

Overview of the Trusts of Land and Appointment of Trustees Act 1996



Exploring key aspects and procedural issues

Agenda Overview



- Basic legal principles of Trusts of land
- Declaratory relief
- Equitable accounting / occupation rent
- Orders for sale
- Procedure

Basic Principles – unmarried couple – family home - separated

Issues:

- Does A have a beneficial interest in the property?
- If so, what is the extent of their interest?
- How can that interest be realized?
- Should there be a payment from one party to the other?
- Costs risks

Step 1 – beneficial interest?

Straight to *Stack v Dowden* / *Jones v Kernott*?

Where the parties engaged / agreement to marry / civil partnership?

If so – property in which they had a beneficial interest during the engagement subject to same rules as H & W in equivalent circumstances:

- s.2 – Law Reform (Miscellaneous Provisions) Act 1970
- s.17 – Married Women's Property Act 1882
- s.7 – Matrimonial Causes (Property and Maintenance) Act 1958
- s.37 – Matrimonial Proceedings and Property Act 1970
- s.74 – Civil Partnership Act 2004
- 3-year limitation period from termination of the agreement
- Family Procedure Rules

Declaration of trust?

- If established – unlikely to consider common intention constructive trust
- Usually conclusive – *unless varied by subsequent agreement*
- Consider vitiating factors
 - a) Fraud
 - b) Mistake
 - c) Undue influence
 - d) Sham
 - e) Proprietary estoppel

Subsequent Agreement

***Stack v Dowden* [2007] UKHL 17**

- No clarification what was meant by 'subsequent agreement'
- Does it include a common intention constructive trust?
- Are the requirements of s.2 Law of Property (Miscellaneous Provisions) Act 1989 needed

***Pakhanria v Chandegara* [2012] EWCA Civ 1438** – Patten LJ – s.2 LP(MP) A 1989 agreement needed.

***Nilsson v Cynberg* [2024] EWHC 2164 (Ch)** – James Pickering KC – held 'subsequent agreement' inc. common intention
- *distinguished facts from Pakhanria* – *b/c the agreement re c/i related to intention at the time or before declaration not subsequent to it.*

Declaration of trust – what am I checking?

- TR1
- JO
- Deed – check formalities (especially attestation)
- Cohabitation agreement

Those checks done...no solution – what next?

***Stack v Dowden* [2007] UKHL 17 & *Jones v Kernott* [2011] UKSC 53**

- Common intention constructive trust NOT resulting trust
- Equity follows the law – what does the proprietorship register say?
- Joint names case / sole name case?
- Who bears the burden of rebutting the presumption?
- Could be an express agreement – oral, ineffective deed, writing, texts...
- What can be inferred from their discussions / conduct?
- Is detriment required to establish a constructive trust? ***Hudson v Hathaway* [2022] EWHC 631 (QB)**

How do the courts infer the common intention?

- The whole course of dealings
- Start with the conveyancing file
- Mortgage application
- Emails, texts, witnesses (oral agreement is valid see ***Ely v Robinson* [2016] EWCA Civ 774**)
- Bank statements – joint – who paid for what?
- Children?
- *Stack* = context is everything
- *Jones* = intentions can change over time

Imputation

- If the court can infer that the property was to be held on trust for the parties AND can infer from the whole conduct of the parties what their intended shares were – will make an order in those terms.
- If not possible – court can impute what it thinks the parties have intended at the outset or over time.
- Inferred intention = objective assessment of what the parties' actual intention was in light of actions and statements.
- Imputed intention = attributed because no actual intention can be deduced from their actions / statements.
- Imputation = what they would have intended.
- Inference = what they actually intended.

