

WHITE PAPER
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POST SEPARATION ACCRUAL: Continuum v New ventures

Or, 'how do you balance "endeavour" and "chance" when advising on post-separation accrual of income and capital (wealth), e.g. bonuses, the increase in share value of companies, development work on a property, inheritances, new ventures, employment promotion etc?'

Authorities

GW v RW [2003] 2 FLR 108
N v F [2011] EWHC 586 (Fam)
K v L [2011] EWCA Civ 550
Rossi v Rossi [2006] EWHC 1482
Cooper-Hohn v Cooper-Hohn [2014] EWHC 4122 (Fam)
JL v SL (No 2) [2015] EWHC 360 (Fam)
JB v MB [2015] EWHC 1846 (Fam)

General principles
Section 25 and s25A
Section 31 (7)

1. Per Mostyn J in JL v SL(No 2):

Post-separation accrual

"32. Post-separation accrual is a difficult subject conceptually as it is often a hybrid creature. In my decision of *Rossi v Rossi* [2006] EWHC 1482 (Fam), [2007] 1 FLR 790 I attempted to explain the problem at para 15:

'But what of the position where a party has taken matrimonial property that existed at separation and traded with it and achieved a significant profit? Two points of view arise here. On the one hand it can legitimately be argued that the party in question has traded with the other party's undivided share and so should share with that party the profit that has been generated. On the other hand it can equally convincingly be said that the second party has not contributed to the industry or endeavour that gave rise to the profit or growth and so it is unfair that the second party should share to the same extent in that profit as the first who made all the effort. Similar controversy arises in relation to bonuses earned in the period of separation. The earner of such bonuses can validly argue that he did his work outside married life and without the support of his spouse. But the other party can equally validly argue that the ability to earn was generated during the marriage; that she was maintaining the family infrastructure pending dissolution of the marital partnership and division of the assets; and that during the period of separation the parties were financially linked.'

33. After analysing all the cases on the subject, some of which stretched back far into the past, including the important pronouncements of Lord Mance in *Miller* at para 174, I attempted to summarise the relevant principles at para 24 as follows:

'24.1. The statute requires all the assets to be valued at the date of trial.

24.2. For the purposes of establishing the matrimonial property in respect of which the yardstick of equality will "forcefully" apply the value of assets brought into the marriage by gift and inheritance (other than the former matrimonial home), together with passive economic growth on those assets, should be excluded as non-matrimonial property.

24.3. Assets acquired or created by one party after (or during a period of) separation may qualify as non-matrimonial property if it can be said that the property in question was acquired or created by a party by virtue of his personal industry and not by use (other than incidental use) of an asset which has been created during the marriage and in respect of which the other party can validly assert an unascertained share. Obviously, passive economic growth on matrimonial property that arises after separation will not qualify as non-matrimonial property.

24.4. If the post-separation asset is a bonus or other earned income then it is obvious that if the payment relates to a period when the parties were cohabiting then the earner cannot claim it to be non-matrimonial. Even if the payment relates to a period immediately following separation I would myself say that it is too close to the marriage to justify categorisation as non-matrimonial. Moreover, I entirely agree with Coleridge J when he points out that during the period of separation the domestic party carries on making her non-financial contribution but cannot attribute a value thereto which justifies adjustment in her favour. Although there is an element of arbitrariness here I myself would not allow a post-separation bonus to be classed as non-matrimonial unless it related to a period which commenced at least 12 months after the separation.

24.5. By this process the court should, without great difficulty, be able to separate the matrimonial and non-matrimonial property. The matrimonial property will in all likelihood be divided equally although there may be deviation from equal division (a) if the marriage is short and (b) part of the matrimonial property is "non-business partnership, non-family assets" (or if the matrimonial property is represented by autonomous funds accumulated by dual earners).

24.6. The non-matrimonial property is not quarantined and excluded from the court's dispositive powers. It represents an unmatched contribution by the party who brings it to the marriage. The court will decide whether it should be shared and if so in what proportions. In so deciding it will have regard to the reality that the longer the marriage the more likely non-matrimonial property will become merged or entangled with matrimonial property. By contrast, in a short marriage case non-matrimonial assets are not likely to be shared unless needs require this.

