

practitioners should tuck the pages inside their Red Book to have them readily available at court.

Rhys suggested that the court's view on the nature of pension assets has shifted post-2014: whether a pension should be seen as deferred income or as capital can be material in a needs case. In *SJ v RA* [2014] EWHC 4054, [2015] All ER (D) 60 (Jan) Nicholas Francis QC sitting as a High Court Deputy (as he then was) refused to grant permission to instruct an actuarial report to consider equalisation of pension income. He stated his view that it is incorrect to distribute pension funds on the basis of equality of income and there is, therefore, no need for an actuarial report in the overwhelming majority of cases (para [83]). Rhys suggested that this view was likely to cause mischief going forwards. In his view Mr Francis QC was only discussing big money cases. Rhys warned of what the implications of this judgement might be in the murky grey area middle money cases.

Judicial opinions on whether to equalise income or capital appear to remain split and confused. Against the view expressed in *SJ v RA* (above) are the decisions in *RP v RP* [2006] EWHC 3409 (Fam), [2007] 1 FLR 2105 and *B v B (Assessment of Assets: Pre-Marital Property)* [2012] EWHC 314, [2012] 2 FLR 22 where Coleridge J and David Salter (sitting as a Deputy High Court Judge) respectively, prefer equalisation of income over capital. As case law fails to provide a definitive answer, Rhys endorsed the Family Justice Council's support for equalisation of income in needs cases.

Recent changes in pension law

Robin Ellison, Head of Strategic Development at Pinsent Masons, discussed the recent changes in pension law that every family practitioner should know. Robin explained there has been a key shift in Treasury policy: for the first time since the end of the First World War, policy is moving away from pensions and towards savings. Lifetime ISAs (or LISAs) which become available in April 2017 are an example of this. These are likely to be an attractive

prospect to many. Unlike a pension, you do not have to wait until you are 55 to benefit. With a LISA you can take your money when you wish: you may have to pay tax on it but you can take the money earlier. Robin noted that the artificially low interest rates today make pensions very expensive items. Nowadays, it could cost up to £400,000 worth of pension to produce an annual income of £10,000.

Four case studies were also considered throughout the day. These were an invaluable experience for both lawyers and experts – providing an opportunity to exchange ideas and tactics. One case study regarding the death of a party following a PSO showed the clear benefits of utilising expert financial opinion.

David was right to introduce the seminar panel as the 'A Team'. The advice, insight and experience were first class and provided an invaluable education to all professions in the audience. As more shifts and changes loom never-ending on this horizon, it is clear this annual seminar will remain an essential resource in the years to come. For an impressive collection of five pensions-related articles go to the special February 2017 issue of *Family Law*.

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Behind closed doors: the Cafcass/ADCS agreement

Maria Colwell should, around now, be celebrating her 52nd birthday. Those with long enough memories will recall that she was killed by her step father on 6 January 1973, aged 7. The majority report of the inquiry that was set up to investigate her death made two observations that are, perhaps, timely to remember:

'[H]ad the views of an independent social worker been available to the court, it would have had the assistance of a second opinion which might or might not have endorsed the conclusions and recommendations in the social worker's report . . . One aspect of

Maria's story which has naturally given rise to concern is the extent to which the social workers directly involved in the case . . . were able to communicate with Maria about her feelings.' (*Report of the committee of inquiry into the death of Maria Colwell*, DHSS 1974)

The Children Act 1975 introduced the power for the court to appoint a guardian to separately represent the interests of a child who was the subject of some (not, at this stage, all) proceedings. Jasmine Beckford should recently have celebrated her 37th birthday. She too was killed by her stepfather, on 1 July 1984. The report of the inquiry into her death included the following comment about the guardian's role which had by now been extended to include opposed proceedings:

'We should like to highlight the value of the guardian ad litem in care proceedings. The essential feature of that role is that for the first time there is someone, other than a legal representative, whose concern is exclusively the welfare of the child.' (*A child in trust: report of the panel of inquiry into the death of Jasmine Beckford*, 1985)

On 7 February 2017, Anthony Douglas on behalf of Cafcass and Andrew Webb on behalf of ADCS published an 'Agreement about how local authorities and Cafcass can work effectively in a set of care proceedings and pre-proceedings in the English Family Courts'. This agreement apparently seeks to 'strengthen the way in which social workers, IROs and children's guardians work together in the best interests of children'. In fairness, the agreement contains the proviso that, 'working together must never be collusive and casework must never be allowed to lead to a perception of collusion between local authority social workers and children's guardians'. More worryingly, however, it then goes on to express a, 'commitment to developing a collaborative approach designed to resolve disagreements between the local authority and Cafcass about the social work evidence base being relied on in decision-making . . . [and] commitment by the guardian to examine the

social work evidence to see if it can be agreed before putting any different positions to the court'. In a section headed 'working together on care plans' it states, 'it would be unusual if an agreed evidence base led to different conclusions about the way forward but, if it does, attempts should be made to resolve differences out of court before referring the issue to the court'.

