



Albion Chambers FAMILY TEAM NEWSLETTER

Overheard by Myles Watkins in a pub somewhere in Bristol...

Bruce: Er, Wazzer, you 'eard 'bout these new directions?
Wayne: Directions? No need mate; I've got a TomTom.

Bruce: No, not that! Don't mean 'left' and 'right' directions, I means the new President's Practice Direction on Court Bundles 27 July 2006. There's a long name; 'The Family Proceedings: Court Bundles (Universal Practice to be applied in all Courts other than the Family Proceedings Court)'.
Wayne: You're right there, Brucie; very long name. I likes 'President's Practice Direction 27 July 2006' meself! Wha's it do then?

Bruce: Well, from the 2 October 2006, it replaces the President's Direction (Family Proceedings: Court Bundles) 10 March 2000 directions.
Wayne: And what's apply to then?

Bruce: All family cases, 'cluding trusts of land, not in the FPC that are listed for more than an hour.
Wayne: An hour! Used to be half a day!

Bruce: Yeah, well not no more. And the bundles got to have separate bits for applications and statements; just like 'fore.
Wayne: Yeah? I'll bets they'll want a load of preliminary documents as well, you knows; summary of the background, statement of issues, chronology and reading list and all that, all cross referenced, like.

Bruce: Wazzer – you're spot on. All in a A4 binder, but no more than 350 pages a binder, mind, and with all the details on the side and the front.
Wayne: I's going to fax the index to counsel the night 'fore, and lets them sorts it.

Bruce: Wazzer – no good, you's got to send counsel a paginated bundle not less than three days 'fore the hearing! An index

is no good! And you's got to get the bundle to the court two days 'fore the hearing. And there are new rules for marking the package for the DX, and getting proof of posting, phoning people up to check they have got it and all sorts.
Wayne: Anything else?

Bruce: Yer, for each hearing, you has to do a time estimate, setting out reading time, time for evidence and submissions, and time for judgment. And, if the case settles, you has to telephone the court, and then write in with a summary, saying what's happened.
Wayne: What happens if you don't do all this, Brucie?

Bruce: Wazzer – wasted costs, Wazzer, wasted costs.
Wayne: I thinks I should read this new direction very carefully.
Bruce: Good idea Wazzer, good idea.
Wayne: Thinks I might need somit else 'n all.
Bruce: What's 'at? 'Nother pint?
Wayne: No, 'nother photocopier! Cheers!

Publication deadlines sometimes go against topicality in a newsletter – you will not find any analysis of Miller/MacFarlane here since the judgment came out just too late for our last issue and by now you are all up to date with other people's comments – we will have to see how will it work in practice before commenting any further. We do have plenty of exciting news: we are particularly delighted to announce that Charles Hyde has taken silk; Gemma Borkowski and Anna Midgley are now tenants following successful completion of their pupillages; our team is now 23 strong with two silks and 21 juniors, offering clients one of the largest specialist Family Law teams in the South West. Stephen Wildblood and Claire Wills-Goldingham have published a new book, *Butterworths' Family Finance in Practice 2006*, and Geraint Norris was involved in what was probably the first Special Guardianship case to be reported, *A Local Authority v Y, Z and others* [2006] FLR 41.

We look forward to your feedback on this publication, and to seeing you at our forthcoming Pensions seminar in Bristol on 30th November, and Ancillary Relief Updates on 15th November in Bristol, 16th in Cardiff and 4th December in Exeter.

Tacey Cronin, Editor

Inheritance and Ancillary Relief Part 3: Future Inheritances

So far in this series of articles on inheritance and ancillary relief we have assumed that the inheritance is received or vested. But what if it is yet to come? It appears that we are being encouraged down the route of the adjourned lump sum. That is the direction of *R v R* and becomes more explicit in *Pearce v Pearce* and *D v D* and *Re G*.

Pearce v Pearce [2003] EWCA Civ 1054

This was a 34 year marriage. Ancillary relief proceedings were concluded on 11th November 1997 (noted by Headley J and Thorpe LJ to be a good day for the termination of matrimonial hostilities). As part of the settlement the wife received a property in Chelsea which she soon sold to purchase a property in Ireland. After two years she wished to return to Chelsea but could by then, because of the rise in the property market, only afford a small flat and even that required a mortgage. She

relied on this downturn in her finances as grounds for an upwards variation in periodical payments.

