

# FINANCIAL PROVISION AFTER MILLER/ McFARLANE: A PRACTICAL REVIEW

Miller and McFarlane (2006) 1 FLR 1186

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## **ABOUT THE SPEAKER AND AUTHOR**

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He was joint founder in 1995 of probably the world's first metropolitan practice to combine family lawyers, mediators and counsellors and with an emphasis on a conciliatory and holistic approach. It was subsequently copied in many practices across the world. He is past chairman of the Solicitors Family Law Association's Financial Provision Reform Committee, Training Committee and Good Practice Committee and a member of its International Committee. He is a member of the Law Society's Family Law Protocol Committee. He is a member of the President's International Committee. He is past vice chair of the UK College of Family Mediators, the umbrella organisation for family mediation. He is a member of the Chartered Institute of Arbitrators. He is co-author of "Divorce Reform: a Guide for Lawyers and Mediators", "The Business of Family Law" "Guide to International Family Law" and consulting editor of "Family Law in Europe". He is a SFLA Accredited Specialist (with portfolios in Substantial Assets and International Cases), a Fellow of the International Academy of Matrimonial Lawyers, a past trustee of Marriage Resource and member of the Family Law Section of the Law Council of Australia.

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## A INTRODUCTION

The judgments handed down on Wednesday, 24<sup>th</sup> May, by the Law Lords in the conjoined appeals of Miller and McFarlane caused a frenzy of activity of marketing, publicity and client alerts amongst some lawyers and a frenzy of anxiety about the implications of the case amongst many other lawyers.

Apart from those few lawyers dealing with very big money cases (distinguished now from mere “big money cases” by Baroness Hale at para 149), what should lawyers be saying in advice to their clients as a result of these cases? How different will settlements be? In both content and quantum? What new areas of investigation and enquiry?

In any event, what is now the state of financial provision law?

Some basic questions!

Is it a “groundbreaking” decision, as was widely reported in the media?

No. White was. Miller/McFarlane is not. It is “further judicial enunciation of [the] general principle” in White (para 8).

Will it dramatically affect tens of thousands of couples each year going through a divorce, as was also widely reported in the media?

No. The specific applications of the principles will be limited in practice to a relatively small category of couples with significant wealth. Certainly a number of cases will be affected, but unlikely to be in the numbers proclaimed in the media nor in the numbers of cases which have caused anxieties amongst family lawyers and their clients across the country in the days after the case.

Will it cause a reopening of a significant number of existing orders, as also reported in the media?

Unlikely. If the general consensus was that White was not a Barder event, it seems unlikely that Miller/McFarlane, especially on the compensatory element of spousal maintenance, will result in the wholesale reopening of existing orders. But other issues may arise on variations.

Will it result in substantially higher divorce settlements across the board, outside of the very big money cases?

Unlikely, although quantum of spousal maintenance orders and provision after short marriages may increase in some cases. Stay at home wives are certainly more protected than before.

Will it create more certainty and clarity?

Undoubtedly so on some discrete aspects of the law – conduct, short marriages, legitimate expectation, term orders when dependant mothers.

But by some (stray?) remarks and by disagreements amongst themselves the law lords have created new areas of uncertainty, potential litigation and dispute although with scope to settle down quickly with the application of common sense by practising lawyers!

## B BRIEF FACTS AND BACKGROUND

### Miller

Parties in their 30s, H English and W American.

No previous cohabitation. No children.

Engaged July 1999, married July 2000 and separated April 2003. H had affair.

W in marketing, reasonable income and career.

H highly successful in asset management. After certain dealings, H received £13M net of tax in March 2000. Joined new company with former colleague in January 2001 and paid £200K for shares. Some restrictions on sale

At time of final hearing, W had £100K, half in pensions. But H had income of £180K plus bonus of £3M for 2003 and £1.2M for 2004. Had £17.5M, no change from separation or marriage but what was value of additional shares? Figures of £15M put forward.

In High Ct, Singer J awarded £5M. Husband had argued short marriage. Judge found that the husband's affair was not conduct which it would be inequitable to disregard but equally it should be taken into account as one of the circumstances of the case in considering whether to make a conventionally smaller award based on a short marriage. He referred to the fact of the wife not wanting to end the marriage. The affair was used as a defence to an a claim of short marriage.

Moreover, where the parties were wealthy, the wife had a legitimate expectation that on a long-term basis she would be living on a higher economic plane than rented accommodation and £85,000 pa!

There was no further itemisation of how the £5 million was arrived at.

In the Court of Appeal, primarily Thorpe LJ, it was held the award was not plainly excessive although at the top end! The husband's conduct could be used as a counterbalancing factor to the shortness of the marriage. The judge was entitled to regard the legitimate expectation of living to a higher standard as a key element in the case. In relation to the appeal, it was said that the judge's perception of the overall award was strongly influenced by the size of the husband's wealth. He was a very rich man. The amount was neither excessive nor disproportionate.

The Court of Appeal delivered judgment in July 2005. Mr Miller appealed immediately. In his notice of appeal, drafted by James Turner QC, he said that the case raised issues of significant importance for practitioners across the country undertaking a substantial number of more modest cases. Leave to appeal was given on the basis that it was heard with the appeal set down 12 months or so before in the case of Mr and Mrs McFarlane, to be heard in late January 2006. The speed of the appeal was a recognition of the difficulties created across the profession by the decisions. Many cases around the country were being argued on conduct and legitimate expectation.

### McFarlane

This was a long marriage, married in September 1984. There were three children aged 16, 15 and 9. They separated in December 2000. The parties were in their mid-40s. In the early years of the marriage, they were young trainee professionals, he an accountant and she a solicitor working at a City law firm. She gave up work entirely, by agreement, on the birth of their second child. He thrived in his career and became a successful partner in a top accountancy practice. She did not return to work as

a solicitor but retrained and attempted several other more modest careers.

At the first hearing before the district judge, they had a house in southwest London, a holiday home in Devon and the husband had bought a flat near the city. They agreed that the capital of about £3 million should be divided approximately equally.

The husband's net income was about £750,000 net per annum.

It was agreed there was insufficient capital for a clean break. Maintenance should be joint lives.

The wife put her income needs at £128,000 for herself and £87,000 in total for the three children. The district judge said she was the primary carer, her earning capacity was depressed by being out of the job market, it was unreasonable to expect her to acquire a material earning capacity until the youngest was at secondary school, or later, and she had made a very full contribution to the relationship. She referred to the joint decision to allow the husband to concentrate on his career and said that the wife should have a fair share of what had been acquired. She awarded £20,000 per annum per child plus £250,000 to the wife.

