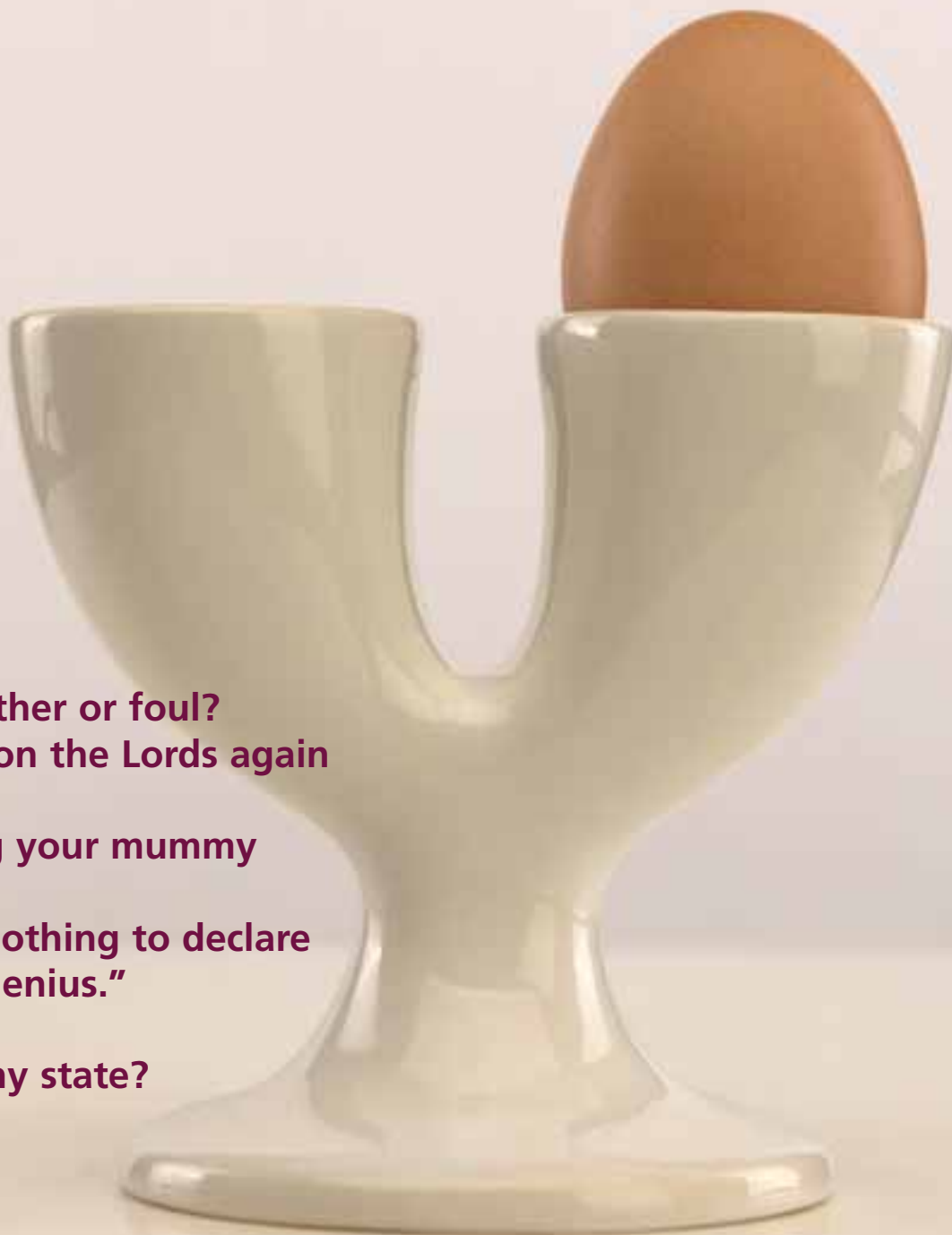


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# Family matters

Winter 2006



**Fair weather or foul?  
All eyes on the Lords again**

**Marrying your mummy**

**"I have nothing to declare  
but my genius."**

**The nanny state?**

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## Welcome to the winter edition of *Family Matters*.

It is a time of great change in family law: as you will gather from the following articles, legal principles are in a state of flux and practitioners and clients alike are waiting with bated breath for a decision from the House of Lords which might assist in making sense of the bigger questions. In this issue, we attempt to shed some light on the current chaos. We hope to be able to bring you news of a more coherent way forward later on this year.

