A fair and reasonable decision

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To many couples, family lawyers are viewed as a necessity only when a relationship breaks down. However, the involvement of a family lawyer at the beginning of a relationship can minimise the conflict (and cost) at the end.

A case which highlights this is *Kernott -v- Jones [2011] UK SC 53*, which recently hit the headlines. Mr Kernott and Ms Jones never married. Instead they cohabited, purchasing a property jointly in 1985 (with no Declaration of Trust). When the relationship broke down in 1993, Mr Kernott moved out, while Ms Jones stayed in the house, bringing up the children and paying the mortgage. Thirteen years later, in 2006, Mr Kernott decided he wanted his 'share'.

The case went from County Court to High Court to Court of Appeal. Finally, four years after the case started in 2007, it went to the Supreme Court, where they restored the original Order made by the County Court in 2007. The Supreme Court followed earlier case law *(Stack -v- Dowden [2007] UKHL17)* and ruled that where a couple have bought a property jointly, the Court can declare that a change in circumstances has caused the ownership to change, even if not expressly agreed between the couple.

The aspects the Court considered were:

1. If the home was bought jointly, the presumption is that each person would receive 50% of the equity. However, this presumption can be displaced by evidence of 'common intention'.

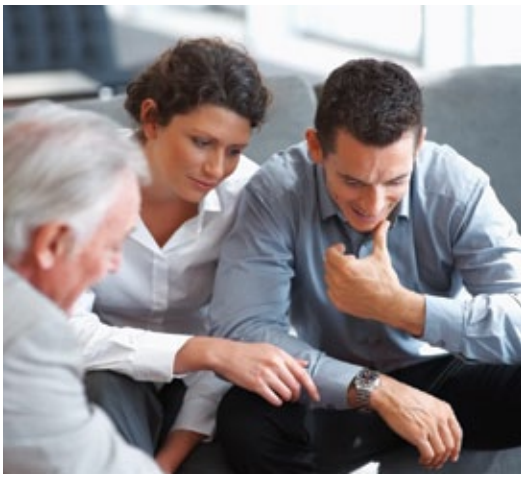
2. 'Common intention' should be objectively deduced (inferred) from the conduct of the parties involved (e.g. relationship breakdown/ payment of mortgage).

3. If the actual shares in the home are not clear based on intention, then the Court can impute an intention which is 'fair and reasonable', taking into account the 'whole course of dealings' between the couple.

The 'fair' result here was 90% to Ms Jones and 10% to Mr Kernott.

This could have all been avoided had Ms Jones and Mr Kernott, either when they purchased the property or when the relationship broke down, set up an agreement stating how they wished the property to be held, and in what shares. Such an agreement could have dealt with how the net proceeds of sale were to be divided when the property was sold.

Ironically, if they had taken appropriate legal advice at the time of the relationship breakdown, four years of involvement with lawyers and the Courts could have been avoided.



The role of the family lawyer continues to evolve. As the above case shows, involvement at an earlier stage (before Court) can minimise litigation. The role of the family solicitor can be proactive, rather than reactive, and deal with situations at the outset, such as Ante-Nuptial Agreements which will hopefully minimise any potential litigation should there be a later divorce.

These agreements range from multi-jurisdictional cases involving offshore assets, complicated trusts etc, to the ring fencing of separate pre-acquired property and everything in between. Each agreement will be individual, as every couple is, and whilst they can be viewed by some as unromantic, they can prevent considerable litigation, which will be costly in financial and emotional terms at a distressing time.

An area in which Ante-Nuptial Agreements can be useful is where a beneficiary of a Trust is to be married and the Trustees are concerned about the effect a subsequent divorce may have on the Trust(s).

The English Family Courts have an uneasy relationship with Trusts. If a Court makes an award, they like it to be adhered to. However, this sometimes doesn't happen if Trusts are involved, particularly if the majority of assets are contained within family Trusts. In such cases the Trustees, quite rightly, put their duty and obligations to the other beneficiaries first. In this regard, the English Courts have created (through case law) the concept of 'judicious encouragement': they 'encourage' Trustees to assist their divorcing beneficiary and in turn the ex-spouse.

The most recent example of this is the case of *BJ -v- VMJ (Financial Remedy: Overseas Trusts) [2011] EWHC 2708 (FAM)*, which involved two Jersey Trusts and a company incorporated in the British Virgin Islands. Mr Justice Mostyn decided that all the assets of the case, including the Trust property, amounted to matrimonial property and should therefore, in principle, be shared equally.

The award Mr Justice Mostyn proposed required (as part of it) that the two settlements were to be varied. However, unusually, his Order would not be perfected (i.e. made final) until the stance of the Trustees had been ascertained, because if the Jersey Trustees would not cooperate then he would have to deal with the wife's entitlement differently.

The husband, who was frail, did not want this to happen as he was attached to the property where he lived (which would have needed to be sold if the Trustees would not assist). Mr Justice Mostyn gave the Trustees 'encouragement' whilst warning them of the implications that not heeding his 'encouragement' would cause considerable detriment to their beneficiary.

Family law is not, despite media perceptions, about Court battles. It is often more about achieving settlements, helping couples to reach agreement at whatever stage their relationship may be, minimising conflict where possible and providing couples with certainty about their finances.

If you need advice on any aspect of family law please contact Shona at Forsters Solicitors on 020 7863 8539 or via shona.alexander@forsters.co.uk.