



Family Team Newsletter

November 2005 Edition

Contents:

Section One

Forthcoming Changes to Cost in
Ancillary Relief Proceedings

– *Nicola Martin*

Section Two

The Adoption and Children Act 2002

– *Eleanor Davies*

Section Three

Domestic Violence Crime and Victims Act 2004

– *Imogen Robins*

WELCOME

Welcome to our latest addition of our family team newsletter. It is said that 'there is no constant but change' and here at 3 Paper Buildings we aim to keep you informed of the latest challenges facing family lawyers. As ever, I would be very grateful for any comments you have. Please let us know of any topics you would like to see covered in later publications.

Chambers has a range of expertise covering all aspects of family law. As our family team continues to expand and develop, we would like to take this opportunity to remind you that 3 Paper Buildings is fully accredited by both the Law Society and the Bar Council to give lectures and other training sessions qualifying for Continuing Professional Development points.

If you would prefer to receive this publication via e-mail please contact me.

STUART PRINGLE
Senior Clerk Family Group

SECTION ONE

Forthcoming Changes to Cost in Ancillary Relief Proceedings

THE WAY WE WERE:

Gojkovic (No 2) 1992 Fam 40 it seemed to be the case that the party who had not offered enough to settle should pay all of the costs of litigation. This decision was reflected in FPR 2.69 but the difficulty was that 2.69B seemed to contemplate the position where only one party had made an offer but it became arguably unworkable when each party had written Calderbank proposals. In such cases the order often ends up between the two and both parties pay their own costs. However real analysis of judgments in **Gojkovic** shows that the decision was not just because an insufficient offer was made which was “beaten” by the order, but that there had been a denial of the opportunity to negotiate because of the lateness of the other (and also of disclosure)!

By the time **Norris v Norris** and **Haskins v Haskins** [2003] EWCA Civ 1084 was decided the President made clear the need for counter offer and genuine negotiation by both parties. Whilst the starting point was an offer by the paying party, the absence of a counter offer may well be reflected in costs.

This flagged up the major rethink which was already underway on ancillary relief costs. A rethink became necessary because the decision **White v White** meant that proportionate division in entitlement based cases became the order of the day.

In January 2003 the President wrote to the Senior Costs Judge:-

“The purpose of this letter is to suggest that it may be worth giving serious thought to doing away with fee shifting in family proceedings. The Family Proceedings (Miscellaneous Amendments) Rules 1991 disapply CPR 443(2) (costs follow the event). It is therefore a relatively short step to providing that in family proceedings no order for costs will be made unless a particular party has behaved in such an unreasonable manner that the court feels that a sanction should be imposed. I would suggest that if this idea were to be adopted the court making such an order should decide what amount should be paid by way of costs there and then.

The level of venom in detailed assessment in family proceedings is such that I am firmly of the view that the removal of costs as an area of conflict would have an overall beneficial effect. If cost were never an issue the heat would be taken out of the situation far more quickly and any incentive to legal representatives to pursue remedies over-vigorously in the hope of recovering greater costs would disappear”.

In effect this led to the President’s Advisory Committee on Ancillary Relief having the following terms of reference:-

- (a) What changes (if any) in the rules of practice in relation to ancillary relief are necessary and or desirable to reflect the developments in principle and practice in the light of developments in civil litigation.
- (b) The problems identified as caused by the previous rules.
- (c) The difficulty in specifying the event which costs should follow.
- (d) Court assistance in the reorganisation of finances should not of itself imply blame on either party.
- (e) FPR 2.69B is unworkable where both parties have made offers and so of little value.
- (f) The Calderbank process which requires parties to bet on the results of a case can lead to unfairness.
- (g) The disproportionate effect in low or middle value cases.
- (h) Costs orders can increase acrimony (and obscure the fact that parties are spending their own money!)

The conclusions of the sub committee were:-

1. Costs following the event was no longer appropriate and should be abandoned.
2. If the above were to be replaced the new principle should either be that each party should bear their own cost or all costs should be paid from the total assets pre-division.
3. There must be a residual power to make costs orders against any party who has acted unreasonably.
4. Without prejudice offers should no longer be taken into account when deciding costs - ALL OFFERS SHOULD BE OPEN!
5. Reasonable costs were in the future to be included as part of the assets and liabilities of parties with schedules exchanged for comment and decision on a summary basis. Costs orders then part of main judgment.

The proposal was that we should adopt the Australian practice s117 of their Family Law Act 1975 - a basic no order regime BUT with the jurisdiction to make an order where one party behaved unreasonably - was to be taken as a starting point with modifications.

