

# FAMILY LAW

Hilary Lennox, Barrister at Five St Andrews Hill Chambers



Hilary Lennox



Roger Birch

Over the next few pages, Lawyer Monthly hears on the topic of family law, in particular regards to divorce and separation, and children-related disputes. Led by Hilary Lennox and her colleagues, the team at Five St Andrews Hill talks about international regulations surrounding child abduction and relocation, what reforms are needed surrounding surrogacy law, and also touches on the ins and outs of forced marriage and the tax advantages of marriage.

## What are the most common disputes that arise in relation to divorce and separation in UK?

The most common disputes in family law arise in matters of finance: financial relief proceedings and children proceedings.

Financial relief consists of the assets of the marriage and how they are divided up amongst the parties. If it is a long marriage (twenty years and over), the starting point is then 50/50. These assets may include the house(s), most often being the largest asset, pensions, businesses and tangible goods; even the family dog. Valuations of the house are consistently argued over! Pensions are always an issue as the pensions will not be realised until a party attains the requisite age. A business which has been acquired or set up during the marriage will also be placed in the family pot! Parties can be reluctant to have those businesses valued, particularly from an independent

forensic accountant assigned by the court.

The second most common dispute is the children; the disputes are where and with whom the children will live and how often the second party will spend time with their children. The courts are inundated with parties coming to court with applications for child arrangement orders under the Children Act 1989. This can determine where the child(ren) will live or how often one party can see their child(ren). Prohibited steps orders may prevent parties from attending at the children's school or taking the children overseas for holidays if the facts require that. Non-molestation and occupation orders (as mentioned by Gemma Lindfield below) arise when it's time to stop domestic abuse or remove one party from the family home.

Child maintenance can also be an issue, particularly where one party believes the other is



Gemma Lindfield



Amelia Nice



Katherine Duncan



Jaqueline Julyan S.C.

earning more than they say. Child maintenance is obligatory for any biological parent of the child, at least until they reach the age of 18. So how much must one party pay? That is determined by your income and lifestyle. On a maintenance application, vouching documentation verifying your income must be filed with the court so the Judge can make proper provisions for the child.

- Hilary Lennox

## Does the case relating to the children always have to be decided by the Court?

On the 19th July 2016 'The Family Law Arbitrators Children Scheme' was launched, backed by the President of the Family Division. The Children Arbitration Scheme will deal with a range of private law children matters, including:

- Internal relocation within England and Wales (but not yet external relocation);
- Child arrangements orders;
- Holiday arrangements – though not currently applications for the temporary removal of a child from the jurisdiction;
- Change of name;
- Education disputes;
- Prohibited Steps Orders.

Over 40 arbitrators have already been trained under the Children Arbitration Scheme and more are expected to follow once the scheme gets properly underway.

It has been argued that the Scheme will provide a flexible alternative to court proceedings.

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The advantages will be:

- Speed, convenience and cost;
- Choice of Arbitrator;
- Confidentiality;
- Flexibility over content and timing;
- Informality.

Obviously, as with a court application involving children, the welfare of the child is paramount in the decision making process. The instruction of an independent social worker to ascertain the wishes and feelings of the children will be a key part of the new Children Arbitration Scheme, where appropriate.

An interesting situation will arise if the children, as in the case of *Mabon v Mabon and Others*, want to be heard, being independently represented by Counsel. Currently, the Arbitrator will not meet or interview the children. One assumes that should such a situation arise then the case will have to be transferred to the Court.

- Roger Birch

## What circumstances necessitate the use of domestic injunctions in a divorce case? What are the specific protection measures for children?

Since the Family Law Act in 1996, it is possible for a spouse, or other associated person, to apply for an Occupation Order or a Non-Molestation Order. These are civil orders, although the breach of the latter is a criminal offence with a maximum penalty of 5 years' imprisonment. Both orders may be applied for without notice to the other party, in the first instance.

An Occupation Order delineates the rights of those who are entitled to live in the family home. It may be used to remove an abusive spouse from the matrimonial home or restore the injured parties to it. On occasions, it can outline who may use what part of the home. It may also outline who is to pay the rent or the mortgage. The court will take a wide range of factors into account when deciding whether to make an occupation order. These include, but are not limited to: the housing needs and housing resources of each of the parties

and any relevant child or children; the parties' respective financial situations; the likely effect of either making or not making an order on the health, safety and wellbeing of the parties or any child; and the conduct of the parties. Often, occupation orders are made when one party has used or threatened violence against the other. In making provision about the rights of the spouses over the matrimonial home, it therefore protects any children who are involved.

