

# Family Matters

*From the Family Team at Tanfield*

**W**elcome to the Spring edition of Tanfield Chambers' Family Matters. Whether it's an article or a seminar that catches your eye, whether it be Gerald Wilson's topical note on Civil Partnerships (below) or Lucy Reed's piece on the use of ICOs in the context of private law proceedings, I hope that there is something of interest to all of you in this short publication.

We have put together a Summer Seminar Programme following specific requests from you for coverage of particular issues. You will find details of the Seminar Programme on the back of this newsletter. We look forward to seeing you in Chambers at one or more of these events.

*Peter Hughes QC*

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## **CIVIL PARTNERSHIPS**

**Gerald Wilson**

It is just over a year since the first civil partnerships were registered. The statutory regime is almost identical to marriage. This means that for some, sadly, this is their first opportunity to dissolve their union.

The procedure and forms for dissolution are the same as for marriage. However, non-consummation and infidelity are not grounds of nullity: the petition must be brought for dissolution on the grounds of unreasonable behaviour.

The statutory provisions for financial relief are the same as for marriage. This does not necessarily mean, however, that they will be treated in the same way. The fact that the parties are of the same sex does create differences:

- Treating the economically weaker party as a "wife" can be misleading.
  - The courts may well be more reluctant to order maintenance.
  - It may be easier to argue for departures from equity, particularly as the parties' contributions are likely to be more commensurable.
  - Child support will hardly ever be subject to the CSA, as one party will always be a step-parent.
- Many cases will involve long periods of prior cohabitation. It is not clear how these will be treated.

This creates a fair amount of litigation risk for both parties. Few clients will want to be test cases. However, in many cases settlements should be lower to reflect the uncertainties.

Gerald Wilson's article in Family Law, January 2007, p.31 sets out the issues in more detail. He is also co-author of the textbook Civil Partnership: The New Law (Family Law, 2005)

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**TC**

## **THE CASE OF RE: MB - A PRIME EXAMPLE OF JUDICIAL INDEPENDENCE**

**Robin Powell**

**T**he very sad case of RE MB [2006] EWHC 507 (Fam) decided by Mr J Holman is nevertheless a prime example of the truth that in this jurisdiction we have trial by judge and not trial by expert and should encourage lawyers and parents alike that the court will listen carefully to their case and weigh in the balance ordinary human concerns and values even in the face of unanimous and overwhelming expert evidence in a contrary direction to the parents' case.

In re MB an NHS Trust sought a declaration that it would be lawful and in the child's interests to end artificial ventilation and provide palliative care with the inevitable and immediate resulting death of the child. The parents opposed the application. The Guardian supported the application. The child in this case suffered from the most severe form of Spinal Muscular Atrophy (SMA) which is an inherited, progressive and incurable wasting disease. Within weeks of life MB began to lose the use of his muscles. By the time the matter came to court he was age 18 months and had reached a point where, save for barely imperceptible movements of his eyebrows and the corners of his mouth, he could not move at all. He was unable to breath or swallow. There was, however, no loss of cognitive function and he was awake during the day and slept at night. The two doctors treating the child, and five other consultants in paediatric care, the senior nursing staff and 4 medical experts who reported all supported ending treatment stating that the child already had an intolerably poor quality of life which would only get worse, although artificial ventilation was keeping him alive it was not restoring his health, was futile and sadly would not change the outcome of his illness. Only junior nursing staff wanted the treatment to continue.

The parents, and the Mother in particular believed that the child was still able to show signs of pain or distress by frowns and tears and pleasure by the merest movement of his lips as if he was trying to smile. He recognized his family and followed their movement with his eyes. He enjoyed listening to CD's and watching

DVD's. She agreed that some medical procedures caused him discomfort and pain but that it was exaggerated. She believed he had improved but the judge found that she was mistaken about this and had an unrealistic belief that a cure might be found.

The Guardian at the request of the judge drew up a table of benefits and burdens. The list of benefits was 6 items long including all those argued by the mother: the list of burdens ran to 31 items over five pages and encompassed future continuing deterioration in his condition and further aggressive treatment that would be required to keep him alive. The Guardian supported the application to end the treatment.

The judge in his decision stated that he was not persuaded it was in the child's best interests, even taking into account future deterioration, to discontinue ventilation with the inevitable result of immediate death. He went further to state that it was currently in his best interests to continue with continuous pressure ventilation although he did not make an order to that effect. He did, however, make a declaration that more aggressive procedures of resuscitation in the event of cardiac failure or infection would not be in the child's interests. In refusing the application of the Trust supported by the Guardian the judge expressed his genuine respect for doctors and the Guardian but held although it was a sad and helpless life that life did include within it the benefits of a relationship of value to him with his family and the pleasures of sight and sound. Holman J stated that it was impossible to put a mathematical value on those benefits to the child but they were precious and the only benefits the child was destined to gain from life.

In refusing the declaration sought Holman J raised concerns amongst the medical profession that he had in effect compelled the doctors to treat the child against their views of the child's best interests and therefore against their conscience. This is not the case. In expressing his views as to the best interests of the child Holman J was in no different position to a parent who  
(con't over)

# INTERIM CARE ORDERS IN PRIVATE LAW PROCEEDINGS

Lucy Reed

It is often forgotten that the court has the power to make an interim care order within private law proceedings, i.e. even in the absence of an application from any Local Authority. This power arises under s38(1)(b) of the Children Act 1989 and is, unsurprisingly, rarely used.

