Non-matrimonial property: no longer a 'lawless science?'

Bethany Hardwick, Barrister, St John's Chambers

Published on 30 November 2016

1. Introduction

In recent years, there has been two arguably parallel lines of case law on the general approach courts should take to non-matrimonial property:

Scientists

N v. F (Financial Orders: Pre-acquired wealth) [2011] 2 FLR 533

FZ v SZ and Others (Ancillary Relief: Conduct: Valuations) [2011] 1 FLR 64

JL v. SL (No. 2) [2014] EWHC 360 (fam)

Artists

P v. P [2008] 2 FLR 1135

C v. C [2009] 1 FLR 8

SK v. WL (Ancillary Relief: Post-Separation Accrual) [2011] 1 FLR 1471

(Cooper-Hohn v. Hohn [2015] 1 FLR 745)

Reconciliation?

JB v. MB [2015] EWHC 1846 (fam)

MCJ v. MAJ [2016] EWHC 1642 (fam)

2. The two approaches

2.1. Scientists

Mostyn J is the clear leader of the scientists

Under this approach, the court must first identify the whole matrimonial pot, and within that how much constitutes both matrimonial and non-matrimonial assets.

The court shall '*identify the scale of the non-matrimonial property to be excluded, leaving the matrimonial property alone to be divided in accordance with the equal sharing principle.'(N v. F [2011] 2 FLR 533).*

At paragraph 14 of *N v. F (Financial Orders: Pre-acquired wealth) [2011] 2 FLR 533* he was clear:

> *[14] I adhere to my view that 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.*

2.2. Artists

The artistic approach takes a more discretionary broad brush approach, rather than the formulaic two stage method as set out above.

The percentage share of the whole matrimonial pot is adjusted from the 50%:50% starting point according to discretionary judicial 'feel' as to what would be an appropriate percentage shift to reflect the existence of non-matrimonial property in that case.

This approach has been consistently preferred by Moylan J (as he then was):

> *'…it would be unhelpful to suggest that the assessment of the extent to which such departure is justified can be calculated by reference to any formula or clear mathematics…' (Moylan J, C v. C [2009] 1 FLR 8).*

3. Scientific case law

3.1 N v. F (Financial Orders: Pre-acquired wealth) [2011] 2 FLR 533

The parties separated after 16 years of marriage. There were 2 children of the marriage. Total assets were c.£9.7m. However, at the time of the marriage H had pre-acquired wealth of c.£2.1m.

> *[14] I adhere to my view that 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.*

Mostyn J held it would not be right for none of H's pre-marital wealth to be excluded. He excluded £1m of H's pre-marital wealth and divided the remainder of the assets equally between the parties. This lead to a 45%:55% split. Mostyn J was clear that the reason for this outcome was due to W's **needs.**

In *FZ v SZ and Others (Ancillary Relief: Conduct: Valuations) [2011] 1 FLR 64* Mostyn J Stated:

> *[143] It is so easy to say – 'well there is a good deal of non-matrimonial property here so I will reduce the claimant's share to 40%', but that approach simply does not tell anyone what weight is being given to that factor…*

3.2. JL v. SL (No. 2) [2014] EWHC 360 (fam)

W received an inheritance of £465,000 shortly before the parties' separation. The last tranche of these funds was paid 10 months prior to the parties' split.

In *JL v. SL (No.1) [2014] EWHC 3658 (fam)* Mostyn J gave permission to appeal DJ Reid's treatment of the inheritance at first instance.

In his second judgment, he explained the problem with the artistic approach as follows:

> *[24] The problem with the first technique is that it is quintessentially intuitive. How do the parties understand how, say, 40% has been alighted on, as opposed to, say, 43% or 45%? The technique may reflect the individual judge's instinct and intuition but it risks being described as a lawless science.*
>
> *[25] This seems to me to mandate that the court should always attempt to determine the partition between matrimonial and non-matrimonial property. Once it has done so the matrimonial property should usually be divided equally and there should usually be no sharing of the non-matrimonial property…*
>
> *…*
>
> *[29] It can be seen that this technique maintains the purity of equal division of what is found to be the matrimonial property and in my judgment is the path that should be generally adopted.*

Mostyn J held that W's inheritance was non-matrimonial property in this case.