It was said in the House of Lords that this represented a third of the husband's net income but this ignores the reality that school fees were believed to be about £100,000 and there was £60,000 for child maintenance. If the notional element of child support for the husband was perhaps £40,000, then available income between himself and his former wife for themselves was £550,000 and she therefore had closer to one half. Is this relevant?

The husband appealed. In the High Court, the judge said that £250,000 per annum was well above her needs and that the husband would be paying money to allow her to save. That was against the principle of maintenance. He reduced the amount to £180,000 per annum but again on a joint lives basis.

The wife appealed. The Court of Appeal held that periodical payments could be used as a means to accumulate capital. It restored the £250,000 per annum. However it was limited to five years. The court said that by making a joint lives order, the court would be not giving effect to the clean break principle. It was uneasy that such a large award should be for an indefinite period. After five years the court could reassess the prospects of a clean break, the extent the wife had built up capital and her own earning capacity. It said that indeterminate and unfocused joint lives orders excessive to needs were not part of the strategic objective. The wife appealed.

In contrast to Miller where the parties only separated in April 2003 yet got to the House of Lords in January 2006, Mr and Mrs McFarlane separated in December 2000 and there were material delays at each stage of the process including having four separate substantive hearings from district judge to House of Lords.

## C THE JUDGEMENTS

The decisions of the five judges were unanimous as to outcome in the two separate cases. Although illustrative of some of the principles, the specific outcomes can have a danger of obscuring wider principles and application.

The Miller award was upheld.

The McFarlane quantum of spousal maintenance was upheld but the 5 year term changed to a joint lives order.

### Five Judges and their judgements

The lead judgments were by Lord Nicholls of Birkenhead and Baroness Hale of Richmond.

There were many similarities in certain aspects of their judgements, described by Lord Hope as “*complimentary*” with Lord Nicholls’ speech being clear and simple and Lady Hale’s giving an account of the development of the law and her opinion of the way the principles on which it is based should be applied in practice (para 101). Lord Hoffmann agreed with Baroness Hale. Lord Hope dealt with the position if the case had been decided in Scotland. Lord Mance drew attention to a number of differences he perceived between Lord Nicholls and Baroness Hale in a judgment which no doubt sets out his personal opinions but which will have the direct effect of encouraging litigation by the taking of points on his remarks.

Is it too simplistic and naïve to say that it is a pity (well actually verging on professional recklessness given the impact of the judgements on so many people) that the five law lords could not have come up with one, consensual, unanimous judgement to help the profession - and have left their own individual concerns for separately written articles or talks?

As advisers in daily practice with huge costs at stake in cases, we need certainty and clarity to settle our clients’ cases, not opportunities for litigation from disagreements between law lords.

### Fairness

Both Lord Nicholls and Baroness Hale emphasised the overriding requirement of producing a fair outcome. Whereas in *White* fairness had been described, like beauty, as seen in the eye of the beholder, fairness has now become an *elusive concept, grounded in social and moral values* and changing from one generation to another. It is broad, unspoken principles and can be the subject of development by general judicial practice. It is not appropriate to talk in terms of one party taking away from the other party or of one party giving to the other party but instead *each being entitled to a fair share of available property*. (paras 4-9).

Baroness Hale went so far as to describe the ultimate objective being *to give each party in equal start on the road to independent living* (144); an objective perhaps but a great distance from daily life and practice where very many men see their capital tied up for long years in the family home and very many women wearily await the sporadic child support or alimony cheque!

She accepted *an equal partnership does not necessarily dictate an equal sharing of assets* (142); formal equality and equality of outcome

The bases for fair outcomes

There are three strands or rationales to considering the requirements of fairness in financial provision on divorce. These are, in summary, needs (paras 10 – 12 and 138-139), compensation (13 – 15 and 140) and sharing (16-20 and 141 – 143).

### **Needs**

*In most cases, the search for fairness largely begins and ends at needs. In most cases, the available assets are insufficient to provide adequately for the needs of two homes. The court has to stretch modest finite resources so far as possible to meet the parties needs (para 12).*

Needs may be generously interpreted. For those cases where there is only enough to provide for needs (or less!), the other, more esoteric, strands of fairness are either irrelevant or of significantly lesser relevance than needs. For the majority of couples going through divorce and for many lawyers, the needs basis alone is the criteria.

Note that in recent years, the trend has been for only cases involving relatively substantial assets (or substantial costs: Piglowska!) to go to the higher courts for adjudication and ancillary clarification of principles. Yet cases where there are barely sufficient assets to meet needs are some of the most difficult, problematical and emotionally draining cases of all. Whilst there is a tidiness in the House of Lords stating a number of principles applicable in financial provision cases and then saying they will not really apply in needs cases, the reality is that those needs cases are probably in even greater need (pun intended) of guidance from the higher courts than are the big money cases which are the normal lucky recipients.

### **Compensation**

The House of Lords went on to say that a second strand of financial provision, now more recognised than before, is *compensation*.

This is a term that reeks of the worst excesses of the US litigation process and sits uncomfortably, in some ways, in the marital arena. However the term was used in both lead judgments and will inevitably now become a standard head of claim here.

The intention of the compensation strand is to readdress actual or prospective significant *economic disparity between the parties arising from the way they conducted their marriage* (para 13).

It arises even if there is self sufficiency, hence being in addition to needs. It is in the context, often, where one party has sacrificed their own career or income/capital earning for the benefit of the other spouse, the children or the family. Baroness Hale described it as compensation for “*relationship - generated disadvantage*” (140).

There is not a shred of guidance in any judgement on how to quantify or deal with compensation:

- When is it used apart from the classic McFarlane case?
- How/when is it varied?
- How long does it last? Was the dismissal of the House of Lords of a limited term order referable to the needs element or the compensation element?
- How is it assessed?
- How does it relate to sharing, see below?
- If needs predominates initially, but the recipient later becomes self sufficient, can she then later claim compensation?
- Can compensation be claimed on a variation? S v S (2002) 1 FLR 992

- Does there have to be an established career or initial career path or can it be more speculative?
- How does compensation link with saving and subsequent clean breaks, the concept from Parlour
- How does compensation on income link with a sharing of capital?
- Is compensation only lost income or can it be a loss of opportunity to acquire capital and investments?
- How does it apply in short marriages, below generally, especially if no children?
- Presumably it continues post cohabitation as it is not a needs based payment but it will end on remarriage as it is a periodical payments. This is pure discrimination against marriage – and ironically also against civil partnerships – and against those who seek the relative permanency, stability and many other advantages of marriage relationships.

A new legal doctrine without any guidance given to practitioners on how best and fairly to operate it! Is this the way to run a multi billion pound industry called family law resolution?!

## **Sharing**

The third strand is sharing.

