# MIDDLE TEMPLE
# AMITY VISIT TO HONG KONG

## FAMILY LAW

26 Sept. 2015 (Lantau Room)

In the best traditions of Family Law, we will be totally ignoring received wisdom, legal convention and the careful preparation which so plagues other (lesser) areas of the law[1]. Instead our workshop will be following the refreshing and rather "alternative" system of informality, with everybody being able to pitch in. All views will be gratefully received. Thus the format will not be so much "workshop" as "play room"; five topics will be thrown out to be dissected by the assembled mass[2]. Each topic raises exciting and novel issues – some putting Hong Kong at variance with England – others showing the esteem which each jurisdiction feels for the other. The first four topics will be introduced over five minutes and then thrown open to everybody for hot disputation. The fifth; a passionate and controversial look at potential reform. We will finish with a Q&A; an opportunity for you to put your most searching questioning to our Panel.

The topics (and the very roughest of timings) are:

1. 10.15 to 10.40 *Who cares, who shares*. Sharing; a difference of approach between HK and UK. Introduced by Richard Todd QC

2. 10.40 to 11.05 *Knowing that you've won; should we still have sanctioned (Calderbank) offers?* The English experience and the Hong Kong view. (RTQC)

3. 11.05 to 11.30 *Kicking the habit*. Recent developments in HK on habitual residence; introduced by Russell Coleman SC.

   **COFFEE AND TEA at 11.30 AM**

4. 11.45 to 12.05 *According to Philip Larkin mums and dads arrest your development, ("they may not mean to, but they do"). But how can a good claim be made against the likes of them?* Form your KEWS here. (RCSC)
5. 12.05 to 12.25 *Principles or chaos? The need for reform and the Deech Bill* Ann Hussey QC.
6. 12.25 to 12.45. *Questions and Answer* session chaired by Ann Hussey QC. Panel consisting of (alphabetically): Russell Coleman SC, Robin Egerton, the Hon. Mr Justice Michael Hartmann NPJ, GBS and Richard Todd QC.

[*Some brief notes follow. There will not be a test at the end*]

[1] As Robin Egerton reminds us – Lord Justice Ormrod in *Martin v Martin* said, "*ancillary relief is but trial and error and imagination.*"

[2] Chatham House rules apply!

## Who cares, who shares?

1. In England there appeared to be a dichotomy of approach between two competing schools of thoughts; the Separate Property School and the other, the Community of Property.

2. The "Separatists" argue that matrimonial property should presumptively be divided equally. To this extent both Schools are agreed. However where there is non-matrimonial property the Separatists maintain that the assets should be encroached upon only to the extent that is necessary to meet a needs based claim (or a claim for compensation). Where needs is present then the entirety of the non-matrimonial property is considered – it is all or nothing. Or as Wilson LJ (as he then was) describes it in *K v L* [2011] 2 FLR 980 - "100%" or "0%" [paragraph 21].

3. The Communards hold that the existence of non-matrimonial property should be taken into account in the overall exercise of discretion but this will usually lead to a departure from equality – thus the presence of non-matrimonial property might result in a considerable discounting exercise of the *total* of the assets (both matrimonial and non-matrimonial) – but with a degree of "grey area" to allow for the fact that the rigid distinction between "matrimonial" and "non-matrimonial" is a distinction which is neither pure nor simple.

4. A worked example best illustrates the point. Total assets are $100 million of which $20 million are generated as a product of the matrimonial acquest. The Applicant in a very long marriage did not contribute to the other $80 million. Her needs are fully met by a payment of the $15 million. The "separatist" would say that her "share" is $10 million. But non-matrimonial assets should be invaded to the extent of an additional $5 million in order to meet her needs (generously interpreted). The Communard will start from a discount down from 50% of the total – so perhaps 40% goes to the Applicant; $40 million.

5. The ultimate expression of Communard wisdom was found in paragraph 66 of Sir Mark Potter P's judgment in *Charman v Charman* [2007] EWCA Civ 503. There the framework of the "Mixed Assets School" was set out thus:

> *[66] To what property does the sharing principle apply? The answer might well have been that it applies only to matrimonial property, namely the property of the parties generated during the marriage otherwise than by external donation; and the consequence would have been that non-matrimonial property would have fallen for redistribution by reference only to one of the two other principles of need and compensation to which we refer in paragraph 68 below. Such an answer might better have reflected the origins of the principle in the parties' contributions to the welfare of the family; and it would have been more consonant with the references of Baroness Hale in Miller at [141] and [143] to "sharing … the fruits of the matrimonial partnership" and to "the approach of roughly equal sharing of partnership assets". We consider, however, the answer to be that, subject to the exceptions identified in Miller to which we turn in paragraphs 83 to 86 below, the principle applies to all the parties' property but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality. It is clear that both in White at p.605 F-G and in Miller at [24] and [26] Lord Nicholls approached the matter in that way; and there was no express suggestion in Miller, even on the part of Baroness Hale, that in White the House had set too widely the general application of what was then a yardstick.*

**5.** This school ruled for four years; it was hugely influential in the Hong Kong CFA decision of *WLK v TMC* [2010] 13 HKCFAR 618. It stood until the decision of Wilson LJ (as he then was) in *K v L* in 2011.

6. In *K v L* Wilson LJ advanced the proposition that needs (and compensation) alone allowed invasion of the "non-matrimonial" asset. He stated it thus:

- first, negatively, in para 2 where it is stated:

  > "We know that non-matrimonial property belonging to one spouse can be awarded to the other to the extent that the other needs it…"

- and then positively in paragraph 21:

  > "…although non-matrimonial property also falls within the sharing principle, equal division is not the ordinary consequence of its application. The consequences of the application to non-matrimonial property of the two other principles of *need* and of *compensation* are likely to be very different; but the ordinary consequence of the application to it of the *sharing* principle is extensive departure from equal division, usually to 100% - 0%."

7. This has now become the orthodoxy in England despite the contrast with what Lord Nicholls said in *White v White*, viz:

> "*Plainly, when present, this factor is one of the circumstances of the case. … The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered."*

**8.** Similarly in *Miller & McFarlane* Lord Nicholls reiterated what he had said in *White* and added:

> ***"[24]*** *In the case of a short marriage, fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage.*
>
> ***[25]*** *With longer marriages the position is not so straightforward. Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as the years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not…"*

Lady Hale agreed [at 149] that the source of the property might be a reason for departure from "full equality".[3]

9. But Baroness Hale rejected my appeal to the Supreme Court in *K v L* leaving the Wilsonian Separate Property School triumphant. Consequentially the *K v L* route was followed in, for example, *S v AG* [2011] EWHC 2637 at paragraph [7] per Mostyn J,

> *"Therefore, the law is now reasonably clear. In the application of the sharing principle (as opposed to the needs principle) matrimonial property will normally be divided equally (see para 14(iii) of my judgment in N v F). By contrast, it will be a rare case where the sharing participle will lead to any distribution to the claimant of non-matrimonial property. Of course an award from non-matrimonial property to meet needs is a common place, but as Wilson LJ has pointed out we await*

[3] Also note *Robson v Robson* per Ward LJ at para [43 (7)] *"The nature and source of the asset may well be a good reason for departing from equality within the sharing principle"* which accords with what had been said in *Charman (No.4);* and at [76] *"…the capital is inherited capital and as such deserves a special consideration. It is not to be regarded as inviolate having regard to the length of time during which and the extent to which the parties have relied upon it to subsidise the lifestyle they had individually and jointly established for themselves."*

*the first decision where the sharing principle has led to an award from non-matrimonial property in excess of needs."*

10. Recognising that the debate was over, I helped draft the new interpretation in the English Law Commission report, "*Law Commission Report on Matrimonial Property Needs and Agreements"* (see Law Comm. No. 343, chapter 8, § 8.81). Noting this system added clarity.

