



# Family Team Newsletter

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## WELCOME

The Family Team at 3 Paper Buildings is expanding both in numbers and geographically. At present we have some 27 members who practice predominately in family work, and we cover the whole range of such work from representing all parties in public law care work, through private law matters and Inheritance Act work to ancillary relief hearings for parties of all means. We have specialists in all these areas, as can be shown from the variety of articles in this Newsletter.

3 Paper Buildings have recently opened a further office or annexe in Bristol. From this centre we can help service the needs of our professional clients further west. *“Have brief, will travel”* has long been the motto of circuiters, and for over 100 years since these Chambers were founded this has been the way we have worked at 3 Paper Buildings (though the LSC is not helping us very much at present on this particular aspect...).

I hope that you both enjoy and derive benefit from this Newsletter. The Family Team also provides CDP lectures, which can be tailored to meet your needs. Please contact Stuart Pringle in Winchester on 01962 868884 in the first instance to arrange this.

RICHARD TYSON  
*Joint Head of Chambers*

## SECTION ONE

# The Private Law Programme

### Background

The Government's Green Paper entitled "Parental Separation – Children's Needs and Parents' Responsibilities" put forward proposals intended to assist parents to safeguard their children's welfare after parental separation or relationship breakdown.

The Paper points out that whilst only 10% of separating couples with children have had their contact arrangements ordered by the court an increasing number of disputes are going to court. It estimates that in 2003 in England and Wales 67,000 contact orders were made.

The opinion of the Government and the senior judiciary, expressed through the paper, is that the family courts are not intervening in an efficient or satisfactory way. The Government's view on dealing with these concerns is not to amend or change any of the core principles of the Children Act 1989 but to provide more effective help and remedies to resolving disputes.

The Government ultimately aims to reduce the number of parents who feel the need to apply to court but for those who seek the services of the court it is hoped that adversarial proceedings will only come after informal resolutions have been explored.

A key concern about the current process is the delay. Currently, on average, a case takes up to 36 weeks to reach its conclusion. It is hoped that the introduction of the Private Law Programme will reduce the delay within the system although it has been emphasised that it is a programme and not a protocol.

### The programme

When an application is made to the court under Part II of the Children Act 1989, the welfare of the child will be safeguarded by the application of the overriding objective of the family justice system in three respects:

1. Dispute Resolution at a First Hearing
2. Effective court control
3. Flexible facilitation and referrals

### Dispute Resolution at a First Hearing

The first hearing will be listed within a target time of 4-6 working weeks after the issue of the application. The purpose of the first hearing will be to identify any issues of safety in the case, for the court to identify the aim of the proceedings, the likely issues and timescale and to consider the possibility of referring the parties for support and assistance to resolve the issues. Wherever possible a CafCass officer will attend the first hearing to facilitate and assist in resolution thereby doing away with the need for a formal report. The Government is keen that CafCass reports are only ordered when they are required and when they are required that they address the issues that have been identified. It is envisaged that the skills and services of CafCass officers can be more efficiently used in assisting resolution rather than writing reports.

If it is not possible to reach a resolution at the first hearing then the court will direct, undoubtedly with the assistance of the CafCass officer, that the family be referred to one of a number of schemes for alternative dispute resolution. The type of assistance and support to be suggested will depend on the specific issues in the case and could range from mediation, to therapy to the Family Resolutions Pilot Programme, (although only currently available in Inner London, Brighton and Sunderland). In cases in which children's safety is in issue families will not be referred for support or assistance.

### **Effective Court Control**

The court will be at the centre of continuous and active case management which will be achieved through judicial availability and continuity. It is anticipated that this will avoid unnecessary delays by ensuring that the aim of each hearing is achieved. The outcome of hearings, where necessary, will be monitored and reviewed, often by CafCass officers reporting to the court, and if enforcement is necessary arrangements are in place between the Court Managers and the judiciary to release the judge or magistrates for urgent enforcement hearings.

### **Flexible Facilitation and Referral**

CafCass officers will play a large role and often be continuously involved to facilitate or supervise any orders made by the court. It is hoped that agreement between the parties will be facilitated and assisted by the use of parenting plan materials, rehabilitation, training and other resolution programmes. The progress and outcome of any of these programmes will be monitored and again if an urgent review is required the local listing scheme should provide access to an urgent review.

