



# Family Team Newsletter

February 2007 Edition

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All our Family Law Group members are members of the Family Law Bar Association

Conferences can be arranged either at our chambers in London, Bournemouth, Oxford, Winchester and Bristol or, if need be, at the offices of solicitors. Video-conferencing facilities are available at all our five centres and 3-way telephone conferences with solicitor and client can be arranged by appointment.

Directions to any of our premises and information about transport and parking can be found on our Website.

## **Seminars, lectures and training**

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 for both professions. We provide both general lectures and seminars and also “bespoke” events for individual firms of Solicitors and Local Authorities.

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# WELCOME

Welcome to our first Newsletter of 2007.

2007 sees me take over the role of Chair of the Family Group at 3 Paper Buildings. Pat Kelly is a formidable act to follow – many of you will know her and no doubt miss her. I would like to take this opportunity to thank her for her tireless hard work and commitment to Chambers over many years.

2006 has been a challenging year for all of us, not only managing our caseloads but also responding to the ever present threat from the LSC. I fear the reprieve is only temporary and we at 3 Paper Buildings remain committed to ensuring that every effort is made in order to secure the best possible future for family practitioners across the board.

We hope that this newsletter provides both interesting and enlightening material across the different disciplines of family practice.

We would be delighted to give accredited lectures and other training sessions as required – tailored to suit your needs.

*LUCY HENDRY*

## Court Bundles – Don't Get Caught Out

On the 2nd October 2006 the new Practice Direction governing Court bundles in family proceedings came into force. It is lengthy, it is detailed and it carries a nasty sting in its tail. Judges have made it plain that they intend to apply the Practice Direction rigorously, and that sanctions will follow failure to comply with the new requirements. The aim of this article is to highlight the main points of the new arrangements. The reality however is that there is no substitute for a careful reading of the Practice Direction itself. The prudent practitioner will keep a copy on their desk. (see [2006] 2 FCR 834, [2006] 2 FLR 199).

### 1. Does the Practice Direction apply in my case?

Almost certainly if your time estimate is more than one hour. The exceptions are hearings in the FPC and urgent applications where it is not possible to comply. Keep your eyes and ears open: the designated Family Judge at any Court can, after consultation, direct that the Practice Direction will apply to hearings with a time estimate of less than one hour. You may know of the position locally to you, but make enquiry of the Court office when litigating in unfamiliar courts.

### 2. Who has to provide the bundle?

The party who is applicant, or, where there are cross applications, the first applicant. If the first or first and subsequent applicants are in person, the first person who is not a litigant in person gets the job.

### 3. How do I construct the bundle?

The paginated (and if possible agreed) bundle should be presented with an index at the front and an (agreed if possible) time estimate. The time estimate should be broken down into (a) time for reading by the Judge (b) time for evidence and submissions and (c) an estimate of time for preparing and delivering judgment. In estimating time for evidence assume the witnesses have read all the relevant documents.

The bundle should be presented in numbered Sections with the contents as follows:

#### Section 1

- a) An up-to-date summary – keep it brief and to the point;
- b) A statement of the issues to be decided at this hearing and at the final hearing;
- c) A position statement for each party and a statement of the Order they want now and at the final hearing;
- d) An up-to-date chronology if not set out at (a) above;
- e) Skeleton arguments, if appropriate, with copies of any authorities relied on;
- f) Any essential reading for the particular hearing.

Each of the documents (a) to (f) above should have at their front the date when they were prepared and the date of the hearing for which they are prepared, and each should give the page number in the bundle of any document referred to.

To the extent that documents (a), (b), (d) and (f) above are not agreed by the parties that should be indicated.

#### Section 2

Applications and Orders in date order.

#### Section 3

Statements and affidavits in date order and with the date they were made on the front page – top right-hand corner.

#### **Section 4**

Care plans (if appropriate).

#### **Section 5**

Experts and other reports in date order.

#### **Section 6**

Any other documents in date order (n.b. not notes of contact visits unless specifically directed).

If, for a particular application, a full bundle is not necessary, provide only the relevant parts and make it clear in the Summary in Section 1 that that is the case. Each time that the case goes back for a hearing, up-dating is required, and out-dated documents (particularly in Section 1) must be removed.

#### **4. Is there a preferred format?**

A4 ring binders or lever arch files please, with no more than 350 pages to a file. On the front and spine of the file mark (a) the case name and number, (b) the Court where the hearing will take place, (c) the date and time of the hearing, and (d) (if known) the name of the Judge. Where there is more than one file, mark them A, B, C and so on.

