White Paper seminar

Aspects of exercising the s 25 criteria relating to inheritance and whether it should be included or excluded

1. What is realistic and achievable regarding inherited assets?

- In terms of the recipient – how to protect
- In terms of the non-recipient – how to infiltrate
- **Joy v Joy [2019] EWHC 2152 (Fam)** adjourning a lump sum application

2. Consider how the inherited assets were treated during the marriage? Were they:

- Pre acquired ***HC v FW*** [2017] EWHC 3162 and **Y v Y** [2012] EWHC 2063 (Fam)

- acquired during : **AR v AR** [2011] EWHC 2717 (Fam)

- Mingling (**JL v SL**)

- post acquired **JL v SL** [2015] EWHC 360 – inheritance received shortly before separation **Critchell v Critchell** [2015] EWCA Civ 436, [2016] 1 FLR 400

3. What is the likelihood of future receipt of inheritance?

   **HRH Louis Prince of Luxembourg v HRH Tessy Princess of Luxembourg and Anor (Application for Financial Remedy)** [2018] EWFC 77 MacDonald J:
   *"Inheritance Prospects*
   76. A finding that a party's expectation under a will or other expectation of inheritance constitutes a financial resource will be a rarity by reason of the uncertainties both as to the fact of inheritance and as to the timescales within in which the inheritance will be received. These uncertainties will usually make it impossible for the court to conclude that an inheritance is property that is likely to be had in the foreseeable future for the purposes of s 25(2)(a) of the Matrimonial Causes Act 1973 (see *Michael v Michael* [1986] 2 FLR 389 at 396)."

4. The position if one spouse mingled an inheritance but the other did not?
   I.e. perhaps one spouse put all of their inheritance into the deposit for the matrimonial house and the other receives their inheritance after separation or maybe has yet to receive it
   - No recent authorities
   - Treat each inheritance separately
   - Fairness
   - Needs

**Some General principles**

1. Inherited wealth what is it ? What category would it be put in to as it is likely to be in a different category to other non / matrimonial assets

   In *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186, the court gave guidance on what exactly 'sharing principle' (enunciated in *White v White* [2000] 2 FLR 981) should apply to. In *Miller*, Lord Nicholls and Baroness Hale coined the phrase to express a qualitative difference between assets reflective of 'marital endeavour', and assets originating from a source 'external to the marriage'.

   In *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186 Lord Nicolls :

   **"Matrimonial property and non-matrimonial property**

   [21] "A complication rears its head at this point. I have referred to the financial fruits of the marriage partnership. In some countries the law draws a sharp distinction between assets acquired during a marriage and other assets. In Scotland, for instance, one of the statutorily prescribed principles is that the parties should share the value of the 'matrimonial property' equally or in such proportions as special circumstances may justify. Matrimonial property means the matrimonial home plus property acquired during the marriage otherwise than by gift or inheritance: Family Law (Scotland) Act 1985, sections 9 and 10. In England and Wales the Matrimonial Causes Act 1973 draws no such distinction. By section 25(2)(a) the court is bidden to have regard, quite generally, to the property and financial resources each of the parties to the marriage has or is likely to have in the foreseeable future.

[22] This does not mean that, when exercising his discretion, a judge in this country must treat all property in the same way. The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties' common endeavour, the latter is not. The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So, it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.

[23] The matter stands differently regarding property ('non-matrimonial property') the parties bring with them into the marriage or acquire by inheritance or gift during the marriage. Then the duration of the marriage will be highly relevant. The position regarding non-matrimonial property was summarised in the *White* case [2001] 1 AC 596, 610:

'Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little

weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property.'

[24] In the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage.

[25] With longer marriages the position is not so straightforward. Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as the years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not. After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom intended to be retained in specie. Some of the matters to be taken into account in this regard were mentioned in the above citation from the White case. To this non-exhaustive list should be added, as a relevant matter, the way the parties organised their financial affairs."

Lord Nicholls definition of matrimonial property is picked up in *Charman v Charman (No 4)* [2007] 1 FLR 1246 in which matrimonial property was defined as "the property of the parties generated during the marriage otherwise than by external donation" (para 66).

