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**White Paper: Matrimonial Finance Conference: April 2023**

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

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**(recent relevant cases - see accompanying PowerPoint presentation for analysis)**

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**WX v HX (Treatment of Matrimonial and Non-Matrimonial Property) [2021] EWHC 241****(Roberts J: 10 February 2021)****Summary:**

- Parties met in early 1980s, quickly engaged and married in 1985; final separation 2018 (2 earlier petitions in 1991 and 2013 but reconciled); 3 surviving adult children.
- W played a full role as a mother and homemaker. H made a very significant contribution to the marriage in terms of wealth creation.
- Both W and H came from wealthy families. H came from a wealthy and long-established North American business family. W was the beneficiary of two trusts which were worth just under £9m net, and which provided W with income as high as c. £350,000 gross pa (£235,000 net). H managed W's funds on her behalf.
- High standard of living.
- Broadly agreed wealth available for distribution between £50-£60m. A further cUS\$50m generated during course of marriage now held in an offshore trust ("the S Trust"); parties' children were principal beneficiaries.
- H accepted that the H Trust (which held the parties' Oxfordshire home) was a variable nuptial settlement.
- Offshore entities had also been created to minimise tax exposure: H effectively converted the capital assets into an income stream, with the capital value passing tax free into the offshore structure and guaranteed by the existence of the promissory note.
- H had offshore assets totalling some £11.56m, and he was owed c. £9.285m by an offshore entity.
- H's case was that much of the value in his offshore bank accounts was a reflection of an inheritance which he received from his step-father: he proposed W should have his 50% interest in the jointly owned family home in London, which had an agreed (mortgage-free) value of £13.75m. On his case, this would leave each party with roughly half of their combined marital wealth.
- W sought to discount completely any value in her inherited trust interests, and any assets which she owned personally which derived from those inherited funds.

- W sought the family home together with an additional cash sum of £10m, which she proposed would be paid from H's personal offshore assets. On her case, that would leave each party with a half share of matrimonial assets, worth some £20m, on the basis that W's non-matrimonial inherited wealth of c. £14m net was ring-fenced.
- H argued that he had made a very significant contribution to the management of W's independent resources, and that his contribution resulted in a significant increase in the value of W's funds over the years.

### **Decision:**

1. The full value of the Oxfordshire property fell to be counted as an asset of H's on the matrimonial balance sheet. The Court was satisfied that the structures H had set up would '*afford him the opportunity with the cooperation of his children to enjoy the occupation of that property without the need to contemplate a sale*' [§67].
2. The assets of the S Trust would be excluded from the schedule of the parties' resources. B House provided no direct financial benefit for H, and in relation to the art collection, he could not sell the art, and there was no prospect of him realising value from the collection for his personal benefit other than through a wholesale rearrangement of the family trust structure.
3. W's inherited trust funds were primarily an income resource rather than a liquid capital asset which W was likely to realise as cash. W had been clear that her trust wealth was dynastic in nature and was of principal benefit to her only in terms of the income it generated. W's trust assets were included 'below the line' as non-matrimonial property for the purposes of computing an overall figure for the total assets available to the parties.
4. **Pre-marital/non-matrimonial assets:** whilst W's wealth had always been kept separate and outside the financial arrangements put in place to manage the family's domestic economy, virtually all of H's pre-marital wealth, together with the wealth he went on to generate through the marriage, had been applied towards the support of the family and the acquisition of assets from which they had had the benefit.
5. Roberts J identified that the following principles could be derived from the authorities on matrimonial and non-matrimonial property [113]:
  - a. The fact that property or assets owned by a party derive from a source outside the marriage (such as inheritance or pre-acquired wealth) does not *per se* lead

to its exclusion altogether from the court's consideration of a fair outcome to both parties.

