

M v M (PRENUPTIAL AGREEMENT)

[2002] 1 FLR 654

Family Division

Connell J

19 July 2001

Financial provision – Divorce – Prenuptial agreement – Whether to be taken into consideration as circumstance of case – Whether to be taken into account as conduct – Weight to be given to agreement

The parties, both Canadians, entered into a prenuptial agreement very shortly before their marriage. The wife was pregnant, and anxious to get married; the husband, who had been very distressed by the breakdown of a previous marriage, was not prepared to marry again without a prenuptial agreement. The agreement signed by both parties provided that, in the event of marital breakdown, the husband would pay the wife £275,000. After 5 years of marriage the couple separated and the wife sought relief for herself and the 5-year-old child of the marriage. She argued that she should not be bound by the agreement, having been pressured into it at a time when she was very vulnerable, and that she was entitled to a lump sum of £1,300,000. The wife's total net worth was about £300,000, including the value of a property occupied by her mother, the husband's net worth was about £7,500,000. By the date of the hearing, which followed a complex forum dispute, the wife had incurred costs of £326,888 and the husband had incurred costs of £442,092.

Held – awarding the wife a lump sum of £875,000, and an order for periodic payments for the child of £15,000 pa plus school fees and expenses – it did not matter whether the court treated the prenuptial agreement as a circumstance of the case or as an example of conduct which it would be inequitable to disregard; under either approach, while the court was not in any way bound by the terms of a prenuptial agreement, the court should look at it and decide in the particular circumstances what weight should, in justice, be attached to the agreement. This agreement did not dictate the wife's entitlement, but had been borne in mind as one of the more relevant circumstances of the case and had tended to guide the court to a more modest award than might have been made without it. It would have been as unjust to the husband to ignore the existence of the agreement and its terms as it would have been to the wife to hold her strictly to those terms. Other relevant factors in departing from equality were the comparative shortness of the marriage and the fact that the husband had created the family wealth (see paras [21], [26] and [41]).

Statutory provisions considered

Matrimonial Causes Act 1973, s 25

British Columbia Family Relations Act 1996, s 65

Hague Convention on the Civil Aspects of International Child Abduction 1980

Cases referred to in judgment

Brockwell v Brockwell [1975] Fam Law 46, CA

Camm v Camm (1983) 4 FLR 577, CA

Edgar v Edgar [1980] 1 WLR 1410, (1981) 2 FLR 19, [1980] 1 All ER 887, CA

F v F (Ancillary Relief: Substantial Assets) [1995] 2 FLR 45, FD

Hyman v Hyman [1929] AC 601, HL

S v S (Divorce: Staying Proceedings) [1997] 1 WLR 1200, [1997] 2 FLR 100, [1997] Fam Law 541, FD

Jeremy Posnansky QC and Matthew Firth for the petitioner

Timothy Scott QC and Anne Hurd for the respondent

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Cur adv vult

CONNELL J:

[1] This is a wife's application for all forms of ancillary relief. The application relates to the wife and the only child of the family, C aged 5. The application is made after a marriage which lasted 5 years. The parties had both been married before. The wife is 39, and her first marriage was childless. The husband is 55, and he has three children by his first marriage, which lasted 14 years. Those children are now aged 20 and 18 (twins) and they all live with their mother in Vancouver.

[2] The characteristic of the case which merits the description unusual is that the parties, both Canadians, entered into a prenuptial agreement which was signed by both of them very shortly before their marriage in Vancouver on 14 April 1995. The agreement made provision for the payment to be made by the husband to the wife in the event of a matrimonial breakdown; and the husband's case before me has been that the wife should be held to the contractual bargain set out in that agreement. He argues that he was very distressed by the breakdown of his first marriage, and by the consequent litigation; which distress he was determined to eliminate in the event of a second marriage followed by a breakdown. Accordingly he says that he made it clear to the wife that he was not prepared to marry her unless she entered into a prenuptial agreement; and he says that, having made this fact plain to the wife before the marriage, she should now be held to that bargain.

[3] On the other hand the wife contends that this agreement is at most a material circumstance in the case; and an aspect of the conduct of both parties which is relevant for the court to bear in mind, but which should be in no way determinative of the wife's application. Her case is that she was pregnant and already committed to the wedding ceremony and celebrations when she was in effect required to sign this agreement; so that it would be quite unjust now to restrict her to its terms.

[4] The consequence of this difference of approach is that there is a significant difference between the claims advanced on behalf of the wife, and the provision which the husband is prepared to offer to her. She claims a lump sum once-and-for-all payment of £1,300,000. The husband offers her £275,000 (\$C600,000), the amount due and paid under the agreement, which he feels is generous provision for her after a short marriage.

