

**Short Marriages – Short, Sharp, and occasionally Shocking**

- 1) Prior to Sharp v Sharp [2017] EWCA Civ 408 judicial guidance in relation to short marriages was most recently to be found in Miller v Miller. The marriage had lasted for 2  $\frac{3}{4}$  years (from July 2000 to April 2003) between parties who were 39 (H) and 33 (W) at the date of separation. The parties had been in a relationship – but had not cohabited – for four years prior to marriage. There were no children. At the time of the marriage, H was already a successful fund manager earning in the region of £1m a year; W was an associate partner at a financial public relations firm earning £85,000 a year.
- 2) At first instance (before Singer J) H submitted that the wife was only entitled to be returned to her former position as a professional woman living in a flat with an income of about £50,000 a year net. It was said that this could be achieved by allowing her £500,000 to purchase a flat and a £120,000 to cover three years of revenue shortfall whilst she worked her way back to her former level. His offer of £1.3m was therefore said to be generous. W submitted that as a consequence of White v White [2000] 2 FLR 981, HL the correct approach was to calculate W's award by reference to the marital acquest, that is to say the increase in H's fortune during the period of marriage. The extent of the acquest was much in dispute but it was said that her award should be £7.2m representing (using W's figures) 37.5% of the marital acquest. Singer J awarded £5 million (represented by the £2.3m family home) (H being obliged to redeem the c. £500,000 mortgage thereon and a lump sum of £2.7m)).
- 3) On H's appeal to the Court of Appeal (Miller v Miller [2006] 1 FLR 151) it was argued, *inter alia*, that Singer J had wrongly rejected a clear line of authority that established the principle on which claims were to be determined in short marriage cases. Particular reliance was placed on S v S [1977] Fam 127; H v H (Financial Provision: Short Marriage) (1981) 2 FLR 392; Robertson v Robertson (1983) 4 FLR 387 and Hedges v Hedges [1991] 1 FLR 196.
- 4) This ground of appeal was roundly rejected by Thorpe LJ [emphasis added]:

[32] It is now convenient to consider Mr Marks' fourth ground in which he vigorously but vainly sought to argue that cases largely decided about 25 years ago settled the principle

to be applied in determining claims arising out of brief marriages. The principle drawn from those early cases was that the award should be enough to get the unhappy applicant back on her feet. I think that characterisation is probably drawn from the judgment of Balcombe J in *Robertson v Robertson* (1983) 4 FLR 387 when at 392 he said:

'I also order a lump payment of £15,000 which seems to me more than adequate to enable the wife to get on her feet again.'

[33] There are a number of very good reasons why that should no longer be the modern approach. **First, it originated and developed during long years in which the yardstick for measuring the extent of the applicant's claim was an assessment of her reasonable requirements. Secondly, a marriage is not to be equated to a purely financial venture where the court may redress breach of contract or the disintegration of a partnership by an award of damages or other financial relief.** Section 25 requires a more sophisticated evaluation of the extent of the wife's commitment to and investment in the marriage emotionally and psychologically. In some cases it may be necessary for the court to assess emotional and psychological damage and the extent to which the applicant's future capacity and opportunity to enter into a fulfilling family life has been blighted. What a party has given to a marriage and what a party has lost on its failure cannot be measured by simply counting the days of its duration.

[34] **Thirdly, Mr Marks' reliance on the old cases is clearly precluded by the decision of this court in *Foster v Foster* [2003] 2 FLR 299.** Between that case and the present there is an obvious similarity in that the duration of each was approximately 2¾ years. In other respects, the cases are clearly distinguishable. In *Foster* the means of the parties were comparatively modest, the assets being approximately £400,000. Furthermore, during the marriage each had contributed to property dealing and development which had proved profitable. The wife had made the greater financial contribution to the dealing. The district judge decided to return to each what he or she had brought into the marriage as well as such post-separation contributions as he or she had made. The profits made during the marriage were to be divided equally between the parties. The result of that exercise left the wife with approximately 61% and the husband 39%. The wife appealed successfully to the circuit judge who increased her share to 70%. The husband's appeal succeeded and this court restored the order of the district judge. Since it was a second appeal caught by the provision of s55 of the Access to Justice Act 1998 this court could not grant permission unless the husband demonstrated an important point of principle or practice or some other compelling reason. Hale LJ (as she then was) explained that the husband had cleared that hurdle thus:

'in our view the case does raise the important issue of the proper approach, in the light of *White v White* and later decisions of this court, to the parties' respective contributions in a short childless marriage where both are working. Accordingly, we gave permission to appeal.'

[35] Accordingly, in her judgment Hale LJ considered the impact of the decisions in *White v White* [2000] 2 FLR 981, *Cowan v Cowan* [2001] 2 FLR 192 and *Lambert v Lambert* [2003] 1 FLR 139. Counsel for the wife argued that those authorities were solely concerned with the problem of evaluating the very different contributions of breadwinner and homemaker over a long marriage where there have been children to bring up. They were of no relevance to a short, childless marriage where both parties had been working. Hale LJ rejected that submission emphatically. **In para [19] she recorded counsel's eventual concession that where a substantial surplus had been generated by joint efforts it could not matter whether they had taken a short or long time to do so.**

[36] **Although the facts of that case are very different and although much of the judgment is directed to the features of the particular case, it is clear that Hale LJ was signalling a fresh approach to measuring of awards in cases involving marriage of short duration.** In my opinion, she says so expressly in the passages to which I have

referred. Furthermore, she underlines that implicitly by omitting any reference to the old cases, cases which would, of course, have been very familiar to her.

5) Wall LJ took a similar approach:

[72] *Foster v Foster* [2003] 2 FLR 299 was a case in which wealth had been accumulated during the marriage by the joint efforts of both husband and wife. The district judge decided, accordingly, that the right approach was to return to each party that with which they had entered the marriage and to share the wealth accumulated during the marriage equally between them. That approach was upheld in this court. The length of the marriage, in that case, was of very little relevance. As Hale LJ perceptively remarked, where 'a substantial surplus had been generated by their joint efforts, it could not matter whether they had taken a short or a long time to do so'. The case, in my view, is a warning of the dangers which can flow if there is a disproportionate emphasis on the brevity of the marriage.

