Community Legal Service
Criminal Defence Service

Albion Chambers, Broad Street, Bristol BS1 1DR
Telephone 0117 927 2144 **Fax** 0117 926 2569
DX 7822 Bristol **Email** clerks@albionchambers.co.uk
www.albionchambers.co.uk

Number 8 November 2007

Albion Chambers FAMILY TEAM NEWSLETTER

The Mental Capacity Act 2005 – some guidance.

Part One

The Mental Capacity Act 2005 has been in force since the 1 April 2007 (subject to Articles 3 and 4 and sections 30 to 34 which come into force on the 1 April 2008). The Act has its origins in the Law Commissions Report No. 231 on Mental Incapacity (February 1995) and was further considered in the Government Policy Statement making decisions (October 1999). It has been subject to pre-legislative scrutiny by a Joint Committee of Houses of Parliament.

The intention and the purpose of the Act was stated by David Lammy (Parliamentary Under Secretary for State for Constitutional Affairs) in these terms: *'First, it is about rights of the individual person. It starts by saying that individuals should be assumed to be capable of making decisions, and helped to make them.If they cannot make them, the [Act] says that each decision or act under the [Act] must be based on the 'best interests' of the individual. Secondly, the law is unclear, and the Joint Committee agreed that we needed to clarify the law as it affects day to day life. Thirdly, the [Act] makes it clear that relatives and carers should be consulted when other people do things without consent to someone who lacks capacity… fourthly, the [Act] clarifies what can be done, and who can do it, when someone lacks mental capacity, and emphasises that they must act in the person's best interests'.* (Second reading debate, 11th October 2004: 425 HC Official Report 6th Series) Cole 24.

In essence the Act can be divided into three parts:

Part 1 (sections 1 – 44 and schedules 1 and 2) sets out the principles and structure of the law regarding decision making for people without capacity.

Part 2 (sections 45 to 61) provides for the creation of the Court of Protection with extended powers and establishes the Office of Public Guardian to, in effect, oversee the operation of the [Act].

Part 3 (sections 62 to 69 and schedules 3 to 7) sets out miscellaneous general provisions.

It is however, important to remember that mental illness or disorder (as is defined under the Mental Health Act 1983) is not synonymous with lack of capacity. The person who has such disorder will be deemed to have capacity unless information is provided to the contrary. Therefore, this [Act] does not authorise medical treatment or other welfare based decisions or acts not related to mental disorder. However, the new Mental Capacity Act 2005 does repeal Part 7 of the Mental Health Act 1983 (Receivership) and furthermore repeals the Enduring Powers of Attorney Act 1985 under which a person when capable may appoint 'an Attorney' to act for him/her in relation to his property and financial affairs which powers survive and can be used when he/she becomes incapacitated.

Objectives

It appears the main objectives of the Act can be considered as follows:

- To provide a clear and consistent legal basis and/or authority for decisions to be taken on behalf of, and in respect

Editorial

There's never a dull moment in Family Law! Whilst we wait to assess reaction to the Law Commission's Report on Cohabitation and measure the impact of the new public funding rules the team have been busy and the range of articles published here continues to demonstrate the breadth of our practice. However, our individual personal news will also be of interest to readers: three of the team have new babies to show off – Archna Dawar and Marie Leslie will be returning to practice in January, and Stephen Wildblood has made it a double by being appointed to the Circuit Bench with effect from mid-November.

Stephen has been at Albion Chambers throughout his professional life, having been pupil to HHJ Boothman and Kit Rawlins, although his interests have never been restricted to Chambers' matters. He took silk in 1999, having been made a Recorder in 1997, and has found time and energy to write specialist books covering the whole spectrum of Family work and to branch out into the Mental Health Tribunal, where he has sat since 2003. Our loss will be Devon and Cornwall's gain in the short term, and we wish him well and look forward to his return upcountry in due course.

Many of you came to our Public Law seminar on September 25th and will already be booked in for our Autumn series of talks on ancillary relief: the dates of the Spring series are above. Do remember to let us know what interests you if there are other services we could provide for you.