- b. The overarching principle which supports fairness to both parties is that of 'non-discrimination';
  - c. Each case has to be considered on its own facts and the court's assessment of fairness in that particular case. The way in which property has been used over the course of the marriage has the potential to affect whether it remains 'separate' property;
  - d. Assets or property which are matrimonial in character will be captured by the 'sharing principle' and divided equally between the parties;
  - e. The application of the sharing principle, in practice, impacts only on the division of marital property and not on non-marital property;
  - f. The application of the sharing principle will not always lead to an arithmetically equal division of the marital wealth.
6. Roberts J concluded that W's non-matrimonial property had throughout been preserved as her own separate property, and that it had not acquired a matrimonial character, either in whole or in part, as a result of H's activities as an investment manager. There was insufficient evidence that H's management of the funds produced a financially measurable uplift in value over and above any allowance for passive growth and rejected the notion that particular aspects of H's contribution had somehow operated to 'matrimonialise' what remained, essentially, W's separate property [§141].
  7. Roberts J calculated the parties' assets had a total value of c£55m. She identified the matrimonial assets as being worth c. £39m, 50% of which was c£19.5m.
  8. On the basis that W would retain the London property and the matrimonial assets currently held by her, a 50% share would require a lump sum payment from H to W of c. £6.36m.

**ND v GD (Financial Remedies) [2021] EWFC 53****(Peel J: 14 June 2021)****Summary:**

- W 54, H 59. Long, 23-year marriage. Two adult children at university.
- Comfortable but modest marital standard of living (capital c£382k) until H inherited his mother's estate - by the time of the final hearing the total net assets were £2.6m.
- W (represented by her litigation friend) had been diagnosed with Young Onset Alzheimer's ("YOA"); reduced life expectancy; no earning capacity save for income protection policy and PIP .
- H proposed that W should receive £750,000 on a clean break: £525,000 for housing and an income fund of £225,000; alternatively, joint lives PP at £16,216pa.
- W sought £1.2m: £700,000 for rehousing and £500,000 as an income fund on a clean break basis (expressly disavowing the thought of ongoing PP).
- The Judge summarised the relevant authorities (paragraphs 38 to 56) in terms of approach to financial remedy (*White; Miller; McFarlane*) and that:
  - 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 [2018] 1 FLR 1283*) and the extent to which non-marital assets acquire a marital character is fact-specific
  - 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 [2001] EWHC 242*)
  - 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*).

**Decision:**

1. About £750,000 of the capital was marital. The rest had been received by H about 5 years before separation and had not substantially mingled in the family economy. As half of that sum was £375,000, W's needs claim comfortable exceeded her sharing claim.
2. W needed £650,000 to rehouse.
3. *Capitalise* calculations indicated that an income fund of £300,000 would provide W with £79,519pa net for 5 years or £46,008pa net for 10 years: these sums were a "reasonable balance", not providing for the highest level of costs over a full 10-year term nor restricting W to the bare minimum. If that income funds proved insufficient, W will be required to deploy money tied up in her property.
4. A clean break was highly desirable: there is ongoing tension between the parties and W not strong enough to cope with the ongoing stress of financial and legal links with H.
5. The outcome would result in a 63/37 split in H's favour – considered fair in the context of the s.25 factors and balances W's needs, the length of the marriage and the source of the assets.
6. There should rarely, if ever, be a need for an IFA to carry out a Duxbury style exercise which adds costs, delay and confusion (§29). The Duxbury model remains sound (*JL v SL (No 3) [2015] EWHC 555*) and the Court has sufficient flexibility to depart from it where necessary (e.g in *A v A [1999] 2 FLR 969; Tattersall v Tattersall [2019] EWCA Civ 1978*) (§52).

