My Half is Bigger Than Your Half

The latest thinking on Post Separation Acquest

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1. The evaluation by the court of the demarcation between marital and non-martial assets is not always easy. It must be carried out with the degree of particularity or generality appropriate in each case; Hart v Hart [2018] 1 FLR 1283. Usually, non-marital wealth has one or more of 3 origins, namely (i) property brought into the marriage by one or other party, (ii) property generated by one or other party after separation (for example by significant earnings) and/or (iii) inheritances or gifts received by one or other party. Difficult questions can arise as to whether and to what extent property which starts out as non-marital acquires a marital character requiring it to be divided under the sharing principle. It will all depend on the circumstances, and the court will look at when the property was acquired, how it has been used, whether it has been mingled with the family finances and what the parties intended.

2. Mr Justice Peel in WC v HC [2022] EWFC 22 at §21 xi)

3. It is worth remembering that from the outset of the introduction of the equal sharing principal the courts have recognised non matrimonial property.

WHITE v WHITE [2000] FLR 981

4. The paradigm case for equal sharing?

5. Rexton Farm

6. Mr and Mrs White also farmed Rexton Farm as part of their partnership business. This farm also comprised over 300 acres. Rexton Farm was 10 miles from Blagroves Farm, but the two were run as a single unit. Rexton was part of the Willett estate. Mr White's father bought this estate in 1971 at an advantageous price, mainly with the assistance of borrowings. Later he transferred the estate into the joint names of himself and his three

sons. The four of them held the estate in equal shares. Mr White's share of the cost of borrowing, in the form of interest and endowment premiums, was met, through a tenancy agreement, by the Whites' farming partnership. In 1993 Mr White acquired Rexton Farm, subject to a mortgage debt of £137,000, as his partitioned share of the Willett estate. Rexton Farm, as distinct from the farming business carried on at the farm, was held in Mr White's sole name. Unlike Blagroves Farm, it was not in joint names, nor was it treated as belonging to the Whites' partnership. Rexton Farm was worth £1.25 million.

7. On appeal wife was awarded £1.5M from a pot of £4.6M not withstanding that much of the land that husband had inherited was farmed as a part of the farming partnership husband conducted with wife.

On Sharing

8. As to sharing, which Lord Nicholls called the 'equal sharing' principle, in his view: 'When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is good reason to the contrary' (Miller, at para [16]). Baroness Hale of Richmond put it in terms of 'the sharing of the fruits of the marital partnership' (at para [141]) and 'roughly equal sharing of partnership assets' (at para [143]).

9. **Jones v Jones [2011] 1 FLR 1723**

10. **Robertson v Robertson - [2017] 1 FLR 1174**

11. **Hart v Hart [2018] 1 FLR 1283**

12. **Sharp v Sharp [2017] 2 FLR 1095**

    (a) Unusually husband was not entitled to share in wife's matrimonial earnings.

13. **Waggott v Waggott [2018] 2 FLR 406**

14. [83] In *VB v JP* [2008] EWHC 112 (Fam), [2008] 1 FLR 742, at para [59], Sir Mark Potter P addressed the effect of the end of the partnership in terms which were endorsed by Thorpe LJ in *Hvorostovsky v Hvorostovsky* [2009] EWCA Civ 791, [2009] 2 FLR 1574, at para [37], and by Ryder LJ in *H v H (Financial Remedies)* [2014] EWCA Civ 1523, [2015] 2 FLR 447, at para [40]. Quoting from VB v JP:

15. '… on the exit from the marriage, the partnership ends and in ordinary circumstances a wife has no right or expectation of continuing economic parity ("sharing") unless and to the

extent that consideration of her needs, or compensation for relationship-generated disadvantage so require. A clean break is to be encouraged wherever possible.'

16. The fact that this observation has been approved twice by the Court of Appeal is clearly significant to the outcome of the present case

17. **[121]** First: (i) is an earning capacity capable of being a matrimonial asset to which the sharing principle applies and in the product of which, as a result, an applicant spouse has an entitlement to share?

18. **[122]** In my view, there are a number of reasons why the clear answer is that it is not.

