



Albion Chambers MATRIMONIAL FINANCE TEAM NEWSLETTER

Global maintenance orders

Section 8 of the Child Support Act 1991 removed the power of the family court to make orders for child maintenance in all cases where the CSA (now CMS) had jurisdiction

and the parties were unable to agree an order. Where a maximum assessment had been made the court retained jurisdiction to top up the assessment. Otherwise this proscription threatened to leave the weaker economic party (usually the wife) at the mercy of the most notoriously inefficient arm of government and the labyrinthine complexities of the various formulas which seem to have changed with the wind.

A practice therefore developed of making global orders; namely orders which included spousal and child maintenance and which were defined so as to decrease pound for pound by any subsequent assessment made by the CMS.

Authority for this practice stemmed from District Judge Segal, who, for many years, sat in the courts on High Holborn. Those of us lucky enough to have appeared in front of him will remember him as a man of sound common-sense, without airs and graces, and as far removed from some of the current inhabitants of that place as is possible to imagine. Anyone truly interested in organising a "Family Remedies Unit" would be well advised to ignore the sensibilities of District Judges who want to do this sort of

work, and concentrate instead on ensuring it is staffed by people of the quality of District Judge Segal.

Be that as it may, District Judge Segal, being a pragmatic man, apparently developed a practice of making global orders, which was referred to in the leading case of *Dorney-Kingdom v Dorney-Kingdom* [2000] 2 FLR 855. In that case the Court of Appeal, led as so often by Thorpe LJ, endorsed the practice, providing it contained a "substantial ingredient" of spousal maintenance.

The Court of Appeal nevertheless expressed misgivings as to the legitimacy of global orders, describing them as "just within the bounds of legitimacy". The problem was that they were clearly designed to circumvent the strictures of the Child Support Act and to confer continuing jurisdiction on the court which parliament had not intended.

As time went on and the inadequacies of the CMS became ever clearer, global orders became more and more common, and were used regularly, usually in cases where the wife had a particular need for a minimum income and no CMS assessment had yet been made.

Ironically, District Judge Segal himself did not approve of the widespread use of these orders carrying his name. In an article published in *Family Law* shortly after *Dorney-Kingdom*, he made clear his view that Segal orders should only ever be used as a short-term measure, designed to cover a period early in proceedings before disclosure and before a CMS assessment had taken place.

Despite this objection, global orders continued to be made on a regular basis

Editorial

I am pleased to present the spring Albion Chambers Matrimonial Finance Newsletter. Head of team Nicholas Sproull deals with the vexed issue of global periodical payments. Jonathan Stanniland considers the sentence handed to Mr Hart of *Hart v Hart* fame, for non-compliance. Richard English gives an interesting insight into a government review in relation to Sharia Law in the UK. Finally your humble editor describes the court's power to order an interim sale. We hope to see many of you at the Albion Chambers Finance seminar which was due to take place in March but was delayed because of the unseasonal weather. The event has been rescheduled for Friday, 22 June. Seasonal spring greetings.

David Chidgey

and have their place in both the original and updated Mostyn standard orders. Furthermore, they have now been sanctioned by Roberts J in *AB v CD* [2017] EWHC 3164.

Roberts J is soon to be seen in Bristol, and in this case was sitting on appeal from a Circuit Judge, His Honour Judge Everall QC (who is a charming man of the old school, who sits in London and who recently dealt with one of the writer's submissions by saying "this is not Victorian England you know Mr. Sproull").

The parties had lived together for about 15 years and had three children who, by the date of the final hearing, were aged 11, nine and seven. Both parties were lawyers, but the wife was not working and the husband earned about £11,000 net pm. Neither party had applied to the CMS and so the court's top-up jurisdiction was not engaged.

HHJ Everall QC had made a global order in the sum of £3,250 pm, which was not apportioned between the wife and the

children: it was for an extendable ten-year term and was expressed to be for the “benefit of herself and the children of the family”.

