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Albion Chambers FAMILY TEAM NEWSLETTER

Interim removal, imminent risk

The risks involved in considering the interim removal of a child following Baby P

In February, a small party from the family team set off for Urchfont Manor in the beautiful Wiltshire countryside to present a training day for Wiltshire County Council on Childcare Law. It became apparent that a matter of particular concern to those in attendance was the Court's attitude to applications for the interim removal of a child from his or her family against the wishes of the child's parents.

In the context of trying to assist a Local Authority's legal and management teams in the wake of the Baby P tragedy and Haringey Council I delivered a talk with the subtitle '*Damned if you do and Damned if you don't*'. This phrase seemed to express how some social workers felt when faced with making decisions about whether or not to apply to remove children in need from their parents. Of course, Lord Laming's report, *The Protection of Children in England: a Progress Report*, was published on 12 March 2009 following the death of Baby P.

From the point of view of those representing parents, however, the two magic words are 'Human Rights', although to the neutral onlooker, the Human Rights of the child can appear to get overlooked in some cases if the parents shout loudly enough.

In the recent case of *Re L (Care Proceedings) (Removal of Child) [2008] 1 FLR 575* Ryder J criticised a Local Authority and a Guardian for failure to recognise 'that removal is a separate consideration from the existence of the interim threshold or the need for an interim order'.

He made it clear that the established principle in cases of emergency removal (EPO) namely that the Court must be satisfied to the requisite standard of proof that 'there is an imminent risk of really serious harm i.e. that the risk to the child's safety demands immediate separation' – per Thorpe LJ in *Re H (a child) (ICO) [2003] 1 FCR 350* applied with similar force in cases where immediate removal was part of an interim care plan.

Ryder J went on to add that if such imminent risk were not apparent the question whether a mother was able to provide good enough long term care should be decided at the final hearing because making such a decision at the interim stage 'usurped' the function of the final hearing or the issues resolution process. (Although who ever resolved anything at an IRH?)

The area of tension between local authorities and parents may be highlighted by the two quotes below:-

(1) A Public Authority's failure to take a child into care when it is suffering inhuman and degrading treatment may be a breach of its obligations under Article 3 Convention of Human Rights – *Z v UK [2001] 2 FLR 612.*

(2) 'The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature' (Lord Templeman in *Re KD (A Minor)(Ward: Termination of Access [1988] 1 AC 806 at 812).*

It is of interest to note that CAFCASS report that there was a 25% drop off in care cases commenced between April and June 2008 compared with the year before. (PLO began 1 April 2008). However the increase in care cases commenced in December 2008 compared with December 2007 was 66%! The Baby P case hit the headlines in the month before that when the adults ▸

Editorial

This is the first Albion Chambers family team newsletter that I have edited and my thanks go to Tacey Cronin for her diligent editing of the previous ten Albion family team newsletters. I am just beginning to appreciate her commitment to the newsletter which has continued even in this edition.

William Heckscher has joined the team from Chambers in Preston. His practice covers a broad range of matters including matrimonial finance and both public and private children law.

We also welcome back Charlotte Pitts after the birth of Amelie and Hannah Wiltshire after the birth of Tom. The team's warmest congratulations go to Alex Ralton who is to take up a full-time position as a District Judge in the Court of Protection in London from April 2009. He will be sadly missed by the team. Our best wishes also go to Charlie Hyde QC who has moved to Chambers in London.

The current climate is extremely difficult for those practising at the Bar and undertaking publicly paid work. The consultation period for 'Family Legal Aid Funding from 2010: A Consultation' closed on 18 March. Both at a local and national level the Bar and solicitors did their utmost to inform the LSC of the potentially dire consequences of their ill-founded proposals. The LSC's claim that the proposals are cost neutral rings hollow upon careful examination of the reduction in remuneration for all under the scheme. It is widely perceived that one of the aims of the consultation paper is to drive a wedge between the two sides of the profession. As this matter is further debated in the months to come it is crucial that we keep open clear lines of communication between the two professions. There is a need to impress upon the LSC, the government and the press the reduction that there will be in access to justice, scope ▸

for careful case preparation and availability of suitably experienced and skilled representatives if the proposals are adopted in their original form. Early reports of progress should not deter us from pressing the point.

My thanks go to Anna Midgley for her assistance with the Editorial.

Deborah Dinan-Hayward

concerned were convicted in respect of the child's death and case details became public knowledge.

