

IN SHORT MARRIAGES, WHAT ARE THE NEW ARGUMENTS THAT YOU CAN USE OVER SHARING AND RING FENCING OF ASSETS?

“SHORT” per OED

“Measuring a small distance from end to end”

“Lasting or taking a small amount of time”

”Seeming to last less time than is the case; passing quickly”

“NEW” per OED

“Produced, introduced, or discovered recently or now for the first time; not existing before”

“Already existing but seen, experienced, or acquired recently or now for the first time”

Judgment in **Sharp v Sharp [2017] 4 All ER 1046**¹ was given by the Court of Appeal in June 2017 and much has subsequently been written about the ramifications of the decision.

The Daily Telegraph heralded the “the case that could change everything for couples divorcing after a long marriage”; the Daily Mail, more prosaically, headlined “cheating husband has his divorce payout slashed”

This paper adds to the cacophony of analysis, both informed and less informed, and attempts to look at the consequences of the decision from a practical perspective, rather than engaging in an academic survey of matrimonial finance cases from **White v White [2001] 1 All ER 1** to date.

¹ First instance decision of Sir Peter Singer reported as **JS v RS [2015] EWHC 2921 (Fam)**

The decision in *Sharp* opens the door afresh to arguments that the “sharing principle” does not necessarily apply with full force, or at all, to the parties’ ‘unilateral assets’, these being (per Baroness Hale in *Miller*) non business partnership, non-family assets arising from one spouse’s endeavours during the marriage. One important check on this concept is the need to balance the other spouse’s endeavours, domestic or otherwise, in a way which is non-gender discriminatory.

The decision in *Sharp* grasps firmly the inconsistencies between Lord Nicholls’ judgment and the majority view as expressed by Lady Hale/Lord Mance in *Miller*, then tramples through paragraph 86 of *Charman*² and alerts us to the fact that we may sometimes have been getting it wrong, even if for the laudable aims of expediency, predictability of outcome and to promote settlement.

The reality is that the ‘sharing principle’³ has been used as a short hand and has been used with a degree of indolence. Intellectual rigour in consideration of ‘sharing’ has returned. Fairness sometimes dictates a departure from equality, even in relation to those assets built up during the marriage, if the marriage is short and the parties’ finances have remained separate.

² 86. The extension of the concept of unilateral assets, suggested by Baroness Hale in *Miller*, at [153], was expressly endorsed by Lord Mance, at [170]. Although obiter, it clearly commands great respect. It relates to the ‘dual career’. The suggestion was that, where both parties had worked throughout the marriage, had pooled some of the assets built up by their efforts but had chosen to keep other such assets under their separate control, the latter, although unequal in amount, were unilateral assets which might not be subject to the sharing principle. Because of the convincing logical objections of Lord Nicholls to the different treatment of unilateral assets, we would prefer, so far as it is proper for us to do so, to keep the room for application of the concept closely confined.

³ The judgment in *Sharp* is in contrast to that in **Work v Gray [2017] EWCA Civ 270** (a case concerned with the issue of ‘special contribution’) where at para 34:

“the sharing principle is now firmly embedded and, in those cases where the resources exceed needs, the “ordinary consequence” of its application will be the equal division of matrimonial property: Wilson LJ in *K v L* at paragraph 21”

Sharp: The Facts

- cohabitation to separation 6 years
- both parties early 40's
- no children
- Assets totalled £6.9 million (less the value of one property at £1.1million and a further £350,000 conceded by husband to be pre-accrued by wife) thus total 'pot' of matrimonial assets £5.45 million
- 2 properties, both FMH, both funded by W
- basic incomes at the outset of the marriage were the same, ca.£100,000 p.a.
- W receiving bonuses during relationship of £10.5million (H de minimis by comparison)
- They maintained separate finances, no joint bank accounts, no joint investments
- H would pay ½ costs household bills and restaurant bills
- W had paid for the houses, for holidays and gifted 3 cars to husband
- No pre-nuptial agreement
- They lived well, they “ did not flinch from what many would regard as extravagant and self indulgent spending without much regard to value for money or the advantages of caution”

First instance: Sir Peter Singer

The judge awarded husband £2.725 million, on the basis that the sharing principle applied to the matrimonial acquest comprising all the assets and savings built up during the marriage, irrespective of the very different proportions in which the parties contributed to them and irrespective of the length of the marriage and how the parties had arranged their financial affairs.

