**FAMILY – financial consequences (lecture 4)**

**FINANCE:** Part II MCA 1973 (married couples)/s72(1) and sch 5 CPA 2004 (civil partners). S25 MCA has been heavily criticised: Cowan; White (concept of fairness, yardstick of equality, no discrimination); Lambert. Judicial efforts to resolve the confusion; Miller, McFarlane– fairness requires needs of spouse and children to be satisfied, compensation to redress future economic imbalance, equal sharing of ‘matrimonial assets’ acquired. Charman– if sufficient assets for needs; assume equal then assess matters to see if good reason to depart; departure from equal sharing more likely for non matrimonial assets/exceptional contribution; departure from equal sharing may be for compensation, needs, conduct, clean break; all property should be open for sharing; 3 principles of need, compensation and sharing contained in s25.

### FACTORS TO BE CONSIDERED BY THE CT

- **s25(1)**-all circumstances of the case. First consideration to children.
- **S25(2)(a)** – income, earning capacity, property, etc
  - *Pre marital asset*
  - *Post separation assets limited circs – Rossi; B v B*
  - *Future earning capacity – A v A (financial provision)*
  - *TP assets – X v Y*
- **S25(2)(b)** – needs, obligations and responsibility
  - *Most basic need is provision of accom and expenses associated with food, clothing etc. Needs are relative.*
- **S25(2)(c)** – standard of living
  - *Only applicable if sufficient resources: F v F; McCartney v Mills McCartney.*
- **S25(2)(d)** – age and duration of marriage
  - *Significant when considered with other factors: C v C*
- **S25(2)(e)** – physical and mental disability
  - *May affect the party’s resources/earning capacity*
  - *Disability post marital separation v Seaton*
- **S25(2)(f)** – contributions
  - *Contributions should be judged in a non-sexist manner – White; Lambert and must be exceptional eg be stellar contribution.*
- **S25(2)(g)** – conduct
  - *Either party can apply for financial provision.*
  - *Only taken into account in limited circs and only if ‘gross and obvious’ – Wachtel; Kyte*
- **S25(2)(h)** – any benefit which that party will lose
  - *Ct should consider any potential benefits a party may lose eg pension rights. Not speculative – S v S re inheritance.*

### CLEAN BREAK

- *Object is to settle finances once and for all – Munion.*
- *S25A – Ct has a duty to consider clean break, but it may not be appropriate.*

### ORDERS

**Financial Provision Order** (lump sum)

- *Periodical payment (regular payment of money): no guidance as to amount: can be limited/indefinite period (s23) – Parlour; can be varied, discharged or suspended (s31) – I v I; only if former spouse hasn’t remarried; doesn’t promote idea of clean break- Fleming; W v W*
- *Lump sum –allows clean break; instalment payments will survive a remarriage/death of payer.*

**Property Adjustment Order** (s24)

- *Types: Transfer of property (usually in exchange for lump sum), Mesher order (dependent on future event) and Martin order (remain in house until remarriage/death).*

**Pension Orders** (s24(b)(c)(d))

- *Types: Offsetting, attachment orders (give wife % when husband gets pension), pension sharing (divides pension at time of divorce), to enable both parties to retire, pension adjustment order (for lump sum), to enable both parties to retire)*

### CLEANSAL ORDERS

- *Regard all circs of case but consider break (s31(7)). Overall objective is fairness – North*
- *Capital/property adjustment orders – normally regarded as final – Myerson.*

**Barder** - must be change in circs, event must have occurred soon after the original order, application for leave must be prompt, no prejudice to TP.

- *Each party must make full and frank disclose – failure to do so has consequence (P v P, Livesey v Jenkins)*

### AGREEMENTS

**Pre-nup:** not enforceable – contrary to public policy; S34(1) MCA; can take them into account when considering all circs of the case: K v K; Crossley *Important new case: Radmacher v Granatino (freely entered into, both parties knew implications,had full disclose, independent legal advice, no pressure UNLESS it would be unfair)*

**Post-nup:** Can be enforceable but not binding in ancillary relief; MacLeod.

**On divorce:** Can be incorporated into consent order. Only overruled if emotional distress/unfair pressure: NA v MA.