NON-MATRIMONIAL PROPERTY

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JUNE 2022 – WHITE PAPER CONFERENCE

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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?

*"It is, perhaps, worth reflecting that the concept of property being either matrimonial or non-matrimonial property is **a legal construct**. Moreover, it is a construct which is **not always capable of clear identification**."*

Moylan LJ in Hart v Hart

[2017] EWCA 1306 (Civ) §85

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*"**Fairness is an elusive concept**. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they **cannot be justified, or refuted, by any objective process of logical reasoning.** Moreover, they change from one generation to the next."*

Lord Nicholls in Miller/McFarlane §4

*"**Fairness has a broad horizon**…."*

Lord Nicholls in Miller/McFarlane §26

Moylan LJ in Hart v Hart §97

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What is marital property? - Miller/McFarlane [2006] UKHL 24

*"the **financial product of the parties' common endeavour**"*

Lord Nicholls §22

*"the **fruits of the matrimonial partnership**"*

Baroness Hale §141

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What is non-marital property? - White v White [2000] UKHL 54

"Property acquired before marriage and inherited property acquired during marriage come ***from a source wholly external to the marriage****"*

Lord Nicholls §42

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But an asset can be both… Hart v Hart [2017] EWCA Civ 1306

*"an asset can be comprise both, in the sense that it can be **partly the product, or reflective, of marital endeavour and partly the product, or reflective, of a source external to the marriage**"*

Moylan LJ §85

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Hart v Hart [2017] – Moylan LJ

- Summary of Law at §55-97
- §84: *"**the court is not required to adopt a formulaic approach**…when determining whether the parties' wealth comprises both matrimonial and non-matrimonial property"*
- §88: *"The principle which is being applied is that **the sharing principle applies with force to matrimonial property and with limited or no force to non-matrimonial property."***

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Hart v Hart [2017] – Moylan LJ

- §89: First, a case management decision will need to be made as whether, and if so what, proportionate factual investigation is required.
- §91: Secondly, the court will need to make such factual decisions as the evidence enables it to make.
- §95: The third and final stage….is when the court undertakes the section 25 discretionary exercise…This is not to suggest that, by application of the sharing principle, the court will share non-matrimonial property but the court has an obligation to determine that its proposed award is a fair outcome…

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Miller/McFarlane – Lord Nicholls §25

"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****."*

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"Mingling" - K v L [2011] EWCA Civ 550 - Wilson LJ §18

"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.****"*

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Inherited property & "mingling" – WX v HX, NX, LX [2021] EWFC 14

- 33-year marriage; H 66, W 60
- 3 adult children; 2 of the adult children joined as parties (NX & LX)
- £55m assets for division
- Further US$50m held in offshore trusts for adult children; W had challenged that the trust was for the children but trustees put the issue beyond doubt by taking steps to ensure neither H nor W could benefit
- Of the £55m, H proposed broadly equal division; both brought non-marital wealth to the long marriage & H argued the fair outcome was equality
- W sought ring-fencing of her "inherited" wealth (c.£14m) plus equal division of the remaining assets

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WX v HX, NX, LX – non-marital wealth

- Both parties had owned properties – pooled in their first marital home
- H brought in substantial wealth but it could no longer be separately identified – contributed to the 'marital pot' and grown substantially during the marriage
- H inherited money towards the end of the marriage
- He had taken the primary role in managing W's pre-marital/inherited wealth, making investment decisions and liaising with trustees
- W had played no part in financial decisions - left these to H
- W's wealth left in trust structures / sole name
- H argued unfair for his pre-marital wealth to be considered "mingled" but for W to get full "ring-fencing" of hers

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WX v HX, NX, LX – H's arguments

- For his sharing claim, H relied on K v L §18(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.*"

- AND his direct contributions to the management/increase of W's wealth

WX v HX, NX, LX – W's arguments

- W relied on K v L §18(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.*"
- W argued her wealth had not been mixed & never accepted it should be treated as matrimonial property. W accepted H had managed her money but argued he had done so no more successfully than a fund manager, and that this should not give him a 'share' of it.

