THE PROSPECTS OF CLAIMS BY NON-INHERITING PARTIES

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1. INTRODUCTION

1.1. The purpose of this paper is to look at claims made for financial orders when the wealth available for distribution primarily comprises inherited assets, and to consider, in particular:

(a) whether in such circumstances, a needs-based award is all that the non inheriting party (the "NIP") can reasonably aspire to;

(b) in what circumstances (if any) might a claim for an award based on an application of the sharing principle result in the applicant securing a meaningful share, over and above the satisfaction of his/her needs.

1.2. Having regard to the question posed by today's hosts, the White Paper Conference Company, particular consideration will be given to the significance of the *timing* of the inheritance – whether the fact that it was received before the marriage, during the marriage or post separation makes a difference.

1.3. For completeness sake a lot of the old law has been set out below, but the focus today will be on the most recent decisions, there having been two important inheritance cases in the past 6 months.

2. INHERITED ASSETS - THE LAW IN THEORY

2.1. As ever, the starting point, of course, must be the Matrimonial Causes Act of 1973, not least because the Court of Appeal constantly enjoins us to "concentrate on S.25"[1]. When we do so we find there is no mention in the

[1] See, for example, Ward LJ's comments in *Robson* – considered in section 0 below.

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statute of a need to consider the *source* of the parties' financial resources. That remains the position 40 years on:

(a) even though the MCA has been amended a number of times over the years[2];

(b) even though a need to have regard to source has long since been recognised in other civilised jurisdictions, amongst which New Zealand should certainly be included[3] -.

2.2. Although not picked up by all at the time, the *distinction* to be made between matrimonial and non-matrimonial property was first articulated in *White* - in other words 27 years after the enactment upon which we are supposed to focus.

(a) The much cited part of Lord Nicholls speech at page 610 will be familiar to most:

> Typically, **in countries where a detailed statutory code** is in place, **the legislation distinguishes between two classes of property: inherited property, and property owned before the marriage, on the one hand, and "matrimonial property" on the other hand** …
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> This distinction is a recognition of the view, widely but not universally held, that … 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.
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> 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] E.G. by the Matrimonial Homes and Property Act 1981, the Administration of Justice Act 1982, the Matrimonial and Family Proceedings Act 1984, by the Pensions Act 1995, by the Welfare Reform and Pensions Act 1999

[3] see sections 8 to 11 of the Property (Relationships) Act 1973 (formerly the Matrimonial Property Act 1976) of New Zealand

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(b) It is important to have in mind what Lord Nicholls did not say. He did not say that "a non-inheriting party shall have no right to benefit from an inherited asset save insofar as the same may be required to meet a needs-based claim". In fact he effectively said, that it would all depend on the facts of the particular case.

2.3. The theme was taken up again 5½ years later, in *Miller* and *McFarlane*.

(a) Lord Nicholls, again in passages with most will be familiar, emphasised the potential importance of source:

> [22] This does not mean that, when exercising his discretion, a judge in this country must treat all property in the same way. The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that **there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other property**. The former is the financial product of the parties' common endeavour, the latter is not. **The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose**. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.
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> [23] The **matter stands differently regarding property ("non-matrimonial property") the parties bring with them into the marriage or acquire by inheritance or gift during the marriage. Then the duration of the marriage will be highly relevant**. The position regarding non-matrimonial property was summarised in the White case [2001] 1 AC 596, 610: …
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> [24] In the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage.
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> [25] With longer marriages the position is not so straightforward. Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as the years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not. After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom intended to be retained in specie. Some of the matters to be taken into account in this regard were mentioned in the above citation from the *White* case. To this non-exhaustive list should be added, as a relevant matter, the way the parties organised their financial affairs.

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> '[26] This difference in treatment of matrimonial property and non-matrimonial property might suggest that in every case a clear and precise boundary should be drawn between these two categories of property. This is not so. Fairness has a broad horizon. 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] Accordingly, where it becomes necessary to distinguish matrimonial property from non-matrimonial property the court may do so with the degree of particularity or generality appropriate in the case. The judge will then give to the contribution made by one party's non-matrimonial property the weight he considers just. He will do so with such generality or particularity as he considers appropriate in the circumstances of the case.'

(b) Baroness Hale also accepted that the nature and source of the property might be relevant, albeit only in a very small number of cases.