11. But recently Hong Kong has decided to continue to embrace the *Charman – WLK* line of authority. First *K v L* was doubted in *TCWF v LKKS* [2014] 1HKLRD 896 at para. [70] – *K v L* etc. were described as merely illustrative. But then more trenchantly it was rejected in first *PW v PPTW* (CACV 224 / 2013 – judgment dated 12 March 2015; an award of 45% : 55%) and then on 3 July 2015 in *AVT v VNT* (CACV 234 / 2014) per Cheung JA at [69]:

*"Personally I do not find the argument in the English cases about which is the preferred approach helpful. More importantly the Court of Final Appeal has already given guidelines on how non-matrimonial property should be dealt with under the sharing principle in a short marriage which I will deal with in the following paragraphs. Hence the starting point of excluding the matrimonial property from consideration will be contrary to the Court of Final Appeal judgment which this Court must follow. But for the purpose of discussion, my view is that the second approach which may eventually include the non-matrimonial assets should not be regarded as the touchstone to the solution of the problem. Words such as 'insufficient logical rigour' or 'risk of palm-tree justice' used by the proponents of the second approach to criticise the first approach are really, with respect, not helpful at all. This is after all a discretionary relief to be exercised by reference to well defined perimeters and established principles. Further, under the second approach the determination of how much of the non-matrimonial property is to be included is very much a discretionary decision as well."*

So where are we now? Discuss.

Richard Todd QC

TEMPLE CHAMBERS & 1 HARE COURT

## *Knowing that you have won; should we still have sanctioned offers (Calderbanks)?*

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1. To beat one's own offer is to know ecstasy. But it is now a wicked pleasure denied to our practitioners in England & Wales. There, in a world gone crazy, it is presumed that all litigants are equal; no litigants are more equal than others – only the rarest and naughtiest misconduct (usually but not always litigation misconduct) will justify the caning of a costs order.

2. Not so in Hong Kong which maintains an excellent tradition of keeping what is good from England (e.g. the MCA / MPPO) whilst not adopting the rubbish (e.g. the truly awful Child Support Act).

3. But before we are too congratulatory about Hong Kong, we must note the truly bizarre fact that the roles are then reversed when it comes to the Courts of Appeal. In England Part 36 (the modern English *Calderbank* offer) is expressly applied to appeals to the Court of Appeal. Whilst in marked contrast the wording of RHC O 22 (HK's *Calderbank* offers) expressly excludes offers in the Court of Appeal. See *Ryder Industries Ltd. v Chan Shui Woo* [2015] 2 HKC 582. That said the distinction might not be so marked as *Ryder* goes on to note in its paragraph [30]:

   > "[34] …(2) *In dealing with the costs below, by reason of the combined effect of O 59 r 0(1) and O 22 r 23,* ***the Court of Appeal should take into account the sanctioned offer made below where appropriate,*** *having regard to all the circumstances, including how the appeal is disposed of.*
   >
   > *(3) In dealing with the costs of the appeal,* ***the Court may take into account the sanctioned offer made below where appropriate,*** *having regard to all the circumstances, including the result of the appeal."* [Emphasis supplied].

4. So how did we get here? Well, the origin of sanctioned offers in both England and Hong Kong is the case of *Calderbank v Calderbank* [1976] Fam 93. There, there was also no provision in the rules (the English Matrimonial Causes Rules 1968 and Supreme Court Rules 1965) for sanctioned offers. But at page 106C, Cairns LJ in a decision which was then widely followed, held,

   "*it should be permissible to make an offer of that kind in such proceedings as we have been dealing with and I think that would be an appropriate way in which a party who was willing to make a compromise could put it forward. I do not consider that any amendment of the Rule of the Supreme Court is necessary to enable this to be done."*

5. Thus was born the Calderbank Offer. It is impressive judicial intervention. Adopting the ineluctable logic of Cairns LJ why have pesky rules at all? After all, like clients, they just get in the way of the advocate's job.

6. The paradigm statement on how these were looked at was found in *Gojkovic v Gojkovic* (*No 2*) [1992] Fam 40 per Butler-Sloss LJ; a case decided in the era of

"reasonable requirements", (now comprehensively condemned as discriminatory). In that case Butler-Sloss LJ stated at p 54:

"*It is, therefore, clear that Calderbank offers require to have teeth in order for them to be effective. This is recognized by the requirement in R.S.C. Ord. 62 r. 9 (and the equivalent C.C.R. Ord. 11 r. 10) for the court to take account of Calderbank offers, and, by analogy open offers, in exercising its discretion as to costs. There are certain preconditions. Both parties must make full and frank disclosure of all relevant assets, and put their cards on the table. Thereafter the respondent to an application must make a serious offer worthy of consideration. If he does so, then it is incumbent on the applicant to accept or reject the offer and, if the latter, to make her/his position clear and indicate in figures what she/he is asking for (a counter-offer). It is incumbent on both parties to negotiate if possible and at least to make the attempt to settle the case. This can be done either by open offers or by Calderbank offers, both adopted by the husband in this case. It is a matter for the parties which procedure they prefer. There is a very wide discretion in the court in awarding costs, and as Ormrod L.J. said in McDonnell v.McDonnell ([1977] 1 All ER 766 at 770, [1977] 1 WLR 34 at 38), the Calderbank offer should influence, but not govern, the exercise of discretion.*

*There are many reasons which may affect the court in considering costs, such as culpability in the conduct of the litigation; for instance (as I have already indicated earlier) material non-disclosure of documents. Delay or excessive zeal in seeking disclosure are other examples. The absence of an offer or of a counter-offer may well be reflected in costs—or an offer made too late to be effective. The need to use all the available money to house the spouse and children of the family may also affect the exercise of the court's discretion. It would, however, be inappropriate, and indeed unhelpful, to seek to enumerate and possibly be thought to constrain in any way, that wide exercise of discretion. But the starting point in a case where there has been an offer is that, prima facie, if the applicant receives no more or less than the offer made, she/he is at risk not only of not being awarded costs but also of paying the costs of the other party after communication of the offer and a reasonable time to consider it. That seems clear from the decided cases and is in accord with the Supreme Court and County Court Rules requiring the court to have regard to the offer. I cannot, for my part, see why there is any difference in principle between the position of a party who fails to obtain an order equal to the offer made and pays the costs, and a party who fails by the offer to meet the award made by the court. In the latter case, prima facie, costs should follow the event, as they would do in a payment into court, with the proviso that other factors in the Family Division may alter that prima facie position."*

