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ToLATA and Schedule 1

What can a house owner do when they are not married, but have a baby, and the relationship breaks down? Occupation Order? Balance of Harm Test?

1. The proportion of the population aged 16 years and over in England and Wales who are married has continued to decline in 2018 to 50.5%, down from 51.0% in 2017. The number of people aged 16 years and over who live with a partner and have never married has continued to increase, rising by 1.3 million people since 2008, to a total of 5.0 million (10.4%) in 2018.[1]

2. In 2017, just over half of all live births were born to parents who were married or in a civil partnership (51.9%); however, 67.3% of live births born outside of marriage or civil partnership were to parents who lived together.[2]

3. Whilst there have been significant legislative developments of the law in respect of civil partnerships, for those who are not married nor in a civil partnership, the law remains governed by both the civil and family law and is often considered to be unclear, uncertain and unnecessarily complex.

4. The aim of this talk is to set out in a clear and practical way the key substantive law principles which apply when advising an unmarried couple with children as to their property rights.

[1] Office for National Statistics 18 July 2018

[2] *supra*

OCCUPATION ORDERS

5. Where a cohabiting relationship breaks down it is often useful to seek an occupation order under the Family Law Act 1996.

6. *Occupation Orders under section 33*: Section 33 deals with applications with applications where the applicant is entitled to occupy by virtue of a beneficial estate or interest or contract, or where the applicant has "home rights".

7. The dwelling house concerned must be the home (or intended to be the home) of that person and another person with whom he is associated. Whether a person is "associated" with another person is governed by section 62(3) and includes a wide variety of relationships including "cohabitants or former cohabitants" (section 62(3)b)).

8. There is power under s.33(4) for the court to declare that the applicant is entitled to occupy the property concerned by virtue of a beneficial estate or interest or contract or has home rights. Whilst often obvious, this can be a useful starting point if the matter is in dispute.

9. The court has significant powers to enforce, regulate and restrict occupation. In *Chalmers v Johns*[3] which was decided not long after the FLA came into force, Thorpe LJ described the power giving the Court the jurisdiction to declare and regulate who has the right to occupy a property as "Draconian", as they override existing property rights.

10. The court can:
    (a) enforce the applicant's entitlement to remain in occupation against the other person (the respondent);
    (b) require the respondent to permit the applicant to enter and remain in the dwelling-house or part of the dwelling-house;
    (c) regulate the occupation of the dwelling-house by either or both parties;
    (d) if the respondent is entitled to remain in occupation, prohibit, suspend or restrict the exercise by him of his right to occupy the dwelling-house;
    (e) if the respondent has home rights in relation to the dwelling house and the applicant is the other spouse or civil partner, restrict or terminate those rights;

[3] [1999] 1 FLR 392

(f) require the respondent to leave the dwelling house or part of the dwelling house or
(g) exclude the respondent from a defined area in which the dwelling house is included.

11. Section 40 gives additional powers to the court when making an occupation order under ss 33, 35 or 36 (see below). In those circumstances the court can impose obligations: to repair and maintain the dwelling house and discharge rent, mortgage payments or other outgoings; to make periodical payments in respect of the accommodation; to grant possession or use of furniture or other contents; to take reasonable care of furniture or other contents; to take reasonable steps to keep the dwelling-house and contents secure.

12. In deciding whether to exercise these powers the court must consider the financial needs and resources of the parties and the financial obligations they have now or in the foreseeable future including to each other and to any relevant child.

13. In the writer's experience, orders under section 40 are becoming more common, although it should be noted that there is no power to enforce a money order (see Butler-Sloss P in *Nwogbe v Nwogbe* [2000] 2 FLR 744).

14. An order under section 33 may be made for a specified period, until the occurrence of a specified event or until further order (section 33(10)). It is important to note that there is no maximum duration for an order under this section.

15. The "balance of harm" test: the test for an order under section 33 is two-fold. The first part is the balance of harm test under section 33(7). The court *shall* make an order if the applicant or any relevant child is likely to suffer significant harm attributable to the conduct of the respondent unless the respondent or any relevant child would suffer significant harm if the order were to be made and that harm is as great or greater than the harm that the applicant or any relevant child would suffer if the order were not made. In many cases the order will be made on the basis of this test.