The drop off may have been partly due to the extraordinarily high cost of issuing proceedings (£2,225 issue fee cost up to CMC) and partly because of the front-loading approach of the PLO requiring so much more to be done 'pre-proceedings'. The rapid increase in the issuing of proceedings must have been linked with the Haringey case.

The Serious Case Review in relation to Baby P found there was too much delay in seeking legal advice and that the advice given was wrong, and made some recommendations about recruitment, six-weekly reviews and pro-forma guidance for legal planning meetings.

It seems that there may have been some confusion at Haringey about the difference between justification for interim removal and justification for commencing proceedings; perhaps even a confusion over whether a criminal finding of guilt could be obtained as opposed to findings in care proceedings.

Those involved in proceedings on either side of the fence must be careful to be clear in their own minds about exactly what is being sought and what criteria apply. In relation to interim removal the case of Re L above should be considered along with the two 'X' cases namely *X Council v B(EPOs) [2005] 1 FLR 341 (Munby J.) and Re X (EPOs) [2006] 2 FLR 701* (McFarlane J.)

In each of the 'X' cases lengthy guidance is provided by the respective judges – 14 points from Munby J and several more from McFarlane J. All those dealing with interim removal cases should familiarise themselves with what was said. Many of the points were made in the earlier case of *Re M [2003] 171.* Munby J said:

'The removal of a child from his mother at or shortly after birth was a draconian measure which demanded extraordinarily compelling justification. The fullest possible information had to be given to the court and the evidence in support of the application had to be full, detailed, precise and compelling, with sources of hearsay evidence identified and expressions of opinion supported by detailed evidence and properly articulated reasoning. Unparticularised generalities would not suffice' (para 44 (ii)).

The court should look at 'the nature of the feared harm' with its 'nature and gravity' being 'highly relevant' in determining which course to take: *Re C and B (Future harm) [2001] 1 FLR 611.* Responses must be 'proportionate'. Issues of 'safety' are often referred to – *Re K and H [2007] 1 FLR 2043.*

Further, the court should look at the needs of each of the children separately and can, even on an interim basis, order the removal of some children under an ICO whilst leaving other children in the home under Interim supervision orders – unreported Court of Appeal case of *Re N-F Children (11 February 2009).*

As with so many cases the facts are crucial in determining proper outcomes for children but applying the correct law based on good evidence is essential even at interim hearings.

Geraint Norris

Ancillary relief update

The risks and the remedies for the ancillary relief practitioner

The Nationwide Building Society recently announced that the average house price has fallen by 17.6% in the last 12 months. The British Bankers Association has reported that mortgage borrowing is down by 43% compared with the same time last year. Unemployment reached 1.23 million in January 2009, the highest figure since 1997. It is now approaching two million and is predicted to hit three million in the near future. At current trends, it is estimated that two million homeowners will be in negative equity by 2010. Repossession figures are soaring; up 68% in 2008. The full force of the falling economic conditions is yet to be felt. However, they signal a new era for the ancillary relief practitioner.

Hitherto (at least for the last ten years), the courts have regularly dealt with cases in which future accrual of wealth appears to be a forgone conclusion because of increasing house prices, healthy business projections, the security of well paid employment and increasing bonuses. In small money cases many gaps in the parties' ability to meet needs could often be met by lending which was freely available. In modest cases the courts are now likely to be influenced by the need to stretch resources to meet both parties' needs: see *M v B (Ancillary Relief Proceedings: Lump Sum) [1998] 1 FLR 53.* The current economic changes present fresh challenges for the courts. So how should the practitioner meet those challenges?

Risk

A key proposition for the practitioner is the fair apportionment of risk. In times of economic downturn the disparity between 'risk laden' and 'copper-bottomed' assets, as explored in *Wells v Wells [2002] EWCA Civ 476* becomes more pronounced. Parties should be alive to the fact that 'equality does not necessarily mean precisely 50% of the value of a given assets schedule on a given date. It means leaving each side in a position of broadly similar financial muscle'; *G v G [2002] 2 FLR 1143* per Coleridge J at para 47.

The effect of uncertainty on private companies makes valuations increasingly complex and fragile. Practitioners involved in cases where there is a broad range of valuations for a private company should revisit the guidance of Charles J in *A v A [2004] EWCH 2818 (Fam) as paras 62-63* and in *D v D and B Ltd [2007] EWHC 278 (Fam).* Particular consideration should be given to the obligation upon parties to consider alternatives to a clean break.

