Shared and equal

D oes equality or near equality in the time a child spends with his parents mean that the court will make a shared residence order? Or are the level of contact and the issue of shared residence entirely separate and to be determined separately? The Court of Appeal in the case of Re. K (Shared Residence Order) 2006 2 Family Law Reports 380 has recently determined these issues.

The brief facts are that a three year old boy was diagnosed with mosaic Downs Syndrome just prior to his parents’ separation. It was agreed that he would reside with his mother, although no residence order was made. There was a consent order for staying contact to the father on alternate weekends. The parents agreed extensions to the periods which the child spent with his father. As a consequence the child was spending about 40% of his time with his father and 60% with the mother. The father applied for a shared residence order inviting the court to extend his time with his son to 50%.

The District Judge at first instance, having heard evidence, considered that it was not in the child’s interests to increase the time spent by him with the father and concluded that he should therefore not make a shared residence order. The father appealed. The matter came before a Circuit Judge who ruled that there had been no error of law and that the District Judge’s view was well within his discretion. The father then appealed to the Court of Appeal. The decision of the Court can be distilled as follows:

- The two aspects of the application, namely equal division of contact time and shared residence were completely separate matters and “did not stand or fall together”. Those aspects needed to be considered separately and it was possible for a shared residence order to be in the interests of the child even if there was not precise equality of time between the child’s parents’ homes;
- The right approach was for the court to rule first on the amount of time that the child would spend in either home and then proceed to consider whether that time should be expressed as a shared residence order or as a contact order;
- Where there are two committed, caring and loving parents, even if there is not precise equality of the time spent with each parent, the Court should make a shared residence order unless there is strong evidence of ‘malign motivation’.

On the facts of this case the court did not increase the father’s time with the child but made a shared residence order. The mother had resisted both the extension of the time the child spent with the father and the making of the shared residence order on the basis that neither was in the child’s best interests. She argued that there was no need for an order given the level of agreement that existed between the parents up until this litigation, and secondly that if a shared residence order were made the father would be empowered to undermine the child’s foundation within the mother’s home. On the facts of this case the Court of Appeal did not feel that there was strong enough evidence to suggest that the father’s motivation for seeking a shared residence order was to undermine the mother’s role in the management of the child’s life. The court nonetheless said that courts should be “alert to discern such malign motivation”.

Lord Justice Wall referred to another Court of Appeal decision in Re. P (Shared Residence Order) 2006 2 FLR 347 CA and the observation made at paragraph 22 about shared residence orders “…Such an order emphasises the fact that both parents are equal in the eyes of the law.”

Editorial

This is the tenth edition of the Newsletter in the present form, and the last under the current editorship. Deborah Dinan-Hayward will take over from the Spring edition of 2009. Recent news from the Family Team includes the appointment of Myles Watkins as District Judge, now dividing his time between Gloucester and Swindon County Courts, and the admission to Chambers as tenants of both of our most recent pupils, Monisha Khandker and Simon Emslie, both of whom have contributed to this newsletter.

William Heckescher, currently a tenant in Chambers in Preston, will join us in February 2008.

We are beginning to see the effect that the credit crunch will have on practice in family law. Uncertain valuations, unsold houses, unemployed parents, homeless families – undoubtedly there will be new challenges ahead, and the articles in this edition seek to deal with the usual range of current issues, whilst underlining the enormous range of work covered by family practitioners. The wave of litigants who cannot afford representation has been engulfing the court system for some time already, and the cases affected by confiscation orders are likely to rise as the new PoCA provisions become better used and times get harder, whilst divorcing couples trying to avoid the Courts can only become more familiar.

Tacey Cronin, Editor
Both parents in Re. K were found to be caring and committed and the mother had not made any real allegation against the father nor he against her.
There is an argument therefore that, in the absence of real questions about motivation, the court is likely to make a shared residence order as “a stamp that the child has two parents of equal importance in the overall directions of his life”.

Presumption therefore?

