

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 resource / earning capacity

*Disability post marriage: *Seaton 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 – *Minton*.

*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(1)(c)(i))

*Types: Offsetting, attachment orders (give wife % when husband gets pension), pension sharing (divides pension at time of divorce, to enable both parties to retire).

FINANCIAL 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*.