



Welcome to the Spring edition of the College Chambers newsletter. In this publication you can expect to find articles covering a wide range of legal issues all of which we are able to further advise upon, should you wish. We hope you will find the content both topical and of interest.

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## WE ALL STAND TOGETHER

The Legal Services Commission (LSC) are currently negotiating with the Family Law Bar Association (FLBA) following its proposal to reduce the family bar's annual Public Funding budget from 1 April 2009, by £6.5million. The LSC propose to fund the reduction by a massive cut to the barrister's graduated fee scheme in private family law work (children and ancillary relief cases). The LSC gave notice of the proposed cuts at 4pm on the 23 December, Happy Christmas!

To counter the proposals, the FLBA is utilising data gathered in a comprehensive fees survey of all FLBA members in October 2008. College Chambers, who oversaw the collation and submission of data from all chambers in Wessex, awaits the outcome of negotiations with bated breath!

Douglas Taylor is the FLBA's fees representative for Wessex and represents the Bar on the Family Justice Council, he would be pleased to answer your queries regarding the LSC's proposals. The LSC amended its proposals at the last moment to provide for the whole of the cut to fall on private law cases, rather than sharing the cuts with public law cases. Would it be bad publicity if they cut fees in public law work in the light of Baby P?

In November 2007, the LSC admitted that it was making a profit on private law work because its income from the realisation of legal aid charges (secured against legally aided parties' homes), outstripped the cost of historic and current public funding. In light of this admission one is forced to question the LSC's motives for its proposed cuts.

An even bigger challenge to the Public Funding of family work looms in April 2010. ONE CASE ONE FEE. It will affect all legal aid family practitioners from both sides of the profession and is regarded by many as a "divide and rule" tactic.

Wayne has spoken with a number of solicitors regarding these proposals and the consensus is that the proposed fees are not workable: £297 for two days advocacy [solicitor or counsel], 'all in', in private law cases.

Wendy Hewstone at Access Law in Southampton, is the Law Society Council member for the Legal Aid Practitioners Group and is responding to the LSC proposals via LAPG and the Access to Justice Committee of the Law Society. If you have any comments you wish to pass to her she can forward them on your behalf; or, alternatively the Law Society, Bar Council, Association for Child Care lawyers, Resolution, LAPG and Family Justice Council are responding and you may respond through them. Please note, the consultation period closes on **18 March 2009**.

The LSC proposals seem badly constructed throughout and it is difficult to determine what figures the LSC is using for its calculations. The FLBA have already been able to highlight a number of mistakes and miscalculations in the consultation paper.

There are proposals to taper fees, so that for private family cases the hearing fee reduces after five interim hearings (seven for public law cases) even if there are a greater number of hearings

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## DIARY OF EVENTS

- SATURDAY, 16 MAY 2009  
COLLEGE CHAMBERS' CHARITY BALL  
De Vere Grand Harbour Hotel, Southampton  
7pm - 2am - £45 per person

For further details of any of these events, or to reserve your place, please contact  
**Beryl Harris on (023) 8023 0338**

# BEATING A PART 36 OFFER-ish:

On 6 April 2007 reforms of CPR Part 36 came into force. The Court of Appeal gave guidance on these reforms in *Carver v BAA plc* [2008] EWCA Civ 412. It was generally accepted under the old rules on money claims that if the claimant beat the defendant's payment into Court by as little as £1 then the defendant would be deprived of the benefits of Part 36. Under these rules it was a question of whether the claimant had bettered the defendant's payment or the defendant had been held liable for more than that offered by the claimant. Under the new rules these concepts have been replaced by consideration of how advantageous the result is compared to the offers made.

In *Carver* the Claimant recovered only £51 more than the defendant's Part 36 payment. The Court confirmed that this case was covered by the new rules and that despite the Claimant beating the offer in monetary terms, the claimant should pay the defendant's costs from the last day upon which that Part 36 payment could have been accepted. It concluded that the new tests went beyond monetary comparison and required a wide ranging review of all the facts and circumstances of the case. This included the emotional impact on the claimant in continuing the claim. The Court of Appeal concluded that 'No reasonable litigant would have embarked upon this campaign for a gain of £51'.

