

Wealth protection on divorce

Mills & Reeve Birmingham partners, Marc Saunderson and Matthew Hansell, spoke at the conference of the M5 group in Oxford on Friday, October 5 on the subject of asset protection and trusts in divorce. Around 100 private client lawyers from all over the country attended. The notes from the talk are laid out below.

1 Setting the scene

1.1 Introduction

English courts are now seeing the largest divorce payouts ever and London is regarded as the divorce capital of the world, certainly for divorcing wives.

1.2 The starting point

Section 25 Matrimonial Causes Act 1973:

- children
- length of marriage
- ages
- contributions
- disability
- standard of living
- pension needs
- resources
- conduct

1.3 The law pre 2000

It is important to think of the law pre-2000 as being a bit like the Middle Ages: we had the black death and pro-husband courts.

Dart v Dart (1996)

This was a 15-year marriage with two children. The wife received a £9 million clean break.

The wife's divorce costs were £1.4 million.

The husband was worth in excess of £400 million.

1.4 The law post 2000

The landmark decision of *White v White* (2001) changed everything, and while Mrs White did not receive a half share, the courts quickly moved to more significant awards in favour of wives in larger money cases between 2000 – 2006.

SUMMARY OF CASES BY VIRTUE OF LENGTH OF MARRIAGE SINCE 2000

Case name	Length of marriage	Capital	Per cent to wife	Clean break?
<i>White v. White</i>	33	£4.6 million	37	Clean break
<i>HJ v HJ</i>	25	£2.7 million	50	Clean break
<i>Lambert v Lambert</i>	23	£20.5 million	50	Clean break
<i>Parra v Parra</i>	20	£2.49 million	50	Clean break
<i>Parlour v Parlour</i>	6 + 3 year cohabitation to date of appeal	£3 million	37	No. On appeal 4 year term order – £444,000 to include children pa.
<i>McFarlane v McFarlane</i>	20	£3 million	50	No. Wife received £250,000 pa on a joint life basis.
<i>Sorrell (2005)</i>	30 +	£73 million	40	Clean break

We have therefore gone from a situation 12 years ago where the wife could receive as little as between two per cent and ten percent of the asset in larger money cases, to fairly clear guidance that 50 per cent is the norm in medium to longer marriages. Even where it is not 50 - 50, as in the *Miller* case where the wife received £5 million after a childless marriage of two years and nine months she received an award of £4,935 net for every day of the marriage.

2 Special contribution or genius

2.1 *Sorrell v Sorrell* (2005)

The husband was worth just over £73 million net. The wife conceded after a 34-year-marriage that the husband had made a stellar contribution and the husband was able to raise a “seed of genius” argument, and the assets were apportioned 60 – 40 per cent in the husband’s favour. Bennett, J. stated in the Judgment (para 117), “*I do not base my decision upon the fact of the size of the family fortune alone as justifying a conclusion of special contribution*” ..., but the question remains, had the fortune been £7.3 million rather than £73 million would or could he have made the same decision? In my view the answer is no.

2.2 *Charman v Charman* (2006) EWHC

This a case worth considering on its own facts, given the inter-play of trusts.

The husband and wife were both aged 53.

It was a 30-year-marriage and there were two adult sons.

This was described as a “huge money case” with assets of over £100 million. The wife alleged somewhere between £150 – 160 million.

There was £6 million in the wife’s sole name, £25 - £20 million in trust for their sons, £56 million in the husband’s sole name and £68 million in the Dragon Trust based in Bermuda. The wealth was all generated during the marriage through the husband’s business activities as a high-risk insurer.

The wife sought 45 per cent of the assets. Departure was justified on *Sorrell* grounds, ie, a further £53 million to add to the £6 million in her own name. The husband offered her £14 million to bring her up to £20 million.