> [152] My Lords, while I do not think that these arguments can be ignored, I think that they are irrelevant in the great majority of cases. In the very small number of cases where they might make a difference, of which *Miller* may be one, the answer is the same as that given in *White v White* [2001] 1 AC 596 in connection with premarital property, inheritance and gifts. **The source of the assets may be taken into account but its importance will diminish over time**. Put the other way round, the court is expressly required to take into account the duration of the marriage: section 25(2)(d**). If the assets are not "family assets", or not generated by the joint efforts of the parties, then the duration of the marriage may justify a departure from the yardstick of equality of division**. As we are talking here of a departure from that yardstick, I would prefer to put this in terms of a reduction to reflect the period of time over which the domestic contribution has or will continue (see Bailey-Harris, "Comment on *GW v RW (Financial Provision: Departure from Equality)* " [2003] Fam Law 386, 388) rather than in terms of accrual over time (see Eekelaar, "Asset Distribution on Divorce-Time and Property" [2003] Fam Law 828). This avoids the complexities of devising a formula for such accruals.
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> [153] This is simply to recognise that in a matrimonial property regime which still starts with the premise of separate property, **there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them**. **The nature and the source of the property and the way the couple have run their lives may be taken into account in deciding how it should be shared**.

(c) Note again that neither Lord Nicholls nor Baroness Hale suggested that an inherited asset would be 'off-limits' save for the purpose of a needs based claim; neither suggested that the sharing principle should not apply to an inheritance.

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2.4. Having regard to the views of Lord Nicholls and Baroness Hale, in particular, the fundamental pronouncement made by the Court of Appeal in *Charman*[4] as to the application of the sharing principle was hardly surprising.

(a) The Court of Appeal answered its question, "to what property does the sharing principle apply?" by declaring that "the (sharing) principle applies to *all* the parties' property".

(b) It is right to observe that it went on to qualify that answer by saying "but to the extent that their property is non-matrimonial, there is likely to be better reason for departure from equality."

(c) However, the Court of Appeal did not say, "subject to satisfaction of a needs-based claim, when the sharing principle is applied to inherited property the departure from equality should be 100% to 0% in favour of the inheritor".

3. INHERITED ASSETS - THE LAW IN PRACTICE

3.1. After *Charman* the first occasion that the Court of Appeal had to provide guidance specifically in relation to inherited property, was the case of *Robson v Robson*[5]. In that case, the entirety of the £22.5 million of assets had been gifted to, or inherited by H. Those assets, which essentially comprised an estate in Oxfordshire and an estate in Scotland, had all been acquired by H prior to the 21 year marriage. Having enjoyed a very high standard of living W was pursuing a generously assessed needs-based claim.

3.2. Any doubt about the propriety of a needs-based claim in relation to inherited property had previously been dispelled by Munby J in *P v P (Inherited Property).* In that case:

(a) The inheritance comprised a hill farm in the north of England, which had been in H's family for some while. Indeed H was the fourth generation of his family to have farmed it. W had also done a lot of physical work on the farm and indeed was its only licensed sheep-dip operator.

[4] At paragraph 66
[5] [2010] EWCA Civ 1171; [2011] 1 FLR 751

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(b) W's primary claim was advanced on a sharing basis, to the effect that a percentage-based outcome was warranted. To that end it was contended that her "50% *White v White* entitlement" should be reduced by 10%, to reflect the fact that the assets originated from H's inheritance, leaving her with 40% - approximately £900,000. H contended not only that W's claim should be limited to an assessment of her 'reasonable needs' but also that, even if her reasonable needs required more, her award should be limited to the amount of the husband's free capital.

(c) Munby J considered the proper approach which most closely accorded with the over-arching requirement of fairness was for an award to be made based on the wife's reasonable needs for accommodation and income. He justified that approach in the light of the fact that the bulk of the family's assets represented the farm which had been in H's family for generations and which had been brought into the marriage with an expectation that it would be retained in specie.

(d) However, he made it clear that merely because an asset had been inherited did not mean that it would *never* have to be sold to satisfy a claim from a NIP.

> [37] I should like to emphasise the importance of Lord Nicholls of Birkenhead's observation that:
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> > 'The judge 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.'
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> There is inherited property and inherited property. Sometimes, as in *White v White* …, the fact that certain property was inherited will count for little: …. On other occasions the fact may be of the greatest significance. **Fairness may require quite a different approach if the inheritance is a pecuniary legacy** that accrues during the marriage than if the inheritance is a landed estate that has been within one spouse's family for generations and has been brought into the marriage with an expectation that it will be retained in specie for future generations.
>
> [38] That said, **the reluctance to realise landed property must be kept within limits.** After all, there is, sentiment apart, little economic difference between a spouse's inherited wealth tied up in the long-established family company and a spouse's inherited wealth tied up in the long-held family estates.

