



Family Group Newsletter

December 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 final Newsletter of 2007.

As always, much has changed since our last publication: a new Public Law Outline (PLO) is now being tested in 10 pilot areas, with the intention to implement it nationwide in April 2008. This replacement of the existing Protocol for Judicial Case Management in Public Law Children Act cases is intended to streamline procedure and reduce cost and delay in care proceedings. This is to be achieved by the “front loading” of care cases and developing new pre-action stages: an analysis by day 6 by a CAFCASS Guardian of the issues and the introduction of a new “Issues Resolution Hearing” where the issues will be identified by the trial judge.

Under the new PLO there were no provisions for the payment of advocates attending meetings held under stages 2, 3 or at the IRH under stage 3. However as of 16th November 2007 the definition of an “Advocates Meeting” extended to include meetings under the draft PLO. Also, where the same counsel attends both the PHR and the main hearing (under the Children Act protocol) or the IRH and the main hearing (under the draft PLO) a function F5 primary hearing fee will be paid in respect of the PHR or the IRH and the main hearing as the secondary hearing fee.

Also as of the 1st July 2007 s42A was inserted into Pt IV of the Family Law Act 1996 (FLA) this has introduced a fundamental shift to the enforcement of non molestation orders. Miss Judy Earle has kindly produced an update for you in this newsletter.

3 Paper Buildings has continued to move forward with the introduction of our first Business and Marketing Manager, Christopher Bean. Chris has a wealth of experience in Professional Service Marketing and has held senior marketing positions in Accountancy firms, Law Firms and Chambers.

We hope that throughout the year you have found these newsletters to be both informative and interesting. We endeavour to keep the content as topical as possible and to keep you all abreast of what we consider to be ground breaking news in this evolving world of family law.

We would appreciate any feedback you may have - for example if there are particular areas of law or specific topics that you would like to see covered in future editions please do let us know, so that we can continue to provide you with up to date and relevant information.

For any further information please contact me or Chris Bean.

It only remains for me to wish you a very Happy Christmas and Prosperous New Year.

STUART PRINGLE

SECTION ONE

Adoption or Special Guardianship

Some recent authorities

a) In Re AJ 2007 1FLR p507 (Court of Appeal) a child had been placed in the care of the paternal uncle and aunt. The parents were in no position to care for the child given violence in their relationship and ongoing criminal activities. A care order was made on the basis the child would remain with the uncle and aunt as long term foster carers with ongoing contact to the parents. However, later the care plan was revised to one of adoption and reduced contact to the natural parents. The uncle and aunt favoured a continuation of the care order to ensure the local authority liaised with the parents. The trial Judge made an order for adoption. The parents appealed, but the Court of Appeal dismissed the appeal. The Court commented that:–

- Special guardianship had not replaced adoption in cases involving wider family placements
- Each case must be looked at on its own particular facts

In deciding that adoption was the appropriate order, the court felt that although section 91(14) could be used as a filter to avoid unmeritorious applications disturbing the child or his carers e.g. for increased contact, it did not answer the objection that special guardianship would not provide the necessary security. In any event in the context of family members it was unrealistic to suppose that the special guardian would not come to hear about any proposed application.

Re AJ is a case well worth looking at. Annexed to the report is a very useful table setting out the main differences between special guardianship and adoption.

For example:

Q: If you are a special guardian, can you remove a child from the jurisdiction?

A: For up to 3 months without leave, thereafter only with the written consent of all PR holders or leave of the Court (unless the Court gave general leave on making the SG order).

There are no such restrictions if an adoption order has been made.

Q: Can a child's surname be changed?

A: In the case of special guardians, only with the written consent of all PR holders or order of the Court.

There are no such restrictions if an adoption order has been made.

b) In M-J (Adoption Order or Special Guardianship Order) 2007 1FLR p691 the child was placed in foster care due to the parents' drug and alcohol dependency. The initial plan was to rehabilitate the child to the mother who was undergoing a programme of rehabilitation from drug and alcohol addictions. Unfortunately the mother's progress lapsed and she took heroin during the second stage of her detoxification programme. The child was placed with her aunt. The mother thereafter made good progress re her recovery. The local authority however applied to free the child for adoption and the aunt applied to adopt the child. The mother argued a special guardianship order was more appropriate. The recorder found that the only order to make on the facts of this case was one of adoption to give total security and the Court of Appeal agreed:–

- The order to be made is the order best able to meet the needs of the child concerned;
- It is not the case that the Court must make the least interventionist order.

