July 2010

Family Law Week

NEWS

Revised child protection guidelines due to be announced

The Press Association reports that the Government will today announce changes to child protection guidelines in England and Wales. The Association states that online safety and trafficking will be among the new areas included.

Following last year's examination of procedures in Scotland, the then Children's Minister, Adam Ingram, said that the Government was working with child protection agencies in order to ensure that measures were as robust as possible.

More than a third of social workers and police officers feel 'powerless' in child neglect cases

According to a YouGov poll, more than a third of social workers and police officers feel powerless to act in suspected cases of child neglect. The polling organisation surveyed 490 front-line staff at Action for Children. Of those who said they felt unable to act in such cases, 29% said they believed that the case in question, while of real concern, did not meet the threshold for social work intervention.

Chief executive Dame Clare Tickell said:

> "It's a real concern that front-line professionals are telling us not only that they are seeing more cases of neglect, but feel they can't intervene as soon as possible."

Action for Children are arguing that any cuts in public spending should not reduce investment in social work.

BAAF marks National Family Week with 'adoption champions' scheme

As part of National Family Week, the British Association for Adoption and Fostering is launching a scheme in local communities across the UK to recruit ordinary people as 'adoption champions' in a bid to find more permanent families for children in care.

The charity is asking both adoptive parents and adopted people to sign up to the scheme and use their experience, passion and enthusiasm for adoption to encourage others. The initiative is the first of its kind in the sector and the charity hope that is will make a significant difference to some of the 4000 children waiting for adoption every year in the UK.

David Holmes, Chief Executive of BAAF, said:

> "We did some research that showed word of mouth is the biggest influencing factor on getting people to adopt. We know that adoptive parents already talk and influence others in their community informally. This scheme is a way to celebrate and support these unrecognized champions of adoption. They really can make a significant difference to children waiting for their forever family."

An estimated one in four people have a connection to adoption so the charity hopes the scheme has the potential to create an army of hundreds of volunteers.

The Adoption Champions scheme is part of BAAF's 30th anniversary celebrations this year.

GENERAL EDITOR
Stephen Wildblood QC

Deputy Editor
Claire Wills-Goldingham
Albion Chambers

Family Law Week is published by

Law Week Limited
Greengate House
87 Pickwick Road
Corsham
SN13 9BY

Tel & Fax: 0870 145 3935

Court of Appeal clarifies law on post-separation variation of cohabitants' beneficial interests

The Court of Appeal, by a 2-1 majority, has allowed a cohabitants' appeal against a decision of the High Court that insofar as the intention of the parties cannot be inferred, the court is free to impute a common intention to them.

In May 1985 the parties, K and J, who had an infant child, purchased a property in joint names for £30,000. The woman, J, contributed £6,000 and the balance of the purchase price was raised by means of an endowment mortgage.

In 1986 a further loan of £2,000 was taken out for an extension, built and paid for largely by her partner, K, enhancing the value of the house from about £30,000 to £44,000. The parties' second child was born that year. J and K shared household bills including mortgage payments.

They separated in 1993, J and the children staying in the property. It was common ground at trial that at that time their beneficial interests were equal. Thereafter, J assumed sole responsibility for the outgoings on the property and the children's maintenance.

In May 1996 K bought another property for £57,000. He raised the deposit, with J's agreement, by cashing in a separate life policy which they owned, whose proceeds they divided equally.

The trial judge ruled that J's investment towards the purchase of the property, particularly since separation, meant that she was entitled to a greater share. In addition she received very little contribution from K to the maintenance and support of the two children.

He found that at the outset the parties' intentions may well have been to provide a home for them and their children, but they had altered since separation to the extent that K demonstrated that he had no intention until recently of availing himself of the beneficial ownership, having ignored it completely by way of any investment in it or attempt to maintain or repair it whilst he had his own property upon which he concentrated.

The judge turned to assess the altered shares on the basis of what was "fair and just". He fixed the beneficial interests at: J – 90%; K – 10%.

Nicholas Strauss QC sitting as a deputy judge of the High Court, dismissed K's appeal. He held that, so far as the intention of the parties cannot be inferred, the court is free to impute a common intention to them. The judge was quite right to infer or impute the parties' intention to change their beneficial interests. "Fair and just" was the appropriate criterion to quantify the varied interests by imputation.

The Court of Appeal allowed K's second appeal, by a 2-1 majority (Jacob LJ dissenting). The judge had identified no evidence from which could properly be inferred a common intention to vary the equal beneficial interests held on separation. The parties' beneficial interests were equal.

New online tool helps legal professionals assist victims of forced marriage

The Government's Forced Marriage Unit (FMU) has launched an online resource to help legal professionals working with young people identify and provide appropriate support to potential victims of forced marriage. Forced Marriage E-learning is the first interactive online training tool which provides guidance to a range of front line professionals on handling forced marriage cases.

The free resource uses scenarios based on real life stories from the FMU's work which take the user through a journey from identifying the first warning signs to providing the right support and reaching a positive outcome. Also aimed at education, health and social care professionals, police and housing officers, those working with young people in the third sector and registrars, the resource encourages anyone who comes into contact with those affected, to work together closely in order to protect victims.

The FMU, a joint-initiative between the Foreign & Commonwealth Office and Home Office, is the Government's specialist 'one-stop shop' for forced marriage. It provides support to victims of forced marriage as well as expert training and guidance to professionals working with victims or potential victims. In 2009 the FMU received 1,682 calls or emails to its helpline about potential incidents of forced marriage and is committed to raising awareness about forced marriage across the public sector.

Olaf Henricson-Bell, Joint Head of the Forced Marriage Unit, said:

"Front line professionals may only have one chance to help someone at risk of forced marriage, and making the wrong call could have devastating results. Our new online resource is a step-by-step guide on how to deal with forced marriage cases and reach a positive outcome. We encourage people to make the most of this tool in the run up to the summer holidays which is when we see an increase in cases of forced marriage."

Shaminder Ubhi, Director of the Ashiana Network, said:

> "Given that many of the men and women forced into marriage are of school age, the need to raise awareness of this issue amongst professionals working with young people is essential. This innovative resource will equip them with the skills they need to offer appropriate support to victims."

The Forced Marriage Unit runs a public helpline that provides advice and support to both practitioners handling cases of forced marriage as well as to victims themselves. Call 020 7008 0151 between 9am-5pm Monday to Friday or email fmu@fco.gov.uk. For out of hours emergency advice, call 020 7008 1500 and ask for the FCO Global Response Centre. Further information can be found by visiting www.fco.gov.uk/forcedmarriage .

Forced Marriage E-learning is available at www.fmelearning.co.uk

Jo Delahunty QC and Alison Grief join 4 Paper Buildings

4 Paper Buildings have recruited Jo Delahunty QC and Alison Grief from Garden Court Chambers. Both have developed specialisms in children cases. Jo Delahunty has particular expertise in legally significant and factually complex care proceedings. Alison Grief's practice consists of predominantly public law children work, acting for parents, children's guardians and competent children, local authorities and the Official Solicitor.

Nominations sought for ALC's 'Outstanding Newcomer in Children Law' Award 2010

Now in its sixth year, the ALC's 'Outstanding Newcomer in the Field of Children Law Award' is looking for its 2010 winner. The award is in memory of David Hershman QC. Its aim is to recognise the contributions of newcomers to the field of children law and to encourage them to continue to play an active role in shaping the future.

Last year's nominations included university students, barristers and solicitors alike. If you know someone who you think is an exceptional newcomer to the field of children law the ALC would be delighted if you would nominate them.

The winner will be presented with the award at the Hershman/Levy Memorial Lecture on Thursday 1 July 2010 at St Philips Chambers, Birmingham.

Nominees must be solicitors, barristers, trainees, pupils or students. They must have been working in the field of children law for 5 years or less. The proposer must feel that the nominee has made a contribution to good practice, facilitating children's voices or the development of the field of children law.

Sir James Munby to deliver this year's Hershman / Levy Memorial Lecture

The speaker at this year's Hershman / Levy Memorial Lecture, hosted by the Association of Lawyers for Children, will be Lord Justice Munby. He will be speaking on the transparency of family proceedings by particular reference to the Children, Schools and Families Act.

The lecture, delivered in memory of David Hershman QC and Allan Levy QC, will take place on 1st July 2010 at 5.30 pm at St Philip's Chambers, Birmingham.

14 EU states 'go it alone' on divorce reform for 'international couples'

Justice ministers meeting in Luxembourg last week have reached agreement allowing couples of different European nationalities to choose which divorce laws will apply to them.

Where the spouses are from different countries, living apart in different countries, or are from the same country but living abroad, they will be able to choose which nation's laws should apply to their divorce. The agreement will apply where one of a divorcing couple has a connection with any of the following states: Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain.

An EU official commented:

> "[The agreement] would increase flexibility and autonomy by giving spouses a possibility to choose the applicable law to their divorce or legal separation and it would set clear rules for cases where no law has been chosen.
>
> "If we were to wait for everybody to come on board, we could have been waiting forever."

The European Parliament has still to legislate upon the arrangement but it is thought that the momentum behind the scheme makes it likely that it will be passed.

The United Kingdom and the Republic of Ireland have not acceded to the proposed scheme.

Ann Thomas, a specialist international solicitor with The International Family Law Group commented:

> " This is an excellent development as it makes it easier and clearer for us English lawyers to advise clients involved in European cross-border divorce cases. We will now better know which law will be applied in which countries. It does however open up a significant gulf between the 14 enhanced cooperation countries and the remaining EU states in which the UK, the Republic of Ireland and the Scandinavian countries are at the forefront."

Family Courts Service in crisis, says Sir Mark Potter

In a wide ranging interview reported on the Guardian's website, Sir Mark Potter, immediate past President of the Family Division, expresses concern that our inadequately resourced Family Courts Service is becoming overwhelmed by an increasing workload resulting in children being put in danger.

He refers to "advice deserts" in certain parts of the country caused by significant reductions in the number of law firms undertaking publicly funded work.

Sir Mark explains that he had reluctantly supported the increase media access to family courts but that it had been necessary to allay public concern about secret justice/injustice in the family justice system. Whilst he is confident that increased media access will dispel such concerns he feels that a "sad spin-off" is that some children are bound to have been adversely affected.

Law Commission seeks proposals for law reform projects

The Law Commission is seeking proposals for its Eleventh Programme which is due to begin in the summer of 2011. Correspondents have until the 15th October 2010 to submit a suggestion by online questionnaire.

Anyone can propose any area of the law which he or she considers to be in need of reform. Projects which the Commission says it might consider for the Eleventh Programme will, of course, relate to the law, and are likely to focus on issues that:

· are systemic,

· are caused by laws or policies that are complex or hard to understand,

· have widespread discriminatory impact or cause disproportionate costs, or

· arise from laws or policies that are inconsistent with modern standards.

You can submit a proposal in one of three ways:

· by entering your response here, online

· by printing off the questionnaire, filling it in and posting it to the Commission, or

· completing the questionnaire in Word and emailing it to the Commission.

All proposals will be reviewed before drawing up a list of potential projects. As set out in the Law Commissions Act 1965, the Lord Chancellor will decide the final contents of the Eleventh Programme. It is expected to be during 2011.

Resolution launches new online advice service

Resolution is launching a new online advice centre with information on the legal aspects of splitting up, as well as advice on parenting apart, sorting out money and arranging child maintenance. The advice centre is available via Resolution's website here.

> "Families come in all shapes and sizes", says David Allison, Chair of Resolution. "As we celebrate national family week, it is important to remember those families who are experiencing difficult times and we hope that this new advice centre will provide answers to some of the common questions that people struggle with when going through family breakup."

The online advice centre has sections on the legal process of splitting up, tips on managing the relationship with children post-separation, as well as sections on sorting out child maintenance and other financial arrangements. The information is provided in different formats, including video clips, factsheets and FAQs.

Serious Case Reviews must be published, says Government

The Parliamentary Under-Secretary of State for Children and Families, Tim Loughton MP, has written to all chairs of local safeguarding children boards, and directors of children's services to confirm that the overview report and the executive summary of all new serious case reviews (SCRs) initiated henceforth should be published. The presumption is that all SCRs will be appropriately redacted, anonymised and published in full except where it would affect the welfare of any surviving children and their siblings.

The letter explains the necessary change to the statutory guidance set out in Chapter 8 or Working Together to Safeguard Children (2010) relating to the publication of serious case reviews.

Marion Davis, President of the Association of Directors of Children's Services commented:

> "The purpose of serious case reviews is to share learning about how work to safeguard and protect children from abuse and neglect can be improved. The published output of the review should be suitable to allow professionals not directly involved in the case to learn from the review and to help the public learn and understand what has happened. However, the publication of full Serious Case Reviews must be handled very carefully, as today's announcement acknowledges, so that the welfare of the very vulnerable children and young people involved in these serious cases is not affected. It is important to note that these reviews occur not only when a child has died, but when a child has committed a serious crime or where agencies are thought to have failed in their duty to vulnerable children. Many children who die will have surviving brothers and sisters. The reviews examine their family lives and awful events in those lives in great detail. We must be sensitive to the needs of these children who have already had experiences that many members of the public find difficult even to imagine – the review process must not increase the emotional burden on children who have survived abuse and neglect or the siblings of those who have died."

Munro Review to look at children's social work and frontline child protection practice

The Secretary of State for Education, Michael Gove, has appointed Professor Eileen Munro of the London School of Economics to conduct an independent review of children's social work and frontline child protection practice. The review will look at how to remove the barriers and bureaucracy which prevent social workers spending valuable time with vulnerable children.

In a letter to Professor Eileen Munro, the Secretary of State paid tribute to the dedication and hard work of frontline professionals, but expressed concern that the child protection system in England is still not working well enough.

