TO SHARE OR NOT TO SHARE: THAT IS THE QUESTION

THE DIVISION OF ASSETS ON DIVORCE: WHAT IS SHARED?

Authored by: Stuart Clark - The International Family Law Group

Or when is it noble in the Courts to share the cash and investments of non-matrimonial fortune?

Stepping away from this very loose approximation of the words of the Bard, this article asks: what exactly is available for division when sharing assets on divorce in England and Wales?

The answer is not always straight-forward but I shall endeavour to give as good an explanation as is possible based on the weaving and ever-changing parameters of the law in England and Wales.

I start with the essential elements underpinning all. Upon a divorce taking place in England and Wales the Courts have the power to make orders dividing assets and making provision for income, maintenance. I am concerned here with the first aspect – the division of assets.

I say that the Courts have this power; in reality the great majority of all disputes about finances on divorce are settled, agreed, without a Judge having made a determination. Most clients manage to resolve their differences and agree a settlement without having to litigate to a trial. There are of course also many spousal disputes which do not settle, and which require the intervention of a Judge to decide. But that is not the only way.

Whichever way a dispute is resolved, we follow the same set of legal principles. Those principles are derived from Parliament made law, statute, which is primarily found in the Matrimonial Causes Act 1973, and Court-made law, judgments made in cases in the High Court, Court of Appeal and Supreme Court. This caselaw is derived from disputes between spouses in which Judges make decisions based on the interpretation of statute and previous caselaw, creating Judge-made authorities.

The article focuses on situations where there is sufficient capital available to meet the reasonable financial needs of both spouses and any children of the family. Where there is insufficient capital to do so, the financial needs of the spouses and any children will always take priority over the principle of sharing.

And finally, these principles apply equally to divorces or civil partnership dissolutions.

What is Past is Prologue: A short history

Parliament set down the law in relation to the Court's powers to resolve financial matters following a divorce in the Matrimonial Causes Act 1973. Over the next 48 years the Courts have developed the law beyond the recognition of the checklist of factors contained in that statute.

In the early 1980s the prevailing mood of the Courts was that any applicant for financial provision upon a divorce could expect to have only their reasonable financial requirements met. No entitlement to share the fruits of the marriage, merely to be able to leave the marriage with enough to get by. It floundered somewhat. The spouses of the very wealthy were left with only basic (or 'reasonable') financial provision, leaving a great disparity in standard of living even after lengthy marriages. In the more modest of cases, the financially affluent spouse might find themselves closed out of their wealth by having to provide for the other spouse for life. Unsatisfactory at both ends of the scale.

This changed in 2001 following the Supreme Court case of White v White. The emphasis since 2001 has been on equality; a starting point of equal division. The Supreme Court cast its judgment on the decisions of years past which created great wealth gaps upon divorce. It said that the previous law was gender discriminatory and that it did not respect that a marriage is a partnership of equals, the fruits which should be shared equally no matter the form of those contributions: all contributions must be respected and there can be no discrimination in how assets are divided.

Over the next 20 years the Courts have given further guidance and we are now in the position where the law about sharing capital assets on divorce can be distilled into two central tenets:

- Marital assets are shared equally
- Non-marital assets are not shared at all

Both propositions are caveated and there are circumstances where equal sharing of marital assets does not take place and non-marital assets are relevant to the division of marital assets (or may even be divided).

Those cases predominantly involve situations where the needs of one of the spouses or of the children would not be met if the basic principles are rigidly applied. If one of the spouses needs more capital so as to be able to continue to reasonably live with a similar standard of living as was enjoyed during the marriage, then these tenets are relaxed.

But the nutshell analysis is that marital assets = shareable: non-marital assets = non-shareable.

What's in a name? Assets by any other name would smell as sweet

But what does this mean? What are marital and non-marital assets? The Supreme Court sowed the seeds of defining this in White:

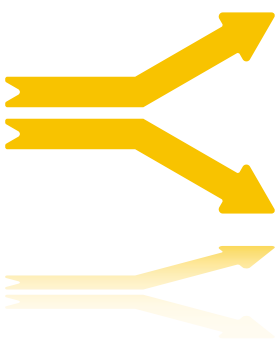
- Property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may loosely be called matrimonial property

Pretty straight-forward. If one spouse had assets before the marriage or if they received an inheritance, then the pre-owned or inherited assets are non-matrimonial and therefore cannot be shared. Everything else can be shared.

Simple.

End of article.

But life is not that simple. The arrangement of financial affairs during the marriage is never that straight-forward It is not always possible to squarely define what was owned before the marriage and what was acquired during the marriage. It is rare that spouses will lead entirely separate financial lives, meaning that often there is a blurry line between marital and non-marital assets. It is rare that the wealth of a couple at the time of divorce will have developed only during the marriage or only before the marriage.



We know what we are, but know not what we may be: separating marital and non-marital

Family lawyers often speak of the two schools of thought when categorising assets: formula vs feel.

In a case from 2014 called S v S the husband brought approximately £13m into the marriage. At the time of the divorce this had risen to £25m. £12m was accrued during the marriage. The wife received a £6m settlement. The Formula approach.

