How the courts approach finances

The courts have changed the way they look at finances in recent years. The law is still developing case on case as each month goes by. It is very difficult – particularly for wealthy families – to predict what will happen in any particular case.

The courts have very wide powers when making financial orders. Parliament has given the courts a menu of orders that it can make, but there is no limit on the figures or percentages involved. That is up to the judge's discretion.

Parliament has also given the courts a prescribed list of things to consider. These are pretty much what you would expect. For example, the courts have to consider whether the marriage is a long one or a short one. That obviously makes a difference, certainly if money has been brought into the marriage.

Again, the courts have to look at the financial needs of children. These are a priority. They also look at the overall financial resources. The first stage in any discussions or court proceedings is to go through the financial resources. Everything has to be looked at in detail. We have set this out in the website, though of course each case is different.

Recent developments – division of assets

In October 2000, the House of Lords reviewed this area of law. It was a farming case called *White v White*. The court declared that the courts until that point had been taking the wrong approach: they had been discriminatory towards women.

The correct approach was to look at the list of considerations and then apply the "yardstick of equality". This should ensure that there is no discrimination between the traditional contributions of husband and wife, between the role of the breadwinner and the role of the homemaker or person bringing up the children.

What does all this mean in practice?

After much debate over many months and in several leading cases, the Court of Appeal concluded in the case of *Lambert v Lambert* that – yes – assets built up during the marriage should be divided equally. However, that would be impractical for most families, whose capital does not comfortably provide two homes. The housing needs of a mother and children will still be the trump card. They may well need more capital than the husband. In return, he may be able to keep more of his pension or he may get some of the capital back later, when the children are grown up.

So far so good, but a number of questions remained:

- How should income be divided – does the yardstick of equality apply to that?
- What happens to inheritances and money that has been brought into a marriage?
- What happens in short, childless marriages?
- What happens to businesses?

On inheritances, the courts came to a consensus: property or money received by way of inheritance should not be "ring-fenced" or excluded from the family pot. They should be considered a financial resource, though these would justify the courts moving away from an equal division, perhaps to 35:65 or 40:60.

Unless, that is, the needs of the parties dictate otherwise. Again, the key factor of "needs" is the trump card.
But, while this consensus was being achieved in the High Court and the Court of Appeal, two other cases were grinding their way through the system to the House of Lords – the cases of *Miller v Miller* and *MacFarlane v MacFarlane*.

House of Lords – *Miller* and *MacFarlane* – May 2006
These were two very different cases.

Melissa Miller had been married to her husband, Alan, only for a short period of time: under three years. She had been pregnant, but very sadly lost the baby. It was at that point that their marriage came to an end.

She was awarded a very substantial amount by the first judge to hear the case. Her husband, Alan, appealed – all the way to the House of Lords – to have this reversed. He argued that he had brought the wealth into the marriage and that Melissa had received much more than she needed.

Julia MacFarlane on the other hand had been married to her husband, Ken, for a long time. She had given up her career as a City solicitor, and Ken was earning around £750,000 per annum after tax as a successful accountant. The first judge to look at her case gave her 38 per cent of the income for herself and generous child maintenance and school fees on top of this. On the first appeal, her maintenance was reduced and there were arguments about whether or not it should be generous enough to allow her to make savings. On the second appeal, she was told that it would come to an end after four years – an unusual step, since women tend to receive open-ended maintenance if they have families to bring up.

The House of Lords said that there were three principles that the courts should look at:

- the needs of the parties are crucial;
- marriage is a partnership, so what is built up should be shared; and
- there should be compensation for careers that have been lost because of commitment to the family.

The first two principles seemed to consolidate what the courts had said before. The third principle, relating to compensation, remains controversial.

The House of Lords also put great emphasis on categorising assets into matrimonial assets, which have built up during the marriage, as distinct from non-matrimonial assets, which have been brought into the marriage or inherited.

Unfortunately, the House of Lords could not agree any more than that, and a number of areas remain very uncertain:

- Are non-matrimonial assets now treated separately, or does that merely produce a reduction from 50:50 as before?
- Julia MacFarlane's maintenance was restored to being open ended – does that now mean it is more difficult to impose restrictions than before?
- Are clean breaks more difficult to achieve?
- In what circumstances should a "special contribution" justify a departure from 50:50?

Sadly, we are left in a state of uncertainty. The case of *Charman v Charman* has provided some guidance in the Court of Appeal, but that was a case involving enormous wealth.

For most people, housing and income needs will be the main focus. It is for families whose net worth is more than £4 million or £5 million where the serious questions remain.

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