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Albion Chambers FAMILY TEAM NEWSLETTER

Whose cross-examination is it anyway?

Imagine this scenario, which could arise in any one of our local County Courts. You are representing the mother in a private law dispute in which the father is seeking contact with their nine year old daughter. As can routinely happen, the proceedings have become drawn-out and there comes a point where the father is no longer able to continue funding the litigation. His earnings disqualify him from receiving public funding. He therefore resorts to acting in person.

The mother opposes contact for a number of reasons, one of which is that she contends her other daughter from a previous relationship (now aged 20) was abused by this father when she was aged nine while they were living together as a family. The father vehemently denies these allegations. The issues are of the utmost importance in the case and there comes a point where 'findings of fact' have to be considered during a contested hearing. Are there any procedural issues that you should be raising during the run up to that hearing?

The answer, according to Wood J. in the recent High Court case of *Re H [2006]* EWHC 3099 (Fam), is 'yes'. When the same set of facts arose before him he proceeded to deliver a judgment bringing the spotlight to bear on the anomalies that exist between the criminal and the family courts for the protection of complainants giving evidence about acts amounting to sexual offences (including indecent assaults).

Public and media 'outrage' followed the case of *R v Milton Brown* [1998] EWCA Crim 1486, in which a rapist, representing himself in the criminal court, was permitted to put his victim through the agony of a lengthy cross-examination. This resulted in Parliament acting urgently to regulate the practice and procedure in criminal courts where a defendant in person has to cross-examine, or may choose to cross-examine, an adult complainant in certain categories of case involving allegations of a sexual offence. Sections 34-36 of the Youth Justice and Criminal Evidence Act 1999 intervened to preclude a defendant charged with most types of sexual offence from cross-examining the complainant while acting in person.

However, upon taking this step Parliament was, even in those pre-Convention days, mindful of the need to uphold the rights of a defendant to have any witness cross-examined. It therefore provided, in section 38 of the same Act, for the court to alert the unrepresented defendant at an early stage to the fact that he is precluded from cross-examining the complainant by himself, and invite him to arrange for a legal representative to conduct that cross-examination. It further provided (at s.38(3)) that if the accused does not arrange, within a specified period, for such representation, then the court can determine whether it is necessary for an advocate chosen by the court to be appointed to conduct the cross-examination. With Legal Aid being routinely available in the arena of the criminal courts, particularly for the most serious offences, the public purse bears the cost of this appointment without any queries being raised.

The types of allegations that are often encountered in family proceedings are ones which would routinely trigger these measures if they were being heard by the criminal courts. However, family practitioners considering these well-developed procedures for avoiding direct witness box confrontations between accused and complainant in criminal proceedings will immediately recognise the paucity of such safeguards in family cases.

There is no obvious reason why complainants in family proceedings should have lesser safeguards where the proce-

Editorial

Each of the three principal articles in this edition was inspired by a case undertaken by its author, demonstrating the wide range of subject matter included under the umbrella of "Family Work" at Albion Chambers – and highlighting the dynamic and developing environment we and our readers operate within.

The ways in which we deliver our services have also always been subject to change and development – although with less controversy nowadays than twenty–five years ago, when barristers were not even allowed to go to solicitors' premises for conferences! The Albion Chambers Family Team provide advice and advocacy at all levels of Court in any area of law touching or concerning family life, and can call on our criminal and civil teams for clarification of the effects of other life events on our clients' affairs: as well as providing advice in writing or conference, settling proceedings and drafting, we also provide mediation services, host round table meetings and professionals meetings, offer collaborative advice, deliver training and education at different levels – and any other service the client requests. We are able to assist before disputes have arisen and at all stages of the litigation process and the implementation of decisions – recent developments include prenuptial agreements and planning for the effects of civil partnerships.

Our service standards are available on our website and our clerks are available to discuss how best we can meet your needs, including the provision of fee estimates and the development of relationships between our team and instructing solicitors' teams. Please take us up on our promise to meet your needs and don't hesitate to phone Michael or Julie.

