



ST JOHNS BUILDINGS

White Paper Conference – Manchester – April 2023

SAMANTHA HILLAS KC

samantha.hillas@stjohnsbuildings.co.uk

❖ White Paper Question - Non-Matrimonial Property

What is the latest judicial thinking on the treatment of non-matrimonial property, including inheritance, pensions and the application of the mingling principles?

❖ What is non-matrimonial property?

- ❖ Matrimonial property = all property generated by the parties during the marriage
- ❖ Each party to the marriage has a powerful claim to share in the matrimonial property
- ❖ Non-matrimonial property is property received or created outside of the span of the partnership, or gratuitously received during it from a source external to it
- ❖ Recourse will ordinarily only be had to non-matrimonial property insofar as is required to meet needs

JL v SL (No 2) [2015] EWHC 360 (Fam), §§17-20



Miller v Miller; McFarlane v McFarlane [2006] 1 FLR 1186 per Lord Nicholls

[26] This difference in treatment of matrimonial property and non-matrimonial property might suggest that in every case a clear and precise boundary should be drawn between these two categories of property. This is not so. Fairness has a broad horizon. Sometimes, in the case of a business, it can be artificial to attempt to draw a sharp dividing line as at the parties' wedding day ...

[27] Accordingly, where it becomes necessary to distinguish matrimonial property from non-matrimonial property the court may do so with the degree of particularity or generality appropriate in the case. The judge will then give to the contribution made by one party's non-matrimonial property the weight he considers just. He will do so with such generality or particularity as he considers appropriate in the circumstances of the case.

Businesses

IR v OR [2022] EWFC 20 - Moor J 29.03.22

- ❖ *...The first issue is the question of how the court goes about valuing pre-marital assets that should be excluded from matrimonial property as being an “unmatched” contribution and, therefore, not be subject to the sharing principle. [§52]*
- ❖ Two main different approaches :
 - ❖ broad-brush approach
 - ❖ arithmetical approach

❖ Staged approach – *Versteegh; Hart*

- ❖ Can non-matrimonial property be identified?
- ❖ If so, how is it to be measured and what factors should be taken into account when assessing passive growth and latent potential?
- ❖ If non-matrimonial property exists but cannot be clearly identified, how should that be reflected in the discretionary exercise?

❖ Broad brush - *Hart v Hart* [2017] EWCA Civ 1306

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 section 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 said in Miller and, in my view, with the decision in Jones.

Per Moylan LJ at [96]

❖ Arithmetical approach

Two potential arithmetical approaches:

- ❖ **Straight line (*Martin v Martin*)**
- ❖ **Historical valuation (*Jones v Jones*)**

❖ Straight line: *Martin v Martin* [2019] 2 FLR 291

❖ At first instance (reported as *WM v HM* [2017] EWFC 25), Mostyn J calculated the number of years that a company existed before the marital partnership commenced and divided it by the total length that the company has been in existence to calculate the proportion of current value that can be excluded from the matrimonial pot

❖ Benefits – simple, fair, does not require complex and expensive valuations many years after the event

❖ Disadvantage – ignores exponential growth

❖ More likely to be of use in a case where it is one of the spouses who formed the business prior to the date of the marital partnership commencing (Moor J in *IR v OR* at [§53])

❖ Historical valuation - *Jones v Jones* [2011] 1 FLR 1723

- ❖ Firstly, attempt to value the business at the date the marital partnership commenced
- ❖ Apply an appropriate uprating to that value to take account of things such as inflation, passive growth, latent potential
- ❖ Decide on a figure for the non-matrimonial element, deduct that from the assets and divide the balance equally
- ❖ Benefit – can be more accurate than straight line approach
- ❖ Disadvantage – can lead to massive topslicing which can produce an unfair result (*XW v XH* [2019] EWCA Civ 2262)

❖ Approaches compared in *IR v OR*

- ❖ Assets of just under £185m
- ❖ Largely derived from proceeds of sale of H's family business which had been in existence well before the marriage but had experienced major period of growth during the marriage
- ❖ On arithmetical approach, W would have been awarded £65m (c35%)
- ❖ On broad brush approach, Moor J determined between 37.5% (£69m) and 40% (£73m)
- ❖ Moor J averaged those figures to come out with £70m, which gave W just under 38%

❖ Recent cases involving businesses with a non-matrimonial element

E v L [2021] EWFC 60 (Mostyn J: 13.07.21)

- ❖ Neither childlessness nor shortness of the marriage detracts from the central principle that marital acquest (whatever that is) should be shared equally
- ❖ Starting point for calculating acquest was cohabitation or start of serious, committed relationship
- ❖ End point = date of trial
- ❖ This should apply forcefully to assets in place at point of separation and shifted in value since then
- ❖ Total assets c£9.2m
- ❖ Marital proportion £3.9m
- ❖ W received half of marital proportion after 4 year marriage
- ❖ 21% overall

❖ Recent cases involving businesses with a non-matrimonial element

L v L [2021] EWFC B83 (HHJ Booth: 05.10.21)

- ❖ By time parties began to cohabit, H owned 57% of shares in family business worth (then) £3.3m; rest settled to trust for his benefit
- ❖ Prior to separation, the parties had restructured company to mitigate IHT and provide for their adult children
- ❖ Company worth c£49m and generated profits of £3.2m pa
- ❖ H's shares transferred to newco for fixed benefit of H and W (c£24m) which had been calculated would meet their lifetime needs
- ❖ Rest of shares plus future profits transferred to vehicles for children
- ❖ Court held dynastic nature of H's shares already accounted for by transfer of shares/profits to children
- ❖ What H and W retained was shared 50/50

❖ Recent cases involving businesses with a non-matrimonial element

SD v GD [2021] EWFC B62 (HHJ Rogers: 09.07.21)

