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What's a woman worth? The maintenance law Transcript

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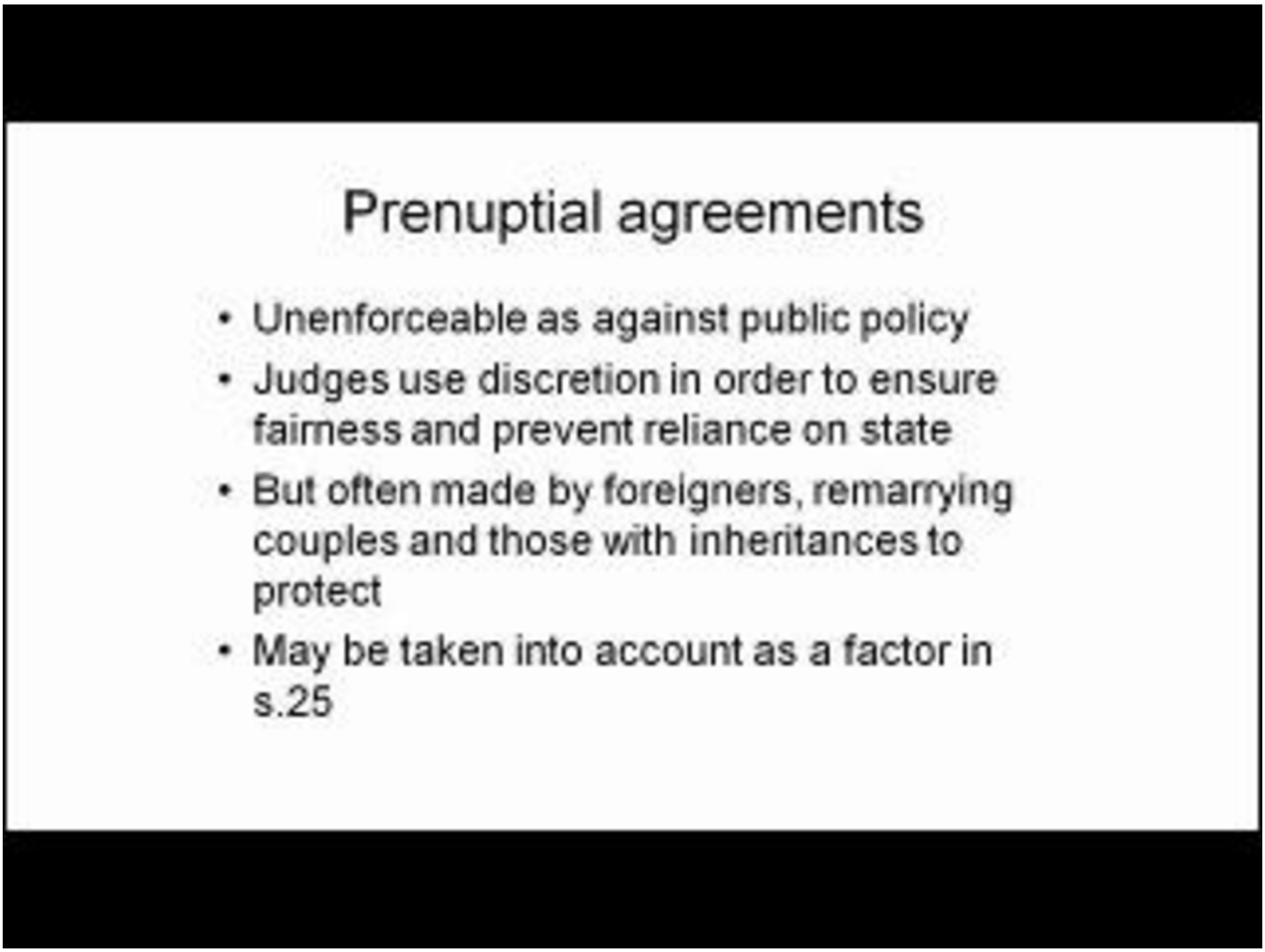

What's a woman worth?

