Chancery Bar Association

AN UNCONSCIONABLE TIME A-DYING : REPORTS FROM A TRAVELLER IN A FOREIGN COUNTRY

The Chancery Bar Association Annual Lecture 2011

given by Lord Justice Munby in the Great Hall of Lincoln's Inn on 14 March 2011

On 25 July 1957 one Hastings stood before the Recorder of Liverpool to receive sentence. He had been convicted on five counts of dishonesty. The Recorder delivered a suitably brief if pointed homily – "You are a menace to the integrity and health of the commercial community" – and said that Hastings would go to prison for four years' corrective training. Happily for the development of the law the Recorder omitted to add the words "concurrent on each count."

On 18 December 1957 the Court of Criminal Appeal quashed Hastings's conviction, though only on one count. Hastings conceived the idea that his continuing incarceration was unlawful[1] and set out on an ultimately unsuccessful Odyssey to establish the point.

He sought a writ of habeas corpus from a Divisional Court of the Queen's Bench Division (Lord Goddard CJ, Streatfield and Slade JJ), which on 7 March 1958 refused the writ.[2] He sought to appeal to the Court of Appeal (Hodson, Morris and Sellers LJJ), which on 28 July 1958 refused to entertain the appeal, on the ground that it arose in a criminal cause or matter in which it had no jurisdiction.[3] He made a further application to a differently constituted Divisional Court of the Queen's Bench Division (Lord Parker CJ, Hilbery and Diplock JJ), which on 21 November 1958 refused the writ, on the ground that it had no jurisdiction to hear an application which, on the same evidence and grounds, had already been decided by the Divisional

---

1 His argument was that only one general sentence had been passed and that since his conviction on one count had been quashed there was no lawful sentence upon him in existence.

2 *In re Hastings* [1958] 1 WLR 372.

3 *Re Hastings* The Times, July 29 1958, [1958] 3 All ER 627n.

Court.[4] Cautiously, if unhappily for the encouragement it gave Hastings to try his luck elsewhere, Lord Parker concluded by observing that Hastings was "not entitled to be heard again by another Divisional Court *of the same Division*" (emphasis added).[5] Hastings responded by applying for the writ to a Divisional Court of the Chancery Division (Vaisey and Harman JJ). The application was dismissed.[6] Hastings, by now in person, appealed to the Court of Appeal (Lord Evershed MR, Romer and Pearce LJJ), which on 15 June 1959 held, adopting the same view as on the previous occasion, that it had no jurisdiction to hear the appeal.[7] At that point, the pertinacious Hastings seems to have disappeared from view, no doubt to serve out the remainder of his sentence.

Now this litigation bore primarily on the historically interesting question of whether or not an applicant for habeas corpus had the right to go from judge to judge, groups of judges to groups of judges, court to court, until he found a judge or court willing to issue the writ.[8] But I am not here to talk about habeas corpus. It is to another, and for present purposes much more interesting, part of Vaisey J's judgment that I wish to draw attention.

Saying that the application was, as he put it, "based upon a complete misconception", Vaisey J explained that "The mistake the applicant or his advisers made was to assume that the Chancery Division is a separate entity, a separate court".[9] He continued:[10]

> "It is a curious thing, and I think very notable and encountered in many connections, how hardly this idea of the separate courts dies. The Habeas Corpus Act was passed in the reign of Charles II, and all remember how that monarch with his graceful courtesy apologised to those who surrounded his deathbed for being an unconscionable time a-dying. I think that an "unconscionable time a-dying" may certainly be said of those courts which we

---

4 *In re Hastings (No 2)* [1959] 1 QB 358.

5 Ibid, 377.

6 *In re Hastings (No 3)* [1959] Ch 368. A preliminary issue as to whether there was such a court was resolved in Hastings's favour: the curious can find the details at 370.

7 *In re Hastings (No 3)* [1959] 1 WLR 807.

8 See the fascinating essay by R F V Heuston, 'Personal Liberty', in Essays in Constitutional Law, ed 2 1964, 101, 115-127, from which I borrow this characterisation of Hastings.

9 *In re Hastings (No 3)* [1959] Ch 368, 377.

10 Ibid, 377-379, applied by Lord Gardiner LC in *In re Kray* [1965] Ch 736, 744-745 (an attempt by the Kray twins to obtain from the Lord Chancellor the bail which had already been refused by the committing magistrate, the judge in chambers, the Common Serjeant and the Divisional Court; this was, I believe, the only occasion when Lord Gardiner sat judicially).

> thought had been put an end to and were dead and buried in 1873, and yet continually emerge in the minds and in the speech of English people as if they still exist. The expression "The Court of Chancery" is constantly heard, yet it is three generations since it existed as a court. "The Court of Queen's Bench" is referred to in the same way: but there is now only one court – the High Court of Justice … a good deal of colour is lent to the suggestion of separate courts by various expressions which are used, "a Chancery judge," "a Queen's Bench judge," which mean, respectively, a judge assigned to do the work which is commonly denominated Chancery work, and a judge assigned to do that work which was commonly done in the old court of Queen's Bench …
> … If it is thought that there is some kind of emanation of the Chancery spirit which can overrule the decisions of the Queen's Bench, or some special inspiration of common sense which allows a judge of the Queen's Bench to say that the decisions in the Chancery Division are wrong, that is complete illusion.
> It may take some time for that to become known, if indeed people are interested in knowing it. But the main fact that I wish to emphasise in this case is that there is but one High Court."

Vaisey J also commented that "It is said sometimes that there are people abroad who do not always realise that we are not at the moment living under the conditions described in Charles Dickens's novels."[11] As to that I merely observe that when I first came to Lincoln's Inn some forty years ago the Chancery Motions Court was much more reminiscent of the famous scene in *Bleak House* than of the corresponding Queens Bench Division arrangements in the Bear Garden. And in those days there were many other differences between the two Divisions, though most have since been swept away by, successively, the Oliver and the Woolf reforms.

The best part of a further two generations have passed since Vaisey J said all this, but the idea which he rightly condemned appears to have life in it still, at least in one part of the High Court. I refer to the Family Division.

At this point I must apologise to those who have come here expecting to listen to an elaborate disquisition upon some such topic as the different treatment of equitable principles in this country and (say) Australia. For as you will by now have guessed the foreign country of which I speak is rather closer to Lincoln's Inn than the Antipodes. Not much distance may separate the Thomas More Building and the Queen's Building, but the world of the Family Division is, I suspect, almost more alien to many of you here than the jurisdictions overseas with which you are so familiar.

---

[11] To this charge I must, I suppose, plead guilty: see the reference below to *Jarndyce v Jarndyce*.

So it seemed to me, as one of the still small number of Chancery practitioners, and the most recent, who has been translated *in partibus infidelium*,[12] that it might be of interest to you if I said something about the Family Division and, in particular, those aspects of its work which intersect and engage with the work you do.

It is, of course, an inaccurate caricature, but I suspect that many who practise in the one Division think of those practising in the other as mere pedants; a feeling reciprocated by those who see the Family Division as lacking in curiosity and intellectual rigour and as painting with an excessively broad brush. You may recall Wilson J's memorable observation in his 2002 Atkin Lecture,[13] that "most of you will admit that your private perception of the Family Division is, in every sense, as the Third Division. The Leyton Orient of the High Court." His rejoinder, which I venture to echo, was "We are not the Third Division." The fact is that there is just as much intellectual ability, vigour and rigour in the one Division as the other. Both are concerned with the identification and application of *principle* but – and this accounts for many of the misconceptions – in forensic contexts which are very different.