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WX v HX, NX, LX – Roberts J decision §119

- *"W's inherited assets have remained wholly separate from the matrimonial assets at all times"*
- Did not regard her use of income (and small amounts of capital) for the benefit of the family as sufficient to "*mingle*" the underlying assets
- *"never been an understanding, far less an agreement, that the funds should be shared or that H should acquire any interest in them as a result of his management role"*
- No "mingling" by W per §18(b) of K v L

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WX v HX, NX, LX – Roberts J decision

- §122: *"the question for the court is the extent to which W's separate property can be said to be an asset which is "partly the product, or reflective, or marital endeavour and partly the product, or reflective, of a source external to the marriage""*
- §134: *"insufficient evidence… that H's management of these funds from 2004 has produced a financially measurable uplift in value over and above any allowance for passive growth"*
- §135: *"I conclude that (a) W's non-matrimonial property has throughout been preserved as her own separate property, and (b) it has not acquired a matrimonial character, either in whole or in part, as a result of H's activities as investment manager"*
- §141: *"I reject that notion that particular aspects of H's contribution has somehow operated to 'matrimonialise' what remains essentially W's separate property"*

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WX v HX, NX, LX – result

- H received "credit" for his late-inherited money, but not for his pre-marital wealth
- W's non-marital assets "ring-fenced"
- Of the £55m assets:
  - £39m "marital" = 50:50 division
  - £14m "ring-fenced" for W's pre-marital/ inherited
  - £2m H inheritance
  - Overall 40% H- 60% W despite 33 year marriage
- §158: *"The equal sharing of the available matrimonial assets will result in an overall financial disparity in the parties' positions. That disparity has arisen in part because of the financial landscape which the alienation of the funds in the S Trust has produced."*

Business with pre-marital element

- How to identify current value of pre-marital business endeavour?
- Various approaches:
  - Valuation/springboard/passive growth/indexation (Jones)
  - Broad-brush/intuitive approach (Robertson, IX v IY, XW v XH)
  - Time apportionment/ "linear" graph (Martin)

Valuation/ passive growth - Jones v Jones [2011] EWCA Civ 41, Wilson LJ

Valuation/ passive growth - Jones v Jones [2011] EWCA Civ 41, Wilson LJ

- Business worth:
  - £2m at marriage in 1996
  - £12m on separation in 2006
  - £25m on sale in 2007 (1 yr post-separation)
- Court did not treat increase from 2006 to 2007 as post-marital – "latent" value not new venture
- CA took £2m value in 1996, doubled it for "springboard" ("highly arbitrary" per Wilson LJ), then applied Oil/Gas index for marital passive growth to £9m non-marital / £16m marital, giving W £8m (50% of marital, 32% of total)
- NB LSQC tried to argue for "straight-line graph" approach, but rejected
- Approach now out of fashion - courts rejected it in later cases incl Robertson & Martin

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Intuitive - Robertson v Robertson [2016] EWHC 613, Holman J

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- W argued for Jones approach - £5m out of £220m for pre-marital
- H argued that the ASOS shares (and properties bought with sale of some shares) were wholly non-marital
- Court took broad-brush approach
- **50% marital; 50% non-marital** – W received 25% value
- Judge accepted his approach "*may be said to be arbitrary*"

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Intuitive – IX v IY [2018] EWHC 3053, Williams J

- £38m assets (almost all business)
- W sought 50% (full marital sharing)
- H proposed 13% on "needs" basis (business argued to be mostly pre-marital – 'heavy lifting' already done at marriage, only passive growth since)
- Jones arguments run – rejected by Judge as impossible to do in a "*reliable*" way
- Judge decided **40% non-marital / 60% marital** – no explanation for how these % were reached
- Gave W overall 24%

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Intuitive – XW v XH [2019] EWCA Civ 2262

- £530m assets
- W argued for nearly 50% (Jones approach - gave only minor reduction in business value for pre-marital)
- H proposed "needs" award only
- Jones approach rejected by Baker J
- CA approved: open to Judge to undertake "*broad evidential assessment*" and to conclude there was significant value not reflected in formal valuation
- CA treated **60% of business sale proceeds as marital and 40% as non-marital**; no mathematical explanation of how this was done
- Overall W received c.35% assets

