



1 HARE COURT

What is the latest judicial thinking on non matrimonial property and the mingling principle, including inheritance and post separation earnings, and how do you gain an edge for your client?

**ANN HUSSEY KC**

The answer.....



- Where we were
- Where we are
- Where we are likely to be

# INHERITANCES

- Munby J
- ***AB v CD (Inherited Property) 2004 EWHC 1364***
- “there is inherited property and inherited property..
- Fairness may require quite a different approach if the inheritance is a pecuniary legacy that accrues during the marriage, than if the inheritance is a landed estate that has been within one spouses family for generations and has been brought into the marriage with an expectation that it will be retained in specie for future generations”

# Earning capacity

- ***Waggott v Waggott* [2018]EWCA Civ 727**
- Moylan LJ on the issue of whether an earning capacity is capable of being a matrimonial asset to which the sharing principle applies held that “there are a number of reasons why the answer to that is clearly not”
- Including undermining the court’s ability to impose a clean break
- Earning capacity is not “property”
- Would require the court to assess the extent to which it had been accrued during the marriage

# Peel J *WC v HC* [2002]EWFC 22

- “Pursuant to the sharing principle,
- (i) The parties ordinarily are entitled to an equal division of the marital assets and
  - (ii) non-marital assets are ordinarily to be retained by the party to whom they belong absent good reason to the contrary.”

# What are non-matrimonial assets

- Mostyn in *JL v SC (NO 2)* [2014]EWHC 360 (Fam) at 19
- “property received or created outside the span of the partnership, or gratuitously received within the partnership from an external source...
- However, ..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.”

# Background & First Instance

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## Background Facts



H (71): CFO of UBS (retired 2007)  
/ “sheep-farming tycoon” (*Daily Mail*)



W (57): Homemaker



Second marriage for both



Agreed fact: H had significant assets as at  
June 2004 (per H, £57m)

# First instance decision

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*“I am entirely satisfied that this is an appropriate division, taking into account all the section 25 factors. It is fair and just. It reflects both parties’ contributions and all the other circumstances of the case.”*

# First instance decision: reasoning

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75 As the £80m transferred to the Wife did not become her separate assets, I must decide what it did become. **Mr Bishop urges me to find that it did not become marital property. He cannot be right about that. The assets are not held by the Wife on trust for the Husband as he had to give up all interest in them** for the tax saving scheme to work. **The only possibility is that they became matrimonial property.**

## Court of Appeal: the law

*“the concept of matrimonialisation should be applied narrowly” [¶163]*

Reformulated Wilson LJ’s *K v L*  
para 18 situations [¶163]

Application is *“a question of fairness”* [¶163/5]

Matrimonialised property need  
not be divided 50:50 [¶166]

# Court of Appeal: the law

Reformulation of K v L para 18

## K v L 18(b)

Mixed where:

- Contributor may be said to accept treat matrimonial
- ID current value too difficult



## Standish 163(b)

EXTENT to which and MANNER in which non-mat property has been mixed with mat property mean that, in fairness, it should be shared

# Court of Appeal: this case

No  
matrimonialisation  
by the 2017  
transfers

*“the transfer of the 2017 Assets into the wife’s sole name did not change their characterisation. This did not transform them into matrimonial property.” [¶171]*

‘Sifting’ exercise

- to identify % of £80m earned during marriage
- at most, 25% (£20m) had been earned during the marriage

Total matrimonial  
property calculated

	Matrimonial
2017 Assets (25%)	£20 m
Moundsmere Manor	£20 m
Ardenside land	£0 m
Ardenside business (80%)	£6.88 m
Other	£3.6 m
<b>Total shareable</b>	<b>£50.48 m</b>
<b>W's award</b>	<b>£25.2 m</b>

## SC: Five issues



Issue 1: The application of s25 of the MCA 1973 and, in particular, the **sharing principle**.



Issue 2: What is the **test** for 'matrimonialisation'?



Issue 3: Was the **legal test correctly applied to the facts** of this case?



Issues 4: Should **matrimonial property** (normally) be shared **equally** or court discretion to share other than equally?



Issues 5: Should **matrimonialised property** (normally) be shared **equally** or court discretion to share other than equally?

# Issue 1: The sharing principle

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## W EMPHASISED

*“unusually wide discretion”* under MCA 1973

Caselaw bears little resemblance to **statute**

No Law Commission proposals

*“an opportunity for **incremental change**”*

## H EMPHASISED

Appellate courts formulated **guidelines**

White (Lord Nicholls) **distinction** between pre-mat/inherited and generated during marriage

**Equal** share of that generated by during marriage; reflecting:

- **Endeavour** of equal importance
- **Contribution** = s25(2)(f)

# Issue 2: Test for matrimonialisation

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Matrimonialisation applied **narrowly**?

Moylan LJ wrong to **reformulate** *K v L* situations?

Do **gifts** matrimonialise?

# Issue 2(a): Matrimonialisation narrow?

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## WIFE

*“a **significant and unjustified** change in the law”*

3 situations in K v L **not exhaustive**

Moylan LJ wrong to say matrimonialisation a derogation from sharing principle – led him into error

## HUSBAND

**Rationale** underpinning sharing is entitlement to share fruits of common endeavour

Matrimonialisation **derogates** from this rationale

Derogations should be **limited / narrow**

# Issue 2(b): Wrong to reformulate K v L?

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## WIFE

Yes

Intention removed and fairness substituted

Makes **subjective and uncertain**

## HUSBAND

No

Consistent with s25 aim of fairness (see White / Miller; McFarlane)

Limits excessive application

Test of fairness requires **objective assessment** by judge

# Issue 2(c): Do gifts matrimonialise?

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## WIFE

Yes

**Authorities** do not deal with gifts

Title not irrelevant to whether an asset ***becomes*** matrimonial property

**Autonomy** should be respected

W made a **contribution** by accepting gift

## HUSBAND

No

Gift must be considered in **all the circumstances**

Rarely of significance

***Radmacher*** confined to nuptial agreements

No contribution as **no tax saved**

# Issue 3: Test applied to facts

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## WIFE

### Matrimonialisation

*“The **distinctive characteristic** of the gifting of the 2017 assets should have been **taken seriously** by the Court of Appeal, as it had been by Moor J: it was one of the relevant circumstances of the case”*

Unreserved gift of £80m, *“had the effect that the entirety of those assets should be **treated as matrimonial** property in which – as a result – the wife was entitled to share”*

## HUSBAND

### No matrimonialisation

No mixing

Composition static

**Not a pooling marriage**

Purpose = avoid IHT

Intended it would go into trust

Plan **not implemented**

**Timing**

Context = ongoing marriage

# Issues 4/5: Matrimonial(ised) property shared 50:50?

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## WIFE

Matrimonial property “*will be - or will almost always be – shared equally*”

Promote **certainty**

## HUSBAND

Matrimonial property **normally** divided equally

Matrimonialised property – not product of common endeavour

Claim to equal share is **weaker**

# TOP TIPS and QUESTIONS

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