7. But that which the judiciary giveth, they may also taketh. And so it was in Olde England. It began with Mostyn J (of course) in *GW v RW* [2003] 2 FCR 289. First he suggested that where the outcome falls between two *Calderbank* offers the presumption should be no order for costs – that was the first blow to the sanctioned offer system. Second,

*"**[85]** It is very easy to see why in an era where the wife's claim was perceived to be against the husband's money for a sum necessary to meet her reasonable requirements, costs should, prima facie, follow the event. Her position was comparable to that of an ordinary civil claimant. It is much more difficult to apply the analogy in the post-White v White era where the court's function is (per Thorpe*

*LJ in Cowan v Cowan [2001] 2 FCR 331 at [70], [2002] Fam 97 at [70]) to determine the parties 'unascertained shares' in the pool of assets that is the fruit of the marital partnership.*

***[86]*** *In this case I have ascertained W's share in this pool to be 40% and H's to be 60%. In such circumstances what is the event that the costs are supposed to follow? It is an intellectual concept with which I find it hard to grapple. In Gojkovic v Gojkovic [1991] FCR 913 at 919,[1992] 1 All ER 267 at 273, [1992] Fam 40 at 60 Butler-Sloss LJ stated:*

*'In this case the wife was obliged to make the application for ancillary relief, and was obliged to go to court and pursue her application to its conclusion over nine days in order to obtain a lump sum of £400,000 in excess of the last offer of the husband.'*

*This is a submission that is often made: '... the wife has had to come to court to get her money.' But surely the husband has equally had to come to court to get his? Each party has had to come to the court to obtain an order which fairly disposes of the issues between them.*

***[87]*** *There are further objections. First, I agree with Mr Marks' submission that a presumption that the husband (for it is almost always him) should pay the costs until and unless he has protected himself with a Calderbank letter backed by full disclosure must be discriminatory.*

***[88]*** *Second, it seems to me that the present system in effect forces the parties to engage in a mandatory form of spread betting. The parties are required to guess the outcome of the case and to take a position. If they have guessed correctly then they win a large amount; if they have not then they lose. But there is one significant difference to a spread bet. With a spread bet the amount the gambler wins or loses is the difference between the result and the position-maker's spread. If he has bought and the result is higher than the top of the spread he wins; if it is lower he loses. If he has sold and the result is lower than the bottom of the spread he wins; if it is higher he loses. The closer the result is to the position-maker's spread the smaller the amount the gambler wins or loses. The orthodox Calderbank theory in ancillary relief proceedings is however different in that it does not reflect the closeness of the litigant's call. Instead, the mere fact of beating his guess by even a tiny amount entitles the maker of the offer to call for payment of the entirety of his costs from 28 days after the date of his offer. Similarly if his guess is a fraction less than the result, then the other party can call for all her costs to be paid by the maker of the offer. So it can be seen that vast sums can swing on even the smallest failure to guess accurately. And there is no premium for guessing really well.*

***[89]*** *Here W's costs are £345,490 and H's are £229,803. Mr Marks submits that for the period between 23 April 2002 and 2 July 2002, and from 10 December 2002 to trial, H offered W slightly more than the result I have ordered. He says, according to his calculations (which Mr Pointer does not agree), that in the first period H offered W 40·7% and in the second 40·2%. He says that as a result of H's prescient guessing for these periods W should pay most of his costs. I estimate that he is seeking about £150,000. If one takes a rough mean of H's offers at 40·5% it can be seen that he is in effect asking to be treated as a spread-better who has wagered about £300,000 per percentage point.*

***[90]*** *Even the most reckless gambler would blench at taking such a risk; yet this is what the orthodox Calderbank theory ordains. Thus it can be seen that the form of betting ordained by the Calderbank system is infinitely more terrifying than that assumed by voluntary spread-betting gamblers.*

***[91]*** *This system of betting is regarded as appropriate for civil litigation. But it seems to me to be utterly inapt for the resolution of what may be a substantial financial liability at the sad end of a*

*marriage. What I have to say is confined exclusively to ancillary relief proceedings, and has no bearing on other civil proceedings where differing considerations arise.*

***[92]*** *In my judgment, a safer starting point nowadays in a big money case, where the assets exceed the aggregate of the parties' needs, is that there should be no order as to costs. That starting point should be readily departed from where unreasonableness by one or other party is demonstrated. This approach is I believe consistent with the spirit of the judgment of Butler-Sloss LJ in Gojkovic v Gojkovic when due allowance is made for the seismic shift in the law since that decision was given. It reflects the terms of CPR 44.3(5). It also reflects the disapplication by r 10.27(1)(b) of the 1991 rules of the general rule within CPR 44.3(2) of the unsuccessful party paying the costs of the successful party.*

***[93]*** *It may also reduce the extent of satellite costs assessment litigation, which itself can be protracted and acrimonious, and which prolongs the agony between the parties.*

***[94]*** *Unreasonableness may encompass the following.*

***[94.1]*** *Failure to give full and frank disclosure.*

***[94.2]*** *Other culpable conduct of the litigation such as the unreasonable and unsuccessful pursuit of a particular issue or other meritless tactical posturing.*

***[94.3]*** *The failure to negotiate or the adoption of a manifestly unreasonable stance in the Calderbank correspondence.*

***[95]*** *This is not intended to be an exhaustive list. There may be other instances of unreasonableness."*

8. At first there was resistance to Master Mostyn (Bencher of Middle Temple)'s views[4] but ultimately changes to the rules happened and the rest, as they say is history. (Or rather "history repeating" as the old *Leadbeater* [1985] FLR 789 approach was to take both side's costs off of the assets summation and then proceed on the net figure).

9. Now murmurings are heard in HK for a similar presumption of no order for costs and the abolition of sanctioned offers.

So has the English experiment been a great success? What should be done? Discuss.

Richard Todd QC

TEMPLE CHAMBERS & 1 HARE COURT

[4] Most notably by Thorpe LJ in *Norris v Norris* [2003] 3 FCR 136; *"it is not for judges to deem a rule or a section of an Act of Parliament incomprehensible or unworkable. If passed by Parliament, whether it be primary or secondary legislation, it is the duty of the court to do its best to make sense of it. Judges do not have the right to dump the awkward passage wholesale. In my judgment, therefore, Mr Mostyn QC in his judgment in GW v RW (above) was wrong to treat the rule as incomprehensible and to substitute his own approach by making a decision which was not based on the existing rules."* Ouch. (Albeit Mostyn's view prevailed in the end – thanks mainly to the hard work of the UK's Lord Chancellor's Advisory Committee on Ancillary Relief – LoCACAR; endearingly known to posterity as the *LoCACAR Louts*).

