

Non-matrimonial property:
What is the latest judicial thinking on
non-matrimonial property, including
inheritance, pensions and the application of
the mingling principles, with a focus on
"needs"?

Justin Warshaw KC

WC v HC (Financial Remedies Agreements) [2022] EWFC 22

Rule 10:

x) Pursuant to the sharing principle, (i) the parties ordinarily are entitled to an equal division of the marital assets and (ii) non-marital assets are ordinarily to be retained by the party to whom they belong absent good reason to the contrary.

White v White [2000] UKHL 54

...section 25 of the 1973 Act makes no mention of an equal sharing of the parties' assets, even their marriage-related assets. A presumption of equal division would be an impermissible judicial gloss on the statutory provision

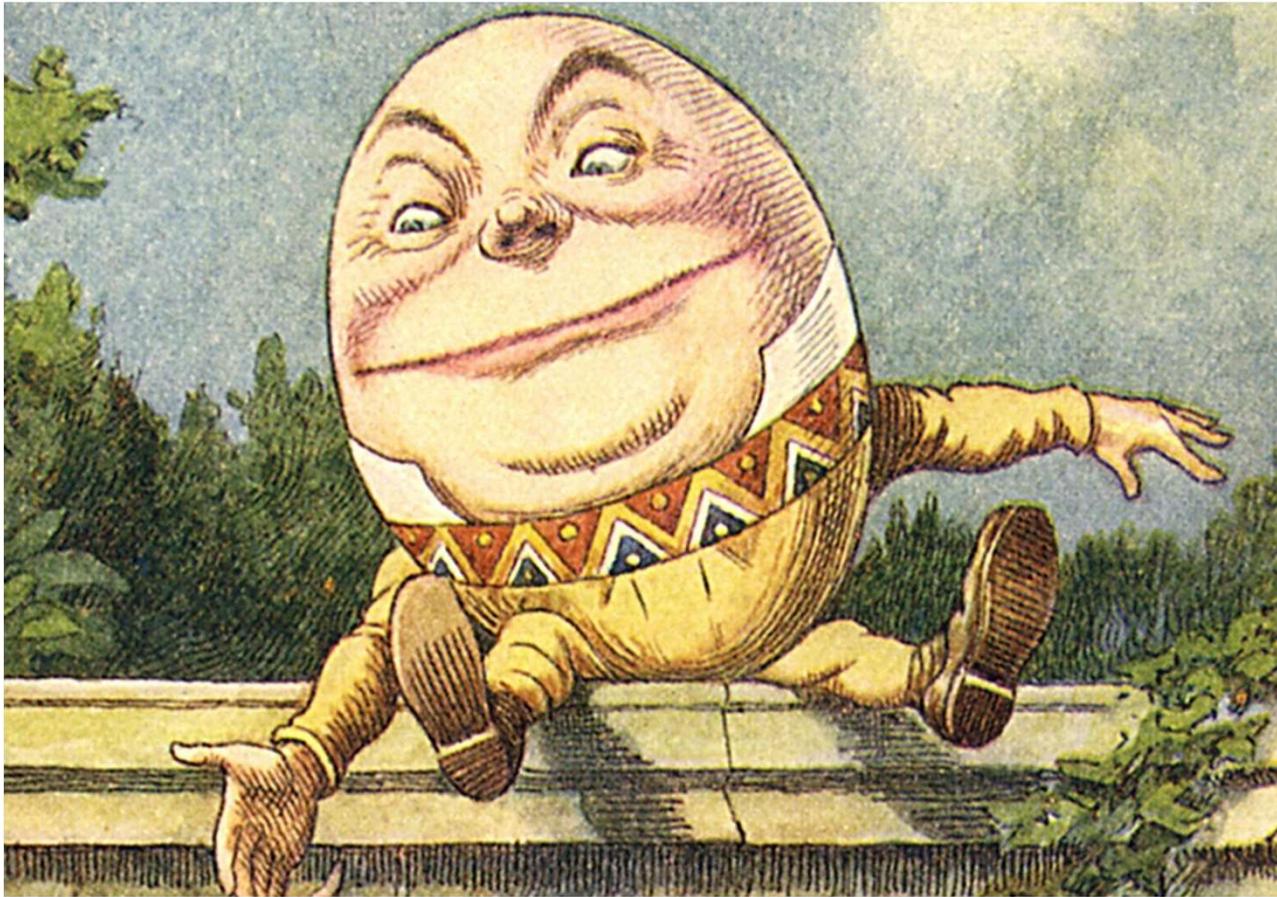
- A. the income, earning capacity, property and other financial resources [...]
- B. the financial needs, obligations and responsibilities [...]
- C. the standard of living [...]
- D. parties' ages and duration of the marriage
- E. any physical or mental disability
- F. the contributions [...] a party made or is likely [...] to make to the welfare of the family, including [...] looking after the home or caring for the family
- G. the conduct of each of the parties, if [...] inequitable to disregard it
- H. [...] the value [...] of any benefit [...] a party will lose the chance of acquiring.

