

January 2008

Fenners Family News

WELCOME to the first edition of Fenners Family News

We hope that it will provide a useful bulletin for our instructing solicitors and keep you firmly up-to-date. It also gives us an opportunity to let you know about our news within chambers.

The aim is to produce the bulletin on a regular basis and distribute it principally by email. If you prefer to receive a hard copy, please email the editor liam.gribbin@fennerschambers.co.uk.

If you have any suggestions to make concerning content then please do not hesitate to let us know.

Leader of the Family Team
Liza Gordon-Saker



Ancillary relief

In *S v S* [2007] EWHC 1975 (Fam), Mrs Justice Baron said that a trial judge was not correct in ring-fencing two of the wife's assets which had accrued from her family's wealth; this had skewed the result in the wife's favour. The marriage was a long one (23 years) and both parties had made a full contribution so there was no reason to depart from equality. The trial judge was however right to consider the wife's inheritance prospects as a background feature only; such prospects weighed lightly in the overall analysis of fairness.

In *Vaughan v Vaughan* [2007] EWCA Civ 1085 the Court of Appeal considered the principle of sharing in the light of *Charman*. It held that a 57/43 split in the wife's favour did not, on the facts, interfere with this principle where it was desirable that a clean break should be achieved. The wife would probably have been entitled to fairly substantial periodical payments and the departure from equality was a fair quid pro quo. The effect of the calculation was to depart from equality in the sharing of assets in order to achieve greater equality in the overall outcome.

In *Smith v Smith* [2007] EWCA Civ 454 the marriage had lasted 10 years and, whilst the parties had no children, the wife had a 14-

year-old child from a previous relationship who was a child of the family. All of the assets came from the husband, including a company and the premises from which it traded, which he had started before the marriage. At first instance and on appeal to a Circuit Judge it was decided that there should be equal division of all assets together with substantial periodical payments. The husband retained the business while the wife could retain the business premises and all of the liquid assets. The Court of Appeal held that it was wrong to adopt equal division as the starting point in circumstances where all the assets came from the husband and the marriage had only lasted 10 years. Furthermore, the unconditional transfer of the business premises to the wife from where the husband continued to trade was a recipe for dispute and was likely to be wrong save in exceptional circumstances. No account had been taken of the fact that the husband would be left with the risk-laden assets whilst the wife would retain the copper-bottomed remainder. The wife should retain the share of the business which owned the property, but only as a mechanism to provide security for her. In addition there was a requirement that she hold the shares and not dispose of them for a specified period. A clean break was justified and desirable.

Inside this issue:

Bankruptcy	2
Children—Public Law	2
Children—Private Law	3
Practice	3
Now In Force	3
Our News	4
Paul Green, Senior Clerk	4



FENNERS CHAMBERS

Bankruptcy

Two recent cases demonstrate that real care should be taken when settling ancillary relief applications where bankruptcy of one of the parties is a possibility.

In **Turner v Avis and Another** [2007] EWCA Civ 748 the Trustees in Bankruptcy sought sale of a property in which the spouse and the bankrupt had an interest. The wife had appealed on the basis that that an order for sale could not be made on the Trustees' application because none of the events noted in a consent order made more than 20 years before had so far occurred. The Court of Appeal held that the wife's rights under the consent order were always subject to the possibility that the court might make an order for sale. Where there is an ancillary relief order postponing the sale of a property until the occurrence of certain specified events (e.g. *Mesher* or *Martin* orders), the bankrupt's former spouse will not be protected from an application for sale by the trustee prior to the occurrence of the specified events. Priority

must be given to the creditors save for in exceptional circumstances.

However, in **Haines v Hill** [2007] EWCA Civ 1284 the wife appealed against a decision to grant a declaration in favour of the respondent Trustee in Bankruptcy that a transfer of property pursuant to an order in matrimonial proceedings had been a transaction at an undervalue.

The wife and her former husband had jointly owned a property that in ancillary relief proceedings had been ordered to be transferred to the wife. Shortly afterwards the husband had become bankrupt and the Trustee in Bankruptcy had unsuccessfully sought to set aside the transfer at an undervalue pursuant to the Insolvency Act 1986 s.339.

