WESTGATE
CHAMBERS

Non-Matrimonial Property

How can we argue for inclusion of non-matrimonial assets?

Trina Little

WESTGATE
CHAMBERS

"Non-matrimonial property – How can we argue for the inclusion of non-matrimonial property, including inheritance, pensions and applying the mingling principles?"

Introduction

1. As we know, there is a two-stage process for the court in determining a financial claim, firstly computation and secondly distribution. Whilst all property, however acquired, must be included in the computation stage, identifying the nature of the property will be essential for the distribution stage as the sharing principle has little, if any, application to non-matrimonial property. Therefore, what is and perhaps more importantly what is not defined as matrimonial will be pivotal to the quantum of the eventual award.

2. Whilst *Charman (No 4)*[1] is clear that sharing applies to matrimonial and non-matrimonial property alike but to the extent that property is non-matrimonial there is likely to be better reason for departure from equality, experience and case-law suggest a development in approach post 2007. As Mostyn J observed in *JL v SL (no.2)*:

"Given that a claim to share non-matrimonial property (as opposed to having a sum awarded from it to meet needs) would have no moral or principled foundation it is hard to envisage a case where such an award would be made. If you like, such a case would be as rare as a white leopard."[2]

3. The exception to that 'rule' is where a court makes a needs-based award. Non-matrimonial property can be invaded to the extent that it is required to meet a party's needs. Yet even if the court does make a needs-based award, the starting point will be for the court to classify the assets as either matrimonial or non-matrimonial and the assessment of extent of 'needs' will undoubtedly be influenced by the non-matrimonial nature of the property required to meet them.

---

[1] [2007] 1 FLR 1246
[2] [2015] EWHC 360, at paragraph 22

Non-matrimonial property – what is it?

4. The court's approach to identifying matrimonial and non-matrimonial property is well settled and its development was set out in *XW v XH*[3] and *WX v HX*[4]. As is often the case, we look to White v White and Miller; McFarlane.

5.Lord Nicholls outlined the foundations of the court's approach in White:

"property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property……"[5]

6. As stated in Miller, non-matrimonial property regularly falls into 3 categories:

a. Property that one party brings into the marriage;
b. Property that one party acquires during the marriage, either through inheritance or gift; or
c. Property generated through the sole industry of one party. [6]

7. While basic, it may instead be easier to classify non-matrimonial property by thinking about what is matrimonial. If matrimonial property is the property that the parties have built through their joint endeavour during the lifecycle of their relationship, what falls outside that definition is non-matrimonial. It therefore includes property acquired postseparation (although this can be more complex – discussed below).

[3] [2019] EWCA Civ 2262, at paragraphs 91-106. Annex 1
[4] [2021] EWFC 14
[5] [2000] UKHL 54, at paragraph 42.
[6] [2006] UKHL 24

8. Consider examples: The landed estate, the Picasso, the business, the pension, money in the bank.

Mingling

9. Property can lose its non-matrimonial character and become 'matrimonialised'. The starkest example is monies put into the FMH. Again, we turn to White and Miller in which it was recognised that ***"the source of the assets may be taken into account but its importance will diminish over time"***[7].

10. In K v L, Wilson LJ provided the following guidance:

"I believe that the true proposition is that the importance of the source of the assets may diminish over time. Three situations come to mind:

(a) Over time matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property.

(b) Over time the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult.

(c) The contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home which, although vested in his or her sole name, has – as in most cases one would expect – come over time to be treated by the parties as a central item of matrimonial property."[8]

11. Intermingling is a term of art, not an exact science. Whether an asset has been matrimonialised, or intermingled, will turn on:

a. The way that the assets have been treated; and/or

[7] ibid, per Baroness Hale at paragraph 152
[8] [2011] EWCA Civ 550, at paragraph 18.

b. The length of the marriage.

12. Like non-matrimonial property, it is likely that you will know when you see it. There are some obvious examples. If we take inheritance, in a long marriage the distinction between the property one party inherited before the marriage and the property acquired during the marriage will fade as the parties' finances become more intertwined.

