# Ancillary Relief and Financial Orders Handbook

Eighth Edition

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# FOREWORD

It is more than a decade since I was privileged to write a foreword to the first edition of Roger Bird's invaluable Handbook.

In the concluding paragraph I forecast that significant changes in law and practice were imminent. The foundation for that speculation was Mr Hoon's announcement in February 1998 at the SFLA Conference that the Government intended to reform the law governing ancillary relief as a matter of high priority.

In July 1998 the Lord Chancellor's Ancillary Relief Advisory Group had delivered its report on the options for reform. In the very month that I wrote the foreword, positive proposals for reform were put out for public consultation in the White Paper, *Supporting Families*. Surely then, I was entitled to be confident in predicting imminent change. However, as all speculators know there are no certainties. This Government's enthusiasm for reform withered and died. The law has not changed. It is the judges who have been responsible for the evolution of the law, taking advantage of the flexibility given by section 25.

My final prediction was that the *Ancillary Relief Handboo*k would be a demanding creation. That prediction was, at least, secure. Over the intervening years Roger has scrutinised the considerable developments in practice and the landmark judgments in the House of Lords, and to some extent, in our court.

Roger's survey of the ever-changing scene is not just completely dependable but also enlightened by an insight derived from his natural wit and his experience of the evolutionary history to which he has made such a rich contribution as judge, teacher and reformer.

The Rt Hon Lord Justice Thorpe
*June 2009*

# PREFACE

One of the principal new developments recorded in this edition is the coming into force of the long-awaited Family Procedure Rules 2010. To some extent these rules will be less of a novelty to practitioners in the field of financial remedies (the new term for ancillary relief) than in other areas of family law, since the rules in this area were substantially reformed in 2000 and have been incorporated more or less unchanged in the new rules. However, there are changes, such as Practice Directions, which will have to be assimilated and of course the numbering of the rules and the names of certain forms of remedy are now different.

The decision of the Supreme Court in *Radmacher v Granatino* is the latest example of the highest court in the land taking a pro-active interest in the field of financial remedies. If one includes the Privy Council in this calculation, this is the fourth occasion since 2000 that financial issues of family law have been pronounced upon at this level. It is fair to say that the law has been substantially reformed and changed by these interventions, and it cannot have escaped the attention of readers that, with one exception, none of the judges involved at this level has been a family lawyer with a background of practice in this field. The distinguished exception, of course, is Baroness Hale but her position as the sole dissenter in *Radmacher v Granatino* underlines her position as the odd person out.

On several occasions the body of distinguished family lawyers in the Court of Appeal has seen its careful judgments overruled. It will be for others to speculate on what the moral of all this may be.

In this edition I am delighted to welcome District Judge Andy King as my co-author. Andy has specifically contributed the chapters on procedure and pensions, but has also helpfully scrutinised the whole book to ensure that the eccentricities of one author do not go unchallenged.

The law is given as at the date stated below.

Roger Bird
*1 June 2011*

# Chapter 1

# INTRODUCTION TO FINANCIAL REMEDIES

## SCOPE OF THIS CHAPTER

**1.1** Financial remedies comprise those orders of a financial nature which the court may make in proceedings for divorce, judicial separation or nullity of marriage. In this chapter, the range of possible orders is set out and the general principles on which orders are made are considered. In later chapters, each type of order (eg periodical payments orders) is examined in detail; in this chapter, certain matters common to all such orders are considered, although where any individual factor merits more detailed examination it is the subject of a chapter in its own right.

This book also deals with one type of remedy which does not depend on the issue of proceedings for divorce etc, namely, applications for neglect to maintain under s 27 of the Matrimonial Causes Act 1973 (MCA 1973). The principles applicable to such applications are considered in Chapter 14.

Most readers will be more familiar with the term 'ancillary relief' than 'financial remedy'. The change in nomenclature has been brought about by the Family Procedure Rules 2010 (hereafter FPR 2010) which came into force on 6 April 2011. Not only the names have changed; while the procedural reforms introduced originally as the pilot scheme and then as standard from June 2000 have survived more or less unscathed, the numbering is different and, as will be seen, there are a few changes of substance.



**1.2** It would be unusual for the court to consider making one type of order only. That might in fact be the result of a particular case, but the court must have regard to the overall position, and the result of most applications is that a combination of orders is made. The court must take an overview of the whole case.

## DEFINITIONS

**1.3** 'Financial remedy' is defined by the FPR 2010[1] as:

> '(a) a financial order;'

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[1] Rule 2.3(1).

This is the class of remedies with which this book will principally be concerned. However, the term encompasses a number of other remedies such as:

- an order under Schedule 1 to the Children Act 1989 (orders for children);
- an order under Part 3 of the Matrimonial and Family Proceedings 1984 (relief after overseas divorce);
- an order under section 27 of the MCA 1973 (failure to maintain).

A complete list will be found in the rules at Appendix B.

'Financial order' is defined as:

> '(a) an avoidance of disposition order;
> (b) an order for maintenance pending suit;
> (c) an order for maintenance pending outcome of proceedings;
> (d) an order for periodical payments or lump sum provision as mentioned in section 21(1) of the 1973 Act, except an order under section 27(6) of that Act;
> (e) an order for periodical payments or lump sum provision as mentioned in paragraph 2(1) of Schedule 5 to the 2004 Act, made under Part 1 of Schedule 5 to that Act;
> (f) a property adjustment order;
> (g) a variation order;
> (h) a pension sharing order; or
> (i) a pension compensation sharing order;'
>
> ("variation order", "pension compensation sharing order" and "pension sharing order" are defined in rule 9.3.)' [and will be considered in more detail in Chapter 10]



## THE PRINCIPLES GOVERNING THE EXERCISE OF THE COURT'S DISCRETION

**1.4** Before embarking on a detailed consideration of the individual factors in s 25(2), the court's overall approach will be considered. This must involve consideration of the issues of equality and fairness, which have assumed greater significance over recent years.

Section 25 of MCA 1973 contains the matters to which the court is to have regard in deciding how to exercise its powers under ss 23, 24 and 24A. It has frequently been said[2] that the statutory 'guidelines' must be the principal determining factors for the court; decided cases showing how the court's discretion has been exercised on other occasions are of limited relevance although, clearly, guidance from appellate courts as to occasions on which courts have misdirected themselves are valuable.

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[2] Notably, first in *Sharpe v Sharpe* (1981) Fam Law 121, (1981) *The Times*, 7 February.

In a leading case,[3] Butler–Sloss LJ, as she then was, stated the position as follows:

> 'There is a danger that practitioners in the field of family law attempt to apply too rigidly the decisions of this court and of the Family Division, without sufficiently recognising that each case involving a family has to be decided upon broad principles adapted to the facts of the individual case. Ancillary relief applications are governed by the statutory framework set out in the Matrimonial Causes Act 1973 as amended in 1984. Sections 25 and 25A provide the guidelines and require the court to have regard to all the circumstances of the individual case and to exercise the discretion of the court to do justice between the parties.'

Although *White v White*, from which these words are taken, was subsequently the subject of appeal to the House of Lords (and will be frequently mentioned in the following pages), the guidance given in this extract remains compelling law. Indeed, as will be seen, the House of Lords reinforced the principle that the provisions of the statute are pre-eminent.

Each case will turn on its own facts, and reference to the statutory criteria is therefore always essential. However, this point needs reinforcing in view of the attention given to two leading cases which have reached the House of Lords in recent years and which must now be analysed in some detail. The point which will be made, and which perhaps needs to be made now so that it may be borne in mind when the reader considers decisions of any of the highest courts, is that, notwithstanding the valuable guidance given in the speeches or judgments, authority for any proposition must ultimately be derived from the statute and not from any judicial gloss thereon.



## EQUALITY AND FAIRNESS

**1.5** Although s 25 prescribes the matters to which the court must have regard, it does not suggest or recommend any starting point, tariff or formula for deciding what proportion of the assets of the parties each should receive. This is in contrast to other jurisdictions, many of which contain prescriptions as to percentages to be awarded to each party, often depending on the length of the marriage. It is frequently argued by practitioners and academic commentators that the law of England and Wales should be amended to contain such guidelines. However, judges have continued to emphasise that such prescription is not possible within the terms of the statute, and that each case must be considered on its own merits against the background of consideration of the s 25 factors. What has been described as 'the search for principle' continues.

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[3] *White v White* [1998] 2 FLR 310, CA.

Having said that, guidance has been given in the two decisions of the House of Lords which are about to be considered, and it will be seen that, save in one important area (as to which see **1.41**), there is general agreement as to certain important principles.

Neither the words 'fairness' nor 'equality' appear in the Matrimonial Causes Act. However, in *White v White*, Lord Nicholls, after recording the self-evident proposition that the court must act in a just and non-discriminatory way, set out the important principle that this means that the court must be fair, and that fairness implies equality. The 6 years which elapsed between the decision of their Lordships' House in *White v White* (*White*) and *Miller v Miller* and *McFarlane v McFarlane* (*Miller/McFarlane*) have seen much discussion on the part of practitioners and judges as to what this means in various classes of case.

Before analysing the statutory factors therefore, we will consider the following:

(1) the significance of *White v White*;

(2) *Miller/McFarlane*; and

(3) developments post *Miller/McFarlane*, in particular *Charman v Charman*.



## *White v White*

**1.6** Very few cases relating to ancillary relief reach the House of Lords. Family cases which get that far usually relate to children, particularly public law issues. When the financial dispute between Mr and Mrs White reached their Lordships in 2000[4] it was thought that this would be the final word on these matters for some considerable time. *White* set out guidelines for the determination of such cases which may be summarised as follows:

- The court must be fair. There can be no discrimination between husband and wife in their respective roles. Whatever the division of labour, fairness dictates that this should not prejudice either party when considering the statutory factors. There should be no bias in favour of the breadwinner as against the homemaker and child-carer.

- When carrying out the statutory exercise, the judge should always check his tentative views against the 'yardstick of equality of division'. Equality should only be departed from if, and to the extent that, there is good reason for doing so. This does not mean that there is a starting point or presumption of equality.

- The concept of reasonable requirements is erroneous. The statute refers to 'needs' but this is only one of the statutory factors.

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4 *White v White* [2001] 1 AC 596.

However, this was not to be the last word and certain issues remained to trouble the courts, including the Court of Appeal. These issues may be summarised as essentially the search for fairness, and what fairness means. Given that the court must be fair, and given that the yardstick of equality is overriding but does not amount to a rigid regime of equality, what are the circumstances in which the court may be fair and at the same time depart from equal shares? Would this be appropriate where, for example, the marriage was short; if so, what constitutes a short marriage? Would it be appropriate where one party had created the wealth enjoyed by the couple by his or her exceptional contributions? If so, how exceptional would the contributions have to be? It would be inappropriate to recite here the cases in which these issues were discussed and sometimes contradictory answers given.[5] Running parallel with all this was academic criticism of the whole approach of the law of England and Wales.[6] This law is based on a discretionary approach, and even in recent times judges in the Court of Appeal have gone out of their way to emphasise that there is no formula which will apply to all cases; these matters have to be considered on a case-by-case basis.[7] The criticism made is that even on that basis, analysis of the cases reveals no rational pattern, and further, that this unpredictable case-by-case approach is unfair, since parties who wish to settle their disputes are given uncertain guidance and often have to risk large sums of money to achieve a result.

The combined appeals of *Miller v Miller* and *McFarlane v McFarlane* which were decided by the House in May 2006 therefore attracted widespread interest, both among family lawyers and in the popular press.



## *Miller* and *McFarlane*

**1.7** The House of Lords heard the appeals in *Miller v Miller* and *McFarlane v Macfarlane* (*Miller/McFarlane*) together because they clearly raised similar issues. Both were 'big money' cases, and both dealt with the issues arising out of *White* which are briefly outlined above. The facts in both cases need not be described here;[8] rather, the principles established or affirmed will be considered.

## *White v White re-affirmed*

**1.8** The two most important speeches were those of Lord Nicholls and Baroness Hale, who tried to set out a clear list of principles to be followed. They began with some fairly obvious but nonetheless important points; the

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5 For a detailed analysis see R Bird 'Dividing Marital Assets after Lambert' [2003] Fam Law 534. However, two decisions of Coleridge J repay careful reading, namely *H-J v H-J (Financial Provision: Equality)* [2002] 1 FLR 415, and *G v G (Financial Provision: Equal Division)* [2002] EWHC 1339 (Fam), [2002] 2 FLR 1143. In *Lambert v Lambert* [2002] EWCA Civ 1685, [2003] 1 FLR 139, CA Thorpe LJ said that Coleridge J was not wrong (i e he was right!) to find that '50/50 resonates with fairness' [para 38].

6 See e g R Bailey-Harris [2003] Fam Law 386, and J Eekelar [2003] Fam Law 828.

7 See e g Wall LJ in *Miller v Miller* [para 88].

8 For more detail see R Bird 'Miller and McFarlane – The implications for Family Lawyers' (Family Law, 2006).

court must be fair, and the statutory first consideration of the welfare of the children must be observed. The principles of *White v White*, such as fairness, non-discrimination and the yardstick of equality, were repeated and remain of the first importance.