Therefore the DCA published a consultation paper in October 2004 seeking views on the proposals to amend FPR on costs. This led to a draft statutory instrument which was initially thought likely to be in force in 2004, then Easter 2005, and now (according to September 2005 Family Law) 5 December 2005!

So, we cannot be sure of exactly what is coming in, or when, but we do know that it is on the way and it is going to be pretty fundamental and by looking at the rationale behind the proposal for change we can be fairly sure about the shape of things to come.

Several issues gave rise to concern over costs. Firstly the consequences of closed offers and parties failing to “beat” Calderbanks can undermine completely the substantive order for ancillary relief that the court has just made.

In **GW v GW** [2003] 2 FCR 289 this was likened to a form of spread betting by parties, in that one need only win or lose by a few thousand pounds in order to lose or gain liabilities for tens of thousands of pounds in costs. This is clearly disproportionate and can lead to unfairness, especially in “big money” cases. However in “small” or “middle money” cases such costs orders can lead to real hardship and undermine the courts asset division, especially when there is barely enough (or not enough) to cover two households out of one.

Secondly costs were perceived to be an expensive satellite area of litigation with more costs and more Calderbanks to shore up costs positions post the substantive decision of the court.

It is clear too that, post White and the move away from the era of reasonable requirements, the question arose, why if there is equal division should one party pay the other's costs?

The recommendations of the costs sub committee were endorsed by the President in

Norris v Norris and **Haskins v Haskins** [2003] EWCA Civ 1084 and the stage is set for the abolition of existing FPRS in relation to costs and the provision of a new rule 2.71.

THE FUTURE:-

1. New general rule that the court will not make orders as to costs.
2. The court may make an order because of unreasonable conduct of a party in relation to the proceedings (not marital conduct). For instance where a failure to comply with an order e.g. on disclosure, or where a party has been wholly or partially unsuccessful in the proceedings or in respect of an issue, or because of the terms of an open offer made. But the court is also entitled to consider all the circumstances.
3. Costs will be part and parcel of the substantive application and taken into consideration as a liability which each party has. The extent to which it is reasonable for a party to have high disproportionate or unnecessary costs will become an issue to be pursued in evidence. A new Form H has to be filed and served 14 days before the final hearing setting out full particulars

of costs incurred and to be incurred. So the advocate would need to decide prior to final hearing whether to attack the level of costs incurred by the other side as unnecessary or unreasonable with a view to contending that the court should not treat such costs as a legitimate liability (e.g. cost of an unhelpful expert or empty allegations of non-disclosure - argument would be that costs wasted should be added back in as an asset rather than treated as a liability).

4. Costs will not be a separate issue to be determined at the end of the case but rather taken into account whilst the court is considering the appropriate ancillary relief order such that it will not be necessary to determine costs after judgment thereby running the risk of undermining the basis of the court order.
5. Abolition of Calderbanks. The only offers to be referred to will be open offers (save that strict without prejudice letters can still be written but only referred to at FDR). Thus the earlier a well pitched open offer is made the greater the possibility of displacing the general no order for costs. (Failure to negotiate in a timely manner in the open could expose a party to an order for costs as such a failure could be regarded as conduct in the proceedings).

The basic rationale behind the changes appears to be to enable the Judge during the ancillary relief hearing to come to an informed view on the level of costs of both parties and simply to treat cost incurred as liabilities to be paid by each side or to make notional adjustments to reflect costs issues - but not to have judgment as a whole derailed by Calderbank correspondence.

The abolition of the Calderbank scenario will emphasise the “no order” principle and lead to an incentive not to run up costs unnecessarily because (save for misconduct) no one else is to pay the costs. If each party bears their own costs and makes open offers it is thought they are more likely to be reasonable and to focus on settlement.

Postscript and acknowledgements

However Nigel Dyer to whom I am deeply indebted for his lecture to the FLBA in 2004 (as well as Nicholas Ashworth's 2003 lecture to the same body) did suggest that a party may try their luck in going to court knowing that the risk is generally only going to be paying their own costs if they fail. As well as Nigel Dyer and Nicholas Ashworth's lectures, Jonathan Southgate also wrote a useful article in February 2004 Family Law, setting out his response to the consultation paper. However, despite his and other contrary feedback from the consultation process the Ancillary Relief Advisors Committee was unmoved and all appears set for the new regime (subject possibly to a few minor amendments) to come into force (along with change in other rules) on 5 December 2005. It seems that the new rules will apply to applications made in Form A on and after 5.12.05. Applications issued before that date will continue under the present rules. Also look out in this months Family Law for a full note and commentary by David Hodson, on the implications for practice.

