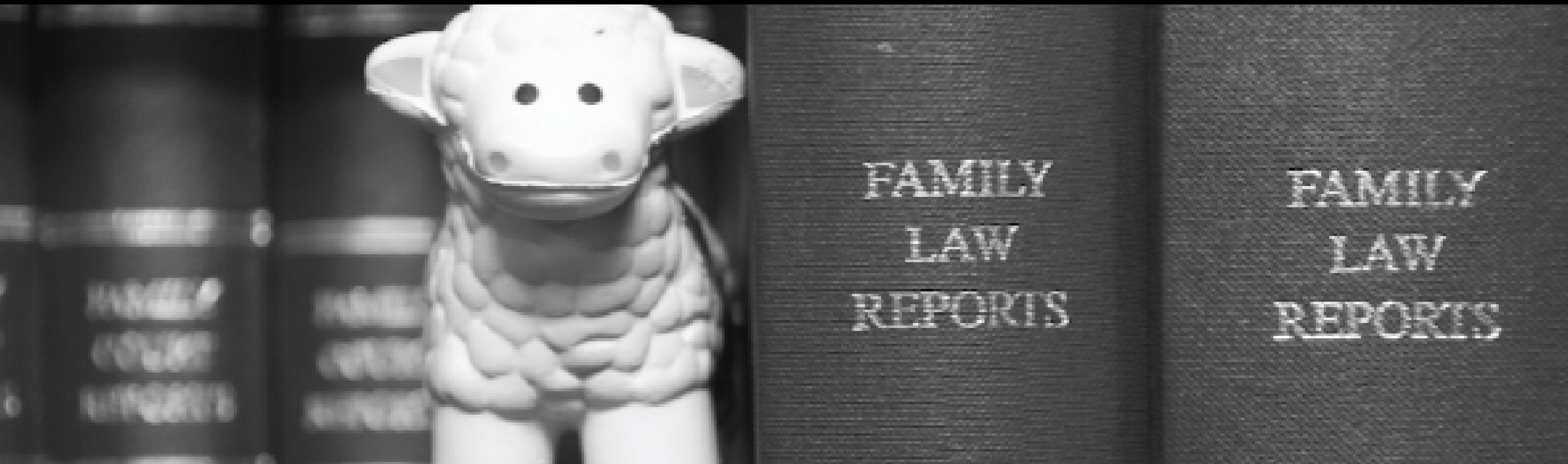
TANFIELD CHAMBERS



FAMILY GROUP NEWSLETTER

A warm welcome back to all our readers and delighted to see so many of you at the recent CPD 'Crammer Days'. We hope that you found the seminars both interesting and useful and look forward to bringing you another update on family law next year. It was extremely kind of the Supreme Court to hand down their judgment in *Radmacher* just in time for our first 'Crammer Day' and for Charlotte Jewell to be able to enlighten us all as to its content and potential impact. With that in mind, and especially for those of you who were not able to attend, our first Article deals with the *Radmacher* Judgment. Enjoy!

Dick Pears

ISSUE NO 8: WINTER 2010

RADMACHER –V- GRANATINO: NUPTIAL AGREEMENTS BINDING, SO LONG AS THEY ARE FAIR

The long awaited judgment in the much talked about appeal in the case of *Radmacher (formerly Granatino) (Respondent) –v- Granatino (Appellant)* [2010] UKSC 42 was finally handed down on Wednesday 20 October 2010. The Supreme Court (by a majority of 8 to 1) dismissed the appeal against the decision of the Court of Appeal. Interestingly, the dissenting judgment was given by Lady Hale, the member of the court with the most experience of family cases in the English courts.

The central issue dealt with in the appeal concerns the principles to be applied when a court, in considering the financial arrangements following the breakdown of a marriage, has to decide what weight should be given to an agreement between a husband and wife made before the marriage.

The essential point of principle, now established by the Supreme Court in **Radmacher,** as neatly summarised by the majority at paragraph 75, is this:

"The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."

The court stressed that whilst in the right case a nuptial agreement can have decisive or compelling weight (para 83), a nuptial agreement cannot oust the jurisdiction of the court (para 2) and cannot be allowed to prejudice the reasonable requirements of any child of the family (para 77). However, the court made clear that respect should be given to individual autonomy (para 78) and the reasonable desire to make provision for existing property

WITH THIS PRE-NUP, I THEE WED

A REVIEW OF THE LAW ON ICO'S - HAVE WE COME FULL CIRCLE?