On the first appeal the Chancery Division judge held that the wife had given no consideration, or that any consideration she might have given was not measurable in money or money's worth, and that the

transfer should be set aside.

The Court of Appeal allowed the wife's appeal, holding that the judge had been wrong to conclude that parties to an order for ancillary relief did not give consideration for the purposes of s.339 of the 1986 Act. The ability of one spouse to apply to the court for an order under the MCA 1973 was a right conferred and recognised by law. It had value in that its exercise might lead to court orders entitling one spouse to property or money from or at the expense of the other, and the value of that right was the value of the money or property. Accordingly, there was no reason why some dealing with a pre-existing statutory right could not constitute consideration.

Children—Public law

The court's concern with fair process was apparent in **Re EK (A child)** (CA 12.6.07) the Appellant mother (M) appealed against a case management decision in care proceedings refusing her application for a family assessment. Various assessments had taken place and, in its final care plan, the LA stated that it did not propose to undertake any further assessment. M applied for a two-day assessment which was refused. The Court of Appeal said that the judge had given insufficient reasons for rejecting M's application. If the order was allowed to stand, the essential requirement of fairness to M, in seeking to resist the final care order, would be jeopardized.

A contrasting recent case however is **North Yorkshire County Council v B** [2007] Fam Law 895. Mrs Justice Black

confirmed that there was nothing wrong in the court determining, in advance of the LA's final care plan, that a particular individual (in this case the M) was not going to be in a position to care safely for a child within the timescale that the child needed.

Finally, the issue of experts arose in **Re S** [2007] 1 FLR 90 where a father (F) sought permission to instruct his own expert in a case involving allegations of non-accidental injuries. The Local Authority and Children's Guardian had already jointly instructed experts. The Court of Appeal held that *W v Oldham Metropolitan Council* [2005] EWCA Civ 1247 was not authority for the proposition that F was entitled to instruct his own expert. The justification for a second

opinion lay only in circumstances in which the first opinion was 'pivotal' and until the first set of reports were available, it could not be discerned whether any one of them was the pivot around which the other turned.

Children—private law

There have been some interesting recent private law cases involving shared care, the transfer of residence and the importance of a child being made aware of the identity of his biological father.

In **Re F (Children)** [2007] EWCA Civ 873 the Court of Appeal held that there was jurisdiction for a court to make a specific issue order requiring that the children be informed of the identity of their father.

In **Holmes-Moorhouse v Richmond LBC** [2007] EWCA Civ 970 the Court of Appeal considered whether a father (F) had a 'priority need' for local authority housing following the making of a shared residence order (by consent). It was decided that the LA had erred in law in taking the view that F's children were

only staying with him and not residing with him: they had confused the concept of staying with that of shared residence.

In **Re M (Children)** [2007] EWCA Civ 1363 the Court of Appeal held that an unrepresented father was effectively bound by a medical report concerning the mother's alcohol dependency because he had not challenged it at trial.

In **Re C (Residence Order)** [2007] EWCA Civ 866 contact between a father and his young daughter continued for a year following the parties' separation before the mother stopped it. She had been overheard frightening the child about the father and making negative comments about him. The judge found the mother to be implacably hostile and took the view that, as all other remedies

had failed, the child should reside with the father. On appeal it was held that the essential balance to be struck was the likely effect on the child of a change in circumstances against the harm she had suffered or would suffer if she was denied contact with her father by the implacably hostile mother. The judge had had regard at all times to the welfare checklist which was paramount. He had also had regard to all the appropriate factors and the making of a residence order to the father was within his range of options that he was entitled to consider. On that basis the mother's appeal was dismissed.

Now in force

With effect from 1 October 2007 section 16 of the Children Act is amended so that **family assistance orders** can be made for up to 12 months' duration. In addition the circumstances of the case no longer need to be exceptional and the order may direct that the officer give advice and assistance as regards establishing, improving and maintaining contact. A new s.16A is inserted into the Act which

specifies that an officer must carry out a risk assessment if he/she is given cause to suspect that the concerned child is at risk of harm and provide such risk assessment to the court. The President has issued a *Practice Direction* dealing with such assessments at [2007] 2 FLR 625. In practice it seems that this is likely to lead to a greater number of 'Re L' hearings.