**E v L [2021] EWFC 60****(Mostyn J: 13 July 2021)****Summary:**

- W 61, H 66. Short marriage (4 years on W's case, just over 2 years on H's case)
- W's total net assets £444,980.
- H = highly successful production manager for live music events with an interest in six businesses (A) to (F). H's share of five of those companies (B) to (F) were worth £365,000. There was a dispute about both the value of Company A and the marital acquest generated by it.
- W sought a lump sum of £5.5m, which she calculated as half the marital acquest/
- H offered £600,000 on the basis it was a short, childless marriage and W's award should be confined to her very conservatively assessed needs

**Decision****1. The impact of childlessness**

*“In my judgment this factor should be banished from any consideration of whether there should be a departure from the application of the equal sharing principle.”* [§34]:

- a. The concept of childlessness as potentially leading to a departure from the equal sharing principle was referred to in *Sharp v Sharp [2017] EWCA Civ 408* and *XW v XH [2019] EWCA Civ 2262*, relying on the speeches in *Miller v Miller [2006] UKHL 24*
  - b. However, childlessness was not a reason why the House of Lords upheld the unequal division of the marital acquest in *Miller*
  - c. Whether the parties have children or not, a marriage is a marriage, (*Baxter v Baxter [1948] AC 274; Re X (A Child) [2018] EWFC 15*)
  - d. For the Court to attempt an evaluation of the quality of the marriage or the arrangements made within it as part of the application of the sharing principle risks subconscious discrimination (hence why *“the doctrine of special contribution has to all intents and purposes been consigned to history.”* [§28])
- 2. The impact of the length of the marriage in the context of marital acquest**

“There is absolutely no logical reason to draw a distinction between an accrual over a short period and an accrual over a long period”. [§43]

- a. Lord Nicholls in *Miller* had correctly “condemned as heretical my opinion in *GW v RW [2003] 2 FLR 108* that in order to have equal validity with financial contribution, a domestic contribution needed to be earned over time”. To do so is an attempt to evaluate the quality of the marriage.
- b. The duration of the marriage will be reflected in any event in a short marriage as the accrual will likely be less than in a longer marriage. [§43]
- c. A case which shared unequally matrimonial property that was *earned* (as opposed to being brought into the marriage and ‘matrimonialised’) during a short marriage will be “*as rare as a white leopard*” [§45].
- d. A rare exception might be the dual career case in which the spouses had pooled assets for the benefit of the family but retained separately their non-family assets (*Sharp*).
- e. It would be discriminatory also to apply a different approach to a business asset on the basis it had been generated by the breadwinner’s enterprise: to do so would be to elevate the value of the breadwinner’s contributions above those of the other spouse during the marriage [§46].
- f. However, there are cases in which part of the assets may be excluded from the marital acquest because that part represents the fruits of a pre-relationship project: this is particularly so in a short marriage where those fruits may not have become ‘matrimonialised’ [§§49-50].
- g. This case is not a white leopard: the acquest should be divided equally [§77].

### 3. Start and end dates for calculating marital acquest

- a. For the purposes of calculating the acquest, the starting date was held to be January 2016, which was when the parties were in a very serious, committed relationship, even if it was somewhat iterant because both parties had their own homes and did not immediately cohabit in the conventional sense [§75].
- b. The endpoint of the calculation of the acquest is the date of trial (*Cowan v Cowan [2002] Fam 97*).
- c. This rule of thumb should apply forcefully to assets in place at the point of separation which have shifted in value between then and trial.

- d. For new assets such as earnings made during separation, see *Rossi v Rossi* [2006] EWHC 1482 (Fam) (a bonus relating to period commencing at least 12 months after separation may be classed as non-matrimonial) [§73]

#### 4. Assessing the value of the marital acquest in this case

- a. The first step is to calculate the increase in the surplus assets of the company over the acquest period.
- b. The second step is to calculate the increase in the enterprise value.
- c. The enterprise value was discounted by 45% to account for [§§93-96]:
  - i. Uncertainty as to the continued impact of the Covid-19 pandemic
  - ii. The possibility of an alteration to the profit share sought by H's business partner for future tours
  - iii. Achieving the enterprise value would require significant post-sale (and post-separation) endeavour by H and his business partner
  - iv. Part of the future maintainable earnings represents the fruits of H's personal earning capacity (personal skill and attributes) which is unlikely to be acquired or reproduced by a purchaser.
- d. The overall increase in the equity value of the business during the period of acquest is therefore the increase in the surplus assets plus the increase in the enterprise value [§98].

