When will a court depart from equality because of pre-marriage acquired wealth or wealth inherited during the marriage?

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1 KBW

Back to Basics – Equality?

White v White 2001 1 AC 596

Lord Nicholls:

"Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division."

“This is not to introduce a presumption of equal division under another guise. Generally accepted standards of fairness in a field such as this change and develop, sometimes quite radically, over comparatively short periods of time. The discretionary powers, conferred by Parliament 30 years ago, enable the courts to recognise and respond to developments of this sort. These wide powers enable the courts to make financial provision orders in tune with current perceptions of fairness.”

It is largely for this reason that I do not accept Mr Turner's invitation to enunciate a principle that in every case the "starting point" in relation to a division of the assets of the husband and wife should be equality. He sought to draw a distinction between a presumption and a starting point. But a starting point principle of general application would carry a risk that in practice it would be treated as a legal presumption, with formal consequences regarding the burden of proof. In contrast, it should be possible to use equality as a form of check for the valuable purpose already described without this being treated as a legal presumption of equal division.

Miller v Miller; McFarlane v McFarlane [2006] 2 W.L.R. 1283

Lady Hale

"142. Of course, an equal partnership does not necessarily dictate an equal sharing of the assets. In particular, it may have to give way to the needs of one party or the children. Too strict an adherence to equal sharing and the clean break can lead to a rapid decrease in the primary carer's standard of living and a rapid increase in the breadwinner's."

"Thus far, in common with my noble and learned friend, Lord Nicholls of Birkenhead, I have identified three principles which might guide the court in making an award: need (generously interpreted), compensation, and sharing. I agree that there cannot be a hard and fast rule about whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance. Much will depend upon how far future income is to be shared as well as current assets."

Charman v Charman [2007] 1 F.L.R. 1246

Sir Mark Potter:

“65 Although in White the majority of the House agreed with the speech of Lord Nicholls and thus with his description of equality as a “yardstick” against which tentative views should be “checked”, Lord Cooke, at p. 615D, doubted whether use of the words “yardstick” or “check” would produce a result different from that of the words “guideline” or “starting point”. In Miller the House clearly moved towards the position of Lord Cooke. Thus Lord Nicholls, at [20] and [29], referred to the “equal sharing principle” and to the “sharing entitlement”; those phrases describe more than a yardstick for use as a check. Baroness Hale put the matter beyond doubt when, referring to remarks by Lord Nicholls at [29], she said, at [144],

“I agree that there cannot be a hard and fast rule about whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance.””

B v B [2008] 1 WLR 2362

- Hughes LJ
- *24 We have been taken helpfully to the landmark cases of White v White [2001] 1 AC 596 and McFarlane v McFarlane [2006] 2 AC 618 . These cases do not establish any rule that equal division is the starting point in all cases. On the contrary, the starting point in all cases is the financial position of the parties and section 25 of the Matrimonial Causes Act 1973 : see Sir Mark Potter P in Charman v Charman (No 4) [2007] 1 FLR 1246 , para 67. And in all cases the objective is fairness, which requires an individual assessment of each case: see White's case [2001] 1 AC 596per Lord Nicholls of Birkenhead, at p 604, and McFarlane's case [2006] 2 AC 618 per Lord Nicholls, at para 9, and Baroness Hale of Richmond, at paras 134 and 136.*

"…the process of distribution of assets after divorce is generally informed by need (generously interpreted), compensation and sharing: see Baroness Hale, at para 144, and Lord Nicholls, at paras 10–16. ***The sharing principle gives rise to the general proposition that no distinction is to be made, when considering the contributions of the spouses to the marriage (section 25(2)(f) of the 1973 Act), between monetary and non-monetary contributions. Thus there also follows the requirement to test the outcome of the exercise against the yardstick of equality, and to depart from it only if and to the extent that there is a good reason for doing so****: see Lord Nicholls in White's case [2001] 1 AC 596 , 605 f . Lord Nicholls there expressly adverted to the fact that, more often than not, it is necessary to depart from it; the commonest reasons are probably a disparity of need, especially of housing need where there are children to be provided for, and a disparity of potential financial resources in future, especially of earning capacity. The importance of the "yardstick of equality" is twofold. First it underlines the necessity not to treat financial contributions differently from those in non-monetary form. Second, it underlines the essential fairness of equal division in a large number of cases of shared matrimonial life."*

- *25 Nevertheless, one possible reason for departing from equality is recognised to be the case where assets are the product not of efforts of different kinds during the marriage, but of inheritance by one spouse alone: see Lord Nicholls in White's case, dealing with property acquired before marriage or inherited during it, at p 610:*
- *“Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, 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.”*
- *In McFarlane's case [2006] 2 AC 618 Baroness Hale echoed this approach, although that case was not concerned with inherited property: see especially paras 149 and 152* ***. It seems to me that this approach will normally accord with the ordinary sense of fairness of people in general.***

What Have Courts Actually Done?

