 has been revised and updated where there is a need to test a child for the presence of HIV. The need to make an application will be rare. An application should be made, or transferred to, a county court. The High Court should only be involved if there are pending proceedings there or there is a need to use the inherent jurisdiction.
Where a child of sufficient understanding opposes the application, reference to the court is necessary. If there are no pending proceedings, then application should be made to the High Court under the inherent jurisdiction. Notice should be given to CAFCASS Legal (as it should if the application is urgent and the parents lack legal representation).
President's Direction: HIV testing of children [2003] 1 FLR 1299.

Choice of jurisdiction: stay of proceedings
Faced with a choice between proceedings pending in England and in Virginia, Bracewell J held that the choice is not a question to which CA 1989, s 1 (welfare paramount) applies. In cases involving children, the child's habitual residence is a very important factor but is not conclusive. Where the foreign court has a great deal of information about the family and has recently exercised its jurisdiction, this is a factor that goes into the balance in favour of the foreign jurisdiction.
Re D (Stay of Children Act Proceedings) [2003] EWHC 565 (Fam); [2003] 2 FLR 1159.

Brussels II: enforcing contact order
Where Brussels II applied, its effect did not cease on the divorce being made final but extended to all orders made in the course of the matrimonial proceedings. An order giving leave to remove from the jurisdiction was likely to be classified as a final judgment in on-going proceedings under Brussels II sufficient to terminate the umbrella of Brussels II.
Re G (Foreign Contact Order: Enforcement) [2003] EWCA Civ 1607; [2004] 1 FLR 378

Brussels II: extent of power to vary foreign order
Under Art 21 of Brussels II, there is an overriding duty to enforce a foreign order. Art 24 provides that there should be no review as to its substance, but Holman J held that there was some discretion to phase the order in over a period. The target was to achieve the operation of the foreign order as soon as that could effectively be done.
Re S (Brussels II: Recognition: Best Interests of Child) (No 2) [2004] EWHC 2974 (Fam); [2004] 1 FLR 582.

Brussels II: after final order jurisdiction can pass to another state
Once a final order has been made in the state that has jurisdiction under Brussels II, jurisdiction with respect to the child may pass to another member state.
Re A (Foreign Contact Order: Jurisdiction) [2003] EWHC 2911 (Fam); [2004] 1 FLR 641.

Practice Guide on Brussels II bis Regulation
In November 2003 Council Regulation 2201/2003 "Jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility" was adopted. It came into force on 1 August, and applies as of 1 March 2005. (NB This regulation repeals Reg 1347/2000 ["Brussels II"]). A practice guide has been developed by the Commission and was issued in mid-November.

It can be found under “what’s new” on the European Judicial Network website:
http://europa.eu.int/comm/justice_home/ejn/index_en.htm

Choice of jurisdiction: Scotland or England+Wales
Scottish father and Somalian mother (who had indefinite leave to remain in UK) lived in Scotland with their child. In September 2000 mother separated and came with child to England. County court made a residence order in favour of mother in November 2000 – common ground that there was no jurisdiction for English court to do so in first 12 months after departure from Scotland where child had been habitually resident [FLA 1986, s41].
After the 12 month period, the father sought orders in the Scottish court and sought a direction that the English court did not have jurisdiction. His applications were refused and he appealed.
The Court of Appeal [Arden and Wall LJJ] held that the November 2000, whilst without jurisdiction, remained in force until discharged. Thereafter the English court had jurisdiction post the 12 month period.
Re B (A Child: Court’s Jurisdiction) [2004] EWCA Civ 681; [2004] 2 FLR 741

Communication with the Home Office
Where a request is made of, or an order is made against the Home Office, the court should immediately draw up the order and immediately provide a copy to the President’s Chambers accompanied by a letter setting out relevant details. The Family Division Lawyer will then communicate directly with the Home Office to ensure that the information required is supplied in time.
Protocol: Communicating with the Home Office [2004] 1 FLR 638.

Communicating with the Passport Service
Where a request is made of, or an order against, the UK Passport Service, a copy should be provided to the President’s Chambers accompanied by a letter setting out the relevant details. The Family Division Lawyer will then send the make direct contact with the Passport Service and attempt to ensure the timetable of the court is complied with.
Protocol: Communicating with the Passport Service [2004] 1 FLR 640.

Obtaining a passport when parent refuses to sign application
Where a court has decided that it is in the best interests of a child that he be issued with a passport, but the adult(s) with parental responsibility refuse to sign the passport application, then a form filled in in accordance with this guidance, supported by a court order providing for the issue of a passport, will be accepted by the UK Passport Service.
Guidance from President’s Office (UK Passport Application) [2004] 1 FLR 746.

