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Albion Chambers FAMILY TEAM NEWSLETTER

Advance decisions to refuse treatment

The Advance Decisions to Refuse Treatment are set out in detail in sections 24 to 26 and may be referable to the "living Will" debate. In essence they provide for:

- Advanced refusals of treatment – not requests for treatment (i.e. the deliberate bringing about of death by virtue of medication prescribed at the ending of life). They must have been made by an adult who has capacity to be effective when the adult has lost capacity;
- The alteration of an advanced decision need not be made in writing – it can be oral;
- Advanced decisions can be made orally and/or expressed in layman's terms;
- The advanced decision must apply to the treatment in question and in the circumstances which have arisen (they need to be specific);
- Additional safeguards where an advanced decision is made to refuse life sustaining treatment in that it must:
  - (i) be in writing;
  - (ii) include a statement by the maker that it is to apply to the treatment even if his life is at risk;
  - (iii) be signed by the person or by another person in the patient's presence and at their direction, witnessed in the presence of the patient by a witness who equally signs or acknowledges the presence of the patient making the advanced decision.

A caveat is provided in s.26(5) similar to advanced decisions as to general treatment, namely such life sustaining treatment can be given or such treatment to prevent serious deterioration of condition pending a decision of the court.

Lasting Powers of Attorney

These replace Enduring Powers of Attorney (which are now repealed under the Act and no new Enduring Powers of Attorney can be made after the 1 October 2007.

What is the difference?

The central differences are:

1) A lasting Power of Attorney may give the Attorney power to make welfare and healthcare decisions; and
2) Registration requirements have been changed – an LPA can be registered with the Public Guardian at any time but cannot be used unless or until registered.
3) There are prescribed forms – either property and finance or welfare and healthcare. Whilst the LPA may be used for property and affairs if a donor has so willed before the onset of incapacity – healthcare and welfare powers can only be used once a donor lacks capacity. Personal welfare LPAs which provide for advanced decisions as to treatment cannot override a subsequent advanced decision refusing treatment (unless there is an issue of life saving treatment). However, an Attorney has no power ▶

Editorial

The Public Law Outline, which came into effect on 1 April 2008, marks the most significant change in attitude to litigation about children's rights since the Children Act 1989.

We wait to see how it will work in practice, but early implementation in the pilot scheme areas and locally (where cascade training has allowed the judiciary to make an early start) suggests that a pragmatic approach consistent with the overriding objective of the CPR will be taken, resulting in an efficient use of the court's resources and a departure from the habits of detailed enquiry into peripheral matters.

Of course, that implies a judgment as to which matters are, or will, be central to the decision and which will be on the edges of relevance, and that will call for a level of skill and expertise from the court and advocates alike. This may seem like a daunting task, but it bears comparison with the introduction of the current Ancillary Relief rules and process: an impressive and apparently different process built on best practice to bring about enormous improvements in speed and predictability, which have (arguably) created the arena for a rights-based re-evaluation of the substantive law.

Whether such optimism can be found here, given the undermining of the funding of care proceedings, remains to be seen: the other comparison to be borne in mind is with the standard of civil litigation practised in the small claims court where insurance companies have devolved their work down to claims clerks with no professional training because of the perception that every RTA is the same.

Tacey Cronin, Editor

to consent to or refuse life sustaining treatment unless the LPA has expressly authorised it. Regard must be given to the Code of Practice and any dispute or issue must be resolved by the Court of Protection.

Court of Protection

The new Court of Protection has the same powers and authorities as the High Court. It came into force on the 1 October 2007 and provides a unified jurisdiction over property, finance, welfare and healthcare matters relating to an incapacitated person. It replaces the High Court's inherent jurisdiction. Different tiers of judges are nominated to sit as judges of the Court of Protection. The court will sit in regional centres as well as London.
Pursuant to s.15 of the Act the court may make declarations as to the following:

- Whether a person has or lacks capacity to make a decision specified in the Declaration;
- Whether a person has or lacks capacity to make decisions on such matters as are prescribed in the Declaration;
- The lawfulness or otherwise of any act done, or yet to be done, in relation to that person. An act also includes an omission or a course of conduct;
- The court also has powers to appoint a Deputy who will make decisions on the incapacitated person's behalf. The principles the court has to consider when considering whether it is in the incapacitated person's best interests to appoint a Deputy are set out as mandatory in s.16(4) namely:
- A decision by the court is to be preferred to the appointment of a Deputy to make a decision;
- The powers conferred on a Deputy should be as limited in scope and duration as is reasonably practicable in the circumstances;
- The appointment of a Deputy can be varied or discharged by subsequent order and furthermore in certain circumstances as set out in s.6(8) the appointment of a Deputy or variation of powers conferred upon him can be revoked;
- The Deputy appointed will be under the supervision of the Public Guardian. The provision of payment for the Deputy it is submitted is similar to that of the Official Solicitor and Public Trustee and is set out in s.19. The powers available to the Deputy in relation to personal welfare are set out in s.17 and it is important to note that the Deputy may not refuse consent to the carrying out or continuation of life sustaining treatment (s.20(5)). The powers conferred upon a Deputy in relation to property and affairs are set out in s.6;
- No permission is required for an application to the Court of Protection by the following:
  (a) A person who lacks or is alleged to lack capacity;
  (b) If such a person has not reached 18, by anyone with parental responsibility for him;
  (c) By the Donor or a Donee of a Lasting Power of Attorney to which the application relates;
  (d) By a Deputy appointed by the court for a person to whom the application relates; or
  (e) By a person named in an existing Order of the court if the application relates to the Order.

However, permission is required for any other application to the court.

It would seem this is to emphasise that court proceedings are brought as a matter of last resort and it appears in considering s.50(3) the factors the court has to consider in deciding whether to grant permission effectively amount to whether benefit can be achieved in any other way. (In considering the factors set out in s.50(3) it may be considered to be in some of its terms analogous to s.10(9) Children Act 1989.

Public Guardian

The statutory Public Guardian and his functions are set out in s.58: amongst other roles he/she establishes and maintains a register of Lasting Powers of Attorneys, appoints Deputies, supervises Deputies, and directs a Court of Protection visitor. The Public Guardian also has the power to examine and take copies of Health records, records held by local authorities/social services and those held under Part 2 of the Care Standards Act 2000 so far as the records relate to the incapacitated persons. Furthermore, the Public Guardian may also interview the incapacitated persons. Similarly, a Public Guardian Board is created (s.59) and Court of Protection visitors are created under s.61. These bodies provide supervisory functions in relation to the operation of the Act.

Independent Mental Capacity Advocates

The Act creates an Independent Mental Capacity Advocacy Service under s.35 and its functions are set out in s.36. In essence the Act imposes a duty on the Secretary of State for Health in England, and the Welsh Assembly in Wales to make arrangements to enable independent Mental Capacity Advocates to be available to represent and support incapacitated persons in circumstances defined in the act, namely a person to whom a proposed act or decision relates should so far as is practicable be represented and supported by a person who is independent of any person who will be responsible for the act or omission. The provisions and regulations came into force on the 1 April 2007.

A strategic Health Authority, NHS Foundation, PCT, NHS Trust or Care Trust will be under a duty to instruct an IMCA and to take into account any information which is provided or submission made before providing 'serious medical treatment' when there is no-one else for the provider of the treatment to discuss the matter with.

The definition of 'serious medical treatment' is contained in the Mental Health Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006 (SI No. 1832) as treatment which involves providing, withdrawing or withholding treatment in circumstances where:

- If a single treatment, there is a fine balance between its benefits to the patient and the burdens and risks it is likely to entail for him;
- Where there is a choice of treatments, a decision as to which one to use is finely balanced;
- What is proposed would be likely to involve serious consequences for the patient.

The duty does not apply if treatment has to be provided as a matter of urgency, nor to treatment given under Mental Health Act 1983 (for example, s.3).

Funding has been put in place for IMCA's.