.....

[77] Furthermore, I have to say I received no help on the difficult issue of quantum from Mr Marks' comparisons with awards for libel or professional negligence or personal injuries. Not only were such comparisons, in my judgment, irrelevant, but they seemed to me both to demean the status of marriage, and to take no account of the serious social, financial and psychological effects which irretrievable breakdown frequently has on those who suffer it.

[78] So I am in no doubt at all that the judge was right to reject the pre- *White* cases. He was right to hold on to the terms of s 25 and the discretionary exercise, and to follow the guidance of Thorpe LJ in *McFarlane v McFarlane; Parlour v Parlour* [2004] 2 FLR 893 at [110]:

'The judges must remain focused on the statutory language, albeit recognising the need for evolutionary construction to reflect social and economic change. The statutory checklist and the overall circumstances of the case allow the judge to reflect factors which are said to be inherent in either the entitlement model or the compensation model. But to adopt one model or another or a combination of more than one is to don a strait-jacket and to deflect concentration from the statutory language. Clearly in the assessment of periodical payments, as of capital provision, the overriding objective is fairness. Discrimination between the sexes must be avoided.'

6) Singer J's award was upheld by the Court of Appeal.

7) Wall LJ's comments at paragraph [77] reflect the submission made by Lewis Marks QC that "*If my client had knocked her down with his motor car, and she had suffered severe injuries - brain damage and losing the ability to have children - at most the damages would be £2m.*" Perhaps unsurprisingly this submission generated some colourful tabloid headlines ...

8) On H's subsequent appeal to the House of Lords (*Miller v Miller; McFarlane v McFarlane*) [2006] 1 FLR 1186) similar arguments were pursued but were equally unsuccessful.

- 9) Lord Nicholls of Birkenhead stated the following in the context of the 'sharing' principle, matrimonial (and non-matrimonial) property, and short marriages [emphasis added]:

[16] A third strand is sharing. This 'equal sharing' principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. In 1992 Lord Keith of Kinkel approved Lord Emslie's observation that 'husband and wife are now for all practical purposes equal partners in marriage': *R v R (Rape: Marital Exemption)* [1992] 1 FLR 217 at 220 .... This is now recognised widely, if not universally. 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. But I emphasise the qualifying phrase: 'unless there is good reason to the contrary'. The yardstick of equality is to be applied as an aid, not a rule.

[17] This principle is applicable as much to short marriages as to long marriages: see *Foster v Foster* [2003] 2 FLR 299, at 305, para [19] per Hale LJ. A short marriage is no less a partnership of equals than a long marriage. The difference is that a short marriage has been less enduring. In the nature of things this will affect the quantum of the financial fruits of the partnership.

.....

[24] In the case of a short marriage, fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. **The source of the asset may be a good reason for departing from equality.** This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage.

- 10) Specifically in relation to the *pre-White* short marriage cases he said the following [emphasis added]:

*The pre-White short marriage cases*

[54] Several issues arise from these judgments. The first concerns the relevance today of the approach to short marriages enunciated in the 1980s. In the 1980s and earlier there were several reported cases concerning short marriages. The facts vary widely, but in these cases the general approach to division of assets was to concentrate on making provision for the financial needs of the claimant, usually the wife, and on compensating her for any financial disadvantage she had suffered from the breakdown of the marriage. To greater or lesser extent this approach appears in *S v S* [1977] Fam 127, *H v H (Financial Provision: Short Marriage)* (1981) 2 FLR 392, *Robertson v Robertson* (1983) 4 FLR 387, *Attar v Attar (No 2)* [1985] FLR 653 and *Hedges v Hedges* [1991] 1 FLR 196.

[55] On the present appeal, Mr Turner QC submitted this approach has not been invalidated by the decision in the *White* case. Both Singer J and the Court of Appeal declined to adopt this submission. They were right to do so. In the 1980s cases attention was directed predominantly at the wife's needs. There may be cases of short marriages where the limited financial resources of the parties necessarily mean that attention will still have to be focused on the parties' needs. **That is not so in big money cases. Then the court is concerned to decide what would be a fair division of the whole of the assets, taking into account the parties' respective financial needs and any need for compensation. The court will look at all the circumstances. The general approach in this type of case should be to consider whether, and to what extent, there is good reason for departing from equality. As already indicated, in short marriage cases there will often be a good reason for departing substantially from equality with regard to non-matrimonial property.**

11) Baroness Hale of Richmond said as follows:

*The source of the assets and the length of the marriage*

[147] Nevertheless, such debates are evidence of unease at the fairness of dividing equally great wealth which has either been brought into the marriage or generated by the business efforts and acumen of one party. It is principally in this context that there is also a perception that the size of the non-business partner's share should be linked to the length of the marriage: see, eg, Eekelaar, *Asset Distribution on Divorce – the Durational Element* [2001] 117 LQR 552; and *Asset Distribution on Divorce – Time and Property* [2003] Fam Law 828; and *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 108.

[148] The strength of these perceptions is such that it could be unwise for the law to ignore them completely.....

[149] The question, therefore, is whether in the very big money cases, it is fair to take some account of the source and nature of the assets, in the same way that some account is taken of the source of those assets in inherited or family wealth. Is the 'matrimonial property' to consist of everything acquired during the marriage (which should probably include periods of pre-marital cohabitation and engagement) or might a distinction be drawn between 'family' and other assets? Family assets were described by Lord Denning in the landmark case of *Wachtel v Wachtel* [1973] Fam 72, at 90:

'It refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole.'

Prime examples of family assets of a capital nature were the family home and its contents, while the parties' earning capacities were assets of a revenue nature. But also included are other assets which were obviously acquired for the use and benefit of the whole family, such as holiday homes, caravans, furniture, insurance policies and other family savings. To this list should clearly be added family businesses or joint ventures in which they both work. It is easy to see such assets as the fruits of the marital partnership. It is also easy to see each party's efforts as making a real contribution to the acquisition of such assets. Hence it is not at all surprising that Mr and Mrs McFarlane agreed upon the division of their capital assets, which were mostly of this nature, without prejudice to how Mrs McFarlane's future income provision would be quantified.