A Non-Molestation Order essentially injuncts an abusive spouse, or associated person, from being abusive towards the victim and any children of the marriage. The order may prohibit various types of conduct. Examples are: from being physically or emotionally abusive; contacting the applicant and any children; and coming within a certain proximity of the applicant and any children. The order often prohibits direct or indirect contact or abuse, to prevent the situation where an abusive spouse may ask third parties to harass or abuse an applicant on their behalf. A



Non-Molestation Order can also allow an abused spouse space and confidence to pursue divorce proceedings, knowing that they will not be influenced by the actions of their abuser.

- Gemma Lindfield

#### Do you think that current legislation needs to change to reflect modern day relationships and if so, how?

Reform in surrogacy law is needed to reflect modern families. In June 2016, the government indicated there would be a review after a case in which it accepted the law discriminated against a single father of a child born via a surrogate who was refused a parental order.

Surrogacy in the UK is currently restricted and legally complex. Surrogacy contracts are unenforceable, which means that everyone relies on each other to honour the agreement. If there is a dispute about who should care for the child after the birth (and who should have contact), an application can be made to the family court for a child arrangements order.

Many parents cross borders for

surrogacy. The US, Ukraine and Georgia are common destinations. The law is not internationally governed, so knowledge of the law in the destination country is essential. UK law currently treats the surrogate as the child's legal mother. Who is treated as the child's father/second parent is complicated, and depends on factors including the surrogate's relationship status and where conception takes place. The English law solution is a parental order, which reassigns parenthood fully and permanently to the applying couple and extinguishes the legal status and responsibilities of the surrogate (and her partner). The Court will then examine whether the surrogate properly 'consented', whether payments exceeded 'reasonable expenses' and issues of domicile.

A review of the law should ensure that there is legal framework accessible and clear from the outset; that transfer of parentage is immediate. Currently, the surrogate is treated as the legal mother and it takes many months for parenthood to be transferred, leaving everyone in limbo. Internationally, this can be extremely problematic. Finally,

there ought to be some clarity about 'reasonable expenses'. More honesty and transparency would be more likely to protect all concerned.

- Amelia Nice

#### On what grounds are pre-nuptial agreements enforceable?

Unfortunately pre-nuptial agreements are not enforceable in the UK contrary to popular belief. When you hear prenuptial agreements some think of an iron clad document protecting their assets feverishly; for example in the US George Clooney's film 'Intolerable Cruelty', about an iron clad contract called 'the Massey pre-nup'. In the UK pre-nuptial agreements are generally a useful guide for the court to determine the intentions of the parties. However, independent legal advice should be sought by each party to prevent any inference of duress which could negate the intentions.

- Hilary Lennox

#### How does international law fit in to family law?

A number of the team have vast experience in extradition, criminal

and public law and are qualified in several jurisdictions. This is a great base when advising clients. London is a diverse city where assets are owned all over the world. Most family law cases now in London, be it finance or children, have an international element.

In nearly every family finance case I do, I have property portfolios all over the world including in the US, India, Nigeria, Ireland, Tanzania, Spain and eastern European countries. Our finance cases have property portfolios all over the world, which still form part of the marital pot and must be valued and adjudicated in London once the parties' habitual residence is the UK.

- Hilary Lennox

#### How does international family law apply to children?

Given how international London is, there are a large number of child relocation cases. Members are involved in international child abduction and child relocation. These cases can develop quickly and need immediate action. A simple scenario is when the breakdown of a relationship occurs and one party wants to return home and take their child(ren) with them.

This scenario is not easy if it's Europe (Brussels II applies), but it is even more difficult when it's back to a country like the US, Australia or in Africa where the distance alone is an issue. Determining contact with that child is the prevailing issue and the financial position of parties is relevant when determining how to facilitate the contact when the child is thousands of miles away. If a country is not a signatory to 'The Hague Convention', it may be impossible to seek the return of that child. There are several countries not signatories to the Hague convention including but not limited to Pakistan and Iran.