13. In contrast, there are scenarios where families treat inherited property discretely, it may be left untouched or settled within a trust. In those circumstances, the argument that the inherited property has retained its non-matrimonial character will have greater force.

14. There are, however, occasions where the distinction is less obvious and harder to establish. An asset can be a combination of both ***"partly the product, or reflective, of marital endeavour and partly the product, or reflective, of a source external to the marriage"*** per Moylan LJ in *Hart v Hart*[9]

Pre-marital property and the length of the marriage

15. Pre-marital property is perhaps the easiest to immediately identify as non-matrimonial particularly if it remains separate and apart from the parties' matrimonial finances. It follows that when the marriage is deemed to have started will determine whether the property was non-matrimonial at the outset. This is a fact-led enquiry, and the court takes a de facto, rather than a de jure approach. The relevant dates are when the parties began to cohabit and the date of separation, rather than the date of the marriage and divorce and/or conclusion of the financial remedies claim.[10]

16. TM v KM [11]is a recent example of how this important distinction can play out and its effect on the determination of the marital acquest.

17. The parties married in June 2006 and separated in 2021. The wife had purchased a flat in New York in April 2005 for $775,000. The flat was in her sole name. The parties lived in the flat

[9] [2017] EWCA Civ 1306, at paragraph 85
[10] VV v VV [2022] EWFC 41, at paragraphs 40-48; see also the comments of Mostyn J in JL v SL (no.2), at paragraph 20 and E v L [2021] EWFC 60
[11] [2022] EWFC 155

from 2005 until it was tenanted in 2006. It was the wife's case that this was her property, it had never played a central role in the marriage and, accordingly, it should be treated as non-matrimonial.

18. The parties fought ferociously over the date of cohabitation. The husband positing August 2004, the wife 2006. HHJ Hess preferred the husband's case, finding that cohabitation began in 2004. This, for him, placed the property "***fairly persuasively (though not necessarily inevitably) in the matrimonial property territory.***"[12] The Judge also noted that the husband did make one mortgage payment in 2006 and that the rental payments went towards paying down the mortgage. In conclusion, the Judge found that the property should be treated as matrimonial and commented: ***"to exclude this asset because of the difference in contributions to the purchase price would in my view be discriminatory. The wife's argument has a flavour of 'what's mine is mine and what's yours is half mine"***[13]

Post-Separation accrual

19. By the same logic, assets or property generated or 'accrued' post-separation and therefore not an asset generated as a consequence of the joint marital endeavour, will be deemed non-matrimonial in the first instance. For the same reasons, the date of separation will be determinative.

20. As Mostyn J observed in *JL v SL*:

"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."[14]

21. It is easy to think of some other clear examples of where property post-separation will be non-matrimonial. If one party was to inherit or be gifted property after the date of separation, that property would be classified as non-matrimonial.

---

[12] ibid, at paragraph 44
[13] ibid
[14] JL v SL (no.2), at paragraph 42

22. Equally, as the Court of Appeal made clear in *Waggott v Waggott*, earning capacity is not an asset to which the sharing principle applies, and therefore income or capital received by a party post-separation will be non-matrimonial, if that work was carried out after the date of separation.[15] By extension, property purchased using that 'post separation capital' would also fall into the non-matrimonial category.

23. Often, however, distinguishing post-separation assets can be complex. The classic examples arise in cases of deferred consideration cases (bonuses, RSUs, sale of assets/companies etc), in which payment – although technically post-separation – relates to work done during the life-time of the marriage. Likewise, the value of an asset may increase post separation. There has been a recent flurry of judgments published on the topic.

24. The principles that the court applies to cases of post-separation accrual were recently distilled in CG v SG, another judgment of HHJ Hess:

"(a) Assets acquired or created by one party after separation may qualify as non-matrimonial property if it can be said that the property in question was acquired or created by a party by virtue of his personal industry and not by use (other than incidental use) of an asset which has been created during the marriage and in respect of which the other party can validly assert an unascertained share. Obviously, passive economic growth on matrimonial property that arises after separation will not qualify as non-matrimonial property.

