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A *Sharp* turn in divorce finance distribution: the cost of principle versus pragmatism

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As is well known, a significant number of marriages end in divorce (ONS – 2013 showed 34% of marriages had ended in divorce by the 20th marriage anniversary – albeit the ONS – 2015 found there had been a modest reduction in divorce between opposite couples overall to 101,055 from 111,169 in 2014 – *Divorces in England and Wales: 2015*, ONS). As such, the risk to married couples of undergoing the trauma and cost of divorce remains significant. A survey undertaken by Resolution in 2014 found 28% of the separated adults taking part had undertaken some form of additional borrowing as a direct result of their relationship break-up (www.resolution.rg.uk/site_content _files/files/reso). The costs of overall family breakdown to the taxpayer nationally was estimated by the Relationships Foundation's *Cost of Family Failure Index* to have risen to over £48bn by 2016 (www.relationshipsfoundation.org/family-policy/cost-of-family-failure-index).

Against this background, the width of discretion under s 25 of the Matrimonial Causes Act 1973 afforded to the Family Court in determining a bespoke outcome in each disputed case of divorce financial division has, it is submitted, become an out of date and over expensive luxury which requires reform to a more predictive and economic outcome. At the very least, uncertainty of the principles to be applied by the Family Courts in divorce distribution is, for obvious reasons, in this context to be avoided. Settled law promotes from the outset the greater likelihood of agreement between divorcing couples over their finances and helps avoid extended litigation and contested hearings. ('It is the welcome fruit of a jurisdiction founded upon clearly understood principles' – McFarlane LJ in *Sharp v Sharp* [2017] EWCA Civ 408 ([2017] FLR forthcoming) at para[74])

With such ideals in mind,it is over a decade since the House of Lords in *Miller v Miller: McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186 opined that the sharing principle may not apply to 'unilateral assets' (ie those non-business-partnership, non-family assets arising from one spouse's endeavours only during the marriage). As to assets of this nature, there had plainly been a difference of opinion, principally between Lord Nicholls and Baroness Hale. Lord Nicholls had stated in regard to the concept of fairness in the distribution to be achieved between divorcing parties:

'16. A third strand is sharing. This "equal sharing" principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. In 1992 Lord Keith of Kinkel approved Lord Emslie's observation that "husband and wife are now for all practical purposes equal partners in marriage": *R v R* [1992] 1 AC 599. This is now recognised widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there

is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: "unless there is good reason to the contrary". The yardstick of equality is to be applied as an aid, not a rule.

17. This principle is applicable as much to short marriages as to long marriages: see *Foster v Foster* [2003] 2 FLR 299, 305, para 19 per Hale LJ. A short marriage is no less a partnership of equals than a long marriage. The difference is that a short marriage has been less enduring. In the nature of things this will affect the quantum of the financial fruits of the partnership.

…

20. For the same reason the courts should be exceedingly slow to introduce, or reintroduce, a distinction between "family" assets and "business or investment" assets. In all cases the nature and source of the parties' property are matters to be taken into account when determining the requirements of fairness. The decision of Munby J in *P v P (Inherited Property)* [2005] 1 FLR 576 regarding a family farm is an instance. But "business and investment" assets can be the financial fruits of a marriage partnership as much as "family" assets. The equal sharing principle applies to the former as well as the latter. The rationale underlying the sharing principle is as much applicable to "business and investment" assets as to "family" assets.'

By contrast, Baroness Hale had stated:

'152… . In the very small number of cases where they might make a difference, of which Miller may be one, the answer is the same as that given in *White v White* in connection with premarital property, inheritance and gifts. The source of the assets may be taken into account but its importance will diminish over time. Put the other way round, the court is expressly required to take into account the duration of the marriage: section 25(2)(d). If the assets are not "family assets", or not generated by the joint efforts of the parties, then the duration of the marriage may justify a departure from the yardstick of equality of division. As we are talking here of a departure from that yardstick, I would prefer to put this in terms of a reduction to reflect the period of time over which the domestic contribution has or will continue (see Bailey-Harris, 'Comment on *GW v* RW (Financial Provision: Departure from Equality)' [2003] Fam Law 386, 388) rather than in terms of accrual over time (see Eekelaar, 'Asset Distribution on Divorce-Time and Property' [2003] Fam Law 828). This avoids the complexities of devising a formula for such accruals.