#### 5. W's award

- a. The total marital assets (when added to the parties' other net matrimonial assets – properties, cash, debts and pension) were £3,919,497.
- b. W should receive half i.e. £1.959m. She therefore needed another £1.515m on top of her own assets of £444,980.
- c. H's total assets were found to be £8,754,540.
- d. W received 21% of the total assets of £9,199,250 [§104].

**A v M [2021] EWFC 89****(Mostyn J: 5 November 2021 (revised 9 November 2021))****Summary:**

- H aged 63; W aged 54; both US citizens; 26-year marriage with 5 children.
- Total net realisable assets of £2.166m and H also had a US pension worth just over \$690k.
- W was the daughter of extremely rich parents and the beneficiary of valuable trust funds which had lent the parties money to buy properties.
- The 2004 trust loaned \$950,000 to the parties towards the purchase of the London house (the loan subsequently assigned to W's father) and there was a further loan made to the parties by the 2016 trust for the London property, now standing at £3.8m.
- H had worked in private equity for many years and founded X Co with a business partner in 2015, establishing two funds in 2016 and 2018 which come to fruition in 4½ years and 6½ years respectively. The future, estimated value of H's receipts from the two funds was c£28.75m although (a) they were not current values, and (b) Mostyn J acknowledged at §35 the risk those values would not be realised.
- W argued the carried interest (known as the 'carry') on the funds was a return on capital investment (i.e. to be shared); H argued it was a post-separation earned bonus.
- W also sought spousal PP of £225,000pa, to be paid indefinitely.

**Decision:**

1. The net realisable assets would be divided equally, with the London, New York and Spain properties being sold and the proceeds divided equally, Italy being transferred to H and H paying to W a balancing lump sum of £1.807m. The US pension would also be divided equally (§§74-78).
2. As to the carry:
  - a. It was neither exclusively a return on capital investment nor an earned bonus (§10)
  - b. It should be subject to *Wells* sharing but, recognising H's "*great unhappiness*" that W should be a shadow carry partner in both funds, W would be a shadow

- carry partner in one fund only, with W's share of fund 2 being reallocated to fund 1 (§21)
- c. The fair outcome was to calculate the marital acquest to the date of trial (which Mostyn J undertakes at §§15 and 19-31) in line with the decision of Coleridge J in ***B v B* [2013] EWHC 1232 (Fam)**. This approach should be adopted as the general rule in cases involving private equity funds (§14)
  - d. The marital element of the carry and co-investment would be divided equally: this should provide total funds receivable by W (in 4½ years) of £6.483m and by H (in 4½ to 6½ years) of £22.268m (§31). Although there is an element of risk, the Court was satisfied it is more likely than not that the parties will receive sums of that order (§32)
  - e. The 77:23 split of the funds in H's favour reflects his continued sole endeavour after dissolution of the marital partnership: the court "*emphatically*" rejected as unprincipled the claim by W that she should share in the carry generated by H after the date of trial (§17).
3. The claim for indefinite periodical payments was "*unrealistic and unprincipled*" (§52):
- a. If the forecast holds good, W will be receiving marital carry of c£6.5m at the age of 58. This would generate a Duxbury income of £325,000pa which would "*abundantly meet the wife's needs, with much to spare*" (§28)
  - b. W should meet her needs until then from her divided share of the net realisable assets or her non-marital trust resources. "*It is an elementary principle that a claimant of periodical payments must meet her needs first from her own resources, including her non-marital resources, before a call is made on her ex-husband's resources.*" (§53).