[150] **More difficult are business or investment assets which have been generated solely or mainly by the efforts of one party. The other party has often made some contribution to the business, at least in its early days, and has continued with her agreed contribution to the welfare of the family (as did Mrs Cowan). But in these non-business-partnership, non-family asset cases, the bulk of the property has been generated by one party. Does this provide a reason for departing from the yardstick of equality? On the one hand is the view, already expressed, that commercial and domestic contributions are intrinsically incommensurable. It is easy to count the money or property which one has acquired. It is impossible to count the value which the other has added to their lives together.** One is counted in money or money's worth. The other is counted in domestic comfort and happiness. If the law is to avoid discrimination between the gender roles, it should regard all the assets generated in either way during the marriage as family assets to be divided equally between them unless some other good reason is shown to do otherwise.

[151] **On the other hand is the view that this is unrealistic. We do not yet have a system of community of property, whether full or deferred. Even modest legislative steps towards this have been strenuously resisted.** Ownership and contributions still feature in divorcing couples' own perceptions of a fair result, some drawing a distinction between the home and joint savings accounts, on the one hand, and pensions, individual

savings and debts, on the other (*Settling Up*, para [128] above, chapter 5). Some of these are not family assets in the way that the home, its contents and the family savings are family assets. Their value may well be speculative or their possession risky. It is not suggested that the domestic partner should share in the risks or potential liabilities, a problem which bedevils many community of property regimes and can give domestic contributions a negative value. It simply cannot be demonstrated that the domestic contribution, important though it has been to the welfare and happiness of the family as a whole, has contributed to their acquisition. If the money maker had not had a wife to look after him, no doubt he would have found others to do it for him. Further, great wealth can be generated in a very short time, as the *Miller* case shows; but domestic contributions by their very nature take time to mature into contributions to the welfare of the family.

[152] My lords, while I do not think that these arguments can be ignored, I think that they are irrelevant in the great majority of cases. **In the very small number of cases where they might make a difference, of which *Miller* may be one, the answer is the same as that given in *White* in connection with pre-marital property, inheritance and gifts. 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: s 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 (see Bailey-Harris, comment on *GW v RW (Financial Provision: Departure from Equality)* [2003] Fam Law 386, at 388) rather than in terms of accrual over time (see Eekelaar, 'Asset Distribution on Divorce – Time and Property' [2003] Fam Law 828). This avoids the complexities of devising a formula for such accruals.

[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. What seems fair and sensible at the outset of a relationship may seem much less fair and sensible when it ends.** And there could well be a sense of injustice if a dual career spouse who had worked outside as well as inside the home throughout the marriage ended up less well off than one who had only or mainly worked inside the home.

#### *Application in the Miller case*

[157] In *Miller*, the needs generated by the relationship are comparatively small. The wife will be able to re-establish herself in life within a relatively short time. But she was for some time the fiancée and then the wife of a very rich man. Much of that wealth accrued during the marriage. The New Star shares could not sensibly be valued, but that the husband stood to gain at least £6m and probably a great deal more from them in the readily foreseeable future was undeniable. The company had been deliberately grown very quickly with a view to disposing of it advantageously in the relatively short term. Mrs Miller never sought to claim a half. The judge eschewed the yardstick of equality because the assets had not been generated by their joint efforts (cf *Foster v Foster*) but by the husband using his pre-marriage assets and expertise to generate substantial extra profits during the marriage. The judge quantified her claim without reference to the unfathomable value of the New Star shares acquired during the marriage, but in such a

way as to give her a permanent income upon which she could live in the former matrimonial home albeit at a lower standard than she had been accustomed to during the marriage.

[158] That is undoubtedly more than she would need to get herself back to where she would have been had the marriage not taken place. But that has never been the express objective of the law, even in the 1970s and 1980s when the Court of Appeal supported such an approach in short childless marriages. Even without the former statutory objective, the court has to take some account of the standard of living enjoyed during the marriage: see s 25(2)(c). **The provision should enable a gentle transition from that standard to the standard that she could expect as a self-sufficient woman. But she is also entitled to some share in the assets. The couple had two homes and there is no reason at all why she should not have a share in their combined value, together with other assets obviously acquired for the benefit of the family. She is also entitled to some share in the considerable increase of the husband's wealth during the marriage. Had the yardstick of equality been applied to all the assets which accrued during the marriage, she would have got much more than she did. In my view the judge was wrong to take account of the reasons for the break-up of the marriage, but there was a reason to depart from the yardstick of equality because those were business assets generated solely by the husband during a short marriage.** Whether one puts this as the result of the contacts and capacities he brought to the marriage or as the result of the nature and source of the assets generated (or, put another way, whichever the rationale one chooses from *GW v RW*), it comes to much the same thing.

12) And then came Sharp ...

13) The Final Hearing of JS v RS [2015] EWHC 2921 (Sharp v Sharp at first instance) took place before, as it would happen, Singer J over 4 days in May 2015. Jonathan Southgate QC and Robin Rowland appeared on behalf of the husband. Frank Feehan QC appeared on behalf of the wife.

14) The assets were:

• SD (the parties' first home)	-	£1.067m
• LC (a second property)	-	£1.455m
• W's accounts & investments	-	£4.171m
• <u>Various smaller assets</u>	-	<u>£207,000</u>
<b>Total</b>	-	<b>£6.9m</b>

15) The parties became engaged in August 2008, having cohabited since 2007. They celebrated their marriage in June 2009. Between engagement and marriage, they purchased SD in their joint names.

16) The wife petitioned for divorce in December 2013 making this a marriage of some **6 years** – to coin Singer J's expression '*not so desperately short...but still by no means lengthy*'.