Nicola Martin

SECTION TWO

The Adoption and Children Act 2002

Introduction and Overview of the Main Changes

There are three principle areas of change brought in by the Adoption and Children Act 2002 (“ACA”). The first is a change in who may adopt, the second is the range of Orders available to the court and the third is the process of achieving the Orders. The third change is perhaps the most fundamental in terms of its influence on the court process, since it results in a complete change in the emphasis of the proceedings. What was sought to be achieved by Freeing Orders is now achieved by Placement Orders (“PO”). The battles over consent have not gone away but have fundamentally changed in their timing. In addition, there are some further ‘weapons in the armoury’ and I hope to set out what they are and how they can best be put to use.

Placement

There are now two routes for the placing of a child for adoption. The intention of the ACA was to formalise the steps necessary before placing a child for adoption, thereby increasing the probability that a placed child will remain once placed and enabling proper consideration of the rights of those with Parental Responsibility (“PR”) prior to the important step of placement. It is intended that this will surmount the difficulties faced by Freeing.

No child, over 6 weeks of age, may be placed for adoption by an Adoption Agency unless either:

1. there is consent of the parents or
2. where there is no parental consent, under a Placement Order of the court,

and where a child placed before the age of 6 weeks e.g. by voluntary consent, attains the age of 6 weeks, these same provisions will apply.

Therefore where a child is in the care of a Local Authority (“LA”), and the LA decide that the child should be placed for adoption, they must apply first to the Adoption Panel, ensuring that the child is consulted directly (where age allows) and that the child’s views are before the Adoption Panel.¹

It is important to note that although their capacity to exercise it may be reduced, the natural parents PR will continue until the making of a final Adoption Order. There are, however, fundamental changes to contact with parents as set out below.

The Consent Route s19 ACA 2002

Parental consent should be given:

- a. freely;
- b. with a thorough understanding of its implications;
- c. with the CAFCASS officer as a witness.

The Consent may be given either to:

- (i) specific prospective adopters ‘identified’ in the consent, or
- (ii) to any prospective adopters who may be chosen by the agency, or
- (iii) to specific prospective adopters but with provision for any prospective adopters chosen by the agency in the event that the first placement is no longer available.

It is important to note that this provides for ‘identified’ rather than ‘named’ so that parents can be given the opportunity to be told details of the prospective adopters without their names or identity being revealed. This appears to have been a deliberate decision that was amended at the Special Standing Committee stage and as such would appear to be an encouragement to this approach.

¹ This is of particular note since where the child’s views are not acted on, the reasons for departing from them should be recorded by the Panel.

Withdrawal of consent

The timing of the application for adoption is the crucial factor in situations where consent is withdrawn. This is because where consent is withdrawn *before* the issuing of an application the child must be returned to the parents:

- a. within 7 days if no placement has yet been made, and
- b. within 14 days if placement has been made.

AND the child may not be removed from the parents pending the seeking of a 'Placement Order' until the application for adoption has been made. This situation is not covered by the usual powers of the LA to remove under a Care Order since the consensual placement route does not apply where there is an application for a Care Order pending or if a Care Order has been made following the giving of consent for placement.

Placement Orders s21 and 22 ACA

In the absence of consent, a child may only be placed for adoption under a Placement Order. Only a LA can apply for such an Order and an Order will only be made if:

- (i) the child is subject to a Care Order, or
- (ii) the threshold under s31(2) of Children Act 1989 (as amended²) are met or
- (iii) the child has no parent or guardian, or
- (iv) each parent or guardian has consented to the child being placed for adoption and has not withdrawn consent, or
- (v) the parents' consent should be dispensed with because the welfare of the child requires it.

It is also clear that as expanded below, a full consideration of the Welfare Checklist and the no-order principle will be employed.

The PO confers considerable protective powers on the LA since a PO grants the LA Parental Responsibility and the power to restrict the PR of both the parents and the prospective adopters. Once a PO is made only the LA have the power to remove the child from the placement unless a specific legal right to remove is established.

The PO gives the child 'looked-after' child status and all that this status implies. However where a child is 'placed for adoption' there is the capacity to dis-apply some of the duties that would otherwise apply, most importantly the duty to promote contact between the child and the parent and to consult the parent before taking any decision relating to the child. These are clearly important distinctions from children who are under Care Orders. Although parents may still apply for contact,³ the presumption that contact will occur is not present.

The order is non specific and allows the LA to place a child for adoption with any prospective adopters who may be chosen by the Authority.⁴

The PO remains in place (unless it is revoked under s24) until the Adoption Order is made, or the child marries or attains the age of 18. It is likely that the Regulations that accompany these orders will require LAs to review placements regularly.

In addition to these reviews, where a child has not been placed within 2 years of the making of an order, the LA should reapply the s1 test and consider whether the adoption route remains appropriate. If it is not, the LA should itself seek to revoke under s24.