*Three principles: meeting needs, compensation and sharing*

The House underlined the fact that financial relief is not a matter of taking from one party to give to the other, but is rather a matter of a proper and fair sharing of assets which both of them, in their interdependent and joint lives, have acquired.

The three principles which this case establishes and/or confirms as being the rationale for financial provision contained in the 1973 Act may be summarised as follows:

(1) *Meeting the needs of the parties*

Lord Nicholls said that mutual dependence begets mutual obligations of support. Fairness requires that the assets of the parties should be divided so as to meet their housing and financial needs.

Baroness Hale said that the most common rationale for redistribution is that the relationship has generated needs which it is right that the other party should meet. Needs may arise as a result of one party having been a homemaker and childcarer, and needs generated by such a choice are 'a perfectly sound rationale for adjusting the parties respective resources in compensation'.

(2) *Compensation*

Lord Nicholls said that compensation is aimed at redressing any significant prospective disparity between the parties arising from the way they conducted their marriage. Baroness Hale described this as compensation for relationship-generated disadvantage, which goes beyond need.

(3) *Sharing*

Lord Nicholls saw sharing as derived from the basic concept of equality permeating a marriage. Husband and wife are equal partners in marriage.

Baroness Hale described this as the sharing of the fruits of the matrimonial partnership.

These three principles may be taken as the foundation for any intellectual approach to the task of awarding financial provision. However, both Lord Nicholls and Baroness Hale made it clear that these are general principles and that they must be adapted to suit the requirements of a particular case. In particular, Lord Nicholls emphasised that equality applies 'unless there is good reason to the contrary. The yardstick of equality is to be applied as an aid, not a rule'.

## *Legitimate expectations and standard of living*

**1.9** The judge at first instance, and the Court of Appeal, had approved the concept of 'legitimate expectations'. The House strongly disapproved this concept; this could play no part in the decision-making process.

However, the importance of the standard of living of the parties during the marriage was affirmed, and this was one of the statutory factors prayed in aid by Lord Nicholls to justify the *Miller* award. For obvious reasons, it will only be important in cases where assets exceed needs, but this is an important reminder of the need to consider all the s 25 factors.

## *Application to smaller money cases*

**1.10** One of the problems with discussing decisions of the higher courts is that they normally involve very large amounts of money and rich parties. Many practitioners will be more interested in whether or not they apply to the normal run of cases.

It must first be said that the *White v White* principles of fairness, non-discrimination and the yardstick of equality apply to all cases, big or small and regardless of the length of the marriage. However, Lord Nicholls makes it clear that while the approach has to be the same, the result will be different in cases where the needs exceed the assets because the funds are not available to take the matter further. It is worth repeating his words:

> 'When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.
>
> In most cases the search for fairness largely begins and ends at this stage. In most cases the available assets are insufficient to provide adequately for the needs of two homes. The court seeks to stretch modest finite resources so far as possible to meet the parties' needs. Especially where children are involved it may be necessary to augment the available assets by having recourse to the future earnings of the money-earner, by way of an order for periodical payments.'

Baroness Hale expressed similar views. An equal partnership does not always dictate equal sharing of the assets. (One could interject there the view that, in lower value cases, it almost never does.) As Baroness Hale, said, equal division may have to give way to the needs of one party or the children.

> 'Too strict an adherence to equal sharing and the clean break can lead to a rapid decrease in the primary carer's standard of living and a rapid increase in the breadwinner's. The breadwinner's unimpaired and unimpeded earning capacity is a powerful resource which can frequently repair any loss of capital after an unequal distribution.'

Baroness Hale adds that recognising this is one reason why English law has been successful in retaining a home for the children.

Other issues were discussed in this case, but they will be considered under their separate subject-matter headings, see:

- 'Duration of marriage' at **1.34**;
- 'Contributions' at **1.41**; and
- 'Conduct' at **1.48**.

## *Charman v Charman*

**1.11** Since the decision of the House of Lords in *Miller/McFarlane*, the courts have not been idle. The first significant development was the decision of the Court of Appeal in *Charman v Charman* to which reference must now be made. In its judgment in *Charman*, the court dealt with several issues of considerable importance.[9]

The first of these issues was how the yardstick of equality should be approached. In the course of argument, there had been debate as to whether a judge should begin with some notion of equality and then, as it were, depart from it where appropriate, or whether the various s 25 factors should be considered with no preconceptions and then the provisional result compared with the yardstick of equality. The court dealt with this by reference to the new concept of 'sharing' introduced in *Miller*, and it is worth quoting the passage from the judgment of the court in full. This begins at para [64] where it is said that:

> '"The yardstick of equality of division", first identified by Lord Nicholls in *White* at p 605G, filled the vacuum which resulted from the abandonment in that decision of the criterion of "reasonable requirements". The origins of the yardstick lay in s 25(2) of the Act, specifically in s 25(2)(f), which refers to the parties' contributions: see the preceding argument of Lord Nicholls at p 605D–E. The yardstick reflected a modern, non-discriminatory conclusion that the proper evaluation under s 5(2)(f) of the parties' different contributions to the welfare of the family should generally lead to an equal division of their property unless there was good reason for the division to be unequal. It also tallied with the overarching objective: a fair result.
>
> [65] Although in *White* the majority of the House agreed with the speech of Lord Nicholls and thus with his description of equality as a "yardstick" against which tentative views should be "checked", Lord Cooke, at p 615D, doubted whether use of the words "yardstick" or "check" would produce a result different

[9] It is worth noting that this was a particularly strong court, consisting of the President, and Thorpe and Wilson LJJ. It would be difficult to conceive a greater concentration of expertise in this field. Moreover, the judgment was the judgment of the court, so there are no differences of opinion to be analysed.

> from that of the words "guideline" or "starting point". In *Miller* the House clearly moved towards the position of Lord Cooke. Thus Lord Nicholls, at [20] and [29], referred to the "equal sharing principle" and to the "sharing entitlement"; those phrases describe more than a yardstick for use as a check. Baroness Hale put the matter beyond doubt when, referring to remarks by Lord Nicholls at [29], she said, at [144],
>
> > "I agree that there cannot be a hard and fast rule about whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance."
>
> It is clear that the court's consideration of the sharing principle is no longer required to be postponed until the end of the statutory exercise. We should add that, since we take the "the sharing principle" to mean that property should be shared in equal proportions unless there is good reason to depart from such proportions, departure is not from the principle but takes place within the principle.'

It might seem from this, therefore, that sharing, which means equality and equal shares, is now more of a starting point than a yardstick.

The court then amplified this to guidance to 'flesh out'[10] what the concepts of 'sharing', 'need' and 'compensation' set out in *Miller* actually meant. First, on the issue of what property falls to be shared, and whether there should be a category of 'matrimonial property', the court said:

> '[66] … We consider, however, the answer to be that, subject to the exceptions identified in *Miller* … 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.'

The court then dealt with the three principles enunciated in *Miller* as follows:

> '[70] Thus the principle of **need** requires consideration of the financial needs, obligations and responsibilities of the parties (s 25(2)(b)); of the standard of living enjoyed by the family before the breakdown of the marriage (s 25(2)(c)); of the age of each party (half of s 25(2)(d)); and of any physical or mental disability of either of them (s 25(2)(e)).
>
> [71] The principle of **compensation** relates to prospective financial disadvantage which upon divorce some parties face as a result of decisions which they took for the benefit of the family during the marriage, for example in sacrificing or not pursuing a career: per Lord Nicholls in *Miller* at [13], Lord Hope at [117] and Baroness Hale at [140]. But the principle goes wider than that. As long ago as 1976 this court decided that, where the marriage was short, it was relevant to consider

[10] The author's term, not the court's.

> whether a party had suffered financial disadvantage arising out of entry into it: see *S v S* [1977] Fam 127 at 134C, albeit that the consideration was there directed to restriction rather than augmentation of the award. Equally, in respect of disadvantage arising out of exit from the marriage, s 25(2)(h) requires the court to consider any loss of possible pension rights consequent upon its dissolution. Even disadvantage of the type to which reference was made in the speeches in *Miller*, i.e. that stemming from decisions taken during the marriage, had been held in this court to be relevant before it became the driver for a principle of compensation: per Hale J (as she then was) in *SRJ v DWJ (Financial Provision)* [1999] 2 FLR 176 at 182E and per Thorpe LJ in *Lambert v Lambert* [2003] Fam 103 at 122G. In cases in which it arises, application of the principle of compensation is an appropriate contribution to the fair result.
>
> [72] The enquiry required by the principle of **sharing** is, as we have shown, dictated by reference to the contributions of each party to the welfare of the family (s 25(2)(f)); and, as we make clear in paragraph 85 below, the duration of the marriage (the other half of s 25(2)(d)) here falls to be considered. Also conveniently assigned to the sharing principle, no doubt dictating departure from equality, is the conduct of a party in the exceptional case in which it would be inequitable to disregard it (s 25(2)(g)). [The husband's counsel] argued to the judge that the husband's generation of substantial wealth was not only a special contribution on his part to the welfare of the family but conduct which it would be inequitable to disregard. We think, however, that it is as unnecessarily confusing to present a case of contribution as a positive type of conduct as it is to present a case of conduct as a negative or nil type of contribution: see *W v W* (2001) 31 Family Law 656.'

In this case there was also considerable analysis of the issue of contributions. This is considered in more detail at the paragraph dealing with that topic at **1.41**.



## Case-law since *Charman*

**1.12** Since the decisions in these leading cases have been handed down there has been a natural tendency on the part of practitioners to refer to them as if they and not the statute were the primary source of authority. The High Court has been at pains to try to refute this view as will be seen by the comments in a few leading decisions.

In *RP v RP*[11] Coleridge J said that care must be taken not to elevate passages from the speeches to some kind of quasi-statutory amendment. In particular, it was not possible or desirable to break up ancillary relief claims into separate 'heads of claim' like a personal injury matter. His Lordship also doubted whether 'compensation' added anything to 'financial obligations and responsibilities'.

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[11] [2007] 1 FLR 2105.

In *CR v CR*[12] Bodey J repeated these points; it was important that the terms 'sharing', 'compensation' and 'need' were not elevated into separate 'heads of claim' or 'loss' independent of the words of the statute. Otherwise, there could be a danger of double counting.

In *B v B (No 2)*[13] it was said that the reported authorities did not establish the proposition that equal division was the starting point in all cases. This remains the financial position of the parties and s 25 of the MCA 1973. In all cases the objective was fairness and avoidance of discrimination. The outcome of the s 25 exercise must always be tested against the yardstick of equality, which should be departed from only if and to the extent that there was some good reason for doing so.

Similar points are made in *P v P*,[14] *H v H*[15] (Charles J), *H v H*[16] (Moylan J), and *C v C*,[17] in which it was said that a formulaic approach should be resisted; the proper approach was to consider the s 25 factors and then to consider the principles of needs and sharing (and also compensation where appropriate, which was not the case here). In this case the judge added that, after a long marriage, factors of substance had to justify a departure from an equal division of assets.

One issue which remains difficult is that of wealth acquired by one party after separation. In *B v B*[18] Moylan J held that to award the wife half of the wealth existing at the date of trial would give insufficient weight to the fact that a substantial part of the husband's wealth had accrued directly as a result of his efforts since separation. Nor could such an award be justified on the basis of the wife's needs. As a general proposition, absent needs or compensation, the sharing principle should end at the end of the marital partnership.

With some trepidation therefore, one might summarise the proper approach as follows. First, the s 25 factors must be considered in turn, always bearing in mind the need for fairness and absence of discrimination when considering each factor. (As to the relative importance of the factors in relation to each other, see **1.18** where this is considered in more detail.) In so doing, the principles of needs, sharing and compensation should be borne in mind. Finally, the provisional result of this exercise must be compared with what would be the result of equal division of assets, and if it falls short of this yardstick of equality some good reason identified by the court and founded on the evidence must be available to allow the provisional result to remain un-amended.



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12 [2008] 1 FLR 323.
13 [2008] EWCA Civ 483.
14 [2008] 2 FLR 1135.
15 [2007] 2 FLR 548.
16 [2008] EWHC 935, [2008] 2 FLR 2092.
17 [2008] EWHC 2033 (Fam), [2009] 1 FLR 8.
18 [2010] EWHC 193 (Fam), [2010] 2 FLR 1214.

### *Equality and periodical payments*

The impact of the cases cited above on periodical payments will be considered in more detail in Chapter 2.

## ALL THE CIRCUMSTANCES OF THE CASE

**1.13** In deciding whether to exercise its powers under ss 23 to 24A, and, if so, in what manner, it is the duty of the court to 'have regard to all the circumstances of the case'.[19] The section goes on to set out particular factors, but the term 'all the circumstances' must be taken to mean what it says. It is in wide terms, and it has been held that the court must not confine itself to the specified factors.[20] It is necessary to consider all other circumstances, whether past, present or future. For example, the remarriage of one of the parties is not specifically referred to as one of the statutory factors, but it has been held that it is one of the circumstances into which the court may properly enquire.[21] Another circumstance which is not specifically set out in the statute but which is nonetheless important is the existence of an agreement between the parties. This is considered in more detail at **1.54**.