The review is stated to be fundamental and will ask of the system 'What helps or hinders professionals from making the best judgments and interventions they can to protect a vulnerable child?' in order to reform frontline social work practice. The intention is that social workers should be in a better position to make well-informed judgments, based on up-to-date evidence, in the best interests of children, free from

unnecessary bureaucracy and regulation.

The Secretary of State says in his letter of appointment that he wants Professor Munro's review to set out the obstacles preventing these improvements and the steps required to bring about improved social work practice. This should include considering how effectively children's social workers and professionals in other agencies work together. The letter states that Professor Munro should work closely with those leading related reviews such as the Family Justice Review and that the review should be informed by the strongest systems of child protection in other countries.

The review team will submit a first report on evidence gathered and problems identified by September 2010, an interim report by January 2011 and a finale report, offering solutions, by April 2011.

Marion Davis, President of the Association of Directors of Children's Services, commented:

> "We strongly welcome this review and its emphasis on supporting social workers and their multi-agency partners in keeping children safe, and the recognition that overly burdensome guidance and regulation can hinder this aim. We believe that there is scope to improve the practice of social work by redirecting resources, human and financial, away from obeying detailed step by step instructions and procedures to supporting confident professionals to spend more time and effort on directly working with children, young people and their families. The current regulatory and inspection regime emphasises compliance with procedures, is expensive and does not serve children and families well – reducing red tape should allow for reinvestment in the services that make a difference, stable and well-supported teams involving social workers, health professionals and the police, which are flexible enough to tailor provision to the needs of individual children. This will, in turn, require a more flexible regulation system that can support and monitor the quality of practice, whatever structures and processes are used."

Councillor Shireen Ritchie, Chair of the Local Government Association's Children and Young People Board, referring to new research carried out on behalf of the LGA, said:

> "Children who are at risk, and families which are struggling, will benefit more from additional time with experienced social workers than they will from an increase in the number of forms filled in about them. Some paperwork is essential to doing the best possible job, but it is right to try to reduce bureaucracy where it can ease the pressure on social workers and increase the quality of care offered to children.
>
> "It is time to show more trust in our social workers to do the right thing for children. It is time for professionals like the police and health service workers to step up to the mark and show they understand the part they have to play in helping social workers reach the most vulnerable children first.
>
> "The aim must be to find the right way forward, to make services that protect children the best they've ever been while properly supporting the people who do this vital work."

The statistical analysis carried out for the Local Government Association by the National Foundation for the Educational Research (NFER) has shown that the recent increase in child protection referrals could lead to an increase of nearly 35 per cent in the number of children starting to be looked after in 2011/12 compared to 2007/8. This would mean that 61,000 children would come into the care system in England in the next two years.

The LGA has previously argued that a reduction in bureaucracy is needed to allow social workers to spend more time with the children they are working to protect. On average, only 13 per cent of the time taken to complete an initial assessment is spent with the child or family but 87 per cent is spent on paperwork and process. An initial assessment is just one formal procedure which makes up the child protection process.

Essential time could be saved, says the LGA, by having all professionals, such as health workers and teachers, record information about at-risk children in the same way, using the Common Assessment Framework. This would reduce the effort needed to cross-reference information.

Maggie Atkinson, the Children's Commissioner for England, has also welcomed the review and says that her office look forward to working closely with Professor Munro.

Court of Protection publishes first report

The Court of Protection has published its first report. The Court was set up in October 2007 and the report covers the 27 months to the end of 2009.

In his introduction, the Senior Judge of the Court of Protection, Denzil Lush, summarises the first two years by acknowledging that it has not been plain sailing. The judge says:

> "The court has had to endure more than its fair share of setbacks, which were caused in the main by a failure to anticipate, prior to the implementation of the Act, the volume of work that would inundate the court during the initial transitional period, and the overall burden it would place on the judges and staff."

From October 2007 to the end of March 2009, 1,248 complaints were made about the court. The complaints were mostly about delays, the timescales involved in the application process or about judicial directions. From April 2009 to the end of December 2009, there have been 424 complaints which is a significant reduction from the first year. This is largely due to shorter waiting times resulting from the use of visiting judges.

The issues covered by complaints include judicial decisions and unwillingness to comply with rules (25%); the cost of proceedings including fees and security bonds (15%); administrative errors (15%); and the length of the process and delays (30%). The court administration cannot intervene in complaints about judicial

decisions which can only be challenged by making an appeal.

In respect of delay, the Senior Judge refers in the Report to the appointment of three new District Judges to the central court registry at Archway so as to produce a full complement of London based judiciary.

He also states:

> "….there have, nonetheless, been some significant achievements following the implementation of the Mental Capacity Act. These include the expansion of the court so nominated judges can hear cases in the regions; the successful 'transition' of 7,000 Mental Health Act receiverships into deputyships; the implementation of the Deprivation of Liberty Safeguards; and the integration of the court into HMCS."

The report describes the wide variety of work undertaken by the court and includes a summary of the reported decisions of the past two years.

CSA reports an increase of 15,000 recipients of child support in Wales over last five years

The Child Support Agency reports that 78% of children in Wales who are eligible for child support are now receiving payments. This is a rise from 62% in 2005. Nearly 50,000 children living in Wales are now receiving child maintenance (an increase of 15,000 on the figure of five years ago).

Steve Harrison, the senior legal enforcement team leader for Wales, is reported on Wales Online as saying:

> "It's a growing area for the agency where an aim is to get to people who are not prepared to pay for their children much quicker, getting them to make regular payments.
>
> "We've been able to deal with more cases. There's less chance of people evading us."

President issues guidance to judges and Magistrates on split hearings but guidance does not constitute a practice direction

The President's office has confirmed to Family Law Week that advice given to judges and magistrates recently by the President in relation to split hearings is guidance only and does not constitute a practice direction.

The President considers that split hearings are: (1) taking place when they need not do so; and (2) are taking up a disproportionate amount of the court's time and resources. He has therefore issued guidance to judges and magistrates. However the Guidance is not binding on the judiciary but an attempt to identify good practice, designed to apply in both private and public law proceedings.

The President reminds judges and magistrates that a fact finding hearing is a working tool designed to assist them to decide the case. Thus a fact finding hearing should only be ordered if the court takes the view that the case cannot properly be decided without such a hearing. Even if the court takes such a view, it does not follow that such a hearing needs to be separate from the substantive hearing. In nearly every case, the court's findings of fact inform its conclusions. In my judgment it will be a rare case in which a separate fact finding hearing is necessary.

The President refers judges and magistrates, in relation to domestic abuse cases, to the President's Practice Direction: Residence and Contact order: Domestic Violence and Harm of 14 January 2009 [2009] 2 FLR 1400; in respect of care proceedings, to the rationale of split hearings enunciated Bracewell J in *Re S (Care Proceedings: Split Hearing)* [1996] 2 FLR 773; the Court of Appeal's decision in *Re C* [2009] EWCA Civ 994; and the provisions of the Practice Direction: The Revised Private Law Programme which came into effect from 1 April 2010.

Dame Jill Black appointed to Court of Appeal

The Queen has approved that The Honourable Mrs Justice Jill Margaret Black be appointed as a Lord Justice of Appeal with effect from 15 June 2010, following the appointment of The Right Honourable Sir Nicholas Wall as President of the Family Division on 13 April 2010.

Dame Jill Black was called to the Bar (Inner Temple) in 1976. She took Silk in 1994, and was appointed as a Deputy Judge of the High Court in 1996 and a Recorder in 1998. She was appointed a Judge of the High Court (Family Division) in 1999.

Mrs Justice Black was appointed a Dame of the British Empire in 1999.

ALC seeks details of children giving evidence in family proceedings

The Association of Lawyers for Children has requested its members to advise it of any family proceedings in which they might be involved where an application is made for a child to give oral evidence.

The Association has published a form on its website which it has asked members to complete and submit..

Landmark legislation for children and young people's rights in Wales

Wales is set to become the first part of the United Kingdom to embed the rights of children and young people into legislation.

The proposed Rights of Children and Young Persons (Wales) Measure was laid last week. The purpose of the Measure is to place a duty on Assembly Government Ministers to have due regard in taking strategic decisions to the rights and obligations in respect of children that are enshrined in the United Nations Convention on the Rights of the Child. This will enhance an existing rights-based approach for children and young people in policy making in Wales, and also strengthen children and young people's position in Welsh society.

Deputy Minister for Children, Huw Lewis, said:

> "Children and young people who know about their human rights generally also have improved self-confidence, higher expectations and are more likely to fulfil their full potential.
>
> "We in Wales value these characteristics. We take pride in striving to give our children and

young people the tools they need to play a full and active part in our society as citizens.

"This proposed Measure will not only help the children and young people of today enjoy improved wellbeing, it will also provide a mechanism to ensure a better tomorrow for our communities and Wales as a whole."

Deputy Executive Director for UNICEF UK, Anita Tiessen, said:

"The mission of UNICEF is to advance the application of the UN Convention on the Rights of the Child in children's lives, and we do that in close collaboration with governments.

"We are therefore delighted to see the Welsh Assembly Government considering adopting a Measure to apply a duty of due regard to the CRC to all the functions of Ministers.

"This is a far-reaching commitment and would place Wales in the leading group of countries when it comes to the incorporation of the UNCRC and will set an example to others, including here in the UK.

"On behalf of UNICEF UK I congratulate the Welsh Assembly Government on taking this huge step forward towards embedding child rights."

For more details, go to the website of the Welsh Assembly Government.

Court orders local authority to pay £100,000 towards LSC costs

HHJ Bellamy, sitting as a Judge of the High Court, has awarded parents £50,000 each towards settlement of their costs, funded by the Legal Services Commission under high costs contracts, in failed care proceedings. The award was made against an unnamed local authority.

HHJ Bellamy said in his judgment in Re X, Y and Z (Children):

"[W]ithin the last six months the local authority has twice sought to persuade the court to authorise the immediate interim removal of the children from the care of their parents, it now seeks leave to withdraw the proceedings in their entirety. It seems likely that the proceedings will cost the LSC somewhere in the region of £398,000. The local authority's own legal costs are no doubt also substantial."

After reviewing the history of the litigation, HHJ Bellamy, applying the approach of Cazalet J in Re M (Local Authority's Costs), asked: is the conduct of the local authority reprehensible or beyond the band of what is reasonable? He concluded that the local authority's conduct of this case fell outside the band of what is reasonable. He therefore ordered that the local authority pay the sum of £50,000 towards the costs of each parent (i.e. £100,000 in total).

The judge noted that in Re R (Care: Disclosure: Nature of Proceedings), having made an order for costs against the local authority, Charles J. went on to say:

'I would also express the view, which can be conveyed, for what it is worth, to the Legal Services Commission that this is an issue between publicly funded bodies. They may, as a matter of discretion, wish to take that into account in deciding whether or not they enforce this order having regard to the circumstances of the case and the way in which legal aid is granted in family proceedings.'

HHJ Bellamy echoed those views.

The judgment in this case was handed down on the 19th February 2010 but has been made public only now following considerable media interest.

Mr Justice Mostyn calls for review of Poel and Payne

Payne v Payne receives further judicial scepticism

Last week's judgment in Re AR (A Child: Relocation) advances the debate concerning the permanent removal of children from the jurisdiction against the wishes of the remaining parent.

In Re D (Children) [2010] EWCA Civ 50, in which judgment was handed down in February, Lord Justice Wall commented:

'There has been considerable criticism of Payne v Payne in certain quarters, and there is a perfectly respectable argument for the proposition that it places too great an emphasis on the wishes and feelings of the relocating parent, and ignores or relegates the harm done of children by a permanent breach of the relationship which children have with the left behind parent.'

He went on to say, 'this .... would, I have no doubt, in the right case constitute a "compelling reason" for an appeal to be heard.'

In *Re AR (A Child: Relocation)* [2010] EWHC 1346, a French mother sought leave to permanently remove a five-year old child to Troyes in France. The English father applied for shared residence. The child, A, had only French nationality. The father had parental responsibility by virtue of being named on A's birth certificate.

Mostyn J considered the authorities including *Poel v Poel* [1970] 1 WLR 1469, *Payne v Payne* [2001] 1 FLR 1052 and *Re D (Children)* as well as the recent Washington Declaration on International Family Relocation (March 2010). He described the last as follows:

"The Declaration supplies a more balanced and neutral approach to a relocation application, as is the norm in many other jurisdictions. It specifically ordains a non-presumptive approach."

In making a shared residence order, Mostyn J said:

"In my view (for what it is worth) a review of the ideology of Poel/Payne by the Supreme Court is urgently needed, where the "emerging body of significant research in various jurisdictions" would be brought into account."

The Custody Minefield, welcoming the judgment, commented:

"[Mr Justice Mostyn] turns the tables on 40 years of precedent, bringing child welfare back to the fore. In a single judgment, a herd of misguided sacred cows are slain. He reaffirms the desirability of shared parenting, questions the need for supervised contact where there is no evidence of risk, he reminds us of the child's

Convention Right to Family Life, he calls for the removal of Thorpe's illegitimate gloss on the purity of the paramountcy principle.

"With such public criticism by the High Court of the Court of Appeal's guidance, and that criticism having been so intelligently reasoned through, an urgent review by the Supreme Court has become a necessity."

Divorce decrees absolute rise in first quarter of 2010

There were 30,400 decrees absolute granted for the dissolution of marriage in the first quarter of 2010 (an increase of 6 per cent compared to the first quarter of 2009). However, the long-term trend over the last few years has been an overall decrease in the numbers of divorces granted.

5,600 domestic violence orders were made in the first quarter of 2010, a drop of 7 per cent on the 6,100 in the same period of last year. The number of domestic violence orders made fell between 2004 and 2008, followed by a slight rise in 2009.

On matters affecting children, 5,700 public law applications and 30,200 private law applications were made. However, the latest quarterly figures for private law applications exclude around 20 per cent of family proceedings courts. This follows the current roll-out of the upgrade to the database for recording family cases.

