

LAMBERT v LAMBERT and OTHER POST-WHITE CASES

By Valerie Sterling

1. Introduction

- The starting point is Section 25 of the Matrimonial Causes Act 1973. Section 25(2)(f) examines “the contributions” which spouses have made or are likely to make in the foreseeable future to the welfare of the family “including any contribution by looking after the home or caring for the family”.
- First consideration should be given to the welfare of any child of the family under the age of 18. Thereafter, the court conducts the s.25(2) exercise by looking at sub-paragraphs (a) to (h) – the weight to be attached to any single sub-paragraph will depend on the facts of the case.
- The **duration** of the marriage (see Section 25(2)(d) is now highly relevant because a marriage of long duration (long = over 20 years) where there are surplus assets, will suggest equality, whereas a **shorter** marriage, for example, one of 12 years [see the recent case of **GW v RW (Financial Provision: Departure from Equality) 2003 (June 2003 Family Law)**] resulted in only **40%** of the assets going to the wife. In that case, the husband came into the marriage with a proper fully fledged career as an established financier and his contribution was unmatched by the wife’s contribution. Some departure from equality of division went in the husband’s favour and was justified on the basis of the duration of the marriage. In that case, the wife was ordered to pay one half of the husband’s costs and the husband to pay one quarter of the wife’s costs. The costs’ part of the case is subject to appeal.

2. Objective (White) is to achieve a ‘fair outcome’ but what is fair?

White v White 2002 2FLR House of Lords page 981. Page 989C-D, “In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife in their respective roles”.

Page 989F, “If, in their differences, each contributed equally to the family, then in principle it matters not which of them earn the money and built up the assets. There should be no bias in favour of the money earner and against the homemaker and the child carer”. (Lord Nicholls on Equality, p.989).

G-H, “Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination”.

“This is not to introduce a presumption of equal division under another guise” (p. 989H).

In White, the marriage was of 33 years’ duration.

(The decision of White 26th October 2000)

3. Some Departure from Equality in Cowan: 5 reasons given by Thorpe LJ including H is ‘genius’ as wealth creator.

Cowan v Cowan 2001 2 FLR 192 Court of Appeal Thorpe, Robert Walker and Mance LJ 14th May 2001. Husband’s idea to make bin bags in rolls, ‘complete with drawstrings’. Couple start married life in council house and end up ‘with substantial homes in this country and overseas’ (see Peter Hughes QC H v H (2002) 2 FLR para.25). 35 year marriage, two children, £11.5m assets. Overall division on appeal was about 38% of assets to the wife, 62% to the husband. See p.241 Lord Justice Mance, para.161: “Ultimately, there is probably one continuous spectrum, extending from the entirely ordinary to the ‘stellar’”.

Para.166 “For my part, I would not wish attempts at detailed examination and invidious comparison of the respective contributions of spouses on the different domestic and business fronts to become common place” (Mance LJ).

Lord Justice Thorpe departed from equality for five reasons (see paras. 65-69 of his Judgment in Cowan). His third reason was to recognise the genius in Mr. Cowan: **“Thirdly, in my opinion fairness certainly permits and in some cases requires recognition of the product of the genius with which one only of the spouses may be endowed. Indeed, Miss Baron conceded the proposition, whilst contending that this husband was not in the category, since she submitted that he was no more than a hardworking businessman. That submission does not seem to me to do justice to the husband’s achievements, which clearly for their scale depended upon his innovative visions as well as upon his ability to develop those visions. It is a factor that in the present case deserves some recognition. I do not regard it as discrimination by the back door. Whilst no doubt the husband’s capacity to devote himself to the expansion of the company depended in part upon the stability and security of the home and family life which the wife had created and sustained, his creativity was not so dependent to the same or perhaps to any degree”** – Lord Justice Thorpe, Cowan v Cowan, para.67.

