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Pre-acquired assets

Bloomsbury Professional Family Law Conference – current issues

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Current position: matrimonial and non-matrimonial property

- **Origins -- *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2—6] 1 FLR 1186. Lord Nicholls:**

> **16. A third strand is sharing. This 'equal sharing' principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. In 1992 Lord Keith of Kinkel approved Lord Emslie's observation that 'husband and wife are now for all practical purposes equal partners in marriage': R v R [1992] 1 AC 599, 617. This is now recognised widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: 'unless there is good reason to the contrary'. The yardstick of equality is to be applied as an aid, not a rule.**

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17. This principle is applicable as much to short marriages as to long marriages: see Foster v Foster [2003] EWCA Civ 565; [2003] 2 FLR 299, 305, para 19 per Hale LJ. A short marriage is no less a partnership of equals than a long marriage. The difference is that a short marriage has been less enduring. In the nature of things this will affect the quantum of the financial fruits of the partnership.

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22. This does not mean that, when exercising his discretion, a judge in this country must treat all property in the same way. The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties' common endeavour, the latter is not. The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.

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- **Practical guidance from *Hart*:**

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. In this context, I do not agree with Mostyn J's comment in N v F [2011] 2 FLR 533 , para 24 that a party would need to prove the existence of pre-marital assets "by clear documentary evidence". There is no reason to limit the form or scope of the evidence by which the existence of such property can be established. The normal evidential rules *113 apply. These include the court's ability to draw inferences if such are warranted.

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95. The third and final stage of the process is when the court undertakes the section 25 discretionary exercise. Even if the court has made a factual determination as to the extent of the parties' wealth which is matrimonial property and that which is not, the court still has to fit this determination into the exercise of the discretion having regard to all the relevant factors in this case. 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 having regard to all the relevant section 25 factors.

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96. If the court has not been able to make a specific factual demarcation but has come to the conclusion that the parties' wealth includes an element of non-matrimonial property, the court will also have to fit this determination into the section 25 discretionary exercise. The court will have to decide, adopting Wilson LJ's formulation of the broad approach in the Jones case [2012] Fam 1 , what award of such lesser percentage than 50% makes fair allowance for the parties' wealth in part comprising or reflecting the product of non-marital endeavour. In arriving at this determination, the court does not have to apply any particular mathematical or other specific methodology. The court has a discretion as to how to arrive at a fair division and can simply apply a broad assessment of the division which would affect "overall fairness". This accords with what Lord Nicholls said in McFarlane v McFarlane and, in my view, with the decision in the Jones case.

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- ***XW v XH* [2019] EWCA Civ 2262**

> **128. Hart may also have created confusion when I added, at para 96, that the court did not have "to apply any particular mathematical or other specific methodology". I should perhaps have emphasised that, as I said in the next sentence, I was talking about a broad assessment as being a permissible route to the division of the wealth which would be fair and not that the ultimate effect of this determination need not be identified.**

Pre-acquired assets

- ***N v F (Financial Orders: Pre-Acquired Wealth)*** **[2011] EWHC 586 (Fam);** ***Jones v Jones*** **[2011] EWCA Civ 41**
  - **Fact specific and highly discretionary!**
  - **Pre-marital property should be taken into account because it represents a contribution made by one party unmatched by an equivalent contribution by the other.**
  - **The longer the marriage the easier it is to say that by virtue of the mingling of that property with the product of the parties' marital endeavours the supplier of that property has, in effect, agreed to share it with their spouse.**
  - **In a short marriage, fairness may require that the claimant should not be entitled to a share of the other's non-matrimonial property.**
  - **With longer marriages the position is not so straightforward. Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as years pass, the weight to be attributed to the contribution will diminish, sometimes it will not.**

Pre-acquired assets

When dealing with pre-marital assets:

1. Consider whether the existence of pre-marital property should be reflected at all -- This depends on questions of duration and mingling.

2. If it should, decide how much of the pre-marital property to exclude.

   Actual historic sum? Or less, if mingling? Or more, to reflect springboard and passive growth (as in Jones)?

3. Remaining matrimonial property should normally be divided equally.

4. Fairness to be tested by overall percentage technique.

Pre-acquired assets

- ***Hart v Hart*** **[2017] EWCA Civ 1306;** ***Versteegh v Versteegh*** **[2018] EWCA Civ 1050.**

87. […] I am not sure there are different schools. In my view, the differences which he identifies are examples of the same principle being applied, but applied in a different manner depending on the circumstances of the case. One application may be more specific than the other but this will typically reflect the "degree of particularity or generality appropriate in the case": see McFarlane's case, para 27. The outcome will be the same, namely, when justified, an unequal division of the parties' property.

Pre-acquired assets – recent authorities

Recent cases:

- ***WX v HX*** **[2021] EWHC 241**
- ***XW v XH*** **[2019] EWCA Civ 2262**

Distinction between passive and active growth:

Jones v Jones **[2011] EWCA Civ 41**

Robertson v Robertson **[2016] EWHC 613 (Fam)**

Application of income generated by non-matrimonial asset:

MCJ v MAJ **[2016] 1672 (Fam)**

Practical tips

- **Take early stage details from clients; proof of evidence and detailed chronology.**

- **Formulate your case theory on pre-acquired/non-matrimonial assets as soon as possible, when preparing Form E/voluntary disclosure – communicate to the other side and seize the narrative.**
  - **Details to include the nature of pre-acquired asset (e.g. date of acquisition, current and historic valuation) etc.)**
  - **Evaluate the extent of intermingling (and if so, how, and with which other property)**

- **Consider necessary evidence / expert instruction. Early disclosure may be necessary (*AC v DC (No 2)* [2012] EWHC 2420 (Fam)).**

Disclaimer and contact

These slides are no substitute for legal advice and should not be relied upon as such. No responsibility is accepted for any actions or forbearance taken in reliance upon them.

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