Based on the *concept of equality permeating marriage as understood today*, Lord Nicholls described a husband and wife being now for all practical purposes equal partners in marriage. They commit themselves to sharing their lives, to living and working together and *so when the partnership ends, each is entitled to an equal share of the assets of the partnership unless there is good reason to the contrary. The yard stick of equality is to be applied as an aid, not a rule* (16).

Baroness Hale referred to it as *sharing the fruits of the matrimonial partnership*. She said an equal partnership does not necessarily dictate an equal sharing of assets and there were many cases in which the approach of roughly equal sharing of partnership assets with no continuing claims was nowadays entirely feasible and fair (143).

There was interesting debate between the two lead judgments about whether lawyers should first work out needs and then decide on compensation and sharing, alternatively work out a sharing of the assets and then consider the meeting of needs. Predictably, they said it all depended on the circumstances (28 – 29 and 144)

Sharing may not always be half.

This doctrine or stream of fairness builds on many of the post White cases.

Impact of these three streams of fairness

In the vast majority of cases, needs, especially needs generously interpreted, amply meets the totality of the available resources. Moreover, where provision of needs also compensates, for instance overcomes any disadvantage experienced in the employment market, then the second strand is also satisfied.

It is where the asset base is in excess of needs and also compensates for sacrifices made in the marriage that the issue of sharing the fruits of the marital enterprise arises. It is in this area where the judgments become more complicated, primarily because conflicts arise between the lead judgments in the House of Lords. These concern primarily a categorisation of what sort of property should be shared and how and the effect of different lengths of marriage.

It is likely to be good practice at First Appointment, and certainly before the FDR, to state the nature of

claims and how separated between these three streams. Sworn evidence or other statements of case may be needed so arguments can be directed to the particular head of claim.

What is matrimonial property? Different impact on lengths of relationships

England does not have a community of property regime on divorce. In such regimes, commonly the assets occurring during the marriage and up to the point of separation are equally divided. However the House of Lords has taken us even closer than White to a community of property regime, at least in the cases above needs. They have done so by distinguishing several categories of property.

Matrimonial property (also referred to as matrimonial acquest) is *property acquired during the marriage otherwise than by inheritance or gift*. It is the *financial product of the parties' common endeavour*. *The family home, even if brought into the marriage at the outset by one of the parties usually has a central place in a marriage* and should be normally treated as a matrimonial property (22). Property acquired during periods of *premarital cohabitation and engagement* should also probably be included as matrimonial property (149). Lord Nicholls did not himself distinguish between matrimonial "family" assets and matrimonial "business and investment" assets.

Non matrimonial property includes inheritances, gifts and property the parties bring into the marriage with them i.e. pre marriage assets (23).

In principle, the *entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been* (22). The House of Lords finally buried the short marriage law, already dying post White, of putting the parties into the position as if not married or to overcome any prejudice by the short marriage.

Now the matrimonial property of the short marriage is to be shared – the rationale of the Miller outcome itself. In some cases, this will make a big difference in outcome from the previous law even in some relatively modest cases. In other cases, the outcome may co-incidentally be the same as under the previous law, a curious example of fairness in action! This sharing may be irrespective of the absence of needs or compensation.

(Lord Nicholls has created a prospect of an appalling stream of litigation by a stray remark at this point. He said that *the parties matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose*. (22) Can this possibly be correct? Where the relationship breaks down very quickly and before children, why should one particular asset have a starting point of being shared? This remark will be seized on by applicants and undoubtedly have to be argued in the circumstances of each case, Baroness Hale wisely did not contribute on this point.)

However for non matrimonial property, the length of the marriage may be of relevance. In the case of a short marriage, *fairness may require that the claimant is not entitled to a share of the non matrimonial property* and it may be a good reason for departing from equality (24). With a longer marriage, the contribution made by one of bringing in the non marital property may diminish but this may depend on the case, the nature of the property and the circumstances (25). The longer the marriage, the more non matrimonial assets will become part of the matrimonial pot.

Lord Nicholls' logical and careful exposition of the above (save one stray remark) will not cause difficulties for many lawyers, or perhaps for many clients.

### **Additional categories of resources**

Baroness Hale went further with the categories set out above by Lord Nicholls and did not fully endorse

his view about matrimonial “business and investment” assets being included in the yardstick of equality as matrimonial property. She said that in a *very small number of cases*, if the assets *are not “family” assets or not generated by the joint efforts of the parties, then the duration of the marriage* i.e. its shortness *may justify a departure from the yardstick of equality* (153). Family assets are presumably the assets used by the family such as homes, bank accounts, insurances etc. The reference to assets generated by joint efforts applies naturally where the parties are in business together but also e.g. where one has had some involvement in the past but not continuing, perhaps through home caring responsibilities, but the reference to these assets is not wholly clear.

Lord Mance agreed that non business partnership, non family, assets which are nevertheless matrimonial assets may not have the yardstick of equality applied with the same force in the case of short marriages (168).

These references and principles are fraught with uncertainties and problems. The only consolation for most lawyers is that it is specifically relevant in only a very small number of cases, with very big money accruing during the marriage itself which is a short marriage.

Baroness Hale seemed then to define a further category of property and property arrangement where it was not automatic that property would be shared. She felt the *nature and source of property and the way a couple have run their lives may be taken into account in deciding how it should be shared*. With a *genuine dual career family where each had worked throughout the marriage and certain assets had been pooled for the benefit of the family but others had not*, it might be *fair to leave undisturbed whatever additional surplus each had accumulated during his or her working life*. She emphasised that this was not for a needs or compensation basis case and that the approach should not be taken too far (153).

Lord Mance had yet further, perhaps even stronger, views on the topic of maintaining on divorce the financially separate arrangements some couples chose for their marriage. He said dividing equally might be *inconsistent with a proper respect for the other’s personal autonomy and development, and even more so if the other were to claim a share of any profit made from them* (170).

These are dangerous themes being introduced. Some clients and indeed some couples may well feel that their pattern of finances during the marriage does not produce fairness on divorce. The two are separate.

In any event, if they are going to bound by their pattern of financial arrangements during marriage, why cannot they also bind themselves by agreements as part of their personal autonomy?! This is a yet further inconsistency in this part of the judgement. Unlike the few very big money cases, there are many young dual career couples with separate and pooled finances. There is every potential for these remarks, unprompted by the cases under appeal, to be the source of much dispute in a number of cases, especially of young and middle aged professionals.

This aspect of the judgements should be looked at, applied and argued with great care because of the emotional impact it may have on a case. Nevertheless the separate additional categorisations of property and financial arrangements, including as relating to short marriages, needs consideration.