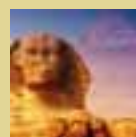
I hope you enjoy this edition – do feel free to get in touch and let me know!



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Meredith Thompson looks at a historic decision of the European Court of Human Rights on marriage rights for in-laws.



## The family team

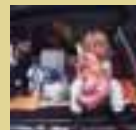
The Mills & Reeve family law team is one of the largest and most respected in the country. Our fully integrated team operates across all of the firm's offices. We specialise in all aspects of relationship breakdown, with particular expertise in handling complex issues involving family companies, trusts, farms, offshore financial structures and pensions. We also have significant experience of dealing with cases with an international element. We are highly competent in advising on issues relating to children, cohabitation, pre-nuptial agreements and the new law relating to civil partners. We are pioneers in the field of collaborative law, the new approach to resolving disputes on relationship breakdown outside the confines of the court system.

Our family law team is able to call upon the expertise of other teams across the firm, as is increasingly necessary when dealing with relationship breakdown. As well as the traditional private client services of tax advice, trusts, wills and residential conveyancing, we have a strong corporate team who provide invaluable assistance in dealing with family businesses.

- 8 "I have nothing to declare but my genius."**  
Andrew Breakwell examines where we are when husbands claim a greater than 50% share of the assets on divorce because of their "genius".



- 10 The nanny state?**  
Caitlin Jenkins examines whether some divorced mothers are being trapped into dependence on welfare benefits.



## Campaign to change tax rules on divorce

Financial advisers to divorcing couples know well that there is a tax-related elephant trap in the process: in order to transfer assets between the separating spouses on a no gain/no loss basis for capital gains tax purposes, transactions must take place in the same tax year as the permanent separation occurs. Any transfers after that period are chargeable, if there has been a gain.

The family law group *Resolution* and the Law Society are campaigning to change this rule. They say it puts pressure on wealthy separating couples to take decisions about where assets should lie in isolation from other parts of a divorce settlement, which may take many months or even years longer to agree. They argue that the rule takes no account of delays in the court process – in some county courts, it may take up to two years to get an ancillary relief case to trial.

HM Revenue & Customs has agreed to look again at the issue, but requires evidence of the present system's malfunctions before it will recommend to the Government that the law be changed. If you have any examples, please do contact us and we shall put you in touch with the campaign team.



## A little light reading

A German publisher is aiming at a niche market with a new publication. The magazine, called *Rosenkrieg* (which translates as 'War of the Roses'), covers matters of interest to divorcees. It gives basic advice on all matters of divorce, separation and making a new start, with tax advice, case studies and information about alternative ways of resolving disputes. Other less legal features have included advice on how to decorate a one bedroom apartment, internet dating and tips on housework for those who are domestically challenged!

# Quick bites

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## High Court to rule on gay marriages

A lesbian couple from North Yorkshire, who were legally married whilst living in Canada in 2003, have asked the High Court to rule that their overseas marriage should be recognised in English law.

The couple would be considered to have a civil partnership in the UK, but they claim this is a "lesser substitute" for the recognition of their marriage, and the fact that the UK law does not recognise their overseas marriage as a marriage is insulting and discriminatory.

The Government is opposing the couple's challenge to the law. The couple, who are supported by the campaign group *Liberty*, will argue at the hearing that UK law currently breaches Article 8 of the Human Rights Convention which requires respect for a person's private and family life, as well as Article 12 which says that men and women of marriageable age have the right to marry.

The test case will be heard before Sir Mark Potter, President of the Family Division.

## Civil partnership legislation comes into force

On 21 December 2005, the first civil partnership ceremonies were performed in England and Wales, including the high profile union of Elton John and David Furnish that took place at Windsor Guildhall. Amidst much jubilation, there was also protest. However, most of this came from those who believe that gays and lesbians should be given full marriage rights and not, contrary to expectations, from those who do not believe there should be any form of legal recognition of homosexual relationships at all.

## 'I do' share in the housework

The Spanish senate has passed a law requiring those who are married in a civil ceremony in Spain to enter into a contract promising that, along with the usual requirements of faithfulness etc, they will equally share the domestic chores and caring responsibilities for the old and young of the family.

This is part of a Government drive to make Spanish society more equitable for women, and reportedly comes in response to a survey showing that Spanish men do less housework than men in any other European country. Although the contract may be a useful reminder at the start of a marriage that the burden of domesticity should not fall on women alone, it remains to be seen how this new marital obligation will be enforced!