Nkumbe Ekaney

Ancillary relief update

Whilst the sun has been shining on sunnier countries than ours over the summer months and you have now returned, hopefully, from a relaxing and enjoyable break, I thought you might find a resume of what has been happening in our courts in money cases whilst you have been away useful. Here is a brief summary of the interesting ancillary relief cases that have caught my eye and which have come before the Courts over the last few months. The summary of the cases below will save you reaching for your law reports and journals and get you back up to speed:

Jurisdiction, Brussels II Revised
In M v M [2007] EWHC 3315 (Fam) Bennett J dealt with the issue of jurisdiction where an English couple had moved to Spain where they owned property and where the husband had become a tax exile. The Judge found that the English courts retained jurisdiction as neither the husband nor the wife had acquired a new country of domicile because neither had made an “unequivocal abandonment” of England. The case of Bush v Bush [2008] EWCA Civ 865 came before the Court of Appeal in July 2008 and concerned British citizens who divided their time between Spain and Tanzania.

The Wife issued divorce proceedings in England on the basis of domicile and the Husband then issued proceedings in Spain concerning the children. The English Court then made an order for interim periodical payments which included provision for the children. The Wife obtained a stay of the Husband’s Spanish children proceedings on the basis that her proceedings were underway in England on the basis of domicile because neither had made an “unequivocal abandonment” of England. The case of Bush v Bush [2008] EWCA Civ 865 came before the Court of Appeal in July 2008 and concerned British citizens who divided their time between Spain and Tanzania.

Procedural

In I v I [2008] EWHC 1167 (Fam) Charles J heard the wife’s application to set aside an ancillary relief order made at the FDR by consent on the basis of non-disclosure by the husband. At the time of the FDR hearing, the Husband had entered into negotiations with another employer which would have meant an increase in his salary if he had accepted the new position. The wife’s application was refused. The Judge held that although the Husband had failed to disclose these negotiations they would not have made a difference as there were uncertainties as to the husband’s remuneration in his current firm and the level of remuneration from the new employer had not been agreed at the time of the FDR.

In Zeiderman v Zeiderman [2008] EWCA Civ 760 a second appeal by the Husband against an ancillary relief order was allowed. The district judge had awarded the wife half the proceeds of sale of the matrimonial home and periodical payments of £20,000 p.a., which was half the husband’s income after deductions. The judge had believed that the husband was lying when he said that he was not due any money from the sale of his parents’ house, which is what the wife had claimed. Black J refused the first appeal on the grounds that this conclusion was within the district judge’s discretion and she refused to hear more evidence from the husband. The case was remitted to an experienced District Judge.

However, in El Farargy v El Farargy & Ors [2008] EWCA Civ 884 Thorpe LJ found that the trial judge had been fully entitled to reach the conclusions that she had, given the husband’s inconsistencies and his determination to deprive the wife of any settlement. There had been little point in the Wife’s counsel challenging every piece of evidence produced by the Husband. The Husband’s application for permission to appeal findings in these complex ancillary relief proceedings was refused. [In X & Y (Bundles) [2008] EWHC 2058 (Fam) Munby J reiterated the sanctions available for badly prepared bundles which were not supplied in accordance with the 2006 Practice Procedure

In Whitehouse-Piper v Stokes [2008] EWCA the Court considered that the Wife could proceed even though her notice of her intention to proceed with an application for ancillary relief was issued after her remarriage but where she had applied in her divorce petition for all forms of ancillary relief.

Agreements

In Q v Q & Ors [2008] EWHC 1874 (Fam) Black J considered how the court should approach an agreement between family members concerning the former matrimonial home that the parties lived in. On the evidence, the Court found that the agreement was that the husband should have the property and following Stack v Dowden, the property should be his.

The judge then went on to consider the other issues including the law concerning the limits on the brother and father’s reliance on a transaction with an illegal purpose when attempting to recover property. In NG v KR (Pre-Nuptial Contract) [2008] EWHC 1532 (Fam) Baron J awarded the Husband £ 5.5.million despite the terms of a pre-nuptial contract. Whilst the court was critical of the agreement, it nevertheless decided that it would not be right to ignore the agreement completely, given that the husband was a man of commerce and aware of the effect of the contract.