Where an incapacitated person is accommodated or transferred to long stay accommodation in hospital (more than 28 days) or care home (8 weeks) there is a corresponding duty placed on local authorities in relation to residential ▸

accommodation provided through them. Pursuant to the Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Expansion of Role) Regulations 2006 (2006 SI No. 2883) – in force 01.04.07 – the NHS Body, or local authority may instruct an IMCA when reviewing accommodation arrangements for the person to take protective measures to minimise the risk of abuse or neglect.
The functions of the IMCA are set out in statute in s.36 which also provides the power to challenge a decision taken as if he were, for example, a 'nearest relative'.

Medical research

Provisions relating to medical research are set out in sections 30 to 34 which came into force on the 1 April 2008. Two avenues to enable some research to be carried out on an incapacitated person are through the Medicines for Human Use (Clinical Trials) Regulations 2004 (SI No. 1031) and now the Mental Capacity Act 2005 sections 30 to 34 – the latter which provides a framework under which it will be possible for intrusive medical research to be carried out on an incapacitated person which may not be of direct benefit to that person but is intended to provide knowledge in helping people in a similar condition. Additional safeguards are provided in s.33 and include amongst others that the interests of the person must be assumed to outweigh those of science and society and if the incapacitated person indicates in any way that he wishes to withdraw from the project he must be withdrawn without delay. However, treatment is not to be required to be discontinued if there are reasonable grounds for believing that there would be a significant risk to the incapacitated person's health if it were to be discontinued.

Claire Wills-Goldingham

The writer sits as the legal member on the Mental Health Review Tribunal. Her review of the new Act was published in the Autumn 2007 edition of the Newsletter and this article deals with the newest aspect of the Mental Capacity Act 2005.

Coleridge J addresses the Resolution National Conference

Coleridge J's speech to the largest annual gathering of family lawyers attracted a good deal of press comment, largely focusing on his warnings about the state of British society resulting from the breakdown of ordinary family life. It was a long speech (7000 plus words) and it makes rewarding reading.

He began by setting out his own credentials: 37 years of experience at all levels of the system – he began his professional life as the then ground breaking reforms of divorce law were introduced, and he admits to having been a fat cat (very successful, well paid lawyer) as well as a humble advocate in the Magistrates' Courts, before achieving his current role as Family Division Liaison Judge for the Western Circuit. He does not need to say that he has no personal interest in the rate of pay available to legal aid practitioners or the adequacy of provision of court services. What he does say is that traditionally *Judges have kept their mouths shut* and not entered the arena of the administration of justice, but *that the time has come for family judges to speak out publicly in protest at the way in which the Family Justice system in this country has been and is being mismanaged and neglected by government.*

That time has come because *'in some of the more heavily populated urban areas of the country family life is, quite frankly, in meltdown or completely unrecognisable.'* He is not knocking single-parent families (his own phrase). He is talking about the wholesale breakdown of ordinary family life in the households of our land, parents (whether married or not) providing no consistent parental influence or authority over their children's daily lives and separating as a matter of course and as part of the ordinary experience of children as they grow up. The consequential damage to the functioning of individuals and their ability to contribute to society cannot be overestimated. *'What is certain is that almost all of society's social ills can be traced directly to the collapse of the family life.* We all know it. Examine the background of almost every child involved in the public law Care system or the youth justice system and you will discover a broken family. Ditto the drug addict. Ditto the binge drinker. Ditto those children who are truanting or cannot behave at school. Or indeed any of the other ills which are so regularly trumpeted by the media as the examples of national collapse. *It always comes back to a broken family or the complete lack of any stability within the family.'*

He urges Government to take action, to recognise the importance of dealing constructively with the members of the public who come before the family and criminal courts and to meet the pressing need for greater resources in the legal system. He goes on to apply the same argument to private law as to the care system, and to call for a new reform of the divorce laws. He quotes other Judges and the Public Law Protocol. Nobody with any interest in the area of work which we practice who reads this speech can fail to be impressed, moved and inspired by it. It was a rallying cry to solicitors, but it gives support from the judiciary, *'my message to you is that the work of this organisation has never been more vital to the health of the nation. Do not allow yourselves to lose sight of the big agenda of which you are an essential part.'*

It is a message that we all should heed.