Proprietary Estoppel

- Can be pleaded as well as common intention constructive trust
- Requirements are:
 - Assurance – inducement, encouragement, leads other to believe that they will have an interest in the property.
 - › Express, passive / active encouragement
 - › Expenditure
 - Detrimental reliance – they act on the assurance with knowledge to the legal owner.
 - › Detriment
 - › Must be linked with the assurance
 - Unconscionability – owner acts unconscionably by denying the other a right or benefit in the property

Equitable Accounting

- Common law (i.e., outside TOLATA 1996)
- Separate from division of equity
- Giving credit for things that have increased value of the property
- Avoids giving the non-paying party a windfall (***Murphy v Gooch* [2007] EWCA Civ 603**)
- Examples include:
 - Mortgage payments after one party has left and stops paying (reduction in mortgage capital)
 - Renovations / improvements (during cohabitation or post-separation)
- Cannot double count financial contributions
- If beneficial interests not equal, this is reflected in the credit given

Basic principles

- Fact-specific
- Mostly occupation rent is offset in its entirety against the mortgage interest paid by the person who remains in occupation
- If A pays some mortgage capital usually should be given credit for half the capital repayments on the mortgage which increase equity
- Renovations and/or improvements carried out **without** the authority or consent of the co-owner, = without more, not entitled to an **account** in respect of those works
- If renovation/improvement have been carried out with the express or implied agreement or approval of the co-owners, or at their express or implied request = entitled to credit of **lower of** $\frac{1}{2}$ of the increase in the value of the property $\frac{1}{2}$ the actual cost

Occupation Rent

- *Stack v Dowden* – emphasis on ss. 12 to 15 TOLATA
- SP = beneficiaries have a right to occupy the property
- Trustees right to exclude one but not all beneficiaries from the property (s.13(1))
- Trustees may impose reasonable conditions on a beneficiary re occupation (s.13(3))
- Conditions include payment of outgoing, expenses or assume any other obligation re the property (s.13(5))
- Can include payments of compensation to the excluded or restricted party (s.13(6))
- 'Forceable' exclusion not essential (**Bailey v Dixon [2021] EWHC 2971 (QB)**)
- Mere fact of not living at the property not enough – must have something that makes it just and equitable for occupier to pay (see **Ali v Khatib [2022] EWCA Civ 481**).
- Contrast with **Re Pavlou (A Bankrupt) [1993] 1 WLR 1046** and **Murphy v Gooch [2007] EWCA Civ 603**.

Occupation Rent – quantification

- ***Roland v Blades* [2021] EWHC 426 (Ch)** – matter of fact and degree if there has been exclusion / restriction.
- Have regard to factors in s.15 of TOLATA
- Example of dealing with exclusion (context was a holiday home) and quantification based on usage
- Daily rate established on 'open market value' – SJE
- Cost of renting alternative accommodation

Orders of sale

- Permissible – s.14 TOLATA
- Consider s.15 factors
 - Intentions of those who created the trust – family home?
 - The purpose of the property
 - Welfare of any minor who may reasonably be expected to occupy the property as their home
 - Interests of any secured creditor
- Not exhaustive list
- Enforcement – occupation order, order under s.13 TOLATA, penal notice, court to sign documents
- Court cannot order one beneficiary to sell their interest to the other or to a trustee
- Court cannot remove a legal owner or order that they are 'removed from the mortgage'

Procedure

- County Court not Family Court (definition of court in s.23 TOLATA = High Court or County Court)
- White Book not Red Book
- High Court or County Court (if High Court – use Family Div rather than Chancery Div but then governed by CPR but PD27A (bundles) applies)
- County Court able to deal with TOLATA claims irrespective of value (art.2(1) High Court and County Courts Jurisdiction Order 1991 (SI 1991/74))
- Depends on complexity and value – High Court (Business and Property Courts)
- Do not need to be dealt with in specialist hearing centres – considered to be ordinary County Court work
- Can issue with an application under Schedule 1 Children Act 1989 – consolidate but dealt with together (e.g., **V v W [2020] EWFC B25**) TOLATA dealt with first followed by Sch 1.

Steps

- Part 7 or Part 8?
- CPR applies = pre-action protocol – letter before action – consider ADR
- Dispute of fact? E.g. A says that B made contributions, but they were rent. B says that they were not rent but contributions to household expenses as part of the overall agreement regarding the property.
- If Part 7:
 - Claim form and particulars of claim (can be served after claim form) – no witness statements.
 - Acknowledgement of Service
 - Defense (Defense and Counterclaim)
 - Reply (Reply and Defense to Counterclaim)
 - Directions questionnaires
 - CCMH – therefore need to prepare a costs budget

Procedure Cont.