In *A v T (Ancillary Relief: Cultural Factors)*,[22] a case where the cultural values of both parties were not those of this country, it was held that in such a case and where the parties had only a secondary attachment to the English jurisdiction, the court should give due weight to the primary cultural factors and not ignore the differential between what one party might anticipate from determination here as opposed to another jurisdiction.[23]

As has been seen when considering the decisions of the House of Lords in *White v White*[24] and succeeding cases above two further extra-statutory principles, 'the yardstick of equality' and 'fairness', must now be borne in mind at all times.



## FIRST CONSIDERATION THE WELFARE OF CHILDREN

**1.14** It is provided that 'the first consideration' of the court must be given to:[25]

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19 MCA 1973, s 25(1).

20 See e g *Kokosinski v Kokosinski* [1980] Fam 72 at 183; *Trippas v Trippas* [1973] Fam 134 at 144.

21 *H v H* [1975] Fam 9; *Jackson v Jackson* [1973] Fam 99 at 104. However, prospects of remarriage are not a 'guessing game' and findings must be supported by some reasonable evidence: *Wachtel v Wachtel* [1973] Fam 72 at 86. A spouse is under a duty to be frank and give complete disclosure.

22 [2004] 1 FLR 977.

23 For another example see *G v G (Matrimonial Property: Rights of Extended Family)* [2005] EWHC 1560 (Admin), [2006] 1 FLR 62.

24 [2000] 2 FLR 981, HL.

25 MCA 1973, s 25(1).

> '… the welfare while a minor of any child of the family who has not attained the age of eighteen.'

This requirement is therefore limited to children of the family, 'child of the family' being defined as any child who has been treated by both of the parties to the marriage as a child of their family.[26] It includes stepchildren and, where the parties have lived together with a child, it is difficult to imagine circumstances in which a stepchild would not be a child of the family.[27]

The child must be under 18 years of age, and the scope of the court's duty under this provision is limited to the period ending with the child's eighteenth birthday. This is not to say that the court may or should not have regard to dependent children who are over 18,[28] but such consideration would arise from one of the other factors such as the financial obligations or responsibilities of the parties, or as one of the circumstances of the case, and would not be the first consideration of the court.

**1.15** As to the meaning of 'the first consideration', it has been held that this is not the same as the paramount consideration.[29] The welfare of a child is not to be regarded as taking precedence over all other matters but is the first matter to which the court should direct itself (see **1.18**).



## NO ONE FACTOR MORE IMPORTANT THAN OTHERS

**1.16** The statute sets out a list of matters to be considered, first when making orders as between the parties to the marriage and secondly when making orders in relation to children. The court is directed to have regard to all the matters contained in the subsection, and there is nothing in the Act to indicate that any one factor shall be more important than any other. Clearly, in some cases, consideration of one factor (eg discrepancies in age, or the length of the marriage) will occupy more of the time of the court than the others, and it may be that, in the circumstances of a particular case, one factor will prove to be more important than the others. In principle, however, there is no intrinsic reason why one factor should outweigh the importance of the others.[30]

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[26] MCA 1973, s 52(1).

[27] See eg *Teeling v Teeling* [1984] FLR 808, CA.

[28] *Lilford (Lord) v Glyn* [1979] 1 WLR 78.

[29] *Suter v Suter and Jones* [1987] Fam 111, CA. In that case, it was held that the judge had been wrong to elevate the children's interests so as to control the outcome of the case. However, see also *R v R* [1988] 1 FLR 89, CA, where it was said that, broadly speaking, a person having an obligation to maintain his children has an obligation to order his financial affairs with due regard to his responsibility to pay reasonable maintenance for them and to meet his reasonable financial obligations.

[30] It used to be argued, for example, that if significant conduct were proved, this might be the major determining factor in the case. This is not, and never has been, so. See also *Piglowska v Piglowski* [1999] 2 FLR 763, HL.

In another case,[31] Thorpe LJ, after considering the historical evolution of s 25, and the deletion in 1984 of the statutory duty to attempt to place the parties in the financial position in which they would have been had the marriage not broken down, observed that even prior to that amendment the Court of Appeal[32] had defined the judge's ultimate aim as being to do that which is fair, just and reasonable between the parties, and that had continued to be the judicial interpretation of the objective of the section. Parliament had not chosen to lay any emphasis on any one of the eight specific factors above any other.[33] He continued:

> 'Although there is no ranking of the criteria to be found in the statute, there is as it were a magnetism that draws the individual case to attach to one, two, or several factors as having a decisive influence on its determination … That said there is, if not a priority, certainly a particular importance attaching to s 25(2)(a).'

The reasons for that priority will be considered further below. Thorpe LJ concluded this part of his judgment as follows:

> 'It has often been said, and cannot be too often repeated, that each case depends on its own unique facts and those facts must determine which of the eight factors is to be given particular prominence in determination.'

In *Charman v Charman*[34] the Court of Appeal gave guidance on a further difficult question, namely how to resolve any irreconcilable conflict between the result suggested by one principle and that suggested by another. At para [73] of the judgment of the court, Sir Mark Potter P said:

> 'Often conflict can be reconciled by recourse to an order for periodical payments: as for example in *McFarlane*, per Baroness Hale at [154]. Ultimately, however, in cases in which it is irreconcilable, the criterion of fairness must supply the answer. It is clear that, when the result suggested by the needs principle is an award of property greater than the result suggested by the sharing principle, the former result should in principle prevail: per Baroness Hale in *Miller* at [142] and [144]. At least in applying the needs principle the court will have focussed upon the needs of both parties; analogous focus on the respondent is not present in the compensation principle and we leave for another occasion the proper treatment of irreconcilable conflict between that principle and one of the others. It is also clear that, when the result suggested by the needs principle is an award of property less than the result suggested by the sharing principle, the latter result should in principle prevail.'

The developing law as to pre-nuptial and other agreements provides a good example of how one issue (in these cases, the significance of an agreement) should be considered. These cases are considered in more detail at **1.60**.



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31 *White v White* [1998] 2 FLR 310, CA.
32 In *Page v Page* (1981) 2 FLR 198, CA, at 206.
33 See also *Smith v Smith* [1991] 2 FLR 432, CA, per Butler-Sloss LJ.
34 [2007] EWCA Civ 503, [2007] All ER (D) 425 (May).

## FINANCIAL RESOURCES

**1.17** The financial resources of the parties are crucial to any application for ancillary relief. It is only when the court has all the evidence as to the resources of the parties that it can decide whether, and if so, how, to redistribute them. As Coleridge J put it in *Charman v Charman* at first instance,[35] 'the obvious starting point for all these applications is the financial position of the parties now'.

The court must have regard to:[36]

> '… the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire.'

In *White v White*, referred to in **1.8**, in the Court of Appeal, Thorpe LJ underlined the importance of this factor by saying that, in almost every case, it is logically necessary to determine what is available before considering how it should be allocated, and repeated his opinion, first expressed in *H v H (Financial Provision: Capital Allowance)*,[37] that the discretionary powers of the court to adjust capital shares between spouses should not be exercised unless there was a manifest need for intervention upon the application of the s 25 criteria.

It has to be said that the second part of that statement cannot survive unscathed the decisions of the House of Lords in *White v White* and of the Court of Appeal in *Lambert v Lambert*. It is certainly still the case that the court has to fulfil a fact-finding role but even then some caution must be exercised. In *Parra v Parra*[38] Thorpe LJ was concerned that the judge had examined the financial position of the parties at very great length and in extraordinary detail and gave the following guidance:

> 'The outcome of ancillary relief cases depends upon the exercise of a singularly broad judgment that obviates the need for the investigation of minute detail and equally the need to make findings on minor issues in dispute.'

The task of the judge in ancillary relief litigation was different from that of the judge in the civil justice system; on the one hand, his quasi-inquisitorial role gave him a certain independence from the arguments of the parties but, on the other, he had an obligation to eschew over-elaboration and to:



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35 Approved by the CA at para [59] of its judgment.
36 MCA 1973, s 25(2)(a).
37 [1993] 2 FLR 335 at 347.
38 [2003] 1 FLR 942, CA.

> '… endeavour to paint the canvas of his judgment with a broad brush rather than with a fine sable. Judgments in this field need to be simple in structure and simply explained.'

The issue of what are 'matrimonial assets' and 'non-matrimonial assets' was raised in *Jones v Jones*.[39] Here, the Court of Appeal held that for the purpose of the sharing principle it was appropriate to divide assets into non-matrimonial and matrimonial. The matrimonial assets were £16m and the non-matrimonial £9m. It was held that there was no reason to depart from an equal division of the matrimonial assets. However, it was also held that the trial judge had erred in ascribing a capital value to the earning capacity of the husband and treating it as a non-matrimonial asset.

## The duty of full disclosure

**1.18** The exercise by the court of its statutory powers will be frustrated if one or other party is less than frank. The parties are therefore under an obligation to make full and frank disclosure of all relevant circumstances.[40] It is not appropriate to give partial disclosure, nor to wait for the other party to demand certain information. The information must be given voluntarily and completely. Failure to give full disclosure may result in the court exercising its powers to make interlocutory orders, for example for disclosure and production of documents,[41] will probably lead to the offender being condemned in costs, and, in extreme cases, may be regarded as conduct of a financial nature which it would be inequitable to disregard.[42] Readers are referred to the protocol which is discussed in Chapter 16.



A related issue is the extent to which disclosure of potentially incriminating documents or evidence is privileged. In *S v S (Inland Revenue: Tax Evasion)*[43] Wilson J dismissed an application by the Revenue to keep a transcript which had irregularly come into its possession and to inspect affidavits and documents, on the ground that the public interest in encouraging full and frank disclosure in ancillary relief proceedings outweighed the interest in countering tax evasion. However, in *R v R (Disclosure to Revenue)*,[44] he permitted the Revenue to retain a transcript because it contained explicit findings as to evasion which had already resulted in action by the Revenue.

In *A v A; B v B*,[45] Charles J went further. A party to ancillary relief proceedings should be aware that if he or she does not claim protection against

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39 [2011] EWCA Civ 41.

40 *Livesey (Formerly Jenkins) v Jenkins* [1985] AC 424, HL.

41 See FPR 2010, r 9.15(2)(b).

42 *P v P (Financial Relief: Non-disclosure)* [1994] 2 FLR 381; *B v B (Real Property: Assessment of Interests)* [1988] 2 FLR 490. See also *Minwalla v Minwalla* [2004] EWHC 2823 (Fam), [2005] 1 FLR 771; where the court finds that a party has set out to conceal resources and to obstruct proper investigation it may draw adverse inferences and reflect such conduct in costs.

43 [1997] 2 FLR 774.

44 [1998] 1 FLR 922.

45 [2000] 1 FLR 701.

self-incrimination, the court may make or authorise disclosure in the overall public interest to a prosecuting or other public authority. The risk of serious harm being done to the administration of justice does not outweigh the public interest in the payment of all sums lawfully due to the Revenue. Where a court is satisfied that there has been illegal or unlawful conduct it should generally report the relevant material to the relevant authority. Advisers and courts should be alert to warning parties of their privilege against self-incrimination, but the fact that such a party may have assumptions made against him or her that result in a high award is not something that founds a public interest that disclosure should not be made.

Since those decisions the position has become yet more difficult for practitioners with the coming into force of the Proceeds of Crime Act 2002 (as to which, see Chapter 21).

## Income and earning capacity

**1.19** Further consideration will be given to this matter in the section on periodical payments at **2.9**. Here it may be noted that the court will make an order on the basis of what the parties may reasonably be expected to receive if their opportunities are fully exploited. A party who chooses not to work when he or she could do so, or who chooses not to take advantage of opportunities to earn or to receive funds which are available to him or her, will find that the court draws adverse inferences from such unwillingness.[46] This is referred to as earning capacity, as opposed to earning potential which is dealt with at **1.22**.

The income to be taken into account does not normally include welfare benefits, so that it would be unusual, to say the least, to make a periodical payments order against a person whose only income was income support.[47] Nevertheless, the availability of welfare benefits to one party may be a source of comfort to a court which feels unable to make an order in favour of that party.



## Earning potential

**1.20** Slightly different considerations arise when the court considers any increase in earning capacity which it might be reasonable to expect a party to take steps to acquire, and the subsection recognises this by making it a separate matter. This wording was added to the statute by the Matrimonial and Family Proceedings Act 1984 (MFPA 1984), and must be read together with s 25A which is considered at **2.21** et seq.

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[46] See e g *Hardy v Hardy* (1981) 2 FLR 321. But, for a contrary decision in a 'big money' case, see *A v A (Financial Provision)* [1998] 2 FLR 180.

[47] *Barnes v Barnes* [1972] 3 All ER 872; *Stockford v Stockford* (1982) 3 FLR 58, CA; *Fletcher v Fletcher* [1985] Fam 92 at 100.