48....."Not to share" as Baroness Hale speculated might be appropriate in cases where there are unilateral assets seems to me, with every respect, a retrograde step which would incidentally open up fresh arenas of factual dispute for spouses to rummage through.

Appeal

- i. W submitted on appeal that the sharing principle should be set against the parties' separate ownership of property, and that the judge had erred in failing to reflect the short, dual career, childless features of the marriage, and to reflect the significant unilateral assets which W held.
- ii. H submitted on appeal that since Charman, the law on sharing had followed Lord Nicholls in Miller (paras 17-20) with regard to short marriages and therefore, no distinction ought to be drawn between family and unilateral assets – the sharing principle applied to all such assets, whatever the length of the marriage.

Judgment

It is important to remember that the decision in Sharp is intended to sit within firm constraints; it applies to a 'discrete cohort of cases'.

The key factors which were present were:

- short marriage
- dual income
- separation of financial arrangements
- accrual of unilateral assets
- no children

The arguments in support of a departure from the sharing principle when these factors are present are not properly new, but rather a re-alignment and clarification of the correct approach to be adopted in the event that the 'perfect storm' of factors is present.

How does the sharing 'principle' apply in this type of case, a case which might properly be described as lying on the littoral?

McFarlane LJ:

113. It is, therefore, my conclusion that the division of the assets determined by Sir Peter Singer in this case does not accord with the approach dictated by the majority of the House of Lords in *Miller*. Further, as a matter of law, the decision of the House in *Miller* established that departure from the principle of equal sharing may occur in order to achieve the overarching goal of fairness in a particular case. This case is, therefore, one of the 'very small number of cases' (Baroness Hale, para 152) where the factors that I have identified justify departure from the equal sharing principle.

McFarlane LJ also adopted Baroness Hale's analysis at para 153 of *Miller*

153. This is simply to recognise that in a matrimonial property regime which still starts with the premise of separate property, there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them. The nature and the source of the property and the way the couple have run their lives may be taken into account in deciding how it should be shared. There may be other examples. Take, for example, a genuine dual career family where each party has worked throughout the marriage and certain assets have been pooled for the benefit of the family but others have not. There may be no relationship-generated needs or other disadvantages for which compensation is warranted. We can assume that the family assets, in the sense discussed earlier, should be divided equally. But it might well be fair to leave undisturbed whatever additional surplus each has accumulated during his or her working life. However, one should be careful not to take this approach too far.

and Lord Mance's analysis at para 170 of *Miller*

But there can be marriages, long as well as short, where both partners are and remain financially active, and independently so. They may contribute to a house and joint expenses, but it does not necessarily follow that they are or regard themselves in other respects as engaged in a joint financial enterprise for all purposes. Intrusive enquiries into the other's financial affairs might, during the marriage, be viewed as inconsistent with a proper respect for the other's personal autonomy and development, and even more so

if the other were to claim a share of any profit made from them. In such a case the wife might still have the particular additional burden of combining the bearing of and caring for children with work outside the home. If one partner (and it might, with increasing likelihood I hope, be the wife) were more successful financially than the other, and questions of needs and compensation had been addressed, one might ask why a court should impose at the end of their marriage a sharing of all assets acquired during matrimony which the parties had never envisaged during matrimony.

