Additional Needs & the Impact on Family Law Proceedings

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West Northamptonshire Council v The Mother (Psychological Assessments) [2024] EWHC 395 (Fam)

1. Application before Lieven J for a cognitive assessment

2. M sought permission to withdraw application but this was refused.

3. There was no reference in the SWET to a cognitive impairment and there was no 'Special Educational Needs Statement'.

4. Mother's case was she was vulnerable due to age, past experiences, mental health and difficulty retaining information.

5. Applications for cognitive assessments *"must be accompanied by proper evidence which explains why the case goes beyond the standard difficulties faced by many parents in care proceedings"* and *"why the parent's needs cannot be properly managed by careful use of language and the professionals taking time to explain matters in an appropriate manner."*

6. There must be evidence as to why the proposed assessment is *"necessary"* rather than *"just something that would be nice to have"*.

7. [21] it is *"only appropriate to order a psychological assessment relevant to the Court process if the approach in the Advocates' Gateway was plainly insufficient."*

8. *"It would often be the case that if one parent does have cognitive issues this will have been identified at school, during previous interactions with the Local Authority and/or in pre-proceedings work."*
    - School?
    - Age?
    - Shortage of Educational Psychologists?
    - Parenting factors?

9. *"If it is clear to the Guardian and the Child's solicitor that an application should be refused, then they should make that clear to the Court."*

10. *"It will often be the case that parents may struggle to absorb information, to understand the proceedings and to concentrate through meetings and hearings. However, the solution to this problem is not, in the majority of cases, to have cognitive assessments and appoint intermediaries. It is for all the professionals involved, including lawyers and judges, to bear closely in mind the need to use simple language, avoid jargon, and where appropriate check that a litigant has understood what is being said. That is all set out in the Advocates Gateway."*

West Northamptonshire Council (acting via Northamptonshire Childrens Trust) v KA (Mother & Anor) (Intermediaries) [2024] EWHC 79 (Fam)

11. Mother was profoundly deaf and had the assistance of a British Sign Language Interpreter ('BSL')

12. A cognitive assessment was completed which found Mother's cognitive functioning to be in low average range and recommended that information be translated by interpreter and she should have an intermediary.

13. Recommended the avoidance of jargon etc.

14. Intermediary did not attend the final hearing and it was adjourned.

15. A number of points were made by the court after considering criminal cases:

- Exceptionally rare for intermediary to be appointed for the whole trial.
- Not to be appointed on a "just in case" basis.
- Court should give consideration not just to the individual but the facts and circumstances.
- Intermediary should only be appointed if "compelling reasons" not just because the process "would be improved".
- The court should consider other adaptations and decide whether those would be sufficient.

- Recommendation from an expert is not determinative.
- If every effort has been made to find an intermediary but one cannot be found, it would be unusual for a case to be adjourned.
- The court can consider breaks and short questions.
- Making things easier and all parties agreeing is not the test.

SEN Key Legislation, Regulations & Guidance

- Children & Families Act 2014
- Special Educational Needs and Disability Code of Practice: 0 – 25 Years ("Code")
- Special Educational Needs and Disability Regulations 2015
- Care Act 2014
- Section 2 of the Chronically Sick and Disabled Persons Act 1970

Legal Definition of Special Educational Needs

16. Section 20 Children and Families Act 2014 (when a child or young person has special educational needs):
    - has a significantly greater difficulty in learning than the majority of others of the same age, or
    - has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.
17. A child or young person does not have a learning difficulty or disability solely because the language (or form of language) in which he or she is or will be taught is different from a language (or form of language) which is or has been spoken at home.

Why does an EHCP Matter?

18. Defines special educational needs and provision

19. Legally binding on LA in respect of provision and recommendations in respect of health and social care

20. Names a school or type of school – mainstream/specialist and maintained/ independent sector

21. Evidential value:

    - Contains appendices (Educational Psychologist, Psychiatrist, Speech & Language Therapist, Occupational Therapist, Physiotherapist)!!

    - LA, NHS and/or privately commissioned reports and the plan is reviewed annually.

Evidence

- Social, emotional, mental health challenges?

- Difficulties coping with change?

- Sensory issues?

- Physical environment?

- Sibling attachment and relationship dynamics?

- Think about the needs in school compared to home?

22. Record keeping:

    - Individual Education Profile

    - Individual Behaviour Profile

    - Attendance Records

    - Attainment Records/Progress Reports

    - Subject Access Request

Disputes about EHC Plans

- Refusal to assess a child or young person
- Refusal to issue an EHCP
- Content of EHCP
- Dispute over placement
- Refusal to maintain

23. ***JW v Kent County Council*** **[2017] UKUT 281 AAC**

    - Both parents can be joined as separate parties if they hold different views.

Quick Think About:

24. Mesher Orders (trigger event attendance at residential school, school out of area etc) or optimum time to sell - pay back clause? Transfer to adult services?
25. Residential school (52 or 38 week placements).
26. Any pending tribunal proceedings (may need a long adjournment or a stay).
27. Any school fees which might be payable by LA.
28. Cut off point for child support or other child related benefits may not tie in with young person achieving independence, a relevant factor in a financial settlement?
29. Schedule 1 application for costs associated with the disability.
30. Section 29 (3)(b) MCA 1973 for financial provision for children can be extended beyond the child's 18th birthday if there are special circumstances.
31. Effect on pension contributions.

Impact on finances of a relationship breakdown involving SEND

32. Has thought been given to how the additional costs associated with meeting the need for a child or young with SEND are likely to be met?

