

## PUBLIC LAW OUTLINE IN FORCE SOON

As of 1st April 2008 the Protocol for Judicial Case Management in Public Law Cases will be replaced by the new Public Law Outline ("PLO"). The main changes are a reduction in the number of hearings in care cases (from 6 to 4) and a shift towards early issue identification, focus and resolution. The role of the children's guardian will also shift from being report focused to one of analysis at all the various stages. CAF/CASS will be expected to see the child in advance of the First Appointment.

Revised Statutory Guidance to the Children Act has been issued, also coming into effect on April Fools' Day. It will have considerable impact on public law proceedings, as the emphasis is heavily on 'front-loading' Local Authority investigations. Local Authorities will be expected to carry out the majority of assessments PRIOR to issuing any public law application.

A consultation is currently underway, proposing a rise in the cost to Local Authorities of issuing proceedings from the present £150 to £4000! Have your say at <http://www.justice.gov.uk/docs/cp3207.pdf>. The consultation closes on 11th March.

Chambers is offering training and seminars on the PLO and associated Guidance. Please contact Richard Preston or Robert Lyon (family clerks) for further details.

**Laura Scott**

Tanfield Chambers' dedicated conference facilities are readily accessible by the mobility-impaired. Please contact the clerks to agree fees in advance, whether on a fixed or hourly rate. Feedback on our service is welcomed and should be directed to the Senior Clerk, Kevin Moore. A copy of Chambers' Complaints Procedure is available on our website or on request.

## 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

Want to find the right skills and experience to suit your case? View profiles of the Family Team members at [www.tanfieldchambers.co.uk/areas\\_fam.php](http://www.tanfieldchambers.co.uk/areas_fam.php)

or speak to the Family Team Clerks Richard Preston and Rob Lyon for more information.

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# Family Matters

*From the Family Team at Tanfield*

As we settle in to 2008 I am pleased to be able to provide you with another of our regular newsletters from the family team here at Tanfield. In it you will find both bite sized tips (Catriona Maclaren) and a more in-depth article pertaining to money cases (Robin Powell), along with a useful summary of the important changes in public law children work hailed by the introduction of the Public Law Outline (Laura Scott).

As ever at Tanfield, the family team strives to provide a friendly and high quality service to both lay and professional clients, and we welcome your feedback on all aspects of your dealings with Tanfield, including on this newsletter.

On behalf of us all at Tanfield may I wish you a successful 2008.

**Dick Pears**  
*Head of Family Team*

**Spring 2008  
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## FUNDING ANCILLARY RELIEF CLAIMS IN A TIME OF CLIMATE CHANGE

The changes in the availability and level of public funding for divorce work and the consequent reduction in the number of solicitors and barristers who are willing to work for the low fees under the Legal Services Commission contracts and graduated fees scheme has resulted in a creative approach to alternative funding in the professions which has been encouraged by the judiciary.

The starting point is the *Sears Tooth*' agreement in which Wilson J (as he then was) considered the validity of a deed of assignment in which the wife assigned her right to financial provision, other than periodical payments, in ancillary relief proceedings. The deed was held to be technically invalid and contrary to public policy by a district judge but the ruling was reversed on appeal by Wilson J who found that the deed was both valid and in the interests of justice by promoting the securing of proper legal advice and representation of a significant constituency of wives who were ineligible for legal aid and were seeking to assert their rights against more powerful husbands. Wilson J also warned that solicitors considering such a deed much advise the wife to seek independent legal advice and the deed should be disclosed to the husband. The uncertainty of recovering the fees through a lump sum and problems with financing cash flow in along running suit will deter most solicitors from this route in any event.

This approach was followed by *A v A (Maintenance Pending Suit: Payment of Legal Fees)* [2001] 1 FLR 377 in which Holman J considered the novel point of whether an order for maintenance pending suit could include an element expressly to fund the payee's legal costs. In *A v A* the wife had no income or capital and had been dependent on her husband for 20 years. Holman J considered the wording of s.22 of the Matrimonial Causes Act and held that in the absence of statutory definition 'maintenance' was to be construed widely and could include the need to pay legal costs. Holman J was fortified in his decision by reference to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, presumably the requirement for equality of arms.

Holman J's decision in *A v A* was followed by Charles J in *G v G (Maintenance Pending Suit: Costs)* [2002] EWHC 306 who held that the meaning of 'maintenance' was not limited by common law or statute and has to be judged from time to time according to the context of the case. He held that fairness between husband and wife gave the court the power to include an element of costs to be exercised with regard to the advantages and disadvantages to both payer and payee.