Tacey Cronin

'Brussels I' and 'Brussels II Revised' in relation to international ancillary relief proceedings

From March 2002, the 'Brussels I Convention' was replaced by the new Council regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I').

Brussels I provides a mechanism for applying for and enforcing maintenance orders in States contracting to the Convention. The Council Regulation (EC) No 2201/2003 of 27 November 2003 ('Brussels II Revised') concerns jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation 1347/2000 entered into force on 1 August 2004 ('Brussels II'). It has applied from 1 March 2005. It has direct effect in the United Kingdom and all other member states of the European Union except Denmark. 'Brussels II Revised' has adopted the provisions of Brussels II which have not changed on divorce, divorce jurisdiction and first to issue, although, rather inconveniently, the numbers of the Articles have.

The new role of this country in international ancillary relief was referred to in *Charman v Charman* (2007) 2 FCR 217 by Sir Mark Potter P at page 264:

'… Globalisation particularly affects the ultra-rich. They are unlikely to inhabit only one country. With a string of properties acquired for diverse purposes they are likely to be subject to the jurisdiction of at least two courts when the marriage falls apart. London is increasingly likely to be one of the jurisdictions. Now that London is regularly described in the press as the 'divorce capital of the world' it is inevitable that applicants will seek to achieve a London award. If there are no international conventions applicable to the dispute there will be a forum conveniens battle, often at quite disproportionate cost to the parties' assets or, more importantly, the means of one of the spouses. Even if international conventions apply, expensive struggles can still escalate..'.

There have however been some recent interesting cases in relation to Brussels I, Brussels II Revised and Habitual Residence which have come before the Courts in finance cases.

- In *Marinos v Marinos [2007] 2 FLR 1018*, Munby J reviewed the European authorities in great detail and concluded that s 5(2) Domicile and Matrimonial Proceedings Act 1973 (as amended) makes Brussels II Revised the primary basis for establishing jurisdiction in all matrimonial suits. So in any suit where habitual residence is in issue it is now necessary to turn to EU law rather than the domestic law.
- In *Prazic v Prazic [2006] 2 FLR 1128*, the husband petitioned for divorce in France. Shortly afterwards, the wife issued divorce proceedings in the UK, but that move was 'frozen' by an application under Brussels II Revised so she then issued proceedings under the Trusts of Land and Appointment of Trustees Act 1996 to get around the problem! She sought a declaration as to equal ownership in equity of two properties acquired during the marriage, and a tracing order in relation to the proceeds of sale of an Essex property. The Husband's appeal to stay the TOLATA proceedings pending the outcome of divorce proceedings in France was allowed. The Court held that having recognised the primacy of the French jurisdiction by the stay of the divorce proceedings initiated by the wife in the UK, it would be quite inconsistent with the objectives and underlying policy of the Brussels II Revised to say that the wife could bring civil proceedings in this jurisdiction which only thinly disguised their true competitive objectives.
- In *Bentinck v Bentinck [2007] EWCA Civ 175* the Husband had taken up permanent residency in Switzerland and the Wife had remained in the United Kingdom. The premarital agreement had provided that the contract and marital relationship between the parties would be subject to Swiss jurisdiction and law. The Husband initiated divorce proceedings in Switzerland and the Wife later petitioned for divorce in England. The Swiss court heard the dispute as to which court was first seised in divorce and ancillary matters. The Court of Appeal granted a stay of the English divorce proceedings on the basis that the issue of which jurisdiction was first seised according to Swiss law was determinable in Switzerland and better determined by a Swiss court than an English one.
- The case of *J v P [2007] EWHC 704 (Fam); (2007)* Fam. Law 560 concerned maintenance for the child of unmarried parents. The Italian father started proceedings in Italy in July 2006 seeking a declaration of parentage and a decision as to maintenance against himself. The mother, who lived in England, made an application under Sch. 1 Children Act in October 2006. The father applied to stay the mother's proceedings which was reluctantly granted by the Court as being mandatory. The proper forum for the mother to raise her arguments was the Italian court. Under Article 27 of Brussels 1 where proceedings involving the same cause of action and between the same parties are brought in two Member States, the state second seised must stay proceedings until the jurisdiction of the state of first issue is established. If Article 27 does not apply but the two sets of proceedings are related actions under Article 28, the Court second seised has a discretion whether to it should stay its own proceedings.
- Finally, in *Moore v Moore [2007] 2 FLR 339*, the Court of Appeal upheld the granting of permission to a wife to apply for financial relief after an overseas divorce as the husband's earlier application in Spain had related not to maintenance but to property rights arising out of the marriage and therefore fell outside Brussels I.