The new **Mental Capacity Act 2005** came into force on 1 October 2007. New Court of Protection forms and guidance are available from the Public Guardianship Office at www.guardianship.gov.uk.

Practice

In **Truex (A Firm) v Kitchin** [2007] EWCA Civ 618, a firm of solicitors was held to be negligent in failing to advise a client that she might be eligible for public funding. A solicitor has such a duty from the outset. The Professional Code of Conduct, Family Law Protocol and Legal Service Funding Code were all cited as indicative of the standard of care expected.

In **Re S (Practice: Muslim Women Giv-**

ing Evidence) [2006] EWHC 3743 (Fam) a practicing Muslim woman who wore the veil sought a decree of nullity and, for the purposes of giving evidence, agreed to remove her veil before the female judge provided she was screened from the view of her male counsel, the only male member of the particular court. It was held, granting the decree, that the ability to observe a witness' demeanour during the giving of oral evidence was essential to assessing

accuracy and credibility. The facility of screens and the ability, if at all possible, to list such cases before a female judge should be sufficient to meet the objections of parties unwilling to appear before the court without a veil.

Our news

Fenners Chambers
3 Madingley Road
Cambridge CB3 0EE

Telephone 01223 368761

Fax: 01223 313007

E-mail: clerks@fennerschambers.co.uk

Website: www.fennerschambers.co.uk

Editors: Liam Gribbin & Azreen Mussa



FENNERS CHAMBERS

Celia Miller (26.8.48-11.12.07)

As many of you will know, our colleague and friend Celia Miller has passed away after a short illness.

She was a remarkable person and an extremely talented barrister. Much of her professional life was spent at East Anglian Chambers where she became a formidable head of their family team. She moved to Fenners Chambers in 2003 where she immediately became a key component of our family team. Not only did she throw herself into her successful practice with a mix of vigour, charm and steely determination but she was always available to support and encourage her junior colleagues. We will all miss her enormously.

We are pleased to announce that **Robin Chaudhuri** has been appointed as a District Judge, sitting in Milton Keynes County Court. We all wish him well.

Paul Green has joined chambers as the new Senior Clerk.

We are delighted that **Meryl Hughes** has returned to chambers after a career break spent running around after two energetic children. Meryl is a very experienced practitioner who will continue to specialise in family law.

Nick Davies has joined the family team following the successful completion of his pupillage. Nick is a mature entrant to the Bar having worked previously as an accountant.

In November **Donna Paul**, part of our clerking team, gave birth to a bonnie baby girl, Ruby.

Liam Gribbin is a co-author of the recently published new edition of *A Practical Approach to Family Law* (Oxford University Press).

Our new Senior Clerk—Paul Green

I am delighted to introduce myself as the new Senior Clerk at Fenners Chambers. I moved here from a large London chambers where, since 1997, I held the post of Chambers Director. I have been clerking since 1974, becoming a senior clerk in 1982.

I had little hesitation in applying for the post as I was aware that Fenners Chambers has had a first class reputation for many years. I was also familiar with the chambers because, before returning to London in 1997, I was Senior Clerk of Tindal Chambers in Chelmsford for 10 years: they and Fenners often crossed swords! I was also aware that a number of members were recommended in the premier legal directories Legal 500 & Chambers & Partners as leading juniors.

I hope to add my expertise and knowledge to an already experienced clerking team and I am confident that with the quality of counsel that I have at my finger tips, I can help to promote an already excellent product. Please feel free to contact me; I would be delighted to talk to you.

Telephone (direct line) 01223 431900 or email paul.green@fennerschambers.co.uk



Dates for your diary—2008

31 January Cambridgeshire & District Law Society course on the Code of Conduct with Austin O'Malley from the Solicitors Regulation Authority. Details from CDLS telephone 01223 367007.

7 February: Family Law Update, details from www.familylawtraining.co.uk

Advance notice: Fenners Chambers family law seminars (contact sharon.bannerman@fennerschambers.co.uk for more information):

1 October Dunston Hall, Norwich
2 October The Haycock, Wansford, Peterborough

3 October Trinity Centre, Cambridge