#### **5. When do I have to do this?**

You have to get paginated bundles to all parties not less than 4 working days before the hearing (or 5 in public law Children cases leading up to case management). If you are instructing Counsel they have to have their bundle 3 working days before the hearing.

The Court has to have the bundle 2 working days before the hearing (or at the time directed by the Court if different).

If the Section 1 documents are not all available when you lodge the bundle with the Court they must be with the Court by 11.00 am on the day before the hearing. (In the High Court, if you know who your Judge is, you must also e-mail the Section 1 documents to his/her clerk).

#### **6. Where do I send the bundle?**

At the R.C.J. it is the office of the Clerk of the Rules. At the P.R.F.D. it is the List Office Counter. Elsewhere find out where the Designated Family Judge has directed bundles to be lodged by telephoning the Court Office.

**WARNING:** Failure to send the bundle to the correct place can mean the Judge will treat the bundle as having not been lodged. This can have disastrous consequences as we will see.

If you are sending bundles by post, DX or courier show the date and place of the hearing on the outside of any packaging. If you send bundles or Section 1 documents to the RCJ or PRFD by post or DX get proof of despatch and bring it with you to Court for the hearing. If you deliver by hand get a receipt and bring that with you to the hearing. If you don't have the proof at Court there is a risk the Judge will treat the bundle or documents as not lodged.

#### **7. What if I am running late?**

At the R.C.J. the Clerk of the Rules will not accept bundles or Section 1 documents after 11.00 a.m. on the working day before the hearing. If that is the position take the bundle of documents to the Judge's Clerk if it is a case listed before a High Court Judge. In any other case take the bundle of documents to the messenger at the Judge's entrance to the Queen's Building and telephone the personal assistant to the Designated Family Judge (020 7947 7155) to confirm what you have done.

At the RCJ, the Clerk to Counsel for the Applicant must check by 3.00 pm on the day before the hearing that the Judge has received the bundle and/or Section 1 documents. If that has not been received, the Applicant's solicitor has to organise prompt delivery. (Where Counsel is not instructed, the responsibility for making the check falls on the advocate representing the party in the position of Applicant).

**8. Timing is everything.**

If the time estimate changes, the Court has to know straight away. (Notify the Clerk of the Rules at the RCJ, the List Officer at the PRFD and the Listing Officer elsewhere). If a hearing is not going to be effective, for whatever reason, the parties must immediately inform the Court by telephone and in writing. The letter should, if possible, be a joint letter of and signed by all the parties. Attached to it should be a short summary of the background of the case and the consent of each of the parties. If the consent of any party cannot be obtained, say why not and set out any steps taken to try to get it.

Set out the Order asked for and give the Court enough information for it to be able to decide whether to take the case out of the list.

**9. My hearing has finished. What now?**

If you have produced the bundle retrieve it straightaway, (or at latest within 5 working days if it can't be done there and then). For the next hearing you will need to re-submit the bundle in its updated form.

**10. The Sting!**

If you fail to present the parties or the Court with bundles in the way described and at the right time the Judge can (a) take your case out of the list, or (b) put your case further back in the list and either way (c) make a wasted costs or other adverse Costs order.

As I indicated at the start, the Judges seem to be determined to enforce these new requirements. Don't get caught!

*Timothy Coombes*

## SECTION TWO

# Solving The Trusts Of Land Problem

1. There are a number of ways in which a person (call them 'a claimant') can establish a 'share' in a given property; by 'share', that is to say a beneficial interest. They are;
  - 1.1. An express declaration or agreement in writing pursuant to **section 53 (1) (b) and (c) of the Law of Property Act 1925**. This might prove that the claimant has a legal or beneficial interest in the property.
  - 1.2. A constructive trust created because of the 'common intention' of the parties; the parties being the legal owner of the property and the claimant. A constructive trust would create a beneficial interest in favour of the claimant.
  - 1.3. A resulting trust; that is a trust resulting from direct financial contributions made by the claimant to the property. This too would create a beneficial interest in favour of the claimant.
  - 1.4. By estoppel. Estoppel is a concept in equity. Therefore, the court has a range of remedies available to do justice to the case. One of them might be to grant a beneficial interest.
2. In advising any claimant on their potential interest in a property, the first place to look will be the transfer deeds and the office copy entries.

### Express Declaration or Agreement in Writing.

3. Section 53 of the Law of Property Act 1925 provides that;

*53(1) Subject to the provisions herein contained with respect to the creation of interests in land by parol; –*

*(a) no interest in land can be created or disposed of except by writing signed by the person creating the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;*

*(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by the some person who is able to declare such trust or by his will;*

*(c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.*

*(2) This section does not affect the creation or operation of resulting, implied or constructive trusts.*

4. When scrutinising the transfer and ownership documents, we are therefore looking for written proof of legal title<sup>1</sup> and beneficial ownership;<sup>2</sup> both will exist in any jointly owned property. Irrespective of legal title, it is the beneficial ownership which dictates who owns what 'share' in the home. In the case of non-registered land, one will need to look at the conveyance to the current owner or the title deeds. If registered land, it will be the appropriate Land Registry documents.

