



FAMILY GROUP NEWSLETTER



Welcome to the Winter edition of the Tanfield Family Newsletter with articles on the Supreme Court decision in *Jones v Kernott*; on leave to remove following *CK v MK*; and on the new rules for reciprocal enforcement of maintenance. I hope these will be not just topical but useful and enlightening. Dick Pears has recently handed over to me as Head of the Family Group and Zoe Bluck has taken over as our principal family clerk. We are really grateful for all Dick has done and will be working hard to build on his achievements and strengthen our relationship with all our clients. We really welcome your comments on how we can improve our service to you, both in the running of cases and in our other services such as our recent crammer days.

GERALD WILSON

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INTERNATIONAL RELOCATION AND THE IMPACT OF MK v CK

On 7 July 2011, the Court of Appeal handed down judgment in *MK v CK* [2011] EWCA Civ 793.

THE TRIAL

M presented a classic application for relocation following the breakdown of the marriage. She wanted to go home to Canada. She was isolated in England. In Canada, she would be able to live with her parents, receiving both emotional and material support.

F pointed to his commitment to the children and the significance of the arrangement for shared care (whereby the children spent 5 nights with F and 9 nights with M in any 14 day period).

CAFCASS considered there to be a fine and difficult balance between the detriment to the children if they remained and the detriment that would result from a diminished relationship with F. CAFCASS concluded that the balance came down against relocation and recommended the refusal of the application.

The Judge allowed M's application. F appealed the decision.

SUBMISSIONS ON APPEAL

There were three principal submissions on appeal:

- (i) The Judge rejected the recommendations of the CAFCASS officer without proper analysis or explanation;
- (ii) The Judge directed herself by reference to the guidance offered by Dame Elizabeth Butler-Sloss P. at paragraph 85 of *Payne* (guidance apt for applications by primary carers) rather than by reference to the decision of Hedley J in *Re Y* [2004] 2 FLR 330 (the only authority then available directly considering a relocation application by a care sharer); and
- (iii) In explaining her conclusion, the Judge only referred to the case that M represented. Even when this was raised by Counsel for F, she had not remedied this defect.

INTERNATIONAL RELOCATION: WELFARE PREVAILS

FAIR SHARES IN TRUSTS OF LAND?

NEW RULES FOR RECIPROCAL ENFORCEMENT

CONTINUED OVERLEAF



ESTELLE LEAR

Estelle's practice involves both family and personal injury law. Estelle has appeared at all levels of court from the Family Proceedings Court to the High Court. Her financial work encompasses cases involving complex businesses, trusts, third party claims against matrimonial property, bankruptcy, nuptial agreements, cases with an international element and enforcement proceedings. She also litigates cohabitation disputes, Schedule 1 and Inheritance Act claims. Estelle's private children work includes contact / residence disputes, leave to remove applications and other specific issue orders. She also undertakes child abduction work (Convention and non-Convention). In her public children work Estelle has acted for Local Authorities, parents, family members and children. Estelle sits on the Bar Council Recruitment and Entry Committee.

JUDGMENT ON APPEAL

In his leading judgment, Thorpe LJ found that F succeeded on all three grounds, and that any one of them would have been sufficient to upset the judgment below (paragraph 30).

In relation to point (i), he held that "given the clarity of the recommendation, there can be no denying the judge's obligation to explain why she rejected it" (paragraph 32).

On point (ii), "Given the extent to which the father was providing daily care, the judge should have considered and applied the dicta of Hedley J in **Re Y** rather than those of the President in **Payne**" (paragraph 35).

In respect of point (iii), "Her conclusion is not the result of a balancing of pros and cons. She lists only the pros upon which she pronounces her conclusion. That is, in my judgment, a fatal deficit" (paragraph 37).

Whilst points (i) and (iii) were clear on the face of the judgment, point (ii) required consideration of the case law in external relocation applications. It was concluded that:

The only principle to be extracted from **Payne** is the paramountcy principle. All the rest is guidance as to factors to be weighed in search of welfare paramountcy (para 39, 86 and 119).

The guidance in **Payne** is posited on the premise that the Applicant is the primary carer (para 41).

Given the extent to which F was providing daily care, the Judge should have considered and applied the dicta of Hedley J in **Re Y** rather than those of the President in **Payne** (para 35).

