¡Viva El Loro!

Speech to Jordan's Family Law Conference

8 October 2014

It is a great honour to be addressing you today, an honour that is enhanced when I reflect that I follow in the footsteps of that behemoth in the field of family law Sir Paul Coleridge.

His address last year was entitled *"Lobbing A Few Pebbles In The Pond; The Funeral Of A Dead Parrot"*, which is an interesting mixed metaphor even if it lacks the intricacies of those habitually peddled by Sir Peter Singer. I cannot resist however repeating this gem of Sir Paul's: *"the days of the gladiatorial wars of the titans are over. The dinosaurs have had their day"*. I have done some research into the practices of the ancients but so far as I can ascertain titans did not fight in the arena as gladiators against dinosaurs.

Sir Paul's central themes were these:

- That relationship breakdown is a national calamity not only in terms of heartache but also in terms of vast sums of wasted money.
- (By implication) that the objectives of the Marriage Foundation, which promotes as the gold standard traditional marriage as a bulwark against dysfunction, are, if not the panacea, then certainly the way in which government reform should move.
- That the Matrimonial Causes Act 1973 is a dead parrot.

He said:

> "The current divorce and financial provision law (not to mention the law relating to unmarried partners) is no longer, I suggest, fit for purpose. It was designed in a wholly different era to deal with a wholly different society and way of life. In the immortal words of John Cleese, it is a dead parrot. It is no more. It has gone to meet its maker. Or should do. The Matrimonial Causes Act 1973 with all its layers of crustacean growth needs to be humanely killed off and given a decent burial and the heroic efforts of the Supreme Court to maintain the life support system need to stop. The Act has, quite simply, had its day."

I do not agree with Sir Paul. Hence my title.

In his speech Sir Paul states: *"Unmarried parents are nearly 3 times more likely to break up before their first child's seventh birthday. And the chances of a 15 year old still living with both his parents, if they are unmarried, is very small indeed. About*

7% of unmarried parents are still together by the time their children reach 15 whereas 93% are married." I am not going to spend much time disputing these statistics other than to say that it does not in my opinion follow as a matter of logic or the laws of probability that because empirically more non-marital relationships fail than marital ones it can be concluded, on that evidence alone, that a marital relationship is by virtue of the marriage and no other factor more stable than a non-marital one. That seems to me to use an impermissible conclusionary technique the error of which is well illustrated by the following story.

An engineer, a physicist and a mathematician are travelling through Scotland on a train. They espy through the window a black sheep. The engineer says "based on my observation I conclude that most sheep in Scotland are black". "No", says the physicist, "all you can properly conclude is that some sheep in Scotland are black". "I disagree", says the mathematician, "all you can say, based on the evidence, is that in Scotland there is one sheep, one side of which is black".

Let me show why I believe that the statistics relied on by Sir Paul should be treated with considerable caution. Figures recently released for the first 8 months of this year show that 21% of all applications for permission to apply for judicial review were granted on paper. And that 29% of all applications initially refused on paper but later orally renewed were granted. Do these statistics mean that irrespective of any other factors there is a one in five chance of obtaining permission on an application for judicial review? Or that there is a one in three chance of gaining permission on a renewal? Of course not. That would be a totally impermissible and erroneous statistical conclusion. It is of a piece with the probability nonsense advanced by Professor Sir Roy Meadow against Mrs Sally Clark which suggested that there was only a one in 79 million chance that she did not murder her two children. This being the square of the rate of incidence of cot death (1 in 8,543). This analysis, as the Royal Statistical Society has pointed out, was exceptionally flawed as it did not take into account microbiological evidence suggesting that one of the children died of natural causes or the (perhaps more obvious) argument that while a double cot death is very unlikely a double act of filicide is even more unlikely in terms of statistical incidence (apparently between 5 and 9 times more unlikely)[1]. The Court of Appeal was withering in its condemnation of this statistical evidence: see *R v Clark* [2003] EWCA Crim 1020 at [172] – [180].

