

Focus on Pre-nuptial Agreements: or ‘Better luck next time Mrs Crossley!’



by Simon Tattersall

The role of pre-nuptial agreements is becoming increasingly important in the determination of ancillary relief applications and can, as demonstrated in the recent case of **Crossley v Crossley** [2007] EWCA Civ 1491, save significant time and costs in the long run.

The ‘traditional’ approach has been that any contract or agreement purporting to oust the jurisdiction of the court is unenforceable any agreement seeking to prevent a party’s right of access to the court would not be countenanced.

In **M v M** [2002] 1 FLR 654, for example, Connell J. held that the agreement could be determined within the section 25 criteria as “a circumstance of the case” or as “conduct which it would be inequitable to ignore”. While the Court was not bound by the terms of the agreement, it had to take it into account and determine in each case what weight to attach to it.

In **Crossley** the previously-married husband, a 62 year-old property developer, was worth £45 million at time of agreement. The wife, also previously-married, was 50 years old and was worth £18 million. They met in June 2005 and by September were engaged. The pre-nuptial agreement was signed by them in November 2005 after negotiations between experienced lawyers (i.e. independent legal advice) - each to walk away with what they had brought into marriage and that neither “shall apply to any court in any jurisdiction for any order for financial provision of any kind based on the marriage of Stuart and Susan”.

They married in January 2006 and separated in March 2007; the wife petitioning for divorce and issuing Form A soon after. The husband immediately issued a summons seeking the wife to show cause why her ancillary relief claims should not be resolved in accordance with the terms of the agreement.

At the First Appointment Bennett J ordered that Forms E be filed without the documents exhibited and explaining why the agreement should or should not be upheld. The wife appealed.

The Court of Appeal held that the judge had not ordered the determination of the agreement as a preliminary issue, and had not prevented the wife from filing a questionnaire. Thorpe LJ said: “All these cases are fact dependant and this is a quite exceptional case on its facts, but if ever there is to be a paradigm case in which the court will look to the pre-nuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seem to me that this is just such a case... It does seem to me that the role of contractual dealing, the opportunity for the autonomy of the parties, is becoming increasingly important” (paras 14 & 17).

The Court of Appeal decided that full disclosure, entered into freely with independent legal advice (or the opportunity to take it) and lack of any pressure are all pre requisites to the agreement being binding in the event of dispute.

The jurisdiction under Section 25 will not be ousted by the existence of an agreement so that in addition to all the above factors the agreement must satisfy the criteria of fairness and will not be upheld if it would cause significant injustice to a party.

Factual or other matters not covered by the agreement (whether existing at the time and/or occurring after the agreement) may be good reasons for not implementing the precise terms of the agreement whilst taking it into account.

The agreement should be executed at least 21 days prior to marriage. It should attempt to encompass future changes, specifically the birth of children, the progress (or otherwise) of the parties’ careers and the accrual of financial resources from whatever source - inheritance, joint endeavour etc as well as the retention of assets (whenever acquired) in sole names by future agreement. The list is not exhaustive and should obviously be tailored to the individual client’s situation.

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Ancillary Relief

The Court of Appeal has again considered whether a remarriage following a consent order qualifies as a ‘Barder event’. In **Dixon v Marchant** [2008] EWCA 11 the parties divorced in 1993, the wife obtaining an order for maintenance which, in 2005, was capitalized by agreement. At that time the wife confirmed that her present intention was not to cohabit with her long-term partner. She in fact married him in 2006. The husband sought to set aside the consent order on the basis of it being a ‘Barder event’. At first instance the trial judge found that the wife’s remarriage was not planned and that she had been open and honest. The Court of Appeal (Wall LJ dissenting) held that there was no basis or fundamental assumption that, for an indefinite period to be measured in years rather than months or weeks, the wife would not remarry and Barder

applied. Furthermore, the importance of finality in clean break cases made it clear that the application of the Barder principle was reserved for exceptional cases. The facts of the instant case fell far below the necessary standard.

In a judgment of the Family Division, the President considered how the well-known principles of *Miller and Macfarlane* should be applied to the variation of periodical payment orders. In **VP v JB** [2008] EWHC 112 (Fam) a former wife’s maintenance was increased from £33,000 to £65,000 per annum six years after the original consent order due to the fact that her present earning capacity was far less than it would have been had she pursued her career following the birth of the children, it being a mutual

decision at the time of the parties that she should not. The language employed in *Miller and Macfarlane* was of general application and extended, where appropriate, to consideration by the court of the overall fairness of an order made upon an application to vary a joint lives periodical payments order.



