Articles

MILLER/MCFARLANE AND *MACLEOD* – THE DUALITY OF LAW-MAKING

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In *MacLeod v MacLeod (Isle of Man)* [2008] UKPC 64, [2009] 1 FLR 641, the Board of the Privy Council held that 'the difficult issue of the validity and effect of ante-nuptial agreements is more appropriate to legislative rather than judicial development.' The purpose of this article is to explore why the Law Lords were bound to exercise their judicial function to develop social policy in *Miller v Miller*, *McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186 whilst, in *MacLeod*, bound to defer to Parliament on the validity on ante-nuptial agreements.

THE NEED FOR JUDICIAL LAW MAKING

In his September 2008 paper to the International Society of Family Law World Conference (published as 'London: the Divorce Capital of the World' in January [2009] Fam Law 21), Lord Justice Thorpe explained that the requirement for judicial law making in the field of ancillary relief lay in the amendments to the Matrimonial Causes Act 1973 brought about by the Matrimonial and Family Proceedings Act 1984; specifically the removal of the 'tailpiece' which had provided that the overarching objective was 'to place the parties in the financial position in which they would have been if the marriage had not broken down'.

As Thorpe LJ noted, 'the removal of an overriding objective without any replacement had the obvious consequence of enlarging yet further the ambit of the judges' discretion. However, the judges reasonably inferred that *Parliament must have intended them to craft outcomes that were seen to be fair to each party, even if Parliament had not so stated*' (emphasis added). Thorpe LJ's comment succinctly summarises Lord Nicholls of Birkenhead's opening comments in *Miller/McFarlane* (at para 5 et seq):

> 'The 1973 Act gives only limited guidance on how the courts should exercise their statutory powers. Primary consideration must be given to the welfare of any children of the family. The court must consider the feasibility of a 'clean break'. Beyond this the courts are largely left to get on with it for themselves. The courts are told simply that they must have regard to all the circumstances of the case.
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> 'Of itself this direction leads nowhere. Implicitly the courts must exercise their powers so as to achieve an outcome which is fair between the parties. But an important aspect of fairness is that like cases should be treated alike. So, perforce, if there is to be an acceptable degree of consistency of decision from one case to the next, the courts must themselves articulate, if only in the broadest fashion, what are the applicable if unspoken principles guiding the court's approach.
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> 'This is not to usurp the legislative function. Rather, it is to perform a necessary judicial function in the absence of parliamentary guidance. As Lord Cooke of Thorndon said in *White v White* [2001] 1 All ER 1 at 18, [2001] 1 AC 596 at 615, there is no reason to suppose that in prescribing relevant considerations the legislature had any intention of excluding the development of general judicial practice'.

Thus the decisions in *White v White* [2000] 2 FLR 981 and then *Miller/McFarlane* were crafted as much to bridge the gap in the statute as to lay to rest the concept of 'reasonable requirements'.

THE DISTRIBUTIVE PRINCIPLES

Achieving an outcome which is fair between the parties required the Law Lords to develop in *Miller/McFarlane* the three strands of need, sharing and compensation. However, whilst need (generously interpreted or otherwise) is expressly mentioned in Matrimonial Causes Act 1973, s 25(2) (b), neither 'sharing' nor 'compensation' can be found anywhere in the Act. This issue was met head on by the President, Thorpe and Wilson LLJ in *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246.

The concept of sharing encroaches into the realms of a quasi community of property regime. Whilst this has never been the legislative basis of English matrimonial law, the Court of Appeal nevertheless held that 'sharing' could be imputed from the contributions made by each of the parties to the welfare of the family (s 25(2)(f)), the duration of the marriage and the conduct of a party in those cases in which it would be inequitable to disregard it (s 25(2)(g)).

The issue of compensation is even more troublesome. While the Court of Appeal held it could be imputed from s 25(2)(h), disadvantage there relates to a different class of loss, namely loss of chance; primarily in the context of lost pension benefits rather than compensation for relationship engendered disadvantage of the nature described in *Miller/McFarlane*. The Court of Appeal nevertheless found authority in *S v S* [1977] 1 All ER 56 at 60, [1977] Fam 127 at 134 for the principle that, where a marriage was short, it was relevant to consider whether one of the parties had suffered financial disadvantage arising out of their entry into it. The judges acknowledged, however, that in that case consideration of financial disadvantage had in fact been directed towards reducing, rather than supplementing, the wife's award.

Firmer ground for the principle was found in *SRJ v DWJ (Financial Provision)* [1999] 3 FCR 153, which was, per Hale J (as she then was), 'a classic example of the sort of case where the wife could have continued to work as a teacher; indeed, she did for some of the time. But she gave up her place in the world of work to concentrate upon her husband, her home and her family. That must have been a mutual decision from which they both benefited. It means that the marriage has deprived her of what otherwise she might have had. Over the many years of that marriage she must have built up an entitlement to some compensation for that.' But in *Miller/McFarlane*, the compensatory element of an award described in *SRJ v DWJ* was expanded upon and afforded far greater significance, not least since Mrs McFarlane's award of £250,000 had substantially exceeded her financial needs on any analysis.