I shall return to that point in a moment but may I first try and make good my general proposition by describing a really rather remarkable development which, I suggest, shows that there is no lack of intellectual vitality and creativity in the Family Division: I refer to the Family Division's development since 2000 of its re-discovered inherent jurisdiction in relation to adults who lack decision-making capacity.

At this point you will, I trust, permit me a historical diversion. In 1989 the House of Lords[14] had to consider whether it was lawful to sterilise an adult woman who lacked capacity to consent. The problem arose because in 1960, when the Mental Health Act 1959 was brought into force, whilst the inherent *parens patriae* jurisdiction in relation to an incapacitated adult's *financial* affairs was transferred to the (old) Court of Protection, the corresponding jurisdiction in relation to such an adult's *non-financial*

---

12 I was appointed to the Family Division in 2000. My predecessors were Bagnall J (1970), Arnold J (1972, President 1979), Balcombe J (1977, CA 1985), Waite J (1982, CA 1993), Rattee J (1989, transferred to ChD 1993) and Charles J (1998).

13 'The Misnomer of Family Law', [2003] Fam Law 29,

14 *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.

affairs was inadvertently abolished. So there was a gap in the law, which the House of Lords was able to plug by finding that the newly elaborated doctrine of necessity could render lawful in certain circumstances what would otherwise be a tortious or criminal invasion of the patient's body. At the same time, it held that the question of whether a proposed procedure would be lawful in a particular case could be determined by way of proceedings for a declaration.

So far, so good – and this solution has sufficed ever since as the basis for judicial decision-making in the medical or surgical context. But neat as this solution was, it had three great defects. First, it was tied to the doctrine of necessity, which was simply not apt to regulate many personal welfare decisions. Second, it assumed a traditional operation of the declaratory jurisdiction: but a declaration changes nothing, it is merely declaratory of the lawfulness or otherwise of a state of affairs. Third, since the jurisdiction was concerned fundamentally with declaring what was lawful, and since the benchmark of legality appeared, despite rhetorical references to the patient's best interests, to be whether what was proposed met the '*Bolam*' test[15] of professional negligence, the possibility remained that two diametrically opposed courses of conduct could both be lawful – with the consequence that a jurisdiction whose very purpose was to determine what should or should not be done, on occasions left the underlying question undetermined.[16]

The law was rescued from this dead end by two decisions of the Court of Appeal in 2000, shortly before the Human Rights Act 1998 came into force. One[17] framed the jurisdiction in terms which included reference to Article 8 of the European Convention on Human Rights and Fundamental Freedoms. The other[18] discarded the '*Bolam*' test in this context, asserted that the jurisdiction was indeed founded on an appraisal of the patient's best interests – best meant best, so in any given set of

---

15 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

16 The nadir was reached when a judge, loyally applying what the House of Lords had said, and faithfully giving effect to all the medical evidence he had heard, declared that it was lawful to sterilise the woman and also lawful not to sterilise her – the resulting order being quite useless to answer the question for the resolution of which the proceedings had been brought, namely whether or not she should be sterilised.

17 *In re F (Adult: Court's Jurisdiction)* [2001] Fam 38.

18 *In re S (Adult Patient: Sterilisation)* [2001] Fam 15.

circumstances there could only be one solution which was best – and held that the declaratory jurisdiction was akin to a welfare *parens patriae* jurisdiction.

The timing of these two decisions was fortunate, for it enabled the Family Division to explore the nature and extent of the jurisdiction, as it now had to, at a time when it had to hand the newly available tools of the Human Rights Act and the Convention. There were three drivers for the process. The first was the increasing volume of cases coming before the Family Division which involved non-medical issues to which the doctrine of necessity did not apply. The second was the delay in implementing the Law Commission's proposals which, dating from the mid-1990s, were not introduced until 2007, when the Mental Capacity Act 2005 was brought into force. The third was the obligation of the court as a public authority to comply with the Convention, which required the court to develop its jurisdiction in such a way as to give proper effect to the Article 8 rights of all involved. Unless the court moved beyond the limited jurisdiction assumed by the House of Lords, we would be in breach of our obligations under the Convention.

The outcome was the re-discovery – in plain language the invention – by the family judges of a full-blown welfare-based *parens patriae* jurisdiction in relation to incapacitated adults which is indistinguishable from the long established *parens patriae* jurisdiction in relation to children. A jurisdiction, moreover, which bears little relation to the declaratory jurisdiction as reinvigorated by the House of Lords in 1989. The result is that well before the Mental Capacity Act 2005 reached the statute book the inherent jurisdiction was already being exercised in a manner largely indistinguishable from the way in which the new Court of Protection now exercises its statutory 'personal welfare' jurisdiction under that Act.

Without the impetus of the Human Rights Act I doubt whether the jurisdiction could have developed so quickly or been extended so far. It has long been recognised that the common law is probably beyond child-bearing and the received wisdom is that equity's last progeny dates from the 1840s. But, appropriately perhaps, the Family Division is still able to give birth to a lusty infant, even if only with the assistance of a foreign midwife.

Yet, acknowledging that there is no lack of vitality, the Family Division is still seen, and still sees itself, as somewhere different. Nothing perhaps better exemplifies this than its inveterate practice of sitting in private. You will glad to hear that I do not propose to embark upon a consideration of that technical – indeed abstruse – topic, but, if you will bear with me, history illustrates just how long these attitudes have been entrenched.

You will no doubt recall the decision of the House of Lords in *Scott v Scott*,[19] endorsing in emphatic terms the principle of open justice. But what is interesting for present purposes is the history which it reveals. In 1857 there was set up by the Matrimonial Causes Act 1857 the Court for Divorce and Matrimonial Causes, replacing the ecclesiastical courts which had previously exercised jurisdiction in such matters. In 1859 the question arose as to whether or not the new court had power to sit in private. The question was considered by the Full Court (Sir Cresswell Cresswell, the Judge Ordinary, Williams J and Bramwell B).[20] All three judges denied that the court had any power to sit otherwise than in public. Bramwell B said:

> "If this had been the first application of the kind, I also should have thought it perfectly clear that this being a new court was constituted with the ordinary incidents of other English Courts of justice, and, therefore, that its proceedings should be conducted in public. Upon that question I should not have felt the slightest doubt; and the only doubt I now entertain is in consequence of this court having since it was established, on two occasions, sat in private. But in those cases I understand that that course was adopted with the consent of both parties, and that no discussion took place. In my opinion the court possesses no such power."

None the less, from about 1864 it became the practice of the court to hear nullity suits in camera, and that practice continued after the court for Divorce and Matrimonial Causes was subsumed into the newly established Probate Divorce and Admiralty Division by the Judicature Act 1873. The asserted justification was[21] that "the Ecclesiastical Courts would have had power to hear in camera any case which, for reasons of decency, ought so to be heard" and that "this court [has] inherited those

---

19 [1913] AC 417.
20 *H (Falsely Called C) v C* (1859) 29 LJ (P&M) 29.
21 *D v D, D v D and G* [1903] P 144, 148.

general powers." The House of Lords begged to differ, reinstating Bramwell B's decision. But some would say that even this has had little effect down the years in changing the mindset of family practitioners, a mindset based on a number of more or less firmly rooted preconceptions, beliefs and assumptions which, however inveterate and however distinguished those who hold them, can be a less than accurate guide to the true legal position.[22]

Cases on 'piercing the veil incorporation' provide an interesting insight into prevailing mentalities, even today. In one of the leading authorities from the Family Division, the judge referred to what he called two strands of authority – those decided in the company/commercial sphere and those decided in the family sphere. He commented that there did not seem to be any decided case in which the authorities in the family sphere had been considered in the company sphere and that in only one of the family cases had any of the company authorities been referred. He then proceeded to examine and compare what he referred to as the company law approach and the family law approach.[23] When I subsequently had to return to the same issues, I commented that:[24]

> "The reasons for this are not altogether obvious, though the cynic might say that it reflects the inveterate belief of those who practise in the Family Division that it is a law unto itself and of those who practise in the other two divisions that nothing of any interest, let alone intellectual rigour, is ever to be found in the Family Division."