By contrast the husband's capital position had prospered since the separation.

At first instance the judge decided, against the husband's wishes, to capitalise the wife's maintenance and in so doing awarded £740,000, of which £635,000 was her reasonable future income needs of £47,000 (including the mortgage costs) on a Duxbury basis and £70,000 was a supplemental redistribution of capital to create 'fairness'.

On the appeal, Counsel for the wife tried to argue that post-White a judge under s31(7) is not confined to substitution and compensation but may readjust the family assets to ensure a fair outcome. Counsel relied on *Cornick v Cornick (No 3)*¹. The latter case states *obiter* that supplemental provision and not just compensation can be provided under s31(7)B. Accordingly it said that the court could order whatever lump sum was fair in the circumstances.

Thorpe LJ held, as he had in *Harris v Harris*² that s31(7) confers a very wide discretion on judges as to the mechanics involved in determining the proper level of substitution and compensation but he also held that the judge's discretion under s31(7) was limited to strict capitalisation and not to redistribution.

Accordingly, Thorpe LJ refused both to supplement the proper level of periodical payments and to include the cost of the wife's mortgage as a reasonable requirement resulting as it did from her poor investment of the capital received under the final order. Thus the judge has discretion as to the proper level of periodical payments and the mechanics of capitalization but none whatsoever in supplementing the capital provision already made.

In the key passage it is stated,

'I believe that this discipline is necessary as a safeguard against the temptation to further adjust the capital division between the parties to reflect the factors which were not foreseen or which did not pertain at the date of the division. This abstinence is required not only by authority but also as a matter of policy. Families with not inconsiderable assets are obliged to achieve division, by one means or another, once the marriage has foundered. They are entitled to know that that obligation once completed does not revive. In cases where a complete clean break cannot be achieved at the date of redistribution of the family assets it is important that the parties should be encouraged to take advantage of any subsequent developments that permit the dismissal of the outstanding periodical payments order...Therefore a relatively simple, certain and predictable method for the calculation of the capital sum that can be fairly substituted for the periodical payments order is of great importance. It enables parties to see where they stand and to weigh the relative advantages and disadvantages of finality.'³

This is a cautionary word against hoping to capitalise periodical payments out of a future inheritance and inclines us again to the adjourned lump sum.

Two cases are illustrative of the historic approach.

Milne v Milne⁴

In *Milne v Milne* it was suggested that an adjournment is appropriate if the future may be confidently predicted and a prospective capital order can be made contingent upon an event which is:⁵

- a. a certain entitlement
- b. at a specific time

MT v MT (Financial Provision: Lump Sum)⁶

An adjournment was ordered in *MT v MT* due to seven factors:⁷

- a. There was a vested interest (a 'Pflichtteil')
- b. 'The next few years' was foreseeable
- c. Justice could not be done without an adjournment

- d. The parties had always anticipated and lived for the prospective capital (they had borrowed against the expectation)
- e. Reliance on periodical payments would not be realistic
- f. The desirability of a clean break
- g. There would be no other available capital in the future.

D v D (Lump Sum: Adjournment of Application)⁸

D v D (Lump Sum: Adjournment of Application) was the first post-White case to address the subject. Very significantly the court granted the adjournment but in these limited circumstances:⁹

- a. A real possibility of capital
- b. From a specific source
- c. Available in the near future
- d. The adjournment would not be for more than seven months.

It is probably correct to see *D v D* as something of a contrast to the preceding cases. The earlier cases put great store by finality. Whilst seeking, naturally to secure a 'fair' result a substantial part of the fairness was perceived to be allowing the parties to 'move on'. Post White it seems that achieving a 'fair' result places greater emphasis on the cross-check/benchmark of equality than on finality. It has always been the case that fairness was an ideal circumscribed by finality. Now it may more realistic to regard the ideal of finality as a circumscribed by fairness.