(b) If the post-separation asset is a bonus or other earned income then it is obvious that if the payment relates to a period when the parties were cohabiting then the earner cannot claim it to be non-matrimonial. Even if the payment relates to a period immediately following separation it may be too close to the marriage to justify categorisation as non-matrimonial. How close is 'too close' can create some differences of judgment. Mostyn J in Rossi suggested: "Although there is an element of arbitrariness here I myself would not allow a post-separation bonus to be classed as non-matrimonial unless it related to a period which commenced at least 12 months after the separation". The 12 month period, although perhaps a helpful rule of thumb in cases where the income concerned falls into a grey area where it is partly or wholly earned before

[15] Waggott v Waggott [2018] EWCA Civ 727

separation but paid after separation, but has been thought by some to be too arbitrary. Roberts J in Hohn suggested, less formulaically, "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."[16]

25. As an interesting side note, in CG v SG two interlinked arguments were made as to why shares bought by the husband post-separation should be classified as matrimonial, despite the timing of the purchase. It was argued on behalf of the wife that (i) in the absence of a tracing exercise the court could not establish that the shares were purchased with monies generated post-separation; and (ii) the income generated post-separation was matrimonial, having been generated by the continuum of the matrimonial business.[17] While those arguments were unsuccessful, they do outline some of the creative arguments that can be deployed.

26. In summary, the markers that the court will look for to identify an asset to be non-matrimonial are:

a. It is created by personal industry (by implication this excludes value accrued by passive growth).

b. It is unrelated to an asset to which the other party has a claim.

c. It must relate to work done post-separation.

d. The greater the time that has passed since separation, the more likely the court will find it to be non-matrimonial. But remember, if it is easy to identify evidentially this will significantly assist in arguments. It maybe best to advise clients to open a separate bank account for bonuses etc that are paid for work completed during a period that is entirely post-separation.

[16] [2023] EWHC 942 (Fam), at paragraph 16
[17] Ibid, at paragraph 19

Business assets

27. In the context of arguments about non-matrimonial property, it is most likely to encounter business assets in three scenarios: (i) a family business; (ii) a business that was started before the marriage (Robertson v Robertson)[18]; and (iii) businesses where the value increased due to post-separation endeavour (as opposed to passive growth).

28. XO v YO[19] is an example of how the court may approach business or corporate assets that have their origins in a source external to the marriage. The court started from the observation that: **"if assets are from an external source, this can be a good reason to depart from equality, depending on the facts of the case: see Charman v Charman (No 4) [2007] 1 FLR 1246; Miller v Miller; McFarlane v McFarlane [2006] 1 FLR 1186. The 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. The extent to which assets from an external source should be shared: 'depends on questions of duration and mingling': N v F [2011] 2 FLR 533"**[20]

29. HHJ Hess then accepted the following principles: *"the process of mingling can occur in a number of ways:-*

(i) *by literal co-mingling, merger or mixing of matrimonial property with non-matrimonial property;*

(ii) *by the property becoming part of the "economic life of the marriage …utilised, converted, sustained and enjoyed during the contribution period"; or*

(iii) *by an acceptance by the parties that it should be treated as matrimonial property notwithstanding its origin."*[21]

The court accepted the proposition that ***"The impact of the twin factors of mingling and duration on the treatment of assets brought into a marriage from an external source is an exercise which is both (a) 'evaluative' and (b) 'discretionary' viz 'the weight he considers just' (per Lord Nicholls in***

[18] [2016] EWHC 613 (Fam).
[19] [2022] EWFC 114
[20] ibid, at paragraph 64
[21] ibid, at paragraph 65

Miller; McFarlane) or a 'fair overall allowance' (per Wilson LJ in Jones v Jones [2011] 1 FLR 1723). The discretionary element can be introduced by the Judge either at the stage 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."[22]

30. It was common ground that the substance of the business assets, valued at £180m at the time of separation, derived from inheritance and, therefore, first appeared to be non-matrimonial property, despite the inheritances coming to the husband during the marriage. By way of the inheritance the husband became the owner of the business, but he had worked within it for time before then.