Pre nuptial contracts were also considered in W v H [2008] EWHC 2038 (Fam) where King J considered the cases relating to case management and nuptial agreements including Crossley, Xydhias and Edgar in circumstances where the Husband claimed that an agreement had already been concluded. The judge held that it was likely that an agreement had been concluded, that the issuing of a Notice to Show Cause was an appropriate procedural route and the agreement was a factor of “magnetic importance” and therefore the hearing to determine the Notice to Show Cause must be set against the background of the e25 factors to be considered. In Whitehouse-Piper v Stokes
Confiscation and ancillary relief

There are various confiscatory regimes which exist to deprive those found guilty of particular criminal activities of the fruits of those crimes: the Drug Trafficking Act 1994, Criminal Justice Act 1988 and, the most recent and arguably most draconian, the Proceeds of Crime Act 2002 (“PoCA”). The question for ancillary relief practitioners is whether the provisions of those Acts will also deprive an unconvicted spouse of assets to which they would otherwise be entitled. Under PoCA, the process of enforcement has changed, and practitioners need to be aware of the impact this may have on ancillary relief proceedings.

How does the confiscatory regime under PoCA work?

The Crown Court will determine the offender’s “benefit” from crime and the “available” amount, namely all free property held by the defendant. Property is “free” unless it is subject to any of the orders specified in Section 82 (which does not include orders made under the MCA 1973). Property is held by a defendant for the purposes of the Act if he has any interest in it (Section 84(2)(a)). The court then deducts “obligations having priority” (Section 9(1)) from the free property to arrive at the available amount. As defined by the Act, obligations having priority do not include obligations pursuant to an order under the MCA 1973 (see Section 9(2)).

The confiscation order will either be in the sum of the benefit, or, if less, the available amount figure. This is an order personal to the defendant and as a result third parties who may have an interest in the “free” property considered by the Crown Court do not have locus unless and until enforcement proceedings are taken if the defendant defaults. Civil legal aid is available for third parties who wish to be heard at the enforcement stage.

At the enforcement stage the Crown Court is able to appoint a receiver. By Section 69(2) when a receiver is appointed he must exercise his powers with a view to the value of realisable property being made available (by the property’s realisation) for satisfying the confiscation order. Crucially for spouses, however, subsection 2 has effect subject to the steer in Section 69(3)(a), which provides that the powers must be exercised with a view to allowing a person other than the defendant (or a recipient of a tainted gift) to retain or recover the value of any interest held by him/her.

Thus, a wife (W), whose husband (H) has committed an offence, will have no say in the amount of the confiscation order or the property which is considered to be available to H in order to meet the payment. However, if H does not pay, and enforcement proceedings are taken, W will have locus to object to the sale of assets in which she has an interest, and any receiver appointed has a specific statutory duty to exercise his/her powers with a view to allowing W to retain the value of her interest.

Should W miss her opportunity to make representations prior to enforcement, the Act makes provision for an affected third party to apply to the Crown Court to vary or discharge an order made in the exercise of the receiver’s powers (Section 63(1)(c)).

What is the procedural impact of the confiscatory regime on ancillary relief proceedings?

It matters not whether ancillary relief proceedings are issued prior to or after the making of the confiscation order or the issue of enforcement proceedings2. It used to be the case that where there were concurrent confiscation and ancillary relief proceedings, the two matters would be joined and transferred to the High Court (best practice guidance given in W v H, and HM Customs & Excise [2004] EWHC 526), where a court with appropriate expertise in both areas would determine the applications simultaneously. However, the Proceeds of Crime Act 2002, in an attempt to simplify enforcement proceedings, grants the Crown Court jurisdiction to deal with enforcement.

1. In A v A (2003) 2 WLR 210 it was held that this does not simply mean that W should be enabled to retain the monetary value, but where she is in occupation of the FMH, extends to allowing her to retain the asset in specie. See paras 50-54 of Lord Justice Schiemann’s judgement.

Deborah Dinan-Hayward
As a result, the Court of Appeal in Webber v Webber [2006] EWHC 2893
Farn held that such applications cannot be dealt with concurrently as the High Court
no longer has jurisdiction over enforcement proceedings. The two sets of proceedings
will have to proceed separately, creating an obvious tension as to which should be
decided first. Fortunately for W, Sir Mark Potter in Webber v Webber said that it
would save costs if the ancillary relief application were dealt with first, in order that
the Crown Court judge could then vary the available amount in light of the
family court’s order. The CPS or enforcing authority will apply to be joined as an
intervener in the ancillary relief proceedings, and those proceedings will be then
transferred to the High Court.

Anguished in spite of the new jurisdictonal position, the remainder of the good practice guidance given in W v H should continue to apply, in particular that the CPS should indicate at the outset whether or not they accept the position advanced by W and crucially whether or not they assert that she had knowledge of H’s criminal activity.

