

RECENT DEVELOPMENTS AND CURRENT ISSUES IN ANCILLARY RELIEF

LIFE AFTER MILLER AND McFARLANE

Charman v Charman (No. 2) 2006 EWHC 1879 (Fam) [2007] 1 FLR 593 FD

Coleridge J

This was a 28 year marriage. The parties were 23 and 22 when they met and 53 at trial. In the beginning they had no significant property but when they separated their combined worth was £150-160 million. There were 2 adult sons who were beneficiaries under a £30 million trust fund. W had £6 million of her own with the balance of £125 million divided between H (£57m) and the so called Dragon Trust (£68m) held offshore.

W wanted 45%- £59m including the £6m she had already. She accepted there should be a 5% discount for H's special contribution as a highly successful mover in the insurance world. She relied on the fact that she had been in it from scratch and had played a full part as a wife and mother.

H offered £14 m to add to her £6 m. He wanted to exclude the Dragon Trust because it was a discretionary trust with a number of possible beneficiaries and had been created, according to him, for dynastic purposes, to provide for children yet unborn. He argued that the remainder was far from suitable for a 50/50 split owing to:

- 1) his stellar contribution;
- 2) her failure to support him in business and move to Bermuda with him;
- 3) him being entitled to discounts for the lack of marketability of some of his assets.

Decision

Coleridge J awarded W £48 m, which was about 37% of everything. His main conclusions were:

- 1) The reduction of the W's share from 50% was on account of H's stellar contribution, not any other factor raised by H.

- 2) The Dragon Trust was in the pot and as a matter of fact it was not accepted it had a dynastic purpose and even if the intention had existed in H's mind, he could not take it out of the pot by changing its purpose, without W's consent. Quite apart from this the test was "*was the trust a resource available to him on demand, even if not his money?*" The answer to this was "yes", and so even if the husband had established his case on the facts, he would not have succeeded on the law.
- 3) W was not guilty of misconduct within section 25(2) (g) on the facts and even if she had been it did not reach the standard of "obvious and gross", the test which HL in **Miller** had re-established.
- 4) There would be no discount for lack of marketability. Valuations should be real and not hypothetical. Discounts were often appropriate where an asset had to be sold at an inconvenient time, but where in reality sale could be delayed to a more opportune time, or avoided, then that should be reflected in the issue of discounting. The same approach should be adopted when discounting the sale of a minority interest in a private company.
- 5) The test for stellar contribution was the "gross and obvious" test set by Lord Nicholls in **Miller**. It was the same test as for conduct. In fact conduct and contribution were 2 sides of the same coin and there was no reason why conduct should not be positive as well as negative. Once the threshold was passed there should be a significant, not token uplift, on the star's share - "use a carving knife and not a salami slicer". However, any adjustment shouldn't be so great as to affect the other party's standard of living.

The judge also tentatively suggested that in big money cases there should be consideration of a tariff system of percentage bands, which graduated the uplift for stellar contribution according to the wealth created.

Commenting on the varying guidelines on the issue of what weight to give to exceptional wealth creation the judge said "**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.**"

Charman v Charman (No 4) EWCA Civ 503 [2007] 1 FLR 1246 Court of Appeal

H's appeal was dismissed. By and large, CA approved the approach of Coleridge J. Sir Mark Potter P, who provided the only substantive judgement, gave useful guidance on the application of **Miller/ McFarlane** as follows:

- 1) **Miller/McFarlane** identified 3 main factors- needs, generously interpreted, compensation and sharing.
- 2) The yardstick of equality has developed into an “equal sharing principle” and property is to be shared in equal proportions unless there is good reason to depart from this.
- 3) But the starting point is in fact the enquiry into the financial position of the parties, which process divides into 1) computation and then 2) distribution. The latter should focus firstly on section 25(2) (a). Irrespective of whether the assets are substantial, the likely future income should be appraised even in a clean break as likely to be relevant to division in an overall fair outcome.
- 4) The sharing principle applied to all property, but to the extent it was non - matrimonial there was likely to be a better reason to depart from equality. The distinction of Baroness Hale in **Miller** between unilateral assets and other matrimonial property was relevant to short marriages only.
- 5) The 3 factors all corresponded to different parts of the section 25(2) checklist. Needs corresponded to (a), the standard of living in (c), age in (d) and physical and mental disability in (e). Compensation related to prospective financial disadvantage, as a result of decisions taken for the benefit of the family, during the marriage, which featured at (h). Sharing corresponded to contributions at (f), the duration of the marriage at (d) and, exceptionally, conduct at (g). But it was unnecessarily confusing to talk about contribution as a kind of positive conduct.
- 6) If needs, sharing and/or compensation were in conflict, then this must be answered by applying the criterion of fairness. When the needs were greater than the award suggested by sharing, then the needs should usually prevail. Where the needs were less than what the sharing principle suggested, the sharing award should prevail. If compensation conflicted with either of these, then how to resolve that would be left to another case.
- 7) In a case like this where it is obvious that needs and/or compensation will be subsumed in the sharing, there is no need to waste time on needs, but go straight to consider sharing and refer then only briefly to the other two.
- 8) The stellar contributions found so far had all concerned wealth creation, but in theory there was no reason why it could not stretch to other fields of endeavour. A windfall of wealth would be unlikely to be a stellar contribution.
- 9) The court was unable to identify a threshold figure for stellar wealth creation, but Coleridge J's invitation to set tariffs prompted the indication that, while it would always depend on the facts, it would be hard to conceive of a special

contribution that would uplift 50% to less than 55%, or to more than 66.6%.
The greater the unmatched wealth created the more would be the differential.

10) Regarding the Dragon Trust, more detail was given on the features that made the discretionary trust part of the pot:

- 1) The obvious fiscal purpose of trust (rather than dynastic);
- 2) H was a named beneficiary;
- 3) H's power to replace the trustees;
- 4) The contents of a letter of wishes that H should have fullest access to income and capital;
- 5) The inference from H's resistance to disclosure of documents by the trustees.

There was no quarrel with the "resource" test stated by Coleridge J, but the question was restated as ***"can the judge be satisfied that the trustees would be likely to advance the trust property to H, if he asked them to?"***

The President's parting shot was that Miller had not been perceived by the profession as making outcomes more predictable. He referred to an editorial in Family Law, "Lets Play Ancillary Relief". (it refers to the litigants as the players who are forced to stake everything they have and the lawyers as game masters who keep changing the rules as the game progresses). He called for a Law commission review and reformulated legislation.

Rossi v Rossi [2006] EWHC 1482 [2007] 1 FLR Nicholas Mostyn QC sitting as a Deputy High Court Judge

The parties were married in Italy in 1964 and ceased living together in 1978. There was a business dealing antiques largely from Asia which moved to London in 1985. H said he played a full part in this business but W denied it. W went into partnership with her son and they came to own 2 properties in London as well as the business partnership. The parties eventually divorced in 1992 but H made no application for AR. He was arrested in India in 1993, alleged to have stolen an artefact from a temple. He said he was unable to leave India until 2001. In 2005 H brought a claim for AR, under TLATA 1996 and the Partnership Act 1890 against W and son, Fabio.

H said he had been a partner in the business, played a full part in setting it up and he should share in its rewards. He said he had not brought his application sooner as he had been indisposed. Thus, the judge was faced with a decision on the effect of the passage of time since a separation and a long delay in bringing an application.