Tacey Cronin, Editor

of acts done to, a person who lacks capacity;

- Adult autonomy is to be respected where a person has capacity;
- When there is a question as to whether a person lacks capacity there must be a proper assessment made on an issue specific basis and that person's views, wishes, beliefs and values must be taken into account and he must be encouraged to participate in that assessment;
- There must be consultation of relatives and carers (if practicable);
- To enable a person to plan ahead for loss of capacity (the Living Will/Right to Life debate);
- It replaces Enduring Powers of Attorney which have been considered to be open to abuse with lasting Powers of Attorney – these allow the donor to give his chosen representative health care and welfare decision making powers;
- It provides an appropriate and accessible way of resolving disputes as a matter of last resort.

In essence therefore, the Act has looked at the existing common law (High Court (Family Division) Inherent Jurisdiction) and provides a basis to empower those who find themselves in circumstances of considering issues of capacity and incapacity as opposed to the protective measures invoked most usually through the inherent jurisdiction of the court.

The key principles

These are set out in Part 1 of the Act and are as follows:

- A person must be assumed to have capacity unless it is established that he lacks capacity;
- A person is not to be treated as unable to make a decision unless all practical steps to help him do so have been taken without success;
- A person is not to be treated as unable to make a decision merely because he makes an unwise decision;
- An act done or decision made under this Act for or on behalf of a person who lacks capacity must be done, or made in his best interests;
- Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of actions;

However, it is right to note that the Mental Capacity Act 2005 is prospectively to be amended by the Mental Health Bill currently before Parliament in order to provide a procedure which complies with the European Convention and thus retains the option of treatment in circumstances which amount to detention other than using the full powers under the 1983 Mental Health Act. This has come about following the European Court of Human Rights case of *H L v UK (2004)* 1 FLR 1019 known commonly as *'Bournewood'* – where an autistic man had been re-admitted to a hospital after a period in the community with paid carers but had not been sectioned under the 1983 Act as he was a voluntary patient. The decision in the European Court was that this man had been deprived of his liberty (contrary to s.5 of the Human Rights Act 1985). The detention was arbitrary and not in accordance with procedure prescribed by law and more importantly the safeguards that apply to a detained person under the convention were not available to him as there was no procedure under which he could seek a review (if this man had been subject to an order under s.2, 3 or placed under the Provisions of Guardianship under s.37 of the MHA 1983 then he would have had automatic recourse to the Mental Health Review Tribunal).

The Mental Capacity Act 2005 is also subject to the Codes of Practice (Section 42) and thus together with the provisions of the Act there is a powerful tool to ensure best practice is followed and standards for decision making raised. Regard must be had to the relevant provisions of the code by any person acting on behalf of someone who lacks capacity.

Lack of capacity

The statutory definition of people who lack capacity is contained within s.2 namely *'A person lacks capacity in relation to a matter if at all material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain'.*

How is this assessed? – generally it will be provided by way of medical evidence, either from a psychiatrist, or where there are issues of learning disability, a psychologist. However, there is no legal requirement that medical evidence must be used in order to establish a lack of capacity. It is most important to stress that even where a person has been detained under the Mental Health Act 1983 it does not follow that they lack capacity (for example Re. C *(Adult : Refusal of Treatment) 1994 1 WLR 290* – whether a gangrenous foot was to be amputated.

The standard of proof is the balance of probabilities – the normal civil standard irrespective of whether the impairment or disturbance is temporary or permanent. A lack of capacity cannot be established simply by virtue of age, appearance or certain aspects of behaviour and there is no power to exercise the provisions of this Act in relation to a child under the age of 16 – who is, of course, covered by the Children Act 1989.

Inability to make decisions

This is contained within s.3 and sets out the criteria by which a person may be held to be unable to make a decision for himself as follows:

i) Unable to understand the information relevant to the decision;

ii) Unable to retain that information;

iii) Unable to use or weigh that information as part of the process of making the decision;

iv) Unable to communicate the decision (whether by talking, using sign language or by any other means).

However, there is a caveat to this as defined in sub-section 2: namely, a person is not to be regarded as unable to understand the information relevant to the decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances for example using simple language, visual aids or any other means. Furthermore, if the person is only able to retain information relevant to the decision for a short period only, this does not prevent the person from being regarded as unable to make a decision. Finally, information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or the other or failing to make the decision.

