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Albion Chambers FAMILY TEAM NEWSLETTER

Special Guardianship

A comment on some initial issues arising

The brand new concept of special guardianship excited a lot of interest before it was brought into force on 30 December 2005 by the Adoption and Children Act 2002, s115 of which inserted s14A – 14G into the Children Act 1989.

I have found that the interest in the order is strong, and there continues to be much discussion among lawyers and professionals about how the order should be used, and, if different, how it will be used.

The Special Guardianship Regulations 2005 have now been published, SI 2005 No.1109, readily available to download and print. If you haven't done so already, get yourself a copy. In these early days it is helpful to know (or have on hand) what information the court must have before making a special guardianship order.

I have been involved in three quite separate cases where the court has been very keen to make such an order, and wanted to do so there and then of its own motion. All three have involved family placements where the family members were not the foster carers of the child or children at the time the court wanted to make the order.

Though detailed, the requirements for making this order are not especially complex. A checklist from the Act and the Regulations can be compiled, and where the three months notice specified by s14A (7) has been given, all matters can be dealt with without obvious difficulty.

However, my experience (and therefore I assume others must have been in the same position) has been that there is impatience to get on and make these orders! My cases have all been care cases: it seems likely that the situation in private law proceedings will be different.

Several issues arise (not an exhaustive list!):

- has the court the power to make an order in this way?
- what information does the court need?
- is there a particular form in which the information must be presented?
- does it matter who the information comes from?
- is finance and the issue of Local Authority Services resolved?
- what else must the court consider?

The court does have the power to make the order of

This edition of the newsletter comes too late for New Year's resolutions but fits well with Spring cleaning our ideas about the way we work! The articles in this edition all have clearly legal content – that is, law rather than policy or material borrowed from other professional disciplines. Family law is often regarded by Civil and Criminal Lawyers as less strict and in some ways 'softer' than other areas of practice. In particular, the perception is that hearsay evidence is not just more easily admitted but carries more weight in family proceedings, although of course, this really only applies to Children Act proceedings: secondly, the requirement in almost all areas of family law apart from divorce itself for the Judge to exercise discretion is sometimes seen as making the task easier, although it actually produces a very much heavier burden of responsibility for Judges and Advocates alike. Two recent decisions re-emphasise the need for strict preparation for trial and thorough investigation of issues of fact – the stuff of good resolutions for us all!

In Re. A 2006 1FLR 283 (a fact finding hearing within a contact application) Black J gave guidance as to good practice:

- Time estimates must be realistic and not adjusted to fit the available space in the court's diary
- The best possible evidence, first hand is available and any corroborative evidence should be presented to the court
- It is inappropriate simply to present the court with a problem and ask for help. Draft directions and proposals for resolving the issue should be presented
- Statements of Evidence must be full
- Schedules of Allegations with the other parties' answer, should be prepared to be used by the court in a way akin to pleadings to base findings

In **K v K** 2005 EWHC 1040 Baron J set out the requirements for good practice in difficult ancillary relief cases:

- Where disclosure is going to be significant and there is extensive disagreement over assets and/or behaviour, there should be Case Management by an allocated (High Court) Judge from the outset
- All outstanding issues should be resolved at the final hearing, including the division of chattels. A Scott Schedule should be completed for the court's use in making decisions regarding chattels
- There should also be joint instructions of any expert and where there is lack of co-operation, an application should be made to the court.

These Practice Directions will apply in all cases where the court is invited to make Findings of Fact, perhaps most obviously at the threshold stage in care proceedings, where violent or other relevant behaviour is alleged in private law Children Act Proceedings, where the extent of the assets is not agreed in ancillary relief, and in defended divorces. They will not appear to be unusual to anybody with experience of a criminal trial or civil litigation above the "Small Claims" track. However, the exigencies of real court timetables and the limits imposed by public funding have made best practice something of a luxury. It needs always to be borne in mind that these guidelines seek to do no more than ensure a fair trial and a safe foundation on which the Judge can exercise a discretion.