153. This is simply to recognise that in a matrimonial property regime which still starts with the premise of separate property, there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them. The nature and the source of the property and the way the couple have run their lives may be taken into account in deciding how it should be shared. There may be other examples. Take, for example, a genuine dual career family where each party has worked throughout the marriage and certain assets have been pooled for the benefit of the family but others have not. There may be no relationship-generated needs or other disadvantages for which compensation is warranted. We can assume that the family assets, in the sense discussed earlier, should be divided equally. But it might well be fair to leave undisturbed whatever additional surplus each has accumulated during his or her working life. However, one should be careful not to take this approach too far. What seems fair and sensible at the outset of a relationship may seem much less fair and sensible when it ends. And there could well be a sense of injustice if a dual career spouse who had worked outside as well as inside the home throughout the marriage ended up less well off than one who had only or mainly worked inside the home.'

Very shortly following their Lordships' speeches, the Court of Appeal in *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 was able to give some obiter guidance upon the relevance of such 'unilateral asset' issues following *Miller/McFarlane* and in deference to the minority view of Lord Nicholls thereby sought to restrict the application of the same to short marriages only. Sir Mark Potter (sitting with Thorpe LJ and Wilson LJ (as he then was)) giving the leading judgment stated with reference to these matters:

'85. Such was the context in which the House turned to consider whether the sharing principle applied to cases in which the property had been generated during a short marriage. It was in this area that the members of the House were in substantial disagreement; and we cannot subscribe to the ingenious attempt of Burton J in *FS v JS*, at [30] and [31], to reconcile their

differences. We suggest with respect that, while the approach of Lord Nicholls was perhaps the more logical, the approach both of Baroness Hale, with which Lord Hoffmann agreed, and of Lord Mance was perhaps the more pragmatic. Lord Nicholls, at [17] to [20], stressed that the sharing principle was as fully applicable to short as to long marriages and that the concept of treating unilateral assets differently from other matrimonial assets discriminated in favour of the bread-winner. He justified departure from equal sharing of the matrimonial property in *Miller* by reference, at [73], to the amount of work done by the husband prior to the marriage referable to the venture. In a section entitled "The source of the assets and the length of the marriage" Baroness Hale, at [147] to [152], squarely faced the conceptual difficulties inherent in the different application of the sharing principle to short marriages but considered that, on balance, perceptions of fairness justified it. Such became, at [158], her rationale for justifying departure from equality in *Miller*. Lord Mance, at [169], powerfully stressed the practical value of Baroness Hale's approach, namely that it would often obviate the need to address the argument, sometimes called the "seed-corn" argument, raised in *Miller* itself, to the effect that wealth which one of the parties ostensibly generated during the marriage was a crop of which he or she had sown the seed prior to it.

86. The extension of the concept of unilateral assets, suggested by Baroness Hale in *Miller*, at [153], was expressly endorsed by Lord Mance, at [170]. Although obiter, it clearly commands great respect. It relates to the "dual career". The suggestion was that, where both parties had worked throughout the marriage, had pooled some of the assets built up by their efforts but had chosen to keep other such assets under their separate control, the latter, although unequal in amount, were unilateral assets which might not be subject to the sharing principle. Because of the convincing logical objections of Lord Nicholls to the different treatment of unilateral assets, we would prefer, so far as it is proper for us to do so, to keep the room for application of the concept closely confined. Lord Mance offered, at [170], the following interesting rationalisation for the suggested extension:

"Once needs and compensation had been addressed, the misfortune of divorce would not of itself… be justification for the court to disturb principles by which the parties had chosen to live their lives while married."

Lord Mance may there have foreshadowed future, albeit no doubt cautious, movement in the law towards a more frequent distribution of property upon divorce in accordance with what, by words or conduct, the parties appear previously to have agreed.'

