March 2005 issue

Family Law Week

# Family Law Week - Our Aims

*Stephen Wildblood QC*

The practice of family law is, in many ways, the practice of coping with permanent revolution. No other area of law is at the mercy of such a wide range of influences. Political, economic, legal, social, cultural and even technological changes all eventually impact on the family courts.

Social and economic changes have been reflected in the increased acceptance of the wife's financial contribution within marriage and "yardstick of equality".

Political pressures have seen successive governments squeeze public access to legal advice and fundamentally alter the way in which firms, and indeed the courts, are managed. The Clementi Review threatens further change in the near future.

Pure legal developments, which as always reflect wider external forces, have seen the continual refinement of concepts such as the "welfare of the child" and the introduction of an additional layer of case law developed under the Human Rights Act 1998.

Fundamental changes in cultural attitudes have driven through a raft of legislative changes that would have seemed impossible only 15 years ago. The Civil Partnership Act 2004 is the most striking example.

Medical, scientific and technological advances are so rapid that the foundations of knowledge underpinning the determinations of the court are constantly shifting. What may seem acceptable when deciding someone's right to life may, one or two years on, seem hopelessly outdated.

It is against this turbulent background that we decided to create Family Law Week. The breadth of current information and knowledge required by the dedicated family lawyer compels the practitioner to stay on top of the subject in the most immediate and streamlined manner possible. Our mission is to help all levels and sectors of the profession achieve that aim.

Our promise is to publish the latest news, cases and legislative changes Family Law Week as soon as we know about them. We will commission the best legal writers to provide practical advice and analysis. All this is integrated with our regular training course assessments so that now, for the first time, family lawyers can be on top of their brief all the time and with little outlay.

We also want Family Law Week to be a forum for debate on all aspects of family law. We want your contributions or comments whether in the form of an article, an opinion piece, a news item or a letter to the Editor. And we want contributions from lawyers, mediators, experts and guardians as the involvement of every sector of the family justice system can only benefit us all.

## A further message from the Family Law Week team

Family Law Week is deliberately built on an open access model providing the content at no cost so that everyone can benefit from the service. We are determined that this should remain the case. That means we rely on our training and advertising to generate the revenue to keep the site going so wherever you can please support us by taking training courses, clicking through to our sponsors and buying your family law books from the site.

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# NEWS

## All I want for Christmas is a Civil Partnership?

Commencement of the Civil Partnerships Act 2004 has now been announced for 5th December 2005 which means in practical terms that the first civil partnership registrations under the standard procedure set out in ss 8-17 may take place on 20th December i.e. 15 days later.

## Child abuse victims abused again in court claims NSPCC

The NSPCC has launched a fundraising campaign to provide support services for child witnesses. The campaign follows publication of a new report "In their own words", a joint research by the NSPCC and Victim Support.

The report found that:

- Half of the child witnesses did not understand the words or phrases being used in court
- Just under half said that they had been accused of lying - sometimes more than once
- More than half were very upset, distressed or angry when in court. A fifth of them said they were crying, feeling sick or sweating
- On average, child witnesses waited for almost a year (11.6 months) before the trial, despite long-standing government policy to give priority to child abuse or child witness cases.

In response to these findings the NSPCC is calling for:

- Pre-trial support to be made available to every young witness
- Lawyers and judges to ensure that children understand all the questions they are asked in court and are not questioned aggressively
- Monitoring of delay in young witness cases and publication of statistics to avoid unreasonable delays.

Copies of the report are available from the NSPCC. The charity has also played a key role in producing a good practice handbook, *Preparing Young Witnesses for Court*, as well as a young witness pack, which can be used by supporters to explain court proceedings to children due to give evidence.

## Family Barristers - New LSC Forms again

Any family barristers being paid for by the LSC needs to know about the new CLSCLAIM 4 form to be used in March (if you want to be paid!). Further details are available on the LSC site

## Tailored Fixed Fees for all family legal aid solicitors

The new system of tailored fixed fees for Controlled Family Work under the Civil Contract becomes mandatory on 1st April. The scheme introduces a new approach of paying legal aid solicitors fixed fees for each case, based on their average claims between 1 April 2003 and 31 March 2004, rather than the current system where the LSC pays for the time spent on individual cases and should mean that firms will gain by an average of 2.5%. Those who signed up for the scheme voluntarily have been working under the new system for some months now and the window for joining up was extended to February 28th.

The move to make the scheme mandatory was formally announced on 31 January.

## Single Civil Court a possibility?

Civil Law Minister, David Lammy, launched a consultation on introducing a single civil court on 3 February 2005. Seeking the views of judges, lawyers and court staff he announced that "the idea of unifying the civil court jurisdictions has been gathering momentum for many years" but that before proposing changes "we have to be sure that they would lead to real benefits"

Among other issues to be considered, the DCA specifically wants feedback on whether there should be a single family court. Responses are sought by 27 April so if you want to get involved see the DCA website.

## Joint committee on the Draft Children (Contact) and Adoption Bill opens its doors

A committee to consider the draft Bill, appointed by both Houses of Parliament, started hearings on 24th February and, at the time of writing, The President of the Family Division is listed among the first to give evidence. This committee stage is described as a period of "pre-legislative scrutiny" and, according to the committee's homepage, the purpose of this stage is "to take evidence on the policy underlying draft Bills, and to consider whether bills can be improved before they are introduced into Parliament".

The committee is timetabled to report by 26th May. You can keep track of progress on the committee's website.

## ANALYSIS

# CONTACT – WHERE ARE WE NOW?

*District Judge John Mitchell, Bow County Court*

The Government's 'agenda for action' on contact, *Parental Separation: Children's Needs and Parents' Responsibilities:* (') (1) was published in January and accompanies the *Private Law Programme* (2) issued by the President of the Family Division in November. The third part of the triangle is the draft Children (Contact) and Adoption Bill ('the Bill') published in February. Together they form a programme whose aim is to ensure that both parents continue to have a meaningful relationship with their children after separation.

> 'In time it needs to become socially unacceptable for one parent to impede a child's relationship with its other parent wherever it is safe and in the child's best interests. Equally, it should be unacceptable that non-parents absent themselves from their child's development and upbringing following separation.' (3)

### Non-Judicial Resolution of Problems

The key to the proposals is that, so far as is possible, parents should be helped to resolve their disputes rather than relying on adjudication. In September 2004 a Family Resolutions Pilot Project was launched in Brighton, Sunderland and Inner London with the aim of raising parents' awareness of childrens' needs and to help them agree parenting arrangements appropriate to their own situation.

When a parent applies for contact, they and the other parent will be sent an information pack including guidance on how courts view contact cases. They will be directed to attend, separately, two facilitated group sessions to discuss how difficult separation and disputes can be for children and how these might be lessened. The final stage involves their attending together one or more parent planning sessions with a CAFCASS Family Court Advisor before the matter returns to court (4). In areas where the Pilot is not operating, Designated Family Judges are encouraged to introduce a local scheme. Details of a model scheme are given in the Programme.

Even where the Pilot Project is not operating locally, parents will be expected to mediate before or when applications are issued.

> 'The court to which an application is made will always investigate whether a family has had the benefit of [advice and assistance of information and advice, e.g. through the Family Advice and Information Service ('FAInS')] or similar services and whether any available form of alternative dispute resolution can be utilised.' (5)

Wherever possible a CAFCASS officer will be available at the court at the First Hearing to facilitate early dispute resolution. Unless immediate agreement is possible, save in exceptional circumstances (e.g. safety) the court will direct that the family is to be referred for support and advice to the Pilot Project or locally available resolution services.

Even after the initial stages of a case, parties can expect that judges will continue to urge mediation or therapy. In *Re S (Unco-operative Mother)* (6) there was a long history of litigation over contact, the father alleging that the mother was implacably opposed to contact. The parents had attended three sessions of therapy without success. A year later in the Court of Appeal Lord Justice Thorpe commented that:

> 'Manifestly there are between these adults unresolved areas of conflict which, unless resolved, will continue down the years to resound to the prejudice and harm of these two children. A process of family therapy is infinitely more likely to lead to resolution than continuing litigation between them.'

So, although the mother could not be ordered to re-engage in therapy,

> 'If it emerges…that…proposals, reasonable as to time and location have been advanced for the revival of the family therapy and she has continued to refuse, then she must understand that the court may draw adverse inferences against her.' (7)

In order to assist mediation and to avoid the worst excesses of litigation the Bill aims to insert a new section, s.11A into the Children act 1989 ('the Act) which will give a court power to direct that a party to the proceedings take part in a 'contact activity' defined as attending an information session or taking part in 'a programme, class, counselling or guidance session or other activity' devised for the purpose of assisting a person to establish, maintain or improve contact with a child.. Only a parent can be directed to attend and no sanction for non-compliance appears in the Bill. Presumably a parent who applies for contact but disregards the direction may find it more difficult to obtain an order.

