MATTERS THE COURT TAKES INTO CONSIDERATION WHEN DECIDING WHO GETS WHAT IN MATRIMONIAL FINANCIAL APPLICATIONS

Section 25 Matrimonial Causes Act 1973 states that the duty of the Court when considering to exercise its powers and if so, and in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of 18 years.

In addition, the Court is required to have regard to the following matters:-

a) The income, earning capacity, property and other financial resources which each of the parties of the marriage has or is likely to have n the foreseeable future, including in the case of earning capacity, any increase in that capacity which it would in the opinion of the Court be reasonable to expect a party to a marriage to take steps to acquire;

b) The financial needs, obligations, responsibilities which each of he parties to the marriage has or is likely to have in the foreseeable future;

c) The standard of living enjoyed by the family before the breakdown of the marriage;

d) The age of each party to the marriage and duration of the marriage;

e) Any physical or mental disability of the parties of the marriage;

f) The contributions which each of the parties have made or is likely to make in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family.

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

In the House of Lords case of White and White it was held that in seeking to achieve a fair outcome in dividing the property of a divorced husband and wife, there was no place for discrimination between husband and wife and their respective roles. There should be no bias in favour of the money–earner as against the home maker and child carer. As a general rule, equality should be departed from only if and to the extent that there was a good reason for doing so. The need to consider and articulate reasons of departing from equality would help the parties and the Court to focus on the need to ensure the absence of discrimination. This was not to introduce the presumption of equal division under another guise, nor to use equality as a notional starting point but to use equality as a form of check, a yardstick against which to measure the Judge's award.

In this case the decision of the Court of Appeal to award the wife £1.5m was upheld in the House of Lords, but for different reasons. Those reasons now stand as the bedrock of financial provision. In other words, the importance of White far surpasses its context. The following propositions emerge from the speech of Lord Nicholls:

(1) Although MCA 1973, s 25 is couched in terms of the widest discretion, guidelines are needed to ensure consistency of judicial decision-making and to limit people's exposure to costs.

(2) The implicit objective of s 25 is to achieve a fair outcome, giving first consideration to the welfare of any children.

(3) Fairness is a flexible concept that can move with the times. But in current conditions, it means at the very least that there can be no discrimination between husband and wife and their respective roles.

(4) Thus, the mere fact that one spouse stays at home while the other goes out to work (or that any other division of labour is agreed upon) is immaterial:

'If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.'

5) Fairness generally implies equal division, although not invariably so. There will be many situations where, having carried out the s 25 exercise, the judge's decision means that one party will receive a bigger share of the assets. Inherited wealth may be such a case. But:

'Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.'

(6) There is however no presumption of equality, as there is in the Scottish system.

(7) Moreover, there is no warrant in the statute for elevating 'needs' above 'resources'. Insofar as earlier authorities limited a wife's claims to the ceiling of her 'reasonable requirements', they were wrong to do so.

'But I can see nothing, either in the statutory provisions or in the underlying objective of securing fair financial arrangements, to lead me to suppose that the available assets of the respondent become immaterial once the claimant wife's financial needs are satisfied. Why ever should they? If a husband and wife by their joint efforts over many years, his directly in his business and hers indirectly at home, have built up a valuable business from scratch, why should the claimant wife be confined to the court's assessment of her reasonable requirements, and the husband left with a much larger share? Or, to put the question differently, in such a case, where the assets exceed the financial needs of both parties, why should the surplus belong solely to the husband?'

(8) There is no rule of law that a party's wish to leave property to the next generation is irrelevant under s 25. On the contrary, the court should respect the wishes of both parties in this regard.
(9) It follows that the Duxbury calculation (which amortises a wife's income needs over her assumed life expectancy) has limited relevance in the Family Division, other than to capitalise an income stream where that is strictly required.

In another House of Lords case Miller and McFarlane the Court summarised the current position regarding basic principles to be considered when sorting out financial settlements between divorcing spouses:-

FINANCIAL PROVISION: **Miller v Miller; McFarlane v McFarlane [2006] UKHL 24**
(House of Lords; Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Baroness Hale of Richmond, Lord Mance; 24 May 2006) [2006] 1 FLR 1186

Basic Principles: the House of Lords, having considered the cases of Miller and McFarlane, identified three important principles which justified the redistribution of resources from one party to another following divorce: (1) the needs (generously interpreted) generated by the relationship between the parties; (2) compensation for relationship-generated disadvantage; and (3) the sharing of the fruits of the matrimonial partnership. These three principles could guide the court in making an award under Matrimonial Causes Act 1973 (the 1973 Act), although the court must be careful to avoid double counting. Which of the three would be considered first would depend upon the circumstances of the case. The ultimate objective was to give each party an equal start on the road to independent living.

Conduct: where there was no conduct which it would be inequitable to disregard under s 25(2)(g) of the 1973 Act, the court should not seek to weigh the parties respective conduct or attitudes in an attempt to assess responsibility for the breakdown of the marriage, or to attribute legitimacy or reasonableness to the wish of one party to continue the marriage against the wishes of the other.

Contribution: the question of contribution should be approached in much the same way as conduct. Only if there was such a disparity in the parties respective contributions to the welfare of the family that it would be inequitable to disregard it, should this be taken into account in determining their shares.