The husband appealed on several grounds, including one which argued that the court had no jurisdiction to make global orders.

Roberts J dismissed the appeal. In concluding that the trial Judge had jurisdiction to make a global order she drew support from a number of sources:

- They are contemplated by the Mostyn standard orders, which have themselves been endorsed (twice) by the President.

- Global orders have been in use for more than 20 years since *Dorney-Kingdom*.

- Leading text books accept the practice as good law.

- Such orders have been endorsed by the Child Support Commissioner (CCS 316/1998).

- Such orders are in any event within the jurisdiction conferred on the court by section 23 MCA 1973.

The husband also appealed against the trial Judge’s assessment of the wife’s needs,

the award of a £30,000 contingency fund and the failure to make a Mesher order. None of these arguments found favour with Roberts J and the judgment provides a useful reminder both of the legal basis for such orders and the way in which appeals on such points are likely to be dealt with.

Two main points emerge from the case. First, it is beyond question that global orders are permissible. Whether this is intellectually justified is a different question; but it is pragmatic and to be welcomed, particularly in cases where the payer’s income exceeds the CMS maximum and the court could, if an assessment were in place, exercise its top-up jurisdiction in any event. Secondly, it is increasingly clear that the standard orders are being used by the judiciary not only as a guide to good drafting, but as a source of law, on the basis that they have an impeccable pedigree, reflect current practice up and down the country, and have been endorsed by the President himself. Anyone in any doubt as to whether any order is permissible need look no further.

Nicholas Sproull

objectively be justified by reference to W’s reasonable housing need...” and that “the purpose for which the property was acquired was to provide a home for both of them while they lived together and that purpose can no longer be achieved”. The order was that the house should be marketed for sale forthwith, and that completion should not take place before three months, upon which the Wife should give vacant possession.

In the Court of Appeal Wilson LJ stated:

“I am clear that, confronted with an application under TOLATA between separated spouses, the court should embark upon the discretionary exercise by asking itself whether the issue raised by the application can reasonably be left to be resolved within an application for ancillary relief following divorce. It is in principle much more desirable that an issue, as here, about sale of the home should be resolved within an application for ancillary relief.”

His Lordship noted that if there was any measurable chance that one of the parties will be able, within the divorce proceedings, to secure a transfer to them of the property, it was hard to conceive that an order for sale would reflect a proper exercise of discretion.

On the facts of *Miller-Smith*, the Court of Appeal found that H’s application under TOLATA crossed the threshold stage of the enquiry. W had, by seeking to hold up the grant of a decree, already caused significant delay. The size of the mortgage and the fluctuations in the exchange rate were a material factor. In the circumstances, the potential delay until matters were fully resolved was not tolerable. Also there were no other substantial assets and there was no measurable chance that W would secure transfer of the property into her sole name.

So, *Miller-Smith* is authority for the fact that the court can make an interim order for sale of a house in joint names, under TOLATA, where there is no measurable chance that one of the parties might retain the property within the divorce and the delay was not tolerable.

The matter more recently came before Mostyn J in *BR v VT* [2015] EWHC 2727. H was English and W was American. They had children who were 14 and 10. They bought a house in London in H’s sole name. The purchase was funded by a loan of £517,500 from H’s mother under a formal loan arrangement. The parties separated in 2014. All the parties’ money had been spent, including the money which H should have set aside for tax and money earmarked for school fees. The parties also owed over £300,000 in legal costs, which were incurred even before the ancillary relief proceedings had started!

Significantly, after separation the parties

Interim orders for sale

An important tool in any family lawyer’s kit is a knowledge of interim remedies. It is arguable, however, that the present interim remedy rules are inadequate:

- Why is maintenance pending suit only available to deal with “short-term cash-flow problems?” Why should the receiving spouse have to live like a hermit until the conclusion of the divorce?

- Why should it be necessary when applying for a freezing order to show that there is a significant risk of assets being dissipated? What is wrong with freezing surplus assets until proceedings are finished?