31. The issue was made more complex by the fact that:

a. The wife was employed within the business in a senior role since 2009, and the court found that she made a significant work contribution to the marriage;

b. The wife asserted that she substantively turned around the company's fortunes, which was unchallenged;

c. The wife received some shares in some of the underlying businesses and the family lived off the companies, which to the Judge suggested that the husband was treating the business as a joint/mingled operation; and

d. Some of the business operations were developed by investments made in the course of the marriage.

32. The court noted that this was a long marriage on any view, [23] and the wife invited the court to apply a 30% discount to reflect the matrimonial origin of the assets. HHJ Hess discounted the value of the husband's business assets by 50%, acknowledging that while this was not based on any mathematical calculation, it gave fair recognition to the initial source of the assets.

---

[22] ibid, at paragraph 66
[23] The parties met in 2000, married in 2002 and separated in 2018.

33. ARQ v YAQ[24] provides further clarification on the approach the court may take when quantifying the matrimonial aspect of a business which began before the marriage. There are two methods, the court may:

i. adopt a 'broad-brush' approach, as articulated by the Court of Appeal in Hart v Hart;[25]

or

ii. conduct a detailed calculation of the non-matrimonial property, then deduct that figure from the overall assets to arrive at a valuation for the matrimonial assets, as undertaken in Jones v Jones and Martin v Martin. [26]

34. The proper approach will be determined on the facts of the case. It is noteworthy that in ARQ v YAQ Moor J preferred the broad-brush approach over the straight-line method adopted in Martin and the more formulaic approach to computation espoused in Jones. 11 In so doing, the Judge rejected Mostyn J's proposition in Martin[27] that a day worked before the marriage began is of equal value to a day worked last week, and seemingly confined that principle to the context of a single privately owned business built up over a long period.

35. In light of current judicial trends, it appears that in 'intermingling' cases the court will be more inclined to favour the broad-brush approach, based on the simple observation that in the majority of cases the court will be unable to precisely determine the value of the pre-marital aspect of an asset. This also avoids the risk identified in XW v XH that top slicing non-matrimonial assets can lead to a large departure from equality.[28] Indeed, in IR v OR, another case

[24] [2022] EWFC 128.
[25] Hart v Hart [2017 EWCA Civ 1306, per Moylan LJ at paragraph 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 s 25 discretionary exercise. The court will have to decide, adopting Wilson LJ's formulation of the broad approach in Jones, 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 of Birkenhead said in Miller and, in my view, with the decision in Jones."
[26] Jones v Jones [2011] EWCA Civ 41; Martin v Martin [2018] EWCA Civ 2866
[27] WM v HM [2017] EWFC 25, at paragraph 20
[28] As noted in IR v OR [2022] EWFC 20, at paragraph 88. 29

in which the husband asserted that the pre-marital 'genealogy' of the wealth could not be ignored, Moor J combined both approaches, first conducting a more formulaic computation of the non-matrimonial assets, and then cross-checking this outcome with the broad-brush approach derived from Hart.[29]

Unequal sharing of matrimonial property

36. ARQ v YAQ also raised interesting questions over whether, if the court determines that pre-marital property has been matrimonialised, it follows that this matrimonialised property should be shared equally, unless one party establishes a special contribution.

37. Having distilled the relevant authorities, Moor J rejected that suggestion, explaining that the court is conducting a discretionary exercise and must take into account all relevant factors, including the source of the funds and whether there were unmatched contributions as some, or all, of the assets pre-date the marriage. The Judge underlined that this is not a return to the pre-Lambert position; it does not constitute discrimination in favour of the money-maker as the court is not dealing with assets generated during the marriage.[30]

38. These questions arose in ARQ v YAQ as the husband had transferred assets, amounting to c.£80m into the wife's name. The husband brought those assets into the marriage and accepted that he made those transfers with free will and they had been classified as gifts to satisfy HMRC.