#### Valuations and the date of separation

The courts must still look at overall resources at the date of the final hearing, the time of the settlement. However in the case of sharing including the definition of matrimonial property, there was good cause to look at the date of separation.

Whilst the two lead judgments did not deal with it, Lord Mance felt that where the focus is on assets

acquired during the marriage, rather than on overall means, it was natural to look at the period until separation (174). Other case law indicates that account should be taken of the increases in assets from date of separation until trial based on indexation growth and normal market increases.

Many clients will find this fairer, especially when there have been big delays before the final settlement. It separates out the new developments in acquired assets post separation. It also brings England yet closer to a community of property regime.

The consequence is that valuers will be required to value in some cases not just up to date but also for the date of separation. This will be easier for some assets than others!! Expect mail shots from valuers on these services!

## Conduct

Perhaps the primary reason (apart from the figures themselves) why the Miller case had reached the House of Lords had been the reliance on conduct (his adultery and affair) by the High Court judge and the Court of Appeal. In case it may be thought that this was a mere temporary aberrance by a couple of judges having a bad hairy day, it was pointed out by the House of Lords that this reliance on conduct went back to a Court of Appeal decision of G v G in 2001, reported in (2004) 1 FLR 1011, led by Thorpe LJ accompanied by the then President.

The general view across very many family lawyers was that this throwback to reliance on conduct was nothing short of scandalous. However if the higher courts told us this was the “new” law, lawyers had to advise their clients accordingly. The consequence inevitably had been that conduct started to be raised yet again on the strength of these cases. The House of Lords had to act, and act quickly. This was one reason why the Miller decision of the Court of Appeal of July 2004 appeared in the House of Lords only six months later!

The Law Lords were strong and unanimous. They said as any family lawyer in daily practice had understood. A spouse’s affair in bringing an end to the marriage is not conduct which is inequitable to disregard and should not have any impact on the financial settlement. So back to where we were before Miller.

Conduct is only to be raised if very exceptional. In most cases *fairness does not require consideration of the parties conduct* (65). If it is inequitable to disregard, statute permits it to be taken into account.

For recent conduct, see H v H (Attempted Murder as Conduct) (2006) Fam Law 264 and M v M (Ancillary Relief: Conduct: Disclosure) (2006) Fam Law 923

## **Legitimate expectation**

At the same time, they dismissed notions of “legitimate expectation”, used by the High Court in Miller to justify the award on the basis that the wife could have reasonably expected a high standard of living from a long marriage if it had not been for the husband’s affair. Whilst the court must look at standard of living, “*hopes and expectations are not an appropriate basis on which to assess financial needs*” (58) It was wrongly reintroducing the pre 1984 law of putting the parties into the position as if the marriage had not broken down.

## **Special contribution**

History in Cowan and Lambert

Recent outing in High Court in Sorrell (2006) 1 FLR 497, but not mentioned in House of Lords!

The Law Lords took the opportunity to consider contribution at the same time. There was condemnation of what had, at least until Lambert (2003) 1 FLR 139, become a professional habit of long and detailed contribution arguments set out in either the form E or the “contribution affidavit”.

Now the law lords aligned contribution, particularly so-called “special contribution” to depart from equality, with conduct.

*Parties should not seek to promote a case of special contribution unless the contribution was so marked that to disregard it would be inequitable. A good reason for departing from equality is not to be found in the minutiae of married life* (67).

Exceptional earnings would only point away from equality of division when it would be inequitable to do otherwise (68) according to Lord Nicholls. Baroness Hale seemed to differ slightly as she put the weight on contributions to the welfare of the family before a special contribution argument could succeed (148). However, as before, these will only arise when there have been exceptional levels of wealth created.

Now see Charman below

Clean breaks and spousal maintenance

The Law Lords naturally restated the legal, financial and psychological benefits of clean breaks and reviewed the history of their development and creation in statute. But how did the clean break fit in with these strands of compensation and sharing?

This was the essence of the McFarlane case. The district judge had given the wife a joint lives order. The Court of Appeal had limited it to five years, admittedly not with a section 28 bar but still with the obligation in law and burden on the wife to justify the continuation after five years. Yet the youngest child was only nine. As with the law on conduct, many lawyers in daily practice had thought the position clear namely a dependent mother with primary care of a child should not have her maintenance end during the child’s minority if the father is able to provide.

So what was the Court of Appeal doing? The fact that her maintenance of £250,000 per annum consisted approximately of one half being her needs based on her budget and the other half based on strands of compensation and sharing could or should not lead to an expectation that this mother’s spousal maintenance should end in five years.

The House of Lords dismissing this five-year term was believed by most family law solicitors to be as certain as the House of Lords restoring the previously understood position on conduct. So it was. The district judge was vindicated and proven correct. It was for the husband to argue for a variation on any change in circumstances, not for the wife to have to justify an extension after an imposed term.

The decision of the Court of Appeal in Fleming (2003) EWCA 1841 is left untouched

A periodical payments order may be made *for the purpose of affording compensation as well as meeting needs* (32). This would be the case where there was insufficient capital to bring about a capitalisation and in any event where one spouse is continuing to have a significant benefit from the contribution and sacrifice of the other spouse.

A clean break (s25A (1) MCA) *is not intended to bring about an unfair result* (38) nor to arise (s25A (2)) when it would create undue hardship, as would be the case if it was imposed where compensation was due.

*If the claimant is owed compensation and capital assets are not available, it is difficult to see why the social desirability of a clean break should be sufficient reason for depriving the claimant of that compensation* (39). By extension, there should not also be a term order. It should not on the recipient of the maintenance to have the burden of justifying an extension.

There may now be less clean break orders, certainly in cases where an element of the maintenance is more than pure needs e.g. compensation.

On this subject see excellent article by Philip Moor QC and Val Le Grice QC “Periodical payments orders following Miller and McFarlane - a series of unfortunate events” at (2006) Fam Law 655.

### **Good practice on the three strands of financial provision**

It will be good practice in a case where maintenance includes an element above pure needs for the court to specify how much is the needs basis element and how much is either compensation or sharing. This may be relevant for several reasons

- If there is a later variation application, the needs basis may be appropriate to be varied at a different rate than the compensation/sharing basis. A time may come when it is no longer appropriate for the compensation/sharing basis but the needs basis may remain.
- If there is later capitalisation, some elements may be more suitable for capitalisation than others, or at different rates.
- For any issues of enforcement across Europe, where there is a dramatic divide between the concept of maintenance and property division, it is quite likely that the continental European courts will give enforcement and recognition to the maintenance element alone.