In the same case I was driven to say of the wife's submissions on the point that her case was:[25]

---

22 See *Clibbery v Allan and another* [2001] 2 FLR 819, [21], appeal dismissed [2002] EWCA Civ 45, [2002] Fam 261.

23 *Mubarak v Mubarak* [2001] 1 FLR 673, 678-679. In fairness, there is one point that has to be borne in mind. As Bodey J has observed (682), "In practice, especially in "big money" cases, the husband (as I will assume) will often make a concession that company/trust assets can be treated as his, whereafter the case proceeds conveniently on that basis. It is pragmatic, saves expense and usually works. Problems such as have arisen in this case are rare and anyway can be avoided where there are other assets against which the lump sum order can be enforced." This enables what he called a "short-circuiting of the full company law route", for example the declaration of a dividend to the husband enabling him and/or the court then to transfer it onwards to the wife.

24 *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam), [2009] 1 FLR 115, [205].

25 Ibid, [149].

> "founded on an implicit assumption as to the relevant legal principles, which assumption, common, I suspect, to much thinking in this division, is simply not well founded."

I must return in due course to consider the point, and, indeed, some of the other instances of Family Division practice that may be of particular interest to you, but first I need to explore what it is that may be responsible, at least in part, for the Family Division mindset.

In the first place the vast bulk of the work done in the Family Division has to do with the consequences of breakdown in the most intense and emotionally fraught of all human relationships, those between people living together as a couple and those between parents and their children. The Chancery Division has its own experience of bitter personal disputes – we must all have had experience of bitterly acrimonious partnership litigation, contentious probate actions and other disputes over wills or the consequences of intestacy – but none of these can match in bitterness, acrimony and sheer human misery and despair the cases with which the family bench and bar deal on a daily basis. The focus is inevitably, and rightly, on the human problems; there is often understandable impatience if recourse is too readily had to what in such a fraught arena can sometimes seem to be unhelpfully technical rules.

A second, and fundamental, aspect of the work of the Family Division is the very high level of abstraction at which the most important principles of family law are formulated.

The two most important of these principles are those underpinning, respectively, the vast bulk of cases to do with children and that aspect of family money that family lawyers call ancillary relief. The first is to be found in section 1 of the Children Act 1989, the other in section 25 of the Matrimonial Causes Act 1973.

The principle that the interests of the child are paramount was developed by Chancery judges in the days before jurisdiction in wardship was transferred to the Family Division. Its antecedents go back deep into the nineteenth century, though I think I am right in saying that it first found voice in something like its modern form in a

judgment of Farwell J in 1902.[26] As a principle of judge made law it found definitive form in a decision of the House of Lords in 1924,[27] shortly before being put on a statutory basis in section 1 of the Guardianship of Infants Act 1925. The relevant provision is now section 1(1)(a) of the Children Act 1989: "When a court determines any question with respect to … the upbringing of a child … the child's welfare shall be the court's paramount consideration." Now that, as you will understand, leaves much to what is often referred to as the discretion of the judge, though I think the nature of the judicial task is better understood as being one of identifying and evaluating all those factors which, in the particular circumstances of the individual case, lead to the ultimate decision. Be that as it may, the consequence, of course, is that, since the only principle of law is that set out in section 1(1), and since the Court of Appeal cannot interfere with a decision of this type unless the judge is "plainly wrong", exceeding "the generous ambit within which reasonable disagreement is possible",[28] not merely is the family judge governed by a rule which contains no rules or principles beyond a statement of the objective which guides him (and which in the nature of things he is unlikely to forget or mis-state) but he is operating within a system where appeal is unlikely. Perhaps of no other area of the law can it more aptly be said that "on the same evidence two different minds might reach widely different conclusions without either being appealable."

All this is obvious and well understood. There is, however, a deeper point which has to be borne in mind and which has a particular resonance in the context of family law.

It is a well established principle of Strasbourg jurisprudence[29] that "A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." Nonetheless, the Strasbourg court recognises how "experience shows that absolute

---

[26] *F v F* [1902] 1 Ch 688, 689-690, "The Court … has regard before all things to the infant's welfare; … the essential requirements of the infant are paramount."

[27] *Ward v Laverty* [1925] AC 101, 109, "It is the welfare of the children, which, according to rules which are now well accepted, forms the paramount considerations in these cases". I suspect the two events were not unconnected, for Viscount Cave, who gave the only speech, was active in the Parliamentary process which led to the 1925 Act.

[28] *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, 651-652; *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372.

[29] *Olsson v Sweden* (1989) 11 EHRR 259, [61].

precision is unattainable and the need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague." Section 1, it might be thought, is a prime example of such a provision.

How then does one accommodate these two somewhat conflicting requirements? It may be helpful to bear in mind here Professor Dworkin's distinction[30] between the 'concept' which does not change and changing 'conceptions of the concept'.[31] He epitomises the distinction with his reference[32] to:

> "the proposition that … respect provides the concept of courtesy and that competing positions about what respect really requires are conceptions of that concept. The contrast between concept and conception is here a contrast between levels of abstraction."

The rule of law demands adequate statement of the 'concept' but recognises and, within appropriate limits, can accommodate the fact that 'conceptions of the concept' may change over time. That is why we do not pursue the chimerical search for what Judge Bork would call the 'original understanding' of the founding fathers; and that is why we recognise that our statute-law is, in Lord Thring's phrase,[33] deemed to be 'always speaking'.[34] As Lord Hoffmann has said,[35]

> "when a statute employs a concept which may change in content with advancing knowledge, technology or social standards, it should be interpreted as it would be currently understood. The content may change but the concept remains the same. The meaning of the statutory language remains unaltered. So the concept of a vehicle has the same meaning today as it did in 1800, even though it includes methods of conveyance which would not have been imagined by a legislator of those days. The same is true of social standards.

---

30 *Taking Rights Seriously*, 1977, pp 134–136 (where the discussion is by reference to the concept of 'fairness') and *Law's Empire*, 1986, pp 70–72 (where the discussion is by reference to the concept of 'courtesy').

31 See *R (Smeaton on behalf of the Society for the Protection of Unborn Children) v Secretary of State for Health (Schering Health Care Ltd and Family Planning Association as Interested Parties)* [2002] EWHC 610 (Admin) and [2002] EWHC 886 (Admin), [2002] 2 FLR 146, [323]–[325], *R (A, B, X and Y) v East Sussex CC (No 2)* [2003] EWHC 167 (Admin), (2003) 6 CCLR 194, [94]–[98], and CF v Secretary of State for the Home Department [2004] EWHC 111 (Fam), [2004] 2 FLR 517, [101].

32 *Law's Empire*, p 71.

33 Lord Thring, *Practical Legislation*, 1902, p 83.

34 *R v Ireland; R v Burstow* [1998] AC 147, 158.