The maintenance law

The Baroness Deech of Cumnor DBE

Imagine three sisters. One is very pretty and marries a national footballer; they have no children and it is a short marriage before she leaves him for an international celebrity. The second sister marries a clergyman and has several children; the marriage ends after 30 years as he is moving into retirement. The third sister never marries; she stays at home and nurses first their mother, who has a disability, and then their father, who has Alzheimer's, and dies without making a will. Which of the three sisters will get the windfall, an amount sufficient to keep her in luxury for the rest of her days, when her relationship with a man comes to an end? And one most needs and deserves financial support, even of the bare minimum?

The divorce courts are still trying to put women in the position they would have been in had the marriage not ended. If you marry a captain of industry, you become one yourself for all time, at least as far as the standard of living is concerned. The message is that getting married to a well off man is an alternative career to one in the workforce. If you are married to a clergyman with a tied house and little income, you will get next to nothing, and of course not even the continued occupation of the vicarage. If your parents do not make a will in your favour, and you are over the age of majority, you might be able to make a claim under the Inheritance (Provision for Family & Dependants) Act 1975, but to be eligible the claimant has to have been economically dependant on the deceased, and the case of the carer daughter, it was more probably the other way round. This particular law of inheritance rewards the mistress who is kept by the old man, but not so readily the carer-daughter. The law is of course gender neutral on the face of it. Men too can expect to continue in the style of living to which they have been accustomed if they have the good fortune to divorce a wife who is wealthier than they are. Guy Ritchie reportedly received around £50m from Madonna, the largest ever settlement made for a man. He was worth about £30m and she £300m at the time of the divorce. The settlement included their country home and London pub, and is twice the amount paid by Sir Paul McCartney to Heather Mills.

Here are some other examples of how English maintenance is allocated on divorce. Of course they are all well off families, for the poor have nothing to allocate, as we will see. Heather Mills was judged to be worth £28m after three years of marriage to Sir Paul, including £35K pa for their daughter Beatrice, and £50K a year for her charitable donations, also taken from Sir Paul's assets. Mrs. Charman was awarded £48m after a 28-year marriage during which she pursued no outside employment, a sum legally notable because it went far beyond what had once been the yardstick, namely the spouse's reasonable requirements.

Mr and Mrs Miller married in 2000 and divorced after 3 years, with no children. He was then 40 and she 35, and he left her for another woman. She earned £85K pa and had no assets; he had £17m or so and a huge salary. The award to her of £5m was upheld all the way on appeal, and I will look at the Lords' judgment shortly. [2006] 2AC 618. Mr and Mrs McFarlane had 3 children after a marriage that lasted 16 years. She gave up her career as a solicitor to be a mother. The Court of Appeal awarded her half the matrimonial assets and £250 pa for 5 years. Her appeal against the time limitation of 5 years was successful, and the judgment of the House of Lords was that it should last for life until and unless the ex-husband applied to alter it. In the case of *White* v *White* the legal costs of the couple were £500K to gain assets of £1.5m when both their appeals were dismissed by the House of Lords. So a clear first point to notice is that the costs of disputes may amount to as much as the assets (in*Piglowska* 1999, the costs of the case outweighed the assets in dispute.) This is because of the lack of certainty. The judges, with their best efforts, have not been able to make the law certain enough in application to avoid lengthy litigation and negotiation between the parties, which obviously blocks the process of moving on from the divorce and increases the stress and expense. Indeed, judgments pile new principle on new principle and move further and further away from the statutory law. So the procedure is bad and the theory and effects that underly the awards even worse.

I started to say this more than 30 years ago. ('The Principles of Maintenance' (1977) 7 *Family Law* 229) Maintenance law has not been thoroughly overhauled since 1857, although the courts' powers have been extended from time to time to sugar the pill of easier divorce. Maintenance law has been left behind by social developments, and the failure to reconsider it has had unfortunate consequences. In the past a wife had to depend on her husband for financial support during marriage and for the rest of her life (and she would normally have been kept by her father before her marriage.) Her lack of education, of legal capacity and of opportunities for self-support, her vulnerability to pregnancy and the fact that her husband controlled her property during marriage meant that her only participation in the economy was as his dependant. It followed that her position could not be altered substantially by separation, divorce or his death. Legal theory gave effect to the reality of those times. Her payment for the services she was bound to supply during marriage was his duty of supporting her, even though it was not enforceable during marriage, and still is not, if for example a wife feels that her husband gives her too little 'housekeeping'. Maintenance law has not been reformed since 1969, apart from pension splitting provisions, and has never had any rationale since divorce was made gender equal. Yet we are now in a society where the majority of women, even with children, work or are expected to work, where they claim equal pay and opportunities in employment, where there is contraception to enable a family to be planned and more women are entering higher education and the professions than men. It is schizophrenic if at one and the same time family law assumes that a woman can and should stay at home and care for their children and be

compensated for that on divorce, and for society to call for women to take 50% of top jobs.