When a contact order is made the Bill provides by way of s.11B to the Act that a condition may be added to the order requiring any party (and not just a parent or a party in whose favour an order has been made) to take part in a contact activity.

By virtue of s.11D the court will be able to require CAFCASS to monitor compliance with the direction or condition.

### Delay

Courts must, of course, have regard to the fact that 'any delay in determining the question [of the upbringing of this child] is likely to prejudice the welfare of the child.' (8). Not only is a cessation of contact after separation or a period of contact likely to impact adversely on a child, studies have suggested that well-defined visiting schedules established immediately after separation are more likely to be adhered to over a period of time.(9)

To this end the Programme states that the overriding objective of cases involving children (10) will safeguard the welfare of the child by effective court control. At the First Hearing which should be held within 4-6 weeks of the application being issued, the court must identify the aim of the proceedings, establish the timescale within which the aim can be achieved, the issues between the parties, the opportunities for resolution by referrals for support and advice and any other steps which may be required. Thereafter there must be continuous and active case management including judicial continuity and the avoidance of unnecessary delay by the early identification of issues and timetabling of the case from the outset. Each order must record not only the issues which are determined, agreed or disagreed but also, for the first time, the aim of the order, agreement, referral or hearing which is set. The order must also

identify how monitoring of the outcome is to be secured. Such monitoring can include urgent relisting before the same court within 10 days of any request by CAFCASS.

## Domestic Violence

There is a risk of domestic violence in a significant number of contact cases. One study found indications of physical or emotional violence in almost a quarter of cases (11). In another which examined cases where a CAFCASS report had been ordered (12), a third of children interviewed said they had witnessed violence. A key note of both *Next Steps* and the Programme is the need to have regard to the safety of the child and the parties. However, like the Court of Appeal in *Re L, Re V, Re M, Re H (Contact: Domestic Violence (Re L)* (13) the Government has declined to create a presumption against contact where there is domestic violence.

> 'The Government does not believe that any kind of blanket statutory presumption of no contact will work in cases where allegations of harm were made. It is essential that court-ordered contact should be safe for all involved but this does not mean that a parent who has been violent may never have contact with their children - but that any contact should be safe and in the children's best interests.'

The welfare check list requires to the court to have regard to any harm which a child has or is at risk of suffering. The definition of 'harm' in s.1 1(3)(e) of the Children Act 1989 has been amended to include 'impairment suffered from seeing or hearing the ill-treatment of another' (14). In order to assist the court in assessing risk a new application form C1 (in use from the 31st January) asks the question:

> 'Do you believe the child(ren)…have suffered or at risk of suffering any harm from any of the following: any form of domestic abuse, violence within the household, child abduction, other conduct or behaviour by any person who is or has been involved in caring for the child(ren) or lives with or has contact with the child(ren).'

An applicant answering 'yes' (or respondent if allegations are made) has to complete a new form, C1A, giving details of incidents, medical treatment or assessment and steps thought necessary to protect the children. Under the model scheme an application for contact will be faxed to CAFCASS on the day it is issued and CAFCASS will undertake a paper risk assessment with a view to advising the court at or before the First Hearing that a particular case has risk or safety issues. If allegations are made, the court has to decide whether, if proved, they would be relevant to the issue of contact. Do they suggest a risk of future abuse of the child or carer or that past abuse has made the child or carer fearful?

> 'If the allegations might have an effect on the outcome, they must be adjudicated upon and found proved or not proved. It will be necessary to scrutinise such allegations which may not always be true or may be grossly exaggerated…In cases of proved domestic abuse, as in cases of other proved harm or risk of harm to the child the court has the task of weighing in the balance the seriousness of the domestic violence, the risks involved, the impact on the child against the positive factors (if any) of contact between the parent found to have been violent and the child. In this context, the ability of the offending parent to recognise his past conduct, be aware of the need to change and make genuine efforts to do so will be likely to be an important consideration.' (15)

*Re L* hearings to try any disputed allegations may still be necessary but, as in public law cases (16) where preliminary issues are tried, it is very important that the same judge should hear the case throughout.

## Monitoring and enforcement

The Green Paper promised that the government would 'provide effective follow-up of court orders by ensuring that families are contacted by a CAFCASS officer soon after an order has been made, to check that it is being implemented in practice.' *Next Steps* is less forthright.

> 'CAFCASS will target its resources where needed and will liaise with the judiciary with a view to ensuring that its interventions add value.'

Nonetheless the Bill inserts s.11F into the Act allowing a court to direct CAFCASS to facilitate and monitor compliance for a period of not more than twelve months and to report non-compliance to the court. The Programme states that that orders should indicate 'if a particular agreement or order is to be facilitated or monitored and whether particular arrangements for enforcement are provided for e.g. that the first handover…did in fact take place, who is to inform CAFCASS, whether, in what circumstance and how CAFCASS is to inform the court…and whether, how and when the matter is to be listed in the event of non-compliance.' It should be made possible for a party or CAFCASS to bring the matter back to the court for enforcement within ten days.

*Next Steps* stated that the Government intended to legislate 'at the earliest possible opportunity' to provide additional enforcement powers including referral of a defaulting parent to a variety of resources including information meetings, meetings with a counsellor or parenting classes designed to deal with contact disputes. This proposal which originated in *Making Contact Work* (17) has been criticised as displaying 'a rather chilly authoritarianism, perhaps reflecting a greater concern to prevent judicial orders being scoffed at than to fulfil children's interests' (18). A more practical concern is that the early experience of such a scheme in Australia suggests that its effectiveness has been hampered by poor planning and 'by its embodiment of conflicting policy objectives which are reflected in the contradictory views and various resistances among its service providers and consumers.' (19)

In fact, the Bill does not go as far as the *Next Steps* proposals. Section 11G provides that if the court is satisfied that a party to the proceedings has, without reasonable excuse, failed to comply with the order it may make an enforcement order imposing an unpaid work requirement of not less than 40 and not more than 200 hours to be performed during a twelve month period or a curfew order that the party remains in a specified place for no less than two and no more than twelve hours a day for a period of no more than twelve days. Both orders can be suspended.

In the meantime in appropriate cases where a resident parent fails to comply with contact orders there is the possibility of residence being transferred to the other parent (20), if necessary under an interim care order (21). *Next Steps* states that courts will continue to have the power to impose fines or commit the defaulting party. In *Re D (Intractable Contact dispute: Publicity)* (22) Mr Justice Munby said that 'a willingness to impose very short sentences…may suffice to achieve the necessary deterrent or coercive effect without significantly

impairing a mother's ability to look after her children'. But such steps are draconian and are recognised both by the Government and the judiciary as being very much a matter of last resort.

### Moving away

An important factor governing the frequency of contact is the distance between the home of the child and the non-resident parent and one reason contact diminishes is parents moving away from the neighbourhood of the other (23). In an immigration case, *Edore v Secretary of State for the Home Department* (24), the Court of Appeal held that deporting a mother and her children who were emotionally dependent on their father breached their art 8 rights. However as practitioners are aware it remains very difficult to obtain orders preventing a parent with residence moving elsewhere within the United Kingdom or abroad. There are cases where such orders have been obtained (25) but these are the exception. *Next Steps* has nothing to say on the issue. *Payne v Payne* (26)has never been considered by the House of Lords. Would leave to appeal be refused or would the decision be the Children Act version of *White v White*?