He decided as follows:

- 1) Post **Miller/McFarlane** the primary function was to determine what was the matrimonial property (MP) and what was the non - matrimonial property (NMP).
- 2) All the assets are to be valued as at the trial.
- 3) The value of assets brought to the marriage by gift and inheritance, other than FMH, together with passive economic growth on these would be NMP
- 4) Assets acquired post separation may be NMP if it can be said they were acquired, or created, by a party as a result of their personal industry and not by use (other than incidental use) of an asset created during the marriage and in respect of which the other party can assert an unascertained share. Passive economic growth on MP can't be NMP.
- 5) Where it is a bonus, or other earned income, and it relates to a period when the parties were cohabiting, or to a period immediately following separation, this will be MP. To be NMP it needs to relate to a period that commences at least **12 months** post separation.
- 6) MP should be divided 50/50 although this could deviate where there is a) a short marriage or b) part of MP is *non business partnership non family assets*, or MP is represented by autonomous funds accumulated by dual earners.
- 7) NMP is not quarantined and excluded from the court's dispositive powers. The court will decide if it should be shared and in what proportions. The longer the marriage, the more likely it is to get entangled with MP, the shorter the marriage the less likely it is to be shared, unless needs must.
- 8) A factor in deciding whether a party could share in post separation accruals of NMP was diligence in proceeding with the claim. Other factors were whether the party benefiting from the accrual had treated the other fairly over the period since separation and the prospects of the money maker making further gains, or earnings, after the division and, if so, whether that other party will be sharing those future gains and how.
- 9) There is no formal time limit on AR claims but delay increases the risks of injustice, memories of witnesses fade, documents are lost. It would be very difficult to successfully prosecute a claim over 6 years from the petition for divorce, unless there is very good reason for the delay.
- 10) The 2 sets of civil proceedings under TLATA and PA 1890 were misconceived and unnecessary, as these claims should be dealt with in the AR by the one judge. Any third party claims should be handled by interventions in the AR. In order to establish what is in the pool, for the claims between H and W, the third party claims must be resolved first,

applying the normal civil law. Then once the matrimonial pool is established in this way the issues between H and W are dealt with using MCA 1973. It may be advisable to resolve the claims of third parties at a separate hearing, before FDR.

- 11) The judge found that H's role in the business was no more than mentoring in the early stages and this was not enough to make the business MP. H had delayed too long in any event. In order for needs to call for an award there must be a causal connection between the need and the marital relationship. There was no connection here (Baroness Hale in **Miller/McFarlane** talked of relationship generated needs).
- 12) As an aside the judge wondered if *compensation* will be widely awarded, or be confined to an exceptional case (this echoes the sense of uncertainty in **Charman** where the issue was left to one side).

H v H [2007] EWHC 459 (Fam) Charles J

The parties separated after 19 years of marriage. H was an investment banker and W a housewife who looked after the 4 children, having given up her career as a teacher. Assets were 29.4 m, including H's bonuses for 2006 and 2007. Separation was in 2005, although attempts were made to reconcile after this. W got £13.7 m made up of 50% of the assets built up over the marriage and £1.4 m from H's bonuses (one third of bonus in 1st year after separation, one sixth in the next year and one twelfth in the next one). It was held:

- 1) **Miller/McFarlane** had not set a series of statutory tests the passing or failing of which led to predetermined results, as this detracted from the flexibility of section 25.
- 2) MP was determined as at the time of separation, valued as at the date of trial and divided equally.
- 3) Re the bonuses, Charles J disagreed with Nicholas Mostyn in **Rossi** about his one year rule of thumb. W could get one half during the marriage but her entitlement to a share of future earnings was restricted to that part of H's income which had been enhanced as a result of W's contributions during the marriage.
- 4) The non-discriminatory, equal and fair approach applies to Hs as much as Ws and since a marriage can end at any time, there can be no legitimate expectation of long term economic parity. The aim is for both parties to have an equal start on the road to independent living. The gradual tailing off of the bonus would allow a gentle transition to self sufficiency (£13.7 million!).

