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WHITE PAPER TALK



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Gareth Schofield
Head of family
Clarke Willmott LLP

QUESTION

* *“When your client is co-habiting and children are involved, what is the value of issuing a Schedule 1 application to run concurrently with a claim under TOLATA?”*

Some resources to help

- * Claims under Schedule 1 to the Children Act 1989 (second edition - 2013) – James Pirrie, Charlotte Bradley and Jan Ellis
- * Cohabitation claims: Law, Practice and Procedure (second edition - 2015) John Wilson QC
- * “The Orders Project” (free from Family Law Website):
 - Schedule 1 to the Children Act 1989 Omnibus
 - Proposed draft final TOLATA order – Rhys Taylor.

General comments

- * Schedule 1 applications under the Children Act 1989 with TOLATA (Trust of Land and Appointment of Trustees Act 1996) are underused
- * It is interesting and potentially rewarding work, but not always felt to be within the traditional family law comfort zone
- * Remember you are mixing CPR and FPR – it may help to run the case with a civil litigator colleague as the procedure can be complex
- * Cases tend to be dealt with by District Judges or Deputies in the provinces (who are comfortable in both) so you need to ensure you are CPR compliant – the Mitchell experience was not healthy for those used to more lax family law attitudes to deadlines

What can TOLATA do?

* Interesting to note that:

* Under section 13 TOLATA the court can impose:

Conditions on which beneficiary occupies a property, and for how long

Order one or other beneficiary to pay outgoings in respect of that land/property, and one or other beneficiary to make payments by way of compensation (equitable accounting/occupation rent) to the excluded party

* Under section 15 TOLATA the court has to look at the intention(s) of the person(s) who created the trust, and the welfare of any minor

Application of TOLATA

- * Case law has, broadly, determined in cohabitation disputes under TOLATA that a immediate sale is the end result to realise the beneficial shares
- * But the case law is more complex and inventive for partnership/commercial disputes
- * On that basis the cases to consider to determine the beneficial ownership remain:
 - *Stack v Dowden* 2007 UKHL 17
 - *Jones v Kernott* 2009 EWHC 1713
 - Case law remains very fact specific but has been relatively restrictively applied, and has not created a quasi matrimonial jurisdiction

Limitations of TOLATA

- * The Court cannot adjust beneficial interests
- * It can only determine what they are
- * It tends to look to a sale as the only outcome if there is a dispute as to ownership
- * So Schedule 1 is potentially very helpful where:
 - either the parent with primary care cannot establish a beneficial interest in the property, or
 - where she can but, as there is no redistributive power, she cannot re-house with her child with the limited beneficial interest alone
 - Plus it has other potential remedies

So just use TOLATA?

- * The court may conclude that the mother and father each have an equal interest in the property, and the purpose was to provide for a home during their child's minority
- * In these circumstances the court may be able to provide under TOLATA for the sale to be postponed until the child's minority ends, or they have completed their education
- * If so, it may not be necessary to use Schedule 1 (and note no order for sale exists in the Children Act)
- * But, for this to work, the purpose of the trust needs to have been to provide a house for the children, and neither party can see any further benefits of the Schedule 1 application

Child arrangements orders

- * It may be necessary to also apply and have this joined in the other applications
- * Query whether the greater the extent of the child care by the main carer the greater the provision under the claim for Schedule 1 provision? The case law does not support this
- * If such an application is made it should be part of the TOLATA and Schedule 1 application
- * See Hale J in *J v C* – child's circumstances should be similar in both households

- * Best case on the point is *W v W (joinder of Trusts of Land Act and Children Act applications)* 2004 2 FLR 321
- * Here the county court had directed that the mother's TOLATA claim be heard first with the father's Children Act application to follow – it was held that was wrong and they should be dealt with together
- * John Wilson QC is clear the two applications (or three if also for CAO) need to be dealt with at the same time and with the same judge dealing with all three, but query the level of judicial continuity to be able to do that given the current issues with court time and listing

Possible orders under Schedule 1

- * Top up maintenance
- * Lump sum or sums for the benefit of the child (more than one order to the child's 18th birthday is possible)
- * These have covered:
 - Birth expenses
 - Mother's credit card debts
 - Furnishings for property and moving expenses
 - Cost of car with renewal fund to end of child's education
 - Legal costs (both anticipated and incurred)
- * Settlement of property either in possession or reversion (only one order)
- * Transfer of property for the benefit of the child as may be specified in the order (only one order)
- * All the above are for the needs of the children

Provision for legal costs

- * See *CF v KM 2010 EWHC 1754* – Charles J held that provision for legal costs could be made not only for proceedings under Schedule 1, but also section 8 applications
- * This is a substantial benefit over TOLATA
- * Don't forget that Calderbank offers are effective under Schedule 1 as they are under TOLATA
- * James Pirrie “*Respondents now face the risk of funding the costs of both sides and so come under enormous pressure to settle*”
- * Charles J tried to strike a balance on this issue in *CF v KM* so the costs were reviewed at each stage of the proceedings.
- * Holman J in *Dickson v Rennie 2014 EWHC 4306* – awarded mother costs under Schedule 1 to fund her child maintenance tribunal