Best Interests

The criteria concerning best interests is set out in s.4 and is a key provision in the Act. In essence it appears to replicate the common law position. The test remains objective *'the person making the determination must consider all the relevant circumstances. Specific criteria are set out in s.4 and 'relevant circumstances' are defined under sub-section 11 as:*

i) Those of which the person making the determination is aware; and

ii) Those which it will be reasonable to regard as relevant. For family lawyers it could be seen to be analagous with the Lord

Hailsham test in the adoption case of Re. W in that it is not a substituted choice or subjective judgment as to what the person concern would have decided. Relatives, carers and any attorney appointed under a Lasting Power of Attorney or a Deputy appointed by the court must be consulted. Difficulties of course may well arise if the person's views ascertained before losing capacity are at variance with currently expressed views and also those of the Attorney or a Deputy appointed by the court or relatives/carers etc'.

Particular provision is made in s.4 to the issues relating to life sustaining treatment, where it is set out *'He must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death'*. This provision means that the House of Lords decision in Airedale NHS Trust v. Bland 1993 AC 789 – the issue of PVS - is not reversed. However, it does have implications where a family member is also the attorney under a Lasting Power of Attorney or a Deputy appointed by the court if there are concerns as to improper motive.

'Acts in connection with care or treatment' – s.5: this came into force on the 1 October 2007 and provides that a person who does an act in connection with the care or treatment of another person will be put in the same position as if dealing with someone who had capacity to consent and had consented and therefore will **not** incur any liability in doing the act **if**:

i) Before doing the act he had taken reasonable steps to establish whether the person lacks capacity; and

ii) Reasonably believed the person lacked capacity and it was in his best interests for the act to be done.

This replaces the common law doctrine of necessity. However, this does not protect clinicians from negligence but will provide a basis upon which the majority of medical treatment or welfare decisions in relation to an incapacitated person can be taken. Whilst this section allows restraint of the incapacitated person (s.6) provided there is *'reasonable belief'* that it is *'a proportionate response'* and *'is necessary'* **it does not authorise deprivation of liberty under Article 5(1) of the Human Rights Convention irrespective of whether a public authority is involved.** (See the reference to *'Bournewood'* and the lacuna above).

It is important to note that the Act does not stop a person providing life sustaining treatment or doing any acts which he/she reasonably believes to be necessary to prevent serious deterioration in a condition whilst a decision on any relevant issue is sought from the court (s.6(5)).

Claire Wills-Goldingham sits as a legal member in the Mental Health Review Tribunal.

(See the Spring 2008 issue for Part two: *Advance Decisions to Refuse Treatment*)

A creative approach to parental responsibility in private law cases.

It is well established that the Court can regulate the scope of PR as defined in the Children Act 1989 s.3(11): ***'rights, duties, powers, responsibilities and authority which by law a parent… has…'*** and that each case is considered on its own particular circumstances where the parties cannot agree. The perception of many fathers is that they are no longer an active feature of their child's life outside contact hours, and many mothers see the acquisition of PR as the way that the father may choose to intrude upon every aspect of her new life, for example, where there is a new partner or husband. A balance has to be struck with the child's welfare as its centre.

Where a mother refuses to accept the principle of PR she may ask *"why does he deserve it? He doesn't pay a penny maintenance?"* Constraints of time outside the busy court room dictate that the advice given would be on the lines of the approach of Balcombe J in *Re. H (Minors) (Rights of Putative Fathers) (No. 2) [1991] FCR 361:* commitment, attachment and motivation. The CAFCASS reporter will often remark that he (i.e. the father) has managed to catch a bus to the Contact Centre, arrive on time and spend six consecutive contact sessions with the child and has therefore demonstrated commitment. It may be hard for a mother who has endured extreme violence and injury and who is now struggling with poverty – to accept such advice. Against a background of implacable hostility, findings of fact, and a current diagnosed medical anxiety on the part of a mother, I recently found the analysis of Mrs Justice Black in *Re. D* at *2006 EWHC 2 (Fam /FCR 2006 Vol 1)* useful.