Re G (Financial Provision: Liberty to Restore Application for Lump Sum)¹⁰

(Decided in January 2004 by Singer J). The parties were married for 4 years and had two children. They separated in Autumn 1992. The wife suffered from multiple sclerosis. Ancillary relief proceedings were concluded in November 1995. The only significant liquid capital asset were the net sale proceeds of a house owned and occupied by the wife and her mother of £100,000

The district judge adjourned the wife's lump sum claim generally with liberty to restore by consent. The reason for that agreement is not clear but it was presumed by Singer J to be because the husband was expected to inherit significantly on the death of his father and/or uncle and it was accepted that a clean break could not fairly be achieved.

In August 1997 the wife remarried and subsequently divorced. The husband remarried and his uncle died in July 2001. The husband became entitled to approximately £2.1 million. It is not clear if some £750,000 of this was vested during the marriage.

The matter came before Singer J on the wife's application to restore her claim. The judge reconsidered the decision in *D v D* and particularly the words of Connell J that the step of adjournment,

'...should only be taken in rare cases where...there are circumstances in which justice to both parties can only be done if there is an adjournment.'

Interestingly, the judge did not consider the circumstances of *D v D* as set out above but simply observed,

*'On the face of it, and in the circumstances...dismissal of the wife's lump sum claim as empty in 1995 would indeed have been unjust'*¹¹

That is startling proposition in itself – a prospect of an inheritance, substantial in the circumstances of the case justifies adjournment generally even if there is (apparently) no vested interest and the testator does not die for nine years after separation and nearly six years after the final order. What is more

¹ [2001] 2 FLR 1240

⁵ At 289 C-E

⁹ At 639D-E

² [2001] 1 FCR 68

⁶ [1992] 1 FLR 362

¹⁰ At 289 C-E

³ At 1156 [39]

⁷ At 368E-369C

¹⁰ 2004 1 FLR 997

⁴ [1981] FLR 286

⁸ [2001] 1 FLR 633

¹¹ At 999 [8]

the father was still alive and only 74 years old in 2004. Singer J stated,

'In the light of what is now...H's financial position it would seem to me to be grossly unfair were this to be recognised only by rejection of her lump sum claim, albeit with continuing child maintenance... So in principle, the submission that on the facts of this case the wife's application for a lump sum should be dismissed holds no attraction for me.'

An equal division of the inheritance was never pursued. The judge made a lump sum order which reflected the wife's straightforward needs of £460,000 stating,

'I believe that that outcome is firmly within the parameters of fairness'.

A number of factors are notable:

(a) The effect of the original order being by consent is difficult to discern.

(b) Whether the inheritance prospects of the father alone would have been sufficient to justify an adjournment.

(c) The extent to which any inheritance being vested swayed the judge.

(d) Whether the case establishes a wide discretion to adjourn generally for the purposes of inheritance (and other purposes). (NB the adjournment was not until the time of a specified event).

(e) Both parties had remarried, the wife had divorced, her

health had declined, she had accrued substantial debts paying school fees. In essence the parties appear to have got on with their lives but none of these events in the circumstances affected the wife's needs. It is possible to imagine a very different set of circumstances. The possibility that both or either party had or had not arranged their finances in anticipation of the inheritance was not canvassed.

In a recent appeal in Bristol County Court a Deputy District Judge decided to adjourn lump sum claims generally where the only potential assets after a long marriage were the husband's future discretionary entitlement under a nil rate band trust and his mother's estate. It was pertinent in this relatively modest case that the parties had planned their finances in anticipation of inheriting and that the husband was highly likely to inherit at some future date.

What effect the decisions in Miller/MacFarlane might have on the issue of future inheritances is of course unclear although given their Lordships' strictures on the subject of marital acquest/matrimonial property pause for reflection and a degree of caution is probably required.

That is the end of these three articles on ancillary relief and inheritance. Doubtless the authorities will keep on coming but I would be delighted to hear your feedback too. If you have any thoughts or observations please email the Albion Family Team at clerks@albionchambers.co.uk.