<sup>1</sup> The legal owners are 'joint tenants'; each joint tenant has an identical interest in the whole land and every part of it. The interest of each is the same in extent, nature and duration. The legal owners' interests cannot be severed; that is, separated one from the other (see Vol 39(2) of Halsbury's Laws (4th edn) paragraphs 193 and 198.

<sup>2</sup> Beneficial ownership can be severed. In the circumstances, the owners of beneficial interests can either be 'joint tenants' (in which case they are not severed) or 'tenants in common' (in which case they are). If the beneficial interest is severed, each tenant in common will own his/her own 'share' and for co-habiting couples it is this share that is important. (e.g. 80% to one tenant and 20% to another). If the beneficial ownership started off joint and was then severed (usually by one party giving notice of severance), then the beneficial owners become tenants in common in equal shares.

5. At this stage, it is convenient to look separately at two different types of case.

Type A; in which only one person is named as the legal owner, the claimant is not that person but they are nevertheless trying to establish a share in the home.

Type B; in which the claimant and another are named as legal owners but there is dispute as to the extent of the 'share' that each of them owns in the home.

### TYPE A: The Single Owner.

6. It is axiomatic that if the transfer and ownership documents reveal a single owner who is not the claimant and there is no separate document complying with s 53 LPA 1925, then the claimant cannot pursue an argument based on an express declaration or agreement in writing (as per paragraph 1.1 above). He must therefore look for an argument employing trust principles or estoppel (see 1.2 to 1.4 and paragraph 21 below).

### TYPE B: Joint Owners.

7. If the transfer and ownership documents reveal joint legal title between the claimant and another, then the claimant will want to know the extent of his or her beneficial 'share'; will it inevitably be 50/50 automatically to reflect the legal title?

8. Once again, the starting place is the transfer and ownership documents themselves. If one of those documents *declares not only in whom the legal title is to vest but also in whom the beneficial interest is to vest*, then that declaration is conclusive. In the absence of fraud or mistake at the time of the transaction, the parties cannot go behind it even on death or when they separate.<sup>3</sup> Conversely, where the legal estate is conveyed to two (or more) people as joint tenants *but neither the conveyance nor any other written document contains any express declaration of trust concerning beneficial interests*, the way is open for a claimant to employ the doctrines of constructive and or resulting trusts or estoppel.<sup>4</sup> The short answer then to the question posed in paragraph 8 above is 'No'; a conveyance of the legal title into joint names which contains no declaration of the beneficial interests does not lead necessarily to the conclusion that the parties were entitled beneficially in equal shares.

9. The next question then becomes: what wording in the transfer or ownership documents is required to provide an express declaration of trust concerning the beneficial interest?

10. The current conveyancing regime administered through The Land Registry has largely superseded the need for individually tailored conveyancing documents. In the circumstances, the available documents may well be limited to:

10.1. The Transfer Document (currently Form TR1)

10.2. The Land Registry Office Copy Entry.

11. Until recently, the drawback with this documentation has been that it inevitably shows you who owns the legal title but it may well not tell you who is the beneficial owner. It is principally designed to help those unconnected with the land (potential purchasers, creditors and so forth) identify what the land is and who owns the legal title; they are less concerned with beneficial ownership.

12. Under the pro-forma regime, the conveyance is now the 'Transfer Document'. By definition, the pro-forma layout invites particular wording to appear on the document. The wording has been scrutinised by the Courts in the context of whether it defines the existence and extent of beneficial shares.

13. In **Re; Gorman (A Bankrupt)** ([1990] 1 WLR 616), the Court considered the wording of a 1968 transfer of 30 Sandcross Lane, Reigate to Mr and Mrs Gorman. It included the following provision:

<sup>3</sup> See **Pettitt - v - Pettitt** ([1970] AC 777 at 813. In a recent article in Family Law (January 2006 'Co-owners, the Transfer, the Intent and Stack' p.26), Alex Ralton suggests that an estoppel argument might also succeed.

<sup>4</sup> Per **Slade LJ in Goodman - v - Gallant** ([1986] Fam 106, 110 F - H).

