legislation which can result in fatherless children, or whether judgments of the European Court of Human Rights which require more than proof of a genetic link in order to establish family life, can be squared with this fundamental requirement of the UN Convention is open to doubt. In neither of these cases was there any mention of this difficulty.

ANDREW BAINHAM

PRESUMING EQUALITY OR DOING THE SECTION 25 EXERCISE?

AFTER *White* v. *White* [2001] 1 A.C. 596, to divide assets fairly between divorced spouses the court must consider all the relevant factors set out in section 25 of the Matrimonial Causes Act 1973 and then check the tentative award against the "yardstick of equality", providing good reasons for any inequality (p. 605). The decision of the Court of Appeal in *Foster* v. *Foster* [2003] EWCA Civ 565 is the latest instance in which the court has examined the proper application of the "yardstick".

The district judge considered the duration of the Fosters' marriage (Matrimonial Causes Act 1972 s. 25(2)(*d*)), that they were childless (s. 25(2)(*b*)) and the contributions of each to the welfare of the family (s. 25(2)(*f*)). She awarded a 61% share to the wife because it was possible, the duration of the marriage being sufficiently short at two and a half years, to separate assets owned independently prior to marriage and to return those assets to the individual. Assets acquired during the marriage were treated as the product of joint enterprise and divided equally, notwithstanding the brevity of the marriage. Despite receiving the greater award, the wife appealed, claiming that her financial contribution had been given insufficient weight. The circuit judge agreed, awarding her a 70% share. The husband appealed, seeking equal division of assets.

The Court of Appeal granted permission to appeal in order to address the important question whether it was proper to extend the decision in *White* to short, childless marriages. The courts now routinely consider *White* where spouses' contributions are determined by reference to the lengthy duration of a marriage or the raising of children (*Cowan* v. *Cowan* [2001] EWCA Civ 679; *Lambert* v. *Lambert* [2002] EWCA Civ 1685). *White* has yet to be fully considered in reference to short, childless marriages. The Court of Appeal then asked whether the district judge had been so wrong that the circuit judge had been right to intervene: that is, was it reasonable to apply *White* to a marriage easily

https://doi.org/10.1017/S0008197303376408 Published online by Cambridge University Press

distinguishable from the marriages in *White* and subsequent precedents?

Hale L.J. found the district judge had been correct in her approach and approved of returning to each what they had brought into the marriage and dividing equally those assets acquired during the marriage. For Hale L.J. the brevity of the marriage did not supersede the concept of marriage as joint enterprise, and without children to consider, equal division had to reflect the fairest outcome. Therefore, with regard to the certified point of importance, the proper practice in brief, childless, big money marriages is to apply the yardstick of equality, as is usual in big money cases.

However, putting aside duration and childlessness, was the Court of Appeal correct to insist on a more equal division of assets? Did other section 25 factors raise good reasons for departing further from equality? The court found that each spouse's contribution to their joint welfare was the other section 25 factor most relevant to arriving at an award. In recent cases the courts have discussed the possibility of inadvertent sexual discrimination when assessing spouses' contributions to family welfare. For example, where each spouse contributes differently, breadwinning or homemaking, the discrimination resides in the fact that society has traditionally accorded less value to homemaking (*Lambert* at para. [45]). Alternatively, when both spouses contribute financially, it is discriminatory not to have regard to the social fact that women are paid less than their male counterparts (Equal Opportunities Commission, *The Gender Pay Gap* (2001)). Since *Cowan*, in order not to perpetuate discrimination in ancillary relief awards, one spouse's contribution has only been accorded greater worth when it has been defined as a "stellar" contribution, the threshold of which was raised higher still in *Lambert*. In *Foster* Hale L.J. continued the trend towards addressing the different value society traditionally accords to gendered roles: "it would be a surprising proposition indeed if [the spouses] were not to be regarded as having made an equal contribution to the family home or other family assets" (para. [18]). Assigning the same worth to contributions of a different type or quantity is a manifestation of equality as difference. Different contributions can have equal worth and thus should be rewarded with equal shares of family assets.