2. How the Court deals with inherited assets depends upon the nature and value of the property, how and when it was acquired :

"the time when and circumstances in which the (non matrimonial / pre-acquired) property was acquired, are among the relevant matters to be considered": Lord Nicholls in ***White v White*** **[2000] UKHL 54**

*Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186
Baroness Hale :
[148] "The strength of these perceptions is such that it could be unwise for the law to ignore them completely. In *White v White* [2001] 1 AC 596, it was recognised that the source of the assets might be a reason for departing from the yardstick of equality (see p 610c-g). There, the reason was that property had been acquired from or with the help of the husband's father during the marriage, but the same would apply to property acquired before the marriage. In White, it was also recognised that the importance of the source of the assets will diminish over time (see p 611b). As the family's personal and financial inter-dependence grows, it becomes harder and harder to disentangle what came from where. But the fact that the family's wealth consists largely of a family business, such as a farm, may still be taken into account as a reason for departing from full equality: see *P v P (Inherited Property)* [2004] EWHC 1364 (Fam); [2005] 1 FLR 576. So too may be the nature of the assets, where these are businesses which will be crippled or lose much of their value, if disposed of prematurely in order to fund an equal division: see *N v N (Financial Provision: Sale of Company)* [2001] 2 FLR 69."

3. <u>The relevance of the origin of the inheritance is likely to be greater in a short marriage case than a long marriage case</u>:

*P v P (Inherited Property)* [2004] EWHC 1364 / [2005] 1 FLR 576, a decision of Munby J (as he then was) stated:

[37] “I respectfully agree with Bennett J and Mr Mostyn QC. But I should like to emphasise the importance of Lord Nicholls of Birkenhead's observation that:

'The judge should … decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered.'

There is inherited property and inherited property. Sometimes, as in White v White [2001] 1 AC 596, itself, the fact that certain property was inherited will count for little: see the observations of Lord Nicholls of Birkenhead at 611 and 995 respectively and of Lord Cooke of Thorndon at 615 and 998 respectively. On other occasions the fact may be of the greatest significance. Fairness may require quite a different approach if the inheritance is a pecuniary legacy that accrues during the marriage than if the inheritance is a landed estate that has been within one spouse's family for generations and has been brought into the marriage with an expectation that it will be retained in specie for future generations.

[38] That said, the reluctance to realise landed property must be kept within limits. After all, there is, sentiment apart, little economic difference between a spouse's inherited wealth tied up in the long-established family company and a spouse's inherited wealth tied up in the long-held family estates".

**Rossi v Rossi** [2006] EWHC 1482 a case decided in the immediate aftermath of *Miller and McFarlane,* Nicholas Mostyn QC (as he then was, sitting as a deputy Judge of the Division) identified the issue of post-separation accrual as one which was then in a state of development. At page 794, he said,

**[10]** **"**In all cases now a primary function of the court is to identify the matrimonial and non-matrimonial property. In relation to property owned before the marriage, or acquired during the marriage by inheritance or gift, there is little difficulty in characterising such property as non-matrimonial (provided it is not the former matrimonial home). The non-matrimonial property represents an unmatched contribution made by the party who brings it to the marriage justifying, particularly where the marriage is short, a denial of an entitlement to share equally in it by the other party : see *White v White* [2001] 1 AC 596, [2000] 2 FLR 981; *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam), [2003] 2 FLR 108; *P v P (Inherited Property)* [2004] EWHC 1364 (Fam), [2005] 1 FLR 576; *Miller* (paras [21]-[25], [148]).

**[11]** But what of money or property acquired by one party after the separation? This gives rise to a number of conceptual problems which

I have to say have not been altogether resolved by the opinions in *Miller*."

4. The importance of the source of non-marital assets (and thus the extent to which they are subject to the sharing principle) may diminish over time: because the significance of their value is reduced in relation to the overall value of marital assets accrued by virtue of mingling with marital assets or otherwise being treated as marital, and / or by their application to the purchase of the matrimonial home : **K v L** 2011 EWCA Civ 550 at 18

5. <u>Inheritance utilised as a contribution argument</u>

**Charman v Charman** [2007] EWCA Civ 503 deals with inheritance property in terms of contributions

Sir Mark Potter P

[72]. "The enquiry required by the principle of sharing is, as we have shown, dictated by reference to the contributions of each party to the welfare of the family (s.25(2)(f)); and, as we make clear in paragraph 85 below, the duration of the marriage (the other half of s.25(2)(d)) here falls to be considered. Also conveniently assigned to the sharing principle, no doubt dictating departure from equality, is the conduct of a party in the exceptional case in which it would be inequitable to disregard it (s.25(2)(g)). Mr Singleton argued to the judge that the husband's generation of substantial wealth was not only a special contribution on his part to the welfare of the family but conduct which it would be inequitable to disregard. We think, however, that it is as unnecessarily confusing to present a case of contribution as a positive type of conduct as it is to present a case of conduct as a negative or nil type of contribution: see ***W v. W*** (2001) 31 Family Law 656.