I also bridle at the implication that in some way a marriage is a better form of relationship than a non-marital one. It is not the role of the state (in my humble opinion) to go round telling people how they should form their relationships. Marriage is already discriminated in its favour through the tax system, and some might think (I could not myself possibly comment) that such state aid to one form of relationship is already a distortion.

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[1] Ray Hill: "Multiple sudden infant deaths – coincidence or beyond coincidence?", Pediatric and Perinatal Epidemiology, vol. 18, pp. 320–326 (2004).

Surely, in terms of social engineering (assuming that is a proper role for the state at all) the emphasis should be not so much on the form of relationship but on support for families?

So I turn to Sir Paul's central argument that the present statutory system of equitable distribution, as interpreted by the judiciary, is an anachronism which should be quietly killed off and replaced by something else.

I start by saying immediately that I agree with Sir Paul that it is indefensible that the unmarried are denied access to judicial equitable distribution, but unlike him for exactly the same reasons that I have quibbled with what I believe to be the Marriage Foundation's espousal of what it says is the gold standard for the formation of a family. In Scotland a curtailed system of equitable distribution exists but it has different rules, mainly based on compensation for economic disadvantage, which are a world away from the full blown system available to married couples. I do not support two classes of adjudication depending on whether there happens to be a marriage. Sir Paul says *"no-one, least of all me, is suggesting a cohabitant should be given equivalent rights to married couples"*. Well, I support the extension of the existing system of judicial equitable distribution to the unmarried, warts and all. That is just what happened in New Zealand, and no-one there has suggested that the sky has fallen in and civilisation has come to an end. In my opinion it is anomalous that the discretionary system should have been extended to one sector of the unmarried community, namely civil partners, but not to the rest.

I would however observe that as a result of the hieratic pronouncements from the Supreme Court the lot of the unmarried is now very much better than it was. It is easy to denigrate that regime as "the law of trusts". The fact is that we now have a simple system where the court will implement a property agreement, express or tacit, between the partners, and in the absence of one will impute (I forebear from saying "impose") a fair result. I have noted that my very good friend Professor Bailey-Harris has suggested at [2014] Fam Law 1117 that I have fallen into error in suggesting that the fairness safety net applies in a sole name case. She says that it only applies in a joint names case where there is evidence of intention to share but no evidence as to the proportions. She says that there is authority of the Court of Appeal which backs her up. Well, I do not agree that the authorities she cites are consistent with a fair purposive reading of *Jones v Kernott* [2011] UKSC 53, and for my part I intend to try to navigate around them should I ever be confronted with that particular problem in the future.

So I turn to the Matrimonial Causes Act. This was in fact passed in 1970, as the Matrimonial Proceedings and Property Act and later consolidated in 1973. I have not done an analysis of how many statutes are in force that were passed in 1970 or earlier but the number surely runs into the hundreds, if not thousands. To state the obvious, a statute does not lose its legal or moral validity because it was passed in an earlier era.

I cannot help but observe however that in 1970 the Equal Pay Act was passed. To quote Sir Paul the *"world we inhabit today is not the same world as we inhabited [then] … Socially, society is unrecognisable. The norms of behaviour, the so called stigmas and the taboos have all changed beyond recognition or evaporated altogether."* True enough, but have the social tenets and principles that underlay that key reform "evaporated"? Plainly not. It was a first step on a drive to promote equality between the sexes recently expanded and consolidated in the Equality Act 2010.

I might further observe that the Seal Conservation Act was also passed in that very different era of 1970, but from the point of view of the seal the fact that we live in a different world is hardly of any significance. Equally in 1969 the Tattooing of Minors Act was passed, and the enduring merit of that is perhaps more important now than it ever was.

I could go on. Magna Carta was passed in a very different age. As was the US Constitution. The European Convention on Human Rights was agreed in 1950 and came into effect in 1953. A different age indeed. For obvious reasons I steer clear of the Bible.