33. E.g. does the child or young person require a specialist residential school placement? If so, does this require funding through an EHCP. Will a SENDIST appeal be required to secure the placement. Has provision been made for challenging a decision ceasing to maintain? Are therapies required – e.g. SLT, PT – should these be funded in the EHCP?

34. Will School Transport required? If so, what's the cost and is the child or young person entitled to funded school transport by the Local Authority?

35. Does the child or young person require care and support in the family home? If so, what level of care is required, will their needs be the same in both households? Is statutory funding available to provide that support?

36. Note distinction between children's health & social care versus adult's health & social care statutory funding streams.

37. Consider impact of means-testing rules.

38. Consider certainty of any statutory funding entitlements – all SEND, health & social care provision is subject to Annual Review.

39. Annual Review = risk of reduction in support.

40. Consider if adaptations are required to the family home(s) – is a Disabled Facilities Grant available to assist with costs?

41. Be prepared for the ages where key decisions regarding SEND, health & social care are likely to be made, denoting an increased probability that a legal challenge may be necessary to secure provision:

    - Key ages for SEND/EHCPs: 4, 11, 16, 18/19 and 21.
        - Note at 16-18 – added uncertainty of transition from children to adult services. Often described as the 'cliff edge'.
    - Beware of statutory phase transfer deadlines: 31 March – for secondary to post-16 placements; or 15 February for any other key transfer of the calendar year.

42. Given the uncertainty associated with statutory funding, consider if the family finances are sufficient to budget for privately funded support. Also consider if family finances are sufficient to budget for legal fees if public law challenges are required.

43. Are the family planning on relocating following separation?

- If so, consider variations in Local Authority provision. Specialist schools may differ in terms of what they provide and as such privately funded top-ups might be an option to filling any gaps.

- EHCP will be maintained by the home LA.

- Following a move, the EHCP transfers to the new home LA and that LA is required to 'adopt' the EHCP.

- Difficulties may arise in cases where the child or young person is splitting their time between two homes on a 50/50 basis. Would require LAs to consider/determine through principles of ordinary residence.

44. If the child or young person's SEND arises from negligence and there is a compensation settlement managed by a Court of Protection appointed Deputy, do not assume that settlement funds can be used to fund the costs associated with challenging decisions. Beware of restrictions to the scope of a Deputy's authority pursuant *Re ACC & Ors* [2020] EWCOP 9.

45. How will support in adulthood be funded? E.g. residential or supported living placements once education falls away.

Ability to Work? Maximising Earning Capacity?

46. Schools not meeting need/reduced timetable or persistent school refusing?

47. **Section 19(1) of the Education Act 1996:**

> Each local authority shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.

Other Options to Explore?

48. **Local Offer**

- Section 30 Children & Families Act 2014
- Look at Local Offer in current area and new area.

49. **Ask LA for a needs assessment**

- Short breaks
- Care at home
- Aids
- Financial help e.g. towards travel costs for hospital visits

Standing outside the Booth with a G & T - Matrimonialisation and the Business

By Michael George
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Standish v Standish [2024] EWCA Civ 567

1. W appealed decision of Moor J
2. Lady Justice King, Lord Justice Moylan, Lord Justice Phillips
3. Court of Appeal considered the proper application of the sharing principle and the assets to which it applies.
4. What makes an asset matrimonial or non-matrimonial?
5. How does a non-matrimonial asset become matrimonialised?

Background

- H = 71, successful career in financial services and retired in 2007.
- 3 children from first marriage.
- Divorce from first wife in 2003.
- W= 56
- 3 children from first marriage.
- Divorce from first husband in 2004.
- H moved to Switzerland in 2003, the year the relationship began. W and her children moved there in 2004.
- Married in 2005 and had two children.

- Marriage of 15 years 9 months.
- FMH in England purchased in 2008 in joint names and family moved to UK in 2010.
- Marriage broke down in 2020.

Assets at Beginning of Marriage

- H – financial investments and funds in bank accounts.
- Farm and farm business in Australia purchased outright in 2002.
- Property in Melbourne sold in 2010.
- H's estimated value of his assets at 2004 was £57 million and now £155 million.
- W – property in Melbourne sold in 2011 for AUS 5.6 million
- Inheritance worth AUS 626,340.

Decision at First Instance

6. Total assets £132 million.
7. £112 million was matrimonial of which:
    - £80 million were investment funds transferred from H's sole name to W's sole name in 2017 and £8.6 million in shares in a farming business were given to W in 2017 (Ardenside Angus).
8. H said the transfers to W were done as part of UK IHT tax planning. H intended to place the assets in discretionary Jersey trusts but the trusts were never established although trustees had been selected.
9. There was some tax inefficiency in Australia connected to profits from Ardenside which H believed could be resolved by using profits to buy shares in the business for W.

W's Arguments at First Instance

10. This was a marriage of partners.

11. There should be a 50:50 split of all assets.

12. The FMH should be included in her 50% share.

13. She had contributed to the marriage by way of her inheritance and her Melbourne property.

14. The transfers to her in 2017 were aimed at estate planning as a result of her non-dom status. H would not have had any reserved benefit.

15. The assets were separate property and would not be matrimonial unless she brought them back in but she accepted a 50:50 split of all assets as a concession.

16. Arguments about provenance were consigned to history as discriminatory.

17. A pre-nup in Australia would have been binding. There was no pre-nup and the parties twice rejected the idea.

H's Arguments at First Instance

18. The entirety of the assets were non-matrimonial.

19. Ardenside was in his sole name (unlike during his first marriage when it was in joint names)

20. He had made unmatched contributions.

21. There was no material increase in the wealth since retirement in 2007.

22. He retired just a couple of years after the marriage and earnings from the early years were largely lost in the 2008 banking crisis.

