

M v L (FINANCIAL RELIEF AFTER OVERSEAS DIVORCE)
[2003] EWHC 328 (Fam)

Family Division

Coleridge J

28 February 2003

*Financial provision – Overseas divorce – 30-year delay – Short marriage –
Wife raising two children of marriage – Wife’s contribution as mother –
Whether capital to be divided on basis of equality or provision to be
limited and based on need*

The wife’s claim was for financial relief after an overseas divorce, under the Matrimonial and Family Proceedings Act 1984, Part III. The parties had married in 1966 and separated in 1970, having had two children. The husband had been born in South Africa, and, although he had moved to England before the marriage, he had retained his South African domicile, which at the time meant that the only place where he could take divorce proceedings was South Africa; the couple were duly divorced in South Africa in 1973. During the initial separation period the husband had provided the wife with £100, then £130 per month to cover rent and the family’s living expenses, and the only financial order made by the South African court was for the husband to continue making those payments ‘for the said children’. In 1976 the wife asked the husband for better accommodation, and the husband purchased a flat for the wife and children to live in, spending considerable sums on improvements. The husband granted the wife a lease for 11 years, by which time the youngest child would be 22 years old. By 1985 the monthly payments had increased to £300, which the wife supplemented by taking temporary secretarial jobs and by taking in paying lodgers. The payments continued to be made to the wife even after the children reached adulthood, and when the lease on the property expired, the husband renewed it for a further 10 years. The wife had remained in the property, no longer worked, and no longer took in lodgers. In 2001, as a result of a banking error, the monthly standing order was interrupted, which the wife interpreted as a decision by the husband to stop the payments, and she instructed solicitors. By holding over after the expiry of the second term of the lease in 2001, the wife had become a statutory tenant of the husband, which meant she could not be evicted. A consent interim maintenance order of £650 per month was in force. The husband had been married to his second wife for 22 years, with whom he had a child, and lived on a substantial income from family trusts set up by his father.

Held – allowing the wife’s application and ordering the husband to pay a lump sum of £30,000 to builders to make repairs on the wife’s home and periodical payments of £1,000 per month, to be capitalised at £150,000, and on the sale of the property the wife to receive 50% of the net proceeds –

(1) It was appropriate to make a financial order in this case, despite the 30-year delay between divorce and the application. The husband had acknowledged by his actions during that period that he had a moral obligation to the mother of his elder children, and had suffered no financial prejudice by the delay. It had been entirely anomalous that the original divorce had taken place in South Africa, the result of a jurisdictional anachronism, and the case should always have been an English one. The South African jurisdiction had not afforded the wife appropriate relief. The South African order had made no reference to the wife’s financial claims, as opposed to those of the children. This was not a case in which the wife was seeking a second bite of the cherry after a proper foreign determination (see paras [31], [32], [35], [37], [38]).

(2) The wife's contribution as mother justified full recognition, notwithstanding that the marriage had not been a long one. The wife had a real financial need which to some extent arose out of that contribution. The wife had remained financially dependent on the husband, admittedly through voluntary payments, and it would be unfair for him to walk away from that dependency. There remained a liability on the husband arising out of the former marital relationship, which he had the means to meet. It would be grossly unfair to the husband to divide his capital on the basis of modern precepts, and the award was based on what would be reasonable in all the circumstances for the applicant to have for her maintenance, which was within the husband's ability to pay (see paras [55], [56], [57]).

Statutory provisions considered

Matrimonial Causes Act 1973, s 25

Inheritance (Provision for Family and Dependants) Act 1975, s 1(e)

Matrimonial and Family Proceedings Act 1984, ss 16, 17, 18, Part III

Cases referred to in judgment

Edgar v Edgar [1980] 1 WLR 1410, (1981) 2 FLR 19, [1980] 3 All ER 887, CA

Holmes v Holmes [1989] Fam 47, [1989] 3 WLR 302, [1989] 2 FLR 364, [1989] 3 All ER 786, CA

Jonathan Cohen QC for the applicant

Jeremy Posnansky QC and *Stephen Trowell* for the respondent

Cur adv vult

COLERIDGE J:*Introduction*

[1] If ever there was a case which illustrated the advantages of properly, and if possible completely, finalising all maintenance and property arrangements between spouses and as soon as practicable after they separate then this must be it. The parties to this application separated 33 years ago.

