CA on appeal from Preston County Court (His Honour Judge Appleton) before Thorpe LJ, Chadwick LJ, Mr Justice Morland. 28th January 2003.

JUDGMENT : LORD JUSTICE THORPE:

1. The essential facts underlying this appeal can be briefly stated. The parties formed a relationship and cohabited in and after 1991. They bought a home together in August 1992 and naturally enough had it conveyed into their joint names, presumably as joint tenants. They then had two little girls, Hannah who was born in August 1993 and Bethany in January 1997. Sadly, almost immediately after Bethany's birth the respondent father left the home for good. The appellant mother and the respondent father had to cope with the consequences of the breakdown of their relationship. For a time the father made ad hoc payments but he wanted to know where he stood. Accordingly, on 26th May 1998 the parties signed a document clarifying their future rights and obligations. I read the document in full. It is prepared in the form of a letter from the father to the mother. It starts:

"Dear Katherine,

I am writing to confirm the following points:

1) Maintenance payments to yourself are as follows:

- Rent on 12 Riverside Road, at £415 per month (paid directly to landlord)
- Maintenance payments at £600 per month (paid directly to you)
- Nursery fees for Bethany at £75 per month (paid directly to you.
- Car insurance at approx. £27 per month (paid directly to insurer)
- TV & Video rental at £32 per month (paid directly to Radio Rentals)

The grand total is, therefore: £1,149 per month.

Should you purchase a house, or change any of the above elements, the grand total will not decrease. The above payments will continue until there are any significant changes in your personal circumstances.

2) I will pay you 50% of the surrender value of the endowment policy for 24 Victoria Lane. I will pay this to you once I have received payment from London & Manchester Assurance Company. The estimated value to you is £1,700.

3) I will be willing to act as guarantor for any mortgage arrangement you make in order to purchase a house for you and the children. This will not give me any claim to ownership for any house you purchase.

4) You will sign the required paperwork to transfer ownership of 24 Victoria Lane, and any associated endowments to myself as sole owner.

Please sign below as acceptance of the above. Whilst there are no timescales attached to the above terms, the overriding objective is to provide a home and financial support for you and our children for as long as this is required, and we will change the details of the above only by our joint agreement.

Yours sincerely.
Paul Strout"

2. In September 1998 the mother embarked on a one year course which qualified her to commence a BA degree course at Manchester University in September 1999. However, her aspirations were shattered by the father's decision in January 2000 to reduce the payments which he had theretofore been making under the agreement to the sum of £600 per month. That decision reflected substantial changes in his circumstances. He had in the interim found someone else, someone else whom he had married, and his wife had presented him with another child.

3. In these reduced financial circumstances the mother was unable to continue to meet the rent on the property which she and the girls were occupying, and the result was a forced move and the end of her degree course. In April 2000 the Child Support Agency made an administrative assessment of the father's liability in the sum of £706 a month. It is my understanding that between that date and the present day he has continued to make payments for his two daughters as assessed by the Agency.

4. The proceedings in the case commenced with a particulars of claim dated 13th March 2001, issued in the Manchester County Court. The particulars sought the enforcement of the agreement of 26th May 1998, which was defined in paragraph 5 as a "*separation agreement*". In paragraph 17 it was pleaded:

"The claimant provided consideration for the contract and substantially changed her position and that of the children by transferring title to the property to the defendant, moving out into rented accommodation, giving up her job as a nursery nurse and commencing further education."

The following paragraphs pleaded the defendant's breach and claimed damages which were said to be in excess of £15,000. A schedule of loss, settled by counsel, sought ambitiously to recover not only loss of maintenance payments under the agreement from January to December 2000, but continuing damages thereafter until the hypothetical future date of the mother obtaining satisfactory employment, having completed a BA degree course. So it was said that the total loss amounted to £45,000 plus interest, both past and continuing at a daily rate of £10.