- c) In Re L (court of Appeal 2007 EWCA Civ 196) the parents were both involved in using drugs and there was a history of domestic violence. The mother and her mother had a difficult relationship. The child was being cared for by the maternal grandmother when the matter came before the Court.

The grandparents applied for an adoption order, but the Local Authority did not favour adoption and preferred a Special Guardianship order.

The main concern was that the grandparents were “not in a position to positively promote the child’s life story as would be expected of any other prospective adopters”

- The grandparents settled for the comparatively new status of Special Guardians.

- d) In Re S 2007 EWCA Civ 54 the Appellant, D, appealed against the decision to appoint her as a special guardian for a 6 year old girl (S) rather than make the adoption order she had sought. When the child (S) was 3 years old she had been placed with the Appellant (D) as a foster mother on a voluntary basis. Care proceedings followed, which concluded that neither parent could care for S. She was placed with a cousin of the father but this was unsuccessful and she moved back to live with D. The care plan changed to adoption and the Appellant put herself forward as an adopter. The Judge appointed D as a special guardian and made an order under S91(14) Children Act 1989 ordering that leave was required for any application under the Act. Both mother and father were to have contact.

The Court of Appeal gave guidance on amongst other things a) special guardianship orders within a pre-existing family relationship b) in what circumstances, if any, the Court should impose a special guardianship order on unwilling parties, and c) the need under a special guardianship order for leave for a parent to apply for a Section 8 order.

The Court pointed out that there is nothing in the statutory provisions themselves which limits the making of a special guardianship order or an adoption order to any given set of circumstances. There is no presumption that one is better than the other. Each case will involve the careful application of judicial discretion to the facts.

The Court added that “although the “no order” principle as such is unlikely to be relevant, it is a material feature of the special guardianship regime that it is “less intrusive” than adoption. In other words it involves a less fundamental interference with existing legal relationships. The Court will need to bear in mind Art 8 of ECHR and to be satisfied that its order is a proportionate response to the problem, having regard to the interference with family life which is involved.

The Court of Appeal ruled that it did not have power to make a special guardianship order unless it had received a report dealing with the matters referred to in S14 A (8) Children Act 1989. The court therefore proposed that the Local Authority conduct an investigation and prepare a report and then the original trial Judge should look at the matter again having read that report.

It is clear from the White Paper that special guardianship was introduced at least in part to deal with the potential problems arising from the use of adoption in the case of placements within the wider family “... where a child is adopted by a member of his wider family, the familial relationships are inevitably changed”. The Court commented that this is referred to as the “skewing” or “distorting” effect of adoption.

The Court in dealing with restricting parents’ Children Act applications if a special guardianship order were made noted that:–

- Generally a parent does not require the leave of the Court to make an application for a Section 8 order, but of course S 91(14) enables the Court to impose specific restrictions.
- There is something of an anomaly in that Section 10(7A) Children Act 1989 (inserted by the 2002 Act), provides that if a special guardianship order is in force with respect to

a child, an application for a residence order can only be made with the Court's leave. Thus, under a special guardianship order the only section 8 application which a parent requires leave is to apply for residence. (Leave is also needed to vary or discharge a special guardianship order and a parent so applying must show a "significant change of circumstances".)

- The Court in considering that the restriction limiting Section 8 applications is limited to applications for a residence order noted that this was surprising given special guardianship orders are designed to produce finality. They thought Section 91(14) Children Act would have to be used to place a filter on future applications and they thought the Court had power to make indefinite orders under Section 91(14).

Should you impose an order on an unwilling party?

The Act makes it clear that a Court has power to make a special guardianship order of its own motion, subject to receiving the appropriate report where the welfare of the child is in issue in any family proceedings.

The statute therefore envisages that an order may be made against the wishes of the parties and the Court concluded that if a Court comes to the view that if on all the facts and applying the welfare check list (including the potential consequences for the child of the threat to refuse to be appointed a special guardian being implemented) that a special guardianship order is the right order in the interests of the child in question, then that is the order it should make.