Daniel Leafe

Shareholdings in Private Companies

The treatment of shareholdings in private companies presents the ancillary relief practitioner with a number of problems. At a practical level the shareholder may be reluctant to sell them and indeed may be dependant upon the benefits generated by them – either to produce an income for himself or for the family. Most private company shareholders have an interest which reaches beyond investment alone. An accurate valuation may be difficult to obtain. One based upon a snap shot of the business will often be unfair. The structure of private companies raise a multitude of issues which need to be considered, for example, the lack of an open market in which to trade shares, the contents of the articles of association and potential restrictions on transfer or sale, and the differential between the value of shares in the hands of a controlling shareholder and the value of a minority interest, which in itself creates the potential for differences in value by reference to the positions of the transferor and potential transferees.

These factors regularly give rise to large differences of opinion between even the most reputable valuers and even when the same methodology is employed. However, obtaining a conventional valuation with a view to selling the shares may be a short sighted approach which fails to recognise the full benefits of the shares and short changes both parties.

In *A v A* [2006] 2 FLR 115 Charles J

emphasised the need to approach shareholdings in private companies from the matrimonial and the commercial perspectives.

A viable and pragmatic business solution might become apparent, which avoids the difficulties of an uncertain valuation and problems raising finance or finding a suitable purchaser, but makes the most of the benefits which flow from the shares. A fair division of the shares may involve the creation of a trust or the transfer of shares. The Court must be creative in order to achieve the outcome which is most beneficial to both parties. Commercial solutions are unlikely to involve a clean break. However, it may offer a means by which the Court can take into account the features of a given shareholding including the diverse benefits which flow from the retention of it. This avoids the unfairness of the common practice of comparing a snapshot valuation of shares to other assets for the purposes of division. The parties may still be adamant upon having a clean break. However, their legal advisers should ensure that they are clear as to what they risk and sacrifice in taking such a course.

The nature of the shares should be considered at a very early stage when deciding the basis of the valuation and the issues to be considered by the expert. Requesting a valuation on the conventional basis may be of little assistance. Identifying the issues at that stage will provide the Court with the information necessary to allow it to make the fairest decision. In so doing the expense of the valuation will be justified and the risk of costs escalating at a late stage will be minimised.

Important questions for the practitioner include:

- What are the advantages of the current arrangement of shares between the share-

holders?

- What provision do the articles of association include in relation to the sale or transfer of shares?
- Are there potential suitable buyers for the shares?
- Could the holder of the shares realise the same income from the investment of a lump sum?
- What benefits flow from the shareholding apart from dividends?
- What is the likelihood of the company being sold as a whole or going public?

It is suggested that, in appropriate cases, much could be gained from instructing the expert to consider these wider questions rather than simply instructing the expert to 'value the shares.' This will be particularly important in cases where the facts are similar to those in *V v V* [2005] 2 FLR 697, where Coleridge J highlighted the unfairness of including a share valuation as part of the capital assets when both parties were going to benefit from the dividend income from the shares. As to the court's concern that only like assets are compared with one another, see the article by Ben Jenkins on *Martin-Dye v Martin-Dye* [2006] 2 FCR 325.

Gemma Borkowski

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Expert evidence in interpretation of video interviews in sexual abuse cases

The use of expert evidence in the interpretation of video interviews in sexual abuse cases and the diagnosis of such abuse have been considered recently by Coleridge J in the case of *B v Torbay Council and Others* (soon to be reported).

The salient facts are that P, then aged about 13 years, made allegations of serious sexual abuse by his stepfather CB on him. CB and the mother HS, had two children of their own, M and J. As a result of P's allegations care proceedings were initiated by the local authority and at a final hearing in June 2000 the Judge at first instance made findings of serious sexual abuse of P by CB. The Judge heard evidence from experts on their interpretation of P's CAMAT video interviews and as to CB's propensity to commit such acts of sexual abuse.

P did not give evidence and therefore his allegations were not tested in court.

All three children were made the subject of care orders and no appeal was pursued.

P then retracted his original allegations of sexual abuse nearly five years later. The stepfather CB then applied to discharge the care orders and sought a re-opening of the findings of sexual abuse arguing, amongst other

things, that those sexual abuse allegations should be set aside.

P gave live evidence at the hearing before Coleridge J. He was cross-examined by the local authority, who urged the court to be cautious about P's retraction, contending that pressure may well have been brought to bear on P to retract his initial allegations and, in any event, the court should be careful about accepting evidence from a declared liar.