- Part 8
 - Claim Form, Details of Claim and witness statement(s) or affidavit
 - Defendant – acknowledgment of service – 14 days after service of claim form
 - Defendant's evidence – WITH the acknowledgment of service
 - Claimant's evidence in reply – 14 days later
 - Listed (i) for directions - possible transfer to Part 7 but (ii) court can list for a hearing.

If Part 7...

- Costs budgets – unless shorter trials scheme in Business and Property Courts (exceptions for LiPs)
- File and service with the direction's questionnaires (CPR r.3.13) or no later than 21 days before the CCMH
- Budget discussion report – 7 days before CCMH
- Precedent H = budget
- Try and agree budgets
- Discussion form = Precedent R
- Multi-track
- Disclosure by list, then inspection, witness statements, trial timetable etc.
- Relief from sanctions procedures and extensions of time can be agreed between parties
- Judgment in default (not available in Part 8)
- Summary judgment and strike out
- **Costs follow the event (even for Part 8)**

Blurred lines

When private law and public law proceedings
collide

Typical private law cases

- Applications for 'live with' and/or 'spend time with' Child Arrangements Orders
- Applications for permission to remove a child from the jurisdiction
- Applications for parental responsibility
- Applications for a Specific Issues Order
- Applications for a Prohibited Steps Order

Features to look out for in private law cases which could elicit public law remedies

- Domestic Violence
- Parental Alcohol and/or Substance Misuse
- Poor Parental Mental Health
- Poor Parental Physical Health
- A Child who is Beyond Parental Control
- Allegations of Physical/Emotional/Sexual Abuse
- Parental Alienation
- Parental Criminality/Incarceration
- Lack of Engagement
- Volatility
- Previous/Ongoing involvement by the Local Authority (Child In Need; Child Protection Plans; Previous Public Law Proceedings)

Public law remedies

Section 7 Reports

- A S7 Report to be undertaken by a Social Worker –
 - 7(1) A court considering any question with respect to a child under this Act may
 - (b) ask a local authority to arrange for
 - (i) an officer of the authority to report to the court on such matters relating to the welfare of that child as are required to be dealt with in the report

Public law remedies

Section 7 Reports

- An appropriate direction when the child is already known to social care
 - Team Around the Child (TAC)
 - Child In Need (CIN)
 - Child Protection Plans (CPP)
 - Pre-Proceedings (PLO)
 - Recent Conclusion of Public Law Proceedings

Public law remedies

Section 37 Reports

- S37(1) gives the court the power to order the local authority to undertake an investigation of a child's circumstances as it appears to the court that it may be appropriate for a care or supervision order to be made. The report should address whether the local authority should:
 - a) make an application for a care or supervision order;
 - b) provide services or assistance for the child or his/her family; or
 - c) take any other action with respect to the child;

Public law remedies

Section 37 Reports

- S37(2) provides that the report must be completed within 8 weeks.
- Practitioners must ensure that the court spells out the reasons for the making of the s37 direction very carefully and a transcript should be provided to the local authority as soon as possible. It is not enough for the local authority to simply be told that a s37 order has been made.
- S37(3) provides that within the 8-week period the local authority must inform the court of the outcome of the investigation and if they decide not to make an application, they must inform the court of their reasons, any service or assistance provided to the family and any other action which has been taken or is proposed to be taken with respect to the child.

Public law remedies

Section 38 - Interim Care/Supervision Orders

- S38 gives the court the power to make an interim care order or interim supervision order where the court gives a direction under s37(1).
- The court has to be satisfied that the s31(2) interim threshold criteria are met, that is that there are reasonable grounds for believing that the child is suffering or likely to suffer significant harm attributed to the care given to the child, or likely to be given, not what it would be reasonable to expect a parent to give, or the child is beyond parental control. The child must be under 17 years of age.

Public law remedies

Section 38 - Interim Care/Supervision Orders

- No threshold document is required in private law proceedings
- No interim care plan/supervision plan is required in private law proceedings
- An interim care order enables a local authority to share parental responsibility for a child with his/her parents.
- An interim supervision order requires a local authority to advise assist and befriend the child and his/her parents.