This may lead to parties opting for ongoing periodical payments rather than a clean break or to transfer of part of the husband's business interest / shares to the wife rather than periodical payments where this is possible. One problem with this approach is taxation. Assets transferred after the fiscal year of separation will attract capital gains tax at 18% whereas transfers are not taxable where the parties have lived together at some point during the fiscal year. A party

taking the risk laden assets may argue that they should have a greater proportion of the assets in view of the associated risk. Such risk is speculative and difficult to quantify. An argument of this nature was rejected in *CR v CR [2007] EWCH 3334 (Fam).*

Practitioners should be alive to the effects of falling economic conditions upon the value of pension funds and the risks which will be attached to orders involving such funds. In cases involving large pension funds actuarial advice may assume greater importance.

Debt

Even if a property is on the verge of repossession, the court lacks jurisdiction to make an interim order for sale or to make an interim capital award. One possible solution to this would be to obtain decree absolute at an early stage.

The court is unable to order the apportionment of debt, the transfer of the burden of a mortgage or repayment of a mortgage to a third party. Where there are related proceedings involving a third party e.g. a creditor, which may affect the assets, an adjournment should be sought to await the outcome of those proceedings or an application should be made for both sets of proceedings to be allocated to the same Judge; see *George v George [2004] FLR 421* per Thorpe LJ at para 14.

The statutory criteria for presentation of a bankruptcy petition should be a live consideration in cases involving large amounts of debt. Where the statutory test ie 'the debtor is unable to pay his debts' is satisfied, an application by a spouse to annul the order on the basis that the debtor was motivated to frustrate the spouse's claims will fail regardless of whether he was in fact so motivated; *Whig v Whig [2008] 1 FLR 453; Re Dianoor Jewels Ltd [2001] BPIR 234.*

Where a creditor applies to set aside an order in ancillary relief proceedings on the basis that a transfer contained within the order was a 'transaction at an undervalue' the order will not be set aside unless the order was the result of collusion between the parties or there is some other vitiating factor; *Hill v Haines [2007] EWCA Civ 1284*. The relevant date of the transaction is the date of the decree absolute (or the effective date of the order) as opposed to the date of the conveyance; *Mountenay v Treharne [2002] 2 FLR 930.*

Setting aside

In *Warren v Warren [1983] 4 FLR 529* an appeal was allowed where a house increased in value by 78% in eight months. The appeal was allowed on the basis that in view of the substantial discrepancy between the valuation and the sale price, there had been a gross error which rendered it just to re open the matter. Griffiths LJ added:

'In this case the discrepancy between the valuation and the subsequent sale price achieved was almost 100%. By the very nature of things the valuation could only be an approximate estimate of the value of the property, and it would be very rare that, when the property is sold it will achieve precisely the sum at which it was valued. The extraordinary discrepancy in this case must not be taken by the profession as any encouragement to bring appeals to this court wherever there is a difference between a valuation and the ultimate sale price…'

As Sir Roger Ormerod said, this case is atypical because of the extraordinary discrepancy between the valuation and the sale price. It is for that reason that this court allowed the evidence of the sale price which enabled the figures to be re-examined.

This case is probably the strongest example of an order being set aside because of fluctuating property prices. However, it suggests that the discrepancy between valuation and realisation must be gross or extraordinary ie 78% – 100%. Warren also predates the seminal case of *Barder v Barder (Calouri intervening) [1987] 2 FLR 480* from which the following principles can be extracted in relation to an application for leave to appeal out of time based upon the occurrence of a supervening event:

(i) The new events must invalidate the basis of the order;

(ii) The new events must happen within months or a year at the most;

(iii) The application must be made relatively promptly;

(iv) Third parties' legitimate interests must not be affected.

These principles were applied in *Thompson v Thompson [1991] 2 FLR 530.*

A business thought to be worth £20,000 in the order was sold immediately for twice that much. In that case it was stated that this could be a supervening event provided that the applicant was not in some way to blame for the mistake, by for example failing to investigate properly and to put their evidence before the court.

