Articles

MONEY, MARRIAGE AND COHABITATION

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In May 2006, the Law Commission published its consultation paper, *Cohabitation: The Financial Consequences of Relationship Breakdown*. This represents the halfway stage of this important project, which reviews the existing law that applies when opposite- or same-sex cohabiting couples separate and considers whether certain cohabitants should be entitled to claim financial relief. The paper argues the case for more effective remedies to be made available on separation where a couple has children, criticising the shortcomings of the general law of trusts and Sch 1 to the Children Act 1989. It sets out a scheme for financial relief, with 'family law' remedies such as property transfer, periodical payments, lump sum and pension sharing being available to the courts in the exercise of their discretion. It invites the views of consultees as to whether certain cohabitants who do not have children should also be eligible to apply for financial relief and, if so, in what circumstances.

The proposed scheme of financial relief, while superficially similar to the current ancillary relief scheme, is entirely self-standing, based on distinct principles of its own. In formulating its proposals, the Commission provisionally rejected the view that the redistributive jurisdiction of the Matrimonial Causes Act 1973 should be extended to cohabitants on separation. Respect for the parties' autonomy would be accorded by allowing cohabitants to 'opt out' of the scheme and to enter into enforceable 'cohabitation contracts' of their own devising.

Those who keep an eye on events north of the border may be aware that the Scots are ahead of the English and the Welsh, having recently implemented the Family Law (Scotland) Act 2006 which inter alia introduces a remedial scheme for cohabiting couples (applicable whether or not they have children, and however long they have lived together). The principles on which the new Scottish scheme are based are not dissimilar to those underlying the proposals of the Law Commission.

Seven days before the publication of the Commission's Consultation Paper, judgment was given in *Miller v Miller* and *McFarlane v McFarlane* [2006] UKHL 24, [2006] FLR (forthcoming). These decisions, the sequels to *White v White* [2000] 2 FLR 981, marking only the second consideration of the substantive law of ancillary relief on divorce by the House of Lords, provide important guidance regarding the basic principles underpinning the jurisdiction. This article takes the opportunity to reflect further upon the rationale for providing financial relief at the end of personal relationships and the justification for adopting different approaches to married and unmarried couples.

A PRINCIPLED APPROACH

It is important that orders for financial relief, whether between spouses or civil partners on the dissolution of their relationships, or between cohabitants on separation, should be made on a principled basis. In the words of Baroness Hale of Richmond (at para [122]), 'this is not only to secure that so far as possible like cases are treated alike but also to enable and encourage the parties to negotiate their own solutions as quickly and cheaply as possible'. A principled basis for adjudication promotes the twin objectives of consistency and of practicality.

WHAT PRINCIPLES?

More fundamentally, the key questions are what principles should be adopted by a given scheme, and whether and how the nature of the relationship with which that scheme is concerned should affect the selection of principles. The Matrimonial Causes Act 1973 has, at least since 1984, given very limited guidance on how the court should exercise its jurisdiction on divorce. There are, as Baroness Hale explains [128], three statutory 'pointers' towards the correct approach:

(1) first, consideration should be given to the welfare while minors of the children of the family;
(2) regard must be had to the foreseeable future as well as with the past and the present; and
(3) a clean break, severing the spouses' continuing financial ties where appropriate, is to be encouraged.

However, despite these pointers, the Act itself does not provide much by way of guidance. It was left to the House of Lords in *White* to identify the principle of fairness and 'the yardstick' of equality, emphasising that the court must not discriminate between husband and wife in their respective roles. In *Miller* and *McFarlane*, their Lordships sought to analyse how these principles are to be applied. The House of Lords has now identified three 'rationales' (per Baroness Hale), 'elements' or 'strands' (per Lord Nicholls) which should inform the judicial discretion: (1) need; (2) equal sharing of 'matrimonial property' or 'family assets'; and (3) compensation.