Women have contraception, education, full legal status, equal opportunities and pay (failures in those fields do not mean that the divorcing husband is responsible for them.) Just under half the entire workforce is female, and 70% of married women work, even mothers, although the work rate of single mothers is lower. 42% of the women work part time. 40% of marriages break down; more women will become widows or single and have to keep themselves. 50% of divorces are of marriages that lasted 9 years or less. But the concept of female dependency on the male as inevitable continues to permeate maintenance laws. Judges tend to call it a partnership when dividing the couple's assets on divorce, but analysis of the judgemade law show that it still rests on the picture of the male earner and the wife as housekeeper and childrearer.

One could equally well postulate that the award of large sums of their ex-husband's money to women who have done little other than live is actually a way of punishing the men for leaving them. It is actually considered degrading to women in some quarters and perpetuates the common law proprietary relationship of the husband and wife even after divorce, because of ongoing financial claims and deferred house sale. (This is the so-called *Mesher* order named after the case where the couple have a house and not much more; so it is preserved for the wife to live in with the children after divorce until the children finish education, at which stage it is to be sold and a share of the proceeds finally given to the ex-husband. This is not satisfactory for him as he is deprived of his capital for many years; nor is it good for her as she will have to sell when in later years and in no better position than before to amass the capital to buy another house.) The maintenance laws are an irritant to many ex-husbands because they have to continue to provide, regardless of new family commitments and regardless of the bad conduct which they believe was evidence by the wife, hence a feeling that justice has been denied. The wife also feels hard done by, and maintenance laws are emotionally charged with the desire on the part of the wife for retribution, given that no such allegations are allowed in the divorce proceedings themselves. The awards, especially for children, are hard to enforce for the ex-husband feels he is paying and getting nothing in return. Modern financial provision law has substituted for the old public divorce hearing an equally unpleasant inquisitorial procedure designed to establish the husband's financial position, and rivals the old law in its depth, length, cost, temptation to lie and humiliation.

There are theoretical difficulties too. The principle of maintenance, possibly for life, does not square with the irretrievable breakdown grounds on which divorce is granted, ie that there is no fault, simply that the marriage has broken down. Some women argue that they should be compensated for non-monetary contributions to the home, and for handicaps in the labour market. Others just want equal treatment and opportunity. But housework has to be done whether single or cohabiting; and for many women giving up a career on marriage is a myth: either it is a career which one would give up with a sign of relief with the prospect of being kept, or it is a free choice to opt for the home rather than the office. The choice to stay at home and care for the children is only possible if the man's income permits and is far less likely to be available to his second wife.

Maintenance does not align itself with the equality of the sexes at work. The disadvantages suffered by working women or those who would like to work are not actually attributable to one particular divorcing husband who is expected to pay maintenance. It is unfair to expect one person to shoulder an expense that should be spread evenly between all men, if the economic disadvantage argument about women is correct. Large awards to rich women do not help the underpaid married working woman. More than that, maintenance laws cushion and legitimise the attitudes of employers who discriminate against women, because they are aware of the 'meal ticket for life' mentality.

The strongest argument in favour of maintenance is that the divorced wife will have raised children and her career has been undermined by marriage. Given that most women work, this is a matter of choice; childcare does not take up the whole of a long marriage; and the wealthier the spouses the less likely that there was much to do by way of housework. The notion of 'compensation' recently put forward by judges as a basis for awards is unrealistic. It is covering up for the fact that our divorce rate is high because in part the law has made it easy, and we are punishing men and trying to limit the welfare liability of the state by making them pay over assets and pension funds. Perceptions of what might happen to their funds on divorce may affect men's willingness to commit (and women's, if they have means.) This adds to the high cost to society of marital breakdown overall, as I explained in my last lecture. Regardless of the theories, some certainty about the way to split assets may be more important than total fairness, especially when considering how difficult negotiations may impact on the children's wellbeing.