How does the existence of a confiscation order or the threat of
enforcement proceedings affect the exercise of the court’s discretion in ancillary relief proceedings?

The confiscatory regimes do not prevent the court from exercising its
discretion under Section 25. In Customs & Excise Commissioners v A and another
A v A [2002] EWCA Civ 1039 it was held that “there is nothing in the provisions of either the 1973 Act or the 1994 Act which requires the court to hold that either statute takes priority over the other when the provisions of each are invoked in relation to the same property”.

The authorities show two principal categories of case: those in which there are
sufficient assets to meet the confiscation order with a surplus (rare); and those in
which there are insufficient assets to meet the confiscation categories of case: those in which there are
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The authorities show two principal categories of case: those in which there are
sufficient assets to meet the confiscation order with a surplus (rare); and those in
which the amount of the confiscation order is approaching or equivalent to the parties’ assets. In the latter case the question is whether the public interest requires that the sum of the confiscation order is paid, or whether it is better met by an order allowing W to retain the assets.

The confiscation order will be an obligation which falls to be considered
under Section 25(2)(b), but the crucial argument is that it would be inequitable to disregard H’s conduct where it has obvious financial consequences for the family. It is however, as stated above, essential to know whether this argument cuts both ways: if it is asserted that W knew of H’s conduct, then her knowledge and enjoyment of tainted assets become relevant to the exercise of the court’s discretion.

It is apparent from the judgement in A v A that where the answers to the following questions are “yes” (as they were in that case), the public interest is better met by an order allowing W to retain the relevant assets (in that case the home) than by enforcement of the confiscation order:

Would enforcement of the confiscation order force W to sell her home and become dependent on the state for housing?
Was the property concerned obtained legitimately (i.e. rather than using criminal proceeds)?
Did W make a substantial financial or other contribution to the acquisition of the property?
Was W ignorant of the crime involved?
Is W in occupation of the property?
Schienemann LJ said “a substantial injustice will be done to Mrs A to garner the sum of £29,360 into the coffers of the state. I cannot regard that, on the facts of this case, as a proportionate outcome, or one which is in the public interest”. A transfer of property order was made in her favour. For other occasions on which the public interest has been held to favour the interests of spouses over satisfaction of the confiscation order, see CPS v Grimes, Grimes intervened and Grimes v Grimes [2003] 2 FLR 510 and R v R [2006] 2 FLR 1137.

However, Mr Justice Holman sitting in the High Court recently distinguished the facts of A v A from those with which he was concerned in Stodgell v Stodgell [2008] EWHC 1925 (Fam). In that case there was another “innocent” wife, untainted by the crimes committed by her husband, and there was in addition a young child. However, the court held that the satisfaction of the confiscation order had to prevail in view of the following:

The crimes concerned, Revenue fraud, could not be viewed as crimes with
“no victim” – the victim was the state (unlike in A v A in which the criminal activity was drug trafficking, of which the court said there was no identifiable victim). Mr Justice Holman said “It may be said that in cases in which there truly is a crime with no victim, the purpose and effect of a confiscation order can be no other and no greater than to deprive the criminal of the fruits of his crime…But in the case of these crimes the making of a confiscation order does have a dual effect…[the confiscation monies] will go into what Lord Justice Schiemann described in paragraph 48 of A as “the coffers of the state””.

The scale of the offending and the amount of the confiscation order (£390,453 – which was no greater than the tax, interest and penalties already due);
In contrast to the wife in A v A, the wife did not have and could not assert any beneficial interest in the assets concerned, nor was she in occupation of the home;
It was impossible to view any asset of the family as “untainted” in view of the scale of the offending;
Unlike in A in which the offending began at or after separation, the offending occurred before and during the relationship and marriage.

The authorities are clear that as a transfer of property under the 1973 Act does not relieve the defendant from his obligation to satisfy the compensation order, the object of the confiscatory regimes is not defeated because, in default of payment, the defendant is liable to an additional custodial term.

In R v R [2006] 2 FLR 1137 Mr Justice Bennett said “harsh as it may seem to the husband, the disadvantage to him of the possibility of an extra period of imprisonment that he may have to serve for not paying the confiscation order in full is outweighed by the possibility of serious deprivation to the wife, and more particularly to B [the child]…”.

H’s human rights may thus be adversely affected by the court’s order, but this will be a necessary and proportionate outcome in view of W’s and/or child’s rights.

