Certainty versus Fairness:

Should the Discretionary Powers Conferred on the Court by the Amended ss 23-25A of the Matrimonial Causes Act 1973 to Redistribute the Assets of Spouses be Confined?

Jonathan Russel Ee Wen Suen

Leicester Law Review
Spring 2018

Upon the breakdown of a marriage, the couple's assets are to be redistributed by the courts. This process is governed by part II of the Matrimonial Causes Act (MCA) 1973. However, the amended sections 23–25A of the MCA, in particular, are vaguely worded, allowing the courts a broad interpretation of the statutory provisions on ancillary relief, resulting in uncertainty in the judgements. This article argues that, specifically in this particular subject of family law, fairness should take precedence over certainty.

Upon the breakdown of a marriage, the task of financial and property redistribution falls under the purview of the courts. Part II of the Matrimonial Causes Act (MCA) 1973 sets out the provisions with regards to this area of family law. However, rather than proffering definitive rules, the amended sections 23 – 25A of the MCA, in particular, are vaguely worded.[1] In essence, the courts of England and Wales are allowed a broad interpretation of the statutory provisions on ancillary relief. As current law stands, it may be debated that Waite LJ's comment in *Thomas v Thomas* that the courts' discretionary powers are "almost limitless" has become less accurate.[2] The statutory provisions detailing the law on ancillary relief are now to be considered contemporaneously with guiding principles derived from recent cases heard by the apex court. With these developments in mind, this essay will explore the courts' jurisprudence in interpreting the statutory factors on redistribution, alongside the supplementary judicially-derived principles, before evaluating whether the current state of law is satisfactory or if it should be refined to set parameters as to the meanings of the provisions.

The courts' powers to redistribute the assets of the spouses come in the forms of income and property orders as set out under sections 23(1), 24(1) and 24A MCA 1973. These include periodical payment orders, secured periodical payment orders, lump sum orders, property transfer orders and the power to order a sale of property. Given the array of orders that the court is able to impose, its decision should be reached based on an appraisal of the eight ambiguously-worded factors of each case listed under section 25(2) MCA 1973, with the welfare of children accorded first importance as per section 25(1). The judiciary is guided by section 25A, which calls on them to achieve a clean break wherever possible, so as to 'encourage each [party] to put the past behind them and to begin a new life'.[3] However, as per the vague wordings of the statute, the courts are able to exercise discretion in assessing whether a situation would be 'just and reasonable' for the principle of clean break to be invoked. As there is no presumptive favour of making a clean break order, then-Baroness Hale commented that 'section 25A does not tell us what the outcome of the exercise required by section 25 should be…[but] how that outcome should be put into effect'.[4] With the advent of the recent cases of *White v White*,[5] *Miller v Miller; McFarlane v McFarlane*[6] and *Granatino v Radmacher (formerly Granatino)*,[7] the judicially-derived principles of needs, equal sharing, compensation, and autonomy provide further guidance when apportioning weight to the statutory factors, in seeking to achieve the overarching principle of fairness. Professor Elizabeth

[1] Matrimonial Causes Act 1973, Part II.
[2] [1995] 2 FLR 668.
[3] *Minton v Minton* [1979] AC 593, [608].
[4] *Miller v Miller; McFarlane* v *McFarlane* [2006] UKHL 24, [133].
[5] [2001] 1 AC 596.
[6] Miller; McFarlane (n 4).
[7] [2011] 1 AC 534.