VAT and CGT changes impact on family lawyers' work

Last week's Budget announcement by the Chancellor, George Osborne, described as the harshest for thirty years, has made numerous changes that will impact both directly and indirectly on the work of family lawyers. For example, the increase in the rate of VAT will impact on client costs of divorce. CGT has been raised and will be of special concern where asset sales are sought to fund a settlement.

Responding to the Budget, the Children's Commissioner for England, Maggie Atkinson said:

"As Children's Commissioner I have a duty to represent all children and young people in England and to have particular regard to the concerns of the most vulnerable. That is why I am looking closely at the impact of the proposals set out in this Budget.

"I welcome the Government's commitment on child poverty in the Budget and previous promise to overcome the hurdles that stand in the way of improving children's lives via the Children and Families Task Force. The Chancellor also said there would be no further cuts in capital spending. In thinking through capital spending cuts it is important to look at the importance of the services to children and young people.

"It is vital that the impact of change on families is considered in full. My concern is both for the millions of children who still live in poverty and those who are growing up in hard working families that depend on publicly funded services that support family life and childhood. All of us who work with children, young people and families need to work together to meet today's needs without jeopardising our shared aspirations for their chances and opportunities."

BSB chair calls for merger of solicitors' and barristers' training courses

The Law Society's Gazette reports that the chair of the Bar Standards Board has called for a radical overhaul of legal professional education by merging the solicitors' and barristers' courses. This, says Baroness Deech , would give young people longer to decide which branch of the profession they want to join.

She said that the training regime must be fit for the 'new world' of the Legal Services Act and that legal professional education must be revisited 'in its entirety', and suggested that a Future Legal Education Committee should be established.

For a full account of Baroness Deech's comments, visit The Law Society Gazette's website.

Ministry of Justice proposes closure of 157 courts

The Lord Chancellor and Secretary of State for Justice, Kenneth Clarke, has published proposals for the closure of 103 magistrates' courts and 54 county courts. The Court Service currently operates from 530 courts.

Mr Clarke said:

"Some of [the courts] do not fit the needs of modern communities. Their number and location does [sic] not reflect recent changes in population, workload or transport and communication links over the many years since they were originally opened.

"Across the civil, family and criminal courts I want to look at what can be done to use technology more effectively so fewer people have physically to attend court for routine purposes. Increasingly we are using the internet, telephone and video technology in our work and personal lives – we should be more rigorous in exploring their use across the justice system."

Closure of the courts covered in the consultation would achieve running cost savings of around £15.3m per year. These courts also have backlog maintenance of around £21.5m, costs that can be avoided if the closures go ahead.

A consultation will take place, seeking the views of those with an interest in local justice arrangements. The consultation will close on the 15th September 2010.

The Lord Chief Justice, Lord Judge, responded to the proposals, commenting:

"The decision whether to close courts rests with the Lord Chancellor. The judiciary cannot ignore fiscal realities when considering how to respond to individual proposals. However, it is important that both the judiciary and the public have the opportunity to comment on the proposals and this process will now take place. Consultation will draw out many sensitive issues specific to individual communities. All of

the proposals will be carefully examined and, where appropriate, they will be questioned."

The courts subject to the consultation are as follows:

North West
Magistrates' courts:
Northwich Magistrates' Court, Southport Magistrates' Court, Knowsley Magistrates' Court, Whitehaven Magistrates' Court, Penrith Magistrates' Court, Rawtenstall Magistrates' Court, Salford Magistrates' Court, Rochdale Magistrates' Court.

County courts:
Northwich County Court, Southport County Court, Penrith County Court, Runcorn County Court, Whitehaven County Court, Rawtenstall County Court, Chorley County Court, Salford County Court, Bury County Court.

North East
Magistrates' courts:
Guisborough Magistrates' Court, Bishop Auckland Magistrates' Court Tynedale Magistrates' Court, Alnwick Magistrates' Court, Blaydon Magistrates' Court, Gosforth Magistrates' Court, Houghton Le Spring Magistrates' Court, Goole Magistrates' Court, Skipton Magistrates' Court, Selby Magistrates' Court, Batley And Dewsbury Magistrates' Court, Keighley Magistrates' Court Sitting At The Bingley Court House, Pontefract Magistrates' Court.

County courts:
Bishop Auckland County Court, Consett County Court, Barnsley County Court, Goole County Court, Skipton County Court, Pontefract County Court, Keighley County Court, Dewsbury County Court.

Wales
Magistrates' courts:
Barry Magistrates' Court, Aberdare Magistrates' Court, Llwynypia Magistrates' Court, Ammanford Magistrates' Court, Cardigan Magistrates' Court, Llandovery Magistrates' Court, Denbigh Magistrates' Court, Pwllheli Magistrates' Court, Flint Magistrates' Court, Chepstow Magistrates' Court, Abertillery Magistrates' Court, Abergavenny Magistrates' Court, Llangefni Magistrates' Court.

County courts:
Chepstow County Court, Aberdare County Court, Rhyl County Court, Pontypool County Court, Llangefni County Court.

Midlands
Magistrates' courts:
Halesowen Magistrates' Court, Sutton Coldfield Magistrates' Court, West Bromwich Magistrates' Court, Rugby Magistrates' Court, Stoke Magistrates' Court, Tamworth Magistrates' Court, Ludlow Magistrates' Court, Market Drayton Magistrates' Court, Oswestry Magistrates' Court, Ilkeston Magistrates' Court, Newark Magistrates' Court, Worksop Magistrates' Court, Retford Magistrates' Court, Coalville Magistrates' Court, Market Harborough Magistrates' Court, Melton Mowbray Magistrates' Court, Spalding Magistrates' Court, Towcester Magistrates' Court, Daventry Magistrates' Court, Rutland Magistrates' Court, Kettering Magistrates' Court.

County courts:
Rugby County Court, Stourbridge County Court, Stratford-Upon-Avon County Court, Newark County Court, Worksop County Court, Melton Mowbray County Court, Wellingborough County Court, Grantham County Court, Skegness County Court, Tamworth County Court, Oswestry County Court, Ludlow County Court, Shrewsbury County Court, Evesham County Court, Redditch County Court, Burton-Upon-Trent County Court, Kidderminster County Court.

South West
Magistrates' courts:
Frome Magistrates' Court, Bridgwater Magistrates' Court, Liskeard Magistrates' Court, Newton Abbot Magistrates' Court, Camborne Magistrates' Court, Totnes Magistrates' Court, Honiton Magistrates' Court, Penzance Magistrates' Court, Blandford Forum Magistrates' Court, Wimborne Magistrates' Court, Coleford Magistrates' Court, Cirencester Magistrates' Court, Stroud Magistrates' Court, Andover Magistrates' Court, Alton Magistrates' Court, Lyndhurst Magistrates' Court.

County courts:
Cheltenham County Court, Penzance County Court, Trowbridge County Court, Poole County Court.

South East
Magistrates' courts:
Grays Magistrates' Court, Harlow Magistrates' Court, Epping Magistrates' Court, Ely Magistrates' Court, Wisbech Magistrates' Court, Thetford Magistrates' Court, Cromer Magistrates' Court, Swaffham Magistrates' Court, Sudbury Magistrates' Court, Ashford Magistrates' Court, Sittingbourne Magistrates' Court, Epsom Magistrates' Court, Woking Magistrates' Court, Mid-Sussex Magistrates' Court, Lewes Magistrates' Court, Bicester Magistrates' Court, Hemel Hempstead Magistrates' Court, Witney Magistrates' Court, Amersham Magistrates' Court, Newbury Magistrates' Court, Didcot Magistrates' Court.

County courts:
Ashford County Court, Gravesend County Court, Haywards Heath County Court, Epsom County Court, Huntingdon County Court, Harlow County Court, Lowestoft County Court, Newbury County Court, Hitchin County Court.

London
Magistrates' courts:
Acton Magistrates' Court, Haringey Magistrates' Court (Highgate), Harrow Magistrates' Court, Sutton Magistrates' Court, Barking Magistrates' Court, Brentford Magistrates' Court, Kingston Magistrates' Court, Woolwich Magistrates' Court, Balham Youth Court, Waltham Forest Magistrates' Court, Tower Bridge Magistrates' Court.

County courts:
Ilford County Court, Mayor's And City Court.

Report for Barnardo's recommends earlier care interventions

A report, funded by Barnardo's and carried out by Demos, the social and political think-tank, suggests that taking vulnerable children into care earlier could save millions of pounds of public funding and produce better outcomes for the children concerned.

Through an in-depth review of existing data and research studies, In Loco Parentis shows that there are a number of factors that influence outcomes among children in care, not least their pre-care experiences; and that looked-after children, far from being a homogeneous group, enter care for a variety of reasons and have very different needs. Using new

quantitative analysis of the costs associated with good and poor care, In Loco Parentis is said to demonstrate the significant gains to be made by minimising delay and drift, promoting stability in placements and supporting young people's transitions to adulthood.

Drawing on primary research with looked after children, care leavers and foster carers as well as case studies of good practice cross the UK, the report sets out recommendations to de-stigmatise care as a source of family support and 'taper' the edges of the system so that care is not used as an all-or-nothing intervention. The report demonstrates that what matters most is building a care system which is sufficiently proactive and responsive to provide the right kind of support for children and their families at every stage.

Permission to appeal granted in Jones v Jones

The Court of Appeal has granted the wife in Jones v Jones permission to appeal against an award made by Mr Justice Charles in the High Court. The High Court judgment, reported by Family Law Week as J v J.

In the High Court Mr Justice Charles had found that the bulk of Mr Jones's wealth had been accumulated before his marriage to the claimant. He concluded that he should not depart from equality on the grounds that the husband was the worker in the business as "the non-discriminatory approach that must be applied founds the result that my findings as to the choices made, the reasons for them and their product do not warrant any such departure". However, there should be a departure instead based on pre-acquired and gifted assets and the increase in the value of the husband's company after separation.

Martin Pointer QC, counsel for Mrs Jones, dismissed that award as "plucked out the air", insisting that "the pot of gold was truly created during the marriage". Lucy Stone QC, for Mr Jones, argued that Mrs Jones had been just one year old when her former husband started a career in the oil and gas industry which culminated in phenomenal success.

Sir Nicholas Wall, the President of the Family Division, said that the wife's case was arguable and gave permission for the appeal to proceed.

A fuller report of the proceedings can be found on the Daily Telegraph website.

ANALYSIS

Kernott v Jones and the search for shared intention:- Stack v Dowden clarified?

Luke Barnes, barrister, 3, Dr Johnson's Buildings

Allowing the appeal from the judgment of Nicholas Strauss QC, sitting as a Deputy High Court judge (*Jones v Kernott* [2009] EWHC 1713 (Ch), itself an appeal) the Court of Appeal (*Kernott v Jones* [2010] EWCA Civ 578) grappled with an important issue arising from the majority judgment in *Stack v Dowden* ([2007] 2 AC 432), which has doubtless caused careful thought to many, if not most practitioners:

What is the correct way to understand the meaning and scope of Baroness Hale's direction in Stack to search for shared intentions?

[60] The search is to ascertain the parties' shared intentions, actual, inferred, or imputed, with respect to the property in the light of their whole course of conduct in relation to it..

Nicholas Strauss QC delivered a long and careful judgment, dismissing the first appeal. In the Court of Appeal Wall LJ, Jacob LJ and Rimer LJ each delivered a separate judgment in allowing the second appeal by a majority (Jacob LJ dissenting).

After a brief summary of the facts of the case and the outcome of the trial and appeals, I shall look more closely at the judgments on the first and second appeals, attempting to draw out useful pointers for practice.

(1) Facts

In May 1985 the parties, who had an infant child, purchased the property in joint names for £30,000. The woman, J, contributed £6,000 and the balance of the purchase price was raised by means of an endowment mortgage.

In 1986 a further loan of £2,000 was taken out for an extension, built and paid for largely by the man, K, enhancing the value of the house from about £30,000 to £44,000. The parties' second child was born that year. J and K shared household bills including mortgage payments.

They separated in 1993, J and the children staying in the property. J accepted at trial that at that time their beneficial interests were equal, since she would not have been able to rebut the presumption of joint, equal ownership at that date. Thereafter, J assumed sole responsibility for the outgoings on the property and the children's maintenance.

In May 1996 K bought another property for £57,000. He raised the deposit, with J's agreement, by cashing in a separate life policy which they owned, whose proceeds they divided equally.

(2) Trial

It was not in dispute that the parties had no discussions as to the variation of their beneficial interests. At first instance the judge did not direct himself to paragraph [60] of Stack. Nor did he use the words "infer" or "impute" in the key passage of his judgment (set out by Wall LJ at paragraph 19 of his judgment in the second appeal).

The trial judge ruled that J's investment towards the purchase of the property, particularly since separation, meant that she was entitled to a greater share. In addition she received very little contribution from K to the maintenance and support of the two children.

He found that at the outset the parties' intentions may well have been to provide a home for them and their children, but they had altered since separation to the extent that K demonstrated that he had no intention until recently of availing himself of the beneficial ownership, having ignored it completely by way of any investment in it or attempt to maintain or repair it whilst he had his own property upon which he concentrated.

The judge turned to assess the altered shares on the basis of what was "fair and just". He fixed the beneficial interests at: J – 90%; K – 10%.

(3) First appeal

Nicholas Strauss QC, sitting as a deputy judge of the high court, dismissed K's appeal. He held that, so far as the intention of the parties cannot be inferred, the court is free to impute a common intention to them. The judge was quite right to infer or impute the parties' intention to change their beneficial interests. "Fair and just" was the appropriate criterion to quantify the varied interests by imputation.

(4) Second appeal

The Court of Appeal allowed K's second appeal, by a 2-1 majority. The judge had identified no evidence from which could properly be inferred a common intention to vary the equal beneficial interests held on separation. The parties' beneficial interests were equal.

