

Reform of ancillary relief? A formula will do nicely, sir

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This discussion article proposes formulae for calculating capital and spousal maintenance post Miller. It seeks not to replace or reform the law. It seeks to help some couples and lawyers make better progress to a settlement and provide more certainty and predictability. The formulae are relatively easy to operate and can be adapted to IT Web based resources.

As dust settles on Miller six months ago, the profession realises what it thought in May was correct - helpful clarification on some issues, utter confusion on other areas and greater difficulty in settling cases. By common consent, Parliamentary reform will not happen soon. Yet post Miller, higher court decisions are flowing fast and furious. It is probably not for the profession now to seek reform of the law. But it is incumbent on the profession to fill the vacuum in practice to create certainty and predictability for our clients and to encourage out of court resolution.

One way forward, and the way increasingly used outside the discretionary, text based world of family law, is via formula calculations. Not to replace the law. Not to replace solicitors. Not to produce binding outcomes by formula alone. But to help cases along the road to a settlement, to put the case law and higher court judgments into a logical and systematic context and to help more clients do more of the resolution process themselves.

I accept many will run scared and horrified from such an approach, in part for jurisprudential reasons, in part from the fear of all things techie and mathematical. But the latter is where many in our society now expect to find their answers.

In July I wrote an article for Family Law Week Online (www.familylawweek.co.uk) proposing a formula for spousal maintenance based on experiences in a couple of post Miller mediations. The article had over 1000 hits, admittedly from an IT aware readership.

In late July, Mr Justice Coleridge in the High Court handed down judgement in Charman. Stating that “*Extraordinary energy, extraordinary entrepreneurial or other wealth generating skill, combined with the sheer size of fortune*” have “*a tendency to overwhelm the s25 exercise however carefully performed*”, he concluded: “*Tariffs are a bit crude and purists would protest that this is an incursion into the hallowed s25 exercise but are they, in the end, likely to produce a less fair result than any other unscientific exercise of judicial discretion? And they have the advantage of increased certainty. Of course they are non-binding and only guidance. S25 would continue to prevail. I forbear from suggesting one at this stage in this case lest it be thought I have applied it to arrive at my decision. I have not. But a tariff of percentage bands which decreased as the size of these extraordinary fortunes increased might prove to be helpful guidance and, ultimately no less fair than the current expensive uncertainty.*” (paras 135 and 136).

For tariffs perhaps also read formulae. Perhaps perversely by not giving us a practical and clear blueprint for family finance resolution, the House of Lords in Miller has stimulated a debate on another way of getting to a fair resolution according to clearly discernable law principles. Formulae and tariffs must now be one obvious starting point.

My July article, amplified and refined, was then published in the autumn SFLA/Resolution Review and attracted much interest and guarded support. This article summarises my previous articles and adds a formula to capital. I put it forward for discussion as a way forward in practice.

References to paragraph numbers below refers to Miller.

The capital calculation formula

Total resources at date of separation	A
Increase in resources to date of settlement/final settlement	B
Resources available for settlement, A + B	C
Pre-marital assets (probably pre cohabitation), indexed to date of settlement	(D)
Gifts properly excluded, indexed to date of settlement	(E)
Inheritances, indexed to date of separation	(F)
Element of B above acquired or created by one party's personal industry and not from an asset created during the marriage (<u>Rossi</u> and other case law)	(G)
Matrimonial resources, C – D – E – F – G	H
Business assets generated solely or mainly by one party (Hale at 150)	(I)
Surplus accumulated by genuine dual career family (Hale at 153)	(J)
Total matrimonial, non sole business assets, H – I - J	K
Simple equal division, K /2 or K x 50%	L
Preliminary outcome, unless L is less than needs and/or subject to s25 factors	L
Additional capital for compensation, including capitalised compensation	M
Any capitalised spousal maintenance for clean break	N
Outcome, L + M + N	O

All items need assistance with input from solicitors or very careful explanatory notes. The outcome needs review for the particular circumstances of the case, perhaps fine tuning and tweaking or perhaps material departures. An advantage is that future case law developments can be – or should be – fitted into an overall scheme of a calculation of financial provision.