What is significant is not the label 'shared residence' but the *practical arrangements* for sharing the burden of care between two equally committed carers. Where each is providing a more or less equal proportion and one seeks to relocate externally then the approach as suggested in paragraph 40 in **Payne** should not be utilised. The judge should rather exercise his discretion to grant or refuse by applying the statutory checklist in section 1(3) of the Children Act 1989 (para 57).

Black LJ suggested that, even in shared care cases, **Payne** should not be put so completely to one side [para 96]. Hedley J's decision in **Re Y** is a decision within the framework of which **Payne** is part and exemplifies how the weight attached to the relevant factors alters depending upon the facts of the case (para 144).

Accordingly, Black LJ stated that she would not expect to find cases bogged down with arguments as to whether the time spent with each of the parents or other aspects of the care arrangements are such as to make the case 'a **Payne** case' or 'a **Re Y** case', nor would she expect "preliminary skirmishes over the label to be applied to the child's arrangements with a view to a parent having a shared residence order in his or her armoury for deployment in the event of a relocation application." (para 145)

In cases concerning a shared care arrangement between the parents, the guidance in **Payne** should now give way to a consideration of the welfare of the child and application of the welfare checklist. It is clear, however, that **MK v CK** does not mark the end of **Payne**. The guidance remains applicable in cases where the applicant is quite clearly the primary carer but **MK v CK** makes clear that this is merely guidance, not a binding checklist akin to s 1(3) Children Act 1989.

ESTELLE LEAR

OUR AUTHORS



CAN THE AMBULATORY BENEFICIAL HOME GO WALKABOUT AFTER THE COHABITING JOINT OWNERS?

The short answer is YES

The Supreme Court has now (after a lengthy gestation) handed down its judgment in **Jones v Kernott** [2011] UKSC 53.

In light of the relatively small amount of money involved in this case, the time taken to hand down the judgment, the amount of academic comment leveled at the case of **Stack v Dowden**, the absence of parliamentary assistance in regulating cohabitation property disputes and the anticipation that it would assist lawyers in giving firm advice to property owning cohabitantes, the judgment is in my view something of a damp squib. One might have expected something a bit more robust.

The issue before the Court was:

Can a Court properly *infer* an agreement by an unmarried couple, who hold a property in equal shares at the date of their separation, to the effect that thereafter their respective beneficial interests should alter.

Thus it can be immediately seen that the controversial question of whether the imputation of the parties' common intention is to be what the court thinks is fair or what the parties ought to think is fair has not been clarified.

THE FACTS:

In 1983 the appellant and respondent started co-habiting in the appellant's home, and went on to have two children together, in 1984 and 1986. In May 1985 the parties purchased a property in joint names, using the proceeds of sale from the appellant's home and taking out a joint mortgage for the balance. They lived there together until they separated in 1993. The respondent then moved out and purchased another property. He made no further contribution to the payment of the mortgage on or to the upkeep of the property, or to the outgoings. In 2006 the respondent sought to realise his share of the property and in 2008 severed the joint tenancy. The appellant issued proceedings to determine the parties' respective beneficial interests. The Circuit Judge held that the appellant had a 90% share and the respondent 10%. The first appellate judge refused Mr Kernott's appeal. The Court of Appeal allowed his subsequent appeal and held that the property was held in equal shares by each party.

In the Court of Appeal, LJ Rimer and Wall P were unable to find that there was any evidence or conduct to find that the parties' intentions had changed after separation and therefore there was nothing to displace the presumption of equality. Rimer J's interpretation of **Stack v Dowden** was that it did not "enable courts to find, by way of the 'imputation route', an intention where none was expressly uttered nor inferentially formed" [para 77].

The Supreme Court has now allowed Ms Jones's appeal and has restored the Circuit Judge's judgment.

Four of the 5 Lord Justices found that the Judge (contrary to the majority view of the Court of Appeal) had indeed made a finding by inference that the intentions of the parties had changed



SEBASTIAN READ

Sebastian Reid was called to the Bar of England and Wales in 1982 and the Bar of New South Wales in 1983. Sebastian specialises in civil and family work. Sebastian consequently brings a wealth of experience to his private client work, and especially enjoys the cut and thrust of the courtroom. Sebastian's work

focuses on financial remedies (matrimonial finance and Schedule 1), Inheritance Act, TOLATA and other property disputes. He also has detailed experience in child abduction work, leave to remove applications, and public law proceedings. He is married with four children. His interests include rugby union, ski touring, and singing both opera and choral works.



