CASE COMMENTARY

MILLER v MILLER; McFARLANE v McFARLANE [2004] UKHL 24

Fairness Remains an Elusive Concept – Financial Provision on Divorce

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The House of Lords in *Miller and McFarlane* sought to articulate principles which would enable the courts to exercise their discretionary powers under Part II of the Matrimonial Causes Act (MCA) 1973 in a consistent manner and provide a fair outcome for divorcing couples.

The decision was greeted as a tour de force by some media sources, and as a gold diggers' charter by others, for wives who abandoned, or were abandoned in, short-lived marriages. It has been variously described as just; groundbreaking; historic; principled; a landmark decision; a triumph for women; a disaster for wealthy men; and as a trigger for reform of the law relating to pre-nuptial agreements. A close analysis of the decision, however, suggests that some of these comments may be reflections of wishful hopes rather than reasoned responses to the actual reality of the judgment. Although it must be acknowledged that the House, on the basis of its construction of fairness, did take a significantly new approach to short marriages and to the purpose of periodical payments. The law relating to ancillary relief on divorce remains remarkably unchanged and problematic.

THE FACTS

(a) Miller

Mr and Mrs Miller were aged 39 and 33 respectively. Prior to divorce, they had enjoyed (sic) a short and childless marriage, for a little less than 3 years. During that time Mr Miller had taken a lover; left to live with her, and eventually married her. Immediately prior to the Miller's marriage, Mrs Miller resigned from her job in Cambridge and moved to London where Mr Miller was working. She took up new employment as an associate partner of a public relations firm where she earned £85,000 per annum. Mr Miller was a

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very successful fund manager and earned £181,000 per annum, plus bonuses of £1 million. He had capital assets of £17.5 million. In addition, he owned shares, the value of which were difficult to estimate, and in any event, were unsaleable at the time of the divorce. However, they were likely to produce significant capital sums in the future. Mrs Miller had £100,000 of capital assets, half of which was tied up in a pension fund. On divorce, she made an application for ancillary relief in the form of a capital sum of £7.2 million, which would permit a financial clean break between her and her husband. Mr Miller believed that he was generous in offering her £1.3 million, which she rejected.

(b) McFarlane

Mr and Mrs McFarlane were both aged 46 and, by contrast with the Millers, had been married for 16 years. They had 3 children aged 16, 15 and 9 years. Mrs McFarlane had been a successful solicitor with Freshfields, but had reached an agreement with her husband that she would give up her career to be a wife and mother and enable him to pursue a successful career as a partner with the accountants Touche Ross. After their separation, the couple agreed to divide equally their capital assets of about £3 million, some of which were owned jointly and some of which were in Mr McFarlane's sole name. By agreement, Mrs McFarlane was to retain the family home for herself and the children, and Mr McFarlane would keep the holiday home in Devon, a flat in London, and his partnership current account. The couple also agreed that, because there was insufficient capital to allow for a financial clean break between them, Mrs McFarlane would be entitled to periodical payments for the couple's joint lives, or until a further order was made, for herself and the children. However, they differed over the level of these payments. Mrs McFarlane wanted £345,000 per annum which included £70,000 for the children, and £275,000 for herself. In addition, she also wanted school fees for the children. Mr McFarlane proposed payments of £60,000 plus school fees for the children, and £100,000 plus insurance payments for his wife, for their joint lives, or until a further order was made.

(c) The High Court decision in Miller

Singer J accepted that the circumstances in *Miller*[1] patently demanded a "clean break" in accordance with the MCA 1973 s 25A. The section, it will be recalled, directs the court to consider whether it is possible to end all obligations between the spouses, either at the time of the hearing, or at a

[1] [2005] EWHC 528.

specified date in the future, and allow them to live independently. After considering, albeit in a rather generalised manner, all the factors laid down in the MCA 1973 ss 25 (1) and (2), Singer J awarded Mrs Miller £5 million which was made up, almost equally, of the family home and capital. She also received furniture and other goods worth £150,000. This was certainly a significant settlement after such a short marriage.