S v S (Ancillary Relief after Lengthy Separation) [2006] EWHC 2339 [2007] 1FLR 2120 Singer J

This was an 18 year marriage with no children. The couple separated in March 1996, when H moved into rented accommodation. W stayed in FMH and H paid the mortgage. 7 years later H petitioned for divorce, having in the meantime considerably developed his business without support from W. Due to further delays, in particular, in valuing H's company, the AR was not tried until 10 years after separation. By then H's shares in his company were valued by W at £27.2 m and by H at £3.73 m. Less controversially H had £719k in deferred preference share dividends. FMH was worth £970k and H's new property £360k. W had a pension of £56k and H of £2.1 m. H had an income of £287k pa and W's was very modest. H's business had great potential, but was going through a testing time and expert evidence was that it would need to show a track record of increasing turnover and profitability to realise its potential. A trade sale or flotation was not viable in a specified timescale.

W argued that she was entitled to a full share of H's business, as he had made free use of the capital that would otherwise have been awarded to her. The parties had agreed her pension provision at £1 m.

Singer J gave the W £75k pps pa, plus H to continue paying her mortgage till redemption. He gave W FMH, a lump sum of £200k and further lump sum of £900k secured on H's preference shares. This was effectively all the liquid and secure assets. Judge had felt his room for manoeuvre limited by the agreement that W should have FMH in its entirety. Notable points were:

- 1) The starting point for valuation was always the time of the hearing, but what happened in the intervening years and H's substantial efforts required in the years to come to make his assets realiseable at a good value should be reflected in the split.
- 2) H should get more if he had the less tangible realiseable or risk laden assets. As he bore the risk, he should get the reward if the shares eventually realised a higher figure.
- 3) As the years passed it was less and less fair for W to benefit from the potential in H's company and she should have issued proceedings earlier. It was no defence that H could have done so.
- 4) If the company was sold in the future, it was significant that this would only be by dint of H's considerable efforts in future years.

- 5) H's shares were more akin therefore to NMP.
- 6) It was not discriminatory to factor in that W, in this case, had not made the contribution of bringing up children.
- 7) Singer J approved Nicholas Mostyn in Rossi in his treatment of post separation accruals.
- 8) Compensation did not feature, as W had not given up a successful and lucrative career.

The Role of Compensation?

RP v RP [2007] EWHC 779(Fam) [2007] 1 FLR 2105 Coleridge J

Parties were married 10 years having cohabited for 4 years previously. W was 47 at the hearing. She had given up work as director of a recruitment agency to support H as an investment banker working in HK. The couple had twins at the time of the hearing. By the trial she had recently set up a design consultancy and property search co. and was getting a profit of £15-20k. H was 46 CEO of a bank and earning £400-500k, although he was about to leave to be a self employed banking consultant in Australia. His income would plummet but was predicted to reach £150k pa in 5 years. Both parties sought a clean break and had agreed H would pay child pps of £6k pa, index linked, plus provide for their school fees secured in a separate fund of £130k. W proposed she should get £2m plus the children's fund with H receiving £1m less the fund. H was asking for an additional £300k. H asked the judge to focus on W's and the children's needs. W asked she be compensated for loss of income caused by the marriage. The court awarded W £1.8 m including the pension which together amounted to 60% of the assets on a clean break.

Coleridge J echoed Charles J in **H v H (supra)** in saying that principles enunciated in **MillerMcFarlane** should not be given quasi statutory status. A new mythology should not be allowed to creep in that made AR claims analogous to claims for damages in civil cases, broken down into different heads of compensation. Compensation does not appear explicitly in section 25, but has always been a consideration of the court concerned with contributions and obligations stemming from the marriage. It was not possible and undesirable to waste resources on a "what if" exercise in respect of career opportunities. W's contribution in sacrificing her career would be recognised by an award that provided her with a secure future whilst enabling H to re-establish himself.

W's additional 20 % was on account of the desire of both parties to achieve finality, the children's needs and H's far greater earning capacity in the long term.

Coleridge J was unimpressed by anecdotal references to expert evidence, in another case, being called to establish a wife's loss of earnings and earning capacity, caused by the marriage.