Tacey Cronin, Editor

dure that they face in the hearing is very much the same. Although Wood J. was faced with the prospect of the cross-examination of a complainant who was not a party to the proceedings, it is more often the case that the allegations will come from one of the parties, usually the wife / mother. In such circumstances the complainant, unlike a complainant in criminal proceedings, will therefore usually have been involved in all of the preliminary hearings leading up to the final hearing, she will have had to read through the accused's evidence, denials and counter-allegations, and she will perhaps have had the pressure of some ongoing involvement with the accused if, for example, the child is still participating in some sort of contact. The potential for the complainant to be daunted by the prospect of a face-to-face cross-examination by the time the allegations are heard at a final hearing in the family court is therefore, arguably, even greater.

A high burden of proof still remains where allegations of a sexual nature are made against a family member within family proceedings *(Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] 1 FLR 80). If the complainant wishes to rely on serious allegations of this type as part of her case it will rarely be possible to prove them without evidence being given from the witness box. In Re D (sexual abuse) [2002] 1 FLR 723 Dame Elizabeth Butler-Sloss P., while considering the issue of protecting children from having to give evidence, said:

'It is not the practice to protect adults. Some adults may need protection and therefore, exceptionally, there may be an adult who does not give evidence but whose statement may be acceptable to the court. That will be a rare occurrence. Normally the court will expect adults to give evidence and at least to give a statement.'

The right to have evidence tested and to cross-examine complainants enshrined in Article 6 of the European Convention on Human Rights has become an intrinsic part of the family court trial process. A 'fair' hearing on serious issues cannot therefore be conducted in the family court unless a complainant undergoes cross-examination.

Wood J., upon encountering this state of affairs in the proceedings before him, seems to have immediately recognised that the cross-examination exercise that would be conducted before him by an unrepresented person was one which Parliament itself had actively discouraged within the criminal courts. His judgment identifies the cul-de-sac in which most family practitioners will currently end up in when trying to avert such a scenario. All potential sources of assistance appear to have been considered:

a) CAFCASS Legal was approached with a request to provide an advocate to conduct a cross-examination. CAFCASS legal declined stating that such a service was not within its statutory remit under s.12 of the Criminal Justice and Court Services Act 2000, or as defined under *'CAFCASS Practice Note'* [2001] 2 FLR 151. CAFCASS Legal suggested that the cross-examination should be undertaken by the advocate for the child (there being a 9.5 Guardian involved in the case).

b) The 9.5 Guardian appointed on behalf of the child regarded it as wholly inappropriate that the burden of cross-examination on such significant issues should be undertaken through the child's advocate. The cases in which a Guardian would feel it appropriate to adopt such a role seem likely to be very limited. Furthermore, the involvement of a 9.5 Guardian is not a routine occurrence in private law cases, so even being able to ask for their advocate's assistance is something of a luxury.

c) The Official Solicitor was approached but also declined to provide an advocate on the basis that providing representation for such 'one off' involvement was not within his remit *(Official Solicitor: Appointment in Family Proceedings* [2001] 2 FLR 155.)

d) The Free Representation Unit of the Bar was approached to determine whether an advocate could be provided. It became apparent that there was unlikely to be an advocate available with the experience to conduct a cross-examination on such delicate issues. (The availability of such an advocate on a *pro bono* basis within the Western Circuit must be equally more unlikely).

e) The Attorney-General, when approached, highlighted that the terms of *Attorney-General's Memorandum: 19th December 2001*, [2002] Fam. Law 229, usually limits assistance to cases where an important or difficult point of law is being decided. Paragraph 4 of the Memorandum specifically states that *'an advocate to the court will not normally be instructed to lead evidence, cross-examine witnesses, or investigate the facts.'* As it happened, in *Re H* Wood J. made an urgent request himself to the Attorney-General and the Attorney-General took the 'exceptional' step of providing an advocate for the three day finding of fact hearing. However, it was made clear that this was an 'exceptional' step. It has to be assumed that the average County Court Judge is not as 'well connected' as Wood J. and that the Attorney-General would be far less inclined to accommodate requests from County Court Judges. The provision of a cross-examining advocate from this source therefore has to be ruled out in 99 per cent of cases.