#### Notes

1 - Cmd 6452 (2004) Department of Constitutional Affairs
2 - (2004) Dame Elizabeth Butler-Sloss www.dca.gov.uk
3 - Ministerial Foreword to Next Steps
4 - The Green Paper, Parental Separation: Children's Needs and Parents' Responsibilities July 2004 ('Green Paper') paras 68-72. See also The Family Resolutions Pilot Project [2004] Fam Law 687.
5 - Programme
6 - [2004] EWCA Civ 597 [2004] 2 FLR 710
7 - Op cit at paras 20-21
8 – s. 1(2) Children Act 1989.
9 - See, for example, Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research Kelly [2000] J.Am.Acad. Child Adolesc. Psychiatry 3.98 963
10 - Defined as the court dealing with every child case justly, expeditiously, fairly and with the minimum of delay in ways which ensure as far as practicable that the parties are on an equal footing, the welfare of the child is safeguarded and distress to all parties is minimised and, so far as is practicable, in ways which are proportionate to the gravity and complexity of the issues and to the nature and extent of the intervention
11 - Residence and Contact Disputes in Court vol 1 Smart (Department of Constitutional Affairs 2003)
12 - Families in Conflict Buchanan (Policy Press 2001)
13 - [2000] 2 FLR 334
14 - s.31(9) as amended by s.120 Adoption and Children Act 2002 with effect from the 31st January 2005
15 - Re L at 341-2 per Butler-Sloss P
16 - *Re G (Care Proceedings: Split Trials)* [2001] 1 FLR 872
17 - The Advisory Board on Family - Children Act Sub-committee (2002) Lord Chancellor's Department
18 - Children's Rights and the Developing Law 2 ed. p 406 (2003) Fortin
19 - Contact enforcement and parenting programmes - policy aims in confusion? Rhoades [2004] CFLQ 1
20 - As in *V v V (Contact: Implacable Hostility) [2004] EWHC* 1215 (Fam), [2004] 2 FLR 851
21 - As in *Re M (Intractable Dispute: Interim Care Order)[2003] EWHC 1024* (Fam), [2003] 2 FLR 636
22 - *[2004] EWHC 727* (Fam), [2004] 1 FLR 1226
23 - See, for example, Non-Resident Parental contact Blackwell and Daws (2003) Office of National Statistics
24 - [2003] EWCA Civ 716
25 - For example, *Re S (A Child) (Residence Order: Condition) (No 2)* [2002] EWCA Civ 1795 [2003] 1 FLR 1066 and *B v B (Residence: Condition Limiting Geographic Area)* [2004] 2 FLR 979 (United Kingdom) and *Re C (Leave to Remove from Jurisdiction)* [2000] 2 FLR 457 (removal abroad)
26 - [2001] EWCA Civ 166 [2001] 1 FLR 1052

## ANALYSIS

# The Domestic Violence Crime & Victims Act: what are the changes?

***District Judge Roger Bird, Bristol County Court***

The Domestic Violence, Crime and Victims Act 2004 (DVCVA) has now received Royal Assent. It is not known when this change in the law is to come into force, but readers should be aware that the law and procedure will change at some future date and should now familiarise themselves with the changes.

The changes may be summarised as follows:

(a) amendments to definitions of cohabitants and associated persons;

(b) changes to procedure for undertakings;

(c) removal of power of arrest from non-molestation orders; consequent amendments to occupations orders;

(d) creation of new offence for breach of order;

These will be considered in turn.

The DVCVA amends the existing law in two respects by enlarging the class of associated persons. By section 3 the existing definition of Cohabitants in section 62(1)(a) of the Family Law Act 1996 (FLA) is removed and the following is substituted:

> "Cohabitants are two persons who, although not married to each other, are living together as husband and wife or (if of the same sex) in an equivalent relationship."

No change is therefore made to the existing definition in respect of couples of different sexes but the category is now intended to include homosexual couples.

The class of associated persons is further extended by section 4 so that section 62(3) FLA 1996 reads as follows:

> "For the purposes of this Part, a person is associated with another person if-
>
> (ea) they have or have had an intimate personal relationship with each other which is or was of significant duration."

It seems that the intention of the legislation is to include the boyfriend and girlfriend who had not actually lived together. Only time will tell whether this is workable.

The second class of important changes made by the DVCVA relates to enforcement for breaches of non-molestation orders and changes in the approach of the court to acceptance of undertakings in lieu of an order. The effect of paragraph 38 of Schedule 10 DVCVA is to amend section 47 FLA so that the

power to attach a power of arrest to a non-molestation order is removed, while allowing it to remain for occupation orders. The reason given for this is that breach of a non-molestation order has become a criminal arrestable offence and it was thought that it would be unduly confusing for police officers to have to decide whether a person arrested by them should be dealt with under the previous procedure of bringing before the family court within 24 hours or as a criminal defendant to be dealt with in the magistrates court.

By section 46(1) FLA the court has power, within certain restrictions, to accept an undertaking from any party where it has power to make an occupation order or non-molestation order. Because the ability to attach a power of arrest to a non-molestation order has been removed, this position has had to be rethought and the restriction on the right of the court to accept an undertaking redefined. First, section 46(3) is amended to read as follows:

> "The court shall not accept an undertaking under subsection (1) instead of making an occupation order in any case where apart from this section a power of arrest would be attached to the order."

This recognises that a power of arrest may still be attached to an occupation order. Secondly, a new subsection (3A) is inserted (by para 37(3) of sched 10) which reads as follows:

> "(3A) The court shall not accept an undertaking under subsection (1) instead of making a non-molestation order in any case where it appears to the court that-
>
> (a) the respondent has used or threatened violence against the applicant or a relevant child; and
>
> (b) for the protection of the applicant or child it is necessary to make a non-molestation order so that any breach may be punishable under section 42A."

The proviso in the old law, contained in section 47(2)(b) and applicable to section 46(3), namely that the court may decline to attach a power of arrest (and therefore feel able to accept an undertaking) if satisfied that the applicant would be adequately protected without a power of arrest, has gone. Now the test is whether the court considers that it is necessary to make a non-molestation order, breach of which is an arrestable offence, for the protection of the applicant. It may be that the end result is very much the same as before, but the wording is different.

The changes effected by the DVCVA in respect of the method of enforcing non-molestation orders and punishing breaches thereof are some of the most significant matters contained in the Act. The Government's view was clearly that the existing system had been found wanting, and therefore, as described above, non-molestation orders may no longer bear a power of arrest, and breach of such an order becomes a criminal offence.

The reasoning for this was that making a breach an offence would extend the range of sanctions available to the court. Section 1 DVCVA inserts a new section 42A into the FLA 1996 which provides that:

> "(1) A person who without reasonable excuse does anything that he is prohibited from doing by a non-molestation order is guilty of an offence.
>
> (2) In the case of a non-molestation order made by virtue of section 45(1), a person can be guilty of an offence under this section only in respect of conduct engaged in at a time when he was aware of the existence of the order.
>
> (3) Where a person is convicted of an offence under this section in respect of any conduct, that conduct is not punishable as a contempt of court.
>
> (4) A person cannot be convicted of an offence under this section in respect of any conduct which has been punished as a contempt of court."

Subsection (1) therefore contains the ingredients of the offence. The act complained of must be forbidden by the non-molestation order, and there must be no reasonable excuse for the breach; put another way, reasonable excuse is a defence to the charge. The position is therefore that breach of any provision of the order, however comparatively insignificant, will constitute an offence.

Subsection (2) refers to orders made under section 45(1) FLA, namely without notice orders. Subsections (3) and (4) deal with the overlapping of criminal proceedings and contempt proceedings. Even though the power of arrest has been removed, there is no reason why a complainant should not seek to punish breach of an order by means of the issue of a warrant of arrest under FLA section 47(10) or by the issue and service of a notice to show good reason why the respondent should not be committed to prison (Form N78 in the County Court, Form FL418 in Magistrates Courts). The Act imposes no restrictions or time limits on either a prosecutor or a complainant wishing to enforce by a contempt application.

Subsections (3) and (4) provide, in effect, that a person who has been punished for contempt in the family proceedings may not be convicted of an offence and vice versa. This still leaves an unfortunate lacuna. There is nothing to prevent a complainant beginning contempt proceedings where the respondent has been arrested, and there is nothing to prevent prosecution of an alleged offender where contempt proceedings are pending. It may be that rules of court will deal with this but it has to be said that, at present, there is room for confusion.

Further, there is nothing to prevent a complainant who is dissatisfied by the acquittal of a respondent, or the dismissal of contempt proceedings against him, making a second attempt to punish him in the other court, perhaps armed with better evidence. The Act only prohibits duplicate proceedings in the event of a favourable outcome for the applicant; it does not contemplate the result of unsuccessful proceedings. The changes which the DVCVA makes to occupation orders are limited in comparison with those made to non-molestation orders.

Section 41 FLA provided that where the parties were cohabitants or former cohabitants, in considering the nature of the parties' relationship the court 'is to have regard to the fact that they have not given each other the commitment involved in marriage.'. Section 2(1) DVCVA repeals section 41 so this is no longer an issue to trouble the court.

Section 36 FLA governs the position where the parties are cohabitants or former cohabitants and one party has a right to occupy but the other does not. Subsection (6) sets out the matters to which the court must have regard, and subsection (6) (e) requires the court to have regard to 'the nature of the parties relationship'.

Section 2(2) DVCVA amends subsection (6)(e) so that it now reads 'the nature of the parties relationship and in particular the level of commitment attached to it'. This does not make a material difference to the existing law and in fact makes explicit what was previously implicit.

