As Lord Nicholls observed, "Divorce creates many problems". Not least of these is determining the basis on which property should be divided between divorcing spouses, a problem with which the House of Lords had to grapple for the first time in *White* v. *White* [2000] 3 W.L.R. 1571. The case required consideration of the principles which should guide exercise of the discretion under the Matrimonial Causes Act 1973 to make capital awards, in particular in so-called "big money" cases. But the decision invites discussion of issues extending beyond the concerns of the super-rich.

The Whites had been married for over 30 years. As well as raising three children, they had run a farming business, each contributing equally to its success. One of their farms, purchased in part with an interest-free loan from Mr. White's father, was held jointly. The other, acquired partly thanks to Mr. White senior's generosity, belonged to Mr. White alone, though the partnership farmed it. Each party had private pension assets. Needless to say, the net worth of the assets substantially exceeded the sums required to meet both parties' housing and income needs.

An immediate clean break having been agreed, the dispute related to the basis on which the assets should be split. Several questions arose. What significance should be attached to the contributions made by the parties to the business and the family? Was Mrs. White entitled to an equal share of the assets? What were, and what was the relevance of, Mrs. White's "reasonable requirements"?

It is a notable—and criticised—feature of the current law that it specifies no overarching principle or objective to guide the ancillary relief exercise. In the absence of explicit legislative guidance, Lord Nicholls' leading speech unsurprisingly identifies fairness as the judicial lodestar. More specifically, he insists there is "no place for discrimination between husband and wife in their respective roles". If one spouse acts as home-maker and child-raiser while the other goes out to work, and each in their different spheres contributes equally to the family, "then in principle it matters not which of them earned the money and built up the assets ... As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so."

What constitutes such "good reason"? Perhaps the concept of "reasonable requirements". This concept had come to dominate big money cases, a capital ceiling being set by applicants' "reasonable requirements", regardless of how small was the share of assets thereby allocated (*e.g. Dart* v. *Dart* [1996] 2 F.L.R. 286, though the

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Court of Appeal expressed reservations about the concept's influence). Lord Nicholls rejects that approach. It departs from the statute—financial needs are just one of several factors in the checklist, along with available financial resources and the applicant's contributions to the marriage—and discriminates against home-makers. Where the parties have built up a fortune from scratch, each contributing in their different ways, then "where the assets exceed the financial needs of the parties, why should the surplus belong solely to the husband"? Whilst there will sometimes be grounds to cater only for the applicant's needs—Lord Nicholls gives no guide as to what those grounds might be—mere absence of need does not justify that step. Nor, it seems, could the parties' wealth being partly attributable to Mr. White senior's generosity justify a large departure from equality, since it was through both parties' efforts that his contributions had come to bear such fruit.

Where did that leave Mrs. White? The Court of Appeal ([1999] 2 W.L.R. 1213) had awarded her a two-fifths share, overturning Holman J.'s decision which, based on her "reasonable requirements", would have required a transfer of assets *from* Mrs. White to her husband, leaving her with only one-fifth. The Court declined to award an equal share in view of Mr. White senior's contribution to the parties' wealth. Judging this decision to be within the appellate court's discretion (Lord Cooke a little reluctantly), the House of Lords was restrained by *Piglowska* [1999] 1 W.L.R. 1360 from departing from that assessment. So in the event, Mrs. White was denied equality.

The affirmation of the equal value of home-makers' contributions is welcome, Lord Nicholls' dictum applying as much to "traditional" marriage partnerships as it does to the business/matrimonial partnership enjoyed by the Whites. But the equality principle enunciated by Lord Nicholls within the confines of the 1973 Act exerts limited formal influence—not a presumption or starting-point (as Lord Cooke might have it), but a mere "check" against which to evaluate decisions reached through straightforward consideration of the factors listed in section 25(2). This approach may be compared with jurisdictions which operate presumptions or even rules of equal division, accompanied by complex rules identifying the "matrimonial property" susceptible to that regime. The Ancillary Relief Advisory Group recently rejected the adoption in English law of such a scheme or the more nuanced Scottish approach, pending substantial research; those systems may achieve greater certainty, but may fail to provide appropriate results in individual cases. The Government has suggested some "guiding principles", equality included, which might more firmly direct the

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judges' task than does Lord Nicholls' equality "check" (*Supporting Families* (HMSO 1998)). But substantive reform is no longer under active consideration.