But what of the case of Nick Robertson, the founder of online clothing retailer ASOS. Mr. Robertson launched ASOS in 2000, before he met his future wife. When they eventually started their relationship, his shares in ASOS were worth 8-12p each. If those shares had been left to grow passively during the course of the marriage, they would have been worth £5m at the time of the separation. But, after the 11-year marriage the family fortune was in fact £219m.

Mr. Robertson's wife argued that she should receive one half of £219m minus £5m, being the matrimonial acquest; the added value to the wealth brought about during the marriage, deducting for what would have happened had there simply been passive growth. Net result of £107m to her. Mr. Robertson proposed that his former wife received £30m.

She in fact received £69m. The Judge put a gloss on the formulaic approach in a bid to achieve, fairness, abstractly. Mr. Justice Holman described the aforementioned S v S methodology as a tool, not a rule. The overall award to the wife was 31% of the matrimonial assets. The feel approach.

How can one predict what might happen? As family lawyers, we continue to scratch our heads. It is not always predictable. English family law is incredibly discretionary.

If you can finely de-mark between the matrimonial and the non-matrimonial, then great: de-mark, apply a formula and the outcome becomes predictable.

But where the non-marital assets become enmeshed with the finances of the family there is less predictability. Mr. Robertson's pre-marriage shareholding value only really took off during the course marriage, a natural enmeshment of financial life occurred. The Judge gave some account to the springboard

of the pre-marital work and came down on an outcome which 'felt right', so such outcomes are less predictable.

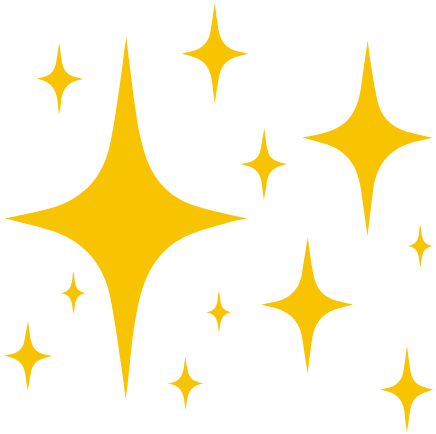
You speak an infinite deal of nothing: what does this mean?

For marriages where it is quite straight-forward to separate out what is and what is not a marital acquest, then the court can and usually will use the formulaic approach.

But when pre-marriage assets have been mixed with the marital fruits, or there has been a continuum throughout matrimony of a pre-martial endeavour the courts will be less likely to divide assets formulaically. We are then into the more abstract arena, a 'lawless' approach as one Judge has called it, of feel.

If you are financially planning for the future, be cautious of the financial effects of a potential divorce settlement. If you are the financially affluent spouse, aim to keep your finances separate. Do not mix pre-marital assets with the marital finances. Divert and de-mark your earnings. Consider a pre-marital agreement. These options may not all be available.

If you are already separating, take advice early, find out the scope of discretion and try to settle as best you can within that scope.



It is not in the stars to hold our destiny but in ourselves: What of the future?

What happens to financial gain following separation and going into the future?

Juliet owns and manages a fast-food franchise. After a 20-year marriage, she and Romeo separate. Business is booming and the franchise is worth £10m on the day on which they separate. Two years later, after much wrangling, Juliet and Romeo divorce and settle their financial affairs. By this time the company is worth £12m. Juliet can expect to receive an income going forward of £1m per year as owner of the franchise.

During the two years since separating Juliet also starts working in a start-up company. This becomes her main focus as her fast-food franchise is just ticking over. She invests considerable time and efforts but, crucially, puts no money in. Over the course of the two years this start up goes from strength to strength and her shares in the start-up are worth £5m on the date of settlement.

What is shared? The most likely answers are as follows:

- The £12m value of the fast-food franchise, including the £2m accrued since separating, is shared equally. The increase in value is a 'continuum'. It is seen as passive growth of a pre-existing company even if there has been an investment of time by Juliet during those two years. The answer might be different if many more years had elapsed, especially if Romeo caused the delay or if perhaps Juliet had introduced a new direction to the franchise which made the most profit during that period
- The £1m future fast-food income is not shared. The Courts recently have been very keen to say that future earnings are not shared
- The value of the shares in the start-up is not shared. This is an entirely new endeavour post-separation for which there has been no matrimonial investment

I am not bound to please thee with my answers: a conclusion

- The financial fruits of a marriage are shared with a starting point of equality
- Any assets from outside of the marriage are not shared, whether it is pre-acquired assets, an inheritance, or the fruits of a new endeavour post-separation…
- …provided the needs of both spouses' post-divorce are met. If needs are not met, then these rules are applied less rigidly
- If it is simple to discern what is marital and what is non-marital, try to apply a formulaic approach
- Where the non-marital assets have been mixed with the marital assets, or become enmeshed with the family's finances, then you may not be able to apply a formula, and a more abstract feel approach may be applicable
- The fruits of new endeavours after separation and a spouse's future earning potential are not shareable
- Consider financial planning, separating assets or income and a nuptial agreement if you are concerned by any of the themes raised in this article