ANALYSIS

# Advising clients about the Civil Partnership Act

*Bridget Garrood, Partner - Family Law Department, Cartridges, Exeter*

Following the passing of the Civil Partnership Act 2004 (the Act), many people in committed same-sex relationships are now wondering whether or not it will be in their interests to register as civil partners. Commencement has now been announced for 5th December 2005 which means in practical terms that the first civil partnership registrations under the standard procedure set out in ss 8-17 may take place on 20th December i.e. 15 days later. This article is intended to assist the family lawyer to anticipate some of the preliminary enquiries, which may be received in the lead-up to commencement. This article is intended to assist the family lawyer to anticipate some of the preliminary enquiries, which may be received in the lead-up to commencement, expected towards the end of 2005/ early 2006. It is not intended as a comprehensive guide but simply to alert practitioners to some of the issues that they will need to consider at this early stage in this novel area of family law.

Many same-sex couples will have been living together for several years or even decades. Others may have been arranging matters between themselves in separate households, so it will be important to look closely at their individual circumstances, perhaps in consultation with private client department colleagues, for specialist tax or wills and succession advice. Unlike many heterosexual cohabiting couples, same-sex couples tend to be more aware of their lack of legal status in relation to each other and therefore may have already taken legal advice. Accordingly they are more likely to have made wills or deeds of trust in respect of their interests in jointly owned property. It should be borne in mind, however, that they are not yet likely to have arranged their personal and legal affairs in anticipation of the new Act. That they now have the opportunity to do so is a welcome step forward and presents a rare opportunity for family lawyers to advise clients who are not in any current dispute but simply considering the potential change in the legal status of their relationship. Whilst entirely new, the Civil Partnership Act aims largely to mirror existing matrimonial legislation and the concepts should therefore be sufficiently familiar to most experienced practitioners to fall within 'the comfort zone' of their existing expertise.

There will however be a need to become familiar with the new language and terminology of civil partnership law under the new Act. It is possible, for example, to enter into a "civil partnership agreement" under s.73 of the Act. Confusingly, such an agreement, preliminary to a registered civil partnership, is not the equivalent of a pre-nuptial-type agreement. It is instead an agreement to enter into a civil partnership with another person of the same sex and is more akin to an engagement to marry. Although such an agreement does not, under the law of England and Wales, have effect as a contract that in itself will give rise to legal rights, it does give rise to many of the same limited but enforceable enhanced rights as those of fiancées in relation to certain property.

Under s.74 there is reference to the property provisions which will apply if a civil partnership agreement is terminated, including the provision under s.65 whereby a former party to such an agreement can claim in the same way as a formerly engaged party to have acquired a share in the other parties real or personal property after having made a substantial contribution in money or monies worth to the property during the period of the civil partnership agreement. In this way the Civil Partnership Act 2004 mirrors s.37 of the Matrimonial Proceedings and Property Act 1970. Similarly s.74(5) CPA 2004 mirrors s.3(1) of the Law Reform (Miscellaneous Provisions) Act 1970 regarding gifts of property by one party to the other during the period of a civil partnership agreement. If such a gift is made on the condition that it is to be returned if the agreement/engagement is terminated, it can be recovered after termination of the agreement.

Similarly, s.17 of the Married Women's Property Act 1882 concerning disputes between husband and wife as to title or possession of real or personal property is reflected in much plainer and more succinctly drafted terms at s.66 of the new Act. On such application the High Court or County Court may make such order with respect to the property as it thinks fit, including an order for sale. The provisions of s.17 MWPA 1882 and those of s.7 of the Matrimonial Causes (Property and Maintenance) Act 1958 are also available to formerly engaged couples and virtually identical powers are conferred on the court under s.66 and s.67 of the new Act to resolve disputes between former parties to a civil partnership agreement. In some circumstances this may prove useful as an alternative remedy or negotiating tool in respect of such things as furniture, gifts of money, possession of a home, ownership of civil partnership presents, since no parallel application is strictly necessary for such couples under the Trusts of Land and Appointment of Trustees Act 1996. It is however prescribed under s.74 (4) of the new Act that applications under s.66 and s.67 must be brought within 3 years of the termination of the civil partnership agreement.

The significance for practitioners at this stage lies in understanding the definition of a civil partnership agreement as set out in s.73 (3). This includes an agreement to register as civil partners or to enter into an overseas relationship as defined at s.212 (see below). It noteworthy that, whilst it is not yet possible to register as Civil Partners under the new Act, it would appear possible to enter in to a civil partnership agreement and, indeed, to terminate such an agreement already. In view of the implications for the disputes which may follow, family lawyers who are enthusiastic to advise at this stage may therefore need to brush up on their sometimes rusty knowledge of the rarely used legislation upon engagement and upon formation of the legal relationship of marriage rather than simply assume that it is their expertise upon its dissolution will be called for in due course.

Another matter which practitioners may usefully be able to attend to at this stage arises from the fact it will be necessary to advise couples awaiting the chance to register as civil partners that if they have previously been married they will need to prove that a divorce has been obtained by production of a decree absolute in the same way as though they were about to re-marry. Gay clients may not previously have bothered to obtain a divorce or may have given up trying to gain their former spouses co-operation or consent at an earlier and perhaps a more acrimonious stage in the breakdown of the marriage. If they intend to register as civil partners with their same

sex partner, the divorce is something they can be getting on with already and it may of course be necessary to address financial and property issues which were previously neglected, even if only to obtain a clean break. If such a client is however receiving spousal maintenance at present then they must be advised that this will automatically terminate in the same way as would occur upon remarriage.

More problematic may be the advice to be given to a couple where one or both have been registered abroad in a same-sex relationship with another partner. Such a relationship will now be recognised under the new Act and will be a bar to registration of a civil partnership with a subsequent partner. Therefore the former relationship may need to be formally dissolved in the country in which it was created. It will not be possible to do so in this country prior to commencement of the new Act.

Legally recognised same-sex relationships created abroad might include marriage itself, which is already permitted for same-sex couples in, for example, Belgium and the Netherlands. Various other countries have registration schemes which are available to couples of the same sex but which fall short of legal marriage: for example, a German Lebenspartnerschaft (life partnership) or a French Pacte Civile de Solidarite (civil solidarity pact). These are just two of the specified overseas relationships listed in Schedule 20 to the Act. Since such relationships will be specifically recognised as civil partnerships for the purposes of s.212, those who will be eligible to register as civil partners, and are impatient to do so before commencement of the Act, might wish to consider entering into such a relationship abroad. This must be an overseas relationship as defined for the purposes of the new Act under s.212 as either one which is specified (i.e. listed in schedule 20) or which meets the general conditions referred to at s.214

Broadly speaking, in order to be recognised under s.214, the overseas relationship may have been formed, before or after the passing of the Act, by two people who are not already party to a relationship of that kind nor lawfully married. The relationship must be of indeterminate duration and its legal effect must be (in the country of registration) that the parties are either treated as a couple generally or for specified purposes, or treated as married. Whilst this gives rise to some interesting points of international family law (quite clearly it is not a simple matter of recognition as with marriage), it would appear that it is possible to enter into a suitable overseas relationship with a view to acquiring the full package of rights and responsibilities which shall subsist during a civil partnership and for surviving civil partners upon death or upon dissolution of the partnership in court. This may be of particular interest to couples where advanced age or a terminal illness may give rise to the wish to import all possible succession advantages under the new law, for example for inheritance tax purposes, on the date of commencement.

There are inevitably some potential negligence traps for the unwary family lawyer who may not have often advised clients before the event of their marriage as to the relative merits of acquiring the new status. There will be a clear need, for example, to inform couples that their existing wills will become void upon registration as civil partners. Such couples may then wish to give instructions for new wills to be made specifically in contemplation of registration as Civil Partners. They will also need to be advised of the court's powers to interfere with interests in property by means of property adjustment orders in the event of dissolution of the civil partnership. They may seek advice together about making a binding "pre-nuptial"-type of agreement, which will of course raise the uncertain issue of future enforceability. There will be potential or actual conflicts of interest inherent in offering such advice to a couple and there is likely to be a need for separate advice for each party to the potential civil partnership.

Some gay couples may decide it is not in their interests to register as civil partners. Nevertheless they should be warned that their legal rights and responsibilities may still be affected by the new law, and not always with a positive outcome. Hardest hit are likely to be cohabiting same-sex couples where one or both parties are claiming means-tested benefits such as income support, housing benefit or tax credits. Whether or not the couple register as civil partners, they will be treated under the new law as living together as if in a registered civil partnership (i.e. as husband and wife). Consequently for the first time they will be treated as living together as a couple in a single household for the purposes of assessing their entitlement. Their previous lack of legal status as a couple will have caused them to be assessed as two single people. This change is likely to reduce their benefit. It is feared in the gay community that this may act as an unwelcome disincentive for couples in low income households to be open about their relationship; ironically perhaps driving some couples people back into the closet or causing them to separate to different addresses.