Chambers news this Spring is that we have been joined by Ben Jenkins on completion of his pupillage and that we are planning a public law update day in September to share and consolidate our experience of the Adoption Act 2002 now that it is in practice. A similar session on the Civil Partnership Act will follow when there is news to report on – probably more than a year after 5 December 2005!! Meanwhile, please contact us with your comments on what we do and what you would like us to provide in the way of newsletter, lectures and chambers services generally.

Tacey Cronin Editor

its own motion (s14a (6) (b)), and the circumstances in which it can make that decision are not specified: so if the court is satisfied, that would appear to be all that is required.

'The court may not make a special guardianship order unless it has received a report dealing with the matters which referred to in subsection (8)' (s14A (11)), which are (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, [i.e. the Regulations] and (c) any other matters which the Local Authority consider to be relevant.

The Act (as above) uses the phrase 'a report', and the schedule to the Regulations is entitled 'Matters to be dealt with in report for the court'. There is no format specified. There seems to be a view common among practitioners that the report need not all be in one document. That remains to be tested.

The report which the court must have before making a special guardianship order is, according to ss(8), to be prepared by the Local Authority, but ss(8) deals with the cases where notice has been given; ss(11) does not distinguish between those cases where notice is given, and those where the court wishes to make an order of its own motion, so is it the case that the Local Authority must necessarily prepare the report which the court must have in those circumstances? Subsection (11) states that the court may not make the order unless it has received a report dealing with the matters referred to in ss(8), but does not repeat the requirement for the Local Authority to prepare the report. If a full report is needed, then it seems obvious that the Local Authority must undertake this task.

However, in circumstances where the court has much of the information required, or even all of it (though there are one or two things it is very unlikely to have in the ordinary course of events, such as reports from three referees), or can obtain the last details quickly and easily, can a report of many parts be used, where, for example, a report from an independent social worker provides some of the required information?

S 14A (10) permits the local Authority to '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…' so the information can come from another, but would this include retrospectively adopting or using information from a report from another person, when the information in it may not have been gathered for the purposes of special guardianship, but otherwise fits the bill?

Finance and services for special guardianship are big issues for Local Authorities, and the latter must be addressed before an order is made. Unless no finance is required by the prospective special guardian, it would be unwise to agree to an order being made on behalf of a client unless finance is resolved (Chapter 2 of the Regulations). Many Local Authorities are still writing their policies on this, so whoever you are acting for, caution is needed.

The court must also consider those matter specified in s14B (1), and may deal with the matters in s 14B (2).

Overall, making one of these orders in a hurry is likely to be tricky, and very often the whole of the information needed will simply not be available, but if it is, and there are such cases out there, it seems there are ways it can be done. I look forward to hearing from you how it goes!

Jane Murphy

Inheritance and ancillary relief funding

The recent perspectives

Part Two: Post-White developments

A small part of the historical background to inheritance as an issue in ancillary relief cases is set out in the previous edition of this newsletter. In this edition the developments in some of the relevant authorities since then will be sketched out.

Cowan v Cowan

Almost immediately after White Thorpe LJ analysed the decision in Cowan v Cowan[1] the judgement does not expand or explain the law but it does regard the passage by Lord Nicholls as one aspect of an over-arching theme of fairness but we should note fairness that potentially points away from equality not towards it.

Norris v Norris [2]

'Applying the words of the statute, in my judgement the court is required to take into account all property of each party. That must include property acquired during the marriage by gift or succession or as a beneficiary under a trust. Thus, what comes in by statute through the front door ought not, in my judgement, to be put out of the back door, and thus not remain within the court's discretionary exercise without very good reason. In my judgement, merely because inherited property has not been touched or does not become part of the matrimonial pot is not necessarily, without more, a reason for excluding it from the court's discretionary exercise. In this case, 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 judgement 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'

Thus in the view of Bennett J there is no argument for ring-fencing assets in any circumstances. The emphasis must be from the point of view of contribution.