Departures from this formula outcome may include

- Longer marriages are more likely to include non matrimonial assets, items D - G, I and J above (Hale 152)
- The matrimonial home even if a pre marriage asset may be equal division (Nicholls 22 but controversial)
- Charman special contribution, but subject to appeal to Court of Appeal in March 2007
- Liquid and illiquid assets cannot be treated alike
- Case law authority on refinements to the formula e.g. developing case law on when inheritances will or will not be brought into account
- All s25 factors e.g. health
- “Needs” always trumps sharing and non matrimonial assets
- Dangers of too strict adherence to categorisation of property and each case must be approached on its own facts “with the degree of particularity and generality appropriate to the case” (Nicholls 27 but see below for comment)

The spousal maintenance calculation formula

Miller sharing does not stop with capital. Why should income, especially income resulting from work undertaken the marriage, not be shared when there are generally similar needs of the spouses, making allowance for child costs. In such circumstances, is it possible to devise a spousal maintenance formula

to produce some consistency of approach across a range of cases and from year to year; a consistency described by the House of Lords as so important yet sadly not promoted by some inconsistencies in the Miller judgements!

I have successfully adopted this formula in recent mediations. It presumes the husband is the primary earner and the wife is the primary carer but with a good level of contact to the husband.

Total net income of husband	A
Total net income of wife	B
Total income resources (A + B)	C
Direct school fees, extras and related educational expenses	(D)
Additional child expenses to be paid direct	(E)
Sub Total (C – D – E)	F
Child maintenance needs of wife as primary residence parent	(G)
Child maintenance needs of husband as secondary residence parent	(H)
Subtotal, being available income for parties themselves (F – G – H)	J
Divided equally for shared needs, being J/2 or J x 50%	K
Less total net income of wife	(B)
Spousal periodical payments (K – B)	L

By way of example, a husband earns £120K net (A), a wife earns £15K (B) with £35K school fees (D) and £20K other direct children's expenses (E) and agreed direct children's cost of the primary carer is £20K pa (G) and of the 5 nights a fortnight secondary carer is £16K (H). The total available income is £135K (C, 120 + 15), the amount after school fees and other direct children expenses is £80K (F, 135 – 35 – 20) and the amount available after child support for each parent is £44K (J, 80 – 20 – 16). This amount remaining for the adults of £44K is divided equally between them to produce £22K (K). From this is deducted the wife's own income of £15K to produce alimony, spousal maintenance, of £7K (L, 22 – 15).

The total income (A and B above) will naturally include earned income of whatever form including bonuses and commissions. One benefit of such a formula is that it can be applied to regular monthly income and also to one off annual payments. It could include in exceptional cases a notional income attributed to one party who should be producing an income at a certain level but is not. This formula is flexible to permit adjustment if a wife later gains an income after time at home in child caring.

The children's educational costs and related expenses (D) such as school fees invoices, school trips, uniform are then deducted. If the parties have chosen private education of any form to continue post divorce, this cost should first be taken off the available income resources. The court order or settlement will direct who will pay these expenses. There are then non educational direct children expenses (E) which include private health insurance, medical expenses, opticians, dentists, sports equipment, holidays other than with one parent. These are items payable to a third party, although it will need to be resolved who will pay what and how amounts are passed to the party who will make the payments.

Even if a parent cares for children for only one night a fortnight, there are indirect costs of accommodation and some direct costs which should be taken into account and shared. Increasingly, children spend good amounts of time with each parent. Naturally the primary residence parent has the greater need and this can be calculated by reference to assessments of needs or other methods e.g. CSA formula. But the other parent, perhaps with a third or half of school holidays and three

to five nights staying contact a fortnight has considerable indirect accommodation costs and direct costs. Perhaps the ratio might be in the sort of order of e.g. 100 per month for the primary residence parent and 50 - 70 for the secondary residence parent. Some realistic allowance must be included.

These two amounts of child support for each parent (G and H) are deducted from the available income. The remainder (J) is literally what is left for the parents as single adults!

Is there any reason why, at this stage and during the periods on separation and a few years after divorce, the remaining available income should not simply be shared and divided equally? From the half amount (K), the income already of the wife (B) if applicant for spousal support is deducted to produce the spousal alimony element (L).

The formula involves substantially less work on detailed budgets, is more flexible for future years and changes can be operated by parties without material lawyers' involvement and takes more account of child support of the secondary carer.