24.7. In deciding whether a non-matrimonial post-separation accrual should be shared and, if so in what proportions, the court will consider, among other things, whether the applicant has proceeded diligently with her claim; whether the party who has the benefit of the accrual has treated the other party fairly during the period of separation; and whether the money-making party has the prospect of making further gains or earnings after the division of the assets and, if so, whether the other party

will be sharing in such future income or gains and if so in what proportions, for what period, and by what means."

34. That summary received approval from Singer J in *S v S (Ancillary Relief After Lengthy Separation)* [2006] EWHC 2339 (Fam) [2007] 1 FLR 2120, but at least in one respect Charles J in *H v H* [2007] EWHC 459 (Fam), [2007] 2 FLR 548 disagreed with me (see para 57). However, in *Jones v Jones* [2011] EWCA Civ 41, [2011] 1 FLR 1723 at para 46 Wilson LJ approved one aspect of my decision. Further, the Court of Final Appeal of Hong Kong in its recent decision of *Kan v Poon* FACV20/2013, (2014) 17 HKCFAR 414 approved my summary. Ribeiro PJ stated at para 133:

"The summary of the principles provided in *Rossi v Rossi* is broader than Thorpe LJ's stricter approach [in *Cowan*] and is, in my view, preferable. It points to various factors relevant to deciding whether a post-separation accrual justifies departure from equality, including the length of the marriage and separation, the nature of the property accruing and the means or efforts by which it was acquired, and so forth."

35. In that case the attempt by the husband to exclude the post-separation accrual from the marital pool failed. Ribeiro PJ stated at para 134:

"In my view, the increased Analogue Group profits do not provide a ground for departure from the equal sharing principle in the present case. The parties married in January 1968 and separated in mid-2008, over 40 years later. The period of separation prior to the hearing date was relatively insignificant. The profits accruing to the Analogue Group during the post-separation period arose out of the business which had been built up in the course of the marriage, in respect of which W can legitimately assert an unascertained share on the principles accepted in *LKW v DD*."

36. Perhaps unsurprisingly, I remain satisfied that my summary of the relevant principles is correct, although my references to sharing non-matrimonial property in paras 24.6 and 24.7 must now be read in the light of *K v L* and *S v AG*. Only very exceptionally will such sharing be found to be fair.

37. Recently in her monumental judgment of *Cooper-Hohn v Hohn* [2014] EWHC 4122 (Fam) Roberts J meticulously analysed the entire jurisprudence between paras 147 and 197. At para 183 she stated:

"Thus what I have to decide is whether and to what extent the new work and new investments created by the husband in the period after the parties separated falls to be considered in the character of matrimonial property in which the wife should be entitled to a share or whether some or all of it falls at a point too distant from the essential character of the matrimonial partnership to qualify."

And her next section was pithily headed "*Continuum versus new ventures*" which to my mind rightly captures the essence of the debate.

38. In that case a particular portfolio which was unquestionably matrimonial property had almost doubled in value during the period of separation of two years. In that period its increase in value had been \$550m. The reason it had exploded in value was "the husband's investment eye coupled with his ability to drive change and so achieve levels of profit which are demonstrably in excess of any conventional rates of investment return" (para 185).

39. Roberts J in para 195 reached this conclusion:

"Whilst I shall come on to the precise figures once I have considered the issue of overall computation and special contribution, it is not my intention that this wife should receive no share of the assets which fall outside the marital acquest in this case. She will receive a share and that share will form part and parcel of the overall award which I will make on the basis of fairness to both parties. There is no question of her entitlement to any element of post-separation accrual being triggered by a 'needs' argument but I take the view that, notwithstanding the exponential increase in the growth of the Fund post-separation, its genesis as a matrimonial asset is a factor of considerable significance. That factor must, in my view, find its reflection in the overall quantum of the financial award she will receive at the conclusion of these proceedings. It goes to the heart of what I consider to be fair in the overall context of the case."