McFarlane LJ concludes:

97. The inescapable conclusion from this analysis of the speeches in *Miller*, in terms of the possibility of some alteration from, rather than a strict application of, the equal sharing principle in relation to short, childless marriages, where both spouses have largely been in full-time employment and where only some of their finances have been pooled, is that fairness may require a reduction from a full 50% share or the exclusion of some property from the 50% calculation. Of the five members of the Judicial Committee, only Lord Nicholls suggested a contrary view and even on his analysis the potential for some form of relaxation can be seen. (*emphasis added*)

107. the distinction between the treatment of short marriages in paragraph 152 and the (obiter) discussion about dual career marriages in paragraph 153 in *Miller* was recognised by this court in *Charman* at paragraph 83 and that distinction is carried forward in paragraphs 85 and 86. At paragraph 85 the court addresses the issue of short marriages and accepts the majority view expressed by Baroness Hale at paragraph 152 of *Miller*, while at paragraph 86 they address the obiter example of dual career marriages. It was clearly unnecessary for them to do so, because *Charman* was not a dual career marriage. What is said at paragraph 86 is therefore obiter comment on Baroness Hale's obiter comment on dual career marriages. The court appears to have been concerned that recognition of unilateral assets as falling outside the sharing principle in a long (or more than short) marriage could well produce an unfair result. For that reason, they wanted the notion of different treatment of unilateral assets in such marriages to be "closely confined". Baroness Hale had herself recognised the need for care and limitation in the last three sentences of paragraph 153. That issue, which does not arise on the facts of the present case, remains a matter for debate on another day. On that analysis of the key passages in the judgment in *Charman*, there is no impediment, in terms of possible conflict, for this court now to contemplate a departure from the equal

sharing principle in the case of a dual career marriage which was short, and where the couple had kept their finances separate

Relevance of pre-nuptial agreement

The court described as ‘unsustainable and not supported by any authority’ Sir Peter Singer’s holding that the sharing principle must apply to all property unless the parties have entered into a pre-nuptial agreement.

What is a “short” marriage?

There is, helpfully, no statutory definition. Nor could there, or should there be, as social values with regard to parties exiting a marriage change and patterns of separation, divorce and re-marriage are not static. As was said in *White*, the law must not be ‘moribund’ and must move to reflect social values.

Yet, post *Sharp*, the consequences of falling one side or the other of the line of a “short” or “medium” length marriage will undoubtedly be richly litigated.

The *Sharp* marriage (6 years in all) was described by Sir Peter Singer as “not so desperately short.. as some, but still by no means lengthy”

In **Fields v Fields [2016] 1 FLR 1186** Holman J described a marriage of 8 ½ years preceded by one year of cohabitation as ‘not a short marriage’.

In **FF v KF [2017] EWHC 1093 (Fam)** Mostyn J did not ‘find the label ‘short’ to be helpful’ in the context of a relationship of 5 years 4 months stretched over 9 years.

One judge’s short, is another judge’s medium. Categorisation of a marriage as ‘short’ will form part of a judicial survey of the totality of the parties’ evidence, in that part of judicial decision making which is incapable of complete explanation and which is effectively judicial instinct.

As the length of the marriage becomes a more important factor, potentially supporting a departure from equality in the division of assets accrued during the marriage, so we may expect much more detailed argument over why the marriage broke down – effectively the use of conduct as a ‘defensive shield’ to the short duration point.

In **G v G [2004] (Financial Provision: Separation Agreement) 1 FLR 1011** Thorpe LJ at para 34

“A judge has to do fairness between the parties, having regard to all the circumstances. He must be free to include within that discretionary review the factors which compelled the wife to terminate the marriage as she did. The point was essentially taken as a defensive shield to the reliance upon the duration submission. There must surely be room for the exercise of a judicial discretion between the pole of a wife who is driven to petition by the husband's unfeeling misconduct and that of a wife who exits from a marriage capriciously and for her own advantage”.

This will encourage much more “rummaging in the attic” and, inevitably costs.

Unilateral assets

It was held that wife’s bonuses were not ‘family assets’ as categorised by Baroness Hale in **Miller**.

