

In practice: Out of the ordinary

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Lowry Legal



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In many financial cases, the parties' assets will comprise a house, a pension and some savings. The parties' needs will tend to trump all other issues, with the assets often insufficient to allow both parties to maintain the lifestyle they had previously. In high-net-worth cases however, the scope for argument is much wider. Asset bases may include complex corporate considerations, difficult and wide-ranging family trusts and tax implications that span international jurisdictions, all of which will need specialist consideration and external experts to assist.

This article will consider some of the common features in high-net-worth cases and how they may be approached. Clients in this category will have significant wealth and the ability to pay significant legal fees, but they often also have very high expectations and can be quite demanding in terms of the time spent on their case and how often they are able to contact their lawyer. In other words, they will often require a very bespoke service, in contrast to more modest asset cases where keeping the cost of legal fees under control may be top of the agenda.

Non-matrimonial assets

Where there is significant wealth, arguments about what assets are matrimonial and which are non-matrimonial can become all consuming. As mentioned above, in lower-asset cases the needs of the parties and any children will often take priority, but in cases where there is a significant amount of wealth left over once needs have been dealt with, arguments about whether and how that wealth should be shared tend to rear their head.

The distinction between matrimonial and non-matrimonial property was first identified and discussed by Lord Nicholls in *White v White* [2000], who drew a distinction between:

- property brought into the marriage by one party;
- property inherited during the marriage; and
- property created by the efforts of one or both of the parties during the marriage.

Lord Nicholls said that where a party had inherited wealth, either before or during the marriage, or had been gifted monies from an external source etc, there was an argument that they should be able to keep this property. However, if ring-fencing such property would mean that the other party's needs would not be met, then this argument would be of limited weight.

The argument was developed further in *Miller v Miller; McFarlane v McFarlane* [2006], where Baroness Hale's approach was agreed by the majority and it was suggested that the parties should share in the fruits of the matrimonial partnership. She said that matrimonial property could be made up of everything built up during the marriage, but that a difference should be drawn between those assets that were family assets and those that were not. For example, she said assets that were clearly used for the benefit of the family should be included as matrimonial regardless of the source.

As case law has developed, so have a number of differing approaches among the judiciary, giving rise to more scope for argument. Relevant case law includes the following:

- In *Rossi v Rossi* [2006], Nicholas Mostyn QC, sitting as a deputy High Court judge (as he then was), said that the court should have regard to the length of the marriage. The longer the marriage, the more likely it would be that the non-matrimonial property would be merged with the matrimonial pot. In a short marriage, unless needs required it, non-matrimonial property was not likely to be shared.
- In *Charman v Charman* [2007], Potter P considered that the sharing principle should apply to all the parties' property, but there would be more reason to depart from equality if it could be shown that some of the property was non-matrimonial.
- A formulaic approach was advocated in *Jones v Jones* [2011], with the matrimonial pot divided into two sections: non-matrimonial and matrimonial. The matrimonial section would be divided equally (subject to needs and compensation) and the non-matrimonial section would be left effectively with the owner. Wilson LJ said that the approach should then be 'tested' so as to avoid unfairness.
- In *N v F* [2011], Mostyn J adopted the two-step approach as in *Jones*, ie that first it should be decided if there is non-matrimonial property at all, with issues of intermingling to also be considered as well as the length of the marriage. It should then be decided how much of that non-matrimonial property should be taken out of the pot. The rest of the matrimonial property should be divided equally, and the overall fairness of the award tested by looking at the overall final percentage split of both the non-matrimonial and matrimonial pot combined.
- In *FZ v SZ* [2010], Mostyn J was critical of a telescoped approach - ie for the two-stage process to be telescoped into one, which is a much more discretionary-based approach - on the basis that it ran the risk of:

... insufficient logical rigour being applied to the identification and treatment of the two very different categories.

Marital agreements

When families have wealth to protect, it is more common for there to be pre- and post-nuptial agreements to address financial provision if/when the parties separate. As such agreements are still not technically legally binding, if at the point of divorce one of the parties wishes to try to rescind from an agreement, then a layer of additional and complex litigation is added. This includes arguments to try and invalidate the agreement completely or at least have the court interpret it in a less strict fashion. The main case for consideration as to marital agreements is still *Radmacher (formerly Granatino) v Granatino* [2010].

The judgment in *Radmacher* is very clear that the parties to a marriage still cannot oust the jurisdiction of the court or enter into an agreement to attempt to override the s25, Matrimonial Causes Act 1973 factors. A marital agreement can still only be considered as one of the overall factors of the case.