[2] This case also calls into question both the duration and extent of the financial obligation which arises between spouses upon marriage. And in this case that question needs to be considered both at the time these parties were divorced (1973) and today; some 30 years later.

[3] The applicant Mrs M (who I shall call the wife), with the leave of Hogg J, makes a claim for financial relief after an overseas divorce under Part III of the Matrimonial and Family Proceedings Act 1984. The respondent is her former husband Mr L (who I shall call the husband). After a marriage which lasted in reality only about 4 years they divorced in South Africa in 1973. However, at all times since their marriage they (and their two children) have lived in this country.

[4] The wife, who has relied since the separation in 1970 almost entirely on voluntary payments and other informal provision from the husband, is now looking for orders which would be worth to her in total a little less than £1 million. As part of that claim she seeks a transfer to her of the flat in London where she has lived for the past 22 years. The husband says that, one way and another, over the years he has provided enough for her and so her claim is, in the circumstances, entirely without merit and should be dismissed.

[5] That is the very considerable issue between the parties. It has taken the best part of 4 days of court time to resolve. I have read some five volumes of statements of evidence and other documents. I have also heard oral evidence from the wife, the husband and the husband's brother-in-law, RM (who flew from New York for the purpose). Finally, I pay tribute to the painstaking and attractive arguments advanced by both leading counsel. Both written and oral they have nicely focused the issues calling for my resolution. Their quality and persuasiveness, however, has not, at the end of the day, made my task any the easier.

The parties

[6] I should say something about the credibility and demeanour of the witnesses before coming to the background and chronology in detail because in dealing with it I shall necessarily have to resolve certain important issues of fact which arise along the way.

[7] The wife gave evidence to me for the better part of a day. She is convinced that she is the victim of a long and conscious campaign by her former husband to keep her and previously the children pitifully short of funds. This is a view which she has not always held as is apparent from numerous letters which I have seen and which passed between the parties over the intervening years. In the past it is clear she regarded her husband as trustworthy and if not generous then certainly perfectly reasonable in the level of provision he made for her. However, she has now convinced herself that contrary to her previous view he has treated her very meanly indeed. I think this has coloured her evidence from the start of this application. Initially it was based, at least partly, upon an assertion, now withdrawn, that the original financial order obtained in South Africa was obtained by duress. The duress alleged was that the husband had threatened to keep their daughter in South Africa if she did not agree his terms. That was a wholly untruthful assertion. I do not think the wife set out deliberately to mislead the court in this respect. But I think it demonstrates graphically the level of paranoia and misplaced sense of grievance which has crept into the wife's case and which from time to time has coloured and clouded her evidence. Overall, I did not find her evidence reliable in relation to historical matters. Repeatedly the contemporaneous documentation did not bear out her recollections or support her current view of her treatment at the husband's hands. She has, I am satisfied, in her mind rewritten history casting herself as the victim of terrible and chronic injustice. That is not to say that she does not, at the end of the day, have a valid claim today, merely that if she does it is not based on years of underpayment and insofar as it is based on evidence which is challenged by the husband I found it, as I say, in many respects unreliable.

[8] The husband also gave evidence to me. He is a mild-mannered man who has undoubtedly, and in my view understandably, felt immensely hurt by the allegations of mean-mindedness now made against him by the wife. He feels he has always played fair by her and that she has not, until this application, complained about the financial arrangements which he has made and always rigorously stuck to. He was a sound witness whose evidence was to be preferred on issues of historical fact. It was supported in important respects by RM who had known the parties for many years. He too was, I found, manifestly reliable and clear in his evidence.

Chronology

[9] Against those findings I turn to consider the background and the issues which arise within it. The husband is 64 and was born in South Africa. He lived there until 1964 when as part of a general exodus by his family he came to live in this country aged 25. However, he has always, to this day, retained his South African domicile of origin. It obviously has fiscal advantages.

[10] The wife is 57. She is English, has always lived in this country and has never been to South Africa.

[11] The parties met in Regents Park, London, in 1965. The wife was then 19 and the husband 26. They had a whirlwind tempestuous romance culminating a few months later in elopement to Scotland where they were married on 31 January 1966. The wife was then 20 and the husband 27.