The husband asserted as follows:

- 2.2.1 The Dragon Trust assets should be left out, as they had been set aside in a long-term plan to provide for future members of the family.
- 2.2.2 He had not accepted an equal division as a starting point or a cross-check, as since Miller and McFarlane business assets had to be looked at differently.
- 2.2.3 Any award to the wife should be reduced, as she failed to accompany him to the tax haven of Bermuda, therefore she should not benefit from any saving he made by moving.
- 2.2.4 The wife’s calculations did not take into account a lack of liquidity in much of his wealth.
- 2.2.5 He had made a special/stellar contribution fully justifying a departure from equality.

Where there was a conflict of recollection the judge preferred the evidence of the wife.

The court’s findings were that assets were just a little over £131 million, of which £6,634,000 was held by the wife, £56,564,000 in the husband’s name and £68,125 million in the Dragon Trust. Despite the husband’s claims that it was a “dynastic settlement”, there was no record of this in the trust document and the husband’s evidence was not accepted.

Conclusion:

The husband to pay the wife a lump sum of £40 million and transfer the FMH, worth about £2.5 millions, so she retained assets of £48 million or 37 per cent. This settlement reflected the high-risk nature of the husband's investment.

Charman – The appeal, 24 May 2007

The facts are set out above.

The husband's first ground for appeal was that the judge arrived at the starting point of equal division and then factored the husband's special contribution into the equation by way of discount and was wrong to do so. The proper approach should have been for the judge to allow for the husband's special contribution and the exercise mandated by s.25 (ii) of the MCA, and had he done so, then after conducting the necessary cross-check against the yardstick of equality, the award would have been almost £28 million to the wife.

The second main ground of the appeal was the judge had erred in computing total assets of £131 million and including the £68 million held in the Dragon Holdings Trust.

It was noted that the Dragon Trust was entirely discretionary, therefore it was considered to be an asset of the husband, but the K R Charman Trust set up for the adult children in 1987 was excluded from the marital assets.

It transpired that the husband's lawyer sought to argue that the Dragon Trust should be excluded, and a number of arguments were presented, to include the issue of advancement, i.e. if husband had asked for the money from the Trust would he have received it?

Given that he was described as having put up a "Herculean struggle" in order to prevent Codan giving evidence regarding the Trust, the Court of Appeal were not impressed with that approach and he was criticised for his cynical deployment of contradictory arguments.

The Appeal was dismissed, and the husband is now appealing to Europe.

Sir Mark Potter, President of the Family Division commented, (para 124):

"If, unlike the rest of Europe, the property consequences of divorce are to be regulated by the principles of needs, compensation and sharing, should not the parties to the marriage, or the projected marriage, have at least the opportunity to order their own affairs by nuptial contract?"

3 Inheritance

No money is excluded from the Section 25 calculation, ie, everything falls into the pot to be considered by the court in ancillary relief proceedings.

It may be possible to ring-fence assets in larger money cases. *White v White* (2000), Lord Nicholls, “property held by one spouse before the marriage and inherited property whenever acquired stands on a different footing from what may loosely be called “matrimonial property”. Such property comes from a source wholly external from the marriage and, in fairness, where this property still exists the spouse to whom it was given should be allowed to keep it.”

3.1 *GW v RW* (2003)

Inherited assets should not be quarantined from the pool of assets. The statute requires the court to take into account all property of each party, including property acquired during the marriage by gift or succession, or as a beneficiary under Trust.

3.2 *A v A* (2006)

“Inherited assets fall into a bracket known as non-matrimonial, because they all derived from an inheritance in 1998. therefore I must give proper weight to their origin and I accept that they should not be invaded unnecessarily. However, in this case where there is little marital property, as now defined, the award will have to be made from the husband’s inheritance.”

3.3 *S v S* (2007) – The Family Division

A judge had erred in regarding assets provided to a wife by her parents, as non-matrimonial and ring-fencing them when making an order on the basis of an otherwise equal division of assets.

3.3.1 The facts

The appellant husband appealed an order dividing family assets equally between himself and wife, save for two assets held in the wife’s sole name, after a 23-year marriage with two adult daughters.