17) At the Final Hearing, it emerged that the husband had been having an affair since February 2013. The Court of Appeal stressed this had no bearing on the outcome. This must have escaped the notice of the Daily Mail when they plumped for the headline:

*'Cheating husband whose City trader wife made an 'eye-watering' £10.5m in bonuses in five years has his divorce pay-out slashed by £725,000 after he admits affair'*

- 18) Of that £6.9m, it was to some extent accepted on behalf of the husband that SD ought not be subject to equal sharing, the funds to purchase it having emanated exclusively from the wife, notwithstanding that it was:
- (i) bought during the relationship;
  - (ii) bought in joint names; and,
  - (iii) the former matrimonial home for part of the marriage.
- 19) Consequently, Singer J took the 'matrimonial acquest' to be **£5.45m** - £6.9m less the value of SD and the wife's pre-acquired assets (c. £350,000).
- 20) At the time of separating, both were in their early 40s. They did not have children. When they met, each was earning around **£100,000pa**. During the central 5 years of the marriage, the wife entered an unparalleled period of earnings – her bonuses in that period totalling around **£10.5m**.
- 21) It was common ground that from a financial perspective, the £6.9m of assets derived almost entirely from the wife's bonuses.
- 22) Prior to the Final Hearing commencing, the wife's position was that the husband should walk away with **£400,000**. By the time of final submissions, that stance had shifted to around **£1.23m**.
- 23) The husband sought **£3m** – a discount from a full half share of the assets.
- 24) Singer J awarded the husband **£2.725m** – half the 'matrimonial acquest'. In so doing, he intimated that he would have awarded the husband £3.45m, exactly half of the total assets, but for his open position and concessions about the origin of SD (see paragraphs 60 – 63 of the original Judgment).
- 25) This was a case in which needs were not engaged. On any view, both parties would be adequately rehoused. Further, both would exit the relationship with an earning capacity intact due to the length of the marriage, their ages and the absence of children.
- 26) The wife appealed – her central ground of appeal was that her marriage fell squarely within the confines of the kind of case Baroness Hale had envisaged in paragraph 153 of *Miller* (i.e. the genuine dual career family, where both parties have worked and not all assets have been

pooled) and that, as a consequence, there should have been a departure from the sharing principle.

- 27) The Court of Appeal agreed, albeit not to the extent that the wife had hoped. The Judgment is reported as *Sharp v Sharp* [2017] EWCA Civ 408. They reduced the husband's award to **£2m** based on their repeated phrase – a '*relaxation of the sharing principle*' (at 1, 19 53, 82, 97 and 125).
- 28) Surprisingly, in the 10+ years since Baroness Hale hypothesised how the court might approach such a case, there have been almost no reported examples of one arising.
- 29) What gave *Sharp* its unique character was that the wife's bonuses, earned in the wholesale fuel trade, were so out of kilter with her earnings prior to that point and unlikely to be recreated in the future due to changes in the sector.
- 30) It is critical that we appreciate what *Sharp* was **not** about.
- 31) **It was not about non-matrimonial property.** We are all familiar with the ruminations of the senior judiciary on this topic in cases such as *Charman v Charman (No 4)* [2007] 1 FLR 1246, *JL v SL (No 2)* [2014] EWHC 360 (Fam), *Scatcliffe v Scatcliffe* [2016] UKPC 36 and *Hart v Hart* [2017] EWCA Civ 1306.
- 32) Moylan LJ's description of 'non-matrimonial' property in the latter provides a pithy summary:
- [2] ...In *Charman v Charman (No 4)* [2007] 1 FLR 1246 matrimonial property was described as "the property of the parties generated during the marriage otherwise than by external donation" (paragraph 66). Non-matrimonial property can, therefore, be broadly defined in the negative, namely as being **assets (or that part of the value of an asset) which are not the financial product of or generated by the parties' endeavours during the marriage.** Examples usually given are assets owned by one spouse before the marriage and assets which have been inherited or otherwise given to a spouse from, typically, a relative of theirs during the marriage.
- 33) Of course, those cases all descend directly from what the House of Lords said in *Miller*.
- 34) In *Sharp*, there was no dispute that the assets had all 'fallen in' during the confines of the relationship and that they were not provided by external donation. Absent needs, the modern authorities are quite clear – orthodox 'non-matrimonial property' will not be subject to the sharing principle at all.
- 35) Similarly, **it was not about 'special contribution'**. At first instance, Singer J detected the use of the word 'stellar' in Mr Feehan QC's note for the court more than once. He '*rightly rode back*'

when directly confronted with whether or not he was seeking to argue that the wife had made a contribution in that mould (see paragraph 32 of the first instance Judgment).

36) In *Work v Gray* [2017] EWCA Civ 270, the Court of Appeal rejected the husband's argument that assets of some \$225m, generated from a purely financial perspective by the husband, should be divided unequally in his favour following a 20 year marriage.

37) The facts there, were very different from *Sharp* – this was a long marriage that had produced children and the parties occupied different roles, one working in the home and one generating income.

38) The Court of Appeal did provide some helpful clarity on how a 'special contribution' arises:

[102] ...The focus is on disparity of contribution and whether there is a sufficient disparity to make it inequitable to disregard. It is not on whether a contribution is "unmatched". The latter can lead, as reflected in the husband's submissions in this case, to the contention that, if one party has made an exceptional contribution, the court must consider whether the other party has made an equal, matching, contribution.

39) So why was *Sharp*, a case absent arguments about needs, non-matrimonial property or 'special contribution' decided on the basis of anything other than equal sharing?

40) *Sharp* represented a close examination of the subtle differences of approach between Lord Nicholls and Baroness Hale in *Miller* as regards short marriage cases.

41) This had already been explored at Court of Appeal level in *Charman v Charman (No 4)* [2007] 1 FLR 1246, though *Charman* itself was not a short marriage case. It is worth setting out the discussion in full (my emphasis highlighted):

*[85] Such was the context in which the House turned to consider whether the sharing principle applied to cases in which the property had been generated during a short marriage. It was in this area that the members of the House were in substantial disagreement; and we cannot subscribe to the ingenious attempt of Burton J. in FS v. JS, at [30] and [31], to reconcile their differences. We suggest with respect that, while the approach of Lord Nicholls was perhaps the more logical, the approach both of Baroness Hale, with which Lord Hoffmann agreed, and of Lord Mance was perhaps the more pragmatic. Lord Nicholls, at [17] to [20], stressed that the sharing principle was as fully applicable to short as to long marriages and that the concept of treating unilateral assets differently from other matrimonial assets discriminated in favour of the bread-winner. He justified departure from equal sharing of the matrimonial property in Miller by reference, at [73], to the amount of work done by the husband prior to the marriage referable to the venture. In a section entitled "The source of the assets and the length of the marriage" Baroness Hale, at [147] to [152], squarely faced the conceptual difficulties inherent in the different application of the sharing principle to short marriages but considered that, on balance, perceptions of fairness justified it. Such became, at [158], her rationale for justifying departure from equality in Miller. Lord Mance, at [169], powerfully stressed the practical value of Baroness Hale's approach, namely that it would often obviate the need to address the argument, sometimes called the "seed-corn" argument, raised in Miller itself,*

to the effect that wealth which one of the parties ostensibly generated during the marriage was a crop of which he or she had sown the seed prior to it.

