

ANCILLARY RELIEF UPDATE

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Lecture Notes

- Does cohabitation before marriage count?
- What is FAIR? Concept of 'fairness' is something different from 'equality'.
- See two post Lambert cases on this, GW and CO below. Perhaps these cases can be used as guidance in quantifying the cohabitant's case in terms of appropriate percentage to settle at.
- Certainly can be used to argue, in a TLATA case, that the percentage should be 'fair' taking into account all the circumstances.
- Can you 'shoehorn' (term used by Gillian Douglas in June 2004 Family Law at page 407 when analysing these cases) cohabitation into s 25 (2) (d) of the MCA i.e. 'the duration of the marriage' as Nicholas Mostyn QC did in GW, or should cohabitation be more properly regarded, as Coleridge J does in CO, as part of '**all the circumstances of the case**' in section 25 (1)?

- Cohabitation *is* to be taken into account – so where does it fit into the s 25 criteria? See Para 45 of Coleridge J’s judgment in **CO** – cohabitation could be **one** of ‘all the circumstances’ of the case which is just as important as the check-list criteria in s 25 (2) (a) to (h) - or it could be ‘part’ of ‘contribution which each party has made to the welfare of the family’ (subs (f)) or ‘conduct’ (subs(g)). Desire to achieve fairness or justice.
- In marriage, probably will be taken into account as part of ‘circumstances’ (i.e. it being the ‘duty of the court’ to have regard to all the circumstances of the case’ in Section 25 (1) MCA).

GW v RW (Financial Provision: departure from equality) (2003) 2 FLR 108, Mr Nicholas Mostyn QC sitting as a High Court Judge, particularly at paragraph 33: ‘In assessing the duration of the marriage the court has always looked at the position de facto rather than de jure. For example, the end of the marriage is always taken as the date of separation rather than the date of decree absolute. It is true that in *Foley v Foley* (1981) 2 FLR 215 the Court of Appeal said that there is a distinction to be drawn between years of cohabitation and years of marriage. Eveleigh LJ specifically relied on public opinion at that time (at 220):

‘In the great majority of cases, public opinion would readily recognise a stronger claim founded upon years of marriage than upon years of cohabitation.’

That decision is now nearly 22 years old. The case of *White v White* has emphasised that the law in this area is not moribund but must move to reflect changing social values. I cannot imagine anyone nowadays seriously stigmatising pre-marital cohabitation as ‘living in

sin' or lacking the quality of emotional commitment assumed in marriage. Thus, in my judgment, **where a relationship moves seamlessly from cohabitation to marriage**¹ without any major alteration in the way the couple live, it is unreal and artificial to treat the periods differently. On the other hand, if it is found that the pre-marital cohabitation was on the basis of a trial period to see if there was any basis for later marriage then I would be of the view that it would not be right to include it as part of the 'duration of the marriage'.

Mr Nicholas Mostyn QC found that the 18 months of pre-marital cohabitation could be included as part of 'the duration of the marriage' as contained in Section 25 (2) (d).

Facts of GW v RW

(From Head note) Application for ancillary relief by the wife. Parties married in 1989 after living together for 18 months. Period of separation from 1995 to 1997 after which they were reconciled. Finally divorced in December 2001. There were 2 children of the marriage. H was a successful financier; the family fortune derived from his remuneration as a City worker. W had met him while working in the same bank but stopped working on marriage. At the hearing there was considerable confusion as to the H's assets, in particular because his Form E did not properly sort out the extreme complexity of his affairs. In the event, the court found that the defaults in disclosure had not been of such gravity as to affect the award and found the assets of the parties to be approx. £12 million. W sought order granting her ½ of the assets, on the authority of Lambert v Lambert. It was contended on behalf of H that (a) the

¹ My emphasis

assumed equality of value of financial and domestic contributions as proclaimed in **Lambert v Lambert**² only applied to marriages of substantial length; (b) the husband had brought assets into the marriage together with a fully developed career and earning capacity which had to be considered separately from the parties' assets; (c) H had greater needs than the W. It was accepted by the H at the hearing that the mere fact of making a lot of money did **not** amount to a special contribution according to the criteria in Lambert v Lambert.