3.3.2 The issues

3.3.2.1 Whether, in the husband’s case, the fact that the wife’s parents were worth between £1 - £1.5 million should be taken into account; and

3.3.2.2 On the wife’s case, whether assets should be ring-fenced, i.e. wife’s share in her parents’ home and a bond worth approximately £114,000. The wife had retained these assets and all the other assets were shared equally.

On appeal the court took the view that it was common sense that the wife was likely to receive something from her parents, but the timing and amount were uncertain, and there was clearly authority that there is freedom of testamentary disposition and the husband was not suffering a loss in respect of which he required compensation. See *Miller* (2006) UKHL 24.

Such assets, if any, as were acquired by the wife from her parents would be long after the marriage had ceased and husband could not seek a share in such monies.

All the assets which went into the marriage had to be available to cover the parties' requirements. This was a needs case. Each party required a home and had similar income needs in the long term and there should be an equal sharing of the assets to provide them with a home of equal value and, in a long marriage where each of the parties fully contributed, there was no reason to depart from equality.

4 Pre-nuptial agreements

4.1 Introduction

There is nothing new about pre-nuptials, they have been in existence in America and Europe for some time, but until recently they have been largely disregarded by the English courts.

4.2 "Putting children first"

In 1998 the government paper, "*Putting children first*" suggested that pre-nuptials **may** be binding if they complied with the following:

4.2.1 There had been full and frank disclosure between the parties.

4.2.2 There had been independent legal advice.

4.2.3 Provision had been made for any children.

4.2.4 The agreement had been signed not less than 21 days before the date of marriage.

4.3 The case law

Everything changed with the decision of *K v K* (2003).

4.3.1 The facts

4.3.1.1 The wife was aged 28 and had assets in the region of £1 million. The nature of the Trust within which those assets was held meant that the capital should be treated as a source of income rather than capital.

4.3.1.2 The husband was 39 and had significant assets by way of property dealing, worth at least £25 million.

4.3.1.3 The wife was described as intelligent, but not well-versed in financial matters.

4.3.1.4 The wife, on discovering she was pregnant, took the view that she did not want to be a single parent.

She proposed that she would either marry or terminate the pregnancy. She clearly loved the husband and thought that their marriage would be successful.

4.3.1.5 The husband was wholly opposed to termination, but was not yet ready to marry. At the end of a five-week holiday the husband proposed, but on the

basis that they would not marry for some time and certainly not until after the baby was born.

- 4.3.1.6 Pressure was put on both of them by the wife's family to marry before the baby's birth. It was felt that a pre-nuptial agreement was a carrot to persuade the husband to marry the wife pre-birth and the driving force for the pre-nuptial was the wife's father.
- 4.3.1.7 At no time did the husband tell the wife that he would not marry her without a pre-nuptial.
- 4.3.1.8 The husband did not put the wife under any pressure to sign any agreement. The wife understood the agreement, but did not really care about it.
- 4.3.1.9 The husband and wife were properly advised that a pre-nuptial agreement would not be strictly binding on the court, but in the event of a divorce would be taken into account, but that it would be less relevant the longer the marriage.
- 4.3.1.10 The husband and wife's advisers all knew that the wife was pregnant.
- 4.3.1.11 The husband indicated that he wished to fully provide for any child.
- 4.3.1.12 There was not full disclosure of assets, although this came from the wife's side, not the husband's, the wife being aware that the husband was very wealthy.
- 4.3.1.13 The pre-nuptial was signed the day before the parties married.
- 4.3.1.14 After the marriage they lived comfortably, but did not live the lifestyle of the ostentatious rich. It was always intended that they would buy a very nice family home, something in the region of £11 million.

4.3.2 The test set out by the court was as follows:

- 4.3.2.1 Did the wife understand the agreement?
- 4.3.2.2 Was the wife properly advised as to its terms?
- 4.3.2.3 Did the husband put the wife under any pressure to sign it?
- 4.3.2.4 Was there full disclosure?
- 4.3.2.5 Was the wife under any other pressure?
- 4.3.2.6 Did she willingly sign the agreement?
- 4.3.2.7 Did the husband exploit a dominant position?
- 4.3.2.8 Was the agreement entered into in the knowledge that there would be a child?
- 4.3.2.9 Had any unforeseen circumstances arisen, such as to make the agreement unjust to hold the parties to it?