Given a changed social climate for the Courts in 2007, the facts of *Re. D* may not be unusual for long. D was born to a lesbian couple A and C and Mr B was his biological father. A (the biological mother) had PR as did C (by virtue of the joint residence order). Neither A nor C wanted B to be granted PR, fearing B's influence on the stability of their lesbian family and relationship. In reaching the decision to grant PR to the father, Black J found herself assisted by B's undertakings not to visit or contact his child's school or to contact any health professionals without prior written consent of either A or C. She analysed the Court's previous approaches to PR and decided that a more sophisticated examination of circumstances is needed where there is a genuine fear on the mother's part that the current stability and security of a child's life is threatened by the grant of PR to the father.

Clearly, there has to be a distinction drawn for example, between a situation involving a hospital admission, or another situation where the father demands to attend every session with the school nurse, GP, or the routine blood test. In practical terms, a carefully worded Schedule of Agreement drawn up at the time that PR is granted can assist the *'hostile'* anxious mother to understand that the PR can, and will be regulated to ensure that the child's welfare is safeguarded. The more detail that can be ordered by the Court, the less potential for anxiety.

In *Re. D* Black J considered whether it would be better to deal with matters of difficulty by way of recital of what are in effect, conditions, or by way of undertakings and she said *'It seemed to me that it would better reflect the fundamental nature of these restrictions of Mr B's parental responsibility if the Order set out that it was made in reliance upon them… if the conditions were not to be observed, the Court might be invited to reconsider the whole question of parental responsibility'.*

If there is no agreement, therefore, invite the Court to spell out the detail of how the PR can be exercised.

Louise Price

Public funding – forget-me-not.

David Truex, Solicitor (a firm) v Kitchin [2007] EWCA Civ 618 (4.7.07)

A reminder to solicitors not to burn all the public funding manuals after setting off in pursuit of a 'private client' only practice. A working knowledge of the eligibility criteria for public funding remains indispensable when interviewing prospective new clients.

The Appellant solicitors' firm brought proceedings against Mrs. Kitchin claiming fees which it alleged were outstanding for work that they had done for her, principally in connection with ancillary relief proceedings. By the time the case reached the Court of Appeal the issue to determine was whether the solicitors had been negligent in failing to advise her that she might be eligible for public funding.

The solicitor's duty at that time was clearly identified in the Guide to Professional Conduct of Solicitors, 8th edition, 1999:

5.01 A solicitor is under a duty to consider and advise the client on the availability of legal aid where the client might be entitled to assistance under the Legal Aid Act 1988.

This has been superseded, since 1 July 2007, by a similarly clear provision in the Solicitors Code of Conduct 2007. The reminder of the professional duty to consider this is set out equally clearly in the Family Law Protocol.

On the first day that enquiries were made of the solicitor on behalf of Mrs. Kitchin the solicitor was informed that Mrs. Kitchin's parents *'would have to lend her the money to pay any legal fees'.* On day two, during a meeting between the solicitor and Mrs. Kitchin, it was established that she was *'nominated to receive a salary of £4,000 per year'* from a company that she had run with her husband, but nothing had been paid to her. It was further established that the company had taken on a certain amount of borrowing and that Mrs. Kitchin 'did not have a clue about the finances of the company'. At that stage Mrs. Kitchin was describing herself as *'completely empty handed'*. It had somehow become recorded in the attendance note of that meeting that about £100,000 of dividends from the company were shared each year between husband and wife. The attendance note did not record that there had been any consideration of potential entitlement to public funding. On day 10 after first contact, in a letter to the solicitor, Mrs. Kitchin again described herself as *'without a penny'*.

On day 15 after the first contact the solicitor was informed by those representing the husband that *'he had submitted an application for public funding'*. At that stage it was suggested by the husband's solicitor that Mrs. Kitchin might have property assets in Italy and Germany. The following day Mrs. Kitchin gave instructions that she had an interest in one property in Germany, but she fully explained why that was of no value. The solicitor reiterated on that day, when Mrs. Kitchin's father queried how it could be that the husband was receiving public funding, that the firm did not undertake publicly funded work. This had been explained in the client care letter that was initially sent out. By this stage substantial costs had already been incurred in taking early advice from Counsel and preparing injunctive proceedings to freeze various assets.

47 days after the first meeting the decision was taken by Mrs. Kitchin to transfer to another firm that did publicly funded work. That firm immediately recognised that she was likely to qualify for public funding and granted her initial public funding using their devolved powers.