[12] After the marriage they lived in a two-bedroom flat in Eton Road, Hampstead bought by the husband with money partly borrowed from the husband's father and partly on mortgage. Even at that early stage the parties were dependent to some extent upon support from the husband's father or family. That has remained so to this day.

[13] In 1967 the parties' daughter C was born so she is now 35. Almost exactly a year later in 1968 their son B, now 34, was born. By common consent the marriage ran into difficulties soon after B's birth. The reasons are now wholly irrelevant. The wife says it had something to do with the husband's attitude to money but I do not accept it and it does not now matter. In the event they separated finally in September 1970 after a trial separation.

[14] The wife then moved into a small rented flat in Glenhurst Avenue, NW5, with the two children aged 3½ and 2½. It is perhaps pertinent to note, putting this event in its historical context, that this occurred a few months before the introduction of the sweeping reforms of English divorce law which occurred on 1 January 1971.

[15] In 1972 the wife and children moved to another small rented Peabody Trust flat in Cathcart Hill, Tufnell Park. Following separation the husband initially provided the wife with £100 per month which he says was what the family lived on, including housekeeping, when they had lived together. After her move to Cathcart Hill that sum was apparently increased to £130 to reflect the increase in rent caused by the move. Of course, those sums sound positively parsimonious in today's money but their modern-day equivalents are respectively about £920 per month and £1,075 per month.

[16] In 1972 the husband began to live with his present wife M. No doubt this was a spur to his beginning to think about taking divorce proceedings. He discussed it with his wife who was not particularly bothered one way or the other as to whether a divorce took place. Accordingly, the husband sought legal advice in this country from a well-known London firm of solicitors, Radcliffe's, who advised him, rightly, that the only place where he could then take divorce proceedings was South Africa. That was because he was domiciled there and domicile in this country was the only basis upon which a husband could bring divorce proceedings here prior to 1974.

[17] According to the wife it was agreed in 1973 that the parties would divorce in this country on the basis of 2 years' separation and consent. But that would have required her to bring proceedings which, I am satisfied, she was not inclined to do albeit that it was open to her to have done so. She was happy to leave it to the husband who she trusted to do the right thing. The

husband says that it was agreed that the divorce should be obtained by him in South Africa. Restitution of conjugal rights was the ground chosen by his South African lawyers. That sounds somewhat arcane nowadays but I am satisfied there was nothing especially cynical or sinister about that as a ground for the agreed divorce whatever the wife may now say. It was merely a convenient vehicle to obtain what was effectively a consensual divorce.

[18] I am also quite satisfied that there was at the time only the scantiest of discussions between the parties about future financial arrangements. The arrangement for the payment of £130 had been in place for some time and there was no need or suggestion to change it. The wife sought no legal advice at the time although the husband offered to pay for it for her if she wanted it. RM paints a picture, accurately I think, of a wife who was young, somewhat bohemian in her approach to life, not interested in money, content to live a modest existence on what her husband provided and making no particular complaint over and above from time to time complaining generally about a lack of funds. She was prepared and wanted to live simply with little or no thought to the future either short or long term.

[19] At all events on 23 October 1973 the Johannesburg Divorce Court dissolved the marriage, made an order that 'the defendant forfeit the benefits of community of marriage' and that the 'plaintiff pay maintenance for the said children at £130 per month'. That is the only order that has ever been made governing the financial position between the parties prior to the institution of these proceedings.

[20] So that was how matters were left at the time. The wife was certainly not pressurised by the husband in any way into accepting or agreeing anything, whatever may now be her evidence. Her intention was to be independent but there was no specific agreement to that effect.

[21] After the parties' divorce and separation the husband had very regular contact, access as it was then called, to the children. They spent weekends and holidays with him and his new partner who, in 1975, herself gave birth to a son. The husband says that he often paid for extras for the children as and when he was asked by the wife. I believe he did.