Fortunately in this country when it comes to statutory interpretation we are not divided like the US between textual originalists and what are termed loose constructionists. For those interested in the story I recommend the most interesting book written by Judge Richard Posner of the US Court of Appeals for the Seventh Circuit entitled *Reflections on Judging* (Harvard University Press 2013). Generally the loose constructionists have had the upper hand. Posner (at p197) refers to the encomium rendered by Oliver Wendell Holmes on the retirement of Justice John Marshall where Holmes stated that it was a fortunate circumstance that the appointment of Chief Justice fell to John Adams rather than to Jefferson a month later, and so gave it to a loose constructionist to start the working of the Constitution.

Of course textual originalist run into obvious and serious problems from time to time as the arch-conservative Justice Scalia discovered during the infamous case about the Second Amendment, *District of Columbia v Heller* (2008) 554 US 570, which overthrew DC's ban on the possession of pistols. As you will know the Second Amendment states *"A well-regulated Militia being necessary for the security of a free state, the right of the people to keep and bear arms shall not be infringed*." Of course having been written in a different era the questions arise: what did the framers mean by "people" and what did they mean by "arms"? Obviously in 1791 "the people" did not mean slaves or women, and then as now it could not have meant prisoners, minors or lunatics. So the literal words are not really very informative. As for arms they can only have meant flintlocks, muskets, pikes and swords. And even Scalia, while acknowledging that the Second Amendment plainly had a military focus with its reference to a Militia baulked at the idea that it meant that the people could keep at home modern military weapons like heavy machine guns, mortars and hand grenades. So again the literal words are useless, and even the supposed intentions of the framers are fashioned by the personal ideological instincts of the interpreting judge. Even for the high priest of textual originalism the meanings of words in a statute change with

the passage of time. As Posner put it (at p191) for Scalia the Second Amendment had become a new young wine in a decidedly old wineskin.

A loose constructionist will interpret a statute purposively, particularly a statute with a social context, as a living instrument, in accordance with the standards and mores of the day. And if the legislature does not like the interpretation given by the third arm of government namely the judiciary then it holds the trump card in the shape of revising legislation. In his thoughtful review in the New York Review of Books on 11 July 2013 of the iconoclastic book *On Constitutional Disobedience* (OUP) by Louis Michael Seidman, his fellow Georgetown Law teacher David Cole wrote:

> "The Constitution ... is not a foreign object imposed on us by the dead hand of the past, but an evolving reflection of our deepest commitments."

So too, I would argue, is our statutory divorce law.

A history of the Matrimonial Causes Acts reveals very clearly that Parliament has left the interpretation of the discretionary powers to the judges to spell out in accordance with the standards and mores of the day.

The first ancillary relief powers, and the direction as to how they were to be exercised were enacted in the Matrimonial Causes Act 1857 ss32 and 45. They were: (1) to award secured alimony and (2) to settle an adulterous wife's property for the benefit of the innocent party (i.e. the husband and/or the children). The court's adjudicative yardstick for the former power was "*as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties it shall deem reasonable*". As regards the latter it was merely "*such settlement as it shall think reasonable*".

This shows that from the very dawn of judicial secular divorce Parliament intended the judges to determine the question of reasonableness. While it is true that the word **fairness** is not actually used here or in any successor statute (as Sir Paul points out) I would suggest that the word reasonable, oft reiterated, is synonymous with that concept.

The court's powers were expanded in 1859 to enable the court to vary ante or post-nuptial settlements. s5 of the Matrimonial Causes Act of that year provided that the court could do so as to it "shall seem fit". Again this was a laconic prescription which left the interpretation squarely in the hands of the judges.

