

Family Review

CONTACT.

Disputes between separated parents over contact with their children are among the most difficult and sensitive cases with which we have to deal. The situation is not assisted by delays and lack of judicial continuity but also because so much can happen between hearings. “foolproof” orders frequently begin to fall apart the moment the parties return home.

For all of these reasons there is a need for CAF/CASS officers to play a much more proactive role in the facilitating of contact. CAF/CASS officers should be able to work with the children rather than simply write reports about them. At present the only circumstances in which CAF/CASS brings a matter back to court prior to a listing is where there are problems completing the report. The same route should be available where interim contact is not working.

Practitioners should always be slow to involve local authorities in children's lives but Family Assistance Orders (s16 Children Act 1989) are an option to facilitate contact. There are limits to their use to this end (*S v. P* [1997] 2 FLR 277) and one must keep in mind s16(3) – that the court will need sufficient to find that the case is ‘exceptional’ – but they should not be forgotten as they can yield excellent outcomes. (see comments of Bracewell J in *V v. V* [2004] EWCA 1215 on her proposals for reform which may be used persuasively even now)

There is a need throughout the country and at every level of court for an in-court conciliation system to be operated by CAF/CASS at the first appointment in every contact case. That said, there has been an under-used conciliation scheme in children cases operated at the Principal Registry of the Family Division (PRFD) since January 1983. By Practice Direction: Children – Custody and Access : Conciliation (1982) 3 FLR 448 (as amended (1992) 1 FLR 228) district judges may at any time while considering arrangements for children under s 41 of the MCA 1973 direct a conciliation appointment. More recently, District Judges Direction Children: Conciliation [2004] 1 FLR 974 required that all applications under ss 8 and 13 of the CA 1989 are now automatically placed in the conciliation list.

Accordingly, nearly all applications for contact or residence are, at the commencement of the proceedings, referred for conciliation. (Where allegations of serious child abuse or domestic violence have to be investigated conciliation may be dispensed with.) Upon request, applications for prohibited steps and specific orders can also be referred. At the first appointment, a summons in

wardship can also be referred by the court for conciliation. Any party with whom any child 9 years old or more involved in the proceedings lives should bring that child to the conciliation appointment (and if only one of the two or more children concerned are aged 9 years, the younger child can also attend) so by this route there is direct involvement of the children in the dispute resolution process.

At the conciliation agreement must be reached voluntarily. The fact a conciliation appointment may be adjourned for further conciliation can be a useful tool to facilitate eventual resolution of a dispute. It is possible and not unusual for solicitors from outside London to issue their CA 1989 applications at the PRFD to provide the advantages of the conciliation scheme to their clients.

The courts maintain that they recognize the role of the non-resident parent as vital (see the speeches of the President & Thorpe LJ in *Re S Contact: Promoting Relationship with Absent Parent* 2004 EWCA Civ 18, [2004] 1 FLR 1279) and the court will only preclude contact when it must e.g. serious domestic violence where a party fails to acknowledge or address the issues. Munby J has led the way in pushing contact through in the face of intransigence (see e.g. *Re D (Intractable Contact Dispute: Publicity)* 2004 EWHC 727 (Fam), [2004] 1 FLR 1226) but the sad reality is that the court has very little control over what is said to a child in the privacy of the child's home: a factor in many children's attitudes to contact. Note though, that s120 of the Adoption and Children Act 2002 (in force January this year) includes in the definition of harm “impairment suffered from seeing or hearing the ill-treatment of another”. In future, courts will be required to consider at the earliest stage in proceedings whether any incidents of harm (as defined) have had an adverse impact on the child or might affect the child in the future. Concerns about harm will be set out by parents who apply for court orders, or who respond to court applications by the other parent, on revised court forms known as ‘Gateway Forms’.

This development is in part because though stopping short of recognizing a syndrome, as has occasionally been urged on them, courts will now recognize that one party has deliberately alienated the child from the other party (see e.g. *Re D or V v. V* [2004] EWHC 1215, in which Bracewell J changed residence from one parent to the other). The difficulty for the practitioner lies in establishing that the child's resistance is due to the resident parent's intervention rather than the non-

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INVESTOR IN PEOPLE

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resident parent's conduct. Where appropriate, this needs to be addressed in statements illustrating the lack of anything in the non-resident parent's conduct which would lead to the hostility.