*It is hereby agreed and declared that the transferees are entitled to the land for their own benefit and that the survivor of them can give a valid receipt for capital moneys arising on a disposition of the land (my emphasis in italics)*

14. Vinelott J. concluded that not only did Mr and Mrs Gorman own the legal title but that these words revealed them to be joint beneficial owners at the time of purchase (and therefore having a 50% share in the property ).<sup>5</sup>

15. In **Goodman - v - Gallant** ([1986] 2 WLR 236), the conveyance declared that they held the property:

*'until sale upon trust for themselves as joint tenants.'* (again, my emphasis in italics).

16. The Court of Appeal held that this was a declaration of a beneficial joint tenancy: i.e. that Goodman and Gallant were joint beneficial owners. Accordingly, when the co-habiting couple separated, Mrs Goodman served a notice on Mr Gallant formally severing the joint tenancy; this created tenancies in common in 50/50 shares. Each party was therefore entitled to 50%.

17. Compare with these two examples, a pair of cases in which the Court of Appeal declined to find a beneficial joint tenancy. This meant that they did not necessarily have to divide the net proceeds of sale 50/50. The Form 19 (JP) was the predecessor of the current pro-forma transfer document. Page 2 of the form contained a standard text as follows:

*The transferees declare that the survivor of them [can] [cannot] give a valid receipt for capital money arising on a disposition of the land.*<sup>6</sup>

18. In **Harwood - v - Harwood** ([1991] 2 FLR 274), 126 Rosendale Road, London had been transferred to Mr and Mrs Harwood in 1982 using Form 19 (JP). On their copy, the word *[cannot]* had been obliterated; there was no mention of beneficial interest. The Court of Appeal concluded that the standard form words showed only the legal title; it did not reveal the beneficial interest. They then divided up the beneficial interest under constructive trust principles which included the interest of a 3rd party who had provided some of the purchase price).

19. The same wording from Form 19 (JP) was considered again in **Huntingford - v - Hobbs** ([1993] 1 FLR 736). This time, there was no complication of a 3rd party. Mr Huntingford and Mrs Hobbs cohabited for a number of years in 3 Carter's Lane Cottages. It had been paid for using a deposit provided by Mrs Hobbs and a joint mortgage which was paid almost exclusively by Mr Huntingford. The Court of Appeal followed **Harwood** and considered that the words used in the Form 19 (JP) did not disclose the beneficial interests. The Court therefore divided up the shares largely on Resulting Trust principles according to their contributions.

20. The position with joint owners has now been given a thorough overview by Chadwick LJ in **Stack - v - Dowden** ([2005] EWCA Civ 857). In 1993, Barry Stack and Debra Dowden purchased 114 Chatsworth Road, London in joint names. The purchase price of £190,000 was funded by: (1) £65,000 mortgage in joint names; (2) £67,000 proceeds of sale from a previous property owned by Miss Dowden but used by the parties as a family home and (3) £58,000 of Miss Dowden's savings. The transfer document contained no express declaration of trust but there was this declaration at p.2:

*'The Purchasers declare that the survivor of them is entitled to give a valid receipt for capital money arising from a disposition of all or part of the property.'*

21. Obviously, Barry Stack had contributed considerably less to the purchase of the property than Miss Dowden. It was in his interest to argue that this declaration complied with **section 53 LPA 1925** or revealed a common intention to create a joint beneficial interest in the property (50/50 each). Following **Harwood and Huntingford**, Chadwick LJ had

<sup>5</sup> see 624 at A and B.

<sup>6</sup> This sentence was included in the Form to give effect to section 27(2) of the Law of Property Act 1925. Where there were beneficial tenants in common, purchase money usually had to be paid to two legal owners not just one.

little difficulty in rejecting that argument but his judgement provides a useful exposition of the law currently. In summary, he said this:

1. Is there an express declaration or agreement in writing pursuant to **section 53 (1) (b) and (c) of the Law of Property Act 1925**? If so, then it is final and dictates the proportions
  2. If there is not, then can the Court point to discussion between the parties as to the extent of their respective beneficial interests at the time of the purchase? If so, absent any subsequent variation, those discussions dictate the share.
  3. If there is not, then ... *'each is entitled to that share which the Court considers fair having regard to the whole course of dealing between them in relation to the property. And, in that context, 'the whole course of dealing between them in relation to the property' includes the arrangements which they make from time to time in order to meet the outgoings (mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home'. (at para 25 citing his own judgement in Oxley -v- Hiscock ( [2005] Fam 211))*.
22. This final test provides the court with a much wider discretion in (the fairly common) circumstances where parties buying a house together simply do not discuss the niceties of their ownership or who gets what when they separate. It imports a significant quantity of general 'fairness' to the test which, of course, is open to all sorts of interpretations; a fruitful ground for litigation.
23. Having said that, the opportunities for arguing **Stack-type** cases are likely to diminish in the light of the most recent manifestation of the Transfer Document. This is the TR/1 which was introduced on 6th June 2003. It contains a box for the identity of the 'Transferee'; that is, the owner(s) of the legal title but it also has a tick box system asking the following:
1. *The Transferees are to hold the Property on trust for themselves as joint tenants...*
  2. *The Transferees are to hold the Property on trust for themselves as tenants in common in equal shares...*
  3. *The Transferees are to hold the Property (complete as necessary).*
24. This is an eminently helpful development because it is likely that whatever is written here will comply with **section 53 LPA 1925**.
25. Before we leave the topic of section 53 of the Law of Property Act 1925, there are still two further lines of enquiry that can be made.
26. The ownership documentation will also include The Office Copy Entry. This, of course, will tell you who the legal owner(s) is or are.<sup>7</sup> Usually it is silent as to the beneficial ownership for the reasons given. The Land Registry Practice Guide does provide a mechanism for registering the existence of a trust but it is rarely used. The existence of a beneficial interest will appear as a Restriction on the Charges Register. Although the fact of its appearance on the Register will not be conclusive proof of the existence of a trust, it is strong evidence to support it. A person intending to apply for such a Restriction will have had to comply with certain formalities before the Registry entered it on the Charges Register.<sup>8</sup>
27. Secondly, it is important to note that the words used in section 53 (1) (b) are *'manifested and proved by some writing...'* The expression does not mean that the trust must be created in writing but only that evidence of it must exist in writing. It will be sufficient if the trust is revealed through a subsequent written acknowledgement by the settlor. (**Rochefoucauld -v- Rochefoucauld [1897] 1 Ch 196**). This might come in the form of a recital in a later deed or even in a letter to third party provided that the essential elements of section 53 (1) (b) are made out. See a fuller commentary on this in Emmet On Title para 22.004.

<sup>7</sup> Part A: Property Register.

<sup>8</sup> Under the current rules, the Applicant must have completed a Form RX/1 accompanied by a statutory declaration or conveyancer's certificate setting out how the beneficiary's interest has arisen. **Land Registry Practice Guide 19 (PG/19) para 8.4**.

## Constructive and Resulting Trusts: where the Claimant is not a Legal Owner.

28. We now return to consider this situation. The transfer and ownership documents reveal a single owner who is not the claimant and there is no separate document complying with s53 LPA 1925. In those circumstances, the claimant must resort to trust principles. The well-known recent authority is **Oxley - v - Hiscock** ([2004] EWCA Civ 546, [2005] Fam 211); Chadwick LJ again. Before we turn to it, we need to see how the law has developed in the last 30 years.
29. One of the conventional starting points is the speech of Lord Diplock in **Gissing -v- Gissing** ([1970] 2 All ER 780 HL). He summarised the principles of resulting, implied and constructive trusts as follows;
- 29.1 In the event that a claimant cannot rely on the provisions of s 53 LPA 1925, they will have to resort to the principles of resulting, implied or constructive trusts. (p.789/790).
- 29.2 The trust arises where the legal owner has so conducted himself that it would be inequitable to allow him to deny his co-habitee a beneficial share in the property. He will have done this if by words or conduct he has induced the co-habitee to act to her detriment in the reasonable belief that by doing so she was acquiring a beneficial share in the property p.790. All the authorities reveal that living with him is insufficient.
- 29.3 In the circumstances, a constructive trust will have been established if there is an express agreement reached at the time of the acquisition that the co-habitee will have a share. If such an express agreement is reached, then the cohabitee will still have to show that she acted to her detriment; but Lord Diplock considered that she would achieve this simply by making some ‘...contribution to or economy in the general family expenditure’ (p.790). A recent example of this category of case is **Crossley -v- Crossley** ([2005] EWCA Civ 1581).
- 29.4 If there has been no express agreement, then the claimant will have to show that there was a common intention to create a share for her; this may be by a constructive trust (referable to what appears to have been the common intention) or it may reflect financial contributions to the purchase price itself (this being a resulting trust). (p.790)
- They may have formed this common intention...’ without having used express words to communicate this intention to one another; or their recollections of the words used may be imperfect or conflicting by the time that the dispute arises. In such a case – a common one where the parties are spouses whose marriage has broken down – it may be possible to infer their common intention from their conduct’.*
- 29.5 Contributions to the purchase price by the co-habitee or to payments towards the mortgage are likely to be indicative of a common intention to create a share; both are immediately referable to the purchase itself.
- 29.6 Payments towards other domestic obligations (gas, council tax, food bill) are insufficient of themselves to establish a common intention<sup>9</sup> because; ‘...such conduct is no less consistent with a common intention to share the day to day expenses of the household, while each spouse retains a separate interest in capital assets acquired with their own monies or obtained by inheritance or gift’ (p.793).
- 29.7 If the co-habitee is relying on her financial contributions to the purchase/mortgage cost to substantiate an argument for ‘common intention’, then the court will look to see if any part of the evidence indicated how much share the ‘common intention involved (e.g. that the share was to be 50/50 or 25/75). Only in the event that the other evidence failed to provide an answer, then the amount of that share should be proportionate to the financial contribution. That is the principle of the resulting trust (p.790).