(5) The Search for Intention

The decisions on the first and second appeal turned on Nicholas Strauss QC's, Lord Justice Wall's, Lord Justice Jacob's and Lord Justice Rimer's respective interpretations of what was included in the Stack search for intention. I turn to those interpretations as follows.

> "The search is to ascertain the parties' shared intentions, actual, inferred, or imputed, with respect to the property in the light of their whole course of conduct in relation to it" *Stack v Dowden*, ibid., per Baroness Hale at [60]

(i) Nicholas Strauss QC (*Jones v Kernott* [2009] EWHC 1713 (Ch))

Nicholas Strauss QC directed himself to a key passage of Baroness Hale's opinion in Stack, citing the following two extracts:

> [60] ... The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.
>
> [61] ... the search is still for the result which the parties must, in the light of their conduct, be taken to have intended ...

He did not cite, although he clearly had in mind, the next sentence of Baroness Hale's opinion:

> ... the court [may not] abandon that search in favour of the result which the court itself considers fair. For the court to impose its own view of what is fair upon the situation ... would be to return to the days before *Pettitt v Pettitt* [1970] AC 777 ...

Nicholas Strauss QC reminded himself of Lord Neuberger's definitions of "inferred" and "imputed" in Stack. Baroness Hale did not attempt to define the terms.

> [126] An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention.

Nicholas Strauss QC then considered how the court may approach the Stack search for intention:

> [30] ... In my view, what the majority said in Stack held was only that the court should not override the intention of the parties, in so far as that appears from what they have said or from their conduct, in favour of what the court itself considers to be fair. The key words used by Baroness Hale are that the court must not impose its view. [the deputy judge's emphases]
>
> [31] To the extent that the intention of the parties cannot be inferred, the court is free – as the key passage makes clear – to impute a common intention to the parties. Imputing an intention involves, as Lord Neuberger points out, attributing to the parties an intention which they did not have, or at least did not express to each other. The intention is one which the parties "must be taken to have had". It is difficult to see how this process can work, without the court supplying, to the extent that the intention of the parties cannot be deduced from their words or conduct, what the court considers to be fair. In particular, in the present case, if there is evidence of conduct from which it is right to conclude that the parties intended their respective shares to alter following [K]'s departure, but none to indicate how, the only available criterion by which to assess the extent of the alteration is what is objectively fair, and the only available judge of that is the court.

Applying this analysis to the appeal before him, Nicholas Strauss QC ruled [47 – 49]:

> [47] So the position after the split in 1993 was that they maintained separate finances to an even more marked degree that the unmarried couple in *Stack v Dowden*. In my view, the judge was quite right to infer from these facts that they no longer intended equal beneficial ownership, or to impute to them such a change in intention. Thus far there was no need for him to invoke fairness: the change in intention can easily be inferred or imputed from the parties' conduct [emphasis added].
>
> [48] The next question is, what different intention is to be inferred, or (as I think more realistically) to be imputed to the parties ...
>
> [49] ... in the absence of any indication by words or conduct as to how [the beneficial interests] should be altered, the appropriate criterion was what he considered fair and just.

In summary, then, he found that the alteration of intention was inferred or imputed by the trial judge. Since the court did not have material to infer an intention as to the amount of the altered shares, they were fixed at 90:10 (J:K), as what seemed to the Court fair and just, on the basis of an intention imputed to the parties.

(ii) The Court of Appeal allowed K's appeal by a 2-1 majority. The judge had identified no evidence from which could properly be inferred a common intention to vary the equal beneficial interests held on separation. The factors mentioned were insufficient.

The Court did not therefore address itself to the amount of the varied shares as part of its decision and any comments made must be obiter dicta. However, each of Wall and Rimer LJJ made interesting comments on that aspect of the tribunal's task. I will consider each judgment in turn, before attempting a synthesis.

Lord Justice Wall:

> [6] The case raises a short but ... difficult issue ... Where (1) an unmarried couple has acquired residential accommodation in joint names, which by common agreement was held by them beneficially in equal shares as at the date of their separation and (2) one party thereafter (a) continues to live in the property and (b) assumes sole responsibility for its continuing acquisition and maintenance – [including] the mortgage and all outgoings – can the court properly infer an agreement post separation that the parties' beneficial interests in the property alter ...
>
> [7] A subsidiary issue arises if the question posed [above] is answered in the affirmative, namely whether the split 90% to 10% is correct on the facts. This is not an issue which I propose to address. If what the judge and deputy judge did on the primary issue was permissible, and provided that there was

> an arguable basis for the 90% - 10% split then the actual split is an exercise of judicial discretion [emphasis added] with which the court should not interfere:- see *G v G* [1984] 1 WLR 645.
>
> [26] [citing part of Chadwick LJ's judgment in *Oxley v Hiscock* [2005] Fam 211] ... in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have ... the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property ... [Baroness Hale's emphasis]

- By way of reminder, I add that in Oxley Chadwick LJ was explicit that:

> [66] ... what the court is doing, in cases of this nature, is to supply or impute [emphasis added] a common intention as to the parties' respective shares (in circumstances in which there was, in fact, no common intention) on the basis of that which, in the light of all the material circumstances (including the acts and conduct of the parties after the acquisition), is shown to be fair ...

Wall LJ continues:

> [36] [considering Stack] ... The search was to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it (paragraph 60). Baroness Hale then cites with approval and italicised emphasis paragraph 69 of Chadwick LJ's judgment in *Oxley v Hiscock* which I have set out (complete with Baroness Hale of Richmond's emphases) at paragraph 26 above.

- It is submitted that the exercise of judicial discretion described by Wall LJ in [7] is one which may include imputation, particularly in the light of his citation of Oxley. He reminds the reader that Baroness Hale approved Chadwick LJ's formulation. *Oxley* (a sole name case) concerned the quantification of undefined beneficial interests, in the absence of evidence of express discussions.

- Since *Stack*, *Oxley* cannot apply to a sole or joint names case unless and until the presumption that equity followed the law has been displaced. But, as I read Wall LJ's judgment (remembering that it is obiter as regards that issue) an *Oxley*-style imputation could then apply to quantification, in the absence of relevant discussions.

Wall LJ:

> [52] There is a total lack of evidence about the parties' intentions. They do not appear to have discussed the matter. The severance of the joint tenancy by [K] in March 2008 is ... alas, about the only piece of objective evidence as to the parties' intentions.

- It seems that 'total lack of evidence' refers to express evidence.

> [53] Furthermore, his decision to wait until the children were older when [J] no longer needed the property as a home for herself and the children is consistent with cases such as *Mesher v Mesher* [1980] 1 AER 126n ...
>
> [57] The critical question is whether or not I can properly infer from the parties' conduct since separation a joint intention that, over time, the 50-50 split would be varied so that the property is currently held [90:10] ...

- I comment that to be faithful to the precise wording of Baroness Hale's guidance, one might have expected Wall LJ to say: "whether or not I can properly infer from the parties' conduct since separation or impute to them a joint intention [to vary] ...". I submit, tentatively, that the reason he did not is that the imputation exercise described in *Oxley* (approved by Wall LJ and, as he saw it, by Baroness Hale) only applies to quantification.

- I remind the reader that the two categories of common intention defined in *Lloyds Bank v Rosset* [1990] 1 AC 107 as capable of establishing a beneficial interest under a constructive trust were express and inferred (/implied). Imputation played no role. And in Stack, shortly after the reference to the parties' shared intention, actual, inferred or imputed, Baroness Hale specified, (in a clear reference to the exercise of establishing the interest, as opposed to quantifying it): "[63] We are not in this case concerned with the first hurdle." It would follow that anything she had to say about establishing the interest was obiter dicta.

- Wall LJ's conclusion on the facts of *Kernott* was that no variation from equality of interests could be inferred. He did not consider whether it could be imputed – which would be a surprising omission, if imputation were permissible, since the judgment under appeal found that the intention to vary could properly have been inferred or imputed by the trial judge.

> [58] This is a point which I have considered anxiously, and at the end of the day I simply cannot infer such an intention from the parties' conduct. In my judgment, the conveyance into joint names, following *Stack v Dowden* created joint beneficial interests, and the parties agreed that when they separated they had equal interests. There has to something to displace those interests, and I have come to the conclusion that the passage of time is insufficient to do so, even if, in the meantime, [K] has acquired alternative accommodation, and [J] has paid all the outgoings.
>
> [60] ... In short, in my judgment, there is nothing on the facts of this case to displace the presumption of equality.

- I suggest that the thrust of Wall LJ's approach is: the intention to vary must be express or inferred; the quantification of the varied interests may be based on an actual, inferred or imputed intention.

Lord Justice Rimer:

- Rimer LJ turned a piercing eye on various aspects of *Stack*. I set out some key observations as follows:-

> [71] [Baroness Hale] said again, at [61], that the search is 'for the result which reflects what the

parties must, in the light of their conduct, be taken to have intended.' In the same paragraph she said that it is not open to the court to abandon that search 'in favour of the result which the court itself considers fair', so rejecting the approach favoured by Chadwick LJ in *Oxley v Hiscoc*k ... at [69] (a sole name case) [emphasis added].By citing with approval an extract from a Law Commission paper, she made it plain that the parties' intentions for which the court is searching are not just that the shares should be other than joint but also what they should be. [emphasis added] At [62] she recognised that that such intentions may change over time, producing what Lord Hoffmann described in argument as an 'ambulatory' constructive trust ...

[72] ... In Stack, save that the parties had bought the property in joint names, they had otherwise kept their financial affairs rigidly separate, a context which Baroness Hale said made [it] 'a very unusual case'. She explained that the fact of the unequal contributions in such context supported the inference that the parties intended to share otherwise than equally ... and instead to enjoy a beneficial tenancy in common in the shares [65:35].

[75] I suspect that Stack may be regarded by trial judges as presenting something of a challenge. I am not sure, with respect, what is to be made of the emphasis by Baroness Hale and Lord Walker that Stack was an exceptional case.

[76] The key feature of Stack is, however, the task that the majority sets for trial judges, namely that of searching for the parties' shared intentions – 'actual, inferred or imputed' – with respect to the property. Since an 'inferred' intention must also be an 'actual' intention, I presume that Baroness Hale used the word 'actual' as a synonym for 'express' .....
...
Taking the facts of Stack itself, it may not perhaps to obvious to everyone how the facts described by Baroness Hale justified the inference of an unspoken intention that the beneficial shares were to be held in the declared proportions.

[77] As for ... imputed intention, I do not, with the greatest respect, understand what [Baroness Hale] meant. It is possible she was using it as a synonym for inferred ... in which case it adds nothing. If not, it is possible that she was suggesting that the facts ... might enable the court to ascribe to the parties an intention that they neither expressed nor inferentially had: in other words, the court can invent an intention for them. That, however, appears unlikely, since it is inconsistent with [her] repeated reference to the fact that the goal is to find the parties' intentions, which must mean their real intentions. Further, the court could and would presumably only consider so imputing an intention to them if it had drawn a blank in its search for an express or an inferred intention but wanted to impose upon the parties its own assessment of what would be a fair resolution ... But [her] rejection of that as an option at paragraph [61] must logically exclude that explanation ... I accordingly do not myself interpret Stack as having intended to enable courts to find, by way of the imputation route, an intention where none was expressly uttered or inferentially formed.

- This is striking. Firstly, Baroness Hale's "imputation" is meaningless and/or superfluous and can be ignored. Secondly, Nicholas Strauss QC was wrong to treat imputed intention as distinct from inferred intention and to base any part of his reasoning upon imputation.

- In contrast to Wall LJ (see [36], as set out above), Rimer LJ felt ([71]) that in Stack Baroness Hale rejected the approach favoured by Chadwick LJ in Oxley. It would seem to follow that the court may not impute an intention as to the amounts of undefined beneficial interests (whether following a variation or not).

- I submit Rimer LJ's approach could cause great problems – since the court could only quantify varied (or undefined) beneficial interests on the basis of actual common intention (be that express or inferred). However, there is little doubt that in the overwhelming majority of cases where the beneficial interests are undefined (e.g. (a) joint names cases where the presumption of equality is rebutted and (b) sole name cases where the claimant manages to cross the first hurdle of establishing an interest), this is because the parties did not have a shared intention as to their amount. It would be surprising if the court could not assist the parties by quantifying the varied amounts in those circumstances.

- However, the following paragraph of Rimer LJ's judgment suggests exactly that:

> [83] In my view ... the problem with the judge's decision is that there was no evidence (or none that he identified) from which he could draw an inference of an intention by the parties to agree that their beneficial shares should be other than equal, let alone any intention as to what such shares might be ...a decision for which the evidence, findings and reasoning simply provide no support.... he was also wrong to hold that it was for him to decide what a fair split in the beneficial ownership was, because as Baroness Hale explained in Stack, the parties must themselves have evinced their intentions as to that, either expressly or impliedly, whereas the judgment shows they had not; and she also made it plain at [61] that the imposition of a 'fair' solution upon the parties was not an option open to him.

- Rimer LJ expressly left open (at [85]) the possibility that J might seek compensation in regard of her expenditure by an equitable accounting exercise. By definition that is distinct from the issue of determining the beneficial interests.

Lord Justice Jacob:

- I will deal with the dissenting judgment more briefly. Jacob LJ ruled that the judge was not in error in finding that "[the parties'] intentions have altered significantly over the years". As to the judge's use of the criterion "fair and just" to quantify the varied interests, Jacob LJ accepted that might arguably be the wrong test if it were free-standing, as being inconsistent with the search for the parties shared intentions.

But, he said, the passage was not free-standing.

> [97] ... What he is saying in context is that the parties' shared intentions must be taken to be (they can be

"inferred" or "imputed") that they should each have a fair and just share. That is what the Deputy Judge also thought.

