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Albion Chambers FAMILY TEAM NEWSLETTER

No palm-tree justice for pre-acquired wealth after a long marriage

In the recent case of *N v F* [2011] EWHC 586 Fam, the central issue was the treatment of the husband's assets at the date of the marriage. The case involved a 16-year marriage with two children. The total pot amounted to £9.714 million. At the date of the marriage the husband had assets worth £2.116 million.

Mostyn J reviewed the jurisprudence relating to pre-marital or non-marital property. He identified (with reference to cases such as *White v White* [2001] 1 AC 596; *Robson v Robson* [2010] EWCA Civ 1171 and the recent Hong Kong Appeals in *LKW v DD* and *WLK v TMC* (FACV 21/2009)) that the treatment of such property is 'highly fact specific and very discretionary'. However, Mostyn J was keen to point out that discretion must be exercised 'consistently and predictibly' otherwise (quoting Deane J in the High Court of Australia case of *Mallett v Mallett* (1984) 156 CLR 605) the law would, in truth, be the 'lawless science' of 'a codeless myriad of precedent' and 'a wilderness of single instances' of which Lord Tennyson wrote in his poem 'Aylmer's Field'. He referred to Baroness Hale's comment in *Miller & McFarlane* [2006] 1 FLR 1186 that consistency and predictability should be promoted to encourage the parties to negotiate their own solutions as quickly and cheaply as possible.

The words of Omerod J in *Martin v Martin* [1978] Fam 12 were noted by Mostyn J in observing that the Court's pronouncements 'can never be better than guidelines' since it 'cannot put fetters on the discretionary power which Parliament has left largely unfettered'. Guidelines from which a judge may depart when it is just and equitable to do so represent a compromise between idiosyncrasy in the exercise of discretion and an impermissible limitation of the scope of discretion.

Mostyn J then discussed the two schools of thought regarding the way in which the expression of pre-matrimonial property should be worked out. The first is simply to adjust the percentage of the total assets from 50% as in *Charman No 4* [2007] 1FLR 1246. The alternative technique is to identify the scale of the non-matrimonial property to be excluded, leaving the matrimonial property alone to be divided in accordance with the sharing principle.

The judgment of Wilson LJ in the recent case of *Jones v Jones* [2011] EWCA Civ 41 was quoted at length by Mostyn J as a vivid deployment of the second approach. In that case the main dispute related to the valuation of the husband's business at the date of the marriage. Wilson LJ increased the actual valuation to reflect the 'springboard effect' of the business as well as passive economic growth from £2m to £9m. The £9m was deducted from the total £25m pot of assets and the remainder was divided equally, giving each party £8m. This figure was then tested, secondarily, by the overall percentage technique. The £8m award to the wife represented 32% which was within Wilson LJ's bracket of fairness (30-36%). It is significant to note that the capitalisation of a spouse's earning capacity as applied to the not fledging or fledged but fully airborne husband in *GW v RW* (Financial Provision: Departure from Equality) [2003] EWHC 611, a judgment of Mostyn sitting as a Deputy High Court Judge, was specifically overruled.

Having considered the application of the second school of thought in Jones, Mostyn J helpfully quoted his own words in *FZ v*

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Editorial

First and foremost I, on behalf of all in Chambers, would like to congratulate Nkumbe Ekaney on taking silk. It goes without saying that it is thoroughly deserved and a just recognition of his exceptional abilities. Having been silk-less for sometime we are all very pleased that, once again, we have the skills of a QC to call upon from within the Family Team. Well done Mr Ekaney QC! Now, I hope you will agree that this edition of the Newsletter is, as ever, well worth a read. AR (or rather Matrimonial Financial Proceedings!), Probate, financial considerations in Care proceedings, McKenzie Friends and some 'Steve Wright style factoids' all await you. What more could you ask for? A brief mention of the new FPR which came into effect on 06.04.11. New forms, new procedures and new terminology all to be grappled with just as we were getting comfortable with the old rules. A change is as good as a holiday, so I'm told! Can I finish by reminding you that Chambers is presenting an evening of 'Matrimonial Financial Provisions – an Update' on 18th May 2011 at The Grand Hotel, Bristol between 5pm and 7pm. The Speakers are Deborah Dinan-Hayward (Head of the Family Team), Daniel Leafe and Gemma Borkowski. A strong line up and a must for any financial practitioner eager to bring themselves right up-to-date on law and procedure. Finally, the ever-popular Family Team Public Law Day will be on 9th September 2011, more on that in the next edition. I look forward to seeing many of you at these thoroughly informative, entertaining and good-value events. That's enough hard sell, *enjoy the Newsletter!*