Lambert in the Court of Appeal (on ‘special contribution’)

But now see Lord Justice Thorpe in Lambert v Lambert 2003 1 FLR 139¹ at para.43 on special contributions: “The judgements in Cowan v Cowan that consider the legitimacy of a departure from equality on the basis of exceptional financial contribution must be understood in the context of that case. First, the trial had been conducted before the decision in White v White and therefore decided on the basis of reasonable requirements. On appeal it was common ground that in principle the court was free to depart from equality if the husband’s financial contribution had been sufficiently exceptional. Both parties submitted that that issue should be remitted for determination by the trial judge. Out of a desire to achieve finality and avoid further costs we declined and ourselves made the value judgement from the evidence and findings at trial, which were of course not specifically directed to the issue. With the

¹ Decision of 14 November 2002.

advantage of hindsight it seems regrettable, given the significance subsequently attached to our judgements, that the crucial issue was not addressed at trial nor was there any argument before this court on the validity of the principle.

The authority of *Cowan v Cowan* cannot therefore be elevated nearly as high as Mr. Pointer would have it. In my judgement, I based my departure from equality on five considerations, of which the special character of a husband's contribution was but one. Each member of the court advanced different reasons for arriving at the same result. Those who have subsequently attempted to argue that their breadwinning contributions were special have focused on the judgement of Mance LJ. In his reasoning, he placed considerable reliance on the Australian authorities, culminating in the decision of the Full Court in *Lynch v Fitzpatrick*. But a large question mark has been placed against that line of authority by the judgment of the Full Court in *Figgins v Figgins*. In *Cowan v Cowan* I offered no new approach and certainly no new principle. As I said in para.[41], this court could do no more than explore the boundaries by the application of the principles to be found in *White v White* on a case-by-case basis."

Para.45 Lambert: "Having now heard submissions, both full and reasoned, against the concept of special contribution, save in the most exceptional and limited circumstance, the danger of gender discrimination resulting from a finding of special financial contribution is plain. If all that is regarded is the scale of the breadwinner's success, then discrimination is almost bound to follow, since there is no equal opportunity for the homemaker to demonstrate the scale of her comparable success. Examples cited of a mother who cares for a handicapped child seem to me both theoretical and distasteful. Such sacrifices and achievements are the product of love and commitment and are not to be counted in cash. The more driven a breadwinner, the less available will he be physically and emotionally both as a husband and father."

Para.46 "In sum I am much more wary of the issue of special contribution than I was in writing my judgement in *Cowan v Cowan*.....for the present, given the infinite variety of fact and circumstance, I propose to mark time on a cautious acknowledgement that special contribution remains a legitimate possibility but only in exceptional circumstances. It would be both futile and dangerous to even attempt to

speculate on the boundaries of the exceptional. **In the course of argument, I suggested that it might more readily be found in the generating force behind the fortune rather in the mere product itself. A number of hypothetical examples were canvassed, ranging from the creative artist via the superstar footballer to the inventive genius who not only creates but also develops some universal aid or prescription. All that seems to me to be more safely left to future case-by-case exploration.”**

Comment

It seems therefore that Lambert treats Cowan as either wrongly decided or peculiar to its own facts. But both are Court of Appeal decisions. It could be argued that Lambert leans heavily now in favour of the wife or home-maker and discriminates against the industrious wealth creator who has created wealth beyond the parties' expectations. Also if equality is the test then it makes careful examination of the section 25(2) criteria somewhat obsolete. Leave to appeal to the House of Lords in Lambert has not been given. See June 2003 Family Law commentary by Professor Rebecca Bailey – Harris on *GW v RW*, at page 387, in which she writes: “The simultaneous dismissal by the House of Lords of both Mr. Lambert’s petition for leave to appeal and Mrs. Cowan’s second attempt (*Cowan v Cowan*...[2001] 2 FLR 192) poses nice questions from the perspective of the doctrine of precedent: are we faced with two apparently inconsistent decisions of the Court of Appeal, or does neither constitute a precedent in the classic sense, since each merely demonstrates the application to particular facts of the general principles enunciated in *White*? Juristic niceties apart, it is clear that the House of Lords does not intend to become further involved in the exposition of principles implicit in s.25 of the Matrimonial Causes Act 1973, which task has effectively been left to the Court of Appeal.”

Lambert (L v L) before Connell J.