<sup>9</sup> If a claimant is relying on payment of mortgage bills and food alone, then they will only succeed if they can prove an express agreement (see para 22.3). Mrs Gissing failed to prove that she had a share. 28 Tubbenden Drive, Orpington was bought by the parties for £2,695 in 1951. It was bought using (1) £2,150 mortgage in H's name which he alone serviced; (2) a £500 loan from H's employer; (3) £45 of H's savings. W's only contribution was to buy furniture and make good the lawn (£220 in all). There was no express agreement at the time of purchase. After the marriage had broken down, H said to W 'don't worry about the house-it's yours' but this was insufficient because it was long after the purchase.

30. 'Common intention' may still be inferred where the co-habiting party has made no contribution to the purchase/mortgage instalments. It is inferred because the facts fit the definition given by Lord Diplock in **Gissing** at 22.2., namely: '*... by conduct he has induced the co-habitee to act to her detriment in the reasonable belief that by doing so she was acquiring a beneficial share in the property*'. Examples of circumstances in which the Court has inferred a common intention to give the co-habitee a share are:
- 30.1 **Grant - v - Edwards** ([1987] 1 F.L.R. 87). The legal owner had told his girlfriend that he was not putting the property into joint names because it would prejudice her pending divorce case from her former husband.
- 30.2 **Eves - v - Eves** ([1975] 1 W.L.R. 138). The legal owner had told his girlfriend that had she been older than 21, he would have put the property into joint names. He admitted later in evidence that this was simply an excuse for not doing so.
- 30.3 **Hammond - v - Mitchell** ([1991] 1 W.L.R. 1127). The court held as follows. The legal owners statements inferred an intention that the parties would share the house equally; the owner's girlfriend relied on those statements and acted on them to her detriment.
- 30.4 **Midland Bank - v - Cooke** ([1995] 2 F.L.R. 915). House purchased in H's name for £8,500 using (1) £6,500 mortgage; (2) £1,000 payment from H and (3) £1,000 gift from H's parents to both parties. W made no direct contributions to the mortgage but allowed herself to be bound under certain covenants to charges placed on the property in relation to H's business. Court found a common intention as to a 50/50 share because the gift was to both parties from H's parents and because of her willingness to sign the covenants.
31. Despite the wealth of Court of Appeal and House of Lords authorities re-visiting one or other aspect of constructive and resulting trusts, the principles set out by the House of Lords in **Gissing** remain the cornerstone of this area of law. The most recent commentary is **Oxley - v - Hiscock** ([2004] EWCA Civ 546, [2005] Fam 211). Its importance is this.
32. In any Constructive/Resulting Trust case, the Court (and therefore the parties) must address two questions:
- 32.1.1 Has the claimant established that they are entitled to a 'share' in the property by virtue of a constructive or resulting trust ?
- 32.1.2 If so, what is the extent of that share ?
- Oxley** concerned itself with the second of the two questions in circumstances where (i) the property is bought as a home for a couple who intend to live together as man and wife (ii) each makes a financial contribution to the purchase (either directly or by mortgage instalments) (iii) the property is purchased in the name of one of them and (iv) there is no express agreement as to the extent that either party has a share in the property.
33. Such circumstances are becoming increasingly common with marriage generally in decline and couples needing to pool resources to afford housing. The circumstances of modern life have also meant that 'contributions' to the purchase price have become more complex. The legal owner may have put up the initial purchase price and be the sole mortgagor but it may be that he stopped paying the whole mortgage after a few years and their co-habitee took over. Later, they both opened a joint account from which all household bills were paid.
34. The analysis provided by Lord Diplock in dealing with such cases (**p.791 and over to p.792**) was:
- that each case would turn on its own facts but certain observations could be made;
- 34.1 that if the rest of the evidence was 'neutral',<sup>10</sup> the prima facie inference was that the common intention must have been for the contributing spouse to have a share based on the proportion of her contribution (a resulting trust);

<sup>10</sup> Presumably, 'neutral' meant 'did not support or contradict a constructive trust on particular proportions (25/75, 50/50).