Benjamin Jenkins

SZ and Others (Ancillary Relief: Conduct: Valuations) [2011] 1 FLR 64 as follows:

143. Some argue that this dictum stipulates that the two-stage process should be telescoped into one....A telescoped approach runs the risk of insufficient logical rigour being applied to the identification and treatment of the two very different categories. It runs the risk of palm-tree justice being applied. It is so easy to say – "well there is a good deal of non-matrimonial property here so I will reduce the claimant's share to 40%", but that approach simply does not tell anyone what weight is being given to that factor….What is the point of all this work if it is then to put to one side in favour of a percentage based on 'feel'?

Mostyn J then outlined the process to be followed in relation to pre-marital property as follows:

i) Whether the existence of pre-marital property should be reflected at all. This depends on questions of duration and mingling;

ii) If it does decide that reflection is fair and just, the Court should then decide how much of the pre-marital property should be excluded. Should it be the actual historic sum? Or less, if there has been much mingling? Or more, to reflect a springboard and passive growth, as happened in Jones?

iii) The remaining matrimonial property should then normally be divided equally;

iv) The fairness of the award should then be tested by the overall percentage technique.

The Judge then stated that the whole process is subject to the question of need reminding the Court of Lord Nicholls' words in White regarding the fact that non-matrimonial property can be expected to carry little weight, if any, in a case where the Claimant's financial needs cannot be met without recourse to the property. He finally posed the question as to whether the existence of pre-marital property could have the effect of assessing need more conservatively in the same way as an agreement to preserve non-matrimonial property as in *Radmacher v Granatino* [2010] 2 FLR 1900. Mostyn J briefly reminded himself of the separate nature of the need and sharing principles as articulated by Wilson LJ in Jones, before stating that he did not take that to suggest the assessment of need is an insulated metric, uninformed by factors that are centrally key to the performance of the sharing principle.

On the facts of *N v F* Mostyn J noted that it would be wrong not to exclude any of the pre-marital wealth from the sharing principle. It had been the bedrock upon which the marriage was founded. As against that, the marriage was long and the monies were well and truly mingled with marital funds signifying an acceptance that the monies or their growth or earnings would be shared. The £2.116m pre-marital wealth was reflected by excluding £1m. Any greater sum would not have permitted the wife's needs to be reasonably met. But for that factor, Mostyn J would have excluded more. The remaining assets were divided equally leaving the wife with 44.7% of the total assets.

This case brings real excitement for practitioners advising clients in cases involving pre-matrimonial assets. It confirms the approach to be taken, following Jones, in a well principled, clear, simplistic way. It is somewhat disappointing that having approached the exercise with such rigour in his excellent judgment, Mostyn J reflected the £2.116m pre marital assets (subject to the wife's needs) with exclusion of the round figure of £1m.

The Judge alluded to some difficulty in assessing the wife's needs due to the completely unrealistic nature of her statement of needs and the unsatisfactory provision of evidence relating to her housing requirements, which may explain this.

Gemma Borkowski

Kinship placements, Special Guardianship Orders and potential financial hardship

When a child cannot live with either of his parents and is placed on a permanent basis under a Care Order in long-term foster-care, a Special Guardianship Order or Adoption Order, the regulations governing funding can vary widely depending in which Local Authority the Order is made.

These thoughts on hardship arise out of a case in which I have been involved recently on behalf of a child, and where a Special Guardianship Order in favour of a grandmother was supported by the Local Authority. The case involved a detailed scrutiny of the Regulations and policy of that particular Authority and reference to the authorities (in judicial review and administrative law) for guidance as to where practitioners look for advice when applications for allowances are made and refused, or accepted in part, or allowed on a discretionary basis and then time-limited.