Charman (No 4) 2007 1 FLR 1246

To what property does the sharing principle apply?...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.



“Life is all about sharing. If we are good at something, pass it on. That is the pleasure I get from teaching – whether it is television or books. We should all share.”



‘When I use a word,’
Humpty Dumpty
said in rather a
scornful tone, ‘it
means just what I
choose it to mean —
neither more nor
less.’

K v L [2012] 1 WLR 306

[21]....The ordinary consequence of the application to [non-matrimonial property] of the sharing principle is extensive departure from equal division, often (so it would appear) to 100%–0%.



1. PRE-ACQUIRED
ASSETS



2. EXTERNAL
DONATIONS



3. MATRIMONIALISATION



4. POST-SEPARATION
ACCRUALS

When does the sharing principle start?

Miller; MacFarlane [2006] UKHL 24

"Is the 'matrimonial property' to consist of everything acquired during the marriage (which should probably include periods of pre-marital cohabitation and engagement) [...]"

VV v VV [2022] EWFC 41

I am not aware of any reported case where the mere fact of engagement generated a sharing entitlement, regardless of cohabitation.

E v L [2021] EWFC 60

"It may not have been traditional in its functioning in that there was not conventional cohabitation; the wife did not move in lock, stock and barrel to F House. But it was, as [counsel for the wife] rightly says, from that point a committed sexual, emotional, physical and psychological, if somewhat itinerant, relationship."

How do you evidence the pre-acquired assets?

***N v F* [2011] 2 FLR 533**

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.