3.3. In *Robson*, the Court of Appeal, although reducing W's award from £8 million to £7 million, did not criticise the fact that Charles J had required H to realise all

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his interest in the Oxfordshire estate in order to meet W's claim. So, again, there was confirmation that a NIP *can* expect to benefit from an inherited asset, even when that can only be achieved by a sale. But, with respect to the applicability of the sharing principle in inheritance cases, the observations of the court did not take things much further forward.

(a) Ward LJ made the following pronouncements[6], which, going by their regular citation[7] in would appear to have become the *locus classicus*

> "How then does the court approach the 'big money' case where the wealth is inherited? At the risk of over-simplification, I would proffer this guidance:
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> (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 weigh**t.
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> (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.
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> (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.
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> (5) **Need, compensation and sharing will always inform** and will usually guide the search for fairness.
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> (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

[6] At paragraph 43
[7] In e.g. in *AR v AR (Treatment of inherited wealth)* [2012] 2 FLR 1, in *Y v Y* [2012] EWHC 2063 (Fam)

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> '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**."

(b) For his part Hughes LJ[8] was rather more concise.

> **That the origin of assets in inheritance is a relevant factor for the court in no sense means that the approach to inherited assets ought always to be the same. What is fair will depend on all the circumstances**; **those** cannot exhaustively be stated but **will often include** the nature of the assets, **the time of inheritance**, the use made of them by the parties and the needs of the parties at the time of trial

3.4. It will be noted that in *Robson*, neither Lord Justice, having taken upon themselves the task of providing guidance, went so far as to say that "in a case involving inherited assets the sharing principle has **no** part to play once needs have been met". Perhaps with that in mind, in the next case involving inherited assets which came before the Court of Appeal, counsel on behalf of the NIP was bold enough to argue that the Court of Appeal in *Charman* actually meant what it said. Thus it was that in *K v L (Non-matrimonial property: Special Contribution)*[9] Martin Pointer QC contended that "as the sharing principle applies to *all* the parties' property, his client (the applicant husband) should not

[8] At paragraph 96
[9] [2011] 2 FLR 980

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have been restricted to a needs based award. As a brief review of the case shows, he got very short shrift. In that case:

(a) By the time of the parties' marriage W had inherited a shareholding in an Israeli company, which increased massively in value both during the marriage and after the parties had separated. At the end of the 21 year marriage, in 2007, the shareholding was worth £28.3 million; two years later it was worth £57.4 million.

(b) Throughout the marriage the shareholding remained W's discrete own asset; there was never any intermingling of it with any of H's assets.

(c) Remarkably, notwithstanding the scale of W's wealth, the parties' standard of living was modest; the matrimonial home was a 3 bedroom semi-detached worth £225,000 at time of hearing, and even after the separation the home which W chose to buy only cost £320,000.

(d) H sought a lump sum of £18 million, on the basis that the sharing principle applied, and that even where one party made an exceptional contribution, as in *Charman*, the other party should not be left with less than one third.

(e) At first instance H was awarded a lump sum of £5 million, leaving him with a total of £5.3 million, which Bodey J held was more than sufficient to meet his housing and income needs.

(f) In explaining the Court of Appeal's decision to uphold the award, Wilson LJ conceded that non-matrimonial property falls within the sharing principle. However he then went on to say that the "ordinary consequence" of application of the sharing principle to non-matrimonial property is "extensive departure from equal division, often (so it would appear) to 100% - 0%. Cruelly he added the following

> [22] … . 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.

(g) One of the most important planks of Martin Pointer's argument was the length of the marriage and the observation made by Baroness Hale in

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Miller "that the importance of the source of the assets will diminish over time". That was dealt with by Wilson LJ in the following manner:

> [18] … with respect to Baroness Hale, 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:
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> (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.
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> (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 situations described in (a) and (b) above were both present in *White*. By contrast, there is nothing in the facts of the present case which logically justifies a conclusion that, as the long marriage proceeded, there was a diminution in the importance of the source of the parties' entire wealth, at all times ring-fenced by share certificates in the wife's sole name which to a large extent were just kept safely and left to reproduce themselves and to grow in value.

