

WHITE PAPER
POST-SEPARATION ACCRUAL
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A THE DATE OF VALUATION

The starting point is to use up to date valuations as opposed to values as at date of separation. This was considered recently by Bodey J in *X v X (application for a financial remedies order) [2016] EWHC 1995 (Fam)*. He considered the authorities as follows:

- *Cowan v Cowan [2011] 2 FLR 191* – the date of the exercise of the court’s power
- *N v N [2001] 2 FLR 69* – the date of the hearing
- *Rossi v Rossi [2007] 1 FLR* at page 801 – the date of the trial
- *S v S [2007] 1 FLR* at page 2140 – at the hearing date

In *B v B [2013] EWHC 1232*, Coleridge J said as follows,

“The industry standard/general rule is that the date of trial is the date when both the categorisation of the pot and its value is assessed, should not easily be circumvented. The proposition that merely because an asset comes into existence after the date of separation it should be excluded is far too simplistic and is not appropriate when, as here, a respondent’s efforts are merely a seamless continuum of similar pre-separation activity and there is no obvious delay in proceedings. It is as if the husband is banking his surplus income during the time between separation and trial”.

B NEEDS TRUMP EVERYTHING

In the vast majority of cases, arguments relating to pre-acquired assets, inherited assets or post-separation accrual count for little or nothing at all. As Lord Nichols stated in *White v White*,

“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”.

The leading case on the formulaic approach for excluding pre-acquired or inherited assets is the Court of Appeal's decision in *Jones v Jones* [2011] EWCA Civ 41 which was followed and elaborated on by Mostyn J in *N v F* [2011] 2 FLR 533. Even after adopting a detailed approach to the exclusion of pre-marital property, not all of that property was excluded because of the wife's needs.

More recently in *S v AG* [2011] 2 FCR 523 (Fam) Mostyn J stated, "therefore, the law is now reasonably clear. In the application for sharing principle (as opposed to the needs principle) matrimonial property will normally be divided equally...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 for non-matrimonial property to meet need is common place, but...we await the first decision where the sharing principle has led to an award from non-matrimonial property in excess of needs".

C POST-SEPARATION ACCRUAL – CONTINUUM V NEW VENTURES

The genesis of the prevailing approach lies in the decision of Nicholas Mostyn QC sitting as a Deputy High Court Judge in *Rossi v Rossi* [2006] EWHC 1482 (Fam), the main principles of which are as follows:

- (a) All assets must be valued as at the date of trial.
- (b) Assets acquired or created by one party post-separation may be treated as non-matrimonial property if it can be said that the asset was created or acquired by that party by virtue of their own personal industry and not by the use of an asset which had been created during the marriage and in respect of which the other party can assert an unascertained share.
- (c) Passive economic growth on matrimonial property which arises post-separation will not qualify as a non-matrimonial property.
- (d) Where the post-separation asset in question is a bonus or other earned income, it is relates to a period when the parties were still cohabiting or to a period immediately post-separation, it cannot be claimed as non-matrimonial. A post-separation bonus should not be classed as non-matrimonial unless it related to a period which commenced at least 12 months after separation [NB – see below].
- (e) In deciding whether non-matrimonial post-separation accrual should be shared, the court should consider such factors as whether the applicant proceeded diligently with his or her claim; whether that person was treated fairly by the person who had the benefit of the accrual during the period of separation; and whether the money-making party has the prospect of

significant further gains or earnings in the future and whether the applicant will be sharing in such future income or gains.

Considering his own decision in *Rossi* eight years later in *JL v SL (No 2)* [2014] EWHC 360 (Fam), Mostyn J noted:

- (a) That *Rossi* been approved by Singer J in *S v S* [2006] EWHC 2339 (Fam), at least in one respect by Charles J in *H v H* [2007] EWHC 459 (Fam) and Wilson LJ in the Court of Appeal in *Jones v Jones*.
- (b) He remained satisfied that his summary in *Rossi* was correct, subject to the caveat that his references to sharing non-matrimonial property must be read in the light of *K v L* [2011] EWCA Civ 550 and *S v AG*. He stated that, “only very exceptionally will such sharing be found to be fair”.

The heart of Mostyn J’s judgment in *JL v SL (No 2)* is as follows:

1. “...for those assets which were in place at the point of separation, they remain matrimonial property but 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...”
2. “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”.

In his judgment, Mostyn J refers to Roberts J’s “monumental” judgment in *Cooper-Hohn v Hohn* [2014] EWHC 4122 (Fam). In dealing with the post-separation accrual, she stated,

“Thus what I have to decide is whether and to what extent the new work and new investments created by the husband in the period after the parties separated falls to be considered in the character of matrimonial property in which the wife should be entitled to a share or whether some or all of it falls at a point too distant from the essential character of the matrimonial partnership to qualify”.