5. This pleading attracted a defence, in which absence of consideration and absence of intention to create legal relations were advanced and relied upon. The action came on for trial before His Honour Judge Appleton on 18th February 2002 in the Preston County Court. We know from the transcript of the proceedings on that day that the case should have been listed in Manchester but could not be accommodated in that court as a result of pressure on the lists. It was purely fortuitous that Judge Appleton had a settlement that freed up a day before him in Preston in February. Accordingly, he took the case at little notice, and as his judgment reveals he had little opportunity to consider the points of law that were extensively argued before him by Mr Jay for the mother and Miss Proops for the father. In the end, the judge decided the case against the mother, upholding Miss Proops' submission that the agreement of May 1998 was unsupported by consideration. The judge's reasoning can be distilled from three paragraphs of his judgment, when he said: *"Mr Jay for his part was frankly left stranded on this issue of consideration by his own synopsis because it is plain as a pikestaff, reading his case synopsis, that he had formed a strategic view of the strengths of his client's case on this issue, as set out in paragraphs five, six and seven of the synopsis, and he wrote without reservation:*

'As a result of the above agreement she left the former home, the property owned in joint names.'

As the evidence has come out, that simply is not correct, she had already gone. So his main item of consideration has disappeared during the course of the evidence."

The judge, having formed that view, made no separate finding on the alternative defence advanced by Miss Proops, namely that the parties had no intention to create legal relations.

6. The application for permission to appeal was granted by Mance LJ who explained clearly the reasons for his grant. Having read the appeal bundle and the skeleton arguments advanced on behalf of the appellant mother, I, as a family lawyer, at once saw this case in a very different light to that in which it was viewed by the judge below. I emphasise that I have every sympathy with Judge Appleton who, not unnaturally, viewed the issues as he was invited to view them by counsel in the case, particularly by Mr Jay, who had pleaded the case for the mother and who appeared to support his pleadings.

7. This in my perspective was an agreement not to be classified as a separation agreement but as a child maintenance agreement. Any family lawyer would perceive the breakdown of the relationship between the parents as bringing into effect statutory rights and obligations. First of all, the mother had the statutory right of application to the court for financial orders under paragraph 1 of Schedule 1 of the Children Act 1989. At the date that statute was brought into force she had the fundamental right to seek periodical payment orders in respect of each child. She further had the right to apply under paragraph 1(1)(d) for an order requiring a settlement to be made for the benefit of the children of property to which the parents were entitled, and equally an order under paragraph 1(1)(e) requiring either or both parents of the child to transfer to the applicant for the benefit of the child such property to which they were entitled. By the date of separation the right to apply to the court for a judicial determination of the level of periodical payments had been transposed into a right to apply for an administrative assessment of that level under the Child Support Acts 1991 and 1995. However, both statutes recognise the special position of child maintenance agreements. That recognition within Schedule 1 is to be found in paragraph 10, which provides, after a definition in subsection (1), by subsection (2): *"Where a maintenance agreement is for the time being subsisting and each of the parties to the*

agreement is for the time being either domiciled or resident in England and Wales, then, either party may apply to the court for an order under this paragraph."

Equally, the validity of maintenance agreements is recognised by section 9 of the Child Support Act 1991 which again, after a definition section, subsection (1), provides in subsection (2*): "Nothing in this Act shall be taken to prevent any person from entering into a maintenance agreement."*

It follows from that review of the statutory provisions that the assertion on the defendant's part that there was no consideration for the agreement of 26th May 1998 was hopeless. Manifestly, this agreement constituted a compromise of the mother's statutory rights to both housing provision and continuing maintenance for the children, and equally a compromise of the father's obligations to provide housing and continuing maintenance for his daughters.

8. I am equally clear in my mind that the alternative defence, namely that the parties did not intend the agreement to establish legal relationship, is equally hopeless. First of all, the terms of the agreement itself suggest due formality and the creation of legal rights and obligations. Second, agreements of this character do have a special status in family law. As between spouses, agreements to maintain have had specific statutory recognition in section 35 of the Matrimonial Causes Act 1973, which provides a mechanism for parties who have chosen to settle their respective rights and obligations contractually to approach the court for the subsequent variation of the agreement by the exercise of a judicial discretion on the application of a statutory checklist. In just the same way the Children Act 1989 provided a mechanism to enable parties who had chosen to settle their respective rights and obligations in relation to children to approach the court for subsequent variation, particularly to reflect a relevant change of circumstance. So in my view it is plain that the judge fell into error in dismissing the mother's claim for relief absolutely. I have every sympathy with the judge who took an unusual case at short notice from another court and then had it presented to him on a mistaken basis by counsel.