Having heard P give evidence the learned judge had no hesitation in finding that the findings of sexual abuse were 'wholly wrong and should be set aside'.

A number of principles emerge from this case:

- The court has the ability to visit and revisit allegations in the light of new evidence

- Not to do so would amount to an infringement of the parties' human rights both to a family life and to a fair trial (see *Re S (Discharge of Care Order)* [1995] 2 FLR 639)

- Ultimately the question of credibility is a matter for the trial judge and experts should defer to the court

- However good the procedures for the interviewing of children may be, they are never more than that, i.e. interviews. An interview is not evidence which has been tested in court

- Only a proper investigation by testing of evidence in court can cast full light on the allegations of this kind and, more importantly or as importantly, their context. Any other process is a poor substitute and the use of experts to produce a personality profile as tending to show that an individual might have certain tendencies has been rightly deprecated by the Court of Appeal in the past (See *Re M and R (Child Abuse Evidence)* [1996] 2 FLR at 195 and *Re N (Child Abuse Evidence)* [1996] 2 FLR 214)

- Even evidence from a psychologist about the veracity of a child's video evidence can tend to give undue credibility to it

- In the end the Judge is the best arbiter and he or she needs, where possible, to hear the child

- There is no substitute for live tested evidence in court and where children are of the age of this child, rising 13, more serious consideration should be given to such a child giving evidence with the usual safeguards and the procedural arrangements familiar in the criminal jurisdiction (*Youth Justice and Criminal Evidence Act 1999*).

The Learned Judge urges caution on the use of experts in interpreting video interviews and commenting on the propensity of alleged perpetrators of sexual abuse. The alleged victim should be interviewed in accordance with the principles set out in 'Achieving Best Evidence in Criminal Proceedings' (Home Office Communications Directorate, March 2002). The complainant's evidence can then be tested in court under cross-examination. Surely this is more likely to produce a fairer outcome for all concerned rather than the cross-examination of an expert who might have prepared a report based on his or her interpretation of the video evidence in the case? Such a report is only ever an opinion, and (as was conceded by an eminent expert in a case heard in Bristol this Summer) there is no statistical research available to assist in the interpretation of evidence where allegations are withdrawn.

Nkumbe Ekaney
(Counsel for the Children's Guardian)

Shared Residence: where are we now?

The Courts' approach to the making of shared residence orders ('S.R.O.s') has relaxed significantly since 2000, and the requirement to show 'exceptional circumstances' or 'positive benefit' has been entirely abandoned.

In *Re C* [2006] EWCA Civ 235 the Court of Appeal recognised that the tenor of recent authorities has been to liberate judges to elect shared residence, if the circumstances of the case support that conclusion and if that conclusion is consistent with the paramount welfare consideration.

When will the circumstances of the case support the conclusion that an S.R.O. should be made?

Following *D v D* [2001] 1 FLR 495 the focus is on a reflection of the reality of children's lives in residence orders. Where the child spends a substantial proportion of time with both parents, even where those proportions are not equal, an S.R.O is prima facie appropriate. The Law Commission's Report No 172 of 1988 stated in terms that 'It is a far more realistic description of the responsibilities involved in that sort of arrangement to make a residence order covering both parents rather than a residence order for one and a contact order for the other'. (It can also be advantageous for a par-

ent in this situation to have an S.R.O. in their favour, vis-à-vis the Child Benefit Agency and sharing benefits between the parents).

The practicalities of the proposed arrangements are also relevant. *Re A* [2003] 3 FCR 656 recognised that where there is sufficient proximity of homes and a relatively fluid passage of the children between them, the judicial convention that the welfare of the children demands a choice between one parent or the other as guardian of a residence order ceases to apply. However, the requirement that the order should reflect reality will trump practical difficulty, within reason. In *Re F* [2003] 2 FLR 397 the court observed that a long distance between parents does not preclude the possibility that a child's time may in fact be divided between them, and an S.R.O. could therefore still be appropriate.

