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***“WHEN WILL A COURT DEPART FROM EQUALITY BECAUSE OF PRE-MARRIAGE ACQUIRED WEALTH OR WEALTH INHERITED DURING THE MARRIAGE?”***

Unlike many other jurisdictions, we have no legislative distinction between 2 classes of property being i) inherited and pre-marital assets and ii) matrimonial property.

Nor do we (yet) have the widespread use of pre-nuptial agreements which provide for how these different types of asset should be treated upon marital breakdown.

Casting one’s eye over the cases as far back as Mrs White’s application for ancillary relief, some 17 years ago, we find different judges grappling with the thorny issue of the categorisation of assets and the application of the sharing principle in different ways.

**White v White [2000] UKHL 54**

Lord Nicholls:

“property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.

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”.

### **Miller v Miller; McFarlane v McFarlane [2006] UKHL 24**

Lord Nicholls:

“The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: 'unless there is good reason to the contrary'. The yardstick of equality is to be applied as an aid, not a rule.”

Baroness Hale:

“sharing of the fruits of the matrimonial partnership”

“in a matrimonial property regime which still starts with the premise of separate property, there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them. The nature and the source of the property and the way the couple have run their lives may be taken into account in deciding how it should be shared”.

### **The developing jurisprudence**

#### **Robson v Robson [2010] EWCA Civ 1171**

H: 66 W: 54

21 year marriage with 2 children aged 20 and 17

H assets £22.3 million of which £18 million his family estate (s), inherited.

On appeal:

- W housing award reduced from £5 million to £4.3 million
- W awarded £2 million capitalised maintenance plus legal costs of £600,000

Ward LJ:

"How then does the court approach the 'big money' case where the wealth is inherited? At the risk of over-simplification, I would proffer this guidance:

- (1) Concentrate on s 25 of the Matrimonial Causes Act 1973 as amended because this imposes a duty on the court to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of 18; and then requires that regard must be had to the specific matters listed in s 25(2). Confusion will be avoided if resort is had to the precise language of the statute, not any judicial gloss placed upon the words, for example by the introduction of 'reasonable requirements' nor, dare I say it, upon need always having to be 'generously interpreted'. (2) The statute does not list those factors in any hierarchical order or in order of importance. The weight to be given to each factor depends on the particular facts and circumstances of each case, but where it is relevant that factor (or circumstance of the case) must be placed in the scales and given its due weight. (3) In that way flexibility is built into the exercise of discretion and flexibility is necessary to find the right answer to suit the circumstances of the case. (4) Like every exercise of judicial discretion, the objective must be to reach a just result and justice is attained when the result is fair as between the parties. (5) Need, compensation and sharing will always inform and will usually guide the search for fairness. (6) Since inherited wealth forms part of the property and financial resources which a party has, it must be taken into account pursuant to subs 2(a). (7) But so must the other relevant factors. The fact that wealth is inherited and not earned justifies it being treated differently from wealth accruing as the so-called 'marital acquest' from the joint efforts (often by one in the work place and the other at home). It is not only the source of the wealth which is relevant but the nature of the inheritance. Thus the ancestral castle may (note that I say 'may' not 'must') deserve different treatment from a farm inherited from the party's father who had acquired it in his lifetime, just as a valuable heirloom intended to be retained in

specie is of a different character from an inherited portfolio of stocks and shares. The nature and source of the asset may well be a good reason for departing from equality within the sharing principle. (8) The duration of the marriage and the duration of the time the wealth had been enjoyed by the parties will also be relevant. So too their standard of living and the extent to which it has been afforded by and enhanced by drawing down on the added wealth. The way the property was preserved, enhanced or depleted are factors to take into account. Where property is acquired before the marriage or when inherited property is acquired during the marriage, thus coming from a source external to the marriage, then it may be said that the spouse to whom it is given should in fairness be allowed to keep it. On the other hand, the more and the longer that wealth has been enjoyed, the less fair it is that it should be ring-fenced and excluded from distribution in such a way as to render it unavailable to meet the claimant's financial needs generated by the relationship. (9) It does not add much to exhort judges to be 'cautious' and not to invade the inherited property 'unnecessarily' for the circumstances of the case may often starkly call for such an approach. The fact is that no formula and no resort to percentages will provide the right answer. Weighing the various factors and striking the balance of fairness is, after all, an art not a science.