The legislative framework is set out in the decision of Black J in *B v London Borough of Lewisham* [2008] EWCH 738 C Admin when she held that linking Special Guardianship Allowances to adoption allowances was unlawful:

"Some children who are placed with Special Guardians are in situations which have derived from fostering arrangements...and the cost of bringing up those children may not be significantly less than the cost Orders, or where the Special Guardian is expected to manage without Orders".

Whatever the decision, contact will be managed by the Special Guardian and the parents may live miles away. There may be potential expense in facilitating contact. The Special Guardianship report produced for the Court for the hearing is required to deal with many matters in respect of the suitability of the applicant for Special Guardianship in terms of welfare issues. Key information about the child and the prospective Special Guardians and all their circumstances must be included in the Special Guardianship report for the Court. What is not clear, in practice, however, in my view, is to what extent, if at all, the financial circumstances of the applicants is relevant and will be taken into consideration, and if so, at what stage?

Support Services

Each Local Authority will offer a variety of support services which will vary from Authority to Authority. Support for the management of contact, counselling, advice and therapeutic support. Who will qualify? How often can an application be made? What happens if the Special Guardian moves away from the Authority? The picture is complex and far from easy to grasp, depending upon which regulation and which policies are in place at any given time.

Potential Hardship

The Local Authority in my recent case had helped a grandmother with the cost of building an extension to her home, to accommodate the young children she was taking on, but could not accede to any application for ongoing maintenance for someone living solely on Income Support because the policy of that particular Authority is to preclude any financial means-tested assessment at all for an application for Special Guardianship.

The process of assessment involves assessing a particular child's own needs. If those needs can be met by what are termed the 'universal services' of the National Health Service and education, then the assessment ends there. The Authority only moves on to consider the financial situation of the applicant for Special Guardianship if a need over and above the norm for the child has been assessed as being present. Clearly a child-focused approach, but where does such a policy leave the impecunious applicant?

In our case, the Judge concluded, after the agreed submissions from the Bar, that she had no jurisdiction to assist the applicant by any Order. The remedy for the applicant will be by way of judicial review of the policy. Only the most brave and committed of grandparents would pursue a long, expensive judicial review process to achieve change for their descendants.

Practitioners, advising Authorities and applicants alike need to check the individual policies and regulations and watch out for proposals that seek to place with family "on the cheap" or to regard kinship carers as foster-carers at all, stating that these are "voluntary arrangements".

In *Barrett v Kirklees Metropolitan Borough Counci*l [2010] EWHC 46 (Admin) a Special Guardian did succeed in obtaining a fresh assessment of the allowance and it was back-dated.

In *GC v LD* and others [2009] EWHC 1942 Fam the issue of which Local Authority was responsible when a Residence Order had been made in one Authority and the Special Guardianship Order in another, and Sections 20 – 23 Children Act 1989 were analysed.

As family lawyers practising in an environment of cost saving and streamlining of public funding, and as practitioners, Community Charge payers and taxpayers who want what is right and fair for children, this is an interesting area of practice and regulation to watch.

Louise Price

Did you know?

Some fascinating facts with which to delight your friends!

There were 230,000 marriages in 2008, just under half the number from 1974. Divorce rates, however, remained almost the same at 114,000.

35% of parents said they were unwilling to leave an inheritance as their child's spouse could end up with some of the assets in the event of a breakdown of the relationship

Median earnings of full-time male employees were £538 per week in April 2010; for women the median was £439.

Male employees reached their highest earnings aged 40 to 49 at £614 per week, whereas women reached their highest earnings aged 30 to 39 at £508.

About 27 million people are members of an occupational pension scheme. Nearly half of them (12.7 million) are in the public sector.

Men and women in their late twenties have the highest divorce rates of all age groups.

