AT A GLANCE 2021

It is always great to be back among the family lawyers. I still think you are the best sort of lawyers. But I feel out of my depth because it is so long since I was really one of you. And you may not like what I have to say. Recent family experience has brought home to me the truly shocking cost of sorting out the family finances on divorce if one – or both – of the parties chooses to be secretive, unreasonable, vindictive or all three. That was a typical modest middle-class case. But it also applies to people who think of themselves as relatively well off. Mostyn J recently protested at the nearly £900,000 spent in a case where the overall assets – let alone those actually in issue – were about £9.2 million.[1] This despite the procedural reforms which came into force 25 years ago, which were obviously a great improvement on what had gone before.

Why is that? Is it that family lawyers are greedy folk who encourage their clients to litigate? I don't think so. All the research shows that most family lawyers are wholly settlement orientated and that most cases do in fact settle reasonably satisfactorily. A rather more plausible reason, popular in some quarters, is the

[1] E v L [2021] EWFC 60 (Fam), para 15.

shape of our substantive law. So I'd like to take the long view of how that law has come to be how it is to see how much traction that idea has.

We have to go back at least as far as the Married Women's Property Act 1882. That Act is responsible for the fundamental principle of our family property law. This is separate property. Each party is free to own, earn, make and keep their own assets and resources. They can share if they want to, but they do not have to. They do not even have any right to know what the other's resources are (husband used to have to know what their wives' incomes were because of the tax system but that went long ago). Of course, for a long time this meant that many wives, especially middle-class wives, had very few resources of their own.

A husband had a duty to maintain his wife, but he could choose how to do so while they were together. I think that my father was unusually progressive in insisting that my mother – who had had to give up work as a teacher when they married in 1936 – had some money of her own to spend, over and above the housekeeping. No wonder they had such a happy marriage. If the couple separated, a wife was only entitled to maintenance if she had behaved herself during the marriage and continued to do so even after it ended. The court had no power to share out

property and inevitably had to concentrate on what was necessary for her maintenance.

In the 1950s and 1960s there was a growing feeling amongst some fair-minded legal grandees that this was wrong. Lord Denning did his best to find ways of giving some wives a share in the ownership of the home or at least the right to stay there if her husband left her. The view was developing that the wife's work inside the home made a genuine contribution to the family's wealth.[2] In Lord Simon's famous phrase, 'The cock bird can feather his nest precisely because he is not required to spend most of his time sitting on it'.[3] I don't think the metaphor works but it was very powerful at the time – it led to some limited reappraisal of the separate property regime. In 1973, the Law Commission recommended that the matrimonial home should automatically be jointly owned unless the couple contracted out.[4]

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2 We should not forget the important contribution made by Edith Summerskill and the Married Women's Association in promoting these ideas. See Sharon Thompson, 'Behind Casanova's Charter: Edith Summerskill, Divorce and the Deserted Wife', in Miles, Monk and Probert, *Fifty Years of the Divorce Reform Act 1969.*

3 Sir Jocelyn Simon, *With All my Worldly Goods*, Holdsworth Club Presidential Address, University of Birmingham, 1964, but quoted by Lord Denning as (slightly) inaccurately cited by Lord Hodson in *Pettitt v Pettitt* [1970] AC 777, 811, an example of the judicial habit of citing other judicial pronouncements rather than extra-judicial writings.

4 *First Report on Family Property, Co-ownership of the Matrimonial Home and Household Goods*, Law Com No 52, 1973. By the time the Commission got round to working out the conveyancing details in its *Third Report on Family Property*, Law Com No 86, 1978, enthusiasm had waned and the backlash was setting in.

But before that the Commission had tackled financial provision on divorce[5] (and the implementation of the Divorce Reform Act 1969 was held up until it had done so). This produced the revolution which came into force in 1971. Divorce courts had radical new powers to share out the present and future assets and resources of each party. Their various contributions to the welfare of family were to be taken into account. But there was also a guiding principle. The much-derided tailpiece to section 25 directed the court:

'so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.'