NEED

According to Baroness Hale (at para [138]), in seeking to ground the divorce jurisdiction in principle, 'the most common rationale is that the relationship has generated needs which it is right that the other party should meet'. Those needs may be viewed as a consequence of the parties' relationship and notably include needs generated by the presence of children or other dependent relatives. Needs may arise from having had to look after children or relatives in the past: where, for example, one parent has given up work and thereby 'seriously compromised their ability to attain self-sufficiency' in the future. Then there may be needs generated by the way in which the spouses have decided to run their lives together whether by way of choice or compromise. Lord Nicholls of Birkenhead (at para [11]) recognised marriage as essentially 'a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support'.

Where a couple has not made the explicit commitment entailed in the formalised relationships of marriage and civil partnership, it may not be safe to assume that the parties' relationship entailed assumptions of wide responsibility following separation for all needs arising during the relationship. As the House of Lords' discussion of need in *Miller and McFarlane* indicates, there is more than one category of need, and it may be argued that not all categories of need are properly the concern of an ex-cohabiting partner. In formulating a scheme for financial relief between cohabitants on separation, we have therefore rejected the idea that the court should simply be required to meet the needs of the parties.

In our consultation paper (CP) (at 6.62 et seq) we distinguish between needs derived from the relationship and needs unrelated to the relationship, whether they arise contemporaneously with it or not. In the latter case – for example, need arising from long term unemployment throughout, or the onset of illness or disability during, the parties' relationship – we do not consider that the mere fact of the parties' cohabitation in itself justifies the more economically powerful party being required to make provision for the other in relation to that need. The simple fact that one party may experience hardship or need when the support provided by the relationship ends is not, in our view, sufficient reason for relief to be granted.

The case is clearly very different where the relevant need is the product of the parties' relationship, and the contributions and associated sacrifices which each made to it (for example, needs deriving from one party's having given up paid employment in order to care for the parties' children). But in that context, it seems to us more

appropriate to frame the issue in terms of economic advantage and disadvantage. By this we mean economic disadvantage arising from contributions to the relationship or the retention by the other party of some economic advantage to which the party in need had contributed – rather than in the potentially broader terms of need. Moreover, a purely needs-based approach might deny relief to an applicant who happened to be self-sufficient post-separation but had nevertheless suffered economically in consequence of the relationship. While needs and compensatory principles may overlap in many cases (and double-counting has to be avoided, see Lord Nicholls, at para [15]), they are not co-terminous. Overall, it seems that the concept of 'economic disadvantage' and its twin, 'economic advantage', provide a more appropriate and accurate justification for relief following the separation of cohabitants than 'need'.

It is, of course, inevitable that, in the vast majority of cases, the extent of the assets and income available for division is such that, in practice, an award would be able only to meet the parties' basic needs (see Lord Nicholls, at para [12]). Moreover, we consider that, once it has quantified the extent of the claim being made in accordance with the economic advantage and disadvantage principles, the court should be entitled to have regard to the needs of both parties, and those of any relevant children, when it comes to deciding what particular order, if any, it should make in the exercise of its discretion. But the relevance of the parties' needs at this final stage of the exercise does not, in our view, detract from the importance of justifying and in broad terms quantifying the initial claim by reference to criteria more tightly defined than the needs of the applicant.

PARTNERSHIP: EQUAL SHARING

Marriage, in the words of Lord Nicholls, at para [16], is:

> 'a partnership of equals … This is now recognised widely, if not universally. The partners commit themselves to sharing their lives. They live and work together. When their partnership ends, each is entitled to an equal share of the assets of the partnership, unless there is good reason to the contrary.'

As Baroness Hale explains, at para [142], the needs of one spouse or the children, particularly given the greater earning power of the other spouse, may often justify an unequal share. Consistently with the partnership principle, sharing is confined to property related to that partnership and so, potentially, excludes at least pre-acquired property, a factor of particular significance in the *Miller* case.

Cohabiting partners should be regarded as equals in many important senses, but we do not consider that that equality should necessarily be accorded recognition on separation by means of a presumed entitlement to an equal share of a particular property pool. Simply cohabiting with another person, for however long, in the absence of the specific legal commitment made on marriage or registration of a civil partnership, does not seem to us to justify the degree of interference with the parties' existing property rights which is implicit in a regime of equal sharing.