[76]: " Since they had drawn upon capital to support their lifestyle, there can be no complaint about the fact that the judge required the inherited property to continue to be the source to fund the wife's future income needs. Given the husband's age, lack of earning capacity, and the loss of the farm income, he could hardly provide future support for the wife otherwise than by continuing to use his capital resources."

Hughes LJ at [95]:

"That the origin of assets in inheritance is a relevant factor for the court in no sense means that the approach to inherited assets ought always to be the same. What is fair will depend on all the circumstances; those cannot exhaustively be stated but will often include the nature of the assets, the time of inheritance, the use made of them by the parties and the needs of the parties at the time of trial. In the present case, although the assets were inherited from the husband's family, the parties had jointly elected to live off them and, in effect, to use them as a substitute for earned income. There can be no possible complaint about an order which treated the capital in this case in the way the parties had themselves jointly treated it. Moreover, in this sort of family circumstance the conventional distinction which may be made elsewhere between capital and income ceases to have the significance it may have for others. That is true also of other family

situations, especially when the capital is the result of income accumulated with a view to it supporting the family lifestyle in future, for example in retirement"

### **K v L [2011] EWCA Civ 550**

The issue on appeal was whether the judge at first instance had erred in principle in ruling that the award to the husband should be limited to a generous interpretation of her needs.

The wife's considerable unmatched financial contribution (W shares worth £57.4m) represented almost entire wealth of the parties.

Per Wilson LJ:

it was right to identify and to reflect this substantive difference in contribution. The importance of the contribution may diminish over time, (viz. Baroness Hale in *Miller; McFarlane*) *depending on the facts of the case, such as how the non-matrimonial property has been invested or mixed.*

In this matter there had been no inter-mingling; the wife's shares had been ring-fenced at all times.

### **GS v L [2011] EWHC 1759 (Fam)**

10 year marriage; husband claimed £1.49 million should be ring-fenced as pre owned by him.

Per Eleanor King J: held to be inappropriate and unnecessary to determine whether those assets constituted non-matrimonial property as they were need to satisfy both the immediate and the long-term needs of the wife and the children.

NB. a needs-based argument often obviates that need to analyse whether property has acquired the nature of a matrimonial asset either by merger, by use or by passive accrual on pre-owned assets.

**Jones v Jones [2011] 1 FLR 1723 , EWCA Civ 41**

Total assets £25m.

Wilson LJ

H entered the marriage with a company at that point worth £2 million. At the date of separation it was worth £12 million and on sale, £25 million.

The court was concerned with the passive economic growth on this non-matrimonial asset during the marriage. There is a need to distinguish between passive growth on a non-matrimonial/pre-marital asset and active growth, which is referable to the husband's endeavour during the marriage, and therefore properly treated as matrimonial.

**AR v AR [2011] EWHC 2717 Fam**

Moylan J

Assets £20m, all but £1m inherited by or gifted to H.

W was seeking a 30% share of the overall wealth

[81]... Miss Bangay submits that, in particular, the length of the relationship and the wife's contributions justify her being awarded a sum that includes an "element of sharing". It is clear to me that the bulk of the wealth in this case is accurately described as non-matrimonial, in other words, it is not the product of the parties' endeavours during the marriage. The form of the wealth has in some respects changed, in particular following the realisation by the husband of his interests in the family company. The former matrimonial home has been lived in and the family have clearly in part used the invested income generated from the husband's inherited wealth. But, nothing has happened to the bulk of the wealth which has changed it into matrimonial property or diminished the weight to be attached to it as a factor in this case. In my judgment, the principle which in this case best guides me in the exercise of my discretion under section

25 to the determination of a fair award is that of needs. I do not consider that the sharing principle justifies any additional or enhanced award..

