
HALL BROWN

Family Law

James Brown



- **Summary – The Flow of Case Law**
- 2001 - ‘We are where we are’ – Assets are as at date of trial.
- 2006 - Marital Partnership does not stay alive for sharing unless need or compensation. Date of separation the relevant date.
- 2006 - The 12 month rule.
- 2007 - The pendulum approach.
- 2011 - The mathematical approach.

- **Cowan [2001] EWCA Civ 679**
- Thorpe LJ @ [70]:
- *“The assessment of assets must be at the date of trial or appeal. The language of the statute requires that. Exceptions to that rule are rare and probably confined to cases where one party has deliberately or recklessly wasted assets in anticipation of trial.”*

- *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24
- Baroness Hale @ [144]
- *“In general it can be assumed that the marital partnership does **not** stay alive for the purpose of sharing future resources, unless this is justified by need or compensation.”*
- Lord Mance @ [174]
- *“Assuming that the focus is on assets acquired during the marriage, rather than on the husband’s overall means, it seems to me therefore natural in this case to look at the period until separation.”*

- **Rossi v Rossi** [2006] EWHC 586 (Fam)
- Mostyn:
 - 1. Assets created by one party after separation may qualify as non-matrimonial property if result of his personal industry
 - 2. If a bonus or other earned income relating to period when cohabiting often matrimonial. Bonus less than 12 months after separation matrimonial.
 - 3. The non-matrimonial property is not quarantined and excluded. The court will decide whether it should be shared and if so in what proportions.

- **S v S [2006 EWHC 2339 (Fam) [2007] 1 FLR 2120**
- Singer J approved Mostyn's guidance.
- Introduced concept of deducting passive economic growth if giving benefit of post-separation asset.

- ***P v P* [2007] EWHC 2877 (Fam); [2008] 2 FLR 1135**
- Moylan introduces the pendulum approach:
 - - Don't have to define what is and is not non-matrimonial property.
 - - Award of 40% to W
 - - Moylan repeated in *SK v WL* [2010] EWHC 3768 (Fam); [2011] 1 FLR 1471.

- **Jones v Jones [2011] EWHC Civ 41; [2011] 1 FLR 1723**
- A move to a more mathematical approach.
- Wilson LJ (as he was then):
 - Divide the assets into matrimonial and non-matrimonial assets, with the former being divided 50:50 and the latter 100% to the ‘contributor’ (there being no reasons in that case to do otherwise).
 - BUT, the percentage of overall assets which that approach achieved was then to be tested against overall fairness. The award of £8 million out of £25 million was 32% and survived the test of overall fairness.

- **N v F [2011] EWHC 586 (Fam); [2011] 2 FLR 533**
- Mostyn highlights the difference in approach of Moylan and Wilson:
- *“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.....”*

- ***K v L (Non-Matrimonial Property: Special Contribution)*** [2011] EWCA Civ 550
- Wilson clarifies – don't necessarily exclude non-matrimonial property:
- *“..... 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%”*

- **Cooper-Hohn v Hohn** [2014] EWHC 4122 (Fam); [2015] 1 FLR 19
- Roberts J used a hybrid:
- Classed post separation investment and unallocated profit earned 12 months after separation outside marital acquest.
- Issue – what to do with post separation growth of \$550m on a central investment fund created in marriage.
- Did not see date of separation as a cut off but did recognise H's endeavour post separation actively managing fund.
- Also recognised H's financial genius.
- As a combination W got £530m (36.12%) – in reality a percentage award.

- **JL v SL (No 2) [2015] EWHC 360 (Fam); [2015] 2 FLR 1202**
- Mostyn on growth in value:
- *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.*
- Mostyn on general approach:
 - - Disagreed with Moylan and Roberts (risk of ‘lawless science’)
 - - Where significant post separation growth:
 - Determine share of pool in absence of growth (usually 50/50)
 - Determine share of growth (usually unequal)
 - Cross check for fairness with a percentage

- **JB v MB [2015] EWHC 1846 (Fam)**

Nicholas Cusworth QC sitting as DHCJ:

- Attributed a percentage of the value of the business to H's post-separation endeavour and excluded.
- Put balance of value of business in asset schedule.
- Divided those assets equally.
- Cross checked against fairness and needs.

- **Summary**
- Bonuses
 - consider period attributable to. Still consider the “12 month rule”
- For other assets, ‘mathematical approach’:
 - What is matrimonial vs non-matrimonial
 - How much of asset in question is genuinely attributable to endeavour of one party post separation?
 - Even when it is remember to take account of passive growth.
 - Not as simple as “one out and the other in” – non-matrimonial can be 0-100% divided.
 - Once carried out mathematical approach cross check against needs and fairness.

Thank you

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