While there is substantial public support for equal sharing between spouses (see Baroness Hale, at para [141]), surveys relating to cohabitants yield more mixed responses. In relation to couples without children, surveys find a preference for property division based more closely on the parties' actual contributions to the accumulated wealth. This finding corresponds with research into couples' money management practices, cohabitants without children being the more likely to adopt 'independent' money management systems, in preference to forms of pooling. There is considerably greater support for equal sharing between cohabiting parents, among whom pooling of resources is also much more common (details of the relevant research are to be found at CP, paras 5.69, 6.102, 6.106- 6.108). But the category 'cohabitants with children' is itself diverse, as it potentially includes not only relationships where the cohabitants are the child's parents, but also those where only one cohabitant is parent of the child or where neither is parent. An equal sharing norm may be considered appropriate for some but not all of these circumstances.

COMPENSATION

That brings us back to the compensatory principles which underpin many needs-based arguments and which we consider provide the firmest justification for financial relief between cohabitants. Lord Nicholls expounds upon the principle in the divorce context in these terms (at para [13]):

> 'This is aimed at redressing any significant prospective disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband's enhanced income.'

Baroness Hale (at para [140]) refers to 'compensation for relationship-generated disadvantage' suffered by one party while the other benefits from choices made during the marriage.

The twin principles that we are provisionally proposing in the case of cohabitants would deal effectively with these sorts of issues (CP, at 6.240). The economic disadvantage principle would address, for example, future loss of earning capacity or reduced pension savings arising where one party reduced his or her labour market participation in order to undertake childcare obligations during the relationship or following separation. The economic advantage principle would be concerned to share economic benefits (whether of capital, income or earning capacity) generated in part by the contributions of the applicant that would otherwise be retained by the respondent. There is a further related issue on which we invite views: whether the courts should have the power to make orders in relation to the costs of professional childcare that might be necessary to enable the applicant to maximise their earning capacity following separation (CP, at 6.243). This issue poses difficult questions regarding the respective functions of child support, tax credits and financial relief between the adult parties.

WHAT IF THEY HAD NOT MARRIED?

To state the obvious, *Miller* and *McFarlane* are highly exceptional, 'big money' cases. There are difficulties translating the principles applicable where the parties' wealth is so substantial to those much more usual circumstances where the family resources are limited in extent. It may nevertheless be instructive and a useful exposition of the principles we are proposing to ask how our scheme would be likely to operate in such cases, assuming that the parties in question had never married and also that they had not opted out of the remedial scheme.

The outcome in *Miller* would have been very different. Let us assume for these purposes that the couple would be eligible under the scheme – in the CP, we invite the views of consultees on whether couples without children should be included at all (CP, at 5.114). This was a short relationship. Mrs Miller gave up work, but only for a short period and without apparently causing any long or even medium-term damage to her earning capacity. Mr Miller continued to acquire immense wealth as a result of his pre-existing skills and business opportunities, and not as a result of any contributions made by his partner. Our scheme would not entail any equal sharing (or any lesser partnership-based entitlement to any particular asset pool), so there would be no 'automatic' award in relation to property acquired during the relationship. It would be necessary instead to prove that the principles of economic advantage or disadvantage were satisfied by reference to the parties' actual contributions to and sacrifices made for the relationship. On these facts, there could be no claim based on economic advantage and any economic disadvantage claim would be minimal, the applicant being required to limit the extent of her disadvantage by returning to employment as soon as possible following separation. While the applicant would undoubtedly experience a fall in her standard of living on separation, that is not something in itself for which our scheme would provide any relief. Finally, one important point of agreement between our CP (at 6.233) and the decision in *Miller* is the denial of any examination of the parties'

conduct (save where it relates to litigation or financial misconduct or where it would be inequitable to disregard it).