23. Some of the increase in value was due to exchange rates.

24. He had never transferred assets into W's name until he had been given the relevant tax advice. He had never intended for the assets to be matrimonialised.

25. The tax advice he had been given was flawed.

26. H formulated proceedings in the Chancery Division seeking recission of transfers on basis of mistake. Court decided this could be heard as part of the MCA final hearing.

27. H then abandoned his arguments based on mistake.

28. W's award should be based on her reasonable needs.

Moor J's Decision

29. Moor J found the shares and the investment funds transferred to W to form part of the matrimonial assets and concluded that they had been matrimonialised.

30. Moor J decided that £20 million was non-matrimonial (Ardenside farm in Australia).

31. Moor J rejected the argument that once an asset was matrimonial it should be divided equally unless there was a special contribution.

32. Moor J accepted W's argument that H was estopped from arguing the money was not legally and beneficially her money.

33. No finding was made regarding mistake.

34. No specific finding was made as to the value of H's assets at the start of the relationship.

35. The court found that the years in Switzerland were probably H's best and there was marital accrual albeit some was lost in the crash and H had lost a significant share of his wealth in first divorce.

36. W's case on the absence of a pre-nup was rejected and her case on it having been a 'partnership marriage'. The absence of a pre-nup was not significant. Absence of a pre-nup is not evidence of intention to share.

37. Court did not agree that Ardenside had been matrimonialised because it had been used for holidays. They only spent 6 – 7 weeks there between 2007 – 2010, once when living in Switzerland and once when living in the UK. It was a working farm not a matrimonial home.

38. The court did not accept the argument that the 2017 transfers made the assets W's 'separate property' on the basis it has been long established that a party cannot benefit from keeping an asset in his/her sole name.

39. The 2017 assets had become matrimonial property but this did not lead to automatic equal sharing and section 25 still applied. The source of the funds remained a significant feature as this was not money generated during the marriage.

40. Ardenside was not matrimonial and would not be shared.

41. Ardenside Angus was matrimonial. H intended to transfer them to W without any benefit to himself but the source remained relevant.

Decision

42. W awarded 40% of the £112 million (£45 million) with H receiving 60% (£67 million)

43. Overall division of total wealth = 34% to W (£45 million) and 66% (£87 million to H) causing W to have to transfer £50 million to H.

Arguments on Appeal

44. ***Husband***

- H argued the court was wrong to conclude that the assets had been matrimonialised because they were the result of H's pre-marital endeavour.
- Only 3 of his working years occurred during the marriage.
- If he was wrong about that argument then the court had awarded W an 'excessive' share given H's unmatched contributions.
- Title is not relevant to the sharing principle. The label is not important.
- Contributions and marital endeavour were critical factors.
- It can be fair in some circumstances to reduce the weight given to pre-marital contributions.
- Matrimonialised assets do not have to be divided equally.
- H's non-marital endeavour was the determinative factor when applying the sharing principle.

- The court had confused the title of the assets with the question of whether it was fair to treat them as matrimonial.
- The assets remained broadly in the same form between 2004 – 2017.
- The 2017 assets had not been mixed with matrimonial property and there was no evidence that H had accepted they would be matrimonial property. H intended for assets to be put in a trust not wholly retained by W.
- The division did not reflect the source as H's pre-marital career.

45. ***Wife***

- W argued the court was wrong to conclude that the assets had been matrimonialised because the assets were her separate property and held by her.
- W also argued that Ardenside was matrimonial because although it had been owned by H before the marriage, the parties had holidayed there, improvements had been made during the marriage and the gross value of the land had increased substantially.
- Ardenside was matrimonial because it was the farm from where the joint business was run.
- Ardenside Angus should have been divided equally.
- There is no category of 'matrimonialised' property, only H's property, W's property and joint property.
- Transferring or donating an asset to the other spouse transforms it into that spouse's separate property. The latter becomes the source of the property not the former.
- Motives are not important.
- The property had been 'alienated'.
- W made a concession that there should be an overall 50:50 split.

46. ***Radmacher*** should apply to any oral or other agreements.

47. The absence of a pre-nup in a second marriage was a particularly important factor.

48. If the property was matrimonialised then there was no good reason to depart from equal division.

49. Part of the wealth was generated during the marriage before H's retirement but he had paid a lot of tax and shares had lost value. Impossible to quantify what an equal division of that money would be.

50. A needs assessment was not required as W could live comfortably on her award.

Court of Appeal

51. There is a whistlestop tour of various authorities with which everyone will be familiar.

- The court returned to ***White*** and Lord Nicholls' conclusion that *"the parties' proprietorial interests should not be allowed to dominate the picture"*.
- The court also considered ***Miller*** in terms of need, compensation and sharing and moved on through ***Charman*** and ***Radmacher***.
- The court said that ***Radmacher*** was not dealing with *"how they chose to own their assets"*. Autonomy was specific to that context.
- ***K v L*** was described as important. In K v L, W's dividends, shares and occasional sale of shares met the parties living expenses but were not deemed matrimonial property and the case was decided on the basis of needs not sharing.
- Emphasis was placed on ***Hart*** and the lack of a clear dividing line between matrimonial and non-matrimonial property.
- ***XW v XH*** was referred to and the link with ***K v L*** in which it was said that *"the importance of the non-marital source of the of the assets may diminish over time"* as well as highlighting the potential for mixing of assets so that the contributor may be said to have accepted it having become matrimonial.

Key Conclusions

52. In Summary

- The source of the asset is critical, not the title. Title is not a significant feature in the cases cited.