As family lawyers we often bemoan the fact that we are not consulted at the point in a couple's relationship when it is possible to prevent some of the problems which may face them if it breaks down or one or other dies. The Civil Partnership Act 2004 presents an opportunity to advise couples prior to the formation of a civil partnership. We should be encouraging more people to take our advice upon considering a proposal of marriage, although this begs the question as to whether prospective civil partners can enter into anything equivalent to a pre-nuptial agreement. Such agreements are, of course, of uncertain legal validity. Given, however, that there is no provision in the Act for civil partners to exchange vows, or indeed any specific written or verbal commitment upon formation of the civil partnership, it is difficult to see how similar public policy grounds may be used by the Courts once faced with the cases which will undoubtedly be presented in due course.

## ANALYSIS

# Pensions - All change

*David Salter, Partner, Addleshaw Goddard, Leeds*

Changes are to be made to the forms used in connection with pension sharing / attachment orders. The changes in question are to section 2.16 (pensions) of Forms E (financial statement), P1 (pension sharing annex), P2 (pension attachment annex) and M1 (summary statement of financial information in support of a consent order). Additionally, a new Form P3 (pension inquiry form) is to be introduced. It is hoped that the new forms will come into effect on 4 April 2005.

### (a) Form E

Whilst other changes may also be made to Form E in due course, section 2.16 (pensions) is to be amended because the current version had been drafted before the introduction of pension sharing. Much of the information requested was frequently not completed in full. The revised section 2.61 simply requires the CETV along with the value with any SERPS/S2P rights and details of whether the pension is in payment or draw down.

In many cases (particularly those where pensions are not a significant consideration), this will be all the information which the parties and the court need. If one of the parties decides that he/she requires further information (e.g. so that a pension sharing order may be made), that information may be provided by the new Form P3 (see below).

### (b) Form P3

This is a completely new Form designed to provide the more detailed information about a pension arrangement when one of the parties decides to apply for a pension remedy, e.g. a pension sharing/attachment order or off-setting. It is intended that the court will, at the First Appointment, order the completion of all or part of Form P3 within a set time limit in readiness for the FDR. Most of Form P3, which has been prepared with the Pensions on Divorce etc (Provision of Information) Regulations 2000, reg.s 2, 3 and 4 (boxes B and C of Form P3) as well as FPR, r 2.70(2) in mind, will have to be completed by the pension arrangement.

Form P3 can be used to provide voluntary disclosure in accordance with the Law Society's Protocol, in which event Form P3 will need to be signed by the pension scheme member/policy holder to provide authorisation for the release of information. Alternatively, Form P3 can be used prior to the First Appointment on a voluntary basis so that the timetable of the ancillary relief application is not unnecessarily extended, e.g. where it might otherwise be possible to combine the FDR with the first appointment. In this alternative situation, Form P3 will again need to be signed by the pension scheme member/policy holder.

### (c) Form P1

Form P1 is improved in a number of ways:

- The current version left the date on which the pension sharing order was to take effect blank. The new wording puts the matter beyond doubt indicating that a pension sharing order takes effect from the date of decree absolute of divorce or nullity or, if later, either (a) 21 days from the date of the pension sharing order (unless an appeal has been lodged in time), in which case (b) the effective date of the order determining that appeal.
- The current Form P1 contains wording indicating that the court was satisfied that the trustees had furnished the information required by the Pensions on Divorce etc (Provision of Information) Regulations 2000, reg.4 and that it appeared from that information that there was power to make a pension sharing order. That requirement was rarely complied with so that the reg.4 information must now be set out in box C of Form P3 and box E of Form P1 contains a certificate from the parties that it appears from the information on Form P3 that there is power to make the pension sharing order.
- Views have differed on whether a pension sharing order may be expressed as "such percentage (not being greater than 100%) as shall yield a transfer of £X at the valuation day specified by the person responsible for [relevant arrangement] for the purposes of the Welfare Reform & Pensions Act 1999, s 29" (the Hallam formula). The view of the Department of Work and Pensions is that this formula does not comply with the provisions of MCA 1973, s.21A which provides that a pension sharing order must specify "the percentage value to be transferred". The current Form P1 confuses matters further by its annotation alongside the percentage box stating that "(The specified amount required in order to create a pension credit and debit should only be inserted where specifically ordered by the court)" (for which there is no jurisdiction in England and Wales). The new Form P1 reflects the DWP's view by setting out "-.-%" in the box to be completed alongside the annotation "The specified percentage of the member's CETV to be transferred:".
- The information required under the Pensions on Divorce etc (Provision of Information) Regulations 2000, reg.5 in order for the trustees to implement the pension sharing order must now be set out on Form P1 thereby facilitating the process of implementation and, in particular, accelerating the commencement of the implementation period.

### (d) Form P2

The opportunity has been taken in the amended pension attachment annex to separate out the three types of pension attachment order (periodical payments; lump sum; death benefits) into separate boxes for the sake of clarity.

### (e) Form M1

Form M1 has not been amended since the introduction of pension sharing. In the "other information" section at the end of Form M1, the parties are invited to give details of any other especially significant matters. A separate part of the Form now seeks confirmation that the pension arrangement has provided the information required under the Pensions on Divorce etc (Provision of Information) Regulations 2000, reg.4 and that it appears from that information there is power to make an order including a pension sharing order.

## ANALYSIS

# Exposure to Capital gains tax

## Transfers of business assets on divorce

*Andrew Pitt, KPMG, Bristol*

### Introduction

#### *Basic Rules*

We all know that assets transferred between husband and wife in the tax year of separation, i.e. before the next 5 April after separation, are transferred as though they were transfers between husband and wife living together. The transferee takes the base cost of the transferor for capital gains tax (CGT) purposes. This includes the transferor's period of ownership for taper relief.

For transfers after the next 5 April after separation, CGT is payable on any asset transferred between husband and wife, whether voluntarily or under a Court Order. The husband and wife are still treated as connected parties (1) until the decree absolute so that the transfer will be treated as a bargain other than at arms length. The market value of the asset being transferred must therefore be used in the CGT computations (2). The basic CGT relief for transfers between husband and wife only applies for tax years at least part of which they have been living together (3).

There are a number of exceptions to these basic rules of CGT, including:

- If the transferor is non resident for CGT purposes (but is there a risk of the transferor becoming resident again and what are the consequences?)
- The usual principal private residence exemption applies (but if more than one private residence is owned, is it possible to vary the principal private residence election to avoid a charge?)
- If there are CGT losses brought forward which can cover the gain (for example a number of people have recently realised CGT losses on the exercise of company share options, following the decision in Mansworth v Jelley (4), which they have not been able to use.
- If the transfer of the asset itself creates a loss rather than a gain (but this loss will be treated as a connected party loss and can only be used against gains on the transfer of other assets to the same connected person).
- If business property holdover relief is available on a transfer of shares, or on a transfer of an asset used in a qualifying company, or on a transfer of an asset used in an unincorporated business or partnership.

This article looks at recent changes in the last relief – CGT holdover relief for transfers of business assets.

#### Holdover relief – why is it available?

Business asset holdover relief for CGT is available (5) on the transfer of an asset which is a qualifying asset for no consideration. It is not obvious that the transfer of assets in a divorce involves any consideration, and therefore one would expect the holdover relief to be available. However for many years the Inland Revenue took the view that a divorce was effectively a commercial settlement and in consideration for a transfer of assets, the transferee was giving up other rights and therefore there was consideration. The Inland Revenue therefore published in their capital gains manual that they did not consider that CGT holdover relief was available on a transfer of assets under a Court Order or in connection with a divorce.

Thanks to the judgment of Mr Justice Coleridge in the case of *G v G* (6), the Inland Revenue have now changed their mind and amended their capital gains manual (7) to set out the circumstances in which holdover relief can be used.

*G v G* was a family law case, not a tax case, but Mr Justice Coleridge said that he considered that CGT business asset holdover relief should be available in a divorce situation where assets are transferred from one spouse to the other. He explained that the Inland Revenue had misunderstood the legal structure of the divorce process and that no consideration could be deemed to have passed for assets transferred under a Court Order. As a result of that published decision, the Inland Revenue decided to change their approach without waiting for their original view to be challenged in a tax case. This was announced in a Tax Bulletin in September 2003.