Radmacher highlights (at para 75) that a problem arises where the agreement:

... makes provisions that conflict with what the court would otherwise consider to be the requirements of fairness.

Whether the agreement is capable of altering what is fair is 'an important factor to be weighed in the balance'. The Supreme Court advanced the following proposition, to be applied to both pre- and post-nuptial agreements:

The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.

The question then inevitably arises as to what would be deemed to be fair? This is the elusive question that can only be determined on the facts of each case. However, if a party is left in real need and the parties cannot have possibly intended that when the agreement was signed, the court is likely to step in.

Radmacher gives us some practical considerations to assist when drafting such agreements and when discerning arguments to potentially unravel them. Key points to be considered include that:

- the agreement must have been entered into freely and any duress to enter into the agreement will always put it on shaky ground;
- it is good practice for the parties to have the agreement done and dusted at least 28 days before the date of the wedding;
- each party must understand the implications of what they are entering into and ideally there is parity of legal advice, with the party with the financial advantage generally agreeing to pay the other party's legal costs; and
- there should be full disclosure of each party's asset position, with time allowed for disclosure and for questions to be asked on the disclosure.

In its 2014 report, 'Matrimonial Property, Needs and Agreements' (Law Com No 343), the Law Commission proposed that a nuptial agreement should be binding if it met certain criteria and would then be termed as a 'qualifying agreement'. This proposal has not been taken any further by the government, although it is hoped that in the future marital agreements will have complete legal standing. This will then remove this layer of argument from high-net-worth divorce litigation, making the separation of a couple who has such an agreement considerably smoother and less costly when one party (who has the means to do so) chooses to try and rescind from it.

International considerations

There are regularly international elements to consider, as couples with a higher net worth tend to have assets and connections across the world. A major consideration has been whether the UK's departure from the EU will have an impact upon how international elements of divorce and financial remedies are handled, in particular as to the appropriate forum for the proceedings.

Where there is more than one option, before deciding on the most appropriate forum for a high-net-worth client, it is best practice to obtain advice from a specialist lawyer in the other potential jurisdictions so as to determine where the client would do 'best' in any financial proceedings.

Before the UK left the EU, the principle of *lis pendens* was applied in England and Wales, ie the court would stay proceedings if another member state court (apart from a court in Denmark) was already seised, in accordance with Council Regulation (EC) No 2201/2003 (Brussels II bis), Art 19. This was the old 'first-past-the-post petition race' that used to occur, and as London was often described as 'the divorce capital of the world', renowned for its generosity especially from a maintenance perspective, there was often a race to issue in England and Wales first. This led to many cases being urgently issued at court, when in fact non-court dispute resolution may have been more appropriate.

Save in transitional cases, the *lis pendens* provisions in Brussels II bis will not now apply and instead the courts in England and Wales will look to the principle of *forum non conveniens* to assess which court and which jurisdiction should be used, although the ability to impose a stay of proceedings (discretionary and mandatory) remains (per Sch 1, Domicile and Matrimonial Proceedings Act 1973, as amended). The test as to *forum non conveniens* is for the most suitable jurisdiction to be identified, having regard to the interests of the parties and justice (per *De Dampierre v De Dampierre* [1987]).

The problem with this approach is that *lis pendens* gave a degree of certainty, whereas *forum non conveniens* introduces the possibility for considerable argument and bitterly fought litigation, increasing costs and stress for the couples and families involved. There is also the issue of whether an EU member state seised first in time will recognise proceedings in England and Wales that have been accepted under the *forum non conveniens* principle, with the risk that each member state may take a different approach.

Therefore, it is imperative that where there are potential international jurisdictions in the frame, swift and concise cross-jurisdictional advice is taken at the outset of a case.

Conclusion

In high-net-worth matrimonial litigation, there will be wide-ranging demands on the practitioner, who will also need to have an awareness of other areas of law that may be relevant (for example as to trusts and tax). It is therefore important in such cases to ensure that a robust team of experts is in place for a high-net-worth client.

Cases Referenced

- Charman v Charman (No 4) [2007] EWCA Civ 503; [2007] WTLR 1151 CA
- De Dampierre v De Dampierre [1987] 2 All ER 1
- FZ v SZ & anr [2010] EWHC 1630 (Fam)
- Jones v Jones [2011] EWCA Civ 41
- Miller v Miller; McFarlane v McFarlane [2006] UKHL 24
- N v F [2011] EWHC 586 (Fam)
- Radmacher v Granatino [2010] UKSC 42; WTLR(w) 2010-13
- Rossi v Rossi & anr [2006] EWHC 1482 (Fam)
- White v White [2000] UKHL 54

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