In the vast majority of cases, this was not practicable, so I called this the principle of equal misery. But the point was that if they had stayed together they would have continued to enjoy roughly the same standard of living and so in the future they

[5] *Report on Financial Provision in Matrimonial Proceedings*, Law Com No 25, 1969. Once again, the efforts of Edith Summerskill and other should not be forgotten.

should continue to do so. The principles were laid down in the long-forgotten but seminal decision of CA in *Wachtel v Wachtel*.[6] Lord Denning emphasised that the 1971 reforms had indeed been a revolution. The law was no longer premised on there being an innocent and a guilty party. Fifty-fifty fault meant fair shares for both. Hence conduct could be ignored unless the behaviour of one had been so 'obvious and gross' that it would be wrong to ignore it. All the 'family assets', both capital and income, could be redistributed. The wife's contribution to the welfare of the family should generally be recognised by granting her a share in the matrimonial home. But she would usually need periodical payments too. If so, the fairest way was to start with one-third of each. As I used to say, you can't have your cake (by sharing assets fifty fifty) and continue to eat it (by claiming a continued share in the future). The Law Commission and Lord Simon were the principal sources for Lord Denning's confident pronouncements.

Of course, there was soon a push back from the sharing principle. The profession was used to assessing maintenance needs and continued to do so. Husbands objected to having to share both assets and future income, especially if they thought that the wife had been at fault. They saw maintenance as the price they

6 [1973] Fam 72.

had to pay if they broke up the marriage, rather than as compensation for the dependence which had resulted from the marriage. The backlash which developed during the 1970s led the Law Commission to reconsider the case for financial provision, but very oddly the project did not include asset sharing.[7] The result was the repeal of the principle of equal misery, leaving the courts without any principle to guide them; the welfare of minor children was inserted as a first consideration; conduct was inserted as a relevant factor, but only if it would be inequitable to disregard it, which in effect meant the same as obvious and gross; there was a push towards self-sufficiency and time-limited periodical payments unless this would cause 'undue hardship'; and the courts were given power to achieve a permanent clean break.[8]

There was no longer any obligation to produce roughly equal standards of living for each party, not only now but in the future. I suppose that the courts could have gone either way. They could have adopted the approach then advocated elsewhere in the common law world and shared out the family assets equally without any continuing maintenance. Or they could have concentrated on continuing

7 Law Commission, *The Financial Consequences of Divorce*, Law Com No 112, 1982.

8 Matrimonial and Family Proceedings Act 1984.

maintenance. In practice they did the latter. In the run-of-the-mill, less prosperous, cases, they tried to preserve a home for the children and their carers, often successfully. In the more prosperous and so-called 'big money' cases, the concept of 'reasonable requirements' took over. How well I remember advocates like Mostyn QC talking of the 'discipline of the budget'. He may have meant the intellectual discipline of working out what each party needed to live on, but it sounded a lot more like disciplining the wife, which indeed it was. It was quite a costly discipline too.

Then along came *White v White.*[9] The idea that 'reasonable requirements' were a ceiling was knocked firmly on the head. The considerations listed in section 25(2) of the Matrimonial Causes Act 1973 should be given equal weight. The contributions made by breadwinners and home-makers should be regarded as equally valuable. Having gone through the statutory checklist, the result should be checked against the 'yardstick of equality'. Lord Nicholls, in his leading opinion, with which the other Law Lords agreed, did not rely on any Law Commission report or academic research. He simply pointed out where he thought that the courts below had been going wrong, without much in the way of justification for a different

9 [2001] 1 AC 596.

approach. But his sentiments clearly had their roots in the thinking of Lord Denning and Lord Simon.

Lord Hoffmann has been known to say that if you want to know how a judge thinks about the law, look at who taught him. Lord Nicholls was learning his law in the mid-1950s when Lord Denning's campaign for the deserving wife was at its height. Whether or not his teachers were in favour is not known, but Lord Denning was then and has remained an exciting figure for law students – someone who had a strong sense of justice and who did what he could to mould the law to match it. Lord Nicholls also belonged to a generation of clever men who had married clever women but whose wives had concentrated more on their homes and families than upon their professional careers. They regarded their wives as their equals even though their wives had not earned or made as much money.

White v White still left many unanswered questions – in particular about the underlying rationale for redistributing wealth in a system of separate property. So along came *Miller v Miller; McFarlane v McFarlane*.[10] Lord Nicholls and I agreed that there were three possible rationales: provision for need; compensation for

[10] [2006] UKHL 24, [2006] 2 AC 618.

marriage-related disadvantages; and fair sharing of the matrimonial assets. We did not dream these up by ourselves. I guess that they owed much to Rebecca Bailey-Harris, junior counsel for Mrs Miller, who had only recently become a full-time barrister after a highly regarded academic career in both Australia and Britain. Lord Nicholls and I also agreed that conduct should rarely be taken into account and that there should be no discrimination between financial and domestic contributions to the welfare of the family. If this has meant that the notion of the 'stellar' or 'special' contribution has been knocked on the head, then all well and good. Neither did either of us suggest that childlessness was relevant to the sharing principle (although childfulness can obviously be very relevant to the needs and contribution principles). I really like the principle summed up by Sir James Munby: 'a marriage is a marriage'.[11] It is not for the courts, or anyone else, to pass judgment on the quality of a couple's married life: the crucial thing is that they chose to get married and marriage brings with it responsibilities and rights which other relationships do not.