[5] The relevant history begins with the parties meeting in Canada in 1993. This was a casual meeting, but they began 'dating' in December 1994. On 26 December 1994 they travelled together to Mexico taking the husband's daughters by his first marriage with them. They proceeded to Aspen over the New Year, and early in 1995 the wife went with the husband to South Africa where they arrived in Cape Town on 4 January 1995. The circumstances surrounding the conception of their only child, C, are contested. The wife says her conception was accidental; whereas the husband says that at the wife's suggestion they ceased to take contraceptive precautions and C was rapidly conceived. He now believes that the wife saw him as a good catch; and in essence trapped him into marriage via her pregnancy. This is strongly disputed by the wife.

[6] In February 1995, once the wife's pregnancy had been confirmed, and after various discussions, the parties agreed to marry. The wife had thought about an abortion, but the husband was adamantly opposed to this.

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Accordingly she insisted on marriage, since she was not prepared to contemplate bringing up a child as a single mother. The husband was still very bruised as a result of the expensive and hostile litigation relating to his first marriage. On 3 February 1995 he consulted his lawyer, Mr Gill, and on 14 February 1995 Mr Gill proposed that his anxieties should be catered for by a marriage agreement. This case illustrates vividly the problems by which such agreements are beset. There was as I find a strong physical attraction between these parties which had prompted their early cohabitation and their continuing association. On the other hand their objectives were somewhat different. The husband was determined to limit the financial consequences of the marriage which the wife required if she was to give birth to their child. The wife could

not contemplate giving birth without being married; and was unwilling to contemplate the possibility of cancelling a wedding for which invitations had been sent to many guests about 7 weeks before the date proposed for the ceremony, 14 April 1995.

[7] Given the husband's insistence on a contract, which he had prepared by his lawyers, the wife sought legal advice. The first two lawyers she approached refused to represent her, insisting that financial disclosure from the husband was essential before they could give proper advice. Indeed the second lawyer was not prepared to offer advice, since he felt it was a waste of time, given that the wife was intent on signing an agreement in any event. Eventually the husband's lawyer suggested that the wife should take advice from Mr Buchanan QC. He is very experienced in matrimonial law in British Columbia, and he advised the wife that she should not sign the agreement proposed on behalf of the husband. This was because he believed that the agreement was fundamentally unfair to the wife. His attempts at negotiation with the husband's lawyer produced cosmetic adjustment only; but the wife insisted on signing the agreement, since this was the only way that she was able to ensure that the marriage went ahead as planned. In the result the wife signed the agreement on 11 April 1995 and the husband signed the agreement on 13 April 1995.

[8] By the terms of the agreement after a marriage of some 5 years the wife would be entitled to a capital payment of \$C600,000, which equates to £275,000. This has been paid to her. From this figure the wife would in effect receive very little net benefit since she has incurred costs of £327,000 in these proceedings, of which she has paid £98,000. Therefore she has to find some £228,000. None the less it remains the husband's case that this is the bargain the wife made, and this is what she should receive. In addition he has throughout been prepared to pay generous maintenance towards C, together with her reasonable school fees.

[9] After the wedding the parties continued to live in the husband's property in Vancouver which had been the matrimonial home during his first marriage. This was a substantial property, which was sold in 2000 for £450,000 gross. They continued to travel internationally (and usually first class when on business) until on 29 September 1995 C was born in Vancouver. Thereafter the pattern of their life, which involved extensive travelling and promotion of the husband's business as Chief Executive of the D Mining Corporation, continued. The places visited included Chile, Argentina, France, Portugal, Canary Islands, Madeira Islands, Morocco, Italy, and Scotland. C and her nanny accompanied her parents on these expeditions.

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[10] In February 1998 the husband sold his substantial shareholding in the D Mining Corporation. The sale price was \$C16,000,000 on which the potential tax was \$C5,000,000. The husband took advice from Mr David Birnie, a tax lawyer in Vancouver, in an attempt to devise a scheme which would reduce the incidence of tax on the sale of his shares. In February 1999 the husband's Vancouver home was offered for sale and the parties emigrated from Canada to England. This was in accordance with a scheme devised by Mr Birnie, the effect of which was to reduce the potential tax liability on the sale of the husband's shares from \$C5,000,000 to \$C2,000,000. The essence of the scheme was that the husband should become resident in England. Accordingly the family moved to this country, renting a property in Virginia Water. C was placed in the pre-kindergarten class at a school in Egham. In August 1998 the wife had enrolled on a business course at an academy in Arizona, which she had been attending on alternate weekends via flights from Vancouver, and subsequently from England. The pursuit of this course by her produced frictions within the marriage, which were not surprising in any event since both husband and wife are strong personalities.

[11] In December 1999 they vacated the rented property in Virginia Water, stored their belongings in a smaller flat in Ascot, and spent Christmas in Canada. The relationship between the husband and the wife did not improve, and on 12 March 2000 there was a major argument between them. On the following day the husband consulted Steven Gill his Vancouver lawyer and later in the same month the wife also

consulted her lawyer in Vancouver, Alison McClennan QC. On 5 April 2000 in Vancouver the husband asked the wife to sign an 'amending agreement' to the prenuptial agreement of April 1995. On its face the document was designed to confirm the existence of the prenuptial agreement, but to vary its terms in the circumstances of marital disharmony which had by then arisen. The wife refused to sign it.