"[149]…*the sharing principle is founded or based on each party, in accordance with the objectives of fairness, equality and non-discrimination, being entitled to an equal share of their matrimonial property, namely the "fruits of the partnership" or the wealth built up by the parties' endeavours during the marriage."*

- W's approach ran contrary to ***White*** and may lead to unfair outcomes. It would be discriminatory and entirely unfair and the court would be returning to pre-White times. It placed undue weight on legal and beneficial title.

  "[152] To adopt what was said in Charman in respect of what were called "unilateral assets", to base an award on title "would be deeply discriminatory and would gravely undermine the sharing principle".

- Radmacher could not be extended in the way Wife had argued.

  "[154] *There was no suggestion that the same approach would apply to conversations or oral discussions which might have taken place either before or during the marriage. Nor, of more relevance to Mr Todd's submissions, was there any suggestion that it would apply to how the parties had held their assets or had "chosen to regulate their financial affairs" during their marriage. Indeed, it is very clear that it does not because it was only applicable to an agreement which was intended to govern what should happen on divorce."*

  "[155] *Further, as he said, the underlying policy of s.25 of the MCA 1973 is to disturb the parties' autonomy in order to achieve a fair outcome or, as Lady Hale put it in Miller, at [124], the court is "given a wide range of powers to reallocate" the parties' resources in accordance, at [137], with "the principles of fairness, equality and non-discrimination".*

- The absence of a pre-nuptial agreement was not of any relevance.

- The use of the term 'separate property' is not helpful.

- The concept of matrimonialisation should continue to be applied.

  "[162]…*it would be wrong to state that, as a matter of principle, property which has a non-marital source can never be subject to the sharing principle. There may well be situations when, as referred to above, fairness justifies this."*

- The concept should be applied narrowly and there is no hard or fast line. It is a question of fairness.

  "[163] *In my view, therefore, it would be helpful to make clear, expressly, that the concept of matrimonialisation should be applied narrowly. This is not a hard and fast line but remains a question of fairness, reflecting, as Wilson LJ said in K v L at [18], that "the importance of the [non-marital] source of [an asset or assets] may diminish over time". With some diffidence, I would propose the following slight reformulation of the situations to which Wilson LJ referred in K v L, having regard to the developments that have taken place since that decision as follows: (a) The percentage of the parties' assets (or of an asset), which were or which might be said to comprise or reflect the product of non-marital endeavour, is not sufficiently significant to justify an evidential investigation and/or an other than equal division of the wealth; (b) The extent to which and the manner in which non-matrimonial property has been mixed with matrimonial property mean that, in fairness, it should be included within the sharing principle; and (c) Non-marital property has been used in the purchase of the former matrimonial home, an asset which typically stands in a category of its own.*

  [164] In the first example, the sharing principle would apply in conventional form. In (c), the court will typically conclude that the former matrimonial home should be shared equally although this is not inevitable as shown by cases such as FB v PS."

- (b) is more nuanced when there is 'no clear dividing line'

  "[165] *As Mostyn J said in JL v SL (No 1) at [18], the underlying question is whether the asset or assets "should have the same character as those assets built up by their joint endeavours during the marriage, with the consequence that they should be shared ... on divorce". I have deleted the word equally because that was simply a reference to what the District Judge had done in that case."*

- It does not mean that it has to be shared equally which could be contrary to a fair outcome. The source could still be relevant.

Application to Facts

53. The Court of Appeal agreed that prior to 2017 the wife *"could not possibly have mounted a claim to share equally in the Husband's pre-marital wealth"*

54. The argument that the 2017 assets were the Wife's separate property was rejected. She was not the source of this wealth.

55. The Court of Appeal did not agree with Moor J that the 2017 assets had become matrimonial property. The reasoning was that this placed too much weight on title which resulted in title becoming the determinative factor.

56. [169] *This is making title the determinative factor when deciding how the wealth is to be characterised rather than its source. This is particularly so in this case when the reason for the transfer was a tax scheme which was never fulfilled and in which the next step would have been the transfer by the wife of those assets into a trust. There was, in my view, nothing which justified the conclusion that the importance and relevance of the source of the 2017 Assets being non-matrimonial (which I deal with further below) was in any way diminished as a result of their transfer to the wife.*

57. The Court of Appeal was not in a position to say that the judge was wrong to conclude the business was matrimonial as a result of shares having been placed in A's name.

    "[172] *This might have been a generous decision in the wife's favour but it was tempered by the judge's further conclusion that "the source of the business, namely a pre-marital asset, is relevant".*

58. The judge was entitled to conclude that Ardeneside was non-matrimonial.

59. The parties agreed that the FMH (£20 million) and £3.6 million of assets should be divided equally.

60. The Court of Appeal agreed with the judge that Ardenside Angus was matrimonial and the source was relevant. 20% was considered non-matrimonial with 80% (£6.88 million matrimonial). The division with W receiving 40% and H receiving 60% accounted for that.

61. The Court of Appeal did not agree with the judge's division of the 2017 assets. W had been awarded 36% of the value of those assets. The court considered that the findings did not support the division.

62. The judge had found that a significant part was generated prior to the marriage, that to a significant extent it was pre-marital and referred to the "pre-marital origin of most of this sum" and that it was almost impossible to say what part of the £80 million was generated during the marriage.

63. The Court of Appeal said:

"[178]… *It did not adhere to the approach set out in Jones and Hart, namely to award the wife such percentage "as makes fair allowance for [it] in part comprising or reflecting the product of non- marital endeavour"...The source of this wealth had not changed as a result of its transfer to the wife and, in the application of the sharing principle, this remained the critical factor."*

64. The judge should not have concluded other than, at least, 75% was non-marital.

65. 25%, or £20 million, would then be added to the other matrimonial property.