GW v RW (Financial Provision: Departure from Equality) [3]

This approach is confirmed in GW v RW,

'This analysis cannot be challenged. I therefore propose to treat all arguments advanced by Mr Marks QC on his second point as impacting on the question of contributions. It must be artifice and contrary to the express words of s25(2)(a) Matrimonial Causes Act 1973, as Bennett J has pointed out, to exclude the non-marital assets from the pool of assets to be divided.'

H v H (Financial Provision: Special Contribution) [4]

But it is (perhaps) difficult to reconcile the two cases above with H v H in which it

[1] [2001] EWCA Civ 679 at para 51.

[2] [2003] 1FLR 1142 at 1162 [64] and 1164 [67] Per Bennett J.

[3] GW v RW (Financial Provision: Departure from Equality) [2003] 2 FLR 108.

[4] [2002] 2 FLR 1021 at [60].

was said that, 'In my judgement, there is a clear distinction between the two inheritances. The wife's forms part of the parties' resources which it is fair to take into account in deciding how they should be split. The US inheritance, in my judgement, should not and I propose to disregard it in my calculations, as I am satisfied that without it I can still strike a balance that is fair to both parties'.

This would appear to possibly be an example of an inheritance which was not a contribution to the welfare of the family. It does, however, seem somewhat perverse if matters are to be viewed from a 'contribution' perspective that failing, refusing or deciding to not contribute an inheritance to the welfare of the family should be rewarded to a fuller extent than making a contribution. Perhaps, therefore it is more accurate to see the case as one where there was a more decisive circumstance or relevant factor.

Figgin v Figgins [5]

Figgins v Figgins further rejects the 'ring-fencing' view. It is a very useful summary, approved by the Court of Appeal in Norris.

'A useful recent discussion of inheritance is to be found in the decision of the House of Lords in White in the judgement of Lord Nicholls. His Lordship refers to a view that inherited property, whenever acquired, should stand on a different footing from other matrimonial property. According to this view, the spouse to whom it was given should be allowed to keep it. Conversely, as a consequence of such a view, the other spouse has a weaker claim to it. Lord Nicholls entirely rejects the above proposition ([ring-fencing]). The substance of what his Lordship said after referring to that view, is as follows:

- When present, the factor of an inheritance is one of the circumstances of the case
- It represents a contribution by one of the parties
- The Judge should take it into account and decide how important it is in the particular case
- The nature and value of the property and the time that it was acquired are among the relevant matters to be considered
- However, in the ordinary course, this factor carries little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to the property.

We note in passing that Thorpe LJ in the later case of Cowan appears to have treated Lord Nicholls' statement as supportive of a view that we think Lord Nicholls rejected, that it is appropriate to 'quarantine' inheritance.'

J v C (Disclosure: Offshore Corporations) [6]

Not the sort of case that many of us are likely to see! The husband was worth 'over £15 million'. Much of the family wealth had been introduced by the husband from his family shipping company that existed long before the marriage. In those circumstances it was said,

'…this is clearly not a case for a half share…once the court departs from equality fractions tend to become arbitrary and carry almost no logical significance. It is far safer and better…in cases of this kind, properly to recognise the wife's contribution by looking carefully at her financial needs.'

P v P (Inherited Property) [7]

This was a farming case with assets of over £2.25m and a 19 year marriage.

'There is inherited property and inherited property. Sometimes, as in White v White itself, the fact that certain property was inherited will count for little…On other occasions the fact may be of the greatest significance. Fairness may require quite a different approach if the inheritance is a landed estate that has been within one spouse's family for generations and has been brought into the marriage with an expectation that it will be retained in specie for future generations. That said reluctance to realise landed property must be kept within limits. After all, there is, sentiment apart, little economic difference between a spouse's wealth tied-up in the long established family company and a spouse's inherited wealth tied up in the long-held family estates.'