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Children—Public Law



by Daniel Pitt

The **Public Law Outline (PLO)** is now in force, applying to all care proceedings commenced on or after 1 April 2008. It replaces the 2003 Protocol for Judicial Case Management in Public Law Children Act Cases. There is a new Practice Direction: Guide to Case Management in Public Law Proceedings. There is an overriding objective adapted from the CPR of “enabling the court to deal with cases justly, having regard to the welfare issues involved” which includes dealing with the case:

- Expeditiously and fairly;
- Proportionately to the nature, importance and complexity of the issues

- Ensuring parties are on equal footing
- Saving expense
- Allotting appropriate share of court resources (taking into account the need to allot resources to other cases)

There are to be 4 stages: the First Appointment (FA); the Case Management Conference (CMC); Issues Resolution Hearing (IRH) and the Final Hearing.

The main changes are (1) an increase in “front-loading” of care cases by developing new pre-action stages; (2) a Case Analysis and Recommendations by the children’s guardian before the FA; (3) encouragement of active case management; (4) more emphasis on advocates meetings/discussions (at least 2 days before CMCs and IRHs); and (5) the new IRH where the trial judge will identify

the key issues, “examine if those issues can be agreed” and “where those issues cannot be agreed, examine the most proportionate method of resolving those issues”.

The advocate who has conduct of the final hearing should ordinarily attend the CMC and IRH.

If the parties agree, the case can be adjourned for Alternative Dispute Resolution.

The parties are expected to “co-operate” and will be asked at each court appearance what steps they have taken to achieve co-operation.

The fee for issuing care proceedings has been increased from £150 to £4,000.

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Children—Public law (continued)

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There is also a new Practice Direction: Experts in Family Proceedings Relating to Children (which includes private law proceedings) applying to cases issued on or after 1 April. The Children Act Guidance and Regulations have also been revised.

Please contact Bobbie Thompson in chambers if you would like to be e-mailed any of the above documents.

As far as recent cases are concerned, in **R (on the application of G) v Nottingham City Council** [2008] EWHC 152 (Admin) Munby J made it clear in strong terms that it is unlawful for a local authority to remove a newborn baby from the care of its mother without the sanction of a court. Prior to the mother giving birth, an inter-agency child protection conference was held and a birth plan was prepared for medical staff at the hospital. The conference recommended that the local authority should apply for an interim care order and a foster placement following the baby's birth. It noted that the baby should not be removed from the ward by the mother and an emergency protection order should instead be sought if the care order was not in place. The birth plan given to the hospital by the local authority however stated that the baby was to be removed from the mother's care at birth but made no reference to obtaining a court order. Approximately two hours after the mother gave birth, the baby was removed from her and placed in a different room in the hospital. The judge held that local authorities and social workers had no power to remove children from their parents unless they had first obtained judicial sanction for what they were proposing to do. The two qualifications to this were where it was necessary to protect the baby from immediate violence or where there was a medical necessity, neither of which applied in this case.

In **T (a child) v Wakefield MBC** [2008] EWCA Civ 199 the Court of Appeal considered sch 3 para 6 of the Children Act and confirmed that it is not possible to order a supervision order of three years' duration at the outset. This could only be achieved in two orders—the first for a year then a two-year extension. The court also provided guidance to local authorities on the process of extension. Before any extension was sought, the need for and the acceptance of extension should be canvassed in correspondence. The issue of any necessary application should not be delayed so as to imperil a local authority's imperative need for a determination before the expiration of the current order, as once the order had expired the applicant would be compelled to prove, and the court to determine, the s.31 threshold since the application would have become not an application for extension but an application for a new order. It was doubted whether there would need to be an application to extend a supervision order of 12 months' duration before the last quarter of its life, and how well within that quarter the application should sensibly be issued depended on the facts of each case.

The Court of Appeal's judgment in **A.P v The Vale of Glamorgan Council and others** [2007] EWCA Civ 1265 concerned the distinction between a fact finding hearing and a threshold hearing. It is an appeal worth careful consideration by care practitioners, particularly the paragraphs entitled points of practice.