This is countered, however, by the fact that wives and children can only be allowed to receive their fair share. They will not be awarded any part of the pot where this, as in Stodgell, belongs to the state.

Anna Midgley
McKenzie friends in family proceedings: a review and consolidation of the law

The Facts

In the recent case of Re: N (A Child) [2008] EWHC 2042 (Fam) Munby J reviewed the authorities and Practice Directions governing the use of McKenzie Friends. The facts of the case concerned a child aged 7 years, N, whose parents had never married and who had been involved in litigation almost throughout his life. The case involved proceedings under Part IV of the Family Law Act 1996, s.8 of the Children Act 1989 and s.15 of Schedule 1 of the 1989 Act. In the Schedule 1 proceedings the mother (M) was represented by solicitor and counsel. The father (F) appeared in person with a McKenzie friend, Dr Michael Pelling.

The judge allowed Dr Pelling to address him and make submissions. Dr Pelling had suggested that as the matters in issue involved technical points of law and procedure, it would be more expedient if he address the court on behalf of F. In the s.8 Children Act 1989 proceedings, M was assisted by a McKenzie friend, Mr David Holden. F was represented by counsel and Dr Pelling, who was acting in the capacity of solicitor’s clerk.

At the final hearing in the s.8 proceedings, F’s counsel objected to Mr Holden speaking on M’s behalf, making submissions or examining witnesses. These objections were founded on two grounds. Firstly that no application had been made by M at the beginning of the hearing, as required by the President’s Guidance: McKenzie Friends [2008] 2FLR 110 issued by Sir Mark Potter on 14 April 2008. Secondly, there were no ‘exceptional circumstances’ to justify Mr Holden being permitted to act in this way, in reliance on the test set out in D v S (Rights of Audience) [1997] 1 FLR 724. F argued that he may have had a McKenzie friend in the past, but he was now represented by counsel and the issue was not one of mutuality; each application must be made on its own merits and determined in accordance with the law and the guidance given by the authorities.

In her witness statement, M submitted that she had been represented by solicitors throughout proceedings until she had ‘simply run out of money and could no longer afford them’. M also pointed out that she was unable to speak articulately and due to her emotional involvement she would experience great difficulty in presenting the case properly. M argued that Mr Holden, a family friend, had been very helpful to her during the course of these proceedings, had assisted her for the past few months and been permitted to make oral representations on her behalf in the past by Pauffley J. M also highlighted the fact that F had enjoyed the benefit of a McKenzie friend throughout these proceedings and that she had never challenged him on this. Finally, M pointed out that if her application was refused, she would be forced to ask for an adjournment in order to instruct solicitors, causing unnecessary delay which would be disastrous for N who had indicated to the Guardian that he wanted ‘the trouble’ to end. M therefore argued that since these proceedings had been ongoing for five years, for the sake of N, the circumstances should be regarded as ‘exceptional’ and Mr Holden should be granted rights of audience.

The Guardian supported M’s application and argued that Mr Holden was a family friend and not a quasi-professional litigator. The Guardian also reasoned that granting M’s application would enable proceedings to proceed more smoothly and expeditiously, having regard to the acrimonious nature of the case and the volume of evidence (six lever arch files) to be considered. Further the Guardian pointed out that F had previously made attacks on M’s educational abilities and mental stability, which seemed to support M’s application for Mr Holden to be granted rights of audience. Finally, the Guardian referred to the financial implications and highlighted the fact that litigation costs are high; M could not afford legal representation and would therefore be severely compromised without an advocate. The Guardian made clear that she was disappointed with F’s opposition to M’s application and that M had never been given any indication that she would encounter such opposition, entitling her to assume that she would be granted the same courtesy she gave F when he was represented by Dr Pelling.

It transpired that the parties agreed the s.8 matters by consent, but the Judge did hear evidence in relation to Mr Holden’s role. This was because although F’s solicitors gave notice of acting in the Schedule 1 proceedings, it was limited to directions matters to be dealt with by the court at the conclusion of the s.8 proceedings and M wished to raise a point dealing with the relationship between the Schedule 1 proceedings and the s.8 proceedings, with Mr Holden addressing the Judge. The Judge therefore had to decide if Mr Holden should be granted rights of audience, albeit only for this limited purpose. F’s counsel was only instructed in relation to the s.8 proceedings, so Dr Pelling spoke on behalf of F. The matter was heard in chambers but judgment handed down in public for the purposes of pragmatism as Dr Pelling only had rights of audience in chambers. Munby J did not therefore rule on whether Mr Holden could examine witnesses etc., but on an altogether narrower point, although he did comment on the likelihood of Mr Holden being permitted to do so in his judgment.