### **Pre-marriage agreements**

The judgements have given greater weight to the making of pre marriage agreements. Clients who do not want to pay £5M after only three years of marriage. Or pay an extra £125K pa maintenance, potentially for life, through one spouse not working and when all reasonable needs are met in income and capital. Or clients who want to agree that certain assets are outside the matrimonial property definition and so not shared.

Surely it now only a matter of time before pre marriage agreements have statutory weight and in any event case law is moving to give them more force.

Lord Mance specifically referred to giving weight to the autonomy of the parties.

Many practitioners will find themselves advising clients to consider them and then drafting them. Resolving the content of pre marriage agreements requires a totally different dynamic and skill in negotiations than for relationship break downs, as Australian lawyers discovered when binding financial agreements were recently introduced.

The SFLA/resolution precedents remain probably the best on the market.

### **Charman (2006) 2 FLR 422**

Coleridge J, 27 July 2006

30 year marriage, H generated wealth of £150-160 Million through exceptional skill and entrepreneurial activities. About £68M held in trusts. H offered £20M but W sought 45%. H alleged stellar contribution so he should have a special premium, that wife failed to support in his business endeavours esp. moving to a tax haven late in marriage, and trust should be left out of account as for unborn family members.

Court held

- Duration of marriage could have resulted in departure from equality for non family assets or assets not generated by joint endeavours; but importance of source of assets diminished over time
- Concept of exceptional wealth was a relevant factor; husband had “*extraordinary talent and energy*”;
- Did not matter if conduct or contribution; “*opposite sides of same coin or same species, the tests for their inclusion must surely be identical*”; was “*wholly exceptional, gross and obvious*” so departure from equality was justified
- Court should look at difference of cash and high risk assets
- “*Attempts at categorisation of the assets hinted at by Baroness Hale are fraught with difficulty after a marriage of this length*”
- Court should have regard to fact husband’s earning capacity coming to an end
- In big money cases, needs was far outweighed by other factors
- Failure to move to a tax haven was not conduct inequitable to disregard
- Court cannot simply ignore trust assets with informal arrangements, a spouse cannot remove at a stroke half of assets accumulated during the marriage without consent of other party
- W should have £40M, being 37% of assets, but were cash so safe assets whereas husband’s assets were more high risk

Judge said “*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).

See also “Financial Provision: A Formula will do nicely sir” (2007 Fam Law 57) by David Hodson which incorporates a capital formula and spousal maintenance formula

In sympathy with practitioners in “ordinary” cases, he said “*From the summit of the mountain, the House of Lords has pronounced on some of the principles which underlie the “special contribution” issue. They are silent on how to apply them. Indeed whilst disagreeing with the lower courts in Miller, they did not alter the award. For those of us rootling around in the foothills trying to translate these principles into figures, this final stage is the more difficult part of the exercise.*”

### **Charman post order**

One feature of this case has been the significant number of applications before the court.

In 2005 there had been a hearing before Coleridge J regarding orders to the Supreme Court of Bermuda to direct that a director of the Bermuda company holding the husband’s trusts should be from required to produce certain documents and information. The husband lost and appealed, which matter came before the Court of Appeal just before Christmas 2005. See the report at (2006) Fam Law 516.

No doubt there were other interlocutory applications.

In the order above, Coleridge J provided for payment to the wife of a lump sum of £40 million; as to

£12 million on or before 31 August 2006 and as to the balance of £28 million to be directed by the court at a hearing to take place on 23 October 2006. The husband failed to pay all of the 12 million. In September, the wife obtained a worldwide freezing order against all of his assets. Coleridge J made in order in November extending time for payment of the 12 million to mid-November and the balance by 1 March. *In giving judgment, the judge observed that he considered that, in making arrangements for payment under his judgment of July 2006, the husband had taken a “somewhat cavalier” attitude towards the order the judge had made, and that he appeared now to be going out of his way to contest every aspect of that order, such that the judge felt uneasy about whether or not he was going to pay even if he was eventually given leave to appeal (para 8 below).* The husband appealed. His very full skeleton argument ran to 233 paragraphs and 67 pages. Some skeleton! Later in November, Lord Justice Wilson gave a general stay of execution to the husband but allowed the wife to apply to show cause why the stay should not be continued. The wife made application for an order that the appeal should not be allowed unless the husband paid the full amount of the lump sum as ordered above together with security for costs. The matter came before the President, Lord Justice Thorpe and Lord Justice Wilson just before Christmas, [2006] EWCA Civ 1791

The President said: *The proceedings have been notable not only for the size of the sums involved but for the determined resistance of the husband to the claims of the wife in what the trial judge described as his deployment of every available point to protect what he regards as his wealth generated entirely by his own efforts. (3)*

The background to the outcome is not pertinent for this seminar but the judgement helpfully summarises the husband's appeal, which obviously is highly relevant for the future of the law as set down by the House of Lords. *There are two principal grounds to be advanced in the appeal which are of general importance and, when heard, will constitute the first examination and application by this court in a “big money” case of the principles expanded by the House of Lords in the cases of Miller and McFarlane. They relate to the question of*

(1) the general approach of the judge and whether he was correct (as he did) to use a starting point of 50 per cent for the wife's share of assets, thereafter discounting the wife's entitlement on account of various factors considered, or whether he should, as the husband contends, have built up the wife's award incrementally by reference to the individual factors set out in Section 25 of the 1973 Act;

(2) the husband's “special contribution” to the assets built up during the marriage. It is said that, rather than treating that contribution as an individual discounting factor, the judge should have analysed the extent to which it had resulted in the generation of resources and how that should be reflected in determining the wife's award. No doubt it will be contended that the fruits of that special contribution reside in the Dragon Trust.

Whilst undoubtedly elucidation of uncertain law is welcome, many practitioners feel that some elements of the Miller outcome have settled down, after a fashion, into some regular pattern of practice before the courts and in reaching settlements. In early March, the Court of Appeal will again tread the much eroded road of the principles of financial provision. Given that the House of Lords only became involved because of serious misdirections by the Court of Appeal, coupled with a previous period of material inconsistencies and contradictions of higher court decisions, the very real hope must be that the Court of Appeal in Charman does not seek to put his own personalised gloss on the House of Lords judgments in Miller, thus leaving practitioners once again uncertain and unclear about what is the law of financial provision on divorce.

### **Rossi (2006) EWHC 1482**

This case was decided in the immediate aftermath of Miller, with judgment on the 26th June being given by Nicholas Mostyn QC sitting as a deputy High Court judge. The facts are irrelevant here but it was necessary for him to consider post separation increases in assets and related issues. At a key stage in the judgement he gave his own position on a number of the Miller features.