## Property

**1.21** Property includes all real and personal property owned by a party or in which he or she has an interest. It therefore may include beneficial interests under trusts.[48] The law relating to trusts was considered at length by Munby J in *A v A* and *St Georges Trustees and others*.[49] It was held that a spouse who seeks to extend an ancillary relief claim to assets which appear to be in the hands of a third party has to identify, by reference to some established principle, some proper basis for doing so. The determination of a dispute as to ownership between a spouse and a third party is completely different from the usual discretionary exercise between spouses and must be approached on exactly the same legal basis as if it were being determined in the Chancery Division.

Further guidance was given by Moylan J in *B v B (Ancillary Relief)*.[50] A two-stage process is required. First, it is necessary to determine whether trust assets are resources in which a spouse has any present or potential interest. Secondly, if he had, it is necessary to determine what (if any) legitimate expectation he has and, accordingly, the extent of resources likely to be available to him in the foreseeable future.[51]

Property also includes land, shares in public or private companies, partnership assets, business stock, choses in action, money, jewellery, chattels, and so on. Nothing of value which is within the control of the party concerned should be excluded.[52]

In *White v White*,[53] the husband and wife had traded in a farming partnership for many years. This was a genuine, working partnership and not a mere tax vehicle. The assets were between £4.4m and £4.8m, and the judge found that the wife should, prima facie, have £1.5m. Nevertheless, he awarded her a lump sum of £800,000 on *Duxbury* principles.[54] The Court of Appeal allowed the wife's appeal and increased the lump sum to £1.5m. Thorpe LJ said that the first fundamental issue was what was the financial worth of each of the parties as if



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48 For the position as to a discretionary trust, see e g *Charman v Charman* (above); the husband had appealed against the decision of Coleridge J to the effect that the assets which were in a Bermudan discretionary trust (a very sizeable proportion of the total) were to be regarded as assets over which he had control. The CA rejected the appeal.

49 [2007] EWHC 99 (Fam).

50 [2009] EWHC 3422 (Fam), [2010] 2 FLR 887.

51 For other examples see *Thomas v Thomas* [1995] 2 FLR 668, CA and *SR v CR (Ancillary Relief: Family Trusts)* [2008] EWHC 2329, [2009] 2 FLR 1083 (Singer J).

52 See *Donaldson v Donaldson* [1958] 2 All ER 660 (husband derived his living, food and accommodation from running a farm, and his only other source of income was a pension. He was ordered to pay an equivalent sum to the whole of the pension to his wife and children). However, where a spouse receives income under a discretionary trust over which he or she genuinely has no control, the court should only take account of the actual income received (this would not apply where the spouse had de facto control): *Howard v Howard* [1945] P 1; see also *B v B (Financial Provision)* (1982) 3 FLR 298, CA.

53 [1998] 2 FLR 310.

54 See **4.14**.

on the immediate dissolution of the farm partnership. Although, as was seen above, the reasoning of the Court of Appeal was subsequently criticised by the House of Lords, the need to establish the means (and contributions) of the parties remains an integral part of the court's duty.

The position as to property acquired after the separation remains in doubt. In *Charman v Charman* the Court of Appeal[55] considered that a bonus generated by work done 14 months after separation was clearly an asset of the husband, but that the way the court should treat such an asset (e g by applying different percentages for 'sharing') was a 'grey area which this court may need to survey upon a suitable appeal'. However, in *B v B*[56] Moylan J sought to bring some clarity to this (see **1.12**).

See also **1.40** as to contributions.

An entitlement under a pension scheme is frequently a valuable asset and, were it not for s 25B, would have to be considered in detail here. However, that section makes separate provision for pensions, and so pensions will be considered in detail in Chapter 10.



## Dissipated assets

**1.22** A party who recklessly or irresponsibly wastes or dissipates assets will not escape unscathed, because it has been held that it is a proper exercise of the court's discretion to 'add back' or notionally attribute such wasted assets to the party responsible for the dissipation when considering the overall position as to the means of the parties. In *Norris v Norris*[57] Bennett J said that it is only fair to add back into a spouse's assets the amount by which he or she has recklessly depleted the assets and thus potentially disadvantaged the other spouse.[58]

However, this is not a principle to be applied rigidly. In another case[59] Wilson LJ said that a notional re-attribution has to be conducted very cautiously by reference only to clear evidence of dissipation (in which there is a wanton element).

## Expectations

**1.23** The court must have regard to income, property etc which a party has or is likely to have in the foreseeable future. This does not include pensions, which are dealt with separately.

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55 [2007] EWCA Civ 503, [2007] All ER (D) 425 (May) at [104].
56 [2010] EWHC 193 (Fam), [2010] 2 FLR 1214.
57 [2003] 1 FLR 1142.
58 For further authority see *Martin v Martin* [1976] Fam 335, and *Vaughan v Vaughan* [2008] 1 FLR 1721, CA.
59 *Vaughan v Vaughan* [2008] 1 FLR 1721, CA.

The most common example of a financial expectation is where one party is, or is likely to be, a beneficiary under a will or an intestacy. However, here the court must recognise that wills may be changed and that testators may outlive beneficiaries. The court also has problems of evidence, since it cannot compel a potential benefactor to disclose his or her intentions nor can it always accurately estimate the size of the potential inheritance.

What is the foreseeable future may also be debatable. In one case, it was held that the prospects of a 64-year-old woman inheriting from her mother who was in poor health should be disregarded.[60] In another, where the husband was indefeasibly entitled under German law to a substantial inheritance from his father, and the parties had always made their financial arrangements on that basis, the wife's application was adjourned until the death of the father.[61]

When *Miller v Miller* was decided by the Court of Appeal,[62] it was held that when she married a rich man the wife had a 'legitimate expectation' to be maintained thereafter as the wife of a rich man. As has been seen (see **1.11**), the House of Lords rejected this finding (while re-emphasising) the importance of s 25(2)(c) (standard of living – see **1.31**).

**1.24** Before the coming into force of s 25B of MCA 1973 in 1996, there were authorities to the effect that the entitlement of a serviceman to a lump sum on retirement cannot be taken into account because of the provisions of the Army Act 1955 and similar statutes. It was also held that expectations which were more than a few years away were to be disregarded.[63]

These decisions have been reversed by s 25B, which is considered in Chapter 10.

**1.25** Another common example of a financial expectation is a claim for personal injuries.[64] For this to be relevant, the court would have to be satisfied as to the likelihood of success, and the amount likely to be recovered. It should also be said that since, in serious cases, the award of damages would be intended to compensate a party for past and future loss, the damages would fall into a different category than, say, investments acquired during the marriage or a windfall inheritance.

In *D v D (Lump Sum Order: Adjournment of Application)*,[65] it was held that a court which decides to adjourn a lump sum application is doing no more than exercising the discretion vested in it, albeit that this step should be taken only



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60 *Michael v Michael* [1986] 2 FLR 389.
61 *MT v MT (Financial Provision: Lump Sum)* [1992] 1 FLR 362.
62 [2005] EWCA Civ 984, [2006] 1 FLR 151.
63 *Roberts v Roberts* [1986] 2 FLR 152; see also *Priest v Priest* (1980) 1 FLR 189 and *Happe v Happe* [1991] 4 All ER 527.
64 *Daubney v Daubney* [1976] Fam 267; *Roche v Roche* (1981) Fam Law 243, CA; *Wagstaff v Wagstaff* [1992] 1 All ER 275, CA; *C v C (Financial Provision: Personal Damages)* [1995] 2 FLR 171, FD.
65 [2001] 1 FLR 633, Connell J.

rarely, where justice to the parties could not otherwise be done. One such circumstance was the real possibility of capital from a specific source becoming available in the near future.

In another somewhat unusual case[66] after a short marriage which ended 21 years ago a claim for a lump sum had been adjourned generally to allow the wife to apply again when the husband received an inheritance and the judge made the order for a lump sum many years later. The needs of the children were said to be the most important factor.

## Financial needs, obligations and responsibilities

**1.26** The court is directed to have regard to:[67]

> '… the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future.'

In most cases, the task of the court will be to calculate the reasonable needs of the parties, in particular the needs of a parent who is caring for the children of the family, and to make a decision as to whether there should be a transfer between the parties of assets or income to meet those needs. In such a case, it is also necessary to ensure that the 'paying party' is left with sufficient to meet his or her reasonable needs.[68]

In average income cases, the subsistence level indicated by benefit rates, together with the cost of housing is frequently regarded as a minimum figure for needs.[69]

**1.27** What constitutes obligations and responsibilities may be more debatable. Legal obligations assumed by one party from which it would be impossible to withdraw will normally be accepted.[70] The cost of maintaining a second family is clearly frequently contentious, particularly where the result is that that party is rendered unable to afford to maintain the first family. However, the court must be realistic, and must recognise that a second family which is being maintained by a person of average income will not have access to State benefits,



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66 *Re G (Financial Provision: Liberty to Restore Application for Lump Sum)* [2004] EWHC 88 (Fam), [2004] 1 FLR 997, Wilson J.

67 MCA 1973, s 25(2)(b).

68 *Allen v Allen* [1986] 2 FLR 265, CA.

69 Ibid; but see *Freeman v Swatridge* [1984] FLR 762.

70 See e g *Stockford v Stockford* (1982) 3 FLR 58, CA, where a husband had left his wife and first family in the former matrimonial home and bought a new house for his own occupation with the aid of a large mortgage. The court decided not to make an order against him since to do so would mean that he could not service the mortgage. Contrast *Slater v Slater and Another* (1982) 3 FLR 364 where the court thought that the husband had been extravagant in deciding to live in a country house with heavy expenses, and took no account of the unreasonable expenses. See also *Campbell v Campbell* [1998] 1 FLR 828, CA.

whereas the first family might. There is nothing which the court can do to stop someone from establishing a second union and assuming the responsibility for children.

Where assets are surplus to needs it may be that a different approach will be adopted.[71]

Where there are children, the liability of either party under the Child Support Act 1991 (CSA 1991) is an obligation to be taken into account.

It has been held that the court should make a distinction between 'hard debts' such as debts to banks, and 'soft debts' such as money borrowed from relatives.[72]

**1.28** It was once the case that different considerations applied to 'big money cases' where the parties enjoy considerable affluence. This is the subject of a separate section in Chapter 4, where it will be seen that, until the decision of the House of Lords in *White v White*, the concept of 'reasonable requirements' was used in place of that of needs. It has now been established that reasonable requirements were an unwarranted judicial gloss on the words of the statute and that consideration of the needs of the parties is all that the statute permits (although an award will not necessarily be limited to a party's needs).



## STANDARD OF LIVING DURING MARRIAGE

**1.29** Before the changes introduced by the 1984 Act, the court was directed to put the parties in the position in which they would have been if the marriage had not broken down. That was frequently impossible, and is no longer one of the concerns of the court. However, the court is still directed to have regard to 'the standard of living enjoyed by the family before the breakdown of the marriage'.[73] This was upheld by the House of Lords in the conjoined appeals of *Miller v Miller* and *McFarlane v McFarlane*[74] (see **1.11**).

It is perhaps important to note that the subsection refers to 'the family' and not to the parties; taken with the 'first consideration', this might entitle the court to take steps to ensure that the children of the family suffered as little as possible, even at the expense of one of the parents.

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71 For two different approaches in relatively big money cases see *Norris v Norris* [2002] EWHC 2996 (Fam), [2003] 1 FLR 1142 (new children ignored) and *H-J v H-J (Financial Provision: Equality)* [2002] 1 FLR 415 (account taken of new responsibilities).

72 *M v B (Ancillary Proceedings: Lump Sum)* [1998] 1 FLR 53, CA, at 56 and 60.

73 MCA 1973, s 25(2)(c).

74 [2006] 1 FLR 1186, HL.

In most cases, the concern of the court will be to ensure that the standard of life of one party does not deteriorate to a greater extent than that of the other.[75]

**1.30** Separate considerations may arise in cases of a short marriage and in big money cases. These are considered in more detail at **1.34** and Chapter 4, respectively. However, it may be helpful to note here that it has been held that, where there has been a high degree of affluence in the marriage, it is not necessary to ensure that the same high degree of affluence is maintained for both parties.[76]

## AGES OF PARTIES AND DURATION OF MARRIAGE: AGE

**1.31** The next factor in the s 25 checklist is 'the age of each party to the marriage and the duration of the marriage'.[77] The age of the parties is normally relevant in relation to their earning capacity. Subject to the needs of young children, a young wife will normally be taken to have an earning potential, and the provisions of s 25A will apply (see Chapter 2).

Very different considerations apply to a woman aged over 50 who has not worked for many years. The court will take the age of such a person into account when deciding whether she has an earning potential.[78]



### Duration of marriage: short marriage

**1.32** When a marriage has subsisted for more than the average number of years, the significance of its duration is not normally an important factor; the usual guidelines apply and there is no separate point to be made about the length of the marriage. Duration is really only significant in the case of a short marriage, which is a topic which must now be considered.