IS IT POSSIBLE OR DESIRABLE TO DEFINE 'SIGNIFICANT HARM'

CONTINUED OVERLEAF

Estelle Lear

Estelle's practice covers all areas of family law including children (both public and private law), ancillary relief and Schedule 1 applications. Estelle is particularly interested in cases with an international element. Prior to joining the Bar, Estelle had extensive exposure to care work, having worked for two local authorities and spent three years working as a legal costs negotiator. Outside work, Estelle is a keen photographer and can also regularly be found walking her beloved dog on the Heath!

owned by one or the other party, or property that one or other anticipates receiving from a third party (para 79). A distinction should no longer be made between agreements made pre or post marriage (para 63), a distinction that had been made by the Privy Council in the case of **MacLeod –v- MacLeod [2008] UKPC 64.**

In order for a nuptial agreement to have decisive or compelling weight, each party should have all of the information that is material to his or her decision and each party should intend that the agreement should govern the financial consequences of the marriage coming to an end (para 69). The court will continue to pay close attention to the circumstances in which the agreement was reached, so as to ensure that no unfair advantage was taken of any potentially weaker party (usually at times of high emotion, whether pre or post marriage, where inequalities of bargaining power may well exist).

The question of weight to be attached will continue to be considered as part of 'all the circumstances of the case' or as an example of conduct that it would be inequitable for the court to disregard within the meaning of section 25 Matrimonial Causes Act 1973. It would therefore appear that whilst the starting point or onus, as Lord Mance puts it, is that nuptial agreements, freely entered into with a full appreciation of its implications should be upheld, the ultimate question remains as to what is fair and thus, the starting point or onus is unlikely to matter once all the facts are before the court (para 129). This may be desirable if fairness is to be achieved where unforeseen (and perhaps unforeseeable) changes have occurred since the parties entered into the nuptial agreement. It is suggested that the longer the marriage, the more likely it is that the parties should not be held to their agreement (para 80).

Whilst **Radmacher** does not import a change in the law per se, it is the clearest indication yet that, in the right circumstances, a nuptial agreement will be respected and upheld by the courts. Be that as it may, there is no doubt that the law of marital agreements is messy and uncertain and that any root and branch reform depends on Parliamentary intervention. The Law Commission continues to consider whether legal reform is required (a consultation paper is due to be published on the subject shortly). Unless and until systematic review and reform takes place, such cases will continue to be considered by the courts on a case by case basis, with reference to the section 25 criteria.

Estelle Lear

INTERIM CARE ORDERS:-

There is always a frisson of excitement when two members of chambers appear in opposition at the Court of Appeal. This was clearly evident when Robin Powell and I clashed swords this late summer. I shall leave it to readers to discover who "won" the case. This is of course not an analogy suitable for cases involving children. But barristers will be barristers.

On 29 July 2010 the Court of Appeal handed down judgment in the case of **Re GR (Children) & others [2010] EWCA Civ 871**. The Local Authority appealed against the refusal of a Recorder to make an interim care order in respect of two of four children where the Recorder had granted interim care orders in relation to the older children. The judgment provides those interested in the day-to-day twists and turns of contested interim care hearings with a useful review of where we are now following various recent interpretations by the courts of the hurdles to cross at these hearings.

Of course interim care cases must be approached in two stages. Firstly, one looks at what is often called the "threshold" for an interim care order. One needs to apply sections 31 and 38, as those reading this will be aware. If the court is satisfied as required by s 38(2), it must then go on to consider, as a discrete issue, whether or not to grant an interim care order. As in all these cases, this is a question with respect to the upbringing of the child, so, in accordance with s 1 Children Act 1989, the child's welfare is the court's paramount consideration. We also bear in mind the delay principle and the welfare check list.

Where **Re GR (Children)** became interesting was the review of the Court of Appeal of the present state of the authorities in relation to interim care orders which serve as a guide as to how to approach this second stage of the court's determination, the purpose of which is, of course, to establish a holding position pending a full hearing. The result of an interim hearing can have a significant bearing on the management of a case and practitioners need to have their finger on the pulse at these hearings.

In **Re H (a child)(interim care order) [2002] EWCA Civ 1932**, Thorpe LJ said:

"38. … Above all it seems to me important to recognise the purpose and the bounds of an interim hearing. There can be no doubt that a full and profound trial of the local authority's concerns is absolutely essential. But the interim hearing could not be allowed to usurp or substitute for that trial. It had to be properly confined to control the immediate interim before the court could find room for the essential trial.