# Fair weather or foul? All eyes on the Lords again

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You may recall that the most important decision concerning money on divorce in recent years was handed down by the House of Lords in October 2000. This case, *White*, laid down the principle that there should be no discrimination between the spouse who made the money in the family and the spouse who contributed in a more domestic sense.

Although the wife in *White* did not leave the court with a 50% share in the assets, the case has since been interpreted to give an expectation that a wife in a big-money divorce, after a long marriage, is entitled to claim a 50% share of the established wealth, regardless of whether she made a direct financial contribution to its accumulation.

However, what about cases where there may not be a large amount of money at the time of the divorce, but where the husband earns a large salary each year and would ordinarily expect to pay some

level of maintenance to the wife? What about where the marriage has been short but the spouse who built the wealth has behaved in an improper manner to end the marriage and the less well-off party claims some kind of compensation for the fact that the marriage has ended through no fault of his/her own?

Both of these scenarios are real cases. The first, we have looked at before. In the case of *McFarlane*, the wife claimed that she was entitled to a 50% share in her husband's net income – at that time, £753,000 per annum – for life, but she received 33% for a term of five years, extendable if necessary. At the same time as deciding Mrs McFarlane's financial fate, the Court of Appeal pronounced on the case of *Parlour*, where the husband's income would necessarily dip after a certain length of time due to his career as a premiership footballer being inevitably curtailed by his advancing years. The wife here left court with 37.5% of her

husband's net income for four years. Subsequently, another footballer's former wife obtained 40%.

The storm clouds then began to gather. Many pundits thought that Mrs McFarlane had been short-changed partly because her appeal had been considered alongside that of Mrs Parlour, which they thought was clearly a term maintenance case. Unhappy with the results of the Court of Appeal hearing, Mrs McFarlane petitioned the House of Lords for leave to appeal.

Her appeal was heard on 30 January 2006, the first time that the Lords had dealt with an ancillary relief question since *White*. However, Mrs McFarlane had to share her day in court again, this time with the other scenario we summarised above: the bad husband in the short marriage. This is the case of *Miller*.

In this case, it was the husband who had been granted permission to appeal against



an order that he should pay his wife of less than three years the sum of £5 million (albeit from a total fortune of somewhere between £14 million and £20 million, with further expectations from share options). Alan Miller offered, at a reasonably early stage, to pay his former wife Melissa £1.3 million on clean break terms (meaning no maintenance payments). After all, he said, she was still young, and before she gave up work she was earning £85,000 per annum. The trial judge thought this was insufficient, and the appeal court agreed. Melissa Miller left the appeal court with her £5 million award intact, plus costs. This means that, ignoring costs, the price the husband paid for divorce was £4,935.83 per day.

The trial judge in *Miller* appeared to set great store by the fact that the wife had committed herself to the husband at an early stage, even though there had been no pre-marital cohabitation. She had suffered a miscarriage, just before the

marriage ended, when the husband formed a relationship with another woman. The decision was a bit of a shock to practitioners who have been used to telling clients that bad behaviour on the part of a spouse will not be considered by the court in any way, shape or form unless it is extreme. A husband in a short marriage who goes off with another woman is sadly not an uncommon tale.

