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Case Update Flyer Issue 3 McFarlane / Miller – the story so far

Introduction:

Once again, the decisions of Burton J in **S v S (2006)** (a judgment of 32 pages) and Charles J in **H v H (2007)** (a judgment of 34 pages) have begun the process of the case by case analysis, which seeks to unravel some of the mysteries left unexplained by their Lordships speeches in **McFarlane / Miller (2006)**.

The suggestion is that the profession unreasonably craves for certainty of formulae to apply to any given set of circumstances and, in the process, lose sight of the inherent nature of section 25 (MCA 1973), which is flexibility.

The judgment of Charles J criticises those who seek to elevate the words used in the speeches of their Lordships as equivalent to the text of the statute as opposed to guidance in how to apply section 25.

Of course, any reader of these two recent judgments may be forgiven for concluding that in both, the Court, itself, analyses phrases used such as “matrimonial property” and “non matrimonial property” as if the same were part of section 25, when, of course, they are not. The profession, it is submitted, want clarity of application – whereas, certainty is the not unreasonable heartfelt desire of the paying lay client.

S v S [2006] EWCH 2793 (Fam)

Burton J:

Facts:

1.1 H – 61 & W 41. Marriage/cohabitation 7 years 10 months. H’s second marriage.

1.2 H was equity partner and W a trainee when met. 2 children 8 ½ and 3. Separation effectively when H arrested on assault of W to which he later pleaded guilty. H moved out and W and children in FMH. No contact between children and H, although no dispute that H pays £15k child support and school fees for them. H made redundant in 2002 and since acted as consultant on £25k pa and W not worked since marriage.



1.3 Agreed that there should be a clean break, although H been paying voluntary maintenance and most of household bills in interim.

1.4 At start of relationship, H already wealthy and had had successful career with Weatheralls, whereas W not wealthy.

1.5 The Court had to determine the disputed value of certain properties held, but, broadly, all other assets values were agreed (para 4).

Asset Categories:

1.6 The total net value was £7m. From this value, there were a number of categories of property (para 19):-

- (a) the first category of £1.5m was held in the FMH or former or intended marital homes;
- (b) the second category was £1m of retained properties held by H long before the marriage;
- (c) the third category was of commercial properties not held in H's pension SIP and deriving from either properties retained from before the marriage or acquired with proceeds of the sale of such in the marriage or from the Weatherall's monies;
- (d) the fourth category was of pension properties derived from the sale of the original pre marital pension portfolio and now held in another pension fund created in the marriage and valued at £3.4m;
- (e) the fifth category was the balance of the capital less the liabilities.

Parties Claims:

2.1 The W sought £4m and H argued she should receive £2m (para 20).

The Law:

2.2 The Court in analysing the speeches of the House of Lords in both **White (2000)** and **McFarlane / Miller (2006)** confirmed that there was no presumption of equality of division and the yardstick of equality was "an aid and not a rule". It was a standard against which the outcome of the s 25 exercise was to be checked" (para 24).

2.3 A number of factors justifying moving away or returning to equality of division could be identified. The issues in the case gave rise to a consideration of some of these matters (para 27).

2.4 The first was **Non Matrimonial Property** (para 28). This consisted of pre matrimonial property, being assets brought to a marriage and extra matrimonial being e.g. inheritances gained during a marriage and the passive growth of these types of assets once introduced (see **Rossi (2006)** and **S v S (2006) Singer J**).

2.5 These types of assets were those described by Lord Nicholls as non matrimonial property, whereas Baroness Hale included as non matrimonial, “unilateral assets” (Burton J), such as business and investment assets generated by the sole efforts of one of the parties and hence her category of non matrimonial property was wider than Lord Nicholls and, it followed, her category of matrimonial property was more limited (para 30)..

2.6 However, Baroness Hale had accepted that the importance of the source of the asset introduced would diminish with time because there would normally be such intermingling that the source could no longer be identified. The Court identified this was one area where the facts of this case differed in that the assets introduced by this H could still be identified and any enhancement had been solely by his efforts.