The Inland Revenue's new view is set out in their CGT manual which confirms that where there is recourse to the Courts and the Court makes an order for ancillary relief under the Matrimonial Causes Act 1973 which results in a transfer of assets from one spouse to another, or the Court Order formally ratifies an agreement reached by the divorcing parties dealing with the transfer of assets, there will be no actual or deemed consideration for the transfer of the assets. Holdover relief is therefore potentially available.

However, there may still be situations where an immediate charge to CGT will arise on such a transfer where it appears to be a transfer of a business asset qualifying for CGT holdover relief. Some of these circumstances are explained further below.

#### CGT Holdover Relief – assets which qualify

Holdover relief is broadly available on the following assets:

a) An asset, such as a property, used in a business which is a trade, profession or vocation – either carried on by the transferor as a sole trader or by a partnership of which he is a partner. In the latter case the partner will usually be entitled to his partnership share of the asset concerned and the asset will be on the partnership balance sheet.
b) An asset owned by the transferor, such as a property, used in a business carried by the partnership which the transferor is a partner in, or by a company which is a qualifying company. The asset will not be on the balance sheet of the business or company.
c) Shares in a trading company, or the holding company of a trading group, and the shares are not listed on a recognised stock exchange (and for these purposes AIM is not a recognised stock exchange).
d) Shares in a trading company, or the holding company of a trading group, which are listed on a recognised stock exchange, but the transferor holds at least 5% of the voting rights in the company.

What is a trade, profession or vocation? This follows the usual tax definitions – but excludes a property investment business for example. However there are special provisions to allow the

relief for let agricultural land (land which qualifies for IHT let land agricultural relief, broadly that has been let more than seven years).
What is a trading company or member of a trading group? From 6 April 2003 this is a company which qualifies for the business asset taper rate of CGT taper relief. The definition used, before 6 April 2003, to be based on the definition for CGT retirement relief.

### Assets used in a company, or used by a partnership or unincorporated business

If an asset is used partly in a business and partly for other purposes, then an apportionment of the gain is made to arrive at the gain eligible for holdover relief.

### Trading Company and Trading Group

To qualify the company or group must not have activities which include, to a substantial extent, activities other than trading activities.

The Inland Revenue have indicated that they regard substantial as being more than 20% and they will apply a number of different tests, looking at, for example: turnover, the asset base of the company and the expenses incurred or time spent by officers and employees of the company in undertaking its activities. Other measures may also be appropriate. A similar test applies to trading groups taking the activities of the group as a single business, i.e. ignoring inter-group transactions.

Given the uncertainty this creates, the Inland Revenue, through local tax offices, have introduced a clearance procedure whereby you can provide details of the company and the intended transfer and ask for clearance that the company has been a qualifying company up until its last accounting date.

This compares to the position before 6 April 2003 when the total gain on the shares was apportioned between business and non-business chargeable assets held within the company or group. The new rules are a lot tougher – for example a company with substantial cash reserves before could qualify for full holdover relief if all its chargeable asset were used in the trade. Now if cash not required for the trade is more than 20% of the value of the company or group, holdover relief may not be available at all.

### The claim

The holdover relief claim (8) has to be signed by both husband and wife. It therefore makes sense to either obtain a signed claim form at the time of the divorce, or to include provision in the Order that both parties will sign the election. It is also possible to agree with the Inland Revenue at the same time that no valuation of the asset is required at the date of transfer.

### Security for potential CGT if transferee goes non-resident

CGT holdover relief is not available if the transferee is not resident in the UK (not resident or not ordinarily resident). The same applies to a transferee deemed to be not resident under a double tax agreement (9).

If the transferee is UK resident at the time of the transfer, the gain held over crystallises if he becomes non resident. The tax is payable by the transferee, but if unpaid for more than 12 months, the tax becomes payable by the transferor.

This does not apply in two circumstances (10):

a) Where the transferee still owns the asset transferred but he becomes non-resident more than six years after the end of the tax year in which the transfer took place, or
b) Where the transferee becomes non-resident for full time employment and comes back within three years and has not disposed of the asset within this period.

As an example:

- Divorce agreed in February 2005 and asset transferred with a CGT holdover claim.
- Transferee becomes non-resident in February 2005.
- Gain crystallises in 2005/06
- Tax on gain due by transferee on 31 January 2007
- If tax unpaid by 31 January 2008 the Inland Revenue can collect it from the transferor.
- The transferor has a right to reimbursement from the transferee.

The transferor therefore needs protection against his potential tax liability in the event the transferee becomes non-resident before the transferee has disposed of the asset and neither of the exemptions above apply. This is particularly important if the divorce settlement has been reached on the assumption that the CGT will not be payable immediately.
This can be achieved by the transferee undertaking to pay any such CGT. The transferor may want security for such an undertaking – it is not uncommon in similar circumstances for the transferor to retain a charge on the asset transferred for these purposes. The amount of the charge will be a matter of negotiation between the parties.

### Conclusion

The change of practice by the Inland Revenue has been very helpful. It has saved practitioners having to wait for a further challenge to the Inland Revenue through the tax court. However, the changes to the holdover relief rules in April 2003 have made more restrictive the qualification for shares which are eligible for holdover relief as a business asset. It is possible to get clearance from the Inland Revenue that shares will qualify for the holdover relief, but this introduces a new area of planning to be undertaken during the course of a divorce settlement.

Where it is possible to claim holdover relief, consider carefully:

a) Arrangements for the election to be signed by both parties,
b) Whether security for the tax on the heldover gain is required in case the transferee becomes non-resident, and
c) If expert tax advice is required to ensure all the detailed rules have been complied with.

### NOTES

1 *s.286(2) TCGA 1992*
2 *s.18 TCGA 1992*
3 *s.58 TCGA 1992*
4 *CA 2002, 75 TC 1*
5 *s.165 TCGA 1992*
6 *G v G [2002] EWHC 1339*
7 *IR Capital Gains Manual, CG67192*
8 *s.165 TCGA 1992*
9 *s.166 TCGA 1992*
10 *s.168 TCGA 1992*

# CASES

## Court of Appeal

# Chorley v Chorley [2005] EWCA Civ 68

### Court of Appeal: Thorpe, Tuckey and Dyson LJJ

(12 January 2005)

#### Summary
Where there is ambiguity concerning which court is first seised for the purposes of Article 11 of Council Regulation (EC) 1347/2000 ("Brussels II"), the issue should be determined by the courts in the jurisdiction whose process falls to be characterised.

#### Background
The English husband and French wife commenced cohabitation in February 1996; they celebrated their marriage initially in a London registry office in August 2000 (and subsequently at a religious ceremony in France); and they eventually separated in May 2002. A prenuptial contract stipulated France as the appropriate jurisdiction should the marriage fail.

In January 2003, the husband issued divorce proceedings in France by submitting a 'requête', which triggers a process of automatic conciliation at a hearing before a judge, during which the judge may make preliminary orders, including orders for financial support; thereafter, with the court's leave, the proceedings may be extended by the filing of an 'assignation'. The first appointment for conciliation was adjourned without hearing at the wife's request; and at the adjourned hearing in June 2003, which the wife did not attend, the judge granted the husband permission to proceed with the divorce and made orders for interim contact and for maintenance. The wife appealed, on the ground that her rights under Article 6 of the ECHR had been infringed; and, on 9 February 2004, a hearing date was set for 16 September 2004.

In January 2004, the wife had issued a petition for divorce in the UK; the husband's solicitors served a notice of application seeking dismissal of the petition on the grounds of lack of jurisdiction. At the hearing before the district judge in April 2004, the husband proposed that the district judge should leave the French court to determine if it was the court first seised under the terms of Art 11 of Brussels II; for all that was in dispute between the parties was the proper characterisation of the French process: was the issue of the 'requête' the proper commencement of the proceedings, or was it only the subsequent issue of the 'assignation' following the judicial conciliation investigation?

The district judge, who had already made an order transferring everything to the Family Division for determination, rejected the husband's proposal. The husband issued a notice of appeal, dated 11 May 2004, stating that the only issues to be resolved were issues of French law and a French court was in a manifestly better position to determine them. Also, on 6 May 2004, the husband filed his 'assignation' in France.

The district judge's reference and the husband's appeal came before the judge on 23 June 2004: the judge dismissed the husband's appeal, considering that the issue of the 'requête' in France did not trigger the Art 11 priority and that, since the wife's petition in this jurisdiction preceded the filing of the 'assignation' in France, the wife had established primacy. Furthermore, the judge considered that the combination of Family Proceedings Rules 1991 (FPR 1991), r 2.27A and Art 11 of Brussels II created a framework within which the district judge was entitled to give the directions she gave.

