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What counts and what will sway a court weighing children's needs, like stable housing, against standard splits such as 50:50 or 60:40 in asset division?

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Statutory Obligation

Statutory Duty

Section 25(1) of the MCA 1973 provides:

(1) It shall be the duty of the court in deciding whether to exercise its powers under sections 23, 24, 24A or 24B above and, if so, in what manner, to have regard to all the circumstances 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 18.

Miller McFarlane [2006] UKHL 24

Baroness Hale para 128:

- [s25(1)] is a clear recognition of the reality that, although the couple may seek to go their separate ways, they are still jointly responsible for the welfare of their children...
- The invariable practice in English law is to try to maintain a stable home for the children after their parents' divorce...
- Giving priority to the children's welfare should also involve ensuring that their primary carer is properly provided for, because it is well known that the security and stability of children depends in large part upon the security and stability of their primary carers..

Child of the Family

Section 52(1)

- (a) a child of both of those parties; and
- (b) any other child, not being a child who is placed with those parties as foster parents by a local authority or voluntary organisation, who has been treated by both of those parties as a child of their family.

Question of fact, objective test: *Re A (CHILD OF THE FAMILY)* [1998] 1 FLR 347

Does “first consideration” = “paramount consideration”?

Suter v Suter and Jones [1987] Fam 111 CA, Sir Roualeyn Cumming-Bruce at 342:

"...this consideration is to be regarded as of first importance, to be borne in mind throughout consideration of all the circumstances, including the particular circumstances specified in s 25(2). But if it had been intended to be paramount, overriding all other considerations pointing to a just result, Parliament would have said so. It has not'."

Paramountcy cont'd

“In my judgment the words mean that where there is a child of the family who has not attained the age of 18, the court must consider the welfare of such a child first before any other relevant matter and the welfare of such a child will be the most important consideration, more important than any other single factor, but it will not be paramount in the sense that it can be overridden by a combination of other relevant and applicable factors.”

N v N (CONSENT ORDER: VARIATION) [1993] 2 FLR 868, Roch LJ at 881

Application of s25(1)

Fisher-Aziz v Aziz [2010] EWCA Civ 673, [2010] 2 FLR 1053:

Facts

- Both H and W sought transfer of FMH to them
- Children spend equal time with both parents
- FMH subject to m/e & 2nd chge (H business)
- W at trial had no means to service m/e

Application of s25(1) *Fisher-Aziz*

Decision:

- Order for sale
- W proposal impractical
- H shd not receive FMH – deprive W of her asset

First Appeal

- H & W appeal. Appeal refused

Application of s25(1) *Fisher-Aziz*

Court of Appeal, Thorpe LJ

- Ordering transfer to W (W had inherited £250K)
- *As a matter of general principle, if a wife in occupation of the matrimonial home (having primary regard to the interests of the children), sought a transfer of the property in preference to the proceeds of sale, she should ordinarily succeed, providing she could secure the release of the co-owner from the mortgage or charges attached to the property.*

Application of s25(1) *Fisher-Aziz*

- *In this case the wife should have been allowed to run the risk associated with retaining the property if she was keen to do so (in any event, any argument concerning impracticality was now unfounded in the light of the wife's inheritance)*

Application of s25(1) - *ABX*

ABX v SBX [2018] EWFC 81 Francis J

Facts

- 11 year cohab/mge
- 3 ch U6
- FMH valued £3.25m. Purchased family contrib (incl children) and m/e £2m. Net value £157k
- Total assets c£2m

Application of s25(1) - ABX

"Given the upheaval to which the family has been subjected, I have no doubt that it would be preferable, the first consideration of the court being the welfare of the children, for the wife and children to remain in the former matrimonial home for the time being if that is possible." para 23

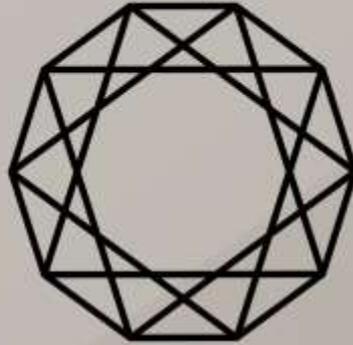
Application of s25(1) - ABX

"In a case where I have valued the assets at something below £2 million (heavily qualified in terms of likely realisable value of the deferred assets), for the wife to live in a property worth about £3m million is, on the face of it, remarkable and untenable. However, in an era of cheap borrowing and expensive rentals, it seems to me that the best financial option for this family is for the wife and the children to remain in the former matrimonial home for the time being. I have set out above why I believe that it is in the best interests of the wife and children from an emotional and welfare point of view." para 86

Application of s25(1) – in passing...

SP v AL & Ors (by their Litigation Friend FL) [2024]
EWFC 72 (B) HHJ Hess

- H children from previous marriage intervening
- Children's mother acting as litigation friend



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