Notice of Application for PO

Essentially, the LA must give notice to the same respondents as would be required for a Care Order application, subject to the new provisions for Parental Responsibility. In addition, however, if none of the persons whose consent is required can be found then any relative who can be found should be notified.⁵

² By s120 of ACA 2002 to 'ill treatment, including sexual abuse and forms of ill treatment which are not physical, or the impairment of health, mental or physical, or impairment of development and including the impairment suffered from seeing or hearing the ill-treatment of another.

³ Under ss26 and 27 ACA 2002

⁴ S21 ACA 2002

⁵ S144(1) defines relative as 'grandparent, brother, sister, uncle or aunt whether full blood or half blood or by marriage'

In addition, the applications of the Welfare Checklist (in particular s1(4)(f) of ACA 2002 which requires the LA and the Court to 'consider the child's relationship with any person in relation to whom the agency considers the relationship to be relevant including that person's wishes, feelings and ability to care for the child and offer him a stable and secure home') mean that a LA should notify any persons likely to fall within this so that they can show that consideration has been given to their ability to care for the child.

Revocation under s24

An application to revoke a PO can only be made by a parent or relevant 'other' if:

- (i) the court gives leave *and*,
- (ii) the child is not placed for adoption by the authority.

Leave to apply for a revocation will only be granted *if circumstances have changed since the order was made* and it is likely that the change would have to be a significant one given the level of deliberation that the court will have undertaken at the time of making the PO. It does, however, seem likely that as with Freeing Orders, where a child has not been placed for a lengthy time, parents may be able to mount the argument that there has been a significant change on the basis that there no longer remains a realistic prospect of adoption.

If a child has been placed but no progress is made towards an Adoption Order within a reasonable time there is provision for 'the child or someone acting on his behalf' to apply to revoke. This does not include a parent and it seems likely that this route will only be taken where there is sufficient inertia by a LA for the independent reviewing system to bring the case to the attention of CAFCASS.

Upon the revocation of a PO, any pre-existing Care Order will automatically be revived.

When to apply for a PO

The LA *must* apply for a PO when s22 requires it. That is:

- A. where a child is 'placed' for adoption or is being accommodated by authority;
and
 1. no Adoption Agency is authorised to place the child for adoption (i.e. no parental consent has been given or it has been withdrawn);*and*
 2. either the LA considers that s31(2) threshold criteria are met or the child has no parent or guardian;*and*
 3. the LA is satisfied that the child should be placed for adoption.
- B. Where there is:
 1. a pending application for a care order, or
 2. the child is the subject of a care order and the LA is not authorised to place the child for adoption (i.e. no parental consent)*and*
 3. the LA is satisfied that the child ought to be placed for adoption.

A LA therefore has *discretion* whether or not to apply for a Placement Order where the child is subject to a Care Order and there is consent to place the child, but if either there is a Care Order pending and no consent to place, or a Care Order is made after the initial consent was given, then they *must* apply for a Placement Order.

These provisions on applications do not apply where there has been notice of intention to adopt served (unless a 4 month period from the giving of notice has elapsed without the making of an application, or the notice has been withdrawn) or if there has been an application for an Adoption Order made that has not yet been disposed of.

Dispensing with Parental Consent

The test for the dispensing of parental consent is transformed completely under the ACA 2002. The test is now whether 'the welfare of the child requires the consent to be dispensed with'. A critical part of this exercise will be to consider the essential elements of s1. In order for the LA to put forward a PO application successfully, therefore, its evidence and Care Plans must carefully address the question of whether it can be 'satisfied that the child ought to be placed for adoption' which, necessarily as s1 of the ACA 2002 applies, involves a consideration of all the alternative options. This will be essential to ensure that the PO is ECHR compliant.

Contact

The placement of a child for adoption by either route discharges any existing s8 or s34 CA 1989 Orders and no applications may be made under the CA 1989 until the final adoption hearing. The hope is that contact may be agreed. However, where that is not possible there will have to be an application under s26 ACA for a Contact Order.

Application

As set out above, an Order under s26 may be made by the court of its own motion upon the making of a Placement Order and indeed is under a duty to consider doing so.

The application may be made by:

- a. the child;
- b. the Agency;
- c. any parent, guardian or relative;
- d. any person in whose favour there was a CA 1989 Contact Order that ceased by virtue of s26(1);
- e. the person with a residence order in force immediately before placement;
- f. the person with care of the child under High Court jurisdiction before the agency was authorised to place;
- g. any person with the leave of the court.

The inclusion of 'any relative' is a change that provides in particular for sibling applications and is recognition of their role in the lives of those who are to be adopted. The important change for relatives such as grandparents is that the application may be made as of right rather than the need for leave.