16. If the balance of harm test is not decisive then the court must go on to consider under section 33(6) all of the circumstances including:
    (a) the housing needs and housing resources of each of the parties and of any relevant child;
    (b) the financial resources of each of the parties;

(c) the likely effect of any order, or of any decision by the court not to exercise its powers under subs.(3), on the health, safety or well-being of the parties and of any relevant child; and
(d) the conduct of the parties in relation to each other and otherwise.

17. In *Dolan v Corby*[4] the Court of Appeal considered the decision of a Recorder who was found to have conflated the two-fold test but that was not fatal to his judgment as on the facts of the case the balance of harm test could not have led to the making of the order and the Recorder had carried out a careful analysis of all the circumstances under s. 33(6).

18. *Occupation orders under section 36:* this section applies only to cohabitants or former cohabitants who share, shared or intended to share a home, where the applicant is not entitled to occupy the home but the respondent is.

19. If the court decides to make an occupation order under section 36 of the FLA 1996 it must give the applicant the right not to be evicted or excluded from the dwelling-house or any part of it by the respondent for the period specified in the order and prohibiting the respondent from evicting or excluding the applicant during that period.

20. It may also contain any of the following provisions:

(a) to regulate the occupation of the home by either or both of the parties;
(b) to prohibit, suspend or restrict the respondent's rights of occupation;
(c) to require the respondent to leave all or part of the home;
(d) to exclude the respondent from a defined area around the home;

21. The court's discretion is exercised in 2 stages: firstly the court decides whether or not to make an occupation order and if an order is made, the court must give the applicant what amounts to rights of occupation. The court has regard to "all the circumstances" including the matters set out at section 36(6). In the second stage the court considers whether to make any further provision, for example in relation to the regulation of the occupation of the home or restricting the respondent's right to occupy, the court must take into account all the circumstances including the factors set out at section 36(a) to (d) in addition to the balance of harm test. Unlike the balance of harm test under section 33 this test is not overriding. The court retains its discretion regardless of the outcome of the balance of harm test.

[4] [2011] EWCA Civ 1664

22. The court may make additional provisions pursuant to section 40 and the criteria to be considered are identical to those under section 33. An occupation order under section 36 cannot last longer than 6 months in the first instance and can be renewed on one occasion only again for a period not exceeding 6 months. The maximum duration possible is 12 months.

23. *Applications under section 38*: this applies to cohabitants and former cohabitants neither of whom are entitled to occupy the home. It is relatively rare to find orders being made under this provision.

24. The court considers the criteria under section 38(4), together with the balance of harm test. As with section 36, the balance of harm test is not overriding. An order may be made for a period not exceeding 6 months in the first instance and may be renewed on one occasion only for a further period not exceeding 6 months, as with section 36.

APPLICATIONS UNDER ToLATA

Deferred Order for Sale

25. In the short term the person who wishes to stay in the property, often with the children, can apply for an occupation order.

26. In the longer term, consideration will need to be given to making an application under ToLATA or Schedule 1 (see below), in order to regularise the status of occupation of the property.

27. The situation which most frequently arises in claims brought under ToLATA is that the relationship between a co-habiting couple comes to an end and one party seeks to realise their interest in the former family home by seeking an order for sale. Where there are children of the relationship, one or other partner may wish to remain in occupation of the family home and seek to argue that any sale should be deferred.

28. The party who wishes to remain in the property must first establish that they have a beneficial interest in the property. Where it is owned in the parties' joint names, the question as to who owns what share will often be easy to resolve as it will normally

be determined by the declaration of trust, usually found in the TR1/JO,[5] although there may be issues of equitable accounting.[6]

29. Where the property is owned in the sole name of one of the partners, then the other partner must first establish that he/she has a beneficial interest in the property. *Stack v Dowden* and *Jones v. Kernott* have clarified the position in respect of joint name cases where there is no express declaration of trust. However, the position in respect of sole name cases remains unclear and claimants seeking a beneficial interest are still regularly disappointed by the courts: see, for example, *Curran v. Collins.*[7]

30. Unless the claimant is able to establish that they have a beneficial interest in the property, then they will not be able to rely upon the powers within ToLATA to seek an order that the sale of the property be deferred.

31. The relevant statutory provisions are contained in sections 12 to 15 of ToLATA. They contain little guidance as to how the powers are to be applied in practice, particularly in family disputes where there are children. Historically, as seen below, the Chancery Courts have not been prepared to defer an order for sale for a lengthy period of time. However, in the writer's experience, they are now increasingly prepared to consider the argument that an order for sale should be deferred, particularly where there is a minor child.