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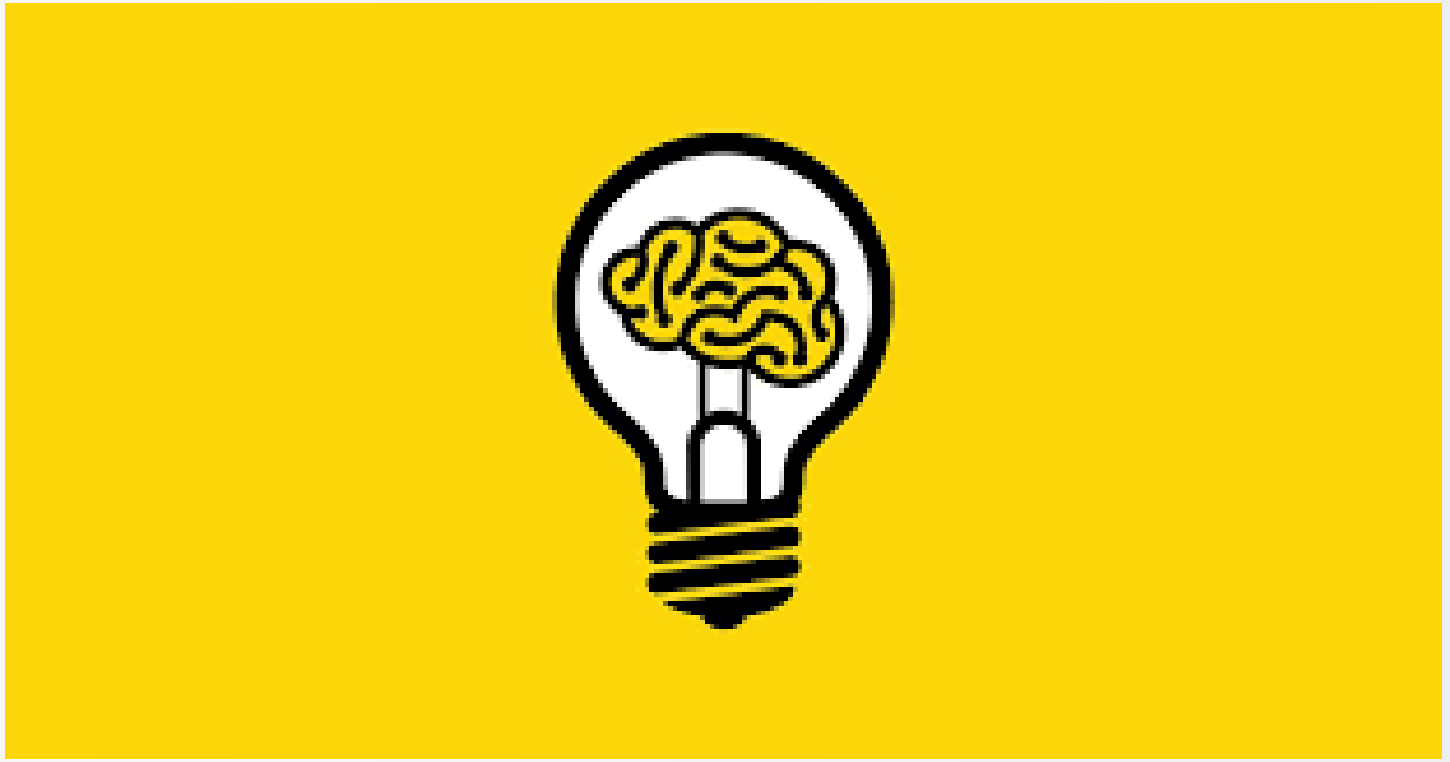
“Linear” graph – WM v HM [2017] EWFC 25, Mostyn J



