

Public Law Newsletter

DATE

December 2009/January 2010

VOLUME

#5

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Homelessness
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Community Care
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Discrimination
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The new Tribunal system is now up and running and getting through some of its early teething problems. In this edition John Friel sets out some of his concerns about the new rules while Morayo Fagborun Bennett takes us through the latest cases in housing law. If you have any questions please contact Louise Poppelwell on louise.poppelwell@hardwicke.co.uk

This month we have been...

- **Kerry Bretherton** has been in the Court of Appeal dealing with the principles of compensation for wounded soldiers
- **John McKendrick** has been for a run – he ran a sponsored half marathon for Plan International. The runners of you will know that his time of 98 minutes was pretty impressive
- **Laura Tweedy** and **Kerry Bretherton** gave a seminar at the Property Bar Association Annual Conference about the Impact of Public Law on Property Cases
- **Andy Lane** spoke to a conference about the Weaver decision and human rights defences to possession claims
- **David Lawson** has been ‘modernised’ with judicial review hearings in the new regional centres and the Upper Tribunal
- **Barbara Hewson** acted for the Official Solicitor in a test case on whether the media can attend Court of Protection hearings: *Independent News Media & others v A* “Times” LR, 17 November 2009. She was led by Gavin Millar QC. The case is going to the Court of Appeal.

In February **Alison Meacher** is speaking at the Public Sector Housing Law Conference organised by Jordans

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Hardwicke's out of hours service

Our barristers and Practice Team are used to supporting and making **out of hours**, including weekends and during the festive period, applications as well as giving out of hours advice to solicitors and approved professionals in both private practice and local government. Our service covers a range of **Public Law** areas including Homelessness, Court of Protection & Mental Capacity, Mental Health, Adult Social Services and Education. If you have any queries please contact the **Senior Practice Manager Daniel Kemp** on daniel.kemp@hardwicke.co.uk or 07876 215584 to discuss how to access this service.

SENDIST becomes HESC - one year under the new rules

Hardwicke's **John Friel** gives his reflections on the possibility of orders to assess a child under the new HESC rules:

Orders for Assessments

The most controversial Tribunal Rule is the ability of the Tribunal to order an assessment of the child (Rule 5). Rule 7 applies a penalty for failing to comply with the rules, ie it permits the Tribunal, in an appropriate case, to take action against a party who does not comply.

It is interesting to consider the position in the Family Division. Provision is made in Rule 4.18 of the Family Proceedings Rules 1991 for the examination of a child for the purposes of an expert report. Leave of the court is required before a child may be medically or psychiatrically examined or otherwise assessed. This restricts the examination or assessment of the child - not the expert giving their view. The Courts use the "**welfare principle**" in interpreting this rule.

The principles were set out by Walls J in *Re G (Minors Expert Witness)* [1994] 2 FLR 291. It is the duty of the court to ensure a fair trial and to exercise control of the evidence. Permission to use expert evidence would be considered discipline by discipline and based on the specific facts of the case and the relevance of the expert evidence. Orders giving general leave to the parties to show documents to experts should never be made. An order granting leave should identify the expert or define the area of expertise. Resource implications should be considered.

In *H -v- Cambridgeshire County Council* [1996] 2 FLR 566 it was said when granting leave that the court should seek to identify the issue which could be usefully addressed by the proposed evidence. Johnson J referred to problems arising from the delay caused by such orders and negative effects on the children.

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Added to this is the issue of consent. A “child” under Part IV of the Education Act 1996 might be up to 20 years old and hence an adult. An assessment without consent in those circumstances might be professional misconduct for the professional carrying out the assessment. In any event many of the children may be “Gillick competent” (*Gillick -v- West Norfolk and Wisbech Area Health Authority* [1985] 3 All ELR 401). In *South Glamorgan County Council -v- W & V* [1993] 1 FCR 626 the High Court held that it could not override the wishes of the child and give consent for a medical assessment where the child had refused it. In my view the current rules do not properly allow for the role of the child in giving consent. There was to be a Practice Direction on the point but it was dropped.

This can cause practical difficulties, for example where a child has already had multiple assessments.