4. THE LATEST CASES

4.1. Since *K v L*, three more cases involving inherited assets have been reported. In one, (*Y v Y*[10]) the court simply applied the needs principle without more ado. In another (*AR v AR (Treatment of inherited wealth)*[11]) the *possibility* of the sharing being applicable was explicitly recognised - but the court then proceeded to determine the appropriate outcome simply by application of the needs principle. However, in the most recent of the three cases (*Davies v Davies*[12]) there was a break through; contrary to the apparent expectations of Wilson LJ in *K v L*, the Court of Appeal upheld a decision in which an applicant had seemingly persuaded the court at first instance to assess her entitlement by reference to the sharing principle.

[10] [2012] EWHC 2063 (Fam)
[11] [2012] 2 FLR 1
[12] [2012] EWCA Civ 1641

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4.2. *Y v Y*

(a) H owned a valuable estate in Oxfordshire which had been in his family for some 70 years. It had effectively been inherited by him (on becoming beneficially entitled under certain trusts) 1 year prior to the 26 year marriage.

(b) The main house on the estate had been used as the matrimonial home. With 4 ancillary properties and 138 acres (the central core) the main house (a grade II listed country mansion) was worth £16.5 million.

(c) Baron J, having accepted that the case was a needs-based one, and having found that the needs should be interpreted in the context of the factor that the wealth was inherited, awarded W £8.74 million. She assessed W's need for a housing fund at £5.1 million and her need for an income fund at £3 million.

(d) That H would probably have to realise a significant proportion if not all of his inherited estate (to which, as Baron J accepted, he was devoted) was no deterrent to the court. There was no room for sentimentality as was apparent from the following observation:

> [23] … Family Antiques described as the Y Family Collection and Y & K Jewellery. These are worth some £2.2 million net. The Husband considers these items as sacrosanct and does not wish to sell them. I do not accept this submission: save for personal gifts to him/family correspondence, such assets are a resource and can be sold to assist his needs. Obviously they have sentimental value but, in the end, they do have a real monetary value and are available to cover indebtedness. Accordingly, they should be included in the Asset Schedule.

4.3. *AR v AR (Treatment of inherited wealth)*

(a) The applicant W sought an outcome which would have left her with £7 million - approximately 30% of the family's wealth. She argued that after a 25 year marriage her needs were but one component of her claims, and that she was entitled to additional provision determined by reference to the sharing principle;

(b) Almost all of the wealth, totalling between £21 and £24 million reflected resources received by H by way of gift and inheritance from his father;

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(c) Although accepting that the sharing principle *could* apply to inherited property, Moylan J concluded that the principle which best guided him in the exercise of his discretion was that of need, and that the sharing principle did not justify any additional or enhanced award. Assessing W's needs at £4.3 million, to include a measure of financial security above that offered by a simple *Duxbury* calculation, he made an award of £3.3 to be added to the funds already owned by W.

4.4. <u>*Davies v Davies*</u>

(a) H was the owner of a successful hotel in the Paddington area. The hotel business had been started by his grandfather, and passed to H by his father in 1997/98, shortly after the commencement of his relationship with W.

(b) H contended that during the marriage W had been no more than a receptionist at the hotel, employed on an intermittent basis, and that as the marriage had been short her entitlement to financial provision was modest. Alternatively he argued that the assets available to satisfy W's needs hardly extended to the hotel business.

(c) W's case was that the hotel business had increased dramatically as a result of her energy, enterprise and marketing skills. Whilst conceding that a portion of the assets should be attributed to H and excluded from the sharing principle, she contended that in the light of her contribution 2/3 should be divided between them

(d) The judge at first instance (HHJ O'Dwyer) preferred W's account and found that her contribution to the increase in the family's net worth had indeed been exceptional. He therefore found that the hotel *business* – even thought it had originally been non-matrimonial property - *should* be subject to the sharing principle.

(e) Accordingly in addition to retaining the final matrimonial home W found herself being awarded a lump sum of £2 million, with the result that she ended up with approximately one third of the available assets. Whilst the scale of her needs does not appear from the report, the clear inference is that her award exceeded what was required to meet the same.

(f) On appeal it was argued on behalf of H that:

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(i) The court should have indentified the value of the inherited assets, ring fenced them and removed them from the tally of assets available for division by the court.

(ii) H should have had proper relief from the sharing principle to reflect the derivation of the substantial part of the available assets from family inheritance.

(g) The Court of Appeal nonetheless upheld the award, on the basis that a one third/two thirds division in H's favour 'fairly reflected the derivation of the hotel and its trade'. Seemingly, and most significantly in the light of Wilson LJ's put down in *K v L (Non-matrimonial property: Special Contribution)* it declined to accept that the sharing principle should have no application to the inherited hotel business.

