



INHERITED AND PRE-ACQUIRED WEALTH

THE SIGNIFICANCE OF UNMATCHED CONTRIBUTION

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1. THE QUESTIONS TO BE ADDRESSED

- 1.1. To what extent and why will the court depart from the equality principle ('the equal sharing principle') because of an unmatched contribution made by one party to the marriage?
- 1.2. When does the Court's guidance in *Charman* as to the limit of the departure apply?
- 1.3. Where is the law heading?

2. THE HISTORICAL PERSPECTIVE

- 2.1. Under S.25(2)(f) of the 1973 Act the court is simply required to have regard to "the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family." The Act doesn't say anything about how different types of contribution should be evaluated.
- 2.2. Before 26th October 2000, in the pre-*White* era, express or implicit findings of *inequality* of contribution were a very common phenomenon - indeed some might say they were the norm. Such findings certainly were not confined to cases involving pre-acquired wealth or inherited assets. The contribution of the wealth generator, particularly in the big money case, was regularly perceived as being more valuable than, and therefore unmatched by, the contribution of the home-maker/child-carer.
- 2.3. Of course, with the anti-discrimination provisions of *White*, all that changed. Per Lord Nicholls:

“...whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties' contributions.”

2.4. Lord Nicholls acknowledged that in other jurisdictions a distinction *was* made between matrimonial property on the one hand, and pre-acquired or inherited wealth, on the other, and that property from a source external to the marriage *might* be retained by the spouse to whom it had been given. However for the purposes of the courts of England and Wales, he did not exactly give that approach a ringing endorsement. He merely said:

“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.”

2.5. Given the less than fulsome backing for a distinction between matrimonial and non-matrimonial property it is hardly surprising that for the next few years following *White* there was a reluctance to make any distinction between contributions.

2.6. It wasn't until March 2003, when Mr Mostyn QC gave his judgment in *GW v RW (Financial Provision: Departure From Equality)* [2003] 2 FLR 108, that the concept of an “unmatched contribution” took root. That would appear to be the first occasion when express reference was made to the concept of “unmatched contribution”.

(a) In *GW v. RW* the judge found that the husband had made 3 different contributions unmatched by those of the wife:

- (i) H had brought to the marriage c. \$0.75 million;
- (ii) H had brought to the marriage “a fully fledged career”;
- (iii) During a period of estrangement H had generated very substantial wealth – up to £9.6 million, although some of that might have been referable to natural capital growth.

(b) Mr Mostyn held that such unmatched contributions warranted a 10% departure from equality, and so he awarded W 40% of the realisable assets – i.e. 10% less than equality – and H 60%.

2.7. Having planted the seed in 2003, Mr Mostyn cultivated it in 2006, in *Rossi v Rossi* [2007] 1 FLR 790.

[10] In all cases now a primary function of the court is to identify the matrimonial and non-matrimonial property. **In relation to property owned before the marriage, or acquired during the marriage by inheritance or gift, there is little difficulty in characterising such property as non-matrimonial (provided it is not the former matrimonial home). The non-matrimonial property represents an unmatched contribution made by the party who brings it to the marriage justifying, particularly where the marriage is short, a denial of an entitlement to share equally in it by the other party:** see *White v White* [2001] 1 AC 596, [2000] 2 FLR 981; *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam), [2003] 2 FLR 108; *P v P (Inherited Property)* [2004] EWHC 1364 (Fam), [2005] 1 FLR 576, *Miller* (paras [21]–[25], [148]).

2.8. So from then on “an unmatched contribution” amounted to “property owned before the marriage” or “property acquired during the marriage by inheritance or gift”.

2.9. But *Rossi* also made it clear that an unmatched contribution could be property acquired *post* separation. Per Mr Mostyn QC:

[13] Thus it has always been the case that, where a party has by virtue of his own industry created further assets **after separation**, such sole unmatched contribution should be recognised and reflected by the court in its award.

2.10. Since *Rossi* “an unmatched contribution” has been regarded as wealth generated other than by the combined efforts of the marriage partnership.

2.11. However, for reasons addressed below, it is important to recognise that there is one other type of “unmatched contribution”, namely “the generation of wealth by means of a *special contribution* in consequence of a wholly exceptional business talent amounting to genius”.