66. It was made clear that this was not a departure from ***Hart*** that the "court has a discretion as to how to arrive at a fair division and can simply apply a broad assessment of the division which would affect "overall fairness". However, the manner in which the court's applies that broad assessment needs to reflect the particular circumstances of the individual case." [179]

67. W = c.£25 million

68. H = c. £107 million

69. But the Court of Appeal could not carry out a needs assessment and so the matter was remitted for determination of the needs principle.

G v T [2020] EWHC 1613 (fam) [2021] 1 FLR 57

70. This case was decided at the beginning of the pandemic. In it Nicholas Cusworth QC grapples with the problems posed by a volatile valuation, post separation contribution and run off. Whilst this case is not hot off the press it still merits mention if you missed it first time around.

71. The judgment reviews all the main earlier authorities on the issues raised by SJE valuations of small and medium businesses and neatly draws the themes together in a clear and well reasoned manner.

72. The outcome is perhaps less important than the reasoning behind it.

73. As a side note the tactical decision as to whether or not to cross examine an expert is interesting and worth consideration.

74. This note will concentrate more on content than form.

The Facts

- Costs £1.5M
- Married 2001 separated in October / November 2017

The Issue

- H shareholder in company undertaking proprietary trading and market making
- 3 individuals own to 2/3 of the shares
- dalliance in asset management
- Husband paid dividends based on performance income varied from £5.1M to £411K over 5 year period.
- Post separation change in business
- Binned asset management,
- marked change in staff
- significantly increased number of staff
- Net asset valuation

The SJE and Shadow

75. shadow expert Mr Bezant FTI consulting.

76. Daniels v Walker application

- questions put
- no evidence adduced
- cross-examined

On value

77. H did not want to sell at the value placed upon it by the SJE

> "The problem for the court is to determine from the limited evidence before it whether that obviously enhanced value to the directors actually has a corresponding value in the marketplace. In other words, whether any third party would see value in acquiring B Ltd as a going concern, at a premium based upon its past trading record."

On liquidity

- *Wells v Wells* [2002] EWCA Civ 476,
- *Versteegh v Versteegh* [2018] EWCA Civ 1050

Review the cases on problems with valuations

- *H v H [2008] 2 FLR 2092*
- *Miller v Miller; McFarlane v McFarlane: [2006] UKHL 24, [2006] 1 FLR 1186*
- *Versteegh v Versteegh* [2018] EWCA Civ 1050
- *A v A [2004] EWHC 2818 (Fam), [2006] 2 FLR 115*
- *Martin v Martin* [2018] EWCA Civ 2866
- *Hart v Hart* [2017] EWCA Civ 1306
- *Goddard-Watts v Goddard-Watts* [2016] EWHC 3000 (Fam)
- *Cooper-Hohn v Hohn* [2014] EWHC 4122 (Fam)
- *JL v SL (No.2)* [2015] EWHC 360 (Fam).
- *Timing §49 to 54*
- *Rossi v Rossi* [2006]EWHC 1482 (Fam),
- *Kan v Poon* FACV20/2013, (2014) 17 HKCFAR 414
- *SK v WL* [2010] EWHC 3768 (Fam)

78. See *Miller v Miller ; McFarlane v McFarlane* [2006] 2 AC 618 [26]:

> *"valuations are often a matter of opinion on which experts differ. A thorough investigation into these differences can be extremely expensive and of doubtful utility". I understand, of course, that the application of the sharing principle can be said to raise powerful forces in support of detailed accounting. Why, a party might ask, should my "share" be fixed by reference other than to the real values of the assets? However, this is to misinterpret the exercise in which the court is engaged. The court is engaged in a broad analysis in the application of its jurisdiction under the Matrimonial Causes Act, not a detailed accounting exercise. As Lord Nicholls said, detailed accounting is expensive, often of doubtful utility and, certainly in respect of business valuations, will often result in divergent opinions each of which may be based on sound reasoning. The purpose of valuations, when required, is to assist the court in testing the fairness of the proposed outcome. It is not to ensure mathematical/accounting accuracy, which is invariably no more than a chimera. Further, to seek to construct the whole edifice of an award on a business valuation which is no more than a broad, or even very broad, guide is to risk creating an edifice which is unsound and hence likely to be unfair. In my experience, valuations of shares in private companies are among the most fragile valuations which can be obtained."*

G v T Paras 39 to 48 are the core ones to read if you read nothing else.

> 39. *The Authorities. I have also carefully considered the several recent authorities about the approach to be taken when attempting to place a value upon a private company for the purposes of a financial remedies application, when there is no evidence that the company is in the throes of sale. Those authorities now firmly take their cue from the decision of Moylan J (as he then was) in H v H [2008] 2 FLR 2092 where he pointed to the fact that the fact that the vulnerability of such valuations had been specifically recognised by the House of Lords in Miller v Miller; McFarlane v McFarlane: [2006] UKHL 24, [2006] 1 FLR 1186. He said:*
>
> > *5. The experts agree that the exercise they are engaged in is an art and not a science. As Lord Nicholls said in Miller v Miller ; McFarlane v McFarlane [2006] 2 AC 618 [26]: "valuations are often a matter of opinion on which experts differ. A thorough investigation into these differences can be extremely expensive and of doubtful utility". I understand, of course, that the application of the sharing principle can be said to raise powerful forces in support of detailed accounting. Why, a party might ask, should my "share" be fixed by reference other than to the real values of the assets? However, this*

is to misinterpret the exercise in which the court is engaged. The court is engaged in a broad analysis in the application of its jurisdiction under the Matrimonial Causes Act, not a detailed accounting exercise. As Lord Nicholls said, detailed accounting is expensive, often of doubtful utility and, certainly in respect of business valuations, will often result in divergent opinions each of which may be based on sound reasoning. The purpose of valuations, when required, is to assist the court in testing the fairness of the proposed outcome. It is not to ensure mathematical/accounting accuracy, which is invariably no more than a chimera. Further, to seek to construct the whole edifice of an award on a business valuation which is no more than a broad, or even very broad, guide is to risk creating an edifice which is unsound and hence likely to be unfair. In my experience, valuations of shares in private companies are among the most fragile valuations which can be obtained."