- 4.3.2.10 Were there any grounds for concluding that injustice would be done by holding the parties to the agreement?
- 4.3.2.11 Was the agreement one of the circumstances to be considered under Section 25?
- 4.3.2.12 Did the entry into this agreement constitute conduct which it would have been inequitable to disregard?

The judge gave effect to the capital part of the pre-nuptial agreement by awarding the wife £100,000 plus 10 per cent per annum for which she had contracted. The court interpreted the phrase “reasonable financial provision for the child” to mean a lump sum of £1.2 million for a suitable house to be held in trust until the child finished full time education, together with periodical payments of £15,000 per annum, plus £15,000 per annum periodical payments for the wife during the period of the trust.

As can be seen, the court drove a horse and carriage through the government’s 1998 checklist.

4.4 Cases post *K v K*

4.4.1 *J v V* (Disclosure: Off-shore Corporations) (2003)

The court commented that the pre-nuptial agreement was put on one side as, whilst these days their existence can be of some significance, it was not in this case because the contract was signed:

- 4.4.1.1 on the eve of the marriage;
- 4.4.1.2 without full legal advice;
- 4.4.1.3 without proper disclosure;
- 4.4.1.4 no allowance was made for the arrival of children and it therefore fell at every fence, quite apart from the fact that the terms were obviously unfair, preventing the wife from claiming any of her husband’s assets.

4.4.2 *V v C* (2004)

The pre-nuptial was signed in Spain. Within five years the marriage had broken down. The pre-nuptial was not binding under English law, but should be taken into account as one of the important factors to be considered by the court.

4.5 Conclusion

So what is the status of pre-nuptial agreements.

- 4.5.1 They are not binding upon the courts, but they are persuasive.
- 4.5.2 As we have seen the state of the law is so uncertain as to make it almost impossible for advisers to accurately gage the outcome of a larger money case, save to start from a broadly 50 - 50 starting point in longer marriages and endeavour to keep costs to a minimum.
- 4.5.3 If there is to be a pre-nuptial agreement, then have regard to the government guidance 1998 “*Putting children first*”.

4.5.4 Make sure that you deal with the following issues:

4.5.4.1 the parties understand the agreement.

4.5.4.2 the agreement is formally entered into, i.e. the parties need to marry.

4.5.4.3 was there any pressure placed upon either party?

4.5.4.4 is the agreement contrary to public policy?

4.5.4.5 were the parties independently legally advised?
A v A (2006)

Here the husband and wife entered into a post-nuptial agreement when husband discovered the wife's affair with his best friend. The effect of this was to limit the wife's claims to £3 million plus periodical payments of £240,000 per annum.

The post-nuptial agreement was set aside in ancillary relief proceedings, because the husband's demands had amounted to undue and unacceptable pressure upon the wife, who had subsequently re-kindled the relationship with the husband's best friend, and the husband was criticised for referring the wife to solicitors of his choice.

4.5.4.6 are there any unforeseen circumstances that would make it unfair to uphold the agreement?

4.5.4.7 was the agreement signed 21 days before the marriage? If not, is there provision to acknowledge that it was not?

4.5.4.8 is the agreement fair?

RESOLUTION the professional body of family lawyers has supported the implementation of pre-nuptial agreements being upheld, subject to them not creating **significant injustice**.

4.6 Pre-nuptials – why do we do them?

4.6.1 Clients want us to.

4.6.2 It attracts a wealthier client base.

4.6.3 It is a way of holding out our expertise.

4.6.4 It is lucrative work.

The downside is that it is high risk work and insurance claims can bite many years later.

It is stressful. At the time when one party, invariably the bride, is thinking about dresses, cakes, flowers and honeymoons there is an inordinate pressure to see an agreement signed off.