The court considers

- * All the circumstances of the case including:
 - The financial resources of each person
 - Their financial needs obligations and responsibilities
 - The financial needs of the child
 - The financial resources of the child, including their earning capacity
- * Case law provides that the child's welfare is one of the relevant circumstances- see *Re P 2003 2 FLR 865* – but not paramount – nor is payer's standard of living ignored – this remains the leading authority on Schedule 1 applications
- * Bodey J in *R v P* – *“the overall result achieved should be fair, just and reasonable taking into account all the circumstances”*

A typical Schedule 1 outcome

- * Most cases provide, further to *Re P* guidance :
 - A house held for the children's occupation with their primary carer until they reach the age of 18 or until they complete their education (includes tertiary) when the property returns to the provider, and the indirect benefit provided to the primary carer ceases at that point
 - [note *A v A 1994 1 FLR 657* where Ward J was happy that the property also benefitted the mother's other children, but Thorpe J in *Morgan v Hill 2006* suggested the other fathers should be joined to meet their share]
- * *Re N (a child) 2009 EWHC (Fam)* – Munby – the occupation is not to run beyond 1 gap year after university to end of first degree course – and *MT v OT 2009 2 FLR* – the beneficial interest does not vest in the child or the mother
- * See also the precedent orders for earlier sale, marriage or cohabitation

Maintenance top up

- * Only (in most cases?) where:
 - No CMS jurisdiction (it is not to make up for the inadequacies of the CMS) – see *Dickson v Rennie* [2014] EWHC 4306 , or
 - Where the child has a disability, or
 - Or where the paying parent has income of over £156,000
- * Case law is littered with discussions on the point of whether CMS has been excluded, but generally in any event the approach if so is to mirror the CMS formula outcome - see *D v R – 2014 EWHC 4306 (Fam)* for one recent example – also does the power to pay the costs of the house exist in a CMS case?

Levels of settlement – big(ger) money

Case	Date	Assets	Settlement	Purpose
Phillips v Peace	1996	£2.6m	£90,000	For property
J v C	1999	£1.4m	£70,000	For property
Re P	2003	??	£1.1m	For property
F v G	2004	£4.6m	£900,000	For property
Re S	2006	£4.6m	£1m	For property
Re C	2006	£100m (?)	£2m	For property
MT v OT	2008	£40m	£975,000	For property
C v N	2012	??	£2.5m	For property

Levels of settlement – small money – higher outcomes?

* See *DE v AB* [2011] EWHC 3792

- Note: mother to also fund a mortgage of £250,000
- Baron J – main priority was child to be housed

Description	Mother	Father
Assumed earning capacity (gross)	60,000	100,000
Mother's debts	(111,385)	-
Net equity	98,000	358,000
Total assets	(13,385)	358,000
Lump sum	40,000	(40,000)
Housing fund		(250,000)
Totals (until house sold)	26,615	68,000

Carer's allowance

- * Should only be in the non CMS cases
- * In the non CMS cases there is no room for “slack” for the mother
- * Mother should account for how payments are spent - *Re C [2007] 2 FLR 13*
- * *PG v TW [2014]1 FLR 923* said the carer's allowance was past its utility
- * Derives from *Haroutian v Jennings [1980] 1 FLR 62*.
- * The principle is that the allowance must be for the benefit of the child, and not disguised for the carer's own benefit.
- * In *DE v AB 2011* Baron J allowed for reasonable running costs of property to be paid by the payer as they were for the direct benefit of the child, but would appear to fly in the face of the recent Mostyn J led case law on the point that if the CMS is engaged no further maintenance can be ordered.
- * The guide consent orders provide for such payments but this is (one assumes) by consent only
- * In reality if it preserves the investment for the payer then they may well see the benefit in paying, but query how you enforce?

Points for the payer

- * Is the property a good investment? *Re P* provides that the payer can veto an unsuitable investment
- * Will it be kept in good repair?
- * Who will insure it?
- * Do you want to check it is being occupied by the main carer?
- * Can the provision ceases on remarriage or cohabitation?
- * How is it to be owned? With a charge, in joint names, under a trust, via a company or in the payer's sole name but with a licence?
- * All these need specialist advice to consider, in particular what are the tax consequences?
- * *MT v OT 2007 EWHC 838 (Fam)* allowed the payer the right as to how the property was provided.

The answer...

- * Yes, generally it is sensible to issue the applications together.

Gareth Schofield

Partner & Head of Family

0845 209 1125/0117 305 6125

gareth.schofield@clarkewillmott.com

www.clarkewillmott.com