Singer J held that neither of the parties' conduct, under s 25 (2)(g) was such that it would be inequitable to ignore it. However, he commented that Mrs Miller, unlike her husband, was totally blameless and had neither sought to end the marriage nor had she given him any remotely sufficient reason for doing so. Singer J believed that fairness demanded that this fact in addition to her commitment should be balanced favourably against the brevity of the marriage. He maintained that Mr Miller had given his wife:

> " … a reasonable expectation that her life as once again a single woman need not revert to what it was before her marriage, and that she should be able to live at a significantly better standard in terms of accommodation and spendable income, even if at one which does not approach the level that [he] can afford for himself and his new family."[2]

Nowhere in the decision is it made clear where "reasonable expectation" fits within the MCA 1973 s 25. Whilst it is true that s 25 (1) requires the court to take into account all the circumstances of the case, the acceptance of reasonable expectation of an enhanced lifestyle as a relevant factor in the context of a short marriage to a wealthy husband appears to be an extraordinarily generous approach.

(d) The Court of Appeal decision in Miller

Mr Miller considered that £5 million was too generous a settlement for a short marriage, and appealed to the Court of Appeal.[3] His appeal was dismissed; the Court (Thorpe, Latham and Wall LJJ) found Singer J's judgment to be somewhat oblique but nevertheless held that the amount of the settlement awarded, albeit at the high end of reasonable, was not excessive.

Of more particular interest in the decision is Thorpe LJ's apparent confirmation of the reintroduction of conduct as a relevant factor via the surreptitious back door route of contribution. He explained that:

[2] Para 41.
[3] [2006] 1 FLR 151.

> "… the language of s 25(2)(g) is intended to discourage allegations of conduct unless it is such that it would be inequitable to disregard. In other words it is pointless, and in terms of costs, risky, to assert misconduct that does not measure high on the scale of gravity. But conduct that would not merit advancing under s 25(2)(g) is not therefore irrelevant or inadmissible. Often the court's assessment of the worth of the comparable contributions will require consideration of motives, attitudes, commitments and responsibilities." [4]

The Court of Appeal also declined to accept Mr Miller's contention that financial settlements after short marriages should merely take into account the claimant's needs. It explained that:

> "Section 25 requires a more sophisticated evaluation of the extent of the wife's commitment to and investment in the marriage emotionally and psychologically. In some cases it may be necessary for the court to assess emotional and psychological damage and the extent to which the applicant's future capacity and opportunity to enter into a fulfilling family life has been blighted. What a party has given to a marriage and what a party has lost on its failure cannot be measured by simply counting the days of its duration."[5]

(e) The District Judge's decision in McFarlane

Mrs McFarlane was awarded periodical payments of £250,000 a year for the couple's joint lives.[6] The award took into account both her needs and her right to compensation for her contribution to the marriage and her future obligations to the children. By some strange coincidence (sic), this sum was equivalent to one-third of Mr McFarlane's net income (see the now discredited rule in *Wachtel v Wachtel* [1973].[7] The district judge accepted that Mrs McFarlane could not be expected to work; the age of the children and her long absence from her profession as a solicitor limited her capacity to return to work in her chosen career. The couple's contributions to the marriage were viewed as equal, albeit different. Their joint decision to separate their roles

[4] Para 29.
[5] Para 33.
[6] [2003] EWHC 2410.
[7] Fam 72.

into income provider and child-carer would continue to have an effect for the foreseeable future.

(f) The High Court decision in McFarlane

Mr McFarlane appealed,[8] and Bennett J decided that the award of periodical payments should only be sufficient to meet Mrs McFarlane's needs. It should not provide her with the potential for capital accumulation to compensate her for her past contribution to the marriage and future contribution by way of childcare. Bennett J held that she had already been provided with a lump sum payment on divorce and he reduced her award to an order for periodical payments of £180,000.

(g) The Court of Appeal decision in McFarlane

Mrs McFarlane appealed[9] and sought reinstatement of the district judge's order. The Court of Appeal held that periodical payments could be both compensatory and needs related. The use of the yardstick of equality in *White v White*[10] could be used to check the fairness of the award of periodical payments in the same way as for capital awards. The Court restored the district judge's order for periodical payments of £250,000 per annum but limited its duration to five years. It held that the order could be reconsidered at that point in the light of Mr and Mrs McFarlane's financial circumstances. The Court reasoned that to award periodical payments for the joint lives of the couple would be to ignore the clean break principle in the MCA 1973, s 25A.