*Carver* has been criticised for being a blow to legal certainty and likely to increase costs litigation. On the other hand it has been applauded for encouraging early resolution and obliging the conscientious consideration of all Part 36 offers. Nonetheless, it is clear that Courts will now be taking a very careful look at the way in which litigation has been conducted and the reasonableness of negotiations.

*Carver* was revisited by the Court of Appeal in *Morgan v UPS* [2008] EWCA Civ 1476. Here the defendant's Part 36 offer had been beaten 'by a whisker'. Both parties were criticised by the Judge at first instance for the way in which they conducted the case. The Court of Appeal upheld the first instance decision that the defendants should pay the claimant's costs on a standard basis. Some commentators have suggested that this represents a backlash against the legal uncertainty created by *Carver*, but *Morgan* does not openly criticise the *Carver* decision and confirms that Courts should consider all the circumstances in determining whether the result is more advantageous than an offer.

The CPR Rules committee will be reviewing the new rules on Part 36 and Jackson LJ has been charged with considering all aspects of the civil costs system in a working paper by May 2009 and a final report by the end of this year. However, he gave an indication of his approach in his recent first instance High Court decision in *Multiplex Construction (UK) Limited v Cleveland Bridge UK Limited* [2008] EWHC 2280 (TCC). In this case he arrives at eight general principles behind appropriate costs orders (paragraph 72). These principles advance a thorough consideration of the conduct of the parties (including their approach to negotiation) and suggest that outright rejections of reasonable offers without further negotiation may be 'penalised'

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## HOW SAFE IS YOUR CONSENT ORDER?

It seems that whenever we turn on the news these days, there is nothing but doom and gloom. On a daily basis companies are going bankrupt, people are losing their jobs, and house and share prices are spiralling downwards. Indeed, as the recession deepens, it is likely that in the future we will not only have to consider the *Matrimonial Causes Act 1973* but also the *Insolvency Act 1986*. One such recent case was *Avis v Turner* [2007] EWCA Civ 748. In that case Mr. and Mrs. Avis divorced in 1985, and in the course of ancillary relief proceedings it was ordered by consent that the former matrimonial home be held on trust for sale to be divided two-thirds to the wife and one-third to the husband on effectively Martin terms. Mr. Avis was declared bankrupt in 1989. In 2005, 16 years on, his trustee-in-bankruptcy sought an order for a sale of the FMH pursuant to s.14 and s.15 of TOLATA 1996, notwithstanding the terms of the earlier consent order. The Court of Appeal held that on an application by a trustee under TOLATA, s.15 must be read in light of s.335(A) of the *Insolvency Act 1986* which provides that where such an application is made after the ending of one year beginning with the first vesting of the bankrupt's estate in the trustee, unless there are exceptional circumstances, the interests of the bankrupt's creditors outweigh all other considerations. So was there anything

exceptional about Mrs. Avis's case - a poor housewife, who was living on a low income and the victim of a bankruptcy that had occurred many years after she had divorced her husband? Judge Pelling QC, who heard the second part of the case on 17 April 2008, held there was nothing exceptional, although he allowed a generous period before the property was delivered up to the trustee!

The days of trusts for sale have long gone, but the current practice of a charge on the FMH would still fall foul of an application under TOLATA. So what do you do if you act for the wife in a case such as this? The starting point must be the date of the bankruptcy. By virtue of s.283A, *Insolvency Act 1986*, at the end of a period of three years beginning with the date of the bankruptcy, any interest of the bankrupt in a dwelling house which at the date of the bankruptcy was the sole or principal residence of the bankrupt's spouse, ceases to be comprised in the bankrupt's estate. If that does not help negotiate with the trustee, the reality is that in the current climate, he may have no greater success in selling the house than your client!

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# CONTACT ORDERS ARE NOW BOUND TO WORK-AREN'T THEY?

Following a lengthy period in the wings, family courts now have seen the unveiling of the long awaited amendments to the Children Act 1989, s.11. On 8 December 2008 Part 1 of the Children and Adoption Act 2006 came into force, introducing the powers of family courts to make contact activity directions ("CADs") and contact activity conditions ("CACs"). The courts also have broader powers of enforcement of contact orders.