Wood J. went on to consider the role that the trial judge might play in ensuring that proper cross-examination takes place. He highlighted that in criminal proceedings prior to the enactment of the Youth Justice and Criminal Evidence Act 1999 the Court of Appeal had suggested that, rather than allowing the defendant to cross-examine, the trial judge should assume the role of asking such questions as (s)he saw fit to test the accuracy and reliability of prosecution witnesses. It nevertheless recognised this as a 'difficult tight-rope' for the trial judge to walk (*R v De Oliveira*, Court of Appeal, 15.11.96). Wood J. expressed 'profound unease' at the thought of having to undertake that role as a trial judge in the family jurisdiction. He suggested that it might not be impossible, but that it would only be appropriate to do so in exceptional circumstances.

In reality it must be wholly unrealistic to expect a trial judge in the family court to be able adopt the role of 'cross-examiner' to an extent sufficient to ensure that the requirements of a 'fair' trial are met in a case involving serious allegations of sexual impropriety. Obvious difficulties are that the trial judge cannot liaise with the accused in the detail that is often necessary to establish the full complexities of his case, nor can (s)he take instructions from the accused to respond to additional details which arise during questioning. The trial judge will invariably not spend the time asking questions, or go into the detail that the accused would expect. The most striking difference between questioning by the Crown Court judge and the County Court judge is that the County Court judge is assuming a dual role due to being the final decision-maker on the evidence that is elicited. The Crown Court judge can proceed knowing that the decision will be made by the jury. The procedure in Children Act proceedings is also such that future problems could arise if a complainant, having been forcefully cross-examined by the trial judge and then had her allegations rejected, later has to appear in front of that same judge for subsequent hearings in the proceedings. There is every risk that that party's perception of judicial impartiality will have been eroded during the process of cross-examination by the judge.

So where does that leave the family practitioner, and the court, when cross-examination by a litigant in person is pending? It left Wood J. imploring the powers that be in the following terms:

'I would invite urgent attention to creating a new statutory provision which provides for representation in such circumstances analogous to the existing statutory framework governing criminal proceedings as set out in the [Youth Justice and Criminal Evidence Act 1999]. Such a statutory provision should also provide that the costs of making available to the court an advocate should fall on public funds. I can see no distinction in policy terms between the criminal and the civil process… If it is inappropriate for a litigant in person to cross-examine such a witness in the criminal jurisdiction, why not in the family jurisdiction?'

It is difficult to dissent from the view that complainants (and indeed accused persons) in family cases, where the same difficult issues are being adjudicated upon, should not be abandoned to

a third rate trial process. One need look no further than the rationale for preventing cross-examination by defendants charged with offences of a sexual nature in criminal proceedings, as found by Bingham LCJ in *Milton Brown*:

'Such defendants lack the knowledge of procedure, evidence and substantive law; that appreciation of relevance; that ability to examine witnesses and present facts in an orderly and disciplined way; and that detachment which should form part of the equipment of the professional lawyer. These deficiencies exist even where a defendant attempts to represent himself in all good faith. But the problems are magnified one hundred-fold where the defendant is motivated by a desire to obstruct the proceedings or to humiliate, intimidate or abuse anyone taking part in it.'

If the potential for problems is magnified one hundred-fold in criminal proceedings it can probably be contended that it risks being magnified by at least that again by the time of a final hearing after a long running and embittered dispute where contact with a child is at stake. It remains to be seen whether there will be any response to the appeal by Wood J. at a time when public funds are being cut rather than extended to finance the involvement in cases of additional advocates.

Wood J. expressed in the High Court that there should be no distinction between what happens in the criminal and the civil process is one that family judges in the County Court certainly ought to be mindful of. It remains to be seen to what extent, with the 'flaw' in the current system having been formally highlighted, family judges will try to find ways to avoid unrepresented persons accused of sexual offences cross-examining complainants. For the time being, at a practical level, it seems that all that can be done is alert the court at the earliest case management stage to the procedural considerations that might arise if a party is going to be representing themselves at a final hearing where issues of this type are likely to arise. If the issue is raised early enough then at least the case management judge can strongly urge the accused person that this is one part of the proceedings for which he really ought to be seeking legal representation.

Although the issue, if it arises, is most likely to appear within the context of private law children proceedings, it could also arise in the first instance in an application for a non-molestation order. It also cannot be discounted that such a scenario could feature in an ancillary relief case. If conduct of this type is raised as an issue which the court cannot disregard, and if a hearing is to take place on the issue, there is some prospect of the accused not being represented, especially in a case where the matrimonial assets are very limited.