35 *Birmingham City Council v Oakley* [2001] 1 AC 617, 631.

> The concept of cruelty is the same today as it was when the Bill of Rights 1688 … forbade the infliction of "cruel and unusual punishments" (section 10). But changes in social standards mean that punishments which would not have been regarded as cruel in 1688 will be so regarded today."

This is recognised, as one might expect, in the Strasbourg jurisprudence. The Strasbourg court[36] has described the European Convention as a "living instrument which must be interpreted in the light of present-day conditions."

Returning to section 1, the concept of the child's welfare or best interests as something central to decision-making in respect of the child has, as I have remarked, been part of our law for well over a century. But what is meant by 'welfare'? Not surprisingly, 'conceptions' of that 'concept' – what Lord Hoffmann would call the 'content' – have changed, and are continuing to change. For as Lord Upjohn famously observed in 1969:[37]

> "the law and practice in relation to infants … have developed, are developing and must, and no doubt will, continue to develop by reflecting and adopting the changing views, as the years go by, of reasonable men and women, the parents of children, on the proper treatment and methods of bringing up children; for after all that is the model which the judge must emulate for … he must act as the judicial reasonable parent."

It is probably no accident that when considering the concept of a child's welfare in 1892, Lindley LJ should have put money first in his list, though he was at pains to point out that the welfare of the child was not to be measured by money only, nor by physical comfort only.[38] One can be confident that no judge in the Family Division would decide a case today by reference to the same standards as would have been applied by a judge in the Chancery Division in 1925. But that is not, of course, to make an illicit comparison between the two Divisions; it is merely a reflection of how

---

36 *Selmouni v France* (2000) 29 EHRR 403, [101].
37 *J and Another v C and Others* [1970] AC 668, 722.
38 *In re McGrath (Infants)* [1893] 1 Ch 143, 148.

enormously our society has changed since the statutory principle was first enacted and, indeed, is continuing to change.[39]

Lord Hoffmann referred, as we have seen, to "advancing knowledge, technology or social standards". The cases in fact suggest that there are at least four different types of change which the law has to recognise and which the doctrine of the 'always speaking' statute may have to accommodate when an elderly statute is to be applied in modern conditions: first, changes in our understanding of the natural world (for example, developments in psychiatry[40]); second, technological changes (for example, the invention of the telephone[41] or of the new types of vehicle referred to by Lord Hoffmann or changes and advances in medical technology[42]); third, changes in social standards (for example, improving standards of hygiene[43]); and, fourth, changes in social attitudes (for example, attitudes to homosexuality[44] and to punishment).

Now this has a particular resonance for family lawyers. There have been very profound changes in family life in recent decades, driven by four major developments.[45] First, there have been enormous changes in the social and religious life of our country. We live in a secular and pluralistic society, in a multi-cultural community of many faiths. Second, there has been an increasing lack of interest in – in some instances a conscious rejection of – marriage as an institution. Moreover, marriage itself as an institution has changed enormously in recent decades.[46] Third, there has been a sea-change in society's attitudes towards same-sex unions. Fourth,

---

39 One need only contrast the outcome in *J v C* itself with the outcome in *Re M (Child's Upbringing)* [1996] 2 FLR 441 to see the extent to which judicial attitudes in such matters had changed between 1967 and 1995.

4040 *R v Ireland; R v Burstow* [1998] AC 147, *White and Others v Chief Constable of South Yorkshire Police and Others* [1999] 2 AC 455 and *Morris v KLM Royal Dutch Airlines; King v Bristow Helicopters Ltd* [2002] UKHL 7, [2002] 2 WLR 578.

41 *Attorney-General v The Edison Telegraph Company of London (Limited)* (1880) 6 QBD 244 and *R v Ireland; R v Burstow* [1998] AC 147.

42 *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, *R (Quintavalle) v Secretary of State for Health* [2002] EWCA Civ 29, [2002] 2 WLR 550 and *R (Smeaton on behalf of the Society for the Protection of Unborn Children) v Secretary of State for Health (Schering Health Care Ltd and Family Planning Association as Interested Parties)* [2002] EWHC 610, [2002] 2 FLR 146.

43 *Birmingham City Council v Oakley* [2001] 1 AC 617.

44 *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

45 See *Pawandeep Singh v Entry Clearance Officer, New Delhi* [2004] EWCA Civ 1075, [2005] QB QB 608, [61]-[66].

46 *Sheffield City Council v E and another* [2004] EWHC 2808 (Fam), [2005] Fam 326, [110]-[131].

there have been enormous advances in medical, and in particular reproductive, science and technology. Reproduction is no longer confined to 'natural' methods. Many children today are born as a result of 'high-tech' IVF methods almost inconceivable even a few years ago. The result is that in our multi-cultural and pluralistic society the family takes many forms. Indeed, in contemporary Britain the family takes an almost infinite variety of forms. Family law – and the demands of section 1 – have to adapt to this ever changing reality. This results, understandably, in a focus on disciplines such as sociology and psychology as much as on the law.

All these factors no doubt play their part in the fact that there has been surprising little analysis, either by the judges or, indeed, by academics, as to what exactly is meant by a child's 'welfare' or 'best interests. The omission – what might be thought a lack of interest and curiosity – has not escaped criticism, in particular in the High Court of Australia:[47]

> "the best interests approach does no more than identify the person whose interests are in question: it does not assist in identifying the factors which are relevant to the best interests of the child … the best interests approach offers no hierarchy of values which might guide the exercise of a discretionary power … much less any general legal principle which might direct the difficult decisions to be made … by … courts. It … must be remembered that, in the absence of legal rules or a hierarchy of values, the best interests approach depends upon the value system of the decision-maker. Absent any rule or guideline, that approach simply creates an unexaminable discretion in the repository of the power … by transforming a "complex moral and social question" into a question of fact, the best interests approach leaves the court in the hands of "experts" who assemble a dossier of fact and opinion on matters which they deem relevant "without reference to any check-list of legal requirements"."

[47] *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 270, 272 (Brennan J). To similar effect, McHugh J, 320.

The English courts remain unrepentant. Judges of the Family Division who were, at the Bar, distinguished Chancery practitioners, are amongst the many disdainful of attempts to meet the objection. So, for example, Balcombe LJ said:[48]

> "I do not know of any demand by the judges who have to deal with these cases at first instance for this court to assist them by laying down any test beyond that which is already the law: that the interests of the ward are the first and paramount consideration, subject to the gloss on that test which I suggest, that in determining where those interests lie the court adopts the standpoint of the reasonable and responsible parent who has his or her child's best interests at heart."

To similar effect, Waite LJ in another medical case said:[49]

> "All these cases depend on their own facts and render generalisations - tempting though they may be to the legal or social analyst - wholly out of place."[50]

And the judges have been at best unsupportive of, and in some instances opposed to, suggestions that the 1989 Act might be amended, for example, to suggest a presumption that a child's welfare is likely to be best met by being cared for within the family, and by maintaining a meaningful relationship with an absent parent, or even, as some propose, a presumption of joint-parenting arrangements in such cases.

Before turning to consider section 25 of the 1973 Act, can I first digress to consider a jurisdiction which is shared between the judges of the two Divisions – that exercised in accordance with the Mental Capacity Act 2005?

---

48 *In re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33, 52.

49 *In re T (A Minor) (Wardship: Medical Treatment)* [1997] 1 WLR 242, 254.