CADs, which can be made at an interim stage, will be the focus of judicial attention whenever called upon to consider the appropriateness or otherwise of making, varying or discharging of a contact order. The most anticipated of such directions are those that will require the attendance by parties at mediation, domestic violence perpetrator programmes (DVPP) and/or parenting programmes. Success or failure of such directions however is likely to be subject to both the availability and funding of activities. The anxiety of many family practitioners eagerly watching on in these early days of CADs is that, rather like that which has variously been described as "a postcode lottery" in terms of healthcare provision across the regions, there is likely to be a similar inconsistency in terms of the availability of activities from one area to the next. The potential for such inconsistency is considered by many to be worrying – bearing in mind the fact that the paramountcy principle under s.1 of the 1989 Act remains the backbone of decisions in such cases.

CAFCASS, on 19 January 2009, published a list of contact activity service providers. Nationwide there are 87 providers of co-parenting services but only 7 providers of the DVPP (with only 2 based on the South Coast). Ironically, the latter course which is the least available is perhaps the most likely to be called upon. It seems therefore that the stark reality is that delays are likely to be introduced into cases through waiting for availability for spaces on what is said to be an intensive 60 hour course. CAFCASS has confirmed that publicly funded parties will not have to pay and will be fully subsidised by The Department for Children, Schools and Families (DCSF). Privately paying parties however, will have to pay unless able to claim financial hardship. Regrettably and notwithstanding the delay in these measures coming into force, the Secretary of State has not yet determined the hardship scheme that would operate in such circumstances.

CACs provide the family courts with the power to impose conditions upon a party who is the subject of a contact order. The court is obliged to be satisfied that the: (1) activity is necessary and appropriate; (2) provider is located within a reasonable distance; and (3) chosen activity takes account of the likely impact on the subject of the condition. After the making of a CAC, the court may instruct CAFCASS to monitor the compliance with the order and report to the court accordingly.

Penalties for breach of contact orders have been broadened by the recent changes. Attached to contact orders there must now be a notice warning as to the consequence of breach. Upon proof to the criminal standard that, without reasonable excuse, a party has failed to comply with the terms of a contact order, the sanctions range from financial compensation by one party to another in respect of financial losses arising from the breach, to an unpaid work requirement (40 to 200 hours).

Compliance with CADs/CACs will test and highlight levels of commitment to the child[ren] at the heart of the order. Whether or not these changes will be the final curtain call for repeatedly breached contact orders remains to be seen. Time may tell...

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# MENTAL HEALTH ACT 2007 WHAT'S NEW?

The Mental Health Act 1983 had governed the care of those with mental ill health for 25 years; however, the Mental Health Act 2007 is now in force. Here are a few examples of the new law:

- The definition of "mental disorder" has changed. Section 1 now simply states, "Mental disorder means any disorder or disability of the mind."
- Supervised Community Treatment enables some patients to live in the community subject to Community Treatment Orders (CTO), (these replace Supervised Discharge Orders.). Conditions will be attached and patients can be recalled to hospital without notice.
- A patient may apply to displace their nearest relative (NR),
- The "treatability test" has been replaced. Section 4 requires that appropriate medical treatment is available for the patient. Section 145 states that the purpose of the medical treatment has to be to, "alleviate, or prevent a worsening of, the disorder or one or more of its symptoms or manifestations."

It may be that the rationale behind the new law is derived from the Government's desire to avoid headlines associated with the criminal conduct of those with serious personality disorders, which many psychiatrists regard as 'untreatable' (e.g. Michael Stone who murdered Josie Russell's mother and sister)

and the desire to enhance 'Care in the Community' (a.k.a., saving money on hospital beds). Or it may be these changes will improve the system for those detained .....

At first glance, the new 'appropriate medical treatment' test might appear to assist an application for discharge, as many conditions do not have effective medications/treatments; however, Section 7(1) widens the old definition of 'medical treatment' in the new Section 145(1) to include,

*"nursing, psychological intervention and specialist mental health habilitation, rehabilitation and care."*

The new definition includes 'specialised services' offered by nurses and social workers, which aim to improve or assist the patients' physical and mental abilities and social functioning. The question remains, what is a 'specialist service'?