40. When I first read this I wondered if I had sighted a white leopard, as Roberts J appears to be suggesting that the wife would receive a share (not on a needs basis) in property that was "outside the marital acquest" and which was therefore non-matrimonial property. But on reflection I think I was wrong. I think the proper analysis is that Roberts J was saying that the fund retained its matrimonial character but the wife would share unequally in the increase in the value achieved by the husband alone in the period of separation.

41. This approach is to my mind undoubtedly correct for those assets which were in place at the point of separation. They remain matrimonial property but the increase in value achieved in the period of separation may be unequally divided. I emphasise may. Obviously passive growth will not be shared other than equally, and there will be cases where on the facts even active growth will be equally shared, as happened in *Kan v Poon*.

42. On the other hand there will be cases where the post-separation accrual relates to a truly new venture which has no connection to the marital partnership or to the assets of the partnership. In such a case the post-separation accrual should be designated as non-matrimonial property and save in a very rare case should not be shared".

2. *JB v MB [2015] EWHC 1846 (Fam)*

In *JB v MB* Nicholas Cusworth QC reviewed Mostyn J's review of the authorities. Facts: H was aged 52 and W 50; they cohabited from 1990, married in 1997 and separated in late 2006/early 2007. There were 2 children of the marriage, aged 16 and 13. W petitioned for divorce in 2011 but did not, at that time, apply for financial remedies, and H in due course commenced financial proceedings in December 2013.

The principal asset was H's 70% shareholding in a company, Z Ltd. The company had applied to intervene in the proceedings. Mostyn J dismissed that application, noting that the purpose of FPR r.9.26B(1)(a) had not been simply to enable a third party to put themselves on a better footing to advocate its point of view. That could, said Mostyn J, be done by the husband and witnesses from the company. Mostyn J did,

however, permit counsel on behalf of the company to attend the final hearing "so that [counsel for the husband] can be prodded if [counsel for the company does] not think that he is saying the right things."

H was a systems analyst; the year before the parties began their cohabitation he set up the enterprise which was to become Z Ltd with two other shareholders. The company originally developed insurance administration systems, and then in 1995 developed the first website on which users could purchase motor insurance in real time. At separation H's 70% shareholding in the company was, according to the SJE, worth £1.9m pre-tax. It had an annual turnover of £1.8m with profits of £477K.

From about 2010, however, Z Ltd flourished on the back of H's creation of a specific insurance industry product. By the time of the hearing, H's shareholding was worth between £7.4m and £8.5m, net of tax. H's evidence was that, since February 2011, the company had a strategy of reducing dividends paid in order to invest its current profits year by year into research and development, to make the company a more valuable commodity with a view to eventual sale.

W had been a PA when the parties met and by 1997 was earning £30K per annum. She gave up work after the first child was born and did not return to employment until after the parties' separation, when she found a job as a school receptionist, earning just over £12,000 per annum.

The issue for the court was the extent to which H's shareholding in Z Ltd could fairly be said to fall outside the matrimonial assets.

DHCJ Nicholas Cusworth QC reviewed the recent case law relating to post-separation accruals and particularly post-separation increases in the values of matrimonial assets, including *N v F* [2011] EWHC 586 (Fam), *K v L* [2011] EWCA Civ 550, *Rossi v Rossi* [2006] EWHC 1482, *Cooper-Hohn v Hohn* [2014] EWHC 4122 (Fam) and of course, *JL v SL No2*, and noted the tension between those decisions where a precise differentiation between the matrimonial and non-matrimonial assets is employed, and those which involve the court adopting a more "intuitive" approach.

In this particular case it was significant that H's shareholding had been held originally as a matrimonial asset but that his post-separation efforts and inspiration had added significant value.

The court held that there had been a greater degree of "continuum" than H had admitted, that re-investment of the post-2011 profits into the company had to be treated as having included W's share in those profits, and the delay between the parties' separation and the instigation of proceedings had in part, been orchestrated and sanctioned by H in order to enable him to trade with the full value of the shareholding which was an undivided matrimonial asset. On the other hand, W's award needed to reflect the fact that the increase in the value of the shareholding post-separation had been unmatched economic endeavour by H over a number of years, rather than mere, or even largely, passive growth.