In the Court of Appeal the solicitors contended that no reasonable solicitor would have formed a view, on the facts that were known, that Mrs. Kitchin might be eligible for public funding. In particular it was submitted that no such consideration would be given upon hearing that dividends of £100,000 were paid by the company. Waller LJ doubted the accuracy of the information about the dividend but concluded that, in any event, such a detail should still have been regarded by the solicitor in the context of what else was known about Mrs. Kitchin. This was a client who was saying in the next breath that she had no idea about the company's finances, who was repeatedly saying that she had no money at all, and who was borrowing from her parents to pay legal costs. Based on this information any reasonable solicitor would have formed the view that she might be eligible for public funding.

The Appellant also sought to contend that the position was not clear because the solicitor had heard from those representing the husband that Mrs. Kitchin might have property assets in Italy and Germany. Waller LJ roundly rejected this and underlined that by the time this (inaccurate) allegation was raised after 15 days the solicitor should already have made full and proper enquiries of Mrs. Kitchin and established an accurate position of what her assets were.

The sequence of events in this case rather suggests that the solicitor was mindful of proceeding quickly to undertake the urgent early work in the case. Unfortunately, however, in so doing insufficient time was spent at the outset establishing the new client's assets, and insufficient analysis was undertaken of the funding ramifications in the light of her impecuniosity. The result in this case was that the solicitor's early hard work went unpaid.

The best way to avoid such a scenario must be: (a) thorough questioning during the initial meeting with a new client ; (b) taking a realistic overview of all the information that they give about assets, especially when those emanate from a family business; and (c) keep details of those eligibility criteria either in mind, or in an easily accessible cabinet!

Adrian Posta
(Adrian Posta is a member of both the Family and the Personal Injury Teams)

The Domestic Violence, Crime and Victims Act 2004.

Certain key provisions of the DVCVA 2004 came into force on 1 July 2007. Below are some changes to be aware of in three areas:

Non-molestation orders

- Section 42A of the DVCVA provides that breach of such an order is a criminal offence;
- A power of arrest can no longer be attached to a non-molestation order. The offence under Section 42A is an arrestable offence - the police can, without more, arrest the respondent;
- The lawfulness of the arrest does not have to be proved once the respondent is brought to court, and the matter must then be dealt with within fourteen days unless the court makes an order under r4(d) of the Family Proceedings (Amendment) Rules 2007, 2007/1622. Otherwise, the procedure remains as it was under a power of arrest;
- Sections 42A(3) and (4) provide that once an individual has been prosecuted for breach of the order, that person cannot be punished for contempt, and conversely that he/she cannot be convicted of the offence if the breach has been punished as a contempt. Given that these subsections deal with conviction and punishment, there is nothing to stop contemporaneous proceedings up to those points;
- An individual cannot be guilty of an offence under Section 42A(1) unless they know of the existence of the order (Section 42A(2)). NB They do not need to know the exact terms of the order;
- One consequence of Section 42A(2) is that ex parte orders must be clearly identified as such;
- It will be for the police and CPS to decide whether or not to prosecute, and the applicant's wishes may or may not be taken into account. In reality however, where the applicant is the only witness of the breach, if she/he refuses to pursue the breach any prosecution is unlikely to proceed;
- In advising a client as to whether or not she/he wishes to apply for an order in spite of the criminalisation of breach, practitioners should be aware of the additional possible sentencing options available within the criminal jurisdiction (the key difference being that the court can make a community order, or suspended sentence order, with potentially rehabilitative requirements (see Sections 189, 190 & 199 – 215 CJA 2003).

Undertakings

- The previous ambiguity has been clarified and the court may now issue a warrant in the event of breach;
- Paragraph 37 of Schedule 10 prevents the court from accepting an undertaking where it appears to the court that the respondent has either used or threatened violence against the applicant or a relevant child.

Widened definitions

- Section 3 amends the definition of cohabitants to include same sex cohabitants, enabling them to apply for occupation orders under Section 36 and 38 of the FLA;
- Section 4 of the DVCVA amends the definition of 'associated persons' in s62(3) of the FLA to include individuals who 'have or have had an intimate personal relationship with each other which is or was of significant duration'.

Anna Midgley

North v North [2007] EWCA Civ 760, [2007] All ER (D) 386.