In *Cornick v Cornick [1994] 2 FLR 530* at 533 Hale J examined the fluctuation of the value of assets as supervening events in detail. The following points were enounced in that case:

(i) A valuation which is mistaken can form the basis of setting aside an order (this is not strictly speaking a supervening event);

(ii) Natural processes of price fluctuation are not supervening events however dramatic the change. This appears to conflict with Warren but is the more contemporary approach;

(iii) An inaccurate valuation is a potential basis for setting aside but not if it is the fault of the party relying on the mistake;

(iv) Supervening events are rare;

(v) Supervening events must be unforeseen and unforeseeable at the time when the order was made.

Thorpe LJ summarised the position in *Burns v Burns [2004] EWCA Civ 1258* in approving the following statement:

'Where an asset which was correctly valued at the time of the order changes value within a relatively short period because of the natural processes of price fluctuation, leave to appeal should not be granted. But where something unforeseen and unforeseeable has occurred which has altered the value of the asset so dramatically as to bring about a substantial change in the balance of the assets, then the court may intervene'.

From *S v S (Ancillary Relief: Consent Order) [2002] 1 FLR 992* the following principles can be derived:

(i) the new event must not be a development of facts which were known, or ought to have been known at the time of the order;

(ii) the event must be new not a foreseeable event on an unforeseen scale;

(iii) the new event must not have been possible to envisage;

(iv) the event must not have been ascertainable by diligent enquiry which was not conducted (as in Thompson)

In *B v B EWHC 2472 (Fam) (26/10/07)* a fluctuation in the value of a property of 19% was not found to be a supervening event.

At times of economic volatility the need for the court to have information as to valuation of assets and income at the date of trial is even more important. However, this can be very difficult given the stagnant housing market, fluctuating share prices and the strength of other currencies against the pound.

In *I v I [2008] EWCH 1167 (Fam)* Charles J dismissed a wife's application to set aside a consent order made at an FDR. Simultaneously with proceedings for ancillary relief, the husband, a stockbroker, was in negotiations with a

new employer for a possible move and increased salary. These negotiations were conducted at the same time as the FDR but not disclosed. The judge found that there was a breach of the duty of full and frank disclosure. The wife argued that the order should be set aside on the basis that it was unfair and that the court would not have been in a position to make the order had she known about the possible job move because she would not have agreed to the consent order presented. The test for supervening events was set out by Charles J as follows:

'It has to be shown that the new events invalidate the basis, or fundamental assumption upon which the order was made, so that if leave to appeal out of time were to be given, the appeal would be certain, or very likely to succeed.'

Charles J found that the order was objectively a fair one. He considered whether disclosure of the information would have led the Court to make a substantially different order from that which it made. It is unlikely that an asset failing to realise an anticipated value will be sufficient to meet the test. This case may be of assistance to a party seeking to resist an application to set aside an order made in circumstances where they have failed to fulfil the duty of full and frank disclosure. See also *Dixon v Marchant [2008] EWCA Civ 11* for an example of Ward LJ rejecting remarriage shortly after proceedings as a Barder event.

In *Myerson v Myerson [2009] EWCA Civ 282* the husband was seeking to appeal an order on the grounds that the fall in the value of his shares, caused by the financial crisis, constituted a Barder event that undermined the basis of the order.

The original order had divided the assets, valued at the time at £25m, at 57% to the husband and 43% to the wife. The husband's retained assets were largely made up of his shareholding in his company, which was traded on the AIM. At the time of the compromise the shares were worth £15m (each share was valued at £2.99). By the time of this appeal the shares were trading at 27.5p. The husband had paid the first instalment (£7m) of a lump sum totalling £9.5m in April 2008. He had sought to vary the order prior to this appeal at which counsel submitted that the case judge's jurisdiction should be extended to fundamentally rewrite the order at a future hearing as the order was no longer fair and the husband could not perform his remaining obligations (i.e. the lump sum instalments).

Thorpe LJ gave permission but rejected the appeal even though it had 'dramatic features'. Identifying that the relevant case is Cornick, he agreed with Hale J's reasoning that the 'natural processes of price fluctuation' should not constitute a Barder event. He also added four other factors in this case that prevented the appeal succeeding:

i) the husband, with all his knowledge and experience, had agreed the compromise;

ii) the husband, in attempting to vary and offer the wife shares instead, was seeking to relieve himself of the consequences of his speculation;

iii) he still has the opportunities as 'unusual opportunities are created for the most astute in a bear market' and;

iv) the husband had already invoked the statutory power of variation concerning the instalments. This result arguably left the husband in a negative position!