2.7 However, on close analysis, the Court considered that, in reality, any difference in the speeches of Baroness Hale and Lord Nichols was likely to be very narrow in that Baroness Hale appeared to accept that even “unilateral assets” introduced by one party could be family assets, if, on Lord Denning’s definition in **Wachtel**, cited in her speech, they had been "used for the benefit of the family as a whole" or "acquired with the intention that there should be continuing provision from them for the family” (para 29).

2.8 Hence, the Court concluded that following the House of Lords cases, non matrimonial property was both pre and extra matrimonial assets together with their income or fruit (para 31)

3.1 Clearly, in this case:-

(a) the category 1 property was matrimonial as it consisted of the FMH past, present and intended in the future;

(b) the category 2 property was, clearly, not contributed to on the facts of the case by W and the H’s own dealings with this property in the relationship was entirely passive – accordingly, it was non matrimonial (para 32).

(c) categories 3 and 4 - because H used his expertise once they were realized in the marriage to reinvest them – they became matrimonial assets and, in any event, the parties needs would not have been catered for without their inclusion to some extent.



4.1 The next relevant issue involved **Contribution** (para 36). Non financial contribution by one spouse, even in a short marriage, was to be recognized as important, although, a substantial pre marriage financial contribution by one spouse, even in the longer marriage, is also to be recognized, unless overridden by the financial needs of the other.

4.2 Conduct was considered (para 37). Relevant conduct had to be exceptional. The case law showed it was relevant when manifestly serious so that there was a “gasp” factor to its description. Having analysed and made findings of the incidences of violence and behavior in the case, the Court could only admit to a “gulp” reaction and hence the same was not so serious that “it was inequitable to disregard”.

4.3 Compensation was another issue (para 58). However, the Court considered that the W’s 7 ½ year break in her employment, occasioned by agreement between the parties that this was what she should do, had not given rise to anything akin to “a thwarted ambition or an irrevocably damaged career”. Instead, the same had been the result not only of their mutual understanding but also of her own desire to lead her life in this way. It was not every circumstance that gave rise to a claim for compensation.

4.4 As to the **Need** issue (para 61), the Court was not concerned with a line by line analysis of the expenditure, but rather considered that the parties’ standard of living in the marriage was an important factor. The claimant spouse is not entitled to an improvement of the standard of living they enjoyed when together.

5.1 The Court considered that the earning capacity of W was c £15k pa and with the child support of £15k pa and a maintenance allowance of £50k pa capitalized at £700k, the W would be able to meet her reasonable needs, either with economies in the FMH or trading down, at this stage, to cheaper property.

The Award:

5.2 Accordingly, the matrimonial property was c £6m and the non matrimonial £1m. W would get 50% of the former (para 64).

5.3 There would be no additional award for compensation or conduct (para 65).

5.4 The length of the marriage would not decrease the award in view of the same being a reasonably long marriage and there being two young children. In the circumstances, the length of the marriage also meant that the W would not get a share of the non matrimonial property (para 66).



5.5 H had contributed more in terms of his monies from Weatheralls and his pension portfolio than W had in looking after the home and caring for the children, in this case.

5.6 Overall the award would be £2.5m with an agreed repayment of £0.5m of the W's debts.

5.7 It was not necessary to pass the yardstick of equality over the non matrimonial property, the yardstick only applied to matrimonial property. The award represented 60/40 division of the matrimonial property because of H's greater contribution

(para 69).

H v H [2007] EWHC 459 (Fam)

Charles J:

Facts

1.1 W 46 and H 44. Marriage of 19 years 3 months.

1.2 H was a banker and by agreement between parties W travelled abroad with him, as his work dictated, devoting herself to their home and family of 4 children. W, as a teacher, had not given up a career that was likely to attract a substantial income or monetary award. Common ground that parties had willingly made the choices they had. The Court reminded itself that such choices have both a benefit and burden. H worked hard but the same brought job satisfaction and W's role in caring for the home and family supported H, but also brought her joy and pleasure.

Issues:

2.1 The questions (para 10) were first, what bonuses of H should be included in the matrimonial property to which the yardstick of equality is to be applied and what award should be made in relation to future bonuses falling outside the definition of matrimonial property. There was a likelihood that H would continue to receive substantial bonuses of c £4m in total.