4.7 Practical points

Do not forget confidentiality agreements, ie, a pre- pre-nuptial.

5 Use of trusts to protect assets from divorce

5.1 Introduction

As you have heard from Marc Saunderson, the divorce courts are prepared to order much larger financial settlements than they once were. Fifty per cent or so of the individuals assets may be at risk.

But what about the courts power to attack assets held in trust if it is a “nuptial trust” and under Section 24 (1)(c) of the Matrimonial Causes Act 1973, the court has full authority to vary the terms of the trust, including ordering a distribution of trust funds to one of the parties to the marriage. If it is not a “nuptial” trust, the court has no powers whatsoever to order either a financial settlement of the trust funds or that the Trustees should act in a certain way. In these cases the Court looks at the “reality” of the situation and may regard the existence of the trust fund as a notional resource of the beneficiary’s spouse. As a result, the court might end up ordering the spouse a bigger chunk of the beneficiary’s personal assets than might otherwise be the case, but as stated cannot order a direct distribution of the trust funds.

I will look at some of these provisions in more detail and will also look at what practical steps can be taken to protect trust funds from attack.

5.2 The extent of the court’s powers

5.2.1 Nuptial trusts

5.2.1.1 Under section 24 (1)(c) of the Matrimonial Causes Act 1973, the divorce court can vary the terms of a “nuptial trust”. Let’s look now at what is meant by “nuptial” in this context as clearly this is an absolutely key question. First though let us look at the extent to which a trust can be varied under section 24 (1)(c). There are no limitations here and examples of how the divorce courts have used this power are as follows:

- (a) To order the trustees to distribute trust capital to one of the parties of the marriage.
- (b) To provide a fixed level of income from the trust for one of the parties of the marriage.
- (c) To exclude one of the spouses from benefiting under the trust.
- (d) To add further beneficiaries including the claimant spouse.
- (e) To remove or replace trustees and/or the protector.

Nor are there any jurisdictional limitations. Section 24 (1)(c) can apply to any nuptial settlement wherever located and whatever the law of that trust (eg, even if the law of the trust is not that of England and Wales). The court has, for example, used its powers to vary Scottish, New York, Northern Irish, Indian and Bermudian trusts.

From a practical point of view the UK court’s order will need to be enforced in a court where the trust (i.e. trustees) is situated and in some jurisdictions that might prove impossible leading to somewhat of a hollow victory.

5.2.1.2 As the courts have such sweeping powers over nuptial trusts, the important questions arises as to what is a nuptial trust?

It is a question of fact. Unfortunately there is no clear and obvious definition. As Lord Nicholls unhelpfully said in *Brooks* (1995) “*there are no precise limitations to the definition of a (nuptial settlement)*”. Not very helpful! There are though some indicative factors that have come out of the case law:

(a) Who is the settlor (i.e. the maker of the trust)?

A party to the marriage? Clearly if a party to the marriage is the settlor then it is more likely that it be regarded as a nuptial settlement? A close relative? The closer the more likely again that it be regarded as a nuptial settlement.

(b) What was the settlor’s intention?

Is the marriage “a fact of which the settlor takes account in framing the settlement (i.e. trust)” *Joss v Joss* (1943). Again, if it is, the more likely it is to be regarded as being a nuptial settlement. Is the settlement upon the wife (or husband) in her character as a wife (or his character as a husband) *Worsely v Worsley & Wignall* (1869). The point here is, is that beneficiary included only by virtue of being the spouse of a person or beneficiary.

(c) Who are the beneficiaries?

If the spouses are the main beneficiaries, then again the more likely it is to be regarded as a nuptial agreement. If it is a wide discretionary trust with a very large class of beneficiaries, the less likely it is that it will be regarded as a nuptial settlement.

(d) When was the settlement made?