[12] On 11 April 2000 the husband travelled to Arizona, where in 1996 he had bought some land in Scottsdale, Arizona. In Arizona he consulted Mr Meel an Arizona lawyer; and on 14 April 2000 he issued divorce proceedings in Arizona. The basis for this petition was said to be the husband's occupation of a home in Arizona, which he had in fact rented on the day that the petition was presented to the Arizona court. The term of the lease was until 31 May 2000, with options to extend for up to 1 year. The husband did not tell the wife that he had issued these proceedings, and they were not served on her until 2 months later. On 25 April 2000 the wife and C travelled to Arizona at the husband's request. He wanted her to sign the amending agreement. She refused. There were arguments between them and on 7 May 2000 the husband left a note for the wife, together with a cheque for \$C50,000. In his note he said that this was 2½ times the first instalment due under the marriage agreement and that the wife should deduct the agreed monthly payment for C. He added 'as of next week, you do not have a visa card'. On the cheque he endorsed the words 'for payment re pre-nuptial agreement'. The wife did not present the cheque for payment. Despite this, the parties were able to resume sexual relations and later on 7 May 2000 when the husband left for Vancouver, they parted on good terms. The following day the wife and C left Arizona and went to Vancouver.

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[13] From Vancouver C went to Colorado with her maternal grandmother on 13 May 2000, and on 14 May 2000 the wife flew to London. Here she rented her present property in Virginia Water, consulted her solicitor and gave instructions that a petition for divorce should be issued in this jurisdiction. Over 17/18 May 2000 the wife flew to Colorado, collected C, and returned to England with her. Thereafter C was restored to her school in Egham. On 19 May 2000 the wife's petition for dissolution was issued, being dated 17 May 2000, the date on which it was filed at court. This petition was served on the husband on 25 May 2000, allegedly at some personal risk to the process server. On 7 June 2000 the husband alleged to the court in Arizona that the wife had abducted C from Arizona. On 13 June 2000 the wife issued her Form A in these proceedings; and made application without notice to the husband to Black J for an asset-freezing order against the husband's assets. This order was made as sought; and was subsequently mirrored in Guernsey where the husband had significant funds in various bank accounts. On 15 June 2000 the wife was served with the husband's Arizona proceedings re divorce and the alleged abduction of C. On 30 June 2000 the husband applied to stay the wife's English divorce proceedings.

[14] In due course on 3 July 2000 the issue of the asset-freezing order came before Sumner J. He ordered that £1.5m should be frozen and held in a bank account in Guernsey; while allowing the husband to make voluntary payments to the wife for herself and C. The husband has in fact paid sums which were in accordance with the provisions of the prenuptial agreement, in particular as to instalment payments. The wife's position was that such payments were for interim provision for herself and C. The order states that such payments were to be made without prejudice to the cases on either side as to the validity or otherwise of that agreement.

[15] The husband's application under the Hague Convention on the Civil Aspects of International Child Abduction 1980 came before Wilson J on 31 August 2000 and 1 September 2000; and then on 18 September 2000 when limited oral evidence was admitted by the judge. The main issue in that application related to the habitual residence of C. In due course on 2 October 2000 the judge handed down his judgment in which he concluded (a) that the husband, as he admitted, was habitually resident in England and had been such since February 1999; and (b) that the wife and C had never

lost their habitual residence in England which they had also acquired in February 1999. He further concluded that since the breakdown of the marriage in May 2000 the wife's intention had been to continue to reside with C in England, albeit independently of the husband. The judge described the application as unusual. Not only did he dismiss the husband's application under the Hague Convention on the Civil Aspects of International Child Abduction 1980; but he also dismissed his application under the inherent jurisdiction of the court that C should be removed from England to Arizona. He said:

'In the light of [C's] settlement into life at home and in school in England, of the absence of significant links on her part with Arizona, and of the past, current and proposed habitual residence of each parent in England, Mr Scott's proposition is self evidently absurd.'

He went on:

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'What I strongly deprecate is the father's cynical attempt, by this application, to have [C], and therefore the mother, summarily obliged, contrary to the child's interests, to move to Arizona in order to bolster his case for a determination of his financial obligations to be conducted in Arizona, whether in the proceedings already issued there or in further proceedings to be issued following their acquisition of residence there.'

He ordered the husband to pay the wife's costs of those proceedings on an indemnity basis. Subsequently on 27 October 2000, before the same judge, the husband agreed that the divorce should be dealt with in this jurisdiction, as should the wife's application for ancillary relief. The judge made an order that C should reside with the wife in England and Wales, with contact for the husband, which has subsequently been extended to include staying contact.

