The Duration of the Marriage: When does it Begin and End?

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1. The duration of the marriage is one of the s.25 criteria[1].

2. In particular, the short duration of a marriage tends to influence the Court towards orders for short term rehabilitative maintenance[2] and a more conservative assessment of needs[3]. Any *non-matrimonial* property that is surplus to needs will tend to be returned to the contributor. Particularly the last of these consequences may require an investigation into when the marriage began and when it ended so as to identify whether an index asset is *matrimonial* or *non-matrimonial* in characteristic.

3. That last exercise is not limited to short marriages. Identifying whether an asset was acquired outside the duration of the marriage is often a key step in defining whether an asset is to be characterized as *matrimonial* or *non-matrimonial* irrespective of how long the parties were married for.

4. In appropriate cases, the Court must therefore determine when the relevant period for the marriage began and/or when it ended. The current approach to those questions is the subject of this short paper.

Cohabitation and the Start of the Marriage

5. Practitioners readily recognize that the duration of the marriage will probably not begin on the day the parties married. If proved to the relevant level, pre-marital relationships will count towards its length.

[1] S.25(2)(d) The age of each party to the marriage and the duration of the marriage.
[2] Attar v Attar [1985] FLR 653, Robertson v Robertson [1983] 4 FLR 387, MD v D [2009] 1 FLR 810 and Fallon v Fallon [2010] 1 FLR 910 although see p.32 of Dictionary of Financial Remedies 2022 for a fuller analysis of the effect of short marriages on maintenance.
[3] H's submissions in McCartney v Mills McCartney [2008] EWHC 401 (Fam) It is 'legitimate to look at the claimant's needs more conservatively than in a long marriage, because the standard of living that had a bearing on assessment of need had been enjoyed for a shorter period'

6. It was Deputy High Court Judge Nicholas Mostyn QC (as he was then) who started the judicial debate surrounding the *seamless transition of cohabitation into marriage* in **GW v RW [2003] EWHC 611** with this (now) familiar principle [33]:

Thus, in my judgment where a relationship moves seamlessly from cohabitation to marriage without any major alteration in the way the couple live, it is unreal and artificial to treat the periods differently.

7. Since then, successive authorities have examined in more detail the essential characteristics that permit a Court to treat the parties' relationship prior to marriage as being *relevant cohabitation* for the purposes of defining the duration of the index relationship. Equally (as we will see) the Court has considered applying those principles when it has had to decide when the marriage has come to an end.

8. In **McCartney v Mills McCartney [2008] EWHC 401**, Bennett J said this [55]:

*[55] Cohabitation, moving seamlessly into and beyond marriage, **normally involves in my judgment a mutual commitment by two parties to make their lives together both in emotional and practical terms**. Cohabitation is **normally but not necessarily in one location**. There is often a **pooling of resources, both in money and property terms**. …*

9. Bennet J accepted that from 1999 to the date of their marriage Paul McCartney and Heather Mills spent many nights together, holidayed together and became engaged. They had a very close relationship. However, in the circumstances of the case those factors did not equate with a settled, committed relationship moving seamlessly into marriage.

9. In **IX v IY [2018] EWHC 3053** Williams J described cohabitation as occurring in the following circumstances [68]:

*'**What the court must be looking to identify is a time at which the relationship had acquired sufficient mutuality of commitment to equate to marriage**. Of course, in very many cases, possibly most cases, this will be **very obviously marked by the parties' cohabitating**, possibly in conjunction with the purchase of a property. However, in other cases, and this may be one of them, it is not easy to identify. **The mere fact that parties begin to spend time in each other's homes does not of itself, it seems to me, equate to***

***marriage**. In situations such as this **the court must look to an accumulation of markers of marriage** which eventually will take the relationship over the threshold into a quasi-marital relationship which may then either be added to the marriage to establish a longer marriage or becomes a weightier factor as one of the circumstances of the case'.*

10. In **E v L [2021] EWFC 60**, Mostyn J concluded that whereas it was dangerous for the Courts to evaluate the *quality* of a *marriage*, the Court is entitled to look at the *state* of the parties' pre-marital *relationship* to evaluate its durability and permanence. Although they were not in a state of permanent cohabitation, he felt that the essential features of the parties' pre-marital relationship in ***E v L*** allowed him to treat it as part of the duration of the marriage. He said this [75]:

*'It may not have been traditional in its functioning in that there was not conventional cohabitation; the wife did not move in lock, stock and barrel to F House. But it was, as Mr Glaser QC rightly says, **from that point a committed sexual, emotional, physical and psychological, if somewhat itinerant, relationship**'.*