Mr Miller is taking the government to the ECHR on the ground that divorce laws are so uncertain that they infringe his human rights. As we are about to see, it is judge made, and thus there has been no opportunity for public debate, as there would be if changes were proposed in Parliament.

The statutory law is as follows. It is contained in Part II of the Matrimonial Causes Act 1973, s.25. The court is to consider the welfare of minors under eighteen first, then to take into account a list of factors including - all the financial resources, needs and obligations that the parties have at divorce and in the foreseeable future; the standard of living enjoyed by them prior to the breakdown of the marriage; the age of the parties and the duration of the marriage; any physical or mental disability; any contributions made or that might be made to the welfare of the family; conduct if so gross that it would be inequitable to disregard it; and the value of any benefit which might be lost on divorce. The court has the power, rarely used, to end all obligations ('the clean break') if it

is just and reasonable to do so; and periodical payments end on remarriage.

One could actually categorise divorce cases into four. Short marriages with no children; couples on welfare; middle income couples with a house and not much more; the wealthy. These are not explicitly adopted as legal categories because of the undesirability of attaching class or income labels to the law, but since everything turns on the income and assets available, that is what happens in practice. The more judgments there are, the greater the confusion about the principles to apply, because case law is dominated by the stubborn and the wealthy, no one else being able to afford the costs.

The list of factors in s. 25 of the MCA has been largely ignored recently in favour of an equal split; in the 1970s and 80s it was more likely to be one-third/two-thirds. For the poor and unemployed there can only be a token order, a reminder to the father that he has children for whom he is responsible, and that the order could be re-visited if circumstances change. For the slightly better off, there is reallocation of the house and there may be repayments of legal aid to be made. Then there is one law for the rich and one for the poor, because the wealthy wife gets a lump sum and has no need to pursue, as the poorer may have to, the enforcement of periodical payments.

Unusually in law, judges have despaired of any parliamentary reform of s.25, and have developed it creatively and quite openly in a succession of cases. Still they have found no one overarching objective or even consensus. In recent times, they have spoken variously of dissolving a partnership, paying compensation for losses incurred by virtue of divorce and marriage; equality; childcare concerns and fairness. They are united in taking no note of conduct and in retaining discretion, no matter what the cost. *White* v *White* and some recent House of Lords judgments seem to have put an end to reasonable requirements as a yardstick, and lean more to equality unless there is good reason, whatever that may be, for departing from it. They are likely to ignore claims that one spouse made a special contribution (ie earned) towards the matrimonial assets, and in *Miller* and *McFarlane* there was an opinion that some of the assets might not be regarded as matrimonial and therefore not to be divided. This seems reasonable but will lead to dispute as to what are matrimonial assets and what are not. While the judges are trying hard to move with the times, it is no wonder that England is the divorce capital of Europe and out of step with other European countries. The notion that a wife should get half of the joint assets of a couple after even a short childless marriage has crept up on us without any Parliamentary legislation to this effect - the judges have developed the law in a paternalistic and unprincipled fashion that has departed widely from Parliamentary intentions; they have largely ignored the statutory direction to achieve a 'clean break' wherever possible and prediction of what the judge might decide has been rendered an expensive element for the couple.

Autonomy is not even recognised when the couple make a prenuptial or postnuptial agreement in an attempt to regulate their own financial affairs. Prenuptial agreements are regarded as unenforceable because they are against public policy in contemplating the end of a marriage and possibly by taking advantage of the pressure that could be put on one party to agree within a very short time of a planned wedding. Nevertheless, they are made quite often, usually by foreigners who are accustomed to them in their own jurisdictions, by remarrying spouses who have learned from a previous divorce settlement and want to avoid a repeat; and by those who have significant inherited assets that they want to protect. The same rules apply to postnuptial agreements, possibly made with an eye to divorce. The courts may ignore those agreements or sometimes enforce them in part. The advantages of them are certainty of outcome, the taking of responsibility for events, removing certain fears that might deter people from getting married; fewer legal costs, avoiding judicial variability, and the fostering of autonomy. The disadvantages are that agreements about divorce weaken the view of marriage as a lifelong commitment, because they are planning for failure; they evidence a lack of trust; it is difficult to predict the circumstances in which the couple may find themselves years later; the weaker party may be pressured; they may be unfair and could provoke a great deal of litigation designed to overturn or modify them.