The judge rejected both a percentage approach and an approach that did not require the husband to realise any of the farming assets. Similarly to J v C the judge said:

'This is a case where the wife's reasonable needs require to be met: no more and no less. There is no justification for leaving her, after this marriage and bearing in mind everything she has done, and in relation to the children, everything she is continuing to do, with anything less than what she needs.' [8]

R v R [9]

This was another farming case decided in November 2003 and an interesting contrast to the above. It was a 16 year marriage. The farm was run (by the husband's family) through a long-established company in which the husband owned 6.18% of the shares with a vested interest in remainder in relation to 33.3%. The company which was worth £3,800,000 had never declared a dividend. The husband could not borrow against the security of the shares. Thus the husband was a classic minority shareholder. The District Judge regarded the husband's shareholding, discounted for being in a minority, as worth £448,000. The parties had only an additional £30,000 of liquid capital.

On appeal the 'company' offered £200,000 to purchase a house for the wife to occupy and the husband offered the £30,000 in addition.

Wilson J stated:

'The husband is the owner in possession and in remainder of shares which the district judge valued at…£448,000. For this wife to exit from a 16 year marriage, following a full contribution on her part…with a lump sum of only £30,000 would seem to me, even in the context of life-long, rent-free accommodation, to be wholly contrary to principle.' [10]

To attempt to effect a solution where the wife would receive proper periodical payments and £264,000 Wilson J ordered a lump sum with a first instalment of £30,000 followed by monthly instalments for the next 20 years of the amount of the wife's mortgage instalments on a £225,000 mortgage (approximately £1,666 pm). [11]

Such an order would survive his death or her remarriage. Furthermore it was charged on the husband's shares giving the wife the rights of a minority shareholder in the event of default. The instalments were to be made from income as follows:

Income: £38,350 pa [12]

Lump sum instalments: £20,000 pa.

Periodical Payments: £6,000 pa.

Balance: £12,350 pa.

The judge admitted that it was 'a frankly unusual order' but this case illustrates the lengths the courts will now go to in order to ensure what the judge described as 'the only fair result for each party'. The case in some ways provides finality and fairness. Both parties knew where they stood and there was an approximation of equality. However, given that lump sums are not variable it created a long-term

[5] Australian Supreme Court (Full Court). [2002] FamCA 688 (Nicholson CJ).
[6] [2003] EWHC 3110 (Fam) per Coleridge J.
[7] [2004] EWHC 1364 (Fam) per Munby J.
[8] At 589 para 44.
[9] [2004] 1 FLR 928.
[10] At 937 [38].
[11] This is an example of the Coleman order referred to above.
[12] Plus substantial benefits in kind.

obligation for the husband without being able to deal with the inherent uncertainty of both his and the wife's future needs/resources. It is essentially based on the wife's entitlement but that present capital entitlement was to be met out of future income resources.

I therefore tentatively suggest two propositions distilled from all the authorities above.

- Inheritance is only a factor where needs can be met without recourse to it
- Where the assets, including the inheritance exceed the parties' needs and are difficult to realise and/or intended to be preserved for the future the focus is on meeting the needs of the non-inheriting party in full.

These leave the situation where asset, including the inheritance exceed the parties' needs but are readily realisable and there is no need for the parties to be mindful of ongoing familial responsibilities yet to be determined. This will be the subject of the article in the next newsletter.

Daniel Leafe

Ancillary relief funding

The Legal Services Commission has published new guidance in relation to funding applications for ancillary relief. There is now a discretionary ground for refusal 'if it appears reasonable in all the circumstances for proceedings to be funded privately, having regard to the financial circumstances of the client and the value of the assets in dispute'. The LSC will consider the availability of capital assets, the borrowing potential of the client, and the evidence of availability of a loan as well as any evidence produced to show that funding from other sources is not available. This should include evidence from two or more reputable bank or building societies of refusal, and legal representation may still be granted if the interest on a loan would be at least 10% more than the client's monthly contribution. New guidance needs to be read in the light of a decision Nicholas Mostyn Q.C. in TL v ML. An award of maintenance pending suit will not include an element to cover the cost of litigation except in exceptional circumstances, and in particular not in cases where a loan is available or solicitors are willing to enter into a Sears Tooth Agreement.