The courts and professions thereafter have, by limiting in practice the definition of what has constituted a 'dual career' and/or a 'separated finances' relationship, attempted to remain loyal to the all asset inclusive approach advocated by Lord Nicholls, whatever the length of marriage under consideration. Such, it had been thought, had been the pragmatic and accepted solution to this difference of opinion at the highest level. The case of *Sharp v Sharp* has, however, obliged the Court of Appeal to return full square to this issue when faced with a set of facts described in the case as the 'perfect storm' combination.

FACTS

In brief, H was 42 and W 43. There were no children. Adding in the 18 months of pre-marital cohabitation, the marriage had lasted just 6 years to December 2013. W was a trader and H employed in IT – their basic incomes were similar at circa £100k per annum. Each was entitled to bonuses – H's were trivial compared to W's who gained discretionary annual bonuses totalling £10.5m during the marriage. In November 2012, H took voluntary redundancy. H began a clandestine affair with another woman in February 2013 and W filed for divorce at the end of that year.

Without any specific agreement in place to maintain separate finances, the parties did in certain respects operate a degree of such separation in their financial affairs. They had no joint bank account or investments. As was highlighted, they would 'not infrequently' split the costs of restaurant bills or other social occasions and, regularly, each would pay half of household bills and H, whilst aware of W's bonuses, was not aware of the details there of (paras [7] and [11]). During the marriage W had used some of her bonus receipts to make substantial gifts to H (three cars). She had also paid for their holidays and had

entirely acquired each of the parties' two homes, being on marriage £1.02m for a property referred to as SD plus £200k on improvements and £2m for another property referred to as LC in 2012. Both homes, which remained in the parties' possession, had been acquired in joint names. At the first instance hearing, the parties combined net asset value was circa £6.9m – however, this netted down to £5.45m, since H conceded that the £1.1m value of SD and another £350k represented W's pre-accrued marital asset value.

FIRST INSTANCE DECISION

The first instance decision of Sir Peter Singer found, in line with the prevailing practice referred to, that, absent a clear marital agreement, there was insufficient evidence of an intention to separate finances sufficiently to justify a departure from the sharing principle in this dual career relationship. Indeed, the learned judge took the view that post-*Radmacher v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900 such evidence would require the equivalent of a pre-nuptial agreement or an attempt to enter into such an agreement. He therefore concluded:

'50. But as I say I am not persuaded that there is evidentially established any sufficiently clear and consistent pattern of separate finances as might found such a finding in this case. The pattern rather is, to my mind, one of open-ended liberality regularly maintained to meet the wishes and even the whims which W afforded them both. It was in this way that their incomes were pooled, and in addition clearly both contributed to regular household outgoings and other expenditure.'

Accordingly, as almost all of the net asset value before the court had emanated from the period the parties had been together or had been mingled for joint benefit, the learned judge stated further:

'54. Does the sharing principle apply? It is in my judgment consistent with current principle that the matrimonial acquest, the value of the assets and savings built up during the marriage, irrespective of the very different proportions in which the parties contributed them, should be subject to the equal sharing principle.

In such circumstances, Sir Peter Singer would, without more, have divided the £6.9m pot equally after deduction of the £350k agreed pre-accrued assets of W. However, in view of H's concession relating to the value of SD being also removed in W's favour – one half of the adjusted total amounted to a final award to H of £2.725m (paras [14]–[15]).

APPEAL

The parties' positions on the appeal filed by the wife amounted to the following:

1. (1) W submitted that the exercise of the sharing principle under s 25 was to be set against the 'separate ownership' of property by spouses and, accordingly, the sharing principle should reflect the fact here of a short, dual career childless marriage where there existed significant unliteral assets of one of the parties;
2. (2) H submitted that since *Charman* the law had followed the guidance of Lord Nicholls at paras [17] and [20] of *Miller/McFarlane* in regard to short marriages or where unilateral assets existed and, accordingly, no distinction was to be drawn between family and unilateral assets and the sharing principle applied to all such assets whatever the marriage length

For the wife, Jonathan Southgate QC maintained further that this developed approach represented a welcome area of certainty which will inevitably have enabled a much greater number of cases to be resolved without recourse to litigation and any move back from this settled position would be a retrograde and unwelcome step and discriminatory (para [69]).