See as background *L v L (Financial Provision: Contributions)* 2002 1 FLR 642 Family Division Connell J. **22nd October 2001**. This was the case of Lambert v Lambert before Mr. Justice Connell. The facts of Lambert are that the husband and wife were married in 1974. It was a 23 year marriage. The two children of the

marriage were now adults and were “independently rich” as a result of a trust created by the parents. The parties’ joint assets amounted to £20,400,000 of which the husband had £17m and the wife £3,400,000.

Quote from headnote of L v L (2002) 1 FLR 642:

“By way of ancillary relief the wife sought a payment from the husband of £6m, thus achieving equality in accordance with White v White. The husband offered her a payment of £1.6m. He contended that the parties’ wealth had come from the business which he had started, managed and eventually sold with exceptional industry and ability. He relied upon Cowan v Cowan with the proposition that in those circumstances it would not be fair to divide the assets equally”. The wife was awarded 37.5% of the assets, “departing from the yardstick of equality in deference to the really special contribution of the husband to the business and thus to the welfare of the family”.²

The age and duration of marriage was discussed in Connell J’s judgment. The husband was 57 at the time of the hearing and 30 at the date of the marriage. The wife was 49 and 22 at the date of the marriage. Para.16. **“The marriage lasted for 23 years and was self-evidently a long, although not very long, marriage.”** Connell J. examined contributions to the welfare of the family – para 18 **“The wife. The wife’s contribution as wife and mother is accepted by the husband. Given that this was a husband who was intent on building up his company, who worked long hours at that end and who, by his own account, was often away from home for much of the working week, the contribution made by the wife in this regard was particularly valuable. The husband’s contributions, vis-à-vis home life and his children, was primarily confined to weekends; so that he was a committed but frequently absent husband and father. When home he made the major decisions on modernisation (e.g. re the pool complex) and the wife did her best to implement those when he was away”.**

The husband ran a company which produced and distributed a free local newspaper, funded by advertising revenue - Adscene Limited. Para.22 “The husband. There is no dispute that the husband was the main reason for the successful development of his

² See headnote of L v L (2002) 1 FLR

company. He worked very hard and with single-minded intent to achieve its success. He started the company, he saw the opportunity presented by a free newspaper funded by advertising and delivered to the doorstep, and he exploited this potential to the full, for instance, by permitting free small advertisements and by running competitions which encouraged readers to study those advertisements. He saw and pursued the opportunity for expansion in different areas of the country. He expanded the business very significantly in one area. He oversaw the company, gave it its direction and led it to a successful flotation and eventually to successful realisation. The wealth of this family was created in very large measure by his efforts and that wealth enabled the family to live in what became an extravagant home and to a very high standard. None of this is really in dispute.”

Mr. Justice Connell at para. 37 referred to Lord Justice Mance in *Cowan* and the ‘spectrum’ from the entirely ordinary to ‘stellar’. Connell J. quoted Mance LJ in *Cowan* (para.161 of *Cowan*) as follows: “The exercise of special skill and effort raises yet further and different considerations....The underlying idea is that a spouse exercising special skill and care has gone beyond what would ordinarily be expected and beyond what the other spouse could ordinarily have hoped to do for himself or herself, had the parties arranged their family lives and activities differently. The first spouse’s special skill and effort is special to him or her and the individual’s rights to the fruits of an inherent quality of this nature survives as a material consideration despite the partnership or pooling aspect of marriage. For my part, I think that this consideration is a material one to which weight can and should be given in appropriate cases”.