If the call from Wood J. to place complainants in all proceedings on an equal footing when it comes to cross-examination on sexual allegations is heeded, then the re-think will have to be quite extensive. It is rare that in a family case the allegations and incidents are as clearly defined as the charges in a criminal case. There is commonly more than one allegation and events become intertwined so that they run a course over a long period of time involving allegation and counter-allegation. If any safeguards provided extended only to cross-examination related to allegations akin to sexual offences it has to be wondered what the role of any future-appointed advocate might be if the evidence meanders into other events which are not strictly related to the specific sexual misconduct. The highly undesirable spectacle of the advocate having to share questioning with the accused as issues within their respective remits arise would have to be avoided. The only reliable solution would be to ensure that the advocate was instructed for the whole hearing and on all issues arising at that hearing, regardless of whether they related to 'sexual offences' or not.

The challenges for the advocate, of being appointed to represent someone who had wanted to represent himself, and who resents your involvement, would be a whole new experience that we can currently only ask our colleagues in criminal practice about.

Adrian Posta

The Court of Appeals considers special guardianship.

In December 2006 the Court of Appeal considered special guardianship for the first time ever in Re R (A Child) EWCA Civ 1748. In a Court comprised of Lord Justices Thorpe, Tuckey and Wall, Wall LJ delivering the judgment, the Court considered an appeal brought by Birmingham City Council against a decision made in the Birmingham County Court on 3 August 2006. Three questions of law arose which the local authority argued, and the Court accepted, had important practical implications for local authorities generally.

Those questions were:

(1) Is it open to an individual who needs the leave of the court to make an application for a Special Guardianship Order to give notice to the local authority of its intention to apply for such an order under s.14A(7) of the 1989 Act prior to leave being obtained, thereby triggering a mandatory duty on the local authority to investigate the matter and prepare a report for the court under s.14A(8)?

(2) Is it a proper exercise of judicial discretion under s.14A(9) of the 1989 Act for the court to ask the local authority to conduct an investigation and prepare a report pursuant to s.14A(8) (a request which the local authority must obey);

(a) when leave to make an application for a Special Guardianship Order has not been obtained; and/or

(b) without considering whether or not a prospective application for a Special Guardianship Order has any realistic prospect of success?

(3) Where the court makes a request under s.14A(9) is it at the same time open to the court to define (and thereby limit) the scope of the local authority's obligation to investigate and report under s.14A(8) and the regulations?

The Court answered those questions as follows.

1) A person who requires the permission of the court to make an application for a Special Guardianship Order cannot either make an application for such an order or give notice of its intention to do so unless and until he has obtained the court's permission to make the application.

2) S.14A(8) is not triggered where a person who requires the court's permission to make an application but has not obtained it, purports to give notice of his intention to make an application for a Special Guardianship Order.

3) A judge should not invoke s.14A(9) to compel a local authority to perform its obligations under s.14A(8) at the instance of a person who needs but has not obtained permission to apply for a Special Guardianship Order unless s.14A(6)(b) applies.

4) There is nothing in the Act or the regulations which permits the court to restrict the nature and scope of a report under s.14A(8).

During the course of a lengthy judgment Wall L J set out the history. The central facts leading to the consideration of the statutory provisions were that the child's grandparents, who needed leave to apply for a Special Guardianship Order, stated without notice in court through their counsel, that they intended to make an application for a Special Guardianship Order. The judge (having considered other factual detail which I do not set out here) ordered the local authority to prepare a special

guardianship report pursuant to s.14A(8) on the basis that the grandparents undertook to file an application for a Special Guardianship Order within seven days.

The local authority appealed on the basis that the judge's approach had been plainly wrong and that on a true construction of the statute the position of a person requiring leave to make an application for a Special Guardianship Order, was that he or she must obtain that leave before giving notice to the local authority of the intention to apply for a Special Guardianship Order. Further, the court when considering such an application for leave must have regard to s.10(9) of the 1989 Act in exercising its discretion.