- Whether the father had provided the mother with sufficient assurances regarding security for his maintenance obligations;

- Should courts more readily grant interim orders for sale? In this way, in cases where there is a high likelihood of assets having to be sold, a significant part of the delay at the end of the case after the final order could be avoided.

As a general rule, English financial remedies law is not in favour of granting

interim relief. This dates back as far as *Wicks v Wicks* [1999] Fam 65 where it was held that the court has no power to order interim lump sums. In that case, however, the court did reference the court’s power to protect diminishing assets.

We now have three examples of cases where interim sales were considered, one of them very recent. What do they show us?

The first is *Miller-Smith v Miller-Smith* [2009] EWCA Civ 1297. This was a case where the main suit was defended. Two months before the main suit final hearing, H brought an application for the FMH to be sold. The property was a house in Knightsbridge, which was worth around £12M. The mortgage was £7M. It was arranged over five floors and ran to 3,800 square feet. Worryingly the mortgage was “placed into a basket of major currencies”, such that when the pound weakened the mortgage increased. At one point the mortgage payment was an eye-watering £22,250 per month.

The judge at first instance made an order for sale under section 14 of The Trusts of Land and Appointment of Trustees Act 1996. Utilising the factors in section 15, he found that the house was “far larger than could

had agreed that W could relocate with the children to California. The property was placed on the market by agreement. H repented, however, in relation to relocation, and the parties went to court. W's plan for relocation was rejected as too imprecise. Following the court's decision W withdrew her agreement as to the marketing of the property. She had also previously registered a Home Rights Notice with the Land Registry. H issued an application which was effectively for the termination of W's rights of occupation under the 1996 Act.

Mostyn J set out the parties' assets and liabilities and found that despite the house being worth £2.4M, the residual assets were only £105k. He found that the parties were in a position of having a serious revenue deficit: "bankruptcy looms". He found that H's reckless and irresponsible spending would eventually have to be reflected in the outcome. He said that W was to be criticised for "reneging on her clear agreement to sell and then sticking her head in the sand like an ostrich".

His Lordship found that there was no alternative but that the house had to be sold as soon as possible. W's home rights were to be terminated. The parties would have to be housed in rented accommodation. Three-bedroom flats in reasonable areas could be had for £2,500 per month!

Mostyn J also made some observations as to the law:

■ The three procedural routes for an interim sale in financial remedies cases are MWPA, TOLATA, and also FPR 20.2(1)(c)(v). "This provides that the court may grant as an interim remedy an order "for the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly"."

■ It was obvious that when making an order for sale, a court had the power to make a supplementary order requiring an occupant of property to give vacant possession of it. It would be absurd if the court could only make "half an order".

■ He doubted whether Ward LJ in *Wicks v Wicks* had meant to say that an order under s.17 MWPA could not include an order for possession. The very wording of section 17 allows the court to make such order as it thinks fit and specifically refers to the possession of property.

■ However, where there was an application for sale which necessarily included the termination of matrimonial home rights, the court could not make such an order without undertaking the exercise in relation to home right under s.33 of the Family Law Act 1996. His Lordship doubted the Court of Appeal's view to the contrary expressed in *Miller-Smith*.

Finally, the issue has recently come before the High Court in *WS v HS (Interim sale)* [2018]. There, shortly after the issue of form A, H made an application using the

part 18 procedure for the FMH to be sold. W conceded that there should be a sale but wanted to retain the property for another 18 months, while a child completed their A Levels.

The first instance judge, made an interim order for sale. He purported to exercise a power under FPR 20.2(1)(c)(v). The matter came before Cobb J, who allowed the appeal. The appeal was decided on technical grounds. His Lordship noted the importance of distinguishing between procedural and substantive rights. There was no inherent jurisdiction to fill in gaps within the Act. Rule 20.2 was a procedural rule only. The FPR regulates the court's procedure, it does not extend the court's jurisdiction. A formal application under TOLATA or MWPA would have provided the court with jurisdiction and should have been made. Given the implications of the relief which was sought, deeming an application was not appropriate.