- CvC [2009] 1 FLR 8 (Moylan J)

- £22m pot
- Long marriage (<20yrs)
- H brought about 5m (20% of final pot)
- W got 40% (note: that is half of 80%!)

- *“Taking into account all of the factors set out in the Matrimonial Causes Act 1973 s.25, and the authorities, there was sufficient justification for dividing the wealth unequally.* ***In order to establish such justification, especially after a marriage and relationship of such length, there had to be factors of substance. The wealth owned by H prior to the marriage and prior to the relationship was substantial and justified the departure from equality****. None of the other features in the case merited separate consideration.* ***It would be unhelpful to suggest that the assessment of the extent to which such departure was justified could be calculated by reference to any formula or clear mathematics, or that it had to be justified in that way”***

Jones v Jones [2011] 3 WLR 582

- H 58; W 44
- Marriage <10yrs
- H’s company worth £2m at marriage, £25m at separation

- Wilson LJ
- *"33. My view is that, in applying the sharing principle to this case, we should in the first instance adopt the approach commended to the judge by Miss Stone* ***. We should therefore effect a division of the total assets of £25m into the part reflective of non-matrimonial assets and that reflective of matrimonial assets. But in doing so we should remember that, as Lord Nicholls of Birkenhead stressed in McFarlane v McFarlane , at para 26, we are unlikely to need, still less to achieve, a precise division****. The remaining step to be taken pursuant to Miss Stone's approach will be easy partly because in this case there is no ground for sharing the non-matrimonial assets other than 100% to the contributor and 0% to the other and partly because, by contrast, there is no ground for sharing the matrimonial assets other than equally."*

- *“34 My view however is that we should test the result suggested by the adoption of Miss Stone's approach against application of Mr Pointer's approach, namely by identifying, for allocation to the wife, such lesser percentage than 50% of the total assets as seems to make fair overall allowance for the husband's introduction of his company into the marriage.”*

- Result?
  - Value company at the commencement of marriage (£2m)
  - Add arbitrary springboard (£4m)
  - Increase by relevant index (£8m)
  - Deduct and divide (£8m each)

- Arbitrary?
- *"35 Criticism can easily be levelled at both approaches. In different ways they are both highly arbitrary. Application of the sharing principle is inherently arbitrary; such is, I suggest, a fact which we should accept and by which we should cease to be disconcerted."*

- *"43 By reference to its latent potential at the date of the marriage I propose to take the value of the company at that date as being £4m rather than £2m. The figure is, again, highly arbitrary: I make no apology for this but it reinforces the need to test against some other approach the conclusion ultimately reached by reference to it."*

N v F 2011 2 FLR 533

- Mostyn J
- H 58 W 46 – 16 yr marriage
- Children 15 and 8
- Assets £9.7m
- H brought £2m to marriage which was not kept separately
- H sought to exclude most; W sought to include all

- Principles: Para 14

the two-step approach is the right one, generally speaking. It is precisely what Wilson LJ did in Jones. It seems to me that the process should be as follows:

(i)whether the existence of pre-marital property should be reflected at all. This depends on questions of duration and mingling;

(ii)if it does decide that reflection is fair and just, the court should then decide how much of the pre-marital property should be excluded. Should it be the actual historic sum? Or less, if there has been much mingling? Or more, to reflect a springboard and passive growth, as happened in Jones?

(iii)The remaining matrimonial property should then normally be divided equally;

(iv)the fairness of the award should then be tested by the overall percentage technique.