**L v L [2021] EWFC B83****(His Honour Judge Booth: 5 October 2021)****Summary:**

- W aged 45; H aged 52; 19 year relationship; 3 children.
- H held 57% of the shares of his father's commercial property business by the time the parties began to cohabit with the rest settled into trusts created for his benefit.
- Company was worth £49m with post-tax profit of £3.2m per annum.
- Prior to separation, the parties had restructured shareholdings as follows to mitigate IHT and provide for their children:
  - H's shares (57%) were transferred a company for H and W equally at the value fixed at March 2018 i.e. £11.93m each, such value reducing as H and W drew dividends. This sum had been calculated to meet their lifetime needs
  - The balance of shares and any post-March 2018 profit were transferred to vehicles for the benefit of the three children.
- H sought an unequal division because:
  - The value of his shareholding at time of cohabitation was £3.3m
  - There should be an upwards adjustment to reflect passive growth and latent potential (*Jones v Jones; Robertson; Hart*).
- W sought equal division because H's shareholding had been 'matrimonialised' as a result of the passage of time and mingling (*WX v HX (Treatment of Matrimonial and Non-Matrimonial Property) 2021 EWHC 241 (Fam)*).

**Decision:**

1. The question of computation is designed to establish whether assets are matrimonial or non-matrimonial or have features of both where it would be artificial to seek a sharp division: as a starting point the sharing principle will apply to all matrimonial assets but non-matrimonial assets would be shared only insofar as required to meet needs (§25).
2. Following *Veersteegh v Versteegh [2018] EWCA Civ 1050* and *Hart*, the approach is partly evaluative and partly discretionary, leading to the following staged approach (§32):

- a. Can non-matrimonial property be identified?
  - b. If so, how is it to be measured and what factors should be taken into account when assessing passive growth and latent potential?
  - c. If non-matrimonial property exists but cannot be clearly identified, how should that be reflected in the discretionary exercise?
3. Other relevant factors included (§§33-36):
- a. H was the decision maker and drove the restructure process
  - b. He made no distinction within that restructure between the shares to be held by him and W
  - c. The restructure preserves the ‘dynastic’ nature of the arrangements for the parties’ children who will continue to benefit from the dynamic part of the business i.e. profit generation and future wealth.
4. If the dynastic nature of H’s initial non-marital contribution is reflected in the children’s share, it would be unfair to reduce W’s share further to take that into account (§38).
5. A fair outcome is one in which H and W share equally the value of their respective homes and shareholdings (§56).

**SD v GD (Financial Remedies: Needs: Duxbury Calculation) [2021] EWFC B62****(His Honour Judge Rogers: 9 July 2021)****Summary:**

- Long marriage since 1990 with two adult children.
- H held 75.1% of the shares in a family company; incorporated in 1998 but inherited the assets of the earlier enterprise.
- It was agreed that W's assets of £500,000 were non-matrimonial property and would be excluded from the sharing principle.
- It was agreed that as part of the final outcome, W would move out of the family home and have no ongoing connection with the company.
- Both parties openly proposed that W would receive a lump sum and pension sharing order and there would be a clean break.
- W sought a starting point of equality in respect of H's shareholding and H's pension (worth £1.1m) on the basis:
  - The company was incorporated during the marriage
  - She made contributions as a director and employee
  - The length of the marriage and mingling supported it
  - Her needs required it.
- W's open offer was for a £970,000 lump sum and a 45% pension share (40.78% overall)
- H sought to exclude the value of his shareholding and pension as non-matrimonial property and approached the case on the basis of W's generously met needs.
- H proposed a £400,000 lump sum and 40% pension share (28.72% overall).