The Programme will be implemented as soon as it is practicable to do so in each region. The Programme will not initially be a requirement in Family Proceedings Courts but it is hoped that it can be incorporated in due course. Guidance on the Programme has been issued by the President of the Family Division and is available from [www.dca.gov.uk](http://www.dca.gov.uk).

It remains to be seen as to whether the resources are available nationally to have sufficient resolution programmes available to the court and the parties to make the programme work.

*Gillian Campbell*

## SECTION TWO

### Children Cases and the New Brussels II

From 1 March 2005, the new Brussels II Regulation will have an impact upon all children matters. The new Brussels II Regulation (No 2201/2003) replaces Regulation (EC) No 1347/2000. This extends the scope of the regulation to all children matters, not simply the children of married couples. If you anticipate a conflict of jurisdiction then make any application swiftly. Delay will certainly prejudice any competing claims on jurisdiction.

In summary, Article 1 covers the scope of the regulation which is extended to cover matters relating to parental responsibility. Article 1 1(b) states that the regulation shall apply to the attribution, exercise, delegation, restriction or termination of parental responsibility. In particular:

- (a) rights of custody and rights of access;
- (b) guardianship, curatorship and similar institutions;
- (c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
- (d) the placement of the child in a foster family or in institutional care;
- (e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

Under Article 8, a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised. Habitual residence is determined by reference to the law of the individual Member State first seised. If there are competing jurisdictions then this could lead to cases being stayed pending a determination of habitual residence in the court first seised.

Article 16 states that a court shall be deemed to be seised when the document instituting the proceedings or an equivalent document is lodged with the court; or if the document has to be served before being lodged with the court, at the time when it was received by the authority responsible for service.

Under Article 20, in urgent cases the Member State is not prevented from taking provisional protective measures, even if the court of another Member State has jurisdiction as to the substance of the matter.

If you require a full copy of Regulation (No2201/2003) then please contact the senior clerk in chambers.

*Imogen Robins*

### Cohabitation: Recent Cases

#### a. Is pre-marital cohabitation of any relevance?

See Co v Co (Ancillary Relief: Pre Marriage Cohabitation) 2004 1FLR p1095. The parties lived together for nearly 8 years prior to their marriage and had 2 daughters during that period. They separated some 4 years after the marriage.

Coleridge J took into account the pre-marriage cohabitation as part of “all the circumstances of the case”. He commented at para 44 p1102 “committed settled relationships which often endure for years in the context of cohabitation (often but not always with children) outside marriage must, I think, be regarded as every bit as valid as those where parties have made the same degree of commitment but recorded it publicly by Civil registration, ie by marriage...it seems to me capable of being as important a non-financial factor/ circumstance under S25 as any other...”

M v M 2004 2 FLR p236. The parties lived together for 4 years before marrying. Baron J’s observations at p251 – “I do not draw *any*\* distinction between the years of cohabitation and those of marriage in this case...I am clear that in modern society it is a couple’s commitment to each other by cohabiting that is the relevant start date for consideration in most cases”. (\**my italics*).

The cases seem to suggest that periods of cohabitation are becoming increasingly important in the eyes of the Court.

#### b. What if you act for a cohabitee who has never married?

- i) Government statistics show that cohabitation as a domestic arrangement has risen three-fold in a little over 20 years, so that approximately 30% of single female adults regard themselves as cohabitees. Many female cohabitees in my experience are under the mistaken illusion that once they have lived with their partner for a time they become a “common law wife” and thus are entitled to a share in his property.

Clearly the wide discretion given to the Court to redistribute property between married couples who are divorcing pursuant to the Matrimonial Causes Act does not apply to cohabitees.

- ii) Same sex couples who have registered as civil partners are soon to have similar protection on separation as married couples.
- iii) However, when a man and a woman who may have cohabited for many years separate, they have to rely on strict property rights and the law of trusts. An application is generally issued under the Trusts of Land and Appointment of Trustees Act 1996 (TLATA) and the Court is required to determine the parties' shares, eg, usually in the family home and perhaps order a sale of the home.
- iv) A recent case in this area is Oxley v Hiscock 2004 2 FLR p669 Court of Appeal. Chadwick LJ observed that:
  - In cases in which an unmarried couple bought a property intending to live together as husband and wife, each making a financial contribution to the purchase, but purchasing the property in the sole name of one of them and making no express declaration of trust, the first question was whether there was evidence from which to infer a common intention communicated by each to the other that each should have a beneficial interest in the property. In many cases discussion between the parties at the time of purchase would answer that question. Where the evidence was that the matter had not been discussed, a common intention might be readily inferred from the fact that each had made a financial contribution.
  - If such a common intention had been inferred, the second question to be answered was what was the extent of the parties' respective beneficial interests? In many cases the answer would again be provided by discussions at the time of the purchase, but in the absence of specific evidence on that point, each would be entitled to that share which the Court considered fair having regard to the whole course of dealing between them in relation to the property including the arrangements which they had made from time to time to meet the outgoings which had to be met to enable them to live in the property as their home. [This case seems to give the Court a widening discretion in cohabitation].
  - The Court further concluded that there was no difference in outcome in cases of this nature whether the analysis lay in constructive trust or in proprietary estoppel.
  - If the cohabitees had a common intention that each should have a share in the property but had not given any thought to the amount of their respective shares, the Court would infer that the parties must have intended that the question would be answered at a later date on the basis of what was then seen to be fair.