The duration of a short marriage is not, of course, an isolated factor; associated with a short marriage are normally such other important factors as contributions (or lack of contributions), children, and earning potential. For example, when all the capital contributions have come from one party, and the marriage ends after a short period, in the absence of other factors the non-contributing party could not expect a substantial redistribution of assets.

The proper approach to a short marriage has now been considered by the House of Lords in the conjoined appeals of *Miller v Miller* and *McFarlane v*

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75 See generally *M v M (Financial Provision)* [1987] 2 FLR 1; *Leadbeater v Leadbeater* [1985] FLR 789; *P v P (Financial Relief: Non-disclosure)* [1994] 2 FLR 381.

76 See e g *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45.

77 MCA 1973, s 25(2)(d).

78 See the cases cited in Chapter 2 on 'Periodical payments', in particular 'The clean break' at **2.21** et seq.

*McFarlane*.[79] It may be helpful first to summarise the leading pre-*Miller/McFarlane* cases and then to contrast these with the House of Lords guidance.

## *Pre-Miller/McFarlane cases*

**1.33** In *Attar v Attar (No 2)*,[80] the marriage had lasted for only 6 months and the actual cohabitation only 7 weeks. It was held that because of those facts it was impossible to have regard to all the usual s 25 factors; the only proper approach was to have regard to the effect on the parties of the marriage and its dissolution. There were no children, the husband was very wealthy, and the order was for a limited term of periodical payments to enable the wife to readjust.

In *C v C (Financial Relief: Short Marriage)*,[81] the facts of the case were described as 'highly unusual' with features that made it 'unique'. There was, however, a child of the marriage. The judge had ordered periodical payments with no term, and this was upheld by the Court of Appeal. Ward LJ said that the appropriateness of a term order depended on all the s 25 checklist criteria, including the welfare of any child; it was not appropriate simply to presume the imposition of a term whenever there was a short-term marriage.

In *Hedges v Hedges*,[82] the marriage had lasted 4½ years; there were no children, and the wife had continued to work. She was awarded half the husband's liquid assets to help deal with her housing needs, and periodical payments for 18 months to help her to readjust. This was upheld by the Court of Appeal.

In *Hobhouse v Hobhouse*,[83] the parties divorced after 4 years of marriage; there were no children. The wife had inherited £0.5m and expected to inherit a further £1.5m on her mother's death. The husband's wealth was indicated by the fact that he pleaded the 'millionaire's defence'.[84] The wife was likely to return to Australia and her family home there within 3 to 5 years. The judge awarded her a lump sum of £175,000. The wife's appeal was dismissed. The marriage was childless and brief; the wife had not sacrificed any financial advantage; she had been allowed 3 to 5 years to rebuild her life. There was no obvious bracket, and the award was well within the judge's discretion.

In *G v G (Financial Provision: Separation Agreement)*,[85] the marriage lasted 4½ years. The wife brought into the marriage her two children from a previous marriage and they enjoyed a luxurious lifestyle. It was held that the short duration of the marriage was only one factor; both parties had made



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79 [2006] 1 FLR 1186, HL.
80 [1985] FLR 653.
81 [1997] 2 FLR 26, CA.
82 [1991] 1 FLR 196, CA.
83 [1999] 1 FLR 961, CA.
84 See **4.12**.
85 [2000] 2 FLR 18, Connell J.

significant contributions to the welfare of the family and were likely to continue to do so. The husband's total wealth exceeded £4.5m; the wife earned £11,500 per annum and had a house (purchased for her by the husband) worth £250,000. She was awarded a lump sum of £240,000.

For an example of a more recent decision involving substantial assets see *K v K (Ancillary Relief: Pre-nuptial Agreement)* which is discussed at greater length at **1.60**. The most interesting point to emerge from that case in this context is that, after dealing with the capital claims of the wife, the judge dealt with the needs of the child of the family almost as a discrete issue and as if it were an application under Sch 1 to the Children Act 1989. The husband was ordered to provide a home and furnishings for the child at a cost of £1.2m, to revert to him eventually.[86]

In *Foster v Foster*[87] the Court of Appeal allowed an appeal from a circuit judge and restored the order of a district judge awarding a wife 61% of the assets after a very short marriage where she had introduced the bulk of the capital. The district judge had sought to give the parties back what they had brought into the marriage at the value it held at that date, and that was not unfair. That was the only possible reason to depart from equality in this case. As will be seen below, this case is probably the most important of the pre-2006 cases.

In *B v B (Mesher Order)*[88] the marriage had lasted 10 months and there was one child. The district judge found the wife needed £220,000 to rehouse herself and awarded her a lump sum of £175,000 and periodical payments. The husband appealed and argued, inter alia, that there should have been a *Mesher* order. This was rejected on the ground that, given the wife's continuing contributions to bringing up the child, her prospects of being able to generate capital were small whereas the husband's were good. A *Mesher* order would therefore produce inequality of outcome. It was also held that a term order for periodical payments for the wife was not appropriate in view of the uncertainty and that the proper approach was to impose no term and to leave it to the payee to seek variation.

**1.34** Perhaps the best way to summarise these decisions would be to reaffirm the importance of considering all the s 25 factors without preconceptions, while recognising that many of those factors will have little relevance in many cases of a short marriage. It was important to consider what had been the effect of the marriage on the parties, and, perhaps, to ask what they had lost in financial terms.



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86 For an even more generous order in favour of a child made under Sch 1 see *Re P (Child: Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865 and **11.25**.

87 [2003] 2 FLR 299.

88 [2003] 2 FLR 285, [2003] Fam Law 462.

Where there is a child, it cannot be denied that this will have a significant effect on the parent caring for the child, and this would seem to make it prima facie inappropriate to impose a term on periodical payments.[89]

## *Miller/McFarlane guidance*

**1.35** The House held that, if it were not clear before *Foster v Foster*, it must now be clear that the old law relating to short marriages was swept away by *White v White*. The old principle of trying to restore one party, normally the wife, to her position before the marriage, was no longer applicable.

The principles of *White*, particularly the yardstick of equality and the concept of sharing, apply as much to short as to long marriages. *Foster v Foster* had made clear that all the s 25 guidelines must be applied in such a case. Having said that, in his speech Lord Nicholls also made clear that the application of these principles will not necessarily result in equal division. When he said that the length of the marriage 'will affect the quantum of the financial fruits of the partnership' he can only mean that the court must look at what the partnership produced during the term of the relationship, and that will be one of the factors to be considered.

Unsurprisingly, Baroness Hale agreed with the approval of her judgment in *Foster*. Referring to *Foster*, she said that:

> '… [a]lthough one party had earned more and thus contributed more in purely financial terms to the acquisition of those assets, both contributed what they could, and the fair result was to divide the product of their joint endeavours equally.'

**1.36** A post-*Miller/McFarlane* case dealing with a short marriage but where the assets were large was *McCartney v Mills McCartney*.[90] This case attracted enormous public interest out of proportion to its legal significance because of the notoriety of the parties, but it does provide a useful example of how the courts may approach such a case. The marriage was a short one, but there was one child. The husband's assets exceeded £400m, but had almost entirely been earned by the exceptional talents of the husband many years before the marriage. The wife's assets were £8m. The wife was awarded £16.5m, and provision for the child.

An issue associated with the length of the marriage may be the significance which the court should give to cohabitation outside marriage. As to pre-marital cohabitation, the law is reasonably clear; the court may have regard only to the

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[89] See also *Re G (Financial Provision: Liberty to Restore Application for Lump Sum)* [2004] EWHC 88 (Fam), [2004] 1 FLR 997, where after a short marriage a claim for a lump sum was adjourned generally with liberty to restore to enable the wife to apply in the event of the husband's inheritance; it was said that the interests of the children changed the perception of fairness.

[90] [2008] 1 FLR 1508, Bennett J.

period between the marriage and the breakdown when considering the length of the marriage.[91] The same applies to post-marital cohabitation.[92]

Perhaps a more contemporary approach can be derived from *GW v RW (Financial Provision: Departure from Equality)*[93] where it was held that where a marriage moved seamlessly from cohabitation to marriage it was unrealistic and artificial to treat the periods differently. However, it was equally unrealistic to treat the period of estrangement conducted under the umbrella of a divorce petition as part of the duration of the marriage.

Cohabitation of the party who applies for financial relief after divorce will be considered in more detail at **2.10.**

## DISABILITY

**1.37** The court must have regard to 'any physical or mental disability of either of the parties to the marriage'.[94] This is another factor which overlaps with earning capacity or potential, and the position of disabled parties would be no different if this provision did not exist. There seems to be no other way in which disability has ever been regarded as a factor in itself.

## CONTRIBUTIONS

**1.38** The next s 25 factor is:[95]

> '… the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family.'

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91 *Foley v Foley* [1981] Fam 160; *Campbell v Campbell* [1976] Fam 347.

92 *Hill v Hill* [1997] 1 FLR 730, an unusual case which turned on other issues, eg whether an order made in 1969 could be set aside on the ground of 25 years' cohabitation after dissolution. 'Under English law, a relationship of cohabitation no matter how long nor how great the dependence does not give the wife any right to claim nor power in the court to order either maintenance or discretionary capital provision', per Holman J. See also *Hewitson v Hewitson* [1995] 1 FLR 241, CA. See also *CO v CO* [2004] EWHC 287 (Fam), [2004] 1 FLR 1095, where Coleridge J held that committed settled relationships which endure for years outside marriage must be regarded as every bit as valid as marriage; where such an arrangement existed and seamlessly preceded the marriage it is as capable of being as important a non-financial circumstance as any other.

93 *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam), [2003] 2 FLR 108, Nicholas Mostyn QC. See also *S v S (Financial Provision) (Post-Divorce Cohabitation)* [1994] 2 FLR 228; another unusual case, involving cohabitation of 6 years before, 8 years during and 15 years after marriage. Douglas Brown J held that it was necessary to have regard to all the circumstances and awarded the wife a lump sum of £185,000 out of the husband's free capital of £400,000 plus £100,000 in respect of her interest in the home. However, caution is required; in *Hewitson* (above), 'grave reservations' were expressed as to this decision.

94 MCA 1973, s 25(2)(e).

95 MCA 1973, s 25(2)(f).

The purpose of this subsection is, clearly, to try to reflect the value of each of the parties to the whole marriage, which is not an easy task. This factor may be subdivided into several categories.

## Financial contributions

**1.39** Contributions of a financial nature will include the earnings of both parties over the course of the marriage, any capital sums provided by them, for example for the acquisition of a house, and any inheritances which they have received from which the family has benefited. It also includes the value of a discounted purchase price for a former council house under the 'right to buy' scheme.

The court has a duty to make findings of fact where there is a dispute as to any financial contributions made by either party; any decision as to how available capital is to be divided to give effect to the s 25 criteria must start from an accurate assessment of what the parties' respective proprietary interests are.[96]

As to 'negative contributions', see **1.24**.

In *White v White* the relevance of inherited wealth as a contribution was mentioned and for a time it was thought by some that this class of asset might fall outside the ambit of the normal division of assets. However, in *Norris v Norris*[97] Bennett J held that Lord Nicholls had not enunciated a guideline that inherited contributions should not be included in the pool of assets for division. In theory, a spouse could claim more than half for this reason, but only in very limited and quite exceptional circumstances. Inherited property represented a contribution by one of the parties and was a factor to be taken into account.

This case was of some significance since it post-dated *Lambert v Lambert* and clearly reflects the thinking as to 'special contributions' in that case.[98] A similar conclusion was reached by Nicholas Mostyn QC in *GW v RW (Financial Provision: Departure from Equality)*.[99] Nevertheless, the fact that there might be room for more than one point of view on this issue was demonstrated by the decision of Munby J in *P v P (Inherited Property)*.[100] This was a case involving a family farm which had been in the husband's family for several generations. His Lordship held that fairness might demand a different approach if the inheritance were a pecuniary legacy which accrued during the marriage than if it were a landed estate which had been in one spouse's family for generations



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96 *M v B (Ancillary Proceedings: Lump Sum)* [1998] 1 FLR 53, CA, per Thorpe J at 58. See also *White v White* [1998] 2 FLR 310, and *A v A (Elderly Applicant: Lump Sum)* [1999] 2 FLR 969.

97 [2002] EWHC 2996 (Fam), [2003] 1 FLR 1142.

98 [2002] EWCA Civ 1685, [2003] 1 FLR 139, CA. Cases such as *M v M (Financial Provision: Valuation of Assets)* [2002] Fam Law 509 and *H v H (Financial Contributions: Special Contribution)* [2002] 2 FLR 1021 which arrive at the opposite conclusion may be distinguished and doubted for that reason.

99 [2003] EWHC 611 (Fam), [2003] 2 FLR 108.

100 [2004] EWHC 1364 (Fam), [2005] 1 FLR 576.

and had been brought into the marriage with an expectation that it would be retained in specie for future generations. In the instant case, the proper approach was to make an award based on the wife's reasonable needs for accommodation and income; to do more would be to tip the balance unfairly in her favour and unfairly against the husband.