Equality as difference may be fair when spouses make incommensurable contributions (*Lambert* para. [38]), but the respondent's counsel argued that it is inappropriate when contributions are commensurable. Hale L.J. disagreed, seeing "no justification for treating differences in income any differently from

https://doi.org/10.1017/S0008197303376408 Published online by Cambridge University Press

differences between breadwinning and homemaking" (para. [18]). To presume an equal contribution in this way increases the likelihood, in the absence of other overriding considerations, of an equal division of assets. Is this equal division by the back door? Lord Nicholls rejected a presumption of equal division in *White* (p. 605), so is Hale L.J.'s position defensible?

For Hale L.J. it is impossible to separate the contribution of each spouse to the success of the joint enterprise of marriage: though both spouses work equally hard, their earnings may be unequal. This standpoint is attractive both in practical terms and as a means of overcoming established gender inequalities in the home and workplace, but it is also susceptible to criticism. It takes a view of socially constructed inequalities (the invisibility of domestic work or lower pay for women) as insurmountable, hence the need to presume equal contributions. However, those gendered inequalities would be better addressed by carrying out a full section 25 exercise. This would bring the specific context of the couple's lives before the court. A presumption of equal contribution prevents this from happening and results in injustice rather than justice. For example, Mrs. Foster earned double her husband's salary. She also made greater financial contributions to their property acquisitions. A presumption of equal contribution ignores this. If the courts wish to redress the unequal value traditionally accorded to women's work, a presumption of equality of contribution in cases of incommensurable breadwinner and homemaker contributions is appropriate. However, when contributions are commensurable and a woman has achieved success despite a social background of gender inequality, the presumption is inappropriate. In order to redress gender inequality and to make fair awards, the court must complete the full section 25 exercise in order to be aware of the specificities of the case, including the impact of gender, rather than try to take shortcuts to equality.

According to the Law Society, the focus since *White* on contribution rather than needs has increased legal uncertainty. Consequently, it has proposed guidelines, based on the Government's *Supporting Families* document (1998), which take the form of a proposal for statutory change (*Financial Provision Following Divorce* (2003)). The proposals state that the needs of children should be addressed first, followed by the needs of the parties. Surplus funds should only be considered once the needs of each party have been notionally met. In doing so, the guidelines propose that "the non-financial contributions of the homemaker ... must be given a weight and significance appropriate to the circumstances of the case" (at para. 98). This suggests a move away

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from a presumption of equal contribution in incommensurable cases, likely to result in a return to awarding homemakers considerably less than their breadwinning partners. Moreover the guidelines do not acknowledge the gender inequalities relevant to decision-making in ancillary relief cases. The proposals recognise that "fairness may require the ... remaining assets to be divided equally" (*ibid.*), but the judicial statements from *White* onwards relating to how to achieve gender equality are not reflected in the guidelines.

It is true that quality of outcome is not always best served by a presumption of equal contribution, particularly in cases of commensurable contribution like *Foster*. The section 25 exercise is essential for equality of outcome, but only if it is conducted with an awareness of the effect of gender inequality in the home and workplace. This awareness is lacking in the new proposals.

ANNE SCULLY-HILL

INJUNCTIVE RELIEF IN THE FRENCH COURTS: A CASE OF LEGAL BORROWING

A RECENT decision of the French Cour de cassation (Cass. Civ. 1re, 19 nov 2002, *Banque Worms* c. *Epoux Brachot*, J.C.P. 2002.II,10 201, concl. Sainte-Rose, note Chaillé de Néré, D.2003.797, note Khairallah) provides an interesting contribution to the recurrent debate, fuelled by the House of Lords' request for a preliminary ruling from the European Court of Justice in *Turner* v. *Grovit* [2001] UKHL 65, [2002] 1 W.L.R. 107, over the availability of extraterritorial injunctive relief within the scope of the Brussels I Regulation—whether in the form of anti-suit injunctions in cases of parallel proceedings, or indeed of freezing orders under Article 31 in relation to assets situated in another Member State. This debate, yet another expression of the *Justizkonflikt* between the models of adjudication in the common law and civilian worlds, is clearly linked to profound cultural differences which span the perceived requirements of comity (or, in continental terms, of territorial sovereignty) and the existence of judicial discretion to entertain or stay proceedings. Thus, from a continental perspective, or at least so the traditional argument goes, injunctive relief awarded *in personam* and designed to bring about, albeit indirectly, effects on foreign assets or proceedings, is considered as unduly intrusive, infringing the monopoly of the foreign State to regulate the functioning of courts and enforcement agencies within its borders. While there have been some recent indications that such objections

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