S v S [2006] EWHC 2793 Burton J

Parties were married when H was 52 and W 32 and separated 7 and a half years later. H had been married before and was an equity partner in a firm of chartered surveyors with a successful career over 30 years. H's interest in the business had no real value at the time of the marriage but H had received unexpectedly during the marriage £1.2 m for his interest from a French company. H was made redundant and began working for another firm as a consultant at £25k pa W had been a trainee chartered surveyor, but did not work after the marriage, mothering the parties 2 children, 8 and 3 by the time of the hearing. All available assets were brought into the marriage or created during the marriage by H. Parties had a volatile relationship and the marriage ended when H was arrested and later convicted for assaulting W.

Child Maintenance was agreed at £15k pa plus school fees expected to total £18k pa and a clean break was agreed.

Burton J gave W 40% of the overall assets made up of FMH worth £1.8 m a lump sum of £700k and payment of her debts and legal costs of £500k.

Burton J's approach was to characterise the assets as MP or NMP. He decided:

- 1) All matrimonial homes whether former, or intended, were MP irrespective of the source of the funds to buy them.
- 2) Commercial properties purchased prior to marriage, where H had done nothing with them during the marriage, were NMP.
- 3) The so called pension portfolio had been liquidated and managed within the pension wrapper by H, substantially increasing its worth over the course of the marriage. This made it MP and even if it was not needs dictated recourse to it.
- 4) Commercial property purchased during the marriage from assets H had before it or from proceeds sale of his partnership interest was MP. As the partnership had no value on marriage its later proceeds were likened to Mr Miller's new star shares. Since proceeds were realised and invested during the marriage using H's expertise this was MP.

- 5) 7 and a half years was not considered a short marriage, but reasonably long.
- 6) The conduct aspect did not get factored in as it was only enough to induce a “gulp” and not a “gasp”.
- 7) Compensation did not arise as a separate head.
- 8) H was to be given credit for his substantial contribution financially to the marriage.

A SECOND BITE AT THE CHERRY

N v N [2006] EWHC 3269 [2007] 1 FCR 749 Charles J on appeal from DJ Greene

After a 13 year marriage the 3 children remained in FMH with H. An order was made in 1981 based on the agreement of the parties that W would transfer FMH to H and he would furnish her with a lump sum to accommodate herself. As at that time a clean break could only be made by consent the order contained nominal pps to W.

After that the parties' financial fortunes were contrasting. H increased his wealth to several millions. W made no attempt to get employment, emigrated to Australia, lived in an expensive part of Sydney and invested badly, such that she felt obliged to apply for the nominal pp order to be varied upwards. H cross applied for the order to be discharged.

DJ Greene made various trenchant findings against W: that she had been the author of her own misfortunes and that H should not be held responsible for her. However, he found certain factors in her favour and varied the maintenance upwards to £16,500 pa and capitalised it under Section 31 (7B) MCA 1973 in the sum of £202,000

On dismissing H's appeal Charles J rejected H's argument that there had to be some kind of trigger factor of merit as a precondition for the desired variation. He emphasised that section 31 (7) dealing with variation of pps required him to have regard to *all the circumstances*, and within that all the factors within section 25. No one factor, or factors, could be isolated and given general precedence. There had to be an overview and a balancing exercise.

Although Charles J in that exercise might well have come to a different conclusion himself, he acknowledged the DJ was entitled to bring in the fact that there never had been a clean break or any consensus that the pps order was not

still in existence, that H was now much better off and W in need, therefore it could not be said the DJ was plainly wrong within the “Cordle” test.

North v North [2007] EWCA Civ 760

The matter then went to CA which had no such scruples about setting the DJ ‘s order aside.

Thorpe LJ approved Charles J’s rejection of the trigger argument but felt the DJ’s conclusion was entirely contrary to his findings, which 3 times absolved H from responsibility for W’s situation and pinned the responsibility on her. He also failed to explain how he arrived at the figure of £16,500 pa and whether this included any discount for W’s improvidence.

“A Respondent was not to be an insurer against all hazards and nor, when fairness is the measure, is he necessarily liable for needs created by an Applicant’s financial mismanagement, extravagance or irresponsibility.”