v) Where one party has not contributed to the initial purchase, that is not fatal to the claim. If, for example, there has been an agreement that, the woman should have a share in the property even though it has been put in the man's sole name, and she had acted to her detriment in reliance on this agreement, she will have a remedy. See Cox v Jones 2004 2 FLR p1010. The parties, both barristers, decided to look for a home in the country. After much house-hunting, the bulk of which was done by the woman, a house was purchased in the man's sole name. There was an express agreement between the couple that the woman was to have a share in the property. On the basis of that understanding, she put her legal practice to one side and concentrated on renovating the property, contributing some limited sums to the renovations, but not to the purchase price. She made her main contribution in time and energy. The Court followed Oxley v Hiscock, above, and found that although there had been no specific agreement as to the extent of the woman's share, they could look at the whole course of dealings to see what was fair. She was awarded a 25% share in the home.

vi) **The Application:-**

In many cases it may be appropriate to couple an application under TLATA with a Schedule 1 Children Act 1989 application. If, for example, a mother is found to only have a 50% interest in the family home, the father's right to realise his share may eg be deferred during the child's minority under the Children Act, thus enabling the mother and child to remain in the home for that period.

See recent case law re procedure:-

W v W (Joinder of Trusts of Land Act & Children Act Applications (2004) 2 FLR p321 – The Court of Appeal indicated that as a general rule if there are outstanding applications under TLATA and Children Act 1989 Schedule 1, then unless there was some special reason why it was not desirable for the Court to consider exercising powers under both Acts, the matters should be considered by the same Court and at the same time.

*Elisabeth Hudson  
June 2005*

## SECTION FOUR

### Low Asset Ancillary Relief post *White*

#### Post *White* capital division in low asset cases

It appears that the days of a straight transfer are very much over. The Court, when using the 'yardstick' of equality is far more likely to balance the immediate sacrifice of the party leaving the FMH by a Mesher Order or similar, than has been the case.

The most important question would appear to be: Is there a realistic prospect that the Husband will have sufficient excess of income after rehousing to compensate him for the reduced capital available from downsizing the FMH when the children leave home? If so then it would seem less likely that a Mesher Order will be made. The second question that flows on from this is: How can the needs be met in such a way as to inflict least damage on the principle of fairness?

The difficulty is at its most acute when the mortgage on the FMH is too large to be supported by the wife and yet the FMH is the bare minimum of reasonable housing for her and the children. The Courts will increasingly look for more creative solutions provided for in shared ownership schemes and Local Authority initiatives. In borderline cases where there is the possibility of meeting the mortgage from maintenance, the Husband is likely to retain an almost equal share on Mesher Terms, to reflect the fact that his income will have to be applied to preserving the FMH, rather than freed to rebuild capital assets for the future.

If the only way to retain a home for the children is by ordering significant child maintenance, then consideration should be given to a *Smith v McInerney Order* (see drafting precedent in Duckworths).

An alternative to the use of Mesher Orders in low asset cases is the use of lump sum orders by instalments, this gets around the argument of 'that's all I can raise' without the ties and associations of a Mesher Order. In particular the latter instalments can be raised by remortgage or as the children reach school age when the care giver is freed up to return to, at last part time, work.

#### Post *White* income division in low asset cases

*White* did not deal with income since it was not a factor in that case. This has left a vacuum in the view of the consideration of 'needs' in lower asset cases. Although there are not yet any cases giving guidance on income post *White*. I have attempted to give a summary of the current position as I understand it:-

#### *What is the maintenance payer's disposable income?*

This should be assessed from a net salary or income less 'reasonable deductions'. Clearly much debate will focus on what is a 'reasonable deduction' however the factors deducted by the CSA in their calculation would appear to be a good starting point. In addition, CSA payments themselves are best deducted.