40. More recently in *Versteegh v Versteegh* [2018] EWCA Civ 1050, Lewison LJ explained in a little more detail the reasons why Moylan J's rationale in the former case was a sound one. He said:

185. The valuation of private companies is a matter of no little difficulty. In *H v H* [2008] EWHC 935 (Fam), [2008] 2 FLR 2092 Moylan J said at [5] that "valuations of shares in private companies are among the most fragile valuations which can be obtained." The reasons for this are many. In the first place there is likely to be no obvious market for a private company. Second, even where valuers use the same method of valuation they are likely to produce widely differing results. Third, the profitability of private companies may be volatile, such that a snap shot valuation at a particular date may give an unfair picture. Fourth, the difference in quality between a value attributed to a private company on the basis of opinion evidence and a sum in hard cash is obvious. Fifth, the acid test of any valuation is exposure to the real market, which is simply not possible in the case of a private company where no one suggests that it should be sold. Moylan J is not a lone voice in this respect: see *A v A* [2004] EWHC 2818 (Fam), [2006] 2 FLR 115 at [61] – [62]; *D v D* [2007] EWHC 278 (Fam) *(both decisions of Charles J)*."

41. Subsequently, in *Martin v Martin* [2018] EWCA Civ 2866, Moylan LJ, as he now his, returned to the theme and analysed how the court should look to utilise these valuations once they have been received and determined. He said:

93. How is this to be applied in practice? As referred to by both King LJ and Lewison LJ [in *Versteegh*], the broad choices are (i) "fix" a value; (ii) order the asset to be sold;

and (iii) divide the asset in specie:…The court has to assess the weight which can be placed on the value even when using a fixed value for the purposes of determining what award to make. This applies both to the amount and to the structure of the award, issues which are interconnected, so that the overall allocation of the parties' assets by application of the sharing principle also effects a fair balance of risk and illiquidity between the parties. Again, I emphasise, this is not to mandate a particular structure but to draw attention to the need to address this issue when the court is deciding how to exercise its discretionary powers so as to achieve an outcome that is fair to both parties. I would also add that the assessment of the weight which can be placed on a valuation is not a mathematical exercise but a broad evaluative exercise to be undertaken by the judge.

79. 94. …The need for this approach derives from the fact that, as said by Lewison LJ, there is a

"difference in quality" between a value attributed to a private company and other assets. This is a relevant factor when the court is determining how to distribute the assets between the parties to achieve a fair outcome.

95. It might be said… that it would be unfair to award one party all the "upside" in the event that the valuation proves to have been an under-estimate. That, however, is intrinsic in an asset being volatile. There is potential for the value to increase as well as decrease. If one party is not participating in that risk and is obtaining what Thorpe LJ referred to in Wells v Wells as a secure result, one aspect of achieving that result is that, because they don't have the burden of the risk of a decrease in value, they also don't have the benefit of an increase in value…

96. …it is all about weight and balance. Not placing undue weight on a valuation and seeking to achieve a fair balance of risk between the parties in the allocation of the assets.

42. So too in this case, I remind myself that there is no certainty at present what the economic future of the planet will hold, in the short or medium term. The husband's evidence has been that, since the last company figures were received in October 2019, the asset value of the company had first risen sharply, to the tune of more than £50m, but then fallen back to a figure now which is probably less if anything than it was in June 2019. That he had not disclosed the fact of the original rise may fairly be the subject of criticism, regardless of the precise wording of the PTR order of Holman J, but of more import is the

fact that, by fixing a price for the assumed value, there is no likelihood that that creates prejudice for either party in particular.

43. It is also right that, given that the value put forward by Ms Hall is one based on the NAV of the company, the court can be certain that is accurate as at the date that it is taken. The only question is as to alternative methodology, and that renders this valuation perhaps more robust than those based on uncertain forecasts predicated upon past performance.

44. I would also stress that in this case, I am not faced with a 'bracket' for valuations provided by the experts. Ms Hall's is the only expert valuation before me. Mr Webster's brave attempt to apply her rejected methodology to more recent figures is worthy of consideration, but must inevitably come with considerably less weight. In this regard, Moylan LJ continued in Martin as follows:

> 97. I have not yet addressed one key aspect of Mr Marks' submissions, namely that a judge should adopt a conservative figure when fixing the value of shares in a private company. I am acutely aware of the importance of reducing scope for argument and "the need for clear guidance", as I mentioned in *Hart v Hart*, at [97]. However, as Lord Nicholls said in *White v White*, at p. 612 G, as "with so much else in this field, there can be no hard and fast rule". I do not consider it appropriate to seek to limit or direct where in a bracket a judge should alight…As I have already said, it is the use which is made of such valuations which is of critical importance.

45. It follows from the above that I accept in the circumstances Ms Hall's methodology and valuations at various points in time as being the safest and most reliable available to me, and that the husband's shares in B Ltd will therefore be considered at their NAV for the purposes of determining the outcome of this case, rather than as calculated by any other method. However, the issue of determining a fair value does not end there, as there remains another matter of key importance, which is the date at which the value of the husband's shareholding should be calculated.