24 *Doing the best I can to draw the various threads together I think that the following principles can be deduced:*

24.1. *The statute requires all the assets to be valued at the date of trial.*

24.2. *For the purposes of establishing the matrimonial property in respect of which the yardstick of equality will “forcefully” apply the value of assets brought into the marriage by gift and inheritance (other than the former matrimonial home), together with passive economic growth on those assets, should be excluded as non-matrimonial property.*

24.3. *Assets acquired or created by one party after (or during a period of) separation may qualify as non-matrimonial property if it can be said that the property in question was acquired or created by a party by virtue of his personal industry and not by use (other than incidental use) of an asset which has been created during the marriage and in respect of which the other party can validly assert an unascertained share. Obviously, passive economic growth on matrimonial property that arises after separation will not qualify as non-matrimonial property.*

24.4. *If the post-separation asset is a bonus or other earned income then it is obvious that if the payment relates to a period when the parties were cohabiting then the earner cannot claim it to be non-matrimonial. Even if the payment relates to a period immediately following separation I would myself say that it is too close to the marriage to justify categorisation as non-matrimonial. Moreover, I entirely agree with Coleridge J when he points out that during the period of separation the domestic party carries on making her non-financial contribution but cannot attribute a value thereto which justifies adjustment in her favour. Although there is an element of arbitrariness here I myself would not allow a post-separation bonus to be classed as non-matrimonial unless it related to a period which commenced at least 12 months after the separation.*

24.5. *By this process the court should, without great difficulty, be able to separate the matrimonial and non-matrimonial property. The matrimonial property will in all likelihood be divided equally although there may be deviation from equal division (a) if the marriage is short and (b) part of the matrimonial property is “non-business partnership, non-family assets” (or if the matrimonial property is represented by autonomous funds accumulated by dual earners).*

24.6. *The non-matrimonial property is not quarantined and excluded from the court’s dispositive powers. It represents an unmatched contribution by the party who brings it to the marriage. The court will decide whether it should be shared and if so in what proportions. In so deciding it will have regard to the reality that the longer the marriage the more likely non-matrimonial property will become merged or entangled with matrimonial property. By contrast, in a short marriage case non-matrimonial assets are not likely to be shared unless needs require this.*

24.7. *In deciding whether a non-matrimonial post-separation accrual should be shared and, if so in what proportions, the court will consider, among other things, whether the applicant has proceeded diligently with her claim; whether the party who has the benefit of the accrual has treated the other party fairly during the period of separation; and whether the money-making party has the prospect of making further gains or earnings after the division of the assets and, if so, whether the other party will be sharing in such future income or gains and if so in what proportions, for what period, and by what means.*

### **S v S [2006] EWHC 2793**

Burton J

Parties married in mid 97, H then 52 and second marriage, W was 32 and her first. He was a senior partner and she was or had been a trainee. Marriage ended in Dec 2004 with an act of violence between H and W. H admitted and was convicted of ABH and received 12 month Community Rehabilitation Order. 2 children, 8 and 3. Big issue of conduct (4 out of 7 days of trial; W unsuccessful) but also compensation and division of property

On compensation, the QBD judge said

*59. ....I have listened carefully to the evidence of the Applicant, particularly in the context of the cross-examination of her on the basis that she could and should take up employment – in the area ... of some £50,000 per year, and ... quite soon, after a short period of training or retraining - in any number of jobs, including surveying where she spent time as a trainee at Weatheralls. I am quite satisfied that she gave no sign of what might be the case in other circumstances, a thwarted ambition or an irrevocably damaged career. I do not believe that this head of loss can be said to arise in every circumstance. It is not an unfamiliar situation, e.g. in employment tribunals, where it is said to be the consequence of an unfair dismissal that a claimant can never recovery satisfactory employment, although in that forum there is the statutory cap to compensation. In this case, I am not persuaded at all that anything has been lost by the 7½-year gap in the Applicant's employment, or as a result of the mutual agreement between the parties that she would not work: indeed the understanding, and her own desire, as was plainly in evidence, was that this arrangement of her not working would not be limited to the period when she might have to be the carer of the children, but would extend to their joint enjoyment of his retirement at Brudenell, where she would choose to spend her time in sailing and painting.*

*60. I make no award, or allowance, for compensation under this head*

On the division between matrimonial assets (£6M) and non matrimonial assets (£1M), the wife got £2.5M, being 40% of matrimonial assets although the husband agreed also to pay her debts at £500K, being mostly her costs at £460K, hence she got £3M. She got 35% of overall assets. The judge said

67. I conclude that there should be an allowance for the substantial financial contribution of the Respondent to the marriage, over and above the norm, and after taking into account the Applicant's contribution as carer and homemaker, by virtue of the pension portfolio and the Weatheralls proceeds. This contribution is, in my judgment, at least sufficient to justify an entitlement of some 60% of the matrimonial property (while he retains the pre-matrimonial) which would itself make no allowance for the fact that the Respondent will be, as is agreed, paying off the entirety of the Applicant's debts.

69. Mr Mostyn QC submitted that the effect of Lord Nicholls words in *White* at 989 is that the judge must test his conclusion against the yardstick of equality of all the property, including the non-matrimonial property. I do not agree. I consider that the yardstick is by reference to 50% of the matrimonial property, and that the non-matrimonial property is excluded, and only brought into consideration if needs dictate. However, if I am to measure my conclusion against that yardstick, then the total figure I award to the Applicant (exclusive of the payment off of the £500,000 debt) would fall from approximately 40% of the matrimonial, to approximately 35% of the total of matrimonial and non-matrimonial, property. This latter, lesser, percentage would be, in my judgment, more than justified by virtue of the fact that the Respondent's financial contribution would then have to be considered to be all the greater, if it included, not only his financial contribution to the matrimonial property, but his deemed contribution of the entirety of what is otherwise non-matrimonial property. In either event, against whichever yardstick my award is measured, there is, in my judgment, and by reference to the factors in s25, ample good reason for it.