Conclusion:

Regretfully I have come to the conclusion that the current system is **over complex** and not administratively fit for purpose. It is putting together a Tribunal dealing with vulnerable children with Tribunals dealing with economic interests, the public interest or public protection. These issues are not appropriately matched.

Morayo Fagborun Bennett considers two important recent cases in housing law:

Can a local authority have a tenancy agreement with a homeless young person?

Minors are not capable of holding a legal estate in land (s.1(6) of the Law of Property Act 1925). Any purported grant of a legal estate to such an applicant will operate as a declaration that the premises are held on trust for the applicant (paragraph 1(1) of Schedule 1 of the Trusts of Land and Appointment of Trustees Act 1996). The Court of Appeal in *Alexander-David v London Borough of Hammersmith and Fulham* [2009] EWCA Civ 259, has addressed the question of how local housing associations are to discharge their duty under the Housing Act 1996 to secure that accommodation is available for sixteen and seventeen year old homeless applicants given these provisions.

The local authority (“LA”) had entered into a non-secure tenancy agreement with the appellant on its standard form for creating legal tenancies with its adult tenants. The Court of Appeal rejected the submission that an equitable tenancy had thereby been granted. It held that a conflict of interest arose when the LA wanted to serve a Notice to Quit (“NTQ”). The LA, as trustee had a duty to act in the best interest of the child beneficiary and

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to protect the trust property. The LA also had a duty to protect the public purse, including by taking possession of property, where this is necessary. It would be a breach of trust for the trustee to serve a NTQ. The LA, as both the lessor and trustee, was not merely a party to the breach but was the instigator of the breach. Further, the service of a notice to quit only on the minor beneficiary of the trust was not sufficient to terminate the tenancy that was being held by the LA as trustee on her behalf.

What to do?

LAs will need to check whether their minors' tenancy agreements identify a trustee - rather than holding the legal estate themselves as trustees. If the agreement does not do this the LA can make an application for the appointment of a new trustee, thus resolving the conflict of interest. LAs should ensure that minors are granted a license to occupy the dwelling house with a provision in the agreement for some attention or services, or to permit inspection of the premises by those charged with the child's welfare. This would prevent the grant of exclusive possession and ensure that the agreement is not merely expressed to be, but actually is, a grant of a licence rather than a tenancy. Further the LA could give an agreement to grant a lease for the period until the applicant turns 18 rather than actually grant a lease.

Morayo Fagborun Bennett

Kerry Bretherton represented the Appellant

How long is it lawful to leave a family in accommodation which is not reasonable to expect them to continue to occupy?

Answer - for so long as it is suitable as short term accommodation (*Birmingham City Council v Ali* [2009] UKHL 36, HL).

This is helpful interpretation of the provision "accommodation which it would be reasonable for him to continue to occupy" in s.175(3) and s.191 (1) of the Housing Act 1996. By s.175 (3) a person is homeless even if he has accommodation but it would not be reasonable for him to continue to occupy it. By s.191 (1) a person becomes homeless intentionally if he is responsible for losing accommodation which it would have been reasonable for him to continue to occupy. Accordingly, the homeless at home can remain in their home for as long as it is suitable as short term accommodation, but it is not lawful to leave them there automatically until a house becomes available under the LA's allocation scheme.

Morayo Fagborun Bennett

George Pulman QC	1971 (1989)
John Friel	1974
Stephen Lennard	1976
Barbara Hewson	1985
Karl King	1985
Deborah Hay	1991
Kerry Bretherton	1992
Arthur Moore	1992
Emily Formby	1993
Maggie Bloom	1994
Clive Rawlings	1994
Brendan Mullee	1996
Fiona Scolding	1996
Alison Meacher	1998
Nicola Muir	1998
Alastair Redpath-Stevens	1998
Andrew Lane	1999
Sarah Malik	1999
John Mc Kendrick	1999
David Lawson	2000
Dean Underwood	2002
Sarah Venn	2002
Morayo Fagborun Bennett	2004
Ajmal Azam	2006
Robin Jacobs	2006
Laura Tweedy	2007

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