- (a) In the reported cases it appears that only Sir Martin Sorrell (in July 2005) and Mr Charman (in May 2007) have been able to establish such a special contribution, although of course there may be other unreported instances.
- (b) On proper analysis, that type of unmatched contribution is to the generation of *matrimonial* property, during the marriage; a *special contribution* does not relate to the introduction of non-matrimonial property.

3. WHY DOES AN UNMATCHED CONTRIBUTION WARRANT DEPARTURE?

- 3.1. That an unmatched contribution *can* lead to a departure from equality is now beyond doubt, as the outcome in five recent cases demonstrates (see *Robson v. Robson* [2011] 1 FLR 751, *Jones v Jones* [2011] 1 FLR 1723, *N v F* [2011] EWHC 586, *K v L (Non-Matrimonial Property: Special Contribution)* [2011] 2 FLR 980, and *AR v AR (Treatment of Inherited Wealth)* [2011] EWHC 2717 (*Fam*)).
- 3.2. As to the reason *why* an unmatched contribution should warrant a departure within the equal sharing principle:
 - (a) The simple answer is in the question – “because it is unmatched”.
 - (b) The more sophisticated answer, is because “an unmatched contribution” is not a contribution made by either partner as part of, or within the marriage partnership – it is a contribution derived from efforts external to that partnership.
 - (c) The even more sophisticated answer is because in the guidance which he gave in *Robson*, Ward LJ said the following

[43] How then does the court approach the ‘big money’ case where the wealth is inherited? At the risk of oversimplification, I would proffer this guidance:

- (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.
- (4) Like every exercise of judicial discretion, the objective must be to reach a just result and justice is attained when the result is fair as between the parties.
- (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.

3.3. However there is an important qualification; just because an unmatched contribution *can* lead to a departure from equality does not mean that it automatically will do so. The authorities show that there is unlikely to be any case for departure unless and until the parties' respective needs-based claims have been met.

(a) As Lord Nicholls put it in *White*

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.**"

(b) As was explained in *Charman*

It is clear that, when the result suggested by the needs principle is an award of property greater than the result suggested by the sharing principle, **the former result should in principle prevail**

So what it amounts to is that an unmatched contribution will only lead to a departure within the sharing principle where there is a surplus over and above the amount required to meet needs.

4. TO WHAT EXTENT CAN THERE BE DEPARTURE?

4.1. As regards the *extent* to which there can be a departure on account of an unmatched contribution, the question has been asked, "is there any limit". To that the short answer is "no".

4.2. In *Charman* the court was concerned with departure from equality warranted by a husband's unmatched contribution, albeit not an unmatched contribution by virtue of

inheritance or pre-acquisition, but an unmatched contribution in consequence of Mr Charman's *special* contribution. The President, Sir Mark Potter, giving the judgment of the court said, [paragraph 90]

Although we decline to identify a threshold for the application of the principle of special contribution, we are nonetheless prepared to respond to the judge's postscript to the extent of offering guidance on the appropriate range of percentage adjustment to be made in cases in which the court is satisfied that the principle requires departure from equality; it is necessary however to bear in mind that fair despatch of some cases may require departure even from the range which we propose. As it happens, our views on this subject are by way of endorsement and development of what in this case Coleridge J. has himself said. As we have recorded at the end of paragraph 60(d) above, the judge suggested that any adjustment for special contribution of this character should be significant as opposed to token. We agree. We find it hard to conceive that, where such a special contribution is established, the percentages of division of matrimonial property should be nearer to equality than 55% - 45%. Equally, in the course of Mr Singleton's application to him for permission to appeal, the judge, in referring to percentages in cases of special contribution, observed "I think you need to be careful, after a very long marriage, to give a wife half of what you give the husband". Arbitrary though it is, our instinct is the same, namely that, even in an extreme case and in the absence of some further dramatic feature unrelated to it, **fair allowance for special contribution within the sharing principle would be most unlikely to give rise to percentages of division of matrimonial property further from equality than 66.6% – 33.3%.**

Thus the extent of the departure was limited to 16.6% more or less than 50%.

4.3. But the question to be considered here is "when does the court's guidance in *Charman* as to the limit of the departure apply *in a case involving inherited or pre-acquired assets*". The short answer is that in unmatched contribution cases involving inherited or pre-acquired wealth, the *Charman* guidance does *not* apply. Such attempt as has been made to *limit* or curtail the departure from equality in an inherited asset case – most notably in *K v L (Non-Matrimonial Property: Special Contribution)* - has been unsuccessful.