Claims:

2.2 The parties had reached agreement over the equal sharing of some of the property and pension value including their FMH. Overall, H's case was 50% of £27m, which included his 2006 bonus and that this provision exceeded the most generous calculation of W's needs and



enabled her to continue to increase her retained capital well into her old age. W sought 50% of £29m, which included his estimated 2007 bonus on the basis, she argued, that both bonuses were matrimonial property and, in addition, she sought £1.5m as compensation for her loss of his future income and her interest in his earning capacity.

The Law:

3.1 The Court confirmed that in **McFarlane / Miller (2006)** the House of Lords were not setting rigid rules or formulae but were identifying principles guiding the Court's approach and thus its reasoning in applying the MCA 1973.

3.2 The Court confirmed that the more limited approach of Baroness Hale was that of the majority in **McFarlane / Miller** in defining what was matrimonial property to which the yardstick of equality readily applies, leaving, in any given case, a balance of assets to which the yardstick applies with less force.. Indeed, it was observed that whether one takes the more limited approach of Baroness Hale or the wider approach to matrimonial property of Lord Nicholls the same result is likely to be reached in the exercise of the Court's discretion (para 37).

3.3 Both sides fell into error in treating the guidance of the House of Lords as some sort of statutory tests, which if passed or failed led to a set of given results. Inherent in the section 25 exercise and the pursuit of fairness is flexibility. The Court must not seek to follow a rigid set of stepping stones that is not set out in the statute (para 41).

The Correct Approach:

4.1 The Court considered (para 42) that the correct approach in regard to the statute and the guidance was:-

(a) to have regard to the circumstances of the given case when considering matrimonial property and the application of the yardstick of equality and the range of the reasonable possibilities of their application;

(b) to then stand back and take an overview of the case by reference to those possibilities and guidance and the flexibility built in;

(c) not to apply a set formula such as an automatic 50% of the matrimonial property because it may not be fair to do so in a given case.

4.2 The Court could not accept that it was correct (para 56), contrary to what was said in **Rossi (2006)**, that the Court could set some arbitrary time line (i.e. 12 months from separation) for the application or non application of matrimonial property.



4.3 A result, which placed one spouse under an unalterable long term obligation to borrow heavily to fund a settlement may lead to hardship and bankruptcy and be unfair and discriminatory.

4.4 The objectives are independent finances and self sufficiency (para 69).

4.5 The facts of **McFarlane / Miller** were not determinative of the circumstances of this case. Here a clean break was possible and W had not given up a high earning career.

Loss of Value Added Earnings:

5.1 It was argued that the double loss referred to by Lord Nicholls in relation to a diminution in a wife's earning capacity and the loss of a share in her husband's enhanced income arising out of the way they conducted the marriage was a reference to two sides of the same coin and what has to be established is an actual and demonstrable loss that created a benefit for the other party. This was rejected (para 74). Instead, the Court considered that the reference by Lord Nicholls to the "loss of the husband's enhanced income", literally, meant the loss of "the value added" by the common endeavours of the parties in the marriage. This is likely to be unquantifiable but it is, at least, arguably, reflected by a part of the husband's future earnings (para 75).

5.2 Hence even the wife who was never a high earner could be said to have suffered disadvantage in relation to, first, her income potential or ability to find employment and/ or second, "the value added" enhanced earnings of the husband (para 77).

5.3 However, there should be care in distinguishing between the husband's future earnings and earning capacity and "the value added" earnings or earning capacity enhanced by the efforts of the other spouse. Subject to this and the position at the start of the relationship and the length of the partnership, fairness dictates that the fruit of the enhanced earnings should be shared equally (para 82).

5.4 Such sharing is only applicable to that part of the husband's income and earning capacity which are the fruits of their marital partnership and not to the balance of the husband's income after the partnership has ended, which is the product of "his talents, energy and good fortune" (para 85). Contributions (including looking after the children) after the partnership has ended are not accountable as adding further value to the husband's income or earning capacity so as to be reflected in any compensation (para 87).