### **N v F (Financial Orders: Pre-Acquired Wealth) [2011] 2 FLR 533**

Mostyn J

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.

### **Y v Y [2012] EWHC 2063 (Fam)**

Baron J

Family estate worth £22.9 million net CGT. It was held that the estate coming from the husband's family was non-matrimonial, but the mansion house had been the matrimonial home during the long marriage and the estate income had been used to support the family lifestyle. The family had enjoyed an exceptionally high standard of living during the marriage (albeit financed by borrowing) and that dictated a reasonable needs based award of £5.1 million for housing together with an income fund of £3 million for wife, which represented 32.5% of the assets. The award was said to meet wife's needs and to encompass any right the wife had to share in the assets.

At paragraph [28] Baron J usefully sets out the law on the principles of need:

I accept the following propositions:

a) In the dispatch of a claim for Financial Remedy the Court must apply the Statute – being the Matrimonial Causes Act 1973 (as amended) - to produce a result which is fair to both parties after considering all the circumstances of the case. The Court has an additional duty in respect of children, whose needs, whilst they remain minors, are the Court's first consideration. The younger children fall into this category but I am confident that there is sufficient wealth in this case to have no doubts that their needs will be covered by their parents. b) The origin of the wealth is on the Husband's side. Prima facie, this makes it non-matrimonial property and places it in a special category. As such the Court should be slow to invade it without good reason. Nevertheless "In the ordinary course, this factor [inherited property] 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": *White v White* [2000] UKHL 54, [2000] 2 FLR 981 at 994G. c) Accordingly, I accept that primarily this is a needs case given that the Estate was pre-acquired. There is no assertion that the Wife deserves any element of compensation and I will deal with arguments relating to sharing below d) The Wife's needs should be interpreted fairly on application of the Statute, but in the context of the factor that the wealth was inherited. ..

f) The Estate was inherited and that must be reflected in the award. It is accepted that:

(1) The mansion house was the matrimonial home for almost the entirety of the marriage. The children were brought up there. It was the heart of the parties' relationship and family life; (2) The Estate income was used to support the family lifestyle. The capital value of the Estate was also deployed in funding the family via increased indebtedness secured on the Estate; (3) This was a long marriage to which the Wife made a full contribution.

g) Per Lord Nicholls in *Miller/McFarlane* (supra) at [22]: "the parties' matrimonial home, even if this was bought 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...".

As I said in *NA v MA* [2006] EWHC 2900 (Fam), [2007] 1 FLR 1760, referring to the above quote:

"I do not take that to mean that the property must be divided equally but its value and the lifestyle that it produced are relevant factors in the Court's consideration of fairness."

I consider that observation to be especially apt to the facts of this case.

h) Both parties acknowledge that the sharing principle can apply, in theory, to inherited assets as well as to 'marital acquest' – see *Charman v Charman (No.4)* [2007] EWCA 503, [2007] 1 FLR 1246 at para 66: Per Potter P:

"To what property does the sharing principle apply? The answer might well have been that it applies only to matrimonial property, namely the property of the parties generated during the marriage otherwise than by external donation; and the consequence would have been that non-matrimonial property would have fallen for redistribution by reference only to one of the two other principles of need and compensation to which we refer in para [68], below. Such an answer might better have reflected the origins of the principle in the parties' contributions to the welfare of the family; and it would have been more consonant with the references of Baroness Hale of Richmond in *Miller* at paras [141] and [143] to 'sharing ... the fruits of the matrimonial partnership' and to 'the approach of roughly equal sharing of partnership assets'. We consider, however, the answer to be that, subject to the exceptions identified in *Miller* to which we turn in paras [83]–[86], below, 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. It is clear that both in *White*, at 605F–G and 989 respectively, and in *Miller*, at paras [24] and [26], Lord Nicholls of Birkenhead approached the matter in that way; and there was no express suggestion in *Miller*, even on the part of Baroness Hale of Richmond, that in *White* the House had set too widely the general application of what was then a yardstick."

i) The subsequent jurisprudence, while acknowledging the potential application of

the sharing principle to inherited wealth, has tended towards a needs-based determination. Plainly, as Mr Marks QC puts it,

