PUMP COURT

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Matrimonial Update in the context of 1975 Act claims

J. Andrew Grime

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Need for a valid/void marriage

- For an applicant to qualify as a spouse under s.1(1)(a), there MUST have been a valid marriage or at least a void marriage (See s.25(4) The Act 1975.
- **Attorney General v. Akhter and ors [2020] EWCA Civ 122, [2020] 2 WLR 1183, [2020] 2 FLR 139.**
- Couple entered into a religious marriage (Nikah) at a restaurant in London in 1998 and it was their intention to include a civil ceremony but this did not take place as one of them refused to enter into a civil ceremony. They subsequently lived together, had children and held themselves out to be husband and wife for a period of 18 years.

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Need for a valid/void marriage

- Williams J [2018] EWFC 54 granted a decree of nullity on the facts of this case finding that it was a void marriage because:
- (a) although the couple knew the nikah was not effective to be married in law, it was part of a process intended to include a civil ceremony, that process was not concluded due to the subsequent refusal of one party to enter into such a ceremony;
- (b) although law clear that nikah by itself was a non-qualifying ceremony and not a void marriage, the effect of Articles 8 and 12 of ECHR, allowed him to take a more flexible approach to the court's ability to grant a decree of nullity especially when taking account of the right to family life, the '*horizontal effect*' of the right to marriage and the best interests of any child
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Need for a valid/void marriage

- pursuant to Article 3 of the UN Convention on the Rights of the Child.
- The Attorney General appealed and the Court of Appeal allowed the appeal in light of the following:
- (a) it confirmed that the concept of a '*non-marriage*' or non-qualifying ceremony was part of the law, and rejected submissions that it should be discarded;
- (b) the ceremony in the instant case, held in a restaurant which was not approved premises, in the absence of authorised persons, not preceded by giving of notice of marriage, was a non-qualifying ceremony. The intention for it to have been followed by a civil ceremony was immaterial.

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- (c) Article 1 to the First Protocol of ECHR did not require a different conclusion.
- (d) Williams J had been wrong to place reliance on the '*horizontal effect*' of the right to marry under Article 12. Article 12 was not engaged as there is no right to divorce under Article 8 and there can be no right to nullity under Article 12.
- (e) There was no breach of Article 8 as the European Court of Human Rights has confirmed that a refusal to recognise a religious marriage was a valid marriage did not amount to a breach of Article 8
- (f) an action for nullity was not an action concerning children.

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Matrimonial and Non-Matrimonial Property

- **WX v. HX (Treatment of Matrimonial and Non-Matrimonial Property) [2021] EWHC 14 (Fam)**
- This decision provides an up-to date summary of the law on matrimonial and non-matrimonial property, including all the key authorities. H (66) & W (60) married for 33 years and had four children of whom one had dies when very young and three were now adults. W played a full role as mother and homemaker. H extremely successful banker and financial investment manager who made a very significant contribution to the marriage in terms of wealth creation. He used his non-domiciled UK residence to make tax efficient arrangements for the management of the family's wealth, including offshore trusts. Total asset pool found to be circa £55m.
- Homes in London and Oxfordshire worth over £13m and £10m respectively.
- Primary beneficiaries of the offshore trusts were the children and grandchildren; the two daughters were joined as intervenors in the proceedings. One of the trusts owned the Oxfordshire property in which H resided under a life interest.
- W had inherited wealth of £14m which H had managed on her behalf; she wished to retain this intact.

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Matrimonial and Non-Matrimonial Property

- *'[113] It seems to me that the following principles can be derived from the authorities which have been placed before the court:*
- *(i)The fact that property or assets owned by a party derive from a source outside the marriage (such as inheritance or pre-acquired wealth) does not per se lead to its exclusion altogether from the court's consideration of a fair outcome to both parties. Insofar as it represents a contribution by one of the parties to the welfare of the family, it is a factor which the judge should take into account: per Lord Nicholls in White v. White (above).*
- *(ii) the overarching principle which supports fairness to both parties is that of 'non-discrimination'. The court will treat the contributions made by each of the parties to the marriage as having broadly equivalent value even though they be different in kind: Miller v. Miller; McFarlane v. McFarlane;*
- *(iii) Each case has to be considered on its own facts and the court's assessment of fairness in that particular case. The judge must consider whether the existence of such property should be reflected in outcome at all. This will depend on the extent to which it has been 'mingled' with matrimonial property and the length of time over which that 'mingling' has taken lace: per Mostyn J in N v. F (Financial Orders: Pre-acquired wealth). In other words, the way in which such property has been*

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Matrimonial and Non-Matrimonial Property

- *Used over the course of the marriage has the potential to affect whether it remains 'separate' property: Miller/McFarlane (above) at para [25]. There may be cases where, over the course of a long marriage, the importance of the source of a significant element of one party's wealth, or even the entire wealth, has been maintained through ring-fencing in one party's name, kept safely and left to grow in value: K v. L (above) at para [17] per Wilson LJ.*
- *(iv) Assets or property which are matrimonial in character will be captured by the 'sharing principle' and divided equally between the parties. Matrimonial property is now recognised as being property which is the product of, or reflective of, marital endeavour or 'generated during the marriage otherwise that by external donation'…*
- *(v) the application of the sharing principle impacts, only on the division of marital property an not on non-matrimonial property…*
- *(vi) The application of the sharing principle will not always lead to an arithmetically equal division of the marital wealth. In appropriate circumstances factors such as risk and liquidity may impact the means by which sharing is achieved: XW v. XH (above) at para [136].*

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Matrimonial and Non-Matrimonial Property