Legitimate Expectation:

5.5 Indeed, there is no legitimate long term expectation of living at the same standard of living as was enjoyed in the marriage (para 90). The provision awarded should enable a gentle transition for the party who made the domestic contribution from the standard of living enjoyed during the marriage to the standard that she could expect as a self-sufficient woman (see Baroness Hale in **McFarlane / Miller (2006)**) (para 91).



5.6 The time at which the equal start to independent living (Baroness Hale) should be assessed is the point at which the parties' joint venture and participation as equal partners ends. (para 97).

5.7 The Wife, in this case, had already accepted, correctly, that she could not be entitled under compensation to a lifetime award (para 100). Her award was not based here upon need or compensation for disadvantage occasioning to her a loss of her earning capacity.

Quantum of Compensation:

5.8 The House of Lords speeches did not address how to reach a fair and equitable award in the given case in respect of the husband's future income and earning capacity. The quantum of the compensation applicable is fact sensitive to the given case (para 105). In many cases, it will be a relatively easy exercise by reference to needs and compensation for disadvantage.

5.9 In others, such as the present case, where provision for the Wife already meets her needs and her equal capital entitlement giving her a standard of living equivalent to that enjoyed in the later years of the marriage, the exercise will be more difficult. The focus will then be on the amount needed to provide a "run off" from the marital partnership to independent living (para 113)

5.10 In this evaluation, the factors to be considered will include:-

- the length of time that the wife enjoyed the fruits of the spadework and joint endeavours of the parties;
- the likely future product of that spadework and endeavour;
- an evaluation of the effects of the respective past and future contributions of the parties on the ability of the husband to earn his future income and thus on his earning capacity in the future (as opposed to an assessment of the effects of their contributions during the continuation of the marital partnership); and
- the overall effects of an award with and without a provision in respect of future income.

6.1 In this case, the main family assets were H's very substantial earning power, which had increased in the marriage and the properties and investments acquired as part of, and by the expenditure of, his income (para 115). It was common ground that the date of separation of January 2005 was when the parties mutual support had ended ("the point at which the underlying foundation of the marital partnership was brought to an end") and, therefore, the parties assets, at that time, were matrimonial property, to which the "yardstick of equality" applies "readily and with force" (para 118).

6.2 It followed that the W's attempts to include either or both of the H's 2006 and 2007 bonuses as matrimonial property failed.



6.3 Hence, applying the House of Lords guidance meant in this case (para 126) and as a starting point (para 129), as follows:-

(a) subject to any adjustment required in an overview, their matrimonial property as held at January 2005 would be divided equally;

(b) it should be acknowledged that any argument over matrimonial property relates to the application of the “yardstick” and that its application is flexible;

(c) the rejection of arguments of proximity (**Rossi (2007)**) to extend those assets covered as matrimonial property;

(d) consideration of what, if any, award should be made in regard to the further bonuses and W’s share in H’s future income and the enhanced or value added greater income or earning capacity;

The same may need revisiting on an eventual overview related to fairness, equality and non discrimination and when applying need, compensation and sharing.

6.4 Although, actually, impossible to gauge to what extent precisely the H’s enhanced earnings were the product of the W’s domestic contributions; in this case, if applying a “but for” test, the same must be small in economic terms – his high level of earning being, actually, based on his talents, hard work and good fortune in pursuing his career (para 130). But that which did flow from such a contribution would continue for many years (para 131). As capitalised for a clean break, W’s assessment was £1.5m in this regard and H’s assessment based upon half of the 2006 bonus, was £1.19m (para 132).

6.5 The Court needed to focus its assessment of this part of the award upon the transition or run off period to the independent living, which, because of the size of H’s income, will create disparity of economic positions, but set against the fact that the period of mutual co-operation is over (para 135).

6.6. The fair run off award “to ease her transition to independent living” (para 136) would be, in this case, capitalised at one third of the income earned in 2005, one sixth earned in 2006 and one twelfth earned in 2007 and after conducting a cross check or overview this would amount to £1.4m. This was also after having regard to:-

- the length of the marital partnership;
- W’s contribution to it;
- the size of H’s present and expected income over the next few years; and
- the increases in H’s income over the later years of the marital partnership.



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