Held – Taking into account the period of pre-marital cohabitation as part of the duration of the marriage, but ruling out pre-reconciliation period of separation, the **duration of the marriage had been 12 ¼ years.**

See also Paras 36 to 43: 'Therefore, the fundamental question is: does the principle in Lambert v Lambert of assumed equality of contributions justifying equality of division apply to a marriage of 12 ¼ years? Mr Pointer says emphatically that it does. Indeed with characteristic frankness he says it does not make any difference whether the money was made over a 20, 10, 5 or even 2-year marriage. If the money was made in the span of the marriage, why, he asks, should it make any difference as a matter of logic how long the marriage was? Mr Marks responds by saying that to disregard the duration of the marriage is to shut one's eyes to Parliament's prescription that this factor should be taken into account....It seems to me that the assumption of equal value of contribution is very obvious where the marriage is over 20 years. **For shorter periods the assumption seems to me to be more problematic...**I have to say that whatever intellectual route is adopted, I find it to be

²Lambert v Lambert (2003) 1 FLR 139. In 2002, Mrs Lambert won an appeal giving her an **equal share** of the newspaper tycoon Harry Lambert's £20 million fortune. **She argued that, as a wife and mother, she had been an equal partner in his business.**

fundamentally unfair to be required to find that a party who has made domestic contributions during a marriage of 12 years should be awarded the same proportion of the assets as a party who has made the domestic contributions for a period in excess of 20 years...I therefore **propose to allow some departure from equality ...**(40% of both realisable and deferred/risk-laden assets and liabilities to the wife, ordering H to pay child maintenance of AUS \$40,000 per child, pa, plus educational and contact costs, ordering the wife to pay one half of the husband's costs and the husband to pay one ¼ of W's costs).

CO v CO (Ancillary Relief: Pre-marriage cohabitation) (2004) 1 FLR 1095

Coleridge J 2nd marriage for the W and 3rd for the H. (H had company concerned in the owning and management of health clubs). At the time of the marriage, W was 42 and H was 56. They separated 4 years later in September 2000 when H had corporate interests then valued at about £7m and the total assets of the parties were about £12m. 'If those were the only essential background facts this would be described as a short-marriage case and the claim of the wife would be relatively easy to ascertain. But the essential facts are not as simple as that because it is accepted that they lived together for at least 6 years prior to the marriage (on the wife's case nearer 8) and during that period of cohabitation prior to the marriage two daughters were born, now respectively 13 and 10. Furthermore, since separation the value of the company has plummeted so that the total assets are now under £5m...The parties agree that this is a 'clean break' case and that I should also, by conventional device, determine the level of periodical payments for the children. The husband's open offer is **£600,000** by way of lump sum for the wife and periodical payments for each of the children at the rate of **£7,500 pa**. The wife seeks a

lump sum of **£1.5m** and periodical payments for each of the two children **at between £10,000 pa and £12,500 pa.**

Held – awarding the wife a lump sum of £900,000 and periodical payments for each of the children of £10,000 (therefore just beating the husband’s open offer but not obtaining quite as much as she hoped for) See paras 28 to 29 for a flavour of the case eg ‘Two of the perhaps less attractive aspects of the husband’s case are that he was deceived into having children and then unduly pressurised into marriage... As to the assertion in relation to the conception and birth of the two children, I am unclear how the husband thinks such a factor can possibly be included in the court’s analysis.’

See paras 39 onwards ‘the s 25 factors – ‘having regard to all the circumstances of the case’ Against that background I turn to consider the provisions of s 25 of the Matrimonial Causes Act 1973 (as amended) and I start by emphasising in those considerations that the welfare of E and O must come first. During the hearing there has been considerable debate about the significance, if any, to be attached to the period of pre-marriage cohabitation which I have now found to be about 8 years in duration. Mr Posnansky would caution me against torturing the language of the statute by including it under subs (d): ‘duration of marriage’. He reminds me of the old cases. However, to ignore it would be to fly in the face of the principal statutory ‘duty of the court.... To have regard to all the circumstances of the case’ in exercising its powers. Section 25 was and is intended to be all-inclusive. But the specific factors set out in the subsections (drafted over three decades and more than a generation ago) are not an exhaustive list nor ever intended to be so. They are no more than an aide memoire or checklist of the more obvious factors to be found in every case. Sometimes there is a factor or factors, a circumstance of the case, which does not fall within the list but which is every bit as