Divorce only became available to the masses in 1857 with the first Matrimonial Causes Act. Prior to that your best hope was desertion or selling your wife. The first true parliamentary divorce was in 1670, between John Manners, Lord Roos, and Lady Anne Pierpont.

www.wikivorce.com has an online calculator which claims to tell you what the Court "will" award you. It comes with a health warning: "the calculation logic is extremely complex (because judges in England and Wales courts take dozens of factors into account when deciding what order to make). We do not claim it will work well for all the myriad of different cases from benefits cases to Paul McCartney. We are missing some criteria which we will add over the coming months"!

A 'low income' household is one whose income is less than 60% of the average household wage, namely £119 (single adult) to £288 (2 adults, 2 children) per week after income tax, council tax, mortgage interest/rent, buildings insurance and water charges. Currently, about a fifth of UK households are 'low income'. £800m per year is spent on the family justice system.

A survey of 67 children in care revealed that only half of them trust the Court to make the right decision.

Being adopted might be a postcode lottery – in some local authorities as few as 2% of looked after children are. In other authorities, the figure is as high as 16%.

There were 4,655 children entered into the Adopted Children Register following court orders made in 2009. Almost 60% of them were aged between one and four.

Of non-infant adoptions, nearly 20% break down.

Only 72% of children are placed for adoption within 12 months of the decision being made.

18.6 per cent of 11-17-year olds surveyed by the NSPCC had been physically attacked by an adult, sexually abused, or severely neglected. This is equivalent to almost a million secondary school children across the UK.

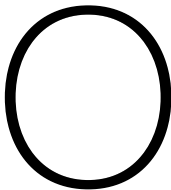
There were 60,000 looked after children at 31-3-07. Nearly half (25,500) were aged 10 – 15. 38,600 were under care orders. Only 5,000 were at home with their parents.

The most popular name for baby boys is Oliver. For girls – Olivia!

Hannah Wiltshire

McKenzie Friends

and what to do with them



ver the last decade, increasing numbers of litigants in person have attended Court with a 'McKenzie Friend' in tow, but who are they, what do they do and how should they be approached, both by the Court and by opponents?

Where do McKenzie Friends come from?

In the case of *Collier v Hicks (1831) 2 B & Ad 663* Lord Tenterden CJ made the following observation: *"Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice…"* This view was endorsed by the Court of Appeal in the case of *McKenzie v McKenzie* [1970] 3 WLR 472 who held that a trial Judge had been wrong to refuse the husband permission to be accompanied during a defended divorce by a friend, (who happened to be an Australian barrister with no rights of audience in this jurisdiction). The Court of Appeal ordered a retrial of the defended divorce and the phrase "McKenzie Friend" was formed.

McKenzie friends in family proceedings

The earliest examples of McKenzie Friends involved cases held in open court. The privacy of the family Courts created more of a dilemma for the Judiciary: what principles should be applied in deciding when to allow non-parties into a hearing held in chambers? The issue was considered by the Court of Appeal in the matter of the children of *Mr O'Connell, Mr Whelan and Mr Watson* [2005] EWCA Civ 759. Two of the appeals involved the refusal by the Judge at first instance to allow a McKenzie Friend into a hearing conducted in chambers. The third considered the issue of disclosure of documentation to the McKenzie Friend. The Court of Appeal confirmed that the presumption in favour of permitting a McKenzie Friend is a strong one and that this right applies to chambers proceedings, subject to the discretion of the judge. There is no reason why documents should not be disclosed to the McKenzie Friend to assist him in discharging his role. The court must ensure that the friend understands the need for confidentiality.

What is the role of a McKenzie Friend?

Essentially, a Mckenzie Friend acts in an advisory capacity to a litigant. It must be borne in mind that he has no rights of audience and so is not permitted to address the court.

Guidance has been given most recently in July 2010 by the President of the Family Division and the Master of the Rolls:

"Practice Guidance: McKenzie Friends (Civil and Family Courts)

What McKenzie Friends may do: i) provide moral support for litigants; ii) take notes; iii) help with case papers; iv) quietly give advice on any aspect of the conduct of the case.

What McKenzie Friends may not do: i) act as litigants' agent in relation to the proceedings; ii) manage litigants' cases outside court, for example by signing court documents; or iii) address the court, make oral submissions or examine witnesses."