THE HOUSE OF LORDS DECISION IN *MILLER AND McFARLANE*

(a) The concept of fairness

Lord Nicholls and Baroness Hale, who gave the leading judgments in the House of Lords,[11] both acknowledged the limitations of the MCA 1973 in providing guidance to the courts in determining applications for ancillary relief. They maintained that the Act had no overarching objective and did little, other than to direct them to give primary consideration to the welfare of the children of the family (s 25(1)), and to consider the feasibility of ending

[8] [2004] 1 FCR 709.
[9] [2005] Fam 171.
[10] [2001] 1 AC.
[11] [2004] UKHL 24.

the financial relationship between the couple by the imposition of a clean break (s 25A). The judgments are lengthy, and contain, at least in the judgment of Lord Nicholls, a substantial amount of judicial philosophising on the nature of fairness. According to Lord Nicholls, the concept of fairness is elusive, it is

> "… an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness in any particular case."[12]

Given this acceptance of the relativist nature of fairness, it is interesting to note that Lord Nicholls set that aside and simply imposed his own view of fairness in determining principles for the guidance of others. A close analysis of his remarkably unwieldy judgment reveals that he actually does little more than impose a hierarchical order on the factors of the MCA 1973, in guiding the courts in their exercise of discretion. He also took an exceptionally complex approach to the different categories of property owned by spouses in determining what property should be available for reallocation.

(b) The three strands of fairness – Needs

According to Lord Nicholls and Baroness Hale, the first strand of fairness relates to the couple's needs. Fairness in the majority of cases, begins and ends with needs because the available assets are insufficient to provide for anything more.

(c) The three strands of fairness – Compensation

They ruled that if there is any excess income or capital, once needs have been met, the courts can then consider the second strand of fairness, that of compensation. This redresses the balance when unfair economic disparity has resulted from the way the couple conducted their marriage (s 25 (2)), for example where a spouse has agreed to give up her career to care for children, and support her husband in the pursuit of his career, she will be at an economic disadvantage if the marriage breaks down. Even when a divorced

[12] Para 4.

spouse is able to earn her own income to satisfy her needs, there may still be an entitlement to compensation for the detriment resulting from the earlier agreement made with her husband, and from which he has benefited.

In considering the types of financial awards which might be awarded, Lord Nicholls accepted that there was nothing in the MCA 1973 which restricted the award of periodical payments for maintenance alone. Such payments could equally be used for compensation and to achieve parity between the divorcing couple where one spouse has high income and insufficient capital to make a final capital settlement. The clean break principle, albeit socially desirable, was not to be seen as sufficient reason for depriving the claimant of that parity.

(d) The three strands of fairness - Equal sharing

The third strand of fairness, according to the House of Lords, is equal sharing. This principle is a development of Lord Nicholl's judgment in *White v White*.[13] It is based on the judicial perception of marriage as a partnership of equals who have committed themselves to sharing their lives in an interdependent manner. If they divorce, each is entitled to an equal share of the partnership assets, unless there is a good reason to the contrary. In *White*, Lord Nicholls stated that domestic contribution and contribution to income and capital generation are to be viewed equally unless there is a seriously exceptional reason for doing otherwise. Gone are the days of the "stellar" contribution argument, usually made by husbands maintaining that their contribution to income generation was so special, and made by themselves alone, and could not be related in any way to their wives' contributions. Any award must be checked for fairness against the yardstick of equality which does not necessarily mean equal division of assets.