"there is a graduated scale or spectrum of kinds of inherited wealth and circumstances relevant to the question of sharing. Factors relevant to likelihood of sharing might include:-

i) the nature of the assets (e.g. land/property, art, antiques, jewellery on the one hand, and cash or realisable securities on the other); ii) whether the inherited assets have been preserved in specie or converted into different assets, realised or even spent; iii) how long they have been 'in the family'; iv) the established or accepted intentions of both the previous holders of the assets and the spouse who has inherited them; v) whether they have been 'mingled' (for example by being put into joint names of the spouses, or by being mixed with assets generated during the marriage); vi) the length of the marriage and therefore the period over which they have been 'enjoyed' by the other spouse; vii) whether the other spouse has directly contributed to the improvement or preservation of the inherited wealth."

### **S v AG [2012] 1 FLR 651**

Mostyn J

7. In the application of the sharing principle (as opposed to the needs principle) matrimonial property will normally be divided equally (see para 14(iii) of my judgment in *N v F*). By contrast, it will be a rare case where the sharing principle will lead to any distribution to the claimant of non-matrimonial property. Of course an award from non-matrimonial property to meet needs is a common place, but as Wilson LJ has pointed out we await the first decision where the sharing principle has led to an award from non-matrimonial property in excess of needs.

8. While matrimonial property will normally be divided equally, this is not an invariable

rule. The reason for this is that sometimes the matrimonial property in question will not be the product of the endeavours of the parties within the social-economic partnership that is marriage (as Guest J described it in the Australian case of *Farmer and Bramley* [2000] FamCA 1615 at para 188).

Sometimes one party brings assets in which become "part of the economic life of [the] marriage...utilised, converted, sustained and enjoyed during the contribution period" (ibid at para 190). This is the concept of mingling referred to by me in *N v F* at para 9 (where I cited the remarks of Lord Nicholls in *Miller & McFarlane* at paras 24 – 25 and of Baroness Hale at para 148), and by Wilson LJ in *K v L* at para 18(b). But even if there has been much mingling the original non-matrimonial source of the money often demands reflection in the award.

9. But even the matrimonial home is not necessarily divided equally under the sharing principle; an unequal division may be justified if unequal contributions to its acquisition can be demonstrated

### **JL v SL (No 2) (Appeal: Non-Matrimonial Property) [2014] EWHC 360 (Fam)**

The leading case; Mostyn J picked up where he left off in *N v F*.

W had received £465,000 of inheritance during the marriage, £365,000 of which was received only 10 months before the end of the marriage.

£190,000 had been put into H bank accounts, Mostyn J concluding “the fact that there had been some mingling of monies..does not mean that the non-matrimonial source of the monies in question is destroyed as a relevant consideration”

The entire judgment merits close analysis, particularly:

17. A key component of fairness is drawing the distinction between matrimonial and non-matrimonial property. ..

18. Matrimonial property is the property which the parties have built up by their joint (but inevitably different) efforts during the span of their partnership. It should be divided

equally. This principle is reflected in statutory systems in other jurisdictions. It resonates with moral and philosophical values. It promotes equality and banishes discrimination.

19. These arguments do not apply to property received or created outside the span of the partnership, or gratuitously received within the partnership from an external source. Such property has little to do with the endeavour of the partnership and the equal sharing principle as explained by Lord Nicholls just cannot apply to it on any moral or fair basis. However, as I will explain, pre-marital property not uncommonly becomes part of the economic life of the spousal partnership and thus acquires a matrimonial character giving rise to a (not necessarily equal) sharing claim in relation to it.

20. For obvious reasons the span of the partnership is looked at de facto and not de jure. It is not looked at from the date of the marriage to the date of decree absolute. Rather it is measured from when the cohabitation began on a permanent basis until the date of the separation.

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.

23. In *N v F* at paras 10 and 11 I stated:

"Where it is decided that the existence of [non-matrimonial] 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%. ...

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. ..."