The Parties married in 1964 and had three children, all of whom were now adult. The parties had an affluent lifestyle but divorced in 1978. The children remained living with the Husband until their majority. A nominal periodical payments order was made by consent in 1981 and this order also provided for the Wife to receive the income from ground rents which gave her an annual income of £6,000. It was also agreed that the Husband would purchase the Wife a house. Further ground rents and investments were voluntarily transferred to the Wife from the Husband after the order had been settled which all together were worth approximately £30,000 per annum. The District Judge found that the Wife was able to work but chose not to. In 1984 the Husband remarried. The Husband allowed the Wife to buy property at a discount from his building company and he gave her half an inheritance that he had received. The Husband believed that the periodical payments order had terminated on this basis but that was not the case. In 1998 the Wife decided to sell her ground rents and her house and emigrate. She invested on advice and made substantial losses. The Husband's wealth increased. Meanwhile the Husband retired. His net assets were worth £4.75 million and he had an annual income of £60,000. The District Judge found that the Husband's behaviour since divorce had been irreproachable and that he had no control and should not bear responsibility for the Wife's financial life style choices. The investment losses fell into another category. The Wife issued an application for the variation of the nominal periodical payments order. The District Judge found that the Wife had an income need of £16,500 per annum which would give her a capital sum of £202,000 on a clean break. The Husband successfully appealed but the Court of Appeal was not of the view that the Wife's application for a variation should be dismissed as a matter of principle and held that the Wife had an entitlement to a modest award of £ 3,000 per annum despite the findings made against her of the District Judge. This sum was then capitalised.

Comment: It is difficult not to have sympathy with the Husband in this case. The decision of the Court of Appeal flies in the face of the Court's duty to consider whether a clean break can be achieved between the parties under s 25A(1) MCA 1973. The award was granted nearly 30 years after the parties had separated and in circumstances where there were no dependant children. Further, the Wife was still young when the parties separated and the District Judge found that she had an earning capacity but chose not to exercise it. The Wife appears therefore to have been largely the author of her own misfortune yet the Court of Appeal endorsed the decision of the lower Court that the Husband should pay for those mistakes albeit in a more modest sum. It is difficult to see why the Wife's periodical payments claim was not dismissed by the Court of Appeal.

Deborah Dinan-Hayward

Co-ownership and accounting. How does it all stack up?

Co-ownership cases have normally involved one or more of three primary issues:

- Does the Claimant have an interest in the Defendant's property;
- What is the size of the Claimant's interest;
- Should there be any financial adjustment between the Claimant and the Defendant, 'equitable accounting', because of unequal spend on or enjoyment of the property.

By the time you read this newsletter *Stack v Dowden [2007]* Almost Every Law Report but say 1 FLR 258 will have been the subject of many an article and viewpoint. Stack, like the last major Co-ownership case to reach the Lords, *Lloyds Bank v Rosset [1990] 2 FLR 155*, is mandatory reading for anyone who goes near a co-ownership case (and a wife fighting the husband's trustee in bankruptcy or relatives faces the same issues as a cohabitee) and your correspondent will assume that you know of these cases and the best articles such as that in Family Law August 2007. However, here is a recap:

- If the Claimant's interest has been declared (e.g. in a deed of trust) then that declaration is binding in the absence of fraud, duress or mistake; see *Pettitt v Pettitt [1970] AC 777*;
- A "beneficial joint tenancy" is a binding declaration of equal shares on a severance; see *Goodman v Gallant [1986] Fam 106*;
- If the Claimant is not the legal co-owner and his interest has not been declared in any way (i.e. registered at HM Land Registry as joint proprietor) he must establish an interest most commonly by proving a binding common intention between himself and the Defendant that he was to have a beneficial interest;
- If the Claimant is joint legal owner and the shares have not been declared then normally the shares will mirror the legal title and will thus be joint/ equal; see *Crossley v Crossley [2006] 2 FLR 813* and *Stack*
- If the circumstances are such that the normal rule should not apply, e.g. in the case where the punters have no idea of what might be intended by joint legal ownership and the contributions to the purchase price are very unequal, then the court should set fair shares having regard to the whole course of dealing between the co-owners with respect to the property; see Stack applying *Oxley v Hiscock [2004] 2 FLR 669* and the recent case of *Adekunle & Ritchie v Ritchie LTL 24/8/07*.