- ❖ H owned 75.1% shares in family company
- ❖ Parties married in 1990 and company not incorporated until 1998 BUT it had inherited the assets of an earlier enterprise
- ❖ H sought to exclude and offered W 28.72% of total assets on basis of needs alone (which would have given her £400k in addition to pension share)
- ❖ W argued that as company incorporated during marriage, she made contributions as director and employee and mingling, she should get half but open offered 40%
- ❖ Court held that W placed too much reliance on passage of time – time itself cannot transform pre-marital assets into marital assets and that, in any event, her needs-based claim exceeded sharing
- ❖ W awarded 31% share of total assets

❖ Recent cases involving businesses with a non-matrimonial element

Gallagher v Gallagher (No.2) [2022] EWFC 53 (Mostyn J: 13.06.22)

- ❖ H set up business in 1998; parties started to cohabit in 2005
- ❖ Assets at trial c£35.5m of which £22.7m represented by H's company
- ❖ Agreed that W would get 50% of matrimonial capital
- ❖ H argued his shares and some properties should be excluded as non-matrimonial; W sought half
- ❖ Mostyn J adopted linear/straight line approach re company
- ❖ Took start date as January 2000 (when H's company really got going) and date of final submissions (c8,100 days)
- ❖ From start date to cohabitation = c2,000 days = 24.5%
- ❖ Court excluded that and 1 x property then divided rest 50/50
- ❖ W came out with just over 40% overall

❖ Recent case involving pension with a non-matrimonial element

KM v CV (No.2) [2022] EWFC 174 (HHJ Robinson: 01.03.22)

- ❖ Long relationship but parties had separated in 2011
- ❖ W serving police officer; H on benefits
- ❖ W's pension now worth £137k
- ❖ Final hearing had taken place in 2019 when Court had taken pension at date of separation (2011) and given H a share worth £21.5k – set aside on appeal
- ❖ Delays due to obtaining PODE report
- ❖ W sought dismissal of H's claims; H sought lump sums totalling £20k
- ❖ **All about needs** – H not working and on benefits; W in ill health, unlikely due to continue working in police and in debt. H needed £10k
- ❖ PSO income to H would reduce his benefits, PAO would be expensive to administer so court made deferred lump sum order

❖ Recent cases involving trusts/inheritances with a non-matrimonial element

WX v HX [2021] EWHC 214 (Roberts J: 10.02.21)

- ❖ Long marriage; both H and W from wealthy families
- ❖ Wealth available for distribution c£50-60m
- ❖ W sought to exclude assets derived from inherited funds c£14m (largely in trust)
- ❖ H argued c£21m held offshore derived from inheritance and offered W the FMH (£13.75m)
- ❖ W sought FMH plus £10m
- ❖ Judge found W's non-matrimonial property had been preserved as her own separate property
- ❖ All of H's wealth had been used to support the family and acquire the (now marital assets)
- ❖ Of £55m total, £39m was matrimonial – that would be divided 50/50

❖ Recent cases involving trusts/inheritances with a non-matrimonial element

ND v GD [2021] EWFC 53 (Peel J: 14.06.21)

- ❖ Long marriage; modest standard of living
- ❖ By time of final hearing assets were £2.6m as H had inherited his mother's estate about 5 years prior to separation. About £750k of that was marital
- ❖ W had reduced life expectancy and no earning capacity (save for benefits) as a result of diagnosis of Young Onset Alzheimer's
- ❖ Acknowledged that W's needs exceeded sharing claim
- ❖ H proposed £750k (£525k housing and income fund £225k)
- ❖ W sought £1.2m (£700k housing and income fund £500k)
- ❖ Court summarised relevant authorities (see over)
- ❖ W needed £650k to rehouse plus income fund of £300k
- ❖ 63/37 division in W's favour

❖ *ND v GD* principles - §§38 to 56

- ❖ Where the result suggested by the needs principle is an award greater than the result of the sharing principle, needs will prevail (*Charman*)
- ❖ The sharing principle (marital assets divided equally/non-marital assets retained by the party to whom they belong) is only engaged where there is a surplus of assets over needs
- ❖ The Court's evaluation of the demarcation between marital and non-marital assets must be carried out with the degree of particularity or generality appropriate in each case (*Hart v Hart*) and the extent to which non-marital assets acquire a marital character is fact-specific

❖ *ND v GD* principles - §§38 to 56

- ❖ The attribution of income derived from a non-marital asset towards the domestic economy will generally not convert the asset from non-marital to marital (*WX v HX [2021] EWHC 241*)
- ❖ Needs are elastic and the main drivers are the scale of the payer's wealth, the length of the marriage, age, health and standard of living (*FF v KF [2017] EWHC 1093*) as well as the source of the wealth, if that source is substantially non-marital (*N v F [2011] 2 FLR 533*)

❖ CONCLUSIONS

- ❖ Matrimonial capital should (save where needs require a different approach) be shared equally
- ❖ This applies equally to the fruits of a short or long marriage
- ❖ Unless there are good reasons not to do so, non-matrimonial capital will not be shared
- ❖ Good reasons include needs (when non-matrimonial capital will be invaded to the extent needs require it) and the extent to which those non-matrimonial assets have acquired a marital element i.e. mingling; how it has been used; what the parties intended
- ❖ The fact non-matrimonial capital has generated an income for the family does not convert it into a matrimonial asset
- ❖ Neither does, in itself, the passage of time
- ❖ In attempting to determine the extent of non-matrimonial capital, the Court can adopt the degree of particularity or generality appropriate in each case



Manchester
0161 214 1500

Sheffield
0114 273 8951

Chester
01244 323070

Liverpool
0151 243 6000



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