The making of interim public law orders in private law proceedings

- Unusual
- Time limited - If an interim care order or interim supervision order is made following a s37 direction it shall expire after 8 weeks if no application has been made by the local authority for an interim order. If the 8-week period for the provision of the s37 report has been extended by the court the order shall expire at the end of that extension period if the local authority has not made an application.

The making of interim public law orders in private law proceedings

- The court has jurisdiction to make more than one s37 direction in any proceedings and can extend an existing direction on the basis of which a further interim order can be made. However, once the purpose of the s37 direction is properly discharged and the local authority has discharged its duty there is a jurisdictional line beyond which the court may not go in deploying the power to make further interim care orders.
- Different Test for Interim Separation - A plan for immediate separation is only to be sanctioned by the court where the child's physical safety or psychological or emotional welfare demands it and where the length and likely consequences of the separation are a proportionate response to the risks that would arise if it did not occur. See *Re: C (A Child) (Interim Separation)* [2020] EWCA Civ 257 Peter Jackson LJ.

What to expect if the local authority issue public law proceedings

- Consolidation of both sets of proceedings with the public law proceedings being the dominant application
- Appointment of a Children's Guardian who will instruct a solicitor to represent the child/children's interests independently
- Public funding for parents and all persons who share PR for the child/children
- Notice to be given to relevant persons ie. A person who is caring for a child who does not share PR for them; A father who does not share PR for the child

What to expect if the local authority issue public law proceedings

- Compliance with the Public Law Outline - need to conclude the proceedings within 26 weeks
- Duty on the Local Authority to Promote Reasonable Contact
- Facilitation of Supervised Contact
- Assessments of Family Members
- Request for a parent to give s20 consent to accommodate a child

Things to consider when advising a client about giving section 20 consent

- Cooperation
- Delay
- Costs
- Equality of Arms
- Separate Representation of Children
- Experts
- Residential Assessment Units

Other issues that require local authority input

- **Applications for Special Guardianship Orders** - A Special Guardianship Assessment and a Special Guardianship Support Plan must be undertaken by the local authority. S14A of the Children Act 1989 deals with SGO's

Other issues that require local authority input

- **Family Assistance Orders** - The power to make a Family Assistance Order is at s16 of the Children Act 1989. It provides that in any family proceedings the court may make an order requiring a CAFCASS officer or a local authority social worker to be made available to advise, assist and befriend any person named in the order. That person may be a parent, guardian, person with whom the child lives or the child him/herself. FAO's may only be made if every person named in the order, apart from the child, consents to the order being made. AFAO cannot be made against a local authority unless the local authority agrees or the child concerned lives or will live within their area.

Other issues that require local authority input

- A FAO is the only way in which the court can complete a local authority to provide supervise contact in private law proceedings
- **Children In Need** - There is a duty on local authorities to provide support and services to children. S17 of the Children Act sets out that such services may include the provision of accommodation or giving assistance in kind or in cash.

The Role of the 16.4 Guardian

Practice Direction 16A

Para 7.1 of PD16A that “making the child a party to the proceedings is a step that will be taken only in cases which involve an issue of significant difficulty and consequently will occur in only a minor of cases.”

Practice Direction 16A

Para 7.2 states:

“The decision to make the child a party will always be exclusively that of the court, made in the light of the facts and circumstances of the particular case. The following are offered, solely by way of guidance, as circumstances which may justify the making of such an order –

(a) where an officer of the Service or Welsh family proceedings officer has notified the court that in the opinion of that officer the child should be made a party;

Practice Direction 16A

(b) where the child has a standpoint or interest which is inconsistent with or incapable of being represented by any of the adult parties;

(c) where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute;

(d) where the views and wishes of the child cannot be adequately met by a report to the court;

Practice Direction 16A

(e) where an older child is opposing a proposed course of action;

(f) where there are complex medical or mental health issues to be determined or there are other unusually complex issues that necessitate separate representation of the child;

(g) where there are international complications outside child abduction, in particular where it may be necessary for there to be discussions with overseas authorities or a foreign court;

Practice Direction 16A

(h) where there are serious allegations of physical, sexual or other abuse in relation to the child or there are allegations of domestic abuse not capable of being resolved with the help of an officer of the Service or Welsh family proceedings officer;

(i) where the proceedings concern more than one child and the welfare of the children is in conflict or one child is in a particularly disadvantaged position;

(j) where there is a contested issue about scientific testing.”