There was an awful lot of focus in Stack upon the lack of rights of unmarried couples. Interesting though that focus was, it did not really have that much to do with the facts in Stack and notwithstanding press commentary to the contrary, there is no new law in Stack except for a little nugget for possible claimants with no legal interest and no deed of trust who have to prove that they have an interest in the first place.

Previously it was thought that *Rosset* meant such a claimant had to show:

i) an **agreement, arrangement or understanding** that they would have a beneficial share on which they relied; or,

ii) a direct or indirect **contribution** to the purchase price.

But a commitment as a quasi-spouse coupled with economic disadvantage pursuant to that commitment was no use whatsoever. (The Law Commission has reported on this but there is no White Paper yet).

There is a suggestion in the judgments that their lordships, in Stack that Rosset, set the bar too high. The suggestion is obiter but we can see a lowering of the bar out in the Commonwealth; see *Abbott v Abbott (Antigua and Barbudua)* a decision of the Privy Council [2007] UKPC 53. The leading judgment is given by Baroness Hale and at paragraph 12 she says:

Finally, it must be borne in mind that the husband accepted in the course of his evidence that the wife did have a beneficial interest in the home, although he disputed the amount. The Court of Appeal appears to have attached undue significance to the dictum of Lord Bridge in Lloyd's Bank plc v Rosset, in particular as to what conduct is to be taken into account in quantifying an acknowledged beneficial interest. The law has indeed moved on since then. The parties' whole course of conduct in relation to the property must be taken into account in determining their shared intentions as to its ownership.

Of course it must be noted that like Stack, there was no issue about whether there was a beneficial interest in the first place: the only issue was how much. Nonetheless, Rosset seems to be falling out of the A list of cases.

And now we must turn to accounting. No, don't go on to the next article. This is important and has nothing to do with accountants.

'Equitable accounting' is a set of rules which have been developed to give co-owners where justice requires:

- credit for spend on the property;
- compensation for lack of enjoyment of the property.

The most common case is where the relationship between A and B falters so B moves out leaving A in occupation paying the mortgage. A is entitled to payment by B of 50% of the mortgage but B is entitled to compensation for being out of the property quantified as 50% of the notional rent that could be charged (an occupation rent). At one time it was thought that there had to be an ouster of B (as opposed to B simply leaving) but in *Byford v Butler [2004] 1 WLR 56* it was held that this 'ain't necessarily so'.

What of unequal spend during the cohabitation as opposed to afterwards? As a matter of common sense, in the absence of an agreement that they would keep books of account, it is unlikely that a co-owner would really expect compensation whilst the relationship continues. In *Clarke v Harlowe [2007] 1 FLR 1*, HHJ Behrens held that accounting during the relationship would be exceptional.

Then we come back to *Stack* in which 'occupation rent' (but not equitable accounting) was dealt a death blow. In *Stack* Baroness Hale said at paragraph 93:

'There remains the question of the payment for Mr Stack's alternative accommodation. This matter is governed by the Trusts of Land and Appointment of Trustees Act 1996. Section 12(1) gives a beneficiary who is beneficially entitled to an interest in land the right to occupy the land if the purpose of the trust is to make the land available for his occupation. Thus both these parties have a right of occupation. Section 13(1) gives the trustees the power to exclude or restrict that entitlement, but under s 13(2) this power must be exercised reasonably. The trustees also have power under s 13(3) to impose conditions upon the occupier. These include, under s 13(5), paying any

outgoings or expenses in respect of the land and under s 13(6) paying compensation to a person whose right to occupy has been excluded or restricted. Under s 14(2)(a), both trustees and beneficiaries can apply to the court for an order relating to the exercise of these functions. Under s 15(1), the matters to which the court must have regard in making its order include: (a) the intentions of the person or person who created the trust; (b) the purposes for which the property subject to the trust is held; (c) the welfare of any minor who occupies or might reasonably be expected to occupy the property as his home; and (d) the interests of any secured creditor of any beneficiary. Under s 15(2), in a case such as this, the court must also have regard to the circumstances and wishes of each of the beneficiaries who would otherwise be entitled to occupy the property'.