Before the parties ever met? If the claim has been brought by a wife, and the Trust was set up before even the husband knew her, then this is highly unlikely to be regarded as a nuptial trust. On the other hand in *Bosworth ICK the Bosworth ICK* (1927) Lord Hanworth said “*The court would have great difficulty in saying that any deed which is a settlement of property, made after marriage, and on the parties to the marriage, is not a post-nuptial settlement*”. In the case of *Charalambous* it was said that once of a nuptial character, it is very difficult to “de-nuptialise” the trust.

(e) What are the terms of the trust?

If there are, say, consecutive life interests for the spouses, then it is more likely to be regarded as a nuptial agreement even if the trust was not made by a party to the marriage, but was made, say, by a parent.

5.2.1.3 Let’s try and apply the above (rather vague!) principles to give some practical guidance on whether or not a trust is “nuptial”.

(a) Examples of trusts likely to be regarded as nuptial trusts:

- A trust set up by a husband to be on the eve of the marriage, with a view to trying to protect his assets in the event of divorce. This is clearly a trust set up in contemplation of marriage and so “nuptial”.
- A will trust set up by the husband’s father under which he gives a life interest to his son, successive life interest to his daughter-in-law and remainder interest (the ultimate capital interest) to his grandchildren. The wife will be a beneficiary by virtue of her “character as a wife” so this trust appears to be caught.
- Most trusts set up by the parties of the marriage during the marriage.

(b) The following trusts are, in my view, unlikely to be regarded as “nuptial trusts”.

- A trust set up by a party to a marriage at a time when he did not know his spouse to be.
- A discretionary trust made by a person who is not a party to the marriage (say a parent to one of the parties), whether made pre or post marriage, and which includes a very wide class of beneficiaries. The trust seems to be too detached from the couple to be regarded as a “nuptial” trust.
- A life interest trust made by a parent to a party to the marriage under which their son, say, is life tenant, with a remainder interest going to the children, but with the son’s wife having no life interest or other direct interest as a beneficiary (even if there was power to add her as a beneficiary). The trust is in favour of the son as a son not because of his marriage and so it is hard to see how this could be regarded as a nuptial trust

5.2.2 Trusts which are not “nuptial”

5.2.2.1 If there is a family trust in existence which is not a nuptial trust, then what would be the likely effect on the financial settlement by the court in divorce proceedings? As it is not a nuptial settlement, the court will have no powers to vary the trust, or in any way order the trustees to distribute the trust funds in any manner.

5.2.2.2 That does not mean that the trust will be ignored completely. The court will look at the “reality” of the situation and if it thinks that the trustees are likely to use the trust funds to benefit a party to the marriage, then they may regard the trust as a notional resource available to that party . This means that the other spouse is may end up receiving a bigger share of the beneficiary spouse’s personal assets to take into account that additional resource.

5.2.2.3 How will the court value this notional resource? Clearly this will depend on the facts and circumstances but there must be a significant discount against the capital values of the trust funds as a whole. For example, where the beneficiary spouse is one of very wide class of discretionary beneficiaries in the trust, and the trustees have not been in the habit of making distributions to him, the reality of the situation is that probably none of the trust fund will be distributed to him and so no or little value at all will be impugned to the beneficiary as a result of the existence of the trust. On the other hand if the trustees have been in the habit of regularly making a significant distribution to that beneficiary, the court will give a notional value to that but taking some account of the fact that the trustees could change their policy and reduce future payments. The court should take account of the wishes of the settler (as, say, recorded in a letter of wishes).

5.3 How the court may use its powers

In 5.2 I looked at the extent the court powers in relation to trusts. I will now look at how the court may exercise those powers. In *Miller & McFarlane* Lord Nicholls and Baroness Hale emphasised three guiding principles in their judgements in deciding on the financial provision on divorce:

- 1 Needs;
- 2 Compensation; and
- 3 Sharing

In lower value cases the needs of the parties and of the children will be all consuming and these other parties and their children in determining how the assets and income is split. Members of

STEP are likely to get involved in the higher value cases, where there are more than sufficient assets to cover the needs of the family. In these circumstances we need to consider the two further principals, compensation and sharing.