The Law

At present, the law concerning rights of audience in relation to McKenzie friends is found in s.27 (2) (c) of the Courts and Legal Services Act 1990 which states: ‘a person shall have a right of audience before a court in relation to any proceedings only in the following cases: (c) where... he has a right of audience granted by that court in relation to those proceedings’

The starting point in terms of case-law is the 1997 Court of Appeal decision in D v S (Rights of Audience), also involving Dr Pelling, in which Lord Woolf said the matter was not subject to the consent of the described parties and the CLSA 1990 as ‘giving a discretion which is to be exercised only in exceptional circumstances’. Lord Woolf also gave guidance to courts in future cases when deciding whether to exercise their discretion in such circumstances, saying that they should ‘pause long before granting rights of audience... because otherwise by considering each case individually, the collective effect of what they are doing is allowing Dr Pelling to bypass the provisions of the Act.’ Lord Woolf held that the fact that a court might be assisted by a McKenzie friend was not of itself a reason for granting a McKenzie friend a right of audience.

In Milne v Kennedy [1999] TLR 106, the Court of Appeal held that it was bound by D v S (Rights of Audience) and said that as the judge had not identified any ‘exceptional circumstances’ the decision of the lower court to allow a McKenzie friend rights of audience could not be upheld.

The third decision of the Court of Appeal considered by Munby J was Clarkson v Gilbert [2000] 2 F LR 839. In this case, the Court of Appeal held that the same objections to granting rights of audience did not apply in the case of a husband who wishes to represent his wife in court. Lord
Woolf qualified the language he used in D v S (Rights of Audience) and said ‘it is clear that the objections to someone setting themselves up as an unqualified advocate do not exist in a matter where a husband is merely seeking to assist his wife’ confirming that the ‘overriding objective is that the courts do justice’.

Lord Woolf acknowledged that legal aid was not as readily available as it was in the past and that there are will be situations where litigants are forced to bring proceedings in person when they will need assistance. Lord Woolf held ‘however, if they are litigants in person they must, in my judgment, establish why they need some other person who is not qualified to appear as an advocate on their behalf. In the ordinary way it will be for them to satisfy the court that that is appropriate. If somebody’s health does not, or may not, enable them to conduct proceedings themselves, and if they lack means, those are the sort of circumstances that can justify a court saying that they should have somebody who can act as advocate on their behalf.’ Lord Woolf held that in such circumstances, the courts should consider whether or not there was a danger of being deprived of a right to have the case conducted before the courts in a way which would enable the litigant’s claims to be investigated.

Waller LJ agreed with Lord Woolf on the proper principles to be applied to an application for a close relative to represent a litigant in person and to have rights of audience. Clarke LJ also agreed and held that the question of whether or not there are ‘exceptional circumstances’ is not the relevant question in a case of this kind… the question is simply whether, in all the circumstances of the case, the court should exercise its discretion under s.27 (2) (c) CLSA 1990.’ Clarke LJ went on to acknowledge that there are a spectrum of different circumstances which may arise which makes it difficult to lay down precise guidelines and that although s.27 (2) (c) will apply when a proposed advocate is holding himself out as providing advocacy services, the situation will be very different where the proposed advocate is a member of the litigant’s family. Clarke LJ concluded that there was no warrant for holding that in the latter case; an order should only be made in ‘exceptional circumstances’, stating that ‘all will depend upon the circumstances’. The test to be applied according to Clarke LJ was ‘whether, having regard to the general principles set out by Lord Woolf, there is a good reason on the facts of this case to permit [the McKenzie friend] to speak on behalf of the [litigant]… and at any trial. To put it another way: is it just to permit him to do so?’

### Parties’ Submissions

In Re: N (A Child), F sought to distinguish Clarkson v Gilbert by arguing that in the latter case, the McKenzie friend was the litigant’s husband, whereas Mr Holden was merely a family friend, and the litigant suffered from angina and depression, whereas M’s health was not an issue. F also argued that the decision in Clarkson v Gilbert did not necessarily mean that the court’s remarks applied to all McKenzie friends, bar professionals. F sought to establish that the decision in that case was intended to be confined to cases where a spouse, partner or relative was acting on behalf of a litigant where there was a good reason for allowing them rights of audience, such as the litigant’s poor health or inability to secure public funding.