24. The problem with the first technique is that it is quintessentially intuitive. How do the parties understand how, say, 40% has been alighted on, as opposed to, say, 43% or 45%? The technique may reflect the individual judge's instinct and intuition but it risks

being described as a lawless science. In my opinion that technique cannot comfortably co-exist with para 21 of *K v L* where Wilson LJ stated:

"Thus a special contribution arises in circumstances in which a spouse's contribution, direct or indirect, to the creation of *matrimonial* property has been so *extraordinary* as to dictate a departure within the sharing principle from the ordinary consequence of its equal division. It is therefore no accident that this court's reference, [in *Charman*] at [90], to the unlikelihood of departure from equality further than to 66.6% - 33.3% was of "division of matrimonial property". By contrast, although non-matrimonial property also falls within the sharing principle, equal division is not the ordinary consequence of its application. The consequences of the application to non-matrimonial property of the two other principles of need and of *compensation* are likely to be very different; but the ordinary consequence of the application to it of the sharing principle is extensive departure from equal division, often (so it would appear) to 100% - 0%."

25. This seems to me to mandate that the court should always attempt to determine the partition between matrimonial and non-matrimonial property. Once it has done so the matrimonial property should usually be divided equally and there should usually be no sharing of the non-matrimonial property.

26. To my mind Lewison LJ put the matter well in *Re A (A Child)* [2014] EWCA Civ 1577 where he said at para 40 "if, as White suggests, the yardstick is equality it is impossible to know whether a pot of assets is being divided equally unless you know what the pot is". And the pot he was referring to was the pot of matrimonial property.

At paragraph 29, Mostyn J endorsed his own approach adopted at paragraph 14 of *N v F* (above)

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.

### **Robertson v Robertson [2016] EWHC 613 (Fam)**

Holman J

The wife contended for the methodology of Jones v Jones; she accepted that the value of H shares in ASOS at the date of cohabitation, uplifted to reflect passive growth should be separated out as non-matrimonial, but contended that the balance of the value, representing active growth during the marriage should be divided equally between the parties.

[34] ... It needs to be stressed, however, that the methodology is a tool and not a rule. The overarching duty upon the court is to exercise its statutory duty under section 25 of the Matrimonial Causes Act 1973 (as amended) and to exercise the wide discretionary powers conferred upon, and entrusted to, it by Parliament in a way which is principled and above all fair to both parties”

“Whether by way of cross-check (Wilson LJ at paragraph 52) or in the case of Arden LJ as an integral part of her reasoning (see paragraph 64 where she said, "... that cross-check is an essential part of my reasoning for my concurrence in the result in this case ..."), all three members of the court seem to have founded their ultimate decision on an overall sense of fairness that, on the facts of that case, about 32 per cent to the wife was fair”.

### **MCJ v MAJ [2016] EWHC 1672 (Fam)**

Assets: £10.5m - £11.6m

H stated sharing principle should be departed from because of pre-marital wealth; argued for needs-based disposal for wife.

W contended for full sharing entitlement.

Roberts J followed JL v SL approach.

However, in this case there was no accountancy evidence to establish a reliable historical benchmark as to value of assets at a particular point in the past or at the date of the parties' marriage.

56...it is simply not possible on the basis of the evidence before me to perform the sort of forensic exercise envisaged by the Court of Appeal in *Jones v Jones* [2011] 1 FLR 1723 and by Mostyn J in *N v F* [2011] 2 FLR 533 and *S v AG* [2012] 1 FLR 651. In appropriate cases (which will be the vast majority), I accept and endorse the stepped and intellectually rigorous approach of (a) deciding whether the existence of pre-marital property should be reflected in outcome at all, depending upon issues of the length of the marriage and what has been referred to in previous decisions as "mingling"; (b) if so, the extent of the pre-marital property to be excluded from the sharing principle; and, finally, (c) the equal division of the remaining (marital) property subject only to the cross-check of fairness and need. This approach was analysed recently by Mostyn J with his customary clarity in *JL v SL (No 2)(Appeal: Non-Matrimonial Property) [2015] EWHC 360 (Fam)*, [2015] 2 FLR 1202, paras 17 to 27. However, there are cases where reliable accountancy evidence is simply not available so as to make it possible for a court to establish a reliable and historical benchmark in terms of crystallised value at a particular point in time. It seems to me that this is one those cases.