9. On my analysis, the issues that developed between these parents in consequence of the father's assumption of fresh legal obligations to another woman and to a third child should have been managed by an application in January 2000, lodged by him with the court under paragraph 10 of the First Schedule. Then a district judge would have looked at the circumstances in the round and substituted for what the parties had agreed in May 1998 what was fair in January 2000. Unfortunately, that step was not taken. When the mother herself turned to the court, it is unfortunate that she presented her claim in such a convoluted shape and found herself driven to argue issues of consideration solely in relation to the arrangements that the parties had reached in relation to the jointly owned house. However, even if the case be reviewed on that partial, and as I would think unrealistic basis, even so, I would not have found the difficulty that the judge found in spelling out consideration for the letter agreement.

10. For all those reasons I would allow the appeal and substitute for the judge's order below an order for judgment for the claimant for damages to be assessed. We have heard some spontaneous submissions as to how the assessment of damages should proceed. It emerges that there are some quite complex questions to be addressed arising out of the administrative assessment of the father's liability and the effect in law that that has on his contractual liability. Those difficulties as they emerged persuade me only of these two conclusions. The first is that, if there has to be a judicial determination of damages, it should be undertaken by a district judge with particular experience in ancillary relief and the interrelationship of the provisions of Schedule 1 of the Children Act and the provisions of the Child Support Acts. My second conclusion is that the parties would be far better advised to resolve what remains to be resolved by negotiation or mediation. There is a difficulty that the lawyers may place in the father's path arising out of his failure to issue an application for variation even now. It may be that the court's powers to vary to reflect his after assumed financial burdens cannot be backdated beyond the date of application. That is the sort of consideration better reflected in a mediated solution than in a judicially imposed solution. The Court of Appeal operates an ADR scheme for cases that are either pending or that have been resolved by judgment. I would urge the parties to consider submitting the

quantification of such damages as the mother may be entitled to to mediation under the auspices of this court's scheme or, alternatively, under the auspices of a local mediation service.

11. **LORD JUSTICE CHADWICK**: I agree that the appeal should be allowed for the reasons which my Lord has given. I endorse his encouragement to these parties to consider resolving their ongoing differences by mediation rather than by further litigation.

12. I add some observations of my own in order to address the short point on which the judge below held that the written agreement contained in the letter of 26th May 1998 was not enforceable. As he put it at paragraph 49 of his judgment, counsel then instructed for the appellant (who does not appear before us today) had not been able to satisfy him that the agreement was supported by consideration. The reason why the judge was led to that view can be found in the way in which the appellant's case had been argued below. It had been submitted by counsel, as his primary contention, that the appellant had provided consideration by moving out of the parties' former home at 24, Victoria Lane, Whitefield. That submission was not supported by the evidence given by the appellant. It was clear that the appellant had moved out of the house at 24, Victoria Lane before the agreement of 26th May 1998 and not in pursuance of that agreement. She had moved out because, following a burglary, she no longer felt able to live there. The judge addressed the point in the paragraphs of his judgment to which Thorpe LJ has already referred.

13. Notwithstanding that that primary contention could not be sustained, the judge needed to address the pleaded case in paragraph 17 of the particulars of claim: that the consideration was provided in part by the appellant's agreement to transfer title to the property to the defendant. He accepted the submission on behalf of the respondent that the agreement of the appellant to transfer ownership of 24, Victoria Lane to him as the sole owner could not constitute consideration for the obligations undertaken by the respondent in the earlier paragraphs of the letter of 26th May. He accepted that submission because he accepted that the value of the house at that time was less than the amount owing under the mortgage. As he said at paragraph 25: "In common with a lot of others at that time the ownership of that property with the mortgage was not an asset but a liability. There was a negative equity, and that much was clear for quite a long time."