Elisabeth Hudson
September 2007

SECTION TWO

The Civil Partnership Act 2004 – a ready reference guide to its main provisions

Part II – Untying the Knot

Introduction

In Part I¹ of the guide I looked at the way in which different categories of couples formed civil partnerships. Whilst no-one enters into civil partnership with a view to separation, some will breakdown, adding to government statistics on divorce and providing valuable copy for a number of newspapers. Our job of course is not to moralise but to assist those who find themselves in this unenviable position. Part II provides a practical and ready reference to the main provision of the *Civil Partnership Act 2004* as they relate to ending a civil partnership.

The end

A civil partnership comes to end when:

- a) one of the parties dies;
- b) it is dissolved; or
- c) it is annulled.

Dissolution

A civil partnership cannot be dissolved in its first twelve months though acts during those first twelve months may form the basis for an application for dissolution after the twelve month period has expired.² After that it can be dissolved as long as one of the parties is able to show that the partnership has broken down irretrievably with one of the following facts proved:³

- a) Behaviour.⁴ That the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent.
- b) Two year's separation.⁵ That the applicant and respondent lived apart for a continuous period of two years immediately preceding the making of the application and the respondent consents to the civil partnership being dissolved. Living together is defined in s45(8) of the 2004 Act as follows: *... civil partners are to be treated as living apart unless they are living with each other in the same household...* Thus it would appear that they may live in the same dwelling but not as a household – so their living arrangements, such as sleeping, cooking and cleaning, would need to be separate.
- c) Five year's separation.⁶ That the applicant and respondent have lived apart for a continuous period of five years immediately preceding the application.
- d) Desertion.⁷ That the respondent has deserted the applicant for a continuous period of two years prior to the application being made.

You will see from the above that the grounds follow those for divorce after marriage with the notable exception of adultery. The latter inequality will undoubtedly form an interesting test case in the future given that the overall aim of the 2004 Act and other legislation on human rights and equality is to put all on the same footing. As a practitioner it may be worth considering using adultery as an example of unreasonable behaviour.

1 Part I of the guide was published in the June 2007 *Family Law Group Newsletter*. Pleaser contact 3 Paper Buildings if you did not receive a copy but would like one.

2 s41 of the Civil Partnership Act 2004 (the 2004 Act).

3 s44 of 2004 Act.

4 s44(5)(a) of the 2004 Act.

5 s44(5)(b) of the 2004 Act.

6 s44(5)(c) of the 2004 Act.

7 s44(5)(d) of the 2004 Act.

Reconciliation

The parties are encouraged to attempt reconciliation and the solicitor filing the papers has to certify that he or she has discussed it with the applicant and given the applicant names and addresses of persons qualified to assist reconciliation.⁸

In addition the court has power to adjourn an application for dissolution at any stage and for such period as it sees fit if it appears to the court that there is a reasonable possibility of reconciliation.⁹

Grave financial hardship

A respondent to an application for dissolution based on five years' separation may oppose it on the basis that it would cause grave financial hardship and it would in all the circumstances be wrong to dissolve the partnership.¹⁰ In order to decide whether or not this is made out the court must have regard to all the circumstances of the case including the conduct of the parties, the interests of the civil partners and any children or other persons concerned.

The order

Once the court is satisfied that:

- a) the partnership has broken down irretrievably;
- b) that one of the grounds has been made out; and
- c) it should not exercise its powers regarding any children (see below);

the court will grant a conditional order (similar to a decree nisi). Six weeks later the court will grant a final order (akin to decree absolute) if:¹¹

- a) the respondent has not made an application to rescind the conditional order; and
- b) the court is satisfied that the applicant should not make any financial provision for the respondent or that the financial provision made for the respondent is reasonable and fair or the best that can be achieved in the all the circumstances;¹²

The period of six weeks may be shortened by the court.¹³

Nullity

A civil partnership may be either void or voidable. If it is void, it is void ab initio as though it never existed. If it is voidable, it existed up to the date on which the final order was made.