[16] Finally, as far as the litigation history is concerned, the financial dispute resolution hearing took place before Coleridge J on 21 February 2001. Directions were given for the trial of the wife's ancillary relief applications which are the applications now before me. Against this background of international litigation, perhaps it is not surprising that the parties should have spent extensive sums on legal fees. As stated, the wife's costs in these proceedings are £326,888, of which she has already paid £98,000. The husband's costs of all proceedings are £442,092, including the international advice which he has received in connection with matrimonial matters and including the sum paid by him to the wife in satisfaction of her costs in the Hague Convention proceedings namely £55,000. These figures clearly demonstrate the hostility by which these proceedings are now beset. This court is faced by the unattractive spectacle of two otherwise intelligent and civilised people who have become so consumed by the perceived injustices which each has suffered at the hands of the other that neither has been able to view their history and their multiple disagreements (both factual and as to principle) in other than a subjective manner. The wife views with horror the husband's attempts to base C and these proceedings, for financial reasons, in Arizona. The husband accuses the wife of running to this jurisdiction so as to bolster her ancillary relief claims; and he further accuses her of being financially motivated from the moment of the conception of their child until the present day.

Statutory considerations, C's welfare, and the future

[17] It is against this background that this court must do its best to apply the provisions of s 25 of the Matrimonial Causes Act 1973 as to do justice between these parties and to reach a fair conclusion. Accordingly I turn to the statute which requires me to give first consideration to C's welfare, whilst she remains a minor. She lives with her mother, and the husband does not seek to suggest that this should change.

However he strenuously challenges the wife's stated intention of living with C and educating C in England, asserting that this is contrary to the child's best interests. He points out that the wife's mother and brother live in Vancouver as do C's half-brother and two half-sisters. He submits that Vancouver is the natural place in which C should be brought up, that it is where the mother's roots, relations and friends are to be found, and that it is certainly the place where

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the mother will choose to live on the long-term basis once this litigation is behind her.

[18] In my view it cannot be unreasonable for the wife to continue, for the moment at any rate, to live in this country. It is the country of her habitual residence, in accordance with the decision of Wilson J, and it is an habitual residence chosen by the husband for the convenience of tax planning and saving money. It is obviously in C's best interests to live with her mother, and Mrs M has been right to attempt to provide for her daughter a period of security after the turbulence of May 2000 and the breakdown of her parents' marriage. No doubt C has benefited from a more stable period in a settled home, attending school with her friends and being relieved of the demands of frequent international travel. I do not criticise this wife for choosing England in the circumstances; nor for promoting this country as her intended long-term residence. When she came here to file her petition I do not doubt that she had taken advice, and it seems likely to me that she realised that the prenuptial agreement might have less importance in this jurisdiction than for instance in Arizona or Vancouver. However to accuse her of forum shopping is hardly justified when she was doing no more than instituting proceedings in the jurisdiction where she was habitually resident, a country chosen by the husband to suit his financial convenience.

[19] That said I think it likely that in the medium term this wife will return to live in Canada. It is her home country. She owns a property there, in which her mother and her brother live. Another brother lives there. C's half-brother and half-sisters live there. This wife worked there both running her own business and employed by others. Her financial prospects in the longer term are likely to be better there. She told the court of her present plans to secure her degree, and thereafter to work as a teacher. This is a sensible plan, given her background and given that she is tri-lingual. It will enable her to give priority to C who is rightly her first consideration. However there is no doubt that she has previously enjoyed forging her career in a more commercial world, and her pursuit of a degree at the academy in Arizona is evidence of her long-term wish to make a success in business. Any attempt to be over precise in a forecast of the future is unwise, but I think it likely that in say 5 years' time this wife will return to her native land and will resume her attempts towards commercial success. As C gets older the wife will have more flexibility to plan her own affairs, and I doubt that she will continue as a teacher of French and Spanish in England. At age 11 a decision concerning C's secondary education must be made. Either she will continue at the convent school and move into the senior school or she could sensibly move away without too much disruption to her education.

[20] Thus when I come to give the first consideration to C's welfare, as the statute requires, I conclude that the wife is reasonable in choosing England as her home at present and that she is reasonable to plan for a continuation of studies leading to a teaching career for a few years in this country. That said she will probably return to Canada and to commerce within a period of 5 or so years.

The prenuptial agreement

[21] The statute requires the court to have regard to all the circumstances of the case. The particular circumstance here which in my view calls for careful consideration is the prenuptial agreement signed by both parties

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shortly before their marriage in April 1995. Sometimes such an agreement is considered by the court as part of the conduct of each of the parties, which it would be

inequitable to disregard under s 25(2)(g) of the Act (see for example *Camm v Camm* (1983) 4 FLR 577, 579D and *Edgar v Edgar* (1981) 2 FLR 19, 24H). In the earlier case *Brockwell v Brockwell* [1975] Fam Law 46 Ormrod LJ had said of an agreement not to claim a lump sum:

'When people make an agreement like this it is a very important factor in considering what is the just outcome of the proceedings.'