[81] In ***Miller*** Baroness Hale said, at [146],

> "Section 25(2)(f) of the 1973 Act does ***not*** refer to the contributions which each has made to the parties' ***accumulated wealth***, but to the contributions they have made (and will continue to make) to the ***welfare of the family***. Each should be seen as doing their best in their own sphere. Only if there is such a disparity in their respective contributions to the ***welfare of the family*** that it would be inequitable to disregard it should this be taken into account in determining their shares."

These words have provoked lively debate upon this appeal. Like the introduction of property into a marriage at its inception (being property helpfully described by Burton J. in ***FS v. JS*** [2006] EWHC 2793, at [28], as "pre-matrimonial") or the introduction into it of property received during it by inheritance or gift (being property there described by Burton J. as "extra-matrimonial"), the generation of wealth during a marriage has conventionally been taken as one obvious form of contribution to the welfare of the family. Here, however, Baroness Hale articulated a refinement, namely that the generation of wealth should not always qualify as a contribution to the welfare of the family and in particular perhaps that in excess of a certain level its generation should not so qualify. The dividing-line is no doubt elusive. But, if the present case were to be one in which, in excess of a certain level, the husband's wealth were not to qualify as the product of a contribution to the welfare of the family, how should the court treat the excess? Mr Singleton submits, albeit with diffidence, that the excess would not be susceptible of redistribution and so should all lie in the hands into which it has fallen, namely those of the husband. We reject that submission: a party's property would not fall

outside the court's redistributive powers in s.s.23-25 of the Act just because it was not the product of a contribution within the meaning of s.25(2)(f). With equal diffidence Mr Pointer submits, by contrast, that, because it is only a special contribution to the welfare of the family which justifies unequal division, the excess, not being the product of a special contribution, should fall for equal division. Such a result would in our view be almost absurd. The facts are that, before the judge, the case was accepted on both sides to be one in which, apart from £1 million which is the subject of the third subsidiary ground of appeal, all the property, notwithstanding its size, was the product of the husband's special contribution to the welfare of the family within the meaning of s.25(2)(f); and that Mr Singleton, followed reactively by Mr Pointer, now uses this difficult passage in the speech of Baroness Hale as a bandwagon on to which to jump. In our view the size of the property in the present case should not compel departure from the usual conclusion that wealth generated by a party during a marriage is the product of a contribution on his or her part to the welfare of the family'.

6. <u>There is no reported case where non matrimonial property has been shared</u>

*JL v SL* [2015] EWHC 360. Mostyn J :

[22] "Given that a claim to share non-matrimonial property (as opposed to having a sum awarded from it to meet needs) would have no moral or principled foundation it is hard to envisage a case where such an award would be made. If you like, such a case would be as rare as a white leopard."

[28] "This leads to the treatment of pre-marital or other non-matrimonial property which has become "part of the economic life of [the]

marriage…utilised, converted, sustained and enjoyed during the contribution period". In N v F I stated at para 14:

"It seems to me that the process should be as follows:

i) Whether the existence of pre-marital property should be reflected at all. This depends on questions of duration and mingling.
ii) If it does decide that reflection is fair and just, the court should then decide how much of the pre-marital property should be excluded. Should it be the actual historic sum? Or less, if there has been much mingling? Or more, to reflect a springboard and passive growth, as happened in Jones?
iii) The remaining matrimonial property should then normally be divided equally. …"

In that case the husband brought £2.116m into a 16 year marriage. It was well and truly mingled into the economic life of the partnership. But, as I found in para 44 it was "the bedrock on which [the] marriage was founded". But for the question of need I would have excluded the initial £2.116m but not any growth on it. I adopted the same approach in my earlier decision of FZ v SZ and Others (Ancillary Relief: Conduct: Valuations) [2011] 1 FLR 64. In contrast in Jones Wilson LJ excluded not only the initial £2m of pre-marital property introduced by the husband but also £7m of growth on it.