Periodical Payments: a periodical payments order could be made to afford compensation to a party as well as to meet their financial needs. A clean break was not to be achieved at the expense of a fair result; if a claimant was owed compensation and capital assets were not available the social desirability of a clean break was not sufficient reason for depriving the claimant of that compensation;. There was no reason to limit periodical payments to a fixed term in the interests solely of achieving a clean break. Given the high threshold which now applied to extending the term of a periodical payments order, it was not appropriate to make an order whose continuation the wife would have to justify, it should be for the husband to justify a reduction, at which stage the court could consider whether a clean break had become a realistic option.

Legitimate Expectation: while the standard of living enjoyed by the parties was to be taken into account as one of the matters included on the statutory checklist, hopes and expectations were not an appropriate basis on which to assess financial needs. Claims for expectation losses did not fit comfortably with the notion that either party was free to end the marriage.

Assets: the Lords disagreed concerning the treatment of certain assets in certain circumstances. Baroness Hale, with whom Lord Hoffman agreed, considered that in a matrimonial property regime which started, as the English system did, with the premise of separate property, there remained some scope for one party to acquire and retain separate property which was not automatically to be shared equally between them. She identified the concept of family assets, ie assets generated by the joint efforts of the parties, which would exclude not merely property brought with the individual into the marriage or acquired by inheritance during the marriage, but also business or investment assets generated solely or mainly by the efforts of one party during the marriage. The duration of the marriage might justify a departure from the yardstick of equality of division in relation to non-family assets, in terms of a reduction to reflect the period of time over which the domestic contribution had or would continue rather than in terms of accrual over time. The nature and source of the property and also the way the couple had run their lives might be taken into account in deciding how it should be shared. However, these arguments would be irrelevant in the great majority of cases and should not be taken too far. Lord Nicholls preferred to identify matrimonial property, ie the matrimonial home and property acquired during the marriage otherwise than by inheritance or gift, as against non-matrimonial property ie property which the parties brought with them into the marriage or acquired by inheritance or gift during the marriage. In his view, the equal sharing principle applied to matrimonial property regardless of the length of the marriage, whereas following a short marriage fairness might well require that the claimant would not be entitled to an equal share of the non-matrimonial property. In a longer marriage, non-matrimonial property represented a contribution made to the marriage by one of the parties whose weight would, in some circumstances, diminish, in others not. Exceptional earnings were a contribution to marriage which could justify departure from equality of division only when it would be inequitable to do otherwise. Lord Hope expressed no view on this point; Lord Mance identified some concerns about the concept of family assets, but identified himself with Baroness Hale's views on the possible relevance of the duration of the marriage and on the possible relevance of the principles by which the parties had chosen to live their lives while married.

Miller: in this case the needs generated by the relationship were comparatively small, as was the need for compensation, but the wife was entitled to some share in the assets, including the considerable increase in the husband's wealth during the marriage. Had the yardstick of equality been applied to all the assets which accrued during the marriage, the wife would have got more; there were however reasons to depart from the yardstick of equality, either on the basis that the substantial growth in the assets was attributable to contacts and capacities the husband brought to the marriage, or on the basis that the assets were business assets generated solely by the husband during a short marriage.

McFarlane: this was a paradigm case for an award of compensation in respect of the significant future economic disparity sustained by the wife, arising from the way the parties conducted their marriage. Equal division of the capital was not enough to provide for needs or compensate for disadvantage but unusually the husband's very substantial earning power was far in excess of the family's financial needs after separation. The wife, having given up her own highly-paid career for the family, was not only entitled to generous income provision, including sums which would enable her to provide for her own old age and insure the husband's life, she was also entitled to a share in the very large surplus, on the principles both of sharing and of compensation. The Court of Appeal should not have set a 5-year time limit on the order, which should be on a life basis.

The above is a statement of the current legal principles. How each couple's finances are resolved depends on each case but the above principles are taken into account when deciding who gets what. I can advise you how this will be applied in your particular case.

As regards the practicalities and process for sorting out financial matters, the parties will need to make full financial disclosure and this is likely to be by way of exchanging Form E which will contain financial details with copy documentation attached. Form E's are normally exchanged voluntarily to enable the parties to enter into negotiations to try and reach agreement. If agreement cannot be reached one party will issue an application to the court. The court will set a time table for formal exchange of form E's and will list the first hearing. If matters are fully contested it is likely to involve 3 hearings however at each stage the parties are encouraged and assisted in trying to reach agreement.

The first hearing is a First Directions Appointment (FDA) to ensure that all necessary documentation has been disclosed and whether any valuations or other matters need considering.

The second is a Financial Dispute Resolution (FDR) hearing when the parties are able to utilise the assistance of a judge on a without prejudice basis to try and assist parties reach agreement.

Lastly, if matters have not been resolved the case will be listed for a final hearing when the court would read the papers hear the evidence and decide the matter.

At any stage the parties can reach agreement and a consent order would be lodged at the court for the judges approval. If agreement is reached prior to issuing formal proceedings then no attendance at court is usually necessary.

I realise that being involved in divorce proceedings and trying to ensure that financial issues are resolved is a hugely emotionally draining and stressful experience. In a majority of cases I am able to advise and assist clients on an appropriate financial settlement without the need for contested Court proceedings, therefore reducing the emotional stress to the client and limiting the legal costs.