4.4. Prior to *K v. L* (reported in May 2011) there had been two significant cases involving inherited assets where there had been departure:

- (a) In *P v P (Inherited Property)* [2005] 1 FLR 576, the assets amounted to £2.5 million. The unmatched contribution comprised a farm which H had inherited. Munby J's award left W with £645,000, which was c. 25% and H, who had inherited a farm from his family with 75%;
- (b) In *Robson v. Robson* the assets came to be about £22.5 million; the unmatched contribution comprised estates in Oxfordshire and Scotland which the husband had inherited. After the Court of Appeal's intervention, the award to the wife was reduced to £7 million, or 31%, leaving the husband with 69%;

4.5. In *K v L (Non-Matrimonial Property: Special Contribution)*:

- (a) the family's net assets came to £57 million. In the main those assets comprised shares in which W had inherited before the marriage. As Wilson LJ observed, those shares increased "massively" in value.
 - (i) When the parties began to cohabit in 1986, her shares (or portion of the shares) were worth £300,000;
 - (ii) when they married in England in 1991, they were worth £700,000;
 - (iii) when they separated in 2007, they were worth £28m;
 - (iv) at the time of the hearing before the judge, they were worth £57.4m (albeit there was latent CGT within that figure)
- (b) Bodey J made an award to H which left him with a total of £5.3 million out of £57 million – only 9.3%.
- (c) On appeal H's counsel, Martin Pointer QC, sought to argue that an unmatched contribution in the form of inherited wealth, should be treated in the same way as an unmatched contribution in consequence of a special contribution - i.e. he sought to apply the *Charman* approach. Wilson LJ dismissed his arguments in the following way.

[19] Mr Pointer's third charge is that the judge failed to follow the guidance given by this court in *Charman* cited above. The judge (so runs the argument) in effect found that the wife had made a special contribution to the welfare of the family. Thus he should have had regard to the guidance in *Charman*, at [90], that fair allowance for special contribution within the sharing principle would be most unlikely to give rise to departure from equality further than to 66.6%–33.3%.

One third of £57m is £19m so (suggests Mr Pointer) the husband's claim to £18m is well-pitched.

[20] But the phrase 'a special contribution' is now a term of art in the law of ancillary relief which is used to describe a contribution entirely different from that of non-matrimonial property. As this court said in *Charman*, at [80]:

'The notion of a special contribution to the welfare of the family will not successfully have been purged of inherent gender discrimination unless it is accepted that such a contribution can, in principle, take a number of forms; that it can be non-financial as well as financial; and that it can thus be made by a party whose role has been exclusively that of a home-maker. Nevertheless in practice ... the claim to have made a special contribution seems so far to have arisen only in cases of substantial wealth generated by a party's success in business during the marriage.'

[21] Thus **a special contribution arises in circumstances in which a spouse's contribution, direct or indirect, to the creation of matrimonial property has been so extraordinary as to dictate a departure within the sharing principle from the ordinary consequence of its equal division.** It is therefore no accident that this court's reference, at [90], to the unlikelihood of departure from equality further than to 66.6%–33.3% was of 'division of matrimonial property'. By contrast, **although non-matrimonial property also falls within the sharing principle, equal division is not the ordinary consequence of its application. The consequences of the application to non-matrimonial property of the two other principles of need and of compensation are likely to be very different; but the ordinary consequence of the application to it of the sharing principle is extensive departure from equal division, often (so it would appear) to 100%–0%. Although Mr Pointer recognises the difference between the 'special contribution' which this court addressed in *Charman* and the contribution of non-matrimonial property exemplified by the present case ... his attempt to represent the difference as immaterial is entirely unconvincing.**

(d) Rubbing salt in the wound Wilson LJ added the following:

... What was much more interesting was the moment during the hearing when we asked Mr Pointer to show us a reported decision in which the assets were entirely non-matrimonial and in which, by reference to the sharing principle, the applicant secured an award in excess of her or his needs. He confessed to be unable to do so. Such a decision will no doubt be made – but not in this court today.

5. WHERE IS THE LAW HEADING?

5.1. Trying to predict the way in which the law is going to develop is notoriously difficult; typically the forecaster finds himself in splendid isolation amongst his peers. But in cases involving inherited assets there is a reasonable prospect that the following two questions are going to call for determination before too long:

- (a) In an inherited asset case should a party's needs be assessed in the same way as they are assessed when all the assets have been generated by the partnership?
- (b) In an inherited asset case should the court should give preference to a solution involving continuing periodical payments, rather to a clean break?