- e.g. Housing costs
- Child support maintenance
- Costs of new family
- Cost of travel to work

### *What is payee's income?*

The emphasis appears to be that this should be maximised where at all possible. The current structure of benefits moves away from the possibility that the Husband can rely on the argument 'there is no point paying maintenance because it will just reduce her benefits'. This policy shift means that whilst the benefits will provide a minimum cushion, there are steps that both can take to raise themselves from the base figure. The calculation of the payee's income should include:

- e.g. Net income
- Income support
- Housing benefit
- Working tax credit
- Child tax credit
- Child support maintenance

### *Apply the yardstick of equality?*

In cases where there has been a capital shift or Mesher order to meet immediate housing needs, maintenance will only be considered where there is either: (a) a continuing very significant difference in income between husband and wife or (b) a shortfall in real needs of wife and children.

### *Apply other section 25(2) factors*

It is unlikely in most low asset cases that the other factors will play a great role in altering this balance. It becomes somewhat of an assessment of 'the only way to keep heads above water'. There are obvious exceptions such as extreme conduct.

### *Maximising the income of lone parents*

Below is some information on the interaction between benefits, tax credits and maintenance. There is an increasing drive to get mothers back into the workforce, even on a part time basis. It can be seen that once one qualifies for Income Support and the associated tax credits, income can be generated to a level of approximately £20,000 p.a. even if the earned part of that is less than £5,000. There are additional benefits to support return to work in the form of:

1. Child care costs assistance
2. Housing benefit extension
3. Council tax extension
4. Retraining costs

### *Benefits*

A knowledge of the benefits available is crucial. Here is a summary:

#### *Income Support*

Available for those who are working up to 16 hours per week. A gateway to many other benefits. Can be available to lone parents studying to return to work, or those returning after long term sickness.

When child maintenance is calculated under the new arrangements, persons with care on Income Support or Income Related Jobseekers Allowance keep up to £10 a week of any child maintenance paid for their children without it affecting their benefit. This is called the child maintenance premium.

### ***Housing Benefit***

Can be claimed up to 13 weeks before entitlement to Housing Benefit. Make the applications no later than the exchange of contracts where FMH is to be sold. Payment will not usually be received before the recipient moves in to the relevant property.

Housing benefit assistance can be payable on loans secured on homes up to £100,000. It may mean the difference between preserving the FMH and it having to be sold.

### ***Extended payment of housing benefit***

An extra 4 weeks' Housing Benefit may be paid if the claimant starts work, increases the number of hours worked, or their wages increase. This is intended to ease the move away from benefits.

In order to qualify for this the client must have been claiming Income Support or Job Seekers Allowance for at least 26 weeks.

### ***Council Tax Benefit***

To work out entitlement the following is considered:

1. Money coming in to the household, including earnings, some benefits and tax credits and things like occupational pensions
2. Savings held by adults in the household
3. Age, the ages and size of family
4. Whether claimant or family are disabled
5. Whether anyone who lives that the property could help with the rent

The maximum Council Tax Benefit is the full council tax payable on the property. The rules for benefits mean that individual circumstances may affect the amount received and it is unlikely that this can be predicted precisely.

Remember 20% discount applicable where only one person over 18 in the property.

In Income Support, Job Seekers Allowance or Pension Credit cases there is a reduction of 25%. Finally if the second adult earns less than £144 gross per week there is a 15% reduction and for earnings between £144 and £185.99 a 7.5% reduction.

In addition there is a premium rate of Council Tax Benefit for lone parents.

### ***Extended payment of Council Tax Benefit***

An extra 4 weeks' Council Tax Benefit may be paid if the claimant starts work, increases the number of hours worked, or their wages increase. This is intended to ease the move away from benefits.

In order to qualify for this the client must have been claiming Income Support or Job Seekers Allowance for at least 26 weeks.

### ***Working Tax Credits***

Working Tax Credit is for people who are employed or self-employed who usually work 16 hours or more a week and who are either:

- aged 16 or over and responsible for at least one child
- aged 16 or over and disabled
- aged 25 or over and usually work at least 30 hours a week

As part of Working Tax Credit you may qualify for help towards the cost of childcare (known as the childcare element) – this is worth up to 70% of your childcare costs up to a maximum of £94.50 for one child and £140 for two or more children each week.

