

Joinder of Schedule 1 to the Children Act 1989 claims with TOLATA claims

Question

When your client is cohabiting and children are involved, what is the value of issuing a Schedule 1 application to run concurrently with a claim under TOLATA?

1. The short answer is when you want to achieve more extensive financial provision than you can achieve under TOLATA proceedings.

TOLATA

2. It is not the purpose of this lecture to discuss the full detail of TOLATA applications. The relevant statutory provisions are contained in the Trusts of Land and Appointment of Trustees Act 1996.
3. Under section 14 (1) of the Act, 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 that section. By virtue of s14 (2) on such an application the court may make any such order
 - (a) relating to the exercise by the trustees of any of their functions or
 - (b) declaring the nature or extent of a person's interest in the property subject to the trust as the court thinks fit.
4. By virtue of section 15 (1) of the Act, the matters to which the court is to have regard in determining an application for an order under s14 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.

These factors are not prioritised, weighted or exhaustive.

5. It is important to note that the court cannot alter the parties' beneficial interests in the property. It only has the power to declare what are those interests. The property will usually but not necessarily be held in their joint names. Since 1 April 1998, the TR1 in the case of all conveyances into joint

names will contain a declaration of trust which will usually be definitive as far as the parties' beneficial interests are concerned. There may be cases where other people have invested money into the property, for example, grandparents. In those cases, it will be necessary to look behind the title to establish the nature and extent of the beneficial interests. In some cases, the property may have been conveyed into the sole name of one of the cohabitees but the other contends that he or she has a beneficial interest in the property.

6. The leading authorities on establishing the existence and extent of a beneficial interest are **Stack v Dowden [2007] UKHL 17** and **Jones v Kernott [2012] 1 FLR 45, [2011] UKSC 53**.
7. Under TOLATA, there is the power for the court to order a sale of the property. The purpose of a trust of land is usually to provide a home for the joint owners. The purpose at the outset may also include the provision of a home for their children. Even if the latter is not part of the original purpose, it may by express agreement be included later as a purpose of the trust. In **White v White [2003] EWCA Civ 924** Arden LJ rejected the argument that the arrival of the parties' children was sufficient in itself to change the purpose of the trust in the absence of the parties' express agreement. Nonetheless, the welfare of any minor who occupies the property or might reasonably be expected to do so is a matter to which the court is to have regard under s15 (c) of TOLATA.
8. If the purpose of the trust has not been fulfilled, then, having regard to the matters set out in s15, the court may postpone the sale of the property and regulate the occupation and use of it. In most cases, this will be done to enable the mother and any child to remain in occupation to the exclusion of the father. The terms of the occupation may be provided for, for example, an occupation rent and payment of the outgoings.
9. Where the parties' relationship has broken down, the property may be of sufficient value to enable it to be sold and separate properties to be purchased for their occupation.
10. There is no power to order the appointment or removal of trustees.

Schedule 1 applications

11. These applications are available where the parents of a child have cohabited but are not married. They are also available where the parents have never cohabited. The child may be the result of a one-night stand or other casual relationship. In those circumstances, the parents are unlikely to have a joint interest in property which can be subject to TOLATA proceedings. The Court has the powers under Schedule 1 to make orders for the maintenance of a child, lump sums for the benefit of a child and transfer of property and settlement of property for the benefit of a child. There can be only one order for transfer or settlement of property but more than one lump sum can be ordered. No financial provision can be made outright to the applicant parent for her or his personal benefit. Almost invariably, but not necessarily, the father will be the respondent.

12. Usually, the main purpose of the application will be to secure the provision of a home for the child and/or financial support by way of lump sum to cover liabilities incurred by the mother in respect of the child and ongoing maintenance for the child. Case law has demonstrated consistently that any property purchased by the father as a home for the child will revert to the father once the child has attained his or her majority or, where applicable, has completed tertiary education or training for a trade or profession or vocation unless there are special circumstances such as the child's disability. Of course, in the absence of the mother herself owning a home, during the child's minority or tertiary education etc, she will benefit from being in occupation of the home. However, once the home is no longer required for the child, the mother is likely to be left in a vulnerable financial position.

13. Lump sums can be ordered to cover the expenses of the birth, an applicant's credit card debts incurred in respect of the child's expenses, furnishings for a property, moving expenses, the cost of a family car and a fund for its replacement while the child is entitled to financial provision and legal costs. All such provision is for the needs of the child.

14. In **re N (A Child) [2009] EWHC 11 (Fam) [2009] 1 FLR 1442** Munby J concluded that absent "special" or "exceptional" circumstances, any capital settlement under Schedule 1 should be expressed as terminating upon the child attaining the age of 18 or completing tertiary education and, in appropriate cases, to provide that a settlement should conclude at the latest

when the child has had a gap year (whether after school or after university) and finished any first degree.

15. The matters to which the court is to have regard in making orders under Schedule 1 are set out in paragraph 4 of the Schedule.
16. What is the advantage of issuing a Schedule 1 application concurrently with TOLATA proceedings? Under Schedule 1, the court has a more extensive power than it has under TOLATA. It can make adjustive orders between co-owners whereas under TOLATA its powers are declaratory of the beneficial interests in the property and/or regulatory as to the occupation and use of the property. Schedule 1 can be utilised where appropriate to order the respondent to transfer or settle property for the benefit of the child. However, the capital will revert to the respondent once the purpose of the order has been fulfilled.
17. In ordinary cases, the CMS calculation will be the determinant of the level of child periodical payments. If a top up is justified, recourse will have to be made to Schedule 1.
18. The provision of capital by way of settlement may have tax consequences by virtue of Schedule 20 to the Finance Act 2006. This introduced retrospective inheritance tax charges that impact upon the traditional settlement of property, namely, a lifetime interest in possession trust as envisaged by Thorpe LJ in **Re P [2003] 2 FLR 865 CA**.
19. The principal authority on the joinder of a Schedule 1 application and TOLATA proceedings is **W v W (Joinder of Trusts of Land Act and Children Act Applications) [2003] EWCA Civ 924 [2004] 2 FLR 321** per Thorpe LJ.
20. Although the welfare of the child is not the court's paramount consideration under Schedule 1, it is a very important consideration. As Thorpe LJ stated in **Re P**, the welfare of the child will inform the court's approach to its consideration of the factors set out under Schedule 1.

21. Schedule 1 has very limited and effectively no useful application where the parents are on benefits and have no property other than rented social housing. On the assumption that the respondent has income from employment, the CMS calculation will apply.
22. Inevitably, Schedule 1 claims have become the preserve of usually the mother of a child fathered by rich film stars or other wealthy people who may not have been in a relationship where there has been cohabitation.
23. It is necessary to remember that TOLATA proceedings are subject to the CPR and, accordingly, require pleading of Points of Claim and Defence and can result in nasty consequences if you fall foul of the rules.
24. It may also be necessary to issue concurrent proceedings for a Child Arrangements Order if the primary residence of the child is in dispute.
25. Accordingly, the value of issuing a Schedule 1 application to run concurrently with a TOLATA application is to secure financial provision for the child by way of capital provision for a home through the exercise of the court's discretionary powers under Schedule 1 beyond what can be achieved under TOLATA. In appropriate circumstances, Schedule 1 can be used to secure child maintenance support.

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