important as any that does. Nowadays for couples to cohabit is a common enough 'circumstance' at all levels of adult society. Freely available government statistics show that cohabitation as a domestic arrangement has risen threefold in a little over 20 years so that now about 30% of single female adults regard themselves as cohabitators. These applications must, if fairness is to be achieved, be carried out in a climate which reflects society's current attitudes and the changing social climate in which we live ...Committed, settled relationships which often endure for years in the context of cohabitation (often but not always with children) outside marriage must, I think, be regarded as every bit as valid as those where parties have made the same degree of commitment but recorded it publicly by civil registration, i.e. by marriage. This has nothing to do with morality or religious belief and everything to do with striving to achieve financial fairness as between a couple at a particular stage in society's development. In the end, where such an arrangement has existed (especially where it seamlessly and immediately precedes the marriage) in a given case it seems to me to be capable of being as important a non-financial factor/circumstance under s 25 as any other, akin to the duration of the marriage (subs (d)), or may be a species or part of contribution (subs (f)) or conduct (subs (g)) if it is necessary to find a specific s 25 pigeonhole. Section 25 is concerned with taking into account the reality of a couple's circumstances and situations during their relationship. It is concerned with establishing fact not fiction in all areas including the financial. To ignore such a factor as cohabitation would lead the court to be considering the case on an untrue basis and almost inevitably lead to unfairness. I have been referred on this point to *GW v RW (Financial Provision: Departure from Equality)* (2003) 2 FLR 108 – a decision of Mr Nicholas Mostyn QC, a practitioner daily at the coal face so far as these type of applications are concerned. Essentially I agree with the views he expresses on this aspect of s 25 but, on reflection, I would not arrive there by quite the

same route. However, I doubt whether, in the end, that is anything more than a distinction without a difference. Accordingly, in this case, I shall give full weight to the fact of the parties' 8 years of cohabitation prior to and moving seamlessly into marriage.'

D v D (Financial Provision: Periodical Payments) (2004) 1 FLR 988

Again, a case of Coleridge J. Interesting for a number of reasons eg this is a 'review' of the decision of a district judge and there are useful dicta on *Cordle v Cordle* (2002) 1 FLR 207, (the case dealing with appeals – the appeal is *not* a rehearing unless it is in the interests of justice that it should be.) Helpful when advising the client who is discontented with a decision of the DJ and seeks to appeal – or in resisting the other side!

Facts:

The wife applied for ancillary relief. The marriage had lasted 21 years; the husband was 51, the wife 55 and the children were now adult. Both husband and wife worked and were planning for their retirements; the husband earned about £61,000 a year as a solicitor, the wife worked as a legal secretary, and was not able to earn her current budget need of £25,000. The judge ordered a capital division based on equality. He went on to order periodical payments of £10,000 a year to the wife, for joint lives or until remarriage. The husband appealed, arguing that the periodical payments order should be limited to a term of 10 years, with a bar on an extension of the term under section 28 (1A) of the Matrimonial Causes Act 1973.³

Held – limiting the term of periodical payments to 10 years but declining to impose a bar on application for extension.

³ Section 28 (1A) enables the court to prohibit a person who has the benefit of a maintenance order from applying to extend its term. Important to insert this prohibition in an order where a **complete clean break** is required – otherwise the applicant is always able to return to make another application.

- (1) **What was the appellate court's 'function'?** paragraph 5: 'this was an appeal from one of that band of extremely experienced district judges who sit at the Principal Registry of the family Division and so I would for that reason alone be very slow to interfere with his discretionary evaluation...I sit primarily in a reviewing capacity to ensure that the process in the court below was properly so undertaken. In that respect I have had quite rightly emphasised to me by Mr Peel, who appears for the wife although he did not appear below, the recent case of *Cordle v Cordle* ...The nub of that case is to be found where this is said: 'Any appeal from a decision of the district judge in ancillary relief shall only be allowed if it is demonstrated that there has been some procedural irregularity or that in conducting the necessary balancing exercise the district judge has taken into account matters which were irrelevant or ignored matters which were relevant or has otherwise arrived at a conclusion that is plainly wrong.'