Lord Nicholls and I did disagree on two points. Lord Nicholls was very clear. First, there should be no distinction between so-called 'family assets' and 'business or

[11] *In the matter of X (A Child)* [2018] EWFC 15, para 7.

investment assets'. 'Matrimonial assets' were everything acquired during the marriage, otherwise than by gift or inheritance. And second, domestic and financial contributions should be valued equally whatever the duration of the marriage. (On that basis, Mrs Miller should have got a great dela more than she did, but there was no cross-appeal.)

Mea culpa. I was not so sure. What was one to do about business or investment assets generated solely or mainly by efforts of one party? You can make a lot of money in a very short time but does a domestic contribution take time to build? Might there be some scope for a reduction from equal sharing to reflect the period of time over which the domestic contribution had been or would be made? This was, as I said, 'simply to recognise that in a matrimonial property regime which still starts with the premise of separate property, there may be scope for one party to acquire and retain separate property which is not automatically to be shared equally between them'.[12] The source of the property and the way in which the couple had chosen to run their lives might be relevant. Another example I gave was of a genuinely dual career family where they had pooled their assets for family

[12] Para 153.

purposes but kept the surplus separate, thus clearly indicating a preference for a separate property regime to continue.

Lord Hope commented on 'The clarity and simplicity which is to be found in Lord Nicholls' speech' which he said was 'matched by the immensely valuable account which Lady Hale gives of the law's development and the way the principles upon which it is based should be applied in practice', without saying which of us he preferred.[13] My reading of Lord Mance's opinion is that he agreed with me on both the points of disagreement.[14] Lord Hoffmann simply agreed with me.

But of course we were not dictating how any of these cases should be decided. The great benefit of our system is supposed to be its flexibility. These three principles can be applied to suit the particular circumstances of each family. In the great majority of cases, need and compensation are going to be far more important than sharing. Above all, as the Family Justice Council put it, our system recognizes 'It is generally right and fair that relationship generated needs should be met by the other party if resources permit'.[15] I myself prefer to see this as compensation. We

13 Para 101.

14 Paras 169 and 170.

15 *Sorting out Finance on Divorce*, April 2016, p 13.

cannot ignore the fact that marriage is a relationship in which the spouses often play different roles – and often varying over time - for their mutual benefit and that of their children and other members of the family such as their elderly parents. This is their choice. It does not necessarily depend upon gender but in practice it usually does. An ONS survey published earlier this year[16] showed that, during the pandemic, women have spent much more time than men on unpaid household work, unpaid child-care and home-schooling and their mental well-being is suffering more than men's. Women often incur a 'motherhood penalty' in terms of lower earnings and pension entitlements. The impact of divorce is on average considerably worse for wives than for husbands, whose incomes on average increase following divorce.[17] Someone who gives up work, even for a few years, in order to concentrate on child-care or other family responsibilities will never make up what they have lost.[18] Yet the most prevalent family form is a man in full-time work and a woman in part-time work. In my view, those wives deserve to be

16 Office of National Statistics, *Coronavirus (Covid-19) and the different effects on men and women in the UK, March 2020 to February 2021*, www.ons.gov.uk.

17 H Fisher and H Low, 'Recovery from Divorce: comparing high and low income couples' (2016) 30 IJLPF 338.

18 Institute for Fiscal Studies, *Wage progression and the gender wage gap: the causal impact of hours of work*, February 2018.

compensated for the losses they have suffered and the contribution they have made to the family.

Despite all that, Emma Hutchins and Jo Miles have shown that there is no 'meal-ticket for life'. Clean break culture is prevalent, periodical payments for spouses are largely confined to cases involving dependent children, and variations between courts may be more a product of local wealth levels and housing costs than differences in interpretation of the law.[19] In their view 'Rather than being undignified, or reflective of or reinforcing a victim mentality, . . . orders that acknowledge the economic impact of how a couple have chosen – or have been required by circumstance – to raise their children protects the dignity of the primary carer, more fairly distributing between the parties the full economic impacts, positive and negative, of their marital partnership'.