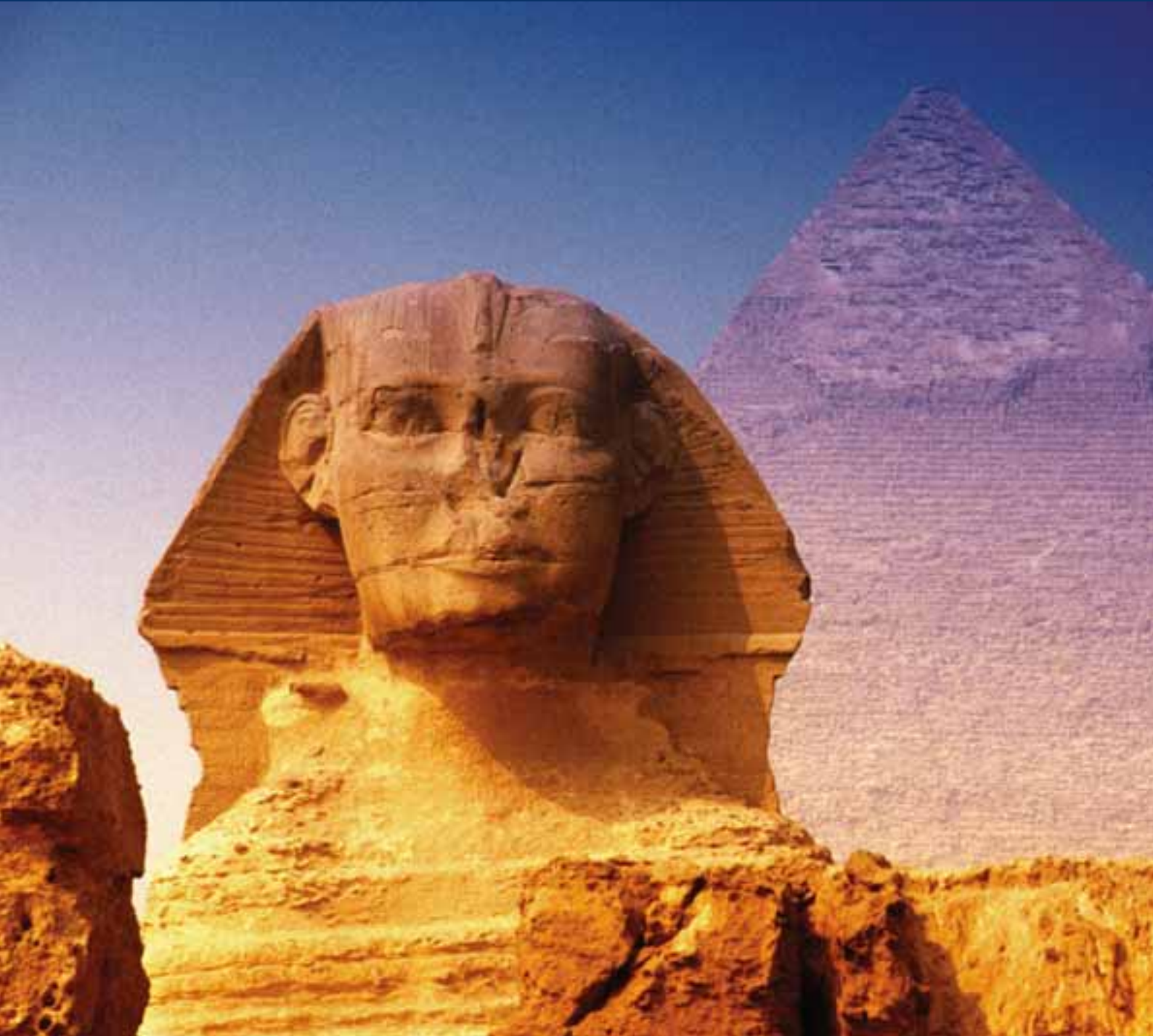
The House of Lords will therefore be faced with two points of principle: in brief, what is the appropriate level and duration of maintenance for a wife in a case where the annual earnings of the husband are very significant, and how are the concepts of conduct and legitimate expectation relevant to ancillary relief in the 21<sup>st</sup> century?

As a result of the worrisome state of flux in which we find the law of ancillary relief, many couples are attempting to avoid the vagaries by entering into professionally

drawn up and fair pre-nuptial agreements. Such agreements, if paying heed to certain safeguards, are influential. Practitioners hope that the House of Lords may take the opportunity to give its endorsement, albeit on an 'obiter' basis, to the practice of divorce planning. Those who do not plan carefully are left at the mercy of the law and may face an uncertain future.

The law is, at present, as unpredictable as the weather. Will the House of Lords shine for justice and fairness or will it pour out more confusion and despair? The Lords will decide in these months following the hearing that took place at the end of January. Watch this space.

# Marrying your mummy



It was common practice for Egyptian pharaohs to marry their own mothers and daughters. A recent decision of the European court could see more complicated marital relationships here and now.



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more than 20 years his junior. The woman's marriage to the man's son had broken down and she had commenced a relationship with her husband's father. The couple, father-in-law and daughter-in-law, had been in a stable relationship ever since.

At present, under the Marriage Act 1949, marriages between in-laws fall within the "prohibited degrees of marriage" and are not permitted unless both parties are over 21 and both former spouses are dead. The prohibition appears to have evolved from previous Canon law, based on the biblical rule against 'lying with' one's relatives or in-laws because a husband and wife were considered to be 'one flesh' (Genesis 2:24). Relationships with one's in-laws were therefore effectively seen as incestuous although, interestingly, they have never been classed as criminal conduct (unlike sex with a blood relative). Despite the decline in prevalence of this extreme interpretation, the rule became a law and has stuck.