Compensation is aimed at redressing “any significant prospective economic disparity between the parties arising from the way they conducted their marriage”. The obvious example is the situation where the wife, having had high earning potential, gave up her career to look after the children. The final element is “sharing”. Baroness Hale in *Miller & McFarlane* emphasised that marriage is an equal partnership and therefore the parties should be looking to the “sharing of the fruits of the matrimonial partnership”. It is here that there is an important distinction to be drawn. It is the matrimonial property which is to be shared (equally in a longer marriage). ***Non matrimonial property is less likely to be.***

According to Nicholas Mostyn QC sitting as deputy High Court judge in *Rossi* (2006) EWHC 1482, handed down 26 June 2006 (see Section 7 below), the approach is clear:

“In all cases now, a primary function of the court is to identify the matrimonial and non-matrimonial property. **In relation to property owned before the marriage, or acquired during the marriage by inheritance or gift, there is little difficulty in characterising such property as non-matrimonial (provided it is not the former matrimonial home).** The non-matrimonial property represents an unmatched contribution made by the party who brings it to the marriage justifying, particularly where the marriage is short, a denial of an entitlement to share equally in it by the other party: see *White v White* (2001) 1 AC 596, *GW v RV* (2003) 2 FLR 108, *P v P (Inherited property)* (2005) 1 FLR 576, *Miller* (paragraphs 21-25, 148), (paragraph 10).

So what is matrimonial, and perhaps more importantly, what is non matrimonial property. Unfortunately a clear distinction is not yet settled and the longer the marriage the more the concept is blurred. In *Miller & McFarlane* Lord Nicholls said it is necessary to consider the source of the property.

“One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or by gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties’ common endeavour, the latter is not.” (para 22)

“The matter stands differently regarding property (“non-matrimonial property”) the parties bring with them into the marriage or acquire by inheritance or gift during the marriage.” (para 23)

So far as the latter is concerned, the duration of the marriage will, according to Lord Nicholls, be highly relevant. Fairness may well require that the claimant should not be entitled to a share of the other’s non-matrimonial property. The source of the asset may be a good reason for departing from equality. “This reflects the instinctive feeling the parties will generally have less call upon each other on the breakdown of a short marriage” (para 24).

It should be noted that non-matrimonial property is not quarantined and excluded form the court’s powers. It represents an unmatched contribution that one party brings it the marriage. The court will decide whether it should be shared and if so in what proportions. So in deciding will have regard to reality the longer the marriage the more likely the more likely the non-matrimonial property will become more entangled with the matrimonial property. The contrast, in a short marriage case non-matrimonial assets are not likely to be shared unless needs require this.

5.4 Practical advice on use of trusts in asset protection

5.4.1 Use pre-nuptial agreements.

Please see Marc Saunderson's notes. If these are fair the courts are unlikely to depart from them. They can provide more certainty (and as a result can produce legal costs in the event of divorce, can be very effective in short marriage cases and can include other provisions such as non publicity etc. something the McCartney's might have found useful!). The pre-nuptial agreement can contain agreement as to what assets are brought to the marriage by each party and that these assets should not be regarded as matrimonial property – this can be important from an evidential point of view.

5.4.2 Set up a non nuptial trust.

The trust cannot be set aside in court, but may be regarded as a notional asset of the beneficiary spouse and so increase the order made against him (but only if the funds are regarded as matrimonial property). If it is made by a party to the marriage then for it to be non nuptial trust, it will need to be set up before the marriage and, better still prior to the relationship being entered into. This idea is more likely to occur to individuals who have previously been married. If it is made by a parent avoid having the child's spouse as a beneficiary of the trust.

5.4.3 Avoid assets becoming matrimonial property. These assets must be kept separate from the matrimonial property. As regards gifts and inheritances from parents the best way to do this is via a formal trust or a bare trust. The choice may be determined by taxation considerations.

5.4.4 Have a statement by the settlor of the trust as how he would like the funds to be used. This may help indicate that the trust funds are not matrimonial property and also that it is not a nuptial trust.

5.4.5 Use of loans rather than gifts if appropriate.

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