In the recent case of *Granatino/Radmacher*, the wife possessed £55-100m, while the husband had given up a lucrative career to become an Oxford research scientist on £30K pa, albeit that his family was well off too. Before marrying in 1998 they had signed a prenuptial agreement not to claim from each other in divorce, this being quite common in Germany where they were then living. In Germany this would have meant what it said. Nevertheless the UK High Court awarded him £2.5m for housing in Chelsea or North Oxford for himself and the children when they visited from Monaco, the housing to be returned to the wife eventually; and a lump sum of close to £1m. Although technically unenforceable in English courts, the wife argued that a prenuptial agreement waiving rights was the only way to be sure that someone was not marrying her for her money. The court was able to give some effect to the agreement, in that it reduced the sum of £5m that the lower court would have given the husband, by taking the agreement into account as one of the factors in s.25, provided it was fair, each party had taken independent legal advice, made full disclosure, had not suffered from duress and that the agreement was made well in advance of the wedding. At least, that is what one might conclude from *Granatino*, but because it is judgemade law there is still no predictability as to when a prenuptial agreement might be upheld or not. It is hard to see why adults should not be free to contract at the point of marriage for the financial consequences of any divorce, subject to inbuilt fairness tests. There would need to be provision for children if any, and a definition of what assets were to be included. Now that there are so many divorces, it seems anachronistic to hold to the principle of the old law that parties may not oust the jurisdiction of the court lest they become burdens on the state or are cheated out of their due support. The same is true of postnuptial agreements.

It is noteworthy that the couple making the law in relation to prenuptial agreements were German, for Europeans have entirely different attitudes and laws from ours. Most of the 27 European states have the custom that an engaged couple would visit a lawyer to choose a marital property regime to regulate the property consequences of marriage and divorce. So different are they that the UK has absented itself from discussions to harmonise European matrimonial property law. The European states, and some US ones, have community of property, at least a default regime if there is no opt out. There are many varieties: immediate community (joint ownership); deferred community (equal division on death or divorce); community of accruals (dividing the added value that ensued after the marriage on separation or death); and separate property. This is in stark contrast to the discretionary system I have been describing. Most of the European countries recognise non-marital assets and allow the couple to define those assets that will not be shared in the agreement. They all allow prenuptial and postnuptial agreements about property and divorce. In France for example, postmarital property is divided equally when the time comes, but not inheritances or gifts. The parties are free to choose separate property and keep their own all the time. One lawyer can advise both, so that the trip to the lawyer before the wedding is not seen as a potential conflict, but a way of organising family finances and debts in the future. Very little ongoing maintenance is awarded.

This continental system presents itself as an immediate and attractive model for reform in this country. What is needed is an end to discretion and the recognition of autonomy in contracts, with the aim of reducing costs and promoting negotiation in a better spirit. Matrimonial and non matrimonial property would have to be defined. Premarital assets should be excluded, especially when the parties are older or have been previously married, and so should legacies and gifts. Subject to the existence of an agreement made by the couple to the contrary, the postmarital matrimonial assets could be divided equally, but in the case of a short marriage, say 3 years or less, there should be no division at all, but the parties should go back to the position they were in before they married. If there are children and the home is too small for sensible division, then it should as now be retained for the occupation of the carer, with eventual sale and division when the children reach 18.

What of the future of maintenance? Certainly it should cease to be payable if the wife cohabits with another man, not just on remarriage. Should it be awarded at all? If we had a divorce system based on misconduct, then it would be easy to find a rationale pinned to guilt and innocence, but that is unlikely to be the case ever again. My extreme view, which will never hold sway, is that no maintenance should be payable unless the claimant spouse is unable to work or has the care of young children. Her incapacity for work should be one for which there is no state support and which is also fairly attributable to cohabitation with the other spouse, and for which it is reasonable to expect him to pay. Some of the factors listed in s.25 would be useful in the assessment of the quantum of maintenance rather than in the establishment of an entitlement. The primary aim of maintenance should be rehabilitative; it should be permanent only for older women and the incapacitated who are not cared for by the state. That is the price of easy divorce granted on a theoretical ground of irretrievable breakdown without fault. The Government has shirked responsibility for re-examining the law; no Royal Commission, no parliamentary debate. It is time to call for reform, not by judges struggling to cope, but by our legislators.