This approach to equality is fraught with similar difficulties to those identified above in judicial approaches to fairness; both concepts involve relativism and with it inconsistency and uncertainty. At practical level how is to be achieved? What is the starting point for the process? Lord Nicholls himself identified the problem. He considered whether in big money cases, the parties' financial needs and the requirements of compensation should be met first, and the remaining assets then shared, or whether financial needs and compensation should simply be subsumed into the equal division of all the assets. Not surprisingly in the light of his flexible approach throughout his judgment, he stated that there can be no invariable rule on this; it all depends upon the circumstances of the case. Generally, it might be convenient for the court to consider first the requirements of compensation and then to give

[13] [2001] 1 AC 596.

effect to the sharing entitlement, thus subsuming needs. But this approach would not always achieve a fair outcome; in some cases provision for the financial needs would have to be assessed first along with compensation and the sharing entitlement applied only to the remainder of the assets.

In the case of short marriages, Lord Nicholls, stated, somewhat obliquely, that equal sharing is also applicable because they are nonetheless partnerships. However, he attempted to minimise the effect of such a view and proceeded to state that the fact that a short marriage has been less enduring will affect the value of the relevant assets available for distribution. He elaborated this point by a complex explanation of what constitutes the relevant assets which are to be equally divided In his view, Lord Nicholls suggested that Lord Nicholls maintained that in fairness demands that there should be no distinction between what he termed "family" assets, and "business or investment" assets. However, he then proceeded to differentiate the assets based on their nature and source, and having regard to all the circumstances of the spousal relationship. Assets acquired during marriage, other than by inheritance or gift, are the financial product of the parties' common efforts and may be referred to as the marital acquest or matrimonial property. Other assets, which are not the product of a common effort, may require different treatment, with one exception, and that is the couple's matrimonial home. One of the spouses might have purchased the property prior to the marriage, in which circumstance Lord Nicholls considered that it should normally be treated as matrimonial property because it occupies a central place in the marriage.

The source of the asset, Lord Nicholls suggested, may be a good reason for departing from equality of division. In the case of a short marriage, for instance, Lord Nicholls' instinctive feeling (sic) was that fairness may well require that a claimant should not be entitled to a share of the other's non-matrimonial property. In the case of a longer marriage the position is not so straightforward. Some modest non-matrimonial property may, over time, lose its significance and become more like matrimonial property, whilst other more valuable non-matrimonial property may retain its individual identity. In any event, Lord Nicholls believed that fairness has "a broad horizon" and that the courts' approach must be flexible; that clear and precise boundaries should not be drawn between the source of assets.

APPLICATION OF THE PRINCIPLES IN *MILLER*

In applying these principles to the facts in *Miller*, the House of Lords dismissed Mr Miller's appeal. It refused to resurrect conduct, directly or indirectly, as a relevant factor except where it was of an extreme nature.

The House of Lords interpreted Singer J's view that Mrs Miller had been given a legitimate expectation that in future she would be living on a higher

economic plane, as merely a statement to the effect that the standard of living enjoyed by a couple before the breakdown of their marriage is one of the discretionary factors in the MCA 1973 s 25 which may be taken into account by the court in determining the amount of the financial settlement. It held that if Singer J meant to go further than that, then he had gone too far. The House explained that:

> "No doubt both parties had high hopes for their future when they married. But hopes and expectations, as such, are not an appropriate basis on which to assess financial needs. Claims for expectation losses do not fit altogether comfortably with the notion that each party is free to end the marriage."[14]

The House of Lords accepted that Mr Miller had brought substantial wealth into the marriage at its outset which it regarded as non-matrimonial property. He had added, hugely, to that wealth during the marriage and provided houses and a very wealthy lifestyle for himself and his wife. The award of £5 million to Mrs Miller was therefore viewed as appropriate in what was termed "this highly unusual case."

APPLICATION OF THE PRINCIPLES IN *McFARLANE*

Mrs McFarlane appealed to the House of Lords on the basis that the award of periodical payments made to her was for a fixed term of 5 years. Her appeal was allowed. The House recognised the unusual combination of features in *McFarlane*; the couple's capital assets were insufficient to allow for an immediate clean break but Mr McFarlane had a substantial excess of income over his own and his wife's reasonable needs. His high level of earnings was the result of their joint decision for Mrs McFarlane to give up a successful and highly paid career to care for her husband and their children. Mr McFarlane would continue to reap the benefits of this decision long after their divorce because his wife would continue to care for their three children, and would remain economically disadvantaged. She would almost certainly have difficulties in returning to her career as a successful solicitor once the children had left home; her career gap would have been too long. In these circumstances, Mrs McFarlane was entitled to an order which would reflect both her needs and compensate her for both her past and ongoing contribution to the relationship.

