

CRIB NOTES

UNMARRIED COUPLES AND SCHEDULE 1

When will the court defer the sale of the home or make a capital award under Schedule 1 of the Children Act?

What are the contributing factors?

Trusts of Land and Appointment of Trustees act 1996 [TOLATA]

Section 14 – any person who is a trustee or anyone with an interest in property subject to a trust of land (including a beneficiary) may apply for an order relating to the exercise by the trustees of any of their functions (power to exclude a co-owner/order a sale) or for an order declaring the nature or extent of a person's interest in the trust for land.

Whilst the court does not have the power to order one beneficiary to sell or transfer the property to another it does have the power to order the trustees to sell the property to a particular beneficiary without the consent of another beneficiary to whom the property is not being sold. This is achieved by ordering a sale at market value but (after an evaluation of the factors in section 15) giving the opportunity to bid to one beneficiary. [CA – Bagum v Hafiz & Another [2015] EWCA Civ 801. The property was owned between a mother and her two adult sons following the father's death intestate. The mother and the two brothers and their families continued to reside in the property. One of the sons fell out with the mother and his brother and left the property. The court at first instance ordered a sale with the occupying brother having the opportunity to purchase his out-going brothers share prior to open market sale.]

[NB: The provisions of the Civil Procedure Rules 1998 apply NOT FPR]

Section 15 – scope

15 (1) The matters to which the court is to have regard in determining an application for an order under section 14 include

- (a) the intentions of the person or persons (if any) who created the trust;
- (b) the purposes for which the property subject to the trust is held;
- (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
- (d) the interests of any secured creditor of any beneficiary

[Section 12 – right to occupy. Section 13 – exclusion and restriction on right to occupy. Statutory basis for occupation rent and maintenance of the property by the beneficiary in occupation.

Trustee in bankruptcy and sale/s15 factors

As a general rule more than a year after a bankrupts' estate has vested in the trustee the court is entitled to assume that the interests of the creditors outweigh all other considerations. There can be

exceptional circumstances (a matrimonial consent order is not an exceptional circumstance) but there is little comfort in the authorities given that in *Grant and Corker v Baker* [2016] EWHC 1782 (Ch) the presence of a 30 year old adult child with the mental age of an 8/9 year old did not prevent an order for sale after 12 months and a Husband with myasthenia and other health conditions [*Pickard & Another v Constable* [2017] EWHC 2475 (Ch) likewise did not prevent an order for sale.

Any discretion under s15 must balance the Article 1 rights (Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law) against Article 8 rights (8.1 Everyone has the right to respect for his private life, his home and his correspondence. 8.2 There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society, public safety or the economic well-being of the country, for the protection of health or morals, or for the protection of the rights and freedoms of others).

TOLAT/Schedule 1

A v A (A Minor: Financial Provision) (1994) 1 FLR 657 – need beneficial interests identified prior to any Sched 1.

Section 15 of and Schedule 1 to the Children Act 1989

Procedure – applications defined as financial remedy applications - FPR 2010, rr 9.18, 9.19, 9.20 PD 9A, para 1.2 (a) (ii) apply.

Schedule 1

1 (2) (c) order requiring either or both parents of a child to pay to the applicant for the benefit of or to the child himself – lump sum

1 (2) (d) – an order requiring a settlement to be made for the benefit of the child and to the satisfaction of the court, of property to which either parent is entitled (in possession or reversion) or property specified in the order.

1 (2) (e) – an order requiring either or both parents of a child to transfer to the applicant for the benefit of the child or transfer to the child himself, such property to which the parent is, or parents are, entitled as may be specified in the order

The court may make further orders in respect of lump sums but make not may make more than one settlement or transfer. [1 (5)]. Any lump sum may be payable by instalments.

Schedule 1 4 sets out the matters to which the court has regard in exercising its powers:

- (a) the income, earning capacity, property and other financial resources which the parent of the child, mother, father, applicant has.
- (b) The financial needs, obligations and responsibilities which the parent of the child, mother, father, applicant has or is likely to have in the future;
- (c) The financial needs of the child;

- (d) The income, earning capacity (if any), property and other financial resources of the child;
- (e) Any physical or mental disability of the child;
- (f) The manner in which the child was being, or was expected to be, educated or trained

Re P (A Child) [2003] EWCA Civ 837. Thorpe LJ. General approach – “I would only wish to amplify by saying that welfare must be not just “one of the relevant circumstances” but, in the generality of the cases, a constant influence on the discretionary outcome”.

N (A Child) [2009] EWHC 11 (Fam) Munby J – cessation of capital settlement.

M-M (A Child) [2014] EWCA Civ 276. McFarlane LJ – lump sum to enable mother to clear debts/limit even if payer outside the jurisdiction to CSA maximum before any “top up” award available.

KS v ND (Schedule 1: Appeal: Costs) [2013] EWHC 464 (Fam). Mostyn J. Costs follow the event. Mother to pay costs. Calderbank strengthened position. Following unsuccessful appeal mother ordered to pay the fathers costs by way of instalment as an “act of mercy” following “reckless and foolhardy litigation”.

DE v AB [2011] EWHC 3792. Baron J. Mother in unaffordable home with increasing debt and mortgage indebtedness at the hearing before the DJ. £177,000 for debt and £250,000 housing fund ordered to be funded by the equity in fathers home. Baron J reduced the debt order made in favour of the mother to £40,000. Balance plus mortgage sufficient for father to house himself.

MT v OT (Schedule 1 order) [2018] EWHC 868 (Fam) Cohen J. Schedule 1 litigation since 2003. The final chapter? (twins now aged 17). Relocation of property provided.

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