The removal of the duty of a LA to promote contact for placed children is to some degree tempered by the wording of s26(4) that implies an expectation that a LA will consider and put forward proposals for continuing contact and with the duty of the court specifically to consider contact at this time. Any LA that does not do so is likely to find that a s26 Order is made by the court.

Section 26 orders

Like the s8 Orders that they replace there is provision for s26 Orders to regulate contact in the fullest sense; as such there is provision for 'No Contact Orders' and for Prohibited Steps Orders. In addition, there is provision for Emergency/Contingency Orders to prevent contact 'in order to safeguard or promote the child's welfare'. Such Orders only last for 7 days and there are regulations setting out what steps must be taken by an agency where it has exercised this power.

The Orders made under this section are made for the duration of the time where the agency is authorised to place (either by consent or under a Placement Order). There is provision for applications to revoke or vary by the child, the agency or anyone named in the Order.

Applying for adoption and the new orders

The starkest change in the rules governing who may adopt is that joint applicants are no longer required to be married.

Joint applications

The definition of those who can apply to adopt jointly is now:

- a married couple; or
- two people (whether of different sexes or the same sex) living in an enduring family relationship

Then the definitions:

- 'couple' does not include two people where one is the other's parent, grandparent, sister, brother, aunt or uncle;⁶ or
- where any of the above are half blood or adoptive relationship of parent child.

Sole Applicants

The right of a person over the age of 21 to apply is preserved and in addition it has been extended to include the 'partner' of the child's parent, thereby allowing step-parents and other partners to adopt without the need for the natural parent making such an application.

There are a number of ancillary adjustments to this which I have not lingered on but can be found at s51 ACA 2002.

Preliminaries to the Adoption Application

There are four preliminary requirements which have to be satisfied before an adoption order can be made:

- (i) probationary periods prescribed for both agency adoptions and non-agency adoptions;
- (ii) reports required by the court;
- (iii) in the case of non-agency adoptions, notice provisions; and
- (iv) generally the suitability of adopters.

For these purposes an 'agency' case is where the child is placed for adoption with the applicants by an Adoption Agency (or in the case of Local Authority foster parents, where the LA converts the placement).

Probationary Period

See the right to make an application for SGO provisions.

Reports

The Agency must submit a report on (a) the suitability of the applicants and (b) any relevant welfare issue under s1 and must assist the court as directed. These reports are likely to cover similar areas to the old law Schedule 2 reports. The Act provides for the appointment of a CAFCASS officer and it is anticipated that it will be they who prepare the welfare report.

Notification in non-agency cases

Proposed adopters in a non-agency case must give written notice to the appropriate LA of their intention to adopt no more than 2 years and no less than 3 months before applying for an Order. Such notice must be given in writing.

Notice cannot be given until leave for the application has been granted, if the applicant requires leave.⁷

Where notice is given by a person with whom the child has been placed by the LA (but not as a prospective adopter), then that notice does not alter the nature of the placement i.e. the LA is not to be deemed as having placed the child there for adoption.

Upon receipt of such notice, the LA must arrange for the investigation of the matter and submit a report to the Court (in particular dealing with the suitability of proposed adopters and the welfare issues for the child). The LA may delegate some of its duties to other suitable agencies where appropriate e.g. where there was residence overseas.

⁶ S144(5) ACA 2002

⁷ S44(4) ACA 2002

Special Guardianship orders (SGO)

These Orders must be considered in any adoption application and as discussed above a failure to do so is likely to result in difficulties in showing that the requirement to consider the minimum interference with the child's right to family life under Article 8 of Human Rights and in turn the 'least interventionist' approach of the no-order principle which the ACA specifically brings into this area.

They provide an option for permanence in a broad set of circumstances e.g.

- Children being cared for by members of the extended family
- Older children who retain significant links with birth family
- Children from ethnic backgrounds where there are religious or cultural difficulties with adoption

*'the new order is intended to offer more than residence order in terms of the security it brings and the support services to be made available including financial support.'*⁸

In particular, the security offered is increased by the ability of the 'Special Guardian' to exercise the Parental Responsibility that they are given to the exclusion of any other holder of PR save in respect of:

- a. the operation of any rule of law that requires the consent of all those with Parental Responsibility (e.g. sterilisation or circumcision of a child); and
- b. the rights the natural parent has in relation to adoption or placement for adoption of the child.

In this way, the security of adoption can be achieved without the loss of the birth family.

The effect of SGO

The making of an SGO confers Parental Responsibility that may be exercised to the exclusion of any other holder of PR save as set out below.