[94] 'These statutory powers replaced the old doctrines of equitable accounting under which a beneficiary who remained in occupation might be required to pay an occupation rent to a beneficiary who was excluded from the property. The criteria laid down in the statute should be applied, rather than in the cases decided under the old law, although the results may often be the same'.

In ***Stack*** the family home continued to be occupied by Ms Dowden and the children. Under the old law Mr Stack would have been entitled to occupation rent. Under TOLATA he was entitled to be considered for compensation but Baroness Hale felt that he should not be compensated in stark contrast to Lord Neuberger who felt he should.

In *Murphy v Gooch [2007] EWCA 603* we see the first visit of the Court of Appeal to the post-Stack world. The case contains a useful summary of the law of modern accounting and is also authority for the proposition that the court can order one co-owner to buy out the other. The lawyers got it in the neck though for bringing a small value dispute to the Court of Appeal!

In conclusion:

1. Keep your eye on the developing law of constructive trust for unmarried couples. The absence of financial contribution might not be the killer point it once was;

2. As night follows day former partners who co-own a property are likely to add up who paid what during the relationship and then seek compensation for any imbalance. This is going to go nowhere unless there is an item of very significant spend or agreement that the imbalance will be put right at a later stage;

3. Compensation for being kept out of a property may still be payable in certain circumstances but if the custodial parent and the children have stayed in the house out of necessity it is unlikely that the excluded party is going to get anywhere;

4. In all cases, is the value of the dispute really worth the candle?

Alex Ralton
(Alex Ralton is a member of both the Family and Civil Teams)

PRACTICE AND PROCEDURE ON URGENT APPEALS IN CHILDREN CASES.

Two judgments this year, one with a local link, have resulted in rather strong comments from the Court of Appeal about the urgency of proceeding with viable appeals in Children Act proceedings. The problem for advocates is no less painful for being recurrent. The Judge decides that a child should be removed from his home, whether under a residence order or an interim care order, the parent who is losing care of the child is desperate to appeal, the advocate recognises the limits of the appeal process and the low likelihood of a decision being overturned, everybody leaves the court and, within time but not for many days, an appeal is launched after the child has been moved. In Re. S (A Child) 2007 EWCA Civ. 958 and Re. A (A Child) 2007 EWCA Civ. 899, Wall LJ makes specific comments about the practice to be adopted following such a decision, and Wilson LJ gives his view about the responsibility which vests in a judge in such a situation.

Both judgments should be read for their full effect, but in summary:

1. A Judge considering a significant change in the arrangements for a child who knows that there is hope of an appeal should consider whether the order should give the aspiring appellant the opportunity to approach the Court of Appeal for temporary relief before the order takes effect. A potential appellant who does not have that leeway provided by the judge at first instance can always approach the court directly (and Wilson LJ gives a phone number). Whether the Court of Appeal grants or continues a stay, it will always give robust directions as to the future conduct of the appeal.

2. Re. A was a case in which a change of residence was ordered because of the mother's actions in frustrating contact, whereas in Re. S a child had been removed from his father under an interim care order and placed with a foster mother. Both are serious orders and the impact on young children of being removed from their homes is not to be underestimated. In both cases, fortunately, the Appeal Court did not interfere with the decision which had been made. This may go someway to explaining why the appeals were not pursued more urgently – it may have been implicitly recognised that the appeals would fail – but the point is no less important. There are a number of other points to do with making speedier progress, planning ahead and timetabling which we can expect to have reinforced in the near future!

Tacey Cronin

Family Team Seminars

Our Spring series of seminars will be taking place on the following dates:

6 March 2008 – Rougemont Thistle Hotel, Exeter
11 March 2008 – Copthorne Hotel, Cardiff
13 March 2008 – Marriott Royal Hotel, Bristol

These seminars start at 5:00pm and are scheduled to run for one and a half hours. The speakers will be Deborah Dinan-Hayward and Marie Leslie. The topic will be **Brussels II (Finance and Children)**.

For further information, please email seminars@albionchambers.co.uk or contact Paul Fletcher on 0117 311 0306

Albion Chambers
Family Team

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 Ekaney Call 1990
Clerk Julie Hathway

Claire Rowsell Call 1991
Former solicitor
Clerk Julie Hathway

Nicholas Sproull Call 1992
Clerk Julie Hathway

Daniel Leafe 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