## *Kicking the Habit: Habitual Residence*

1. The new UK Supreme Court case of *AR v RN* [2015] UKSC 35 has made waves which have crossed the Channel, gone down the Atlantic Oceans, shortcut the Indian Ocean, travelled through the Straits of Malacca and washed up on the shores of Hong Kong. It is quite some splash. So let us have a look….

2. This appeal concerned the application of Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction ('the Convention'). Under Article 3 it is unlawful to remove or retain a child in breach of rights of custody attributed to a person under the law of the state in which the child was "habitually resident" immediately before removal or retention.

3. This case concerned two small children, born and raised in France, who were brought to Scotland by their mother in July 2013 with the consent of their father, who remained in France. The mother and children were to live in Scotland for the period of about a year. In November 2013 the relationship between the parents ended. On 20 November 2013 the mother commenced proceedings in which she sought a residence order in respect of the children and an interdict against the father removing them from Scotland.

4. The father argued that the initiation of those proceedings was a wrongful retention within the meaning of the Convention on the basis that the children were habitually resident in France immediately before proceedings commenced. The Outer House of the Court of Session concluded that the children were still habitually resident in France on 20 November 2013. This judgment was based on the fact that the move to Scotland had not been intended by both parents to be permanent. The Inner House of the Court of Session reversed the Outer House's decision on the basis that shared parental intention to move permanently to Scotland was not an essential element in any alteration of the children's habitual residence. The Inner House concluded that the children were habitually resident in Scotland at the material time.

5. The father appealed to the Supreme Court on the basis that the Outer House had been correct, and that the Inner House had in any event erred in its approach. The mother argued that there had in any event been no wrongful retention.

6. The UK Supreme Court unanimously dismisses the appeal.It considered that, for the purposes of habitual residence, the stability of residence, rather than its degree of permanence, is important. There is no requirement that the child should have been resident in the country in question for a particular period of time or that one or both parents intend to reside there permanently or indefinitely.

7. As the UK Supreme Court has previously held in a series of cases, habitual residence is a question of fact which requires an evaluation of all relevant circumstances; paragraph [16] of their judgment. They relied on *A v A, In re L and In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] AC 1038 where Lady Hale had drawn attention to para 48 to the operative part of the judgment of the Court of Justice in Proceedings brought by A:

   *"2. The concept of 'habitual residence' under article 8(1) of Council Regulation (EC) No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case."* (p 69)

8. In determining habitual residence, the focus is upon the situation of the child, with the intentions of the parents being merely one of the relevant factors. It is necessary to assess the degree of the integration of the child (or, in the case of an infant or young child, the degree of integration of those on whom the child is dependent) into a social and family environment in the country in question.

9. There is no rule that one parent cannot unilaterally change the habitual residence of a child; paragraph [17]. In the present case, the children were habitually resident in

Scotland within the meaning of the Convention. The absence of a joint parental intention to live permanently in Scotland was not decisive, nor was an intention to live in a country for a limited period inconsistent with becoming habitually resident there. The important question is whether the residence has the necessary quality of stability, not whether it is necessarily intended to be permanent; see paragraph [21].

10. Following the children's move with their mother to Scotland, their life there had the necessary quality of stability. Their home was Scotland for the time being, their social life and much of their family life was there. The longer time went on, the more integrated they became into their environment in Scotland [23]. Given this conclusion, the question of wrongful retention did not arise [25].

11. The decision was quickly picked up the Hong Kong Court of Appeal in *JEK v LCYP* [2015] CACV 125/2015 (decision handed down 27 August 2015). One of the orthodoxies which had been adhered to hitherto was the dicta of Lord Scarman in *R v Barnet London Borough Council, ex p Nilish Shah* [1983] 2 AC 309. There he had emphasised a natural and ordinary meaning approach to interpretation (in contradistinction to a purposive and contextural interpretation). Lord Scarman's judgment at pages 340-344 had been adopted in previous Hong Kong decisions (notably BLW) on habitual residence. In essence it was:

*"a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration. It is necessary that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."*

12. In *JEK* it was held,

*7.6 In respect of the Hague Convention jurisprudence on habitual residence, impetus for change first came from the Court of Justice of the European Union ('CJEU') in Proceedings brought by A (Case C-523/07) [2010] Fam 42 and Mercredi v Chaffe (Case C-497/10PPU) [2012] Fam 22 and recently adopted in the United Kingdom by a series of Supreme Court judgments, namely, A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening) [2014] AC 1; In re L*

*(A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2014] AC 1017; In re LC (Children) (Reunite International Child Abduction Centre intervening) [2014] AC 1038 and In re R (Children) (Reunite International Child Abduction Centre and others intervening) [2015] 2 WLR 1583 which was also reported under the title of AR v RN [2015] UKSC 35. The Supreme Court also departed from the approach of Lord Scarman.*

*7.7 Instead of trying to discuss which of the principles in BLW should be modified, it will be more useful to restate the principles on habitual residence in the light of these decisions.*

*(1) Habitual residence is a question of fact which should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce (In re L (A child) paragraph 20);*

*(2) The factual question is: has the residence of a particular person in a particular place acquired the necessary degree of stability (permanent is the word used in the English versions of the two CJEU judgments) to become habitual? It is not a matter of intention: one does not acquire a habitual residence merely by intending to do so; nor does one fail to acquire one merely by not intending to do so (In re LC (Children) paragraph 59);*

*(3) The concept corresponds to the place which reflects some degree of integration by the child in a social and family environment (In re L (A child) paragraph 20);*

*(4) The question is the quality of the child's residence, in which all sorts of factors may be relevant. Some of these are objective: how long is he there, what are his living conditions while there, is he at school or at work, and so on? But subjective factors are also relevant: what is the reason for his being there, and what is his perception about being there? (In re LC (Children) paragraph 60);*

*(5) There is no legal rule, akin to that in the law of domicile, that a child automatically takes the habitual residence of his parents (In re L (A child) paragraph 21); and*

*(6) Although a child could lose his habitual residence without a parent's consent, nevertheless, it is clear that parental intent does play a part in establishing or changing the habitual residence of a child: not parental intent in relation to habitual residence as a legal concept, but parental intent in relation to the reasons for a child's leaving one country and*

*going to stay in another. This will have to be factored in, along with all the other relevant factors, in deciding whether a move from one country to another has a sufficient degree of stability to amount to a change of habitual residence (In re L (A child) paragraph 23).”*

13. They then went on to refer to the fearless advocate who had appeared before them, *“Mr Coleman submitted that BLW is binding on this Court. In my view, recognizing the rule on precedents, it is futile in this case to conduct an academic discussion on the binding effect of a previous decision of this Court on us. BLW correctly stated the law on habitual residence* ***but time has moved on*** *with the European Union (including the United Kingdom) adopting a uniform approach on the meaning of habitual residence under the Hague Convention. Hong Kong should move at the same pace as well.”*[emphasis supplied]. The five points on behalf of the Husband were then thrown out.

14. Does effluxion of time constitute a good basis for reviewing the law? How would you have approached this determination? Discuss.

Russell Coleman SC

TEMPLE CHAMBERS

*According to Philip Larkin mums and dads arrest your development, ("they may not mean to, but they do"). But how can a good claim be made against the likes of them?* Form your KEWS here.