So to conclude:

■ The court can order an interim sale;

■ The jurisdiction will be either under TOLATA or MWPA; and,

■ On the reported cases, to succeed it is probably necessary to show some urgency which will probably arise from the financial situation. It will also be necessary to show that neither party has a measurable chance of keeping the property.

David Chidgey

and no legal binding authority under civil law, they do act in a decision-making capacity when dealing with Islamic divorce. It is this decision-making ability that has proved a source of controversy. Some commentators complain that the councils advocate the primacy of Sharia law over domestic law and in doing so perpetuate the perception that they represent a parallel legal system.

Evidence gathered by the review indicated that the majority of users of the Sharia councils were women and that the clear majority of those women (90%) were visiting the council seeking an Islamic divorce.

It seems that one of the reasons for this high number is that a significant number of Muslim couples do not civilly register their religious marriages and consequently some Muslim women have no option of obtaining a civil divorce.

Unlike women, men seeking an Islamic divorce have the option of "talaq", a unilateral divorce that they can issue themselves. Women do not ordinarily have this option and, therefore, have to seek a "khula" or "faskh" from a Sharia council. It is clear, therefore, that men do not have the same dependence on a Sharia council as women.

However, the sad irony is that one of the

Sharia law review

It is increasingly common when dealing with financial remedy proceedings involving a Muslim couple for issues to arise in relation to their religious divorce.

Courts in England and Wales are, for example, often asked to determine whether the religious divorce has been carried out, and if so its impact if any on the financial remedy proceedings, including the treatment of the Mahr (dowry).

Moreover, concerns have recently arisen in relation to the role of the Sharia councils that, independently of the court, consider and determine the status of the religious divorce for such couples.

In May 2016, Theresa May, acting as Home Secretary, launched an independent review into the application of Sharia law in England and Wales.

The review was tasked with "understanding whether, and the extent to which, Sharia law is misused or applied in a

way that is incompatible with the law within Sharia councils".

Consequently, the review was set up to focus exclusively on the work of Sharia councils in England and Wales and not to look at Sharia practices in general.

The eagerly awaited review was published in February of this year. The purpose of this article is to set out the recommendations advocated by the review, along with the Government's response to them.

Sharia Councils

The committee found that there is no clear definition of what constitutes a Sharia council. The councils call themselves Sharia councils because they deal with all aspects of Islamic law. However, they vary in size and constitution and there is no accurate statistic reflecting their number, with estimates ranging from 30-85.

Whilst the councils have no legal status

primary reasons for the review itself was the underlying concern that these same women were having their rights and freedoms infringed by the very councils that they were dependent on and sought assistance from.

Notwithstanding, the review concluded that *“Sharia councils are fulfilling a need in some Muslim communities. There is demand for religious divorce and this is currently being answered by the Sharia councils”*.

Accordingly, the review considered that *“the closure of Sharia councils is not a viable option”*.

Recommendations

■ Legislative change

The review advocated amendments to the Marriage Act 1949 and the Matrimonial Causes Act 1973 to ensure that civil marriages are conducted before or at the same time as the Islamic marriage ceremony. This step would bring Islamic marriages in line with Christian and Jewish marriages in the eyes of the law.

As a result, the review considered that a greater proportion of women would then have the full protection afforded to them in family law and the right to a civil divorce, lessening the need for those same women to attend a Sharia council for determination.

However, the writer notes that this recommendation would not impact the use of councils in circumstances where Muslim women may, for their own religious conscience, require a religious divorce. In such circumstances the Sharia council remains the only destination.

■ Awareness campaigns

The panel concluded that cultural change is required within the Muslim communities to acknowledge women's rights in civil law. As a result, awareness campaigns and educational programmes were advocated.