Nearly five years ago the President and Hale LJ delivered judgment in *D v D* (Shared Residence Orders) and made very clear that the former's previous statements to the effect that shared residence required 'exceptional circumstances' were plainly wrong. Despite this, courts are still slow to invoke shared residence as a solution. They should not be. Where there is a suggestion of implacable hostility such orders can be invaluable but unless CAF/CASS has been asked to consider one, this option it is often first raised at trial when it is too late for the court to investigate. Practitioners should ensure at an early stage that shared residence is being considered. Such orders also release the children from the responsibility they can feel in being asked to prefer one parent over the other. Many if not most children are aware that their answers to CAF/CASS officers might be used against one of their parents. If shared residence is an option, the effect of this is ameliorated.

Where everything has failed and contact is not proceeding in contempt of the court's wishes, it is manifestly unsatisfactory that the only two methods of enforcement open to the courts are a fine and prison. Both invariably do not assist a child's position and often cause a great deal of distress to the child in question. The Government has indicated that it wishes to address this but that the issue is a formidable one. As yet nothing has been forthcoming on enforcement.

If returned to Government in May the current administration has three proposals which will impact on these areas. One imagines that any other Government might follow a similar course. The first is the Parenting Plan due out in April. This will be designed to help parents to reach agreement about parenting arrangements and is intended for use by parents themselves, sometimes with the assistance of solicitors or mediators. They will provide specific examples of contact arrangements which are known to work well for parents in a range of situations and will show what sort of arrangements might best suit a range of family circumstances.

Secondly the Family Resolutions Pilot Project (FRPP), expected to involve a three-stage process. This will start with parents being sent an information pack, which will include guidance on how the court operates and how it views contact cases. This will make clear to parents the court's expectation that it intends that there should be a meaningful ongoing relationship with both parents. Following this, parents will be directed to attend, separately, two facilitated group sessions to discuss how difficult separation and disputes about contact

can be for the children and how these might be lessened. The final stage will involve one or more parent planning sessions for both parents, with a CAF/CASS Family Court Advisor, and involving the child as appropriate. The revised Parenting Plans will be used as a basis for the discussion in these sessions, as soon as they are available.

And in case practitioners were in any doubt as to what is expected of them, the third proposal is 'Collaborative Law' – a system whereby both parents' lawyers are committed to promoting settlement; they cannot take the case to court if this fails – new solicitors would have to be instructed, but the use of the court could get consent orders would be allowed. The preparatory work is to be done by April 2006. Rollout soon afterwards if evaluation proves positive...

In the meantime we must facilitate effective "early" intervention could prevent disputes from becoming further entrenched. First, a rigorous method of risk assessment and risk management, secondly, where contact is appropriate, an effective way to assist parents in making decisions about contact timetables, and thirdly – some form of intervention to enable parents to collaborate more effectively together as joint parents and to build communication in order to address the concerns of both parents.

Practitioners must ensure that clients know what is expected of them, rather than to let them know what they can get away with. Beyond what I have written above about use of conciliation and early prescription of what CAF/CASS is to investigate, the use of s11(7) of CA 89 should be considered. The court may attach conditions to an order requiring attendance as a class or programme (though such programmes have to exist and at present are few in number) By this means, the court can be asked to refer a parent disobeying an order for contact to a variety of resources including information meetings, meetings with a counsellor, parenting programmes/classes designed to deal with contact disputes; to refer a non-resident parent who was violent or in breach of an order to an education programme or a perpetrator programme; refer to a psychiatrist or psychologist (publicly funded in the first instance). If contempt proceedings are invoked the court may impose a community service order, with programmes especially designed to address the default in contact and place on probation with a condition of treatment or attendance at a given class or programme but given that the same object can be achieved under s11(7) it would seem contrary to the conciliatory spirit urged upon parties for one to use the contempt sanction. Indeed, it is not impossible that a party might garner some goodwill from the other defaulting party by suggesting the use of s11(7) to avoid contempt proceedings.

Susan Pyle

FINANCIAL MATTERS IN NON-MARRIAGE RELATIONSHIP BREAKDOWN.

To the family practitioner property disputes between unmarried couples can often seem daunting, difficult and unpredictable, not to mention unfair when compared with the outcome of proceedings under the MCA 1973. That said, the recent cases of *Oxley v Hiscock* [2004] 2 FCR 295 (CA) and *Cox v Jones* [2004] 3 FCR 693 (Ch D) amongst others, appear to have brought things a little more in line with the approach taken under the MCA by making it clear that if and once a claimant has established the requisite ingredients of a constructive trust, then in the absence of an agreement between the parties as to the size of the share each party should have, a court will determine the parties respective interests in accordance with what is fair. However, a claimant must still get his or her “foot in the door” or in other words, be able to establish the existence of a constructive trust (or as an alternative a resulting trust – although this would not of course necessarily result in the parties interests being determined in accordance with “what is fair”). However, what of those parties who are not able to establish the existence of a constructive or even resulting trust?