However W’s application was not finally dismissed. Needs were in section 31(7) applications usually the dominant or magnetic factor and the losses on W’s investments, at least, were misfortune more than mismanagement and, therefore, a smaller award was at least worthy of consideration. Counsel were asked to provide written submissions on a middle way and a decision was put off until the new term. The matter was not remitted back owing to the disproportionate costs.

TRUSTS AND COMPANIES

A (Petitioner) v A (Respondent) & St. George Trustees Limited & Ors (Intervenors) [2007] EWHC 99 (Fam)

Marriage lasted 17 years. Each had adult children from previous marriages. The family owned 3 companies B, C and D. The couple and H’s son (S) each owned shares in B with a remaining 54% share held in 2 separate trusts. W asserted the 54% share in B was in the pot because H had complete control of the trusts and treated the shares in it as his own. She said the trust had been set up as a sham to help H in his previous divorce and the trustees currently appointed took on their role on this basis. Alternatively, even if the trusts were not shams the trustees could be persuaded to advance H shares.

It was held that whatever a settlor might have intended when the trust was created and whatever may have happened since, a trust would not be a sham if either the original, or the subsequently appointed, trustees had not been party to

the sham at the time of the appointment. Even if the original trustee had been party to a sham, the trust would subsequently become valid and enforceable from the date of the appointment of the current trustees provided they had exercised their powers and fulfilled their duties in accordance with the terms of the trust instrument. In fact no sham was established. W's fall back position also failed. W had to establish that if asked the trustees would be "likely" immediately or in the foreseeable future to exercise their powers in favour of or for the benefit of H (cf **Charman** above). Although a court could encourage a third party to transfer an asset to a party to a marriage it had no authority to compel it. Given the interest of S in B, the fact there was no history of distributions to H, that he was only one of a number of beneficiaries and there was no money to distribute it was unlikely the trustees would give H capital either at his request, or to satisfy a court order. Any suggestions to the trustees by the court would pass beyond judicious encouragement to improper pressure.

D v D and B Limited [2007] EWHC 278 (Fam)

The marriage was 35 years. H had been the sole breadwinner and W at home looking after the children. Assets were FMH, pension, artworks and H's companies, all acquired over the course of the marriage. The business was the production of titanium from aerospace by-products and H operated this mainly from the basement of FMH but his companies owned other property partly abroad. H was so crucial to the business, his activities were akin to those of a sole trader and its success was largely down to his personal relationships and reputation. There were difficulties in valuing the business. W wanted a division of assets and lump sum based on expert valuation. H wanted to sell the trading business and a division of the other assets.

Held despite the wish of both parties to proceed the matter should be adjourned. An order on the information available would be an under-informed guess. The expert lacked a sufficiently commercial approach and in reality H's work was so specialised it might not be possible to find a buyer. The proposed terms of sale were critical and especially re provision relating to handover and competition, otherwise there might be a low value but H continue to benefit from business contacts in competition. AR focus in dealing with private companies should not simply be on valuation and liquidity, but to consider a range of issues relating to the company with the eye of a commercial as well as a matrimonial litigator.

An agreement as to a clean break was of great weight but not conclusive. It was important to consider commercial alternatives such as the ability of the company to lawfully and sensibly finance one or more parties. This involved analysing the relevant company and fiscal law and assessing a commercial situation. A private company was a classic situation where a clean break based on valuations alone may be too uncertain to be fair and especially if there was significant dispute or

uncertainty, a wide bracket of valuation, or doubt about the ability to raise and pay a capital sum without burdening the business of the paying party. It was possible to perform this investigation without excessive expense if the right lawyers were approached and the right questions asked.

MPS AND COSTS ALLOWANCES

Owing to the size of the bills, the difficulties in settlement and the erosion of public funding, Costs Allowances are becoming a regular issue. The credit squeeze will add to the trend.