At para.40 of *L v L*, Connell J. said, **“In my view the contribution made by this husband is as entitled to the description “really special” or “exceptional” as was the contribution made by Mr. Cowan, although I would not describe him as a genius, he was more than just a hardworking businessman. He showed innovative vision and the ability to develop these visions (see Thorpe LJ at para.67). He was not merely a successful businessman but an exceptionally active, determined and innovative one (see Robert Walker LJ at para.94). His was a special achievement, via special business skills, acumen and effort (see Mance LJ at para. 155). The wife’s contribution was as described, without any**

feature which can be described as “really special”. In answer to the question posed in argument by Mr. Mostyn, QC, namely “what more could the wife have done to justify an award of 50%”. The answer is: “in the circumstances, probably nothing”. That in my view does not lead to the conclusion that an award of less than 50% is unfair. In a case where the issue of contribution is central to the outcome, an award which leaves this wife with approximately 37.5% of the assets (£7,500,000) is a fair outcome, which departs from the yardstick of equality in deference to the really special contribution of the husband as described. It also recognises in full the contribution of this particular wife thanks to whose help and support the husband was free to pursue those skills. In percentage terms it is similar to the award made in *Cowan v Cowan*....where the wife achieved 38%. The husband’s proposal of a lump sum of £1.6m would have left the wife with (but) 30%. Such an award would not adequately have recognised the various different elements of her contribution which had been previously described”.

Other Cases

1. H-J v H-J (Financial Provision: Equality) Family Division Coleridge J. 17th **October 2001**. (5 days prior to *L v L* before Connell J.)³ (From DJ Million) : 24 year marriage, 2 children aged 20 and 19. The husband was a corporate executive who had a son to his mistress. The wife was a homemaker, a lay Magistrate, kept pets and animals. The children boarded at Rugby and were now at University. The effect of DJ Million’s judgement was a 45/55% split in favour of the husband. The wife had contended for a 50% split. **The husband contended that his contribution was special or exceptional or stellar. Coleridge J. at p.420F-G quotes from the District Judge’s judgement: “The sworn statements of the parties, which are too long, have descended into great detail about the history of the marriage. There are disagreements, for example, over whether the wife moved a larger or**

³ One assumes that these two judgments were delivered ‘in isolation’.

smaller number of flagstones in one of the properties they occupied, whether she did a lot or only a little decorating and maintenance; whether she earned the same income as the husband in the early years or only half or a third as much. This relating to the period 20 years ago, before the birth of either of the children. Another dispute is whether she should have sought paid work after the boys went to boarding school and, again, whether the husband was away from home with his work for periods of up to a week or only over a night or two. The statements also cover whether the husband changed nappies and attended school open evenings. Fortunately, these points have been largely confined to the statements and were little pursued in oral evidence”. The husband wanted his baby Samuel (by his new partner) to go to private school and Rugby like his other children (i.e. the children by his wife). The husband’s Counsel sought to rely on the husband’s “special significant or stellar” efforts relying on *Cowan v Cowan*. Mr. Justice Coleridge held that there was **“nothing special, exceptional or stellar about the husband’s contribution in this case”**. (See p.428A-B) **“He has undoubtedly worked diligently and successfully and over a long period to amass the assets that have been amassed over the duration of this marriage. He has had some good years and some very good years but if the facts of this case lead to a finding of special contribution, in my judgement, it would be the thin end of a wedge being driven right into the heart of the principles underlying *White v White*.....So I unhesitatingly come to the view that the District Judge’s findings and approach were correct, even in the light of *Cowan v Cowan*”**.

On the question of the husband contending for an allowance in respect of his son, Samuel, Coleridge J. said at p.428 para. G-H, **“To ask the wife, in effect, to take less and/or share in the cost of supporting this further child cannot, I say straight away, in my judgement, be fair. In cases of this kind I think it would normally be wrong in principle to include in calculations liabilities to children from further relationships. I am not prepared to take those into account here”**. Coleridge J. said at page 430 F-G that **“50/50 resonates with fairness (as the House of Lords has**

identified); both parties depart with a sense of being equally valued. There are no winners or losers. Once there is a departure from equality, as there often has to be, however small that departure, one party (more often the wife) is left with a sense of grievance, of her efforts having been under-valued. Understandably, at the time of divorce, these considerations matter a great deal to the parties”.

Coleridge J. went on to observe at page 430H that there was “ample to go round” and that: “It would indeed be sad if, in this category of cases (as opposed to those cases where the overall means are less than sufficient and so the needs of children and their carers must inevitably remain predominant), the broad and sweeping reform underlying those features in *White v White*... was to become bogged down in a welter of zealous, over-sophisticated and costly forensic analysis, or watered down by judicial reticence”.