32. Section 14 contains the powers of the court to make orders under ToLATA:

    "(1) Any person who is a trustee of land or has an interest in property subject to a trust of land may make an application to the court for an order under this section.

    (2) On an application for an order under this section the court may make any such order-

    (a) relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or

    (b) declaring the nature or extent of a person's interest in property subject to the trust."

[5] See *Stack v. Dowden* [2007] 2 AC 432, para 52

[6] Perhaps more appropriately described as "compensation" following *Stack v. Dowden supra*.

[7] [2015] EWCA Civ 404. See also *James v Thomas* [2007] EWCA Civ 1212 and *Morris v. Morris* [2008] EWCA Civ 257

33. Section 15 sets out the matters that are relevant in determining applications:

"(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 the beneficiary.

(2) In the case of an application relating to the exercise in relation to any land of the powers conferred on the trustees by section 13 the matters to which the court is to have regard also include the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under section 12. ..."

34. The section 15 factors are not prioritised. In respect of (a),j *the intentions of the person/persons who created the trust* is the intention of all the persons who created the trust, which they had in common and which they had prior to the creation of the trust: See *W v W (Joinder of Trusts of Land Act and Children Act Applications)* [2003] EWCA Civ 924 *per* Arden LJ at para 22. In respect of (b), *the purpose of the trust* is usually to provide a home for the joint owners. It may also include the provision of a home for their children, but where it does not, it may only change if both parties agree – *W v W supra* at para 24.

35. Also of importance is section 15(1)(c): *The welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home.*

36. There is surprisingly little case law which considers this provision. *Begum v. Issa*[8] is one of the only post-ToLATA decisions to consider whether or not an order for sale should be made where a minor lived in the property in question. His Honour Judge Behrens found that although the youngest child was partially sighted and would require significant assistance if she moved area, balancing this against the interests of the owner (the father's brother) and the fact that the child might not finish her education for 9 years, it was appropriate having regard to the factors in section 15 to make an order for sale postponed for 12 months. He stated:

[8] (2014) WL 5833780

"*105 The joint intentions of Narghis Begum and Nadeem Issa when the trust was created were to provide a home for both of them and their children. However, the parties did not consider what the position would be if the relationship broke down. The relationship has now terminated and Nadeem Issa has moved out. It is still occupied by Narghis Begum and the two children. An important factor is that Iqra is partially sighed and will need significant assistance if she moves area. Whilst Narghis Begum has indicated that she can obtain a mortgage of £60,000 it is unlikely that she could get that mortgage in respect of 107 Chalford Oaks because of course any mortgagee would wish to have the security of a first charge.*

106 Narghis Begum would like to occupy 107 Chalford Oaks until Iqra finishes her education, possibly not for 9 years.

107 Shameem Issa purchased 107 Chalford Oaks as an investment. He has a mortgage of £90,000 and (at present) no rental income at all from the property. He accordingly wants to realise his investment as soon as possible. ...

113 Plainly the Court has to perform a balancing exercise between the rights and wishes of Narghis Begum and Shameem Issa. In doing so it must take into account the statutory matters set out above.

1114 I am conscious that any order for sale will require Iqra to move and that any move will be disruptive in the short term. However, with appropriate assistance she will and can acclimatise to her new environment. In the circumstances I do not think it would be appropriate to delay the order for sale until after she has concluded her education.

115 On the other hand I do not think it would be right to make an immediate order for sale. If my analysis of the position is correct, Narghis Begum has a beneficial half share in a property worth £120,000 subject to a mortgage of £33,214. Accordingly the value of her equity is approximately £43,400 [£120,000 - £33,214)/2]. If she is able to obtain a mortgage of £60,000 as she believes she will be able to purchase a house for about £100,000. In all the circumstances I will postpone the order for sale for 12 months."

Orders for sale

37. The court cannot order one beneficiary to sell or transfer his or her interest to the other. However, it can order that a property be sold and provide that one of the beneficiaries should be given the opportunity to purchase the property at a price to be determined by the court, in default of which, within a certain period of time after the determination, the property be sold on the open market with liberty for all the beneficial owners to bid.
38. This was the approach taken by the trial judge in *Bagum v Hafiz and Hai* [2015] EWCA Civ 801 which was upheld by the Court of Appeal. In *Bagum*, an express trust declared that a mother and her two elder sons held the property on trust for themselves in equal shares. The family agreed to sell the property, but the eldest son refused to sign the transfer and offered to purchase the property himself.