11. In **VV v VV [2022] EWFC 41**, Peel J reviewed these authorities and adopted them. In particular, he referred to Mostyn J's view that (in distinction to marriage) it would be appropriate on occasions to examine the *quality* of the pre-marital relationship. He contributed 2 further considerations to the debate. The first was the relevance of the parties *intentions* at the time of the cohabitation [45]:

*'To the above jurisprudence I would add that the **court should also look at the parties' respective intentions when inquiring into cohabitation**. Where one or both parties do not think they are in a quasi-marital arrangement, or are equivocal about it, that may weaken the cohabitation case. Where, by contrast, they both consider themselves to be in a quasi-marital arrangement, that is likely to strengthen the cohabitation case.*

12. Secondly, Peel J specifically considered the relevance of the parties' engagement and reviewed the Courts' approach to that issue in ***Miller: MacFarlane [206] UKHL 24*** and in ***McCartney v Mills McCartney***. Unsurprisingly, he reached the conclusion that although the fact of the parties' engagement was relevant to the wider analysis of

cohabitation, it was not definitive of the issue. Put succinctly, he was ' … *not aware of any reported case where the mere fact of engagement generated a sharing entitlement'.*

13. In conclusion, the principles that we can derive from these authorities are therefore:

13.1 The mere fact that the parties become engaged does not generate a sharing entitlement. Neither does the fact that they spend substantial time in each other's homes.

13.2 To qualify as relevant pre-marital cohabitation, the parties will normally be living together in one location but not necessarily.

13.3 The Court's analysis is derived from an accumulation of markers. Finding those *markers* will involve exploring the relationship from various perspectives.

13.4 Some markers are more easily defined:

a. Were the parties committed sexually,

b. Was there an element of financial co-dependency?

c. What intentions (if any) did the parties express or otherwise suggest during the index relationship?

d. Did the *quality* of the relationship suggest a permanence?

13.5 Others markers are more ephemeral:

a. Were the parties committed physically and emotionally?

b. Was there a relationship of mutual support?

14. As with so much of the jurisprudence involved in financial remedy proceedings, much depends on the context. As Peel J put it in ***VV v VV*** [46].

'In the end, it is a fact specific inquiry. Human relationships are varied and complex; they do not easily lend themselves to pigeon holing. ***The essential inquiry is whether the pre-marital relationship is of such a nature as to be treated as akin to marriage.***

Separation: the End of the Marriage

15. The date of physical separation in most cases marks the end of the marriage rather than any date referable to the application for divorce (**H v H (Financial Provision: Capital Allowance) (1993) 2 FLR 335**).

16. However, in some rare cases, identifying a single date of physical separation is not possible. It may be that the parties have more than 1 home or the breakdown of the relationship occurred over time with the parties reconciling periodically before petering out.

17. A recent authority reviewing what constitutes the date of the parties' separation in such cases is **MB v EB ([2019] EWHC 1649).** Cohen J adopted the definition of Williams J in ***IX v IY*** when dealing with the relationship at the start of the marriage (see §9 above). He then observed [51]:

*'**That analysis can be applied to an attempt to define the date of the end of the marriage as much to its commencement**'.*

18. The polarities of the issue in MB v EB were these: W contended for separation in 2004 whereas H said it was 2016. Cohen J summarized the essential features of the case which informed his judgment on the date of separation in these terms [55]:

*'Although the parties were as a matter of law married, I cannot define the period after 2004 as a period in which a marital partnership endured. They were **apart far more than they were together**. Their **sexual relationship had concluded** by 2004 but, more significantly, H was engaged in sexual relationships elsewhere. **H always had his own home from 2005 onwards** and from 2011 it was a property that he himself had selected and purchased. **Neither was able to enter the property where the other lived without permission**. He received **no financial support from W for the bulk of the year**. They each **paid their own ways when they were apart and when they were together W paid for them both**. I regard all these as important indicators to when the marital partnership ended'.*

19. Against that Cohen J balanced the existence of other *markers*. In correspondence with each other and 3rd parties, H and W continued to assert the existence of the marriage for 12 years after W's alleged date of 2004. In addition, there remined a clear emotional involvement between them. As Cohen J observed: *neither of them had really moved on emotionally before 2016*.

20. Ultimately he concluded that the marriage came to an end in 2004 as W contended: coinciding with the date recorded in a Deed of Separation signed by the parties in 2011. However, because the parties' mutual emotional attachment continued after 2004 he regarded it as being:

' … inappropriate to exclude from all further considerations the whole of the period after 2004. Whether in fact this will have any impact on the financial outcome of the case is another matter altogether'.