**[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. Lord Mance offered, at [170], the following interesting rationalisation for the suggested extension:**

*"Once needs and compensation had been addressed, the misfortune of divorce would not of itself ... be justification for the court to disturb principles by which the parties had chosen to live their lives while married."*

*Lord Mance may there have foreshadowed future, albeit no doubt cautious, movement in the law towards a more frequent distribution of property upon divorce in accordance with what, by words or conduct, the parties appear previously to have agreed.*

- 42) To put it bluntly, in *Sharp* the husband argued that the above passages from *Charman* showed a concern about the application of Baroness Hale's hypothesis and a preference for Lord Nicholls' more straightforward approach.
- 43) The statute requires the court to have regard to both the duration of the marriage and the parties' contributions.
- 44) Lord Nicholls' approach was that the duration of the marriage would be reflected by the quantum of the assets generated. Absent needs, non-matrimonial property or a special contribution, those assets would be shared, marriage being a partnership of equals.
- 45) Baroness Hale's approach was more nuanced, hence her speculation about how the length of a marriage and its particular features might justify less than equal sharing.
- 46) In *Miller*, the lead judgment, with which the majority agreed, was given by Baroness Hale. Therefore, as a matter of legal principle, it is her approach that lower courts, including the Court of Appeal, must adopt when determining cases (Lord Justice McCombe dealt with this issue in *Sharp* at paragraphs 121 to 127).
- 47) Lord Justice McFarlane specifically concluded that paragraph 86 of *Charman*, cited above, was an obiter statement.
- 48) The ratio of *Sharp* can be distilled from the following three paragraphs of the Judgment (my emphasis highlighted):

[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.**

[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.

[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.

- 49) On the above analysis, *Sharp* is a case confined to its facts. There will be few marriages carrying the combination of features: short, parties working, no children and a huge disparity of financial contribution.
- 50) Conducting a straw poll of the lay public, most would agree that after a 6 year relationship, where one party has generated almost the entirety of the wealth, it would be unfair for the other party to walk away with an equal share.
- 51) Whilst the outcome in *Sharp* may appear fair, it does raise some troubling questions on a wider analysis.
- 52) The first is that it is difficult to sustain that a marriage is a partnership of equals. The inescapable implication of *Sharp* is that:
- (i) After a certain amount of time, query how long, a marriage develops an enduring quality such that divorce will give rise to equal sharing of assets; and,
  - (ii) A marriage in which the parties do not have children takes on a different hue as regards the division of assets on divorce.

- 53) The advantage with Lord Nicholls' approach, endorsed by the husband and indeed seemingly endorsed by the Court of Appeal in *Charman*, is that it gives litigants and the profession greater certainty of outcome. It specifically stops parties engaging in the 'general rummage through the attic' of who made what contribution, rightly deprecated by Coleridge J in *G v G* [2002] 2 FLR 1143.
- 54) The central lesson from *Sharp* is that the Court of Appeal remained faithful to section 25(2) of the Matrimonial Causes Act 1973 and, in particular, faithful to the idea that the exercise of 'fairness' could produce a more bespoke result than anticipated by the husband.
- 55) The problem will emerge when a case takes on a similar guise to *Sharp* but with slight differences. For instance, how long does a marriage have to be to fall outside the bounds of being considered 'short' as the authorities stand? If, as specifically stated by McFarlane LJ, Mrs Sharp's bonuses '*had not been generated by the joint efforts of the parties*', does that rationale not apply to all income earned in cases where there is no tangible domestic contribution?
- 56) One suspects that *Sharp* will be confined to its facts and given little consideration by the lower courts as a consequence. It remains to be seen how far its 'relaxation of the sharing principle' can be stretched in higher worth cases.

#### Periodical Payments

- 57) What of orders for periodical payments following a short marriage?
- 58) In *Waggott v Waggott* [2018] EWCA Civ 727, the Court of Appeal provided two important pieces of guidance in respect to maintenance claims:
- a) First, that a spouse's earning capacity is **not** an asset subject to the sharing principle

122. In my view, there are a number of reasons why the clear answer is that it is not.

123. Any extension of the sharing principle to post-separation earnings would fundamentally undermine the court's ability to effect a clean break. In principle, as accepted by Mr Turner, the entitlement to share would continue until the payer ceased working (subject to this being a reasonable decision), potentially a period of many years. If the court was to seek to effect a clean break this would, inevitably, require the court to capitalise its value which would conflict with what Wilson LJ said in *Jones v Jones*.

- b) Second, that where a party receives capital subject to the sharing principle, it should not be shielded from deployment to meet their income needs

130. I reject Mr Turner's more extreme argument that the wife's capital, apart from her housing need, should be preserved and should not be used in any way to meet

her income needs. **This again would conflict with the clean break principle** to such a significant extent as to undermine the statutory "steer" because, absent other resources, the applicant spouse would always have a claim for an additional award to meet his or her income needs.

131. In my view it is clear from Miller and Charman alone that, as a matter of principle, the court applies the need principle when determining whether the sharing award is sufficient to meet that party's future needs.

59) *Waggott* was *not* a short marriage case but it is worth weighing these remarks in mind when considering how the Court is likely to approach maintenance following a short marriage.

60) Why are they important? First, it firmly restricts the claim for periodical payments to the boundaries of need. Second, 'need' is inevitably assessed, per the statute, by having regard to the length of the marriage, the standard of living enjoyed and the presence of children. Third, if a party receives significant capital following a short marriage – for instance a Mr Sharp – they will not be able to mount a 'fresh' claim for periodical payments that ignores that receipt of capital.