- He went on:

> [101] ... whether a shared intention can be inferred or imputed is, as Lady Hale makes plain, a multifactorial decision. It will depend not only on a number of primary facts but also on things like whether the judge, who has seen the witnesses, considers there was in effect a tacit agreement between them.
>
> [107-8] [Were the post 1993 facts] such a fragile basis for inferring or imputing a shared intention that after the split the parties' shares in the house were to be "ambulatory" (Lord Hoffman's phrase) that no Judge could reasonably have so concluded ?
> ...
> I think not.
>
> [109] if one asks oneself how did these matters come to be, it is not impossible to conclude that they did so by a shared intention that the parties' interests in the house were to vary over time, rather than that his interest as a proportion of the value of the house should remain fixed and immutable. It is possible to infer or impute such a shared intention. And the Judge, having seen and heard the parties was in a better position to decide the matter – and particularly the intentions of the parties – than we are.

(6) Synthesis

Lord Neuberger's Stack definitions of "inferred" and "imputed" seem to becoming the accepted ones for this area of the law.

It is tolerably clear that the majority in the Court of Appeal rejected the notion that an intention to vary existing beneficial interests may be imputed to the parties. Rather (in the absence of an express intention), the requirement is for cogent evidence sufficient to justify the inference of an intention to vary.

Kernott provides a striking example of the Stack presumption holding up against a history of post-acquisition conduct containing factors which could be prayed in aid of an intention to share unequally (especially when compared with the facts said to justify that inference in Stack).

It seems most unlikely that imputed intention may be allowed to play any role in establishing a beneficial interest under a common intention constructive trust.

The courts will continue to work out the boundaries of inference in this area (and see *Thomson v Humphrey* [2009] EWHC 3576 (Ch) for a recent, sole name case where the claim to a beneficial interest failed due to the irrelevance/insufficiency of the claimant's evidence. *James v Thomas* [2008] 1 FLR, CA and *Morris v Morris* [2008] EWCA Civ 257 were very broadly similar claims, which also failed).

More guidance would be welcome as to the manner of quantifying varied and undefined beneficial interests. Has *Oxley* been rejected? In particular, is imputation at all permissible and / or may the court do what seems fair, in the absence of a shared intention?

Kernott provides some assistance in interpreting Stack – but the process is likely to continue for years to come. Will the Supreme Court step in one day?

(7) Practice points

Even if it seems manifestly fair for the interests to be varied, judges will be loath to risk an appeal in the absence of evidence sufficient for them to base a finding of an intention to vary, be that express or inferred. *Kernott* shows this is a genuine hurdle.

Likewise, in sole name cases the evidence of the unentitled claimant must be clear and compelling in order to establish a beneficial interest by way of inferred common intention, in the absence of an express agreement, arrangement or understanding.

In both cases, be prepared to argue for a particular split (i.e.75:25, 66:33) and justify it by pointing to evidence. It may now be too dangerous to assume the court will take a broad brush to quantification.

Do not forget to plead proprietary estoppel, where arguable on the facts. Potentially relevant to both the establishment and variation of a beneficial interest, it depends on the owner's representations/assurances (by words or conduct) and the claimant's reliance – but not on a shared intention.

Do not forget equitable accounting, either. Although it will usually be less valuable than carving out a beneficial interest, it may be a great deal better than nothing – and may help to avoid an adverse costs order.

The Importance of Non-Legal Skills in Private Law Disputes Relating to Children: A Mediator's Perspective

Lisa Parkinson, a family mediator and trainer, responds to a recent article by Richard Gregorian and Gavin Emerson concerning the need for psychological insight when working with separating or divorcing parents.

Lisa Parkinson, family mediator and trainer

Richard Gregorian and Gavin Emerson – see their article: The Importance of Non-Legal Skills in Private Law Disputes Relating to Children including International Relocation ('Leave to Remove' Cases) – are not alone in recognising the need for psychological understanding and therapeutic insights in working with parents and other professionals involved in private law disputes relating to children. Twenty-five years ago, I joined five family lawyers in London in setting up a pilot project called "Solicitors in Mediation" to develop interdisciplinary co-mediation on all issues in separation and divorce. Arrangements for children following parental separation are often entangled with issues over the family home and financial arrangements.

Co-mediators from complementary professional backgrounds, a family law mediator teamed with a mediator from a psychotherapeutic background, helped separating and divorcing couples to deal with legal and non-legal aspects and to manage their often high levels of conflict in reaching consensual decisions. Our pilot project generated so much interest from fellow professionals and demand for training in interdisciplinary co-mediation that we founded the Family Mediators Association (FMA) in 1989. Many FMA mediators see co-mediation as the model of first choice and in some mediation services it is available free of charge to those qualifying for publicly funded mediation.

In emphasising the benefits of an interdisciplinary approach to family law issues, it is a pity that Richard Gregorian and Gavin Emerson confuse in-court conciliation by CAFCASS officers with the different process of out-of-court mediation by mediators from family law, social work and psychotherapeutic backgrounds. The authors base their arguments on Dr Liz Trinder's research on "The Longer-Term Outcomes of In-Court Conciliation" (April [2008] Fam Law). However, as the title of her research indicates, Dr Trinder studied in-court conciliation, not mediation, and the case for mediation is strengthened by her conclusion that "resources should be redirected towards creative work to improve parental and parent-child relationships, rather than repeated attempts at imposing a solution".

Although family mediation is a short-term process compared with counselling or therapy, the focus is not on achieving quick agreements in a short time, under the control of the court. Most mediations are undertaken before application to the court and one of the main aims is to facilitate dialogue between parents whose communication has often broken down and to help them reach joint decisions that take account of their children's needs and feelings, as well as their own. Limited public funding imposes time constraints and inevitably there are situations needing adjudication by the court and/or longer-term therapy, where mediation is unsuitable or ineffective. However, the National Audit Office found that mediation "secures better outcomes, particularly for children" (Review, March 2007). Other studies have shown that agreements worked out by the participants themselves in a private forum are more likely to last than decisions imposed on them with the authority of the court. Separated parents with a renewed ability to co-operate with each other are also more able to renegotiate their arrangements as their children grow up and circumstances change.

There have been some recent pilot schemes undertaken via the President's Private Law Programme and funded by the Legal Services Commission in which litigants in private law children matters have an opportunity to see a family mediator at court to find out about family mediation. If mediation is suitable and both parties are willing, they can arrange to take part in mediation out of court. Court proceedings can be adjourned to enable the mediation to take place. Although there is an occasional possibility of some brief mediation at court on urgent issues, these pilot schemes underline the distinction between conciliation via CAFCASS and mediation itself. Mediators across the country are awaiting publication of the results of the pilots. It is hoped that the findings will support the proposals in the recent Green Paper, "Support for All" (Department for Children, Schools and Families), requiring would-be applicants in family law proceedings to consider mediation before an application can be processed by the court. Although attendance at an initial information meeting would be compulsory, mediation is voluntary and confidential (unless there are child protection issues).

Family mediation can also provide opportunities for children and young people to be involved when appropriate and for their views and feelings to be taken into account by their parents. Mediators are required to have additional specialised training for child-inclusive mediation. Although there are few research studies so far, feedback from children and parents illustrates the benefits of listening to children during the mediation process, in contrast to the distressing case of *S (A Child)* [2010] EWCA Civ 219 described by Claire Brissenden in the recent issue of Family Law Week.

I fully support Richard Gregorian and Gavin Emerson's call for an interdisciplinary approach to family law issues, underpinned by psychological understanding. I hope they will accept that the shortcomings they refer to came from a study of in-court conciliation outcomes and not from mediation.

Pleading the Fifth Amendment – the privilege against self-incrimination

Sarah Lucy Cooper of Thomas More Chambers considers whether parties to family proceedings do have to answer every question or produce every requested document

Sarah Lucy Cooper, barrister, Thomas More Chambers

Introduction

To the outside world it may seem that family lawyers never need to concern themselves with the technicalities of evidence. However, as we know, the reality is rather different.

A fundamental tenet of civil litigation is that a party has the right not to incriminate him or herself and is not bound to answer any question if his/her answer would, in the opinion of the court, tend to expose that person to any criminal charge or penalty which the court regards as reasonably likely to be preferred.

Caselaw is clear that the consideration of whether a statement or admission might incriminate will be interpreted widely, providing the maximum protection for the potential witness – see *R v K* [2009] EWCA Crim 1640 at paragraphs 10-14 and *Rio Tinto Zinc Copn v Westinghouse Electric Corpn* [1978] AC 547, per Lord Denning:

> "if there is some risk of them [proceedings] being taken – a real and appreciable risk as distinct from a remote or insubstantial risk, then he should not be made to answer or to disclose documents."

This fundamental principle is reflected both in common law – *Blunt v Park Lane Hotel* [1942] 2KB 253 – and in decisions from the ECHR including *Heaney & McGuiness v Ireland* (2001) 33 EHRR 12 ECHR.

However, this right can be abrogated either expressly in the statute or by implication. This has important implications for the way that family proceedings are conducted if parties are forced to answer questions and to provide documentation.

It is important also to consider the penalty for a refusal to answer a question in cases where there is no privilege against self-incrimination – see for example *Re O (Care Proceedings: Evidence)* [2004] 1 FLR 161 in which Johnson J held that where a party refuses to answer questions the court should usually draw inferences that the allegations are true. A refusal to answer a question or provide a document is, of course, also a matter of contempt.

Fear of Foreign Proceedings

In any case the privilege against self-incrimination does not extend to proceedings overseas, ie fear of proceedings being brought in a foreign country - see s14 Civil Evidence Act 1968.

This principle of law has been affirmed in two recent cases. In *JSC BTA Bank v Ablyazov & others* [2009] EWCA Civ 1125 the Court of Appeal refused to allow a party not to disclose information on the grounds that such information might be used by prosecuting authorities in Kazakhstan. The Court of Appeal concluded that "in relation to self-incrimination with respect to proceedings abroad, there is no entitlement to privilege". See in particular the forceful comments by Sedley LJ:

> "[H]ow has an exclusionary rule designed to promote justice by preventing the use of torture or pressure to extract confessions become transmuted into a personal right which is able to defeat the ends of justice?" [para 35]

> "The fact that the claimants have been driven to offer this unsatisfactory form of confidentiality as a foil to the privilege against self-incrimination is another reason for concern as its expansion from a protection against state oppression into a fraudster's refuge." [para 42]

The Court of Appeal, albeit in bankruptcy proceedings, took the same approach in *Rottman v Brittain* [2009] EWCA Civ 473. Fear of prosecution in Germany was not a reason for a refusal by a bankrupt to answer questions at public examination. However, the Court of Appeal did decide that the hearing should be held in private.

Family Proceedings

(a) Public law cases under the Children Act

In public law cases there is no privilege against self incrimination.

The Children Act 1989 in section 98(1) provides in terms that, in relation to Parts IV and V [ie respectively Care and Supervision, and Protection of Children], no person is excused from giving evidence on any matter, or answering any question put to him during the course of his evidence, on the ground that to do so might incriminate him or his spouse or civil partner in an offence.

The other side of the coin is that pursuant to section 98(2) such statements or admissions "shall not be admissible in evidence against the person making it, or his spouse or civil partner in proceedings for an offence other than perjury". This is the clearest example of an express provision abrogating the privilege against self-incrimination.

However, as to the scope of the s98(2) protection against criminal prosecution, sadly it does not in fact "do what it says on the tin" . Section 98(2) does not provide an absolute guarantee that there will not be consequences in the criminal context arising from such a disclosure in the civil proceedings. Caution must therefore be used before advising clients, and no judge in the family proceedings can or should give a guarantee of confidentiality to a party.

It is also important that clients are aware of the limitations of s98(2) when speaking to anyone involved in a public law case as caselaw is unclear which types of disclosures are

covered by the s98(2) protection and which are not. See, for example, the following cases which take different views on disclosures to social workers, guardians, experts etc:

* *Oxfordshire County Council v P* [1995] 1FLR 552: protection extends to statements made to guardian in advance of care proceedings,

* *Cleveland County Council v F* [1995] 1FLR 797: protection extends to statements made to social workers investigating a child protection case at least once the proceedings have begun,

* *Re AB (Care Proceedings: Disclosure of Medical Evidence to the Police)* [2003] 1LR 161: disclosures to expert witnesses given same protection as to guardian,

* *Re K and Others (Disclosure)* [1994] 1 FLR 377: Booth J expressed a narrower view "provided protection to a witness who is required to give evidence in relation to a child when such evidence could incriminate his or her spouse",

* *Re G (Social Worker Disclosure)* [1996] 1 FLR 276: Butler Sloss LJ doubted that Oxfordshire CC and Cleveland CC cases correctly decided and considered them too wide and that social workers are not in the same position as guardians.

Prosecution still possible

A crucial case is that of *Re EC (Disclosure of Material)* [1996] 2 FLR 725 in which it was decided that transcripts of an admission made by a father could be disclosed to the police who would be free to use them for questioning him. The s 98(2) protection extended only to statements being admissible in evidence in criminal proceedings and not to police enquiries. This has a particularly significant impact in the light of the recent Criminal Justice Act 2003 s119. The CJA 2003 s119 provides that a previous, inconsistent statement by a witness which is put to him in criminal proceedings is now admissible as evidence of any matter stated of which oral evidence by him would be admissible. In practice this means that in cases in which the police are given transcripts of admissions made in family proceedings and then interview defendants using those transcripts, the defendant could be cross-examined on the same in the criminal trial. Of course, there could still be arguments as to the admissibility of the interviews within the criminal proceedings.

In addition, it is vital to realise that any argument as to fairness in relation to the admissibility of previous, inconsistent statements would be modified if there were a co-defendant. Such statements are much more likely to be admitted if a co-defendant so desires.

The upshot is that s 98(2) is a very leaky sieve indeed.