The above analysis suggests that any party seeking leave to appeal out of time due to deteriorating economic conditions is unlikely to succeed unless their case is extreme to the extent that the basis of the order is undermined. Where leave is granted any substantive appeal is unlikely to receive the sympathy of the Court.

Post-nuptial agreements and variation

In *McLeod v McLeod [2008] UKPC 64*, a decision of the Privy Council, Baroness Hale explored the weight to be given to post nuptial agreements. She stated that the principles akin to the statutory provisions relating to the validity and variation of maintenance agreements would be the starting point:

'In other words the court is looking for a change in the circumstances in the light of which the financial arrangements were made, the sort of change which would make those arrangements manifestly unjust, or for a failure to make proper provision for any child of the family. On top of that, of course, even if there is no change of circumstances, it is contrary to public policy to cast onto the public purse an obligation which ought properly to be shouldered within the family'.

Baroness Hale goes on to state that the circumstances in which the agreement was made may be relevant to the ancillary relief claim. She also considers the factors which may ordinarily affect the equality of bargaining power within a marriage and warns against a formal legal approach towards agreements such as estoppel and misrepresentation:

'Family relationships are not like straightforward commercial relationships. They are often characterised by inequality of bargaining power, but inequalities may be in relation to different issues.'

If a post-nuptial agreement has been reached in circumstances where a particular asset had a value which has now plummeted or where an asset has significantly greater risk attached now than it did at the time of the agreement, these words could be employed to support an argument regarding the limitation of weight to be attached to the post nuptial agreement or variation of it.

An interesting question for the practitioner is whether the same argument could be employed where an agreement has been reached (a) in a separation agreement (b) in negotiations or (c) in a Court order. *Edgar v Edgar* involved a valid and enforceable separation deed. The Edgar principles have also been held to apply to a post nuptial agreement made when the marriage was in great difficulties in *NA v MA [2006] EWHC 2900 (Fam)* and to agreements to compromise a claim for ancillary relief; *Xydhias v Xydhias [1999] 2 All ER 386, 394*. This is because unlike other Court orders made by consent, a consent order in ancillary relief proceedings derives its authority from the court and not from a preceding agreement: *de Lasala v de Lasala [1980] AC 546.* Once a court order has been made, the argument for variation due to the effects of the credit crunch becomes more ambitious. It is most likely to be effective in relation to an application to vary periodical payments.

Conclusions

So how can we ensure that we rise to the challenges of the credit crunch? Spreading the risks taken between the parties is certainly sensible. The practitioner should be alert to the law regarding bankruptcy. Working upon the basis that it is highly unlikely that a court will grant permission to appeal out of time due to factors arising from deteriorating conditions seems to be appropriate, although there may be some scope for consideration of such conditions in relation to post nuptial agreements and variation of periodical payments.

It will be interesting to see whether there is an increasing tendency towards settlement of cases given the increasing uncertainty in litigation. The wife in *I v I* reportedly saw the merits in settlement shortly before the Court of Appeal was due to hear the case. She was prompted by the husband receiving 'dispiriting news' about his bonus.

Gemma Borkowski

Shared residence and location, location, location

A recent case where shared residence order was revisited

On 14 January 2009, the Court of Appeal in *Re L (Shared Residence Order) [2009] EWCA Civ 20* had to decide for the first time the question of a parent's proposed relocation with a child within England and Wales where there was already in existence a shared residence order in favour of the parents in relation to the same child.

The parents of L had a relationship between 1999 and 2005 although they were never married and L was their only child. After the parent's separation the father played a substantial role in L's life. In September 2007, the mother applied to the court to relocate to Israel having been made redundant earlier in the year. The application was refused and the judge made a shared residence order dividing L's time between her parents. The mother sought permission from the Court of Appeal to appeal against the order however, this was refused. The current proceedings were initiated when the mother wished to relocate from North London to Chew Magna. Her case was that the only offer of employment that she wished to take up was based there and the rural setting would be good for L. She suggested the father could have extended holiday contact to compensate him for the mid-week contact he was currently enjoying. The father's case was that the proposed move would seriously disrupt his relationship with L and was contrived to minimise his role in L's life. At first instance the judge refused the mother permission to relocate, not by imposing conditions under section 11(7) of the Children Act 1989, but by varying the shared residence order so that the father had L from after school on Fridays until the beginning of the school day the following Tuesday on alternate weeks and overnight mid-week contact in the intervening weeks. The mother appealed.