McFarlane would be more similar in outcome. The McFarlanes had already agreed to share the capital equally at the end of their long relationship, which had produced children. It would not be a requirement of our scheme that cohabitants prima facie share any part of their assets equally on separation. Instead, the claim would be framed in terms of economic advantage (the accretion to one partner's earning capacity, in so far as that could be attributed in part to the non-financial contributions of the other partner) and economic disadvantage (the substantial impairment of earning capacity incurred by the partner who gave up paid employment and an lucrative career in order to raise the family and look after the home). Where assets and future income are more modest than those at stake in *McFarlane*, the court's principal practical objective would be to meet the needs of the primary carer (insofar as they derived from the economic disadvantage caused by his or her contributions to the care of the children) and the needs of the dependent children (there are issues here about the interaction of any new scheme between the adults with existing remedies for the benefit of the children under Sch 1 to the Children Act 1989). The needs of the respondent for accommodation and other living expenses would also limit the extent to which the applicant's full claim for economic disadvantage could be met. The House of Lords has strongly endorsed the view that where periodical payments are being used as a vehicle for providing compensation, they ought not to be cut off prematurely by the clean break principle. There might be felt to be particular reasons for wishing to achieve a clean break where the couple had been cohabiting, although the arguments relating to compensation apply in the same way between cohabitants as they do between spouses on divorce. In our CP, we are inviting views (at 6.272) on how the clean break imperative should be applied between cohabitants.

SCOTLAND

The speech of Lord Hope of Craighead in *Miller* and *McFarlane* provides interesting insight into Scots divorce law. Unlike the English statute governing ancillary relief, the Family Law (Scotland) Act 1985 (in s 9) explicitly sets out the principles, five in number, upon which the courts are to exercise their jurisdiction to make orders for financial provision. There is a statutory presumption (s 10), rebuttable only by proof of special circumstances, that the net value of the matrimonial property is to be equally shared. In Lord Hope's words (at para [106]), this approach 'produced a result which favoured certainty in place of flexibility … It was intended to establish the law not just for a generation. Like the Forth Bridge, it was built to last for a very long time'.

While the Scots divorce law may give more certain results, however, it was criticised by Lord Hope on the ground that it is less generous in some respects to its pursuers than English law is to its applicants and that it tends to discriminate against women. In particular, its rigid adherence to a clean break, by imposing a 3-year limit on financial provision to help adjust to the loss of the spouse's financial support (see Lord Hope of Craighead, at para [114]), denies the Scottish sheriffs the flexibility afforded to district judges south of the border. As Lord Hope explains (at para [116]), Mrs McFarlane could not have been properly compensated in Scotland for her future economic disparity from her husband's income.

The new Scottish legislation providing financial relief on the separation of cohabitants conveniently distinguishes itself from the divorce regime by adopting for cohabitants just two of the five statutory principles. They are those with a compensatory focus: that fair account should be taken of any economic advantage derived by either person from the other's contributions (widely defined so as to include non-financial contributions) and of any economic disadvantage suffered by either person in the interests of their partner or the family; and that any economic burden of child-care should be fairly shared. These principles, similar to those we are proposing in our CP as founding an appropriate basis for financial relief between cohabitants, are not criticised by Lord Hope.

CONCLUSION

While 'need' and 'partnership' may appear simpler to apply, we currently doubt whether those principles, the rationales underpinning them and the results that they would create are appropriate for cohabitants. Moreover, we think the complexity of the less familiar principles of economic advantage and economic disadvantage can be over-stated. We consider that, in the majority of cases involving couples with children, where assets are limited, the task of the judge should be relatively straightforward. It would be to identify and quantify, in broad terms, what would be patent economic disadvantage arising from childcare obligations and to exercise judicial discretion so as to bring about a pragmatic division of assets in the light of that.
We hope that our consultation paper will generate discussion of these matters. They are questions that raise profound issues concerning the nature of marriage and cohabitation, and how their difference is best to be reflected in orders for financial provision on the termination of relationships by divorce, or (in the case of cohabitants) separation.

The consultation process will continue until the end of September 2006. Following analysis of responses, the Commission will decide whether it should confirm or revise its provisional proposals. A final report, containing recommendations for reform, is to be published in the summer of 2007.

The Cohabitation Consultation Paper (Law Com CP No 179) is available in full, or as an overview, on the Law Commission website free of charge at: http://www.lawcom.gov.uk/cohabitation.htm