The facts, in brief, were that a father was found to have caused significant harm through NAI to his baby nephew. Prior to that fact finding hearing the local authority issued applications in respect of the father's own three children, over whom there had been no social services involvement or concern. The local authority's 'schedule of findings sought' made no mention of the father's own children but the trial judge, having made a finding in relation to the nephew proceeded on the basis that threshold had been met in respect of his children

(likelihood of future harm). The father appealed. The Court of Appeal held that the judge's determination in respect of the father's children could not stand. The Court of Appeal made the following suggestions in order to avoid the confusion that had arisen:

- (1) When a split hearing is ordered, express consideration should be given by all parties and the court to whether satisfaction of the threshold criteria will be considered and determined as part of the first, the final or an intermediate hearing. Orders for directions should identify and describe with clarity what is to be the subject of evidence, argument and decision at each future hearing.
- (2) Labels such as 'threshold hearing' and 'threshold document' must be used with great care and in particular must not be confused with 'fact-finding hearing' and 'schedule of proposed findings of fact'.
- (3) In any case in which the threshold criteria are alleged to be satisfied on the basis of future risk rather than past harm to a child, there must be a clear written analysis and description by the local authority of the facts alleged to give rise to that future risk in relation to each child, to which all other parties have the opportunity to make written response.

Children—Private Law and Financial Provision

In **Re A (Residence Order)** [2007] EWCA Civ 899 the Court of Appeal refused to overturn a decision of a Recorder which transferred the care of an eight-year-old boy to his father on the basis of the mother's continual frustration of contact and her inability to change her behaviour. The recorder had also refused to grant a stay of his decision. The Court of Appeal made it clear that it was not for them to reconsider how the evidence

should be weighed—the recorder had the important features of the case in his mind when reaching his conclusion.

It was pointed out however, that it is in principle unsatisfactory that an appeal should be considered after important changes had been implemented. Where a judge is aware that an appeal may be in the offing, he should build-in a very short delay to the order taking effect or stay the execution of the order for a short period.

Where a judge declines to take either of these courses an applicant should approach the Court of Appeal by telephone, even out of hours.

In **M-T v T** [2006] EWHC 2494 (Fam) Charles J held that the costs of a Schedule 1 application could be interpreted as being 'for the benefit of the child' although care must be taken that such costs are not being spent to satisfy an applicant's taste for litigation.

Practice and Other News

Ofsted has produced its first report on a **CAFCASS** team and concluded that the overall service provision in the East Midlands area (including Lincolnshire and Northamptonshire) was inadequate. Of concern was the unacceptable number of instances where CAFCASS had failed to ensure the safeguarding of the children to whom it provides a service. The proportion of case records and court reports judged by inspectors as inadequate was not acceptable. The report can be downloaded from <http://www.ofsted.gov.uk>

[/publications/070205](#).

The Government announced at the beginning of March that it wished to undertake its own research into the likely effect and cost of the **Law Commission's Proposals on Cohabitation** contained in their recent report. It is therefore to be seen whether those key proposals are to be lost in the long grass!

The President of the Family Division has issued new guidance on **Intercountry Adoption** which applies whenever an

application for, or in connection with, an inter-country adoption order is made.

As many of you will know, District Judge Temple has retired after many years sitting in Cambridge and Bury St Edmunds County Courts; we wish him a very happy retirement. He is replaced by District Judge McLoughlin who comes to Cambridge from Haywards Heath County Court.

Our news

In March **Caroline Horton** gave birth to a bouncing baby girl called Alice.

We welcome back **Daniel Pitt** from his globe-trotting sabbatical.

Dates for your diary

22 April Presentation by 'Family Care' Peterborough on integrated care assessments at Lucy Cavendish College, Cambridge at 5pm. Details from: sharon.bannerman@fennerschambers.co.uk

13 May CDLS course 'Using an IFA in Family Matters' at Tee Collaborative, Newmarket Road, Cambridge at 4pm. Details from CDLS (01223 367007).

5 June Resolution Quiz at Café Rouge, Cambridge. Details from Hannah Wilson at Mills & Reeve.

Fenners Chambers family law seminars:

1st October - Dunston Hall, Norwich

2nd October - The Haycock, Wansford, Peterborough

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