62. It seems to me that the application of income generated by a capital asset (such as a commercial property portfolio) in order to sustain - in part - the domestic economy of a marriage (or, indeed to prop up the temporarily ailing fortunes of a parallel but unrelated business venture) does not thereby change the fundamental nature of that capital asset. It was non-matrimonial from the outset. The evidence is that, when from time to time a property from the commercial portfolio was sold, the equity was ploughed into the acquisition of a substitute property. There might have been 'churn' in the underlying composition of the property portfolio but as an entity it remained wholly external to this marriage. It stands in exactly the same position as a significant sum of money inherited by a party prior to the celebration of a marriage. 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.

W was awarded 24% of the assets, on a needs based assessment.

### ***LENGTHY MARRIAGE***

Matrimonial Causes Act 1973 section 25(2)(d)

It might be thought that the longer the marriage, *a priori* the greater the W's entitlement to share. There is really no such rule – see inter alia court's response to Deborah Bangay QC's arguments in AR v AR (above):

“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.

But note also Lord Nicholls in Miller; McFarlane:

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. ....

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.”

In relation to how the parties ‘organised their affairs’ and when the marriage has been long, the likely argument will be one of ‘mingling’, as a shorthand for a nuanced argument as to the characterisation of an asset.

Wilson LJ in **K v L [2011] EWCA Civ 550** :

16. Mr Pointer's second charge, made by reference to the 21 years of the marriage, is that the judge failed to recognise "that the importance of the source of the assets will diminish over time".

18. .... with respect to Baroness Hale, I believe that the true proposition is that the importance of the source of the assets may diminish over time. 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*. 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.

### ***PARTIES NEAR RETIREMENT AND CHILDREN FROM PREVIOUS RELATIONSHIPS***

The court in this situation may well be more inclined towards a departure from equality in the overall distribution, to reflect wealth derived from a source external to the marriage.

Of course, needs must be provided for, but there is often judicial sympathy for the understandable wish to preserve pre-marital wealth (eg. from a business built up prior to the marriage) for the children of an earlier marriage. Issues of advancement of inheritance and sensible tax planning arise.

Parties re-marrying later in life, with children already, would obviously be well advised to protect their existing wealth with a pre-marital agreement.

### **SUMMARY**

- a. there can be no ‘short-circuiting’ in the approach of the court to the exercise of its distributive powers; whatever the source of the assets, the court must consider all the section 25 factors and must stand back and consider whether an overall result is fair. A detailed forensic analysis and the application of prescribed methodology has its place, but cannot be wholly dispositive of the matter. Talk of ring-fencing is over simplistic and unhelpful. A departure from equality is legitimate as a reflection of the source of the assets;
- b. need will always justify the sharing of non-matrimonial property, but the extent to which it is shared depends upon the level of need, it is not always a matter of equal sharing, but rather of sharing anything between 0-100%;
- c. When the court is required to invade non-matrimonial property to meet need, the court tends to adopt a more restricted approach to an assessment of needs;
- d. in embarking upon the classification of assets, what has happened to pre-marital or inherited assets during the marriage requires careful analysis. ‘Mingling’ is an oft-quoted phrase, which can mean different things to

different judges. In any event, even if, for example, the income from an inherited asset is used as part of the marital economy during the marriage, the underlying nature of the asset does not change and thus it may not fall to be shared;

- e. however, active growth, by the efforts of one party during the marriage, is properly classed as part of the marital acquest and therefore subject to full sharing;
- f. despite the apparent clarity in approach now set out in *JL v SL*, there remains much to argue about in relation to the treatment of inherited or pre-marital wealth and such factors often drive cases to final hearing: see the observations of Bodey J in **S v S [2014] EWHC 4732 (Fam)** noting that cases in this sphere are notoriously fact-specific and subject to the exercise of a wide judicial discretion.

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