**1.40** The potential differences in judicial opinion at the highest level were revealed in the speeches of Lord Nicholls and Baroness Hale in *Miller/McFarlane*. *White v White* had already established that the contributions of the breadwinner are not to be favoured over those of the homemaker and childcarer. Both Lord Nicholls and Baroness Hale sought to deal with the vexed issue of the evaluation of special or exceptional contributions, such as, for example, those of an exceptionally gifted sportsman, musician or entrepreneur (these are the author's examples, not those of the court).

Lord Nicholls deprecated any lengthy and costly inquiry into such matters. The question was whether earnings of this character could be regarded as a 'special contribution', and thus as a good reason for departing from equality of division. The answer was that exceptional earnings were to be regarded as a factor pointing away from equality of division when, but only when, it would be inequitable to proceed otherwise. The wholly exceptional nature of the earnings must be, to borrow a phrase more familiar in a different context, obvious and gross.

Baroness Hale agreed, also equating contributions with conduct. The words she added are important and worth repeating.

> 'Section 25(2)(f) of the 1973 Act does not refer to the contributions which each has made to the parties' accumulated wealth, but to the contributions they have made (and will continue to make) to the welfare of the family. Each should be seen as doing their best in their own sphere. Only if there is such a disparity in their respective contributions to the welfare of the family that it would be inequitable to disregard it should this be taken into account in determining their shares.'

**1.41** The difference between Lord Nicholls and Baroness Hale related to the relevance of 'non-matrimonial property'. Lord Nicholls' approach was that non-matrimonial property should be viewed as all property which the parties bring with them into the marriage or acquire by inheritance or gift during the marriage (plus perhaps the income or fruits of that property), while matrimonial property should be viewed as all other property. The yardstick of equality should apply generally to matrimonial property (although the shorter the marriage, the smaller the matrimonial property is in the nature of things likely to be). But the yardstick is not so readily applicable to non-matrimonial property, especially after a short marriage, but in some circumstances even after a long marriage.

Baroness Hale's approach took a more limited concept of matrimonial property, as embracing 'family assets' (cf *Wachtel v Wachtel*[101]) and family businesses or joint ventures in which both parties work (cf *Foster v Foster*[102]). In relation to such property she agreed that the yardstick of equality may readily be applied. However, she identified other 'non-business-partnership, non-family assets', to which that yardstick may not apply with the same force particularly in the case of short marriages; these included not merely (a) property which the parties bring with them into the marriage or acquire by inheritance or gift during the marriage (plus perhaps its income or fruits), but also (b) business or investment assets generated solely or mainly by the efforts of one party during the marriage.

Baroness Hale's view was that the source of assets may be taken into account but that this would become less important with the passage of time; she points out that the court is directed to take account of the length of the marriage. She continued:

> 'If the assets are not "family assets", or not generated by the joint efforts of the parties, then the duration of the marriage may justify a departure from the yardstick of equality of division. As we are talking here of a departure from that yardstick, I would prefer to put this in terms of a reduction to reflect the period of time over which the domestic contribution has or will continue rather than in terms of accrual over time.'

Baroness Hale concluded, on this issue:

> 'This is simply to recognise that in a matrimonial property regime which still starts with the premise of separate property, there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them. The nature and the source of the property and the way the couple have run their lives may be taken into account in deciding how it should be shared.'



Lord Mance approved this approach.

Given this approval, and the fact that Lord Hoffman expressly identified himself with Baroness Hale's speech and not with that of Lord Nicholls (Lord Hope favouring both equally), it could perhaps fairly be said that the true ratio of this case on this issue is that expressed by Baroness Hale and not that of Lord Nicholls. However, that was not an end of the debate as to 'exceptional' or 'special' contributions. When he gave his judgment in *Charman v Charman* at first instance[103] Coleridge J observed that:

> 'For the past nearly five years, since *White*, courts at every level have been wrestling with the question of whether or not in departing from equality and striving for fairness it is proper to take into account and give weight to exceptional

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[101] [1973] Fam 72 at 90, per Lord Denning MR.
[102] [2003] EWCA Civ 565; [2003] 2 FLR 299, 305, para 19, per Hale LJ.
[103] [2006] EWHC 1879 (Fam).

> wealth creation by one spouse. In reading and re-reading all the now familiar authorities, attempting to expose and explain the underlying principles, one is reminded of a frenzied butterfly hunter in a tropical jungle trying to entrap a rare and elusive butterfly using a net full of holes. As soon as it appears to have been caught it escapes again and the pursuit continues.'

The matter was considered in some detail when *Charman* reached the Court of Appeal for obvious reasons; this was a case involving very considerable assets (£138m) which it was common ground had almost entirely been generated by the exceptional and in every way 'special' efforts and ingenuity of the husband.[104] Giving the judgment of the court, Sir Mark Potter P said:

> 'It was inevitable, so it seems to us, that the notion of a special contribution should have "survived" the decision in *Miller* [as to which, see below]. The statutory requirement in every case to consider the contributions which each party has made to the welfare of the family, as well as those which each is likely to make to it, would be inconsistent with a blanket rule that their past contributions to its welfare must be afforded equal weight. Nevertheless the difficulty attendant upon a comparison of their different contributions and the danger of its infection by discrimination against the home-maker led the House in *Miller* heavily to circumscribe the situations in which it would be appropriate to find that one party had made a special contribution, in the sense of a contribution by one unmatched by the other, which, for the purpose of the sharing principle, should lead to departure from equality. In this regard the House was unanimous.'

The court declined the invitation to identify a figure as a 'threshold' beyond which a special contribution would be appropriate, considering it dangerous to do so. Nevertheless, it was prepared to give guidance (at para [90]) as to 'the appropriate range of percentage adjustment to be made in cases in which the court is satisfied that the principle requires departure from equality'. Even there, however, it was said that 'it is necessary however to bear in mind that fair despatch of some cases may require departure even from the range which we propose'.



The guidance offered was as follows:

(1) The adjustment should be significant as opposed to token. The court found it hard to conceive that where such a special contribution was established the percentages should be nearer equality than 55%–45%.

(2) Equally, it should not be too great. The court approved Coleridge J's comment that 'I think you need to be careful, after a very long marriage, to give a wife half of what you give the husband'. The judgment of the Court of Appeal continued:

> 'Arbitrary though it is, our instinct is the same, namely that, even in an extreme case and in the absence of some further dramatic feature unrelated

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[104] For a similar case with a similar result see *Sorrell v Sorrell* [2005] EWHC 1717, [2006] 1 FLR 497.

to it, fair allowance for special contribution within the sharing principle would be most unlikely to give rise to percentages of division of matrimonial property further from equality than 66.6%–33.3%.'

**1.42** Some more recent cases demonstrate that the courts are concerned to prevent excessive litigation over what is and what is not matrimonial property; the reader is referred to the cases discussed at **1.14**.

In *S v S (Ancillary Relief: Importance of FDR)*[105] the judge at first instance had 'ring-fenced' certain assets of the wife because they had emanated from her family in 1996 and always treated by her as her separate property. That decision was overturned on appeal and the properties brought into the general 'pot'; this was a needs case and the money was needed to fund homes and lifestyle.

In *Robson v Robson*[106] Ward LJ gave some guidance as to the treatment of inherited wealth. Inherited wealth forms part of the financial resources and therefore is not quarantined. However, the fact that wealth is inherited and not earned justifies it being treated differently from wealth accrued by joint efforts. The nature and source of the asset may well be a reason for departing from equality within the sharing principle. Although there were other issues in the instant case it is noteworthy that, after a 21-year marriage, and from a total estate of £22.3m, where most had been inherited by the husband, the wife was awarded £7m.



## Non-financial contributions

**1.43** If the only contributions which the court could consider were financial, a wife and mother who had stayed at home to look after children would be at a distinct disadvantage. Thus it is that the court is directed to have regard to the value to the family of a non-working party. It may be that before the decision of the House of Lords in *White v White*[107] the guidance which was given as to how, if at all, such contributions should be weighed in the balance against financial contributions was not entirely clear. For example, it was held that it was wrong to make a distinction between cases where a wife makes actual financial contributions to the assets of the family and those in which her contribution is indirect.[108] However, in another, admittedly unusual, case,[109] it was held that, where there were ample assets and the wife had made a full contribution to the welfare of the family but had not contributed directly to the build-up of the family assets, the remarks in *Wachtel v Wachtel*,[110] to the effect that there should be a starting point of equality, should be confined to division of the family home and not to division of the family assets as a whole.

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[105] [2008] 1 FLR 944, Baron J.
[106] [2010] EWCA Civ 1171.
[107] [2001] 1 AC 596, [2000] 2 FLR 981.
[108] *Vicary v Vicary* [1992] 2 FLR 271, CA, cited with approval in *Conran v Conran* [1997] 2 FLR 615 by Wilson J.
[109] *W v W (Judicial Separation: Ancillary Relief)* [1995] 2 FLR 259 (husband was 87, wife 78; wife's reasonable needs were limited).
[110] [1973] Fam 72.

In *White v White*,[111] it was held that it is a principle 'of universal application' that there can be no discrimination between husband and wife in their respective roles. Different roles are assumed for many different reasons. Whatever the division of labour, fairness dictates that this should not prejudice either party when considering the statutory factors. There should be no bias in favour of the money-earner and against the homemaker and childcarer.

This principle was developed in *Lambert v Lambert.*[112] Here, judges were given clear guidance as to how to deal with issues of contributions. Any bias in favour of a breadwinner is an example of gender discrimination and therefore to be disapproved:[113]

> 'The danger of gender discrimination resulting from a finding of special financial contribution is plain.'

The statutory requirement to consider all the s 25 factors does not require a detailed critical appraisal of the performance of each of the parties during the marriage:[114]

> 'Couples who cannot agree division are entitled to seek a judicial decision without exposing themselves to intrusion, indignity, and possible embarrassment of such an appraisal.'

Special financial contributions are dealt with above. However, it should not be forgotten that not all special contributions are financial. In *Charman v Charman*, above, it was pointed out at para [80] that:

> 'The notion of a special contribution to the welfare of the family will not successfully have been purged of inherent gender discrimination unless it is accepted that such a contribution can, in principle, take a number of forms; that it can be non-financial as well as financial; and that it can thus be made by a party whose role has been exclusively that of a home-maker.'

**1.44** It is, perhaps, necessary to say again that no one factor is to be regarded as intrinsically more important than the others; the court must take an overall view.

In another unusual case,[115] it was said that the proper approach is to survey the wife's reasonable requirements and then place her contributions and all other factors in the balance, taking into account the nexus between the contributions and the creation of the resources.

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111 See **1.10**.
112 [2002] EWCA Civ 1685, [2003] 1 FLR 139.
113 Ibid, per Thorpe LJ at para 45.
114 Ibid, para 38.
115 *Conran v Conran* [1997] 2 FLR 615; unusual because of the size of the parties' wealth if for no other reason.

## Future contributions

**1.45** The court must take account of the future as much as of the past. This will normally be relevant when one party is to care for the children of the family, and the longer the dependency the greater the significance of this factor. If one party is unable, for financial reasons, to make any significant contribution to the future welfare of the family, so that the burden will inevitably fall on the other party, this might well be a significant factor.

Since the advent of CSA 1991, and the virtual impossibility of contracting out of child support in most cases, the considerable sums which many 'non-resident parents' will have to pay is a future contribution which cannot be ignored.

# CONDUCT

**1.46** The court is directed to have regard to:[116]

> '… the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it.'

As has been emphasised before, no one factor is normally the sole determining factor in any application, and there are few examples of cases where conduct has been a major determining matter.[117] Such examples as there are may be summarised as follows.



## Financial conduct

**1.47** Cases where it can be demonstrated that the behaviour of one party has had a clear (and, impliedly, detrimental) effect on the fortunes of the parties are the most usual examples of conduct having a real significance. In one case, the husband had dissipated the family capital, and the court held that he could not be allowed to fritter away assets and then claim as much of what was left as if he had behaved reasonably.[118] In another case, the husband, a farmer, had brought about financial disaster and his own bankruptcy; in the words of the judge he had 'obstinately, unrealistically and selfishly trailed on to eventual disaster, dissipating in the process not only his own money but his family's money, his friends' money, the money of commercial creditors unsecured and eventually his wife's money'.[119] Even so, he was not deprived of all entitlement but was restricted to the minimum sum needed to rehouse himself.

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[116] MCA 1973, s 25(2)(g).

[117] In *McCartney v Mills McCartney* [2008] 1 FLR 1508, Bennett J declined to hear evidence or argument about conduct on the ground that it would make little or no difference to the final result.

[118] *Martin v Martin* [1976] Fam 335.

[119] *Beach v Beach* [1995] 2 FLR 160, per Thorpe J. See also *Le Foe v Le Foe and Woolwich plc* [2001] 2 FLR 970.

These decisions may perhaps be contrasted with another,[120] in which a wife had inherited her mother's estate and then sold part to her daughter at an undervalue, thereby depleting her own assets. The argument that this was 'financial conduct' was rejected, but the actions of the wife were held to be clearly relevant as one of the circumstances.