A section of her judgment is headed “Continuum Versus New Ventures”.

Roberts J grappled with a scenario where a portfolio, which was unquestionably matrimonial property, had almost doubled in value during the two year period of separation. During that period it had increased in value by \$550 million. The reason for its significant increase in value was due to “the husband’s investment eye coupled with his ability to drive change...”.

This was clearly not a new venture and the husband was dealing with the wife’s undivided share of the assets. On the other hand, in view of what the husband had achieved, could it be described simply as a continuum?

Roberts J concluded as follows,

“...it is not my intention that this wife should receive no share of the assets which fall outside the marital acquest in this case...there is no question of her entitlement to any element of post-separation accrual being triggered by a “needs” argument, but I take the view that, notwithstanding the exponential increase in the growth of the fund post-separation, its genesis as a matrimonial asset is a factor of considerable significance. That factor must, in my view, find its reflection in the overall quantum of the financial award...”

Mostyn J considered that passage in *JL v SL (no 2)*. He said that upon first reading the passage he thought that Roberts J was saying that the wife would receive a share not limited to a needs basis of property which was outside the marital acquest and therefore non-matrimonial. On reflection, he acknowledged that he was wrong and that the proper analysis was that Roberts J was saying that the fund retained its matrimonial character, but the wife would share unequally in the increase in the value achieved by the husband in the period of separation.

More recently we have the decision of Nicholas Cusworth QC, sitting as a deputy High Court judge in *JB v MB [2015] EWHC 1846 (Fam)*. Nicholas Cusworth QC felt that it was necessary to perform the exercise of dealing with post-separation accrual in a “lawless science” and acknowledged that the outcome that he reached “may be arbitrary to a degree”.

In the present case, the company had been established before the parties commenced cohabitation, but the business only really flourished three to four years post-separation due to the husband’s creation of a new product. The court held:

- (a) There had been a greater degree of continuum than the husband had admitted.
- (b) The reinvestment of post-2011 profits into the company had to be treated as having included the wife's shares in those profits.
- (c) The delay in instigating proceedings had in part been orchestrated and sanctioned by the husband in order to enable him to trade with the full value of his shareholding which was an undivided matrimonial asset.
- (d) On the other hand however, the wife's award needed to reflect the fact that the increase in the value of the shareholding had been due to an unmatched economic endeavour by the husband over a number of years rather than mere, or even largely, passive growth.

The wife was ultimately awarded 20% of the value in the shareholding, to be paid upon the eventual sale of the business.

D SPECIAL CONTRIBUTIONS

Two big money cases reported in the last month: *Work v Gray* [2017] EWCA 270 in the Court of Appeal and Bodey J's decision following the final hearing in *Chai v Peng* [2017] EWHC 792.

In neither case did the husband succeed in arguments regarding special contributions. Most significantly, the Court of Appeal rejected the assertion that the treatment of special contributions should be revisited and declined to add to the principles previously established in *Miller and Charman*. The Court of Appeal agreed that the word "genius" is unhelpful and the select band of those who have succeeded in running special contribution arguments remain small.

E DOMESTIC CONTRIBUTIONS POST-SEPARATION

A significant delay will of course have an impact upon an applicant's claims. The Supreme Court considered a case of extreme delay in *Wyatt v Vince* [2015] UKSC 14. A significant delay in bringing an application for a financial remedy was not a sufficient reason to strike out the application under FPR 2010, r 4.4(1). The implications of *Wyatt v Vince* were recently considered by Ryder LJ in *Briers v Briers* [2017] EWCA Civ in which he stated that it is, "beyond argument that the significant delay in making the claim was one of the major factors in play in the subsequent assessment by the court".

Although the Supreme Court allowed the wife in *Wyatt v Vince* to pursue her application for financial remedy, Lord Wilson noted that she faced formidable difficulties in securing an order in her favour bearing in mind the brevity of the marriage and the long delay since separation. He did however note that by virtue of MCA 1973 s25(2)(f) the court must have regard to “the contributions which each of the parties has made...to the welfare of the family, including any contribution by looking after the home or caring for the family”. The wife would therefore rely upon her support for the children post-separation without there being financial support from the husband in the interim. The wife’s claims were resolved by consent with an order being approved by Cobb J providing for a lump sum in the wife’s favour of £300,000, the court being “perfectly satisfied” that the settlement was reasonable.

For other cases of significant contributions post-separation in terms of supporting the children see also *Pearce v Pearce* [1980] 1 FLR 261 and *M v L (financial relief after overseas divorce)* [2003] EWHC 328 (Fam).

F INCOME AND BONUSES

Baroness Hale in *Miller/McFarlane* [2006] UKHL 24 said,

“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. The ultimate objective is to give each party an equal start on the road to independent living”.