[22] In 1976 the wife approached the husband to provide better accommodation for herself and the children. The letters are at 4.10 and following in the bundle. The wife had found 44 B, London N6, and desperately wished to move into it with the children. Her 'paradise' she described it. The husband was willing to help her achieve this dream by buying the headlease of the flat for her and the children's occupation. It cost £16,750 and in addition the husband spent £6,000 on improvements including the installation of a new kitchen. There were discussions and negotiations about the basis upon which the wife and children should occupy the flat, the husband making it clear that he did not regard his obligation to provide a home for the wife as running much beyond their attaining their majority. In the end she was granted a lease for 11 years which would run until 1990 when B was 22. The wife and children eventually moved in November 1979 under the terms of the agreed underlease. That has remained the wife's home ever since. She has lived there rent free. The husband has always paid building maintenance and service charge. The wife pays the council tax and other outgoings.

[23] In 1978 the husband and M moved to their present address in Bedfordshire. The funds for that came from the husband's father and later a

family trust. In 1979 their son was born and in 1980 they married. That marriage has therefore lasted, to date, 22 years.

[24] Throughout the 1980s the wife supported herself and the children from three sources. She continued to receive the child support which by 1985 had been increased by the husband to £300 per month. He also paid other expenses for them from time to time. And of course he was providing a home. The wife also took temporary secretarial jobs of one kind or another until 1985. She did not take permanent positions she says because she needed to be at home for the children in the holidays. B in particular had behavioural problems of one kind and another and so was more than usually demanding. Finally, from 1985 the wife took to taking in paying lodgers to whom she provided bed and breakfast. Interestingly this was instead of rather than as a supplement to her secretarial work which she gave up when the lodgers began. That seems to me to demonstrate clearly a person who, provided she could meet her basic needs, did not want extra money for its own sake.

[25] C reached her eighteenth birthday in 1985 and B in 1986 but the £300 per month has carried on regardless and unchanged until the beginning of these proceedings. It was paid monthly by standing order.

[26] In 1991 the lease on 44 B expired but the husband agreed to renew it on the same terms for a further 10 years until 2001.

[27] In March 2001 as a result of a banking error the standing order for £300 was interrupted and payments ceased. The wife interpreted that as a sign that the husband was terminating payments and she sought, according to her not for the first time, legal advice. Correspondence followed from her then solicitors suggesting, wrongly, that the husband had not properly fulfilled his responsibilities to the wife and children. The husband was perplexed and not a little incensed. These proceedings followed in August 2001, Hogg J granting leave on 9 October 2001.

[28] The position now, therefore, is that the wife remains in the flat; a three-bedroom spacious property (with an agreed open-market value of £575,000) where she is more than happy to remain for the time being. It transpires that she is now a statutory tenant of the husband as she is holding over after the expiry of the second term in 2001. She therefore cannot be evicted by the husband but equally were she to leave voluntarily she would have nothing with which to rehouse herself. She no longer takes in lodgers because she likes to keep the spare rooms free so that her daughter and son-in-law can visit and they pay something for that facility. She has, at present, the consent interim maintenance order of £650 per month. She does not work gainfully preferring to indulge her passion for art and painting. She has received money in the past from her mother and at the beginning of these proceedings had some £40,000 in capital. All of that has been invested in the costs of these proceedings. She is now in receipt of public funding. The wife would like to be in a position to move at some future time when the flat is too large for her. Accordingly, she seeks an outright transfer or that it be conveyed to trustees for her lifetime benefit.

[29] The husband and his second family live in Bedfordshire. He lives on a substantial income from family trusts set up by his father. I will return to the detail of his finances below.

Matrimonial and Family Proceedings Act 1984, Part III

[30] An application under this part of this act is a two-stage process. Before the court can consider what relief should be granted an applicant has to satisfy a type of threshold test, viz 'whether in all the circumstances of the case it would be appropriate for an order to be made' at all. Section 16 sets out certain particular matters calling for specific consideration. They have in fact already been considered by Hogg J at the leave stage (and I have read her judgment) but I have considered them all again. The purpose of this preliminary threshold is to block unmeritorious applications under the Act and avoid abuse of its underlying purpose 'namely that is it there to remit hardships which have been experienced in the past in the presence of failure in a foreign jurisdiction to afford appropriate relief' per Purchas J in *Holmes v Holmes* [1989] Fam 47, [1989] 2 FLR 364 at 57 and 373 respectively.