In a careful analysis of the *Miller/McFarlane* judgments (paras [16]–[39]) and those of the Court of Appeal in *Charman* (paras [40]–[42]), McFarlane LJ set out the relevant extracts of both decisions relating to the approach to be adopted to

unilateral assets in short and longer marriage situations. He also analysed the impact of the Supreme Court's decision in *Radmacher v Granatino* (para [43]) and the observations (para [44]) provided by the Master of the Rolls, King and Moylan LJJ in *Work v Gray* [2017] EWCA Civ 270, [2017] FLR (forthcoming), whereby (at para [34] of the judgment) it was stated:
'The sharing principle is now firmly embedded and, in those cases where the resources exceed needs, the "ordinary consequence" of its application will be the equal division of matrimonial property: Wilson LJ in *K v L (Non-Matrimonial Property: Special Contribution)* [2011] 2 FLR 980 at para[21].'
And where, the court in that case placed significant weight upon the public interest in the promotion of clarity and consistency in the approach courts should take to the division of finances on divorce and the weight to be given to authoritative guidance as to the exercise of the s 25 exercise whether given as part of the reasoning in the individual case or not (paras [80]–[84] of the judgment).

McFarlane LJ's conclusion, with which the other members of the court were in agreement, was that the decision of Sir Peter Singer could not be upheld and was contrary to the obiter guidance of the majority of their Lordships in *Miller/McFarlane* and also for that matter, the further obiter clarification of the position provided by the Court of Appeal in *Charman* (para [77]). McFarlane LJ accepted there had been a difference of opinion between their Lordships in *Miller/McFarlane* in regard to the obiter observations as to the application of the sharing principle to what had been termed as 'unilateral assets'. He also accepted that the Court of Appeal had, again obiter, expressed itself in *Charman* as less than enthusiastic about the departure from the sharing principle suggested as appropriate by Baroness Hale. However, His Lordship considered that the present Court of Appeal was faced with facts which brought the issue centre stage for determination.
Faced with these authoritative yet diverging observations, His Lordship determined that the standard rule of precedent should be applied and thereby the Court of Appeal was obliged to return to the majority (Baroness Hale, Lord Mance and Lord Hoffmann) expression of view relating to unilateral assets in *Miller/McFarlane*, albeit obiter to the decision in that case (paras 80 to 82). Unlike the case of *Foster v Foster* [2003] EWCA Civ 565, [2003] 2 FLR 299, which had been a case entirely involved with the parties' joint contributions and the marital acquest of both parties in a short marriage in which there had been no issue as to separate finances, the present case involved the W's substantial bonuses which were not 'family assets' as categorised by Baroness Hale and to which, subject to any additional domestic contribution by him, H had made no contribution (para [92]).
In short, the facts of the case were, in the Court of Appeal's view, the very set of circumstances (the 'perfect storm') which Baroness Hale and Lord Mance had been contemplating when considering a departure from the sharing principle if dealing with the existence in a divorce of unilateral assets, particularly in a short childless marriage where there had been some marital separation of finances (paras [94]–[97]). McFarlane LJ stated:

'97. The inescapable conclusion from this analysis of the speeches in *Miller*, in terms of the possibility of some alteration from, rather than a strict application of, the equal sharing principle in relation to short, childless marriages, where both spouses have largely been in full-time employment and where only some of their finances have been pooled, is that fairness may require a reduction from a full 50% share or the exclusion of some property from the 50% calculation. Of the five members of the Judicial Committee, only Lord Nicholls suggested a contrary view and even on his analysis the potential for some form of relaxation can be seen.'
In consequence W's appeal was allowed and with the view of avoiding the sharing of W's liquid assets in the light of the above reasoning, the Court of Appeal considered in achieving fairness it would not be appropriate to hold H to his concession in regard to the SD property value remaining with W. Instead, having regard to the factors of a short marriage, no children, dual incomes and separate finances, a departure from the equal sharing principle was justified and therefore of the £6.9m net asset value held, H should retain one half of the capital value of the two properties (£1.3m) and a further £700k to reflect a combination of: (a) the marital standard of living; (b) H's need for a modest capital fund in order to live in the

property that he is to retain; and (c) some share in the assets held by W – a total of £2m made up of the SD property to be transferred to him (value £1.1M) plus a lump sum payment of £900,000 (para [114]–[116]).