50 I might add that, whatever its undoubted importance, matters are not much assisted in this respect by the so called 'welfare check-list' in section 1(3) which requires the court to "have regard in particular to –

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
(b) his physical, emotional and educational needs;
(c) the likely effect on him of any change in his circumstances;
(d) his age, sex, background and any characteristics of his which the court considers relevant;
(e) any harm which he has suffered or is at risk of suffering;
(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
(g) the range of powers available to the court under this Act in the proceedings in question."

For the judges of the Family Division making 'personal welfare' decisions under the 2005 Act it is, by and large, pretty much 'business as usual'. For the principles set out in the Act and applied in the (new) Court of Protection are in many ways little more than a codification of the principles which the judges of the Division had been working out as they developed the *parens patriae* jurisdiction in relation to incapacitated adults.[51]

For the judges of the Chancery Division, on the other hand, exercising jurisdiction in relation to statutory wills and settlements, the Act marks a radical and fundamental break with the past. For the Act puts an end to a difference of approach in the two Divisions which was rarely noticed and, so far as I am aware, was never explained. And, if my old friends in the Chancery Division will permit me the jibe, it is the Family Division which has won.

Let me elucidate, adopting some terminology which is probably more familiar in the discourse of medical lawyers than elsewhere.

Ever since the decision of Lord Eldon LC in *ex p Whitbread*,[52] the Chancery judges, whether exercising the old *parens patriae* jurisdiction or, more recently, jurisdiction in the 'old' Court of Protection, had adopted a subjective, 'substituted judgment' test, that is to say, they attempted to ascertain and then implement the decision which the patient, if competent, would have made for himself. This process reached its intellectual apotheosis in a well-known judgment of Megarry V-C[53] before ending up in the cul-de-sac identified by Hoffmann J.[54] It was a process which, as Lewison J has justly observed,[55] required the judges to perform "mental gymnastics." In stark contrast, the judges of the Family Division always applied an objective 'best interests' test, that is to say, they decided what, on an objective analysis of the circumstances, was in the best interests of the patient. The two approaches were, conceptually, quite different and were, in principle, capable of reaching different outcomes on the same set of facts.

---

51 *Re BJ (Incapacitated Adult)* [2009] EWHC 3310 (Fam), [2010] 1 FLR 1373, para [22].
52 (1816) 2 Mer 99.
53 *In re D (J)* [1982] Ch 237.
54 *Re C (A Patient)* [1992] 1 FLR 51.
55 *In re P (Statutory Will)* [2009] EWHC 163 (Ch), [2010] Ch 33.

Now why this should have been so has never, so far as I am aware, been considered as a matter of either legal history or jurisprudence. And this is not the occasion to explore something which is no longer of any practical relevance. But I suspect that it had something to do with the fact that until recently the judges were simply not concerned at all with what we would now call 'personal welfare decisions' – until recently the question of where and with whom the patient should live was merely subsumed in the wider questions of whether the patient should be detained in an asylum or, if not, how his money should be applied to his maintenance –; and that when, very recently, the judges *did* become involved with such questions it was, as the result of a procedural quirk, the judges of the Family Division who assumed the task and who, hardly surprisingly, had recourse to the tools with which they were most familiar: specifically, the 'best interests' test which, as we have seen, had been the touchstone of the inherent jurisdiction for over a century.

Be all that as it may, the simple fact, as you will know, is that the 2005 Act makes the incapacitated person's 'best interests' determinative in *all* contexts. Thus, in the context of statutory wills and property affairs generally the Act marks a radical change in the treatment of persons lacking capacity. And it follows that the guidance in the old cases about the making of settlements or wills can no longer be directly applied to a decision being made under the Act; indeed, the old authorities are best consigned to history.[56]

So, at the end of the day, it all comes down to 'best interests'. But what, in the context of a statutory will, do we mean by best interests? At this point one needs, I think, to face up to a central difficulty in the application of the concept of someone's best interests to their testamentary dispositions. It is fundamental – and one sees this in particular in the medical cases – that the search for someone's best interests necessarily focuses on *their* best interests, not those of third parties or of society as a whole, and that benefits accruing to a third party are material only insofar as they further the interests of the patient. The principle is exemplified by two well-known cases, though one is probably better known in the Chancery Division and the other in

[56] *Re M, ITW v Z and others* [2009] EWHC 2525 (Fam), [2009] WTLR 1791.

the Family Division: *In re Clore's Settlement Trusts*[57] and *In re Y (Mental Patient: Bone Marrow Donation)*.[58] But how can this analysis apply in the case of a will, which necessarily take effect only on death? And what, indeed, are the interests – never mind the best interests – which P can sensibly be said to have in the testamentary provisions made on his behalf by another? It is a variant of the problem with which the House of Lords had to tussle in the *Bland* case[59] when grappling with the concept of the best interests of the insentient patient in a permanent vegetative state. The answer can only be that given by Lewison J:[60]

> "But what will live on after P's death is his memory; and for many people it is in their best interests that they be remembered with affection by their family and as having done "the right thing" by their will. In my judgment the decision maker is entitled to take into account, in assessing what is in P's best interests, how he will be remembered after his death."

It is an analysis which accords entirely with the powerful analysis of Hoffmann LJ in *Bland*.[61]. It is surely right.

But the area where the worlds of Chancery and Family most obviously come into contact, and sometime collision, is in the context of ancillary relief, the award of financial relief on divorce.

The Family Division has a virtually unfettered jurisdiction to divide up the matrimonial assets – not merely jointly held assets but the assets of each spouse – allocating, and if appropriate transferring, them between the spouses. On what basis if this sweeping jurisdiction exercised? The answer is provided by section 25 of the Matrimonial Causes Act 1973:

> "(1) It shall be the duty of the court in deciding whether to exercise its powers … and, if so, in what manner, to have regard to all the circumstances

---

57 [1966] 1 WLR 955 (payment away of trust monies to a third party for "benefit" of beneficiary if it enables him thereby to discharge what he recognises to be his moral obligation to the third party).

58 [1997] Fam 110 (bone marrow donation by adult incompetent to be determined by best interests of the donor, not the donee, notwithstanding that the donee would die if the transplant did not take place); a case which illustrates vividly that the operation of a best interests test can involve mental gymnastics every bit as tortuous as those sometimes necessitated by a substituted judgment test.

59 *Airedale NHS Trust v Bland* [1993] AC 789.

60 *In re P (Statutory Will)* [2009] EWHC 163 (Ch), [2010] Ch 33, [44]. See also *Re M, ITW v Z and others* [2009] EWHC 2525 (Fam), [2009] WTLR 1791, [38].

61 *Airedale NHS Trust v Bland* [1993] AC 789, 829.

of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

(2) … the court shall in particular have regard to the following matters –

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring."

Section 25 identifies no statutory objective for the court and lays down no hierarchy in relation to the factors to be taken into account, though recent decisions of the House of Lords identify three main distributive principles: needs, compensation and sharing, shaped by the overarching requirement of fairness and equality as between husband and wife.[62]

[62] *White v White* [2001] 1 AC 596 and *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618.