More generally on the issue of matrimonial and non matrimonial assets he said:

27. As a result of the statute, but also as a result of their Lordships' analysis in *White* and *Miller*, a number of factors can be identified which may, in an appropriate case, constitute good reason for moving away from, or indeed back towards, the yardstick of equality. In this case, the issues appear to be as follows:

i) The first question, and the first issue in this case, is what the matrimonial assets are, to which the yardstick is to apply. There is, as will be seen, substantial discussion, particularly in *Miller*, as to what assets e.g. deriving from a source prior and/or external to the marriage, qualify to be kept, at least in

the first instance, separate and apart in considering the division of assets between competing spouses. (“Non-matrimonial property”).)

ii) The second issue is contribution – financial or non-financial. So far as financial contribution is concerned, this issue may overlap with the last, for, if one party is the sole or main source of the assets, even if, on analysis, they do not qualify as “non-matrimonial property”, they will, or may, constitute a substantial unmatched contribution by that party. In the consideration of this issue, the duration of the marriage may play a part. (“Contribution”).)

iii) The third issue is conduct – which only exceptionally arises so as to impact upon the division of property, but is prayed in aid by the Applicant in this case. (“Conduct”).)

iv) The fourth issue is new, and has its genesis in the speeches in Miller of Lord Nicholls at para 13 and Baroness Hale at para 140, namely, in her words, “compensation for relationship-generated disadvantage”, on the basis that “the economic disadvantage generated by the relationship may go beyond need”. (“Compensation”).)

v) The fifth issue can be generically labelled as “Need”, but is to an extent an amalgam. Consideration of need used to be in the forefront of financial provision cases, at least where there was more than a sufficiency of assets, and the aim was to scoop out of the pool sufficient to cope with the need of the less well-resourced party (generally the wife), whether her needs were in a given case assessed generously or stringently. It is now, particularly in the light of the decisions of the House of Lords, clear that need is no longer the yardstick, if it ever was, and that, by concentrating upon need, there has been insufficient account taken, not only of the general principles now so clearly enunciated by their Lordships in White and Miller, but of such a party’s non-financial contribution to the marriage, particularly in a long marriage. The issue of need is however still material, for at least the following reasons. First if there is non-matrimonial property, but the matrimonial property is inadequate to provide for the needs of the payee, then that is a ground for ‘dequarantining’ the non-matrimonial property, which becomes available for general distribution (see White per Lord Nicholls at 994). Secondly, addressing the issue of need is a necessary check to ensure that enough is given to the payee, or left with the payer, to enable each of them to live and meet their obligations. Within the confine of this amalgam issue there are included the following:

a) What are and are likely to be the living expenses and obligations of the parties, particularly of the payee?

b) What is the earning capacity of the payee and of the payer (including consideration of their ages)?

c) Is the likely expenditure to be capitalised on a lifelong basis, in accordance with the Duxbury tables (derived from Duxbury ...), whether as modified e.g. to allow for sale of the matrimonial home and thus the release of additional capital at a given future point, or otherwise, or on the basis of some shorter duration such as exemplified in Fournier [1998] 2 FLR 90)?....

*The answers to any or all of these five issues may constitute a good reason for a move away from or towards equality. In some cases, the shortness of the marriage may be a self-standing reason for reducing a payee’s entitlement.*

*28. It is in the definition of “non-matrimonial property” that there appears, as perceived by Lord Mance in his speech in Miller (paras 167-8) to be a difference between Lord Nicholls and Baroness Hale. Lord Nicholls, as interpreted by Lord Mance, concluded that non-matrimonial property consists of (i) properties which the parties brought with them into the marriage (which I shall define as “pre-matrimonial”) and (ii) property acquired by inheritance or gift during the marriage (which I shall define as “extra-matrimonial”), together “perhaps” (but the perhaps has been overtaken by persuasive subsequent first instance judgment, as will be seen) with the income or fruits of that property (para 167). “Income or fruits” have been subsequently interpreted and adopted by Mr Mostyn QC, sitting as a Deputy High Court Judge, in Rossi v Rossi [2006] EWHC 1482 (Fam) and approved by Singer J in S v S [2006] EWHC 2339 (Fam) as referable to “passive economic growth”. It is to these two types of “non-matrimonial property” that Lord Mance summarises Lord Nicholls’ approach as being limited.*

29. *Baroness Hale, according to Lord Mance, takes a “more limited conception of matrimonial property” – and thus a broader concept of non-matrimonial property. She includes the two categories which I have defined as pre-matrimonial and extra-matrimonial, but then she adds. She includes as matrimonial property “family assets” (as defined by Lord Denning in Wachtel v Wachtel [1973] Fam 72 at 90) and “family businesses or joint ventures in which both parties work”. But she identifies additionally as being non-matrimonial property “business or investment assets generated solely or mainly by the efforts of one party during the marriage”: which I could perhaps define as “unilateral assets”. She is thus seen by Lord Mance as allowing for a wider category of non-matrimonial property. Admittedly she says, as Lord Mance points out, at para 152, that “the source of the assets may be taken into account, but its importance will diminish over time”, and that is naturally of obvious relevance where there has been a long marriage, and such intermingling of assets that their source can no longer be identified (see also Lord Nicholls at para 25). However, that would not be of relevance in this case, where, as discussed above, after 7½ years, there is no difficulty whatever in identifying the source of the assets: on the contrary they plainly derive from, and in many cases are the very same as, the assets brought into the marriage by the Respondent, and insofar as they have been developed, enhanced or transformed, that is generated solely or, at any rate mainly, by his efforts, and they remain wholly compartmentalised, and entirely in his name.*

30. It seems to me however that the difference between Lord Nicholls and Baroness Hale identified by Lord Mance may not in fact be so great or be material:

i) Lord Nicholls refers to matrimonial property (as defined by him, which would include what I have called unilateral assets) as being “the financial product of the parties’ common endeavour” (para 22) as contrasted with pre-matrimonial and extra-matrimonial property. It seems to me that he is thereby regarding assets worked on, even wholly by one of the parties during the marriage as being, by virtue of the other’s contribution, or of the marital partnership, achieved in common.

ii) Lord Denning’s well known definition of family assets in Wachtel is specifically approved by Baroness Hale at para 149: “It refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives and used for the benefit of the family as a whole.” Thus, on this definition, even assets which might otherwise be described as unilateral assets fall, on Baroness Hale’s definition, by virtue of being family assets, within matrimonial property if “used for the benefit of the family as a whole” (or, indeed, if “acquired with the intention that there should be continuing provision” from them for the family).

iii) Again Baroness Hale herself defines, in paragraph 149, as a “prime example” of a family asset, a party’s “earning capacity”: and where, as here, that earning capacity arises out of developmental skills, the product, albeit a unilateral asset, would appear to be brought by Baroness Hale within matrimonial property.

iv) Further, she seems to play down or delimit the impact or effect of unilateral assets yet further in paragraph 150, as she refers to them as being “difficult”, when she recites the “intrinsic incommensurability” between commercial and domestic contributions.