In another case, it was held that although the husband's conduct in relation to certain financial transfers was such that it would be inequitable to ignore it, the approach should be not to fix a sum as a penalty, but rather an evaluation based on all the relevant factors taken in the round.[121]

An unusual situation arose in *W v W*.[122] Both parties had agreed not to pursue allegations of conduct but the husband then sought to argue that, because of the wife's drinking, her contributions were 'negative'. Wilson J said that 'negative contributions' was an unhelpful oxymoron. Where a nil contribution or conduct were alleged, the allegations should be put in those terms.

More comment on dissipated assets will be found at **1.24**.

## Non-financial conduct

**1.48** In previous editions of this book, a summary of what were believed to be the leading cases where conduct was found to be relevant were included. This task was made easier and more authoritative by the judgment of Stanley Burton J in *S v S*.[123] His Lordship had to consider whether or not the alleged conduct in that case should be taken into account. He was at pains to point out that he did not normally sit in the Family Division and so relied on the two expert counsel[124] appearing before him. He dealt with the position as follows:

> 'I have been told by Counsel that there are only rare cases in the reports where this has occurred. I have been taken to what I believe must be all of them. The examples given include:
>
> (i) *Armstrong v Armstrong* [1974] SJ 579: wife shoots husband with his shotgun with intent to endanger life.
> (ii) *Jones v Jones* [1976] Fam 8: husband attacks wife with a razor and inflicts serious injuries: there are financial consequences (wife rendered incapable of working).
> (iii) *Bateman v Bateman* [1979] 2 WLR 377: wife twice inflicts stab wounds on her husband with a knife.
> (iv) *S v S* [1982] Fam Law 183: husband commits incest with children of the family.
> (v) *Hall v Hall* [1984] FLR 631: wife stabs husband in the abdomen with a knife.



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120 *Primavera v Primavera* [1992] 1 FLR 16, CA.
121 *H v H (Financial Relief: Conduct)* [1998] 1 FLR 971.
122 [2001] Fam Law 656, Wilson J.
123 [2006] EWHC 2793.
124 Mr Nicholas Mostyn QC and Mr Philip Moor QC.

(vi) *Kyte v Kyte* [1987] 3 AER 1041: wife facilitates the husband's attempted suicide.
(vii) *Evans v Evans* [1989] 1 FLR 351: wife incites others to murder the husband.
(viii) *K v K* [1990] 2 FLR 225**:** husband's serious drink problem and "disagreeable" behaviour led to the forced sale of the matrimonial home and serious financial consequences to the wife.
(ix) *H v H* [1994] 2 FLR 801: serious assault and an attempted rape of wife by husband: and financial consequences because the consequent imprisonment of husband destroyed his ability to support her.
(x) *A v A* [1995] 1 FLR 345: husband assaults the wife with a knife.
(xi) *C v C* (Bennett J 12 December 2001 unreported): wife deliberately drugged husband to make him very sleepy and then while he was in a somnolent state placed a bag over his head, which she held in such a way that the husband could not breathe. Although it was found that the wife did not have an intent to kill, Bennett J concluded that the husband did believe that she was trying to kill him, and that her aim was to make him so believe.
(xii) *Al-Khatib v Masry* [2002] 1 FLR 1053: husband guilty of "very grave" misconduct in abducting the children of the marriage in contempt of court.
(xiii) *H v H* [2006] 1 FLR 990: very serious assault by husband on wife with knife, leading to 12 years' imprisonment for attempted murder and with financial consequences, namely destroying her Police career.

His Lordship's comments on these cases were as follows:

> 'As will be seen, it is not suggested that there were any financial consequences from the conduct of which the Applicant complains in this case, which factor may have exacerbated, in the judgment of Scott Baker J, the facts in *K v K* referred to at (viii) above. However, that case apart, all of the conduct found in those cases appears of manifest seriousness. Apart from the statutory provision, and the words of Ormrod J in *Wachtel* quoted by Baroness Hale above, there is a certain amount of recurrent phraseology: "If the courts were in these circumstances not to discharge the order, the public might think that we had taken leave of our senses" (per Balcombe LJ at 355 in *Evans* at (vii) above): Sir Roger Ormrod in *Hall* at (v) above describes (at 632) the conduct as "gross and obvious" which has "nothing to do with the ordinary run of fighting and quarrelling in an unhappy marriage" and which the judge's "sense of justice required to be taken into account": Bennett J in *C* at (xi) above, asks whether "it would be repugnant to any sense of justice for the wife to receive any award at all". Mr Mostyn QC pointed to the words of Sir George Baker P in *W v W* [1976] Fam 107 at 110D when he referred to the sort of conduct which would cause the ordinary mortal to throw up his hands and say "… surely that woman is not going to get a full award": and, in the course of submissions, he suggested a test of applying what he called the "gasp factor".'

One case which was, perhaps surprisingly omitted from this pantheon of wrongdoing was *Clark v Clark*[125] which was described by Thorpe LJ as 'one of the most extraordinary marital histories that I have ever encountered' and 'as baleful as any to be found in the family law reports'. The wife was 36 years younger than the husband. At the date of the marriage, he was rich while her liabilities exceeded her assets. The marriage was never consummated. Over the

[125] [1999] 2 FLR 498, CA.

5-year marriage, she persuaded him to purchase a number of properties, most of which were vested in her sole name. In addition, she acquired shares, a racehorse, a Bentley and a boat. The husband was coerced into transferring a large house into the wife's name, and he was then forced to live as a virtual prisoner in part of the house while she occupied the larger part with her lover. He attempted suicide, and when he returned home he was again confined as a virtual prisoner, the wife removing his telephone and gate buzzer. He was eventually rescued by relatives.

The judge found that the wife had exercised undue influence over the husband, that this was a short marriage, that the husband's contributions had been enormous while hers were negligible and that her marital and litigation conduct must be condemned in the strongest terms. Nevertheless, he awarded her a lump sum of £552,500. Both parties appealed.

The wife's appeal was dismissed and the husband's appeal allowed. The judge had fallen into manifest error in allowing the wife £552,500. He had failed to reflect his findings on the wife's misconduct in his award: it would be hard to conceive of a case of graver marital misconduct. This was a rare case in which litigation misconduct should be reflected in the substantive award. However, to leave the wife with nothing was impracticable since that would have required her to make substantial repayments to the husband, and the lump sum was reduced to £125,000.

For a case where the conduct of both parties was equally reprehensible and so cancelled each other out and had no effect on the award see the judgment of Mostyn J in *FZ v SZ (Ancillary Relief: Conduct: Valuations)*.[126]



## Conduct in the course of the proceedings

**1.49** The conduct of the parties during and in relation to the proceedings may be a relevant factor. In *B v B (Real Property: Assessment of Interests)*,[127] it was held that a wife whose conduct in relation to discovery and dishonest statements had amounted to contempt as well as conduct which it was inequitable to disregard should have the award which she would otherwise have received reduced to take account of the conduct. However, this may be a decision which will rarely be followed. In another case,[128] where a wife had knowingly misrepresented her true financial position and failed in her duty to give full disclosure, Thorpe J held that, while accepting that such behaviour was conduct which it would be inequitable to disregard, this should be reflected in an order for costs rather than a reduction of the share of the assets.[129]

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126 [2010] EWHC 1630 (Fam), [2011] 1 FLR 64.

127 [1988] 2 FLR 490.

128 *P v P (Financial Relief: Non-disclosure)* [1994] 2 FLR 381.

129 A similar result occurred in *T v T (Interception of Documents)* [1994] 2 FLR 1083 where a wife had obtained documents belonging to the husband by reprehensible means. See also *Tavoulareas v Tavoulareas* [1998] 2 FLR 418, CA.

In *Al Khatib v Masry*[130] the husband had been highly obstructive and unco-operative in the wife's application for ancillary relief and the court observed that it would be difficult to imagine a worse case of litigation misconduct. The husband had also abducted the children to Saudi Arabia. It was thought that the husband's assets were at least £50m. The wife was awarded a lump sum of £10m, a *Duxbury* award of £5.5m and a 'fighting fund' for legal costs of £2.5m to assist her to recover the children.

In *M v M (Ancillary Relief: Conduct)* it was held that the husband's conduct both in respect of gambling and his disregard of court orders should not be disregarded. Such conduct should be taken into account in a broad way and not with mathematical precision and affected the order and not just the costs.

Finally, mention should be made of *Hall v Hall*.[131] Here, a wife had steadfastly refused to take part in the husband's application for ancillary relief and, clearly in desperation, the district judge had transferred all the assets to the husband. The Court of Appeal held that this was the wrong approach; the husband's counsel should have dissuaded the judge from making an order which went beyond the husband's own case, and the denial of the wife's entitlement to equality was a wholly disproportionate response to her 'tardy engagement' in the proceedings.



## LOST BENEFITS

**1.50** The court is directed to have regard to:[132]

> '… in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.'

This is the factor most frequently relied on when loss of pension benefits is an issue, and its significance is clear.

**1.51** The Pensions Act 1995 amended the MCA 1973 to introduce a new s 25B which is concerned entirely with pensions. The original reference to pensions in s 25(2)(h) has been deleted, and the court is now directed to have regard to the value to each of the parties of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

Since pensions are now adequately covered elsewhere, it would seem that this is now to be a 'catch-all' provision, and it is difficult to think of circumstances which would be applicable to this subsection only and which would not be covered by some other provision.

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[130] [2002] EWHC 108 (Fam), [2002] 1 FLR 1053.
[131] [2008] EWCA Civ 350, [2008] 2 FLR 575.
[132] MCA 1973, s 25(2)(h).

As was seen above, pensions have been removed from the s 25(2) factors and given their own place in s 25B. Pensions is a very important subject which is considered in some detail in Chapter 10.

Here, it is only necessary to consider the requirement on the court to consider the subject; s 25B(1) in effect adds further s 25(2) factors to be considered in every case.

It is provided that the matters to which the court is to have regard under s 25(2) include:

(a) in the case of paragraph (a) (ie when considering the income, means, etc of the parties) any benefits under a pension scheme which a party to a marriage has or is likely to have; and

(b) in the case of paragraph (h) (ie loss of benefits) any benefits under a pension scheme which, by reason of the dissolution or annulment of the marriage, a party to the marriage will lose the chance of acquiring.

It is also provided that, in relation to benefits under a pension scheme, the words 'in the foreseeable future' should be regarded as being deleted from s 25(2)(a).

The result of this is that, in every case, it is necessary to consider the benefits which either party may receive from a pension scheme, no matter how remote that event may seem. In the same way, the effect on the other party of the loss of any such pension benefits must be calculated.

Section 25B(2) goes on to direct the court as to how it should consider dealing with loss of pension benefits. This is best considered in Chapter 10 on pensions.



## AGREEMENTS

**1.52** There is no specific mention of agreements in s 25 but they are generally agreed at least to be one of the 'circumstances' which the court must take into account. The traditional attitude of the courts to agreements was the somewhat paternalistic statement in *Hyman v Hyman*[133] that 'the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the court or preclude the court from the exercise of that jurisdiction'. Previous editions of this book have contained detailed examinations of the way in which the courts have sought to qualify that doctrine and bring it into line with the wishes of divorcing couples and their advisers. Most of this is now of historical interest only due to the decision of the Supreme Court in *Radmacher (formerly Granatino) v Granatino*.[134]

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[133] [1929] AC 602.
[134] [2010] UKSC 42, [2010] 2 FLR 1900.

**1.53** The issue in *Radmacher v Granatino* was how far the terms of a pre-nuptial contract should dictate the result of a husband's application for ancillary relief; the wife, who was extremely wealthy, sought to rely on the agreement to limit the husband's claim. However, the decision of the Court goes far beyond that issue and gives guidance as to the manner in which the court should deal with all agreements, whether made pre- or post-marriage.

The most common kinds of agreement which need to be considered are:

- post-nuptial agreements made (normally) on separation to compromise claims;
- pre-nuptial agreements; and
- agreements to settle litigation.

The first two will be considered together, since the same principles now apply. First, however, a short account of the reasoning of the Supreme Court in arriving at its decision may be helpful.



## *Radmacher v Granatino*

**1.54** The most recent previous occasion on which the issue of pre-nuptial contracts had been determined at the highest level was the decision of the Privy Council (on appeal from the courts of the isle of Man) in *MacLeod v MacLeod*.[135] In that case, it was said that:

> 'Post-nuptial agreements . . . are very different from pre-nuptial agreements. The couple are now married. They have undertaken towards one another the obligations and responsibilities of the married state. A pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry.' (para 36)

In *Radmacher v Granatino* the Supreme Court disapproved this statement:

> '60. … we do not see why different principles must apply to an agreement concluded in anticipation of the married state and one concluded after entry into the married state.
>
> 61. This is not to say that there are no circumstances where it is right to distinguish between an ante-nuptial and a post-nuptial agreement. The circumstances surrounding the agreement may be very different dependent on the stage of the couple's life together at which it is concluded, but it is not right to proceed on the premise that there will always be a significant difference between an ante- and a post-nuptial agreement. Some couples do not get married until they have lived together and had children.'

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[135] [2008] UKPC 64.

