What's mine is yours — until there's a divorce

By David Pannick, QC

IT IS a truth universally acknowledged that a single man or woman in possession of a good fortune must be in want of legal advice, as a result of the judgment of the Appellate Committee of the House of Lords in Miller v Miller last month on the financial provision to be made between a married couple on divorce.

Alan and Melissa Miller were married for two years and nine months. They had no children. On their separation, Mr Miller was aged 39 and Mrs Miller 33. He had a very successful career in asset management and is very rich. In the High Court, Mr Justice Singer awarded Mrs Miller the former matrimonial home worth £2.3 million and a lump sum of £2.7 million. The House of Lords dismissed Mr Miller's appeal, essentially for two reasons: first, because of the substantial increase in the wealth of Mr Miller during the marriage; and secondly because of the high standard of living enjoyed by the parties while the marriage lasted.

As the House of Lords emphasised, the problem in most divorces is to meet the financial needs of both parties, and any children, from the family assets. But big-money cases often come before the courts and so judges need to identify principles for allocating funds surplus to the reasonable requirements of the spouses.

The first problem is that "fairness is an elusive concept", as Lord Nicholls of Birkenhead observed. Identifying what fairness requires is a problem that has troubled moral philosophers, who have all week to think about it, from Aristotle to Rawls.

The second difficulty faced by family law is that the courts have excluded from consideration in other than in exceptional cases one of the most important factors in assessing fairness: who was to blame for the breakdown of the marriage. Such factors are legally relevant only where the conduct is "obvious and gross". This is primarily for practical reasons: an outsider cannot easily identify who was more to blame for what went wrong. This is far from convincing in principle. Judges every day consider and determine complex and highly contentious facts and make findings as to what happened and why. But the policy of the law to deter judicial assessments of other people's dirty laundry (no matter how fascinating it may be) is understandable.

There is a third problem for family law. Baroness Hale of Richmond for the House of Lords has now said that in assessing fairness, the respective contributions made by the spouses should be treated in the same way as their conduct: they should be presumed to be equal in other than exceptional cases. Again, the law is ahead of the general understanding of fairness. Lady Hale acknowledged that so strong are the general perceptions in the country at large that the size of the share of the assets awarded to the non-working spouse should be linked to the length of the marriage that "it could be unwise for the law to ignore them completely".

In White v White in 2000, the law lords adopted, in relation to a marriage that lasted 33 years, a general principle of non-discrimination. Lord Nicholls stated that because the parties to a marriage have committed themselves to sharing their lives, the law regards it as unfair discrimination to value the business contribution

of one spouse more highly than the domestic contribution of the other spouse. On the breakdown of the relationship, they must be entitled to “an equal share of the assets of the partnership, unless there is a good reason to the contrary”. Miller v Miller clarifies that the same principle applies to short marriages.

The Miller case was, however, a wasted opportunity. The judgments involve compromises and unclear exceptions that will inevitably result in awards that are impossible to explain on any rational basis. The law lords should have stated, for reasons of principle and for the pragmatic reasons of promoting clarity and certainty, that on the ending of a marriage (whatever its duration) all the assets of the two partners, surplus to their reasonable requirements, should be split equally. For better, for worse, for richer, for poorer. With all my worldly goods I thee endow — unless we get divorced, in which case we share the lot.

To address any general perceptions of unfairness in such a solution, the law lords should have made clear that there is one other principle that would take priority. The parties to a marriage, as adults, can if they so wish enter into a prenuptial agreement to adopt a different disposition of their surplus assets in the event of a divorce, with the courts upholding such an agreement as they would any other contract. If a married couple decide not to enter into such an agreement, the law should not encourage wealthy husbands (and, increasingly, some wealthy wives) to think that they can maintain the same relationship with their bank accounts till death us do part.

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