The making of an SGO discharges any existing Care Order and related Contact Orders. Because of this, the court is under a duty before making an SGO to consider whether, if the Order were made:

- a. Contact Order should also be made with respect to the child, and
- b. any s8 Order in force with respect to the child should be varied or discharged.⁹

The existence of an SGO does not prevent the making of a Care Order or a Residence Order. The making of either of these Orders whilst an SGO is in force does not discharge the SGO but it does make the person in whose favour a Residence Order is made eligible to apply for variation or discharge of that Order (and indeed the LA become eligible to apply for this also upon the making of a Care Order).

There are areas where the level of security provided does not echo that provided for by Adoption for example:

- a. there is provision for SGOs to be varied or discharged either by the court of its own motion during any family proceedings in relation to that child or by application of:
 - (i) the special guardian;
 - (ii) the child's parents, although only with the leave of the court;¹⁰
 - (iii) the child, with leave of the court and provided that the court is satisfied that he has sufficient understanding;
 - (iv) any person with a Residence Order in their favour;
 - (v) any other person who had PR immediately prior to the making of the SGO again with leave of the court;
 - (vi) where a Care Order is in place, the Local Authority.

⁸ HL Deb, 23 October 2002, col 1374 per Lord Hunt of King's Heath

⁹ CA 1989 s 14B(1)

¹⁰ CA 1989 s 14D(3)(b)

It is important to note, however, that this is limited in scope because where leave is required (e.g. for the natural parent) this will only be granted where there has been a *significant* change of circumstances since the making of the SGO.¹¹

- b. The powers relating to removal from the jurisdiction are limited to 3 months without leave of the court.
- c. The right to cause the child to be known by a new surname is restricted unless it has the consent of all persons with PR or leave of the court.

Other support under SGO

Schedule 3 of ACA 2002 also amends the Children (Leaving Care) Act 2000 in order to place a duty on LAs to consider whether to provide 'advice and assistance' to former looked after children aged between 16 and 21, subject to the SGO including support for employment, education and training and if the child is in need they must advise and befriend and may also provide assistance.

The LA must carry out such an assessment at the request of the SG and may do so at the request of some other person.

Where as a result of such an assessment the LA determines that a person has needs for SGO support services, the LA must then decide whether to provide such services to that person. If the LA does decide to provide such services there must be a plan for provision of those services and this must be kept under review.

The probable effect of this, and the changes in the eligibility of Foster Carers for SGOs, is likely to mean that these Orders are significantly more attractive for Foster Carers than previous long term care arrangements.

The Application Process

NB Governed by sections 14A(3), (5) and (6) as amended by ACA 2002 and sections 14 A-G inserted by section 115 of ACA 2002.

Who may apply?

It is important to note that this is an Order that the court can make in any family proceedings including adoption proceedings, even where there is no application before the court.¹² In these circumstances, the court can require the LA to investigate and prepare a report on the person in whose favour the court is considering making an SGO.

Without leave:

- a. any guardian of the child;
- b. any individual with a residence order for the child;
- c. anyone with whom the child has lived for 3 years or more;
- d. anyone who has the consent of all persons with a residence order in respect of the child;
- e. where the child is in LA care anyone with the consent of that LA;
- f. where not in care, anyone with consent of all those with PR;
- g. any LA foster parent with whom the child has lived for at least a year immediately before the application.

With leave of the court:

- h. anyone else, including the child, who has leave of the court.

There may be joint applications even if the joint applicants are not married provided that they are 18 or over and are not the child's natural parents.

Notice

3 months' notice is required to be given to the LA in whose area the child lives or if the child is in care to the LA with care.

¹¹ CA 1989 s 14D(5)

¹² CA 1989 s14A(6)(b) as amended

BUT NB: NO NOTICE IS REQUIRED WHERE THERE IS AN APPLICATION FOR AN ADOPTION ORDER.

Upon receipt of notice, the LA must investigate and prepare a report on the suitability of the applicants to be SGs. It seems likely that where, for example, the application is by LA foster carers, any past assessments of them will also be taken into account.

It is of note that during the decision making process it is the Children Act 1989 Welfare Checklist test that will be applied, not the ACA 2002 checklist.

Planning and Approach

The 'No-order principle' in s1(6) of ACA 2002 suggests that the court should begin with a preference for the least interventionist approach which is likely to be considered to be in the best interests of the child unless there are cogent reasons to the contrary. In practice this means that statements and Care Plans will leave themselves open to criticism and attack unless they show a clear working through of each option for the child's future. The old suggestion that, in the absence of a familial placement, adoption was the only way to secure the future will no longer hold water (if indeed it ever did!). I would therefore (and have read learned backing for this approach) recommend that every Care Plan which concludes that Adoption is the correct course should begin with a genuine exploration of the following options, with an analysis of why and where they are not appropriate in meeting the needs of the child.