21. It is not clear whether this factor did have any impact on the financial outcome because Cohen J only dealt with the capital element of H's claim in the judgement. He concluded that in that regard H was bound by the terms of the separation agreement. However, he adjourned the income claims to another day.

22. Despite this somewhat unsatisfactory position left by this judgment, it is clear that where a specific date of physical separation is not obvious and it is relevant to the Judge's determination, then the Court should undertake the sort of *marker-based* analysis adopted by Williams J in ***IX v IY***.

What is a Short Marriage?

23. The authors of **The Dictionary of Financial Remedies 2022** provide this pithy commentary under the heading 'What is a Short Marriage or a Long Marriage?' [p.32]:

> *There is no reference in the Matrimonial Causes Act 1973 to 'short marriages' or 'long marriages', but these terms are often used in a broad sense to categorize cases.* ***It is inappropriate to attempt a precise definition****; nor is it helpful to refer to marriage statistics.* ***In practice a marriage of three years or less can properly be characterized as a 'short marriage', while a marriage of 15 years or more can readily be described as a 'long marriage****'. There are, of course, many gradations between these two and arguably the presence of children of the family can be significant.* ***The consequences of falling on one side of the line or the other are marginal, and a broad assessment is usually preferred****.*

24. The following table records the index dates in a number of cases in which the *shortness* of the marriage was deemed to be worthy of consideration [***Fig 1***]. Although careful to avoid inappropriate reliance on *marriage statistics*, the table tends to reflect the views expressed by the authors of The Dictionary:

Name and citation	Index Relationship start date	Index Separation Date	Duration	Trial / Date of Calculation
C v C [1997] 2 FLR 26	March 1992	December 1992	9 months	May 1996
Attar v Attar [1985] FLR 563	December 1982 [M: 12/1982]	June 1983	6 months	January 1985
Miller v Miller [2006] UKHL 24	14.7.00 [M: 14.7.00]	April 2003	2 years 9 months.	October 2004.
M-D v D [2008] EWHC 1929	Late 2000 [M: 11.2.01]	September 2005	5 years	July 2007
AB v FC [2016] EWHC 3285	October 2013 [M: Oct 2013]	May 2015	19 months	December 2016
Sharp v Sharp [2017] EWCA Civ 408	End 2007 [M: 6/2009]	December 2013[4]	7 years	November 2015 (Trial).
FF v KF [2017] EWHC 1093	2004 / Ap 2011 [M: 3.10.11]	September 2011	9 years or 2 ½ years	August 2016*[5]
MB v EB [2019] EWHC 1649	17.4.00 [M: 17.4.00]	2004	4 years	n/a[6]
E v L [2021] EWFC 60	January 2016 [M 20.6.17]	December 2019	3 ½ years	June 2021 (Trial).
VV v VV [2022] EWFC 41	December 2019 [M: 25.1.20]	June 2020	6 months	May 2022.
WD v MH [2022] EWFC 162	2003 [M: 4/2004]	September 2008	5 years	November 2022.

Calculation of the Assets.

25. Irrespective of when the marriage came to an end, the quantification of the parties' financial circumstances should be valued at the date of trial. This was

[4] Chosen by the CA. Date of the petition rather than the actual separation which occurred in July 2014.

[5] Mostyn J said he did not believe it was helpful to define the marriage as short where the actual marriage was for less than two years and the most recent period of cohabitation was for 2½ years. However, the parties' relationship stretched over nine years punctuated by a separation of three years.

[6] There was no substantive assessment of the parties' financial circumstances.

first made plain by Thorpe LJ in **Cowan v Cowan [2002] Fam 97 at [70]** with whom Mance LJ (as he was then) agreed.

26. In ***E v L*** Mostyn J dismissed any notion that Lord Mance (as he had then become) had subsequently departed from his view in ***Miller***. In any event, Mostyn J sought to put the question to rest at [73] of his judgement when he said this:

> *'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. For new assets, such as earnings made during separation, I would apply the yardstick in Rossi v Rossi [2006] EWHC 1482 (Fam) at [24.4] where I stated: "I would not allow a post-separation bonus to be classed as non- matrimonial unless it related to a period which commenced at least 12 months after the separation'*

27. The issue of how the Court may then with relevant significant post-separation accrual is dealt with in the associated talk on 'The Latest Thinking on Post Separational Acquest'.

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