The circumstances of the case at hand illustrate the difficulties involved for social policy-makers. The teenage son from the woman's first marriage now sees little of his biological father and calls his own grandfather, in whose household he has grown up, 'Dad'. The grandfather plans to adopt his intended wife's child as his son. If this all proceeds as planned, the man will be a grandfather to his own son.

When one considers the complexity of the relationships in this one family, perhaps one can see why it was felt necessary to enact legislation to prohibit unions which would lead to such situations. Indeed, the UK argued before the court that, in order to prevent children from becoming confused and to preserve the integrity of the family, the law should remain.

However, as the European Court of Human Rights agreed, society has become more tolerant of relationships outside marriage, and it is clear that a restriction on marriage rather than on the relationship itself is arbitrary and cannot serve the intended purpose. English criminal law would not prevent an extra-marital relationship between the couple, so the court felt that the ban on marriage in these circumstances could not reasonably be upheld.

With regard to other relatives, the law currently allows certain step-relatives to marry, provided they are at least 21 years of age. The younger of the couple must at no time before the age of 18 have lived in the same household as the older person, nor must they have been treated as a child of the older person's family. Courtesy of King Henry VIII, who changed the law, you can marry a cousin (although having her beheaded is nowadays frowned upon).

Amendments have previously been proposed to the Marriage (Prohibited Degrees of Relationship) Act 1986 to lift the prohibition on marrying one's in-laws, but these have not yet been adopted. The Government is now obliged to change national legislation to allow parents-in-law to marry their children-in-law. It has been suggested that the example set by Australia, Norway and Sweden should be followed and that all prohibitions of marriage based on affinity should be abolished, although the Government is thought to be against this course of action for fear of being seen to condone this sort of relationship.

The Scottish Executive has already announced that Scotland will be the first part of the United Kingdom to allow men to marry their mothers-in-law and women to marry their fathers-in-law if their original spouses have been divorced or have died. This will be part of the imminent comprehensive overhaul of family legislation in Scotland. Marriages between blood relations will still be banned, but marriages between those who are not related by blood will now be allowed. The proposed changes to Scottish law were announced before the Strasbourg court's ruling. The English response is awaited.

In September 2005, the European Court of Human Rights in Strasbourg ruled that an English law that prevents people from marrying their in-laws is in breach of the fundamental human right to marry and found a family, as enshrined in the European Convention on Human Rights, Article 12.

The case was brought by a Warrington couple who had been refused the right to marry in Britain. The man was the former father-in-law of the woman, who was

# “I have nothing to declare but my genius.”

Oscar Wilde

The times, they are a-changing. Divorce law, at least that part of it which relates to how the money is shared out, is changing fast.



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Even as recently as the mid-1990s, when dealing with a wife divorcing in a case involving substantial assets, the court would meet what it assessed as her ‘reasonable requirements’ and leave the rest with the husband. There was then a marked distinction between the spouse who was the wealth creator and the spouse who remained at home, often caring for the children. By way of example, in the cases of *Conran* and *Dart*, the wives received just 12.3% and 2.5% of the net assets respectively, with the husbands retaining the balances.

The decision in *White*, in 2000, addressed for the first time the issues of equality and fairness in large money divorces. This landmark decision was treated by family lawyers as meaning that, in a long marriage of 20 years or more, the assets should be divided equally regardless of how they were built up. The old discriminatory approach of addressing the wife’s reasonable needs and giving the rest to the husband was explicitly rejected by the House of Lords, although the wife in this case did not herself actually receive 50% of the wealth due to special factors.

In the case of *Cowan*, in 2001, the court again departed from an equal split. The matrimonial assets stood at £11.5 million, a fortune accumulated as a result of the husband having invented the black plastic bin-bag. The Court of Appeal awarded £4.5 million (38%) to the wife of 35 years and the husband retained 62% of the assets rather than the 50% contended for by his wife. The court recognised the husband’s ‘stellar contribution’ – his extra special entrepreneurial skill – as the factor which tipped the scales of distribution in his favour.

In the case of *Lambert* 18 months later, ‘stellar contribution’ was largely rejected by the same court as a factor leading to unequal division of assets. Mr Lambert, whose original trial judge followed the earlier Court of Appeal decision of *Cowan* (60/40 split), left the court £2 million worse off after the appeal which awarded a 50% share to his wife. Special contributions were treated as if they were a Pandora’s box, causing unfair departure from equality. The court said that it would not discriminate between the established roles of man as a breadwinner and wife as a home provider in a long marriage. From



that point, it seemed that a fair order resonated with fairness only if it achieved an equal split of the assets.