COMMENTARY

Writing as an experienced financial remedy practitioner, while the prospects arising from this Court of Appeal decision of developing several new areas of argument to justify yet further departure from the sharing principle of division on divorce are obvious and at first sight engaging, the overriding sense drawn from experience in practice is that this present decision is contrary to the wider general interests of divorcing parties. It is, with respect, regrettable in this context that the Court of Appeal has failed to take the opportunity to close down the extent to which this exception may yet apply not just to short marriages but also to those of greater length. McFarlane LJ stated (para [75]):

'75. Nothing that is said in this judgment is intended in any manner to unsettle the clear understanding that has been reached post-*White* on the approach that is to be taken to the vast majority of cases. The focus of the present appeal, which is very narrow, is upon whether there is a fringe of cases that may lie outside the equal sharing principle.'

However, His Lordship, when explaining the attempt by the Court of Appeal in *Charman* (2007) to limit the application of this potential issue of unilateral assets in future cases (para [107]) went on to say:

'107. … The court appears to have been concerned that recognition of unilateral assets as falling outside the sharing principle in a long (or more than short) marriage could well produce an unfair result. For that reason, they wanted the notion of different treatment of unilateral assets in such marriages to be "closely confined". Baroness Hale had herself recognised the need for care and limitation in the last three sentences of paragraph 153. That issue, which does not arise on the facts of the present case, remains a matter for debate on another day…'

It is important to remind the reader that Baroness Hale in *McFarlane/Miller* referred (para [151]) to 'family assets' (being in the way of the home, its contents and the family savings) and also to assets 'generated by the joint efforts of the parties' and where the assets in question before the Court did not consist of either of these types then the duration of the marriage may justify a departure from the yardstick of equality of division (para [152]). In addition, Her Ladyship spoke of other examples of which one was the dual career couple who had worked through the marriage and where their family assets on divorce would be shared equally but where any other individual accumulation kept separate might be fairly left with the individual spouse (para [153]). Lord Mance helpfully clarified the extent of asset type distinction involved in the terminology used as follows:

'168. On the other hand, Baroness Hale's approach takes a more limited conception of matrimonial property, as embracing 'family assets' (cf *Wachtel v Wachtel* [1973] Fam 72, 90 per Lord Denning MR) and family businesses or joint ventures in which both parties work (cf *Foster v Foster* [2003] 2 FLR 299, 305, para 19, per Hale LJ). In relation to such property she agrees that the yardstick of equality may readily be applied. In contrast, she identifies other "non-business-partnership, non-family assets", to which that yardstick may not apply with the same force particularly in the case of short marriages; these include on her approach not merely (a) property which the parties bring with them into the marriage or acquire by inheritance or gift during the marriage (plus perhaps its income or fruits), but also (b) business or investment assets generated solely or mainly by the efforts of one party during the marriage.'

The position now reached post-*Sharp*, therefore, appears to countenance that if the parties' and any children's needs are otherwise provided for:

1.

(1) where either party has solely gained during the marriage any form of non-business -partnership/investment asset or non-family asset then on the basis of the Sharp decision – that holding party may, in the absence of any evidence of mingling or an intention to share the same, after a short marriage period be entitled to retain the same free of or with a lesser share entitlement to the other party, subject to any argument of the value of any counter domestic/alternative contribution of the other party;

2.

(2) (albeit subject to a future determination) where after a longer marriage period either party has solely gained during the marriage any form of non-business-partnership asset or non-family asset, then if there is evidence of an intention not to share some or all of the same with the other party such as eg where there exists some form of separated finances between them and each otherwise has made a full contribution such, as would be the position with dual career parties, then again, subject to any countervailing argument as to mingling or a balancing domestic/alternative contribution of the other party, the holding party may be entitled to retain such assets free of or with a lesser share to the other.