(b) Ancillary relief

The leading case is now *R v K* [2009] EWCA Crim 1640, which despite being a criminal case was decided by a Court of Appeal including Mr Justice Holman from the Family Division. It is highly relevant to all family practitioners and has changed the law dramatically from what practitioners had understood the position to be in ancillary relief claims.

Prior to *R v K*, it had been assumed on the basis of *A v A* [2000] 1 FLR 701 that ancillary relief claims fell into the category of other civil proceedings, namely that there was an absolute right not to incriminate oneself and that equally therefore what was said/done in an ancillary relief claim could have criminal repercussions later down the line. Although strictly obiter, Mr Justice Charles in *A v A* said:

> "In my judgment correctly it was not argued before me that the privilege against self-incrimination had been removed in respect of proceedings for ancillary relief, and it follows, that, as is generally the case in relation to the disclosure of material in civil actions and notwithstanding the duty to make full and frank disclosure therein (see Jenkins v Livesey [1985] 1 AC 424), parties to ancillary relief proceedings can assert the privilege. If this was not the case it would be a factor in the decision-making process as to further disclosure."

The Court of Appeal has radically departed from this view, ruling in terms that given the nature of s25(1) MCA and the nature of the discretionary exercise that a court has to embark on, namely an assessment of the information to which the court must have regard under s25(1), that there can be no privilege against self-incrimination.

The case involved H who in his Form E, Questionnaire, open negotiations and without prejudice negotiations had made certain admissions which tended to incriminate him in relation to tax evasion. The Form E and Questionnaire were later supplied to the Inland Revenue by "an informer".

Lord Justice Moore-Bick, having considered s25 and the wording on a Form E, stated at paragraph 31:

> "The fact that a party is compelled by rules of court to disclose information and documents does not of itself abrogate the right privilege against self-incrimination. On the contrary, a party to civil proceedings who is required to give disclosure pursuant to CPR part 31 is entitled on that ground to withhold production of documents that tend to incriminate him. Moreover, the Family Proceedings Rules do not expressly exclude the privilege, so in the absence of other considerations it would be difficult to argue that they had achieved such a significant result. The argument in the present case, however, is, and must be, that the rules, which are contained in secondary legislation and have the approval of Parliament, must have been intended to have abrogated the privilege, since the court could not discharge the duty imposed on it by section 25 unless the parties were required to disclose all relevant information, even if tending to incriminate them. In our view that argument is well founded...it would be impossible for the court to discharge its duty under section 25 of the Act if it were deprived of the information on which it is required to act. For these reasons we are satisfied that parties to such proceedings are not entitled to invoke privilege against self-incrimination in order to withhold information."

Further along in the judgment the Court of Appeal makes clear that this abrogation of privilege in the ancillary relief proceedings does, of course, carry benefits as far as the criminal proceedings are concerned as any statements obtained under compulsion [which included Form Es, Questionnaires, comments made at open meetings ....] could not be used in criminal proceedings:

> "[T]he use of the admissions made by K in the ancillary relief proceedings would deprive K of the right to a fair trial to which he is entitled under Article 6 of the ECHR and must therefore be excluded by the judge ...." [para 43]

The court also made clear that in relation to the admissions made in the open meeting these could also not be used as they provided orally information which should otherwise have been in the Form E and/or Questionnaire. Clients need therefore to understand that prior to embarking upon an application for AR that they will be required by the court to "come clean".

The court did however decide that, given that the without prejudice statements were not made under compulsion but rather to advance negotiations, there was no reason why in principle they could not be relied upon by the Inland Revenue for a prosecution as:

> "[T]he public interest in prosecuting crime is sufficient to outweigh the public interest in settlement of disputes." [para 72]

(c) TOLATA – cohabitation claims

One might assume that in such a case, governed by the CPR, the right not to incriminate oneself is retained as there is no duty on the court to enquire into the assets comparable to that under s25 duty.

CPR 31.3 provides that:

> " a party to whom a document has been disclosed has a right to inspect that document except where-
> (b) the party disclosing the document has a right or a duty to withhold inspection of it".

One of the grounds for asserting a right to withhold inspection is that of the privilege against self-incrimination. So far, so good. However, the Fraud Act 2006, brought into force on January 15th 2007, provides at section 13 that:

> "(1) A person is not to be excused from –
>
> (a) Answering any question put to him in proceedings relating to property, or
> (b) Complying with any order made in proceedings relating to property,
>
> on the ground that doing so may incriminate him or his spouse or civil partner of an offence under this Act or a related Act.
>
> (2) but in proceedings for an offence under this Act or a related offence, a statement or admission made by a person in –
>
> (a) answering such a question, or
> (b)complying with such an order,
>
> is not admissible in evidence against him ....
>
> (3)"Proceedings relating to property" means any proceedings for-
>
> (a) the recovery or administration of any property,
> (b) the execution of a trust
>
> (c) an account of any property or dealings with property,
> and property means money or other property whether real or personal (including things in action and other intangible property).
>
> (4)"Related offence" means-
>
> (a) conspiracy to defraud,
> (b) any other offence involving any fraudulent conduct or purpose."

Since this would seem to cover any TOLATA proceedings, again the right to assert any privilege against self-incrimination has been expressly abrogated. Importantly s13 of the Fraud Act 2006 is retrospective in effect in the sense that in future proceedings it applies to events before the Act came into force as well as those afterwards – see *Kensington International v The Republic of Congo* [2007] EWHC 1632 [Comm].

(d) Children Act section 8 cases, ie private law

An interesting issue arises in relation to private law Children Act proceedings, in particular in relation to fact finding hearings.

Section 1 (3) of the Children Act says:

> " a court shall have regard in particular to ....
>
> (e) any harm which he has suffered or is at risk of suffering ...."

See also the Domestic Violence Practice Direction 14th January 2009 para 3:

> "the court must at all stages of the proceedings consider whether domestic violence is raised as an issue, either by the parties or otherwise."

And at para 5:

> "In considering, on an application for a consent order for residence or contact, whether there is any risk of harm to the child, the court shall consider all the evidence and information available."

It is a moot point as to whether the combined effect of s1 and the DVPD confers a duty analogous to the s25MCA duty of the court to enquire into the circumstances pursuant to R v K. Arguably there is such a duty, in which case there is no right to privilege against self incrimination and a client cannot refuse to answer questions or to provide documentation.

Conclusion

Whilst the privilege against self incrimination appears to be all but dead and buried in most areas of family law, there is never any guarantee that prosecution will not follow using material derived from the very same family proceedings. Clients need to understand that they now may well be stuck between a rock and a hard place.

Family Law Week's Budget Briefing

Changes to CGT and VAT impact on family lawyers

Vanessa Hamer, Tax Director, RSM Tenon

Chancellor George Osborne's emergency Budget lived up to expectation, in that the main emphases were reductions in public spending, together with a general increase in taxes.

Family lawyers will be concerned by the increase to clients' fees resulting from a 20% VAT rate. They will also be braced for cuts in children's services as a result of the proposed reduction of the public sector budget. This is also likely to have an impact on Government IT projects including preparations for the introduction of the Family Procedure Rules. An increase to the rate of CGT will also be factored into calculations on divorce if assets need to be sold in order to fund a settlement. The detail is set out below.

VAT and IPT

Although widely predicted, the increase in the standard rate of VAT from 17.5 - 20% was probably the most unwelcome change in the current Budget. Whilst it was expected that the increase would take immediate effect, the Chancellor announced that the increase would be delayed until 4 January 2011, although anti-forestalling measures will apply to transactions occurring between 22 June 2010 and 4 January 2011.

In addition, the Chancellor announced that the standard and higher rates of IPT would also increase from 4 January 2011. The new rates would therefore be 6% and 20% for standard and higher rate IPT respectively.

Capital Gains Tax

The increase to the rate of capital gains tax for higher rate taxpayers, whilst expected, still held the surprise of taking effect from 23 June 2010. Any gains realised by a higher rate taxpayer after Budget day will therefore be taxed at the rate of 28%, rather than the pre-budget rate of 18%. For basic rate taxpayers, the new 28% rate will only apply if the total taxable income and gains after allowable deductions exceed the basic rate income tax band. In this instance a basic rate taxpayer will pay tax at 28% on the element of the gain that exceeds the basic rate threshold. The Chancellor further announced that the capital gains annual exemption would remain at £10,100 for the current year.

Better news was available for entrepreneurs, with the announcement that the lifetime limit on gains qualifying for entrepreneurs' relief will increase from £2 Million to £5 Million with effect from 23 June 2010 and the 10% effective tax rate will be maintained for both basic rate and higher rate taxpayers.

Capital Allowances

Whilst the Chancellor was keen to emphasise the support for businesses in the budget, one policy change where this was not seen was in relation to capital allowances, where both the Annual Investment Allowance and rate of Writing Down Allowance will decrease. Currently businesses are eligible to claim 100% tax relief on qualifying capital expenditure of up to £100,000 per annum. This allowance, known as the Annual Investment Allowance, will decrease to £25,000 of qualifying capital expenditure per annum with effect from April 2012. With effect from the same date, the standard rate of writing down allowance will reduce from 20% to 18% per annum and the writing down allowance applicable to long life assets will reduce from 10% to 8% per annum, thereby delaying the tax relief available on the purchase of qualifying capital equipment.

Although the Budget contained significant tax increases, there were also a number of significant tax decreases announced including a reduction in the standard and small companies' rates of corporation tax, an increase in the personal allowance to benefit basic rate taxpayers and an increase in the secondary National Insurance threshold for employers National Insurance contributions.

Corporation Tax

The Chancellor announced that it was his intention to make the UK more attractive to inward investment and he believes the key to this is through lower corporate tax rates. With effect from 1 April 2011, the main rate of corporation tax will decrease by 1% to 27% and, for each of the following three years, the rate would be reduced by a further 1% giving a mainstream corporation tax rate of 24% by 1 April 2014.

For small companies, where annual taxable profits are less than £300,000, the rate of corporation tax applicable on their profits will decrease from 21% to 20% on 1 April 2011.

Personal Allowance

With the emphasis on benefitting those most in need, the personal allowance will increase from the current rate of £6,475 - £7,475 from 6 April 2011. However the Chancellor was keen to state that the increase would only benefit basic rate taxpayers, with a corresponding reduction being applied to the basic rate limit to ensure that higher rate taxpayers do not also receive the benefit of this uplift in the personal allowance.

National Insurance

To encourage job creation, the Budget contained a number of National Insurance savings for employers. This includes an increase to the secondary threshold, which is the point at which employers start to pay Class 1 National Insurance by an extra £21 per week above indexation from April 2011 and a reduction in employers' National Insurance contributions of up to £5,000 per employee for new employers in targeted regions for the first 10 jobs that they create in their first year of business.

Other Measures

The Chancellor was keen to announce that tax increases were only part of his strategy for the five year life of this parliament and the country's economic recovery. In addition to the increased tax revenues, George Osborne announced that there will be spending reductions of £31.9 Billion a year by 2014 - 15. Of this saving, £29.8 Billion will be derived from cuts in the public sector current

expenditure, with the remainder coming from public sector gross investment.

Public Sector

For public sector employees, the Chancellor announced that there would be a two year pay freeze for all employees with income in excess of £21,000 per annum. Those employees on less than £21,000 per annum would receive modest increases of £250 per year.

Welfare Reform

Pensions

The measures announced for welfare reform included good news for pensioners, where the basic state pension will increase by at least 2.5% from April 2011.

Tax credits

However middle income families will be hit by the reduction in tax credit eligibility for families with income in excess of £40,000 (down from £50,000) from April 2011. Several further changes were announced in respect of the tax credit system that will have an impact on low income families. These included an increase in the child element of the Child Tax Credit of £150 above the Consumer Price Index (CPI) from April 2011 and the removal of the baby element of the Child Tax Credit on that date.

Child benefit

Families were also targeted by the freezing of the rates of Child Benefit for three years from 2011-12. Although this measure would affect low income families, the Chancellor considered that a freezing of the current rates for all families was the simplest method of maintaining the current cost of Child Benefit.

Housing benefit

Housing Benefit is also to be reviewed, with the Chancellor proposing the introduction of payment caps based on the number of bedrooms of the property. For the largest properties, with four or more bedrooms, a cap of £400 per week will be introduced to ensure that the escalating cost of housing benefit is curtailed.

Pensions

Further changes were announced to the tax relief available on pension contributions made by the highest earners (income in excess of £150,000 per annum). These changes will take effect from April 2011, where the restriction on relief will be achieved through a reduction in the Annual Allowance rather than the current proposal of a claw back of the higher rate income tax relief.

The Chancellor has also announced the Government's intention to end the effective requirement to buy an annuity by the age of 75 from 2011 / 12. Legislation will also be introduced in the Finance Bill to increase the age from 75 to 77 by which members of registered pension schemes have to buy an annuity or otherwise secure pension income.

CASES

Oxfordshire County Council v X, Y & J [2010] EWCA 581 Civ

Appeal against an order requiring, against their wishes, the adopted parents of a child to send to the child's natural parents an annual photograph. Appeal allowed.

J was the subject of an adoption order. J's natural parents wished to receive an annual photograph of J from the adoptive parents. The adoptive parents, supported by the Local Authority and the Guardian, contended that the annual photograph should be made available for the natural parents to view at the Local Authority's offices. The adoptive parents feared that the natural parents would abuse the photograph facility to use the internet to trace J. HHJ Corrie accepted the adopters' concerns and perceptions were genuine but decided in favour of the natural parents.

Lord Neuberger of Abbotsbury, MR, giving the judgment of the court, considered that this "narrow issue" raises the "delicate question of how far the court can or should go in imposing on adoptive parents obligations which they may be reluctant to assume voluntarily".

Lord Neuberger states the task of the judge:

> "was to come to a decision applying the welfare checklist in s1(3) Children Act 1989 but always bearing in mind the jurisprudence as explained in *Re R (adoption: contact)* [2005] EWCA Civ 1128,]"

In particular in Re R, Wall LJ's decision,"that the imposition on prospective adopters a contact order which they are not in agreement with remains extremely unusual".

