Articles

ANCILLARY RELIEF AND SEXUAL (MIS)CONDUCT: NEGATING NEED: *K v L*

ANDREW COMMINS, Barrister, St John's Chambers, Bristol

Sexual abuse is a form of violence quite unmatched in its emotional and physical impact, extent, severity and longevity. For the judge faced with the unenviable task of achieving economic fairness between parties, one of whom is guilty of sexual violence, she will invariably be enjoined to take account of such 'exceptional' conduct in her balancing exercise (*S v S (Non-Matrimonial Property: Conduct)* [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496). However, the weight to attach to such conduct, and the effect upon the fairness of any division of finances, must be discerned with little guidance or instruction. In *K v L* [2010] EWCA Civ 125, [2010] 2 FLR (forthcoming) the Court of Appeal was faced with a sinister and disturbing history of inter-generational sexual violence, perpetrated by a husband against his wife's grandchildren. Understandably, the court was requested, but refused, to provide guidance on the proper treatment of misconduct in awards for ancillary relief, particularly where the available resources permit a contribution to the perpetrator's needs without causing any financial insecurity for the payer. However, an analysis of the judgment does provide the practitioner with a model case in which the conduct itself proved ultimately decisive in overriding all other s 25(2) factors, including the financial needs of the guilty party.

This article seeks firstly to assess the decision in *K v L* as against the other principal reported decision regarding exceptional violent conduct (*H v H (Financial Relief: Attempted Murder as Conduct)* [2005] EWHC 2911 (Fam), [2006] 1 FLR 990) and, secondly, to analyse the logic on the one hand of depriving a party of resources to meet basic needs whilst on the other maintaining that such an order is not punitive in nature or amounts to 'double-punishment' in its effect.

THE FACTS

In *K v L* the husband had pleaded guilty to 15 counts of sexually assaulting two of the wife's grandchildren between 2004 and 2007, of taking indecent photos of one of them and of other related offences. The factual matrix of the ancillary relief case extended, of course, beyond the sexual conduct. At the time of the appeal, the wife was 71 and the husband 65; the marriage had endured for 24 years and the parties had three grown-up children. It was the wife's second marriage. She had inherited significant funds upon the death of her father, who died shortly after the marriage. It was the inherited wealth 'which funded the comfortable lifestyle of the family and enabled the Husband to relinquish paid employment . . . to pursue . . . literary and artistic interests of an essentially unremunerative kind' (Wilson LJ, para [3]). At the time of the marriage the wife transferred a valuable home in London into joint names and in 1987 the parties purchased a property abroad. In 1993 the parties separated for a period and, upon their reconciliation, an agreement was drafted stipulating that the husband transfer his interest in the family home back to the wife and that, if they were to separate again, he would not seek to take advantage of her much greater personal wealth.

At the time of the final hearing before Moylan J, the husband was serving a

minimum 3 year sentence for his sexual crimes. The judge made further limited findings as to his (sexual) conduct and also found, quite understandably, that the wife had been deeply traumatised by the husband's conduct and that the husband was a manipulative man, whose evidence could not be trusted. The wife's assets were valued at £4.3m. The husband's assets comprised largely a half share in the foreign property, valued at £90,000, and an expectation of an inheritance from his 94-year-old mother, which the trial judge valued at circa £100,000.

Without much surprise, the husband's position was needs-limited and he sought a lump sum payment of £500,000 from the wife in return for transferring his half share in the foreign property to her. He deposed a capital need for housing upon his release and a requirement for a small fund from which to draw some income to supplement his state pension entitlement. He hoped to get parole later this year. The wife offered £100,000 in return for the foreign-property transfer, effectively, therefore, a lump sum payment to the husband of £10,000 and a clean break. The judge at first instance made an order reflecting the wife's open position in addition to a costs order against the husband for £50,000, which was to be set-off against the wife's liability to pay him the £100,000 lump sum. The Court of Appeal upheld the decision.

THE EFFECTIVE DETERMINATIVE NATURE OF THE CONDUCT IN *K V L*

The Court of Appeal refused to provide guidance for those sorts of cases in which conduct will override other statutory factors. However, it is clear that the court considered the husband's conduct in this case to be, in effect, determinative within the discretionary exercise, as will be argued in this article. Wilson LJ made it clear that the husband's appalling violence and the consequent legacy of misery was so profound 'as plainly to have entitled the judge to reach what, in their absence, might well, notwithstanding the source of the wife's wealth and even (the husband's promise) in 1993, have been an appealable determination' (para [18]). It was arguably the conduct alone, therefore, that entitled the court to find that the first instance judge had not been plainly wrong.