Although the statutory approach is rather different – in the one case there is, in the other there is no, identified statutory objective or overarching criterion – section 25 of the 1973 Act shares with section 1 of the 1989 Act the characteristic feature that the discretion is very wide. As Lord Hoffmann has said:[63]

> "the exercise of the discretion … in accordance with section 25 requires the court to weigh up a large number of different considerations. The Act does not … lay down any hierarchy. It is one of the functions of the Court of Appeal, in appropriate cases, to lay down general guidelines on the relative weights to be given to various factors in different circumstances … These guidelines, not expressly stated by Parliament, are derived by the courts from values about family life which it considers would be widely accepted in the community. But there are many cases which involve value judgments on which there are no such generally held views. The present case is a good example. Which should be given priority? The wife's desire to continue to live in the matrimonial home where she can conveniently carry on her business and accommodate her sons, or the husband's desire to return to England and establish himself here securely with his new family? In answering that question, what weight should be given to the history of the marriage and the respective contributions of the parties to the family assets? These are value judgments on which reasonable people may differ. Since judges are also people, this means that some degree of diversity in their application of values is inevitable and, within limits, an acceptable price to pay for the flexibility of the discretion conferred by the Act of 1973. The appellate court must be willing to permit a degree of pluralism in these matters."

And herein, of course, lie the seeds of the problems I want to consider this evening.

There are, perhaps, four particular situations in which, in relation to ancillary relief, the two rather different worlds may collide. The first relates to bankruptcy. There are many issues, both technical in their nature but profoundly practical in their consequences which will arise if one of the spouses – typically the husband – is made bankrupt. That is a very large topic on which I hope you will forgive me if I have nothing to say. These are, by and large, matters for the bankruptcy court. But there is

---

63 *Piglowska v Piglowski* [1999] 1 WLR 1360, 1373.

one situation in particular in which the Family Division .may sometimes become involved: where the husband, in the face of pending or anticipated ancillary relief proceedings has himself made bankrupt on his own petition. The instinctive reaction of the family practitioner is often to assume that this is merely a device to enable the husband to defeat his wife's claims, and that proof of that fact should lead to the annulment of the bankruptcy in accordance with section 282(1)(a) of the Insolvency Act 1986.

Sometimes the wife's suspicions will be groundless. In one case[64] the litigation simply collapsed under the unsustainable burden of paying costs which, in circumstances too reminiscent of *Jarndyce v Jarndyce*, had long since become wholly disproportionate to anything at stake and which, well before the final hearing, had swallowed up a grotesquely large proportion of the never very substantial assets, with ultimately ruinous consequences for the parties. The husband, perhaps understandably, saw no escape from the debacle other than via bankruptcy.

Sometimes, of course, there may be more substance in the wife's fears, for you will not be surprised to hear that it is a commonplace of ancillary relief proceedings that husbands are often tempted to resort to devices and stratagems in an attempt to put their assets beyond the reach of their wives. But, as I hardly need to tell you, the ultimate question on an application for annulment is whether, at the date of the order, the husband was "unable to pay his debts." If in fact he was 'unable to pay his debts', the fact that his motive may have been to spite the wife and frustrate her claim to ancillary relief is neither here nor there. If his motive was corrupt then no doubt the court will scrutinise with some care the self-serving assertion that he was insolvent, but if satisfied that he was indeed insolvent then the court cannot annul the bankruptcy order under s 282(1)(a).[65]

---

64 *KSO v MJO and JMO (PSO Intervening)* [2008] EWHC 3031 (Fam), [2009] 1 FLR 1036, [75]. For the references to *Jarndyce v Jarndyce*, see [80], [82].

65 *Whig v Whig* [2007] EWHC 1856 (Fam), [2008] 1 FLR 453, [54], applying *In re Holliday (a Bankrupt) ex parte Trustee of the Property of the Bankrupt v Holliday and Another* [1981] Ch 405 and *Re Dianoor Jewels Ltd* [2001] BPIR 234 (the latter case an outcrop of the *Mubarak* litigation).

In one case which came before me, counsel unwisely referred to the authorities in point as displaying what he was pleased to call "the strict approach advocated by Chancery judges." I am afraid that I dealt with him rather sharply:[66]

> "I do not understand the observation. The High Court of Chancery and the Court for Divorce and Matrimonial Causes were both abolished by the Judicature Acts. Ever since then, as Vaisey J once observed … , there has been only the one court – the High Court of Justice – and all the judges of that court are simply judges of the High Court."

Having quoted the relevant passage from *Re Hastings*, I continued:

> "Nigh on 50 years have passed since those words were uttered, yet the illusion that there is some special inspiration of common sense infusing the family judges and which is lacking in our brethren in the Chancery Division – an illusion no doubt fostered by our inveterate practice of sitting in private – seems to be as prevalent today as ever. It cannot be stressed too much that there is simply no basis for this illusion."

I went on to quote what I had recently said in another case where, having observed that the Family Division cannot simply ride roughshod over established principle, least of all where there are, or appear to be, third party interests involved, I said:[67]

> "It is important to appreciate (and too often, I fear, is not appreciated at least in this Division) … that the relevant legal principles which have to be applied are precisely the same in this Division as in the other two Divisions. There is not one law of "sham" in the Chancery Division and another law of "sham" in the Family Division. There is only one law of "sham", to be applied equally in all three Divisions of the High Court, just as there is but one set of principles, again equally applicable in all three Divisions, determining whether or not it is appropriate to "pierce the corporate veil"."

I added:

> "the same I might add – one really ought not to have to emphasise the point – goes for the law and practice relating to the annulment of bankruptcy orders … The Family Division applies precisely the same principles, and in precisely

---

66 *Whig v Whig* [2007] EWHC 1856 (Fam), [2008] 1 FLR 453, [57]-[61].

67 *A v A (St George Trustees Ltd, Interveners)* [2007] EWHC 99 (Fam), [2007] 2 FLR 467, [19], [21].

> the same way, as the Chancery Division, or for that matter the Queen's Bench Division. A creditor is not to be prejudiced because a wife's application to annul the bankruptcy order on which he depends is heard by a Family Division judge (more properly, as Vaisey J explained, a judge of the High Court who is assigned for the time being to the Family Division) any more than a wife is to be prejudiced because her application is heard by a Chancery judge."

As those quotations suggest, another situation in the context of ancillary relief in which the two different worlds may collide is where, as part of the dispute between the spouses, some issue arises in respect of third party rights. There are many situations in which such points may arise. The wife may allege that some asset in the name of her father-in-law is held by him as nominee for her husband and is therefore available for distribution in the ancillary relief proceedings. Or the mother-in-law may allege that she has some share or interest in the matrimonial home which accordingly is not available to the spouses but on the contrary ought to be paid out to her.[68] The wife may allege that some trust is a sham.[69] She may allege that some property vested in a company is in fact held by the company on trust for the husband, or that shares in the company are held by the shareholders as nominees for the husband, or even that she is entitled to 'pierce the veil of incorporation'.[70]

Now cases such as these give rise to a number of considerations. The first I have already touched on. The Family Division has to address such claims on a properly principled basis, applying the same law as would be applied in any other Division. As I recently had occasion to remark,[71] in response to the submission that an ancillary relief appeal should not be determined on the basis of what counsel called "the strict application of the law in relation to agency", the Family Division is part of the High Court. "It is not some legal Alsatia where the common law and equity do not apply. The rules of agency apply there as much as elsewhere." Advocates from the family

---

68 For an example see *KSO v MJO and JMO (PSO Intervening)* [2008] EWHC 3031 (Fam), [2009] 1 FLR 1036.

69 *A v A (St George Trustees Ltd, Interveners)* [2007] EWHC 99 (Fam), [2007] 2 FLR 467.

70 *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam), [2009] 1 FLR 115.