Deborah Dinan-Hayward

Deborah Dinan-Hayward, Marie Leslie and Hannah Wiltshire gave the recent seminar on Brussels II Revised.

WHEN THE BAILIFFS COME KNOCKING...

With credit problems reaching crisis levels, and record numbers of people being declared bankrupt, it is worth remembering the effect debt can have on ancillary relief proceedings. The Insolvency Act 1986 governs bankruptcy and contains a number of provisions which are pertinent to ancillary relief. Upon bankruptcy, a person's estate is vested in the trustee in bankruptcy and comprises all his property 'subject to the rights of any other person' (section 283(5), or any property 'held on trust for another person' (section 283(3)).

Consequently, the bankrupt's spouse might be forgiven for thinking that he or she could rely on the MCA to protect what they would expect to receive in AR proceedings, and stop their rightful share (according to AR principles), from passing to the trustee. Sadly the reality can be very different. The effect of a bankruptcy depends largely on its timing; any AR order and decree absolute made in advance of the bankruptcy will be upheld by the Court as valid (see Mountney v Treharne (2002) 3 WLR 1760) even if the decree comes only one day before the bankruptcy.

However, the position is very different where the bankruptcy comes before the AR order and decree, again even if only by one day. The most noticeable effect is felt in relation to jointly owned property, since the effect of the bankruptcy is to sever the joint tenancy and convert it into tenants in common. This may, at first blush, not seem to present a problem, since separated couples frequently sever a joint tenancy whilst awaiting the outcome of AR proceedings. However, the bankrupt's share becomes vested in the trustee in bankruptcy who, of course, was not party to the marriage.

Thus the MCA cannot be relied upon. Furthermore, case law has determined that the severance creates tenants in common in equal shares (see Goodman v Gallant (1986) 1 FLR 513), irrespective of what each party may have been able to argue under the principles of AR. Consequently, the trustee in bankruptcy secures a right to 50% of the property which the MCA cannot rectify.

An argument that a joint tenancy includes an implied trust that, in the event of divorce, the parties will divide the beneficial interest in accordance with AR principles, and that that gives rise to a right under section 283(3) Insolvency Act 1986, has yet to be successful in the local Courts, and no doubt it will need some authority from a much higher Court before they can be persuaded to change things at the coal face.

So what can be done if bankruptcy does become an issue during AR proceedings? If the property has not yet been sold, the trustee can place a charge over it instead of requiring an immediate sale (section 313 IA 1986), allowing the spouse and children to remain in it for the short term. There is no such assistance in relation to the proceeds if the property has already been sold (as many couples do to pre-empt possession proceedings and secure the best possible price for the FMH).

It is also worth considering the motive for bankruptcy. Where it seems to have been pursued unreasonably, for example to defeat a spouse's claim under AR or secure a more advantageous position for the bankrupt (for example, it may be that the bankrupt's debts are equivalent to or little more than 50% of the FMH, but s/he was unlikely to recover 50% at AR. Bankruptcy ensures s/he receives 50% and clears the debts leaving him/her free to annul the bankruptcy), a number of courses can be followed. The first is that the spouse can apply to annul the bankruptcy which, if successful, puts that parties back in the position they were in before bankruptcy and thus the AR can continue unimpeded.