2. See also: H v H (Financial Provision: Special Contribution) Family Division, Peter Hughes QC (sitting as a Deputy High Court Judge) 2002 2 FLR 1021 14th June 2002.⁴ 30 year marriage, 2 children. Husband “was already a qualified solicitor with a well-regarded city firm when the parties married” See Peter Hughes QC at para. 45. He had generated a significant amount of wealth by moving houses and taking advantage of the property market and by building up a fine and valuable collection of portrait miniatures. The parties’ wealth was £6m and the husband said that his financial contribution was ‘special’. Fairness, he said, would dictate an **unequal** division of the assets. The husband sought a division of 60/38 in his favour. The husband’s counsel submitted that the husband had made “a special contribution to the creation of the assets” which should be “reflected” in the division (para.19). Peter Hughes, QC, the Judge in *H v H*, at para.21 of his judgment in *H v H* said that “The speech of Lord Nicholls of Birkenhead in *White v White* clearly establishes that the watchword is fairness, not equality. Fairness does not necessarily dictate equality. What is essential is to give consideration to all the relevant factors, in particular those specifically referred to in Section 25, such as the length of the marriage and the respective contributions of the

⁴ Decided 8 months after *L v L* and 5 months before it came to the Court of Appeal..

parties and to reach a conclusion that strikes a balance of fairness. That balance may be achieved by an equal division of the assets - hence the good sense of checking one's provisional conclusions against the yardstick of equality – but each case must turn on its own facts and in many cases there will be clear identifiable reasons why an equal division of the assets does not strike the fair balance”.

The Judge said at para.35: “The picture, which I have from the evidence, is of a mutually supportive and not untypical prosperous professional marriage. The husband working long hours, frequently to the detriment of his time with his family, and often working under considerable strain and pressure, but fully supportive of his family and providing well for them. The wife electing not to work outside the home, a decision made jointly with and supported by her husband, but fully occupied running a large home, garden, looking after the children and removing the domestic responsibilities from his shoulders. It does not follow, though, that in such circumstances the husband's contribution can never be special, justifying special recognition and so I turn to consider the husband's evidence and Mr. Pointer's submissions on the nature of his contribution”. The Judge concluded at para. 42 as follows “I have considerable sympathy for the husband, who has been highly successful and worked extremely hard over many years and no doubt feels that he has created the wealth that exists today. **I am unable to accept, though, that his contribution calls for a special recognition, as in the cases of Cowan and L v L.**⁵ It is not easy to define what may amount to a “stellar” or really special contribution, but rather like the elephant, it is not difficult to spot when you come across it”. The Judge therefore found that after a long and “highly successful marriage for the best part of 30 years” there was no reason to depart from the general guide of equality and the wife would get half.

3. M v M (Financial Provision: Valuation of Assets) High Court of Northern Ireland, McLaughlin J. 20th December 2001, Family Law July 2002: marriage of 17 years, the husband was an “active and successful” businessman while the wife worked very hard in bringing up and educating the four children. The

husband worked very long hours. This case was referred to by Lord Justice Thorpe at para.23 of *Lambert v Lambert* in the Court of Appeal Judgement, where he quoted from p.28 of Mr. Justice McLaughlin's approved judgment in *M v M* as follows: "the husband worked very long hours, getting out of bed at 6 am to be at work by 7 am. His work did not finish until late in the evening as he carried on his working day by supervising Y Ltd and the other business premises owned by the company. I accept all of that evidence as true, but to concentrate on that and fail to recognise that, whilst he toiled at work on company business, Mrs. M from early in the morning was getting the children ready for school, taking them there, running the home during the day, collecting them after school, cooking and cleaning, nurturing them by ferrying them to social, sporting and recreational activities, supervising homework and tutoring them when required, would be to be guilty of the very kind of discrimination warned against by Lord Nicholls of Birkenhead. An example of the value of the life's work of Mrs. M can be seen today in the accomplishments and personalities of their children. These are the abiding rewards of her labour of love rather than the transient rewards in the form of money produced by the labour of the husband. In the context of this family's life these admirable qualities of both parties are to be considered of equal value. Indeed, the words of Lord Nicholls of Birkenhead might almost have been written to describe the respective roles of Mr. and Mrs. M." ⁶ The Court in *M v M* was therefore wary of discrimination against the homemaker.