In short, F attempted to persuade the court that spouses, partners and relatives fall into a special category of representative for whom an exception is made where there is ‘good reason’ to do so, a category which cannot embrace all McKenzie friends with the sole exception of those who are ‘professional’ and that therefore D v S (Rights of Audience) continues to apply.

The Guardian distinguished D v S (Rights of Audience) and asked the court to follow Clarkson v Gilbert and consider firstly the McKenzie friend being proposed by the litigant and the relationship between the two and secondly, the reasons why the litigant was seeking such representation.

### Judgment

Munby J considered the arguments and authorities and approved the decision in Clarkson v Gilbert as outlining the correct approach. He referred to the subsequent decision of Paragon Finance plc v Noueiri (Practice Note) [2001] EWCA Civ 1402, which treated the decision in D v S (Rights of Audience) as correct and reiterated that permission to exercise a right of audience was only to be granted in an ‘exceptional case’. Noueiri however, failed to consider the decision in Clarkson v Gilbert and therein was the confusion as to the correct approach to take in such circumstances. Munby J also referred to the President’s Guidance issued in 2005, which mentioned only ‘exceptional circumstances’ and did not refer to Clarkson v Gilbert other than as an authority for the proposition that a litigant in person must make an application at the outset of the hearing if he wishes a McKenzie friend to be granted rights of audience. The unqualified assertion in this guidance therefore, was that a McKenzie friend could only be granted rights of audience in ‘exceptional circumstances’, which is clearly at odds with the decision in Clarkson v Gilbert.

Munby J’s guidance identified the starting point as being that a McKenzie friend does not have a right of audience as of right, although the court may exercise its discretion to grant such a right under s.27 (2) (c) CLSA 1990. He held that it is not a general principle that the court may only exercise its discretion in ‘exceptional circumstances’: as Clarke LJ noted, there is a spectrum of different circumstances and therefore, each case must be considered on its own merit.

A ‘professional’ McKenzie friend will generally be subject to the principle of being granted rights of audience only in ‘exceptional circumstances’. A spouse, partner or relative is subject to the principle of being granted rights of audience if there is ‘good reason’ in all the circumstances.

Munby J considered that Mr Holden fell closer to the second category of McKenzie friend and found that M had shown ‘good reason’ for the application to be allowed, taking into account all the circumstances, including the nature of the proceedings, the fact that M believed there would be no challenge and that an adjournment would be extremely prejudicial to the welfare of N. Munby J relied on the necessity of the ‘overriding objective of justice’ in such cases, as enunciated by Lord Woolf and the advantage of granting the application in terms of ensuring M received a fair hearing, as set out in the President’s Guidance in 2008.

Although Munby J did not specifically rule on whether Mr Holden ought to be permitted to examine witnesses etc., he did state at paragraph 43 that he had ‘no doubt that the mother was able to show ‘good reason’ why Mr Holden should be granted a right of audience, not merely in the limited circumstances as they presented themselves to me… but also, if the occasion had arisen, for the more general purposes envisaged at the outset of the hearing.’

### Key Points

In summary, when a litigant makes an application for their McKenzie friend to be granted rights of audience, the test will differ depending on the identity of the McKenzie friend and their relationship with the litigant. If the McKenzie friend is a quasi-professional advocate then the application will only be allowed in ‘exceptional circumstances’. If the McKenzie friend is a spouse, partner or relative, then the application will be allowed if it appears to the court that there is ‘good reason’ for doing so, having regard to all the circumstances of the case, including the health and means of the litigant in question.

Monisha Khandker
The Facts

The husband and his first wife married in 1966 and had three children. Divorce came twenty years later and the following year an order was made by consent that the husband pay to the wife periodical payments of £12,000 per annum, less tax. No orders for property adjustment or a lump sum payment were ever made. Despite the divorce, the husband and wife remained good friends, so much so that the wife and the children would often holiday at the husband’s property in Italy and when the husband sold a shareholding in a public company for a large amount of money, he made generous gifts to both his children and former wife.