Family Procedure Rules 2010

Rule 16.2, para (1) states: "The court may make a child a party to proceedings if it considers it is in the best interests of the child to do so.

Rule 16.4 states:

"(1) Except in proceedings under section 55A of the 1986 Act¹ and without prejudice to rule 8.42 or 16.6, the court must appoint a children's guardian for a child who is the subject of proceedings, which are not proceedings of a type referred to in rule 16.3(1), if

Family Procedure Rules 2010

- (a) the child is an applicant in the proceedings;
 - (b) a provision in these rules provides for the child to be a party to the proceedings; or
 - (c) the court has made the child a party in accordance with rule 16.2.
- (1A) Without prejudice to rule 16.6, in proceedings under section 55A of the 1986 Act, the court must appoint a children's guardian for a child where —

Family Procedure Rules 2010

(a) the court has made the child a party in accordance with rule 16.2; and

(b) the child is the person whose parentage is in dispute in those proceedings

(2) The provisions of Chapter 7 of this Part apply where the appointment of a children's guardian is required in accordance with paragraph (1) or paragraph (1A).

('children's guardian' is defined in rule 2.3.)"

Who will be appointed as the 16.4 Guardian?

a) Children and Family Court Advisory and Support Service (Cafcass)

Cafcass is the default public body, and we will usually see a Family and Court Adviser appointed as children's guardian within the proceedings.

There is a requirement to approach Cafcass first under para 7.7 of PD 16A.

Who will be appointed as the 16.4 Guardian?

b) National Youth Advocacy Service (NYAS)

If Cafcass cannot provide a guardian, or if there is a conflict between Cafcass and the parents, the court may appoint NYAS to provide separate representation for a child who has been joined as a party to proceedings. Rule 16.24 of FPR 2010 permits the court to appoint either the Official Solicitor (if she consents) or a person other than the Official Solicitor, which could be NYAS.

Who will be appointed as the 16.4 Guardian?

There is a joint agreement between Cafcass and NYAS which reflects that both agencies are committed to effective communication in the best interests of the child in accordance with the law.

Duties of the 16.4 Guardian

A children's guardian, once appointed, is under a duty to act on behalf of the child upon the hearing of any application in the proceedings and has a duty to safeguard the interests of the child in the manner prescribed by the rules (Section 41(2) of the Children Act 1989 and rule 16.20 FPR 2010).

On their appointment, they must appoint a solicitor to represent the child if one has not already been appointed (PD 16A para 6.2(a)).

Duties of the 16.4 Guardian

The children's guardian must also provide the court with such other assistance as it may require (rule 16.20(2) FPR 2010).

The children's guardian, when carrying out duties must have regard to the 'no delay' principle set out in CA 1989, s 1(2) and the matters set out in the welfare checklist (rule 16.20(3) FPR 2010).

The children's guardian's duties must be exercised in accordance with Practice Direction 16A (rule 16.20(5) FPR 2010).

Duties of the 16.4 Guardian

The children's guardian must make such investigations as are necessary to carry out their duties and must, in particular:

- a) contact or seek to interview such persons as the children's guardian thinks appropriate or as the court directs; and
- b) obtain such professional assistance as is available which the children's guardian thinks appropriate or which the court directs be obtained (PD16A, para 6.1).

Duties of the 16.4 Guardian

The children's guardian must give such advice to the child as is appropriate having regard to that child's understanding; and where appropriate instruct the solicitor representing the child on all matters relevant to the interests of the child arising in the course of proceedings, including possibilities for appeal (PD16A, para 6.2).

Duties of the 16.4 Guardian

The role of the children's guardian is to present an independent view as to the best interests of the child. In this respect the children's guardian should not be described as a 'neutral' participant. While FPR 2010, r 16.20(2) requires the guardian to provide the court with such assistance as it may require, it is wrong for the court to ask a children's guardian or representative to engage in advocacy to assist an unrepresented party or witness whose position conflicts with that of the child (MW v Hertfordshire County Council [2014] EWCA Civ 405).

Duties of the 16.4 Guardian

The children's guardian or the solicitor appointed must attend all directions hearings unless the court directs otherwise (PD16A, para 6.5).