31. It appears to me that Lord Nicholls and Baroness Hale have come to the same bourn, albeit by different routes, and that it is pre-matrimonial (or – not relevant here – extra-matrimonial) property (plus income or fruits) which are non-matrimonial, and source is indeed therefore significant. But this is not yet an answer to the case which I have to decide .... Mr Mostyn QC would have liked to draw comparisons or contrasts with the law of Scotland or New York, but, as Mr Moor QC forcefully pointed out, not only is there no evidence of foreign law in proper form before me, but to consider solely those jurisdictions would, in any event, be selective, and such broadbrush arguments are thus of little assistance. It is also important not to descend too far into what might be called Chancery technicalities in this area. Is the asset “untouched”? (a New York question). Is it transformed or metamorphosed? Has there been more than a “passive economic growth” (Singer J in S v S at para 111) or “natural capital growth” (Mr Mostyn QC at para 17 of Rossi). An example was raised by me in argument, as to what would arise if a party owned and brought into the marriage a Canaletto (plainly pre-matrimonial) and was then advised,

due to the vagaries of the art market, to sell that Canaletto and buy a Renoir instead. Is the Renoir now matrimonial property? Would it make any difference if the other spouse had come to the art auction at which the replacement old master was bought? There was exploration, and cross-examination of the Respondent, with regard to the retained properties, the commercial properties brought into the marriage by him, and still retained, as to whether there had been rent review negotiations or schedules of dilapidation and, if so, who had dealt with them. Mr Moor QC would have none of this. He pointed out that the only issue raised in Miller with regard to non-matrimonial property (at any rate of the Lord Nicholls variety) was as to its source, and that (para 9 of his closing submissions) "source is what makes an asset non-matrimonial. If any proposition of law can be deduced from Miller in this regard, it is limited to (a) erosion over time and (b) use of an asset as a matrimonial home".

We are told by senior counsel and others that subsequent case law will now elucidate and illuminate the Miller judgements. Many solicitors and DJs will not feel enlightened!

## D SUMMARY IMPACT ASSESSMENT

- Conduct is back to where we believed it was, being exceptional, inequitable to disregard and rarely used. We can still feel confident in discouraging the majority of clients from seeking to raise it.
- Contribution, especially where it is intended as a departure from equality, also needs to be very exceptional, perhaps so that it would be inequitable to disregard and probably directed to the welfare of the family.
- Legitimate expectation cannot be used as a justification for an award although may have continuing relevance on standard of living
- Financial provision is still intended to produce a fair result. This fairness may mean giving an equal start to independent living where possible.
- Fairness will comprise three strands, based on needs, compensation and sharing. In many cases, needs alone will still be the only criteria. It is unclear when (save McFarlane scenario), how and to what quantum compensation will apply. Sharing builds on post White law and extends it. These three strands apply just as much to periodical payments as to capital provision. It will be good practice for a judgment or perhaps an order to separate out the elements.
- Clean breaks, including term orders, should not be imposed where they would produce unfairness including inhibiting compensation.
- Where there is surplus income after providing for needs, this will often be met by compensation and/or sharing.
- The previous short marriage law of putting the parties in the position as if they had not married is now bad law. There is, in many ways, no difference between short and long marriages as far as equality is concerned with regard to matrimonial property. Departing from equality may be easier and more appropriate the shorter the marriage and depend on the nature of the property, distinguishing matrimonial property and non matrimonial property.
- More care will be needed in asking clients about their level of assets at the start of the relationship and at the date of separation and about inheritances and gifts. Schedules of the separate assets may be helpful to a case OR may cause friction and irritate the judge and the other side!
- Valuations will increasingly seek the value of the date of separation. It will be necessary for

parties to try to estimate values at the date of start of the relationship if no external evidence.

- It will be easier now to argue about taking out of account increases in values of assets between separation and settlement if they derive from new directions, new initiatives and new streams of enterprise. This should encourage an earlier conclusion of cases.
- In cases of business and investment assets, especially where there has been no element of sharing and/or joint involvement, and if above needs and compensation, there may be a case for treating separately but likely to result in litigation as the judgements are not clear, unanimous or helpful, and may not be accepted by some spouses as fair, and are fraught with difficulties
- For dual career families maintaining various levels of financial independence, particular reference should be made to the appropriate paragraphs of the judgements of Baroness Hale and Lord Mance about which there are likely to be arguments and some client dissatisfaction.

## E THE FUTURE?

The Miller judgments were not the practical blueprint for the law on resolving financial provision cases which the profession had been hoping for, especially following a couple of years of very confusing and contradictory decisions by the High Court and Court of Appeal including Miller and McFarlane themselves.

By separate judgments which are either contradictory or, at best, not fully complementary, there has been more encouragement to litigation, argument, dispute and, as a consequence, greater difficulty in settling. Whilst some issues of law have been helpfully resolved, more questions have now been asked on what has been said in the judgements.

Where do we go from here?

Simon Bruce in the summer edition of the SFLA/resolution magazine refers to parliamentary reform. However after the nightmare experience for politicians of the Family Law Act 1996, will they venture again into this minefield area of social policy? It must be doubtful.

James Turner QC and Rebecca Bailey Harris, contributing to the LNTV video on the case, refer to awaiting more detailed guidance and clarification from the High Court and Court of Appeal over the next five years or so. This may be fine for barristers, and also for law lecturers and commentators, but it does not help solicitors and clients settle cases. Moreover these are the courts which got it so badly wrong in Miller and McFarlane. In other cases they have positively set their face against giving judgments to provide guidance for the wider profession as distinct from judgement for the case in front of itself.

The European Union produced in July a green paper on matrimonial regimes. Without overtly seeking to change substantive law, it may result in the English courts having to apply community of property principles in cases where the parties have a closer connection with another country yet the proceedings are here. Might this first hand experience produce a more orthodox and less discretionary financial provision regime?

Is there a place for a formula or tariff, perhaps on maintenance and perhaps on capital, available on the web, sophisticated to deal with the multitude of situations yet not binding? The benefit would be to bring the parties substantially closer to the final outcome and needing more specialist legal advice on appropriateness of any changes to the formula. See article by David Hodson proposing a formula for spousal maintenance, on family law week website, <http://www.familylawweek.co.uk/library.asp?i=2253> and in January 2007 Family Law "Financial Provision: A Formula will do nicely sir" which incorporates a

capital formula based on Miller and comments by Coleridge J in Charman, above

Should the professions, such as the SFLA/resolution, be making firmer proposals or are we too in thrall to the judiciary?

Will there be many more seeking pre-marriage agreements and might a change of the law here be an easier first step for Parliament?

What will be the continued impact of parties turning their back on the litigious route and seeking mediation including directive mediation and other forms of non court based resolution?

Or is it the case, as described by James Turner QC and Rebecca Bailey Harris in the LNTV video referred to above, that for the next few years it will be very difficult to advise clients on quantum, with a real fear of plucking figures out of the air, with practitioners having to feel their way carefully over the next few years in settling cases.

And will it be the case, as stated by James Turner QC, that practitioners are going to have to warn clients for the next few years that is still bit of a lottery?!

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