The Characterisation of Assets on Matrimonial Breakdown – The merits of a functional approach

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Development of ‘sharing’

• *White v White* [2000] UKHL 54
  • Compensation, need and sharing

• What assets should be subject to equal sharing? Was it applicable to some assets more than others? If so, what was the basis for sharing/excluding particular assets?
Miller/McFarlane

- Issue of categorisation was addressed – topical again!

- Lord Nicholls of Birkenhead
  - Community of acquests/Excluded assets model

- Baroness Hale of Richmond
  - Community of acquests
  - ‘Family assets’
  - ‘Family businesses’ or ‘joint business ventures’ in which both spouses made direct contributions
    - Business assets were otherwise excluded
Miller/McFarlane

- Rationale for sharing? (Cooke 2007; Miles 2008)

- Lord Nicholls’ approach appears to be founded on the principle of partnership

- Baroness Hale’s approach
  - Principle of partnership (narrower)
  - Contribution/valuation approach
Real role of partnership principles?

• Problem 1

• In *White v White*, Lord Nicholls noted:
  • ‘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?’
Real role of partnership principles?

- **Problem 2**
- The inclusion of non-matrimonial assets (i.e., pre-acquired, inherited, gifted) over time
- Lord Cooke of Thorndon in *White* cited Lord Simon of Glaisdale (re. former New Zealand legislation):
  - ‘Initially a gift or bequest to one spouse only is likely to fall outside the Act, because the other spouse will have made no contribution to it. But as time goes on, and depending on the nature of the property in question, the other spouse may well have made a direct or indirect contribution to its retention.’
Real role of partnership principles?

• **Problem 3**

• Role of partnership principles in English matrimonial property law generally?

• **Overall:**
  • Confusion!
  • Process of development eg British Columbia
  • Baroness Hale in *Miller*: ‘Ownership and contribution still feature in divorcing couples’ own perceptions of a fair result…’
Law Commission

• Consultation Paper on ‘Matrimonial Property, Needs & Agreements’ (Sept 2012)
  • Key elements of proposal
  • Justification?
  • ‘If what is being honoured by the sharing principle is the marriage partnership and the joint efforts of the couple concerned it is difficult to bring pre-acquired property into that reasoning’ (emphasis added)

• Crux: Need to share the right assets for the right reasons..... With honesty!
Proposal

• Expanded version of Baroness Hale’s approach

• John Eekelaar (2010) ‘standard deal’

• Top down (excluding assets) vs Bottom up (including assets)

• British Columbia
  • Family Relations Act 1996
  • Family Law Act 2011 (18th March, 2013)
Proposal

• *Family Assets*

• Rationale
  • Consequence of marriage (partnership)
• What is included?
  • Functional test – ‘ordinarily used for a family purpose’
  • Intention v use? (Law Commission)
• Date/mode of acquisition irrelevant
• Problems…. Offset by more detailed legislation? Contrary to Scottish experience!
Proposal

• **Quasi-Family Assets**
• Rationale
  • Contributions
• What is included?
  • Business assets where direct *or indirect* contributions are made
  • Seems to be contrary to Baroness Hale’s approach in *Miller*... but is it really?
  • Temporal accretion
  • Pre-acquired/inherited/gifted assets?
Proposal

- *Business Assets and Other Assets*
- No default sharing

- Reasons for departing from equal sharing
- Family Assets: Needs of children
- Quasi Family Assets: Needs of children/Temporal accretion result is ‘clearly unfair’
- Business Assets or Other Assets: Needs of children
Proposal

• Spousal needs or compensation? Relationship to property?

• British Columbia Law Commission (1989):
  • ‘Requiring that [the need for economic independence and self-sufficiency] be taken into account when dividing family property blurs the distinction between property rights and maintenance obligations. One may easily question whether [this factor] has any relevance in determining entitlement to property.’
Family Home

• Huge importance: financial, emotional etc.
  • Lord Nicholls

• Not all appear to be in favour of special protection for the home....

• Baroness Hale
  • Limited family assets to those acquired with the intention of providing for the family...?

• British Columbia – possible indirect protection in 2011 Act

• Law Commission for England and Wales – undecided
Conclusion

• ‘Harder sell’!
• Simple to calculate vs theoretically sound & better correlation between reason for sharing and assets included.

• Key issues:
  • Family Home
  • Indirect contributions in the home