A void partnership

Section 49 of the 2004 Act sets out the grounds upon which a civil partnership is void and they relate to circumstances which both partners were aware of at the date of the registration:

- a) they did not fulfil the eligibility criteria;
- b) that notice of the civil partnership has not been given;
- c) that the civil partnership register has not been duly signed;
- d) that the civil partnership document is void under s17(3) or 27(2) (ie registration did not take place within 12 months in the case of the standard procedure and one month in the case of the special procedure);

⁸ s42(2) of the 2004 Act.

⁹ s42(3) of the 2004 Act.

¹⁰ s47(1) of the 2004 Act.

¹¹ s48(4) of the 2004 Act.

¹² s48(4) of the 2004 Act.

¹³ s48(5) of the 2004 Act.

- e) that the place of registration is a place other than that specified in the notices or proposed civil partnership and the civil partnership document;
- f) that the civil partnership registrar is not present; or
- g) the civil partnership involved a child and was forbidden under Sch 2 para 6(5).

The Lord Chancellor has the power to validate a void civil partnership if it appears to him that it is or may be void for one of the reasons set out in s49(b).¹⁴

A voidable partnership

Section 50 sets out the grounds on which the partnership is voidable:

- a) either party did not validly consent to it (whether as a result of duress, mistake, unsoundness of mind or otherwise);
- b) at the time it was made either of them was suffering (whether intermittently or continuously) from a mental disorder of such a kind or to such an extent as to be 'unfitted' for civil partnership;¹⁵
- c) at the time the respondent was pregnant by some other person than the applicant;
- d) an interim gender recognition certificate has been issued to either civil partner after the time the civil partnership was formed; or
- e) the respondent is a person whose gender at the time of its formation had become the required gender under the *Gender Recognition Act 2004*.

The application under grounds (a), (b), (c) or (e) above must be issued within three years of the formation of the civil partnership. In the case of (d) above it must be made within six months of the issue of the gender recognition certificate.¹⁶ However the court does have power to extend the three year period if:

- a) the applicant suffered from a mental disorder at some time during the three year period; and
- b) it would be just to grant permission to make the application in all the circumstances of the case.

There is no provision for extending the six month period under ground (d).

In addition the court must not make a nullity order on the ground that the partnership is voidable if the respondent satisfies the court that:

- a) the applicant knew he could obtain a nullity order but conducted himself in relation to the respondent in such a way as to lead the respondent to believe that he would not do so; and
- b) it would be unjust to the respondent to make the order.¹⁷

Separation orders

In addition to the above one of the parties may apply for a separation order which is similar to judicial separation. It is made under s56 of the 2004 Act and the grounds are the same as those required for dissolution, though it is not necessary to prove that the partnership has broken down irretrievably.¹⁸ There is no interim order just a final one.

¹⁴ s53 of the 2004 Act.

¹⁵ Mental disorder is defined in the *Mental Health Act 1983*

¹⁶ s51 of the 2004 Act.

¹⁷ s51(1) of the 2004 Act.

¹⁸ s53(2) of the 2004 Act.

¹⁹ s63 of the 2004 Act.

Arrangements for the children

As with the *Matrimonial Causes Act 1973*, the court is obliged to consider the arrangements for any children of the family and in light of those arrangements whether to exercise its powers under the *Children Act 1989*.¹⁹ If the court decides that it should exercise its powers or that further consideration needs to be given it can order that a conditional order of dissolution or nullity order should not be made.

Death

Section 55 of the 2004 Act gives the court power to make a presumption of death order if it is satisfied that reasonable grounds exist for supposing that the other partner is dead. The fact that a period of seven years or more has passed since the other civil partner has been continually absent from the applicant and that the applicant has no reason to believe that the other partner has been living during that time is evidence that the other partner is dead until the contrary is proved.

As we have seen in Part II, the provisions of the *Civil Partnership Act 2004* are very similar to those relating to married couples who wish to divorce. However, it should be borne in mind that the omission of adultery as a ground for divorce is a notable exception. In Part III, I shall be looking at the financial relief following breakdown of the partnership as well as the powers of the court in relation to any children and other injunctive relief.

Andrew Lorie

SECTION THREE

Domestic Violence, Crime and Victims Act 2004

The impact upon Family Law Act 1996 injunctions, the story so far.

Introduction and Overview of the Main Changes

The Domestic Violence, Crime and Victims Act 2004, (the 2004 Act) received Royal Assent on 15th November 2004, it is typically described as, 'the biggest overhaul of legislation on domestic violence in over 30 years.'