Disclosure of Information

Balance required when considering disclosure of documents
Appellant convicted of 5 counts of rape and 6 of indecent assault on wife’s cousin (aged 8) and family friend with severe learning difficulties. Application for contact refused. Application for permission to use documents (including welfare report, psychologist report on children and psychiatric report on Appellant) for proposed civil proceedings, leave to appeal his conviction and for a further psychiatric report as to his own state in relation to his own treatment in prison. Judge refused application without judgment. Court of Appeal [Hale and Latham LJJ] allowed appeal matter sent back to county court to consider which documents should be disclosed.
The factors that the court must consider on an application for disclosure are: the interests of the children concerned; the interests of the good conduct of children cases generally in preserving confidence in those who give evidence or information to or for the purposes of those proceedings; the interests of the administration of justice and the interests of children generally (for example that perpetrators of abuse are brought to justice). Here there was an appearance of unfairness and the matter should be remitted for consideration.
Re R (children: disclosure) [2003] EWCA Civ 19; [2003] 1 FCR 193

Bar on ‘publication’ of information
The Court of Appeal [Butler-Sloss P, Thorpe and Rix LJJ] allowed an appeal against a widely drawn order prohibiting a father from disclosing any papers filed in the proceedings to either of two named, or any other, expert in parental alienation syndrome or to FNF or a similar organisation. The Court of Appeal preferred a less widely drawn order and, following Re G [2003] 2 FCR 231, limited the prohibition to any document held by the court, any note of judgment and any order made.
Thorpe LJ also questioned whether a litigant in person would need the leave of the court before taking his case to FNF, who in other cases have provided a great deal of helpful advice. The same applies to a

McKenzie Friend.
FPR 1991, r 4.23 has shortcomings and needs to be revisited.
Re G (Litigants in Person) [2003] EWCA Civ 1055; [2003] 2 FLR 963.

Hearings or judgment in public: Approach to be adopted
Bennett J refused the applications of a father for his residence hearing to take place in open court with a public pronouncement of judgment. The father also sought a declaration of incompatibility under HRA 1998 ref CA 1989, s 97(2) and an order in judicial review to quash FPR 1991 in so far as they prevent disclosure or inspection of documents. It was held that s 97(2) is not absolute, and may be relaxed at the court's discretion. The statutory scheme was not incompatible with the ECHR.
On appeal [Thorpe, Sedley and Arden LJJ] permission to appeal was granted but the father's appeal was dismissed.
(1) the father had been to the ECHR and lost on the question of open justice and Art 6;
(2) it remains justifiable, within Art 6, in order to protect the privacy of the parties and avoid prejudicing the interests of justice, to hold s 8 hearings in private and to limit the extent to which judgments are made available to the public;
(3) there should not be a blanket approach. Where the issue is raised, the court must determine the question of private hearing/judgment on a case by case basis and give specific reasons for any decision on the issue;
(4) greater justification is required to justify a refusal to pronounce judgment in public given the almost universal practice of anonymising judgments in children cases;
(5) at Court of Appeal level, again there should be no automatic bar on reporting. Each case should be considered on its merits.
Pelling v Bruce-Williams (Sec of State for DCA intervening) [2004] EWCA Civ 845; [2004] 2 FLR 823
[P v BW (Children Cases: Hearings in Public) [2003] EWHC 1541 (Fam); [2004] 2 FLR 171]

Should the court disclose information of adult inter-sibling incest to police and LA?
In private law contact proceedings Hedley J found that the father was engaged in 'a sexually active' relationship with his half sister. Such a relationship is a criminal offence. The guardian ad litem [presumably FPR 1991, r 9.2A] sought leave to disclose this information to the police and social services. Hedley J held that the effect of FPR 1991, rr 4.11+4.23 was that the guardian was not entitled to disclose the information without the leave of the court. In determining the issue, the court should give weight to the need to encourage frankness in private law proceedings. Other factors are the gravity of the offence, any risk to children and issues of public policy. Regard is also had to the child's welfare and to the guidelines in Re C (Care Proceedings: Disclosure) [1997] Fam 76 (sub nom Re EC [1996] 2 FLR 725). Leave to disclose to the police was refused (interest in encouraging candour outweighed interest in prosecution) leave to disclose to local authorities was granted.
Re D and M (Disclosure: Private Law) [2003] 1 FLR 647.
[Note: Re C/Re EC has recently been affirmed with respect to care proceedings in the detailed judgment of Wall J in Re AB (Care Proceedings: Disclosure of Medical Evidence to Police) [2003] 1 FLR 579]

Strong presumption for disclosing material from family court to assist criminal defence
Father charged with murder and wounding after driving car at mother's relatives and neighbour. Father's relatives applied for private law orders relating to the children. His relatives told the father that the mother's witness statement in s 8 case was materially different from her police statement. Father applied for access to the statement for use in his criminal defence.
Munby J allowed the application. It would be an exceptional case where the family court could deny a defendant facing such a serious charge access to material that might [and that's the test] assist his defence. It was in the interests of the children that there was no miscarriage of justice and that the truth became known. There is no necessity for applications of this sort to be heard in the High Court.
Re Z (Children) (Disclosure: Criminal Proceedings) [2003] 1 FLR 1194.

Andrew McFarlane QC
One Kings Bench Walk

8th December 2004