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1. In deciding ancillary relief applications the Courts often divide the assets into three piles; matrimonial, non-matrimonial and "non-assets". The last of these being assets which belong to a third party and are therefore not susceptible to distribution under the MPPO.

2. These struggles can be titanic – e.g. TCWF v LKKS & Ors [2014] 1 HKLRD 896 where the decision that the assets remained under the control of the Husband's father reduced the asset base from billions of dollars to nil. Needless to say the determination of third party "non assets" is critical and is often determined as a *TL v ML* preliminary issue. However, what of the case where the assets *are* plainly the property of say a parent? Can the Court give judicious encouragement there? The answer was provided by *KEWS v NCHC* [2013] HKCFA 10.

3. First what is the concept of "judicious encouragement"? The term itself is ambiguous. If one starts from the premise that save in exceptional circumstances, court orders can only apply to parties to a litigation and not non-parties, it is difficult to see where the concept of "judicious encouragement" fits as a matter of principle. Courts make orders that are intended to bind and if necessary, to be enforced. It is difficult to conceive of a situation where an order of the court merely "encourages" compliance, and all the more so in relation to a non-party.

4. The origin of the term "judicious encouragement" is the judgment of Waite LJ in the decision of the English Court of Appeal in *Thomas v Thomas* [1995] 2 FLR 668, where, at 670F-671A, it is said:-

   *"But certain principles emerge from the authorities. One is that the court is not obliged to limit its orders exclusively to resources of capital or income which are shown actually to exist. The availability of unidentified resources may, for example, be inferred from a spouse's expenditure or style of living, or from his inability or*

*unwillingness to allow the complexity of his affairs to be penetrated with the precision necessary to ascertain his actual wealth or the degree of liquidity of his assets. Another is that where a spouse enjoys access to wealth but no absolute entitlement to it (as in the case, for example, of a beneficiary under a discretionary trust or someone who is dependent on the generosity of a relative), the court will not act in direct invasion of the rights of, or usurp the discretion exercisable by, a third party. Nor will it put upon a third party undue pressure to act in a way which will enhance the means of the maintaining spouse. This does not, however, mean that the court acts in total disregard of the potential availability of wealth from sources owned or administered by others.* ***There will be occasions when it becomes permissible for a judge deliberately to frame his orders in a form which affords judicious encouragement to third parties to provide the maintaining spouse with the means to comply with the court's view of the justice of the case.*** *There are bound to be instances where the boundary between improper pressure and judicious encouragement proves to be a fine one, and it will require attention to the particular circumstances of each case to see whether it has been crossed."* (emphasis supplied).

5. The words in bold appear to introduce a principle to the effect that a court may somehow frame its orders in a way that will encourage third parties to provide financial assistance sufficient to enable a spouse to meet his or her ancillary relief obligations in accordance with the court's view of the justice of the matter.

6. The CFA in *KEWS* decisively rejected this. It was held:

"48. It is extremely unlikely that the Court of Appeal in *Thomas* was advocating a novel approach based on "judicious encouragement". One of the cases relied on (in both the judgments of Waite LJ and Glidewell LJ) was *Howard v Howard* [1945] P 1. In a passage which bears repetition, Lord Greene MR said this at 4-5:-

> "… In my opinion there is *no jurisdiction in the Divorce Court to make an order which will leave the husband in a state of starvation (to use rather picturesque language) with a view to putting pressure on trustees to exercise their discretion in a way in which they would not have exercised it but for that pressure*. Under discretionary trusts (as, indeed, under this trust) other persons are potential beneficiaries. In many such trusts the range of potential beneficiaries is a very wide one. Here it extends to any future wife that the husband may marry and the children of any future marriage. The settlement has not been varied in that respect. On what ground should pressure be put upon the trustees to exercise their discretion in such a way as to pay to the husband, in order that he may pay maintenance to his wife, sums which in their discretion they would not otherwise have paid to him? It seems to me that such an order is as bad as an order on a man to pay a sum far in excess of what he could be ordered to pay out of his own means merely to put pressure on a rich relation to support him. That is not within the scope of s. 190 of the Act. *What has to be looked at is the means of the husband, and by "means" is meant what he is in fact getting or can fairly be assumed to be likely to get*. I must not be misunderstood. It is, of course, legitimate (as was done in this

> case) to treat a voluntary allowance *as something which the court can, in proper circumstances, infer will be likely to continue, and make an order on that basis.* If and when the allowance is cut off, the husband can come back and apply to have the order modified. Similarly, in the case of a discretionary trust, if the court finds that the husband is in fact receiving regular payments under such a trust it is perfectly entitled to make an order on the footing that those payments will in all probability continue, leaving it to the husband to come back to the court if at some future date they are stopped. But in this case the trustees have exercised their discretion so that the husband will, as frequently happens under these discretionary trusts, get nothing. Trustees, for very good reasons, often do not give money to the husband and the only object of this order, so we are told, was to induce the trustees to change their decision as to the proper disposition and administration of this trust income. The trustees, if they were well advised, would say: "We have exercised our discretion and we refuse "to change it. It is only when circumstances alter that we "shall take them into account and exercise our discretion in "a way suitable to the altered circumstances as we can see them." If they were to do that the husband would be left with a voluntary allowance of 150*l*. out of which he has to pay 100*l*. to the wife, who has remarried.
>
> *In my opinion the practice, if it be a practice, indirectly to put pressure on trustees in this sort of way to commit a breach of their duty and to exercise their discretion in a way contrary to what they desire, is wrong*. …" (emphasis added).

*Howard* was followed in numerous subsequent cases, among them the Court of Appeal cases of *B v B (Financial Provision)* (1982) 3 FLR 298 and *Browne v Browne* [1989] 1 FLR 291. Both these cases were referred to in *Thomas*.

49. This is also the way in which it would appear the English courts since *Thomas* have consistently approached the question of third party financial assistance. While there have been references to "judicious encouragement" and to that part of the judgment of Waite LJ referred to above, the courts have concentrated on the necessity to find, on the evidence before them, not only that third parties have provided financial assistance to the husband or wife, but that it was likely this would continue in the foreseeable future:-

(1) In *Charman v Charman* [2006] 2 FLR 422, where a discretionary trust in favour of the husband was involved, the Court of Appeal regarded it as important to ascertain the likelihood of the trustee of the discretionary trust providing financial assistance to the husband: at 427 [para [12]]. This approach was endorsed by Black LJ in her judgment in *Whaley v Whaley* [2011] EWCA Civ 617 at para 40.

(2) In *TL v ML and Others (Ancillary Relief: Claim Against Assets of Extended Family)* [2006] 1 FLR 1263, Mr Nicholas Mostyn QC (now Mostyn J, then sitting as a Deputy Judge of the High Court) analyzed at some length the concept of "judicious encouragement": see in particular paras [76]-[86]. At para [101], the learned Deputy Judge said this:-

"The correct view must be this. If the court is satisfied on the balance of probabilities that an outsider will provide money to meet an award that a party cannot meet from his absolute property, then the court can, if it is fair to do so, make an award on that footing. But if it is clear that the outsider, being a person who has only historically supplied bounty, will not, reasonably or unreasonably, come to the aid of the payer, then there is precious little the court can do about it."