- On 1st July 2007 s 1 came into force which inserts a new s 42A into Pt IV of the Family Law Act 1996 (FLA). This section will be familiar to many family practitioners. This Section heralds a fundamental shift in the approach to enforcement of non-molestation orders by creating a new criminal offence of breaching a non-molestation order, 'without reasonable excuse.'
- A person can be guilty of an offence under this section when he was, 'aware of the existence of the order'.
- The maximum penalty is 5 years imprisonment.
- Powers of arrest can no longer be attached to non-molestation orders, breach of such an order automatically becomes an arrestable offence.
- The new law has the effect of transferring the proceedings sideways in to the criminal courts.
- A civil contempt of court still exists but the same conduct cannot be dealt with both as contempt of court in the civil court and a criminal offence under s 42A.
- Section 3 amends the definition of cohabitants to include same-sex couples who have the same access to non-molestation and occupation orders as heterosexual couples and section 4 also enables couples who have never cohabited or been married to apply for non-molestation and occupation orders.
- S 46 FLA deals with use of undertakings, is amended by para 37 Schedule 10 of the 2004 Act which creates a new test for granting undertakings and restricts their use further.
- Occupation orders remain unaffected by the changes but you must ensure that occupation orders and non-molestation orders are drafted on separate forms.¹

The 2004 Act has been in place for a few months, it is too early to assess whether we can describe these reforms as a success in so far as their impact upon the victims/perpetrators and whether they have met the primary objectives of Parliament. We need to be ready to deal with the complications that may arise from the legislation. We should be mindful of the changes that may need to occur in the future in order to improve the civil-criminal interface for victims of domestic violence and those who are part of that process.

The statistics

The often-quoted statistics in the field of domestic violence are alarming: One incident is reported to the police every minute.² 1 in 4 women and 1 in 6 men had been a victim of domestic violence (partner/ex-partner) since the age of 16 and about 1 in 20 women (6%) and

¹ Occupation order form FL404, with power of arrest form FL406, non-molestation order form FL404A.

² Stanko, E. (2000) The Day to Count: A Snapshot of the Impact of Domestic Violence in the UK.

men (4%) had experienced domestic violence (partner/ex-partner) in the last year.³ Domestic violence is the largest cause of morbidity in women aged 19-44, greater than war, cancer and motor vehicle accidents⁴ People in lesbian, gay bisexual and transgender communities experience domestic violence in a similar proportion to the rest of the population.⁵

On a reassuring note, the Crown Prosecution Service recently published figures indicating that convictions for incidents arising out of domestic violence are rising steadily and have increased by 20% since 2003. There is a conviction rate of 64% in the Magistrates Court and 75% in the Crown Courts. A smaller number of cases are being discontinued part through by the CPS, dropping from 17% in 2003 to 11% in 2006 and a corresponding reduction in the number of victims seeking to withdraw their statements.⁶ It will be interesting to note how the impact of the 2004 Act will affect those statistics in the longer term in view of the inevitable increase in prosecutions carried out.

The underlying intention

There can be no doubt that in the face of such statistics improved delivery was required in terms of prevention, protection and justice. The clear intention of Parliament in creating this legislation was to bring in line the states approach to violence outside the family home with that which occurs within the domestic context, by criminalising it and punishing it accordingly. It was considered important to fundamentally take the role of enforcement away from the victim, thereby removing the inherent pressure that often comes with taking the perpetrator back to court. It intends to send a stronger message out to those who commit acts of domestic violence and it is hoped that they will be deterred in their acts as a result.