In assessing the fears of the adoptive parents the essential question for the court was whether the adoptive parent's fear of such a risk was unreasonable in the sense that it had no reasonable basis. It was not the judge's position to answer this fear with his own assessment of the risk. This is because "there is no dichotomy between the fears of the adoptive parents and their sense of security and the welfare of their daughter". Therefore:

> "absent any finding that there was no conceivable risk, the fear of the adoptive parents was the factor which ought to have compelled the conclusion that the natural parents should not be given the photographs"

In these circumstances there was no proper basis for taking the extremely unusual step of imposing an order on the adoptive parents. The appeal was allowed and the order discharged.

Per curiam:
HHJ Corrie held that the natural parents had Article 8 rights which entitled them to the order. The Court of Appeal did not decide, or assume, that the natural parent's had such rights post the making of an adoption order.

Lord Neuberger emphasised in the "strongest possible terms" that when two parties have the same interest and support the same outcome, absent an unavoidable conflict of interest, careful consideration should be given to the question of whether those parties should have separate representation, particularly at public expense.

Summary by Ayeesha Bhutta, Barrister, Field Court Chambers.

CMEC v Forrest [2010] EWHC 1264

Appeal by way of case stated from a decision of justices to acquit on a charge of failure to comply with an information request under s. 14A (3) Child Support Act 1991. Held: Appeal allowed. The justices had come to an unsustainable conclusion. Once the claim had been substantiated the justices had been wrong to find that protecting another from the possibility of facing criminal charges could constitute reasonable excuse for failure to provide the information requested.

This appeal was by way of case stated from the decision of the justices sitting in Llandudno in May 2009 when they acquitted Mr Forrest on a charge of failure to comply with a request for information under Section 14A (3) of the Child Support Act 1991 ("the Act"). They acquitted him on the basis that he had a reasonable excuse for not providing that information.

The question by way of case stated was whether the defence of self incrimination or protecting another from the possibility of facing criminal charges could, in principle, be capable of constituting a reasonable excuse within the meaning of section 14A(4) of the Act.

The finding of the justices was that the concept of reasonable excuse under section 14A of the Act was capable of embracing the principle of protecting oneself or a third party from incrimination.

It was held by the appellate court that the justices had arrived at an unsustainable conclusion. First, as a matter of statutory construction, Parliament has provided the defence in only part of the statute, being section 15(7), and not provided the same defence in section 14. Second, the construction adopted by the justices was unsustainable as a matter of authority: *R v Hertfordshire County Council ex p Green Environmental Industries* [2000] 2 AC 412: if answers are potentially incriminating then that may justify the information not being adduced in evidence at any subsequent criminal trial, but it does not justify the information not being provided to the relevant authorities. Thirdly, there is a public interest in ensuring that fathers pay the appropriate maintenance to their spouse or partner and their children. That is the purpose behind the requirement for the information.

The respondent contended that the situation in this case could be distinguished on grounds that these were essentially private matters between the father and the mother and children. The court did not accept this and reiterated the important public benefit that is derived from ensuring that fathers meet their obligations in this way. The respondent also submitted that there may be circumstances where children would be adversely affected if the consequence of the father giving information was to lead to the prosecution of the mother. The court rejected those

submissions stating that in most cases it is greatly to the benefit of children that the information is provided.

The matter was sent back to the justices but without a direction to convict because there may be a further defence to consider.

Summary by Richard Tambling, barrister, 1 Garden Court

SA v KCC [2010] EWHC 848 (Admin)

Judicial review proceedings brought on behalf of 15 year old by her grandmother as her litigation friend against the local authority. The proceedings concern the status of A and whether A was a child in need or a looked after child.

The local authority had been treating A as if she were a child in need by providing services under section 17 of the Children Act 1989 (the Act). A's case was that she is a looked after child as under section 22 of the Act. A change in status would provide additional financial benefits and require the local authority to safeguard and promote A's welfare generally.

A and her mother were known to the local authority from September 2003. The mother had mental health problems and had been involved in a number of violent relationships including one with A's father. Core assessment started in late 2004 and completed in early 2005. At the time of the assessment the mother and father had split up. A was staying with the father's then-partner. A's parents were unable to care for her. The grandmother was 58 in 2004. She was approached by the local authority in late 2004 while she was at work. Very quickly thereafter A moved to the grandmother's home in late 2004. The local authority made all of the approaches to the grandmother and were central in making arrangements for A to live with her. Even though the local authority approached other potential carers, they continued to be heavily involved in supporting A's placement with the grandmother until 2006 when they no longer kept in contact with the grandmother or A.

A is not a child in the local authority's care and therefore the question to be answered is whether A's accommodation with her grandmother is accommodation "provided … by the authority in the exercise of any [relevant] functions."

Considering section 23 of the Act, *London Borough of Southwark* [2007] EWCA Civ 182 and the correct approach to be adopted and noting that A was not a privately fostered child: Black J concluded that despite presence of the grandmother, the local authority was not able to side-step its duty under section 20(1) of the Act and it was discharged by a placement under s 23(2) of the Act. The judge also concluded that local authorities arranging for children to live with relatives may do so under either s 23(2) or s 23 (6) of the Act depending on the facts.

There was considerable delay in bringing the judicial review proceedings (June 2009) by A and the grandmother but this was held not to have been prejudicial to the local authority. It was correct to only backdate the declaration and order by three months and to grant a declaration that A is and has been at all times whilst in the care of the grandmother a looked after child.

Summary by Richard Tambling, barrister, 1 Garden Court

ES v AJ [2010] EWHC 1113

Application by a mother for the return of her twin children from Cameroon to England and Wales.

An application in wardship proceedings for an order that the children be returned to the jurisdiction of England and Wales and the care and control of the Plaintiff mother. The application concerned twin children born in late 2007 who at the time of the application were living in the care of the paternal grandmother in the Cameroon, West Africa.

The parents had undergone a customary marriage in Cameroon and a civil ceremony in England in early 2007, before the twins were born. The mother alleged domestic violence and asserted that she had been bullied and controlled by the father and abused by the paternal grandmother during the relationship. In November 2008 the children, who had British passports obtained by the father, went to live in Cameroon. They were accompanied by the paternal grandmother and had lived in Cameroon ever since. It was common ground that until their removal the children were habitually resident in England and Wales. In July 2009 the mother gave birth to a third child, although by this time the parties' relationship had broken down and the mother was living in a refuge. It was common ground that the father had no relationship with this child and doubted his paternity.

In mid to late 2009 the mother sought legal advice and was informed by her solicitors that the Foreign and Commonwealth Office could not assist in securing the twins' return. She was further informed by the LSC that her application for public funding had been refused on the basis that she should pursue her application in Cameroon.

The mother made her application in April 2010, some 18 months after the children had travelled to Cameroon. The mother argued that the children had been wrongly removed in November 2008 and had therefore never lost their habitual residence in England and Wales.

The father asserted that the mother had agreed to the removal and the children were habitually resident in Cameroon; in any event, the children had been in Cameroon for such a length of time with the mother's acquiescence that even if they were habitually resident in England and Wales the court should exercise its jurisdiction to refuse a return.

Held, giving judgment on the preliminary issue in relation the children's habitual residence and dismissing the mother's originating summons:

1. Habitual residence is a question of fact, as is the question of whether the children had lost their habitual residence: finding therefore:

a) that the mother had agreed to the removal of the children in November 2008, although the agreement was open-ended and there was no fixed date for the twins' return;

b) that the children were currently habitually resident in Cameroon, having acquired that habitual residence in the time they had been in Cameroon.

2. Even if the court was wrong on the habitual residence point, it would in any event not exercise the discretion to order a return due to (i) the length of time the children had spent in Cameroon and (ii) the mother's failure promptly to pursue the remedies open to her, which failure was not wholly the result of bad legal advice.

Summary by Stephen Jarmain, barrister, 1 Garden Court Family Law Chambers

H v Mitson & Others [2009] EWHC 3114

Appeal and cross appeal in proceedings under the Inheritance (Provision for Family and Dependants) Act 1975 (the 1975 Act). The court considered whether the failure of a mother to make any provision for her adult daughter from whom she had been estranged for 26 years was reasonable provision under the Act.

J died in 2004 leaving the entirety of her estate, which amounted to £486,000, to various charities under a will which was executed in April 2002, together with a letter explaining her wishes.

J had one surviving child, H, and no other dependents. J had become estranged from her daughter in 1977 when H began a relationship with N, of whom J strongly disapproved. H and N later married and have five children of their own whose ages at the date of appeal ranged between 11 and 25. H's financial circumstances were limited. H had not been supported financially or otherwise by J since 1977, and had always known that J did not make any provision for her in her will. Although there were three attempts at reconciliation between J and H during the 26 year estrangement, this had never been sustained. The district judge had held that the "the rejection by the mother of her only child was unreasonable and that this has led her unreasonably to exclude her daughter from her will despite her needy circumstances." Flowing from this finding, the court held the failure to make provision to be unreasonable and ordered a payment of £50,000 to be made to H from J's estate. H appealed the order on the basis that the quantum was insufficient. The charities cross appealed on the basis that no provision was a reasonable provision in the circumstances of the case.

The cross appeal was allowed. Mrs Justice King found that the district judge had allowed his criticism of J's unforgiving approach to H to dominate his thinking, and as a result he had failed to take into account all the relevant factors set out in s.3 of the Act. In particular he had placed disproportionate weight on H's limited financial means, and had not placed any weight on the fact that she had no expectations from the will.

The court found that there was a two stage process, first the court has to determine whether the will made reasonable provision, and only if the answer to that question was negative could it go on to consider what alternative provision should be made. *Espinosa v Bourke* [1999] 1 FLR 747, was considered, but distinguished on the basis that in that case the adult child had been wholly dependent upon the deceased, and upon his death had lost all her meagre sources of income.

At paragraph 49 of her judgment Mrs Justice King provides a useful analysis of the relevant case law, which whilst not providing a definitive list should, be borne in mind in this type of case.

Summary by Ruth Cabeza, barrister, Field Court Chambers

Fisher-Aziz v Aziz [2010] EWCA 673

Ancillary relief. The significant issue at trial and on the first and second appeal was whether the former matrimonial home ought to be transferred into the occupier wife's sole name in preference to sale and receipt of the proceeds of sale. Appeal allowed.

Both the wife and husband sought transfer of their most recent matrimonial home into their sole names. There was a charge on this property in favour of a bank which guaranteed the husband's business borrowings.

The trial judge refused to transfer the property into the wife's name because it was impracticable without the wife having the means to pay the mortgage. The judge refused to transfer the property to the husband because it would have deprived the wife of her entitlement to it. Instead the judge ordered a sale and gave clear directions for the conduct of sale and discharge of the proceeds. The husband was required to pay the mortgage pending sale and was prevented from extending the charge in favour of the bank to guarantee his business borrowings beyond a fixed ceiling to protect the equity.

Black J upheld the trial judge recognising the sale of the property was essential given the scarcity in resources in the case and the pressing need for the parties' debts to be discharged so that there would be an income and a business for the future.

The Court of Appeal was unanimous in allowing the appeal. As a matter of general principle, if the wife in occupation of the matrimonial home (having primary regard to the interests of the children) seeks the transfer of the property, in preference to the proceeds of sale of the property, she should ordinarily succeed, providing of course she can secure the release of the co-owner from the mortgage or charges attached to the property. As to impracticability, it was a risk that the wife should be allowed to run if she was keen to run it. As to scarcity of resources, the sale or retention of the home would make no difference either way since no part of the proceeds was going to be available to give sustenance in the overall financial structure.

Summary by Alfred Procter of 1 Garden Court

P (A Child) [2010] EWCA 672

Care Proceedings. Whether it is open to a judge conducting a fact finding hearing in Children Act proceedings to make a finding in general terms that it is probable a party has behaved towards and touched a child in an inappropriate sexual manner. Appeal dismissed.

The subject children, E and D, are daughters of RP and LJ. LJ disqualified herself from the care of the girls and took no further part in the subsequent litigation. RP was the chosen carer when LJ failed. However, he too in turn failed when there was an investigation of injuries suffered by the children, leading to a finding that they had suffered physical abuse at the hands of their father.

The girls were then placed in foster care and it was in that household that the girls, and particularly E, began to say worrying things suggestive of inappropriate sexual activity by the father. The foster mother kept a diary of these events whilst the children were in her care. The local authority sought findings and their schedule set out very specific findings and also a finding in very general terms as follows:

> "In the circumstances it is probable that the second respondent has behaved towards and touched E and/or D in an appropriate sexual manner."

The father was steadfast in his denial of any inappropriate behaviour.

The trial judge acknowledged the following: a question mark over the accuracy of the memory of a child of her age recalling events many months before; no concerns about E's supervised contact with her father and her behaviour at Nursery; that E had been contradicted by D on one or two recorded occasions; and E had attributed 'soreness' to her father when she had not seen him for some time.

The trial judge found the father untruthful in his explanations for missed contact which left the judge unable to place confidence in his evidence. The judge found several particular descriptions made by E alien to a child of her age who had not been exposed to inappropriate sexual activity. To ignore this evidence would be shutting one's eyes to the obvious. However, to make specific findings that certain sexually abusive behaviour took place, given the weaknesses in the evidence, ran the risk of applying an adult interpretation too literally. The judge was driven to the middle ground of being persuaded that the father had been guilty of sexually inappropriate behaviour involving E without being able to say with any confidence that it was more than sexually motivated touching.

On appeal it was argued on behalf of RJ that if the evidence was not good enough to warrant any specific finding the judge could not then, on precisely the same evidence, damn the father in generalised terms.