Current Guidance

As previously stated, the most recent guidance on McKenzie Friends was issued on 12 July 2010 by Lord Neuberger, Master of the Rolls and Sir Nicholas Wall, President of the Family Division. It was not issued as a Practice Direction, but as guidance in light of the increase in litigants-in-person in all levels of civil and family courts. It supersedes the guidance contained in *Practice Note (Family Courts: McKenzie Friends)(No 2)* [2008] 1 WLR 2757.

The presumption of a right to reasonable assistance is upheld. However, the court retains a discretion to refuse to permit such assistance where it is satisfied that "the interests of justice and fairness do not require the litigant to receive such assistance". The onus is on the court or an objecting party to provide sufficient reasons why the litigant should not receive this assistance. However, this onus is reversed in closed proceedings. Although the presumption in favour of permitting a McKenzie Friend to attend a hearing in chambers is a strong one, it is for the litigant to justify the McKenzie Friend's presence.

Paragraph (6) of the Guidance tightens up the position of notifying the court of the identity of the McKenzie Friend. It provides as follows:

"A litigant who wishes to exercise this right should inform the judge as soon as possible indicating who the MF will be. The proposed MF should produce a short curriculum vitae or other statement setting out relevant experience, confirming that he or she has no interest in the case and understands the MF's role and the duty of confidentiality."

If a court forms the view during a hearing that a McKenzie Friend is impeding the *"efficient administration of justice"* (paragraph 10), it can refuse the right to assistance at that point. However, the same paragraph urges the court to consider whether a *"firm and unequivocal warning to the litigant and/or MF might suffice in the first instance."* In the event that a court decides to curtail assistance from a McKenzie friend during a hearing the court should give a short judgment setting out its reasons.

If a litigant is being assisted by a McKenzie Friend in care proceedings, the court should consider the McKenzie Friend's attendance at advocates' meetings, (paragraph 14).

There is no bar to a litigant disclosing court documentation to a McKenzie Friend for the purpose of obtaining assistance. Legal representatives are advised to ensure that documents are served on litigants in good time to enable them to seek assistance regarding this content from McKenzie Friends prior to any court hearing or advocates' meeting, (paragraphs 15 and 16).

Rights of audience of McKenzie Friends

Paragraphs 18-26 of the Practice Guidance deal with the issue of rights of audience for McKenzie Friends. Courts should be slow to grant any application for a right of audience to a McKenzie Friend. Such an application should be considered very carefully and should only be granted where there is good reason to do so. Paragraph 21 lists a number of circumstances which may warrant the granting of a right of audience to a McKenzie Friend. A distinction is drawn within the Guidance in respect of lay persons and those who hold themselves out as professional advocates or professional McKenzie Friends. Those who hold themselves out as professionals should only be granted rights of audience in *"exceptional circumstances"* (paragraph 23).

Reference

The Practice Guidance is available on a number of websites, including www.judiciary.gov.uk and www.familylawweek.co.uk.

Charlotte Pitts

Challenging Wills

A practical guide to contentious probate

Challenging a Will in contentious probate proceedings is one of three principal options available to a disgruntled non-beneficiary; the other two being a claim under the Inheritance (Provision for Family and Dependants) Act 1975 and a proprietary claim on the estate arising out of the doctrines of proprietary estoppel or a constructive trust.

This article focuses primarily on two discrete matters by which the substantial validity of a Will can be impugned through lack of capacity and undue influence.

Testamentary capacity

The test approved countless times is set out in *Banks v Goodfellow* [1870] LR 5 QB 549:

'It is unnecessary to consider whether the principle of the foreign law or that of our own is the wiser. It is obvious, in either case, that to the due exercise of a power thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition. It is essential to the exercise of such a power that a testator [a] shall understand the nature of the Act and its effects; [b] shall understand the extent of the property of which he is disposing; [c] shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, [d] that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.'

It is clear that it is insufficient when taking a medical opinion simply to ask whether the testator was suffering from dementia; more is required. The expert should be asked to comment on the matters raised by the court in *Banks v Goodfellow* otherwise his report will be of doubtful utility.