By s1 Matrimonial Causes Act 1907 the court was given power to award unsecured maintenance. The scope of the discretion, and the matters to which the court was mandated to have regard, were not altered. The menu of powers and the way they were to be exercised were consolidated but not materially altered in ss190 – 192 Supreme Court of Judicature (Consolidation) Act 1925. And again, in ss19, 24 – 25

Matrimonial Causes Act 1950. By section 5 Matrimonial Causes Act 1963 the court was given power to award a lump sum. The Matrimonial Causes Act 1965 consolidated all the powers and the prescription as to adjudication in ss16 and 17; the only direction as to how the powers were to be exercised was "as [the court] thinks fit".

Further powers were given to the Court by the Matrimonial Proceedings and Property Act 1970. These were the power to award (a) a transfer of property order and (b) a settlement of property order in favour of either party irrespective of his or her conduct. Further, the inquisitorial obligations of the court were set out far more expansively, in the well-known form and this included the minimal loss tail piece with which you are all familiar. That was regarded by the Law Commission as doing no more than to express in the statute the principle stated by Lord Merrivale P in *N v N* (1928) 44 TLR 324 viz:

> "I conceive that I must take into consideration the position in which they were and the position in which she was entitled to expect herself to be and would have been, if her husband had properly discharged his marital obligation."

Although the scope of matters the court was mandated to take into account was made more extensive it is hard to see whether they actually encompassed any matters beyond the more laconic 1857 phrase *"as the court thinks reasonable having regard to her fortune (if any), his ability and the conduct of the parties".*

The 1970 Act was consolidated without alteration into the Matrimonial Causes Act 1973 ss 21 – 25. By s7 of the Matrimonial Homes and Property Act 1981 a further power was given the court to order a sale of property (s24A). By the Administration of Justice Act 1982, s 16, the power to award interest on deferred lump sums was given. By the Matrimonial Proceedings and Property Act 1984 the tailpiece was removed and the court was required to give first consideration to the welfare of minor children. A statutory steer was included by s25A to a clean break. By the Welfare Reform and Pensions Act 1999 the court was given power to make a pension sharing order. Now the menu of powers was complete.

So we can see the chronology as to the statutory mandate concerning the exercise of the discretion:

- laconic – 1857
- expansive, with minimal loss objective – 1970
- expansive; no minimal loss objective; first interest welfare of children; steer to clean break – 1984

What is clear, so far as ancillary relief is concerned, is that following the founding statute in 1857 every following statute has amounted to piecemeal tinkering, to a greater or lesser extent. I agree that there has never been a great analysis by

Parliament of the underlying ideology and of the extent of the duties of the court and the parties. Rather, Parliament was fixated with the grounds of divorce; the question of fault; and the concept of the matrimonial offence. This was the gripping issue and was not ultimately resolved until the passage of the Divorce Reform Act 1969. So far as ancillary relief was concerned, as I have shown, Parliament has always intended that the relevant standards should be formulated by the judges.

It is not necessary for me to set out at any length the way in which the judges have exercised the discretion over the decades. Suffice to say that before 2000 the benchmark was the wife's reasonable requirements. That was swept away by the decision of the House of Lords in *White v White* [2001] 1 AC 596 which introduced the concept of the yardstick of equality; the proscription of discrimination; and the over-arching criterion of fairness. Those concepts were refined by the House of Lords in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 where the three co-existing principles of needs, compensation and sharing were expounded. In my opinion the present system works very well, and very predictably, so far as substantive law is concerned.

I do not dispute the merit of the Law Commission's proposal to make qualifying nuptial agreements presumptively binding.

However, I do dispute the need to introduce Scottish-style mechanistic prescriptions as envisaged by Baroness Deech's Divorce (Financial Provision) Bill. It borrows heavily from the Scottish system. In 1997 Lord Irvine sent his Ancillary Relief Advisory Group up to Edinburgh to learn about it and to report. It duly reported – very negatively. It was convinced (and the Scottish practitioners in effect conceded) that their rigid system replaced one set of problems with others, probably worse.

Many technical criticisms can be made of the Bill as presently formulated but I will not tarry over those. The central themes are that:

- Nuptial agreements should be presumptively binding (I have no problem with that).