"Linear" graph – WM v HM [2017] EWFC 25, Mostyn J

- £182m assets; 29 yr marriage
- H wealthy when parties met – business, property, pension, good income etc.
- Wealth from manufacturing lights
- Special contribution?
- Started business 8 years before met W
- W worked on the factory floor
- Same industry, same town, some of same employees 30 yrs later

"Linear" graph – WM v HM [2017] EWFC 25, Mostyn J

- Judge rejected Jones approach as giving insufficient allowance for pre-marital endeavour
- "Linear" graph/time approach to business value
- §20: *"The linear approach is the evaluation which I make in this case. It resonates with fairness. It reflects my opinion of the true latency of the business at the time that the marital partnership was formed, and that, intrinsically, value is (at least) as much a function of time as it is of work or market forces. In argument, I asked* ***"how could it be said that a day's work in 1980 in creating this company was less valuable than a day's work last week?" In my judgment, the answer is that it could not."***

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"Linear" graph – Martin v Martin [2018] EWCA Civ 2866

- W's appeal to CA unsuccessful; Mostyn J approach endorsed by CA
- Moylan LJ §127: "*Whilst it would be an improper fetter on a judge's discretionary powers to elevate this approach above others, **I agree with Mostyn J's general observation about "the beneficial side effect of eliminating arid, abstruse and expensive black-letter accountancy valuations of a company many years earlier at the start of the marriage".** I also agree that, as he said, **it "resonates with fairness"** because it takes an overarching view of the weight to be attributed to the husband's contributions to the business throughout its existence. I would add that it is also an approach which would be **consistent with the overriding objective** not least because it would save expense by limiting the scope for expensive and time consuming investigations of the development of a business…. the court is engaged on a **broad analysis of fairness**.*"

Post-separation accrual & "linear" graph - A v M [2021] EWFC 89, Mostyn J

- Mostyn J applied his Martin v Martin "linear" approach to post-separation "carry"/co-investments
- §14: *"calculate the marital acquest as at the date of trial… this should be the general rule unless there has been needless delay in bringing the case to trial"*
- *§15: "for each fund the marital, and therefore shareable, element of the carry should be calculated linearly over time"* – calculated in months

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Post-separation accrual & "linear" graph - A v M [2021] EWFC 89, Mostyn J

- Decided 53% carry in Fund 1/31% carry in Fund 2 = marital
- BUT then he "relocated" W's share of the carry into Fund 1, giving her 48.53% of Fund 1 carry and nothing of Fund 2….
- Same approach to co-investments giving W 78.91% of Fund 1 co-investments…

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Post-separation accrual – C v C [2018] EWHC 3186, Roberts J

- 13 yr marriage; assets exceeded needs
- H worked in banking; issue re division of future value of H's RSUs which had future performance requirements
- H meticulous mathematical approach to division of matrim/non-matrim elements of RSUs, from month after separation, and segregated post-separation bonuses in separate account
- Judge endorsed H's mathematical approach and accepted that it met step-back test of "*overall fairness*" (3rd step of Hart) on facts of that case

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Short childless marriage & 'sharing' – E v L [2021] EWFC 60, Mostyn J

- 2 yr marriage; no children
- Mostyn J clear that parties have full marital asset sharing claim whatever the length of the marriage and whether or not they have children
- §29 - "*In my judgment for the court to start asking why there are no children, and whether this denotes a lesser extent of commitment to the relationship, is to make windows into people's souls, and should be avoided at all costs.*"
- §43 - "*I now figuratively hold my hand in the flames and recant. There is absolutely no logical reason to draw a distinction between an accrual over a short period and an accrual over a long period.*"

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Pre-marital pension – WM v HM [2017] EWFC 25, Mostyn J

- *§27: "I have excluded from the value of the husband's pension the sum of £1 million which I accept is a reasonable value to attribute to the husband's premarital pension pot"* – out of £2.96m pension
- H's pension fund had been c.£250k 30 years before; £1m was simple indexing of this figure
- £182m overall assets well exceeded the parties' needs making this approach possible

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Pre-marital pension – W v H [2020] EWFC B10, HHJ Hess