91. Having listed the arguments on the one hand in favour of full mixing of assets as 'matrimonial property' on marriage (para 150) and, on the other, those against (para 151), Baroness Hale concluded that the latter arguments (referring to wealth exclusively generated by one spouse, particularly in a very short time) could not be ignored in the very small number of cases where they might make a difference. In that limited cohort of cases, the assets that have been unilaterally generated by one party fall for consideration in the same manner as established by *White* with respect to premarital property, inheritance and gifts (para 152):

'The source of the assets may be taken into account but its importance will diminish over time. Put the other way round, the court is expressly required to take into account the duration of the marriage: section 25(2)(d). If the assets are not "family assets", or not generated by the joint efforts of the parties, then the duration of the marriage may justify a departure from the yardstick of equality of division. As we are talking here of a departure from that yardstick, I would prefer to put this in terms of a reduction to reflect the period of time over which the domestic contribution has or will continue ...rather than in terms of accrual over time This avoids the complexities of devising a formula for such accruals.'

As to how to approach the categorisation of assets:

93. Although based on principle, the approach described not only by Baroness Hale and Lord Mance, but also by Lord Nicholls, is not wholly black and white, with particular categories of asset either very plainly being in or out of account, or with particular factual circumstances either clearly triggering a plain exception to 50/50 sharing or not. Each of their Lordships' and Ladyship's speeches attempts to delineate an approach, within the broad principles, which is, to a degree, more subtle and flexible than that. If, as the speeches of the majority contemplate, some grounds for departure from the equal sharing principle may lie in the littoral zone along its outer edges, these will require careful, fact-specific, evaluation and cannot be fairly determined by the blind application of an arithmetic formula.

In relation to the application of the equal sharing principle where there are unilateral assets:

86. If, as the court was told by Mr Southgate, the equal sharing principle of 50/50 allocation is now applied by courts and practitioners, in cases which are not pre-determined by 'needs', to all relevant assets in every marriage, without exception, from the moment the couple leaves the church or the Register Office, this would seem to be a very significant and wholly unjustified development from the approach so carefully described by Lord Nicholls. An automatic or blind application of a 50/50 split in every case can only be an impermissible judicial gloss on the statute, which expressly requires the court to consider all the circumstances of the case.

Domestic contribution

McFarlane LJ

92. In the present case the wife's bonuses were not 'family assets' as categorised by Baroness Hale and, in contrast to *Foster*, they had not been generated by the joint efforts of the parties (*Foster* being a case which was held to be 'all about contribution'). It is hard to justify holding that this case is not one where 'there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them' (Baroness Hale para 153). By Baroness Hale's analysis at paragraph 152 the court is obliged to take account of the duration of the marriage with a view to considering reducing the husband's share to reflect the period of his domestic contribution. Further, in a case where, in contrast to the more traditional 'bread-winner' / 'home-maker' model, each partner worked full time for most of the marriage, and where there are no children, it must be necessary for the court also to evaluate the extent, if any, by which the husband's domestic contribution exceeded that of the wife.

What relevance is cohabitation?

Mostyn J in **GW v RW [2003] EWHC 611 (Fam)**

"I cannot imagine anyone nowadays seriously stigmatising pre-marital cohabitation as "living in sin" or lacking the quality of emotional commitment assumed in marriage. "Thus in my judgment where a relationship moves seamlessly from cohabitation to marriage without any major alteration in the way the couple live, it is unreal and artificial to treat the periods differently. On the other hand, if it is found that the premarital cohabitation was on the basis of a trial period to see if there is any basis for later marriage then I would be of the view that it would not be right to include it as part of the "duration of the marriage".

A note of caution

The Court of Appeal issued this caveat to its decision:

75. “Nothing that is said in this judgment is intended in any manner to unsettle the clear understanding that has been reached post-*White* on the approach that is to be taken to the vast majority of cases. The focus of the present appeal, which is very narrow, is upon whether there is a fringe of cases that may lie outside the equal sharing principle”.

The different treatment of unilateral assets in the context of longer marriages is expressly said to be ‘a matter of debate for another day’.

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