[29] It can be seen that this technique maintains the purity of equal division of what is found to be the matrimonial property and in my judgment is the path that should be generally adopted. However the fact of mingling may

nonetheless lead to an unequal division of the matrimonial property, most likely where it is the matrimonial home which was provided solely by one party, as was the case in Vaughan".

[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"

**Hart v Hart** 2017 EWCA Civ 1306 : Moylan LJ, dismissing the Wife's appeal:

[2] "In this judgment, I use the words matrimonial and marital interchangeably. In *White v White* [2001] AC 596, Lord Nicholls used the expression, "from a source wholly external to the marriage" (p. 994) when referring to non-matrimonial property. He defined matrimonial property in *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186 (paragraph 22) as "the financial product of the parties' common endeavour". Lady Hale used the expression "the fruits of the matrimonial partnership" in *Miller* (paragraph 141). In *Charman v Charman (No 4)* [2007] 1 FLR

1246 matrimonial property was described as “the property of the parties generated during the marriage otherwise than by external donation” (paragraph 66). Non-matrimonial property can, therefore, be broadly defined in the negative, namely as being assets (or that part of the value of an asset) which are not the financial product of or generated by the parties’ endeavours during the marriage. Examples usually given are assets owned by one spouse before the marriage and assets which have been inherited or otherwise given to a spouse from, typically, a relative of theirs during the marriage”.

[3] “The context is an appeal by the wife (as I will call her) from the final financial remedy order made on 25th June 2015 by His Honour Judge Wildblood QC ("the judge"). He decided that the wife should receive/retain assets with a combined value of approximately £3.5 million out of total resources of just under £9.4 million. The judge undertook what he described as a multi-faceted approach but, ultimately, the sum he awarded the wife was equal to the amount he had calculated as being required to meet her needs.”

80.“ In *K v L*, a case in which there was no matrimonial property, the only assets being the wife's inherited shareholding in a public company, Wilson LJ picked up Lady Hale's comment in *Miller*, about the effect of time, and suggested that the "true proposition" was that the "importance of the source *may* diminish over time" (rather than *will*). He went on to give three examples (paragraph 18):

"Three situations come to mind:

(a) Over time matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property.

(b) Over time the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult.

(c) The contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home which, although vested in his or her sole name, has – as in most cases one would expect – come over time to be treated by the parties as a central item of matrimonial property.

The situations described in (a) and (b) above were both present in *White v White*. By contrast, there is nothing in the facts of the present case which logically justifies a conclusion that, as the long marriage proceeded, there was a diminution in the importance of the source of the parties' entire wealth, at all times ring-fenced by share certificates in the wife's sole name which to a large extent were just kept safely and left to reproduce themselves and to grow in value."

84. In my view, the court is not *required* to adopt a formulaic approach either when determining whether the parties' wealth comprises both matrimonial and non-matrimonial property or when the court is deciding what award to make. This is not necessary in order to achieve "an acceptable degree of consistency", Lord Nicholls in *Miller* (paragraph 6),

or to achieve a fair outcome. Indeed, I consider that the present case demonstrates the difficulties which can arise if a court strives to adopt a formulaic approach in circumstances where that is not likely to be easily achieved because of the nature of the financial history."

[65] "A possible interpretation of *Miller* could have been that the sharing principle applied only to matrimonial property. This was, however, not the conclusion reached by this court in *Charman*. The principle applies to "all the parties' property but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality" (paragraph 66 Charman).

[66]. Having said that, I am not aware of any case decided since *Charman* in which a spouse has been awarded a share of non-matrimonial property by application of the sharing principle. In *K v L (Non-Matrimonial Property: Special Contribution)* [2011] 2 FLR 980 Wilson LJ, as he then was, noted the absence of any such decision before commenting that: "Such a decision will no doubt be made – but not in this court today" (paragraph 22). There has still been no such decision and, during the course of the hearing before us, this led to a brief discussion about the "white leopard" referred to by Mostyn J in *JL v SL (No 2)* (paragraph 22). However, because this issue does not arise directly in this appeal it is not necessary to consider it further. The question of whether, if it is open for this court so to decide, the sharing principle only applies to matrimonial property must await another case although I note, in passing, what Wilson LJ said in *K v L* about the "ordinary consequences" of the application of the sharing principle (paragraph 21) and what he said in the Privy Council's decision of *Scatliffe v Scatliffe* [2017] AC 93 (paragraph 25) about the sharing

principle being applied to the matrimonial property in the "ordinary case".

