The end of the starting point ?

" ... The judges who administer [the jurisdiction under the Matrimonial Causes Act 1973] have traditionally accepted the Shakespearean principle that 'it is excellent to have a giant's strength but tyrannous to use it like a giant'. Lord Justice Waite's words[1] reflect clearly the complex question of judicial discretion in family financial cases.

For most practitioners anticipating how a judge will exercise her discretion in an ancillary relief application is extremely difficult. The specific factors to which s.25 Matrimonial Causes Act 1973, requires regard to be given does not give any guidance as to the weight to be attached to any of these factors. The courts have generally adopted an approach of a starting point figure and then adjusted the figure when considering all the circumstances under s.25. A recent decision of the Court of Appeal has however further confused the approach to be taken.

In Dart[2] a husband applied to the Court for an order to be made against himself for financial provision for his wife (the wife having begun competitive proceedings in the USA). The net worth of the husband was £ 400 million (having a successful manufacturing business in foam paper cups) and the couple jointly spent around £ 400,000 per annum. At the first instance Johnson J awarded, inter alia, the previous matrimonial home in the USA and a £ 9 million lump sum payment. The wife appealed. James Munby QC argued that the starting point convention[3] was the correct way to approach the case. In giving the leading judgment of the court, Lord Justice Thorpe, regarded that approach to big money cases as a hopeless submission given the authorities since 1976. The correct test was to calculate what a spouse reasonably requires, whilst having regard to the other criteria

[1] Thomas -v- Thomas [1995] 2 FLR 668, 670E.

[2] Dart -v- Dart [1996] 2 FLR 286

[3] Wachtel -v- Wachtel [1973] Fam 72

set out in s.25. Butler-Sloss LJ stated that in contrast, the needs of the wife was a highly relevant factor and in big money cases Ormrod LJ remarks that there should be a ceiling on the amounts to be taken into account were approved.[4]

The latest pronouncement of the Court of Appeal leaves the law as being less clear and certain and more importantly perhaps less fair. The re-enacted 1973 Act introduced the concept of equitable distribution. A non-owning spouse could have capital awards made in their favour, as a result of their non-financial contributions. The case-law however, seems to have eroded that concept and have turned to rely on what each parties reasonable requirements are. Lady Justice Butler-Sloss recognised[5] that the courts "may have imposed too restrictive an interpretation upon the words of s.25 and given too great weight to reasonable requirements over other criteria set out in the section." Is it not right to further say that the courts have abandoned the concept altogether?

Arguments against the starting-point guideline include that the Act did not state any notional fractional division and that where the parties resources are small in relation to the needs and obligations of a party, the one-half approach produces a result which is too low and would not accord with the requirements of the section : where the assets are large, the approach may yield a too high figure.

As the Act did not mention a notional figure nor did it elevate the parties reasonable needs or requirements as being the paramount consideration. It was always open for the courts to interpret the Act and give guidance on how to reach a solution. Where the resources are low the starting point does invariably achieve an inequitable figure, and thus falls to be adjusted by considering the factors contained in the Act. What is not understandable is saying that where the figures are high a

[4] Preston -v- Preston [1982] Fam 17,28.

[5] Dart -v- Dart [1996] 2 FLR 286,305E.

ceiling should be imposed and the court should look at the reasonable requirements of the parties as a guide. Why? When is it inequitable for there to be a half-share division of the matrimonial assets where there are sufficient resources?

Since the series of judgments of the Ormrod LJ[6] it has consistently been argued that a starting point guideline is the correct approach to ancillary relief cases. In Bullock[7]the Court of Appeal rejected the argument that the one-third approach was improper following the decisions of Ormrod LJ. There was considerably authority for the starting-point guideline and although it had not been followed in some recent cases, it had not been disapproved. In Dew[8] Anthony Lincoln J, stated that the one third approach still was a helpful guide in some cases.

In W -v- W (Judicial Separation: Ancillary Relief)[9]a big money case, Paul Coleridge QC for the wife submitted that the division of the matrimonial assets should be equal. In giving judgment Ewbank J stated that he did " ...not agree that the proper starting point in a case of this sort is a half and half share..."[10]and made an order specifically stating that he was not trying to redistribute capital in any equal or other share.

In Burgess[11]a middle income case, Hale J ordered that the joint assets of a 24 year marriage should be divided equally. The husband was a 51 year old solicitor and the wife a 52 year old doctor. The husband appealed on the ground that the judge had misdirected herself by stating that in principle

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[6] O'D -v- O'D [1976] Fam 83 : Preston -v- Preston [1982] Fam 17 :Sharpe -v- Sharpe (unreported) 16 July 1980 : Page -v- Page (1981) 2 FLR 198.

[7] Bullock -v- Bullock [1986] 1 FLR 372.

[8] Dew -v- Dew [1986] 2 FLR 341,344.

[9] [1995] 2 FLR 259.

[10] [1995] 2 FLR 259,265.

[11] Burgess -v- Burgess [1996] 2 FLR 34.

equal division of the assets of a long partnership marriage with careers of their own was appropriate. Lord Justice Waite held that the Her Ladyship was correct. In such cases equality of interest should be adopted as a starting-point, but would then yield to the requirements of all the circumstances of the case.

The arguments for a starting point guideline are based on the fact that without it is extremely difficult to advise a client on what a likely outcome would be and also, that it achieves a fair result. In Scotland, the Family Law (Scotland) Act specifically refers to 'equal sharing of matrimonial property' and the Lord Chancellor has agreed that he will initiate a consultation process to evaluate the merits of adopting a similar scheme in England and Wales.[12] Is it not a valid suggestion that in fact the principle of equitable distribution was the intention of Parliament and the court's subsequent interpretation that is at fault rather than laying the charge at the door of the legislators.

PAUL PAVLOU BARRISTER

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Nine King's Bench Walk,
Temple.

[12] See Hansard, 16 May 1996.