***Hart v Hart* [2018] 1 FLR 1283**

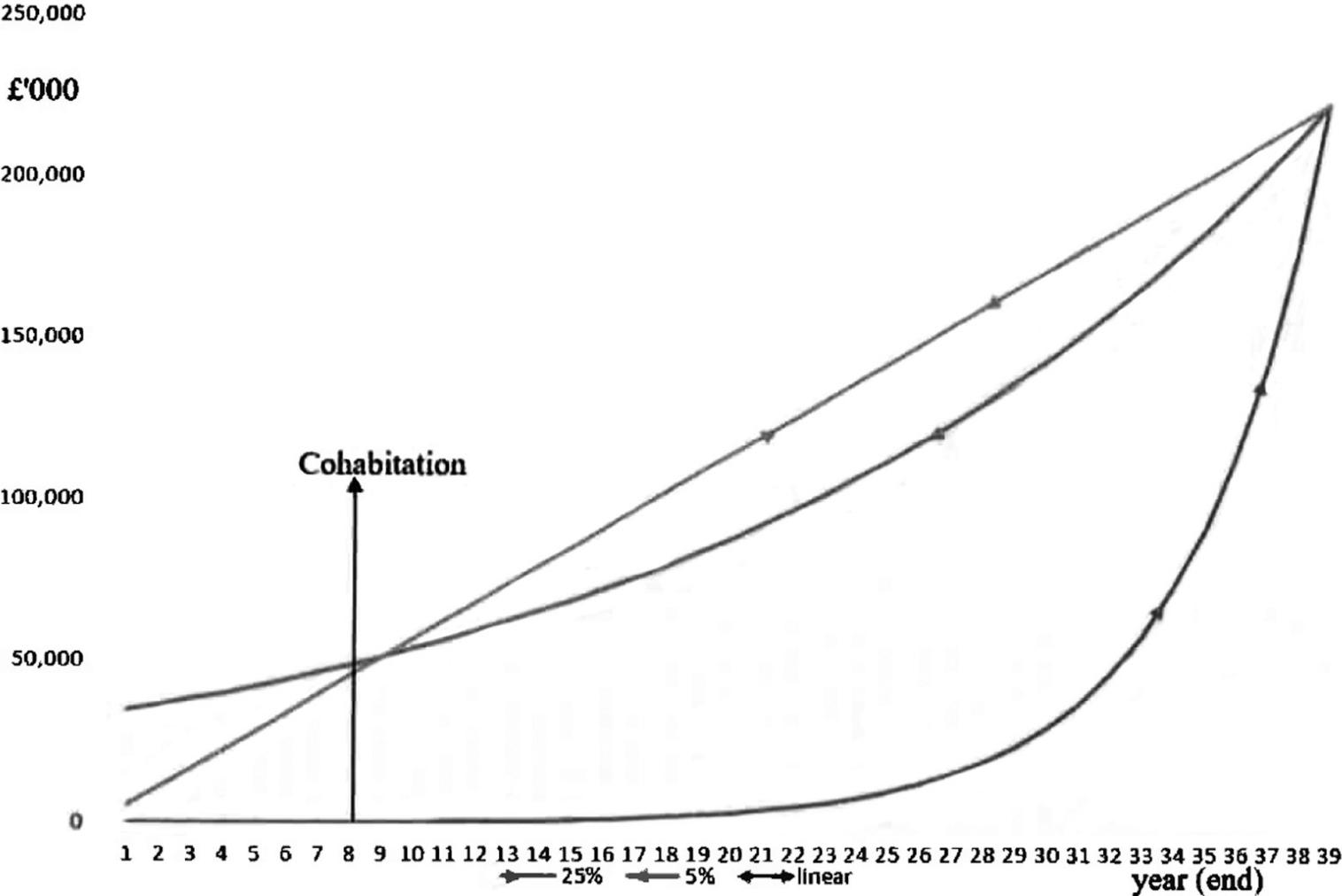
I do not agree with Mostyn J's comment in *N v F* that a party would need to prove the existence of pre-marital assets 'by clear documentary evidence'. There is no reason to limit the form or scope of the evidence by which the existence of such property can be established. The normal evidential rules apply. These include the court's ability to draw inferences if such are warranted

Jones v Jones [2011] 1 FLR 1723

The Court of Appeal said:

- Value business at date of cohabitation/marriage [A]
- Value business at date of separation [B]
- Increase the start value by general market movement
[A + market = C]
- Deduct [C] from [B] to give the matrimonial element

Martin v Martin [2018] EWCA Civ 2866



Hart v Hart [2018] 1 FLR 1283

The court has a discretion as to how to arrive at a fair division and can simply apply a broad assessment of the division which would affect 'overall fairness'. This accords with what Lord Nicholls of Birkenhead said in *Miller* and, in my view, with the decision in *Jones*.

External Donations

- Inheritances
- Gifts

K v L [2012] 1 WLR 306

- (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

Vaughan v Vaughan [2007] EWCA Civ 1085 at paragraph 49:

matrimonial home can be unequally divided to reflect the husband's prior ownership

S v AG [2011] EWHC 2637 (Fam) paragraphs 8 and 37: “the source of this matrimonial property was not a joint endeavour but rather non-matrimonial property...”;

FB v PS [2015] EWHC 2797 (Fam) at paragraphs 120-126:

matrimonial home not shared because its source the husband's family

Waggott v Waggott [2019] Fam 479

[123] Any extension of the sharing principle to post-separation earnings would fundamentally undermine the court's ability to effect a clean break.

C v C [2019] 1 FLR 939

Roberts J excluded post separation earnings from the sharing exercise, suggesting Waggott had overturned Rossi.

E v L [2021] EWFC 60

For new assets, such as earnings made during separation, I would apply the yardstick in *Rossi v Rossi* where I stated: “I 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”

GA v EL [2023] EWFC 206

1. Post separation non marital assets can exist at the date of trial even where there has been no undue delay;
2. In assessing post separation non marital assets I must guard against counting in the product of passive growth;
3. I should remain mindful of the extent to which the person claiming post separation assets is simply benefitting from investing the unallocated funds of the other spouse;
4. I should not overlook the domestic contribution which may be taking place by the other spouse;
5. While a formulaic approach may be better than a 'by and large' approach I will have to make such assessment as I best can on the facts as I find them.