This jurisdiction was carved out of section 22 MCA 1973 by Holman J in **A v A (Maintenance Pending Suit; Provision of Legal Fees) [2001] 1 FLR 377**, where W had no means of funding her own legal representation of comparable quality to H's, without recourse to using part of the MPS supplied by H. The judge increased the MPS to provide a costs allowance. The idea caught on and was included in an order by Charles J in **G v G (Maintenance Pending Suit: Costs) [2002] EWHC 306 (Fam) [2003] 2 FLR 71**. The seal of approval was given by CA in **Moses-Taiga v Taiga [2005] EWCA Civ 1013 [2006] 1 FLR 1074 CA** which indicated certain pre-conditions viz :1) the applicant had no assets of her own with which to fund the litigation 2) could not raise a litigation loan and 3) could not persuade her solicitors to eschew seeking payment, before she got her award, on the basis of a charge upon capital recovery (a so called Seers Tooth charge). It seemed to be taken as read there was a lack of eligibility for public funding, or that such funding if available would not provide legal representation of the requisite expertise. This is, of course, a further condition.

Thorpe LJ went on to say however that *“obviously in all cases the dominant safeguard against injustice is the discretion of the trial judge and it will only be in cases which are demonstrated to be exceptional will the court consider exercising the jurisdiction”*

This raised a second possible line of defence that **the circumstances were not exceptional enough**.

Several recent cases have elucidated the position

Re G (Maintenance Pending Suit) [2006] EWHC 1834 (Fam) Munby J

The DJ's order for MPS was £10k pcm for W and the 4 children with a costs allowance of £6k pcm, all backdated to service of the application. There was a refusal of an amount to fund the son's Barmitzvah.

Munby J held (dismissing the appeal save re the Barmitzvah)

- 1) The court was entitled to make robust assumptions about H's finances;
- 2) The MPS could be backdated to service of the application;
- 3) The costs allowance was allowable as the circumstances were exceptional. W could not be expected to mortgage her property where she and the children lived, to the hilt, or to borrow to the point where no one would lend her more.
- 4) H should pay W £46k for the Barmitzvah as it was an important special occasion and although it was not possible since **Wicks v Wicks 1998 1FLR 470** to award an interim lump sum there was jurisdiction under Schedule 1 of the Children Act 1989.

C v C (Maintenance Pending Suit: Legal Costs) [2006] 2 FLR 1207 Hedley J

It was suggested by H that W did not fulfill precondition 1 because she could raise costs funding on the security of FMH where she lived with the children. The judge held she could not be expected to jeopardise her and the children's occupation by raising such a loan.

L-K v K (Brussels II Revised: Maintenance Pending Suit) [2006] EWHC 153 (Fam) [2006] 2 FLR 1113 Singer J

In the main this case was a jurisdictional dispute where petitions were issued on the same day in France and England. H appealed the decision of the French Court to decline jurisdiction. W wanted a costs allowance to deal with H's application to stay the English Proceedings. Singer J found the circumstances exceptional and awarded the allowance. If the decision was eventually that the French Court had jurisdiction then H would have suffered an injustice, but the injustice to W would be greater if she could not pay for representation.

TL v ML and Others (Ancillary Relief: Claim Against Assets of Extended Family) [2006] 1 FLR 1263 Nicholas Mostyn QC sitting as a Deputy High Court Judge

Nicholas Mostyn decided that Thorpe LJ's judgement in **Moses -Taiga** saying circumstances needed to be *exceptional* to justify a costs allowance was not adding a further hurdle to those already suggested by his 3 preconditions (which in themselves made the case exceptional).

Regarding matters of evidence, he said that evidence that solicitors were not prepared to enter a “Seers Tooth” arrangement need be no more than a letter from them to this effect. Regarding the inability to raise a litigation loan, 2 letters from the Applicant’s solicitors and 2 negative replies from different banks should suffice.

Mr Mostyn also indicated the DJ who dealt with the FDR could hear an application for an extension of the costs allowance.