- (i) no Order at all;
- (ii) a Residence Order alone;
- (iii) a Residence Order with s91(14) restrictions and/or other conditions;
- (iv) a Supervision Order;
- (v) a Care Order;
- (vi) a Special Guardianship order;
- (vii) an Adoption Order.

In addition, the making of Contact Orders or setting out of 'contact arrangements' to run alongside each of these orders should be analysed.

With the inclusion of the no-order principle and the ECHR it is clear that anything less than a thorough analysis of each of these stages of intervention will not suffice.

By Eleanor Davies

SECTION THREE

Domestic Violence Crime and Victims Act 2004

The Domestic Violence Crime and Victims Act 2004 received Royal Assent on 15 November 2004. Some of the Act is in force but not the parts relevant to Domestic Violence. For the latest developments please see Statutory Status Table at www.lawtel.com. There are some indications that it will be in force in Autumn 2005 but we await news!

Statistics

One in four women has been hit by her partner. Research shows that women are beaten thirty five times before they contact the police for help. Two women are killed by their partner or former partner each week in England and Wales. Refuge answers up to 1000 calls to its 24 hour Domestic Violence Helpline per week.

Taken from 'Power and Control' by Sandra Horley Chief Executive of Refuge.

This country still has a poor record on domestic violence and the DVCVA 2004 is intended to strengthen the protection given to victims. A raft of changes have been made to both the criminal and civil law. A broad working knowledge of the Act is essential to all family lawyers. (The authors view!)

Cohabitants - Same Sex Couples

Definition of cohabitants in s62(1)(a) of FLA 1996 currently reads

"cohabitants" are a man and a woman who, although not married to each other are living together as husband and wife.'

The new definition is to be:

Substituted after the words "cohabitants" *"two persons who, although not married to each other, are living together as husband and wife or (if of the same sex) in an equivalent relationship"*

Hence the Act now applies to same sex couples and the DVCVA 2004 and the Civil Partnership Act 2004 have extended the powers under the Act.

Associated Persons

'Associated Persons' widely defined in s62(3) of the FLA 1996. Only 'associated persons' can apply for non-molestation orders and/or occupation orders under Part IV of the FLA 1996

In addition to changing the definition of 'cohabitants' the definition of 'associated persons' has been widened by inserting a new S62(3)(ea) which reads

'they have or have had an intimate personal relationship with each other which is or was of significant duration'

'Dating' is used in USA in the Violence Against Women Act 1994

Hence the DVCVA will apply to all couples who have been dating, but only in the relationship was 'intimate' and of 'significant duration'. Judicial clarification on whether several months amounts to 'significant duration' will be required. In theory it will now be possible for a mistress to apply under the Family Law Act 1996.

New offence of breaching a non-molestation injunction

New s42A (inserted by s1 of the Domestic Violence, Crime and Victims Act 2004).

Offence of breaching a non-molestation injunction. Conviction for breach of a non-molestation under s42A of the FLA 1996 will carry a maximum sentence of 6 months and/or a fine not exceeding the statutory maximum on summary conviction, and a maximum sentence of 5 years and/or fine on conviction upon indictment.

Hence, breach of a non-molestation order becomes an 'arrestable offence' and an officer can arrest without warrant a person he has reasonable grounds for suspecting to be guilty of breaching a non-molestation injunction.

S 42A Offence of breaching non-molestation order

- “(1) A person who without reasonable excuse does anything that he is prohibited from doing by a non-molestation order is guilty of an offence.*
- (2) In the case of a non-molestation order made by virtue of section 45(1), a person can be guilty of an offence under this section only in respect of conduct engaged in at a time when he was aware of the existence of the order.*
- (3) Where a person is convicted of an offence under this section in respect of any conduct, that conduct is not punishable as a contempt of court.*
- (4) A person cannot be convicted of an offence under this section in respect of any conduct which has been punished as a contempt of court.*
- (5) A person guilty of an offence under this section is liable -*
- a. On conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both;*
- b. On summary conviction, to imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum or both.*
- (6) A reference in any enactment to proceedings under this Part, or to an order under this Part, does not include a reference to proceedings for an offence under this section or to an order made in such proceedings.”*

When s42A of the FLA 1996 and Sch 10 to the Domestic Violence Crime and Victims Act 2004 comes into force the power of arrest will not be available to assist in contempt proceedings for breach of a non-molestation order. Power of arrest will only be available for occupation orders.

Breach of a non-molestation order can be either (not both) punished as a crime under s42A or dealt with as a contempt.

