

The Miller's Tale : Short Marriages – The Case for Pre-Nuptial Agreements

Introduction

The popular press has had a field day with the case of Alan and Melissa Miller. The facts are glamorous, the figures large and there is a moral to the story – rich men should beware short marriages. The likely award to a wife has just become greater!

The Facts

Mr Miller was 41 and Mrs Miller 36. They had no children together and they were married for less than three years. Melissa Miller gave up her £85,000 per annum job to divide her time between their newly acquired Chelsea town house and their villa in the South of France. Alan Miller was a very successful fund manager who earned up to £1 million a year. The house in Chelsea was valued at around £2.3 million and in March 2000 Mr Miller received £20 million following the sale of his previous employer company. He also owned 200,000 shares, which he received after joining his new employer. The shares were potentially worth a further £20 million. The court awarded Melissa Miller the Chelsea house and a £2.7 million lump sum - £5 million for a marriage of less than 3 years. Mr Miller appealed but in 2006 the House of Lords confirmed the award to his former wife.

The Law

So what does all this mean for the ordinary couple caught up in a short marriage, without children, which is in difficulties and where a divorce is contemplated?

As in any other matrimonial breakdown, the court will look at the asset base of the parties and apply the factors in Section 25(2) of the Matrimonial Causes Act 1973. It will then come to a decision based partly on previous case law - including *Miller v Miller*.

There is no doubt among practitioners that since the case of *White v White* in 2001 there has been a sea change in the way courts deal with financial awards between parties. *Miller* is a further step down the line of change. Generally the wife is the party, who has benefited, as her non-monetary contributions and sacrifices have been placed on an equal footing with the husband's financial contribution.

In *Miller* the House of Lords said that the three principles that should guide the court when making a financial award were:-

- Need
- Compensation for relationship-generated economic disadvantage; and
- Sharing of the financial fruits of the matrimonial partnership.

The House of Lords drew a distinction between property which the parties bring with them into a marriage or acquire by inheritance or gift during the marriage (non-matrimonial property) and 'the financial product of the parties' common endeavour' (matrimonial property). The matrimonial home, even if brought into the marriage at the outset by one of the parties, should normally be treated as matrimonial property. Business or investment assets generated solely or mainly by the efforts of

one party during the marriage may be considered non-matrimonial, for example in a genuine dual career family, where each party worked throughout the marriage, certain assets may have been pooled for the benefit of the family but others not.

The House of Lords said that the principle of equality of division applies generally to matrimonial property but is not so readily applicable to non-matrimonial property, particularly after a short marriage. In the case of a short marriage, fairness may require that one party should not be entitled to a share of the other's non-matrimonial property.

In the High Court case of *Rossi v Rossi* in 2006, Nicholas Mostyn QC, sitting as a Deputy Judge, set out a series of principles derived from recent cases. He stated that matrimonial property in all likelihood will be divided equally but this may be deviated from if the marriage is short and part of the property is non-business partnership and non-family assets. In a short marriage non-matrimonial property is unlikely to be shared unless needs require.

The property should generally be valued at the date of trial. Where an asset has increased in value due to the effort of one party between separation and trial, independently of any contribution by the other party, the increase may belong to that party alone. In *Rossi* it was held that passive economic growth on matrimonial property (for example an increase in the value of the matrimonial home) that arises after separation will be considered matrimonial property.

Pre-nuptial Agreements

Can a pre-nuptial agreement protect assets from *White* equality and *Miller*-type division in short marriage cases?

Pre-nuptial agreements are not currently enforceable under English law. However they will be taken into account by the court, particularly in short marriages, where there are no children and where one party has brought into the marriage far more substantial assets than the other party and is using the pre-nuptial contract to try to protect those assets. There have been cases in which pre-nuptial agreements have been taken into account by the court and have been upheld. In the recent case of *K v K* the court largely upheld a pre-marital agreement on the basis that the court had to consider 'all the circumstances of the case' and that the agreement constituted conduct which it would be unfair for the court to ignore.

Pre-nuptial agreements are more likely to be upheld by the court if:-

- The parties were independently and professionally advised
- The parties were under no unreasonable pressure to sign
- There have been no unforeseen changes of circumstances which would make it unfair to hold one party to the agreement; and
- There is no injustice to either party.

The Government's position is set out in a consultation document. While it did not suggest that such agreements become mandatory, it felt that they should be allowed subject to six 'safeguards'. If one or more of the following were found to apply, a pre-nuptial agreement would not be legally binding:-

- Where there is a child of the family, whether or not the child was alive or a child of the family at the time the agreement was made

- Where under the general rule of contract the agreement is unenforceable, including if the contract attempted to lay an obligation on a third party who had not agreed in advance
- Where one or both of the parties did not receive independent legal advice before entering the agreement
- Where the enforcement of the agreement would, in a court's opinion, cause significant injustice to one or both of the couple or a child
- Where one or both of the couple failed to give full disclosure of assets and property before the agreement was made;
- Where the agreement was made fewer than 21 days prior to the marriage.

Conclusion

The wide discretion granted to the courts, and the emphasis on applying the Matrimonial Causes Act factors to the circumstances of each case, has made it difficult to predict the outcome of ancillary relief cases. Recent cases have moved in the direction of equality of division. In short marriages the principle of equality of division will be applied to matrimonial property but may not be applied to non-matrimonial property.

The popularity of pre-nuptials is on the increase. With greater use, we expect to see more recognition of them in the courts, particularly where they adhere to the guidelines set out above.

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This briefing note is not intended to be an exhaustive statement of the law and should not be relied on as legal advice to be applied to any particular set of circumstances. Instead, it is intended to act as a brief introductory view of some of the legal considerations relevant to the subject in question.