

Family Review

INTRODUCTION

I would like to take this opportunity of welcoming you to the inaugural issue of Clarendon Chambers Family Review. The Review is designed to give family practitioners an insight into topical issues by means of articles written by members of chambers' family team. If there are any queries or comments regarding the articles or any other aspect of family law solicitors are welcome to contact chambers where a member of the team will be only too happy to assist.

Matthew Rudd

ANCILLARY RELIEF UPDATE

It has been a relatively quiet year so far in terms of reported cases dealing with ancillary relief.

Parra v Parra [2003] 1 FCR 97

This was another example of a long marriage (20 years) and an equally owned business and piece of land. There was much argument about the potential for residential development of the land in the future, although the prospects of such were found to be low. Charles J ordered a lump sum to W which gave her 54.3% of the assets and awarded her a charge over the land in order to guarantee her an equal share of any net gain made from any future development of the land (the claw back provision).

The CofA held if the company and land had been sold, equal division would have been the natural if not inevitable consequence. Judges should give considerable weight to the property arrangements made by the parties during the marriage and where parties had opted for equality, this should be adjusted only where fairness obviously demanded it. The lump sum in this case was therefore adjusted to 50% and the CofA held that where there was equal division of assets there should also be equality of obligation, therefore educational costs should be borne equally between the parties.

An interesting feature of this case was the claw back provision. The Court of Appeal described this as a highly exceptional measure as it was inconsistent with the principle of a clean break. It was also a complex mechanism with potential for future litigation. Two factors tipped the scale in this case; (i) the albeit unlikely potential for profit, would be significant if realised and (ii) H in evidence, had conceded it would be unfair if W did not share in such a profit.

Chan Pui Chun v Leung Kam Ho. [2003] 1 FCR 520

This is the first of two cases recently reported in

the Family Court Reporter which touch on an area that in my experience never ceases to cause practitioners anxiety, namely that of constructive trusts and proprietary estoppel. Miss C (a cohabitant) brought an application under section 33 of the FLA 1996 and sought a declaration as to her beneficial interest in the couple's home under section 14 of TLATA 1996 when her relationship with Mr L broke down. The parties met when Miss C started working for Mr L in Hong Kong. Mr L was subsequently sentenced to a period of imprisonment during which time he asked Miss C to help him manage some of his business affairs, in particular two projects that were ongoing, in return for a share of the business. He promised to marry Miss C and buy her a house. Miss C came to England and a house was purchased in the name of an "off the shelf" company. Miss C was the beneficial owner of 51% of the company.

The CofA reminded practitioners that once a party had established that there was an agreement between the parties that she should have a beneficial interest in the property then the burden was on the asserting party to establish that she had acted to her detriment or significantly altered her position in order to give rise to a constructive trust or proprietary estoppel. The CofA upheld the finding that Miss C had a 51% beneficial interest in the property.

Jennings v Rice [2003] 1 FCR 501

The CofA found that once the elements of proprietary estoppel had been established an equity arose but the value of that would depend on all the circumstances of the case. An essential requirement of the doing of justice was to ensure proportionality between expectation and detriment.

Lucinda Benner



ADOPTION & CHILDREN ACT 2002

The Adoption & Children Act 2002, enacted on 7 November 2002 but not to be fully implemented until 2004, underpins the Government's drive to improve the performance of the adoption service and promote the greater use of adoption. It replaces the Adoption Act 1976 and modernises the law relating to domestic and inter-country adoption. The effect of many of the measures contained in the Act will of course depend not only on the details of secondary legislation but also the resources made available for its implementation.

Adoption

Part 1 of the Act establishes the framework to be followed by the courts and adoption agencies. The welfare of the child, throughout his life, is paramount. Comprehensive duties are placed on local authorities to provide adoption support.

There is a statutory right to request an assessment by local authorities for adoption support services for all adopted people, adopters and birth parents under s.4. New provision is also made for the registration of adoption support agencies under the Care Standards Act 2002.