**Decision:**

1. **Standard of living and its impact on the outcome** (§36):
  - a. Undoubtedly comfortable without being lavish
  - b. In any event, standard of living is but one factor to consider given that it is neither a legal requirement nor often a practical proposition for the party leaving the family home to enjoy an exact equivalence in value or amenity.
2. **W's earning capacity** (§§38-39):

- a. W was in middle age, intelligent and resourceful but without qualifications or substantial outside experience
  - b. It was reasonable to expect her to earn minimum wage and was found to have an earning capacity of c£15,000pa until retirement
3. **W's income needs** (§40-41):
- a. Comparison with H's income needs is not helpful when W is starting afresh, but neither is an assessment of W's income needs conducted in a vacuum
  - b. A separated spouse should not be consigned to the bare necessities after a long and financially successful marriage: her budget must be reasonable and interpreted generously
4. **The matrimonial and non-matrimonial assets and their relevance** (§§46-51):
- a. W placed too much reliance on the passage of time: it cannot of itself transform pre-acquired assets into something they are not
  - b. Whilst the business is 'at the heart of the marriage', it has not radically changed in character to enable it to be described as a product of the marriage
  - c. It is important not to lose sight of overall fairness, however that outcome is arrived at
  - d. In any event, W's open offer (60/40) acknowledged it was not a case for equal sharing and it was effectively presented on the basis of generous needs
  - e. A needs-based approach would exceed any sharing claim
5. **Outcome:** Overall W share was 31% of the total assets, which properly reflects the circumstances and allows both parties to achieve financial independence (§63).

**WC v HC [2022] EWFC 22****(Mr Justice Peel: 22 March 2022)****Summary:**

- H aged 55, from a wealthy family; working in the family office. W aged 52; 16/17 year relationship including cohabitation; two children aged 16 and 13 (with health needs) in fee paying schools.
- Standard of living very affluent but not super-rich; £600,000 annual spend in 2019, largely funded by gifts from H's father. Otherwise, H had modest income (salary €49,000/dividends c€15,600). W has no meaningful earning capacity.
- Parties entered into a Pre-Marital Agreement in which H's wealth was put at £4,317,754 (the equivalent of £6m today).
- Pre-Marital Agreement supplemented by later pre-marital deed about child maintenance and two Swiss agreements to mirror the English agreements.
- The parties negotiated a Post-Marital Agreement in 2017 at which point H's capital was c£10.21m and W's capital was c£2.36m (total £12.57m). Post-marital agreement would give W £7.1m (56%) plus child maintenance. W did not sign it.
- H also had inheritance prospects exceeding €100m.
- Almost all of the parties' wealth originated from gifts and inheritances from H's family and/or was owned by H before the marriage.
- The length of the marriage and mingling blurred the delineation between marital and non-marital assets. The Court did not need to delineate between the two in this case as both parties approached the case principally by reference to needs. The general background of H's non-marital wealth remained relevant to (i) the circumstances surrounding the Pre-Marital and Post-Marital Agreements and (ii) where relevant, the assessment of W's needs.
- H proposed that W should have net assets of £7.15m, broadly consistent with the Post-Marital Agreement.
- W proposed that she should have £10m, increasing to £10.6m in her most recent proposal. This included a *Duxbury* fund of £3.4m, equating to c£155,000pa.

- At paragraphs 21 to 24 Mr Justice Peel set out the general law relating to financial remedies as well as the law relating to nuptial agreements, inter vivos subvention and inheritance.

