“What is the Measure of Maintenance?” How does the court quantify spousal periodical payments?

Alexander Chandler, of 1 King's Bench Walk, considers the court's approach to quantum of maintenance post Charman and Miller

Alexander Chandler, 1 King's Bench Walk

It is not easy to advise on quantum in an area of law as discretionary as ancillary relief. Thirty years ago, Ormrod LJ commented:

> *"I appreciate the point [counsel] has made, namely it is difficult for practitioners to advise clients in these cases because the rules are not very firm. That is inevitable when the courts are working out the exercise of the wide powers given by a statute like the Matrimonial Causes Act 1973. It is the essence of such a discretionary situation that the court should preserve, so far as it can, the utmost elasticity to deal with each case on its own facts. Therefore, it is a matter of trial and error and imagination on the part of those advising clients. It equally means that decisions of this court can never be better than guidelines. They are not precedents in the strict sense of the word." Martin (BH) v Martin (D) [1978] Fam 12 at 20B-E*

However, this has not stopped the higher courts from trying to inject some backbone into the process. In Miller; McFarlane [2006] UKHL 24, [2006] 2 AC 618, Baroness Hale declared:

> *"There is much to be said for the flexibility and sensitivity of the English law of ancillary relief. It avoids the straitjacket of rigid rules which can apply harshly or unfairly in an individual case. But it should not be too flexible. It must try to achieve some consistency and predictability. This is not only to secure that so far as possible like cases are treated alike but also to enable and encourage the parties to negotiate their own solutions as quickly and cheaply as possible" Miller; McFarlane, para. 122*

In Miller; McFarlane, the Lords declared that the overarching objective of a fair outcome required the court to consider three distributive principles: the parties' relationship-generated needs (generously interpreted), compensation for relationship-generated disadvantage and sharing of the financial fruits of the relationship. The latter was described by the Court of Appeal in Charman v Charman (No. 4), [2007] EWCA Civ 503, [2007] 1 FLR 1246 as the 'equal sharing principle', i.e. "…that property should be shared in equal proportions unless there is good reason to depart from such proportions"[1].

Applying these principles has led to a degree of consistency in ancillary relief, at least with respect to the division of capital assets. In L v L [2008] 1 FLR 142, the court summarised the post- Miller; McFarlane and Charman (No. 4) approach as follows:

> *"First, I must determine what are the assets and general financial position of the parties. Secondly, I must decide how all the property of the parties should be shared between them. That property should be shared equally between them unless there is good reason to the contrary. Thirdly, I must decide whether the result produced by the application of the sharing principle meets the needs of the parties. Those needs should be generously interpreted. It is only if the result of the application of the sharing principle fails to meet the needs of the parties that those needs will dictate a greater share of the property than that produced by the application of the sharing principle", per Richard Anelay QC (sitting as a Deputy High Court Judge), L v L, para. 15*

But where does this leave maintenance? In cases which cannot be resolved on a clean break basis, what guidelines should the court have in mind in quantifying the level of spousal periodical payments? Should the court have regard to the 'yardstick of equality' or even an 'equal sharing principle' or does the court in fact exercise what amounts to a free hand in its discretion?

When a client asks 'How much maintenance am I likely to pay?' or 'How much maintenance am I likely to receive?', can the honest answer ever be anything other than 'it's a wide bracket of possibilities? (a.k.a. 'I don't know')'.

The Applicable Guidelines
'Needs'
In most cases, the search for fairness begins and ends with a consideration of the first distributive principle, i.e. "…the needs (generously interpreted) generated by the relationship between the parties"[2]. In the words of Bennett J, this will generally be the 'factor of magnetic importance'[3].

> *"…In the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close as possible to the standard of living which they enjoyed during the marriage" Baroness Hale, Miller; McFarlane, para. 138*

The court weighs the available income from all sources including tax credits and state benefits against the parties' needs, having regard to the parties standard of living during the marriage and giving due weight to such other of the MCA s 25(2) factors as may be relevant. For example, a short childless marriage is likely unlikely to result in anything other than very short term maintenance (if a clean break is not possible).

The emphasis on 'generosity' suggests that, where there is ample income, the court should not be over-exacting when it comes to the parties' schedules of outgoings. But, like the overarching aim of "fairness", "generosity" is a subjective and "elusive concept"[4] that provides no quantifiable guidance as to the court's proper approach.