39. After a considerable length of time had passed, the mother issued proceedings under ToLATA seeking an order that the second eldest son sell his interest in the property to the eldest son, or in the alternative that the property be sold. The judge held that she had no jurisdiction to make the order that the second eldest son sell his interest in the property to the eldest, but did order that the property should be sold and the eldest son should have the opportunity to purchase the property at a price to be determined by the court, in default of which within six weeks the property should be sold on the open market with liberty to all parties to bid.

40. It was held by the Court of Appeal that the judge had jurisdiction to make the order she did under section 14(2)(a): "The court may make such order … relating to the exercise by the trustees of any of their functions … as the court sees fit."

41. Sections 14 and 15 confer on the court a substantially wider discretion than the trustees have when acting without either the consent of the beneficiaries or an order of the court.

Exclusion from the Property and compensation

42. Section 12 provides that a beneficiary who is beneficially entitled to an interest in land is entitled to occupy the land if at that time the purposes of the trust include making the land available for his occupation or the land is held by the trustees so as to be so available.

43. Under section 13(1) and 14 of ToLATA the trustees and/or the Court has power to exclude one co-owner on terms which may include making payments. Under section 13 the power must be exercised reasonably.

44. In *Stack v Dowden* Ms Dowden excluded Mr Stack from the property against his wishes, but eventually a time-limited order in the Family Proceedings Court was agreed between the parties, which excluded Mr Stack from the house and required Ms Dowden to pay him, or to credit him against her share of the proceeds of sale of the house, a sum which reflected the cost of his alternative accommodation. After the expiry of that order Mr Stack effectively accepted Ms Dowden's decision to exclude him, Ms Dowden continued in exclusive occupation of the house, with their four children, and Mr Stack had to continue to pay for alternative accommodation. The House of Lords had to consider the question of whether Mr Stack was entitled to recover compensation or an "occupation rent" for his exclusion from the property.

45. Baroness Hale set out the approach to be taken in respect of occupation of the property and payment of an occupation rent.[9] Her Ladyship said that the question of payment for Mr Stack's exclusion is governed by ss.12 and 13 and ss.14 and 15 of the Trusts of Land and Appointment of Trustees Act 1996, which replace the "old doctrines of equitable accounting"[10]:

    (1) Section 12(1) gives a beneficiary who is beneficially entitled to an interest in land the right to occupy the land if the purpose of the trust is to make the land available for his occupation. Thus both the parties have a right of occupation.

    (2) Section 13(1) gives the trustees the power to exclude or restrict that entitlement; but s.13(2) provides that this power must be exercised reasonably.

    (3) The trustees also have power under s.13(3) to impose conditions upon the occupier. These include, under s.13(5), paying any outgoings or expenses in respect of the land and under s.13(6) paying compensation to a person whose right to occupy has been excluded or restricted.

    (4) Under s.14(2)(a), both trustees and beneficiaries can apply to the court for an order relating to the exercise of these functions.

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10 At para.94

(5) Under s.15(1), the matters to which the court must have regard in making its order include (a) the intentions of the person or persons 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 the property as his home, and (d) the interests of any secured creditor of any beneficiary. Under s.15(2) the court must also have regard to the circumstances and wishes of each of the beneficiaries who would otherwise be entitled to occupy the property.[11]

46. Baroness Hale added that these statutory powers replaced the old doctrines of equitable accounting.[12] Their Lordships agreed that although Mr Stack had to fund alternative accommodation for himself, he had nothing to pay in respect of the upkeep of the family home until he was able to realise his share in it upon sale. It also had to be borne in mind that Mr Stack had agreed to go in the course of proceedings under the Family Law Act 1996 and that the fact that the house was to be sold as soon as possible meant that Mr Stack would not be kept out of his money for long. All of these factors militated against ordering payment of an occupation rent by Ms Dowden to Mr Stack.

SCHEDULE 1, CHILDREN ACT 1989

47. Applications under Schedule 1 of the Children Act 1989 ("Schedule 1") have historically been underused. In more recent times, however, the advantages that an application under Schedule 1 can provide where a co-habiting couple have children are increasingly being recognised.

48. An application under Schedule 1 will often be brought effectively as a "counterclaim" by the partner who wishes to remain in occupation of the property with the children, in response to a claim under ToLATA seeking an order for sale.