[31] I have already in this judgment covered the factual areas raised by subss (a)–(e) of s 16(2). Subsection (f) – the right to apply elsewhere – that avenue cannot assist the wife because advice from South Africa indicates that she now no longer has any rights there. Subsection (i) obviously deals with delay. In this case the time lapse between divorce and this application is very long indeed: 30 years. But the reasons for it must be considered. The wife was content to rely on the voluntary arrangements which have continued unbroken throughout that period. To that extent this is not a case of an approach to the husband coming out of a clear blue sky in the context of no previous support. The husband has obviously acknowledged, to himself at least, a moral obligation towards the mother of his two children and has met it in his own way and largely without complaint. The wife says that in any event she did seek advice about her rights from two previous firms of solicitors but neither mentioned her rights under this Act. So in the context of the facts of this case I see nothing in the delay point per se. The husband has suffered no financial prejudice although emotionally to have to revisit all these matters of ancient matrimonial history must be extremely unpalatable.

[32] Apart from the specific matters covered by the subsections I must, in considering the s 16 test, look at the whole picture and background. In that context I observe that it was entirely anomalous that the divorce proceedings between these two English residents should have taken place abroad let alone on the other side of the globe. The husband chose to divorce in South Africa when if he had waited a few months he could have proceeded here. I acquit him of any improper motive but remind myself that it was only because of an obsolescent jurisdictional anachronism that he had to proceed in the country of his birth which he had left some 9 years previously. This case was and is in every real sense an 'English' one and sensibly should have been dealt with here.

[33] It is argued now by Mr Posnansky QC that the parties reached a full and final 'clean break' agreement in 1973 and that the only financial relief to which the wife, or rather the children, would ever be entitled was the £130 child support. It is said that this was understood and agreed to by the wife, as is attested to by the South African divorce papers which have been obtained from the archives there. They are, it is said, plain on their face; the wife's claims were being dismissed totally, once and for all. She knew it and accepted it (see 1.40 and 1.45). They were properly served on her and she was offered advice which she declined. Thus argues the husband's counsel.

[34] On the other hand, Mr Cohen QC argues that this very simple financial arrangement – reached informally between the parties prior to the South African divorce proceedings and then set out in the order – cannot possibly have the effect of disallowing the wife’s claim now on the basis that she then accepted a full and final clean break. He says that it does not amount to an agreement in the legal or any sense but merely a vague acquiescence in an existing financial arrangement. In addition, he says, there was no disclosure of means. Although there are no papers now available from Radcliffe’s, I am inclined to believe he is right about that. And of course there was no legal advice as I have explained.

[35] In all the circumstances then existing and on all the evidence now available, I am satisfied that this informal arrangement although set out in the South African order cannot be characterised as or elevated to the status of a fully effective clean break agreement in accordance with the principles of *Edgar v Edgar* [1980] 1 WLR 1410, (1981) 2 FLR 19. If it was such an agreement, ie one which took away even her right to income support as well as property adjustment, it would have been grossly unfair on the wife. In any event, I have no evidence about the overall legal effect of the South African order. It certainly seems to deal with the wife’s community of property rights but it is silent about her own maintenance rights. Normally these rights are separate from property rights in jurisdictions which operate such property concepts.

[36] I am satisfied that the wife was happy to continue to rely upon the informal generosity of the husband and that she genuinely hoped and wanted to be able to look after herself financially providing the child support continued. She says in her affidavit at 86 ‘he did however say that he would look after us and I believed him’.

[37] Accordingly, I reject the suggestion that this is a case of someone seeking a second bite of the cherry after a proper foreign determination; a scenario expressly eschewed by the previous case-law to which I have been extensively referred. I do not accept that analysis. This wife has scarcely had a first nibble let alone a bite of the cherry. Her claim should not be dismissed for that reason either.

[38] Considering ‘all the circumstances of this case’ and despite the long time gap, I am quite satisfied that this is an apt application under Part III and should be allowed to go forward to the next stage.

Sections 17 and 18

[39] At this stage, by operation of ss 17 and 18, the application becomes, in all but name, a conventional ancillary relief application set against this very unusual factual background. So, in that context, even though it is right for the court to consider this application, is it right to make any order and, if so, what? I have to consider all the factors under s 25 of the Matrimonial Causes Act 1973 before reaching a decision. Although I have done so I shall not deal with them all specifically as many have already been covered above and the section is very familiar to all. Let me mention a few of the factors in particular.

