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FAMILY LAW UPDATE

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SOMETHING FOR EVERYONE

This month's news items comprise a mixed bag, including three stories with a common theme of future reforms, two cases which Lord Justice Wall says should not be used as precedents, a return to *Crossley* and a visit to Brussels II. Topics involved include cohabitation, ancillary relief, domestic violence, children matters and the family justice system itself.

REPORT ON DOMESTIC VIOLENCE, FORCED MARRIAGE AND "HONOUR"-BASED VIOLENCE

The House of Commons Home Affairs Committee has published its report on Domestic Violence, Forced Marriage and "Honour"-Based Violence. The report is in two volumes, comprising 168 and 514 pages respectively, but the summary notes:

- Available statistics suggest that one in four women and one in six men will experience domestic violence at some point in their lives.
- So far as so-called "honour"-based violence and forced marriage is concerned, the evidence is patchier, but the Government's Forced Marriage Unit handles 300 cases a year, although the true number is likely to be far higher.
- The Government's approach to all forms of domestic violence remains disproportionately focused on criminal justice responses at the expense of effective prevention and early intervention.

The Committee's recommendations included:

1. That the Department for Children, Schools and Families introduces an explicit statutory requirement for schools to educate children about domestic and "honour"-based violence and forced marriage.

2. That visa sponsors are interviewed where there is suspicion of a forced marriage, including where suspicion is raised through information provided by third parties, and that the Government attach a power of refusal without the need for an evidential statement to visa applications in the case of reluctant sponsors.

3. That a thorough programme of accredited training for front-line professionals should be implemented across the board, including teachers, health professionals, visa entry clearance officers, police, judges and magistrates.

4. That the Department for Communities and Local Government urgently quantify the scale of the shortfall of refuge space and emergency housing for those fleeing domestic or so-called "honour"-based violence or forced marriage, and work with local authorities to ensure that refuge space is sufficient to meet demand across every local authority area.

5. That the Home Office and Association of Chief Police Officers must ensure all police officers are explicitly instructed not to issue cautions, and that the Crown Prosecution Service must charge for breaches of injunction.

Links:

Report Volume I:

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmhaff/263/263i.pdf>

Report Volume II:

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmhaff/263/263i.pdf>

CRITICISMS OF THE SYSTEM

Mr Justice Ryder, the most senior family judge on the northern circuit and a member of the Lord Chancellor's Advisory Committee on Judicial Management in Public Law Children Act Cases, has launched a scathing attack on the family justice system. His criticisms include that the family courts are out of tune with society and that they lack the capacity to deal with the volume of cases. He "has called for an overhaul to make family courts open and in touch with the public", for example by giving judgments in public. More radically, he proposes the creation of a new "family court diversion scheme" whereby local community tribunals act as a 'gateway for family justice', and that legal aid be granted by a panel of lay people chaired by a lawyer.

Meanwhile, *The Times* published a series of articles on family justice. The first four articles were written by *Times* columnist Camilla Cavendish and the fifth, a response, was written by President of the Family Division Sir Mark Potter. I'll deal with each article in turn:

The first article talked of the '*secret state that steals our children*' and suggested that privacy rules designed to protect the children are actually being used to protect the experts and professionals involved in the family justice system by making them unaccountable. The article concluded with a call for the government to take action to rectify the problem.

The second article went into more detail about how family courts operate in secrecy, with particular reference to the lack of accountability of social workers and experts such as psychiatrists and paediatricians.

The third article looked at *'the pernicious types of allegation that are almost impossible for parents to disprove'*, such as "emotional abuse".

In the fourth article Cavendish set out a *'ten-point plan to make our courts system fairer'*, with such ideas as opening family courts to the press in all but exceptional circumstances, removing the restrictions that prevent families from talking about their case, providing an automatic right for parents to receive copies of case conference notes and all evidence used against them in court and creating an independent body to oversee the actions of social services.