In my view it matters not whether the court bears such an agreement in mind as part of the circumstances of the case (a very important factor) or as an aspect of the parties' conduct. Under either approach the court should look at any such agreement and decide in the particular circumstances what weight should, in justice, be attached to it. Given that a significant percentage of marriages these days end in divorce, it is understandable that mature adults, and in particular those who have been married before, might wish to agree what should happen in the event of a breakdown. The desire for certainty, or the wish to know where you stand, is not unusual. It is clear, of course, that the existence of such an agreement does not oust the jurisdiction of the court (see *Hyman v Hyman* [1929] AC 601); and Mr Scott QC has not argued in this case that the court has no jurisdiction to entertain this claim. The public policy objection to such agreements, namely that they tend to diminish the importance of the marriage contract, seems to me to be of less importance now that divorce is so commonplace. However the manner in which the courts should treat such agreements will vary from case to case. In *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45, 66G Thorpe J, as he then was, said (referring of course to the agreements in that particular case):

'In this jurisdiction they must be of very limited significance.'

On the other hand in *S v S (Divorce: Staying Proceedings)* [1997] 2 FLR 100, 102G Wilson J said:

'I am aware of a growing belief that, in the despatch of a claim for ancillary relief in this jurisdiction, no significant weight will be afforded to a prenuptial agreement, whatever the circumstances. I would like to sound a cautionary note in that respect.'

He then went on to point out that the circumstances in *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45 were such that to have applied the prenuptial agreement strictly would have been ridiculous. Wilson J then continued:

'But there will come a case – were I to refuse a stay, might this be it? – where the circumstances surrounding the prenuptial agreement and the provision therein contained might, when viewed in the context of the other circumstances of the case, prove influential or even crucial.'

[22] The marriage agreement dated 11 April 1995 contains some clauses which tend to emphasise its importance in this case. Paragraph A in the

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preamble records the fact of the wife's pregnancy and the fact that the marriage is the second marriage for both parties. Clause B refers to the husband's 'long and protracted negotiations resulting in a division of his property and assets' consequent upon his earlier divorce. Clause G states 'both parties are economically independent and self sufficient and were so prior to their cohabitation'. Clause K provides:

'(b) neither of them would have entered into the marriage if he or she believed that the other would apply at any time to vary this agreement, (c) if [Mrs M] were

not pregnant, they would not at this time be entertaining marriage but would have continued to cohabit, (d) [Mrs M] wishes that the parties be married and have the status of husband and wife so that their child will be born of married parents, and for the societal value, and does not intend now or in the future to invoke the Family Relations Act or any regime of family assets or community property for her own benefit.'

Clause L reads:

'(b) They believe that any variation, however fair in light of changed circumstances, would be unfair in fact because of their reliance prior to agreeing to marry, and during their relationship on the binding nature of this agreement. (c) [Mr M] and [Mrs M] agree that [Mr M] would not enter into marriage if, in future, he would be subjected to the Family Relations Act or a regime of family assets of community property.'

Clause 10 of the agreement provides for the separation of the parties' assets, and the general provisions contained in the following clauses. Clause 20 states:

'This agreement contains the entire understanding of the parties. There are no representations, promises, covenants or undertakings, oral or otherwise, other than those expressly set forth herein.'

Clause 22:

'[Mr M] and [Mrs M] acknowledge that they are satisfied with this agreement and are satisfied that this agreement is fair.'

Clause 24:

'If any one or more of the provisions of this agreement is held to be void, voidable, invalid or unenforceable, the validity, legality and enforceability of the remaining provisions of this agreement shall not in any way be effected or impaired thereby.'

Clause 28:

'In the unlikely event a court of competent jurisdiction does not accept this agreement as a replacement for the rights and remedies of

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either party under statute law, common law or equity, then the parties agree and intend that this agreement be considered by such court as the principal factor in determining any division of property or any entitlement to maintenance or support. The parties further agree that their respective business assets are not to be considered by any court in any division of property.'

Finally the agreement is accompanied by a solicitor's certificate of independent legal advice which is signed by Mr Buchanan QC who had advised the wife. It contains the following paragraph:

'[Mrs M] expressed herself to me as understanding, and appeared to me as fully understanding, the said agreement and the nature and effect of the said agreement on and in the light of present and future circumstances and as understanding my advice to her. She stated to me, and it appeared to me, that she entered into the said agreement willingly and without any pressure, duress, stress, undue influence or deception on the part of any other person, including [Mr

M].'

Mr Buchanan QC expressed his belief that the wife was fully advised and informed with regard to all the foregoing matters mentioned and that he may fairly be said to have acted independently herein.

[23] As to this agreement the wife points out as follows:

- (i) She says that she was under pressure to sign the agreement, which pressure was created (a) by her pregnancy and the imminence of the proposed marriage and (b) by the husband who would not marry her unless she signed the agreement. There is good evidence to support this contention, in particular from her doctor, Dr Mary Robinson. She says that she saw the wife in her office on 16 March 1995 regarding the wife's pregnancy and distress over the marriage agreement. The wife was distraught and very distressed both physically and mentally, as Mr M had stated he would not marry her if she did not sign the agreement. She was at that point approximately 12 weeks pregnant; the prospect of being a single mother was terrifying. The doctor saw the wife again on 7 April 1995 when the wife had been unable to sleep or eat. The wife probably did her best to disguise this distress from the husband, but I have no doubt that she was under stress as described when she signed the agreement.
- (ii) She was advised by Mr Buchanan QC that in his view the agreement was very one sided in favour of the husband particularly in view of the fact that the wife was pregnant. None the less, as Mr Buchanan QC pointed out, the wife wished to enter into an agreement because she doubted that the husband would marry her if she did not. The wife very much wanted to marry the husband and wanted Mr Buchanan QC to negotiate with the husband's lawyers on specific terms. She was convinced that the husband would walk away from the marriage if she were to insist on fairer terms.