[67] The exercise on which the court is engaged, when applying the sharing principle in this context, is, therefore, to determine whether the current assets owned by the parties, or within the scope of section 25(2)(a), comprise the product of marital endeavour. The court must then decide how that determination should impact on the court's award. This raises (a) an evidential issue, namely a factual determination which has been described in terms of identifying whether property is matrimonial or is non-matrimonial but which, in my view, is often more nuanced than this because property can be a combination of the two; and (b) an evaluative or discretionary issue, namely the manner in which the factual determination is weighed when the court is undertaking the section 25 exercise and deciding what award to make.

Sharing versus needs

When the result suggested by needs is an award less than the result suggested by sharing, the latter result should in principle prevail and vice versa

7. Expectations - The likelihood of future receipt of inheritance being taken into account

If there is a prospective inheritance, whether it can be considered by the Court as a resource that is likely to be available in the foreseeable future will depend upon how foreseeable it is that a party is actually going to inherit and the timescale of when that inheritance will become available.

- HRS Louis Xavier Marie Guillaume Prince of Luxembourg, Prince of Nassau and Prince of Bourbon-Parma v HRH Tessy Princess of Luxembourg, Princess of Nassau and Princess of Bourbon-Parma & Anor [2017] EWHC 3095 (Fam) (05 December 2017)

- Alireza v Radwan & Ors [2017] EWCA Civ 1545

  Lady Justice King :

[32] The first question therefore is 'does the wife's father's wealth / the wife's inheritance prospects constitute a financial resource which she has or is likely to have in the foreseeable future?'

[33] Mr Peel says not and reminds the court that in the ordinary course of events a party's inheritance prospects are disregarded by the court. In *Michael v Michael*[1986] 2 FLR 389 Nourse LJ said (at 395):

"I am of the clear opinion that s.25(2)(a) of the Act of 1973 as amended, whilst it is primarily concerned with property and financial resources in which there is a vested or contingent interest , is not exclusively so concerned. Indeed, its broad and somewhat informal language demonstrates that it was intended to operate at large and not in some strait jacket tailored to the sober uniforms of property law. Thus, there can be no doubt that it could in certain circumstances extend to something which in the language of the law is a mere expectancy or spes successionis, for example and interest which might be taken under the will of a living person.

[34]. Nourse LJ went on to give an example of a case where there was clear evidence that a person had a terminal illness, that property was left to the

respondent in his will and that it was highly improbable the testator would revoke the will. Having given such an example, he went on (at 396)

"…. However, those facts, being extremely special, demonstrate that the occasions on which such an interest will fall within s,.25(2)(a) of the Act of 1973 as amended, are likely to be rare. In the normal case, uncertainties, both as to the fact of inheritance and as to the times at which it will occur will make it impossible to hold that the property is property which is likely to be had in the foreseeable future."

[35] Mr Todd for his part relies on the decision of Munby J (as he then was) in *C v C (ancillary relief trust fund) (C v C)* [2010] 1 FLR 337.

[36] In *C v C* the husband had a vested interest in property in that, upon the death of his widowed step mother, he and his three siblings would inherit an estate as tenants in common in equal shares. This was not a discretionary trust. The trustees had no power to appoint 'even a farthing' [19] to the husband except with the written consent of the widow who could give it or withhold at her 'unfettered and uncontrolled' discretion. As Munby J said:

"…and the husband and the court have to take the widow as they find her. As against the widow there can be no question of exerting any 'judicious encouragement' (see *Thomas v Thomas* [1995] 2 FLR 668 at 670), as there might be if what was in issue was the exercise by the trustees of their powers if they had any that were relevant."