In the final article Sir Mark Potter defended the system, claiming that it is private, rather than secretive. He admitted that it is far from perfect, and is in 'broad (but qualified) agreement' with much of Cavendish's ten-point plan. However, he says, *"the vision of a secretive system that removes children from families without good reason is an inaccurate and unfair reflection of the work of the family courts in England and Wales"*. He claimed that "the vast majority of parents and children in care cases want privacy, rather than the *"washing of dirty linen and the exploring of deeply emotional and personal issues in public"*, and he therefore supported the view of the Government *"that a better balance would be struck by publicising the judgments in all final hearings that result in the removal of children from their parents, with the parties remaining anonymous to protect the identity of the child"*. He does not see how miscarriages of justice *"would have been avoided by the presence of the press when the evidence was given"*, and I agree with him there.

A few days later Cavendish followed up the series by detailing the responses. As one would expect, most of the responses seem to support the paper's call for an end to 'secrecy' in the family courts, and Cavendish doesn't accept what criticisms there have been. Most importantly, perhaps, she reports that Bridget Prentice, the Justice Minister, has announced that the Government will publish new proposals for reform this autumn. We will have to see whether the proposals will be sufficient to silence the media clamour.

Link:

Mr Justice Ryder speech:

http://www.judiciary.gov.uk/docs/speeches/mrj_ryder_25th_ann_butterworth.pdf

Links to Times articles:

http://www.timesonline.co.uk/tol/system/topicRoot/Family_Courts/

B V B: LEAVE TO APPEAL REFUSED

Mr B has been refused leave to appeal to the House of Lords. Apparently, Lord Hoffmann, Lord Hope of Craighead and Baroness Hale of Richmond

denied the appeal because "...the petition does not raise an arguable point of law of general public importance". Accordingly, the ruling of the Court of Appeal that Ms B be awarded a greater than half share as all of the wealth had been brought into the marriage by her, thereby departing from equality, stands.

To recap, in *B v B* [2008] EWCA Civ 543 the Court of Appeal ruled that the lower courts had erred in trying to share out the assets roughly equally when all of the wealth had been brought into the marriage by the wife, and therefore awarded Ms B a greater than half share.

The facts were that the wife had received a substantial inheritance from her father some years before the marriage. The husband came from Kosovo with no assets. The couple married in 1991, and had a child, and for the first seven years lived off the inherited capital, supplemented by some casual work by the husband. The matrimonial home had been purchased with funds from the inherited capital. In 1998, the wife provided capital for the husband to set up a car wash business. The business did well and by the time of separation the turnover was £140,000, the husband drawing £45,000 per annum, after paying rent to the wife who still owned the business. The trial judge had transferred the business to the husband, who effectively received £750,000 out of the £1.3m assets available.

In the Court of Appeal, Lord Justice Hughes decided that it was not fair to the wife to seek equality where all the assets had been inherited by her from an external source. He therefore ordered that the husband should continue to operate the car wash, but the business should remain with the wife, with the husband paying rent to her. The proceeds of any subsequent sale would then be divided equally. This would give the wife "a total of £960,000 or so", or about 74% of the available assets.

Lord Justice Wall, in a supplemental judgment, made the important point that the "big money" cases which reached the higher courts are of only limited assistance in dealing with cases involving more modest means, and of even less assistance in dealing with smaller cases in which there is simply not enough money to go round. He felt that "the principal lesson to be learned from the leading case of *White v White* [2001] 1 AC 506 is that the court's objective is to achieve an outcome which is fair", rather than achieving equality. He felt that this case raises no new point of principle and that "*the profession should therefore resist the temptation to treat it as a precedent*".

Link:

B v B: <http://www.bailii.org/ew/cases/EWCA/Civ/2008/543.html>

LIVING TOGETHER CAMPAIGN

Resolution has launched a new 'Living Together' campaign, in association with Lord Lester's Odysseus Trust, aimed at ending "*the injustice and financial hardship faced by thousands of cohabiting couples, carers and*

siblings who live together". As part of the campaign, a Bill will be introduced in the Autumn to give rights to couples who live together. I'm not sure whether the purpose of this is actually to get the Bill passed into law, or simply to 'kick-start' the Government into acting on the Law Commission's proposals for the introduction of legal protection for cohabitants.