### **Decision:**

1. H's prospective inheritance:
  - a. The Court set out the principles relating to inherited wealth as reviewed by King LJ in *Alireza v Radwan* [2018] 1 FLR 133, including the position where (as in this case, if H's father dies in Switzerland) forced heirship provisions apply (§24);
  - b. Notwithstanding a family breakdown and the prospect that H's father may move to another country before he dies to avoid forced heirship, H expected – and the Court found - that he will likely inherit significant funds from his father at some stage in the future (§49);
  - c. However (§49):
    - i. Such inheritance would be entirely non-matrimonial;
    - ii. The two agreements recorded the parties' understanding that future inheritance would be excluded from any claims;
    - iii. It is unlikely to be of immediate assistance to H.
2. W's Needs:
  - a. Needs are an elastic concept. The marital standard of living is a relevant benchmark (*G v G* [2012] 2 FLR 48 and *BD v FD* [2017] 1 FLR 1420) but not an immutable guide (*FF v KF* [2017] EWHC 1093). The source of the wealth is also relevant: if it is substantially non-marital then it would be unfair not to weigh it in the balance, as observed by Mostyn J in *N v F* [2011] 1 FLR 533 (§21(xii-xvi));
  - b. An appropriate housing fund for W was £4m. There was no requirement for her to have a holiday home;
  - c. Taking into account the marital standard of living, H's own budget and W's earlier open proposals, an appropriate sum would be £150,000pa, leading to a *Duxbury* capitalised sum of £3,319,000 (§62-63);
  - d. The total sum required was £7.319m. The Court would add an additional sum of £131,000 for unforeseen contingencies, rounding up the award to £7.45m (§64).

3. This represented approximately 60% of the current total assets, which approximates to what W would have received under the Post-Marital Agreement, adjusted to meet needs.

**Gallagher v Gallagher (No.2) (Financial Remedies) [2022] EWFC 53****(Mr Justice Mostyn: 13 June 2022)****Summary:**

- H aged 50; W aged 44; from the Republic of Ireland; 3 young children
- The parties started to cohabit from July 2005 when W moved from Ireland; engaged in December 2006 and married in July 2008. Parties separated in November 2019.
- H met his current business partner in 1997 and set up a construction company called Galldris in March 1998.
- By 2005, the year end accounts for Galldris showed a turnover of £5.7m and a pre-tax profit of £320,000. H's property portfolio was then worth c£1.24m.
- Galldris grew significantly: by year end 2018 the turnover was c£73.76m and by year end 2022 the turnover was c£107m.
- The total assets were found to be just under £35.5m, of which £22.7m represented H's 50% interest in Galldris.
- It was agreed that W should receive 50% of the matrimonial capital.
- H argued that the value of his shares in Galldris and three properties acquired prior to July 2005 should be excluded from distribution. He proposed that W should receive £6.6m.
- W sought a total award of £18m.

**Decision:**

1. Pre-marital property (§§73-80):
  - a. A fair start date for Galldris would be January 2000 which is when H's business partner had come on board and the first two major contracts won.
  - b. The linear method of calculating the extent of the pre-marital element – whilst not the only method – is logical and likely to be most fair (*WM v HM [2017] EWFC 25*).
  - c. 8,182 days elapsed between 1 January 2000 and 27 May 2022 (the date of final submissions) and 2,008 days elapsed between 1 January 2000 and 1 July 2005 (date of cohabitation), therefore 24.5% of the value of H's share in Galldris (i.e. £5,573,579) is to be excluded as pre-marital.

- d. Of the three properties H asserted were pre-marital: one was disregarded as *de minimis* (worth less than £20,000); one had become ‘matrimonialised’ because it was the parties’ holiday home; and one had been purchased for £700,000 prior to cohabitation but developed during the relationship using matrimonial funds. The purchase price of £700,000 (uprated by the Greater London House Price Index to c£1.4m) was pre-marital and deducted from the total pool of assets.
2. Distribution and award (§§81-89): W was to receive 50% of the matrimonial property (£35,456,884 total less £6,981,638 pre-marital = £28,475,246 divided by 2 = £14,237,623 (this was 40.2% of the total assets - §7).