This, however, requires a foray into the bankruptcy Court, and all the associated cost. Alternatively, the matrimonial Court can use other mechanisms to try to rectify the situation. Pensions are largely untouched by bankruptcy and therefore remain available for distribution between the parties. Similarly, the Court is able to make a periodical payments order. The Court also still retains the power to order a lump sum, even if the bankrupt has no means to pay it at the moment. Debts arising from matrimonial proceedings are not discharged by bankruptcy and will persist even after the bankruptcy comes to an end. Whilst it is likely to be a mechanism reserved for cases of blatant misconduct or vexatious behaviour, it can prove useful where there is the future prospect of acquiring assets, such as a likely inheritance.

As to pre-emptive action, Slade LJ in Goodman saw no reason why the initial conveyance could not provide for a property to be held as joint tenants until severance, but in the event of severance to be held as tenants in common in shares other than equal (perhaps, according to AR principles?) although this would require a serious degree of forethought, and pessimism, on the part of conveyancers and spouses alike. Such an express declaration of intention would be upheld by the Court and would displace the otherwise automatic transition from joint tenancy to tenants in common in equal shares. In all other cases where bankruptcy looms, secure an early listing for the AR!

Hannah Wiltshire

Family Team Seminars

Our next team seminar will be held on

Thursday, 12 June 2008 at The Marriott Royal Hotel, College Green, Bristol.

The subject for the seminar will be

The Public Law Outline: A Guide for Practitioners

The session will start at 5:00pm and is scheduled to run for two hours. The speakers will include His Honour Judge Stephen Wildblood QC

For further information, please email seminars@albionchambers.co.uk or contact Julie Stockbridge, Chambers Manager on 0117 311 0349

Prenuptial agreements post Crossley

It has long been recognised that prenuptial agreements are not enforceable at English law, but rather will be taken into account by a court exercising its discretion under Section 25 of the Matrimonial Causes Act 1973 (either as part of 'all the circumstances' (s25(1)) or as 'conduct it would be inequitable to disregard' (s25(2)(g))).

The weight that the courts will attach to a prenuptial agreement has varied, but the trend in the authorities is for an increasing recognition of their weight and the extent to which they should determine the issues.

In *F v F (Ancillary Relief: Substantial Assets) [1995] 2 FLR 45,* Thorpe LJ said, *'In this jurisdiction [prenuptial agreements] must be of very limited significance'.* However, in S v S [1997] 2 FLR 200, Wilson J suggested that although there were circumstances in which prenuptial agreements were of negligible significance (such as in F v F in which adherence to the agreement would have had a *'ridiculous'* result), there would come a case in which the circumstances surrounding the prenuptial agreement and its provisions *'might prove influential or even crucial'*.

The influence he envisaged was found in *M v M [2002] 1 FLR 654*, the first of the post White v White cases on prenuptial agreements. The sway of the prenuptial agreement (that the wife should receive a lump sum of £275,000), was seen in the court's award of £875,000, given that the husband was worth £7,500,000. The court acknowledged that the prenuptial agreement tended *'to guide the court to a more modest award than might have been made without it'*, although it was clearly stated that it did not dictate the wife's entitlement and it was a matter for the court what weight should be attached to any such agreement in order to achieve justice.

K v K [2003] 1 FLR 120 similarly involved a lesser award to a wife than would have been made in the absence of a prenuptial agreement. The wife received, as per the agreement, a lump sum of £120,000 where H had assets of at least £25m (but no disclosure was required upon his concession that he could afford any order the court made) on the ground that no unforeseen circumstances had come about since the making of the agreement which would render it unjust to hold the parties to it .

These developments have now been recognised by the Court of Appeal in the recent decision in *Crossley v Crossley [2007] EWCA 1491*, in which, in a considerable shift from his earlier view, Thorpe LJ remarked *'It does seem to me that the role of contractual dealing, the opportunity for the autonomy of the parties, is becoming increasingly important'*. The Court arguably went further than any court to date in acknowledging that in some cases a prenuptial agreement may be of 'magnetic' importance.