In these circumstances and provided the parties were “engaged” to be married, practitioners are reminded of the provisions of section 37 of the Matrimonial Proceedings and Property Act 1970 (MPPA) and the better known, section 17 of the Married Woman’s Property Act 1882 (MWPA). By reason of the Law Reform (Miscellaneous Provisions) Act 1970 (section 2) both these provisions apply to engaged couples.

A claim pursuant to MWPA must be issued within three years of the termination of the engagement. Applications under MWPA are governed by the Family Proceedings Rules 1991 rules 3.6 and 3.7 and are made by way of an originating summons (High Court) or originating application (County Court) in Form M23 (which

will need to be adapted in the County Court) and supported by an affidavit. Practitioners will be aware that under section 17 the court has power to declare the parties interests in a property but not modify and adjust such interests.

However, section 37 of MPPA provides that where a husband or wife (or partner in the case of engaged couples) “contributes in money or money’s worth to the improvement of real or personal property” in which either or both of them have an interest, the contributing party shall, if the contribution is of a substantial nature (and provided there is no agreement to the contrary), be treated as having acquired a share or an enlarged share in the property. The extent of that interest will either be decided in accordance with what was agreed between the parties but in the absence of any agreement will be determined by the court in accordance with what is “just in all the circumstances”. The obvious advantage of this provision is that a party does not have to establish the existence of a trust in order to establish a share and it is not simply financial contributions that are taken into consideration. The application may also be made in respect of property no longer in existence (by reason of section 7 of the Matrimonial Causes (Property and Maintenance) Act 1958).

Although it may still be prudent to issue proceedings pursuant to TLATA 1996, in the right circumstances section 37 MPPA adds a useful and effective mechanism. If it is clear or even doubtful on instructions whether there was ever any agreement, understanding or arrangement (either express or inferred) between the parties that a party who has made significant contributions towards improvements was to have an interest, section 37 may be the only recourse available to that party.

Lucinda Benner

POCA UPDATE.

Just as all family practitioners were becoming accustomed (if not comfortable) with the onerous obligations imposed on us by POCA and in particular sections 327- 329 of that Act, on the 8th March 2005 the Court of Appeal handed down the now well publicised judgment in the case of *Bowman v Fels*. The issue central to the appeal was “whether section 328 (of POCA) applies to the ordinary conduct of legal proceedings or any aspect of such conduct – including, in particular, any step taken to pursue proceedings and the obtaining of a judgment”. The Court of Appeal considered a proper understanding and interpretation of POCA could only be achieved after detailed consideration of the two European Directives, which gave rise to the enactment of the POCA.

Section 328 (1) provides “A person commits an offence

if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention use or control of criminal property by or on behalf of another person.” The general interpretation of this section has hitherto been that conduct and steps taken in ancillary relief proceedings &/or negotiations could and did fall within the scope of the section if criminal property was involved. In such circumstances, the lawyer themselves committed a criminal offence if they do not make a relevant disclosure to NCIS.

The Court concluded “the proper interpretation of s 328 is that it is not intended to cover or affect the ordinary conduct of litigation by legal professionals. That includes any step taken by them in litigation from the issue of proceedings and the securing of injunctive relief or a freezing order up to its final disposal by

judgment". Furthermore, the Court of Appeal held that even if they were wrong on this former point "section 328 cannot be interpreted as meaning either that legal professional privilege is to be overridden or that a lawyer is to breach his duty to the court by disclosing to a third party external to the litigation documents revealed to him through the disclosure processes" (a reference to the implied undertaking in all proceedings not to disclose documents received in disclosure to third parties)

The Court of Appeal also addressed the situation whereby parties agree to dispose of the whole or any aspect of the legal proceedings on a consensual basis and found "we do not consider that it can have been contemplated that taking such a step in the context of civil litigation would amount to "becoming concerned in an arrangement which... facilitates the acquisition, retention, use or control of criminal property" within the meaning of section 328.

However, the Court of Appeal went on to recognise a distinction between consensual steps (including a

settlement) taken in an ordinary litigious context and consensual arrangements independent of litigation – the distinguishing feature being where there are "existing or contemplated legal proceedings".