A notice of appeal against that decision was issued on 6 September 2004, on the grounds that the UK judge should not have determined an issue such as the proper characterisation of a French process and, further, that he should not have concluded that in France it is the issue of the 'assignation' rather than the issue of the 'requête' that commences proceedings and seises a court for the purposes of Art 11.

Also of significance is the French Court of Appeal's decision of 16 September 2004, determining that the divorce proceedings had been initiated by the issue of the husband's 'requête' in January 2003, with the consequence that the French proceedings were first in time by a period of almost precisely 12 months.

#### Judgment
Held, allowing the husband's appeal, that the judge had wrongly exercised his discretion in proceeding to determine an issue which he well recognised was more appropriately determined elsewhere. Also, FPR 1991, r 2.27A(2) should not be read as obliging a court to determine the question before it: the court clearly had the additional discretion merely to grant a stay pending the determination of the issue in the court of some other member state.

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# Williams v Lindley (formerly Williams) [2005] EWCA Civ 103

### Court of Appeal: Thorpe, Buxton and Smith LJJ

### 10 February 2005

#### Summary
Where a supervening event following the making of a consent order is of great significance, permission to appeal out of time should be given and a re-hearing directed.

#### Background
This case concerns a husband's appeal against the refusal of a judge to grant permission to appeal out of time an order for financial provision made in November 2002. The parties to this appeal were married in 1984 and have two sons. In 1998, the wife went to work for Mr and Mrs Lindley, providing home care for Mrs Lindley who was an invalid. Mrs Lindley died in April 2000

and the wife received a modest inheritance under her will; after the death of Mrs Lindley, the wife was employed by Mr Lindley (28 years her senior) as a housekeeper. The husband and wife separated in August 2001, at which time the wife and both children moved into Mr Lindley's house; the younger son returned to live with his father in the family home in June 2002.

The wife petitioned for divorce in September 2001, and commenced ancillary relief proceedings in April 2002. In those proceedings, the central issue was whether the husband should retain the former matrimonial home and, if so, what lump sum he should pay to the wife to enable her to re-house herself. In November 2002, a consent order was made approving payment to the wife of a lump sum of £125,000, representing in total a 70:30 split in the wife's favour.

In February 2003, the wife and Mr Lindley announced their engagement, and they were married in May 2003. On 17 June 2003, the husband applied to set aside the consent order, seeking leave for a re-hearing and for the necessary extension of time, on the basis that the order had been invalidated by subsequent events. The application sought the specific relief that the husband pay to the wife such lump sum as achieved the result that the assets of the parties were now divided equally on a clean-break basis.

At the hearing in May 2004, the judge considered the respective asset positions of the parties, and concluded that the applicant had failed to satisfy the first condition in *Barder*, namely that 'new events have occurred since the making of the order which invalidate the basis, or fundamental assumption, upon which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed'. Accordingly, the application to extend the time-limit for applying for a re-hearing was refused.

The husband appealed on the ground that the judge had erred in principle in making his assessment of the first condition in *Barder* in the light of the financial circumstances of the parties in May 2004; and, further, that the disclosure ordered by the judge was unnecessarily detailed for determining an application for re-hearing but insufficiently detailed to enable him to carry out a reassessment having regard to all the criteria enshrined in Matrimonial Causes Act 1973, s 25.

#### Judgment

Held, allowing the appeal (Buxton LJ dissenting), that the husband had consented to an order, in the light of the wife's urgent need to re-house herself and the children, that was plainly rendered unfair by the wife's almost immediate subsequent engagement, and he had never had the judicial assessment of fairness, in the light of all relevant considerations, to which he was entitled. (The parties were urged to take advantage of the Court of Appeal ADR scheme, which makes special arrangements for mediation in family appeals.) Consequently, a re-hearing would be ordered before a district judge in the county court, if the reference to the Court of Appeal ADR scheme was refused or if it subsequently failed.

Per Buxton LJ: all that was sought on the appeal to the judge was an adjustment of the distribution of the matrimonial capital; accordingly, the appeal should be dismissed since there was no ground on which the judge could properly be criticised, and the court's emphasis in *Harris v Monahan* on the public interest in the finality of litigation should be respected.

## HIGH COURT

# A County Council v A Mother and A Father and X, Y and Z [2005] EWHC 31 (Fam)

### Family Division: Ryder J
### 18 January 2005

#### Summary

A hearing to make findings of fact in relation to care proceedings in respect of three children, one of whom was the victim of a criminal charge of child cruelty faced by the mother.

#### Background

These proceedings relate to formal applications by the local authority, A County Council, for care orders in relation to each of three children: X, aged 15, who lives with his mother; and Y, a boy aged 10, and Z, a girl aged 8, who live with their father (who is not the natural father of X). The mother and father were married in June 1995, separated in September 1999 at which time all three children remained in the care of the mother with extensive contact with, and the significant involvement of, the father, and were finally divorced in February 2004.

This was a split hearing, to make findings of fact that would be taken into account in any necessary assessments and reports relating to the welfare of the children; the welfare decisions relating to the children would be made at a hearing later in the year.

The father had indicated his intention to care for all three children on a permanent basis and to apply for residence orders if appropriate. The mother wished to resume the care of all three of her children or, alternatively, to exercise the least restrictive contact as may be commensurate with their welfare and placement. Furthermore, the mother faced a criminal trial on a charge of child cruelty relating to Z, to be listed after the conclusion of this hearing.

The judge reviewed in exhaustive detail the allegations made by the local authority regarding the mother's treatment of Z, namely: that Z was a normal, healthy child; that the mother had fabricated, falsified or tampered with evidence of apparent medical conditions displayed by Z, particularly diabetes; that, in all the circumstances of the case and on the balance of probabilities, Z was the subject of 'fabricated or induced illness' (FII), also known as 'Munchausen's Syndrome by Proxy' (MSBP); and that the children Y and X were at risk of receiving the same care and treatment as Z.

#### Findings

The judge made findings of fact in relation to the above allegations, and offered some general observations arising from the case.

In particular, the real issue in the case was the management of a mother who wanted health care support and assistance, and arguably social and educational care and assistance, and felt that she was unable to obtain it without resorting to dramatic effect.

Also, the label MSBP should be consigned to the history books and, however useful FII may apparently be to the child protec-

tion practitioner, it should only be used as a factual description of a series of incidents or behaviours that should then be accurately set out (and even then only in the hands of the paediatrician or psychiatrist/psychologist).

Ultimately, the welfare of the child could not be deduced from any one sole professional perspective: welfare is not just medical best interests nor is it restricted to education or social care. It is a multi-faceted concept. This case should have been managed from at least 1999 by multi-disciplinary strategy meetings to which the parents should have been invited.

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## Portsmouth Hospitals NHS Trust v Wyatt [2005] EWHC 117 (Fam)

### Family Division: Hedley J

**28 January 2005**

**Summary**

The court order making it lawful for doctors not to resuscitate a seriously ill baby if she stops breathing must remain in force while further enquiries are made.

**Background**

Charlotte Wyatt was born three months prematurely in October 2003, and has chronic respiratory and kidney problems coupled with the most profound brain damage that has left her blind, deaf and incapable of voluntary movement or response. She requires very high levels of supplemental oxygen in order to be able to breathe. In his judgment given on 7 October 2004, Hedley J included a declaration that, if Charlotte were to stop breathing, it would be lawful for doctors to 'reach a decision that she should not be intubated and/or ventilated'.

In the present case, it was suggested that Charlotte's condition had now improved: the medical evidence established visible changes, albeit without indicating significant change in the underlying causes; also, it was observed that the evidence of change did not address her capacity to survive aggressive or invasive treatment of the sort that might help to preserve life but that might equally destroy it. Nevertheless, where visible changes had occurred, there should be further investigations to see whether there had, in fact, been any changes in the underlying condition; and further experts would be instructed to investigate those matters, with another hearing before Hedley J to be arranged before Easter.

It was argued on behalf of the parents that, pending those further enquiries, the original order should be stayed.

**Judgment**

Held, refusing to stay the original order, (1) the declarations one way or the other did not derogate from the best interest duty of the medical practitioners which they were required independently to exercise as and when any crisis might arise; and (2) the court should not vary orders of its own without clear grounds for doing so; and, at the present time, everybody acknowledged that no such clear grounds existed.