Running in tandem with such campaigns, there was seen to be a need to ensure that Sharia councils operate within the law and comply with best practice. Most pertinently for those with a financial remedy practice that:

“a clear message must be sent that an arbitration that applies Sharia law in respect of financial remedies and/or child arrangements would fall foul of the Arbitration Act and its underlying protection”.

■ Regulation

The most controversial recommendation as regulation would appear to give the councils a form of legal legitimacy that some think (including members of the panel itself) they should not be afforded.

However, the panel by a majority advocated the creation of a regulatory body that would establish a process for councils to regulate themselves. This would include a code of best practice for councils to implement.

Government's response to the recommendations

Perhaps not surprisingly, the initial response to the conclusions of the panel were focused on the panels third and most controversial recommendation of regulation.

The Government made it very clear that the recommendation did not find favour, stating that:

“The Government considers that the proposal to create a State-facilitated or endorsed regulation scheme for Sharia councils would confer upon them legitimacy as alternative forms of dispute resolution. The Government does not consider there to be a role for the State to act in this way”.

Adding that regulation could:

“add legitimacy to the perception of a parallel legal system even though the outcomes of Sharia councils have no standing in law”.

Whilst the review panel hoped that regulation would “preserve the right of women to seek a religious divorce without risking exposure to discriminatory practices”, the Government clearly concluded that the legitimacy that such regulation would confer was unacceptable.

The Government, in its response, did however acknowledge the need to safeguard women against discrimination, but did so by reiterating the protection that women are already afforded by the law stating that:

“Where Sharia councils exist, they must abide by the law. Legislation is in place to protect the rights of women and prevent discriminatory practice. The Government will work with the appropriate regulatory authorities to ensure that this legislation and the protections it establishes are being enforced fully and effectively”.

The basis of the rejection of the panel's third recommendation is bound to be debated for some time.

On one side of the divide some will see a missed opportunity to deliver what would be the most significant change to Sharia councils and one that they believe would protect the rights of the women that depend on the councils for a religious divorce.

Advocates of the Government's position will however point out that the underlying principle of Sharia councils is the application of Sharia law, and Sharia law is not the law of the land. As such it should not be afforded legitimacy by way of regulation

that would risk the creation (or at least the perception) of a parallel legal system reserved for a particular group. In addition, advocates will state that the current laws of the land already afford women the protection that regulation would supposedly deliver.

It appears to the author that if Sharia councils were afforded legitimacy it might prove a significant challenge for a court to subsequently unpick decisions made, for example, in relation to dowry forfeiture (or return), or other financial remedy related issues.

From a practitioner's perspective, the Government's reiteration of the fact that Sharia law has no jurisdiction in England and Wales and that the decisions of Sharia councils are not legally binding, must in the interests of clarity, be welcomed.

Richard English

Committal proceedings

Hart v Hart [2018] EWHC 548 (Fam)

It is probable that most litigants who suffer through the contemptuous non-compliance with orders and undertakings of their spouse will continue to fight shy of making applications for the committal of the disobedient party. The reasons for this include: costs exposure, ongoing arrangements for dependent children and understandable concerns about the incarceration of the other party on whom they continue to depend.

One of the byproducts of the increase in the volume of litigants in person has been lop-sided litigation in which the funded party is often met with non-compliance on the part of the other. This could result in a corresponding growth in that minority of litigants in relatively low-value claims who commence committal applications. Helpful guidance for those contemplating taking the plunge is to be found in *Hart*.

When Karen and John Hart began cohabiting in the mid-80's she was an air hostess in her twenties, whose most valuable asset was her Porsche. He was a 48-year-old man of substance who had

amassed assets and income through the family fruit trading business and later motor trading and insurance businesses.