39. Moor J observed that this transfer changed the position within the relationship. Until that point this was an entirely conventional second marriage and the wife could not have mounted a claim to share equally in the husband's pre-marital wealth. Having transferred those assets, the only claim that the husband now had to them was in the context of financial remedy proceedings. The Judge concluded that upon transfer those assets became matrimonial property, but "they are most certainly not matrimonial acquest in the standard sense as they were not all earned during the marital partnership".[31] As a consequence, while the Judge could not precisely identify the element which was not pre-marital, he could not ignore the "magnetic feature" that was the pre-marital origin of most of that sum.

[29] IR v OR, at paragraphs 88-91
[30] ARQ v YAQ, at paragraph 75.
[31] ibid, at paragraph 81.

40. In the event, the court added that £80m sum to what was conceived to fall within the matrimonial acquest, in the traditional sense, deciding that it was appropriate to award the wife 40% of the of the combined figure.

Pensions

41. In bigger money cases, where needs are comfortably met, the court is less likely to be interested in drawing a distinction between pension and non-pension assets. As identified in W v H, this is for two reasons:

i. Other capital may be deployed for income production; and
ii. As individuals now regularly have the option to 'cash in' some categories of pension funds, the dividing line between pensions and other capital assets has been blurred, such that pensions can be treated as disposable assets.[32]

42. The question remains whether the court should exclude pension accrued pre-marriage. Where the pension is wholly accrued pre-marriage then it is straightforward to identify as non-matrimonial property.[33] In theory, the exclusion of the pre-marital portion of a pension fund to which a party continued to contribute throughout the marriage represents no more than the identification of non-matrimonial property, to which the sharing principle should not apply.

43. The reality, however, is more complex. To effectively ring-fence the pre-marital portion of a pension that subsisted throughout the marriage by applying a straight-line deduction from the cash equivalent value of the fund with reference to the length of the marriage and the period of pre-marital accrual carries a significant risk of unfairness.

44. As was identified in the PAG report, there are numerous ways to deal with pension rights accrued pre-marriage. The report sets out four methods:

i. No apportionment: this is typically appropriate where needs in retirement are in issue or in the case of a long marriage.

[32] W v H (divorce: financial remedies) [2020] EWFC B10, at paragraph 60.
[33] WM v HM [2017] EWFC 25, per Mostyn J.

ii. Deferred Pension method: which calculates the pension rights accrued at the date of marriage, allowing for passive growth. This method allows less potential for discrimination.

iii. The Cash Equivalent method: which simply takes the CE value at the date of marriage and deducts that value from the CE value at the date of separation. This may lead a lesser amount being allocated as pre-marital.

iv. Straight-line method: in which benefits are divided on the assumption that they have accrued evenly over the period in question. This will usually favour the member spouse.[34]

45. Ultimately, the correct method of distribution is a matter for judicial discretion. Given the above complexities, where a pre-marital pension is likely to be in issue a PODE should be instructed.

Separating property

46. As will now be clear, the treatment of property may well be determinative of whether it will classified as non-matrimonial. The most concrete ways to separate property are:

i. To retain non-matrimonial assets in specie and separate and apart from the matrimonial finances (noting that using income generated by the asset towards 14 the family expenditure does not necessarily 'matrimonialise' the asset – MCJ v MAJ[35], WX v HX).
ii. Placing assets within a trust structure; and iii. Entering a nuptial agreement.

