

Non-matrimonial property –  
How far can you stretch the  
boundaries of non-matrimonial  
property?

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# Introduction



## Basic principles

The starting point: computation *then* distribution

Non-matrimonial property, sharing and needs.

*JL v SL (no.2):*

*“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.”*

# The development of the concept



The court's approach is grounded in the pursuit of fairness.

Three broad categories:

1. Property brought into the marriage;
2. Property acquired either through inheritance or gift; or
3. Property generated through the sole industry of one party

# Mingling



*“the source of the assets may be taken into account but its importance will diminish over time”.*

Miller; McFarlane [2006] UKHL 24, per Baroness Hale at paragraph 152.

Whether property has been ‘matrimonialised’ turns on:

1. The treatment of the property; and/or
2. The length of the marriage.

The distinction can be less obvious.

*“partly the product, or reflective, of marital endeavour and partly the product, or reflective, of a source external to the marriage”*

Hart v Hart [2017] EWCA Civ 1306, per Moylan LJ, at paragraph 85.

# Pre-marital property



Perhaps easiest to identify

Determining the length of the marriage will be instrumental

Example: TM v KM [2022] EWFC 155

- Parties marry in June 2006 and separate in 2021.
- W purchased flat in April 2005
- H and W live in the flat until tenanted in 2006
- W places date of cohabitation at 2006. H argues 2004. HHJ Hess finds 2004.
- Outcome, places the property:

*“fairly persuasively (though not necessarily inevitably) in the matrimonial property territory.”*

# Post-Separation Accrual

*“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.”*

JL v SL (no.2), per Mostyn J at paragraph 42.



Can become complex in cases of differed consideration (bonuses, RSUs, sale of assets/companies).

# Post-Separation Accrual



The markers that the court will look for to identify an asset to be non-matrimonial are:

- a. It is created by personal industry (by implication this excludes value accrued by passive growth).
- b. It is unrelated to an asset to which the other party has a claim.
- c. It must relate to work done post-separation.
- d. The greater the time that has passed since separation, the more likely the court will find it to be non-matrimonial.

# Business assets



Most likely to encounter:

1. Family business
2. Businesses that started before the marriage
3. Business where value has increased due to post-separation endeavour

Example: XO v YO [2022] EWFC 114

- Long marriage (parties met 2000, married in 2002, and separated in 2018)
- Business assets valued at £180m, derived from inheritance
- W found to have made significant work contribution and had received some shares
- W invited court to apply 30% discount
- Outcome: 50% discount applied to account for non-matrimonial portion

# Business assets: determining the non-matrimonial portion



Two approaches:

1. Broad brush (Hart v Hart)
2. detailed calculation (Jones v Jones; Martin v Martin)

*“If the court has not been able to make a specific factual demarcation but has come to the conclusion that the parties' wealth includes an element of non-matrimonial property, the court will also have to fit this determination into the s 25 discretionary exercise. The court will have to decide, adopting Wilson LJ's formulation of the broad approach in Jones, what award of such lesser percentage than 50% makes fair allowance for the parties' wealth in part comprising or reflecting the product of non-marital endeavour. In arriving at this determination, the court does not have to apply any particular mathematical or other specific methodology. 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.”*

Hart v Hart, per Moylan LJ at paragraph 96.

# Unequal sharing of matrimonial property



If pre-marital property has been matrimonialised, it does not follow that it is then shared equally

- The court is conducting a discretionary exercise
- Not a return to pre-*Lambert* position as the court is not dealing with assets generated during the marriage

Example: ARQ v YAQ [2022] EWFC 128

*“they are most certainly not matrimonial acquest in the standard sense as they were not all earned during the marital partnership”* (paragraph 81)

# Pensions



Blurred lines in bigger money cases: pension as capital

Dealing with pre-marital pension:

1. No apportionment
2. Deferred Pension Method
3. The Cash Equivalent Method
4. Straight-line Method

Method of distribution is a matter for judicial determination, but instruct an expert

# Separating property



What can be done to separate property?

1. Retain non-matrimonial assets *in specie* and separate and apart from the matrimonial finances
2. Place within trust structure
3. Nuptial agreement

# Separating property: Trusts



*“the question is not one of control of resources: it is one of access to them.”*

Whaley v Whaley [2011] EWCA Civ 617, at paragraph 113

*“Can the claimant spouse demonstrate, that if asked, the trustees would be likely, immediately or in the foreseeable future, to exercise their powers in favour of or in some way for the benefit of the other spouse”*

Charman (no.4) [2007] EWCA Civ 503

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# Word of warning: nuptial settlements



The court takes a broad approach, and any settlement that makes “*some form of continuing provision for both or either of the parties to [the] marriage*” will fall within the ambit of s24(1)(c).

Brooks v Brooks [1995] 2 FLR, at paragraph 315.

Quan v Bray: trust can become nuptial where there is evidence of an existing intention to benefit one or both parties

Joy v Joy-Marancho: trust cannot become nuptial if it was not nuptial at the outset

# Separating property: Nuptial Agreements



- *“Even where there is an effective prenuptial agreement, the court remains under an obligation to take into account all the factors found in s25(2) of the Matrimonial Causes Act 1973, together with a proper consideration of all the circumstances, the first consideration being the welfare of any children. Such an approach may, albeit unusually, lead the court in its search for a fair outcome, to make an order which, contrary to the terms of the agreement, provides a settlement for the wife in excess of her needs. It should also be recognised that, even in a case where the court considers a needs-based approach to be fair, the court will, as in KA v MA, retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs”.*

Brack v Brack [2018] EWCA Civ 2862, at paragraph 103.

# Conclusions



- In the context of a sharing-based award, non-matrimonial property will be excluded from part of the ‘pot’ of assets distributed by the court.
- For that reason, arguments over the classification of non-matrimonial property will be hotly contested.
- There are circumstances in which non-matrimonial property is easily identifiable (for example, inheritance, pre-marital wealth, or assets clearly generated post separation).
- Non-matrimonial property can become matrimonialised through a process of intermingling and this question will turn on the specific facts of a case.
- When determining the matrimonial portion of an asset, the court may take a broad-brush or more formulaic approach.

# Conclusions



- It does not follow that if the court identifies a matrimonial portion of an asset, that that portion will be shared equally between the parties.
- Although it may be possible to identify that an element of a pension is non-matrimonial, how that element is quantified and distributed is more complex and will invariably require the instruction of a PODE.
- Property can be separated from the ‘matrimonial pot’ including by its placement within a trust or through a nuptial agreement. It is imperative that these mechanisms are executed correctly to protect from the court’s invasion of the assets.
- To preserve property as non-matrimonial create a clear evidential basis for a finding that it is non-matrimonial. In short – keep it separate.
- However: needs trump all.