Barristers' Chambers

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The "Matrimonialisation" of Non-Matrimonial Assets

WX v HX and others (Treatment of Matrimonial and Non Matrimonial Property) (2021) EWHC 241 – Roberts J.

Introduction:

Donald Rumsfeld, the former US Secretary of Defence in interview about a film documentary entitled "The Unknown Known – the Life and Times of Donald Rumsfeld" – himself became confused about what was meant by his own use of the phrase he had famously employed at a news briefing in 2002 concerning the existence of weapons of mass destruction in Iraq. Having said the phrase meant "*things you think you know that it turns out you did not*", he later changed in the same interview to "*things that you know that you don't know you know*".

It has to be said that a possible equivalent of that confusion in current financial remedy practice is when does a non-matrimonial asset become matrimonial. Indeed, to listen to some final submissions, it might be said that the answer to that is "*never*" – when in truth the answer is - it depends on the circumstances of each case as to how the parties have approached the asset in question.

This issue has now been met square on in a recent Judgment of Roberts J in **WX v HX and others** (2021) EWHC 241. The judgment, as is not unusual for this High Court Judge, is somewhat lengthy and not the easiest read. Helpfully, however, in summarising the important elements of the main message concerning the subject of this Update, it will only be necessary to briefly state the core facts and outline the appraisal of Roberts J concerning the law of and approach to what she describes as the "*matrimonialisation*" process.

Facts:

This was W's financial remedy claim on divorce against H. H held c £50m in asset value and W c £60m. There had also been an issue also over trust assets valued at c US 50m dollars held for the benefit of the adult children which had been resolved as being quite separate from the parties individual "resources". The H proposed that his half share in the mortgage free London family home valued at £13.75m should be transferred to W to broadly bring equivalence in value their respective holdings.

W however in addition wanted another £10m from H to reflect the fact that their combined value included £14m net of inherited assets value , which W, therefore, maintained was non-matrimonial in source and should be ring fenced out and H claimed a share to because he had actively managed it during the marriage.

Decision:

Roberts J set out to establish the relevant asset values and what was matrimonial from what was non matrimonial in the assets held. Applying the law as she found it to be and as set out below, Her Ladyship determined that W's inherited value as identified had throughout been kept as her own separate property and had, thereby, never in whole or in part acquired a matrimonial status as a result simply of H managing the same during the relationship.

In the Court's analysis each had made equal and significant contributions to the marriage and H's needs were fully met and, therefore, without inclusion of the inherited value in the division, W, on a clean break, would be entitled to half of what was matrimonial value between them resulting in her retaining the family home plus £6.362m paid offshore to limit the tax payable.

The Approach to the Issue of "Matrimonialisation":

It is appropriate and of assistance to practitioners in relation to this to simply reproduce without further comment the relevant section of Roberts J Judgment in this section in which she stated:-

> *"112. Before setting out my conclusions in relation to the 'matrimonialisation' argument advanced by Mr Marks QC, this seems to me to be an appropriate point at which to return to recent developments in the law. In this context I turn next to the principles which are now established in relation to sharing in the context of matrimonial and non-matrimonial property.*
>
> ***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:* ***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 Waggot****t [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 (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 non-matrimonial 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."*
>
> *117. 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 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 manifested 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. "*

Application:

Applying these principles to the facts, Her Ladyship looked for evidence which might justify the conclusion that W's inherited wealth value had been used for the benefit of the wider family or mixed with the matrimonial capital so as to show she had intended or accepted the treatment of the same as a matrimonial asset in part or in whole.

As to this the Court found:-

- W's inherited wealth had remained in her sole name and wholly separate from the matrimonial funds;
- Whenever funds had been released by her they were never placed jointly;
- The underlying capital in these funds had never been used for housing or other family needs - even though some income therefrom had been used for the children;
- There had never been any understanding that these funds should be shared;
- W had intended only to use the funds income for the wider family / children /grandchildren;
- When H set up a trust he had not included W as a beneficiary because she had her independent wealth;
- H had not sought any contribution from W's wealth to the family properties or when considering buying holiday property in Mustique;
- H had told W the family wealth was as much as £100m

Against these findings, although H maintained he had on top of his role as the family breadwinner assisted in enhancing the value of her late father's estate division to her advantage, freed W's funds from the wider family trust structure, managed W's portfolio for 16years, played a pivotal role negotiating a beneficial option agreement and cared for W whilst she suffered mental illness, the Court found adopting the flexibility of appraisal recommended by Moylan LJ in both **Hart v Hart** (2017) EWCA 1306 and **XW v XH** (2019) EWCA 2262, inconclusive evidence that any of these activities by H had led to a material increase in value over and above what would have occurred in any event passively.

Accordingly, Roberts J determined:-

> *"134. Standing back as I do, it seems to me there is insufficient evidence in this case for me to make any sound assumptions, far less findings, that H's management of these funds from 2004 has produced a financially measurable uplift in value over and above any allowance for passive growth….."*

And

> *"135. In summary, I conclude that (a) W's non-matrimonial property has throughout been preserved as her own separate property, and (b) it has not acquired a matrimonial character, either in whole or in part, as a result of H's activities as investment manager."*

Commentary:

This decision is a much needed example of the evaluation of circumstances which may lead to non-matrimonial property being subjected absent of need to the sharing principle on divorce division. The core question as to whether there has been the necessary "*matrimonialisation*" is does the evidence show on the balance of probabilities that the contributing spouse intended or accepted that the unmatched value introduced should be shared with the other spouse.

The potential variables of circumstances in a relationship bearing upon this question are almost infinite so as to prevent any standardisation of facts pointing one way or another in advance of the particular evaluation undertaken.

The extremes would be on the one hand the inherited or pre-accrued fund which remains untouched in one spouse's name to the other extreme of where the contributor spouse formally transfers such property at the start of the relationship into joint names or the other party's sole name without reason other than to benefit the recipient spouse. Even in this latter example however there may be caveats in any particular set of circumstances since the

marriage may unexpectedly come to an end shortly after the transfer so requiring a court to remind itself that the value in question was always unmatched and fairness may require some discount of this receipt value from what the legal title otherwise suggests.

Simply using the investment income gained during the marriage from an asset whilst leaving the underlying capital value untouched by borrowing etc may not be enough to suggest matrimonialisation has occurred, although long term use in this way may raise an argument as to a percentage which reflects the investment receipt return against the overall asset value – but again the exact circumstances would need to be assessed.

What these higher Court decisions continue to reveal however is that discrete financial remedy judgments made for the fabulously wealthy only serve to make advising the client in 99.9% of other cases far less certain than should be the case under our financial remedy law.

Frankly, the man and woman in the street should not be expected to spend thousands of pounds in obtaining something unfortunately as commonplace as a divorce division based upon some complicated formula only fully understood by divorce lawyers and the judiciary. It is well past the time when anyone contemplating a divorce should be able to simply read the relevant divorce legislation and gain a confident understanding of the likely division that will occur so as to better fuel the prospect of an amicable settlement.