S.12 enables the Government to establish a panel to review determinations made by adoption agencies about the suitability of prospective adopters and the disclosure of confidential adoption information. Agencies may place a child for adoption either if they are authorised to place a child, in that they have the consent of each parent or guardian, or if they have a placement order.

The circumstances in which the local authority must or may apply for a placement order is set out in s.22. Parental responsibility is acquired by an adoption agency as soon as a child is placed, or authorised to be placed, for adoption, or a placement order is in force.

Ss. 30 to 41 provide restrictions on the removal of children who are or may be placed for adoption.

Sections 49-51 permit any couple (whether married or not), or a single person, to apply for adoption.

Disclosure of information prior to and following a person's adoption is provided for at ss. 54-65 and 98.

Part 1 of the Act also makes provision for the Adopted Children Register, the Adoption Contact Register and for inter-country adoption. Chapter 7 covers miscellaneous provisions for offences relating to arranging adoptions, reports and making certain payments in connection with adoption.

Part 3 of the Act includes provision for the establishment of the Adoption and Children Act Register.

Children Act Amendments

Part 2 of the Act makes amendments to the Children Act 1989. Important provisions include the acquisition of parental responsibility by an unmarried father who jointly registers the child's birth. A process for step-parents to acquire parental responsibility either through the courts or with consent is provided. Amendments are also made to complaints procedures and care plans in care proceedings are put on a statutory footing. A duty is placed on local authorities to arrange advocacy services for looked after children and young people leaving care who wish to make a complaint under the Children Act 1989 and s.122 provides for the representation of children in court proceedings.

Richard Harris

GRANDPARENTS AND NON-PARENTS AS PARTIES

For many years Grandparents and others have been discouraged both by the Courts and as a consequence by the lawyers they consult from taking an active role in court cases concerning their grandchildren. The principal reason for this was that courts applied the test set out in **Re M (Care: Contact: Grandmother's Application for Leave)** [1995]2FLR 86 CA. An application must have a real prospect of success and be a good arguable case involving a serious issue to be tried. Given the limitations on investigation of the merits of the case by legally aided parties at the leave stage this resulted in many relatives being prevented from putting their case to the court as parties. In view of the confidential nature of the court proceedings and the often 'grandmother's whispers' way in which information has been inaccurately disseminated within a family grave injustice has often been felt and indeed been suffered.

The consequences of the incorporation of the

ECHR and in particular the Article 6 and 8 rights to a fair trial and family life now appear to have produced a change in the form of **Re J (Leave to Issue Application for Residence Order)** [2003] 1FLR 114, CA. Thorpe LJ ruled that the statutory criteria under Section 10(9) should be applied rather than the test under **Re M**. In particular, he was concerned that an application dismissed without a full inquiry would deprive the applicants of their right to a fair trial.

In consequence, where family members are putting themselves forward as alternative long term carers, such relatives should be advised to consider most carefully whether they wish to become parties to the proceedings. Whilst there may be, for the relatives, uncomfortable cost implications, the prospect is now open for options to be fully ventilated on behalf of the family members who are actually prepared to try and salvage some of the child's original family life.

The criterion to be applied are as follows:

- (a) the nature of the proposed application for the section 8 order;
- (b) the applicant's connection with the child;
- (c) any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it; and
- (d) where the child is being looked after by a local authority:
 - (i) the authority's plans for the child's future; and
 - (ii) the wishes and feelings of the child's parents.

Whilst frivolous and hopeless applications will still be refused leave, timeous applications by relatives should not carry any risk of delay in proceedings or otherwise and have a better chance of being granted. In non-care cases grandparents seeking contact with estranged children should more often expect to be granted leave to make the application and one can only look forward to an increase in such applications as the Family Courts gradually rethink their attitude to such orders in favour of grandparents.