## Other Cases Reported in January and February 2005

### Next Month

**At the time of publication, the following judgments published in February 2005 have been selected for digesting and further comment**

**Re Layla Uddin (A Child) [2005] EWCA Civ 52**
**Gurney v Gurney [2005] EWCA Civ 170**

### For Reference

**Judgments have been published for the cases listed below on either the Court Service, Casetrack or BAILLI websites. They are listed so that you can source the judgments if required**

**- B (Children) EWCA Civ 98 (casetrack)**
**Application by father in a contact dispute to appeal so he can present medical evidence not heard at original hearing.**
**- Bentley v Bentley [2005] EWCA Civ 169 (casetrack)**
**Application by wife to appeal in a defended divorce**
**- Egbayelo v Egbayelo [2005] EWCA Civ 132**
**Application for permission to appeal and overturn sale of freehold in matrimonial home for reasons of fraud**
**- H (Children) [2005] EWCA Civ 167 (casetrack)**
**Application to appeal by local authority in a case where they believe wife is still in a violent relationship with the father.**
**- Halliday v Halliday [2005] EWCA Civ 171 (casetrack)**
**Application by wife to appeal order made under the Trusts of Land and Appointment of Trustees Act 1996**
**- Messer v Messer [2005] EWCA Civ 63 (casetrack)**
**Attempt by wife to overturn a committal order in possession proceedings relating to former matrimonial home**
**- M-G (A Child) [2005] EWCA Civ 162 (casetrack)**
**Appeal by mother and father to overturn a supervision order**
**- P (A Child) [2005] EWCA Civ 149 (Casetrack)**
**Attempt to overturn restrictions on a contact order**
**- Poon v Ong [2005] EWCA Civ 49 (casetrack)**
**Appeal over interest in a property under the Trusts of Land and Appointment of Trustees Act 1996**

## We need your help

**We want to make sure that Family Law Week provides a comprehensive round-up of all the important cases decided within the family courts.**

**As you will know sourcing the transcripts of judgments can be difficult as many cases are in chambers.**

**If you are involved in, or know of a case that you think has relevance to the wider family law community please let us know so we can seek approval to publish the judgment.**

**Any information should be sent to david.chaplin@familylawweek.co.uk**

# Legislation Update

**News of the latest Statutory Instruments published in January and February 2005 (in order of SI number - most recent first)**

## The Family Proceedings (Amendment) Rules 2005

**SI 2005 No. 264.**

The Rules amend the FPR 1991 to take account of a new regulation EC Council 2201/2003 which introduced provisions on enforcement of orders in matrimonial and parental responsibility proceedings. Some of the changes simply update the FPR to the relevant sections of the Direction but a few new Rules are introduced such as allowing for serving and registration of certificates made under the Articles of the new regulation.

## The Family Proceedings Courts (Children Act 1989) (Amendment) Rules 2005

**SI 2005 No 229**

These rules amend the Family Proceedings Courts (Children Act 1989) Rules 1991 to give effect to Council Regulation (EC) No 2201/2003 of 27 November 2003 (the new Council Regulation) on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

The new Council Regulation reproduces and repeals Council Regulation (EC) No 1347/2000 of 29th May 2000 (the previous Council Regulation) extending it to include matters of parental responsibility where there are no matrimonial proceedings.

The amendment to rule 1.2 is to insert a definition of the new Council Regulation and a definition of a "Contracting State", which gives a list of Member States who have signed up to the new Council Regulation. This is to save cross-reference with other documents when trying to determine if the State in question is one to which the new Council Regulation is relevant. To be consistent with all European documents the list is in alphabetical order in accordance with the spelling of each State's own spelling of its name.

New rule 21K has been inserted to deal with the procedure required for Article 15 of the new Council Regulation to operate where parties may apply for their case, or part of their case, to be heard in another Member State.

New rule 21L has been inserted to deal with the procedure required for Article 15 of the new Council Regulation to operate where a court of another Member State applies for a case, or part of a case, to be heard in that other Member State.

New rule 21M has been inserted to set out the procedure so that applications for certified copies of judgments or certificates can be made.
New rule 21N is so that an application for a certificate can be made in accordance with Article 41(3).

New Rule 21P allows for a court to rectify an error in a certificate issued under Article 41.

In force from 1st March 2005

## The Transfer of Functions (Children, Young People and Families) Order 2005

**SI 2005 No 252**

Under the Ministers of the Crown Act 1975, this SI transfers from the Lord Chancellor's Department and certain functions to CAFCASS and certain property, rights and liabilities to the DFES

## The Social Security and Child Support Commissioners (Procedure) (Amendment) Regulations 2005

**SI [2005] No 207**

The SI amends various aspects of procedure for appeals to the Child Support and Social Security Commissioners such as use of email to serve documents and the use of video links in appeals

In force from 28th February 2005

## The Community Legal Service (Funding) (Counsel in Family Proceedings) (Amendment) Order 2005

**SI 2005 No. 184**

This Order amends the system for the payment of graduated fees for counsel for work in family proceedings as set out in the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 ("the 2001 Order").

In particular, new rates are set out for all public funded advocacy work in family proceedings.

In force from 28th February 2005

## The Registration of Marriages (Amendment) Regulations 2005

**SI 2005 No. 155**

These Regulations amend the Registration of Marriages Regulations 1986 and the Registration of Marriages (Welsh Language) Regulations 1999 to reflect the modifications made to the Marriage Act 1949 by section 20(1) and (2) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. In particular, they provide that the existing forms 1 and 1A for marriage are for use by persons who are not subject to immigration control and insert new forms 1B and 1C for use by persons who are subject to immigration control.

In force from 1st February 2005

## The Family Proceedings Courts (Children Act 1989) (Amendment) Rules 2004

**SI 2004 No. 3376**

These Rules amend the Family Proceedings Courts (Children Act 1989) Rules 1991 (S.I. 1991/1395) ("the 1991 Rules") to make changes linked to the amendments to the Children Act 1989 in respect of the definition of "harm".

Where a section 8 order or an order for parental responsibility is sought, the applicant will give the court information where a child has suffered or is at risk of suffering harm.

The rules introduce a new form, C1A, in s.8 applications and sets out when and how the form should be used.

The rule came into force on 31st January 2005

# CPD Assessments

Questions for this months CPD updates are set out below. The multiple choice options are only available on the website. To claim your CPD for reading the content on Family Law Week visit our website and click on "Courses" to view a list of those courses you have not yet completed.

Each course costs only £15 + VAT and is worth 1 CPD hour. You can buy course credits any time you like and they can be used for any of our courses.

## Children, Contact and Domestic Violence Update (March 2005)

1 In Re S (uncooperative mother) Thorpe LJ commented that the Court should not draw adverse inferences from a mother's refusal to resume family therapy (see Contact:Where are we now?)

2 Under the Private Law Programme the parties or CAFCASS should be able to bring the the matter back to court within (see Contact: where are we now?)

3 Under the DVCVA, breach of a non-molestation order will be a criminal offence (see Domestic Violence, Crime and Victims Act: what are the changes?)

4 Which of the following statements about the Private Law Programme are accurate? (See Contact: Where are we now?)

5 The Domestic Violence, Crime and Victims Act 2004 will amend the Family Law Act 1996 to extend the definition of cohabitants to include homosexual couples (see Domestic Violence, Crime and Victims Act: what are the changes?)

6 Which of the following statements about Portsmouth Hospitals NHS Trust v Wyatt are accurate?

7 The new form C1A should be used in all s.8 applications

8 In appropriate circumstances the court can transfer residence to the other party where contact orders are breached (see V v V)

9 Under the DVCVA a complainant cannot pursue contempt proceedings where the offender has been arrested

10 DVCVA amends the FLA 1996 to remove the power to remove the power of arrest from

## Pensions, Civil Partnerships and Tax Update (March 2005)

1 Which of the following statements are correct with regards to the new Form P3 (see Pensions - All Change)

2 The information required under the Pension on Divorce Provisions Reg. 5 in order for the trustees to implement the pensions sharing order is to be set out on form (see Pensions - All Change)

3 The new pensions forms are due to come into use on (see Pensions - All Change)

4 Following G v G, CGT holdover relief is only available where the court makes an order for ancillary relief under MCA 1973 which results in transfer of assets from one spouse to another (see Exposure to Capital Gains Tax)

5 Which of the following is true concerning the availability of CGT holdover relief ( see Exposure to Capital Gains Tax)

6 The holdover relief claim only needs to be signed by one spouse (see Exposure to Capital Gains Tax)

7 The Civil Partnerships Act is due to come into force on (see Advising clients on the Civil Partnership Act)

8 Wills already made by individuals entering into a Civil Partnership will become void (see Advising clients on the Civil Partnership Act)

9 Under a s.73 civil partnership agreement which of the following statements are accurate (see Advising clients on the Civil Partnership Act)

10 Cohabiting same sex couples not seeking to register as civil partners will be treated as a single household for the purposes of assessing means-tested benefits (see Advising clients on the Civil Partnership Act)