It will be necessary to apply for a warrant of arrest under r 3.9A of the FPR 1991 and this requires the application to be in Form FL407. The warrant itself is in Form FL408.

The warrant may become more popular once the new law comes into force. However given that it can be prosecuted as a crime will public funding be available? The Legal Services Commission will want it left in the hands of the CPS.

Will there be very few contempt proceedings for breach of non-molestation orders?

Restriction of the use of undertakings

Once upon a time undertakings were routinely used to protect victims of domestic violence. They were found to be ineffective and rarely enforced. The use of undertakings was restricted by s 46 of the FLA 1996. This section has now been amended further by para 37 of Schedule 10 to the DVCVA 2004 and restricts the use of undertakings further. Given this amendment it is unlikely that undertakings will be accepted routinely. District Judges already question the use of undertakings. It would appear that there is a robust approach being taken by this statute to restrict the use of undertakings in domestic violence cases.

As amended S46 reads:

- “(1) In any case where the court has power to make an occupation order or a non-molestation order, the court may accept an undertaking from any party to the proceedings.*
- (2) No power of arrest may be attached to any undertaking given under subsection (1).*
- (3) The court shall not accept an undertaking under subsection (1) instead of making an occupation order in any case where apart from this section a power of arrest would be attached to the order.*

- (3A) The court shall not accept an undertaking under subsection (1) instead of making a non-molestation order in any case where it appears to the court that -
- (a) the respondent has used or threatened violence against the applicant or a relevant child; and
 - (b) for the protection of the applicant or child it is necessary to make a non-molestation order so that any breach may be punishable under s42A
- (4) An undertaking given to the court under subsection (1) is enforceable as if the court had made an occupation order in terms corresponding to those of the undertaking.
- (5) This section has effect without prejudice to the powers of the High Court and the county court apart from this section.

Some commentators feel that it would have been better to abolish undertakings altogether in non-molestation case. The court will have to make an enquiry in respect of section 46(3A) if the respondent denies everything but offers an undertaking. In many cases it would be useful for findings of fact to have been made as there are often Children Act matters that follow on from any hearing.

Guidance on sentencing

There will be a need to advise clients on injunctions and procedure. This will be difficult for family lawyers who have little or no experience of the criminal law. Often the argument for undertakings could be that the Applicant could use the power of arrest as a 'weapon'. Respondents may be vulnerable to arrest and criminal prosecution for breach. It may be worth drafting a document to assist respondents in non-molestation injunctions to make them aware of their rights upon arrest.

Sentencing for breaches of non-molestation orders

Where enforcement not through criminal courts guidance is offered by case law

Hale v Tanner [2002] 2 FLR 879

Lomas v Parle [2004] 1 FLR 812

H v O (contempt of Court: Sentencing) [2005]

Sentencing under s42A

(Sentencing Guidelines on Domestic Violence Cases, consultation paper, sentencing Advisory Panel, July 2004)

First time breach no/minimal direct contact	Fine/community sentence (punitive-curfew/unpaid work)
More than one breach Minimal/some direct contact	Community sentence (Primarily rehabilitative)
Some violence/significant effect on victim	4 months imprisonment
Considerable violence/great detrimental effect on victim	12 months imprisonment

Advice to clients who have been arrested

Please note, that it will be very important to advise clients as to the implications of the new law. Breach of an injunction will become an 'arrestable offence', that is a person can be arrested without warrant. Important to be able to give some basic advice to clients who face injunction proceedings and may be vulnerable to arrest. Undertakings are probably going to be a last resort for most applicants given the significant changes to the law.

IF YOU ARE ARRESTED

The following four points may assist

- DO NOT talk to the police about your offence until you have spoken to a solicitor
- DO NOT go into an interview without a solicitor present, unless your solicitor has advised you to do so
- DO NOT sign anything to say you do not want a solicitor
- DO NOT resist arrest

BUT

- DO ask for a solicitor immediately
- DO give your name and address
- DO exercise your right to make a phone call

REMEMBER YOU ARE ENTITLED TO FREE LEGAL ADVICE UPON ARREST

Miss Imogen Robins



FAMILY GROUP MEMBERSHIP

Members

Susan Solomon
Susan Trevethan
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
Hamish Dunlop
Christian Sweeney
Krystyna Kirkpatrick
Judy Earle
Melanie De Freitas
Elaine Strachan
Catherine Purdy
Eleanor Davies
Emma Griffiths
Robert Horner
Kalsoom Maqsood
Louise Worton
Nicola Pearce
Gillian Campbell

Group Leader

Patricia Kelly

Specialist Clerk

Stuart Pringle – e-mail: stuart.pringle@3paper.co.uk

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

CHAMBERS ESTABLISHED 1892

www.3paper.co.uk