61) This steer towards needs based maintenance awards is not novel. In *SS v NS (Spousal Maintenance)* [2015] 2 FLR 1124, FD, Mostyn J set out a guide to the principles underpinning maintenance orders (albeit he was at pains to point out that each case turns on its own facts):

[46] Pulling the threads together it seems to me that the relevant principles in play on an application for spousal maintenance are as follows:

(i) A spousal maintenance award is properly made where the evidence shows that **choices made during the marriage have generated hard future needs** on the part of the claimant. **Here the duration of the marriage and the presence of children are pivotal factors.**

(ii) An award should only be made by reference to needs, save in a most exceptional case where it can be said that the sharing or compensation principle applies.

(iii) Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship.

(iv) In every case the court must consider a termination of spousal maintenance with a transition to independence as soon as it is just and reasonable. A term should be considered unless the payee would be unable to adjust without undue hardship to the ending of payments. A degree of (not undue) hardship in making the transition to independence is acceptable.

(v) If the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former.

(vi) The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence.

(vii) The essential task of the judge is not merely to examine the individual items in the claimant's income budget but also to stand back and to look at the global total and to ask if it represents a fair proportion of the respondent's available income that should go to the support of the claimant.

(viii) Where the respondent's income comprises a base salary and a discretionary bonus the claimant's award may be equivalently partitioned, with needs of strict

necessity being met from the base salary and additional, discretionary, items being met from the bonus on a capped percentage basis.

(xi) There is no criterion of exceptionality on an application to extend a term order. On such an application an examination should be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve and, if so, why.

(x) On an application to discharge a joint lives order an examination should be made of the original assumption that it was just too difficult to predict eventual independence.

(xi) If the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party.

62) Indeed, in *FF v KF [2017] EWHC 1093 (Fam)*, Mostyn J expanded on how a needs assessment is made and specifically dealt with its application to short marriages:

[18] So far as the "needs" principle is concerned there is an almost unbounded discretion. The main rule is that, save in a situation of real hardship, the "needs" must be causally related to the marriage. Like equity in the old days, the result seems to depend on the length of the judge's foot. It is worth recalling that Heather Mills-McCartney was awarded over £25m to meet her "needs" (*McCartney v McCartney* [2008] EWHC 401 (Fam)). Mrs Juffali was awarded £62m to meet her "needs" (*Juffali v Juffali* [2016] EWHC 1684 (Fam)). In the very recent case of *AAZ v BBZ* [2016] EWHC 3234 (Fam) the court assessed the applicant-wife's "needs" in the remarkable sum of £224m. Plainly "needs" does not mean needs. It is a term of art. Obviously, no-one actually needs £25m, or £62m, or £224m for accommodation and sustenance. The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise.

[19] In a short marriage case the discretion when assessing needs is particularly broad and fact-sensitive. **Although empirical research shows that in many such cases the quotidian need is determined by an award of a term of years, there is no rule, or even guideline, to this effect.** There have been cases where lifelong support has been awarded after a short marriage: see, for example, *C v C* [1997] 2 FLR 26, where lifelong periodical payments were awarded, Ward LJ at page 43D specifically rejecting the submission that there should be a principle that a short marriage demands a term payment. In *Miller v Miller* at first instance (*M v M* [2005] EWHC 528 (Fam)) Singer J assessed the wife's needs after that short marriage at £5m comprising the former matrimonial home valued at £2.3 million and a *Duxbury* fund of £2.7 million producing for that 36-year-old woman £90,000 spendable for every year for the rest of her life. Although the House of Lords preferred to uphold that award by reference to the sharing principle alone, it did not question the entitlement of the judge, in the exercise of his discretion, to assess Mrs Miller's needs thus.

63) The statute specifically refers to standard of living, although in the vast majority of cases an inescapable consequence of divorce is a reduction in standard of living.

64) *Miller/McFarlane* per Lord Nicholls of Birkenhead [emphasis added]:

[58] ... hopes **and expectations**, as such, **are not an appropriate basis on which to assess financial needs**. Claims for expectation losses do not fit altogether comfortably with the notion that each party is free to end the marriage. Indeed, to make an award by reference to the parties' future expectations would come close to restoring the 'tailpiece' which was originally part of s 25 of the 1973 Act. By that tailpiece the court was required

to place the parties, so far as practical and, having regard to their conduct, just to do so, in the same financial position as they would have been had the marriage not broken down. It would be a mistake indirectly to reintroduce the effect of that discredited provision.

65) *G v G (Financial Remedies: Short Marriage: Trust Assets) [2012] 2 FLR 48, FD* per Charles J:

[136] ... the objective of achieving a fair result ... (i) is not met by an approach that seeks to achieve a dependence for life (or until re-marriage) for the payee spouse to fund a lifestyle equivalent to that enjoyed during the marriage.

66) According to Mostyn J in *SS v NS* the marital standard of living is not the lodestar in assessing maintenance needs:

[35] ... It is a mistake to regard the marital standard of living as the lodestar.

67) *BD v FD (Financial Remedies: Needs) [2017] 1 FLR 1420, FD* Moylan J (as he then was) observed as follows:

[113] Subject to first consideration being given to the welfare of minor children, the principal factors which impact on the court's assessment of needs are:

- (i) the length of the marriage;
- (ii) the length of the period, additional to (i), during which the applicant spouse will be making contributions to the welfare of the family;
- (iii) the standard of living during the marriage;
- (iv) the age of the applicant; and
- (v) the available resources as defined by s 25(2)(a) of the 1973 Act.

[114] In my view, the starting point for the assessment of needs is the standard of living during the course of the marriage ... This does not mean that it is either a ceiling or a floor but, as Mr Howard agreed during the course of his submissions, it provides a benchmark or starting point against which to assess needs.

[118] The use of the standard of living as the benchmark emphatically does not mean that, as referred to above, in every case needs are to be met at that level either at all or for more than a defined period (of less than life) ...

68) In *AB v FC [2016] EWHC 3285 (Fam)* Roberts J referred to *SS v NS* and *BD v FD* and stated:

[77] It has to be borne carefully in mind that there is an inter-relationship between the level at which future needs will be assessed and the period during which a court is likely to find those needs should be met by the paying former spouse. The longer the period, the more likely it is that the court will decline to assess those needs on the basis of a standard of living which replicates that enjoyed during the marriage.