PUNITIVE AWARDS AND CONFISCATORY ORDERS

There is no doubt whatsoever that the husband's conduct in *K v L* was so gross and exceptional as to make it inequitable for it to be disregarded (*S v S (Non-Matrimonial Property: Conduct)* [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496). Indeed, the husband accepted as much through his counsel at the final hearing. The judge's order provided less than 2.3% of the overall assets to the husband and arguably could not provide for him even the smallest mortgage-free re-housing fund. Other than a motivation to punish the perpetrator a second time for his conduct, how is such a restricted award justified? In the case of *H v H (Financial Relief: Attempted Murder as Conduct)* [2005] EWHC 2911 (Fam), [2006] 1 FLR 990 Coleridge J had to assess the impact of the husband's vicious and violent attempts to kill his wife. He viewed the conduct as being at the 'very top end of the scale' (para [43]) and no doubt the sexual violence in the case of *K v L* warrants similar categorisation. *H v H* was not expressly considered by the court in *K v L*; however it is instructive as to the approach to be adopted in such extreme conduct cases. In *H v H* Coleridge J considered that the court 'should not be punitive or confiscatory for its own sake'; rather, 'the proper way to have regard to the conduct is as a potentially magnifying factor when considering the wife's position under the other subsections and criteria' (para [44]). To that extent, the conduct is 'a glass through which the other factors are considered' (para [44]).

In *H v H* the court faced a very different factual matrix to that in *K v L*: the assets were limited to just over £500,000 (including pension valuations); there were two young children of the marriage living with the wife, aged 6 and almost 7, and, most importantly, the court had to balance the competing needs of the parties within the constraints of the modest resources available. Therefore, the wife's need in *H v H* for re-housing for herself and the children away from the scene of the crime deserved a 'much higher priority' (para [44]) and it was the assessment of the

competing needs through the kaleidoscope of the husband's conduct that permitted such precedence. Furthermore, in *H v H*, the wife had been physically injured and emotionally traumatised such that her earning capacity was almost completely eroded with no real accurate estimate as to when – or to what extent – it would return. Therefore, the husband's conduct had a 'direct [financial] effect' upon the wife, to which the court had to have regard; a consideration that could fit relatively easily within the wording of s 25(2).

Most interestingly, however, Coleridge J commented upon the husband's claim for a re-housing fund for himself of £180,000 saying 'if it is possible to achieve that, then of course it is reasonable as well' (para [48]), no doubt in recognition of the fact that the housing needs of the parties often dominate most cases (*Cordle v Cordle* [2001] EWCA Civ 1791, [2002] 1 FLR 207) and that, if possible within the assets available, basic provision for accommodation should be made for both the husband and the wife. In *H v H*, the husband did not expect release from prison for a further 4 to 6 years and, moreover, such provision for the husband was not possible within the limited assets, given that the wife's inability to earn an income demanded a mortgage-free home for her and the children's security and welfare. To that extent, the husband's conduct required the judge to adopt the higher-end housing figure postulated by the wife and to prioritise, therefore, her comfortable and secure future.

By contrast, in *K v L* there were ample resources from which the husband – who hoped for release imminently in 2010 – could purchase even the most modest of accommodation. That basic need was objectively generated from the parties' relationship and long-term interdependence, he having lived and relied upon the financial security of the wife since their marriage some 20 years earlier (*Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186). However, the provision of resources to meet even the husband's minimum housing needs was rejected as illegitimate and unfair: not for reasons of financial constraint but rather because 'it would not be fair to require the wife to make provision for the husband's economic needs' (para [18]). The corollary to this statement must be that, in the court's estimation, it was fair for the husband to be *denied* provision to meet his own basic needs from the marital assets. In contrast to the position in *H v H*, modest needs did not require the stretching of modest finite resources. The wife could have been ordered to provide an additional small lump sum to augment the husband's limited capital without any difficulty to provide for his purchase, for example, of a one bed property upon his release; to meet the requirement of fairness that 'the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs …' (*Miller; McFarlane*, per Lord Nicholls at para [11]). If that refusal is not punitive or confiscatory for its own sake, then what possible rationale can there be for such a significantly limited award when the assets easily permitted such rudimentary financial provision?

THE GLASS AND THE PRISM: AMPLIFYING FACTORS IN LIGHT OF THE CONDUCT

Whereas the court in *H v H* undertook its discretionary exercise through the (magnifying) glass of conduct, in *K v L* the Court of Appeal considered its duty 'through the prism of what was fair' (para [15]). Through either or both of these judicial creations, it can be argued that the court of appeal in *K v L* endorsed an approach in which otherwise comparatively extraneous matters became much more relevant when seen in light of the husband's conduct.

First, Moylan J attached 'significant' weight to the agreement in 1993. He extrapolated that, but for this agreement the parties would not have reconciled, the marriage would not have been so lengthy and the husband would not have had the opportunity to indulge in horrific sexual abuse of the grandchildren. That may be true in a vacuum of strict logic, but it is almost certainly not the only reason for his conduct (which occurred some 11 years after the agreement) and it was an extremely limiting agreement, which, in general terms prohibited him from 'taking advantage of [the wife's] greater wealth'. Interestingly, the approach taken by the

court in relation to the agreement appears not to be so much as to limit the award according to the express conditions of the agreement, but rather to (artificially) 'shorten' the marriage relevant to the court's consideration, precluding 'the husband from being able to attach any significant weight to the further length of the marriage following 1993' (para [14]). It is of course much easier for the court, following the current approach to ancillary relief claims, to restrict an award after a marriage that endured for only 6 years in comparison with one that lasted 24 years when, upon separation, the length of the marriage 'will affect the quantum of the financial fruits of the partnership' (*Miller; McFarlane* per Lord Nicholls at para [17]).