Despite the obvious importance of medical evidence in such cases, one should not lose sight of the importance of lay evidence: see *Zorbas v Sidiropoulous* (No 2) [2009] NSWCA 197 in which that court stated:

'The criteria in Banks v Goodfellow are not matters that are directly medical questions, in the way that a question whether a person is suffering from cancer is a medical question. They are matters for commonsense judicial judgment on the basis of the whole of the evidence. Medical evidence as to the medical condition of a deceased may of course be highly relevant, and may sometimes directly support or deny a capacity in the deceased to have understanding of the matters in the Banks v Goodfellow criteria. However, evidence of such understanding may come from non-expert witnesses. Indeed, perhaps the most compelling evidence of understanding would be reliable evidence (for example, a tape recording) of a detailed conversation with the deceased at this time of the Will displaying understanding of the deceased's assets, the deceased's family and the effect of the Will. It is extremely unlikely that medical evidence that the deceased did not understand these things would overcome the effect of evidence of such a conversation.'

This was approved by Lewison J in *Perrins v Holland* [2009] EWHC 1945 (Ch). Its importance is obvious in any contentious probate claim where there is competing expert evidence. *Perrins v Holland* was appealed however the appeal was dismissed: [2010] EWCA Civ 840.

The most recent case on this point is *Ritchie v Joslin* [2009] EWHC B5(Ch) where the testatrix cut out her relations in favour of the National Osteoporosis Society. It was held that her mind was poisoned by delusions and that the grant of probate should be revoked in favour of an intestacy. It is an important case, especially perhaps for non-contentious practitioners as it demonstrates that even careful consideration of the testator's apparent capacity might not be sufficient.

'I am very conscious that Mr Joslin – an experienced and careful probate solicitor – and Dr Whitcher - Mary's GP both were completely satisfied that Mary was of sound mind. However Dr Whitcher based his opinion on a medical examination five weeks earlier on an unrelated medical matter. He based his assessment on Mary's ability to answer his questions appropriately and his ability to make an assessment of her circumstances and orientation. He was not aware that the Will cut out her children. He did not carry out any formal assessment. I am conscious of the passage in the judgment of May LJ in Sharp v Adam already quoted. I note that in that case the Court of Appeal upheld a decision of a judge who had set aside a Will made in the presence of a solicitor and a medical practitioner and that it is only in rare cases and after much anxious thought that a Court will set aside a Will in such circumstances.'

The reason why the grant of probate was revoked was because her affections to her children were poisoned by delusions. Query how a solicitor ought to know that when the client says she isn't going to leave her estate to her children because, for example, they don't visit her at Christmas, she is suffering from delusions.

Sometimes, it is beyond doubt that the testator does not have capacity and there is no need even to consider the so-called golden rule of requiring the testator to have his Will witnessed by a medical practitioner who thereafter produces a report on the testator's testamentary capacity. That the matter is free from doubt does not necessarily prevent the dispute from reaching the High Court, as is evident from *Kostic v Chaplin* [2007] EWHC 2298 (Ch).

Since the Mental Capacity Act 2005 came into force, it is this Act rather than *Banks v Goodfellow* that applies. It is unlikely whether there will be any significant change in the law not least because the Act is sufficiently vague for the common law to remain intact as a gloss.

Challenging the Will

Expert evidence will almost always be required and if the matter does go to trial, there will almost always be one expert on each side. Considerable expense can be saved on the part of those seeking to challenge a Will by taking a medical opinion at an early stage. As explained above, lay witnesses may have an equally important role to play especially in cases where neither of the experts has seen the testator and is therefore obliged to base his opinion on medical notes. In essence, the court's task can be simply stated: to ▸

review all the relevant evidence in order to determine whether the testator has passed the *Banks v Goodfellow* test.

A successful challenge to the Will results in probate being refused and either an intestacy or the previous Will being admitted to probate. An obvious pitfall that should be avoided is to challenge a Will on good evidence when there is a previous Will to much the same effect made when the testator was obviously in good health. An unsuccessful challenge will lead to a grant of probate in solemn form so that it cannot be impeached in the future.