Result

I conclude that it would be wrong and unfair for none of H's pre-marital wealth to be excluded from the sharing principle. It was the bedrock on which this marriage was founded. As against that are the undoubted facts that the marriage was long and the moneys were well and truly mingled with marital funds, signifying an acceptance by H that to a great extent the moneys, or at least their growth or earnings, would be shared with (or to use the words of the marriage service 'endowed on') W. I have concluded that £1m should be excluded. This satisfies the justice of the sharing principle, and as I will show below, the residual sum will meet W's needs. Any greater excluded sum would not permit W's needs to be reasonably met. But for this factor, I would have excluded more. If W's needs suddenly had come to be met or had disappeared by virtue of an unexpected event, such as a windfall, remarriage to a rich man, or death (as happened in Smith v Smith (Smith and Others Intervening) [1992] Fam 69, [1991] 3 WLR 646, [1991] 2 FLR 432) then I would have excluded £2.116m being the actual value of H's pre-marital wealth, for the same reasons as I stated in FZ v SZ.

S v S [2014] EWHC 4732

- Bodey J
- H 71 W 47
- H brought 13m into marriage; 25m by time of sep
- 1997-2012
- No children of marriage – H has adult children
- Mat pot £6m an the basis of the 2-stage process in Jones
- W awarded 5.8m – half would not meet her needs

INHERITANCE

- Robson v Robson [2010] 1FLR 751

H 66 W54

H inherited large estates worth £22m

21 year marriage with children approaching independence

W sought share; H sought to restrain

- Principles: Ward LJ para 43:

- (1)Concentrate on s 25 of the Matrimonial Causes Act 1973 as amended because this imposes a duty on the court to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of 18; and then requires that regard must be had to the specific matters listed in s 25(2). Confusion will be avoided if resort is had to the precise language of the statute, not any judicial gloss placed upon the words, for example by the introduction of ‘reasonable requirements' nor, dare I say it, upon need always having to be ‘generously interpreted'.
- (2)The statute does not list those factors in any hierarchical order or in order of importance. The weight to be given to each factor depends on the particular facts and circumstances of each case, but where it is relevant that factor (or circumstance of the case) must be placed in the scales and given its due weight.
- (3)In that way flexibility is built into the exercise of discretion and flexibility is necessary to find the right answer to suit the circumstances of the case.

- (5)Need, compensation and sharing will always inform and will usually guide the search for fairness.
- (6)Since inherited wealth forms part of the property and financial resources which a party has, it must be taken into account pursuant to subs 2(a).
- (7)But so must the other relevant factors. The fact that wealth is inherited and not earned justifies it being treated differently from wealth accruing as the so-called ‘marital acquest' from the joint efforts (often by one in the work place and the other at home). It is not only the source of the wealth which is relevant but the nature of the inheritance. Thus the ancestral castle may (note that I say ‘may' not ‘must') deserve different treatment from a farm inherited from the party's father who had acquired it in his lifetime, just as a valuable heirloom intended to be retained in specie is of a different character from an inherited portfolio of stocks and shares. The nature and source of the asset may well be a good reason for departing from equality within the sharing principle.

- (8)The duration of the marriage and the duration of the time the wealth had been enjoyed by the parties will also be relevant. So too their standard of living and the extent to which it has been afforded by and enhanced by drawing down on the added wealth. The way the property was preserved, enhanced or depleted are factors to take into account. Where property is acquired before the marriage or when inherited property is acquired during the marriage, thus coming from a source external to the marriage, then it may be said that the spouse to whom it is given should in fairness be allowed to keep it. On the other hand, the more and the longer that wealth has been enjoyed, the less fair it is that it should be ringfenced and excluded from distribution in such a way as to render it unavailable to meet the claimant's financial needs generated by the relationship.
- (9)It does not add much to exhort judges to be ‘cautious' and not to invade the inherited property ‘unnecessarily' for the circumstances of the case may often starkly call for such an approach. The fact is that no formula and no resort to percentages will provide the right answer. Weighing the various factors and striking the balance of fairness is, after all, an art not a science.

Result?

- W received a housing fund of £4m
- W received a gradually reducing income capitalised at £3.5m
- Thus: a needs based award but which was checked against the £14m value of the main home.

K v L [2012] 1 WLR 306

- Long marriage
- Modest semi-detached lifestyle
- Children grown up
- W inherited shares worth £57m at time of separation
- H awarded needs sum of £5m

- AR v AR (Treatment of Inherited Wealth) [2012] 2 F.L.R. 1
- Very similar facts to Robson
- Follows Robson – treated as a generous needs case.