Secondly, therefore, the inferred 'shortening' of this marriage permitted the judge to attribute greater weight to the terms of the agreement itself and to the fact that the source of the family's wealth lay almost entirely on the wife's side, despite this substantial wealth emanating from the death of the wife's father at the start of the marriage. Notwithstanding an apparent retreat from the strict and formulaic approach of wealth-source categorisation (for example see *C v C* [2007] EWHC 2033 (Fam), [2009] 1 FLR 8), the higher court guidance at its most basic remains that in cases where assets are 'not generated by the joint efforts of the parties . . . the duration of the marriage may justify a departure from the yardstick of equality of division' (*Miller; Mcfarlane* per Baroness Hale of Richmond at para [152]).

Thirdly, the judge at first instance attributed some weight to the husband's future inheritance prospects from his 94-year-old mother (circa £100,000). The husband maintained that his share would be reduced as a result of her entering residential care, but his sister provided a statement challenging this assertion. Despite the husband's mother's age, in the normal case uncertainties as to the fact of inheritance and the time at which it may occur often render it difficult to hold such assets as property which is likely to be received in the foreseeable future (*Michael v Michael* [1986] 2 FLR 389), particularly where marital assets are sufficient to provide more security of receipt. However, in *K v L* such property was relied upon to counter the husband's basic complaint as to the lack of provision for his re-housing, despite: (1) the marital assets easily allowing for such provision; and (2) his need for re-housing being imminent before the year's end.

JUSTIFYING THE AWARD: A JUSTIFICATION TOO FAR?

Without express reference to *H v H*, it appears, therefore, that the Court of Appeal in *K v L* endorsed an approach whereby the court felt entitled to regard the conduct as a magnifying factor when considering the wife's position under the statutory criteria. That approach would seem understandably to mirror that taken in *H v H*; however, it is arguable that the court in *K v L* applied that approach with too much rigour and gave insufficient regard to the husband's needs in light of the assets available. It is, of course, at that tipping point that an award becomes punitive or confiscatory for its own sake rather than limited by the financial effects of the conduct within the discretionary exercise.

The Court of Appeal in *K v L* dismissed the husband's counsel's complaint that the judge had come to a punitive order marking the moral turpitude of her client. However, if the conduct element is removed from the equation, the court's award after a marriage of 24 years involving two pensioner parties, a lengthy term of financial dependence and mutual needs for housing and income security, would be patently unfair. Effectively, the husband was reliant upon the death of his mother to provide him with sufficient capital security to purchase accommodation. It was impossible to determine when that would occur.

Unlike *H v H*, the 'direct [financial] effect' of the husband's conduct did not reduce the wife's assets nor affect her earning capacity or income; factors which are unambiguously relevant to the court's consideration. In *K v L* there was no competition of needs nor was there a limited asset pot from which the court had to prioritise the welfare of the wife, mother and minor children over the long-term incarcerated husband. The matrimonial home, albeit reversed in terms of ownership in 1993, could have the 'central' position often attributed to is as matrimonial property. Even in *H v H*,

where the wife was the direct victim of the husband's murderous attack, Coleridge J was willing to entertain the reasonable possibility of providing resources to re-house the husband, despite the years to his release, his wicked violence and the limited pot available.

In *K v L* the parties were older, the husband reliant upon a state pension and, despite the 1993 agreement, they had actually been married for 24 years. Notwithstanding the source of the wife's significant wealth, it remains good law, of course, that, 'in the ordinary course, [inherited wealth] can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property' (*White v White* [2001] 1 AC 596, [2000] 2 FLR 981 per Lord Nicholls at p 569). However, in *K v L*, the sexual (mis)conduct of the husband – in light of his 1993 agreement and the source of the marital assets – justified an award that would not provide for even his basic financial needs despite almost all the matrimonial wealth being the result of inheritances some 20 years earlier.

Therefore, whereas the award upheld in *K v L* expressly rejects double-punishment as any justification, the actual effect of the husband's conduct on his financial award is punitive to a degree by reference, first to the comparable award upon its removal from the factual equation and, secondly, to the fact that it effectively trumped the husband's basic needs by amplifying the influence of other considerations within the court's discretionary exercise. The question for the court will always be the same: how far can that amplification go? Of course, each case is fact-specific and seeking to draw parallels and rationales is notoriously difficult and inherently risky. However, *K v L* does provide an interesting example of such [sexual] conduct which – when balanced against other factors – can negate needs even if the direct effect of the conduct is not financially quantifiable nor the pot too limited to provide.