4. *G v G (Financial Provision: Equal Division) 2002 2 FLR 1143. Family Division. Coleridge J. 31st July 2002.*⁷ In this case it was a 32 year marriage with four children and a big money case. The husband was involved in contracting work and construction in the executive housing market. He worked exceptionally hard and had "astute business acumen" (para.11) which was acknowledged by the wife. Mr. G had her last child when she was approaching 40 and her youngest child was then 8 and she had four children ranging in age between 0-14. At that time she engaged a part-time nanny. While her husband's company was prospering they bought a large holiday

⁵ (my emphasis) Of course Peter Hughes QC's judgment is 5 months before *L v L* is overturned by the Court of Appeal – yet he still resists the 'stellar' contribution argument of the 'solicitor wealth creator' (VS)

⁶ Para.23, *Lambert*

home in the Cayman Islands. It was a 32 year marriage when the parties' separated finally. At para.32 on contribution and the length of the marriage, Coleridge J. says: **“The wife concedes that the husband was hard working and very successful whilst mentioning, sotto voce, that he spent time and energy at his favourite rugby club. But there is no doubt that he devoted his time and real energy to the building up of RCL Limited. And the proof of the pudding is in the eating. On the husband's part he pays proper tribute to the wife as a full-time housewife and mother. He describes her in turns as a “very good mother” but detracts from that, sotto voce, by referring to the level of domestic help she had from time to time. A glance at the dates indicates that she been engaged upon that activity one way and another for 30 years”.**

'Apples with pears' debate – shut Pandora's Box

Coleridge J. comments on the trends post-White and in the light of Cowan v Cowan and L v L (Connell J.) at para.34. He says, “In a number of decisions since White v White, e.g. Cowan v Cowan and.....L v L the Court has recognised, in an appropriate case, the possibility of a (financial) contribution by one spouse or another at such an extraordinary level that it is entitled to special recognition and value. Unfortunately, this has led to this concept becoming the centrally important issue in almost every case, particularly where the assets exceed the parties' reasonable needs. Hardly a case is heard nowadays but that one party (usually the husband) seeks to establish that he has paid a markedly more valuable part in the accumulation of the wealth in the marriage partnership so that he should be specially rewarded by way of a greater share of the assets. I wonder whether, with respect to the members of the Court of Appeal in Cowan v Cowan, they would have made the extensive remarks they did (about the possibility of a special contribution) if they had realised the forensic Pandora's box that would be opened in actual practice. The effect is not at all dissimilar to “conduct debates” of the 1970s. In those days conduct was

⁷ Referred to also in Lambert at para.20 in LJ Thorpe's review of the recent authorities.

similarly raised against wives to try and limit their claims. However, the Court, recognising the undesirable consequences inherent in those arguments and, further, the impossibility of fairly adjudicating upon them, introduced the concept of “obvious and gross” very effectively to limit their application. It is suggested by some that these current “special contribution” debates are re-introducing conduct by the back door; I would say by the front door. For what is “contribution” but a species of conduct. “Conduct” (sub-s.(2)(g)) refers to the negative behaviour of one of the spouses. **“Contribution” (sub-s. (2)(f)) is the positive behaviour of one or other of the parties. Both concepts are compendious descriptions of the way in which one party conducted himself/herself towards the other and/or the family during the marriage and both carry with them precisely the same undesirable consequences. First, they call for a detailed retrospective of the end of a broken marriage just at a time when the parties should be looking forward, not back. In part that involves a determination of factual issues (and obviously the court is equipped to undertake that). But then, the facts having been established, they each call for a valued judgement of the worth of each side’s behaviour and translation of that worth into actual money. But by what measure and the use of what criteria? Negative “conduct” is one thing, particularly where it is recognisably “obvious and gross”. But the valuing of positive “contribution” varies from time to time. Should a wealth creator receive more because, e.g. his talents are very unusual or merely conventional but well employed? Should the housewife receive less because part of her daily work over many years was mitigated by the employment of staff? Is there such a concept as an exceptional/special domestic contribution or can only the wealth creator earn the bonus? These are some of the arguments now regularly been deployed. It is much the same as comparing apples with pears and the debate is about as sterile or useful”.** Coleridge J. then reminds himself of Lord Nicholls’ remarks in *White* at p.989 (989F *White*) “If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of money earner and against the homemaker and the child carer”.