69) Thus it must be the case that the standard of living enjoyed during the marriage will be of less and less relevance the shorter the marriage itself when it comes to the making of an order for periodical payments.

70) So, what of term of maintenance following a short marriage?

71) Mostyn J's approach at [46] (v) of *SS v NS* - that where the choice between an extendable term and a joint lives order is finely balanced the court should choose an extendable term - does not sit easily with that of Ward LJ in the older cases of *C v C (Financial Relief: Short Marriage)* [1997] 2 FLR 26, CA or *Flavell v Flavell* [1997] 1 FLR 353, CA or that of Holman J in *Murphy v Murphy* [2014] EWHC 2263 (Fam) and *Fields v Fields* [2016] 1 FLR 1186, FD.

72) In *C v C (Financial Relief: Short Marriage)* [1997] 2 FLR 26, CA Ward LJ stated at p45 [emphasis added]:

To summarise, the proper approach is this:

- (1) The first task is to consider a clean break which pursuant to s 25A(1) requires the court to consider whether it would be appropriate to exercise its powers so that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.
- (2) If there is to be no clean break, and a periodical payments order is to be made, then the court must decide pursuant to s 25 what amount is to be ordered. **The duration of the marriage is a factor relevant to the determination of quantum.**
- (3) If a periodical payments order is made, whether for 5p pa or whatever, the question is whether it would be appropriate to impose a term because in the absence of such a direction the order will endure for joint lives or until the remarriage of the payee: see s 28(1)(a).
- (4) **The statutory test is this: is it appropriate to order periodical payments only for such a term as in the opinion of the court would be sufficient to enable the payee to adjust without undue hardship to the termination of financial dependence on the paying party?**
- (5) What is appropriate must of necessity depend on all the circumstances of the case including the welfare of any minor child and the s 25 checklist factors, one of which is the duration of the marriage. **It is, however, not appropriate simply to say, "This is a short marriage, therefore a term must be imposed".**
- (6) Financial dependence being evident from the very making of an order for periodical payments, **the question is whether, in the light of all the circumstances of the case, the payee can adjust – and adjust without undue hardship – to the termination of financial dependence and if so when. The question is, can she adjust, not should she adjust.** In answering that question the court will pay attention not only to the duration of the marriage but to the effect the marriage and its breakdown and the need to care for any minor children has had and will continue to have on the earning capacity of the payee and the extent to which she is no longer in the position she would have been in but for the marriage, its consequences and its breakdown. It is highly material to consider any difficulties the payee may have in entering or re-entering the labour market, resuming a fractured career and making up any lost ground.
- (7) **The court cannot form its opinion that a term is appropriate without evidence to support its conclusion. Facts supported by evidence must, therefore, justify a reasonable expectation that the payee can and will**

**become self-sufficient. Gazing into the crystal ball does not give rise to such a reasonable expectation.** Hope, with or without pious exhortations to end dependency, is not enough.

- (8) **It is necessary for the court to form an opinion not only that the payee will adjust, but also that the payee will have adjusted within the term that is fixed.** The court may be in a position of such certainty that it can impose a deferred clean break by prohibiting an extension of the term pursuant to s 28(1A). If, however, there is doubt about when self-sufficiency will be attained, it is wrong to require the payee to apply to extend the term. **If there is uncertainty about the appropriate length of the term, the proper course is to impose no term but leave the payer to seek the variation** and if necessary go through the same exercise, this time pursuant to s 31(7)(a).

73) *Murphy v Murphy [2014] EWHC 2263 (Fam)* was a case in which the wife was 42 and the husband was 35. The parties had been together for 8 years and had twins aged 3 ½. The wife was a graduate with experience prior to the birth of the children in publishing and marketing, then earning £30,000 pa. The capital and pension assets had been shared broadly equally, leaving the wife with a mortgage free home and negligible pension provision.

74) Notwithstanding the wife's prior earning capacity and relative youth, Holman J refused to impose a term expiring when the children finished secondary education:

[32] My statutory duty is to be found in section 25A(2) which provides as follows ... **It is extremely important to observe that that sub-section requires the court, as a first step, to form an "opinion". Second, the critical word in the sub-section is not "should" but "would".** In other words, the court has to be able to form an opinion that by the end of the selected term the payee will be able to adjust without undue hardship to the termination.

[33] ... What this lady will be able to earn, and how much she will be able to have earned, and what pension she will have by the time she is 57 is frankly, totally speculative ...

....

[35] What, frankly, the arguments by the husband overlook is that the having of children changes everything. Of course this wife could never have expected a "meal ticket for life" on the basis of six years of marriage and two years of cohabitation if there had been no children ... But the fact of having children, and their obvious dependence in this particular case on their mother for their care, changes everything, as I have said. The economic impact on this wife is likely to endure not only until they leave school but, indeed, for the rest of her life.

75) This approach is arguably inconsistent with MCA 1973 s25A and the views expressed in the Law Commission Report '*Matrimonial Property, Needs and Agreements*' (No 343, 26<sup>th</sup> February 2014) and the Family Justice Council's '*Guidance on Financial Needs on Divorce*' (June 2016)

76) It should also be noted that in *G v G (Financial Remedies: Short Marriage: Trust Assets) [2012] 2 FLR 48, FD* Charles J stated that:

[141] ... like all cases of its and earlier dates, *C v C (Financial Relief: Short Marriage)* must be read and applied in the light of the significant changes that have resulted from *White*, and later cases (in particular *Miller v Miller*; *McFarlane v McFarlane*), and this is so notwithstanding that *C v C (Financial Relief: Short Marriage)* is specifically directed to the application of s 25A(2).

77) MCA 1973 s25A provides that:

(1) Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under section 23(1)(a), (b) or (c), 24 or 24A 24B or 24E above in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.

(2) Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.