The Court further determined that it is not a proper exercise of judicial discretion under s.14A(9) for the court to ask a local authority to investigate the matter and prepare a special guardianship report under s.14A(8) before leave has been granted, and without any consideration of whether a prospective applicant for a Special Guardianship Order has any realistic prospect of success. The discretion given to a judge by s.14A(9) must be exercised judicially, and that discretion would fall to be exercised if the judge was satisfied within s.14A(6)(b) that a Special Guardianship Order should be made even though no application for such an order had in fact been made. In those circumstances there would be no report and since the judge cannot make a Special Guardianship Order without such a report (s.14A(11)), he would need to bespeak one under s.14A(9).

Finally, the Court determined that there is no discretion to restrict the contents of the special guardianship report, which is clearly specified in the regulations. Local authorities have discretion to include additional information but not to exclude anything required to be included.

There is interesting and useful comment by the Court of Appeal on the place of Special Guardianship Orders within the menu of orders available to the court and that thinking is carried forward into the judgments in three cases on special guardianship delivered on 6 February 2007.

The three cases, *Re S (A Child)* [2007] EWCA Civ 54, *Re AJ (A Child)* [2007] EWCA Civ 55 and *Re M-J (A Child)* [2007] EWCA Civ 56, were considered by three different constitutions of the Court of Appeal, Lord Justice Wall sitting in each case and delivering the judgment of the Court in each matter. The cases need to be read together, and paragraphs 40-77 of the judgment in Re S are to be read into the other judgments as the agreed commentary on the statutory provision of all the judges involved in the three appeals. The Court also records in Re S that all five Lord Justices of Appeal read the judgment in the cases in which they had not sat, and all judgments had been shown to the President who agreed with the commentary set out at paragraphs 40–77 in Re S, as set out above.

The Court takes the opportunity in the judgement in Re S to explain the way it has dealt with the three cases which were heard, as set out above, by different constitutions and on different dates. It sets out the historical background to special guardianship as well as touching upon the purpose of adoption and custodianship under the Children Act 1975. It considers the statutory provisions relating to special guardianship and adoption as the tension and inter-relation between the two orders is, essentially, the point of the three appeals under consideration. Paragraphs 40-77 are essential reading for family practitioners setting out as they do the Court of Appeals' analysis of the differences between adoption and special guardianship and the differences between the status and powers of adopters and special guardians, the place of Special Guardianship Orders within pre-existing family relationships and the right of parents to apply for s.8 orders where a Special Guardianship Order is in force.

The commentary and analysis are clear and useful guidance, but the Court of Appeal very specifically declined to give guidance on the sort of circumstances when a Special Guardianship Orders should be made rather than an adoption order, making it very clear that each court must give detailed consideration to the individual factual circumstances of every case and then make the order which best serves the welfare interests of the child.

The Court specifically rejected the argument put forward in Re AJ that Special Guardianship Orders have effectively replaced adoption orders in cases where children are to be placed permanently within their wider families. Stating at paragraph 44:

'No doubt there are many such cases in which a special guardianship order will be the appropriate order, but as this court points out in paragraph 61 and elsewhere in its judgment in Re S, each case will fall to be decided on what is in the best interests of the particular child on the particular facts of the case. Moreover, each such decision will involve the careful exercise of a judicial discretion applied to the facts as found'.

It seems that we are now edging our way to a clearer understanding of this new order, but there is plenty of room for argument yet! Many of you rang to talk about special guardianship last time I wrote about it. Please let me know if you come across any interesting points or problems.

Jane Murphy

Section 38(6) Applications – has the backlash against Re:G begun?

On 14th March, judgment was handed down by the Court of Appeal in the case of *CT and another -and- Bristol City Council* [2007] EWCA Civ 213. In his Judgment, Lord Justice Wall examined the relationship between the two leading cases on s. 38(6) applications: *Re C (A Minor) (Interim Care Order: Residential Assessment)* [1997] AC 489 and Re G (A minor) (Interim Care Order: Residential Assessment) [2006] 1 AC 576. He considered that Re G did nothing to detract from the construction of s.38(6) enunciated in Re C. He further observed that Re G concerned a specific question, namely *'In what circumstances may a court direct a local social services authority to pay for a family's admission to the Cassel hospital…?'* (Baroness Hale at paragraph 36 of her Judgment in Re G), and accordingly, distinguished the present case from Re G on that basis. Care practitioners will have no doubt observed a closing of the door on s. 38(6) applications since Re: G. Whether this decision marks the reopening of that door remains to be seen over time. However, it is worth casting an eye over the Judgment.