When the husband turned 50 in 1989, he sought to capitalise on this rapport by trying to persuade the wife that instead of paying her maintenance he should leave her £100,000 in his will. Not a man to be paying her maintenance he should leave her £100,000, the husband argued, but the wife, acting as his personal representative, refused to make any payment to the wife and the children would often holiday at the husband’s property in Italy. She knew that the effect of that marriage was to revoke the will he made in 1991 was a condition subsequent to be fulfilled and that she would not therefore have been in breach of the agreement but by doing so she would have made it impossible for the condition subsequent to be fulfilled and thereby forfeited her right to the payment of £100,000.

The widow’s appeal was unsuccessful. The main issue was whether the agreement was one by which the deceased and his first wife had sought to oust the jurisdiction of the court in respect of ancillary relief. Ward LJ examined in detail the relevant case law, including Xydhias and Hyman v Hyman [1929] AC 601, in which it was held that an agreement to oust the jurisdiction of the court is void.

Key to the court’s decision was the proper construction to be placed on the contract. It was held that this was an agreement to pay £100,000 subject to two conditions subsequent: first, the death of the husband; and, secondly, the first wife not having enforced any arrears nor applied to the court for relief. Ward LJ held that the cardinal conclusions expressed by Thorpe LJ in Xydhias were stated in terms which were too wide. The denial of specific performance must be limited to cases where an ancillary relief application had been compromised. As there was no pending application for any financial relief that could be compromised, the agreement between the couple was governed by ordinary contractual principles and was enforceable as a classic unilateral contract.

Judgment of the Court of Appeal

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Crucially, there had been no promise by the first wife that she would not apply to the court for relief, nor had she barred away her right to maintenance. There was nothing in the agreement, either expressly or by implication, which stopped her from applying to the court.

If she had applied to the court for relief, she would not therefore have been in breach of the agreement but by doing so she would have made it impossible for the condition subsequent to be fulfilled and thereby forfeited her right to the payment of £100,000.

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Comment

The claimant who clears the Xydhias hurdle by successfully arguing that an agreement reached with a former spouse should be governed by ordinary contractual principles should wait before putting the champagne on ice. The absence of agreement will probably appear fairly regularly in defendants’ pleadings, but it is in the realms of consideration and intention to create legal relations that claimants are likely to find the main sticking points.

In Soulsbury, by not applying to the court for relief, the wife gave consideration for the husband’s promise but this was not the only form of consideration she gave. It remains to be seen whether an agreement would be enforced where the sole or main consideration was a spouse not having applied to the court for relief.

Even where consideration is found, it will be difficult for a claimant to prove that there had been an intention to create legal relations.

As Edmund Davies LJ said in Gould v Gould [1970] 1 QB 275, which was quoted by Ward LJ in Soulsbury: “In the general run of cases the inclination would be against inferring that spouses intended to create a legal relationship…” The evidence establishing such an intention needs, in my judgment, to be clear and convincing.”

Given that the parties will have chosen not to seek the court’s approval for their agreement, an inference is likely to be drawn that there was no intention to create legal relations and it may prove very difficult to persuade the court otherwise. Thus, spouses should make sure that they reduce agreements to a court order and family practitioners should not worry that they are set to lose the bulk of their practices to their civil counterparts.

Simon Emslie
Deborah Dinan-Hayward

Our attention has been drawn to a letter circulated by the Gloucester County Court office inviting solicitors who instruct Deborah Dinan-Hayward, District Judge Myles Watkins’ wife, to contact the court office in advance of each booking to ensure that cases are not listed in District Judge Watkins’ court. The letter cautions solicitors that last-minute problems may result in wasted cost orders.

Myles Watkins sat as a Deputy District Judge in many local courts for a number of years before taking his full-time appointment. As a consequence, Chambers implemented a system to ensure that the smooth running of court lists would not be jeopardised by Deborah not being able to appear in Myles’ court. This system continues.

Chambers prides itself on providing a highly experienced and efficient clerking service. Michael Harding, our senior family team clerk has clerked the bar for over 20 years. Julie Hathway, the junior family team clerk has been with Chambers for five years, having previously given 15 years’ service in the County Court, principally in family listing. Michael and Julie are, as with all court centres, happy to liaise with the listing officers at Gloucester and Swindon to ensure, wherever possible, that solicitors are able to instruct the counsel of their choice for each client.

Should you have any concerns about this or any other area of our administration please do not hesitate to contact our Chambers Director, Paul Fletcher.