50. If the true ambit of "judicious encouragement" is really no more than a restatement of the approach set out in section E.3 and in the previous paragraphs, I have no quarrel with that. However, if the term means a form of pressure on third parties to add to the relevant spouse's resources which, on the evidence, they would not do or are unlikely to do, I would for my part reject such a concept. It is an approach which is consistent neither with principle nor with the authorities."

7. But still some attempts to avoid the rigour of the law are made. Very recently in *AVT v VNT* CACV 234/2014 (judgment handed down on 3 July 2015) Cheung JA was faced with an attempt to resurrect "judicious encouragement". He dealt with it thus:

"7.1 *Mr Shieh submitted that the income and capital of the husband are limited. The money he obtained from the company is by way of loans from the company with obligations for repayment. Any order made by the Court in excess of the husband's financial means would in effect have to be met by the husband's father who controls the purse. This harks back to the 'judicious encouragement' approach which the Court of Final Appeal has expressly disapproved of in KEWS v NCHC [2013] 2 HKLRD 314.*

*7.2 Mr Burns on the other hand relied on the following statement in Thomas v Thomas [1996] 2 F.C.R. 544 at 552 that,*

> *' The court was confronted by a husband with immediate liquidity problems but possessing substantial means. He was proposing that the court should make a capital order which would extinguish for ever all claims by the wife to capital relief from him or his estate. The order that he was suggesting was paltry when measured against his total resources and expectations, assessed in the broad terms which the*

*Act requires. On such a husband a heavy onus lay to satisfy the court that all means of access to liquid funds to support suitable outright provision for his wife had been thoroughly explored and found to be impossible. If he failed to demonstrate that, he ran the risk of having the inference drawn against him that ways and means could be found of funding suitable provision for the wife's capital needs.'*

*7.3 In my view, the 'judicious encouragement' approach has not been resurrected to life again. Rather as Ma CJ observed in KEWS the Court had to look at the reality of the situation and have regard to matters of substance and not just form. In looking at reality, it could take into account not only what a party actually had, but what might reasonably be made available to him or her if a request for assistance were to be made. As to what might occur in the foreseeable future, past conduct was often a useful guide. In this case the husband is actually a working son in the company in which he has a 30% share. The only other majority shareholder is his father. The only other sibling is the sister who has no share in the company. The husband's lifestyle has always been funded by the company. While the funding is by way of borrowings from the company, one may ask how likely it is that the father would actually call for the loans to be repaid by the son? The reality is that the husband plainly has the financial resources to meet the order of financial provision for the wife."*

Is that a de facto resurrection (albeit not de jure)?

How do we deal with third party interests in future?

For discussion.

Russell Coleman SC

TEMPLE CHAMBERS

## SPOUSAL MAINTENANCE

## PRINCIPLES OR CHAOS? THE NEED FOR REFORM AND THE DEECH BILL

### INTRODUCTION

1. This paper analyses the current trends in the consideration of spousal maintenance and asks whether the current approach is underpinned by any coherent principles or whether we are in a discretionary wilderness. It then considers how the proposals contained in Baroness Deech's Bill addressed those issues and the professions response.

### THE STATUTORY FRAMEWORK

2. The current statutory framework governing financial provision on divorce is contained in the Matrimonial Causes Act 1973 (MCA). It was enacted on the 23rd May 1973. It was a different era when 92% of men were in the work place compared to just 53% of women. Today the figures are 72% for men and 67% for women. [5]

3. At over 40 years old many consider the MCA to be of pensionable age or at least in need of a complete over haul. There are those who consider that given the changed dynamics of economic and family life there needs to be enshrined in statute the expectation of financial independence on divorce.

4. The 1984 reforms which were contained in the Matrimonial Proceedings and Property Act 1984 were supposed to focus decisions on encouraging self -sufficiency and achieving finality. These reforms introduced the formal duty to consider a clean break and gave the judges the power to dismiss once and for all a periodical payments claim without the consent of the claimant. (For an example of how one of the old pre 1984 nominal periodical payments orders can come back and haunt the Respondent see *North v North.* [6])

5. The Law Commission report[7] which preceded the reforms contained the following passages (emphasis added):

> "There was, however, a wide-spread feeling amongst those who commented on the Discussion Paper that **greater weight should be given to the**

[5] Source ONS report on Women in the Labour Market 25.9.13. Statistics from 1971 and 2013.
[6] [2007] EWCA 112 (Fam)
[7] No. 112/1981 *The Financial Consequences of Divorce*

**importance of each party doing everything possible to become self-sufficient..we believe the statutory provisions should contain a positive assertion of this principle.**

"We think that it would be desirable to require the courts specifically to consider whether an order for a limited term would not be appropriate in all the circumstances of the case, **given the increased weight which we believe should be attached to the desirability of the parties becoming self-sufficient.**"

6. Following the Law Commission report, the government introduced a Bill, which became the Matrimonial Proceedings and Property Act 1984. This wrought amendments to the 1973 Act, the most important (in this area) was the introduction of s25A.

7. This provides as follows:

"(1) Where on or after the grant of a decree of divorce…the court decides to exercise its powers under section 23 (1)(a),(b) or (c) or 24A… in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards each other will be terminated as soon after the grant of the decree as the court thinks just and reasonable"

And

"(2) Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party."

## JUDICIAL INTERPRETATION

8. So what has happened to the clean break??

9. The reality is that for many years the judiciary failed to breathe life into the 1984 reforms. It should have been a brave new world where, in each case, the court analysed

how long would be required to achieve financial independence and whether a shorter period could be imposed without giving rise to undue hardship.

10. Cases should be decided on the assumption that women (as they are usually the recipients) will work.

11. The high water mark for joint lives maintenance was as recently as 1997 in the Court of Appeal decision of *C v C*[8]. In that case a joint lives maintenance order was directed at a husband after a 9 month marriage. His appeal was rejected and Ward LJ offered guidelines as to the working of the statute:

> "Financial dependence being evident from the making of an order for periodical payments, the question is whether, in the light of all the circumstances of the case, the payee can adjust – and adjust without undue hardship – to the termination of financial dependence and if so when. The question is can she adjust, not should she adjust. In answering that question the court will pay attention not only to the duration of the marriage but to the effect the marriage and its breakdown and the need to care for any minor children has had and will continue to have on the earning capacity of the payee and the extent to which she is no longer in the position she would have been in but for the marriage, its consequences and its breakdown. It is highly material to consider any difficulties the payee may have in entering or re-entering the labour market, resuming a fractured career and making up lost ground.
>
> The court cannot form its opinion that a term is appropriate without evidence to support its conclusion. Facts supported by evidence must, therefore, justify a reasonable expectation that the payee can and will become self-sufficient. Gazing into the crystal ball does not give rise to such a reasonable expectation. Hope, with or without pious exhortations to end dependency, is not enough…"

12. Even Baroness Hale in *McFarlane*[9] said (of Mrs McFarlane) as follows:

> "[155] She does, of course, have to consider what she will do in the future. The children will eventually take up less of her time and energy. She could either return to work as a solicitor or retrain for some other satisfying and gainful activity. She cannot therefore rely upon the present provision for the rest of her life. [10] But the Court of Appeal was wrong to set a limit to it on the basis that she would save the whole surplus above her requirements with a view to providing for herself once the time limit was up. They were wrong to place the burden upon her of justifying continuing payments, especially now that they have set a high threshold for doing so: *Fleming v Fleming* [2003] EWCA Civ 1841. On any view she will continue to be entitled to some continuing compensation, even if the needs generated by the relationship diminish or

[8] [1997] 2 FLR

[9] [2006] UKHL 24

[10] Why then do the HL restore the joint lives order?