Charlotte Pitts

Family Team Seminars

Our second series of early evening lectures for 2007 will be taking place on the following dates:

12th June 2007 — Bristol Marriott Royal Hotel
14th June 2007 — Thistle Hotel, Exeter
26th June 2007 — Copthorne Hotel, Cardiff

These seminars start at 5:00pm and are scheduled to run for one and a half hours. The topic for the seminar will be pensions and the speakers will be Daniel Leafe and Dornford Roberts of CS Pension Consultants.

For further information, please email seminars@albionchambers.co.uk or contact Paul Fletcher on 0117 311 0306

Severance.

Severance is a 2006 British horror film with the tagline 'another bloody office outing'. However, a chancery lawyer is likely to get more excited about the 'severance' of a beneficial joint tenancy – why?

Most people who buy a property together (be they married/partnered or just together) ask for the property to be transferred into their names as 'beneficial joint tenants'. The advantage of beneficial joint tenancy is that on a death of a co-owner that co-owner's legal and beneficial interest passes to the survivors automatically as a matter of law; this is the 'survivorship' principle.

Beneficial joint tenants can sever the beneficial joint tenancy at any time whereupon they become tenants in common in equal shares. In most cases severance is brought about by serving a specific written notice of severance on the co-owner(s) under section 36(2) of the Law of Property Act 1925.

The written notice required by section 36(2) of the Law of Property Act 1925 does not need to be in any particular form but it does need to be a notice of severance: therefore a court claim (assuming it has been served) for sale and division of the proceeds may be sufficient (see *Burgess v Rawnsley* [1975] Ch 429) as would a prayer in a divorce petition which sought the same relief (see Re Draper's Conveyance [1969] 1 Ch 486) but a claim for a property adjustment order would not suffice (see *Harris v Goddard* [1984].)

Unfortunately severance is sometimes overlooked or a premature death frustrates severance from taking place. All of a sudden the surviving co-owner has a massive injection of wealth and the estate of the dead co-owner is all the poorer: in claims under the Inheritance (Provision for Family and Dependants) Act 1975 section 10 of that Act allows a court to proceed as if there had been a severance.

So what else amounts to severance? In the old case of *Williams v Hensman* (1861) J&H 546 Page Wood V-C, listed the 3 methods by which a joint tenancy of personal estate could be severed in equity as:

(i) 'an act of any one of the persons interested operating upon his own share'

(ii) 'by mutual agreement'…'The significance of an agreement is not that it binds the parties; but that it serves as an indication of a common intention to sever, something which it was indisputably within their power to do'.

(iii) 'by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common'

So, a contract by one joint tenant to sell his interest does amount to severance see *Brown v Randle* (1796) 3 Ves 256, Re Hewett [1894] 1 Ch 362 and *Burgess v Rawnsley* [1975] Ch 429. (In Burgess the contract was not enforceable because it did not comply with the old statutory formalities (a need for a signed written memorandum) but the Court of Appeal pointed out that a severance does not have to take place by a piece of signed writing). In *Hunter v Babbage* [1994] 2 FLR 806 agreement was reached between the husband and wife in the context of divorce that the matrimonial home was to be sold and the proceeds divided but the husband died before approval was given by the court or the agreement implemented. The Judge held that severance had nonetheless occurred.

However, inconclusive negotiations between co-owners for one to buy out the other may not necessarily amount to a severance; see *McDowell v Hirschfield Lipson & Rumney* [1992] 2 FLR 126 and *Gore v Carpenter* (1990) 60 P and CR 456.

Then there is the matter of alienation by one co-owner of his or her share or otherwise taking action which causes the size of his share to alter. A classic example of alienation is where a co-owner is made bankrupt; he loses his share to his trustee in bankruptcy. Another example is where one co-owner tries to mortgage his share.

Lastly, section 27 of the Matrimonial Proceedings and Property Act 1970 gives the court jurisdiction to find that a spouse has acquired an enlarged share in a property by reason of making significant improvements (unless the spouses have reached some agreement to the contrary). In Megarry and Wade Real Property sixth edition the author gives the opinion that acquisition by a co-owner of an enlarged share brings about severance (because a joint tenancy must have unity of interest i.e. all co-owners have the identical interest).