G v G (conclusion). In money terms, the husband was left with assets at £4.5m. Wife left with assets at £4m. More or less equal. The combined costs of the case, over

£400,000 “almost equally split”. Coleridge J. was very much against examining the history of who did what, when in marriages and he summarised this at para.49. “The parties are not assisted to achieve compromise when they are encouraged by the law to indulge in a detailed and lengthy retrospective involving a general rummage through the attic of their marriage to discover relics from the past to enhance their role or diminish their spouse’s.

Further comments on Lambert

Lambert v Lambert 2003 1 FLR 139. Court of Appeal. Thorpe, May LJJ and Bodey J. 14th November 2002. 23 year marriage. 2 children now at university (see L v L above for facts). Before Connell J., the wife had been awarded only 37% of the assets, leaving the husband with 63% of the assets. Head note (2003 1 FLR, page 139): “The wife appealed, arguing that the judge had treated the husband’s contribution as money maker as of greater value than the wife’s domestic contribution”. Mr. Mostyn, QC contended in his first and main ground of appeal (para.8) that “Connell J. fell into the trap of gender discrimination by concluding that the husband’s contribution as a money maker was special, of greater value than the wife’s and a justification for an unequal division of the family fortune”. Mr. Mostyn submitted (para.29) “That the judges of the Family Division have divided into those who have embraced the spirit of the decision in White v White and those who have adhered to ingrained discriminatory thinking”. Thorpe LJ (para.32) **“When Mr. Mostyn was asked to explain why, given his clear submissions as to the equal worth of the different contributions, he had devoted so much time and effort at the trial to establish the wife’s pivotal business contribution, he responded that it was because he anticipated that he had no other prospect of achieving an equal share in front of Connell J. He pointed out that, by contrast, he had argued the case of Mrs. G in front of Coleridge J. on the simple basis that her contribution as a homemaker was no less valuable than that of Mr. G.”**

There were 5 cases not available to Connell J. which were reviewed by Thorpe LJ, namely H-J v H-J, H v H and G v G (English authorities) then M v M (from Northern Ireland) and, fifthly, the Australian case of Figgins v Figgins 2002 Fam CA 688 which was (see para.24 of Lambert) “an appeal to the Full Court of the Family Court

of Australia in a big money case whose distinguishing features were inheritance and a relatively brief marriage”. (see para. 25, Lambert) : **Nicholson CJ in Figgins said “We think it invidious for a judge to in effect give “marks” to a wife or husband during a marriage. We think that this doctrine of “special contribution” should, in an appropriate case, be reconsidered”.**

Thorpe LJ allowed the wife’s appeal and said as follows: at “para.62 “I have therefore reached the conclusion that the wife is entitled to succeed in this appeal. The only justification for a departure from equality asserted by the husband cannot upheld without discrimination. Of importance too is the rival consideration that the wife’s needs, given the respective ages of the parties, point towards equality. I would therefore increase the wife’s lump sum from £3,152,732 to £5,751,474 or such other sum as Counsel may agree to be necessary to bring her to a 50% share.”