After more than twenty years, the value of the combined assets was assessed by HHJ Wildblood QC to be £9.4 million. The award to W was £3.47 million. One of the hallmarks of the case was Mr Hart's non-disclosure. The reports, both of W's appeal last August and of the committal proceedings, suggest that Mr Hart bitterly resented the proceedings and that he continued to regard the assets as his own exclusive empire. In the committal judgment [2018] EWHC 549, the Judge observed that while Mrs Hart was reliable and truthful, he was an exceptionally poor and untruthful witness. He had failed to engage in the process, notwithstanding the painstakingly patient approach taken not only by the court but also by Mrs Hart.

The orders made in Bristol, in 2015, included that Mr Hart would transfer one of the businesses, Drakestown, to Mrs Hart and his undertakings to take all steps necessary to ensure that she could efficiently manage the company by, inter alia, the provision of paperwork and information she required.

In the event, Mrs Hart was only able to secure vacant possession of the Drakestown premises in 2016, after a further Chancery application. When the premises were finally entered, the paperwork which had been left for her fell well short of what was required to enable her to run the business.

In September 2016 proceedings for committal and enforcement were commenced by Mrs Hart. The case was initially heard over two days in March 2017, and then concluded in February 2018. At paragraph 11 a concise synopsis of the law applicable to the committal application is drawn from counsel's note:

The first task for the court is to identify, by reference to the express language of the order, precisely what it required the Respondents to do. That is a question of construction and, thus, a question of law;

ii) The next task is to determine whether the Respondents have done what was required of them and, if they have not, whether it was within their power to do it. Could they do it? Were they able to do it? These are questions of fact;

iii) The burden of proof lies throughout on [the applicant] it is for her to establish that it was within the Respondents' power to do what the order required, not for the Respondents to establish that it was not within their power to do it;

iv) The standard of proof is the criminal

standard, so that before finding the Respondents guilty of contempt the court must be sure:

(a) that they have not done what they were required to do and

(b) that it was within their power to do it.

v) If the court finds the Respondents guilty the judgment must set out plainly and clearly

(a) the court's finding of what it is that the Respondents have failed to do; and

(b) the judge's finding that they had the ability to do it.

The Judge concluded that Mrs Hart had proved with ease that Mr Hart has acted in contemptuous disregard of the undertaking that was recorded in the substantive order and of the orders dated 24 February 2016 and 29 July 2016. Bank statements and VAT records had been produced late by Mr Hart, and leases and insurance documents which he had falsely claimed were either lost or destroyed, were still outstanding.

In forming a view as to the level of Mr Hart's contempt and the appropriate sentence, the Judge held that:

- it was persistent and that even at the date of the hearing, had only been remedied in part;

- he had given evidence untruthfully in an attempt to disguise the contempt;

- he showed no remorse;

- he was motivated by a wish to frustrate Mrs Hart's running of Drakestown;

- he had deliberately placed pressure on and caused expense to Mrs Hart by his actions.

The judge, addressing the factors in *Crystal Mews Ltd v Metterick and Other* [2005] EWHC 3087 (Ch), determined that:

- Mr Hart's actions seriously prejudiced Mrs Hart;

- he had not acted under pressure but through a wish to put Mrs Hart under pressure due to his dissatisfaction with the outcome of the substantive proceedings;

- his breaches were deliberate and sustained;

- the breaches lay at a high level of culpability (as set out above);

- his contempt had caused deliberate financial and emotional harm to Mrs Hart;

- he had not co-operated in these enforcement proceedings and did not appear to recognise the seriousness of what he had done.

Sentencing took place on 15 March 2018, when an immediate term of 14 months' imprisonment was imposed, composed of a nine-month *punitive* element and a consecutive five-month *coercive* element for the breaches of

order and the breach of undertaking. This composition catches the eye, because of its open acknowledgement that it is intended not merely to punish Mr Hart but also to compel him to produce documents which the court had found to exist and which, in breach of his undertakings, he had elected to withhold.

As was pointed out by the court, nobody wants to see a man in his eighties and in poor health sent to prison, at public expense after litigation which also involved the use of much needed public resources; but, there comes a point beyond which financial penalties and the threat of a suspended prison sentence are inadequate in the face of a party's contempt.

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