The facts of Crossley

The husband (H) was worth approximately £45m, whilst the wife (W) had £18m to her name. A prenuptial agreement was signed, the critical part of which set out that the parties would leave the marriage with whatever they put into it – they would each keep their own property and there would be a division of the joint property. In the event, the parties separated in March 2007 after 14 months of marriage, and there was no such joint property.

W petitioned for divorce in August 2007 and issued ancillary relief proceedings. H then issued a summons in the High Court requiring W to show cause why her claim for ancillary relief should not be resolved in accordance with the prenuptial agreement.

At the first hearing of H's application, Bennet J directed that there should be a deviation from the automatic timetable flowing from the issue of Form A, and ordered that the parties should exchange Forms E without supporting documents. The first appointment in the AR proceedings was adjourned to be heard with H's application in the High Court. He directed the parties to explain in their Forms E either why the prenuptial agreement was of such great importance or, from W's point of view why it was not and there should be a full investigation and hearing.

It was argued on behalf of W on appeal that Bennet J had been wrong to direct that H's application could be dealt with as a preliminary issue, and that as her case was that H had failed to make full disclosure of his assets prior to the conclusion of the prenuptial agreement, full disclosure was a pre-requisite for the evaluation of the impact of the agreement. W argued that she had in effect been denied access to a court and that she had been denied the right to advance her claims for financial provision.

It was argued on H's behalf that in fact Bennett J had not directed that H's application should be dealt with by way of a preliminary issue (the Court of Appeal agreed), and accepted that the existence of the agreement could not oust the court's obligation to apply the Section 25 criteria. It was accepted that the prenuptial agreement was just one aspect of the case: but in all the other circumstances, namely the fact that this was a childless marriage of very short duration between mature adults both of whom had been previously divorced and both of whom had substantial wealth, it was argued that there was a strong case that a possible result of the Section 25 exercise of discretion would be that W would receive no further financial award.

Judgment of the Court of Appeal

W's appeal was dismissed. The court said that neither the prenuptial agreement nor the orders made to date had had the effect to which W's counsel pointed (namely a denial of access to justice). Bennett J had been entitled to apply the overriding objective as he had done in deciding not to apply FPR r 2.61B, and individual rules were not intended to be a straitjacket precluding *'sensible case management'*.

The court was entirely persuaded by the arguments advanced on H's behalf. Thorpe LJ giving judgment said that *'all these cases are fact dependent and this is a quite exceptional case on its facts, but if ever there is to be a paradigm case in which the court will look to the prenuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me this is just such a case'*.

It was pointed out that W had not been prevented from pursuing her argument regarding non-disclosure by Bennett J's decision, as he had provided an alternative mechanism to deal with the problem (namely the writing of a letter setting out assets allegedly undisclosed, to which H should respond in his Form E). Thorpe LJ acknowledged the call for reform of the MCA 1973 to include legislative provision on prenuptial agreements, and the EU's resolution to hand down a directive to address the difficulties which result from the different approaches taken by member states.

Permission to appeal was granted, on the ground that this is a case of general importance as it demonstrates the discretionary power of a judge to require a party to show cause why a contractual agreement should not rule the outcome of an ancillary relief claim, not only when concluded post separation but also prenuptially.

Comment

This case was heralded by some as meaning that prenuptial agreements are now binding upon the parties. Clearly the Court of Appeal has not in fact gone that far. Perhaps the highest it could be put is that the Court acknowledged that in certain circumstances (here a childless, very short marriage in which the needs of the parties were irrelevant owing to their wealth), where a prenuptial agreement has been entered into without undue pressure being exerted on either party, that agreement may well prove to be determinative of the outcome of the ancillary relief proceedings. Looking at cases like K v K, the idea that a prenuptial agreement may be so influential does not appear entirely novel. Crucially, the terms of the agreement in Crossley embodied settled law as to the division of assets upon the breakdown of short, childless marriages in any event.