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[24] In the circumstances the wife overrode Mr Buchanan QC's clear advice that she should not sign anything. Thus she committed herself to an agreement from which she now seeks to distance herself and which on its face precludes her from relying on the British Columbia Family Relations Act 1996 (the relevant statute in Vancouver). Despite this, in the light of the expert evidence placed before me it is likely, in my view, that a court in British Columbia would have concluded that the provisions of the agreement were sufficiently unfair to justify the court in re-apportioning the assets so as to allow the wife a fair portion thereof.

[25] In answer to the wife's points the husband says that this was an agreement signed by a mature independent adult after she had received legal advice; and he emphasises that which is accepted on both sides, namely that he would not have married the wife without the signed agreement. He goes on to suggest that the agreement was reaffirmed in March 1997 when the wife assigned a tax loss to him which was of limited value to her; and when she expressly agreed that that assignment had no adverse effect upon the marriage agreement. In my view this latter point is of no materiality since the wife, who I conclude probably did sign the 1997 agreement in a flurry of legal activity, was doing no more thereby than recognising the fact that 2 years earlier she had signed the marriage agreement.

[26] The circumstances of this case illustrate vividly that the existence of a prenuptial agreement can do more to obscure rather than clarify the underlying justice of the case. On the one hand this husband would not have married the wife unless she signed the agreement. On the other hand this wife signed the agreement because she was pregnant and did not relish single parenthood either for herself or for her child and because she wanted to marry the husband. In my view it would be as unjust to the husband to ignore the existence of the agreement and its terms as it would be to the wife to hold her strictly to those terms. I do bear the agreement in mind as one of the

more relevant circumstances of this case, but the court's overriding duty remains to attempt to arrive at a solution which is fair in all the circumstances, applying s 25 of the Matrimonial Causes Act 1973. Accordingly I pass to consider the various subparagraphs of subs 2.

Resources

The wife

[27] The wife's financial situation is fairly straightforward. Save for child benefit of £825 pa she relies upon payments made by the husband to support herself and C, and she intends to complete her degree over the next year via a course at a college in Egham. Thereafter she proposes a teaching course which she hopes will lead to her qualifying as a teacher of languages in the summer of 2003 and earning as such from September 2003 at the rate of approximately £10,000 pa net. The husband suggests that her earning capacity is much higher than this; and he points to her business career in Vancouver pre this marriage, to her ambition to qualify in business affairs via the academy in Arizona and to the referees who supported her application to that establishment. He believes that the desire which she now expresses to teach is a ploy in the litigation designed to diminish her income.

[28] I accept that the wife was ambitious in her pursuit of a business career both before and during the marriage. Why else would she have flown to Arizona at weekends for some time, at great inconvenience to herself and

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in the face of opposition from her husband for much of the time? However, C is now her priority, and rightly so. She cannot expect to devote enough time to recreating a life in business until C is significantly older, and her decision to pursue a teaching course is in my view both sensible and practical. It is better justified on these grounds than on the basis of a long-held desire to teach; which I doubt. I conclude that her income from September 2003 will be somewhere in the range of £10,000–£15,000 pa net and that it is unlikely to increase dramatically unless and until she returns to Vancouver in about 2006; when she is likely to attempt to recreate a more commercial existence.

[29] Her assets really come down to the property in West Vancouver, which is presently occupied by her 72-year-old mother and her 43-year-old brother who suffers from depression. This is valued at £307,000 or £298,000 after sale costs. She could not sensibly live in this house with C at present, even if she were to return to Canada which is unlikely for the time being for the reasons previously described. The loan from her mother (£32,000 approximately) will probably never be enforced and is correctly described as a soft loan; and she has borrowed from HSBC approximately £90,000 and £14,000 from a friend, Ms D. She has available to her in Guernsey £108,000, namely payments authorised by the husband but not yet transferred to her. Her total net worth is therefore of the order of £300,000; but this is not immediately realisable since she could not in conscience sell her Vancouver house at least while her mother lives there; as is likely for the foreseeable future.