THE PERILS OF JUDICIAL LAW MAKING

In 2005, writing in the *International Journal of Law Policy and the Family*, Rebecca Bailey-Harris complained that 'sometimes appellate courts read principles into s 25; at other times they determine a matter on the basis of a principle identified on the court's own initiative although not pursued in argument. In other instances, the wording of s 25 is used to support an individualised and fact-specific system of family justice.' Accordingly, Bailey-Harris concluded: 'For both practitioner and academic, the pattern of the law's development fails to please. It is impossible to predict when an articulated statutory principle will be seized upon in a judgement, or when a new sub-principle will be invented, or when the search for principle will simply be disclaimed.' As a Professor of Law and practicing Barrister, she falls into both category of the disappointed and, as such, her conclusions merit much weight. The more so given that her article ('*The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales*' IJLP&F 2005 19 (229)) was published before their Lordships delivered their speeches in *Miller/McFarlane*.

Approaching the issue of the division of surplus income in excess of need, the Law Lords held in *Miller/McFarlane* that the court should first consider what should be paid to the wife by way of periodical payments (or capitalised and paid as a lump sum if that was practicable) to meet

need. Those periodical payments (or capitalised lump sum) could then be supplemented, if appropriate, by a further compensatory element. As for the compensatory element, per Lord Nicholls of Birkenhead (at 15), 'Compensation and financial needs often overlap in practice, so double-counting has to be avoided. But they are distinct concepts, and they are far from coterminous.' In Mrs McFarlane's case, three facts converged to make it the paradigm case for a 'compensatory' award: there was insufficient capital to achieve a clean break; Mr McFarlane's income far exceeded the parties' generously interpreted needs; and Mrs McFarlane had herself given up significant employment expectations to care for the family.

The trouble with an auxiliary compensatory claim, though, is that it is loss and not entitlement related. Furthermore, paradigm cases tend to be rare with most far more finely balanced. Despite various skirmishes following the delivery of their Lordships' speeches, no doubt at significant expense, the fact is that, post *Miller/McFarlane*, compensation has for this very reason rather withered on the vine. Per Coleridge J in *RP v RP* [2006] EWHC 3409 (Fam), [2007] 1 FLR 2105, it is neither possible nor desirable to conduct a 'what if . . .?' exercise to reconstruct a couples' marriage on an entirely different basis from the reality.

LEGISLATIVE FAILURE

Bailey-Harris lays the blame for the unsatisfactory development of the law making not at the door of the judiciary, but rather at the failure of the legislature to reappraise and reform the existing statutory framework to develop an appropriate and consistent policy for the division of capital and income on divorce. In the absence of legislative review, it has been left to the House of Lords to fill the void; in the words of Lord Nicholls 'to get on with it for themselves'. It is unsurprising then that legal development has been disjointed and piecemeal. However, as Coleridge J warned in *RP v RP* '. . . care needs to be taken to ensure these passages [from *Miller/McFarlane*] are not treated as some kind of quasi statutory amendment. They are the commentary of the House of Lords on a very well trodden statute now in its fourth decade.' The point is underlined by the decisions in *Miller/McFarlane* and in *MacLeod*.

Miller/McFarlane saw the development of the law, for good or ill, to meet a lacuna left by the removal of the tailpiece to the 1973 Act and the lack of any replacement overriding objective to guide the judiciary. No such lacuna however exists in relation to ante and post-nuptial agreements, hence the approach taken by the Board of the Privy Council to the issues of status and enforceability of ante and post nuptial settlements. The Matrimonial Causes Act, s 34(2) defines maintenance agreements for the purposes of both ss 34 and 35 as being made 'between the parties to a marriage'. Furthermore, any provision in a maintenance agreement purporting to restrict any right to apply to a court is void under Matrimonial Causes Act 1973, s 34(1)(a); the statutory incarnation of the common law rule in *Hyman v Hyman* [1929] AC 601.

The Matrimonial Causes Act 1973, s 35 provides that any maintenance agreement is capable of variation by the court if either there has been a change of circumstances since the agreement was entered which would render it unfair or the agreement failed to make proper provision for a child of the family. Consequently, an ante-nuptial agreement is not a maintenance agreement capable of variation and remains contrary to public policy. As such its import is relegated to 'one of the circumstances of the case' where it will remain pending statutory reform.

Meanwhile, post nuptial agreements, whether made before the marriage had broken down (*MacLeod*) or afterwards (*Edgar v Edgar* [1980] All ER 887) have statutory legitimacy. Thus the provisions of the 1973 Act on the one hand precluded the Board of the Privy Council from holding that ante-nuptial agreements should be 'presumptively dispositive', whilst, on the other, enabled it to hold that post-nuptial agreements could be.

THE CASE FOR STATUTORY REFORM

While recognising that calls for the recognition of ante-nuptial agreements had increased following the 'development of more egalitarian principles of financial and

property adjustment on divorce', the Privy Council argued in *MacLeod* that: 'If such calls are motivated by a perception that equality within marriage is wrong in principle the more logical solution would be to examine the principles applicable to ascertaining the fair result of a claim for ancillary relief, rather than the pre-marital attempt to predict what the fair result will be long before the event.' For 'egalitarian principles', perhaps read the 'distributive principles' developed by their Lordships in *Miller/McFarlane*.

Root and branch reform is off the political agenda, at least as far as this Government is concerned. Instead the Law Commission is left looking to fight rather smaller battles; the status and enforceability of ante-nuptial agreements is of course included in its current programme. In his letter published in March [2009] Fam Law 265, Professor Chris Barton expressed the hope that the Commission's proposals 'will include a route to judge-proof certainty for pre-emptive private arrangements' rather than the 'hopeless, shifting, uncertainty of s 25 of the Matrimonial Causes Act 1973.' Meanwhile the search for fairness and certainty will remain costly as well as illusive.