This is a very welcome and radical decision which effectively overturns the decision of P v P (Ancillary Relief Proceeds of Crime) [2003] EWHC 2260 (Fam) and means that family practitioners no longer have to make disclosures / seek consent from NCIS when there is a suspicion that assets / income in ancillary relief proceedings might be "criminal property". However, it does of course leave uncertain the situation where one is called to advise or take steps in respect of a situation/arrangement where there are no legal proceedings either in existence or contemplated. It is hoped that the Law society and Bar Council will give this aspect consideration in due course.

Of course it should be remembered that the decision does not effect the regulated sector / Money Laundering Regulations.

Lucinda Benner

THE ART AND SCIENCE OF POST-BOWMAN DISCLOSURE.

Lucinda Benner has written of the consequences of *Bowman v Fels* and set out the reasons why Section 328 of the Proceeds of Crime Act 2002 does not apply to family lawyers engaged in ancillary relief litigation. However whilst generally speaking the family lawyer will not have to make disclosure on her own behalf circumstances will still arise where a client should be advised to make or allow disclosure him- or herself. This arises because whilst the lawyer has the protection of client privilege, litigation privilege, and the interpretation of Section 328, the client only has the protection of litigation privilege (which is not insubstantial). I shall illustrate the point with various scenarios.

1) In the course of Ancillary Relief proceedings documents disclosed lead to suspicions (or knowledge) that criminal property is involved on the other side. Litigation privilege prevents either client or lawyer making a disclosure.

2) Documents disclosed by the client cause the lawyer to suspect criminal property is possessed by the client. Client privilege prevents disclosure.

3) Documents disclosed by the client cause the lawyer to know that criminal property is possessed by the client arising from criminal behaviour by the client. Client privilege prevents disclosure but both professional principles and questions as to whether the litigation is bona fide will have to be considered in deciding whether to continue to act.

4) Before any disclosure the client tells you that she knows that her husband has not been paying his tax properly. The information is not protected under litigation privilege since the suspicion/knowledge does not arise from documents disclosed under a duty of

court confidentiality. There is a risk that successful litigation will constitute (as against her) offences under section 327 and/or 329 of POCA. In ancillary relief proceedings it will not necessarily follow that she has given adequate consideration so as to constitute a defence to section 329. In any event section 327 does not allow such a defence. She should be advised to make an appropriate disclosure (which as a matter of caution her lawyers might wish to join in on).

5) In Trusts of Land Act proceedings documents disclosed by the other side give rise to relevant suspicions. Litigation privilege prevents client or lawyer making disclosure.

6) In the same proceedings the case reaches trial. Documents and materials which give rise to the relevant suspicions are aired in open court. If the suspicion can arise from only the evidence given in open court then litigation privilege no longer applies to such material *Home Office v Harman* [1983] 1 AC 280. The lawyers will continue to be protected given the interpretation of section 328. However the client (if she suspects) may not be so protected. If she has not given adequate consideration for what she is to receive then section 329 will bite as will section 327 irrespective of consideration. Disclosure must be given. A counsel of perfection would be to raise the matter with the trial judge in private – however given the thrust of *Bowman* this is unlikely to find favour with the Judge and could lead to 'tipping off'. He is unlikely to adjourn the trial. In the circumstances there ought to be good reason for a post hoc facto disclosure under section 338 (3) provided the disclosure is made as soon as practicable.

Richard Carron

CHASING THE MATRIMONIAL EQUITY.

In the recent case of *Ram v Ram* [2004] EWCA Civ 1452 the Court of Appeal was invited by Mr Duckworth of counsel to adopt 'creative solutions' to protect the interests of a claimant for ancillary relief in the context of a bankruptcy. The central issue before the court was "whether the claims of creditors should be allowed to prevail, both procedurally and substantively, over those of a wife, or whether she should be at least 'level-pegging'." In the court's declining to accept Mr Duckworth's suggestion the impact of the Insolvency Act 1986 was confirmed and a claimant for ancillary relief continues to rank below all other creditors.

In the case the wife obtained a final order valued at £420,000. However the husband's estate was valued by the trustee in bankruptcy at £500,000 with creditors of £411,000; a surplus of just £89,000 to satisfy the wife's claim. To avoid his creditors, the husband had transferred his interest in a property (not the FMH) to his father at an undervalue. This activated section 423 et seq of the Insolvency Act whereby that transaction was liable to be defeated and the property vested in the trustee.

In law, the wife's claim against her husband was unaffected by the bankruptcy, but the practical effect was substantial: to reduce the assets against which she could enforce her order to the £89,000 surplus. Counsel sought to challenge this established position and the prejudice it caused. He pointed to the injustice occasioned and noted that as early as 1996 calls for reform of this subject had been described as "urgent". The court noted that 'urgency in this field is a relative concept' as it had taken a further eight years for a discussion paper to be issued and still the law was unchanged.