The issue was considered for the first time in the Court of Appeal in *Moses-Taiga v Taiga* [2005] EWCA Civ 1013. The leading judgment was given by Thorpe LJ. He reviewed *A v A* and *G v G* observing that the progressive construction adopted by judges was both pragmatic and sensible. He noted the disappearance of alternative forms of funding. He identified three criteria needed to establish the need for maintenance pending suit costs funding: first the applicant has no assets; second the applicant could give no security for

borrowing and third the applicant could not guarantee an outcome that would enable a *Sears Tooth* agreement. He concluded that in such exceptional cases s.22 could be construed to extend to maintenance pending suit including an element to fund costs. He cautioned that the safeguard is the trial judge's discretion and the court would only exercise its discretion in exceptional cases.

Then came *TL v ML and others (Ancillary Relief Claim Against Assets of Extended Family)* in which Nicholas Mostyn QC sitting as a deputy High Court judge considered *Moses-Taiga* and construed 'exceptional circumstances' as any case which fulfilled the three criteria given by Thorpe J. He went on to indicate that when an application to fund costs is made prior to the FDR the costs allowance should fund the applicant up to the FDR and if the FDR fails the judge should consider whether to extend the funding up until trial. In fact the judge hearing the FDR ought not to consider such an application since he is prohibited from further involvement by FPR r.61E(2) and (8).

The meaning of 'exceptional' and the need to satisfy the three criteria of Thorpe J was considered in *C v C (Maintenance Pending Suit: Legal Costs)* 2 FLR 1207 by Hedley J, *LK v LK (Brussels II Revised: Maintenance Pending Suit)* [2006] EWHC 153 by Singer J and *RE B (Maintenance Pending Suit)* [2006] EWHC 1834 (Fam) by Munby J. In each case the meaning of exceptional was watered down according to the facts before the court.

The meaning of 'exceptional' was then again considered by the Court of Appeal in *Currey v Currey* [2006] EWCA Civ 1338 in which Wilson LJ gave the leading judgment. At paragraph 19 he stated that

*"I consider that the word "exceptional" is obstructing the proper exercise of the jurisdiction to include a costs allowance; and I am convinced that Thorpe L.J. never intended that it should do so."*

At paragraph 20:

*"In my view the initial, overarching enquiry is into whether the applicant for a costs allowance can demonstrate that she cannot reasonably procure legal advice and representation by any other means. Thus, to the extent that she has assets, the applicant has to demonstrate that they cannot reasonably be deployed, whether directly or as the means of raising a loan, in funding legal services. Furthermore, not to forget the third of Thorpe L.J.'s three features, she has also to demonstrate that she cannot reasonably procure legal services by the offer of a charge upon ultimate capital recovery. I would add, fourthly, that the court needs also to be satisfied that there is no such public funding available to the applicant as would furnish her with legal advice and representation at a level of expertise apt to the proceedings, i.e. that the applicant does indeed in that regard fall within the unserved constituency referred to by Thorpe L.J..."*

Given the decline in family law legal practices from 4,500 in 2000 to 2,800 in 2006 and the inherent disadvantages in a *Sears Tooth* agreement, the future looks bright for maintenance pending suit funding applications, although it can only be a matter of time before a well heeled spouse takes the meaning of 'maintenance' to the Lords for a second opinion.

**Robin Powell**

<sup>1</sup>*Sears Tooth (a firm) v Payne Hicks Beach (a firm) and others* [1997] 2 FLR 116

## PRACTICAL TIP – PROPERTY PARTICULARS

In all but the 'big money' cases, housing need is often the key factor in claims for ancillary relief. Battle tends to be joined over those little masterpieces of misinformation: the estate agents' particulars. What can you do to improve your chances of persuading the District Judge that it is your collection that truly reflects the cost of appropriate accommodation?

One simple, cost-free suggestion is to get the client to visit each and every one of the properties in question. His or her evidence as to their suitability will be immeasurably strengthened if it comes from first-hand experience. Is it in need of demolition rather than 'some up-dating' as advertised? Does the 'short distance' to local shops or a desirable school actually take 45 minutes by car? And is the 'lively' area more like Basra on a bad day?

Bear in mind that a case may be listed in front of a judge who is unfamiliar with the local area. It is often helpful to provide a map showing the locations of the various properties and any relevant amenities, and always ensure that copies of your particulars are actually legible rather than third generation photocopies.

**Catriona MacLaren**