Cooke (Law Commissioner for property, family, and trust law) reckons that the laws on making a financial order involve 'mid-range discretion' whereby 'the issues would be of fact and of definition rather than of principle'.[8]

The complex task of evaluating the statutory factors is augmented by their failure to be specific as to the effects which varying factors would have against the award. Lord Hoffman emphasised, in *Piglowska v Piglowski*,[9] the generality of the guidelines and that appellate courts should 'permit a degree of pluralism in these matters'.[10] To address the lack of direction, the House of Lords have established general principles from which the courts can seek guidance as to how the legislation should be interpreted. The overarching aim of reaching a fair outcome was put forward in *White*. Lord Nicholls recognised fairness as a subjective concept, adding that 'fairness, like beauty, lies in the eye of the beholder'.[11] Unable to quantify fairness, he introduced the idea of non-discrimination between the roles of the money-earner and the homemaker, and elaborated that a judge should 'check his tentative views against the yardstick of equality of division'.[12] This marked a sea-change in approach to the law, from one which aimed to meet the needs of the parties through a 'reasonable requirements' approach to one which appreciates that marriage is a partnership of equals. Acknowledging that the reform of approach had 'accentuated the need for some further judicial enunciation of general principle',[13] Lord Nicholls articulated three underlying rationales in his judgements of *Miller; McFarlane*, in relation to the pursuit of fairness: meeting needs, compensation and equal sharing.

As the majority of cases involve parties who possess limited assets, the process of redistribution usually ends on catering to needs. This has become recognised as the primary principle in ancillary relief since it involves the fundamentals which parties can expect in allowing them to begin an independent life. In the 'big money cases', the courts have adopted a generous meaning to 'needs', interpreting them as 'reasonable requirements' or more accurately what a party can expect through the standard of living during marriage. Relating back to section 25(2), this principle ties in with the factors of 'financial needs, obligations and responsibilities' as well as 'the standard of living enjoyed by the family before the breakdown of the marriage'.[14] Consensus reached through jurisprudence has allowed for the principle of meeting needs to be fairly straightforward. In *Cordle v Cordle*,[15] the hierarchy of needs was contemplated and it was established that the housing needs of the children and their primary carer should be the foremost consideration of the court; any surplus could then go towards the housing needs of the absent parent, and subsequently, miscellaneous living expenses.[16] Judges have adopted a literal approach when interpreting section 25(2)(c) as illustrated through the cases of *S v S* and *A v A (Financial Provision)*.[17] Both cases involved relatively wealthy couples. In the former case, the court allotted enough money for the wife to continue her passion for horses, which had developed during the marriage. Whereas in the latter case, a spouse had led a frugal lifestyle during the course of the marriage, resulting in the court rejecting the claim for a more substantial award. Despite the clarity, judges still have a wide discretion in deriving an award for needs, as seen in *AR v MR (Treatment of Inherited Wealth)*,[18] where the process did not involve empirical data, but a mere estimation of what would be a fair budget.

Should there be a surplus of assets after needs have been satisfied, the courts can then look towards compensating for the loss arising from the marriage. This principle is particularly significant where an economic disparity arises between the couple, usually where one party gives up a career to take on domestic responsibilities, relating to the factor of contributions under paragraph (f). It aims to redress this position imbalance by putting the economically-weaker party in a 'comparable position which she might have been in had she not compromised her own career for the sake of [the family]'.[19] This is done to ensure substantive equality instead of formal equality.

Having described computing the compensatory element as a speculative exercise that could produce arbitrary results, Mostyn J pronounced in *SA v PA* that it should only be successfully invoked where the court has been satisfied that if not for her marital responsibilities, the claimant would have continued her career practice over a significant period during the marriage.[20] He further expresses his dislike for the principle by reflecting the compensation award as under the needs assessment, albeit at the top end of the discretionary bracket, instead of as a separate strand of financial claim. This has been met with a conflicting approach by Coleridge J under *H v H*,[21] where he mentioned that there are cases where a 'tangible, obvious compensation element…deserves recognition' and to 'simply approach the case on the basis of the more simplistic "needs" argument does not do full justice to a wife who has sacrificed the added security of generating her own substantial earning capacity'.[22] Here, it is illustrated that further complications can arise even through the introduction of guiding principles.