*Subsection (a): financial resources and earning capacity**The wife*

[40] As I have mentioned, at the start of these proceedings the wife had in excess of £40,000 from her mother. That is now gone on costs and her combined estimate of costs amounts to about £94,000 of which she has paid, as I say, about £40,000. The only other capital she has is, I suppose, her statutory tenancy. It is accepted that this must have value in the sense that if the husband wanted to sell the flat with the wife in occupation as a sitting tenant the value of the flat would be discounted by, I am informed, 41% determined actuarially by reference to her age. As a matter of common experience, of course, if the husband wanted to sell with vacant possession he would have to negotiate the wife's departure by 'making her an offer she couldn't refuse'. That might be more or less than 41% depending on the parties' respective negotiating positions at the time. At all events the tenancy has real financial value and furthermore represents total housing security if all else fails.

[41] The wife's earning capacity must now be taken as effectively non-existent although I think she could have done a great deal more in the past to develop one had she had the inclination to do so. She preferred to live frugally and simply on what she was paid by the husband and earned from temporary work or lodgers. One of the consequences is that the wife's state old-age pension is likely to be no more than half what it would have been had she worked full-time for longer.

[42] Nowadays a young spouse at the end of a short marriage, and in the situation in which this wife found herself in 1973 (even with young children), would normally be expected to take proper steps to make him or herself financially independent to a significant extent within a reasonable time so that by the time the children were adult the requirement for support would have at least diminished if not wholly disappeared. But in 1973, more than a generation ago, judicial and public attitudes were different. Term orders for maintenance were non-existent; joint lives orders were the norm. The irony in this case is that if it had proceeded conventionally in England it is likely that the courts would have put pressure on the wife at the periodic applications to vary the maintenance to make more effort to find work. But as there were not any applications there was no such opportunity. So her earning capacity is now insignificant but overall I find she could have done better in this area.

The husband

[43] His present financial position is set out in tabular form on a schedule prepared by the wife called 'Schedule of the husband's significant assets'. I shall annex it to this judgment as Annex A. As can be seen, he has his home (half owned by his present wife), the wife's own flat (subject to the statutory tenancy) and free capital, largely offshore, amounting to about £1 million. The grand total of his own assets is therefore nearly £2.2 million. But that is by no means the whole picture. He is also the main beneficiary of two trusts with combined assets of over £4.7 million. They are based in Liechtenstein but derive entirely from South African money generated by the husband's family. The smaller of the two is available to the husband without real restriction; it has assets worth £350,000. The much larger one is shrouded in the usual mystery which surrounds trust structures based in that particular tax haven. However, I accept the husband's evidence about it; namely that he has had

only very limited capital from it as its primary purpose is to benefit the next generation. If he wants to access it he has to approach the trustees with a sensible proposition whereupon they may or may not assist. The wife's counsel points out, unsurprisingly, that they have not yet refused a sensible request from the husband (see the list on the schedule) and so they might be expected to look favourably on a proposition to for instance, buy the wife's flat as a long-term investment on the basis that she might stay there or have the use of its capital value during her lifetime. The husband refused to predict their reaction but did not rule it out.

[44] The husband's income derives now entirely from his capital and trust interests. Last year it amounted to nearly £85,000 net of tax. Not all of that was remitted to this country because the husband takes proper advantage, as a non-domiciliary, of being only taxed on remitted income. By careful (and entirely legitimate) management the husband's tax liability can be severely mitigated.

[45] As part of this planning, significant sums have been and are paid to his present wife who has now herself amassed in excess of £700,000.

[46] Finally, the husband's own costs exceed £250,000 already largely paid.

Subsection (b): financial needs

[47] The wife is looking for security as she approaches retirement. That translates into a secure home and a secure income. She wants to be able to carry out essential work on the flat and estimates have been obtained ranging from about £20,000 to £100,000. She is now seeking around £40,000 plus a sum to pay for alternative rented accommodation while the work proceeds and a further sum to upgrade the furniture. Despite an earlier annual income budget at a far higher figure, the claim is now put at £18,000 pa. In one sense that cannot be criticised as excessive but whether it is in the end the husband's liability to provide for it at that level depends on considerations other than only need.

[48] The husband's financial needs are, obviously, fully catered for and will remain so even if I was to accede fully to the wife's claim. He would prefer a clean break now if I decide to make an income order.