Tacey Cronin

Where to begin in Ancillary Relief

Part II of the Matrimonial Causes Act 1973, which is mirrored in schedule 5 of the Civil Partnerships Act 2004, gives the court extensive powers of redistribution of income, property, capital and pension on a divorce or dissolution. But where do you begin? Is there a presumption of equality of outcome?
The answer lies in ordinary civil law. A court of law has no jurisdiction in common law or equity to redistribute financial resources between a couple on their separation. A court can declare that a person has a share in property etc. that appears to belong to another (constructive trust) and it can take steps to prevent someone from going back on a promise (proprietary estoppel) but these are powers to declare a situation that already exists rather than powers to redistribute. If the court finds that X holds the house on constructive trust for X and Y in shares of 70% and 30%, it is not 'giving' Y 30% but simply declaring that that is what Y owns.
Powers of redistribution or adjustment are statutory. There are powers uniquely for the benefit of children (Children Act 1989) and certain classes of bereaved person (Inheritance (Provision for Family and Dependants) Act 1975). In the absence of such situations, it is up to the Couple to opt in to the laws which allow for redistribution by marrying or registering. If they do not marry or register, there are no powers of redistribution on separation however long the relationship lasted.

Historically the assets were nearly always in the man's name and he tended to be the breadwinner and the woman the homemaker. Nowadays de facto equality is far more likely and spouses/ partners are likely to jointly own their homes. In Parra v Parra [2003] 1 FLR 950 (a divorce case) the parties had carefully ordered their financial affairs and had opted for equality. Thorpe LJ held that judges should give 'considerable weight to the property arrangements made during marriage' and, in short, they should not interfere unless 'fairness obviously demands some reordering'. In the notorious case of White v White [2001] 1 AC 596 one of Mrs White's arguments was that at civil law she was a partner in the farming business. If she was not married to Mr White and the partnership business was dissolved, she would receive her share which would be worth rather more than a share of the assets based on the fiction of 'reasonable needs'.

As, perhaps, naivety is in decline one can understand the greater weight divorce courts are now attaching to pre nuptial status, pre-nuptial agreements and post nuptial financial arrangements. Logically the same philosophy should apply when unwinding civil partnerships. So the starting point in ancillary relief is to establish the financial status of the parties in civil law and then ask the question whether adjustment is justified after taking the statutory checklist of factors into account. And so the starting point for most modern divorcing / dissolving couples must be the legal and beneficial title(s) that they chose before divorce / dissolution provided, of course, that both parties had deliberately ordered their affairs without overt discrimination or irrationality.

Alex Ralton

New costs rules in Family cases

In GW v RW (Financial Provision: Departure from Equality) [2003] 2 FLR 108 Nicholas Mostyn QC took the opportunity to express his view that in high wealth cases it would be better to start from a standpoint that there should be no order for costs, each party to bear their own, unless a party is guilty of 'unreasonable conduct'. This was not followed in Norris v Norris, Haskins v Haskins [2003] 2 FLR 1124 where it was decided that costs in family cases should be governed by the procedures set out in both the CPR r 44.3 (excluding r 44.3(2) containing 'the general rule') and the FPR 1991, r 2.69. This rule gave statutory authority to the practice approved in Calderbank v Calderbank [1975] FLR 113 of making an offer in a letter headed 'Without prejudice except as to costs'. If a party failed to accept an offer that was not beaten by the court's award, unless the court considered it unjust to do so, that party could be ordered to pay any costs incurred 28 days after the offer was made. The factors the court had to consider in making such a costs order were contained in r 2.69D.

However, this approach will be confined to the history books when the Family Proceedings (Amendment) Rules 2006 come into force on 3 April 2006, giving statutory effect to the approach in GW v RW. These rules amend the Family Proceedings Rules 1991 and will hail an entirely new approach to costs in ancillary relief. The general rule is that the court will not make an order requiring one party to pay the costs of another party (r 2.71(4)(a)) unless the court considers it appropriate to do so because of the 'conduct' of a party (r 2.71(4)(b)). The conduct to be considered by the court is specifically set out at r 2.71(5)(a) to (f).