> eventually vanish (although that cannot be guaranteed, despite her best endeavours, given the length of time she has been out of the labour market and the difficulties of repairing her pension position). The burden should be on the husband to justify a reduction. At that stage, the court will again have to consider whether a clean break is practicable, as it could be if the husband has generated enough capital to make it realistic."

13. In more recent decisions it would appear that the winds of change are beginning to blow. The glimmering of the new dawn began with Eleanor king J (as she then was) in *L v L (Financial Remedies: Deferred Clean Break)*[11]. W was aged 44 and H 50. The marriage had lasted 10 years. The care of the two children aged 12 and 9 was shared. W was a fashion designer and H was a GP offering private medical services. The assets were £3.4m including the parties' homes (the wife had a farm). In financial remedy proceedings the judge awarded W, inter alia, global periodical payments of £47,000 on a joint lives basis. H appealed. Eleanor king J substituted an order for spousal periodical payments at £30,000pa for two years five months with a s28(1A) bar. This case cried out for a term order. W's farm would shortly be mortgage free, she was moderately young and had worked throughout a moderate length marriage. Although her fashion business had dropped off due to the proceedings she was internationally recognised. The shared care arrangements gave her opportunities to attend to the business and the farm. She had capital reserves within the farm.

14. However subsequently in *Murphy v Murphy*[12] we see the paternalistic hand of Holman J refusing to impose a step down or a term despite the fact that W's case was that she wanted to return to work. Prior to the birth of the parties' 3 year old twins she had worked in retail earning £30,00pa. He considered that the fact of having children and their obvious dependence on their mother for care had a fundamental impact on W not only until the end of secondary education but indeed for the rest of her life. He emphasised that each case was highly fact specific and that the court had a wide discretion. He considered that *L v L* was a decision on its own particular facts.

15. In *Matthews v Matthews* [2013] EWCA Civ 1874, the Court of Appeal upheld a clean break and refusal of nominal maintenance for W with two children aged 6 and 3:

[11] [2012] 1 FLR 898.
[12] [2014] EWHC 2263

- W had previously earned £43,000 pa working in a bank, but was made redundant. It was unlikely that she could return to banking given her adverse credit rating.
- W assessed as having an earning capacity of £40,000.
- There was approximately £98,000 equity in properties. W was £6,000 in debt; H had £30,000 funds.
- H had no contact whatsoever with the children; W had full care.
- CA held that it was entirely within the discretion of the first instance court not to award nominal pps; per Tomlinson LJ, such a decision will usually be unappealable as it is exercise of discretion.
- W had earned £23,000 in the six months prior to the hearing from contract work, and it was assumed that she could work in the insurance sector.
- H had a much lower earning capacity than W (£23,000).
- On the capital division, H had to discharge W's debt.

In *Chiva v Chiva* [2014] EWCA Civ 1558 the Court of Appeal upheld a two-year term where there was a 4-year old child (although no section 28(1A) bar).

- The Court expected W, a qualified actuary, to go from working 7 days per month to full time once the child was at full time nursery or school.
- It was a 4.5 yr marriage, with both parties in their thirties.
- £321,159 of capital only to be split.
- W already had rental income from two flats, and earned £32,000 pcm from working 7 days per month.
- On the £700pcm maintenance payments that were ordered, she would only have to work an additional three days per month to cover the shortfall when the maintenance terminated.
- W had earned more than H immediately prior to the birth of their child.
- Maintenance at £700 pcm gave both parties identical shortfalls on their budgets.

In *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 Mostyn J refused a wife's claim for a 27-year term (no bar) for £60,000 per annum, index-linked, plus 30% of H's bonus. Instead, he awarded periodical payments of £30,000 pa (RPI linked) and imposed an 11-year term. In addition, he awarded 20% of the husband's bonus on top, capped at £26,500

for a shorter, non-extendable 7-year term. In arriving at his conclusions, he undertook a review and summary of the current state of the law on periodical payments:

- [28] – the statutory obligation is only to avoid undue hardship; this implies that a degree of hardship might be expected in the transition to independence.
- [31] – if the need of the recipient is not generated by choices in the marriage, then it can only apply to the extent of alleviating significant hardship.
- [35] – there should not be too much reliance placed on marital standard of living in determining needs. Especially as time passes post-separation it becomes less relevant, and reliance upon it hampers the move to independence.

– Mostyn J summarises the principles under the current law

i. A spousal maintenance award is properly made where the evidence shows that choices made during the marriage have generated hard future needs on the part of the claimant. Here the duration of the marriage and the presence of children are pivotal factors.

ii. An award should only be made by reference to needs, save in a most exceptional case where it can be said that the sharing or compensation principle applies.

iii. Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship.

iv. In every case the court must consider a termination of spousal maintenance with a transition to independence as soon as it is just and reasonable. A term should be considered unless the payee would be unable to adjust without undue hardship to the ending of payments. A degree of (not undue) hardship in making the transition to independence is acceptable.

v. If the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former.

vi. The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence.

vii. The essential task of the judge is not merely to examine the individual items in the claimant's income budget but also to stand back and to look at the global total and to ask if it represents a fair proportion of the respondent's available income that should go to the support of the claimant.

viii. Where the respondent's income comprises a base salary and a discretionary bonus the claimant's award may be equivalently partitioned, with needs of strict necessity being met from the base salary and additional, discretionary, items being met from the bonus on a capped percentage basis.

ix. There is no criterion of exceptionality on an application to extend a term order. On such an application an examination should to be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve and, if so, why.

x. On an application to discharge a joint lives order an examination should be made of the original assumption that it was just too difficult to predict eventual independence.

xi. If the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party.

16. There is a welcome emphasis here on prospective earning capacity and the burden is on the wife to come back to court and apply if matters do not turn out as forecast as opposed to the approach in C v. C.