Practice and procedure, what do we need to watch out for?⁷

It is inevitable that with the new provisions in place, there will be some areas where complications may arise. It will be some time before we are able to conclude on the best practice or procedure to adopt, however in the meantime we should be aware of the following:

- Transitional provisions: If you have a pre-01.07.07 non-molestation order, with a power of arrest attached to the order, which is still in force, a breach after 01.07.07 will invoke the old law and committal proceedings.⁸ However, if there is no power of arrest attached to the order or the power of arrest has expired then any breach after 01.07.07 will constitute a criminal offence.⁹
- Extending old orders: Non-molestation orders made before 01.07.07 may still be extended under s 49(1) FLA 1996. A power of arrest attached to a pre-01.07.07 order may be extended after that date under s 49(4) but only if the power of arrest is still in force when you apply.
- Ex parte orders, (s 45(1) FLA 1996): Respondents can be guilty of breaching an ex parte order, 'in respect of conduct engaged in at a time when he was aware of the existence of the order,' (s 42A(2)). There is no requirement that he must know the particular terms of the order. Therefore, the Respondent might only know about the existence of an order as a result of e.g. a telephone call, a text or via email and there is the clear risk that he could be in breach and be unaware of the proceedings or exactly the terms of the order forbidding him from doing certain acts.

The Rule Committee, in drafting the amendments to the FPR 1991 require that an Applicant lodge a copy of the non-molestation order with the local police station and accompany that with a statement showing that the Respondent has been served with the order or informed of its terms whether by being present or by telephone or otherwise.¹⁰ There is clear emphasis here upon the Respondent knowing the terms of the order.

3 Finney, A. Domestic Violence, sexual assault and stalking: Findings from the 2004/05 British Crime Survey.

4 World Health Organisation statistics.

5 Henderson, L. (2003) Prevalence of Domestic Violence among lesbians and gay men.

6 Domestic Violence Monitoring Snapshot, 2006, www.cps.gov.uk

7 His Honour Judge Platt delivered an excellent lecture, which scrutinised the impact of the 2004 Act, and I am grateful to him for his comprehensive analysis.

8 Domestic Violence, Crime and Victims Act 2004 (Commencement No 9 and Transitional Provisions) Order 2007, para 3).

9 DVCVA 2004, Sched 12 para 1(1).

10 FPR 1991, r 3.9 (1A) and (1B).

In cases where you anticipate difficulties with service of the order you could specify at the start of the order, the following, “From or after the time when the Respondent is made aware of the terms of this order whether by personal service or telephone or otherwise the Respondent is forbidden to...”

- Exclusion zones, s33 (3)(g) or s42?: Practitioners are familiar with incorporating exclusion zones as part of an occupation or non-molestation order. Thought must be given to which section the clause should come under as it could come under either. It should be made clear on the face of the order which section applies in view of the criminal sanctions that may follow under s42 and in order to avoid any confusion. If acting on behalf of the Applicant you should assess their particular needs and objectives, the seriousness of the case and advise which section may be more appropriate. If acting on behalf of a Respondent your likely objective will be to try and avoid an exclusion zone under s42 and where appropriate argue that the circumstances of the case come within ss 33 or 35-38.
- Double jeopardy: Ss42A(3) and (4) provide in effect that a person who has been punished for a contempt in family proceedings cannot be convicted of an offence in the criminal courts and vice versa. This is an area riddled with potential problems regarding interpretation and practice. There are no rules of court designed to deal with how applications or prosecutions should be pursued. In those circumstances there is nothing to prevent an Applicant pursuing contempt proceedings in the civil courts at the same time as a prosecution for the same breach is being pursued in the criminal courts. It is at the stage of *conviction or punishment* that the provisions engage. If the Respondent is acquitted in the criminal courts, the Applicant might still pursue the breach in the civil courts and no doubt face an abuse of process argument. In cases where there are a number of breaches the CPS may decide to pursue the more serious ones which leaves it open to the Applicant to pursue any outstanding ones in the civil courts, thus the Respondent would face two sets of proceedings. These examples reflect just a few of the undesirable consequences that may occur.
- Standard of proof for making non-molestation order?: S42 creates a civil order with criminal sanctions. Should the civil standard apply? Parliamentary debates on the 2004 Act indicated that the Government had no intention of altering the civil standard of proof required to grant an order,¹¹ however this is an area that will continue to develop. By way of analysis, an ASBO is borne out of civil proceedings, but it was deemed that the criminal standard should apply in such applications because the nature of the proceedings justified a higher standard of proof.¹² However, injunctions under the Protection from Harassment Act 1997 are borne out of civil proceedings, breaches are punishable by civil and criminal penalties but the standard of proof is civil.¹³ Points supporting use of the civil standard are, (1) FLA injunctions are private proceedings and do not carry the wider *public* protection that ASBOs do, see Hipgrave.¹⁴ (2) Criteria for making an ASBO requires that the local authority ‘prove’ that the person has committed antisocial acts before the order can be made,¹⁵ whereas under FLA there is no requirement that the court finds the allegations proven before an order is made.¹⁶
- Precise drafting: We are all used to the standard ‘catch all’ wording adopted in non-molestation orders and it seems that there is the temptation to continue. This may lead to undesirable results at a later stage if criminal proceedings are contested. One must not lose sight of the serious interference with a person’s private life represented by summary arrest, detention and criminal sanctions upon breach. Remember, breach of any provision of the order without reasonable excuse, however comparatively insignificant