Trusts

47. It is a common misconception held by our clients that any assets held on trust are fully protected in the event of divorce. It has been established since Thomas v Thomas that the court can, in appropriate cases, make a lump sum or other financial order in reliance upon funds in a

[34] The Report of the Pensions Advisory Group, July 2019, Annex S.
[35] [2016] EWHC 1672 (Fam)

trust. As summarised by Lewison LJ in Whaley v Whaley "the question is not one of control of resources: it is one of access to them." [36]

48. S25(2)(a) of the Matrimonial Causes Act 1973 (MCA) is the springboard for understanding how the court will approach trust assets within financial remedy proceedings. The essential question is: does the assets form part of the financial resources available to a party, either now or in the near future?

49. Clearly, if the trust structure prevents a party from receiving any benefit from the assets held on trust, and under that structure no assets are distributable to the party in question, that property will not be deemed as an available resource.

50. The relevant test is derived from Charman: ***"Can the claimant spouse demonstrate, that if asked, the trustees would be likely, immediately or in the foreseeable future, to exercise their powers in favour of or in some way for the benefit of the other spouse"*** [37]

51. Put simply, some all or of the assets within the trust must be available for distribution to the relevant party. Answering this question demands close attention to the trust documents, the trust's structure, and the record of any distributions.

52. If a trust is held to be a financial resource available to a party, the court may make financial orders against the beneficiary on the basis that the trustees will facilitate the terms of that order; often referred to the court giving 'judicious encouragement' to the trustees.

53. However, the court cannot place undue pressure on the trustees. It would not be undue pressure if (i) the interests of other beneficiaries remain inappreciably damaged by the order; and (ii) the court concludes it would be reasonable for the paying party to seek to persuade the trustees to release capital.

54. In HD v WB, Peel J distilled the two-stage process that the court should undertake as follows:

---

[36] [2011] EWCA Civ 617, at paragraph 113

[37] [2007] EWCA Civ 503

"i) A finding as to the likelihood of the third party assisting the spouse in accessing funds belonging to him/her within a structure where there are issues of
(a) liquidity and
(b) respect for the interests of the third party. That finding will depend on the facts of the case, to be judged by all relevant evidence including any pattern of previous such assistance

ii) Having reached the relevant finding, the court will then have the evidential platform to make an order, if thought fit, which might amount to judicious encouragement to the third party, whilst staying alert to make sure that it does not cross the boundary into improper pressure on the third party."[38]

Word of warning: nuptial settlements

55. Per s24(1)(c) MCA 1973 the court has wide discretionary powers when considering whether to vary any ante- or post-nuptial settlement entered into by a party. The nuptial character of the settlement is a question of fact. The court takes a broad approach, and any settlement that makes "some form of continuing provision for both or either of the parties to [the] marriage"[39] will fall within the ambit of s24(1)(c).

56. There is some ambiguity over whether a non-nuptial settlement can be later nuptialised. K v K clearly concluded that such a transformation was not possible.[40] Nevertheless, in Quan v Bray the court held that a trust can become a nuptial settlement where past receipts from the trust evidence an existing intention to benefit one or both parties. [41]

57. In contrast, in Joy v Joy-Marancho it was held that a trust cannot become nuptial if it was not nuptial at the outset. In his judgment, Sir Peter Singer observed that the logic employed in Quan v Bray would mean that any trust which was not nuptial at its moment of inception, but provided benefits to an individual, would become nuptial when that person married and continued to receive benefit from the settlement.[42]

[38] [2023] EWFC 2, at paragraph 36
[39] Brooks v Brooks [1995] 2 FLR, at paragraph 315.
[40] K v K [2007] EWHC 3485, at paragraphs 79 and 82
[41] Quan v Bray & Ors [2014] EWHC 3340, at paragraphs 68-69
[42] Joy-Morancho v Joy [2017] EWHC 2086, at paragraph 109

58. While it seems unlikely for the court to again conclude that a non-nuptial settlement can later be nuptialised, we await for the tension within the authorities to be resolved before a higher court.