As far as bonuses are concerned post-separation two issues tend to arise:

- (a) Whether bonuses should be treated as a matrimonial asset and available for distribution; and
- (b) In the assessment of future periodical payments and whether bonus payments should be included in the quantification of such periodical payments.

Bonus as a Matrimonial Asset

There are conflicting approaches including the following:

- (a) *Rossi v Rossi* – see above – Mostyn J – a post-separation bonus should not be classed as non-matrimonial unless it related to a period which commenced at least 12 months after separation.
- (b) In *H v H* [2007] EWHC 459 (Fam) – Charles J did not agree - the post-separation bonuses were not treated as part of the matrimonial property, although the court was obliged to consider the wife’s loss in sharing the husband’s future income. To enable the wife to smooth transition to independent living, a “run off” award was made giving her a one-third share during the year immediately post-separation, one-sixth in the year thereafter and one-12th in the following year.
- (c) *M v M (ancillary relief: division of assets accrued post-separation)* [2004] EWHC 688 (Fam) – the husband had failed to provide the wife with adequate interim provision pending the final hearing. Baron J also held that although all of the monies accrued post-separation were from the husband’s own hard work. The entire assets of the marriage, including the post-separation accrual were divided equally.
- (d) *P v P (post-separation accrual as an earning capacity)* [2007] EWHC 287 (Fam) – Moylan J held that the husband had received a substantial bonus post-separation and he found that it would be unfair to ignore it.

More recently in *Fields v Fields* [2015] EWHC 1670 (Fam), Holman J declined to award the wife a share of the husband’s post-separation performance payments from a new company. Following the comments in Mostyn J in *B v S (financial remedy: marital property regime)* [2012] 2 FLR 502 (“...the only reason there is income after separation is because of work after separation”), Holman stated that likewise in the present case the husband had to work very hard day in, day out, to earn his salary and, also speculatively, the performance fees. That decision is however worth noting in the context of a case where the wife was awarded a “fair, but generous” periodical payments award and the judge felt that it would be unreasonable to expect the wife to work to generate “a marginal £20,000 gross per annum” income.

More recently still in *X v X (application for a financial remedies order)* [2015] EWHC 1995 (Fam) Bodey J considered how to treat LTIPs. There were £1.5 million of LTIP shares which were awarded to the husband in July 2013, after the parties had separated, but they did not vest until March 2016. The wife contended that they were “very proximate to the marriage” and arose from the husband’s employment during the marriage, as opposed to being from a new venture. The husband sought to exclude them entirely as they were the product of post-separation endeavours.

Bodey J saw force in both arguments: they were only available to the husband because of his employment during the marriage, but they were earned at a time when there was no longer any actual or notional marriage partnership support. Accordingly, he felt that broad justice would be achieved if 50% of the value of the shares were excluded.

Bonuses and Periodical Payments

There have been some historical cases where the bonus was simply treated as part of the husband's income and the periodical payments awarded accordingly – for example *S v S* [2008] EWHC 519 (Fam). The prevailing approach is however summarised in the following three decisions:

- (a) *R v R* (financial remedies: needs and practicalities) [2007] EWCA Civ 503
- (b) *H v W* [2013] EWHC 4105 (Fam)
- (c) *SS v NS* [2014] EWHC 4183 (Fam)

A distinction is drawn between ordinary day to day needs which would be met by a periodical payments order and funded by a regular monthly salary. Additional one-off exceptional needs would be met from the bonus element.

The approach adopted by King J in *H v W* was to award 25% of the net bonus, subject to a cap of £20,000. This was approved by Mostyn J in *SS v NS*. In the earlier decision of Coleridge J, the award was fixed at 20% subject to a cap of £20,000.

G CONCLUSIONS

1. **Needs** – needs based upon children, housing etc will trump all of the factors.
2. **Equality** – starting point is an equal division of the marital acquest – assets will be valued as at the date of trial.
3. **Continuum** – increases in the value of pre-existing/marital assets are likely to be shared equally. Passive growth will tend to arise in respect of assets such as property, pensions, savings accounts, investments.
4. **Active Growth** – may be equally shared, but more likely to represent a departure from equality, depending upon the value of active growth.

5. **New Venture** – this should not be designated as matrimonial property and, save in a very rare case, should not be shared.
6. **Businesses** – likely to be analysed for causation – is it passive growth, or active growth? Is it a new venture? Evidence required of individual endeavour and decision making. Similar principles could apply to property, depending upon the level of active involvement in the property or just passive growth.
7. **Inheritances** - likely to be excluded, save for meeting needs.
8. **Bonuses** – an ongoing capped share may be justified by need in a periodical payments case. In larger money clean break cases, that may only be included in a short period of post-separation and may perhaps be tapered.