- Hilary Lennox

#### Does the child have a say in the court room?

The starting point is Article 12 of the UN Convention on the Rights of the Child (CRC) which states:

"States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

Whilst the CRC has not been incorporated into UK domestic law, Mr Justice Peter Jackson has stated that "Article 12 of the CRC carries a moral, though not legal, authority."

The procedural rules in England and Wales left it to professions to communicate with the child and pass on that communication to the Court. In private law proceedings, it is carried out by CAFCASS reporting officers, and in public law proceedings (care proceedings) it is carried out by the Children's Guardian with the help of the child's lawyer.

It is not always the case that a CAFCASS reporting officer or the Children's Guardian will automatically be accepted as the "Voice of the Child" in court. In the case of *Mabon v Mabon and Others* was an action by the mother against the father for a Residence Order. A CAFCASS officer filed his first report and all six children were jointed in the proceedings as parties to be represented by the Guardian. During the trial the three eldest children, 13, 15 and 17, sought to be separately represented; the Judge refused. On appeal to the Court of Appeal the children's application was granted. In the case of *Mabon v Mabon* there was a conflict between the mother, the father and the Children's Guardian. The old system of paternalistic approach has been replaced by considering, where

appropriate, the child's wishes. Of course, such attendance or non-attendance will depend on the age and level of understanding of the child and other considerations.

- Roger Birch

#### Who else on the team is involved in forced marriage and family law matters?

Jacqueline has an international family practice and is an expert in the field. Such is Jacqueline's knowledge, that she is often called upon to provide expert reports to international courts on international family law is a Fellow of the International Academy of Matrimonial Lawyers (IAML), and serves on a number of committees. She is a member of the International Society of Family Law (ISFL) and the Family Law Bar association (FLBA).

Katherine Duncan, instructed by the Metropolitan Police Services, successfully secured a forced marriage protection order, to prevent a teenage girl from being forced into marriage. Her father had made threats to take her abroad against her will and have her raped and married to a man of his choosing. When she refused, he threatened to kill her. The forced marriage protection order was made against the girl's father, mother and elder brother. As part of the order, a passport order was granted to prevent the girl from being taken abroad, and to prevent her father leaving the country without first notifying the police.

- Katherine Duncan & Jacqueline Julian S.C.

#### What are the current tax advantages of being married and are there any tax advantages for co-habiting unmarried couples?

Couples who are married or in a civil partnership can claim the Marriage Allowance if the following apply: one partner does not earn any money or their income is under £11,000; and the other partner's income is between

£11,001 and £43,000. You can still apply for a Marriage Allowance if one partner is currently receiving a pension, or you live abroad (provided you are entitled to a Personal Tax Allowance in the UK). A Marriage Allowance allowed the partner who is earning the lower income to transfer £1,100 of their Personal Tax Allowance (currently the first £11,000 of a person's income is tax free) to the higher earning partner. This can reduce their tax bill by up to £220.

The Capital Gains Tax exemption is effectively doubled for married or civil partnership couples. Spouses can transfer assets between each other tax-free during their lifetime. Currently Inheritance Tax is charged at 40% on estates worth more than £325,000. However, if you are married or in civil partnership, all assets can be passed to the surviving spouse without Inheritance Tax being

levied. When the second spouse dies, it is possible that the two allowances can be combined when passing on assets to the next generation. This means that couples who are married or in civil partnership can leave £650,000 to their children before inheritance is applied.

Cohabiting couples do not benefit from these tax advantages. However, many pension schemes recognise cohabiting partners alongside spouses and civil partners, provided certain conditions are met. Typically these conditions require the couple to have been financially dependent on one another and living as if married. All couples, whether they are married or living together are treated in the same way when they are assessed for entitlement to most welfare benefits, Working Tax Credit or Child Tax Credit.

- Katherine Duncan LM

### About 5SAH Chambers

The Five St Andrews Hill family team is a growing team qualified in several jurisdictions and maintains a strong presence in all areas of family law providing practical advice and effective court advocacy.

Members are experienced family practitioners also in extradition, crime and public law, which is a great base when advising clients and solicitors in London and internationally as there is generally an overlap.

Our barristers act in leading and landmark cases and understand how sensitive family cases can be. The team are friendly and approachable and treat all enquiries in complete confidence.

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