46. In *Hart v Hart* [2017] EWCA Civ 1306, Moylan LJ dealt with the approach which the court should take in determining what property should and should not be included as property which is subject to the sharing principle. He said:

67. The exercise on which the court is engaged, when applying the sharing principle… is …to determine whether the current assets owned by the parties …comprise the product of marital endeavour. The court must then decide how that determination should impact on the court's award…

…

84. In my view, the court is not *required* to adopt a formulaic approach either when determining whether the parties' wealth comprises both matrimonial and non-matrimonial property or when the court is deciding what award to make. This is not necessary in order to achieve "an acceptable degree of consistency", Lord Nicholls in *Miller* (paragraph 6), or to achieve a fair outcome…

85. It is, perhaps, worth reflecting that the concept of property being either matrimonial or non-matrimonial property is a legal construct. Moreover, it is a construct which is not always capable of clear identification. …When property is a combination, it can be artificial even to seek to identify a sharp division because the weight to be given to each type of contribution will not be susceptible of clear reflection in the asset's value. The exercise is more of an art than a science.

86. In my view, the guidance given by Lord Nicholls in *Miller* remains valid today and, indeed, bears increased weight in the light of the courts' experience since that case was decided. It can, as he said, be artificial to attempt to draw a "sharp dividing line". Valuations are a matter of opinion on which experts can differ significantly. Investigation can be "extremely expensive and of doubtful utility". The costs involved can quickly become disproportionate. Proportionality is critical both because it underpins the overriding objective and because, to quote Lord Nicholls again: "Fairness has a broad horizon"…

47. This was later taken up by King LJ in *Versteegh*, when she said:

90. Wilson LJ (as he then was) in giving judgment in Jones was by no means blind to the limitations inherent in his choice of the arithmetical route saying:

"[35]…Criticism can easily be levelled at both approaches. In different ways they are both highly arbitrary. Application of the sharing principle is inherently arbitrary; such is, I suggest, a fact which we should accept and by which we should cease to be disconcerted. "

…

93. In Goddard-Watts v Goddard-Watts [2016] EWHC 3000 (Fam) Moylan J took issue with the use of the word 'arbitrary' in relation to the judicial decision making process saying:

"…. Wilson LJ said in Jones…. "Application of the sharing principle is inherently arbitrary". Whilst I am not entirely happy with the concept that that sum I award to reflect these factors is arbitrary, I take it that Wilson LJ meant discretionary rather than susceptible to the application of a precise formula."

94. In my judgment it is however the observation of Lord Nicholls in *Miller and McFarlane* [2006] UKHL 24; [2006] 1FLR 1186 which continues to carry the day:

"[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.

[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.

48. Further, in the case of *Martin*, Moylan LJ also said this:

113. In conclusion, a judge has an obligation to ensure that the method he or she selects to determine this issue leads to an award which, to quote Lord Nicholls in *Miller*; *McFarlane*, at [27], the judge considers gives "to the contribution made by one party's non-matrimonial property the weight he considers just … with such generality or particularity as he considers appropriate in the circumstances of the case". This provides the same perspective as Wilson LJ's observation in *Jones v Jones* about "fair overall allowance", at [34]. This was why Holman J was entitled in *Robertson v Robertson* to reject the "accountancy" approach, not only because it seemed unfair to the husband, but because he did not consider that this fairly reflected the relevant considerations in the "overall exercise of (his) discretion", at [59]. Both of the latter cases concerned the development of trading companies and, in my view, these observations apply with particular force in such circumstances.

…

115. Finally, on this question, I mention briefly that the manner in which the court determines whether property is or is not matrimonial can probably be described as partly evaluative and partly discretionary. …the exercise is clearly at least in part evaluative because it is based on the court's assessment of the evidence as to whether the relevant

asset is from a source external to the marriage or the product in part or in whole of marital endeavour. But I also consider that it can be partly discretionary for the reasons set out in paragraph 113 above.

Date for valuation

- End June 2017 shares 12.52 June 2018 17.058 added £12.7M to the value of H shares
- Note separated in October/November 2017
- £6M question what date should be used
    - *Cooper-Hohn v Hohn* [2014] EWHC 4122 (Fam)
    - *JL v SL (No.2)* [2015] EWHC 360 (Fam)
    - *Rossi v Rossi* [2006]EWHC 1482 (Fam)
    - *Kan v Poon* FACV20/2013, (2014) 17 HKCFAR 414

80. The summary of the principles provided in *Rossi v Rossi* is broader than Thorpe LJ"s stricter approach [in *Cowan*] and is, in my view, preferable. It points to various factors relevant to deciding whether a post-separation accrual justifies departure from equality, including the length of the marriage and separation, the nature of the property accruing and the means or efforts by which it was acquired, and so forth

81. *Miller*; *McFarlane*, at [27], the judge considers gives "to the contribution made by one party's non-matrimonial property the weight he considers just … with such generality or particularity as he considers appropriate in the circumstances of the case

25 July 2024

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- **Legal 500 2023**/Divorce and Financial Remedy/Leading Juniors/Midlands Circuit
- **Legal 500 2023**/Child Law (Public and Private)/Leading Juniors/Midlands Circuit
- **Legal 500 2023**/Education/Leading Juniors/London Bar - Ranked Tier 1
- **Legal 500 2022**/Divorce and Financial Remedy/Leading Juniors/Midlands Circuit
- **Legal 500 2022**/Child Law (Public and Private)/Leading Juniors/Midlands Circuit
- **Legal 500 2021/**Child law (public and private)/Leading Individual/Midlands
- **Legal 500 2021/**Divorce and financial proceedings/Leading Individual/Midlands
- **Legal 500 2020/**Family Matrimonial/Leading Individual/Midlands

Aimee Fox – Chambers and Partners

"She is approachable and client focussed."