11 House of Commons Standing Committee E, *Hansard*, col 27 (22 June 2004)

12 *Clingham (Formerly C (A Minor)) v Royal Borough of Kensington and Chelsea; R v Crown Court at Manchester ex parte McCann and others* [2002] UKHL 39, [2002] UKHRR 1286.

13 *Hipgrave and Hipgrave v Jones* [2004] EWHC 2901 (QB), [2005] 2 FLR 174.

14

15 S 1(4) Crime and Disorder Act 1998.

16 S 42(5) FLA 1996

could constitute an offence and therefore the order commands clarity. It is likely that there will be cases that are contested/withdrawn on the basis of an order that is not readily understandable and insufficiently precise.¹⁷ Articles 5, 6 and 8 may be invoked. We should err on the side of caution and draft orders in the clearest terms and avoid the risk of them being unenforceable. In those circumstances avoid orders in general terms, denote specific conduct that should be the subject of the order.

In his lecture dealing with the 2004 Act, His Honour Judge Platt provided some helpful drafting solutions that revised the standard non-molestation wording as follows:

The Respondent is forbidden to:

1. Use or threaten any unlawful violence towards [applicant]
2. Use or threaten any [unlawful] violence towards [named child or children]
3. Come within [x] metres of [applicant's home]
4. Come within [x] metres of [applicant's place of work]
5. Come within [x] metres of any property at which he is aware that the applicant is living
6. Come within [x] metres of [insert address of school] between the hours of 8 a.m and 9 a.m and 3 p.m and 4p.m [adjust times according to school delivery and collection times] except by prior written invitation for the school authorities
7. Send any threatening or abusive letter, text message or other communication to [applicant]
8. Communicate with the Applicant whether by letter, telephone, text message or other means of communication except through her solicitors [name]
9. Communicate with the Applicant whether by letter, telephone, text message or other means of communication except for the purpose of making arrangements for contact between the respondent and [child(ren)'s name(s)]
10. Threaten the applicant
11. Damage or attempt to damage or threaten to damage any property belonging to the Applicant or jointly owned by the parties.
12. Damage or attempt to damage or threaten to damage any of the contents of [insert address occupied by the Applicant]
13. The Respondent is also forbidden to instruct or encourage any other person to do anything which he is forbidden to do by the terms of this order.

It is advisable to specify an expiry date *and time* for the sake of clarity.

Sentencing

Whereas previously sentencing options were limited to a fine or imprisonment for a maximum period of two years, courts now have the full range of sentencing options at their disposal for offences under s 42A. It is important to familiarise ourselves with the guidelines that have been put in place for breach of a protective order by the Sentencing Guidance Council so that we can advise clients accordingly. It seems likely that in view of the guidelines the penalty of imprisonment will be used with more vigour than before.

It should be noted that in serious cases, conduct may also constitute a substantive offence, in which case the breach of the order may be charged as a separate count. In such cases, consecutive sentences can be imposed to reflect the seriousness of the counts but the aim must also be to achieve the appropriate totality. It will be interesting to see how this area of sentencing develops over the forthcoming months.

¹⁷ For cases that illustrate this point see : *Sunday Times v United Kingdom* (No 1) (Application No 6538/74) (1979-80) 2 EHRR 245, *Silver v UK* (1983) 5 ECHR 347, *Kopp v Switzerland* (1991) 27 EHRR 91, *Manchester City Council v Lee*; *Wigan Metropolitan Borough Council v G (a Child)* [2004] WLR 349.