Extra help is available for people working 30 or more hours per week, disabled people, or people over 50 who recently returned to work after a period on benefit.

### ***Child Benefit***

Although CB isn't 'means tested' - which means it is not affected by income or savings – it can affect the amount of other benefits that are means tested. These benefits include:

- Income Support
- Income Based Jobseeker's Allowance
- Pension Credit
- Housing/Council Tax Credit
- New Deal 50+ Employment Credit

For Tax Credit purposes it is not counted as income.

### ***One Off Benefit***

#### ***Sure Start Maternity Grants (the Social Fund)***

A Sure Start Maternity Grant is a payment of £500 which does not have to be paid back.

To qualify the claimant must be receiving income based Jobseeker's Allowance, Income Support, Pension Credit, Child Tax Credit at a rate higher than the family element, or Working Tax Credit where a disabled worker is included in the assessment.

It can be claimed:

- Anytime from 11 weeks before the week the baby is due until 3 months after the baby is born
- If adopting – within 3 months of adopting and only if the baby is under 12 months at the date of the claim

### ***Conclusion***

In cases where the assets are small, whilst *White* and its followers have not impacted as significantly the culture that they have ushered in, does mean that a shift in emphasis is likely to follow. The two significant factors in capital terms are contradictory in their effect:

1. that non-financial contribution is formally recognised as equal; and
2. the tendency to look to rebalance the necessary short term distortions to create long term equality for those who are kept out of their share of the FMH for the sake of the children. This will lead to more imaginative solutions and the need to look further into the future.

In income there is one clear message: you must seek to maximise your earning capacity however small.

*Eleanor Davies*

## SECTION FIVE

### Ancillary Relief and Death

When faced with the death of a party shortly after the ancillary relief proceedings have been concluded, inevitably there will be considerable anxiety and distress to all involved. What steps should be taken to assist clients and what advice can be given?

For example, following a contested hearing, the husband died suddenly, the ancillary relief order had not been perfected and decree absolute had not been granted. The husband had not changed his will and the wife remained appointed the sole executor and beneficiary of his estate.

The above scenario raises a number of issues as to how the courts will deal with death and ancillary relief.

There follows a brief outline of cases where such circumstances have arisen.

Death can be a new event that invalidates the basis upon which the order was made pursuant to the principles set out in *Barder v Barder* [1988] AC 20, sub nom *Barder v Barder (Calouri Intervening)* [1987] 2 FLR 480.

The facts of the case were that the court ordered that a husband transfer, within 28 days, his share in the former matrimonial home to his wife. After the time for appeal had expired, but before the order had been implemented, the wife killed the children and committed suicide. The House of Lords held that there was a discretion to grant the husband leave to appeal out of time against the order and that since the order, which was by consent, had been based on the fundamental assumption that the wife and children would, for a substantial period require a suitable house and the assumption had been totally invalidated by their deaths, such leave should be granted.

Lord Brandon said:

‘There can, in my opinion, be no doubt that the consent order dated 20 February 1985 was agreed between the husband and wife, through their respective solicitors, and approved by the registrar, upon a fundamental though tacit assumption. The assumption was that for an indefinite period, to be measured in years rather than months or weeks, the wife and the two children of the family would require a suitable home in which to reside. That assumption was totally invalidated by the deaths of the children and the wife within 5 weeks of the order being made.’

He continued at pp 41A and 493 respectively.

‘My Lords, the question whether leave to appeal out of time should be given on the ground that the assumptions or estimates made at the time of the hearing of the cause or matter have been invalidated or falsified by subsequent events is a difficult one. The reason why the question is difficult is that it involves a conflict between two important legal principles and a decision as to which of them is to prevail over the other. The first principle is that it is in the public interest that there should be finality in litigation. The second principle is that justice requires cases to be decided, so far as practicable, on the true facts relating to them, and not on assumptions or estimates with regard to those facts which are conclusively shown by later events to have been erroneous.’