17. We then have Pitchford LJ in *Wright v Wright* [13]. This was the refusal of permission to appeal but the Daily M ail readers will be forgiven for thinking that spousal maintenance is terminated once your youngest child is seven. The actual headline on 24th February 2015 read as follows:

## Divorce ruling 'is a game-changer': Lawyers believe judge's order for multimillionaire's ex-wife to 'get a job' means divorced women will now have to support themselves

- **Tracey Wright told to get a job 11 years after her divorce from millionaire**
- **Mother-of-two had £75,000-a-year maintenance claim rejected in court**
- **Appeal judge's ruling could have significant impact on future divorces**
- **Experts said that most ex-wives with children over seven may have to work**
- **'Spousal maintenance is no longer a meal ticket for life', senior lawyer said**

18. The facts of that case can be summarised as follows:

- H was aged 59 and W was 51. There were two children aged 16 and 10.
- The original proceedings took place in 2008 when DJ Cushing made a joint lives' maintenance order in favour of W. At the time, the youngest child was aged 3 and the DJ did not make a finding as to when W could be (or ever would be) self-sufficient.
- However, the DJ had clearly signalled that W could be expected to contribute financially within a couple of years of the original order.

[13] [2015]EWCA Civ 201

- It was she, DJ Cushing, in 2008 who said: "There is a general expectation in these courts that once a child is in year 2 [i.e.6-7 years old], most mothers can consider part-time work consistent with their obligation to their children.".
- At the variation hearing, HHJ Roberts imposed a 6-year diminishing maintenance regime, with a complete cessation within 6 years.
- The effect of the Judge's decision was to relieve H of his obligation to maintain W during his (postponed) retirement
- On the other hand the Judge was critical of W's failure to make any effort to find work and her inflated income needs
- Pitchford LJ refused W permission to appeal against the order. She could not establish, on the facts, a real prospect of success.

**LOOKING FORWARD (AND GLANCING BACK)**

19. This is all fine as far as it goes but the problem is a discretionary jurisdiction has wide scope for different outcomes. There has been enormous social change since the 1984 reforms, more so since the original 1973 Act. Despite this we are still witnessing cases where the following judgement still resonates:

> "A man should not be allowed to treat marriage as a 'mere temporary arrangement, conterminous with his inclinations, and void of all lasting tie or burden'…. According to your ability you must still support the woman you have first chosen and then discarded".

20. These were the words of Sir J Wilde in *Sidney v Sidney* ***(1865).***

21. The Law Commission produced a report on the 26th February 2014 following its Matrimonial Property, Needs and Agreements project. It did not set out any proposals for change but offered "clarification" on the current guiding principles, namely:
    - [1.18] while most people do move on from divorce there are regional disparities in how the law is applied, specifically in relation to joint lives orders;
    - [3.109] the objective of financial awards should enable the parties to make the transition to independence;
    - [3.109] the term of an order should allow time for a party to develop his or her ability to meet their own needs. It specifically should not be a barrier to imposing a term that at the end of the term, the spouse could meet their own needs but would not do so at the standard of living enjoyed in the marriage
    - [3.110] terms should normally be expected to be between 2-10 years
    - [3.110] if a term is to be longer than 10 years it should normally be a joint lives order as the future at that distance is unpredictable
    - [3.111] if there are minor children the term should run until care of the children no longer prevents parent with primary care from meeting their needs. This can be youngest child reaching secondary school, as long as that leaves enough time for the recipient to establish/exercise an earning capacity

22. The Commission recommended there be clear guidance from the Family Justice Council on the meaning of financial needs in order to address the problem of the uncertainty and unpredictability of maintenance outcomes.

23. This however avoids tackling the root problem that radical reform is required in our approach to maintenance.

24. This was addressed squarely by Baroness Deech in her Divorce (Financial Provision) Bill. It included a 5 year maintenance cut off save in circumstances of serious financial hardship.

25. The key provision on periodical payments following the Committee stage was as follows:

    1. In exercising any decision to make a periodical payments order, the court must consider:
        (a) Economic advantage derived by one party from the contributions of the other;
        (b) Fair sharing of the burden of caring for any child under 16 after divorce;
        (c) That a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such periodical payments as is reasonable to enable that party to adjust to the loss of that support on divorce over a period of **not more than five years from the date of the decree of divorce,**[14] such period not to be exceeded unless the court is satisfied that there is no other means of making provision for a party to the marriage and that that party would otherwise be likely to suffer serious financial hardship as a result.

26. What this fails to deal with however is how, if at all, to reflect the duration of the marriage.

27. When considering "economic advantage", the court must take into account:
        (a) Advantage or disadvantage occurring *before* or *during* the marriage;
        (b) Contributions before or during the marriage including non-financial and indirect contributions;
        (c) The extent to which any economic advantage or disadvantage incurred by either party is balanced by any economic advantage incurred by the other party;
        (d) The extent to which any imbalance of advantage and disadvantage has been, or would be, corrected, including correction by the making of an order in relation to the sharing of the value of the matrimonial property.

[14] It had been three years in her original proposals

28. When making periodical payments orders, the court must also take into account;

(a) The age, health and earning capacity of that party;
(b) The duration and extent of the dependence of that party prior to divorce;
(c) Any intention of that party to undertake a course of education or training;
(d) Any support available to that party from a third party;
(e) The needs and resources of the parties; and
(f) All the other circumstances of the case.

29. So what was her reasoning? In an interview with the Financial Times in 2014 she said that the current maintenance rules send out a "bad message" to young women;

"Although there's lots of talk about how women should be half the Supreme Court and they should have half the seats of FTSE boards, we have a whole area of law which says once you are married you need never go out to work, that you are automatically entitled to everything you might need even if the marriage breaks down and it's your fault".

30. Legal commentators were not universally behind the proposals. In feedback in Family Law Week it was suggested that the prime aim of maintenance should be rehabilitative and should only be permanent for older women or those incapacitated who were not cared for by the state. Various blog posts have criticised her for attempting to create certainty at the expense of fairness and that the current discretionary system works well.

**CONCLUSION**

31. However the exercise of judicial discretion is unpredictable and what our clients are looking for is a principled approach such that the outcome of litigation is not a gamble.

32. As Baroness Shackleton supporting the proposals said in the Second Reading debate;

> "In the field of law in which I practise, however, the legislation on which they depend is due for review and is no longer fit for purpose because its interpretation relies too heavily on the discretion of the individual enforcing it, thereby making it more difficult to predict and therefore advise on outcome of a particular case. This creates uncertainty; and uncertainty creates litigation".

33. Our legislation on maintenance is out of kilter with that in many developed nations. Scotland, Sweden and New Zealand have legislation which has provided that save in highly exceptional circumstances the obligation to maintain should not be imposed save for a very short period. In Scotland it is three years. In Finland it is rare for a spouse to be obliged to pay maintenance to the other spouse, as a rule they support themselves. In the Netherlands there is no automatic right to maintenance. If the marriage is less

than 5 years and there are no children the term of the maintenance is limited to the length of the marriage.

34. Reform is needed not only in pursuit of certainty but also to consign to history the paternalistic approach exemplified in the *Sidney* case and still running through our jurisprudence. Women should be encouraged to work to recognise the drive for gender equality and the need not to reward women who do not work more than those who do.

ANN HUSSEY QC[15]

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[15] With grateful thanks to Rebecca Carew Pole for the paper she presented at the 2015 Hare Court seminar