Sarah Dines

Sarah Dines was called to the Bar in 1988 and is one of the most senior female barristers in chambers. She practises primarily in family law with an equal split of private and publicly funded work. She has taken various high profile cases to the Court of Appeal. Sarah has significant experience of big money ancillary relief proceedings as well as the more standard financial cases. She has dealt with care cases involving serious injuries and has also undertaken significant sexual abuse hearings in the High Court. She lives in rural Essex with her husband and four children.

Timothy Shuttleworth

Called in 1971, Timothy Shuttleworth has had a varied practice at the Bar over the last 38 years covering criminal cases (prosecuting and defending) and most aspects of civil claims and family work. In 1985, he began to practice exclusively in family cases, personal injury claims and some employment work before in the last 19 years concentrating solely on family litigation, both children and money. Tim has helped train NSPCC officers and lectured widely on family-related themes, as well as on topics such as the Human Rights Act (including training Local Authority professionals on the Act), elder abuse and the Mental Capacity Act 2005. Last year he began to lecture on Richard III (both historical figure and the play) and he hopes to make many more defences of this much maligned monarch.

- Where Are We Now?

39. .....In my judgment, the arts 6 and 8 rights of the parents required the judge to abstain from premature determination of their case for the future beyond the final fixture, unless the welfare of the child demanded it. In effect, since removal from these lifelong parents to foster parents would be deeply traumatic for the child, and of course open to further upset should the parents' case ultimately succeed, that separation was only to be contemplated if B's safety demanded immediate separation."

This case was the genesis of the need for the child's safety to "demand immediate separation", which appeared to be a stronger test than previously applied and is frequently quoted up and down the length of the country.

In **Re M (ICO: Removal) [2005] EWCA Civ 1594,** Thorpe LJ (once again) referred, in the final paragraph of his judgment, to "the very high standards that must be established to justify the continuing removal of a child from home" as well as to the need to weigh in the balance the potential risk to the child of extended separation from their parents.

In **Re K and H [2006] EWCA Civ 1898,** Thorpe LJ continued in this vein:

"16. Decisions in this court emphasised that at an interim stage the removal of children from their parents is not to be sanctioned unless the child's safety requires interim protection."
The Court considered the treatment of the law by Ryder J in the following case:

In **Re L-A [2009] EWCA Civ 822,** influenced by the decision of Ryder J in **Re L (Care Proceedings: Removal of Child) [2008] 1 FLR 575** which he considered to have altered the law, the trial judge had not made an interim care order when it appears he might otherwise have been inclined to do so. The reference in Ryder J's judgment in **Re L** which had influenced him was to "an imminent risk of really serious harm i.e. whether the risk to ML's safety demands immediate separation". On appeal, it was common ground that Ryder J had not intended to alter the approach set out in the three Court of Appeal cases referred to already. Thorpe LJ took the opportunity to restate the principles established by those authorities. From paragraphs 38 and 39 of Re H, he extracted two propositions:

"that the decision taken by the court on an interim care order application must necessarily be limited to issues that cannot await the fixture and must not extend to issues that are being prepared for determination at that fixture" and

"that separation is only to be ordered if the child's safety demands immediate separation."

The Court of Appeal stated in the present case **Re GR** that the important point from **Re M** was the very high standard which a local authority must meet in seeking to justify the continuing removal of a child from home.

It was therefore clear, following **Re L-A,** that it was to the traditional formulation in the Court of Appeal authorities that courts and practitioners should turn, not to Ryder J's phraseology. This came as a relief to those at the Bar who felt that Ryder had just gone too far.

The most recent case to which the Court referred in the present case was **Re B and KB [2009] EWCA 1254** in which the appeal was against the dismissal of the local authority's application for an interim care order. The trial judge had given himself what was described as an "immaculate self-direction" in these terms:

"whether the continued removal of KB from the care of her parents is proportionate to the risk of harm to which she will be exposed if she is allowed to return to her parents' care".

Lady Justice Black stated in the present case that it may do no harm to invite particular attention to Wall LJ's definition of "safety" in this passage in **Re B and KB.** The concept of a child's safety, as referred to in the authorities, is not confined to his or her physical safety and includes also his or her emotional safety or, as Wall LJ put it, psychological welfare.

In conclusion, the Court of Appeal are back to the traditional interpretation of the relevant statute in that ICOs should not be made unless the child's welfare demands immediate removal from the parent/s care. It appears we have come full circle over the last 10 years.

Sarah Dines

THE DANGERS OF BEING PRECISE

Is it necessary or even wise to provide a definition of what amounts to *"significant harm"* in Section **31 (2)** of the Children Act 1989?

