
Q: Should Trustees Consider Divorce Proofing Your Family's Offshore Trust Either via a Pre-Nuptial or Post Nuptial Agreement. What Risks Do They Face If Assets Are Mingled?

In general, successful families or entrepreneurs are encouraged by their IFA's or Private Wealth advisers to be tax efficient; to protect assets and consider how to preserve your estate in the event of death, with sensible succession/estate planning. Yet how often are such arrangements put under pressure or challenged by the family courts in this jurisdiction.

Since the decision of the House of Lords in *Miller, McFarlane* (2006), the court consider 'needs, compensation and sharing'. The concept of sharing reflects marriage being a partnership of equals with each spouse being "*entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary*"; the court should embark on a process of "*sharing the fruits of the matrimonial partnership*", whilst the assets which are not classed as matrimonial are not usually shared.

The trick is to correctly categorise or determine what is matrimonial and what is non matrimonial.

Various definitions have been applied by the family courts over the years. More recently in *Hart v Hart* (2017) the distinction was made between "*assets (or part of the value of an asset) which are not the financial product of or generated by the parties endeavours during the marriage*".

An alternative way of defining an asset as "non-matrimonial" is to consider the way the parties themselves treat the asset. By way of example, in *K v L* (2011) £290,000 of shares in 1986; worth £57m by 2010 were determined by the court to be "non-matrimonial" and not open to be shared, as the parties of the marriage had lived very modestly (small house, children attended state school). So, the husband's claim as the non-asset holder was defined by need alone, as there was no reliance during the marriage on the non-matrimonial assets.

Once The Asset Has Been Defined As Non-Matrimonial, What Happens Next?

The answer to this question is it depends on who is being asked. In other words, the senior judiciary in the family courts are applying differing approaches known as the Mostyn Approach and the Moylan Approach.

The Mostyn Approach and The Impact Of Mingling

The Mostyn Approach and the impact of mingling was highlighted in *JL v SL (no2)*(2015) which states that broadly speaking, non-matrimonial property, whether acquired before marriage or post separation is not open to be shared. The family courts can only make an Order again on-matrimonial property in order to meet or satisfy needs.

Need is often being defined by the general public as being the minimum amount required to keep a spouse from destitution. However, in the family court scenario, need is defined by s.25 (2)(c) and equates to the standard of living enjoyed by the parties pre divorce.

When dealing with pre-existing assets which existed at the date of the marriage, Mostyn J also considers that the extent to which the pre-existing assets have been mingled as being key to characterising them as non-matrimonial.

In other words, the question of duration and mingling must be taken into account, in determining whether pre-marital; whilst the remaining matrimonial pot should usually be divided equally.

Post Separation

A further distinction is made regarding assets acquired after separation. Generally, growth on pre-existing assets remains matrimonial property. However, the increase in value achieved in the period of separation may be divided unequally. Passive growth is also generally shared equally.

If however post separation accrual relates to a truly new venture, with no connection to the marital partnership then post separation accrual should be classed as non-matrimonial.

The Moylan Approach

In *Hart v Hart* (2017) Moylan LJ reminded Mostyn J of the principles set out by the Higher Court in *Charman* (2007) and *Miller and McFarlane* 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 to the case.

In other words, the Judge will give to the contribution made by one party’s non-matrimonial property the weight he considers just.

Moylan LJ indicated that it may be necessary in the right type of case, for a fact-finding exercise to determine which property is non-matrimonial.

Moylan LJ talks of ‘active’ case management to control this process.

In reality we seem to be back in the remit of judicial discretion, deciding this important issue – which may be less than satisfactory.

Pre Marital Checklist

Checklist To Be Applied When Advising Client's Prior to Marriage

Before setting up an Offshore Trust

- Actively encourage the professional Trustees to promote beneficiaries or classes of beneficiaries to consider seeking expert advice in relation to the preparation of a Pre-Nuptial/Marital Agreement.
- Stress the importance of avoiding/mingling pre-marital/pre-existing assets.
- Advise that using or accessing pre-existing assets should be limited to needs to avoid falling foul of mingling issues.
- Avoid informal emails/records of this (e.g. *"I'm moving some cash into the joint account"*) which simply meet cash flow issues.
- Ensuring that assets are in the name of one party may represent a more important distinction than previously in family cases. It can no longer be assumed that it goes into the matrimonial pot.
- Remember that 'discretionary trust' can be moved by the family courts as a financial resource. Such as in Charman: *"whether, if the husband were to request it to advance the whole (or part) of the capital of the trust to him, the Trustees would be likely to do so."*
- Certain types of disposition can be identified reasonably easily.
- Typical questions that Trustees face are:
 - What information should I disclose and to whom?
 - Should I submit to the jurisdiction of the foreign court?
 - What orders made by the foreign court are enforceable in my home jurisdiction?
- Remember the focus of the Family Courts in England and Wales is on 'justice' between spouses with no mandate to consider the interest of the other beneficiaries in the class of trust beneficiaries; (whilst it is the Trustees job to protect the beneficiary class as a whole).
- Remember that Trusts can be varied (as in Mubank v M (2008) HRC 136), if agreed by all the adult beneficiaries.

Post Separation Checklist

If advising a client following separation:

- Remember that a distinction may be made between matrimonial and non-matrimonial assets are still relevant but arguably less important.
- Whether there should be a fact finding exercise will depend on the nature of the asset and whether there has been mingling.

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