The parameters of such arguments are quite uncertain in practice. In *Sharp*, Sir Peter Singer, as one of the most experienced of family judges, was not persuaded that there was sufficient evidence of a deliberate separation of finances – a conclusion on the facts which many practitioners would have sympathy with. This is especially so as he saw and heard the parties give evidence which the Court of Appeal did not. Undoubtedly, the practice of separate financial arrangement within the *Sharp* household was not consistent and this raises the question where the line is to be drawn in any individual case on just this aspect alone, especially when the bar has apparently been set so low by this decision.

The difference in asset holding worth was derived in the *Sharp* case from W's substantial bonus payments during the marriage. However, there is a lingering sense that once such income/earnings sourced differences are highlighted as a reason for making a distinction between married parties who have otherwise worked full time to the best of their abilities that there emerges once again the danger of reintroducing the thin edge of a discrimination wedge based upon their innate individual capacities and abilities. As Baroness Hale commented in her decision in *Foster*:

'18. … The Matrimonial Causes Act 1973 was designed to move away from the application of strict property law principles, with their dependence upon evaluating contributions in money or money's worth, towards the recognition of marriage as a relationship to which each spouse contributes what they can in their different ways. There can be no justification for treating differences in income any differently from differences between breadwinning and homemaking. These days things are rarely as simple as one breadwinner and one homemaker. Both may work equally hard but in jobs which are unequally remunerated. They may agree that one should work part-time, or take a career break, in order to enable the other to move or take promotion. They may agree that one should work full-time at the outset to enable the other to gain qualifications which will then enable the first to concentrate on domestic responsibilities. As it happens, differences in income and career progression are also frequently the result of inequalities in earning power between the sexes, although not always, as this case shows. If both go out to work and pool their incomes or spend a comparable proportion of their incomes for the benefit of the family, it would be a surprising proposition indeed if they were not to be regarded as having made an equal contribution to the family home or other family assets. Two of the homes acquired here were matrimonial homes and the others (with the possible exception of Rectory Lane) were obviously acquired as joint assets by their joint efforts and the others (with the possible exception of Rectory Lane) were obviously acquired as joint assets by their joint efforts.'

In *Miller/McFarlane* Baroness Hale commented on her earlier decision:

'But there are many cases in which the approach of roughly equal sharing of partnership assets with no continuing claims one against the other is nowadays entirely feasible and fair. One example is *Foster v Foster* …, a comparatively short childless marriage, where each could earn their own living after divorce, but where capital assets had been built up by their joint efforts during the marriage. Although one party had earned more and thus contributed more in purely financial terms to the acquisition of those assets, both contributed what they could, and the fair result was to divide the product of their joint endeavours equally.'

Although Sir Peter Singer at first instance described the duration of the *Sharp* marriage as 'not so desperately short from cohabitation to separation as some, but still by no means lengthy' neither court appears to have rejected the notion that the same fell within a duration which could be described as short. Unhelpfully, case authority in this area is sparse. In *Fields v Fields* [2015] EWHC 1670 (Fam), [2016] 1 FLR 1186 Holman J stated that where a marriage was with cohabitation nine and a half years in duration, the same 'cannot be characterised as a short marriage case'.'

There is no statutory definition of what constitutes a short marriage and no definition was suggested in either *White* or *Miller/McFarlane*. Yet absent evidence of intention to separate finances, the determination of whether a marriage length falls to be so described is likely in this post Sharp context to be very important. It is submitted that 6 years, as in this case, could be described as being on the edge of such a description. Should, however, a marriage of 6.5, 7 or 7.5 years be treated substantially differently – none could be described as lengthy – but are they to be seen as short for the purposes of the approach to be adopted to unilateral assets? The position now created is unsatisfactory from both the practitioner level of being able to offer clear advice and from the litigant level of a clear understanding of the principles to be applied with a view to reaching an early and cost economic compromise Adopting McFarlane LJ's own words, such a position would not appear to entirely promote, 'the welcome fruit of a jurisdiction founded upon clearly understood principles'.