Richard Carron

CHILD SUPPORT ACT KEY CHANGES

The Child Support Pensions and Social Security Act 2000 received Royal Assent on 28th July 2000. The Act makes substantive changes to the calculation of child support and the interaction between the Child Support Agency and the Court. The new formula for calculation of child support maintenance applies from 3rd March 2003.

The key changes in the new act are as follows:

- (i) income of parent with care and their partner is totally ignored;
- (ii) housing costs are irrelevant;
- (iii) discount given for relevant other children of the non-resident parent;
- (iv) discount for staying contact is varied;
- (v) there are directions for variation;
- (vi) if a child periodical payments order is made by consent after 3rd March 2003 either party can opt out of consent order into CSA system after one year from the date of consent.

The Act introduces new terminology, for example "non-resident parent" ("NRP") replaces "absent parent" and "maintenance calculation" replaces "maintenance assessment" and "qualifying child" is defined by section 3(1).

The formula for calculation is much simpler. The calculation is a 3 stage test as follows:

- (i) Basic Calculation;
- (ii) Adjustment
- (iii) Variation

Basic Calculation

The net income of the non-resident parent is calculated as weekly gross pay including bonuses, overtime and pay in lieu of notice less Income Tax, Class 1 NI contributions, full pension contributions (75% for pension mortgage). Pension income is treated in the same way as earned income. Self-employed income is calculated with reference to taxable profits or gross receipts less the same deductions as for salaried income save that class 2 NI contributions are deducted instead of class 1.

Income which is ignored for basic calculation purposes are investment income, benefits in kind and earnings above the cap of £2,000 per week. However, if an application for variation is made the CSA may take into account unearned, notional and

other forms of income.

The basic rate is then calculated by applying the following percentages to the net earned income:

- (i) 15% where NRP has one qualifying child;
- (ii) 20% where NRP has two qualifying children;
- (iii) 25% where NRP has three or more qualifying children.

Adjustment

The basic rate is adjusted downwards if the NRP has shared care (i.e. staying contact) of the qualifying child as follows:

- (i) 52 to 103 nights per year reduction by one seventh;
- (ii) 104 to 155 nights per year reduction by two sevenths;
- (iii) 156 to 174 nights per year reduction by three sevenths;
- (iv) 175 nights or more per year reduction by one half;

The basic rate is also adjusted for relevant other children living in the same household as the NRP. These are defined as children for whom child benefit is received (or would be but for one or more members of the family living abroad). The basic rate is reduced for relevant other children as follows:

- (i) 15% for one child;
- (ii) 20% for two children;
- (iii) 25% for three or more children.

Variation

The starting point for establishing a case for variation is CSA 1991 schedule 4B as amended by the new act. There are 3 broad categories of variation application:

- (i) special expenses;
- (ii) property or capital transfers in matrimonial court orders or agreements pre April 1993; and
- (iii) addition cases

Consent Orders

There is no bar to seeking a consent order for periodical payments in respect of a child and an application can be made for a maintenance calculation.

Other Court Orders

The court retains jurisdiction to make the following orders:

- (i) a top-up order;
- (ii) an order for educational expenses (**Flood -v- Flood 2002 EWHC 1898**);
- (iii) school fees order;
- (iv) maintenance order for a child's disability expenses if Disability Living Allowance is paid;
- (v) child maintenance order against the parent with care;
- (vi) Segall or Connell orders;
- (vii) Lump sum orders for children;
- (viii) School fees order against himself by NRP.

Voluntary Payments

Certain types of voluntary payments made by the NRP will be capable of set-off against arrears or to adjust the maintenance calculation, namely:

- (i) payment in lieu of child support maintenance paid to the parent with care; and
- (ii) a mortgage or loan taken out as security for the property which is the child's home which was taken out to facilitate purchase or pay for repairs or improvements.

Appeals

There is provision for appeals against the maintenance calculation through the Child Support Appeals Tribunal, Child Support Commissioners and Court of Appeal (the latter two with leave).

Conclusion

This article is designed to highlight the recent changes and is by no means a definitive guide to the new act and related regulations.

Allison Fordham

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