Both sides asked that the court should award a simple percentage figure to express W's interest in the current value of the shareholding, and the judge suggested that the

court had to perform an exercise in "lawless science"¹. He attributed to W 20% of the value in the shareholding – 5% less than she had argued for and 10% more than H had argued for. In addition to her share in other matrimonial assets, W's award based on the "sharing" principle therefore came to some £2.336m, just short of 25% of the total assets in the case.

The court then considered whether such sum would meet W's needs, based on her own figures for income and capital needs and decided that it did. A sum equivalent to the value of 20% of H's shareholding in Z Ltd would therefore be paid to W upon the company's eventual sale. The sale was envisaged to take place within 4 years, but the court granted liberty to apply in respect of the timing of the payment in the event that the company was not sold in that timeframe.

Income and periodical payments

The wide-ranging jurisprudence attaching to ongoing periodical payments is a topic in itself, and very much work in progress, and thus not dealt with in depth here.

It is clear from *JL v SL No2* that bonuses payable upon pre-existing employment are likely to be included in the available income for maintenance purposes – for a while, and at least 12 months – see para 24.4 of *Rossi*.

But in the sense that all income earned after separation is the generally sole endeavor of one party or the other, how should any surplus over needs be dealt with?

Trespassing into this minefield for just a moment, if the fabled 'transition to independence' will mean the end of financial support as soon as is reasonably practical, at what point should the economically weaker party adjust without undue hardship – or, how long should she or he continue to receive the surplus of the payer's income after separation? If there are no children the question may (but not always) be easier to answer but what if, typically, a wife gives up work and any hope of earning a high income to support the children and her husband's career? After a long marriage is she to be left, say at 50 or older, with the children on their way to independence, reduced to a term periodical payments order, of say two years or more to enable her to get a job? And if she can only earn say £2,000 net per month, which will just about meet her basic living costs, is it fair for the husband to take his unimpaired income capacity and support himself on £100k per annum? If our stereotypical wife has not contributed to the household of her former husband since their divorce, what right has she to lay claim upon his ongoing endeavour? As Mostyn J said in *B v S*² about the footballer:

"...but he will not get paid unless he plays football. The footballer has to fill the unforgiving minute with sixty seconds' worth of distance run after the marriage."

¹ An oxymoron?

² *B v S (Financial Remedy: Marital Property Regime)* [2012] 2 FLR 502, FD

It would seem that the reward for that post separation effort should be his alone. The idea of sharing future income or compensating the dependent former spouse from his or her lost income capacity has to an extent fallen from favour. Mostyn J expressed his views on Mrs McFarlane's compensation claim in *B v S*:

“I entirely accept that such freely made choices may supply a ‘sound rationale’ for a needs-based periodical payments award but I do not understand how it supplies a rationale for a periodical payments award that supplies a ‘premium’ above need ... I would have thought the free choice made by the claimant to give up work was the dominant consideration. While it was true that her decision was agreed with Mr McFarlane, the reason Mrs McFarlane gave up work was because she decided to give up work. No-one forced her to give up work. She was not browbeaten by Mr McFarlane to give up work. Her motives for giving up work seem to me to be irrelevant. Perhaps she was driven by an intense maternal instinct. Perhaps she was bored with her high-flying job and saw a life being supported by Mr McFarlane bringing up her children as more comfortable. Perhaps she wanted to do something else. At the end of the day, however, what cannot be disputed is that Mrs McFarlane gave up work was because she, an intelligent liberated autonomous adult woman, decided to give up work. I cannot see how that can be characterised as a loss ‘suffered’ by her entitling her to an award in excess of her reasonable needs.”