78) In *L v L (Financial Remedies: Deferred Clean Break) [2012] 2 FLR 1283, FD* per Eleanor King J (as she then was):

- a) the court anticipated a move towards non-extendable terms / clean breaks as to income;
- b) H's appeal against a joint lives periodical payments order was allowed and the court imposed a two-and-a-half year term with a s28(1A) bar, calling it a case "which cries out for a term order" (at [69]);
- c) on its own particular facts, Eleanor King J relied upon a number of magnetic factors: the wife had £2m of her own capital; she had never left the workplace during the marriage; there was a shared care arrangement; the marriage was of moderate length (10 years); children aged 12 and 9. In that sense it is arguably fact specific;
- d) Eleanor King J described *C v C* as being based "... on a highly unusual set of facts" (at [60]) and held that the District Judge had failed to specifically consider s25A in her judgment, despite the requirement of the statute.

79) In *Matthews v Matthews [2014] 2 FLR 1259, CA*, the Court of Appeal arguably went some way towards knocking down the *C v C* approach.

80) Mostyn J's refused to make a nominal periodical payments order in favour of a wife with young children and that decision was upheld.

81) There were very limited capital assets. The wife's income capacity was £40,000 pa working in financial compliance. The husband earned £27,000 pa net as a plumber. The two children, aged 6 and 3, lived with the wife and had no contact with the husband. The wife had been made redundant but had been able to obtain employment for six of the twelve months preceding the

order. She argued that her fragile employment position required the protection of a nominal spousal periodical payments order.

82) The Court of Appeal emphasised that the discretion to order nominal periodical payments must be exercised with regard to the statutory presumption in favour of making a clean break wherever possible.

83) Tomlinson LJ stated [emphasis added]:

[13] Mr Buck [for W] is driven back simply to his submission that the judge was wrong in principle to decide that there should be a clean break, subject only of course to the payments for child support. That is a difficult submission to sustain for a number of reasons. Section 25A of the Matrimonial Causes Act 1973 (the 1973 Act) was inserted into the statute in 1984. The circumstances in which that was done are set out by Lord Nicholls of Birkenhead at para [130] of his judgment in *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186, HL ... Then Lord Nicholls sets out s 25A(1) ... It is that to which **the judge here referred as the statutory steer to a clean break.**

[14] Mr Buck took us also to a decision of Wilson J, as he then was, in *S v B (Ancillary Relief: Costs)* [2005] 1 FLR 474 ... Mr Buck took us to the judge's discussion of the point of principle, which appears at para [36] of his judgment, where the judge was concerned with an appeal against the making of an order for periodical payments of the type which Mr Buck says ought to have been made in this case, that is to say a nominal order thereby keeping alive the possibility of an application for a variation in the event that the wife's circumstances deteriorated during the minority of the child of the marriage. Wilson J said this at para [36]:

'Let me be frank: had I been the judge, I would have dismissed the wife's application for periodical payments. The marriage was, in real terms, so short; the wife is young and able-bodied and, even allowing for her responsibilities towards the child, so fully employable; and the capital award, particularly allowing for the purchase in West London and a third bedroom to assist in childcare (and later perhaps, if necessary, to generate income from a lodger), so large; that I would have considered it as appropriate for the court's powers so to be exercised as to terminate the husband's further obligations towards the wife forthwith. Until the dying moments of Mr Scott's submission, I was minded to allow the appeal in this regard. But he has driven me reluctantly to the conclusion that the nominal order is not appealable: for, although not my preference, it is not plainly wrong. I must accept that a fair number of my colleagues – be they High Court judges, circuit judges or district judges – would reasonably have exercised their discretion in favour of keeping alive, at least until the child was a teenager, the wife's right to seek to inflate a nominal order for periodical payments to a substantive level. They would regard it as a reasonable precaution against unforeseen developments, taken primarily for the sake of the child. I stress, however, that the circumstances in which it would be apt to vary the order are indeed unlikely to arise: if, for example, the wife fell seriously ill and if, by then, the husband was again a substantial earner, then, yes, there might be a needs-based variation of the order, providing always that the court bore in mind the amount of capital for which, after so short a marriage, the wife had by order relieved the husband.'

[15] It seems to me that the corollary of what Wilson J there said is that, whilst the nominal order in that case was not appealable, so too ordinarily the refusal of a judge to make a nominal order will not be appealable because it cannot be shown to be wrong in principle. We are here concerned with an exercise of discretion but it is an exercise of discretion in

which Parliament has indicated that there should be a clear presumption in favour of making a clean break, in the sense that that is something which the court is mandated to consider, whether it would be appropriate to bring about a complete break between the parties, so far as concerns financial matters, as an initial consideration.

84) The phrase “*statutory steer*” echoes that of Baroness Hale in *Miller/McFarlane [2006] 1 FLR 1186, HL* (at [130]) of a “*clear steer in the direction of lump sum and property adjustment orders with no continuing periodical payments.*”

85) See also *WD v HD [2017] 1 FLR 160, FD* per Moor J:

[61] The second argument raised by [W’s counsel] is the safety net argument. It is said that the wife might, at some point in the future, be unable to work. She might lose her job. She might not be able to find another one. There are so many imponderables in this life. It is impossible to operate a crystal ball and be able to determine what may possibly happen at some point in the next eight or so years. I cannot ignore the significant support she has had from her family. Who knows what will happen in future with Mr X. I remind myself that there can be some hardship, albeit not undue hardship.

[62] I now return, as I indicated I would, to the case of *Matthews*. In that case, Mostyn J had imposed a clean break on a wife with two children aged six and three. She had an earning capacity of £40,000 per annum, which I accept in that case was higher than that of her husband, whose earning capacity was only £27,000 per annum. The safety net argument did not cut any ice with Mostyn J. The Court of Appeal dismissed the appeal on the basis that it could not be said that Mostyn J was plainly wrong.

[63] I have come to the conclusion that it cannot be said that the decision of the Deputy District Judge was plainly wrong or outside the band of possible orders that she might have come to. Some judges would have retained the nominal order. She did not.

86) *Matthews* and *WD v HD* together may suggest that the argument that a party may lose their job at some indeterminate point in the future will no longer necessarily hold much sway in arguing for the imposition of a nominal order for spousal maintenance instead of a clean break.

87) The direction of travel is quite clear – particularly with increasingly loud reminders from the Court of Appeal that the statute is paramount. Maintenance orders following short marriages will need to carefully grapple with the extent of need and the manner in which it is causally connected to the marriage.

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May 2018