The matrimonial property was divided equally.

> *[54] 'In my judgment there is no good reason not to divide this equally. Each party will therefore receive £1,792,491 from the matrimonial pool. In addition each party has already received £650,000 as a pension share.'*

4. Artistic case law

Charman v. Charman [No. 4]

> *To what property does the sharing principle apply? The answer might well have been that it applies only to matrimonial property, namely the property of the parties generated during the marriage otherwise than by external donation; and the consequence would have been that non-matrimonial property would have fallen for redistribution by reference only to one of the two other principles of need and compensation to which we refer in para [68], below…**the principle applies to all the parties' property but, to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality**.'*

4.1 P v. P [2008] 2 FLR 1135

The parties had been married for 24 years and had 3 adult children. H had earned a considerable amount working in the financial sector. In the 2 years between separation and the proceedings, H received two bonuses and some deferred shares totalling £7m in value.

The issue as to correct treatment of those bonuses and shares arose.

Moylan J (as he then was) emphasized the court's discretionary role when handling non-matrimonial property.

He held that, as a general rule, the marital partnership did not continue for the purpose of sharing future resources unless such continuum was justified by need (or in rarer circumstances by compensation). The appropriate weight to be given to assets accrued post-separation was a matter for the court's discretion. He acknowledged the tension between predictability and flexibility. Clearly in this case he preferred a more flexible and discretionary approach.

> *[107] '…there is a well recognised tension between practicality and flexibility in approach and outcome. A too ready reliance on the former at the expense of the latter can easily result in unfairness… On the other hand, complete flexibility leads to a consequent lack of predictability (and exposes parties to the costs of litigation referred to be me at the outset of this judgment.'*

4.2. C v. C [2009] 1 FLR 8

Moylan J persisted in his discretionary approach in this case.

Parties separated after a 17 year marriage. At this time the total assets were approximately £22.2m.

H argued that he had accumulated most of his wealth prior to the marriage. Any award to W should therefore be limited to needs generously met. W argues that 95% of the present wealth was generated during the marriage, therefore no departure from equality was justified.

Moylan J held that:

> *'it would be unhelpful to suggest that the assessment of the extent to which such departure is justified can be calculated by reference to any formula or clear mathematics… in my judgment, I would be achieving fairness if I awarded the wife*

40% of the current wealth, dividing the pension assets and the other assets separately in the same proportion.'

4.3. SK v. WL (Ancillary Relief: Post-Separation Accrual) [2011] 1 FLR 1471

The parties had been married for 19 years and had 2 adult children. During the marriage they had worked jointly in a farming business. This had included surviving bankruptcy during the marriage. Three years prior to separation, W had helped H to set up a new business, of which he was the director and sole shareholder. That business was sold for £31.6m net 3.5 years after separation.

The parties' positions as to what W should receive were so juxtaposed Moylan J noted it was impossible for them both to fall within the grounds of the reasonable discretionary bracket.

Moylan J repeated his views as to the level of specificity required (or not) and the discretion afforded to the court. He quoted from Lord Nicholls in *Miller McFarlane* where he said:

[26] 'Sometimes, in the case of a business, it can be artificial to attempt to draw a sharp dividing line as at the parties' wedding day.'

[27] 'Similarly the "equal sharing" principle might suggest that each of the party's assets should be separately and exactly valued. But valuations are often a matter of opinion on which experts differ.'

In both his decisions in *P v. P* and *SK v. WL* Moylan J felt it was not necessary for him to precisely identify and define the pools of property that were 'matrimonial' and 'non-matrimonial' in order to reach his decision.