5.2. As regards the first question - whether the assessment of need should be informed by the source of the assets - the prediction that that will require determination is based on observations made by Mostyn J in *N v. F*.

- (a) In *N v. F* Mostyn said this,

An interesting question is whether the assessment of “needs” can be affected by factors other than the scale of the available resources and the marital standard of living. Specifically, **can the assessment of need be informed by the fact that there is present in the case a deal of pre-marital property?**

- (b) He then went on to answer the question thus

...if an agreement to preserve non-matrimonial property can have the effect of assessing need more conservatively (indeed in *Granatino* far more conservatively) than would have been the case absent that factor, **why cannot the presence of pre-marital property simpliciter not have an equivalent or similar effect?** I accept of course that in *Jones* at para 31 Wilson LJ has stated that:

...in applying the principles of need and of sharing, the court is engaged in two separate exercises, which require it to refer to different considerations (Charman, cited above, at [70] and [72]); and that the suggestion that the result of the assessment under the need principle can be introduced into the assessment under the sharing principle in order to identify the extent of departure from equality is inconsistent with the guidance given in *Miller/McFarlane*, as recognised in Charman at [73] and as noted by the

judge himself at [410], that in principle the higher assessment should found the award.

I do not take this passage to suggest that assessment of need is an insulated metric uninformed by factors that are centrally key to the performance of the sharing principle, for the reasons I have stated above

(c) Mostyn J did not try to support his view by reference to the outcome in *Robson*, but it is suggested that he could well have done so.

(i) In the inherited asset case of *Robson* Ward LJ held that the provision for W's income needs should be reduced from the level considered appropriate by Charles J. He justified such a reduction by saying that the judge had been critical of the parties' plundering of the husband's inheritance to fund their lifestyle, and that criticism carried with it the implication that it should stop. Thus effectively Ward LJ concluded that the parties' previous depletion of *an inheritance* - or their mismanagement of the inheritance - was a reason to assess the wife's needs at a level lower than they had been during the marriage.

(ii) In contrast, it is not believed that in a case solely concerned with the division of matrimonial property it has ever been suggested that the parties' depletion of their capital or their mismanagement of the acquest should somehow, by itself (i.e. ignoring questions of affordability) result in the claimant's income need being depressed.

5.3. As regards the second question, namely whether in an inherited asset case the court should give preference to continuing periodical payments, the prediction that such an issue is going to require consideration before too long is based on the argument run by the husband in *Robson*.

(a) In *Robson*, the approach taken on the wife's side was the standard one, namely that the scale of the assets - £22.5 million - and the fact that those assets could readily be realised, unquestionably called for a clean break.

(b) Mr Robson argued before Charles J that if he could be permitted to meet the wife's income claim by periodical payments, rather than by paying her a *Duxbury* lump sum of £3 million, he might not have to sell the Oxfordshire estate.

Therefore he argued that, at least in the first instance, there should not be a clean break, so that he could preserve his inheritance.

- (c) In a case where all the wealth has been generated during the marriage by the parties' combined efforts, it is unlikely that a husband's keenly held desire to retain rather than sell a property will persuade a court not to implement a clean break. But in *Robson* Charles J was sympathetic to the husband's request, specifically because the estate which he did not want to sell had been inherited.
- (d) When *Robson* came before the Court of Appeal, Ward LJ made certain observations which would suggest that the husband's opposition to a clean break might reasonably have been upheld, had there not been justifiable concern about Mr Robson's reliability as a payer of periodical payments. Having reminded the court about the quality of the Oxfordshire estate ("An unknown jewel in the heart of Oxfordshire; Magnificent grade II listed country house with five reception rooms, orangery and nine principal bedrooms in a Capability Brown park; ... An excellent pheasant and partridge shoot") Ward LJ said

It is without doubt a magnificent property and one has to have some sympathy with the husband over his reluctance to contemplate its sale.

- 5.4. Some might think that such sympathy - or even sentimentality - would be unlikely to prevent the imposition of a clean break in a case solely concerned with matrimonial property. Be that as it may, in cases to come the fact of inheritance may not only impact on assessment of need; it may also impact on how that need should be met - by periodical payments rather than by a *Duxbury* lump sum.

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The matters set out above are the author's views, and do not constitute advice for any individual case