Reasons to depart from the spousal maintenance calculation:

- one party has been attributed a mortgage earning capacity which is taken into account in the calculation of capital so this mortgage cost should act as a deduction before sharing out available income
- one party has work related costs, e.g. travel to work, work clothing, tools etc
- child care costs should be deducted e.g. to allow a mother to take employment
- clean break and/or term, s29 considerations
- one party has greater needs than the other - but these will not be child related as this will be taken into account. In the post White world of reasons to depart from equality, there will have to be very good reasons why one spouse as a single person immediately post divorce should have materially greater needs than the other
- may be inappropriate in bigger money cases
- may be inappropriate when issues of compensation above "needs" may arise
- indexation may be appropriate for the child support for each parent as it is entered into the formula at a needs basis. However the spousal maintenance should not be indexed on this formula
- when the recipient has attained self sufficiency (although she might then want to revive her compensation claim)
- where a payer is able to show a higher income stream derives wholly from endeavours and perhaps new employment direction post separation and divorce
- when the pension sharing order takes effect and the payer has retired, Coleridge J in D v D (2004) 1 FLR 988
- on the recipient cohabiting, the very recent authority of Coleridge J in K v K (Periodical Payments: Cohabitation) (2006) (yet to be fully reported)

- possible when the children have left full time secondary education.

The reasons to depart from this formula are where the lawyer has a more specific and specialist role in advising on what departures are fair.

The formula probably stops being appropriate a few years after the divorce when a review of circumstances is often advisable to fine tune fairness and a less formulaic approach may be appropriate.

Additional areas where calculations might assist

In addition to these above formulae, other calculations might usefully include the following, some of which are already available in one form or another by existing publishers

- Compensation multiplicands for various employments based on age and period out of the workplace
- Indexation increases adapted for family law use, for real property, income and general
- Child support formula, perhaps based on CSA but more acceptable to family lawyers and fairer than the CSA
- Discount for introduction of non matrimonial assets based on length of marriage, but controversial and has found previous criticism

The IT imperative in calculating financial provision

I admit to riding a now rather ancient hobbyhorse. From well before the time of the Web, I have felt that the mass volume litigation of family law finance disputes requires the clarity and certainty that arithmetic formula can produce as a starting point. The high costs, delays, uncertainties and disruption to the wider families, to children, in the workplace and across society generally of the wide discretionary process of resolution is unfair for most. Perhaps fair for those who can afford it. Not for the rest. Reformist noises in the mid-90s fell on deaf, discretionary infatuated ears, although met some resonance in White.

The Web has changed our lives. But not family law resolution. The CSA calculation was botched and the web version came late and was not well presented. The myriad of figures in At A Glance, even in pink, can be brushed aside with a wave of the discretionary wand. However in the rest of our lives, we are accustomed to and expect the highly personalised and interactive calculations of the Web. Car insurance and mortgage quotes. Holiday flights and hotel choices. Internet banking. There are so many examples. Many web sites contain incredibly complex, sophisticated yet hidden formulae, requiring entry of many variables which then produce very personalised outcomes.

I cannot accept that save for a minority of cases we are unable to devise a formula for the majority of family law finance cases. Outcomes would not be binding but they would take the parties substantially further down the road to a settlement than at present through they and their separate lawyers considering s25 and the latest (too often conflicting) higher court decisions. Some cases will be inappropriate for any formula. Some cases will need tweaking and variations to the formula outcome. I believe a number of couples may find the outcome of a formula, and the process of getting to it, as fair especially as it should involve less cost and delay.

I deplore the Brussels II first to issue principle. But it does produce certainty and predictability of

outcome. And across Europe, many consider that very element of certainty creates its own fairness and justice.

Has our law, by being often uncertain through discretion as well as sometimes by unclear higher court decisions with many opportunities to litigate, created its own unfairness? Has it refused to accept what the Web can do for our clients and the resolution process? Has it failed to listen to what parties really want in this present era? Has the time now come to embrace the IT opportunities in the family resolution system?

Conclusion

Each case is different as the House of Lords was at pains to tell us, including their justification for not giving us more certain guidance. But clients seek more certainty. Some seek a fairness and flexibility found in the mediation room and not found in the court room. Some seek a formula to work without lawyers' substantial intervention. Some want help getting closer to a fair and final outcome than the present system provides. Some want their lawyers to fine tune a basic fair outcome to their special circumstances.

The time has come for a debate on the creation of a fair resolution model, based on existing principles of family law such as s25 and White and Miller but through a complex, sophisticated mathematical formula, available on the web, as a good and well advanced starting point to the final settlement. I propose that resolution/SFLA should set up a Working Party, to include the Law Society Family Law Committee, the FLBA, UK College of Family Mediators, hopefully members of the judiciary and the DCA and with IT experts, to consider how this can be set up to serve the profession and our clients.

In the marathon which too often family law finance resolution becomes, can we not use IT and formulae to help our clients avoid the first 25 miles?!

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