14. We do not have the documents of title or the mortgage deed in the bundle prepared for this appeal; but it has been common ground that 24, Victoria Lane had been purchased in joint names, was owned by the parties as joint tenants in equity, and was subject to a mortgage in favour of the Halifax Plc under which they were jointly and severally liable as borrowers. Repayment of the capital monies under the mortgage was further secured by an endowment policy with London & Manchester Insurance Company. That is referred to in the letter of 26th May 1998.

15. The agreement required the appellant to transfer her legal and beneficial ownership of the property to the respondent so that, thereafter, he would be the sole owner in equity and, on registration, the sole registered proprietor; and, further, to join with the respondent in surrendering the endowment policy on payment to her of one half of its proceeds, a sum of £1,700. That puts the value of the endowment policy at £3,400. If the judge had taken that into account against the mortgage debt, he might well have concluded that the overall ownership of property, plus endowment policy, did in fact have some value.

16. There was no agreement in the letter of 26th May for the respondent either to procure the release of the appellant from her liability to Halifax PLC under the mortgage - which would require the co-operation of the mortgage lender, which might or might not have been forthcoming - nor even to indemnify her against her liability to the Halifax as a contractual borrower. It is not said that the letter was defective in that it omitted terms which had actually been agreed. Had that contention been advanced and made good, it could well have been said that the agreement was unenforceable, having regard to section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. But this appeal has proceeded, as the case proceeded before the judge, on the basis that the letter did contain all the terms that were agreed between the parties. On that basis, the effect of the arrangement was to leave the appellant exposed to liability as a borrower under the mortgage, while transferring her legal and beneficial interest in the property to the respondent.

17. The judge took the view that the interest which the appellant agreed to transfer was incapable of constituting consideration because, as he put it, the property had a negative equity. That is to confuse the equitable interest in the property, which was vested in the appellant as joint tenant, with the value of the equitable right to redeem which she and the respondent had as against the mortgage lender. Negative equity is a misleading term. It means no more than that the right to redeem can only be exercised on payment of a sum greater than the then value of the property. It does not mean that the beneficial interests in the property are extinguished - or even valueless. The proposition that an agreement to transfer an equitable interest in property (whatever its value) is incapable of constituting consideration for reciprocal undertakings is a proposition which, for my part, I find impossible to accept. It seems to me irrelevant to the question whether or not the obligation to transfer an equitable interest in the property is capable of constituting consideration that the equitable right to redeem as against the mortgage company may be of no current financial value. The judge was, in my view, misled on that point; and accordingly reached the wrong conclusion. There was ample consideration for the agreement of 26th May 1998 in the agreement to transfer ownership of the property; as well, of course, as in the compromise of the respondent's obligations, as a father, towards his children.

18. I should add this. It was suggested in this court that the judge should have reached the conclusion that the parties had no intention of creating legal relations when making the agreement on 26th May 1998. The judge did not find it necessary to make a finding on that point. The point is hopeless, for the reasons explained by Lord Justice Thorpe, and by Lord Denning MR in **Merritt v Merritt** [1970] 1 WLR 1211, at page 1213. The Master of the Rolls pointed out in that case that, where parties are separated or about to separate, they require their relations to be finalised or, as he put it, cut and dried, and they do not intend to leave their future to mutual trust. The circumstances in which they are separated will often have destroyed any mutual trust between them. It may be presumed in the absence of cogent evidence to the contrary, that - when making an agreement on separation - the parties do intend to create legal relations. These parties had shared children and a shared house. They made their arrangements in relation to the children and the house; and recorded those arrangements in the letter of 26th May 1998. It is plain that they intended that letter to have such legal effect as the law would allow; having regard to the statutory provisions relating to the maintenance of children.

19. **MR JUSTICE MORLAND**: I agree with both judgments.

Order: Appeal allowed with costs here and below.

MISS E HAMILTON QC AND MISS S HARRISON(instructed by Messrs Clough & Willis, Bury, Lancs) appeared on behalf of the Appellant.
MISS H PROOPS (instructed by Messrs Bailey & Haigh, Selby) appeared on behalf of the Respondent.