But what is happening on the ground? Take your pick. Or pick your judge. The well known decision of Ward LJ in *C v C*³ predated *White*, but there is recent authority suggesting that it is unfair to expect an ex-wife to have to go out to work just to earn £20,000 pa if her former husband is a high earner; see Holman J in *Fields v Fields*⁴:

“Having regard to the size of the husband's income and to her employment history and health and to the needs of the children, it seems to me most unreasonable that she should currently be expected to work to generate a marginal £20,000 gross per annum so as to relieve the high earning husband to that extent of paying that amount (netted down).”

³ *C v C* [1997] 2 FLR 26

⁴ *Fields v Fields* [2015] EWHC 1670

And consider Mr and Mrs Mills. A Court of Appeal (Sir Ernest Ryder and Longmore LJ, sitting on 1 February 2017) has apparently confirmed the view that ongoing (life-time, even) periodical payments to a working ex-wife with a 23-year-old son, 17 years after a 14-year cohabitation, is reasonable.

In the other corner is a string of authorities that suggests the days of declaring oneself a house husband or wife are long gone and that ‘surplus, post separation income’ will remain with its generator: *L v L*⁵, *Chiva v Chiva*⁶, *Matthews v Matthews*⁷, *Grocholewska-Mullins v Mullins*⁸, *Wright v Wright*⁹. The Clean Break has gained traction, as has the Term Order. With contrasting decisions coming thick and fast from our senior family courts it is hard to know what are we doing and more importantly where are we going?

It would seem that the collective commentary from the recent Law Commission reports and those from the Family Justice Council, together with the judgments of one or two influential High Court judges¹⁰ are reshaping income awards on divorce. These awards are going to be smaller, for shorter periods and in many cases, will simply disappear. Whether this pressure to reduce income awards (from post separation ‘surplus income’) will lead to any kind of uniform approach is yet to be seen. It hasn’t to date, as the Mills case graphically illustrates. Without Government legislation, the senior courts are our only binding guide. Baroness Deech has, for the fourth time, attempted to introduce a private members bill which would radically reform financial remedies, limiting periodical payments to short term. Assuming this most recent effort fails and the Government manages to sidestep any legislative change in the foreseeable future, the lower courts will continue to weave an uncertain path through the ever-growing body of case law. There is a need for judicial clarification about the treatment of periodical payments and post separation income to provide a fair and consistent approach.

Advice

So what can practitioners advise their clients with any certainty in respect of ‘post separation accrual’?

Generally

- (a) Children, housing and ‘needs’ will usually trump all other factors.

⁵ *L v L (Financial Remedies: Deferred Clean Break)* [2012] 2 FLR 1283, FD

⁶ *Chiva v Chiva* [2014] EWCA 1558

⁷ *Matthew v Matthews* [2013] EWCA Civ 1874

⁸ *Grocholewska-Mullins v Mullins* [2014] EWCA 148

⁹ *Wright v Wright* [2015] EWCA 201

¹⁰ See in particular *Mostyn J in NS v SS* [2014] EWHC 4183

Capital

- (b) Equality of division of the marital acquest (i.e. capital) is a likely starting point; assets will be valued as at the date of trial.
- (c) Increases in the values of pre-existing / marital assets fairly described as continuum or passive growth are likely to be shared equally. This will include pensions, savings accounts, endowments, property, classic cars etc.
- (d) Inheritances (particularly post separation) are likely to be kept out of the equation (save perhaps in cases of exceptional need).
- (e) Increases in share values and businesses are likely to be analysed for causation – passive growth and/or wider market forces (increase will be shared) or evident individual endeavour / decision-making resulting in increases in value (likely to result in an unequal division, albeit no accepted formula for quantifying that inequality).
- (f) Development growth on a property – similar principles, depending upon whether either party had had more input than the other.

Income

- (g) Bonuses payable upon pre-existing employment are likely to be included in the available income for maintenance purposes – for a while; 12 months? See *Rossi*, but NB anecdotal evidence of 2 to 3 years, often tapered. Often related to ongoing periodical payments and / or overall package of measures to provide clean break / term period.
- (h) Maintenance / periodical payments / post separation income accrual: transition to independence, but who knows¹¹?

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¹¹ See *Mills v Mills* [2017] EWCA (1st February 2017; Judgment not yet published)