Costs

Costs in testamentary capacity do not follow the usual rule in civil litigation. This factor makes it much harder for the practitioner to advise. In *Ritchie v Joshlin* [2009] EWHC B7(Ch) Judgement 2, His Honour Judge Behrens explained the rule in more detail, drawing on the case of *Spiers v English* [1907] P 122:

'One of those principles is that if a person who makes a Will or persons who are interested in the residue have been really the cause of the litigation a case is made out for costs to come out of the estate. Another principle is that, if the circumstances lead reasonably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them.'

It is the second principle that applies in these cases. In Ritchie itself, the judge awarded the losing party its costs out of the estate (note that this really means that the winner was ordered to pay the loser's costs) until the winning side's expert produced his report and thereafter there was no order as to costs. Compare *Kostic v Chaplin* [2007] EWHC 2909, which contains the most recent and authoritative discussion of cost rules in probate actions.

The practitioner must therefore examine the prima facie evidence clearly. If he is advising those supporting probate and there is contemporaneous evidence of testamentary capacity from a GP and the attesting witnesses, his clients may well have a free roll of the dice. Otherwise, the costs position is much riskier. Again, Kostic provides useful guidance on this point.

Undue influence

Disgruntled non-beneficiaries often complain that the deceased was unduly influenced by the beneficiary of the estate; for example, if their aunt gave her estate to her gardener, he must have unduly influenced her. Perhaps he did, but the important point to note is that undue influence in probate actions is completely different from undue influence in inter vivos transactions. In the latter, presumed undue influence, a transaction that calls for an explanation coupled with an unequal relationship, is commonplace and often hard to disprove. In probate actions, the complainant must prove undue influence. Moreover, evidence of coercion is essential. See in particular the judgment of Sir James Hannen in *Wingrove v Wingrove* [1885] 11 PD 81:

'To be undue influence in the eye of the law there must be – to sum it up in one word – coercion. It is only when the Will of the person who becomes a testator is coerced into doing that which he does not desire to do, that it is undue influence.'

Influence plays a part in every Will: a testator who leaves his estate to his son is of course influenced by the fact that his beneficiary is his son. As the court held in Wingrove, it is only when the testator would say, 'this is not my wish but I must do it' that undue influence is made out.

The burden being on the complainant, there must be positive evidence to support the contention that the Will was procured by undue influence. The practitioner should therefore be astute to distinguish at an early stage the allegation that 'she must have been unduly influenced as he was only her gardener' from the allegation that 'she must have been unduly influenced as she told me that he threatened her with his spade unless she made a Will in his favour.' Coercion does not of course require the threat of violence but it does require the will to be overborne.

Costs

The costs rule in undue influence actions is much simpler: costs tend to follow the event. This is because the litigation is properly adversarial: the claimant alleges that the defendant unduly influenced the testator to make a Will in his favour. There may well be exceptions, for example if the beneficiary was in the habit of saying, 'she does everything I tell her to do' that would supply a reasonable basis for alleging undue influence. In usual circumstances the loser will have to pay the winner's costs. Those who wish to allege undue influence should therefore be warned that if they lose, a costs bill well in excess of £40,000 (for a two-day trial in Bristol) will probably result.

Procedure

The procedure is little different from civil actions generally save that the High Court is invariably the proper court. The action follows the usual procedure: Particulars of Claim, Defence, disclosure, witness statements, CMC, trial. It is the evidence, whether as to testamentary capacity or undue influence, that is crucial. A realisation of this is essential: these cases are won or lost on the strength of the evidence and not on legal argument as to the meaning of *Banks v Goodfellow*. Gathering of evidence should therefore be a priority; if nothing of substance materialises, the claim can be abandoned or settled at an early stage.

In view of the expense, Part 36 offers should also be made at an early stage. Estates are normally worth far more than the costs involved and a well-judged offer from a claimant with a somewhat shaky case may well result in acceptance whereas a trial might leave him with a ruinous bill.

Marie Leslie

Independent settlement meetings in family law cases

A number of members of our matrimonial finance team now bring a wealth of skills and their practical approach to a new and alternative service that operates in tandem with our expert advocacy and advisory services. The panel of members (normally over 15 years call) provides a service conducting an independently mediated settlement meeting as an alternative to Court litigation by which settlement may be achieved without the high costs that are often involved in litigation. The service is available in all areas of family law but it is particularly suitable for matrimonial finances cases where the parties are keen to settle and avoid the escalating costs.