Mr. Justice Bodey, sitting with Thorpe LJ and May LJ, highlighted four findings of Mr. Justice Connell in the court below that, firstly, the parties had “treated this marriage as a partnership from an early stage”, that secondly, “this pot of gold was truly created during the marriage”, that “in answer to the question posed in argument by Mr. Mostyn, namely what more could the wife have done to justify an award of 50%, the answer is in the circumstances, probably nothing”; and, fourthly, that “it would not be right in my view to describe (the husband) as a genius and the most exceptional part of his contribution relates to the very large sum of money acquired by the family as described”. Mr. Justice Bodey said (para.67) that the four findings of Connell J. above **“flagged up cumulatively the risk of unfairness, if unequal weight were to be given to the differing nature of the parties’ respective contributions to the family’s welfare according to their particular roles in the marriage. The recent authorities examined by Thorpe LJ further developing the law, both here and elsewhere since the decision under appeal, which we (unlike Connell J.) have had the advantage of considering, make this point not only the more forcefully but, in my view, conclusively.**

As Lord Justice Thorpe said at the beginning of his judgement (para.2) “The case would be very suitable for use in a text book ancillary relief. It is a big money case,

and the family fortune, taken by the judge to be £20.2m was all generated during the marriage when husband and wife worked hard for their success. There are two children now grown up and independently rich as a consequence of the diversion of a substantial proportion of the family fortune into a trust for their benefit. There are no complicating factors”.

Post-Lambert

Norris v Norris May 2003 Family Law, Family Division, Bennett J. 28th November 2002. A 23 year marriage. The husband was in IT recruitment. There was one child. The husband had two new children. The wife had over £3m assets upon separation, whereas the husband’s assets were over £4m and the decision awarded the wife a lump sum of £360,000 to enable the parties **“to leave the marriage on terms of financial equality”**.

Parra v Parra 2003 1 FLR 942 CA

An appeal by husband from Charles J. to the CA. 20 year marriage, 2 children, assets comprising a company worth £876,000 with the shares held by H and W equally and a piece of brownfield development land (Star Works) worth £1.5m in joint names. FMH sold and wife received the proceeds. Headnote: “In financial relief proceedings, preliminary issue arose when the wife claimed that the brownfield site should be sold for residential development, thus greatly increasing its value”. Company and land transferred to H. Lump sum of £925,000 and house to W which gave her 54.3% of the assets. On appeal to CA (Thorpe, Sedley Latham LJ):- (Grant of consent for residential development would increase value of site by at least £3.5m).

Allowing appeal in part

1. Equal division of assets. Therefore lump sum to W should be reduced to £818,641. Parents should contribute equally to future education costs.
2. Clawback charge – exceptional but fair in this case **restricted in duration to joint lives** of the parties. Clawback of 50% of the uplift in value of the land in

the event of planning permission for residential development being granted in the future.

- See Thorpe LJ at para.22 on the obligation of the judge in ancillary relief litigation to “eschew over – elaboration and to endeavour to paint the canvas of his judgment with a broad brush rather than with a fine sable”.
- Should be no departure from the ‘natural’ outcome of equality.
- Para.27 “As a matter of principle I am of the opinion that judges should give considerable weight to the property arrangements made during marriage and, in cases where the parties have opted for equality, reserve the exercise of the adjustive powers to those cases where fairness obviously demands some reordering.”
- No clean break but charge/clawback provision restricted in duration to joint lives of parties. Thorpe LJ prepared to uphold imposition of the charge because “although the prospect may be remote, the scale of the windfall would be great”.

Conclusion:

These cases do not distinguish between wives who have made a contribution and those who have not. Three categories of wife(?) -

1. The wife who plays the domestic role.
2. The wife who plays a greater role than purely a domestic one, involving the home, business and finance, possibly including a career (e.g. the female working lawyer who also runs the home and has child care responsibilities).
3. The “least deserving” wife – one who has a life of ease. As District Judge Glenn Brasse humorously states in his article in February 2003 Family Law on Lambert: “The husband will argue that while he was out slaving at a hot computer in his stock brokerage, it was “private schools and the nanny what

brung up the kids, while the missus followed a regular schedule of driving the Merc People Mover from the gym to light lunches in Selfridges and afternoons in the boutiques of South Mildern Street, all financed by the monthly payments he made (and can demonstrate by reference to five lever arch files of documents and affidavits from the school teachers and nannies, who formed the home/classroom link. He would have put up with it for the sake of the sprogs, but the last straw was when she had a workout weekend in Brighton with her personal trainer”. (!)

VALERIE STERLING