The most significant amendment contained within the new rules is the abolition of Calderbank letters, r 2.71(6) states, 'No offer to settle which is not an open offer to settle shall be admissible at any stage of the proceedings,' except for consideration at the FDR appointment. The focus now is clearly on open offers, the substance of which forms part of the 'conduct' to be considered under r 2.71(5)(b). It will be interesting to see what further role Calderbank letters have to play in the process. No doubt there will be occasions when in the early stages a party is willing to settle for a sum they would not want to offer if the matter proceeded. Obviously an open offer cannot be withdrawn as simply as a Calderbank offer can be.

There is also a procedural change that will affect the preparation of every ancillary relief file. A new r 2.69F provides that in addition to the production of the Form H at every hearing or appointment each party must file not less than 14 days before the final hearing full particulars of all costs in Form H1. This is to enable the court to take account of the parties' liabilities for costs when deciding what order (if any) to make for ancillary relief. The Form H1 breaks down all of the costs information separately, from before the issue of Form A, after Form A up to the FDR, after FDR to the date of the H1, after the date of the H1 to the end of the final hearing and finally an estimate of the costs in implementing the court's order.

It is expected that in the absence of relevant 'conduct' the court will treat the parties' costs as part of their reasonable needs. In this respect the costs will form the top slice of the award, with the remainder being divided between the parties. There are a plethora of potential problems with this approach, most notably what should happen when there is a substantial disparity between the parties' costs. Should a party who has controlled their costs be responsible for half of the other parties' costs? Whether the court will encompass this situation within the catch-all provision of any other relevant conduct contained in r 2.71(5)(e) or whether they will devise a new approach will hopefully be addressed soon after implementation.

Benjamin Jenkins

Family Team Seminars

Date for your diary

Our next public law training day will be held on Tuesday, 5 September 2006.

The seminar will again be held at the Bristol Marriott Royal on College Green.

Programme and booking details will be circulated in due course.

RE G (A CHILD) (INTERIM CARE ORDER: RESIDENTIAL ASSESSMENT) REPORTED AS KENT v G

This House of Lords case answered the important question about the extent of the court's power under s 38(6) of the Children Act 1989 to give directions for the 'medical or psychiatric examination or other assessment of the child.' The principal purpose of the subsection was to enable the court to control, and therefore limit, the number and type of examinations or assessments of a child who was the subject of care proceedings. The main focus was on the child. What was proposed to be assessed in this case was the mother's capacity for beneficial response to the psychotherapeutic treatment that she was to receive, which could not be brought within s 38(6).

The Court also dealt with the issue of funding implications of s 38(6) directions. The statute did not identify on whom the cost of compliance with the directions was to fall. It was natural to suppose that a direction by the court under s 38(6) would have to be funded by the local authority or, to the extent that the costs can be treated as costs of the litigation, the costs could be apportioned between the parties by a costs order. But where there was a direction for an assessment at a residential unit of the whole family, the responsibility of the local authority was less clear.

On 8 November 2005 the Children and Families Team at the LSC published a position statement regarding the extent to which the LSC would be prepared to contribute to such funding. The LSC would not fund any element of treatment, therapy or training within a programme of assessment but would fund the costs of an assessment, or a proportion thereof, either agreed between the parties or determined by the court.

What was directed under s 38(6) must be an examination or assessment of the child, including where appropriate the child's relationship with her parents, the risk that her parents may present to her, and the ways in which those risks may be avoided or managed, all with a view to enabling the court to make the decisions which it had to make under the Act with the minimum of delay. Any services which are provided for the child and the family must be ancillary to that end and the subsection must not be used to provide those services. Any further in-patient treatment in the Cassel had gone beyond what fell within the Judge's power to order under s 38(6) and the appeal was allowed.

Deborah Dinan-Hayward

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