Mr Duckworth contended the wording of section 423 of the Act had two purposes: to restore the position to that pre-transaction and to protect the victims of such transaction. This he said, provided the court with an 'autonomous jurisdiction' outside of bankruptcy. The wife was a victim of the transaction: it followed that the Act was to promote rather than defeat her interests. Accordingly, the property sold to the father should be vested in her rather than the trustee and the

court go on to decide how to protect her interests. The suggested options were a) "for the trustee to be paid in full and the wife to take the remainder; b) all creditors (wife included) to recover pro rata; c) wife be paid in full, but trustee accepts a discount on account of his unaccountable delay and inertia since 1998, compared with wife enterprise and persistence in this litigation, for which she deserves some reward."

Counsel also argued that the actions of the trustee in bankruptcy failed a Human Rights assessment as they had been discriminatory and failed to achieve a fair balance between respective wife and other creditors. As a late amendment to his pleaded case, Mr Duckworth also sought to criticize the judgment below on Human Rights.

The Court of Appeal confirmed the trial judge's judgment and rejection the further arguments. Under s424 the court was to restore the pre-transaction position whereas the wife sought to create a quite different position under which she was advantaged.

The sections purpose was to protect the interests of all creditors, not promote the interests of one of them. The court in discussion had referred to rule 12.3(2)(a) of the Insolvency Rules 1986 by which claims in matrimonial proceedings cannot be provable debts and this was said to be "the immediate obstacle to Mr Duckworth's ambitions" and so it proved to be.

The Human Rights argument on the actions of the trustee was said to be "wholly untenable" as the court doubted the trustee could be viewed as a public authority, and in any event if he were, the court could not see that the priority of debtors would be effected. As to the criticism of the judgment below, the court found that it had been in accordance with a current law that, "although criticised, cannot be said to be so manifestly without foundation that the Convention obliges domestic courts either to ignore it or, as is submitted in this case, to take a course under it other than that which the law requires".

Having felt bound to reject the appeal, the Court nevertheless went on to lend its weight to calls for reform.

David Willans

s.38(6) APPLICATIONS TO THE COURT IN CARE CASES.

Public law practitioners will be well-acquainted with applications under s.38(6) of the Children Act 1989 for a direction for further assessment of their client. Often, the making of such an application is the only way forward for a parent who has been unfavourably assessed by the local authority and wishes to avoid the making of full care orders by the court. The subsection reads:

"Where the court makes an interim care order, or interim supervision order, it may give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child; but if the child is of sufficient understanding to make an informed decision he may refuse to submit to

the examination or other assessment."

The subsection was considered by the House of Lords in the case of *Re C (A Minor) (Interim Care Order: Residential Assessment)* [1997] AC 489. Their Lordships approved a broad and purposive construction of s.38(6). The following passage from the speech of Lord Brown-Wilkinson bears this out:

"The purpose of s.38(6) is to enable the court to obtain the information necessary for its own decision, notwithstanding the control over the child which in all other respects rests with the local authority. I therefore approach the subsection on the basis that the court is to have such powers to override the views of the local authority as are necessary to enable the court to

discharge properly its function of deciding whether or not to accede to the local authority's application to take the child away from its parents by obtaining a care order. To allow the local authority to decide what evidence is to go before the court at final hearing would be in many cases, including the present, to allow the local authority by administrative decision, to pre-empt the court's judicial decision."

In the recent case of *Re G* (Interim Care Order, Residential Assessment) [2004] 1 FLR 876, the Court of Appeal corrected earlier authority in removing the distinction between 'assessment', which had been said to fall within the jurisdiction of s.38(6), and 'therapy', which had not. Thorpe L J said in his judgment:

"In reality a permissible assessment to enable the court to obtain the information necessary for its own decision is likely to contain, or at least may well contain, the provision of a variety of services,

supports and treatment with or without accommodation. Applications under s.38(6) will fail if what is proposed is not required to enable the court to obtain the information necessary for its decision, if the child is only peripherally involved, if what is proposed is a bare treatment programme for one or both parents or if the cost of what is proposed has been established to be prohibitive."

Re G has therefore established a less restrictive approach to applications under s.38(6). Practitioners should always bear in mind that many applications will fail not on any legal argument but simply on the basis that further assessment will not yield anything more positive than previous assessments by the local authority and is therefore not in the best interests of the child.

Catherine Le Quesne

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