### ***Amy v Amy* [1992] 2 FLR**

In the above case the husband paid the wife £120,000 in pursuance of an agreement intended to achieve a clean break between the parties. The broad effect of the agreement was to divide the parties' assets equally. The draft minute of the consent order were settled by counsel for the wife, with the intention that the agreement should be approved by the court, but before that could happen the wife died. The husband as Plaintiff sought rescission of the agreement on the basis that it was vitiated by a change in the fundamental assumption underlying it, i.e. by the wife's death. The defendants were the wife's children by a former marriage, who were the beneficiaries under her will, and her executors. Held – dismissing the claim – the fact that parties had not obtained the court's approval of the agreement as to a clean break, did not mean that the agreement was not effective. As one of the parties had died, it was not open to the court to decide in the light of new facts whether to affirm or vary the agreement under the Matrimonial Causes Act 1973, it only remained for the court to consider at common law whether the agreement stood or whether it fell by reason of mutual mistake of frustration. In that context, the proper test to be applied was whether the events that had occurred since the making of the agreement invalidated the basis of the fundamental assumption upon which it had been made. This was a case where the parties were dividing the capital in light of the contribution that each had made to the business, without any assumption being made as to the wife's future health. Taking into account the importance of achieving finality in matrimonial disputes, the fact that agreements freely reached should not be lightly set aside and that the agreement had been performed, it could not be said that death soon after the agreement was an event which entitled the court to intervene. The agreement stood.

### ***Reid v Reid* [2003] EWHC 2878(Fam), [2004] 1 FLR 736**

The wife's death within two months of the order amounted to a new event. The death had not been reasonably foreseeable at the time of the order, notwithstanding the possibility of death at anytime. The wife was registered blind, had high cholesterol and high blood pressure but at the time of the hearing her death was no more than a theoretical possibility.

The question was what would be the appropriate order at the time, had it been known that the wife had only two further months to live? The answer was that there would be a severe reduction of the level of the wife's future needs. This would have led the court, in the absence of any agreement to conclude that there was an opportunity to serve the husband's needs on a less restrictive basis. The court followed the decision in *Smith v Smith (Smith and others intervening)* [1992] Fam 69, [1991] 3 WLR 646, [1991] 2 FLR.

### ***Tips/ Pointers***

1. Was the death reasonably foreseeable at the time the order was made?
2. Has the fundamental assumption upon which the agreement had been reached changed?
3. Consider the length of time that has elapsed between the making of the order and the death?
4. Applications to appeal should be brought promptly following a death.
5. Remember that agreements freely reached should not be interfered with *Edgar v Edgar* (1981) FLR 19, [1980] 3 All ER 887, CA
6. What would be the likely outcome had the court been aware that one party had a reduced life expectancy.

***Imogen Robins***

## CONTACT DETAILS

### CHIEF CLERK

**John (Charles) Charlick**

### LONDON

3 Paper Buildings, Temple, London EC4Y 7EU  
Tel: 020 7583 8055 Fax: 020 7353 6271 DX: 1024 LDE  
Email: london.clerks@3paper.co.uk  
Senior Clerk: David Phillips

### BOURNEMOUTH

30 Christchurch Road, Bournemouth, Dorset BH1 3PD  
Tel: 01202 292102 Fax: 01202 298498 DX: 7612 Bournemouth  
Email: bournemouth.clerks@3paper.co.uk  
Senior Clerk: Stephen Clark

### BRISTOL

Hanover House, 47 Corn Street, Bristol BS1 1HT  
Tel: 0117 9281520 Fax: 0117 9281525 DX: 7836 Bristol  
Email: bristol.clerks@3paper.co.uk  
Senior Clerk: Mark Heath

### OXFORD

1 Alfred Street, Oxford OX1 4EH  
Tel: 01865 793736 Fax: 01865 790760 DX: 4302 Oxford  
Email: oxford.clerks@3paper.co.uk  
Senior Clerk: Russell Porter

### WINCHESTER

4 St Peter Street, Winchester, Hants SO23 8BW  
Tel: 01962 868884 Fax: 01962 868644 DX: 2507 Winchester  
Email: winchester.clerks@3paper.co.uk  
Senior Clerk: Stuart Pringle

Office hours are 8:30am until 6:15pm

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## FAMILY TEAM MEMBERS

Susan Solomon

Susan Trevehan

Leo Curran

Richard Tyson

Nigel Mitchell

Peter Kent

Timothy Coombes

Nicola Martin

Sarah O'Hara

Elisabeth Hudson

Patricia Kelly

Lucy Hendry

Sophie Knapp

Amanda Buckley-Clarke

Imogen Robins

Christian Sweeney

Krystyna Kirkpatrick

Judy Earle

Melanie De Freitas

Elaine Strachan

Catherine Purdy

Eleanor Davies

Emma Griffiths

Robert Horner

Kalsoon Maqsood

Louise Worton

Gillian Campbell