GWYN EVANS

Gwyn completed his pupillage at a leading family law set in the Temple in Sep 2009, before being invited to join Tanfield chambers as a tenant in May 2010. He undertakes the full range of family work, with particular emphasis on financial remedies (including complex cases involving

trusts / non-disclosure), TOLATA, contact and residence disputes, leave to remove applications, injunctions, and disputes involving the CSA. During pupillage, Gwyn devilled in several high-value matrimonial finance and Schedule 1 cases. In his spare time Gwyn enjoys cycling, hiking, guitars, programming synthesizers, and fixing things. He will also be performing again in the Gray's Inn Miscellany show in mid-December.

FINANCIAL INTERESTS IN A FAMILY ON THE SEPARATION OF

"[48]... He did not go into detail, but the inferences are not difficult to draw....The logical inference is that they intended that his interest in Badger Hall Avenue should crystallise when the insurance policy was cashed in and Mr K bought a new house. He did not go into detail, but the inferences are not difficult to draw. The logical inference is that they intended that his interest in Badger Hall Avenue should crystallise then."

[It is to be noted that notwithstanding the "logical inference" referred to above Ms Jones was initially asking for an interest in Mr Kernott's new property. One wonders if it was as logical as held why that claim was ever made. This claim was later abandoned]

Accordingly, the rather more interesting issues concerning the correctness of the imputation route and its meaning being applied to determine the appeal was largely ducked by the Supreme Court.

Kerr J at paragraph 77 did make reference to that route

"I would prefer to allow this appeal on the basis that it is impossible to infer that the parties intended that their shares in the property be apportioned as the judge considered they should be but that such an intention should be imputed to them."

However, his rationale was that an imputed intention would be to do what was fair and the court's focus should be on what is fair. It does rather beg the question why that simple test was not articulated in **Stack and Dowden**. The uncertainty of that issue rumbles on.

Paragraphs 26 to 36 deal with the question of imputation or inference. The disappointing aspect of the Judgment is the manner in which the majority of the Supreme Court appeared to distance themselves from the controversial 'imputed route' by stating that the difference in practice between inference and imputation was not as great as their conceptual difference (Walker LJ, Lady Hale [34] and Collins LJ [58]). LJ Kerr [67] and LJ Wilson do not agree [89]

What is now clear is that this case is the authority that in answering the first question (did the parties have a common intention that the property was to be shared?) the parties must establish that by actual evidence or inference. However, where it is impossible to determine the parties' intentions as to the respective shares by direct evidence or inference, the imputed route can then followed in answering the second question (what are their respective shares?). [31].

Wilson LJ at paragraph 84 expressly leaves open the question of whether a judge would be entitled to answer the first question by an imputed intention. That he says will merit careful thought

Thus the conclusion as set out in paragraph 51 of Lord Walker and Lady Hale's joint judgment does not expressly mention 'imputed intentions'

(1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.

(2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the



home, or (b) that they later formed the common intention that their respective shares would change.

(3) Their common intention is to be deduced objectively from their conduct: "the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party" (Lord Diplock in **Gissing v Gissing** [1971] AC 886, 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in **Stack v Dowden**, at para 69.

(4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, "the answer is that 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": Chadwick LJ in **Oxley v Hiscock** [2005] Fam 211, para 69. In our judgment, "the whole course of dealing ... in relation to the property" should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties' actual intentions.

(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4)).

Whom have the Supreme Court assisted with this Judgment? Certainty is a distant hope where broad discretion is concerned. When cohabiting couples break up, in the very unlikely event of the parties expressing a common intention as to the altering (or not) thereafter of their respective shares, either will thereafter face the uncertainty of not knowing whether or how a court might draw inferences as to their changed common intention.

I fear that as a result of this case there is an increased risk that Courts may drift into finding that the intentions of the parties following the break up of a cohabiting relationship are impossible to determine actually or inferentially. To resolve the matter by applying the 'what is fair' broad brush approach could well be tempting. This uncertainty could result in increased litigation. We will have to wait and see.