In *Sorrell*, the husband's open offer to give £29 million (about 40% of the total assets which were finally held to be £74.12 million) to his wife on divorce was rejected. However, aside from agreeing with the wife that the husband had sought to undervalue the assets involved, his approach was generally upheld by the Court of Appeal which listened to the special contributions argument he raised. This was rather a surprise as it seemed that, on the principles laid down by the House of Lords in *White*, this was clearly an appropriate case for equal division. It was a 33-year marriage, where the wife had played her full part in raising the family and supporting her husband while the husband had worked hard in business and created significant wealth.

The husband submitted that he should be entitled to a greater share of the pot because of his extraordinary business achievements. He had turned a small company that made wire baskets into a worldwide marketing company by a

number of astute and well timed moves (once described as being driven by a 'classic Napoleon complex'). The husband argued that fairness would be achieved by him receiving 20% more than his wife because he had made such a significant contribution to the family's wealth.

This argument was upheld. The court took the view that the husband possessed the 'seed of genius' and that he should retain the lion's share of the money. Although the court refused to link the argument to the huge amount of wealth involved, it seems difficult in practice to separate the two.

### **The future**

In cases of very significant wealth, it is clear that the success of the seed of genius argument in *Sorrell* will encourage husbands to attempt to persuade the court to depart from a strict equal division of the assets. It remains to be seen how many will succeed, but one suspects that the more money there is involved the more willing the court will be to sway. There is now certainly a chink in the armour of the principle of equal division so emphatically stated in the case of

*Lambert*. There may be potential for the seed of genius argument to weed out equality in divorce settlements at the higher end of the asset scale.



# The nanny state?

The consequence of some government benefits for families with children can be such that, if a couple in receipt of such benefits separates, the burden of support for the wife and children falls more on the state than on the husband. Surely this is not what the Government intended?



### Child Benefit:

- Fixed rate and not means tested
- Available for every child under 16, under 18 and in work based training, or under 19 and in full time non-advanced education
- Rates: £17 per week for the eldest child £11.40 per week for every other child

### Child Support Agency basic formula:

- 15% of absent parent's net income for one child
- 20% of absent parent's net income for two children
- 25% of absent parent's net income for three children

Child Benefit has been around for some time and has had little impact on separating couples. Anyone with minor children receives an amount per week per child. This is not means tested (see box).

In April 2003, the Government introduced two new benefits: Child Tax Credit and Working Tax Credit. The aim was to encourage families, particularly single parent families, to arrange their lives in such a way as to enable mothers to return to work even if only for less than 16 hours per week. If the mother (or either parent if they are in the same household) doesn't work, or works less than 16 hours per week, support for the children of the family is increased from Child Benefit alone with the addition of Child Tax Credit. If the mother (or either parent if they are in the same household) works for more than 16 hours per week, Working Tax Credit can top up the household's income to a greater degree than Child Tax Credit alone and help with childcare costs.

When arrangements are made for financial support following a divorce, the usual approach where there are young children is for a wife to have maintenance for herself and maintenance for the children. Since the introduction of the Child Support Agency in 1993 and, in particular, the CSA formulaic approach in 2003 (see box), maintenance for children has been dealt with by the CSA rather than the court where the parents have not been able to agree. Maintenance for wives is based on an assessment of needs, less any income and benefits received.

For more and more women, the fact that they have a small salary as well as Child Benefit, Child Tax Credit and Working Tax Credit, means that they need less from their husband by way of maintenance. In some instances, their needs are reduced so much by these other resources that the husband runs an argument that the wife can be self-sufficient from the outset and does not need any maintenance at all from him in

her own right. This occurs most often in situations where, before Child Tax Credit and Working Tax Credit, the wife may well have had substantive maintenance from her husband.

It is possible to argue that the Child Tax Credit and Working Tax Credit are advantageous to all, and in particular to children, because they mean that families going through separation have more income available. This partially alleviates the hardship of suddenly having to run two households from an income which previously only had to service one. However, it does mean that in some circumstances a wife is more reliant on the state than on her former husband.

This begs the question as to whether the current system is creating a new generation of women caught in a different kind of benefit trap.

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February 2006