[37] Given that the husband's interest was vested and the likelihood was that the reversion would fall in in about 15 years (that being the actuarial life expectancy of the widow), Munby J concluded:

"I confess that on this crucial issue my mind has wavered. On any view, as it seems to me, this case is at or very close to the outer extremity of what can properly be considered a 'financial resource' which a spouse is 'likely to have in the foreseeable future'. At best it is, to adopt Cumming-Bruce LJ's metaphor, only dimly visible. But on balance I have concluded that… the husband's interest is indeed such a resource. In other words, I am persuaded though I have to say without much enthusiasm, that the question posed… is to be answered in the affirmative. "

[38] Munby J said that his decision would have been different had the likelihood been of the husband receiving substantially less than the current value of the estate on the death of the widow or had the widow's life expectancy been greater than he found it to be. Munby J went on to put his decision that the husband's vested interest was a resource in context:

"[66] I must emphasise that, consistently with the terms of the preliminary issue, all I have decided is that the husband's interest in the trust fund is a 'financial resource' which he is 'likely to have in the foreseeable future'. I have not decided that it would in fact be appropriate to make an order of the kind made in *Priest v Priest* and *Milne v Milne* or, indeed, appropriate to make any order at all in relation to his interest in the trust fund. All I have decided is that his interest in the trust fund is, within the meaning of s 25(2)(a), a 'financial resource' which he is 'likely to have in the foreseeable future', and, accordingly, something which s25(2) requires the judge at the final hearing to 'have regard to'. Having had regard to it, the judge may decide to make some order in relation to the husband's interest under the trust. On the other hand, the judge,

having had regard to it, may decide not to make any order at all in relation to the husband's interest under the trust. It is entirely a matter for the judge who is called upon, as I have not been, to exercise the discretion conferred by ss 24 and 25."

[39] In my judgment the words of Nourse LJ in *Michael* hold good 30 years on and in the ordinary course of events uncertainties both as to the fact of inheritance and as to the times at which it will occur, will make it impossible to hold that an inheritance prospect is property which is "likely to be had in the foreseeable future."

[42] “Having said that, as Munby J explained in *C v C*, all that such a finding does is to conclude that the prospective inheritance is a section 25(2)(a) resource; it does not mean that it is inevitably appropriate for the court to make an order whereby the meeting of the needs of the wife is in any way dependant on the prospective inheritance. The fact that the wife's father has a life expectancy of 16+ years will be factor for the court to take into account on the facts of the case. In the present case, the context is very different from *C v C*; here the wife is 37 years old with three minor children for which she has sole care, she needs a home now but cannot reasonably expect to inherit until she is in her 50s.

[44] Mr Todd naturally relied upon *C v C* as authority for his submission that the wife's future inheritance prospects consequent upon Saudi Arabia's laws of forced heirship is a 'foreseeable resource'. He goes further however and says that, on the facts of this case, not only are the wife's testamentary expectations a foreseeable resource but, unlike *C v C*, the wife's father's wealth is a resource which can and should be made

available to the wife by way of *Thomas v Thomas* [1995] 2 FLR 1263 'judicious encouragement'.

[45] *Thomas v Thomas* [1995] 2 FLR 1263 is well known to all who practice in these courts and it is not necessary to rehearse it in this judgment, save to set out the basic principle found in Waite LJ's judgment at p 670.

"[670]…Another is that where a spouse enjoys access to wealth but no absolute entitlement to it (as in the case, for example, of a beneficiary under a discretionary trust or someone who is dependent on the generosity of a relative), the court will not act in direct invasion of the rights of, or usurp the discretion exercisable by, a third party. Nor will it put upon a third party undue pressure to act in a way which will enhance the means of the maintaining spouse. This does not, however, mean that the court acts in total disregard of the potential availability of wealth from sources owned or administered by others. There will be occasions when it becomes permissible for a judge deliberately to frame his orders in a form which affords judicious encouragement to third parties to provide the maintaining spouse with the means to comply with the court's view of the justice of the case. There are bound to be instances where the boundary between improper pressure and judicious encouragement proves to be a fine one, and it will require attention to the particular circumstances of each case to see whether it has been crossed."

[46] In *C v C* Munby J quoted Wilson LJ's formulation of the test set out at [12] to [13] in ***Charman v Charman No 4*** **[2007] EWCA Civ 503**;[2007] 1 FLR 1246

"[25] …the test to be applied in *Thomas v Thomas* cases:

'[12] … But what does the word "resource" mean in this context? In my view, when properly focused, that central question is simply whether, if the husband were to request it to advance the whole (or part) of the capital of the trust to him, the trustee would be likely to do so …

[13] … In principle … in the light of s 25(2)(a) of the 1973 Act, the question is surely whether the trustee would be likely to advance the capital immediately or in the foreseeable future.'"