Nuptial Agreements

59. It is now trite law that a nuptial agreement that fulfils the requirements set out in Radmacher provides a mechanism to separate and define certain property as non-matrimonial. The question will then be whether, per the terms of that agreement, a party will be left in a predicament of real need. Although Kremen v Agrest suggests that the assessment of 'real need' will be severely altered by the existence of the agreement, a more nuanced approach was employed by Wall LJ in Brack v Brack: "Even where there is an effective prenuptial agreement, the court remains under an obligation to take into account all the factors found in s25(2) of the Matrimonial Causes Act 1973, together with a proper consideration of all the circumstances, the first consideration being the welfare of any children. Such an approach may, albeit unusually, lead the court in its search for a fair outcome, to make an order which, contrary to the terms of the agreement, provides a settlement for the wife in excess of her needs. It should also be recognised that, even in a case where the court considers a needs-based approach to be fair, the court will, as in KA v MA, retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs".[43]

60. Notwithstanding the above, it is equally clear that a failure to enter into a nuptial agreement does not result in a presumption of sharing.[44] With that in mind, while an 17 effective agreement may restrict a party to a needs-based award, it does not follow that the absence of an agreement will pre-determine the court's approach; this will turn on factors discussed above, specifically the extent of the pre-marital wealth, the length of the marriage and the extent of any intermingling.

[43] Brack v Brack [2018] EWCA Civ 2862, at paragraph 103
[44] Sharp v Sharp [2017] EWCA Civ 408 See also Moor J's comments in ARQ v YAQ, at paragraph 55

Conclusions

- In the context of a sharing-based award, non-matrimonial property will be excluded from part of the 'pot' of assets distributed by the court.

- For that reason, arguments over the classification of non-matrimonial property will be hotly contested.

- There are circumstances in which non-matrimonial property is easily identifiable (for example, inheritance, pre-marital wealth, or assets clearly generated post separation).

- Non-matrimonial property can become matrimonialised through a process of intermingling and this question will turn on the specific facts of a case.

- When determining the matrimonial portion of an asset, the court may take a broadbrush or more formulaic approach.

- It does not follow that if the court identifies a matrimonial portion of an asset, that that portion will be shared equally between the parties.

- Although it may be possible to identify that an element of a pension is non-matrimonial, how that element is quantified and distributed is more complex and will invariably require the instruction of a PODE.

- Property can be separated from the 'matrimonial pot' including by its placement within a trust or through a nuptial agreement. It is imperative that these mechanisms are executed correctly to protect from the court's invasion of the assets.

- To preserve property as non-matrimonial create a clear evidential basis for a finding that it is non-matrimonial. In short – keep it separate.

61. Ultimately, **'needs trumps all'**. As Charman reminds us:

"when the result suggested by the needs principles is an award of property greater than the result suggested by the sharing principle, the former result should in principle prevail".[45] This will be the majority of cases.

WX v HX [2021] EWHC 241 (Fam) Roberts J

Law in relation to matrimonial and non-matrimonial property in the context of the parties' sharing claims

113. It seems to me that the following principles can be derived from the authorities which have been placed before the court:-

(i) 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. Insofar as it represents a contribution by one of the parties to the welfare of the family, it is a factor which the judge should take into account: per Lord Nicholls in White v White (above).

(ii) The overarching principle which supports fairness to both parties is that of 'non discrimination'. The court will treat the contributions made by each of the parties to the marriage as having a broadly equivalent value even though they be different in kind: Miller v Miller;McFarlane v McFarlane [2006] UKHL 24, [2006] 2 AC 618, [2006] 1 FLR 1186.

(iii) Each case has to be considered on its own facts and the court's assessment of fairness in that particular case. The judge must consider whether the existence of such property should be reflected in outcome at all. This will depend on the extent to which it has been 'mingled' with matrimonial property and the length of time over which that 'mingling' has taken place: per Mostyn J in N v F (Financial Orders: Pre-acquired Wealth) [2011] EWHC 586 (Fam), [2011] 2 FLR 533. In other words, the way in which such property has been used over the course of the marriage has the potential to affect whether it remains 'separate' property:

[45] Charman v Charman, at paragraph 73

Miller/McFarlane (above) at para [25]. There may be cases where, over the course of a long marriage, the importance of the source of a significant element of one party's wealth, or even the entire wealth, has been maintained through ring-fencing in one party's name, kept safely and left to grow in value: K v L (above) at para [17] per Wilson LJ.