- 34.2 but that if she also contributed to the mortgage instalments, then the court might infer a common intention that her mortgage instalments were also to count towards her share.
35. The importance of **Chadwick LJ's** extensive judgement in **Oxley** is that it has provided a broader commentary on how to value the co-habitee's share in these circumstances. His definition is this;
- ... 'each is entitled to that share which the Court considers fair having regard to the whole course of dealing between them in relation to the property. And, in that context, 'the whole course of dealing between them in relation to the property' includes the arrangements which they make from time to time in order to meet the outgoings (mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home'*
36. It was this passage which he later cited in **Stack** (see para 21.3. above) thereby creating some harmony between cases involving a single legal owner and joint legal owners. The approach adopted by Chadwick LJ is perceived as having somewhat liberated the equitable doctrine of trust law and tried to import an element of the adjustive jurisdiction of the **Matrimonial Causes Act 1973**.

### **Equitable Estoppel.**

37. The principle of estoppel is similar to that of constructive and resulting trusts. Where: (1) the words or conduct of the legal owner induce his co-habitee to think that she will receive some interest in the land (or alternatively be allowed to occupy the land indefinitely or for a considerable period) (2) as a result his co-habitee spends money on the property or otherwise acts to her detriment, then the Courts will hold that the co-habitee has an equitable interest over the property and will exercise it in whatever way seems to the court to be appropriate. The leading case is **Gillet - v - Holt ((2001) Ch 210)** in which Courts were encouraged to take a broad approach to the evidence.
38. Essentially, estoppel differs from constructive trusts in two ways. Firstly it relies on the principle not of a 'common intention' between the parties but rather a misunderstanding by the co-habitee (that they will obtain a share) which misunderstanding is encouraged by the legal owner. Secondly, it is much broader in the number of ways that the equity can be satisfied. It may, for example, grant a life tenancy to the claimant, allowing them to remain in the house or a subsequent premises purchased with the sale proceeds (**Ungurian - v - Lesnoff ([1990] 1 Ch 207)**). It may compel the owner to transfer the property outright to the claimant (**Pascoe - v - Turner ([1979] 1 WLR 431 at 438)**). Alternatively, it might order a cash sum to be paid (**Jennings - v - Rice ([2002] EWCA Civ 159)**). The most essential requirements are that: (1) there must be proportionality between the expectation and the detriment and that (2) the court must make an order which does the minimum to meet the equity (**Crabb - v - Arun District Council [1976] Ch 1970**).

*Hamish Dunlop*

## SECTION THREE

# Children (Leaving Care) Act 2000: An Overview

### Aims and Objectives

The Children (Leaving Care) Act 2000 was implemented with the main aim of improving the life chances of young people living in and leaving local authority care.

The DOH Guidance sets out its main objectives which are:

- to delay young people's discharge from care until they are prepared and ready to leave
- to improve the assessment, preparation and planning for leaving care
- to provide better personal support for young people after leaving care
- to improve the financial arrangements for care leavers

To meet its main purpose and aims the 2000 Act amends the leaving care provisions contained in section 24 of the Children Act 1989.

The Children Act and its underlying principles provide the overall legal framework. **Key principles** of the Children Act include:–

- (i) taking into account the views of young people;
- (ii) consulting with them and keeping them informed;
- (iii) giving due consideration to young people's race, culture, religion and linguistic background;
- (iv) the importance of families and working with parents;
- (v) safeguarding and promoting the welfare of young people they are looking after;
- (vi) the recognition of inter-agency responsibility.

The Guidance states that each social services department should provide a written statement of its philosophy and practice on the preparation of young people for leaving care and the provision of aftercare support.

CA 1989 Schedule 2 para 19A inserted by Children (Leaving Care) Act 2000, s1 provides that:

*It is the duty of the local authority looking after a child to advise, assist and befriend him with a view to promoting his welfare when it ceases to look after him.'*

### Who is affected by the new legislation?

#### (A) 16 year old or 17 year old being looked after: eligible child

The local authority has certain responsibilities in relation to an eligible child.

An '**eligible child**' is defined as a child who:

- is aged 16 or 17; and
- has been looked after for a period of 13 weeks which started after his fourteenth birthday and ended after he reached the age of 16 (which does not include a series of pre-planned short-term placements (of up to four weeks) where the child has returned to a parent or person with parental responsibility thereafter).

#### (B) 16 year old or 17 year old who was looked after: relevant child

The local authority has specific duties in relation to a 'relevant child'.

A 'relevant child' is defined as a child who:

- is not looked after
- was, before ceasing to be looked after, an eligible child; and
- is 16 or 17 years old.