5. THE SIGNIFICANCE OF THE TIMING OF AN INHERITANCE

5.1. As Baroness Hale made clear in *Miller* and *McFarlane*, to the extent that we have a marital property regime during marriage, it is one of separate property. That being the case, the mere fact of marriage does not by itself result in parties acquiring any interest in, or having rights to the property of the other. And so, whilst a marriage is *continuing* the timing of an inheritance has limited or no significance for property rights. For example, a NIP cannot realistically be heard to say to her spouse, "I agree that the farm which you inherited on our second anniversary is all yours, but now that I have borne you 3 children, and clocked up 10 years, the share portfolio which you inherited last week is half mine".

5.2. If the marriage should break down, however, the timing of inheritance can indeed be significant. Some recognition of that fact was given by Wilson LJ in *K v L (Non-matrimonial property: Special Contribution)* when he set out three situations in which the importance of the source of an asset *may* diminish over time - see paragraph 3.4(g). It is reasonable to contend that the situations posited by Wilson LJ - the dilution of inherited property, the mingling of inherited property and the use of inherited property to buy a mat home - are not

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the only situations where *timing* of inheritance will have a bearing. Some examples will illustrate the point.

5.3. Consider, first, the case of the NIP who under a purely needs based claim, is seeking an award which will enable him or her to maintain the marital standard of living for the rest of their life. If their spouse should only have come into wealth via an inheritance at the end of the marriage, the NIP is likely to have some difficulty arguing that the elevated standard of living which the inheritance thereafter funded should be used as a yardstick. Mrs Robson and Mrs Y would have had a much harder task persuading the court to award them housing funds respectively of £4.3 million and £5.1 million if the stately homes which constituted their "matrimonial homes" had only been their residences over the last few years of their marriages.

5.4. Secondly, consider the NIP seeking a share of an inherited asset relying on the outcome in *Davies v. Davies*. That case will support an argument that the sharing principle should be engaged where a NIP contributes to an asset inherited by the other party, whether by investing effort or money into it. Such contribution may warrant a finding that what was a non-matrimonial asset became a matrimonial asset, by tacit agreement or simply by operation of law. Plainly the longer the period over which such contribution has been made, the stronger the argument for a share therein. Accordingly, in such a case the NIP's chances of benefiting are likely to be greater the earlier the asset should have been acquired.

5.5. Consider, lastly, the NIP seeking to benefit from an inheritance received after separation. Such an asset might be classified as "non-matrimonial property squared" coming not just from a source external to the marriage, but at a time when, even without a decree, the court tends to consider the marriage to be over.

(a) In relation to a post separation inheritance, the most obvious obstacle to an application for a share is presented by the oft-cited observation of Baroness Hale in *Miller* and *McFarlane*:

> [144] … In general, it can be assumed that **the marital partnership does not stay alive for the purpose of sharing future resources** unless this is justified by need or compensation,

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(b) However, in circumstances where the other available assets are insufficient to enable the parties' *needs* to be met, recourse can and generally will be made to an inheritance even when it has been received post separation.

6. CONCLUDING REMARKS

6.1. From recent and ongoing experience of a number of inheritance cases, I can say that the disposition of inherited property post divorce is apt to generate the strongest of feelings. Whatever the strict legal position, the inheriting party will often feel that the property which he or she acquired by inheritance "is not really his or her own, but rather is something that belongs, in all but the legal sense, to a blood family"[13]. Equally a NIP will often feel particularly resentful if he/she perceives that their former spouse is going to carry on enjoying uninterrupted use of a valuable inheritance to their exclusion.

6.2. In such circumstances the need for realistic guidance on both sides is especially important.

(a) On the one hand a NIP needs to be made aware that even though the current law is discretionary, the courts have moved to a position where non-matrimonial property in general, and inherited property in particular, is typically *not* shared.

(b) On the other hand, an inheriting party needs to be told that even where property has been inherited, it can only be ring-fenced and its invasion avoided where it is not required to meet the other party's needs. Such cases are likely to be few.

6.3. For further and more authoritative guidance I would strongly recommend Part 6 the Law Commission Supplementary Consultation Paper, "Matrimonial Property, Needs and Agreements".

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7TH FEBRUARY 2013

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

[13] See the Law Commission Supplementary Consultation Paper, "Matrimonial Property, Needs and Agreements" paragraph 6.47

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