That then is principle by which I am guided today.

Mr Peel further emphasises the words of Lord Hoffman in the case of *Pigłowska v Pigłowski* ...(1999) 2 FLR 763, where he amplifies the sentiments in *Cordle v Cordle* when directing judges to proceed with the greatest possible care when interfering with a judicial discretion exercised by a competent tribunal. Lord Hoffman said this, amongst other things: 'It is of course not enough for the wife to establish that this court might or would have made a different order. We are here concerned with a judicial discretion. It is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which

reasonable disagreement is possible and in fact plainly wrong that an appellate body is entitled to interfere.’

(The order of the DJ had provided for the distribution of capital – lump sum of £63,000 to W, assignment of a policy, pp’s for joint lives or until remarriage, **pension sharing order** and transfer of interest in 2 policies (one Scottish Equitable, one Friends Provident) – H to pay 75% of W’s costs.)

(2) The district judge had erred in two respects: first, in considering potential financial hardship to the wife at the time of her retirement, rather than at the end of the proposed 10 year term; and secondly, in failing to take into account the full value of the wife’s capital under the lump sum order. The court was, therefore, entitled to exercise its own discretion afresh. Para 16 - the DJ ‘factored in’ the wrong date i.e. instead of taking, as he should have done, the date when the order that he making would terminate – ‘that is to say, not less than 10 years, since that was the ‘date argued for by the husband’ and minimum position agreed by both parties – he took into account the date of the wife’s intended retirement, which was only some 5 years hence at the most. So much is clear from Para (43) of the judgment where he says: ‘I find that she will not at the date of her intended retirement be able to adjust without undue hardship to the cessation of her entitlement to periodical payments.’ ...’Self-evidently, the date must be the date of termination of the order, not any other date.’ Thus, says Mr Stocker, if, as seems unarguable, the district judge considered the wife’s position not at the date of termination of the order but at the date of her own retirement, when the periodical payments order would not any view be terminating, he made a mistake. I am satisfied that that is a proper analysis of the

district judge's reasoning. Mr Peel invites me to say that this may have been no more than a minor slip of the tongue of the district judge, and in fact he was looking at the matter in a more broad way. That may be right but it is certainly not a conclusion that I can derive from the wording of the judgment. I, therefore, agree with Mr Stocker that in this respect the district judge was taking into account an irrelevant matter, that is to say the wrong date. As a result his analysis was flawed.'

- (3) The judge had clearly been attempting to achieve equality, which had been the right objective. However, if an order for periodical payments was left 'rampant', without any restriction, then equality could later be upset because of intervening events. It was not fair for the courts to carry out a careful division of the assets and then leave open in an unrestricted way the possibility for that fairness to be revisited in years to come.
- (4) The wife's periodical payments should not extend beyond H's retirement in 10 years' time – but no bar on W applying to extend the term because after a marriage of 21 years and dependency of this length, it would not be fair to deprive the court of chance to consider the matter again if an unforeseen event occurred in the next 10 years which caused a financial embarrassment for the wife. Coleridge J chose a 'middle way' to be fair to the parties. Para 24 'So the question I ask myself is whether it is fair, in all the circumstances of this particular against the background of the findings made by the district judge, for there to be a 10-year term as contended for by the husband, together with a bar under s 28 (1A) (a direction that the party who receives the order should not be entitled to try to extend it) or whether the open-ended commitment by the husband to the wife should remain unfettered, or whether at the end of the day there should not be some middle way. I

propose to limit the wife's order to 10 years. I have no doubt at that that is the fair way in which this matter should have been dealt with, given the other correct findings that the district judge adopted and given his approach in relation to the capital. All things being equal, in my judgment, the wife's periodical payments should not extend beyond the husband's retirement in 10 years' time, even if he in the intervening period prospers relative to her. It is not, in my judgment, fair to the parties for the courts to carry out a careful, equal division of the assets in the way that this district judge did and then leave open, in an unrestricted way, the possibility for 'the basis of' that fairness to be revisited in years to come. So it is my clear intention, that, all things being equal, there should no further periodical commitment by the husband to the wife after 10 years. However, I have come to the conclusion that with a term as long as this it is simply unsafe to dismiss her claim outright in 10 years' time, when plainly within that 10 year-year period there is a significant dependency. It is quite impossible for a court to look as far as 10 years hence with any degree of precision and, although, as I say, my clear view is (and I express it in this strong way) that there should be no further payment by the husband beyond that term, I do not propose to put in place the bar under s 28(1A). If unforeseen events occur within the next 10 years which create for the wife financial embarrassment, it would be wrong this length of marriage and after this length of dependency after marriage to prevent the court from having the ability to consider the matter again. So there will be no s 28 (1A) bar but the order will terminate automatically unless the wife succeeds in extending it within the term.'