The principle of equal sharing represents a shift in ideology from the previous maintenance-based approach to an entitlement-based model.[23] Through *Miller; McFarlane*, it was elucidated that equal sharing should be a starting point where there is a presumption of equal division, unless there are good reasons to depart

[8] E. Cooke, 'Miller/McFarlane: law in search of discrimination' (2007) 19, 1 Child and Family Law Quarterly 99.
[9] [1999] 2 FLR 763.
[10] ibid (n 9), [1373].
[11] ibid (n 5), [599].
[12] ibid (n 5), [605].
[13] ibid (n 4), [8].
[14] ibid (n 1), s 25(2)(b); Ibid (n 1), s 25(2)(c).
[15] [2002] 1 FCR 97.
[16] ibid (n 15), [33].
[17] [2008] 2 FLR 113; [1998] 2 FLR 180.
[18] [2011] EWHC 2717 (Fam).
[19] ibid (n 4), [154].
[20] [2014] EWHC 392 (Fam).
[21] [2014] EWHC 760.
[22] ibid (n 22), [49], [66].
[23] J. Eekelaar, 'Back to Basics and Forward into the Unknown' (2001) 31, 1 'Family Law Journal' 30.

from it. This principle opposes the House's previous take in *White* that equal sharing should act as an end-of-assessment yardstick. The case also served as a straightforward and pragmatic method of determining the parties' unascertained shares in the pool of marital assets.[24] Unfortunately, the intended degree of certainty that this principle was to generate failed to materialise. The courts still had to address the issue of which situations would necessitate a departure from an equal division of assets. Cases which involve children, and their needs, as well as those of the resident parent, will entail more than half of the available assets. Another instance would be where non-marital property, parental contribution, or inheritance forms part of the pool of assets.

However, courts are increasingly of the view that the greater the extent of intermingling of non-marital assets with marital property and the longer the marriage, less weight will be accorded to the fact that some of the property was non-marital. Exceptional cases where one party had made 'stellar contributions' to the marriage through his/her genius would also require equal division to not be followed for the sake of fairness. Also, cases where one party has committed 'obvious and gross' misconduct will obviate a need for such departure in favour of the victimised party. [25] Other appropriate situations include where there are difficulties in liquidating assets, where parties have organised their own finances prior to the marital breakdown, where the circumstances allow for a clean break to be achieved, or where equal division fails to ensure adequate compensation for relationship-generated disadvantages. Given the spectrum of circumstances which allow for a departure from equality, most reported cases do not result in an equal division of assets in practice. Whilst this principle lays a workable foundation from which the courts can begin their assessment, it ultimately fails to offer more guidance than the needs-based approach it replaced.

In spite of the layered decision-making procedure and the availability of common law principles to supplement the statutory provisions, the law is still 'undoubtedly odd and untidy'.[26] Notwithstanding the guidance which the common law principles have intended to provide, they merely serve to aid the judiciary 'through the discretionary morass of s 25 of the Matrimonial Causes Act 1973' as opposed to being a binding source of authority to be based upon.[27] In addition to the uncertainty arising from some of the judicial principles, two contrasting schools of thought have emerged as to their application. One view being that the principles offer a framework which the courts are expected to work within, thereby limiting their discretion in favour of more consistent results; the other approach being that the principles are guidelines which merely serve to inform the court when making a decision. A new set of precise principles would not only serve to exacerbate the present complexities of the law, but also act as an impetus for further questions to be answered. In *RP v RP*,[28] Coleridge J is critical of the further confusion the prevailing guidance has created, remarking, 'the less said the better'.[29] Also opposed towards further principles being devised, Mary Welstead (Visiting Professor in Family Law at the University of Buckingham) criticises that '[n]o sooner than new principles are articulated, they are followed by decisions which erode them or expand them depending on the viewpoint of the judiciary'.[30] Hitchings stated that '[a]t the everyday level at least, there does not appear to be a pressing need for additional principle to increase certainty'.[31] She elaborates that the majority of cases involving the average couple 'where needs dominate, the findings demonstrate that the advice given to clients is pretty consistent'.[32] Furthermore, following the recent emergence of the fourth principle of autonomy (this came about through the Supreme Court's decision to accord significant weight to pre-nuptial agreements in *Granatino*), it can be argued that the necessity for a set of precise principles has greatly reduced. Future case law, particularly to be heard in the Supreme Court, still allows for enunciation of principles through the judiciary.