The power only arises where the court is also ordering a s37 report to be prepared i.e. to protect the position pending receipt of that s37 report.

The recent case of Re P [2006] EWCA Civ 1613 is a rare example of such a case a Court of Appeal level.

In that case there was a residence order in favour of the Mother; however the child in question was in fact accommodated by the Local authority pursuant to s20 Children Act 1989 and was likely to remain so. The Court of Appeal identified the following issue: *'If P is not living with his mother, albeit of course that she retains parental responsibility for him, and if the residence order in her favour is in reality a dead letter, by what power was the judge able to refuse the father's application for the residence of P?'*

The court reached the conclusion that the residence order in the Mother's favour plainly no longer fulfilled the provisions of section 8 of the Children's Act 1989: *'[It] seemed artificial -- but at the same time it might not well be in [the child's] best interest to live with his father, at least immediately'.*

At the same time the Local Authority was unable to implement its care plan for staying contact with the Father because as was her entitlement under s20 Children Act 1989, the Mother objected to such contact. The Court of Appeal held that orders pursuant to s37 and s38(1)(b) were the *'obvious answer'*. An assessment by the Local Authority had to take place.

The limited threshold requirements for an order pursuant to s38(2) were made out (reasonable grounds for believing the threshold to have been passed).

S38(1)(b) was also utilized, in different circumstances, by Wall J in the case of Re M (Intractable Contact Dispute) (Interim Care Order) [2003] 2 FLR 636.

The Author has dealt also with a recent case where the power under s38(1)(b) was used. There were private law proceedings concerning a child who was living with the Father, the Mother having applied for residence. The father had a recent conviction for harassment of the Mother's partner and the Mother had made allegations of violence and peculiar behaviour by him during the course of the relationship. At a directions hearing the Father made threats to kill the Mother's partner who was in the court building. The police were called and attended, whereupon the Father resisted arrest and assaulted a police officer and was detained in custody. The District Judge made a s37 order and an interim care order against the wishes of the parents and the Local Authority. This child was accommodated with a friend of the family pending release or charge of the Father.

It should not be forgotten that upon the filing and service of the s37 report the power under s38(1)(b) falls away and it is necessary for the Local Authority to make its application under s31 Children Act 1989 using a C1 in the usual way. The purpose of s38(1)(b) is to protect child the pending consideration of whether or not a s31 application is necessary. If the Local Authority consider that a care order is necessary they must proceed promptly under s31. The Court cannot continue to make orders under s38(1)(b) to bridge any gap between the filing of the report and the delayed issue of a C1.

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(Re MB con't)

believes of their sick child are served by a particular choice of treatment, the question is whether or not the particular doctor that they consult shares their views. If the doctor does not share the parent's view he or she cannot be compelled to give that treatment against his properly held view that it is not in the interests of the patient. The problem facing the parents in the case of MB or any other on similar facts is finding a doctor who is willing to treat.

## DIARY DATES

Thurs 17 May

### Islamic Awareness

Fatima Elguenani (Psychotherapist)

This talk will cover such areas as dress codes, domestic violence and Islamic divorce.

Thurs 24 May

### Medical Treatment of Children in Cases of Children facing Inevitable Death

Robin Powell

Thurs 31 May

### Pensions in Ancillary Relief & Businesses in Ancillary Relief

Olivia Murphy & John Buck  
(1½ hrs CPD)

Thurs 7 June

### Civil Partnerships

Gerald Wilson

Thurs 20 Sept

### Contact With Older Vulnerable Persons

This lecture considers a developing area of law affecting vulnerable adults and the inherent jurisdiction of the court.

Timothy Shuttleworth

Fri 12 Oct

### CPD Crammer Day

(5-6 hrs CPD. Programme tbc)

Registration will start at 5.45pm and the seminars

**will start promptly at 6.00pm**

Refreshments will be provided at close. Seminars will be accredited for 1hour CPD except where otherwise stated.

### Booking is required as places are limited.

Please contact Susan Yacoub on 0207 421 5300 or by email at [syacoub@tanfieldchambers.co.uk](mailto:syacoub@tanfieldchambers.co.uk) to book your place at these seminars.

From time to time the Family Team also gives seminars on request at solicitor's offices. Please contact Richard Preston if you would like to find out more about this.

## TANFIELD'S FAMILY TEAM

Peter Hughes QC 1971

Gavin Merrylees 1964

Timothy Shuttleworth 1971

Philip Conrath 1972

Dick Pears 1975

Kerstin Boyd 1979

William Holland 1982

Sebastian Reid 1982

Philip Dixon 1986

David Sharp 1986

Michael Bailey 1986

John Buck 1987

Sarah Dines 1988

Gerald Wilson 1989

Catriona Maclaren 1993

Robin Powell 1993

Charlotte Jewell 1999

Laura Scott 2001

Olivia Murphy 2001

Lucy Reed 2002

Mandy Short 2003

Darren Watts 2005

Katherine Harmer 2005

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View profiles of the Family Team members at [www.tanfieldchambers.co.uk](http://www.tanfieldchambers.co.uk) or speak to the Family Team clerks Paul Green and Richard Preston for more information.

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