Should equality be given greater prominence in English law? Unless the welfare of dependent children is to lose its status as the first consideration, few cases will involve assets sufficiently extensive to do more than meet the children's needs by securing accommodation for the primary carer, and, if assets permit, for the absent parent (*M* v. *B (Ancillary proceedings: lump sum)* [1998] 1 F.L.R. 53). Indeed, the primary carer may initially acquire much more than half of the assets. Equality may be at best a remote goal, postponed until the children's independence. But even when there are no children, equal division remains problematic. Lord Nicholls appears to contemplate an actual assessment of the relative extent of contribution made by the home-making and bread-winning spouses, though their activities are arguably incommensurable. A simple rule of equal sharing avoids that difficulty, but invites obvious criticism unless accompanied by qualifying principles.

Even leaving those problems aside, recent research indicates that the economic effects of divorce may not in *substance* be equalised simply by equal property division (see Eekelaar and Maclean, "Property and Financial Adjustment after Divorce in the 1990s", in Hawkins (ed.), *The Human Face of Law* (Oxford 1997)). As Lord Nicholls recognises, the home-maker may have conferred economic advantages on the respondent by freeing him to concentrate his efforts on career or business, but in doing so incurred personal economic disadvantage in the form of lost opportunity to develop independent earning capacity. Indeed, the greater earning capacity of the other spouse is often the most valuable "asset" created by the marriage. Unless the home-maker's award reflects the value of *that* asset, the spouses will not leave the partnership as equals (Weitzman, "Marital Property: its Transformation and Division in the United States", in Weitzman and Maclean, *Economic Consequences of Divorce* (Oxford 1992)). But it should not be forgotten that in the majority of cases there will not be enough capital to achieve that outcome on an immediate clean break. Periodical payments therefore assume some importance.

The wider significance of *White* may therefore lie in its understanding of the nature of the parties' economic relationship within marriage. The decision arguably reflects what may be called an entitlement- or compensation-based theory of property division, in preference to a needs-based theory, and could support a new approach to periodical payments (Diduck and Orton, "Equality

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and Support for Spouses" (1994) 57 M.L.R. 681, and texts cited above). The home-maker is not a needy supplicant seeking life-long private dependency simply on the basis that she was once married to the respondent, but a person legitimately claiming a return on her "investment" in the partnership and/or compensation for losses she has sustained in consequence. But if the claim is ultimately based on the economic dynamics of a relationship and its impact on the parties, should the law be concerned about the marital status of the parties at all?

JOANNA MILES

RESOLVING THE UNRESOLVABLE: THE CASE OF THE CONJOINED TWINS

IN *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All E.R. 961 the Court of Appeal faced the impossible dilemma of having to decide whether to authorise a complex operation to separate Jodie and Mary, ischiopagus conjoined twins (joined at the pelvis). The condition of the babies was extremely rare, it being estimated that only about once in 100,000 births will monozygotic twins fail to separate completely. Even then, ischiopagus twins account for only about six per cent. of the total instances of conjoined twins. Another very rare peculiarity of the case was the certainty that the operation, if sanctioned, would quickly and inevitably bring about the death of the weaker twin, Mary. This was because the twins shared a common aorta. Mary's own heart and lungs were severely deficient and incapable of oxygenating and pumping blood through her body. Her life was thus sustained only by the common artery and separation would necessarily involve clamping and severing this. It was equally clear that the effect of failing to attempt the separation would be the inevitable death of *both* twins within three to six months. The cause of death would be heart failure since Jodie's heart would sooner or later fail. The parents, devout Roman Catholics, opposed the operation, believing that in God's eyes the twins were equal and that one could not morally be sacrificed to save the other. The hospital took a different view. It believed that a successful operation could be performed which could give the stronger twin, Jodie, a reasonable prospect of a worthwhile life.

After an exhaustive examination of the principles of family and criminal law, the Court unanimously dismissed the parents' appeal from the decision of Johnson J. in which he had granted a declaration that the operation might lawfully be performed. The

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