The Court of Appeal dismissed the appeal unanimously. The trial judge had given a very carefully structured judgment that explained why he was not prepared to go all the way with the local authority to the acceptance of the specific but was satisfied that the lower case was proved. The judgment was specific in recording a judicial finding which was clearly open to the judge on the reliable account of the foster mother and the low credibility rating of the father.

Summary by Alfred Procter of 1 Garden Court

Re AR (A Child: Relocation) [2010] EWHC 1346

Mother's application for leave to permanently remove a five-year old child to France and father's application for residence (subsequently amended to application for shared residence). A shared residence order was made and the mother's application for leave to remove to France was refused.

Applications (i) by a mother for leave to permanently remove a five-year old child, A, to Troyes in France and (ii) by a father for residence of A (application subsequently amended to seek shared residence). The mother was French and the father English. A had only French nationality. The father had PR by virtue of being named on A's birth certificate.

This was the mother's second application for leave to remove to Troyes, her application in August 2008 having been granted by District Judge Segal but not properly taken up by the mother. Unbeknown to the district judge, at the time of the hearing in August 2008 the mother was in fact pregnant again by the father (although that pregnancy ended in miscarriage shortly afterwards). The mother did travel to Troyes with A in September 2008 but the indications were that the relocation was not intended to be permanent. In January 2009 the mother applied for a one year post-graduate course in London which she took up in August 2009, since which time the mother had not returned to France.

Mostyn J considered the authorities including *Poel v Poel* [1970] 1 WLR 1469, *Payne v Payne* [2001] 1 FLR 1052, *Re C (Abduction: Residence and Contact)* [2006] 2 FLR 277, *Re G (Leave to Remove)* [2008], *Re D (Children)* [2010] EWCA Civ 50 and *Re H* (Lawtel 19/5/10), and commented on the recent Washington Declaration on International Family Relocation (March 2010) describing it thus:

> "The Declaration supplies a more balanced and neutral approach to a relocation application, as is the norm in many other jurisdictions. It specifically ordains a non-presumptive approach".

The learned judge commented on the absence within section 1(3) of the Children Act 1989 of any express reference to the impact on a parent of the making or otherwise of a s8 order and stated that:

> "In my view (for what it is worth) a review of the ideology of Poel/Payne by the Supreme Court is urgently needed, where the "emerging body of significant research in various jurisdictions" would be brought into account"

Held, making a shared residence order and refusing the mother leave to remove to Troyes:

1. A shared residence order is nowadays the rule rather than the exception, even where the quantum of care undertaken by each parent is decidedly unequal;

2. If one were to draw up a hierarchy of human rights protected by the ECHR, near the top would be the right of a child, while he or she is growing up, to have a meaningful participation by both of his parents in his upbringing;

3. On the facts and on the application of Payne v Payne and the paramountcy principle, M's application for permission to relocate is refused.

Summary by Stephen Jarmain barrister, 1 Garden Court chambers

AA v NA and Kab [2010] EWHC 1282

Appeal against a fact finding decision arising in private law residence and contact proceedings. Appeal allowed.

The parents were involved in private law residence and contact proceedings concerning their three children. A fact finding hearing was listed to determine cross allegations of domestic abuse, violence towards and poor care of the children. The court considered 31 allegations made by the father against the mother and 49 allegations made by the mother against the father. Following a 17 day hearing, conducted over nine months, the district judge provided judgment in draft form, followed by an amended draft judgment and then an amended finalised judgment in which he found in the mother's favour on all 89 allegations. He proceeded to make an interim shared residence order, effectively by consent, and listed the matter for a disposal hearing with a time estimate of ten days.

The Father appealed against the findings of fact and sought a re-hearing. On appeal Mostyn J considered the purpose of fact finding hearings within private law proceedings and stated that such a 'hearing should only be ordered if the court considering setting one up can discern a real purpose for such a hearing, If the inquiry would not be purposeful then one should not be ordered.'
The test to be applied on appeal was whether the judge at first instance was plainly wrong.

Mostyn J said that would only be held if:

(i) His conclusion was demonstrably contrary to the weight of the evidence, or
(ii) The decision making process can be identified as being plainly defective so that it can be said that the findings in question are unsafe.

I would include in the second category errors of principle as to, say, the burden or standard or proof, or a failure to take into account well-established principles as to the weight to be given to proven lies or litigation misconduct in reaching the factual findings.'

Mostyn J identified three errors in the judgment which rendered it unsafe:

1)As to the assessment of credibility generally
In assessing the credibility respectively of the mother and father, the district judge placed 'considerable reliance' on an allegation that the father, having procured statements from some witnesses, made a plot to prevent them giving live evidence. Mostyn J questioned whether he was right to attach such reliance to this issue and so far as litigation misconduct is concerned stated:

'If a party has behaved reprehensibly in his conduct of litigation it may well be as a result of a fierce determination to win, no more. It does not follow at all that litigation misconduct inevitably demonstrates intrinsic mendacity on the primary issues for adjudication.'

The district judge had failed to rationalise or analyse why this litigation misconduct by the father informed a general finding of overall mendacity. This 'amounted to a significant defect in the reasoning processes.'

2)As to the judging of the seven serious allegations of assault;
The mother made seven very serious allegations against the father. In each case there were inconsistencies between the mother's pleaded allegation and her oral evidence. The district judge made all findings sought and found the accounts in the Scott Schedule true on the balance of probabilities. Mostyn J found the findings to be untenable and gave guidance that:

> 'In making factual findings the court must examine carefully any inconsistencies made by the complainant, and where inconsistencies are exposed these must be clearly analysed and rationalised in the verdict. If someone is to be found guilty of domestic violence then fairness demands that it is clearly explained to him why his defence has been rejected and why the case advanced by the complainant accepted'.

3)As to the finding that F mistreated his children by hitting them
Shortly before the fact finding hearing the mother had expanded her list of allegations. These included a general allegation that the father ill-treated the children by hitting them and a specific allegation of belt hitting. In the initial draft judgment the district judge found that 'M has been assaulted by the F in front of K and K but I do not find that F has hit the children with a belt'. Following a request from the mother's counsel to address specifically whether the father had hit the children, the district judge amended the draft judgment and made the additional finding that 'the F has hit the children on their face, back and legs with his hands'. There was no explanation for this amendment. Mostyn J considered that such an important change 'needs to be accompanied by a clear explanation'.

With the benefit of hindsight the case had 'acquired an unstoppable momentum of its own, where the scope and scale of the inquiry, and the investigation of the collateral issues, was wholly disproportionate to the allegations in play'. Consideration should always be given to whether the findings, if made, would make any difference to the applications before the Court.

The appeal was allowed and all findings were set aside. There would not be a re-hearing in light of the interim shared residence order agreeing equal shared care in the medium term. The disposal hearing was vacated and the matter listed for review following a period of twelve months.

Summary by Elise Kinnear of Field Court Chambers

S (A Child) [2010] EWCA Civ 705

Appeal by father against an order that provided for a child to be 'cared for' by him at various days and times. Appeal allowed.

L was 6 years old. Her parents separated when she was 15 months. At a hearing before HHJ Hamilton, the father sought a shared residence order and the mother a sole residence order. Much of the two day time estimate was used for negotiation between the parties but a full agreement was not reached and the judge adjudicated on the outstanding issues late on the second day.

The order made provided variously that "the father shall have the care of L", "the care of L within the school holidays shall be arranged as follows", "L will be cared for by her father", "L will spend Christmas 2009 with her father, and "L may be in the care of her father for such further and alternative periods that may be agreed in writing". The father appealed.

Thorpe LJ held that there was nothing in the statute, and in particular in the language of s8(1) Children Act 1989, that allowed the court to impose provisions as to one parent or the other 'caring' for or 'having the care of' a child other than in the form of a contact order. It was not permissible to use a prohibited steps or specific issue order.

Thorpe LJ also restated the principle enunciated by Ward LJ in *Re B (a child)* [2001] EWCA Civ 1968 that "a contact order cannot be made unless it can be attached to a residence order providing there for the child to live with a person".

The appeal was allowed and the order set aside. The matter was remitted to the county court. As the practical arrangements enshrined in the order were working well the court expressed the hope that a further hearing could be avoided.

Summary by Ayeesha Bhutto of Field Court Chambers

JUNE CPD QUESTIONS:
Valuing Ancillary Relief Claims in a Changing Market
CXL/LAWE/0610/ARCHMARK2010)

1 in order to succeed in an application to set aside an ancillary relief order on the grounds of misrepresentation, the applicant must show that if the true facts had been known:

- A materially different order would have been made
- A substantially different order would have been made.

2 Which two of the following are conditions (amongst others) which must be met for a *Barder* appeal to succeed:

- The new event must falsify an assumption on which the original order was made;
- The new event must happen within six months of the original order;
- Innocent third parties must not be prejudiced.

3 In *Cornick v Cornick (No 1)* [1994] 2 FLR 530, Hale J (as she then was), said that the court should be able to grant leave to appeal in cases where an asset was taken into account and correctly valued at the date of the hearing, but then changed value within a short time period owing to natural processes of price fluctuation.

- True
- False

4 In *B v B* [2008] 1 FLR 1279 (referring to cases of non-disclosure of an intended event) which two of the following did Sir Mark Potter P indicate would not be sufficient id to invalidate the fundamental assumption on which the order had been made :

- The applicant had failed to make precise enquiries in respect of the event;
- The event was foreseeable;
- The effects of non-disclosure were avoidable by reasonable enquiry;
- The respondent's non-disclosure was unintentional.

5 In *Bokor-Ingram v Bokor-Ingram* [2009] EWCA Civ 412, the Court of Appeal said that

- The judge at first instance had been right to conclude that the husband had been under no obligation to disclose negotiations concerning a new contract of employment because the new employment was not certain at the time of the FDR;
- The judge at first instance was wrong to conclude that the husband had been under no obligation to disclose the negotiations because the obligation extends to any fact relevant to the court's review of the foreseeable future.

6 In *Myerson v Myerson* [2009] EWCA Civ 282, the husband's appeal failed on which one (of the following grounds amongst others) :

- The natural processes of price fluctuation do not constitute a *Barder* event;
- The husband has not invoked the statutory power of variation;
- The reduction in the value of the husband's shares occurred over a period of many months.

JUNE CPD QUESTIONS: CHILDREN

CXL/LAWE/0610/CH)

In ***W (Minors)*** Wilson LJ said that over the last thirty years there has taken hold the need to take decisions about children much younger than 16:

- in accordance with their wishes
- in the light of their wishes
- in contradiction of their wishes.

In ***R (TG) v London Borough of Lambeth*** [2010] EWHC 907 QB, the court decided that a child would become a 'looked after child' within the meaning of the Children Act 1989 section 22 as a consequence of being accommodated by a local authority:

- if accommodated in exercise of the authority's duties to the homeless
- if accommodated in exercise of the authority's services to youth offenders
- if accommodated in exercise of the authority's social services functions.

In ***R (C) v Nottingham City Council*** [2010] EWCA 501 Civ, in which permission to appeal was granted, Waller LJ identified the issue(s) to be determined by the appeal as to whether:

- the children in question were in need
- they fell within section 20(1)(c) of the Children Act 1989
- accommodation provided by the housing department of a local authority should be deemed to be provided under section 20 of the Children act 1989
- all of the above.

In ***K (A Child)*** [2010] EWCA 478 Civ, Wilson LJ allowed the father's appeal, noting that the judge at first instance had not referred in his judgment to:

- the need, in principle, for a child to have a relationship with both parents
- the father's voluntary admission of minor breaches of a non-molestation order in favour of the mother
- the specialist guardian's opinion that there was little risk of the father disclosing to the child his relationship with the child's grandmother.

In ***S (A Child)*** [2010] EWCA 465 Civ, which two of the following did Wall LJ say that in the circumstances of the case as it appeared to HHJ Hughes:

- it was open to the judge to conclude that the child was habitually resident in England
- the judge was entitled to make the child a ward of court
- it was appropriate to order the immediate return of the child to England.

In ***S (A Child)*** [2010] EWCA Civ, Wall LJ decided that the matter should proceed by way of an application for an interim care order.

- True
- False.

JUNE CPD QUESTIONS: FINANCE & DIVORCE

CXL/LAWE/0610/FP)

1. With which of the following matters did the Court of Appeal's judgment in Kernott v Jones [2010] EWCA Civ 578 deal

1. whether there should be a sale of the property?
2. at what point the appellant should realise his interest in the property?
3. what the parties' respective beneficial interests are?

2. Why did the appeal in Kernott v Jones [2010] EWCA Civ 578 succeed?

1. The presumption of equality had not been displaced
2. There was no documentary evidence of any agreement to vary the parties' beneficial interests

3. In Kernott v Jones [2010] EWCA Civ 578 what shares in the property did the Court of Appeal determine were owned by the parties:

1. Equal shares.
2. 60/40 in favour of the appeallant
3. 60/40 in favour of the respondent

4. In B v B [2010] EWHC 193 in relation to the wealth accrued by the husband from his post-separation income, which of the following was the principal issue at stake between the parties;

1. Whether as part of a clean break award, the wife should be entitled to a share in the wealth accrued from the husband's post-separation income.
2. The amount of the wife's share in the wealth accrued from the husband's post-separation income to which the wife should be entitled.

5. In B v B [2010] EWHC 193 why did Moylan J consider this was not a case where the principle of "compensation" was relevant?

1. The wife had only a very limited earning capacity
2. The amount of the final award which the wife would receive easily exceeded what she would have earned had she been in full time employment.
3. The wife had no track record of regular employment

6. In the course of his judgment in De Bruyne v De Bruyne [2010] EWCA 519 Civ Lord Justice Patten's identified a situation where equity will hold the transferee of property to the terms upon which it was acquired by imposing a constructive trust. Which of the following did he identify as being relevant to such a finding?:

1. An act of reliance to detriment of the party asserting the claim
2. A written agreement in relation to the terms of the transfer
3. Whether the circumstances in which the Transferee acquired the property justify the imposition of a trust