Resolution previously criticised the Government's announcement in March that it will delay acting on the Law Commission's proposals for the introduction of legal protection for cohabitants. They said that "*the government is seriously out of step with public opinion*", and that the decision will cause "*continued distress and hardship*". Jane Craig, a member of *Resolution's* Cohabitation Committee, said: "*The present law creates real injustice for many people. Our members frequently see people who face financial hardship and even homelessness as a result of the current law. Any further delay inevitably means further injustice for some people.*" It does seem to me that waiting until some unspecified time in the future to see how the similar Scottish system (which came into effect last year) is functioning, after two years of work by the Law Commission, is something of a cop-out.

Link:

Living Together Campaign:

http://www.resolution.org.uk/editorial.asp?page_id=154

ZEIDERMAN: SHOWING THE SYSTEM IN A BAD LIGHT

It is a common scenario in ancillary relief applications that one party alleges that the other has failed to properly disclose their assets. How does the court deal with this? Well, not as it did in the case of *Zeiderman v Zeiderman* [2008] EWCA Civ 760, which Lord Justice Wall felt "*does not show the family justice system in a particularly good light*".

On the 7th June 2006 District Judge Segal, sitting in the Principal Registry, ordered that Mr Zeiderman transfer the former matrimonial home to Mrs Zeiderman and that he pay her maintenance at the rate of £20,000 a year. According to Mr Zeiderman, the former matrimonial home was the only substantial capital asset of the parties, and £20,000 represented approximately 50% of his net income. The district judge made this order because he did not accept Mr Zeiderman's evidence, in particular that he was not to receive a half share of a property which had previously belonged to his parents and that he had not disclosed his true income, as Mrs Zeiderman alleged.

Mr Zeiderman appealed against the order, and his appeal initially went before Mrs Justice Black in the High Court. She dismissed the appeal and refused to allow Mr Zeiderman to adduce additional evidence. The matter then eventually went before the Court of Appeal, in June this year. There, Lord Justice Wall criticised the approach of District Judge Segal in accepting Mrs Zeiderman's position without a full investigation of the evidence. In the circumstances, he felt that the district judge had "*made*

an inappropriate order in relation to both income and capital". He therefore set aside the district judge's order, and directed a re-hearing.

In his judgment, Lord Justice Wall made it quite clear at the outset that this case turned *"exclusively on its highly unusual facts"* and that it was *"not a precedent for anything nor should it be treated by the profession as such"*. Nevertheless, it is, I would suggest, of interest not just as an example of things going wrong but also for stating clearly that judges, whilst being entitled to form a view as to the credibility of witnesses, should, where essential facts are in issue, make orders on the basis of evidence rather than, as Wall LJ said, *"on the basis of an assumption and a belief"*. In other words, judges cannot come to their conclusions relying on intuition alone. Is this really not a precedent, or is Wall LJ only saying that because he is worried that lawyers will try to use the case as a stick with which to beat judges?

Link:

Zeiderman v Zeiderman:

<http://www.familylawweek.co.uk/site.aspx?i=ed24762>

PRE-NUPS: TO ADVISE OR NOT?

Would it be negligent not to advise clients about pre-nuptial agreements, as suggested by District Judge Duncan Adam in an article he wrote for the Law Society Gazette on the 17th July? He argued that the decision in *Crossley v Crossley* [2007] EWCA Civ 1491 has 'flagged up' *"the potential for negligence claims, where clients are not advised about pre-nuptial agreements"*.

A letter in the following weeks Gazette questioned the District Judge's proposition. Iain Harris, co-author of *Pre-nuptial Agreements: A Practical Guide*, disagrees with the District Judge entirely. He considers that the the statement by Mrs Justice Baron in *NA v MA* [2006] EWHC 2900 (to which the District Judge referred) that 'agreements between spouses were considered void for public policy reasons (but this) is no longer the case' is not correct, and that the law remains that the parties cannot validly make an agreement either not to invoke the jurisdiction of the court order or to control the powers of the court when its jurisdiction is invoked (*Hyman v Hyman* [1929] AC 601). In the circumstances he believes that, rather than it being negligent not to advise on a prenuptial agreement, *"the contrary statement would be a safer proposition, namely that for a solicitor to advise that a prenuptial agreement will be given effect is almost certainly negligent"*.

So, that leaves the difficulty of how we should advise clients. Thankfully, the problem may not arise, as Penny Raby of Penny Raby & Co. in Pershore makes the valid point in another letter that we are not usually given the opportunity to advise clients prior to marriage, as they don't come to see us.