49. Paragraph 1 of Schedule 1 sets out the orders that Court can make against parents:

"1.—

11 At para.93

(1) On an application made by a parent [, guardian or special guardian]

of a child, or by any person [who is named in a child arrangements order as a person with whom a child is to live], the court [may make one or more of the orders mentioned in sub-paragraph (2).]

(2) The orders referred to in sub-paragraph (1) are—

(a) an order requiring either or both parents of a child—

(i) to make to the applicant for the benefit of the child; or

(ii) to make to the child himself,

such periodical payments, for such term, as may be specified in the order;

(b) an order requiring either or both parents of a child—

(i) to secure to the applicant for the benefit of the child; or

(ii) to secure to the child himself,

such periodical payments, for such term, as may be so specified;

(c) an order requiring either or both parents of a child—

(i) to pay to the applicant for the benefit of the child; or

(ii) to pay to the child himself,

such lump sum as may be so specified;

(d) an order requiring a settlement to be made for the benefit of the child, and to the satisfaction of the court, of property—

(i) to which either parent is entitled (either in possession or in reversion); and

(ii) which is specified in the order;

(e) an order requiring either or both parents of a child—

(i) to transfer to the applicant, for the benefit of the child; or

(ii) to transfer to the child himself,

such property to which the parent is, or the parents are, entitled (either in possession or in reversion) as may be specified in the order.

(3) The powers conferred by this paragraph may be exercised at any time.

(4) An order under sub-paragraph (2)(a) or (b) may be varied or discharged by a subsequent order made on the application of any person by or to whom payments were required to be made under the previous order.

(5) Where a court makes an order under this paragraph—

(a) it may at any time make a further such order under sub-paragraph (2)(a), (b) or (c) with respect to the child concerned if he has not reached the age of eighteen;

(b) it may not make more than one order under sub-paragraph (2)(d) or (e) against the same person in respect of the same child.

(6) On making, varying or discharging [...]

[a special guardianship order]

[, or on making, varying or discharging provision in a child arrangements order with respect to the living arrangements of a child,]

the court may exercise any of its powers under this Schedule even though no application has been made to it under this Schedule.

[(6A) For the purposes of sub-paragraph (6) provision in a child arrangements order is with respect to the living arrangements of a child if it regulates arrangements relating to—

(a) with whom the child is to live, or

(b) when the child is to live with any person.

[(7) Where a child is a ward of court, the court may exercise any of its powers under this Schedule even though no application has been made to it.

50. Paragraph 4 sets out the matters to which the court is to have regard in making orders for financial relief:

4.—

(1) In deciding whether to exercise its powers under paragraph 1 or 2, and if so in what manner, the court shall have regard to all the circumstances including—

(a) the income, earning capacity, property and other financial resources which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;

(b) the financial needs, obligations and responsibilities which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable 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.

(2) In deciding whether to exercise its powers under paragraph 1 against a person who is not the mother or father of the child, and if so in what manner, the court shall in addition have regard to—

(a) whether that person had assumed responsibility for the maintenance of the child and, if so, the extent to which and basis on which he assumed that responsibility and the length of the period during which he met that responsibility;

(b) whether he did so knowing that the child was not his child;

(c) the liability of any other person to maintain the child.

(3) Where the court makes an order under paragraph 1 against a person who is not the father of the child, it shall record in the order that the order is made on the basis that the person against whom the order is made is not the child's father.

(4) The persons mentioned in sub-paragraph (1) are—

(a) in relation to a decision whether to exercise its powers under paragraph 1, any parent of the child;

(b) in relation to a decision whether to exercise its powers under paragraph 2, the mother and father of the child;

(c) the applicant for the order;

(d) any other person in whose favour the court proposes to make the order.

...".

51. Whilst the welfare of the child is neither the paramount nor the first consideration, it is one of the relevant circumstances to be taken into account when assessing whether and how to order provision: see *J v C (Child: Financial Provision)* [1999] 1 FLR 152 per Hale J at 156.