The House of Lords found that the Court of Appeal's approach, unlike that of the district judge, had concentrated on the view that periodical

[14] Para 58.

payments were only permissible for the provision of needs. If capital accumulation was possible from periodical payments, the Court of Appeal viewed it as an indication that the award would need to be reviewed in the future to ensure that it only provide for her needs and was not compensatory.

The House of Lords did accept that Mr McFarlane might be able to apply successfully to a court at a later date for a deferred clean break which would allow him to sever his financial relationship with his wife if he could provide the appropriate capital to do so. However, that was a decision which Mr McFarlane would have to make in the future; it would be inappropriate and unjust to impose a time limit on the periodical payments which might not have provide sufficient compensation by the time that limit arrived.

COMMENTARY

What has been achieved in the search for fairness by the decision in *Miller and McFarlane*?

Both Lord Nicholls and Baroness Hale have imposed their own view of fairness which, as Lord Nicholls admitted, cannot be justified by logical reasoning. They have taken the check list of discretionary factors in the MCA 1973 s 25 (financial resources; financial needs, obligations and responsibilities; the standard of living during the marriage; the age of each party to the marriage and the duration of the marriage; physical or mental disability of either party; past or future contributions of either party to the welfare of the family; conduct of either party; the value of any benefit which either party would lose as a result of the ending of the relationship), extracted from the check list needs and compensation and placed these two considerations at the top of the hierarchy of relevant factors. To these they have added a new principle - equal sharing of assets - dependent on the nature and source of the assets, where this is deemed to be judicially appropriate. They have given an even greater discretion to the judiciary by minimising or even discarding the remaining factors of s 25.

It is time for a complete overhaul of the law relating to ancillary relief on divorce. Too much is expected of the MCA 1973. With or without judicial gloss, it is somewhat schizophrenic. The Act both harks back to a time when marriage was regarded, at least at its outset, as a long-term commitment, whilst at the same time it acknowledges the need for clean breaks and new starts. New starts are not financially viable if there are children and there is insufficient capital. As to fairness, the Act it never attempted to be fair; such an objective is judicially unachievable given the relative, and elusive, nature of fairness and because of the very nature of marriage and divorce. The law relating to marriage encourages spousal dependency; the law relating to divorce aims to make the ex-spouses responsible for their own future either

because there is insufficient resources for continued dependency or because there are sufficient resources to permit a "clean break".

The approach of the House to compensatory periodical payments, whilst it is to be welcomed demonstrates the difficulty for couples who fall between these two extremes. The MCA 1973 does not permit these payments to continue after the payee's re-marriage; they end automatically on such an event. The Act is premised on the view that a divorced spouse who remarries becomes dependent on her new partner even though she may continue to suffer detriment resulting from a joint decision to further the career of her ex-spouse at the expense of her own; it denigrates women to a role of dependency on men. Any reform of this area of law should consider the possibility of achieving a clean-break settlement, where there is insufficient capital for a lump sum compensatory payment, by using an actuarial evaluation of the payer's future earnings and dividing the sum into periodical payments which would survive the payee's re-marriage.

The decision in *Miller and McFarlane* is most open to criticism in its approach to short-term marriages and indeed has already been heavily criticised by lay commentators in this regard.[15] The three strands of fairness articulated will rarely be appropriate for short-term marriages. Mr Miller's wealth was not engendered, in any way, by Mrs Miller during the marriage; she had incurred no detriment which required compensation. There was no justification for sharing in this wealth after such a short period of time. Furthermore, her needs could be met from her evident ability to earn her living from the career she had immediately prior to the marriage. The decision, albeit a happy conclusion for Mrs Miller, will make the clamour for pre-nuptial agreements by wealthy spouses even louder.

[15] The judgment was delivered on 24 May 2006, and no published academic comment was available at the time this case commentary went to press.