This question arises because once again the press are on the warpath about the care system suggesting that it is incapable of discharging the task of protecting children. In a recent editorial headed **"We must protect children from their protectors",** The Sunday Telegraph opined:

"...the most serious problem with the child protection system is more fundamental than a lack of money. It is that neither social workers nor the courts understand exactly what they are supposed to be doing. The law says that intervention is justified to prevent "significant harm" to the "interests of the child". The Government has issued hundreds of pages of "guidance for practitioners"- but not one of them provides a precise definition of what "significant harm" means...a meaningful definition of "significant harm" should be inserted into child protection legislation and into the guidance that goes with it. That would at least give those who work in the system a clear idea of what they are supposed to be doing".

As it happens, the Court of Appeal has recently given some guidance on the meaning of "significant harm" **in Re MA (Care Threshold) [2010] 1 FLR 431.** The case is important because, as Ward LJ states in his judgment, this appeal provided the court with its first opportunity to consider the dividing line between "harm" and "significant harm".

Did the court make a good fist of answering the question? Probably not with the exactitude that the journalists at the Sunday Telegraph would wish!

Ward LJ approached a definition of significant harm at page 451, paragraph 54 of his judgment by stating: "Given the underlying philosophy of the Act, the harm must...be significant enough to justify the intervention of the State and disturb the autonomy of the parents to bring up their children by themselves in the way they choose. It must be significant enough to enable the court to make a care order or a supervision order if the welfare of the child demands it...there must be a "relevant and sufficient" reason for crossing the threshold".

So far (some may argue) so loose. But can a better definition be advanced? After all, as Hedley J stated at first instance in **Re L (Care: Threshold Criteria) [2007] 1 FLR 2050** at paragraph 51:

"It would be unwise to a degree to attempt an all embracing definition of significant harm. One never ceases to be surprised at the extent of complication and difficulty that human beings manage to introduce into family life. Significant harm is fact specific and must retain the breadth of meaning that human fallibility may require of it..."

There is also the problem highlighted by Munby J in **Re K: A Local Authority v N and others [2007] 1 FLR 399** where the learned judge stated at paragraph 26 of his judgment:

"The task of the court considering threshold for the purposes of section 31 of the 1989 Act may be to evaluate parental performance by reference to the objective standard of the hypothetical "reasonable" parent, but this does not mean that the court can simply ignore the underlying cultural, social or religious realities. On the contrary, the court must always be sensitive to the cultural, social and religious circumstances of the particular child and family. And the court should, I think, be slow to find that parents only recently or comparatively recently arrived from a foreign country – particularly from a country where standards and expectations may be more or less different, sometimes very different indeed, from those with which we are familiar – have fallen short of an acceptable standard of parenting if in truth they have done nothing wrong by the standards of their own community...".

The answer may be that we can do no better than consult the dictionary for a definition as Miss Jill Black (now Black LJ) did as counsel in **Humberside County Council v B [1993] 1 FLR 257.** Counsel relied on the same dictionary definition of "significant harm" as was offered over 20 years ago in the Guidance originally issued to explain the Act of 1989. The Guidance states:

"It is additionally necessary to show that the ill-treatment is significant, which given its dictionary definition means considerable, noteworthy or important".

My dictionary adds "weighty, telling, substantial".

Let the wordsmiths at telegraph.co.uk provide a better and more meaningful definition if they can, taking into account the need to show some degree of flexibility affecting the courts' approach to the "momentous step" of possibly removing a child permanently from his/her parents in a free and democratic society that values diversity and individuality.

TIMOTHY SHUTTLEWORTH

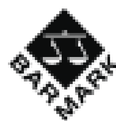
NEWS

Tanfield Family are delighted to announce that, once again, Gerald Wilson and Laura Scott have been listed in The Legal 500.

This year we had two very successful CPD Crammer Days; due to popular demand, one of those days was entirely dedicated to TOLATA applications. If you have any suggestions for future seminars or specific areas of family law that you would like us to consider covering, please contact us as soon as you can. We look forward to hearing from you!

With Christmas looming Tanfield Family wishes to extend our thanks to you for a very busy and productive year and look forward to working alongside you in the New Year.

TANFIELD CHAMBERS



For further information or to instruct a barrister, please contact **Richard Preston,** Family Clerk or **Kevin Moore**, Senior Clerk, on T: +44 (0) 20 7421 5300 or E: clerks@tanfieldchambers.co.uk

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