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‘Miller-lite’: Is it fair *not* to share in short marriages?

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In *Sharp v Sharp* [2017] EWCA Civ 408 the Court of Appeal clarified the circumstances in which it is fair *not* to share. This is the first time an appellate court has directly determined whether the equal sharing principle can be relaxed in short, childless marriages, eleven years after the principle was originally articulated by the House of Lords in *Miller v Miller*; *McFarlane v McFarlane* [2016] UKHL 24.

It is apt that *Sharp* was labelled ‘Miller-lite’ (para. [105]) by McFarlane LJ because it has similar facts to *Miller* but involves a lower level of wealth. The relationship was short, lasting six years (including the period of pre-marital cohabitation); the parties had no children, and are in their early forties. Both parties earned £100,000 per year at the beginning of the relationship, but the wife ultimately earned significantly more than the husband during the marriage as a result of bonuses totalling £10.5 million. One year before the marriage ended in 2013, the husband took voluntary redundancy. An important distinguishing feature from *Miller* is that the parties were, according to the wife, ‘a genuine dual career family’ (para. [11]) that did not pool their finances, whereas in *Miller* the wife did not work.

At first instance Sir Peter Singer applied the sharing principle set out in *Miller* and held that the husband should receive 50% of the matrimonial assets, totalling £2.725 million. He included the wife’s bonuses in the pot of matrimonial assets for division. It is understandable why the judge reached this conclusion. In *Miller* the House of Lords reasoned that the wife was entitled to £5 million because this reflected a share in the wealth acquired during the marriage. As Lord Nicholls said, short marriages are no less a partnership of equals (para. [17]). Therefore in *Sharp*, the bonuses were susceptible to division as they were acquired during the marriage.

On appeal, the court set aside the first instance decision as to the division of capital and instead made a property adjustment order allocating the parties’ first home to the husband and

the second home to the wife, with an additional lump sum payment of £900,000 to the husband. Significantly, the Court of Appeal did not include the wife's liquid capital in the pot of matrimonial assets for equal sharing. And so her bonuses constituted non-matrimonial property.

McFarlane LJ's leading judgment depended on the interpretation of two important points: when the equal sharing principle can be departed from and where to draw the line between matrimonial and non-matrimonial assets in short, childless, dual career marriages.

First, when considering the circumstances in which the equal sharing principle can be relaxed, McFarlane LJ held it was appropriate to depart from equal sharing as the nature of the relationship was such that there was no financial dependence between the parties. In a short marriage, there is less time for assets to be pooled. When there are no children, one party is not undertaking a double shift of work inside and outside the home, and so neither party made any career sacrifices as a result of childcare. Furthermore, the parties kept their finances separate throughout the relationship, with each paying half of the utility bills on their two properties and even splitting restaurant bills. Factors such as the husband's lack of knowledge about his wife's bonuses and the wife's gift of three Aston Martin cars to the husband also reinforced the 'marked degree' (para. [7]) of separation of property in the marriage. In McFarlane LJ's view, these cars would not have been gifts if they had been bought with joint matrimonial funds. Taken together, the nature of the relationship and the financial conduct of the parties implied an intention to depart from the sharing principle. Unlike the judge at first instance, the appellate court was clear that there is no authority to suggest that the parties must have entered into a prenuptial agreement in order to opt out of equal sharing (para. [112]).

McFarlane LJ went on to consider *Miller*, where the Lords stated that departure from equal sharing is also justifiable if the property being divided is 'non-matrimonial'. However, in *Miller* there was some disagreement as to whether assets generated by one party during the marriage will fall into the pot for equal division. As a result, another important part of McFarlane LJ's judgment in *Sharp* was his conclusion that the wife's bonuses were non-matrimonial assets.

At first instance, the classification of the wife's bonuses as matrimonial depended largely on the time of their acquisition. If they had been acquired at an earlier date they may not be susceptible to division according to the equal sharing principle. The appellate court found a

few difficulties with this analysis. McFarlane LJ believed it ‘unfair, in a blind arbitrary sense’ (para. [88]) if assets acquired six months before the marriage were non-matrimonial and not shared, but the same assets acquired six months after the marriage were matrimonial and divided in 50/50 shares. Furthermore, McCombe LJ warned that an inflexible approach is incompatible with statute, as it limits judicial discretion as conferred by section 23 of the Matrimonial Causes Act 1973 (para. [126]). There is no system of community property in this jurisdiction. To apply the sharing principle to all assets surplus to needs, solely because they were acquired during the marriage would prevent the court from considering the full range of factors set out in section 25 of the 1973 Act. For example, section 25 explicitly requires the court to consider the duration of the marriage and the parties’ contributions. On this basis it would be a fiction to suggest that Mr Sharp contributed, even indirectly, to the acquisition of Mrs Sharp’s bonuses (para. [54]).

As the wife’s counsel referred to the ‘cocktail of factors’ in this case as being a ‘perfect storm’ (para. [59]), it could be argued that *Sharp* is too fact specific to have any important impact on the law of financial provision on divorce. Indeed, *Sharp* will only affect a small number of cases, because if one of the parties has made non-financial contributions to the marriage through work in the home, he or she will normally generate entitlement to assets such as bonuses, leading to a different outcome from *Sharp* (see *Charman v Charman* [2007] EWCA Civ 503). However, *Sharp* is significant because it has provided much needed clarification on how key issues from *Miller* are to be interpreted. This is particularly welcome given the Law Commission’s conclusion that the implications of non-matrimonial property must be explored further in the courts before any statutory reform of financial provision law is introduced (Law Com, 2014, para 1.40).

One of the post-*Miller* issues to be clarified somewhat by *Sharp* is if the source of the parties’ assets affects whether they are matrimonial or non-matrimonial, because Baroness Hale and Lord Nicholls did not agree on this point in *Miller*. In short marriages, Baroness Hale said there may be reason to exclude ‘unilateral’ assets from the matrimonial pot (*Miller*, para. [150]). Assets are unilateral if they have been generated solely by one party’s efforts, have not been generated by a business partnership and have not been acquired for the benefit of the family. From this perspective, the wife’s bonuses in *Sharp* truly are unilateral. However, in *Miller* Lord Nicholls preferred not to distinguish between family assets and non-family business assets. Whilst the majority in *Miller* preferred Baroness Hale’s approach, at first instance in *Sharp* Sir Peter Singer supported Lord Nicholls’ analysis. He reasoned that Lord

Nicholls' approach had been followed by the Court of Appeal in *Charman*, which displayed little enthusiasm for the concept of unilateral assets (para. [49]). Yet *Charman* did not involve a short, dual career marriage and *Sharp* did. In *Sharp*, the court found that although the concept of unilateral assets should be considered with care (para. [107]) it is appropriate in the present case. By deciding that Baroness Hale's assessment of unilateral assets is to be preferred over Lord Nicholls' view on the matter, the court in *Sharp* has settled an eleven year old debate as to the significance of non-business partnership, non-family assets in short marriages. This might not affect many cases in practice, but any clarification is welcome given repeated calls for reform of this area.

Sharp has not unsettled the principles established in *Miller*, as the equal sharing principle will still ordinarily apply in cases where resources exceed needs. But it has clarified that the 'inescapable conclusion' (para. [97]) of *Miller* is that there should be a *possibility* to alter the equal sharing principle in short, childless, dual career marriages. This case therefore underlines the importance of context in financial provision decisions, and will be reassuring to those sharing Cretney's (2003) concerns that big money cases resemble community of property systems in all but name.

References

Cretney, S (2003) 'Community of Property Imposed by Judicial Decision' *LQR*, 119, p. 349.

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