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Essay following Family Supervision four

The first point to note is that the divorce courts have very wide discretion about how property and assets are divided up upon divorce. Under section 25 of the Matrimonial Causes Act 1973 certain considerations are paramount, such as the welfare and housing arrangements of minor children. There then follows a list of factors that must be taken into account, although these may be disregarded by the court in the presence of other evidence: the court merely has a duty to consider these factors, rather than impose orders upon the basis of them. The principle laid down in White v White stated that, although there is no presumption of equality upon divorce, if the court intended to depart drastically from an equal splitting of assets they should have good reason to do so. Also under the authority of Lambert v Lambert, when assessing ancillary relief the court should not place greater weight upon the financial contributions of the breadwinner over that of the homemaker as a justification for an unequal division of assets.

i) The first thing that A will want to consider is the possibility of obtaining a maintenance pending suit under section 22 of the MCA; this will compel L to make financial provision for A and the children until the outcome of the court proceedings is known. As these are contested proceedings she would be well advised to make an application under s. 22 to secure her immediate financial future (and that of her children).

The next consideration is that of property, in this case the family home. As mentioned above, the court's primary concern will be that of the children of the family (especially as one of them is a minor), as set out in the MCA, s. 25(1). This normally means that the family home is transferred to the primary care giver until all the children have reached majority. The court is able to do this in a number of ways to achieve a more fair financial balance between the two disputing parties. The house is worth £250,000 with a substantial mortgage remaining outstanding on it; the question makes no mention of who the property is registered to, though, again, the court is able to change the registered title in the interests of a fair settlement.

So what powers does the court have when readjusting the ownership of shared property upon the breakdown of a marriage? They can order a complete transfer under s. 24(1)(a) or a partial transfer (in any proportion) under s. 24(1)(d). They could also make a settlement of property order, (basically an order for sale), under s. 24A(1), which is designed to release the equity tied up in the property and turn it into capital to be divided between the parties, although this can be delayed until, for instance, the youngest child is 16. This recognises the different purposes that a property has, a family home and a valuable asset. However, I feel that, as the youngest child is only six and this would delay matters for ten years or more, this latter option would likely be rejected in favour of another order, as the

latter is in conflict with the idea of a "clean break" upon divorce which enables the parties to move on from a broken marriage.

Given that the most likely response of the court will therefore be to make a property adjustment order, A will want to know what portion she will be likely to receive. Due to the mortgage outstanding on the property it is highly likely that the house will be fully transferred to A, debt and all. If A then subsequently finds that she is unable to meet the mortgage repayments then she will be free to move somewhere more modest; given the ages of her elder two children it is arguable that she will not need such a large property in the future as they grow up and make separate lives of their own. This total transfer of the property would seem fair as L would relinquish a substantial debt while A's debt would then amount to 40% of her total asset. Taking into account the needs of certainly the youngest child, for immediate stability and a home, this would not seem unreasonable.

Next, there is the issue of spousal support and/or a lump sum settlement. As L has already conceded his interest in the family home it would seem inequitable to make an immediate payment from L to A at this point, as this may reduce his ability to find a new home of his own etc. However, due to A's age and the fact that she still has a minor child A is likely to need some support to readjust, particularly as it is likely that she will stop work for L, with or without remuneration, upon her divorce. Thus, the court has the power to order periodic payments from L to A for either a fixed period or indefinitely. Due to A's age and possibility of her achieving gainful employment in the future the court would be more likely to order periodic payments for a period of, say, three years. This can be achieved under s. 23(1) of the MCA. Given L's lump sum and his likely earning power, £10,000 a year for three years does not seem unreasonable.

L's provision for his youngest child will not be covered by the jurisdiction of the divorce court but rather under that of the child support scheme. However, children over the age of sixteen are excluded from the scheme. This would mean that, depending on the circumstances of the children aged 16 and 18, L may be required to make financial provision for them as well (under s. 29 of the MCA, for instance, if they are studying, until they finish full-time education). Assuming that they were both still dependent on A for financial and housing etc. support, a sum of £2,500 per child per annum until they ceased to be legitimately dependent would be reasonable.

The final point to consider is that of the pension held by L. A would lose her chance to claim pension rights as a widow, in addition to losing the financial security of being married to L upon his retirement. The court has a wide discretion with regard to pensions: prior to the mid-1990s the only order they could make was to offset the likely realisation of the pension against what was paid by one partner to the other at the point of divorce. However, since then an attachment order can be made, whereby a percentage of the proceeds gets paid to an ex-spouse upon the maturity of the pension; another order that can

be made is a pension splitting order, which is now more common, and most likely in this case. In this situation a proportion of the pension fund capital gets split off and placed into the other spouse's name to allow them to build up pension rights in their own right. This is in keeping with the "clean break" principle which is perhaps why courts seem to favour this option more. Given L's higher earning power and the fact that A has foregone any chance to build up her own pension rights while working for L and bringing up his children, a split of 60:40 in L's favour does not seem unfair. This would take into account A's future earning potential, which would obviously be curtailed while the youngest child is still at school. Thus a pension splitting order under s 24B of the MCA is most likely.

ii) Although the agreement stated differs from that outlined above this is explained by the divorce court's wide discretion under the MCA to judge each case on its individual facts. L's options of getting the order changed if it were not embodied in a consent order are extremely limited. Under s. 35 of the MCA the court may vary the order for maintenance etc. which it had made but generally only does so upon the drastic changing of circumstances of the paying party. This is due to certainty of agreement and the fact that the receiving party will be expecting the agreement to stay the same, and may be relying on it; this leaves courts unwilling to alter agreements purely because one party feels they have made a mistake. However, if the order were by consent, the financial positions of both parties are much more likely to be taken into account, particularly as A in this case has greatly enhanced her position. However, in keeping with the "clean break" principle whereby both parties should, at the point of divorce be able to conduct their subsequent lives in the manner they choose and free from interference by the other party, courts are reluctant to get involved once an order has been made, save in exceptional circumstances.

After one year has elapsed from the granting of a consent order, L may return to court in order to attempt to get the original orders changed. It is unlikely that he will be able to do anything about his financial responsibility for his older two children as they remain his children and thus his responsibility. Given the rise in value of the house and the arrival of a, potentially paying, D, it is however plausible that he will be able to cease spousal maintenance payments from the date of the second court hearing. The court has no jurisdiction to re-readjust property division or pension rights once the decree absolute has been granted, MCA s. 31(1), so L would not be able to change his original settlement in this respect. However, it remains L's best chance to get the order altered if it was originally embodied in a consent order.