In practice, it is often overlooked that Form E requires a statement of "current income needs" and an explanation if these are likely to change in the near future, as opposed to a hopeful list of future outgoings, especially where they are pitched at several times the parties' combined incomes. A good example of the 'aspirational' approach to case preparation is McCartney v Mills McCartney [2008] EWHC 401 (Fam), [2008] 1 FLR 1508, in which the wife asserted a need of £3.25m pa including:

> *"…seven fully staffed properties with full-time housekeepers in the annual sum of £645,000… holiday expenditure of £499,000 pa (including private and helicopter flights of £185,000), £125,000 pa for her clothes, £30,000 pa for equestrian activities (she no longer rides), £39,000 pa for wine (she does not drink alcohol), £43,000 pa for a driver, £20,000 pa for a carer, and professional fees of £190,000 pa"[5]*

The final outcome (with which the wife said she was 'delighted') was an award of income fund of £14m based upon income needs of £600k pa, less than one-fifth of the outgoings she had relied upon.

The assessment of needs is essentially an exercise of judgment and discretion. It gives the court sufficient discretion that in a case where horses had formed a major part of the wife's life, maintenance was awarded at a level sufficient for her to keep of two horses (S v S [2008] EWHC 519 (Fam), [2008] 2 FLR 113). In any given case, experienced practitioners and judges may have a gut instinct for the quantum, but more general rules cannot be drawn out:

"One of the frustrations of family law, as well as one of its fascinations, is that no two cases are ever the same. Since the essence of any judicial discretion lies in its application to particular facts, and since each case requires its own particular resolution, the concept of fairness becomes, essentially a matter of judgment" Ward LJ, B v B (Ancillary Relief) [2008] EWCA Civ 284, [2008] 2 FLR 1627, para. 54

> *"…attempting to expose and explain the underlying principles, one is reminded of a frenzied butterfly hunter in a tropical jungle trying to entrap a rare and elusive butterfly using a net full of holes. As soon as it appears to have been caught it escapes again and the pursuit continues"[6] per Coleridge J, Charman v Charman (No 2) [2006] EWHC 1879 (Fam), [2007] 1 FLR 593, para. 111*

Compensation for relationship-generated disadvantage
The second distributive principle in Miller; McFarlane was 'compensation for relationship-generated disadvantage', of which Mrs McFarlane presented a 'paradigm case' by dint of having given up her job as a City solicitor. The Lords declared that an order for maintenance could be made for the purpose of affording compensation where the recipient's needs had already been met, but acknowledged that this might overlap with needs: care should be taken to avoid double-counting[7].

Since Miller; McFarlane 'compensation' has noticeably failed to set the courts alight, and compensation-based cases have failed in a number of reported decisions[8]. However, on occasion the principle has led to an increase in the award, notably in Lauder v Lauder [2007] EWHC 1227 (Fam), [2007] 2 FLR 802, where the level of maintenance was increased to £60,000 on appeal (subsequently capitalised):

> *"Her caring role within the family inevitably affected her ability to generate income or assets as she grew older. When this marriage came to an end, she was past the age of being able to start a career anew.", per Baron J, para. 67*

> *"This wife cannot claim to be a Mrs McFarlane, but there can be little doubt that the length of the marriage and her age at separation put her at severe disadvantage in the labour market", per Baron J, para. 69*

A number of helpful propositions with respect to compensation have been set out by Sir Mark Potter P in the case of VB v JP [2008] EWHC 112 (Fam); [2008] 1 FLR 742, including:

> *"…on the exit from the marriage, the partnership ends and in ordinary circumstances a wife has no right or expectation of continuing economic parity ('sharing') unless and to the extent that consideration of her needs, or compensation for relationship-generated disadvantage so require. A clean break is to be encouraged wherever possible."*
>
> *"…in big money cases, where the matrimonial assets are sufficient for a clean break to be achieved, a wife with ordinary career prospects is likely to be have been compensated by an equal division of the assets and consideration of how the wife's career might have progressed is unnecessary and should be avoided…"*
>
> *"in cases other than big money cases, where a continuing award of periodic payments is necessary and the wife has plainly sacrificed her own earning capacity, compensation will rarely be amenable to consideration as a separate element in the sense of a premium susceptible of calculation with any precision. Where it is necessary to provide ongoing periodical payments for the wife after the division of capital assets insufficient to cover her future maintenance needs, any element of compensation is best dealt with by a generous assessment of her continuing needs unrestricted by purely budgetary considerations"*[9]

Accordingly, where a case for 'compensation for relationship-generated disadvantage", can be made out, the correct approach is to be 'more generous', and not to seek recovery under a separate head of claim. Compensation is not a concept that can be calculated with any precision.

Equal sharing?
The judgment of the President in VB v JP refers back to a critical passage in the opinion of Baroness Hale in Miller; McFarlane:

> *"In general, it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal start on the road to independent living"*[10]

In other words, whilst a maintenance order should address needs and potentially, compensation, there is no separate cross-check of equality. The marital partnership normally ends on divorce, and the fruits of the

matrimonial partnership shall not be divided unless required by the parties' needs or compensation.