"Aimee is always meticulously prepared and knows cases inside out. She is approachable and client-focused."

"She is robust in her advocacy, forensic in her preparation and empathetic with clients."

"Aimee applies a forensic approach to every case. She is a pleasure to work with and is compassionate towards her clients.
She is a robust negotiator in court and a tough challenge for her opponents."

- **Chambers UK 2024**/Family/Matrimonial Finance/Midlands Bar

Aimee Fox draws on expertise in both family and education law to advise in a range of financial remedy cases, including high-value matters. She is highly praised for her detailed preparation and quality advocacy.

Strengths: "Aimee is a very safe pair of hands."

“Aimee is well prepared, client-focused, and fights hard for the client.”

“Aimee is a fierce advocate with attention to detail and a dedication to her clients. She is a pleasure to work with.”

- **Chambers UK 2023**/Family/Matrimonial Finance/Midlands Bar

"Her preparation is fantastic. She takes time outside hearings to call and keep an eye on the case."

"Her cross-examination of professional witnesses is particularly impressive."

"She is great with the clients and gets to the bottom of what’s important in the case very quickly."

- **Chambers UK 2022**/Family/Matrimonial Finance/Midlands Bar

Aimee Fox – Legal 500 2023

‘Aimee is a barrister who has excellent preparation and attention to detail and fights tirelessly for her clients. She is approachable and is responsive to instructions very promptly when required. She has an excellent rapport with clients and builds trust and confidence from the start of the case with all professionals in the case.’

- **Legal 500 2023**/Divorce and Financial Remedy/Leading Juniors/Midlands Circuit

‘Aimee is a tenacious advocate who will ensure that a client’s case is put forward in a firm and well-structured manner. She is always impeccably prepared and will build a rapport with the client, demonstrating her knowledge whilst also being very personable.’

- **Legal 500 2023**/Child Law (Public and Private)/Leading Juniors/Midlands Circuit

‘Aimee has great empathy with clients, a tremendous advocate and has technical knowledge. That is an amazing combination to have as a barrister and as a result I frequently instruct her to represent my clients.’

- **Legal 500 2022**/Child Law (Public and Private)/Leading Juniors/Midlands Circuit

'Aimee has a fantastic knowledge of the law and quickly builds up a good relationship with clients.'

- **Legal 500 2022/**Education/Leading Juniors/London Bar

‘An excellent advocate who is extremely capable in both financial remedy and private children proceedings.’

- **Legal 500 2021**/Child law (public and private)/Leading Individual/Midlands
- **Legal 500 2021**/Divorce and financial proceedings/Leading Individual/Midlands

‘Recommended for cases involving children with special educational needs.’

- **Legal 500 2020**/Family Matrimonial/Leading Individual/Midlands

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- **Legal 500 2023**/Divorce and Financial Remedy/Leading juniors/Midlands Circuit - Ranked in Tier 1
- **Legal 500 2022**/Divorce and Financial Remedy/Leading juniors/Midlands Circuit
- **Legal 500 2021**/Divorce and Financial Remedy/Leading juniors/Regional Bar/Midlands Circuit

Michael George – Chambers and Partners

Michael George is an accomplished junior with experience in a range of matrimonial finance cases, including those that involve high-value assets such as farms and pensions. He is well equipped to deal with matters where offshore assets are involved.

Strengths: "Michael is so very knowledgeable. He is extremely thorough, but approachable."

"Michael is a really good advocate, his attention to detail is off the scale. He is careful and methodical."

"Michael is knowledgeable, industrious and conscientious. His cross-examination and advocacy ability are superb."

- **Chambers UK 2024**/Family/Matrimonial Finance/Midlands Bar

Strengths: "Michael is a brilliant advocate who fights hard for his clients."

"He is a very technical lawyer, who is knowledgeable and popular with clients."

- **Chambers UK 2023**/Family/Matrimonial Finance/Midlands Bar

Strengths: "He is experienced and insightful, as well as approachable and thoughtful." "He's very concise and gets to the point quickly. His knowledge of business is also strong and he knows relevant papers back to front."

- **Chambers UK 2022**/Family/Matrimonial Finance/Midlands Bar

Michael George – Legal 500

Michael George is praised for being 'proficient in all aspects of financial remedy proceedings with his knowledge of the law and practice second to none'.

"Michael is a leading junior in this area of work. He understands his subject inside and out. He routinely speaks at seminars concerning complex areas, including pensions. He is collegiate and constructive.'

- **Legal 500 2024**/Divorce and Financial Remedy/Leading juniors/Midlands Circuit - Ranked in Tier 1

Michael George is experienced at handling big money financial remedy cases.

"Michael is an exceptional advocate. He is well prepared and gives clear advice and guidance to clients. He is a safe pair of hands and will fight the client's corner."

- **Legal 500 2023**/Divorce and Financial Remedy/Leading juniors/Midlands Circuit - Ranked in Tier 1

"Michael is a robust negotiator and an excellent advocate and drafts-man, who repeatedly achieves excellent outcomes for clients."

- **Legal 500 2022**/Divorce and Financial Remedy/Leading juniors/Midlands Circuit

"He combines sound judgement and excellent knowledge of the law with an approachable and reassuring manner."

"Michael George is praised for his 'exceptional aptitude for financial remedy work, particularly cases involving company law, complex accounts and pensions'."

- **Legal 500 2021**/Divorce and Financial Remedy/Leading juniors/Regional Bar/Midlands Circuit