SEBASTIAN REID

DEALING WITH FOREIGN CHILD MAINTENANCE ASSESSMENTS WITHOUT A FOREIGN COURT ORDER

How do you advise a client who comes into your office waving a document which has been served upon him by the Lord Chancellor's department / Reciprocal Enforcement of Maintenance Orders unit demanding child maintenance for a child of his who lives abroad? Is this a matter for the CSA?

The answer to the second question is "no": the CSA / CMEC in this country only has jurisdiction where all three of the child and its parents live in this country (see s 44(1) CSA 1991).

The answer to the first question is that it depends on a) which country it originates from and b) what the document is. The key distinction will be as to whether it is a court order, or a maintenance assessment (analogous to the CSA / CMEC).

There are helpful procedural tables in Family Court Practice 2011 at pages 148 - 196. However, with the advent on 18.6.2011 of the *Magistrates' Courts (Enforcement or Variation of Orders Made in Family Proceedings and Miscellaneous Provisions) Rules 2011* (SI 2011/1329 - hereafter "the 2011 rules") these tables are no longer entirely accurate.

The 2011 rules largely consolidate previous rules. They also apply the FPR 2010 to the variation of a maintenance order made in a foreign country. However, the FPR 2010 do not apply to proceedings identified under Part 5 of the 2011 rules - i.e. proceedings involving a foreign maintenance calculation / assessment made by a state-appointed body analogous to the CSA.

It is more straightforward if there is a court order than if there is a maintenance assessment. For example, for EU countries see the Civil Jurisdiction and Judgments Act 1982 Sch 1, Article 31, which provides for reciprocal enforcement of judgments between member states. The relevant rules are contained (at length) in FPR 2010 Part 34. However, matters can be more interesting where there isn't a court order.

MAINTENANCE CALCULATION/ASSESSMENT BUT NO FOREIGN COURT ORDER

An application for recovery of a maintenance assessment made in a country which is a signatory to the *Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* of 2.10.1973 (i.e. Convention No 23 - most EU countries & various others) falls to be considered under Part II of the *Maintenance Orders (Reciprocal Enforcement) Act 1972* ("the 1972 Act"). S 27B of the 1972 Act states that, upon receipt of the foreign maintenance assessment documents, the Lord Chancellor shall send them to the Magistrates Court for the region in which the Respondent is residing. The application will be treated as if it is a Children Act 1989 Schedule 1 application (S 27A(3)), as the CSA has no jurisdiction.

S 65 of the *Magistrates Court Act 1980* does not apply (i.e. these proceedings are not considered to be "family proceedings" for the purposes of that Act). Part 5, Chapter 2 of the 2011 Rules covers applications under Part II of the 1972 Act. Rule 57 sets out that the court must fix a directions hearing, and within 14 days of service by the court of the application upon him, the Respondent must file a Response. Procedural Rules are set out at Schedule 4 (note overriding objective at Rule 5 - FPR 2010 do not apply). Ergo, the curious result of this is that the application for maintenance - which has likely already been considered in the Hague Convention country, and even a figure arrived upon - will be reconsidered under the provisions of Sch 1 CA 1989 in the English courts. If the parent with care does not turn up to the English court, then it is arguable that the court will give more weight to the financial evidence of the non-resident parent, who would be able to give oral evidence which would be unchallenged. The court then makes the order on the basis of the factors in Sch 1 s 4 CA 1989. However, the High Court has indicated that the starting point for an assessment would be the CSA rate (see **GW v RW (Financial Provision: Departure From Equality)** [2003] 2 FLR 108 at § 74, partially overruled by **Jones v Jones** [2011] 1 FLR 1723 but not on this point).

CONCLUSION

If the foreign assessment is lower than what the court in this country is likely to order, it may be wise simply to ask at the directions hearing for a final order and to pay the amount demanded, making sure that the amount is in pounds and therefore protected from currency fluctuations.

GWYN EVANS

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NEWS

ZOE BLUCK NEW PRINCIPAL FAMILY CLERK



I would like to say how wonderful it was to see so many of you at our Crammer Days, it's nice to put a face to a name! Nine months have flown by since I started at Tanfield Chambers & everyone has made me feel very welcome! Congratulations to Gerald on being appointed the new Head of the family team & a big thank you to Dick, for all he has done.

As ever, if I can assist with any queries, please do not hesitate to contact me & I will be happy to help.

TANFIELD CHAMBERS



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

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