Subsection (c): standard of living

[49] Neither side lives or has lived lavishly. The husband is by nature careful and not flamboyant in his lifestyle and expenditure. I have already covered the wife's way of life during and since the marriage. She complains about it now and would like to be able to spend more on holidays etc. But essentially she is a person of simple and inexpensive tastes.

Subsections (d) and (e): duration of the marriage and contribution to the welfare of the family

[50] This was a short marriage and so in one sense the wife's contribution qua wife is very limited and any effect has long since evaporated. However, qua mother her contribution 'by looking after the home or caring for the family' was a full one. She was a single mother for the main part of the children's upbringing albeit that she received a full measure of support from the husband. B in particular has been an extra burden even long into adulthood. The court's approach to the value of the carer/mother's role has always and repeatedly been to recognise it fully. That was the situation in

1973 and it has recently been reinforced by the House of Lords and the Court of Appeal. I will forbear from lengthening this judgment by quoting the now familiar passages from recent cases.

[51] The wife, in my judgment, whatever her shortcomings, has some entitlement arising from this undoubted contribution and it should be recognised and fulfilled if financially possible. Her earning capacity albeit not fully exploited was prejudiced, in any event, by her domestic responsibilities.

[52] The husband's contribution is not to be ignored either. To start with all the wealth in the case is his by inheritance from his father. The wife can make no claim in that regard. He too has fulfilled his role as a father to the full.

Subsection (g): conduct

[53] Neither side relies on conduct as a factor to be put in the balance. As I have made clear, the wife's earlier assertions of foul play by the husband have been abandoned albeit that she remains of the view that she has been poorly treated by him. She has no legitimate justification for that belief but it has coloured her attitude to the litigation, considerably and understandably upset the husband and in the end made it more complex than it needed to be.

Fairness

[54] The lodestar for all these applications is 'fairness'; an elusive quality which, perhaps like 'mercy', 'droppeth as the gentle rain from heaven'. In this context the husband thinks he has fulfilled his moral and legal obligations to the wife in full one way and another over the years. Mr Posnansky argues that his generosity should not be translated into an obligation, he should not be regarded as the wife's insurer for all time. But the wife sees it very differently. She feels that her role as the children's carer has not been properly recognised and the husband can and should help her out now by at least lifting her off the poverty line and providing her with a measure of long-term security in recognition.

[55] In my judgment, the wife is, in fairness, entitled to an order now as a result of the compounding of four main factors. First, her contribution and role as mother justifies full recognition for the reasons I have identified. Secondly, she has, I find, a real financial need which to some extent arises out of that contribution and which, if not at least partially met, will lead to serious hardship. Thirdly, the wife has, admittedly through his voluntary payments, remained financially dependant on the husband throughout and, although concepts of estoppel are not directly applicable, by analogy it would be very unfair to the wife to allow him to simply walk away from that dependency now. By analogy also, it is pertinent to note that Parliament recognises in the parallel and similar jurisdiction created by s 1(e) of the Inheritance (Provision for Family and Dependants) Act 1975 (a statutory jurisdiction created to alleviate hardship) a category of claimants based solely on financial dependency viz 'any person who immediately before the death was being maintained'.

[56] And the final factor is that, in my judgment, there remains, even now, a liability on the husband arising out of the former marital relationship (which produced the children) and it is the husband's obligation to meet it if he has the means to do so. In that respect the husband's financial position is such that, although a division of capital on the basis of modern precepts would be

grossly unfair to him, limited provision based on need would be easily within his ability to pay.

[57] Accordingly, I shall approach this claim broadly on lines similar to those applying to a wife who, having received a nominal maintenance order at the time of divorce now seeks, many years later, to take advantage of it because her circumstances demand it. Reverting to the Inheritance Act analogy, the provision should, in my judgment, be the more limited one namely, such 'as it would be reasonable in all the circumstances of the case for the applicant to have for her maintenance'.