52. This was reinforced by Thorpe LJ in *Re P* [2003] 2 FLR 865:[13]

> "...in the passage which I have cited from the judgment of Hale J in *J v C supra* in which she rightly sets the welfare of the child to be clearly embraced within the court's general duty to "have regard to all the circumstances", I would only wish to amplify by saying that welfare must be not just "one of the relevant circumstances" but, in the generality of cases, a constant influence on the discretionary outcome. I say that because the purpose of the statutory exercise is to ensure for the child of parents who have never married and who have become alienated and combative, support and also protection against adult

[13] although some of Thorpe LJ's comments in respect of the "carer's allowance" have been questioned in the lower courts: see *PG v TW* [2014] 1 FLR 923

irresponsibility and selfishness, at least insofar as money and property can achieve those ends."

Orders that the court can make under Schedule 1

1) *Provision for legal costs*

53. There is often a significant imbalance between parties in terms of funding Schedule 1 cases and that can be true across the financial spectrum. As the concept of applications by the financial weaker party for legal costs to be funded by the financial stronger party has developed in matrimonial proceedings, so it has in Schedule 1 proceedings.

54. The question of the funding of legal costs is open to the court in an appropriate case in two different ways. The first avenue would be by way of an interim periodical payments order in line with orders that can be made within the context of matrimonial proceedings and the second would be the lump sum route. The difficulty with interim periodical payments is that this would apply to very few cases given the inter-relationship between the CSA 1991 and Schedule 1 and the restrictions on the court's power to make a periodical payments order at any time.

55. The lump sum approach found favour with Charles J in *CF v KM (Financial Provision for Child: Costs of Legal Proceedings)*[14] where there was no jurisdiction for making a "top-up" order in the absence of a maximum assessment for child maintenance. He concluded that the making of a lump sum order to meet ongoing legal costs (in that case of both Schedule 1 and section 8 Children Act proceedings) did not circumvent, undermine or run counter to the underlying purpose or theme of the 1991 Act. Charles J was at pains to ensure that costs provision should only be made in limited circumstances having regard to the potential unfairness of any award to the paying party, whether there was a real prospect of a substantive award being made for the applicant at the final hearing and whether there was any prospect of recouping from the award made in favour of the applicant. Of course it can be hard to assess merits at an early stage.

[14] [2011] 1 FLR 208

56. In *Dickson v Rennie*[15] Holman J awarded the mother £10,000 towards her costs of £14,700 incurred in pursuing an appeal to the First Tier Tribunal on the basis that "it seems to me that at the moment this child must be suffering very greatly from the dramatic fall in the income available to her within the household of her mother, and that it is very much in the overall interests of this child that her mother, on her behalf, should be able to pursue that appeal." The order was made expressly for the purpose of her funding her lawyers in the proposed appeal on terms that she pays the whole to her solicitors and that she produce a final itemised bill from her solicitors to the father after the hearing and refund him any amount by which £10,000 exceeds the actual final bill.

57. Applications for legal costs are not something that the court can order in ToLATA proceedings and applications under Schedule 1 can therefore secure a significant tactical advantage for an applicant.

2) *Settlement of Property/Transfer of property order*

58. It is perhaps in seeking an order for postponement of sale or settlement/transfer of property that an application under Schedule 1 has an advantage over a "stand alone" claim under ToLATA.

59. In *Re P* the father's assets were such that he accepted that he could pay up to £10 million if ordered to do so. The mother was awarded a housing fund of £1 million, with £100,000 for internal decoration and periodical payments of £70,000 per annum. While the figures may be different there is much to commend this approach to all cases regardless of the wealth of the parties involved. The first step is for the court to decide the type of home that the respondent should provide for the benefit of the child.

60. Thorpe LJ gave the following guidance:

> **"[45]** Before coming to the details of the present case I would like to offer my opinion as to the method by which a judge should determine a case similar to this, in that one or both of the parents lie somewhere on the spectrum from affluent to fabulously rich. Such cases may be more likely to be litigated, partly because where the parents are of more modest means financial liabilities will be conclusively settled by the administrative process under the Child Support Act

[15] [2014] EWHC 4306

1991, to which the judicial process is only supplementary, and secondly, because the affluent and the very rich may be less deterred by the costs of litigation. The starting point for the judge should be to decide, at least generically, the home that the respondent must provide for the child. The value, the size, and the location of the home all bear upon the reasonable capital cost of furnishing and equipping it as well as upon future income needs, directly in the case of outgoings but also indirectly in the case of external expenditure such as travel, education, and perhaps even holidays. The home will ordinarily be transiently required during the child's minority or until further order. The appropriate legal mechanism is therefore a settlement of property order. Since the respondent is entitled to the reversion, which in certain circumstances may fall in before the child's majority, the respondent must have some right to veto an unsuitable investment.