In McFarlane; Parlour[11] (a decision subsequently overturned in the Lords), Thorpe LJ offered the following rationale why there should be no cross-check of equality for maintenance:

> *"The cross-check of equality is not appropriate for a number of reasons. First, in many cases the division of income is not just between the parties, since there will be children with a priority claim for the costs of education and upbringing. Secondly, Lord Nicholls of Birkenhead suggested the use of the cross-check in dividing the accumulated fruits of past shared endeavours. In assessing periodical payments the court considers the division of the fruits of the breadwinner's future work in a context where he may have left the child-carer in the former matrimonial home, where he may have to meet alternative housing costs and where he may have in fact or in contemplation a second wife and a further child." per Thorpe LJ, McFarlane, Parlour at para. 116*

Attached schedule of cases
A schedule of reported cases that deal with maintenance or the capitalisation of maintenance post-Miller; McFarlane is attached. If this illustrates anything, it is just how fact-specific and inconsistent are decisions as to the quantum of maintenance. The schedule should also be read with the caveat that clear findings are not always obvious as to the level of income upon which the orders are made.

Some tentative conclusions
The potted history of ancillary relief runs something like this: for a generation, the court sifted wives' reasonable from their unreasonable requirements, and left the balance with 'bread-winning' husbands. The potential unfairness and discrimination of this approach was exposed in by the Lords in White v White [2000] UKHL 54 [12]. The abandonment of the criteria of 'reasonable requirements' (which at least had the merits of being fairly predictable) left a vacuum which was filled by the yardstick of equality (now the equal sharing principle), but which does not apply to maintenance claims.

Without the cross-check either of equality or reasonable requirement, the assessment of maintenance falls back on a broad discretionary approach to the generous interpretation of needs.

Several regrettable conclusions can be drawn:

> *i) There is no reliable measure against which maintenance should be estimated: neither 'reasonable requirements' or 'equality' are appropriate cross-checks for the quantification of maintenance;*

ii) The legal guidelines are subjective and imprecise, i.e. 'needs (generously interpreted)' and 'a more generous' assessment in compensation cases;

iii) At worst, these guidelines encourage parties to over-egg their own schedules of outgoings and produce budgets that often bear little relation to the standard of living enjoyed during the marriage, and in some cases exceed the combined incomes of the parties;

iv) Case law provides no precedent and little assistance as to quantum: each case depends on its own facts, and little assistance can be found in any of the practitioner manuals dealing with family law;

v) Contrary to the stated intention of the Lords in Miller; McFarlane to make the law more consistent and predictable, maintenance remains an area of law in which judgment and gut instinct – informed by a consideration of the factors at s25(2) of the MCA 1973 – are uppermost;

vi) Since assessment of maintenance involves a close examination of the figures, 'a fine sable rather than a broad brush'[13], it is often difficult for a District Judge at FDR to give more a clear view as to the likely quantum of any order;

vii) In capitalisation cases, the potential uncertainty is magnified: firstly due to the exponential effect of capitalising the base figure, and secondly with the different methods of capitalising (e.g. Duxbury[14], Frick[15] or a more 'simplistic' approach)

A possible solution
There is no obvious and easy solution to the problem and other jurisdictions, including many US States, allow a wide discretion with respect to spousal maintenance whilst applying fixed percentages for child maintenance.

But, at least for modest asset cases, the court could compare the parties' net positions once fixed and essential outgoings (mortgage/ rent, utilities, food, children's expenses etc.) are met. These are often in inverse proportion to the capital split: e.g. where a husband obtains a smaller share of the capital assets, his fixed outgoings (mortgage etc.) will generally be significantly higher than his ex-wife. A provisional view on maintenance could be measured against the 'yardstick' or 'cross-check' that the parties are left with equal amounts of surplus income after essential expenses are met.