The existence of animosity or even entrenched disputes between the parents is not a bar to the making of an S.R.O. In *Re R* [2005] EWCA Civ 542 Thorpe LJ said 'a harmonious relationship between the parents is not a prerequisite to a shared care order. Indeed the presence of that sort of harmonious relationship is a contra-indication... since such parents would fall within the 'no order' principle emphasised by section 1(5) of the Act.' In *Re G* [2005] 2 FLR 957 the Court said that an S.R.O. should not be rejected on the basis of a possibility, or even probability, of ongoing dispute between the parties: such disputes

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Martin-Dye – what did we expect?

The case of *Martin-Dye v Martin-Dye* [2006] EWCA Civ 681 was an opportunity for the Court of Appeal to address the vexed question of how pensions are to be treated and valued, especially where the court intends to set-off the value of a pension against other assets. The difficulty has long been how to achieve the White objective of fairness when considering a division of different species of assets. There were doubts as to how much general guidance could be extracted from a case concerning pensions in payment, but nevertheless family lawyers waited with baited breath for this much anticipated judgment.

The factual background of the case is largely irrelevant (the assets are set out in paragraph 73) save for the fact that the husband had worked as a commercial pilot for BA and had a pension fund in payment valued at £940,000 and the wife had a pension fund of £100,000, also in payment. The Court of Appeal highlighted that the proper 'label' or methodology for calculating the value of pensions in payment is the cash equivalent [of] benefits (CEB) and not the cash equivalent transfer value (CETV) as per Regulation 3 of the Pensions on Divorce etc (Provision of Information) Regulations 2000. At the first hearing the District Judge ordered a division of the assets 57% to the wife and 43% to the husband. There was no pension sharing order (hereinafter 'PSO') as the assets were apportioned with each party retaining their respective pensions. The percentage of each parties share made up of their pension was as follows: 35% of the husband's and 3% of the wife's overall award.

The argument on appeal was that the judge had erred in principle by ignoring the different nature of the assets in calculating the global asset figure and failed to redress the unfairness of an order that awarded the wife the copper-bottomed assets and lumbered the husband with the risk-laden assets. In his judgment Lord Justice Thorpe reaffirmed the now trite principle contained in *Maskell v Maskell* [2003] 1 FLR 1138 that a pension should not be treated as capital. A pension was described as, '...no more than a whole life income-stream akin to an annuity.' In reference to the section 25 criteria LJ Thorpe was of the view (paragraph 61) that pensions in payment are to be characterised as 'other financial resources' within section 25(2)(a) whilst LJ Dyson stated that they should be treated as 'income'.

The Court of Appeal's guidance on the issue of valuing pensions against other property is contained in paragraph 63, but in my view it is more conceptual than practical. LJ Thorpe states that there are two ways of treating the pensions: leave them undisturbed and compensate the party whose pension produces the lower annuity (offsetting) or make a PSO and then consider the capital. On the issue of offsetting Lord Justice Dyson commented that, 'The problem with this approach is that it is difficult to see how the adjustment would have been calculated', and, 'Percentage adjustments cannot simply be plucked out of the air.' LJ Dyson's conclusion is that in a case such as this the better option is to remove pensions from the equation and make a PSO. A clear warning is evident in the judgment; if you do pursue the offsetting option, careful consideration must be given to the wider 'value' of each asset. It is clear that a simple arithmetical approach identifying each asset in terms of pounds, shillings and pence will be insufficient. LJ Thorpe's view was that the quality of pensions in payment differed so significantly from that of the other property that an order whereby the majority of the husband's share was made up of the former was unfair and so a PSO should have been adopted. This issue of the quality of the assets was expanded upon by LJ Dyson in paragraph 86 where he highlights that pensions vanish on death, are non-transferable and do not increase in value. Unfortunately, the judgment does not contain any assistance on how to value this difference in quality in monetary terms and it is clear that expert evidence will be crucial if this option is to be pursued.

The Court of Appeal did not upset the percentage split of 57/43 but achieved it in a different way by completely separating pensions from the other property and conducting two separate calculations. A PSO was made bringing the wife's share up to 57% of the total pension fund and the remaining property was then divided in the same shares. Finally, LJ Thorpe took the opportunity to remind us all of Form P which should be used in every case where a pension is significant and where a PSO might be made. Overall, it is clear that some appreciation must be given to the different nature of the assets when presenting a global asset figure and advocates must ensure that the court is comparing like with like. If there is a principle to be taken from the Court of Appeal's judgment it is that the safer approach would be to consider the pensions separately from the other property, ensuring that the overall split achieves the White objective in reference to all the circumstances of the case.