Wall LJ's judgment is particularly helpful in exploring in great detail the authorities on internal relocation and he cites *Re E (Residence: Imposition of Conditions) [1997] 2 FLR 638* as being the leading case on the subject. In relation to there already being a shared residence order in place, Wall LJ identifies two particular questions that arise; (1) what effect, if any, does such an order have? And; (2) what weight should a judge give to the existence of such an order? At paragraph 36, he states:

'In my judgment, therefore it is wrong in principle to apply different criteria to the question of internal relocation simply because there is a shared residence order. Plainly, the fact of such an order is an important factor in the welfare equation, but … it is not, in effect, a trump card preventing relocation. In each case what the court has to do is to examine the underlying factual matrix, and to decide in all the circumstances of the case whether or not it is in the child's interest to relocate with the parent who wishes to move.'

Addressing the particulars of the case before him, Wall LJ held that the Judge had been wrong to distinguish the case from the authorities dealing with sole residence orders. The correct approach was to look at the 'underlying factual substratum in welfare terms', bearing in mind the tension which may well exist between the freedom to relocate which any parent must enjoy, against welfare issues that militate against relocation. Distinguishing cases on the basis of a shared residence order runs the risk of 'making it determinative in all cases and of distorting the welfare balancing exercise.' The judge at first instance was also criticised for not fully considering alternative contact arrangements or considering the likely effect on the mother of refusing to allow her to relocate.

However, there were other issues and concerns at play and despite criticisms of the judge's approach, the appeal was dismissed. First, this was a discretionary decision for the court below and that judge had had the benefit of hearing the witnesses. Second, in both these proceedings and the 2007 proceedings, findings which were adverse to the mother had been made. He had found as a fact that the mother's motivation in seeking an internal relocation was 'driven by an objective of undermining shared residence'.

It is very clear from the judgment, and comes as no real surprise, that every case must be decided on its merits. Interestingly, but for the findings against the mother, it would seem that Wall LJ would have allowed her appeal. When advising clients therefore, one thing is certain, a shared residence order gives no guarantees for the future.

There is a postscript to the judgment which would be pertinent advice to many lay clients. It is a very clear message that in this type of case there is no winner. Warring parents can potentially do so much damage to the child concerned and parents have to show their children their respect for each other. This may fall on deaf ears but it is fundemental.

William Heckscher

Who's the Daddy?

A case concerning foreign surrogacy which raises debatable and interesting issues

The case is Re: *X & Y (Foreign Surrogacy) [2008] EWHC 3030* and was heard by Hedley J in December 2008. Some of the issues in this case are relevant to proceedings closer to home.

Background

The case concerned an application, by an established and professional couple, who were unable to conceive children, for a Parental Order pursuant to Section 30 of The Human Fertilisation and Embryology Act 1990 ('the 1990 Act'). Having tried and tested every avenue in the attempt to become parents, complying with both the letter and spirit of the law and after receiving informed and responsible advice, they entered into a commercial surrogacy arrangement with a married woman in the Ukraine: being a country where commercial surrogacy agreements are permitted, unlike the UK.

The agreement provided for financial compensation for the surrogate mother.

The woman was implanted with embryos from an anonymous donor which were fertilised by the male applicant's sperm. The woman conceived and gave birth to twins.

The first question was who was the mother of these twins? The answer is found in section 27 of the Act which provides:

'(1) The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child…'

(2) Subsection (1) above applies whether the women was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs'

It was clear therefore that the Ukrainian woman was the sole legal mother of the twins. The more controversial question was, who was the father of these twins? There was a difference in opinion between the applicants and that of the guardian appointed for the Section 30 application. This was one of the issues in the case on which the court needed to adjudicate. Section 28 provides:

'(2) if…

(a) At the time of the placing in her of the embryo or the sperm and eggs…, the woman was party to a marriage,

(b) …then, subject to subsection 5 below, the other party to the marriage shall be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or sperm and eggs…

(4) Where a person is treated as the father of the child by virtue of subsection 2….above, no other person is to be treated as the father of the child.'

The Ukrainian husband did consent to the surrogacy, and if subsection 2 related to him he would be the sole father of the twins. The male applicant was the biological father and if the Ukrainian woman was not married he would have been entitled to be treated as the father. The guardian contended that subsection (2) and (4) applied to this case and the Applicants contended they did not.