Despite all this we still have push back, not only from the Mr Millers of this world, but also from high-earning wives, and of course from second spouses. Not everyone shares Lord Denning's and Lord Nicholls' ideal picture of marriage as a

[19] E Hitchings and J Miles, 'Meal tickets for life? The need for evidence-based evaluation of financial remedies law' [2018] Fam Law 993.

partnership of equals with differing contributions to make. Many people think that women both can and should look after themselves if their marriages end. Others still are horrified by what it all costs.

This is probably the major selling point for the Divorce (Financial Provision) Bill, introduced to the House of Lords in January last year by Baroness Shackleton. This would repeal section 25(2) (cl 1(1)). Instead, the principle would be that 'the net value of the matrimonial property is to be shared fairly between the parties to the marriage' (cl 4(1)). 'Fairly' means equally unless one or more of four possible reasons for departing from equality means that it would be fair to do so (cl 4(2)). These are (a) the terms of any agreement between the parties relating to the ownership or division of any of the matrimonial property; (b) any destruction, dissipation or alienation of the matrimonial property by either party; (c) the needs of any children of the family aged under 21; and (d) actual or prospective liability for any expenses of valuation or transfer of property in connection with the divorce (cl 4(5)).

The matrimonial property is defined much as Lord Nicholls would have defined it: property acquired during the marriage and otherwise than by gift, inheritance or

succession from a third party (cl 2(1)). But premises and household goods acquired before the marriage for use as or in their matrimonial home are included (cl 2(2)(a)). There are a few other complications.

Then there is a specific regime for periodical payments. This is now much more complicated than in earlier versions of the Bill. It draws on concepts derived from the Scottish regime for unmarried couples and the Law Commission's recommendations for a similar scheme in England and Wales. The court has to take into account three things: (1) their respective economic advantages derived from contributions by the other and economic disadvantages suffered in the interests of the other party or their family; this includes advantages, disadvantages and contributions incurred or made before as well as during the marriage; but the court has also to consider whether any imbalance is corrected by sharing the matrimonial property; (2) the fair sharing of any economic burden of caring after divorce for a child of the family under 16; and (3) that a party who has been dependent to a substantial degree on the financial support of the other party should be awarded periodical payments to enable him or her to adjust to the loss of that support over five years from the decree – longer than that only if there is no other means of making provision and he or she would be likely to suffer serious financial hardship

as a result. Various other factors also have to be taken into account, including any support available from a third party. (I hope that this means a new partner rather than the bank of mum and dad.)

Conduct is to be disregarded unless it has adversely affected relevant financial resources or it would be 'manifestly inequitable' to leave it out of account (cl 6) – not unlike the existing position. Pre- and post-nuptial agreements are presumptively binding (as I see it, it will be up to the party claiming to be disadvantaged by non-compliance with the required safeguards to prove this). If the agreement is binding, the court can only make a lump sum, property sharing or pensions order if the agreement does not deal with the matter (cl 3(4)). There is no equivalent provision for periodical payments.

Would this all have the desired effect of producing solutions generally accepted as fair, and of reducing disagreements and therefore costs? I am reminded of the great Joe Jackson QC, who advised the Bar not to resist changes in the law: any new piece of legislation meant ten years' work for the profession. It is not difficult to predict that many will not perceive the matrimonial property sharing regime to be fair; that huge amounts of money will be spent on valuations and on trying to fit

the circumstances into the reasons to depart; and that everyone will struggle with the periodical payments regime and give up trying to understand it.

I wish I had the answer. I think that our current system works well enough in the great majority of cases. I like the partnership and compensation principles. But it is very vulnerable to the evasive, the unreasonable and the vindictive people I mentioned at the outset. I am not sure that the current costs regime is capable of reflecting and deterring this. Perhaps some work should be done on this. But there is one thing which has always puzzled me. We have what is, in practice, a deferred community of property regime. And we have duties of candour and disclosure once we get to the divorce. But we don't have duties of candour and disclosure during the marriage. Far from it. Husbands and wives – it is usually wives - who pry into their spouses' affairs in an effort to find out what is going on are actively condemned. It would save us all a lot of trouble if husbands and wives had a legal right to know about their spouses' business affairs. A marriage is a marriage. That is the law reform which I would promote.