(iv) Assets or property which are matrimonial in character will be captured by the 'sharing principle' and divided equally between the parties. Matrimonial property is now recognised as being property which is the product of, or reflective of, marital endeavour or 'generated during the marriage otherwise than by external donation': Charman v Charman (No 4) (cited above) at para [66]; Jones v Jones [2011] EWCA Civ 41, [2012] Fam 1, [2011] 1 FLR 1723 at para [33]; Hart v Hart [2017]EWCA Civ 1306, [2018] 2 WLR 509, [2018] 1 FLR 1283 at paras [67] and [85]; and Waggott v Waggott [2018] EWCA Civ 727, [2019] 2 WLR 297, [2018] 2 FLR 406 at para [128].

(v) The application of the sharing principle impacts, in practice, only on the division of marital property and not on non-marital property: Scatliffe v Scatliffe [2016] UKPC 36, [2017] AC 93, [2017] 2 FLR 933 at para [25] Waggott at para [128], and XW v XH 20 (Financial Remedies: Business Assets) [2019] EWCA Civ 2262, [2020] 1 FLR 1015, para [136].

(vi) The application of the sharing principle will not always lead to an arithmetically equal division of the marital wealth. In appropriate circumstances factors such as risk and liquidity may impact the means by which sharing is achieved: XW v XH (above) at para [136].

114. In S v AG [2011] EWHC 2637 (Fam), [2011] 3 FCR 523, Mostyn J said this in para [7]:- "Therefore, the law is now reasonably clear. In the application of the sharing principle (as opposed to the needs principle) matrimonial property will normally be divided equally (see para 14(iii) of my judgment in N v F). By contrast, it will be a rare case where the sharing principle will lead to any distribution to the claimant of nonmatrimonial property. Of course an award from non-matrimonial property to meet needs is commonplace, but as Wilson LJ has pointed

out we await the first decision where the sharing principle has led to an award from non-matrimonial property in excess of needs."

115. In JL v SL (No 2) (Appeal: Non-Matrimonial Property) [2015] EWHC 360 (Fam), [2015] 2 FLR 1202, his Lordship emphasised the very limited circumstances in which non-matrimonial property will be invaded unless to meet needs. At para [22], he said this: "Given that a claim to share non-matrimonial property (as opposed to having a sum awarded from it to meet needs) would have no moral or principled foundation it is hard to envisage a case where such an award would be made. If you like, such a case would be as rare as a white leopard."

116. Finally, in terms of the factual question which a court will need to determine in cases where there is an issue relating to whether or not non-matrimonial property has been 'mixed', 'merged' or 'mingled' with matrimonial property, the court will need to consider whether the 'contributor' has accepted that his or her property should be treated as matrimonial property. This element of 'merger' flows from para 18 of Wilson LJ's judgment in K v L (above) in which he posed three separate situations:- "(a) Over time matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property. (b) Over time the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult. (c) The contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home which, although vested in his or her sole name has – as in most cases one would expect – come over time to be treated by the parties as a central item of matrimonial property."

The classic example of this sort of situation is the use by one of the parties of his or her non-marital funds towards the purchase of a family home. Whether or not the title 21 to that property is held in the joint names of the parties, it will invariably be treated by the court as a matrimonial asset for the purposes of any sharing claim. That example lies at one end of the factual spectrum. There are other more complex situations which fall into sub-categories (a) and (b) above where the court will need to analyse carefully whether the evidence will support a finding that property which was originally non-matrimonial has been treated, or dealt with, in such a way as to bring it within a sharing claim made by the other spouse. If the evidence leads the court to conclude that one of the parties has indeed through words, actions or deeds

anifested an acceptance that it should be treated as such, it must then go on to determine the extent to which that property falls to be shared as between them.