J v J 2004 (Family Law June 04 pp 408 - 409)

Bennett J The parties **met in 1990**. The H (aged 17 at that time) was a footballer whose professional career commenced in 1992. The W (aged 20 when the parties met) had no formal qualifications. In 1994, by mutual agreement, she gave up her work in an optician's firm. The parties became **engaged in 1994** and began to **cohabit** in 1995. Their first child was born in 1995 and their second in 1997. They married in 1998 and their third child was born in 1999. The wife took primary responsibility for the care of the children before and after the parties separated in 2001. Decree nisi of divorce was made absolute in 2003. Therefore, 3 YEAR MARRIAGE, 6 YEAR COHABITATION, CHILDREN AGED 9, 7 AND 5.

FDR in March 03 – total assets £3 million

Consent Order at the FDR and the parties settled on a clean break basis the capital provision aspects of the W's ancillary relief claim; she received the FMH, another property, and a lump sum of £250,000 equating to 37% of the assets.

The parties were unable to agree the rate of periodical payments and that issue proceeded to trial. The judge found that the husband would continue to receive a net income of £1.2 million per annum at least until the expiry of his contract with a football club. The wife sought by way of periodical payments for herself and the 3 children, 37% of the husband's average income (i.e. £444,000 per annum). According to the husband, £120,000 per annum was appropriate.

Held – awarding the wife and children periodical payments in the global sum of £250,000 per annum, the wife's for joint lives or until remarriage or further –

- (1) In exercising the powers under s 23 (1) (a) and (d) of the MCA,⁴ the court was bound to have regard to all the circumstances of the case, first consideration being given to the welfare of the children. (S25 (1)). S25 (2) criteria applied.
- (2) Can't ignore 'all the circumstances of the case' (look at what's fair – as per the case above) - though the marriage only lasted 3 ½ years - not fair to ignore a relationship of over 7 years (i.e. from their engagement in 1994 when H was 21 and W was 24)
- (3) "Needs or reasonable requirements was not a determinative or limiting factor in cases where the payer had the ability to meet the payee's needs.
- (4) The objective implicit in the exercise of the court's discretion under s 25 was to achieve a fair outcome in financial arrangements.
- (5) In seeking to achieve a fair outcome, there was no place for discrimination between the spouses and their respective roles. There should be no bias in favour of the money-earner and against the homemaker and childcarer."
- (6) "The English statutory code allows of only one allocation of capital between spouses. Where, as in this, capital claims were compromised and received the court's approval by way of order, they could not be revisited or reissued. Here, the wife had been well taken care of from a capital point of view."
- (6) PP's are for the spouse's 'maintenance' "and should not be used further to distribute moneys to the payee so as to give her or him savings (ie capital). But such a factor had to yield to a greater or lesser extent to the particular circumstances of the case, if fairness so dictates. In the instant case, to confine an

⁴ S 23 (1) (a) an order that either party to the marriage shall make **to the other** such periodical payments, for such term, as may be specified in the order.

S23 (1) (d) an order that a party to the marriage shall make **to such person as may be specified order for the benefit of a child of the family** in the, or to such a child, such periodical payment, for such term, as may be so specified

award of periodical payments for the wife to the ceiling or needs or reasonable requirements where the husband had the ability to pay far more would be faulty exercise of the court's discretion. To do so would be to determine her application for periodical payments by reference to one only of the matters in s 25 (2) and to ignore the other matter. In the instant cases, the wife's contribution had made a significant success to the success of the husband; she had been part of the circumstances that had persuaded him to drop the 'laddish' culture, including heavy drinking. Her contributions, past, present and future, to the home and the children were not to be underestimated."