The applicants contended that the court should not apply the subsections extra-territorially and that accordingly Sections 29(1) and (2) do not apply, the effect of which is to apply the statutory parenthood 'for all purposes', and, where parenthood is not given, to apply that also 'for all purposes'.

There were further arguments about the consent needed for the Applicants to make applications under Part II Children Act 1989, especially the male applicant, and whether or not leave was required pursuant to Section 10 for the same. In any event the difficulties were foreseen and the Ukrainian husband had already provided consent for interim section 8 orders to be made pending the final hearing of the Section 30 application.

There was a further argument by the applicants that the twins were children of the family as defined in section 105(1) which entitled them to apply for a Residence Order; however, the court found difficulty with this as they were in law, 'strangers'. No definitive ruling was made on this point and is therefore left for a later date.

The court heard expert evidence in relation to Ukrainian law that once the twins had been delivered to the applicants the Ukrainian couple were free of all obligations to the children. This meant that the children had no rights of residence or citizenship in the Ukraine and the Ukrainian state had no obligation to the children other than to accommodate them as an act of basic humanity in a state orphanage. In the Ukraine, the applicants became the parents and were registered on their birth certificates and the twins took the applicants' nationality.

This left the twins in a precarious position; they had no rights to remain in the Ukraine any longer than the applicants' visas had stipulated, but had no rights to enter the UK as the applicants could not confer nationality on them, as they had no rights to bring them into the UK. At best the male applicant may have obtained leave to do so as the putative father.

The twins were, as put by Hedley J, 'marooned stateless and parentless'. The position was dealt with by DNA testing showing that the male applicant was the biological father and the twins were given discretionary leave to enter the UK 'outside the rules' for the applicants to legalise the situation, hence the application under section 30. This process had caused yet further delay.

The decision

Amongst other considerations section 30(5) provides:

'The court must be satisfied that both the father of the child (including the person who is the father by virtue of section 28 of this Act), where he is not the husband, and the woman who carried the child have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.'

The applicants urged the court to find that they did not need the Ukrainian husband's consent in any event.

The court agreed with the guardian and found that the wording of Section 28 was plain and that Parliament did not have any different intention in relation to husbands of a foreign domicile and section 28 should be applied extra-territorially; therefore the Ukrainian husband was the father and his consent was needed. The court granted the application as the consent was provided by the Ukrainian couple.

Further considerations

It became apparent in this case that the time limit for a section 30 application is six months from date of birth to issue (section 30(2)) and there does not appear to be power for the court to extend this time limit; therefore one needs to be alert to this and act quickly if you find yourself needing to make this sort of application.

Unlike the adoption legislation the court does not have the power to dispense with the parent's consent, regardless of how unreasonable it may seem if they withhold it, or even if it is prejudicial to the child. It cannot dispense with consent even if the parents bear no legal responsibility for the child under their own domestic law; they have an absolute veto.

The case leaves some debatable issues and questions remaining:

- What would have happened to the children if consent had not been granted?
- Does this place a premium on unmarried surrogate mothers?
- Does it give the husband of the married surrogate mother the potential for extorting further monies, for example, by not giving his consent without further financial gain?

Marie Leslie

To appeal or not to appeal, in care proceedings

(and if so, how to do it in an emergency)

Earlier this month my colleague Hannah Wiltshire successfully put to the test the procedure laid down by the Court of Appeal for bringing before it children cases of genuine urgency. It seemed to us that the guidance may not be well known, and in any event is well worth a reminder. Appeals are always matters for anxious consideration, and emergency or urgent appeals even more so. Hannah's case proved that the procedure set out in Re S (full citation below) really does work in appropriate circumstances… so here's how to do it!

On 22 August 2007 the Court of Appeal heard an appeal against a decision of HHJ Vincent, sitting in Exeter County Court. The Court of Appeal's judgment is reported as in the *Matter of S (a Child) [2007] EWCA Civ 958*. (The original citation of 2006 was wrong).

That appeal was brought by the father against the making of an interim care order. The interim hearing, and the consequent removal of the child, had occurred some eight weeks before the appeal was heard. Aside from some rather blunt criticism of the listing of the case, the court addressed itself to the procedure to be adopted in cases of genuine emergency, having determined that too long had elapsed in that case for them to consider the matter as an appeal.