Breach of a Non-Molestation order, (s 42A FLA 1996)

Maximum Penalty: 5 Years imprisonment

Nature of Activity	Starting Points
Breach (whether one or more) involving significant physical violence and significant physical or psychological harm to the victim More than one breach involving some violence and/or significant physical or psychological harm to the victim Single breach involving some violence and/or significant physical or psychological harm to the victim	Community sentence More than 12 months The length of the custodial sentence imposed will depend on the nature and seriousness of the breach(es) 26-39 weeks custody [Medium/High Custody Plus order]* 13-26 weeks custody [Medium/High Custody Plus order]*
More than one breach involving no/minimal contact or some direct contact Single breach involving no/minimal direct contact	Non-custodial sentence MEDIUM range community order LOW range community order

Additional Aggravating Factors	Additional Mitigating Factors
<ol style="list-style-type: none">Victim is particularly vulnerableImpact on childrenA proven history of violence or threats by the offenderUsing contact arrangements with a child to instigate an offenceVictim is forced to leave homeOffence is a further breach, following earlier breach proceedingsOffender has a history of disobedience to court ordersBreach was committed immediately or shortly after the order was made	<ol style="list-style-type: none">Breach occurred after a long period of complianceVictim initiated contact

How are the courts coping with the new offence and procedures?

There are now more than 50 specialist domestic violence courts, (SDVC's) that operate throughout England and Wales. The continued expansion of the specialist domestic court programme provides a crucial initiative which should be well equipped to deal with the influx of cases arising from breaches of non-molestation orders. Dedicated prosecutors, police, trained magistrates and legal advisors who specialise in domestic violence cases deal with cases. Courts cluster cases on designated days in order to speed up justice for victim. It seems from my enquiries of the Weymouth and Bournemouth Magistrates Courts in Dorset that neither

* When the relevant provisions of the Criminal Justice Act 2003 are in force.

have yet experienced a contested trial, trial dates are generally set 8 weeks from date of plea. In Bournemouth they are frequently dealing with breaches on their designated day however in Weymouth, curiously, there appeared to have been none. It was of note that the Family Proceedings Court is granting many more injunctions than before, it seems that Applicants are being advised by the police to make such applications and there is the clear incentive of allocated legal advisers being available at designated times to help with form filling and no County Court £60 issue fee.

Unintended consequences

It is too early to assess whether the sentiments of victims of domestic violence indicate that they feel better protected, better supported and that further violence is prevented. However:

- The mere fact that in taking civil action to protect themselves may result in a criminal record for the perpetrator may deter some individuals from seeking such protection in the first place.
- It is likely that breach cases will take longer to resolve. As cases may be tried in the Crown Court the trial process will extend over a period of months and increase the emotional turmoil and pressure for the victim. Previously, breach of an injunction order with a power of arrest would require the Respondent to be returned before the civil court within 24 hours for breach proceedings to take place. Those proceedings were often resolved in a matter of weeks.
- Victims will now become prosecution witnesses, they will not have a controlling hand over proceedings, they will not be a party to the proceedings and will not be represented by their solicitor of choice who can advise and assist them.
- Taking breach proceedings away from the civil court will mean that the opportunity of having judicial continuity and one set of information in respect of all the issues which arise from the breakdown of the relationship, particularly children matters, will be lost.

Improving the civil-criminal interface for victims

The system now in operation means that two separate jurisdictions are dealing with matters involving domestic violence at different times. Practitioners will be expected to be familiar with the relevant aspects of each but would not necessarily expect to be a part of both sets of proceedings. Whilst there are pilot schemes that are developing the integrated domestic violence court system and the notion of 'one family, one judge' (e.g. Croydon) there are no set procedures in place that guarantee information sharing between the civil and criminal courts. This leads to the inevitable conclusion that on occasions the left hand will not know what the right hand is doing. Practitioners should be alert at all stages to any concurrent proceedings that are taking place and whether any associated application for disclosure should be made in order to provide the fullest and most up to date information to the court and your client. The Law Society is due to publish, 'Related Family and Criminal Proceedings – a good practice guide,' in November 2007 which is intended to assist with such cross-jurisdictional issues.

To be continued...

Presently it appears that there have been no formal challenges to the 2004 Act. There can be no doubt that armed with criminal sanctions the legislation will be tested over the coming months, we await such developments with interest.

Miss Judy Earle



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