The children's guardian must advise the court on the following matters:

a) whether the child is of sufficient understanding for any purpose including the child's refusal to submit to a medical or psychiatric examination or other assessment that the court has the power to require, direct or order;

Duties of the 16.4 Guardian

- b) the wishes of the child in respect of any matter relevant to the proceedings including that child's attendance at court;
- c) the appropriate forum for the proceedings;
- d) the appropriate timing of the proceedings or any part of them;
- e) the options available to it in respect of the child and the suitability of each such option including what order should be made in determining the application; and

Duties of the 16.4 Guardian

f) any other matter on which the court seeks advice or on which the children's guardian considers that the court should be informed (PD16A, para 6.6).

The children's guardian must unless the court directs otherwise, file a written report advising on the interests of the child in accordance with the timetable set by the court (PD16A, para 6.8).

Duties of the 16.4 Guardian

Any party to the proceedings may cross-examine the children's guardian to the same extent as any witness. The court may limit the issues upon which the children's guardian may be cross-examined (rule 22(4) FPR 2010).

Duties of a solicitor acting for a child

The most important duties of a solicitor acting for a child are contained in rule 16.29 FPR 2010 which provides:

(1) Subject to paragraphs (2) and (4), a solicitor appointed –

(a) under section 41(3) of the 1989 Act; or

(b) by the children's guardian in accordance with the Practice Direction 16A,

must represent the child in accordance with instructions received from the children's guardian.

Duties of a solicitor acting for a child

(2) If a solicitor appointed as mentioned in paragraph (1) considers, having taken into account the matters referred to in paragraph (3), that the child –

- a. wishes to give instructions which conflict with those of the children's guardian; and
- b. is able, having regard to the child's understanding, to give such instructions on the child's own behalf,^[SEP] the solicitor must conduct the proceedings in accordance with instructions received from the child.

Duties of a solicitor acting for a child

- (3) The matters the solicitor must take into account for the purposes of paragraph (2) are
- a. the views of the children's guardian; and
 - b. any direction given by the court to the children's guardian concerning the part to be taken by the children's guardian in the proceedings.'

Advantages and Disadvantages of a 16.4 Guardian

Advantages:

- The children's guardian acts as a neutral, independent party to represent the child's best interests and views. They will speak directly to the child and will ensure the child's views are made known to the court.
- The child will have their own solicitor to represent their views separately from their parents.

Advantages and Disadvantages of a 16.4 Guardian

Advantages:

- The children's guardian will liaise with other professionals involved with the child such as school, social workers and health care professionals to gain a more holistic picture of the child's situation.
- The children's guardian is better equipped than a FCA to advise the court of the need for expert assessment.

Advantages and Disadvantages of a 16.4 Guardian

Disadvantages:

- There is an additional party to the proceedings which adds an additional layer of complexity to proceedings.
- There will usually be a delay in proceedings being finalised to enable the children's guardian to undertake their investigations.
- If parents are privately paying, the added complexity and delay will have a bearing on their fees.

Removal of the Children's Guardian

Rule 16.25 of the FPR 2010 states:

(1) The court may

- a. direct that a person may not act as a children's guardian;
- b. terminate the appointment of a children's guardian; or
- c. appoint a new children's guardian in substitution for an existing one.

Removal of the Children's Guardian

(2) An application for an order or direction under paragraph (1) must be supported by evidence.

Applications for the removal of a guardian are usually made because the parent is calling into question the guardian's duty to act with fairness or there is an allegation that the guardian has acted manifestly contrary to the child's best interests.

Removal of the Children's Guardian

Some helpful case law:

QS v RS and T (By her Children's Guardian)
[2016] EWHC 1443 (Fam)

*LR v A Local Authority & Ors (Application to
Terminate Appointment of Guardian)* [2019] EWFC
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*Re N (A child) (Termination of appointment of
children's guardian)* [2022] EWFC B16

Finally...

Cafcass has a fact sheet: "What to expect when the court appoints a guardian under Rule 16.4 for my child". It is a useful document to provide to parents and can be found here:

<https://www.cafcass.gov.uk/sites/default/files/2024-09/16.4%20Factsheet%20for%20adults%20August%2024%20Final%201.pdf>