The Association of Lawyers for Children (ALC) has published a response in which it expresses its deep concern about the purported agreement and apparent lack of appreciation of the statutory role and independence of the guardian. The duty in FPR 2010, r 16.20 is, 'to act on behalf of the child . . . with the duty of safeguarding the interests of the child'. As early in the life of the Children Act as 1992, in *R v Cornwall County Council ex parte G* [1992] 1 FLR 270, the independence of the role was emphasised by the then President, Sir Stephen Brown: 'It is vitally important that the position of the guardian should not be compromised by any restriction placed directly or indirectly upon him or her in the carrying out of his or her duties. It is important that the courts and the public should have confidence in the independence of the guardians. It is also important that the guardians themselves should feel confident of their independent status.' The ALC response repays reading in full but, in summary, it identifies a number of problematic assumptions that seem to underpin the agreement:

- social workers and guardians should be expected to come to a consensus about the outcome given the same evidential base;
- local authority decision making is unaffected by systemic or unintended bias, from the tensions of managing shrinking budgets, and increasing demand;
- the most efficient way of conducting proceedings is to try to agree with the most powerful party (ie the local authority);
- it would be unusual for a social worker and guardian to disagree about a 'right' answer;

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- guardians should identify how any gaps in assessments should be ‘bridged’ by the local authority;
- guardians and social workers should be expected as a norm to resolve disagreements without referring the matter to court;
- the proposed guidelines can be said to afford proper respect to due process/Art 6 and the independent role of the guardian.

Meanwhile, the House of Commons public accounts committee published a report on 15 December 2016 in which it records ‘variability in the quality and consistency of help and protection services is leaving children at risk of harm . . . The Department has not done enough to attract sufficient people to the social work profession. Despite some excellent practice, there is a problem with the competency and capability of too many social workers and not enough good people to help improve services faster.’ (HC713 December 2016). The 15th View from the President’s Chambers, entitled ‘the looming crisis’ includes the observation that ‘the fact is that, on the ground, the system is – the people who make the system work are – at full stretch. We cannot, and I have for some time now been making clear I will not, ask people to work harder. Everyone – everyone – is working as hard as they can’.

Recent experience, in the context of clauses 32 to 34 of the Children and Social Work Bill and long overdue action on the cross examination of domestic violence victims, suggests that decision-makers will listen, and even make resources available, if the public and professional clamour on behalf of vulnerable children is sufficiently powerful. Such was the case after Maria Colwell’s tragic death which fired the public imagination and resolve to better protect children subject to proceedings. Given that background, at the very least the public needs: (a) sufficient information about the real scope of the proposed changes to working practices and the risks and dangers for children and parents of introducing collaboration/agreement under the guise of ‘efficiency’ and which is incompatible with

the statutory framework; and (b) an opportunity to comment on so radical a change to duties of the child’s guardian.

Perhaps this agreement, rather than seeking to dilute one of the cornerstones of child protection for the last 40 years, would better honour Maria, Jasmine and others who have been failed by the system by adding their voices instead to the call for substantive improvement and support.

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Legislation update

Vulnerable witnesses

On 30 December 2016 Sir James Munby issued a statement expressing the urgent need for reform of the family justice system to address the issue of vulnerable people giving evidence in family proceedings, in particular in relation to the cross-examination by perpetrators of abuse of their victims and where he stated that the issue ‘requires – demands – urgent action by all, including ministers and officials’. His view was that primary legislation was required to address the problem.

His intervention seems to have had the desired effect because on the 23 February 2017 the government published the Prisons and Courts Bill in which this issue is addressed. The Bill received its first reading on 27 February. As the title suggests the Bill is in the main concerned with reform of prisons and prison security (ss 1–22) and the court system. The reforms of the court system are set out in Parts 2 and 4 of the Bill and includes extension of the use of conducting criminal proceedings in writing and of virtual hearings enabling witnesses to give evidence via audio and video links thus avoiding vulnerable witnesses running the risk of being confronted face – to face with the defendant and, outlines the introduction of online procedure in family and civil court and