What's mine is mine: the application of the sharing principle to non-matrimonial assets

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Enduring divorce and civil partnership dissolution may be painful, but for some couples, the process of resolving their financial differences is agony, made all the more harrowing by the uncertainties caused by the discretionary nature of the exercise of the court's power.

What's mine is mine: the application of the sharing principle to non-matrimonial assets

The courts in Jersey and England and Wales decide first whether an applicant's claims should be decided on the basis of needs alone or, if there is a surfeit of assets over reasonable requirements, whether it would be appropriate to apply what is known as "the sharing principle". If the sharing principle is to be applied, ought assets to be divided with regard to how, when and by whom those assets were acquired?

Clarification on how assets brought into a marriage or civil partnership, to which the other party has made no contribution, are to be treated has been developed further in recent decisions of the English Family Division. Both English decisions detailed below fall squarely into the "big money" bracket, where the value of the assets in dispute exceed reasonable needs by some margin.

In BD v FD [2016] EWHC 594, Moylan, J. considered competing claims to the inherited assets owned by the husband of this couple in their forties. After an eleven year marriage and four children, the wife asked the court to apply "the sharing principle" to £58 million held on bare trust for the husband and to further take into account the £105 million in which the husband had a life interest.

The judge commented that "the origin of this wealth dates back to the 17th century and, accordingly, reflects the endeavours of his family over many generations". The wife sought an award of £29 million; the husband offered £8 million.

The judge explained that "the sharing principle applies with force to marital property, being treated as the product of the parties' joint contributions during the marriage...However, absent some specific justification, the sharing principle will not have an effective application against non-marital property". He went on to find the husband's trust assets were to be treated as part of the husband's separate wealth and that, notwithstanding the quantum of the money at stake, "the determinative principle" was that of need, which was to be assessed by reference to factors outlined in section 25 of the Matrimonial Causes Act 1973 (to which regard is also had by the Royal Court of Jersey), and particularly the standard of living enjoyed by the parties during the marriage. That standard of living and length of the relationship would speak to the reasonable needs of the wife. The wife was awarded £9.1 million, including a sum for capitalised periodical payments.

In Robertson v Robertson [2016] EWHC 613 (Fam), Holman J. was also asked to determine how to treat assets brought into a marriage by a husband (in his forties at the time of the judgment) after a relationship lasting twelve years, which produced two children.

Shares in the business run by the husband were found to have been worth £1.1 million at the time of the marriage. By the time the matter came before the court, the shares and other benefits from the husband's business had amassed for the family a fortune of £219.5 million, half of which was claimed by the wife, allowing only for £4.84 million of passive growth on the value of the shares brought into the marriage.

The husband's primary case was that the financial fruits of the shares should be ring fenced from any claim by the wife, because they did not fall into the marital acquest. His fall back argument was that as the accretion to the family wealth from the husband's business had been so significant, it should be treated as an unmatched "special contribution", which would lead the court to depart from the sharing principle.

Holman J. did not accept that the husband's financial contribution was so "exceptional and individual" that he could depart from the sharing principle, particularly in circumstances in which the wife's role as an excellent home-maker and mother entitled her to claim that she had also made a full contribution to the marriage.

However the judge found that he could not entirely disregard the genesis of the shareholding brought into the marriage. He determined that he should treat half of the shares that remained from the original contribution (and the properties brought with the proceeds of others) as nonmatrimonial property, ownership of which would remain with the husband. The balance would be subject to equal division, in accordance with the sharing principle. The wife obtained an award of just under £70 million.

Comment

The differing approach to the treatment of pre-existing assets in these two decisions can, in simple terms, be justified by the active and significant growth to the value of Mr Robertson's business interests which occurred almost entirely during the marriage. Against a background in which the wife had made a significant contribution to family life, which enabled the husband to focus on accruing wealth, the court could not justify ring fencing the value of the shareholding on the basis of any special contribution.

In contrast, in BD v FD, the husband was treated as the caretaker of family wealth held in trust to which generations of his family had contributed. This justified the finding that the assets in trust did not fall into matrimonial property to be divided according to the sharing principle.

Two recent decisions of the Royal Court of Jersey have approved the line of English authorities on treatment of non-matrimonial assets. The assets in these local disputes were more modest. In C v D [2016] JRC 044A, the Registrar confirmed that the Royal Court would distinguish between matrimonial and non-matrimonial assets where the quantum of assets enabled the court to consider applying the sharing principle rather than a straightforward analysis of the parties' needs.

In U v V [2016] JRC 061, the Deputy Bailiff found that a number of the immovable properties which formed part of the property developer husband's business should be treated as nonmatrimonial property, distinguishing these from the properties which had been used at some point in the marriage as matrimonial homes and those properties which did not fall squarely into the habitual business activities of the husband. The court went on to determine the wife's needs, and to divide the non-matrimonial assets between the parties, leaving the husband with the business that he had brought into the marriage.

Carey Olsen believe that the potentially costly, stressful and time consuming analysis by the court of the source of family wealth on divorce or civil partnership dissolution can, to a degree, be mitigated where one party brings existing assets into a relationship, by careful preparation of an appropriate pre-marital agreement, which can ring fence that pre-existing wealth, be it earned, inherited or the product of a previous marriage.

The anticipated changes to matrimonial legislation in Jersey are expected to give statutory approval, subject to safeguards, of these pre-marital agreements, which will assist couples in defending their assets and retaining wealth to which their partner made no contribution. These agreements, when properly drafted and agreed, may remove the risk and emotional and financial cost of leaving the decision to the court.

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