[46] Once that decision has been taken the amount of the lump sum should be easier to judge. For the choice of home introduces some useful boundaries. In most cases the lump sum meets the cost of furnishing and equipping the home and the cost of the family car.

[47] Those issues settled the judge can proceed to determine what budget the mother reasonably requires to fund her expenditure in maintaining the home and its contents and in meeting her other expenditure external to the home, such as school fees, holidays, routine travel expenses, entertainments, presents, etc. In approaching this last decision, the judge is likely to be assailed by rival budgets that specialist family lawyers are adept at producing. Invariably the applicant's budget hovers somewhere between the generous and the extravagant. Invariably the respondent's budget expresses parsimony. These arts have been developed in Matrimonial Causes Act 1973 claims, particularly where the budget is advanced to found the calculation of the price of the clean break. But it is worth emphasising the trite point that, by contrast, an order for periodical payments is always variable and will generally have to be revisited to reflect both relevant changes of circumstance and also the factor of inflation. Therefore, in my judgment, the court should discourage undue bickering over budgets. What is required is a broad common-sense assessment. What the court first ordains may have a comparatively brief life before a review is claimed by one or other party.

61. *Re N (Payments for Benefit of Child)* [2009] EWHC 11 (Fam) concerned more “typical” modest assets. The district judge made an order requiring the father to pay the mother £20,000 absolutely and to settle on the mother £220,000 to be used to purchase a home for the child’s use until he was 21 or the end of his tertiary education, whichever was the later. The mother intended to contribute to the purchase price by raising a

mortgage on the property and the father's interest in the property was to be whatever percentage of the purchase price £220,000 represented. Both sides then made a number of applications which eventually came before Munby J. His Lordship held, *inter alia*, that special or exceptional cases apart, dependency ceased at 18, so any capital settlement under Schedule 1 should be expressed as terminating upon the child attaining 18 or completing tertiary education. Such "special circumstances" would be, for example, a disability which required the child to remain living with a parent after majority. If the child were to undertake tertiary education, it was appropriate, as a longstop, for the trust to allow the child to take a gap year, either before or after completion of a first degree course.

62. *Re N* came back before the High Court for enforcement, under the title *G v A (Financial Remedy: Enforcement)(No 1), (No 2), (No 3) & (No 4)* [2012] 1 FLR 389, 402, 415 and 427. In *No 3*, Peter Jackson J ruled that where the court made an order for a settlement of property under Schedule 1 the court should give simple, effective directions for putting the order into effect. "An order properly drawn by the court was sufficient and preferable to define a trust in a case of such simplicity" (paras 34 and 35).

3) *Lump sum orders*

63. Another advantage that an application under Schedule 1 has over a stand-alone ToLATA claim is that a claim can be made for a lump sum: see Schedule 1 paragraph 5:

"**5. Provisions relating to lump sums**

(1) Without prejudice to the generality of paragraph 1, an order under that paragraph for the payment of a lump sum may be made for the purpose of enabling any liabilities or expenses-

(a) incurred in connection with the birth of the child or in maintaining the child; and

(b) reasonably incurred before the making of the order,

to be met.

This can be, for example, for repairs to property; furnishing or even to compensate for capital expenditure already made. It can be made in instalments.

64. A lump sum can be paid in instalments and the instalments can be varied.[16] There is no restriction on the number of lump sums that can be applied for on behalf of a child.

65. In more recent years the Courts have been prepared to take a more expansive approach when making lump sum awards. For example, in *MT v OT*[17] Cohen J made provision for the purchase of a replacement property where a property had previously been purchased under a trust. He rejected the submission that this was contrary to the provision allowing only one transfer or settlement of property order, as had been upheld in *Phillips v Peace*.[18]

66. Other examples include:

    £25,000 for the purchase of a family car (*H v. C* [2009] 2 FLR 1540);

    £25,000 for moving costs and £25,000 for improvements to the property at a later date (*MT v OT* [2018] EWHC 868;

    £44,000 reimbursing an applicant for mortgage payments and general running costs incurred in providing the child with a home resulting from the father under-paying a flawed CSA assessment: *DE v AB* [2011] EWHC 3729.

67. An interesting question arises as to whether the Courts might be persuaded to make a lump sum order for the benefit of the applicant where s/he is unable to otherwise obtain a deposit for a property.