Husband

[30] There are various figures advanced by the husband over the past 12 months which were said by him to represent his net assets. In particular there are three documents headed 'Total personal and corporate net worth', two dated 8 June 2001 and one dated 26 June 2001, and for present purposes I shall proceed on the basis of the latter. This puts his net worth (since the companies are in effect his) at £4,470,000; to which should be added approximately £50,000 being the amount by which he has overpaid on account of his litigation costs. Thus in broad terms, he says he is worth £4,500,000. On behalf of the wife Mr Posnansky QC contends for a larger figure of approximately £8,000,000. There are a number of reasons for such a significant difference, (eg an issue over the value of Lot 103, a property in Arizona where the husband's valuation is \$750,000 less than that relied upon by the wife) but the main reason is that the figures given do not represent the same thing. The wife

looks for a net worth figure as at the date of the hearing before me, whereas the husband has allowed for a number of expenses which he anticipates, some imminent, some less so. His business now is in property development, and he has deducted from the figures the anticipated cost of servicing his various developments over the next 3 years. He has also deducted a liability to the Canadian tax authorities of £238,000 which must be found shortly, the anticipated costs of maintaining his four children over the next 3 years of £440,000; and anticipated personal expenses over 12 months of £160,818. The husband's purpose in doing this is to demonstrate that he must meet significant costs to sustain his development business and his personal and his children's lifestyle; and he emphasises that he has not deducted the likely costs of promoting (as

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opposed to servicing) his developments (save in the case of Lot 103, where the deductions do include significant development costs because the expenditure is imminent).

[31] In my view the exercise which he has undertaken is legitimate, even if it is more usual to look at his worth as it is at the date of the hearing. The crucial points are:

- (i) Can the husband meet the order of the court and meet his other proper obligations, business and personal?
- (ii) Will the proposed order prevent the continuation of his property development business?

Here there are two significant features, namely:

- (a) The joint Mareva Trust account in Guernsey presently contains £1,456,000.
- (b) The sale of Lot 103 is likely in the early part of 2002, when the proceeds of sale will be of the order of £2,000,000 after commission, costs and tax. This will provide funds both to repay the Carmel Valley mortgage and to continue with his other projects.

I realise that the husband must incur expense in completing the new house at Lot 103, but he told me that he still has available about \$500,000 from the mortgage on his Carmel Valley land which could be used in part for this purpose; and he may be able to use any remaining funds from the Guernsey account for his purpose, once the order in favour of the wife has been paid; and any costs orders have been dealt with.

[32] In these circumstances it is not necessary for me to reach a precise figure for the worth of the husband (which in my view is somewhere in the region of £7,500,000); nor do I need to resolve the valuation issue over Lot 103 (a difficult exercise in the absence of oral evidence from either valuer), since I conclude that the husband does have available to him very adequate funds to meet the order which I propose to make and to enable him both to continue with his development projects and to maintain himself and his children in a satisfactory fashion.

[33] He asserts that he has no income, but he has ample funds available to him for meeting his expenses, given that he lives off the profits gleaned from time to time from his development business.

Needs, obligations and responsibilities of the parties

[34] For the reasons explained the wife needs funds with which to buy a home for herself and C in England and an income to sustain them both here. I have dealt with her earned income prospects, and she receives no rental income from her Canadian property.

[35] The husband has income as described, albeit that in reality he spends capital. He needs a home and he is now resident in Mexico. His proposal is to build a house on three of the plots which he owns in Mexico, but even if this suggestion does not materialise he will have ample facility to provide a suitable home for himself, in

particular once Lot 103 has been sold. His own assessment of his net worth has allowed for the expenditure of £160,000

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over 12 months as previously mentioned (albeit that £80,850 relates to legal and professional expenses).

Standard of living

[36] The parties lived to a very high standard during the marriage. C was always looked after by a nanny. They travelled extensively, often staying in luxurious hotels. The fact that much of this was financed by the husband's successful mining business does not detract from the fact that they lived to a luxurious standard. During the marriage his taxable income was never less than £260,000, and in 1999 the figure was rather over £750,000 net. The 'back of the envelope' figure which he gave to tax counsel in this jurisdiction, Mr Schwarz, for his UK cash requirement (which covered about 6 months) was £163,000; the equivalent of £326,000 pa for the whole family.

The parties

[37] I have previously described the ages of the parties. The marriage lasted 5 years. Neither party has any physical or mental disability which is relevant for my consideration, although the husband has recently experienced heart problems which should not prevent him from continuing his development business.

Contributions

[38] The husband clearly made the substantial financial contribution to this marriage. He was the Chief Executive of D Mining until the sale of his shares in February 1998, from which he realised \$C16,000,000. In addition he is the sole proprietor of his development business, which runs due to his initiative and skill. Over the period of the marriage I have no doubt that the wife supported him on numerous business appointments, including dinners, parties, and conferences. She was a useful business wife, and an intelligent person with whom to discuss either the value of the mining company shares or potential development projects. However her contribution in the business sense is limited to that of a supporting spouse over the period of the marriage. Her main contribution here relates to the care which she has given to C, and to the care which she will continue to offer to her. This is a major contribution. In addition she was prepared to leave Canada and settle in England in support of the husband's tax saving plan.