Currey v Currey (No. 2) 2006 EWCA Civ 1338 [2007] 1FLR 946

The facts were unusual. In Currey v Currey (No 1) AR final order was made in which W the richer party was ordered to pay H 48k pa pps indexed linked and £1,070,000. Because H was a former name at Lloyds who had large debts part of this sum was structured into a £640k housing fund and W’s share of heavily mortgaged property was transferred to him. At the time of No. 2 this sum was still not invested.

H subsequent to the 2003 case embarked on a campaign of fruitless litigation and a number of his claims were struck out, as without merit, and a civil restraint order placed on him.

W, then wanting H out of her hair for good, applied to capitalise the pps under section 31(7B) MCA 1973. H not surprisingly cross applied to uplift the pps and was awarded an increase to pps in the interim to give him a fighting fund for legal costs of £10,000 pcm until the FDR.

W was appalled as she was already owed £46k in costs already assessed with a further £31k awaiting assessment. H also owed his own former solicitors £180k which was subject to a counterclaim by him. W appealed on the grounds H had the money in his housing fund and the circumstances were not exceptional

The Court of Appeal judgement was given by Wilson LJ. He held, dismissing the appeal:

- 1) That Nicholas Mostyn in **TL v ML** was correct in his interpretation of **Moses-Taiga** and that there was no separate test of exceptionality, other than the normal preconditions for a costs allowance.
- 2) **The proper test was could an Applicant demonstrate that she could not reasonably procure legal advice and representation by any other means, including a charge on capital recovery and that she could not obtain public funding that would provide representation at a level of expertise appropriate to the proceedings.**

- 3) But these matters were not enough in themselves. The subject matter and reasonability of the application were important and the pre-existing costs debts to the Respondent were relevant.
- 4) The judge's finding that the housing fund couldn't be utilised was permissible, although this was due more to the difficulty in deploying it within a reasonable time than per se.
- 5) The significance of H's past litigational peccadilloes were lessened by the fact that this was primarily a defence to an application brought by the W of which the outcome would have a profound effect, bearing in mind a capital sum would be far more vulnerable to his creditors than a pp order. H's cross application was also not unreasonable.
- 6) However, a court needed to be realistic and cautious and it was not placing undue pressure to settle at FDR to warn H that the allowance might not be extended beyond it.
- 7) The dicta of Nicholas Mostyn in **TL** that an FDR judge could extend a costs allowance was disapproved (cf **G v G (Role of FDR Judge) 2006 EWHC 1993 [2007] 1FLR 237 Baron J** where the FDR judge could deal with a variation application after final order).
- 8) Finally, it was confirmed that costs allowances did not fall into the post April 3rd 2006 "no order" regime under Rule 2.71(4) (a) Family Proceedings Rules 1991.

Wilson LJ during the course of his judgement expressed his and others growing unease that the development of the law was being channelled increasingly through big money cases and that the law in the Court of Appeal and the House of Lords bears **"an imbalanced concentration upon forensic conflict within only a few rich families"**.

On a lighter note. . . . **Rossi v Rossi** includes a very interesting aside on the laws of evidence. It will be remembered that H was seeking to show he was a partner in W and his son Fabios' antique business. Nicholas Mostyn comments:

"It is right and proper that a heavy burden of proof is imposed on H because absent the same W and Fabio would have to prove a negative. It is sometimes said that "you cannot prove a negative", but this is not true as an absolute proposition. Even the paradigm unprovable negative of Fermat's last theorem (which postulated that for the equation $x^n + y^n = z^n$ there is no integer solution for n greater than two) was proved by Professor Andrew Wiles in 1994. What the proposition means is that generally speaking it is very much more difficult to prove by evidence that an event did not occur than it did. This is particularly the

case here. It is obviously much more difficult for W and Fabio to prove that there was no business or financial relationship between H and W after 1985 than it is for H to prove the positive proposition that there was.”

See it's all so simple. .

DAVID SHARP

Tanfield Chambers

9th October 2007