71 *Richardson v Richardson* [2011] EWCA Civ 79, [2011] 1 FCR 301, [51], [53]. I added that in applying those rules one must have regard to the context.

bar are fond of quoting Coleridge J's observation[72] that "sophisticated offshore structures are very familiar nowadays to the judiciary who have to try them. They neither impress, intimidate, nor fool any one. The courts have lived with them for years." That, of course, is correct. The court should adopt a robust, questioning and, where appropriate, sceptical approach. The court ought, in appropriate cases, to deal robustly with husbands who seek to obfuscate or to hide or mask the reality behind shams, artificial devices and similar contrivances.

But, as I have said, the court cannot simply ride roughshod over established principle. Even in the Family Division, a spouse who seeks to extend her claim for ancillary relief to assets which appear to be in the hands of someone other than her husband must identify, and by reference to established principle, some proper basis for doing so. The court cannot grant relief merely because the husband's arrangements appear to be artificial or even 'dodgy'.[73] In particular, the Family Division must give effect to the fundamental principle of company law that even a 'one man company' is, in law, an entity distinct from its owner and controller and to all the well recognised consequences of a company's separate legal persona.[74]

Of course, in deciding how these principles operate in any particular case, the court will have regard to the particular context and to the particular factual matrix. Thus it may be easier, for example, to 'pierce the corporate veil' in the context of a small family company than in some larger-scale or more purely commercial context. And the inferences that can properly be drawn in the case of an asserted resulting trust may differ, even in a family context, depending upon the nature of the relationship between the parties; an inference appropriate in the case of a married couple may not be appropriate in the case of an unmarried couple, whilst an inference appropriate in the case of a couple (whether married or unmarried) may be wholly inappropriate as between siblings. In this sense, and to this limited extent, the typical case in the

---

72 *J v V (Disclosure: Offshore Corporations)* [2003] EWHC 3110 (Fam), [2004] 1 FLR 1042, [130].

73 *A v A (St George Trustees Ltd, Interveners)* [2007] EWHC 99 (Fam), [2007] 2 FLR 467, [17].

74 See, respectively, *Aron Salomon (Pauper) v A Salomon and Company Ltd; A Salomon and Company Ltd v Aron Salomon* [1897] AC 22 and *Macaura v Northern Assurance Company, Limited, and Others* [1925] AC 619, 626, 633, considered in *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam), [2009] 1 FLR 115, [101]-[108].

Family Division may differ from the typical case in (say) the Chancery Division. But that is all.[75]

This of course produces a forensic tension, because the task of the judge determining a dispute as to ownership between a spouse and a third party is completely different in nature from the familiar discretionary exercise between spouses under section 25.[76] As Hughes LJ said recently:

> "It is certainly true that the law to be applied to the issue between the wife and the [third parties] differs importantly from the law to be applied between husband and wife. On the ancillary relief claim, as between wife and husband, the court is required to perform an essentially inquisitorial and then discretionary exercise … When determining the issue between the [third parties] and the wife as to who owns what and what if any control the husband retains over the assets in question, the court is not performing a discretionary exercise but is determining issues of property law and associated fact. It is salutary for family practitioners to keep the distinction clearly in mind."

The next considerations are procedural. Generally speaking,[77] it is necessary to ensure that the relevant third parties are joined.[78] There are two reasons for this. The first is that before the judge can embark upon the exercise of his discretion under section 25, he needs to know what is available for distribution, what the marital assets are. The other is to ensure that the third parties are bound by the outcome; if the third party is joined there will be an issue estoppel binding the third party, otherwise there will not.[79] And there are important procedural reasons for doing so, as Hughes LJ has explained:[80]

> "it is desirable to equip a single court with the means of deciding all relevant connected issues within the same proceedings and to avoid a multiplicity of different and potentially conflicting proceedings … They will have to be

---

75 *A v A (St George Trustees Ltd, Interveners)* [2007] EWHC 99 (Fam), [2007] 2 FLR 467, [20]-[21].

76 *TL v ML (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263, [34].

77 But see *Gourisaria v Gourisaria* [2010] EWCA Civ 1019, [2010] 3 FCR 233.

78 *Goldstone v Goldstone* [2011] EWCA Civ 39, [2011] 1 FCR 324.

79 *Tebbutt v Haynes* [1981] 2 All ER 238, 244, 245, *.A v A (No 2) (Ancillary Relief: Costs)* [2007] EWHC 1810 (Fam), [2008] 1 FLR 1428, [249],

80 *Goldstone v Goldstone* [2011] EWCA Civ 39, [2011] 1 FCR 324, [57], [66].

> determined according to ordinary principles of property law in exactly the same way as they would be determined if they arose in free-standing Chancery proceedings. But to say that is not at all the same thing as to say that they must be separated from the family proceedings to which they are directly critical. The latter proposition would tend towards a reversion to the forms of action and to the days before the court unification accomplished by the Judicature Act 1875. If the interests of justice are served by it, the same judge can and should determine both of them, and the rules of court are designed to enable him to do so."

If the proceedings should all be in the same court, in which Division ought they to proceed? Conforming to stereotypes, spouses seem always to argue for the Family Division, the third parties for the Chancery Division. Sometimes the arguments are strenuous, no doubt reflecting the seemingly common assumption that the spouse will do better in the one and the third party in the other.[81] That the appropriate forum will usually be the Family Division has been pretty clear since at least 1976.[82] And, after all, at the end of the day it should not make any difference in which Division the case is heard. As I said in one case where I was trying both ancillary relief proceedings and related proceedings which had been transferred from the Chancery Division,[83]

> "The outcome of the Chancery proceedings cannot depend upon whether the case is heard, where it started, in the Chancery Division or, where it has been transferred, in the Family Division, any more than it can depend upon whether it is heard by a 'Chancery judge' or a 'Family Judge'."

There are usually no pleadings in the Family Division, but experience suggests[84] that there is advantage in directing pleadings in any but the simplest case where third party interests are in issue. Pleadings ensure that everyone has a much clearer idea, and at a much earlier stage, as to exactly what she is or is not being asserted, whether by way of claim or defence. Moreover, as hard experience unhappily demonstrates, the

---

81 For an example, see *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam), [2009] 1 FLR 115, [13].

82 *Williams v Williams* [1976] Ch 278.

83 *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam), [2009] 1 FLR 115, [99].

84 See *TL v ML (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263, [34]-[36], *KSO v MJO and JMO (PSO Intervening)* [2008] EWHC 3031 (Fam), [2009] 1 FLR 1036, [54]-[55].

muddle, confusion and ambiguities which too often characterise such cases is more pitilessly exposed, and at a much earlier stage in the proceedings, if the presentation of the wife's case has been exposed to the intellectual discipline which is one of the advantages of any system of pleading.

The third matter which the Chancery practitioner may have to consider in the context of ancillary relief is the principle in *Thomas v Thomas*. The classic statement of principle is that of Waite LJ in the eponymous case:[85]

> "the court is not obliged to limit its orders exclusively to resources of capital or income which are shown actually to exist … where a spouse enjoys access to wealth but no absolute entitlement to it (as in the case, for example, of a beneficiary under a discretionary trust or someone who is dependent on the generosity of a relative), the court will not act in direct invasion of the rights of, or usurp the discretion exercisable by, a third party. Nor will it put upon a third party undue pressure to act in a way which will enhance the means of the maintaining spouse. This does not, however, mean that the court acts in total disregard of the potential availability of wealth from sources owned or administered by others. There will be occasions when it becomes permissible for a judge deliberately to frame his orders in a form which affords judicious encouragement to third parties to provide the maintaining spouse with the means to comply with the court's view of the justice of the case. There are bound to be instances where the boundary between improper pressure and judicious encouragement proves to be a fine one, and it will require attention to the particular circumstances of each case to see whether it has been crossed."