Commentators have said that equity does not like survivorship and you may recall the old saying that equity will not assist a volunteer. If you do have a fight about severance (and you are the person trying to argue that severance has taken place) you should at least have that most invaluable of assets – the sympathy of the court.

Alex Ralton

Opening up the Family Courts.

In July 2006 the government issued a consultation document, 'Confidence and confidentiality: Improving transparency and privacy in family courts'. The consultation period ended on 30 October 2006.

The consultation paper invited views on the proposals that were intended to:

- Make changes to attendance and reporting restrictions consistent across all family proceedings
- Allow the media, on behalf of and for the benefit of the public, to attend proceedings as of right, though allowing the court to exclude them where appropriate to do so and, where appropriate, to place restrictions on reporting of evidence
- Allow attendance by others on application to the court, or on the court's own motion
- Ensure reporting restrictions to provide for anonymity of those involved in family proceedings (adults and children), while allowing for restrictions to be increased or relaxed, as the case requires
- Introduce a new criminal offence for breaches of reporting restrictions
- Make adoption proceedings a special case, so that there is transparency in the process up until the placement order is made, but beyond that proceedings remain private.

Interestingly the paper gives some international comparisons. It records that Australia, parts of Canada (Quebec and British Columbia) and to a lesser extent New Zealand admit the public and the press, and allow reporting without identification of those involved.

The President and a majority of the Family Division judges have supported the suggestion that press ought to be permitted access to family courts, on the basis that any reporting of the proceedings should not revealed the identity of those involved. This follows a growing disquiet amongst judges that the confidentiality of the family courts is undermining its authority and it's standing in the public perception – see e.g. *Re C* [2004] EWHC 2580 (Fam), [2005] 2 FLR 47, *The British Broadcasting Company and Rochdale Metropolitan Borough Council and X and Y* [2005] EWHC 2862 (Fam) and *Pelling v Bruce-Williams* [2004] EWCA Civ 845, [2004] 3 All ER 875, [2004] Fam 155, [2004] 3 WLR 1178, [2004] 2 FLR 823. Munby J gave the issue a thorough examination in *Re Brandon Webster, Norfolk County Council v Webster* [2006] EWHC 2733 FD.

Recent relaxation of the confidentiality that attaches to family proceedings in England and Wales has been modest. In *Clayton v Clayton* [2006] EWCA Civ 878, [2006] 2 FCR 405, it was held that the confidentiality that arises under section 97 of The Children Act 1989 ends when the proceedings are concluded (but this is without prejudice to the provisions of section 12 of The Administration of Justice Act 1969). Rule 10.20A has provided a code which specifies the extent to which a person connected with proceedings relating to children is bound by confidentiality.

The proposals for greater publicity also have to be judged against the openness that is customary in the criminal courts (which also deal with some extremely sensitive issues) and in the Court of Appeal. The clear indications at this stage are that there will be changes in favour of greater access to the public combined with powers to protect the privacy of individuals in the near future.

Steven Wildblood QC

Albion Chambers Family Team

Stephen Wildblood QC Call 1980 QC 1999
Deputy Judge of the High Court (Family Division)
Recorder Mental Health Review Tribunal (legal member) **Clerk** Michael Harding

Charles Hyde QC Call 1988 QC 2006
Recorder
Clerk Michael Harding

Louise Price Call 1972
Clerk Michael Harding

Geraint Norris Call 1980
Clerk Julie Hathway

Tacey Cronin Call 1982
Deputy District Judge (Civil) Mediator
Clerk Michael Harding

Deborah Dinan-Hayward Call 1988
Clerk Michael Harding

Claire Wills-Goldingham Call 1988
Mental Health Review Tribunal
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Myles Watkins Call 1990
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Nkumbe Ekaney Call 1990
Clerk Julie Hathway

Claire Rowsell Call 1991
Former solicitor
Clerk Julie Hathway

Nicholas Sproull Call 1992
Clerk Julie Hathway

Daniel Leafe Call 1996
Clerk Julie Hathway

Archna Dawar Call 1996
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Hannah Wiltshire Call 1998
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Benjamin Jenkins Call 2004
Clerk Julie Hathway

Anna Midgley Call 2005
Clerk Julie Hathway

Gemma Borkowski Call 2005
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