‘A marriage is a marriage’: equal sharing in short, childless marriages

Donna L. Crowe-Urbaniak

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E v L [2021] EWFC 60 (Fam) considered the case of highly successful production manager, L (the husband, 66 years) and E (the wife, 61 years). Almost immediately after their relationship started in 2015, L began paying financial support to E of between £5,000 – £10,000 per month. Following their engagement in 2016, they married in 2017, separating in 2019, when L decreased his monthly support to E to £2,500 per month. The decree nisi was granted in October 2020, and the wife made an application to the court. L had interests in six businesses and had reached the pinnacle of his career. E was seeking a lump sum of £5.5 million (her calculation of the marital acquest). L’s position was that he should pay £600,000, maintaining that because of the short, childless nature of the marriage, this was not a case for equal sharing of the marital acquest, but one that should be confined to very conservatively assessed needs.

This case considers the significance of childlessness and length of marriage when apportioning finances following divorce. In England and Wales, judicial discretion determines the distribution of economic resources between the parties, with the ultimate aim of achieving a fair outcome (*White v White* [2001] UKHL 54). Family law conceives of marriage as a relationship in which both parties make equal, or at least similar, contributions, with parties co-operating together as part of a joint enterprise (Fehlberg, 2005, Douglas, 2018). The concept of fairness, as measured by a ‘yardstick of equality’, considers three key principles: (i) *needs*; (ii) *compensation*; and (iii) *sharing* (*Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24). Whilst in the majority of cases, limited assets mean that the application of the needs principle is the most significant factor, in ‘big money’ divorces needs are only one of the principles considered (*Miller; McFarlane*); any settlement ‘must be fair both to the applicant in need and to the respondent who must pay’ (*North v North* [2007] EWCA Civ 760, para. 32). The fundamental objective of any financial remedy is that of achieving ‘fairness’ between the parties upon dissolution of marriage:

The parties 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 a good reason to the contrary. Fairness requires no less (*Miller; McFarlane*, para. 16).

Each spouse is thus entitled to an equal share of assets upon divorce for ‘it matters not which of them earned the money and built up the assets’ (*White*, para. 24), unless a

departure from the 'yardstick of equality' can be justified. *E v L* considers whether such a departure is justified in the case of a short, childless marriage.

L argued that the marriage, by virtue of being childless, resulted in a completely different category of commitment. *Sharp v Sharp* [2017] EWCA Civ 408, declared that in short, childless marriages, 'fairness may require reduction from full 50% share' (para. 97), implying that such marriages might constitute a specific category. *XW v XH* [2019] EWCA Civ 2262 seemingly concurred, stating that short, childless marriages might constitute such an exception. However, Mostyn J rejected L's argument, stating that 'for the court to start asking why there are no children, and whether this denotes a less extent of commitment to the relationship, is to make windows into people's souls, and should be avoided at all costs' (*E v L*, para. 29).

The consideration of the length of a marriage is a statutory one, as per s.25 (d) of the Matrimonial Causes Act 1973. In the majority of marriages, childcare (Chesley and Flood, 2017) and domestic responsibilities (Lyonette and Crompton, 2015) continue to be the purview of women, even when women undertake paid employment outside the home (Del Boca *et al.*, 2020). In such cases, extended periods of economic inactivity during a marriage may limit a woman's ability to become financially independent post-divorce (Barlow 2015, Heenan, 2020). Men whose ex-wives continue to be the primary caregiver, continue to reap the economic rewards of having a 'constant flow of unpaid work' unburdened by the 'day to day responsibility for the children' (*Miller; McFarlane*, para. 92). As a result, divorce has a significant detrimental impact on mothers' standard of living, whilst divorced men see little decline (De Vaus *et al*, 2017, Fisher and Low, 2018). In valuing domestic contributions as equal to financial contributions, the law seeks to remove discriminatory gendered presumptions. However, whilst the equal sharing principle may provide formal equality, a departure from the equal sharing principle may be appropriate in order to achieve substantive equality, e.g. where one party receives a greater share of the marital acquest to redress the economic imbalance between them resulting from the choices they made during marriage, ensuring that neither party is unfairly disadvantaged (Douglas, 2018). In *GW v RW* [2003] 2 FLR 108, Mostyn QC (then sitting as a Deputy High Court Judge) had declared that in order for domestic contributions to have equal validity to that of financial contributions, such contributions must be earned over time, implying that domestic contributions over a short time are of less value. Such a notion, however, was criticised by Lord Nicholls in *Miller; McFarlane*, and recanted by Mostyn J himself in *E v L* (para. 27), and no longer holds sway.

Some commentators have held the view whereby certain 'non-family' assets, generated over a short period of time either solely or mainly by the efforts of one party, might be excluded from the marital acquest (*Sharp v Sharp* [2017] EWCA Civ 408, para. 24). However, such exceptions were only likely to arise in cases where both parties are

‘financially active, and independently so’ (*Miller; McFarlane*, para. 170) and, as such, do not comprise the majority of cases (*Miller; McFarlane*, para. 152). Indeed, Lord Nicholls disagreed that wealth-accrual by one party of ‘non-family’ assets during a short marriage should give rise to an exception to the equal sharing principle, ‘This [equal sharing] principle is applicable as much to short marriages as to long marriages’ (*Miller; McFarlane*, para. 17), i.e. the length of the marriage does not itself constitute an exception to the equal sharing principle. Whilst there may be exceptional circumstances where such a departure may be justified, such cases ‘will be as rare as a white leopard’ (*E v L*, para. 45).

Few legal rules exist to regulate how a marriage should be lived; it is for the spouses to determine how they should conduct their lives as a married couple (Miles and Scherpe, 2021). If contemporary marriage is to be conceived of as a ‘joint enterprise’ and a ‘partnership of equals’ (Miles and Scherpe, 2021), a ‘short marriage is no less a partnership of equals than a long marriage’ (*Foster v Foster* [2003] EWCA Civ 565; [2003] 2 FLR 299, 305, para.19). As such, the legal principles of equal sharing apply in cases of short, childless marriages. As Mostyn J categorically states, ‘[w]hen the court is undertaking the application of the sharing principle it should start and almost invariably finish with the proposition that a marriage is a marriage’ (*E v L*, para. 28). In *E v L* it was held that the marital acquest which arose between January 2016 and June 2021 should be divided equally between H and W.

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Correction Statement

This article has been republished with minor changes. These changes do not impact the academic content of the article.

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