Lord Justice Wall delivered the leading judgment in characteristically clear terms. The whole case will not take you long to read, but I set out here extracts from his paragraphs relevant to this article:

'8) As I indicated earlier, the order was made on a Friday [22 June]. The appellant's notice, which was filed on 3 July, seeks a stay of the judge's order but the judge's order had, of course, been implemented, and there was no application to this court for a stay, save for the request in the appellant's notice…

9) What could have happened – I forebear to say should have happened – what could have happened is as follows: the judge could have been asked for a stay. If he refused it, he could have been asked to delay implementation or enforcement of the order for a sufficient period of time to allow the appellant to approach this court. As I say, 22 June was a Friday. The judge could have been asked, for example, to delay the implementation of the order until close of business on 25 June, and if he refused to delay it, and if he insisted on the order being implemented on 22 June, counsel for the father could have made immediate contact with this court by telephone, and could have asked for an urgent stay until an on-notice hearing, which would have taken place on 25 June or shortly afterwards.

10) Had that occurred, it is highly likely that this court would have listed the application for permission to appeal as a matter of urgency, with the appeal to follow if permission was granted… I repeat, therefore, and re-emphasise, the practice in this court in relation for urgent applications related to children. In office hours, a potential appellant who wishes to apply for an immediate stay should contact the Court of Appeal office at the Royal Courts of Justice on the main telephone number, 0207 947 6000; out-of-hours, such an appellant should contact the security offices of the Royal Courts of Justice, 0207 947 6260. In either event, the appellant will be able to speak to a Deputy Master who, in turn, will speak to a Lord Justice. Provided the latter is satisfied that the matter is appropriately urgent, and a short stay is called for, he or she will either grant a stay, or arrange for the matter to be listed at short notice for a short oral hearing, on notice to the other parties, within the time frame permitted by the judge at first instance. If the court is then satisfied either that permission to appeal should be granted or that the application for permission should be listed urgently, with appeal to follow if permission is granted, it will give such a direction. In children's cases… this court can move very swiftly indeed.

11) It must be emphasised that these facilities are designed to cater for urgent cases and must not be abused. When a potential applicant is legally represented, it will always be appropriate for that legal representative to make the approach to this court, but the profession needs clearly to understand that the emergency facilities are always available to deal with urgent child cases and can be speedily accessed by the profession by telephone where necessary… I am in no doubt at all that this court would accept an undertaking from the parties' legal advisers to file the appellant's notice once public funding had been obtained. Plainly, an application will need to be made urgently for the certificate to be extended, and in the scenario I have envisaged, it is highly likely that this court would also encourage the Legal Services Commission to consider an application for funding as a matter of the greatest urgency.

12) I propose to invite the President to make available to the Designated Family Judges both paragraphs 26 and paragraph 27 of Wilson LJ's judgment in *re A (a child) [2007] EWCA Civ 899* which covers the same ground, and this extract from my judgment dealing with the same point, so that they can be widely disseminated within the judiciary hearing family cases, and made available both to the Family Law Bar Association and Resolution, to ensure that the message given in those two cases is clearly known to its members.'

In Hannah's recent case the court concerned had refused to make the order sought, so a stay was not appropriate. Immediate telephone contact was made with the Court of Appeal Office at 4.30 pm. Having explained the situation Hannah was instructed to fax an appellant's notice and grounds of appeal immediately. She did so at 9.00 am the next day, Friday, and by lunchtime that day the court had listed the appeal for the following Tuesday, two business days later, with directions about which parties were to be represented at the appeal and for the filing of skeletons arguments. Although the Court of Appeal dismissed the application, Thorpe LJ commended Hannah for using the procedure in exactly the right way.

Jane Murphy

Lectures

Gemma Borkowski and Deborah Dinan-Hayward will be giving a seminar to Bath Resolution on 30 April 2009 on the *Variation and Capitalisation of Maintenance*. For further information please contact Katherine Moody, Bath Resolution, Withy King (01225 425731).

Daniel Leafe and Deborah Dinan-Hayward are giving the summer series of Albion seminars on *Ancillary Relief and the Credit Crunch; Pensions and the New Child Maintenance* and *Enforcement Commission*. The dates and venues are:

9 June 2009
Copthorne Hotel, Cardiff

10 June 2009
Marriott Royal Hotel, Bristol

18 June 2009
Thistle Hotel, Exeter

For further information please contact: julie.stockbridge@albionchambers.co.uk

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