Links:**Crossley v Crossley:**

<http://www.bailii.org/ew/cases/EWCA/Civ/2007/1491.html>

NA v MA: <http://www.bailii.org/ew/cases/EWHC/Fam/2006/2900.html>

Article by District Judge Adam: <http://www.lawgazette.co.uk/in-practice/benchmarks/pre-nuptial-agreements>

Iain Harris letter: <http://www.lawgazette.co.uk/opinion/letters/marital-advice>

BUSH V BUSH: BRUSSELS II AND ALL THAT

The thorny and increasingly important issue of jurisdiction went before the Court of Appeal in *Bush v Bush* [2008] EWCA Civ 865.

The Facts: The parties were married in London in April 1988 and went to live in Tanzania in 1991 or 1992. Three children, now aged 14, 11 and 9, were born in England and are British citizens, although they have never been resident in the UK. Between 2002 and 2003 the family lived in Marbella, Spain. In August 2003 the mother and the children returned to live in Tanzania before returning to Spain in September 2006. The parents were living separately by February 2007, and the two older children now live with the father. The youngest child is based with the mother, but spends an 'appreciable amount of time' with the father. In July 2007 the mother commenced divorce proceedings in England, on the basis that both parties were domiciled here. It appears that in her Statement of Arrangements she indicated that she wanted to relocate the children in England. The father indicated in his Acknowledgement that he was unsure if the mother was domiciled in England, but did not dispute it. In August 2007 the father began court proceedings in Marbella, for care and custody, maintenance and an order that the children should not be removed from Spain. The mother applied for a stay of the Spanish proceedings, on the basis that a related action was in progress in the courts of England and Wales. The stay was granted by the Spanish court in February 2008. The mother then began proceedings in this country for residence orders and the father sought a declaration under Article 17 of the Brussels II bis Regulation that the English courts have no jurisdiction over the case. The application was dismissed by Mrs Justice Pauffley on 15 April 2008. The father appealed.

The decision: At first sight, the ruling of Mrs Justice Pauffley seems quite reasonable. There were already divorce proceedings continuing in the English court, the father had not disputed the issue of domicile, and the Spanish court had put a stay on the Spanish proceedings. However, their Lordships in the Court of Appeal disagreed. In his leading judgment Lord Justice Thorpe stated:

"I would unhesitatingly conclude that the Marbella court was the more appropriate court having regard to the best interests of the children. First an application to relocate is properly determined by the court of the child's habitual residence which is being asked to sanction the relocation rather than the court of the jurisdiction to

which the primary carer seeks to move. I can understand that the mother might think that she would be more likely to persuade a London judge of the benefits of the move to English residence and education but the Spanish judge should take that decision having at her reach all the evidence as to the well settled history and as to the children's achievements in their current environment. It would in my opinion create a most unhelpful precedent if a court exercising divorce jurisdiction, exceptionally and transiently seised with jurisdiction in matters relating to parental responsibility, were to issue an order permitting a parent to leave the jurisdiction of the child's habitual residence without any involvement of the courts of the children's long settled residence."

Technically, the point was that Article 12(1) (b) of the Brussels II bis Regulation speaks of the jurisdiction being "accepted expressly or otherwise in an unequivocal manner ... at the time the court is seised", and the court first seised in any matter relating to parental responsibility was the court in Marbella, when the father issued his application there.

Commentary: Their Lordships are surely correct. These children lived in Spain - that is their home, and that therefore is where any decision as to arrangements for them should be made. It is true that one can argue that the English court became seised of the matter when the divorce proceedings were issued but, as Lord Justice Thorpe pointed out, the English court was only "transiently seised" with jurisdiction in matters relating to parental responsibility as an adjunct to the divorce proceedings - the real jurisdiction in that area lay with the Spanish court.

Links:

Bush v Bush: <http://www.bailii.org/ew/cases/EWCA/Civ/2008/865.html>

Brussels II bis: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!celexnumdoc&lg=en&numdoc=32003r2201&model=guichett

Brussels II bis Practice Guide:

http://ec.europa.eu/civiljustice/publications/docs/guide_new_brussels_ii_en.pdf

A summary of Brussels II bis by David Hodson:

<http://www.familylawweek.co.uk/site.aspx?i=ed347>

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