- Matrimonial property should be calculated at the date of separation and presumptively divided equally.

- An order for periodical payments cannot extend for more than 3 years.

- An order for periodical payments or for a lump sum (but not any other form of capital provision) can only be made to redress economic disadvantages. And a lump sum can only be awarded out of matrimonial property.

One can see many furious disputes arising. I foresee valuation disputes concerning the assets at date of separation and the question of passive or active growth on them. I foresee disputes about the three year guillotine for maintenance. What of a wife aged 60 with no capacity to work is left after a long marriage and where the parties have negligible matrimonial property but the husband is likely to have a large income for many years? Her future support cannot be met out of capital and she needs periodical payments. The Bill cuts her off at age 63. What is she supposed to do then? I foresee disputes about the different ways in which the discretion is to be exercised in relation to a lump sum and all other capital orders (where the character of a capital asset, land or money, is surely a fortuity). I foresee furious disputes around the inability to effect a clean break because a lump sum can only be awarded out of matrimonial property. Beyond all this I recall Joseph Jackson QC's timeless apothegm: "Every piece of family legislation is 10 years' work for the Bar!"

In truth the tests we presently apply and the tests that the reformers would have us apply are no more than heuristics. Whatever the architecture of choice the decision maker will know at the end of the case what is the just result. If the heuristics in play do not conform to that result the decision maker will simply rearrange the architecture of choice. The great leap forward from needs to sharing has already happened and there is no way of extracting that milk from the coffee.

In the second reading debate on 27 June 2014 my very good friend Baroness Shackleton of Belgravia stated in a magnificently self-sacrificing speech:

> "Uncertainty of outcome creates an industry for lawyers to litigate. It makes it difficult or impossible to have successful mediation, and the financial costs — not to mention the unquantifiable human cost mentioned by many noble Lords, aggravated often by delay because the courts are too full — are vast and unnecessary. The Bill seeks to limit the discretion of a court and provide direction from Parliament for matrimonial finance."

I do not agree that the present system is replete with uncertainly. Were we to scrutinise a case study today I would warrant that the overwhelming majority would be within a few percentage points of the mean. Put another way the standard deviation would be low. I am sure there would be some outliers but the standard deviation graph would be shaped more like a bell than an upturned saucer; of that I am convinced.

But in any event the system must not sacrifice fairness on the altar of certainty. And as Sir Paul has pointed out standards of fairness change, sometimes quickly, and often the only way they can be reflected is by the judicial arm of government, given the other demands made on the legislature.

You have seen that I have disagreed with Sir Paul, with Professor Bailey-Harris, and with Baronesses Deech and Shackleton. I am reminded of the story of the mother watching her son's passing out parade at Sandhurst. "Look" she exclaimed "they are

all out of step with our John!" But I am not completely alone. My almost final word is to quote from Lord Scott of Foscote in the debate:

> "It has to be recognised that there is always a tension in deciding what the statutory framework should be for the management of the affairs of the disputing couple post marriage. There is a tension between certainty on the one hand and fairness on the other. Certainty can be achieved by careful drafting of legislation, but fairness depends on the circumstances of the individual case. However, individual cases and people are different, and people have different problems. The greater the certainty, the more likely that the rigidity of whatever the certain system is that has been decided upon will produce, in some cases, unfairness for one or other of the spouses. That is the justification for giving the judges the huge amount of discretion they have under the present statutory framework. Maybe that leads to more dispute and litigation than is desirable; maybe the judges should not have so much discretion. To introduce more certainty or cut down on the discretion would be at the expense of fairness. That is a very difficult balance to strike. The advantages of certainty will not solve satisfactorily all the problems, because the same answer does not necessarily produce fairness for everybody."

In the immortal words of many an appellate wingman I say "I agree and have nothing (more) to add". So this is why I conclude with my title.

¡Viva El Loro!