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1. Per Sir Mark Potter P, Charman (No. 4) at para. 65
2. Miller; McFarlane, headnote, para. 1
3. Bennett J, McCartney v Mills McCartney [2008] EWHC 401 (Fam); [2008] 1 FLR 1508 at para 311
4. Lord Nicholls, Miller; McFarlane, para. 4
5. Para. 212
6. Coleridge J, Charman v Charman (No 2) [2006] EWHC 1879 (Fam), [2007] 1 FLR 593, para. 111
7. Lord Nicholls, Miller ; McFarlane para. 15
8. For example, see RP v RP [2006] EWHC 3409 (Fam); [2007] 1 FLR 2105, S v S (Ancillary Relief After Lengthy Separation) [2006] EWHC 2339 (Fam); [2007] 1 FLR 2120, H v H [2007] EWHC 459 (Fam); [2007] 2 FLR 548, CR v CR [2007] EWHC 3206 (Fam); [2008] 1 FLR 323 McCartney v Mills McCartney [2008] EWHC 401 (Fam); [2008] 1 FLR 1508
9. Para. 59
10. Baroness Hale, Miller; McFarlane para. 144
11. McFarlane v McFarlane; Parlour v Parlour [2004] EWCA Civ 872, [2004] 2 FLR 893, per Thorpe LJ para. 116. The Court of Appeal's decision (imposing a five year term) was disapproved by the House of Lords in Miller; McFarlane,
12. White v White [200O] UKHL 54; [2000] 2 FLR 981
13. Paraphrasing Thorpe LJ in Parra v Parra [2002] EWCA Civ 1886, [2003] 1 FLR 942 at para. 22
14. Duxbury v Duxbury [1987] 1 FLR 7; see tables in At A Glance
15. F v F (Ancillary Relief: Substantial Assets) [1995] 2 FLR 45, considered in McCartney v Mills McCartney
16. e.g see NA v MA [2007] 1 FLR 1760

Schedule of Cases

Case	*Duration, Children*	*Capital Division*	*Incomes*	*Quantum*	*Notes*
McFarlane v McFarlane [2006] 1 FLR 1189	*16 years, 3 children*	*50/50 of £3m*	*H: £753k, W: Minimal*	*Pp order £250k pa [c. 33%], Child pps on top*	*W a 'paradigm' case for application of compensation*
S v S (Ancillary Relief after Lengthy Separation) [2007] 1 FLR 2120	*18 ½ yrs, No children*	*FMH plus £1.1m secured.*	*H: £287k, W: "very modest"*	*Pp order £75k pa plus mortgage of c. £17k = £92k pa [c. 31%]*	
NA v MA [2007] 1 FLR 1760	*6 ½ years + 6 years cohab. 2 children*	*£9.17m out of £40m, clean break*	*H: ??? No finding [£188k or >£1m?], W: None.*	*Capital split included income fund of £4.5m on basis of £240k pa. [% N/A]*	*'Simplistic' approach to capitalisation (£240k x 18 yrs = £4.5m).*
RP v RP [2007] 1 FLR 2105	*14 years, 2 children*	*60 [W] /40 including income fund. Clean break.*	*H: In flux - est. £150,000 within 5 years. W: £15k capacity.*	*Capital split included income fund of £325k on basis of £50k pa. [% N/A], Child pps of £12k on top.*	*Income fund calculated on Duxbury basis, included in W's 60% split.*

Schedule of Cases

Case	*Duration, Children*	*Capital Division*	*Incomes*	*Quantum*	*Notes*
Lauder v Lauder [2007] 2 FLR 802	*24 years (to 1985), 3 children. Variation application*	*/ (£5m total assets)*	*H £200k net pa. W income £9k*	*S. 31(7B) order capitalising pps: £725k based upon £60k pa or [c. 30%]*	*Included element of compensation*
CR v CR [2008] 1 FLR 323 19/6/07	*24 years, 2 children*	*50/50 of £16m plus further lump sum of £1m, clean break.*	*H: £1m net pa. W: Nominal.*	*Capital split included income fund of £5m, based upon £160k pa or [c 16%] Child pps (£20k pa) on top.*	*Income fund of £5m more generous than Duxbury calculation of £3.59m*
L v L [2008] 1 FLR 26 29/6/07	*10 ½ yrs, two children*	*42 (W) /58 of £6.1m, clean break.*	*H: £296k net pa. W: No immediate earning capacity.*	*Capital split included income fund of £1.3m based upon £55k pa [c 18%]. Child pps on top.*	*"Broad approach" taken to W budget*
VB v JP [2008] 1 FLR 742	*11 year marriage (Variation application)*	*(60 [W]/40 at time of divorce)*	*H >£450k pa*	*Pps increased from £33k to £65k pa [c 14.4%]*	*Compensation should lead to 'more generous' approach.*
McCartney v Mills McCartney [2008] 1 FLR 1508	*4 years. One child*	*£24.4m of £400m, clean break.*	*H: £5.35m*	*Capital split included income fund of based upon £600k pa [c 12%]*	
S v S [2008] 2 FLR 113	*11 years, no children*	*50/50 of £3m*	*H: £145k to 185k net. W: £32k*	*Pp order £50k [c 28 to 34% of H income, but 37 to 46% of overall incomes]*	*H's income sufficient to keep up life with horses*

Schedule of Cases

Case	*Duration, Children*	*Capital Division*	*Incomes*	*Quantum*	*Notes*
H v H [2008] 2 FLR 2092	*15 years, two children*	*£1.5m of c £4.5m to W*	*H £250k*	*Pps at £60k plus child pps at £20k and school fees at £45k to £60k*	