- HHJ Hess: Co-Chair, Pensions Advisory Group
- £124k assets (after debt); £2.37m pensions
- 17 yr marriage
- Judge considered: "*whether it is right for the court, in dividing pensions with a view to promoting equality, to* ***exclude a portion of the member spouse's pension if it was earned prior to the marriage (or seamless pre-marital cohabitation)***"
- H argued for "straight-line" reduction of pension value for years before the marriage (excluding 42% of pensions)
- J ordered pension sharing to effect equal income from all pensions in retirement

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Pre-marital pension – W v H, HHJ Hess

§61:

*"(i) There has **undoubtedly been an established practice in some courts considering the divisions of pension, regardless of needs issues, to make a straight line deduction from the CE** of a relevant pension fund by reference to a fraction where the numerator is the number of years of the marriage (including seamless pre-marital cohabitation) and the denominator is the number of years over which the pension fund in question was accrued, and to include in its calculations and deliberations only the reduced amount of the CE."*

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Pre-marital pension – W v H, HHJ Hess

§61:

*"(ii) In one sense the exclusion of the pre-marital portion of the pension is no more than…**the identification of non-matrimonial property**… The apportionment exercise seems a logical extension of this and **pension funds are rarely subject to the 'mingling'** which often occurs in relation to cash assets."*

*(iv) In a needs case, the approach needs to be treated with more caution. Where the pensions concerned represent the sole or main mechanism for meeting the post-retirement income needs of both parties, and **where the income produced by the pension funds after division falls short of producing a surplus over needs, then it is difficult to see that excluding any portion of the pension has justification."***

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Pre-marital pension – W v H, HHJ Hess

- §61(vii): "…*the straight-line methodology of calculation, though simpler and easier to apply in practice,* ***conceals an unfairness in that the value of a defined benefit pension scheme based on final salary does not accrue on a straight line basis,*** *especially if the member spouse concerned starts work as a lowly paid junior employee and rises to a highly paid director level many years later.* ***The pension will accrue much more value in its later years*** *when the member spouse has reached the high salary level and this is likely to be, as it is in the present case,* ***firmly during the marriage.*** *Thus, where an apportionment is to be made, the straight line methodology of apportionment may well not be fair and some caution needs to be exercised before using it if other fairer methodologies are available. Other methodologies include* ***inviting the PODE to make a notional calculation of the current CE*** *on the basis that the member spouse's earnings rose only with inflation in the post-marriage period."*

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Post-separation pension – KM v CV (Bailii - 25.2.20)

- Appeal hearing before HHJ Robinson, Medway FC; both parties in person…
- 23 yr cohabitation/marriage, 1 (adult) child
- W police pension; H sought pension share
- W argued re **contributions to pension for 7 years post-separation**
- Very few other assets; H in receipt of state benefits
- DJ awarded H no pension so H appealed
- Court concluded:
  - Value of pension to be taken at date of trial (not date of separation)
  - Court must consider not just marital vs non-marital contributions but also needs, health and other s.25 factors

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Pensions - needs vs contributions

- **<u>July 2019 Report of Pensions Advisory Group</u>**: *"It is important to appreciate that **in needs based cases…the timing and source of pensions savings is not necessarily relevant…** in a needs case, the court can have resort to any assets, whenever acquired, in order to ensure that the parties' needs are appropriately met"*

- **<u>Family Justice Council Guidance</u>** on pension assets in needs & sharing cases: *"Broadly speaking, **in needs cases, where the assets do not exceed the parties' needs, apportionment is rarely appropriate**….The overall aim in divorce financial remedy cases is to achieve fairness between the parties… it will often be fair to aim to provide the parties with similar incomes in retirement but equality may not be the fair result depending on needs, contributions, health, ages, the length of the marriage or **in non-needs cases, the non-matrimonial nature of the asset.**"*

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”Non-matrimonial pensions: the forgotten discussion” [2020] Family Law 95

- Article by Joe Rainer of QEB
- Discusses various potential approaches to adjusting pension division for non-marital contributions depending on whether the pension is a Defined Benefit (final salary) or Defined Contribution scheme

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