Given the language of section 25(2)(a), the central question in such a case is whether, if the husband were to request an advance from the trustees, they would be *likely* to agree, either now or *in the foreseeable future*.[86]

Now this inquiry typically involves an investigation of three things. First, one needs to identify what powers the trustees have and whether their exercise of any relevant power is subject to the consent of a third party. Trustees are fiduciaries and must

---

85 *Thomas v Thomas* [1995] 2 FLR 668, 670.

86 *Charman v Charman* [2005] EWCA Civ 1606, [2006] 1 WLR 1053, [12].

exercise any power accordingly, but a third party whose consent is required – for example, a tenant for life – is not a fiduciary and is entitled to give or withhold her consent whether (so far as concerns anyone else) her reasons are good, bad or indifferent and even if they are (or appear to others to be) based upon whim or prejudice, like or dislike. The parties and the court have to take her as they find her and, as against her, there can be no question of exerting any 'judicious encouragement'.[87] Second, one looks to how the trustees have exercised their powers in the past. This is a simple question of fact. Third, one looks to predict what may happen in future. In relation to this, the evidence of the trustees, if they choose to give evidence, may, depending on the circumstances, be decisive, for example in demonstrating that 'judicious encouragement' is unlikely to prove fruitful.[88]

Another point that needs to be borne in mind is that all the court can do under *Thomas v Thomas* is to seek to persuade, it cannot compel. If the trustees disregard the court's encouragement, the court has no power to compel them to make a transfer, for only property owned by a party to the marriage can be the subject of a property adjustment or other order under the 1973 Act.[89]

This leads on to an important procedural point. I have explained why, normally, if there are claims affecting a third party, the third party should be joined. If there is a claim against trustees – for example, an allegation that the trust is a sham – amounting to what Lightman J has described as a hostile trust dispute,[90] then the trustees must be joined if they are to be bound.[91] But a *Thomas v Thomas* claim (for example in respect of a spouse who is the beneficiary under a discretionary trust) is very different, for it usually proceeds on the assumption that the trust is entirely genuine, that the trustees are conscientiously acting in that capacity and that they will exercise their fiduciary powers bona fide and in a lawful manner.[92] It does not involve a hostile trust dispute, nor in such a case is any relief being sought against them. So in such a case there is no

---

87 *C v C (Ancillary Relief: Trust Fund)* [2009] EWHC 1491 (Fam), [2010] 1 FLR 337, [15]-[20].

88 See *A v A (St George Trustees Ltd, Interveners)* [2007] EWHC 99 (Fam), [2007] 2 FLR 467, [97]-[100], Re C.

89 *A v A (St George Trustees Ltd, Interveners)* [2007] EWHC 99 (Fam), [2007] 2 FLR 467, [95].

90 *Alsop Wilkinson (a Firm) v Neary* [1996] 1 WLR 1220, 1223,

91 *A v A (No 2) (Ancillary Relief: Costs)* [2007] EWHC 1810 (Fam), [2008] 1 FLR 1428, [248].

92 *Charman v Charman* [2005] EWCA Civ 1606, [2006] 1 WLR 1053, [12], [60] (an assumption, incidentally, that would sit rather uneasily with a suggestion that the trust is a sham: cf *A v A (St George Trustees Ltd, Interveners)* [2007] EWHC 99 (Fam), [2007] 2 FLR 467, [16], [27], [30].

need for the trustees to be joined and it is undesirable that they should be, not least because of the inevitable lengthening of the proceedings and consequential increase in costs.[93]

The fourth and final aspect of ancillary relief that I want to consider arises out of the Family Division's jurisdiction under section 24(1)(c) of the 1973 Act to vary any ante-nuptial or post-nuptial settlement. This jurisdiction has been vested in the Family Division and its ancestors since 1859.[94] Two features are important. In the first place it is not confined to what a Lincoln's Inn conveyancer would think of as a settlement. Virtually any arrangement in relation to property which makes continuing provision for one or other of the spouses will be caught by the section so long only as it is 'nuptial' in nature.[95] Second, the court's powers are much less constricted than any of the powers of variation of trusts exercisable by the Chancery Division, so I doubt that any useful analogies are to be drawn from the jurisdictions with which you are more familiar.

How is the jurisdiction to be exercised? The guiding principle identified in 1899 by Gorell Barnes J is no longer of any relevance given the modern law of divorce. He said:[96]

> "Where the breaking up of the family life has been caused by the fault of the respondent, the Court, exercising its powers under the … section, ought to place the petitioner and the children in a position as nearly as circumstances will permit the same as if the family life had not been broken up."

He continued:

> "It follows that where the trust funds are settled, as is usual, upon the parents successively, or upon one of them for life, with remainder to the children, the Court, while it might extinguish the whole or a part of the guilty parent's life interest and his or her power of appointment, if any, amongst the children, would not interfere to deprive the children of those interests to which they are entitled under the settlement."

---

93 *A v A (No 2) (Ancillary Relief: Costs)* [2007] EWHC 1810 (Fam), [2008] 1 FLR 1428, [246].
94 Matrimonial Causes Act 1859, section 5.
95 *Brooks v Brooks* [1996] AC 375.
96 *Hartopp v Hartopp and Akhurst* [1899] P 65, 72.

The modern theory is that the jurisdiction is to be exercised in accordance with the general principles set out in section 25, the objective being to achieve a result which, so far as possible, is fair to both sides.[97] Now this is all very well, but how do the interests of the children, who will typically also be beneficiaries under the settlement, fit in? The modern jurisprudence is not that illuminating, but the approach seems to be that the court ought to be very slow to deprive the children or other innocent third parties of their rights under the settlement. If their interests are to be adversely affected then the court, looking at the wider picture, will normally seek to ensure that they receive some benefit which, even if not pecuniary, is approximately equivalent, so that they do not suffer substantial injury.[98] After all, and when all is said and done, the statutory jurisdiction is a jurisdiction to 'vary', not a jurisdiction to confiscate.

As anyone who has studied the case-law under section 24(1)(c) will appreciate, just as will anyone familiar with the various jurisdictions to vary trusts exercisable by the Chancery Division, 'benefit' is a wide and elastic concept. And 'benefit' can be found in circumstances which would leave the untutored layman puzzled or even astonished.[99] But there is a limit to how far one can legitimately take the concept.[100] Just how far you will have to battle out with your colleagues at the Family bar.

It was generous of you to ask someone who you may think has 'gone native' to talk to you this evening. It has been a great privilege. If you feel that what I have had to say is inappropriately autobiographical I can only apologise. I merely hope that it will have been of some interest and that it will not deter you from venturing into what may be an unfamiliar place. Conscious that the shade of the late Sir Harry Bevir Vaisey would disapprove, I have to report that, even today, the Family Division is very different from the Chancery Division. But if the Family bar will pardon the thought, there are cases in the Family Division where the Chancery bar has something very valuable to contribute, even though my experience is that, for reasons which elude me, few of you seem to feel up to the challenge!

---

97 *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam), [2009] 1 FLR 115, [286]-[287].

98 Ibid, [290].

99 *In re Clore's Settlement Trusts* [1966] 1 WLR 955 springs to mind.

100 *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam), [2009] 1 FLR 115, [297].