The system of 'private FDRs' or 'early neutral evaluation' is already becoming increasing successful in other court centres. We however do not see why it should start or stop at the FDR stage. Our service is highly flexible and is designed to meet your and your client's needs and the needs of the individual case.

The scheme is voluntary and confidential, and is designed as an alternative to the litigation process and can be accessed at any stage of the proceedings or pre issue.

Please visit our website at www.albionchambers.co.uk for further details of the scheme.

Albion Chambers Family Team

Team Clerks
Michael Harding
Julie Hathway (on maternity leave)
Theresa Lyne

Nkumbe Ekaney QC
Call 1990
QC 2011

Louise Price
Call 1972

Gerraint Norris
Call 1980

Claire Wills-Goldingham
Call 1988
Mental Health Review
Tribunal (legal member)

Deborah Dinan-Hayward
Call 1988
Team Leader

Claire Rowsell
Call 1991
Former Solicitor

Nicholas Sproull
Call 1992

Daniel Leafe
Call 1996

Adrian Posta
Call 1996

Hannah Wiltshire
Call 1998

Charlotte Pitts
Call 1999

Marie Leslie
Call 2000

Linsey Knowles
Call 2000

James Cranfield
Call 2002

Kate Goldie
Call 2004

Benjamin Jenkins
Call 2004

Gemma Borkowski
Call 2005

Monisha Khandker
Call 2005
(on sabbatical until
Summer 2011)

William Heckscher
Call 2006

Simon Emslie
Call 2007

Stuart Fuller
Call 2007

Philip Baggley
Call 2009

Emily Brazenall
Call 2009

Any comments made or views expressed on the law within any articles in this newsletter are the views of the writer and are not necessarily the views of any other member of chambers and should not be relied upon as legal advice.

Matrimonial Finance Provisions – an Update

The Mercure Southgate Hotel, Exeter – Thursday, 16th June 2011

We are pleased to invite you and your colleagues to a seminar to be given by the Albion Chambers Family Team on Matrimonial Finance Provisions. The Speakers will be Deborah Dinan-Hayward, Nicholas Sproull, Daniel Leafe and Gemma Borkowski.

The topics for the evening will be:

- **the treatment of family businesses and bonuses on divorce**
- **aspects of the Court's discretion**
- **advocacy in Matrimonial Finance applications**
- **the Interaction of Matrimonial Finance applications and TOLATA proceedings**
- **financial resources with particular consideration of Trusts, Inheritance and Post-Separation Income.**

The seminar will be held at The Mercure Southgate Hotel, Southernhay East, Exeter EX1 1QF. Registration will be at 4.45 pm; the seminar will begin at 5:00 pm and is scheduled to finish at 7.00 pm.

The cost of the seminar will be £35.00 + £7.00 VAT.

The seminar will attract two CPD hours and our Course Provider's reference is ACO/ALCH.

To reserve your place(s), or for further information please contact: seminars@albionchambers.co.uk

Public Law Training Day

The Grand Hotel, Bristol – Friday, 9th September 2011

We are pleased to invite you and your colleagues to a Training Day to be given by the Albion Chambers Family Team on Friday, 9th September 2011. Registration will be at 9.30 am and the final session is scheduled to conclude at approximately 3.15 pm. The Speakers will include Nkumbe Ekaney QC, Kate Branigan QC and Prof Don Grubin, Professor of Forensic Psychiatry at the Department of Neuroscience, Newcastle University.

Topics will include:

- **assessment of risk**
- **treatment of sex offenders**
- **research into the use of polygraphs.**

The seminar will be held at The Grand Hotel, Broad Street, Bristol BS1 2EL.

The cost of the day will be £100.00 + £20.00 VAT which includes lunch.

The Training Day will attract four CPD hours and our Course Provider's reference is ACO/ALCH.

To reserve your place(s), or for further information please contact: seminars@albionchambers.co.uk