Having explored the effects of prevailing principles on the law governing financial orders, it would be fair to conclude that introducing a set of precise principles would not be recommended. First, one advantage of a discretion-based system is its flexibility, which allows fairness to be achieved since the principles can be interpreted to cater for a solution that justifies the circumstances of each individual case. Universality, while a realistic aspiration in other fields, would not be a fit for this specific area of family law, keeping in mind the spectrum of considerations. Herring suggests that the question to be asked should be: '[t]o what extent are we willing to put up with injustices in a few cases to enable speedy and efficient responses for the majority?'.[33] Next, the development of case law over the years has resulted in the clarification of numerous principles which were previously left to the courts' discretion. While there are still some aspects in which conflicting views abound, future case law should settle them. Lastly, as evaluated in the above sections, establishing yet another set of principles could engender more disagreement as to how they should apply, consequently compelling the courts to have to re-interpret their meanings.[34] As such, the fundamental concept of a discretion-based system, albeit the current guidance, should be retained.

[24] *GW v RW* [2003] EWHC 611 (Fam), [85].
[25] *Wachtel v Wachtel* [1973] Fam 72, [80].
[26] B. Hale, 'Equality and autonomy in family law' (March 2011) 33, 1 Journal of Social Welfare and Family Law 11.
[27] M. Welstead, 'The sharing of pre-matrimonial property on divorce: K v L' (2012) 42, 2 Family Law Journal 169.
[28] [2008] 2 FCR 613.
[29] ibid (n 30), [78].
[30] ibid (n 29), 169.
[31] Emma Hitchings, 'Chaos or Consistency? Ancillary Relief in the 'Everyday' Case', in J. Miles and R. Probert (eds), *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (Hart, 2009) 204.
[32] ibid (n 33), 204.
[33] Jonathan Herring, *Family Law* (Seventh Edition, Pearson Education Limited, 2015) 225.
[34] J. Dewar, 'Reducing discretion in family law', (1997) 11 Australian Journal of Family Law 309.

Bibliography

Primary Sources

Table of cases
A v A (Financial Provision) [1998] 2 FLR 180
AR v MR (Treatment of Inherited Wealth) [2011] EWHC 2717 (Fam)
Cordle v Cordle [2002] 1 FCR 97
Granatino v Radmacher (formerly Granatino) [2011] 1 AC 534
GW v RW [2003] EWHC 611 (Fam)
H v H [2014] EWHC 760
Miller v Miller; McFarlane v McFarlane [2006] UKHL 24
Minton v Minton [1979] AC 593
Piglowska v Piglowski [1999] 2 FLR 763
RP v RP [2008] 2 FCR 613
S v S [2008] 2 FLR 113
SA v PA [2014] EWHC 392 (Fam)
Thomas v Thomas [1995] 2 FLR 668
Wachtel v Wachtel [1973] Fam 72
White v White [2001] 1 AC 596

Table of legislation
Matrimonial Causes Act 1973

Secondary Sources

Books
Herring J, Family Law (7th edn, Pearson Education Limited 2015)

Contributions to Edited Books
Emma Hitchings, 'Chaos or Consistency? Ancillary Relief in the 'Everyday' Case', in J. Miles and R. Probert, *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (Hart 2009)

Journal Articles
Cooke E, 'Miller/McFarlane: law in search of discrimination' (2007) 19, 1 Child and Family Law Quarterly
Dewar J, 'Reducing discretion in family law', (1997) 11 Australian Journal of Family Law
Eekelaar J, 'Back to Basics and Forward into the Unknown' (2001) 31, 1 Family Law Journal
Hale B, 'Equality and autonomy in family law' (March 2011) 33, 1 Journal of Social Welfare and Family Law
Welstead M, 'The sharing of pre-matrimonial property on divorce: K v L' (2012) 42, 2 Family Law Journal