The agreement in Crossley has not, as yet, been determinative, as the Court of Appeal was not actually applying the Section 25 criteria itself but was approving a forceful case management decision. Nevertheless, such rigorous case management is not usual (without the parties' consent), even when it can be said that a particular consideration to which the court must have regard means that there is a 'strong case' that a particular result will follow. The potential outcome of Crossley is therefore that we must acknowledge that prenuptial agreements can have a more significant status than other s25 factors and can short circuit cases in a way which other considerations do not. It is the propriety or otherwise of this unusual case management which is now the subject of appeal. Watch this space…

Anna Midgley

Child abduction within the United Kingdom

Before the substantive reason for this article becomes clear, one needs to return to the judgment of Lord Denning in Re L (An Infant) [1968] 1 All ER 20. In this judgment he defines the reason for the powers that the High Court has in relation to children. He says that they derive from the 'right and duty of the Crown as parens patriae to take care of those who are not able to take care of themselves'. With that in mind it would seem obvious that child abduction cases may require the powers of the High Court, but in which circumstances?

This article deals only with abduction within the UK. Practitioners will be familiar with the steps pursuant to the Children Act 1989 which can be taken if a parent is afraid a child may be removed from their care. It is usually sufficient to make an application for a prohibited steps order or a residence order. The parent of course will be concerned to know, although they hold an order, how that order will be enforced that order should it be necessary.

The Family Law Act 1986 reduces the problems that can arise when a child is taken out of the jurisdiction of the English courts to another part of the UK. The FLA amended by the Children Act 1989, sch 13 establishes the principle whereby a Part One order, once registered, will be recognized in any other part of the UK as having the same effect as if it had been made by a local court. A court in England or Wales can make various types of Part One order. It can make s8 order, a special guardianship order, a contact order (ACA 2002 s26) or an order in the exercise of the inherent jurisdiction of the High Court, for care and control of the child.

If a child has been abducted the applicant should apply to the court pursuant to s33 and s34 FLA 1986.

33.– (l) Where in proceedings for or relating to a custody order in respect of a child there is not available to the court adequate information as to where the child is, the court may order any person who it has reason to believe may have relevant information to disclose it to the court.

34.– (l) Where

(a) a person is required by a custody order, or an order for the enforcement of a custody order, to give up a child to another person ('the person concerned'), and

(b) the court which made the order imposing the requirement is satisfied that the child has not been given up in accordance with the order, the court may make an order authorising an officer of the court or a constable to take charge of the child and deliver him to the person concerned.

The High Court has a wider jurisdiction than the lower courts to make orders, assisting in the search and recovery of children. For example if the applicant has good reason to believe the person who has control of the child is likely to hide the child or remove him from the jurisdiction on becoming aware of the application an ex parte application may be made under the inherent jurisdiction of the High Court.

Once the abduction has occurred the applicant should apply as a matter of urgency to the High Court for an order that will enlist the assistance of the tipstaff in finding a child. Most commonly a location order will be granted, and once located, the tipstaff may remove the passport of the child and the adult responsible for the child's removal. In exceptional circumstances a collection order may be made. This is usually granted when the child has been recently abducted by a person who is not his primary carer and is at risk: the tipstaff has power to remove the child and place him with another nominated carer or into the care of the Local Authority.

Prior to any actual abduction it is of course right that matters should be dealt with in the lower courts. However in light of the flexibility which the High Court has to search and recover children once abducted, the ability to apply ex parte and it being the only jurisdiction in which a care and control order can be made, it is difficult to imagine any case which could be dealt with in a lower court, post abduction or when an abduction is planned.

In the recent case in which the writer was concerned, the co-operation and initiative shown by court staff, the local child protection unit and the Tipstaff's office was impressive: an order made orally at 13:00 and perfected at 15:00 resulted in the child being collected by the Tipstaff through the agency of a third police force over 100 miles away and returned to the applicant parent in the early hours of the next morning. Most practical tip? If in doubt, phone the Tipstaff's office and ask for pro forma orders by email.

Kate Goldie

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Louise Price Call 1972
Clerk Michael Harding

Geraint Norris Call 1980
Clerk Julie Hathway

Tacey Cronin Call 1982
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Clerk Michael Harding

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