**XO v YO [2022] EWFC 114****(His Honour Judge Hess: 22 September 2022)****Summary:**

- H aged 60 born in Nigeria, living in Nigeria; W aged 48 born in Nigeria, now living in England; two children aged 18 and 15 at university/school in England;
- Parties met in 2000, married in 2002 and separated in 2018 when W moved to England where the parties already owned a property.
- W issued proceedings in October 2020 and H responded with a jurisdiction challenge.
- H largely engaged in the jurisdiction proceedings. He was unsuccessful but did not appeal. H disengaged from the proceedings shortly after an interim hearing.
- The parties owned a property in Miami which the parties used as a holiday property. H had inherited it from his parents in 2008 but by 2013 it had been put into the parties' joint names.
- W contended for a valuation of H's business interests at £180m (£200m minus 10% or disposal costs). H had challenged this in an email to the Court, suggesting that his business interests in Nigeria were not "worth even £5m".
- As to sharing, W accepted that H's business assets had a non-matrimonial origin and proposed a discount be applied of 30%.
- W was not currently able to work due to her visa status but received in the region of £110,000 gross per annum from rental properties.

**Decision:**

1. Computation and adverse inferences (§§47-60):
  - a. The Court was required to make a series of inferences in respect of H's assets because of his failure to provide complete disclosure (*J v J [1955] P 215* and more recently in *Moher v Moher [2019] EWCA Civ 1482*).
  - b. The Court attached little weight to H's emails given his failure to engage and made a series of findings broadly in line with W's assessment of the value of H's business interests.
  - c. There were a number of features which permitted the Court to make inferences which were "*properly drawn and reasonable*" and to avoid "*pure speculation*"

(see *Moher*) including that the joint net assets were £5,921,929 plus W's net assets of £3,958,174 plus H's net assets of £182,073,790.

2. Non-matrimonial assets (§§61-70):

- a. The Court considered the relevant jurisprudence in respect of equal sharing (*Miller v Miller; McFarlane v McFarlane [2006] UKHL 24; JL v SL [2015] EWHC 360*) – fairness and equality usually ride hand in hand.
- b. On the other hand, if assets are from an external source, this can be a good reason to depart from equality, depending on the facts of the case (*Charman v Charman (No 4) [2007] 1 FLR 1246; Miller v Miller; McFarlane v McFarlane*).
- c. A court should approach the assessment of the sharing principle in a flexible way, with the degree of particularity or generality appropriate to the facts of the case.
- d. The extent to which assets from an external source should be shared depends on duration and mingling (*N v F [2011] 2 FLR 533*). The judicial exercise is both evaluative and discretionary.
- e. The discretionary element can be introduced either when the court is divining the matrimonial and non-matrimonial property or later, when determining the weight to be attached to the fact that assets were derived from an external source (*Martin v Martin [2019] 2 FLR 291*).
- f. The Court applied a 50% discount to reflect the non-matrimonial element, taking into account that:
  - i. The business assets derived from inheritance from H's parents, albeit during the marriage;
  - ii. W was employed by the business and said that she was instrumental in turning around the company's fortunes; she also made a significant work contribution in addition to her contribution as a home-maker and primary child-care giver;
  - iii. W had received shares in the business and the family lived off the companies;
  - iv. H had made capital provision for W, from where her current wealth derived, and that might be seen as remuneration for her contribution to the businesses;

- v. Some of the business operations were developed by investments made during the currency of the marriage;
  - vi. On any view it was a long marriage.
  - g. Excluding 50% of H's business interest value, H's known net were assessed at £92,073,790.
  - h. The Court considered W to have a strong sharing claim in relation to 50% of those assets.
3. Distribution (§§71-73):
- a. An equal division of the matrimonial property (50% being £50,976,9460 including the properties and W's net assets) could be achieved by transferring the Miami property and a property in England to W and ordering H to pay W a lump sum of £39,156,843 simultaneously with W transferring to H her shares in his businesses.
  - b. Cross checking this this against (a) the parties' standard of living and (b) W's needs:-
    - i. The Court accepted that the standard of living during the marriage was very high and H had not challenged that;
    - ii. W had averred that her capital needs (including capitalised spousal and child maintenance) were £32m. This was commensurate with the marital standard of living;
    - iii. W's sharing claim amply met her needs in any event.