19. **[123]** Any extension of the sharing principle to post-separation earnings would fundamentally undermine the court's ability to effect a clean break. In principle, as accepted by Mr Turner, the entitlement to share would continue until the payer ceased working (subject to this being a reasonable decision), potentially a period of many years. If the court was to seek to effect a clean break this would, inevitably, require the court to capitalise its value which would conflict with what Wilson LJ said in *Jones v Jones* [2011] EWCA Civ 41, [2012] Fam 1, [2011] 3 WLR 582, [2011] 1 FLR 1723.

20. [2018] 2 FLR 406 at 433 **[124]** Looking at its impact more broadly, it would apply to every case in which one party had earnings which were greater than the other's, regardless of need. This could well be a very significant number of cases. Further, if this submission was correct, I cannot see how this would sit with Baroness Hale's observation in *Miller* that, even confined to '[i]n 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' (at para [144]) or her observation as to the effect of '[t]oo strict an adherence to equal sharing' (at para [142]).

21. **[125]** Additionally, it would inevitably require the court to assess the extent to which the earning capacity had accrued *during* the marriage. This would require the court to undertake the exercise to which there are the powerful objections referred to by Wilson LJ in *Jones*. Where would the court start and by reference to what factors would the court determine this issue?

22. **[126]** Mr Turner had no answer as to what factors would determine either the percentage of any award or its duration. He made general submissions (as summarised in paras [51] and [52] above) but was unable to articulate any principles by which, for example, the court (i) should determine the percentage division of the income which is, of course, only

generated by actual work (the 'unforgiving minute' referred to by Mostyn J in *B v S (Financial Remedy: Marital Property Regime)* [2012] EWHC 265 (Fam), [2012] 2 FLR 502, at para [76]); (ii) should determine how long the relevant earned income should be deemed to continue (would it be based on some notional 'retirement' date considered to be 'fair' or would it require a factual determination?); or (iii) should determine whether any changes in employment were reasonable (if resulting in a lower income) or were, or were not, sufficient to make the new job of a different 'character' to the earning capacity claimed as having been developed during the marriage (see para [28] above). This lack of clarity supports the conclusion that to apply the sharing principle in this way would significantly undermine the 'important aspect of fairness' referred to by Lord Nicholls of Birkenhead (at para [3] above), namely to achieve an 'acceptable degree of consistency of decision'. This is in part because this branch of the road to achieving a clean break would be devoid of clear signposts.

23. **[127]** I also consider that the passage, relied on by Mr Turner from Baroness Hale's speech in *Miller* (at para [154]), cannot bear the weight he seeks to put on it, not least because Baroness Hale began that paragraph by saying:

24. 'There is obviously a relationship between capital sharing and future income provision. If capital has been equally shared and is enough to provide for need and compensate for disadvantage, then there should be no continuing financial provision.'

25. These words, and the other passages referred to above, are inconsistent with Mr Turner's submission.

26. **[128]** In my view *Miller* and the subsequent decisions referred to above, in particular *Jones* and *Scatliffe* [2016] UKPC 36, [2017] AC 93, [2017] 2 WLR 106, [2017] 2 FLR 933, do not support the extension of the sharing principle to an earning capacity. The sharing principle applies to marital assets, being 'the property of the parties generated during the marriage otherwise than by external donation' (*Charman v Charman* (*No 4*) [2007] EWCA Civ 503, [2007] 1 FLR 1246, at para [66]). An earning capacity is not property and, in the context advanced by Mr Turner, it results in the generation of property *after* the marriage.

27. E v L (Financial Remedies) [2021] 1 FLR 952 Mostyn J has very recently reiterated that marital acquest is calculated as at the date of trial, except in cases of undue delay between separation and the start of proceedings. At §73 of that judgment:

28. *"In my view there are already in this field too many uncertainties and subjective variables. The law needs to be transparent, accessible, readily comprehensible and should propound simple and straightforward principles. In my experience convention and tradition dictate that save in cases where there has been undue delay between the separation and the placing of the matter for trial before the court, the end date for the purposes of calculation of the acquest should be the date of trial. This rule of thumb should apply forcefully to assets in place at the point of separation which have shifted in value between then and trial…"*

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