A case may be "*special"* because in different legal systems the inheritance is guaranteed (***Alireza v Radwan*** [2017] EWCA Civ 1545).

[40] "The present case is different. The wife's inheritance prospects do not have the inherent uncertainty found where a will is made in a country such as England where there is no concept of forced heirship. In my view, a prospective inheritance which has the certainty brought to it by the laws of forced heirship, is capable of being a "financial resource" which the wife "has or is likely to have in the foreseeable future".

8. <u>The position if one spouse mingled an inheritance but the other didn't?</u>

Inheritance already received may be used to meet needs, but in the ordinary course of events, future inheritance (as opposed to an existing interest in a trust) is unlikely to be relevant:

*"... However those facts, being extremely special demonstrate that the occasions on which such an interest will fall within s,.25(2)(a) of the Act of*

*1973 as amended, are likely to be rare. In the normal case uncertainties both as to the fact of inheritance and as to the times at which it will occur will make it impossible to hold that the property is property which is likely to be had in the foreseeable future...The world is full of women in their 80s who had high blood pressure in their 60s"* Michael v Michael [1986] 2 FLR 389.

The general rule has been clear since *Michael v Michael* [1986] 2 FLR 389; unless a relative has actually died or is incapacitated and unable to change their will, expectations of inheritance will be ignored.

In answering this question (Qu 4), I believe the answer is : "it depends..."

I am not sure it is possible to give a helpful one size fits all answer to this particular problem. The approach is bound to be very fact sensitive. If one party will enjoy their (foreseeable) inheritance untouched by the court and the other party has it taken into account (may be through mingling), the real difference between the two is simply the time the inheritance was received, then I think subject to the issue of need, the receipt of the inheritance or foreseeable receipt needs to be reflected in the distribution.

9. If inheritance is going to be considered : Quantification – 2 ways of calculating the division of matrimonial and non-matrimonial property

*B v B (Assessment of Assets: Pre-Marital Property)* [2012] 2 FLR 22 at [89]

(applying *N v F (Financial Orders: Pre-acquired Wealth)* [2011] EWHC 586).

**"Pre-marital wealth**

[15] The approach which the court should adopt to pre-marital wealth as non-matrimonial property has recently been comprehensibly reviewed by Mostyn J in ***N v F (Financial Orders: Pre-acquired Wealth)*** **[2011] EWHC 586**. He referred to two schools of thought, the first of which was simply to adjust the percentage from 50% and the second being to exclude the non-matrimonial property, leaving the matrimonial property to be divided in accordance with the equal sharing principle. He then went on to endorse a two-stage approach adopted by Burton J in ***S v S (Non-Matrimonial Property: Conduct)*** **[2006] EWHC 2793 (Fam)** and Wilson LJ (as he then was) in ***Jones v Jones*** **[2011] EWCA Civ 41**. At paragraph [14], Mostyn J summarised the steps which the court needs to consider as follows:

"(i) whether the existence of pre-marital property should be reflected at all, this depends on questions of duration and mingling;

(ii) if it does decide that reflection is fair and just, the court should then decide how much of the pre-marital property should be excluded. Should it be the actual historic sum? Or less, if there has been much mingling? Or more, to reflect a springboard and passive growth, as happened in Jones?

(iii) the remaining matrimonial property should then normally be divided equally;

(iv) the fairness of the award should then be tested by the overall percentage technique."

[16] Mostyn J was at pains to point out that consideration of pre-marital wealth was subject to the question of need. In most cases, the search for fairness begins and ends at the needs stage, as Lord Nicholls put it in ***Miller v Miller; McFarlane v McFarlane*** **[2006] UKHL 24**. Furthermore, as Moylan J has recently observed in ***AR v AR*** **[2011] EWHC 2717 (Fam)**, considering recent authorities including ***Robson v Robson*** **[2010] EWCA Civ 1171** and ***K v L*** **[2011] EWCA Civ 550**, fairness may require the application of the sharing principle to non-matrimonial property.

[17] I have already adverted to the difficulties facing me in making certain findings. As Mostyn J observed in *N v F* at paragraph [24]:

"If a party is going to assert the existence of pre-marital assets then it is incumbent on him to prove the same by clear documentary evidence".