Financial relief

Housing

[58] Both sides want finality. 44 B is an excellent home and the wife's statutory tenancy of it provides ample security for her until she wants to leave. I see no reason to interfere with that legal arrangement save in one respect. If I do not provide by order for the eventuality that the wife wishes to leave, the parties will potentially find themselves in negotiation if not dispute in years to come. A prospect neither side would relish. A transfer to the wife is unjustified on the facts. In my judgment, it is too much after a marriage of this length. Similarly, a trust arrangement relating to the whole property is more than her entitlement and complex to set up and administer. On one view, the value of her statutory tenancy is the discount which the husband would have to suffer on a sale of the flat with her in situ; 41%. On a valuation of £575,000 that would give her just under £229,000 (after costs of sale). That is not quite enough to cover her own housing needs in North London and anyway she might do better in negotiation than 41%. On a sale of the flat, which I shall provide by order, I shall further provide that she should receive 50% of the net sale proceeds; ie nearer £280,000. She may stay there as long as she requires on the basis of her tenancy but she can call for a sale at any time knowing what she will then receive. It would be sensible to provide by order for a structured approach to transfer and/or sale which only renders the husband liable for the capital gains tax on his remaining half-share and at the time of sale. The precise form of the order to reflect my intentions can be considered after tax advice has been received.

[59] The husband accepts that £20,000 needs spending on the flat. To allow for contingencies and builders' optimism, I shall order a lump sum of £30,000 to be paid direct by the husband to the builders on receipt of invoices up to that amount. The wife may choose what is to be done and who is to do it. I make no extra provision for rental costs or replacement furniture; they are not properly the husband's responsibility now.

Income provision

[60] In my judgment, the most the wife can possibly be entitled to from the husband after this length of time and against this background is a modest pension for life. Having considered all the competing arguments and bearing in mind the husband's means, I find that the right level is £1,000 per month or £12,000 pa, significantly less than she seeks to meet even her more limited budget but more than she has received to date. It is appropriate to capitalise that on the *Duxbury* basis which predicates an index-linked income stream for her life. On this basis, at 3.75% that computes to £143,000 which I shall

round up to £150,000 to reflect in part her old-age pension shortfall. So there will be a further lump sum of that amount.

[61] Striving for fairness in a case with these extraordinary features is uniquely a matter of personal judicial judgment. I have tried to look at the circumstances from every angle. Doubtless both sides will feel hard done by. Standing back I regard this solution as fair to both sides. I intend to achieve a clean break.

[62] I shall be guided by counsel in the first place as to the precise form of order to reflect my intentions.

Order accordingly.

**ANNEX A
SCHEDULE OF THE HUSBAND'S SIGNIFICANT ASSETS**

CAPITAL	£
Wood Farm	625,000 (but half put in ML's name)
44 B	570,000 (vacant possession)/ 336,000 (tenanted)
16 CT, Geneva (2:95)	150,000 (R's mother has life interest)
Savings accounts (2:96)	170,583
Barclays portfolio (2:97)	50,600
Channel Islands assets (2:103) (principally cash 3:97)	781,000
	2,347,183/2,113,183
LESS LIABILITIES	
CGT on 44 B	155,000/62,000
Other CGT (2:100) subject to annual exemptions/indexation/loss offsets	21,000
	(176,000/83,000)
OTHER ASSETS FROM WHICH BENEFIT MAY BE OBTAINED	
ML's portfolio (3:17)	709,807
TRUST ASSETS	
South African Eclipse Trust (2:103)	350,000–400,000
Eclipse Trust (3:16)	4,381,442
Use of funds	
(1) Purchase of homes for three children	
(2) School fees	

(3) Provision of M's portfolio	
(4) Distributions to M (3:14)	
(5) Purchase of Wood Farm	
(6) Purchase of land surrounding Wood Farm	
(7) Purchase of 44 B by H	
No request for capital refused	
H sole consultee (3:16)	
INCOME	
2000	
Received in Guernsey	96,412 (3:3)
Received in England	2,440 (3:4)
Remittances taxable	8,000 (3:64)
Total taxable income	10,440
Total income tax payable	1,163 (JC calculations)
Net income	97,689
2001	
Received in Guernsey	83,808 (3:3)
Received in England	2,355 (3:4)
Remittances taxable	9,350 (3:29)
Total taxable income	11,705
Total income tax payable	1,428 (JC calculations)
Net income	84,735

Solicitors: *Dawson Cornwell* for the applicant
Farrer & Co for the respondent

PHILIPPA JOHNSON
Law Reporter