At para 63, the judgment continues:

> 'In summary, we consider that the Board in *MacLeod* was wrong to hold that post-nuptial agreements were contracts but that ante-nuptial agreements were not. That question did not arise for decision in that case any more than in this and does not matter anyway. It is a red herring. Regardless of whether one or both are contracts, the ancillary relief court should apply the same principles when considering ante-nuptial agreements as it applies to post-nuptial agreements.'

It seems therefore conclusively to be the case that, when considering whether or not an agreement should be adhered to or departed from, the same principles will be applied irrespective of whether the agreement is pre-nuptial or post-nuptial.

**1.55** The Supreme Court also dealt with the question of whether the usual rules as to validity of a contract applied. At para 62 the question was asked:

> 'Is it important whether or not post-nuptial or ante-nuptial agreements have contractual status? The value of a contract is that the court will enforce it. But in ancillary relief proceedings the court is not bound to give effect to nuptial agreements, and is bound to have regard to them, whether or not they are contracts. Should they be given greater weight because in some other context they would be enforceable? Or is the question of whether or not they are contracts an irrelevance?'

In *MacLeod*, the Board had been concerned with whether the agreement in that case was a contract properly so-called. The view of the Supreme Court was that this was not important but that there were clearly factors which would justify the court in departing from the terms of a contract. These will be considered below.



## The general approach to agreements

**1.56** At the end of para [75] of the majority judgment, the Supreme Court advanced the following general proposition to govern the correct approach to pre- or post-nuptial agreements:

> 'The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.'

This is now, therefore, the general rule to be applied in all cases. Two areas of discussion are therefore suggested and must be considered. They are, first, the factors which might lead a court to consider that the agreement was not freely entered into (for the sake of convenience these are here described as 'vitiating factors'), and secondly, the circumstances in which a court might consider it was not fair to hold the parties to the agreement. These two sets of issues might overlap in some cases but they are in fact distinct.

## Vitiating factors

**1.57** The Supreme Court considers these factors in detail in paras [71] to [73]. Here, they may be summarised as follows:

(1) Material lack of disclosure or information, and lack of sound legal advice. However, this is subject to the qualification that:

> '… if it is clear that a party is fully aware of the implications of an ante-nuptial agreement and indifferent to detailed particulars of the other party's assets, there is no need to accord the agreement reduced weight because he or she is unaware of those particulars. What is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end.'

(2) The parties must have intended that the agreement should be effective. This cannot always be inferred from the mere existence of the agreement.

(3) Any of the standard vitiating factors in contract such as duress, fraud, illegality or misrepresentation.

(4) Unconscionable conduct such as undue pressure (falling short of duress) would be likely to reduce the weight to be placed on an agreement.

(5) Unworthy behaviour such as exploitation of a dominant position to secure an advantage would reduce or eliminate the value of an agreement.

The Court added the following important observations.

> 'The circumstances of the parties at the time of the agreement will be relevant. Those will include such matters as their age and maturity, whether either or both had been married or been in long-term relationships before. For such couples their experience of previous relationships may explain the terms of the agreement, and may also show what they foresaw when they entered into the agreement. What may not be easily foreseeable for less mature couples may well be in contemplation of more mature couples. Another important factor may be whether the marriage would have gone ahead without an agreement, or without the terms which had been agreed. This may cut either way.'

## The foreign element

**1.58** The Supreme Court then considered the factors which might enhance the weight to be placed on an agreement, the most important of which is a foreign element. This was dealt with succinctly as follows:

> 'When dealing with agreements concluded in the past, and the agreement in this case was concluded in 1998, foreign elements such as those in this case may bear on the important question of whether or not the parties intended their agreement to be effective. In the case of agreements made in recent times and, a fortiori, any

agreement made after this judgment, the question of whether the parties intended their agreement to take effect is unlikely to be in issue, so foreign law will not need to be considered in relation to that question.'

## Fairness

**1.59** Having, as it were, cleared the decks by dealing with such of the above factors as may be relevant, the court must then deal with what the Supreme Court described as the difficult question of the circumstances in which it might not be fair to hold the parties to an agreement. It began with the observation that the reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future.

**1.60** The factors which might lead to argument over whether an agreement was unfair were summarised as follows:

(1) **Children of the family**. A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family.

(2) **Non-matrimonial property**. Where one or both parties own property at the date of the marriage or anticipate receiving such property, and wish to make provision for that property in the event of the dissolution of the marriage, there is nothing inherently unfair in such an arrangement and there may be a good objective reason for it such as obligations to other family members.

(3) **Future circumstances**. Where a pre-nuptial agreement attempts to address the contingencies, unknown and often unforeseen, of the couple's future relationship there is more scope for future events to make it unfair to hold them to their agreement. The circumstances of parties often change over time in ways or to an extent which either cannot be or was not envisaged. The longer the marriage has lasted, the more likely it is that this will be the case.

The Supreme Court considered the hypothetical case of a pre-nuptial agreement providing for no recovery by each spouse from the other in the event of divorce, where the marriage had seen the formation of a fortune which each spouse had played an equal role in their different ways in creating, but the fortune was in the hands for the most part of one spouse rather than the other. It asked whether it would be right to give the same weight to their early agreement as in another perhaps very different example. It concluded that the answer was likely to be 'no'. Of the three strands identified in *White v White and Miller/McFarlane*, it was the first two, needs and compensation, which

could most readily render it unfair to hold the parties to a pre-nuptial agreement. The parties were unlikely to have intended that their agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoyed a sufficiency or more, and such a result was likely to render it unfair to hold the parties to their agreement. If the devotion of one partner to looking after the family and the home had left the other free to accumulate wealth, it was likely to be unfair to hold the parties to an agreement that entitled the latter to retain all that he or she had earned.

However, where these considerations did not apply and each party was in a position to meet his or her needs, fairness might well not require a departure from their agreement as to the regulation of their financial affairs in the circumstances that had come to pass. It was in relation to the third strand, sharing, that the court would be most likely to make an order in the terms of the nuptial agreement in place of the order that it would otherwise have made.

## Agreements to compromise litigation

**1.61** Whether or not an agreement to compromise litigation has been made and, if so, in what terms, may be in dispute. In *Xydhias v Xydhias*,[136] there were prolonged negotiations shortly before trial, which led to the wife asking for the trial to be vacated and for a short directions appointment. The wife applied successfully for an order in the terms of an agreement made between the parties, the husband failing in his purported withdrawal of all previous offers. The husband appealed, unsuccessfully, to the circuit judge and thence to the Court of Appeal. His appeal was dismissed.

It was held that it was a fundamental principle that an agreement for the compromise of an ancillary relief application did not give rise to an agreement enforceable in law; ordinary contractual principles did not apply. The award of ancillary relief was always fixed by the court. The court had a discretion in determining whether an accord had been reached, but if the court decided that agreement had been reached it might have to consider whether the terms of the agreement were vitiated by, for example, non-disclosure or one of the *Edgar v Edgar*[137] factors.

In every case, the court must carry out its independent discretionary review under s 25. In this case, it was held that an agreement had been reached.

This development was extended in *Rose v Rose*[138] where, at the end of a financial dispute resolution (FDR) appointment, the judge was told that the parties had come to terms and it was left to counsel to draw up an agreed order. This draft order was agreed but the husband then sought to resile from it. On reference back to the judge, the judge refused to convert the agreement to an

[136] [1999] 1 FLR 683, CA.
[137] [1980] 1 WLR 1410.
[138] [2002] EWCA Civ 208, [2002] 1 FLR 978.

order. On appeal, an order was made in the terms of the agreement; it mattered not that the hearing had been an FDR appointment.

However, in *Soulsbury v Soulsbury*[139] the view was expressed, per curiam, that the conclusion expressed by Thorpe LJ in *Xydhias* that an agreement to compromise a claim was not enforceable until converted into a court order was too wide. If there were negotiations leading to agreement there was a duty to seek the court's approval. However, even an agreement subject to the approval of the court was binding on the parties to the extent that neither could resile from it.[140] The position is therefore that two differently composed Courts of Appeal have expressed different views on this topic, both per curiam. It remains to be seen what will come of this.

Clearly, however, in the light of these decisions, when parties are negotiating at court and an agreement is reached, it is wise for the advocates to agree between themselves and record when a *Xydhias* agreement has been made.

### Law Commission

**1.62** The interested reader is directed to the powerful dissenting judgment of Baroness Hale (the only family lawyer and the only woman on the court). The Law Commission is currently holding a consultation exercise, which is discussed in more detail in Chapter 22.



## SELF-SUFFICIENCY

**1.63** So far, we have considered the factors which the court is directed to have in its mind when deciding whether, and if so, in what manner, to make an order for ancillary relief. No one factor is more important than any other; the court must weigh them all in its mind, and make a balanced judgment.

However, there is a further factor to which the court is directed to have regard, and that is the possibility of the parties achieving self-sufficiency. It has already been seen that, when considering the financial means of the parties, the court must consider what increase in the earning capacity of the parties it would be reasonable to expect them to acquire. This is reinforced by s 25A, which directs the court, when making a periodical payments order or secured periodical payments order, to consider whether the financial obligations of the parties to each other should be terminated as soon as the court considers it just and reasonable. In such circumstances, the court must also consider whether it should direct that no further application may be made.

**1.64** There is therefore a positive obligation on the court to consider imposing a clean break in every case. Whether or not this will be the result depends on

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[139] [2008] 1 FLR 90, CA.

[140] The court relied on *Goodinson v Goodinson* [1954] 2 QB 118; *Gould v Gould* [1970] 1 QB 275 and *Smallman v Smallman* [1972] Fam 25.

the circumstances of the case, and the position is, perhaps, not as clear as it might be. This is considered further in Chapter 2.

## GUIDELINES IN CHILDREN ORDERS CASES

**1.65** So far, the factors for the consideration of the court have been exclusively confined to orders between the parties to the marriage. When the court makes an order for a child, different criteria apply, and these are contained in s 25(3). These are considered further in Chapter 11.

## WHEN MAY ORDERS BE MADE?

**1.66** An order for maintenance pending suit may be made at any time after the filing of the petition. Other orders, such as orders for periodical payments, a lump sum or property adjustment, may only be made on or after the grant of a decree.[141]

Interim capital provision is discussed further in Chapter 4.

Mr Nicholas Mostyn QC, sitting as a deputy High Court judge in *Rossi v Rossi*, expressed certain views as to whether there is a time-limit on applications for ancillary relief. These statements have authority in the sense that they are from the High Court, but there may be room for doubt about whether they are universally shared.



### Jurisdiction

**1.67** Jurisdiction to make orders for ancillary relief (except for those after a foreign decree – see Chapter 14) depends on the grant of a decree of divorce, nullity or judicial separation. Whether or not the court may make an order for ancillary relief is therefore the same question as whether it has jurisdiction to entertain the proceedings leading to the decree.

This is now governed by the EU Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Joint Children (known as 'Brussels IIA'). This is binding on all EU Member States except Denmark and applies to all proceedings filed after 1 March 2001.

The Regulation deals with the jurisdiction of the court in matrimonial cases and in 'civil proceedings relating to parental responsibility for the children of both spouses'. As to matrimonial cases (eg divorce), Art 3 sets out a multiple choice of jurisdictional factors which do not have a hierarchy; ie no one factor is more important than any other. The factors are:

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[141] MCA 1973, ss 22–24.

- both spouses' habitual residence;
- the last habitual residence of both spouses, one spouse still being habitually resident there;
- the respondent spouse's habitual residence;
- in cases of a joint application, either spouse's habitual residence;
- the applicant's habitual residence based on 12 months' residence immediately before the application;
- the applicant's habitual residence based on 6 months' residence immediately before the application coupled with nationality or (in the case of the UK or Ireland) domicile; and
- the nationality of both the spouses or (in the case of the UK and Ireland) their domicile.

Where no Member State has jurisdiction under the above factors, jurisdiction is determined according to the laws of each State.

Where courts have concurrent jurisdiction, a court must defer to the court first seised of the case unless it needs to take protective measures in urgent cases. A court is seised of a case when the documents instituting the proceedings 'or other equivalent document' is lodged with the court, provided that steps are taken to serve it or, when it has to be served before issue, when it is received by the authority responsible for service.

**1.68** Schedule 1 to the Domicile and Matrimonial Proceedings Act 1973 makes provision for a stay of proceedings where there are proceedings affecting the marriage in another jurisdiction. Such a stay may be obligatory (Sch 1, para 8) or discretionary (Sch 1, para 11).

Questions of jurisdiction can assume some importance in cases of ample means where it is thought that the approach of the courts of England and Wales may be more, or less, generous than that to be found elsewhere.[142]



[142] See eg *de Dampierre v de Dampierre* [1987] 2 FLR 300, HL; *W v W (Financial Relief: Appropriate Forum)* [1997] 1 FLR 257; *S v S (Divorce: Staying Proceedings)* [1997] 2 FLR 100; *Butler v Butler (Nos 1 and 2)* [1997] 2 FLR 311, CA; *C v C (Divorce: Stay of English Proceedings)* [2001] 1 FLR 624.