I cannot overstate the importance of this principle and the onus of proof which it places upon the husband."

[89] In summary, the wife's total capital needs in my judgment amount to £701,349. As Mostyn J observed in *N v F*, the assessment of need is not an insulated metric and the presence of pre-marital property may lead to a more conservative assessment of needs. In reaching my conclusion in relation to the wife's capital needs, I also have regard to the husband's pre-marital wealth".

***DR v GR*** [2013] EWHC 1196 (Fam): Another approach would be to take a percentage of the assets as matrimonial property (at [47]). *the creation of this trust was plainly an agreed part of the financial architecture of this marriage. In her evidence the wife agreed that the object of the trust was to benefit all members of the family. On the other hand the assets of the trust are the product of the joint endeavour of the parties each making the fullest possible contribution in their different ways and are quintessentially matrimonial property.*" The fairest way of balancing these two factors was to allow 80p in £1 as matrimonial property.

**MCJ v MAJ** [2016] EWHC 1672 Roberts J : if the income generated by a non-matrimonial asset has been used towards the parties' domestic economy, this does not necessarily change the non-matrimonial asset into a matrimonial one.

[62] "If those funds are invested and preserved throughout the marriage without any inroads being made into the underlying capital value, the use of interest generated in respect of those funds does not, in my judgment, impugn the fundamental nature of the inheritance as non-matrimonial property."

**HART V HART** [2017] EWCA 1306 Lord Justice Moylan also dealt with the calculation issue:

[81] In *N v F* Mostyn J made a number of observations including that "the treatment of pre-marital property is highly fact specific and very discretionary" (paragraph 7). In addition to mingling, as referred to above,

Mostyn J also identified what he considered to be "two schools of thought" (paragraph 10):

"Where it is decided that the existence of pre-marital property should be reflected, there are two schools of thought as to how its expression should be worked out. The first is the technique of simply adjusting the percentage from 50%. This technique finds its clearest expression in *Charman (No 4)* at para [66] …"

Then, after referring to *C v C*, he continues:

[11] The alternative technique is to identify the scale of the non-matrimonial property to be excluded, leaving the matrimonial property alone to be divided in accordance with the equal sharing principle."

He concludes by adhering to his view that the two-step approach is the right one "generally speaking" (paragraph 14). It is also interesting to note that Mostyn J excluded only £1 million of the husband's pre-marital wealth of £2 million on the broad basis that the marriage was long and the "moneys were well and truly mingled with marital finds" (paragraph 44), although he added that, but for needs, he would have excluded £2 million.

[82] The final decision to which I propose to refer is *JL v SL (No 2)*. In that case Mostyn J considered that, what Wilson LJ had said in *K v L* (paragraph 21) about the "ordinary consequence of the application of the sharing principle to non-matrimonial property (paragraph 21), mandated "that the court should always attempt to determine the partition between matrimonial and non-matrimonial property" (paragraph 25).”

10. Conclusion

Hardening of attitude by the courts to inheritance? I have tried to deal with (fairly) current cases but take Pearce v Pearce (1980) 1 FLR 261 where the parties had separated in 1969 and for nine years the wife cared single-handedly for the three children. Until 1977 the husband was an undischarged bankrupt and made no financial contribution to the running of the wife's household, which was sustained by state benefits. In 1978 the husband inherited from his father a house worth £19,000 and liquid capital of £15,000. The wife then applied for an order for a lump sum. The Court of Appeal upheld an award to her of a lump sum of £12,000. Ormrod LJ, with whom Orr LJ agreed, said, at p 264, that courts would not encourage applications long after the divorce but that the justice of the case might require an award notwithstanding a lapse of time. the fact that the husband's capital had come to him by inheritance long after the separation was no ground for exempting it from partial redistribution to the wife and that the award gave her "an opportunity of perhaps living in something a little bit better than the poverty which she has been living in all these years".

However as in **Joy v Joy** – have we come full circle or is there more non matrimonial property overall being ring fenced ? With future but foreseeable inheritances that do fall within Section 25(2)(a) of the MCA 1973 the Court can choose whether to make an adjustment by way of an increased lump sum to the other spouse to take account of this, if there are assets that are available or, it can exercise its discretionary jurisdiction to order an adjournment.