There will be few cases where the professionals will not offer some treatment capable of satisfying this definition; hence, it will be difficult to facilitate a discharge merely on the basis that there is no effective 'treatment'. How will the Judges of the new Upper Tier interpret such a definition? Watch this space...

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*Agency  
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Costs  
Criminal Law  
Detailed Assessments  
Employment Law  
Environmental Law  
Family Law  
Housing Law  
Immigration & Asylum  
Inheritance & Probate  
Insolvency  
Intellectual Property  
Landlord and Tenant  
Land Law & Real Property  
Licensing  
Mental Health Law  
Mediation  
Partnership  
Personal Injury & Death  
Planning Law  
Professional Negligence  
Sale and Supply of Goods  
Social Security Disputes  
Trust*

## HAPPY BIRTHDAY!

College Chambers turns 20 this year having been started by the (now retired) HHJ Roger Shawcross and Robin Belben back in 1989. In addition to our birthday celebrations College Chambers have also set themselves a target of raising £20,000 for charity in its birthday year.

College Chambers formalised its commitment to raising money for charity with the inaugural Charity Ball in 2005. This raised a massive £15,000 and we haven't looked back since. The Ball went on to be a huge success in 2006 and 2007, and is now a firm biennial fixture.

2008 saw the first College Chambers Charity Quiz Night, and a Twenty20 cricket match between members of Chambers and Isle of Wight solicitors. In total over £50,000 has been raised for a number of charities.

2009 therefore sees the return of the Ball. Many of you will remember the De Vere Grand Harbour Hotel "rescuing" the 2005 Ball with only two days' notice; since then many members of Chambers have returned to events at the hotel and been impressed by its new and improved menu.

As a result, we are working in partnership with the

De Vere Grand Harbour this year and look forward to welcoming you there on Saturday 16 May 2009. In keeping with tradition we have selected a children's charity and a health related charity to support on the night – these are Ocean FM's Help a Local Child and The Anthony Nolan Trust.

We are all fully aware of the difficulties experienced by many in the current economic climate and have worked hard to keep the ticket price as low as possible – all tickets will be just £45 per head – to include a drinks reception, three course meal and a full evening of entertainment.

In addition, there will be a Quiz Night later this year and individual members of Chambers are participating in their own fundraising events.

We do hope you will be able to join with us in making 2009 a truly memorable year for our chosen charities as well as helping College Chambers celebrate its 20th birthday!

*Louise Harvey*

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through no fault of the advocate. The fixed fees are very low and bear little relation to current fee levels.

If our professions are forced to accept these preposterous proposals, or even an improved version of them, we believe that it will be essential to develop close and mutually advantageous business/financial relationships with our solicitors.

On that note, Wayne would be pleased to discuss the situation with you at your convenience. We recommend that any solicitor dealing with publicly funded work should attend the various workshops that have been planned throughout the area by the LSC this month. You will see us there. If you have any queries or thoughts concerning the proposed changes, then please feel free to call Wayne in Chambers and he will do his level best to answer your queries.

The proposed cuts will undoubtedly effect the administration of justice. Judges are already concerned about the increase in the number of parties appearing in person, the consequences for listing and for the potentially damaging effect on the procedures adopted in all Private Law cases, that currently lead to such a high proportion of cases settling at dispute resolution hearings.

The LSC's proposals threaten the viability of this work for us all and therefore the availability of any competent solicitor or counsel to undertake such important work. Together we stand, divided we fall!

*Wayne Effeny, Douglas Taylor  
& Wendy Hewstone*

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## WE WELCOME YOUR COMMENTS...

- Would you like us to give a lecture on a particular subject at your firm?
- Do you have any friends or colleagues you think should receive our newsletter?
- Are our records of your details correct?

## NEWS FROM THE CLERKS' ROOM...

The Clerks would like to inform you that we accept instructions to prepare pre-action documents / advices / pleadings / or any other paperwork, such as PLO documents and schedules in preparation for the hearing within 15 days or if you require a shorter

time frame then please contact us and we will endeavour to assist.

If you have any queries on any aspect of work undertaken by us, please contact us on: (023)80 230338 or clerks@college-chambers.co.uk