5. Reconciliation?

5.1. JB v. MB [2015] EWHC 1846 (fam)

In this case W had failed to file a Form A until 6 years after separation. As a result, the net value of H's shareholding in his business had risen from £1.73m at the time of separation to £8.5m at the time of Mr. Cusworth QC's decision (sitting as a Deputy High Court Judge).

Originally, it appears that Mr. Cusworth QC sided with Mostyn J as to the correct approach to property division:

> *[21] 'It is more satisfactory for the parties to have the exercise of discretion explained by reference to a share of what is matrimonial, and an explanation of why that determination has been so made, rather than simply to be told that x% of the whole combined pot will be the right proportion, for reasons rooted in the judge's experience but not more specifically articulated.'*

However, he then went on to **qualify** his Mostyn-esque scientific approach:

> *[21] 'That is not to say that such an approach will always be practicable, or even possible, nor that in any event it is any less arbitrary. It is simply that if such a determination can be made, then it must be a useful way-marker for the court and the parties to have been able to do so. There are bound to be many cases (and Cooper-Hohn may be an obvious recent example), where even to make such an attempt would appear futile.'*

In other words, when the scientific formulaic approach *is possible* on the facts of the case, it is beneficial for the court to provide their judgment in these terms for the parties. In other cases, however, such as *Cooper-Hohn*, it may be that the factual matrix is so complex that such an approach would be futile at best, or perhaps even harmful at worst.

5.2. MCJ v. MAJ [2016] EWHC 1642 (fam)

Second marriage for both parties. Parties began to Cohabit in 1998. They married in 2000. Total assets in the case were c.£10m.

H had considerable pre-acquired wealth, from two main sources:

(1) Two care homes, HL Limited and NE limited
(2) A property portfolio, (this constituted 68% of H's wealth)

W argued that she was entitled to an award based on full sharing.

H argued that his pre-acquired wealth required any award to be made only on the basis of needs. H produced an asset schedule attempting to show the value of his wealth at the time the parties started to cohabit, (£5.6m)

At Paragraph 56 of her judgment, Roberts J appears to endorse and cement the view first touched on by Mr. Cusworth QC in *JB v. MB [2015] EWHC 1846 (fam)*:

[56] 'Where does this evidence lead me? …As both counsel accept, it is simply not possible on the basis of the evidence before me to perform the sort of forensic exercise envisaged by the Court of Appeal in Jones v Jones [2011] 1 FLR 1723 and by Mostyn J in N v F [2011] 2 FLR 533 and S v AG [2012] 1 FLR 651. In appropriate cases (which will be the vast majority), I accept and endorse the stepped and intellectually rigorous approach of (a) deciding whether the existence of pre-marital property should be reflected in outcome at all, depending upon issues of the length of the marriage and what has been referred to in previous decisions as "mingling"; (b) if so, the extent of the pre-marital property to be excluded from the sharing principle; and, finally, (c) the equal division of the remaining (marital) property subject only to the cross-check of fairness and need. This approach was analysed recently by Mostyn J with his customary clarity in *JL v SL (No 2)(Appeal: Non-Matrimonial Property)* **[***2015] EWHC 360 (Fam***)**, *[2015] 2 FLR 1202, paras 17 to 27.* ***However, there are cases where reliable accountancy evidence is simply not available so as to make it possible for a court to establish a reliable and historical benchmark in terms of crystallised value at a particular point in time. It seems to me that this is one those cases.'***

This confirms reconciliation in practice between the two schools of thought.

If the scientific approach is available, the courts should adopt this technique. If however the facts of the case make this formulaic approach impossible, then in those circumstances the broader discretionary tactics of the artist should be used.

6. Implications for practice?

- Clarity
- Reconciliation of case law
- Advice

Bethany Hardwick
St John's Chambers

bethany.hardwick@stjohnschambers.co.uk
30 November 2016