A child is **not** a relevant child if he has lived with a family for a period of six months (but will become a relevant child if the placement breaks down).

Children (Leaving Care) Regulations 2001 SI 2001/2874 reg 4

### **(C) 18 year old to 21 year old who was looked after: former relevant child**

A local authority has specific responsibilities in relation to a 'former relevant child' who is any person:

- who has been a relevant child and would be one if he were under 18; and
- who has been looked after and immediately before ceasing to be looked after was an eligible child.

### **(D) Person Qualifying for Advice and Assistance**

A person qualifies for advice and assistance if:

- he is under 21; and
- at any time after reaching the age of 16 (but while still a child) he was, but is no longer accommodated or fostered

## **Key Concepts**

### **The Pathway Plan**

It is the duty of a local authority in relation to an 'eligible' child or 'relevant' child to carry out an assessment of needs to determine what advice, assistance and support he requires and to prepare and review a pathway plan.

The Guidance states that the Pathway Plan is

*'pivotal to the process whereby children and young people map out their future, articulating their aspirations and identifying interim goals along the way to realising their ambitions. Each young person will be central to drawing up their own plan, setting out their own goals and identifying with their personal adviser how the local authority will help them.'*

'A Pathway Plan should clearly identify the child's needs and what was to be done about them, by whom and by when' per Munby J in R(J) v Caerphilly County Borough Council [2005] 2 FLR 860.

### **The Personal Adviser**

The Children (Leaving Care) Act requires the responsible authority to arrange for each 'eligible' and 'relevant' child to have a personal adviser and to continue the appointment for 'former relevant' children.

The appointment of a personal adviser is therefore a statutory requirement.

The Guidance states that

*'This emphasises the importance of the role and reflects the belief that young people living in and leaving care should be able to identify someone as committed to their well being and development on a long term basis.'*

The Personal Adviser's role is:

- where applicable, to participate in the child or young person's assessment and the preparation of his pathway plan
- to participate in reviews of the Pathway Plan

- to liaise with the responsible local authority in the implementation of the Pathway Plan
- to co-ordinate the provision of services and to take reasonable steps to ensure that the child or young person makes use of such services
- to keep informed about the child's progress and well being
- to keep written records of contact with the child or young person.

## The financial implications

The 2000 Act introduced new financial arrangements affecting 'relevant' children.

CA 1989 S23B (8) makes clear that while a young person is a 'relevant' child the responsible authority will normally be his or her primary source of income. This new income will cover accommodation and maintenance, and other expenses such as travel and leisure costs.

For care leavers who do not become 'relevant' children but who qualify for advice and assistance under section 24(2) the primary financial-support role remains with the Department for Work and Pensions.

However local authorities may also give financial assistance to these young people on account of their particular needs over and above those of other young people. The local authority's power to provide assistance to these care leavers extends until they reach the age of 21. Any such financial assistance or grant provided under s24B (2) where this is connected to a course of education or training may be given up to the age of 24.

## A case scenario

Child J is 16 and has been the subject of a Care Order since he was 12 years old. He has successfully lived at home with his mother since the age of 14. What are the implications for him if the Care Order is discharged before he is 18?

Should he and his mother consent to the discharge application?

If the Care Order is discharged whilst he is 16 or 17 and living at home he is not a 'relevant child' and is therefore not entitled to the services that the local authority are duty bound to provide pursuant to CA 1989 s23.

Further he will not be entitled to the services for 18-21 year olds pursuant to CA 1989 s23C.

It is therefore vitally important that both the child and the parent is fully aware of the potential loss of financial and other benefits if a Care Order is discharged.

The Local Authority will have to compile a compelling case for the discharge of a Care Order in respect of a 16 or 17 year old living at home as it is likely that the Guardian will scrutinise the services available to the child at this crucial stage of the child's life.

If the child remains the subject of a Care Order until he is 18 years old even though he remains living at home, he will be entitled to services until he is 21 and beyond.

The rationale does make sense. Why should the State have to be subject to strict statutory requirements in relation to children who turn 18 who are not in care and have been successfully rehabilitated home to their parents for six months or more?

If a child is **still** the subject of a Care Order turning 18, even though he is living at home, there must be a need for **further** state intervention after 18 to improve the child's life chances whilst he makes that transition to independent living.

## **And finally**

As the Guidance states:

*'The quality of preparation for leaving care, and of the aftercare subsequently provided, may profoundly affect the rest of a young person's life.'*

Local Authorities must take their statutory duties seriously so that this young and vulnerable section of society can maximise their potential in life.

*Hayley Griffiths  
15th December 2006*



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