4) *Maintenance top-up*

68. This can only be applied for in cases where the CMS does not have jurisdiction. Typically this will be where the non-resident parent's income exceeds a defined threshold[19] (currently £3,000 per week gross).

69. Carer's Allowance: See *Re P per* Thorpe LJ:

[16] Children Act 1989, Sch 1, para 5(6)

[17] [2018] EWHC 868

[18] [2005] 2 FLR 1212

[19] Section 8(6) CSA 1991

"[48] In making this broad assessment how should the judge approach the mother's allowance, perhaps the most emotive element in the periodical payments assessment? The respondent will often accept with equanimity elements within the claim that are incapable of benefiting the applicant (for instance school fees or children's clothing) but payments which the respondent may see as more for the benefit of the applicant than the child are likely to be bitterly resisted. Thus there is an inevitable tension between the two propositions, both correct in law, first that the applicant has no personal entitlement, secondly, that she is entitled to an allowance as the child's primary carer. Balancing this tension may be difficult in individual cases. In my judgment, the mother's entitlement to an allowance as the primary carer (an expression which I stress) may be checked but not diminished by the absence of any direct claim in law.

[49] Thus, in my judgment, the court must recognise the responsibility, and often the sacrifice, of the unmarried parent (generally the mother) who is to be the primary carer for the child, perhaps the exclusive carer if the absent parent disassociates from the child. In order to discharge this responsibility the carer must have control of a budget that reflects her position and the position of the father, both social and financial. On the one hand she should not be burdened with unnecessary financial anxiety or have to resort to parsimony when the other parent chooses to live lavishly. On the other hand whatever is provided is there to be spent at the expiration of the year for which it is provided. There can be no slack to enable the recipient to fund a pension or an endowment policy or otherwise to put money away for a rainy day. In some cases it may be appropriate for the court to expect the mother to keep relatively detailed accounts of her outgoings and expenditure in the first and then in succeeding years of receipt. Such evidence would obviously be highly relevant to the determination of any application for either upward or downward variation."

70. However, in more recent times this correctness of this approach has been queried: see *PG v. TW* [2014] 1 FLR 923 *per HHJ Horowitz QC*:

"[106] I respectfully suggest that the concept of a carer's allowance is past its utility. Mr Francis QC helpfully concedes he has no problem with carers allowance and pps perhaps being, in his phrase, lumped together as a single amount. I agree and record only that my figure acknowledges and takes into account the mother's modest income and the need for back-up childcare and housekeeping to enable her to work without anxiety during the day, through inevitable childhood illnesses and school holidays."

PROCEDURE

71. Where applications are to be made under both section 14 ToLATA and Sch 1, the application should be under both Acts and the exercise of the powers under each should be considered by the same court and at the same time: see *W v W* (Joinder of Trusts of Land Act and Children Act applications) [2004] 2 FLR 321 *per* Thorpe LJ:

    - "Sensible management demands that the applications be conjoined";
    - "If one had to be given leading status, I would have myself assumed that it would be the application under Sch 1, since that statute confers upon the court a much more extensive power, namely the power to make adjustive orders between the co-owners"
    - "Power to make adjustive and not merely declaratory orders."

72. *Seagrove v Sullivan* [2015] 2 FLR 602 involved claims under both ToLATA and Schedule 1. The matter came before Holman J sitting in the Family Division for trial and, even though the central dispute was the claimant's beneficial interest in the property, the court was clear that the FPR applied. The equity in the property was £1 million at most. The claimant was seeking a 50% beneficial interest ie. £500,000. Her costs were £800,000 inc VAT. The respondent's costs were about £506,000 inc VAT. There were 5 lever arch bundles of documents and 32 authorities. In addition, Holman J was "flabbergasted" on the morning of the trial when the solicitors arrived with an additional 5 lever arch files of documents. He was in no doubt that PD 27A of the FPR 2010 applied and ordered the parties to go away and come back the following morning with one, single, composite bundle containing not more than 300 pages (he excluded and retained counsel's skeleton arguments which were 25 pages each). He directed that there be only one bundle of not more than 5 authorities. The case settled.

CONCLUSION

73. Applications for occupation orders are an extremely useful and perhaps underused tool when advising and representing unmarried couples where there are children to regulate occupation of the home in the short term. In the longer term, however, it is necessary to consider applications under ToLATA and/or Schedule 1 of the Children Act in order to ensure that, if possible, the home is preserved.

11 MARCH 2020

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