Conduct

[39] In essence the husband accuses the wife of trapping him into marriage; and of pursuing her claims in this jurisdiction clearly for financial reasons. I reject both these allegations. I have discussed fully the circumstances relating to the marriage, in connection with the prenuptial arrangement. Likewise the inception of the proceedings in this jurisdiction was understandable in my view for the reasons explained. Further, given the terms of s 65 of the British Columbia Family Relations Act 1996, in my view it is distinctly possible that the courts of British Columbia would have reapportioned the division of property provided for in this prenuptial agreement. As discussed, it matters not whether I treat the prenuptial agreement as a circumstance of the case; or as an example of conduct which it would be inequitable to disregard.

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[40] There are no pension points which require consideration.

Conclusion

[41] What order should the court make to reflect these various matters and, in all the circumstances of the case, to attempt to achieve a fair outcome? There are certain

obvious conclusions to be drawn. They are:

- (i) This is not a case for an equal division of the assets, and indeed Mr Posnansky QC has expressly recognised this from the outset. The prime reasons for this are the comparative shortness of the marriage and the fact that the husband created the family wealth.
- (ii) This is a case for a lump sum once-and-for-all settlement. The husband can afford a substantial lump sum payment for the reasons discussed. He does not have a liquidity problem given the money retained in the joint account in Guernsey.
- (iii) Whether the wife and C live in England or in Vancouver, they will need a suitable home in which to live. This means a three- or four-bedroom house with some garden space to which C can bring her friends with comfort and confidence.

[42] Indeed the home for the wife and C is the appropriate starting point for calculation of the award to be made, reflecting the importance of C's welfare in the statutory exercise. It is in Virginia Water that mother and daughter have now settled, and it was in Virginia Water that the family rented their first English home in February 1999. C will go to a local school in September 2001. This is in Sunninghill which is convenient for Virginia Water. I realise that property in this area is expensive, and that larger properties can be bought for less money in Vancouver. None the less in my view the wife's choice of area and town is wholly reasonable in the circumstances, as is her decision to live there for some years. The properties highlighted by the husband are not suitable for this purpose, since they are in a less attractive area and are in most cases too small. I am impressed by the point that C must be able to bring her school friends home to visit or to stay with a degree of pride; and, although at present the husband is living with friends and using a modest flat in Ascot, the home which he may well create for himself in Mexico (possibly using three plots) is likely to be substantial. It is debatable whether the wife needs a four-bedroom property, or whether a three-bedroom house would suffice as it did when the family first arrived in England and as it has done for 12 months now. I conclude that the wife can buy a suitable home in her chosen area for £525,000 and that her housing fund, to provide for stamp duty and extra furniture plus removal costs is properly quantified at £575,000.

[43] As to her income requirements, the wife's budget contends for a need for £120,000 pa for herself and C. Mr Posnansky QC sensibly concedes that this includes school fees, and that it is in any event too high. He suggests a multiplicand of £70,000 pa. The husband has advanced various figures to different people as rough estimates of likely family expenditure; viz \$US528,000 pa in a rough cash-flow projection, \$US530,000 'on the back of an envelope' to Mr David Birnie, and £74,648 as total personal expenses in the 12 months summary of expense projections to May 2002. In these

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circumstances the figure selected by Mr Posnansky QC cannot be far out, but given that the household will in addition be in receipt of fairly substantial maintenance for C and that the wife herself should be earning after 2 years, I propose to take £60,000 pa as the appropriate multiplicand.

[44] What should the multiplier be? This is where the court can most readily direct the award so as to reflect the justice of the case. The wife is aged 39, but again it is sensibly conceded on her behalf that a full-blown *Duxbury* award would not be appropriate. The marriage was fairly short. The prenuptial agreement in my view is relevant as tending to guide the court to a more modest award than might have been made without it. I reject outright the suggestion that it should dictate the wife's entitlement; but I bear it in mind nevertheless. The wife is likely to return to Canada in the time-scale previously discussed, in which case she should be able to re-house herself and C and to release some capital. In due course she will benefit from the

realisation of her property in Vancouver, especially since her responsibility for her brother is a family responsibility rather than a legal responsibility. In all the circumstances I propose to take a multiplier of 5. The marriage lasted 5 years. The parties intended to stay in the UK for 5 years. After such a period the wife will be less handicapped on the labour market and C will be less fully dependent on her. I do not propose to apply a discount for early payment, since in my view the multiplier chosen is intended to reflect the advantage which the wife will gain from early receipt of a capital sum. The lump sum award will therefore be £575,000 (housing fund) plus £300,000 (income fund); a total of £875,000. This can be paid within 14 days. The husband must make interim provision for the wife and C at the rate of \$C21,875 per month until payment.

[45] In addition there will be an order for periodic payments to the wife for C in the sum of £15,000 pa plus her school fees and expenses and on the basis that the husband pays her travel costs relating to contact. In his written submissions Mr Posnansky QC suggests the provision of security for C's maintenance via a term life policy; but I have no information as to the cost of this; and the point has not been developed in oral submissions. I am prepared to hear argument on it if the wife so wishes.

[46] The order should include appropriate tax indemnities and is made on a clean break basis.

Order accordingly.

Solicitors: *Levison Meltzer Pigott* for the petitioner
Gordon Dadds for the respondent

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