Benjamin Jenkins

continued from page 5 depend largely on the nature of the parties' relationship rather than on the particular terms of the court's order. In *Pengelly v Enright-Redding* [2005] EWCA Civ 1639 impaired communication between the parents was held not to be a reason for refusing to make an S.R.O.

In fact, where there is extreme antipathy between the parents, the courts may make an S.R.O in the hope that this will pave the way to co-operation (see for example *A v A* [2004] 1 FLR 1195 in which Wall J said 'Control is not what this family needs. What it needs is co-operation. By making a shared residence order the court is making that point'). If a sole residence order might be misinterpreted as enabling control by one parent (as in *A v A*), an order which emphasises the equality of the parents in the eyes of the law may assist in changing their outlook. (However, a desire to recognise the equal status of parents cannot overcome the need to reflect reality and it may be that a parental responsibility order is the more appropriate way to achieve that recognition). So, although S.R.O.s should be made to reflect an existing reality, they are also used to encourage a state of affairs not yet achieved.

How will the Courts decide whether that conclusion is consistent with the paramount welfare consideration?

The Court in *D v D* made clear that an S.R.O. should be made if it is in the best interests of the children concerned, in accordance with the Section 1(3) checklist. More recent authorities indicate that the courts have moved on even from this liberal position. In *Re A* [2003] 3 FCR 656 the Court stated that greatest weight should be given to ensuring that orders duly reflect the realities, unless there is some counterbalancing welfare consideration. This would seem to suggest that once an applicant has shown that the circumstances are such that an S.R.O. is appropriate, there is a presumption that the welfare requirement is satisfied in the absence of evidence to the contrary. This interpretation of the current trend is given force by Scott Baker LJ's reasoning in *Pengelly v Enright-Redding*, to the effect that where shared residence is apt to describe what is happening on the ground, good reasons are required not to make such an order (echoed in *Re P* [2006] 2 FLR 347).

Presumably, the Court's approach will vary to some degree with the context of the application. If shared care is not the status quo but rather what the applicant hopes to achieve through litigation, the hurdle of showing that this is what is in the best interests of the child according to the Section 1(3) checklist would have to be addressed in a more comprehensive fashion.

Anna Midgley

The Albion Chambers Family Team



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



Charles Hyde QC Call 1988 QC 2006
Recorder
Clerk Michael Harding



Louise Price Call 1972
Clerk Michael Harding



Geraint Norris Call 1980
Clerk Julie Hathway



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



Deborah Dinan-Hayward Call 1988
Clerk Michael Harding



Claire Wills-Goldingham Call 1988
Mental Health Review Tribunal
(legal member) **Clerk** Michael Harding



Myles Watkins Call 1990
Deputy District Judge (Civil)
Clerk Michael Harding



Alex Ralton Call 1990
Deputy District Judge (Civil) Mediator
Clerk Michael Harding



Nkumbe Ekane Call 1990
Clerk Julie Hathway



Claire Rowsell Call 1991
Former solicitor
Clerk Julie Hathway



Nicholas Sproull Call 1992
Clerk Julie Hathway



Daniel Leaf Call 1996
Clerk Julie Hathway



Archna Dawar Call 1996
Clerk Julie Hathway



Adrian Posta Call 1996
Clerk Michael Harding



Hannah Wiltshire Call 1998
Clerk Julie Hathway



Charlotte Pitts Call 1999
Clerk Julie Hathway



Marie Leslie Call 2000
Clerk Julie Hathway



Jane Murphy Call 2001 Former Solicitor
Clerk Julie Hathway



Kate Goldie Call 2004
Clerk Julie Hathway



Benjamin Jenkins Call 2004
Clerk Julie Hathway



Anna Midgley Call 2005
Clerk Julie Hathway



Gemma Borkowski Call 2005
Clerk Julie Hathway