- *[114] In S v. AG [2011] EWHC 2637 (Fam), [2011] 3 FCR 523 Mostyn J said this in para [7]:-*
- *"Therefore, the law is now reasonably clear. In the application of the sharing principle (as opposed to the needs principle) matrimonial property will normally be divided equally (see para 14(iii) of my judgment in N v. F). By contrast, it will be a rare case where the sharing principle will lead to any distribution to the claimant of non-matrimonial property. Of course an award from non-matrimonial property to meet needs is commonplace, but as Wilson LJ has pointed out we await the first decision where the sharing principle has led to an award from non-matrimonial property in excess of needs".*
- *[115] In JL v. SL (No.2)(Appeal: Non-Matrimonial Property) [2015] EWHC 360 (Fam), [2015] 2 FLR 1202, his Lordship emphasised the very limited circumstances in which non-matrimonial property will be invaded unless to meet needs. At para [22], he said this:*
- *"Given that a claim to share non-matrimonial property (as opposed to having a sum awarded from it to meet needs) would have no moral or principled foundation it is hard to envisage a case where such an award would be made. If you like, such a case would be as rare as a white leopard."*

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Matrimonial and Non-Matrimonial Property

- *[116] Finally, in terms of the factual question which a court will need to determine in cases where there is an issue relating to whether or not non-matrimonial property has been 'mixed', 'merged' or 'mingled' with matrimonial property, the court will need to consider whether the 'contributor' has accepted that this or her property should be treated as matrimonial property. This element of 'merger' flows from para 18 of Wilson LJ's judgment in K v. L (above) in which he posed three separate situations:-*
- *(a) Over time matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property.*
- *(b) Over time the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult.*
- *(c) The contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home which, although vested in his or her sole name has – as in most cases one would expect – come over time to be treated by the parties as a central item of matrimonial property.'*

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Matrimonial and Non-Matrimonial Property

- H argued that W's non-matrimonial property, inherited during the marriage and was subject to a trust '*W is the income beneficiary during her life an there is also a power in the trustees to advance capital*', had been subjected to 'matrimonialisation' as a result of his significant contribution above and beyond his role as family breadwinner, by dint of his management of her investment portfolio for in excess of 16 years.
- Roberts J rejected H's argument and held that W's non-matrimonial property had throughout the marriage been preserved as her own separate property and had not acquired matrimonial character, either in whole or part.
- Useful commentary in respect of NEEDS: when referring to S v. AG (supra) where there is a claim by one party that some of the assets are ring fence, firstly we have to ascertain what the parties respective needs are and if they can be satisfied from the undisputed matrimonial assets in a case. If the answer to that question is yes, it is then necessary to look at whether it is worthwhile seeking to contest the claimed ring fenced money, focusing on the individual facts of the case.

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Needs/Third Party Resources/Valuation/Costs

M v. M (Financial Remedies) [2020] EWFC 41 – Mr Robert Peel QC (sitting as a Deputy High Court Judge, 6 May 2020.

- W(50) and H (53. 22 year marriage with 3 children aged 21, 19 and 14 who lived with W in FMH since separation in 2018.
- W had 24% shareholding in two companies founded her parents: A Ltd and B Ltd. W was director of A Ltd and had held various roles therein over a number of years fitting around her childcare commitments. Her current income was £36,500pa plus health insurance of £877pa. W had been neither a director nor employed by B Ltd. She was effectively a sleeping partner in both businesses with no involvement in strategic or operational decisions.
- H had changed careers from the finance sector to become MD of B Ltd. He resigned in 2018 when the marriage broke down, whereupon a dispute arose relating to his conduct whilst MD. In December 2018 he was arrested after a complaint was made by B Ltd about alleged financial misfeasance, however, he was never charged. H was working for a hearing and plumbing company on £32,000pa.
- During initial separation W considered buying out H's share in FMH with financial assistance from her brother.

PUMP COURT CHAMBERS

Needs/Third Party Resources/Valuation/Costs

This was a highly acrimonious case with fractured relations between H and the children. The Judge described the proceedings as '***ruinous and recriminatory***'.

- 13 oral hearings, including 2 FDR's and an aborted 5 day trial, and 4 applications by H for permission to appeal disposed of on paper at High Court and Court of Appeal level.
- Combined legal costs of **£594,000**.
- The only liquid asset was proceeds of sale of FMH of **£630,000**, from which **£33,000** was due to W's brother. Net proceeds all but offset by parties debts and accordingly the liquid wealth was 'virtually nil'.
- Principal liquid assets were the parties pension provisions and W's minority shareholdings.
- Valuation of companies: H assert companies worth £10m. His application for valuation refused at FDA on basis that assets were non-marital and illiquid. Permission to appeal refused on paper. Further application at FDR again unsuccessful, however, at further case management hearing one month before trial SJE was ordered.
- '*In hindsight SJE valuer should have been directed [at an earlier stage]. Parties were £2m apart on value. Liquidity in issue and even if non-marital (which was an issue) then illiquid capital still a resource to take into account; it is hard to see how the case could have been fairly determined without this evidence*'

PUMP COURT CHAMBERS

Needs/Third Party Resources/Valuation/Costs

- CONDUCT: W filed s.25 statement incl wide ranging allegations of conduct against H but CMO recorded that she only sought to rely on those in relation to misappropriation of monies belonging to the children. H ordered to file respond to allegations in his s.25 statement BUT he also continued to assert substantial value of W interests in company assets.
- At trial H argued W business interests were wholly or partly matrimonial and should be reflected in sharing principle. W denied this but that if correct she should be entitled to rely upon H's misconduct whilst MD of B Ltd. W did NOT plead as conduct under s.25(2)(g) but argued his actions should be considered as one of general factors. J ordered further enquiries into H's misconduct on final day of trial. H sought permission to appeal and invited J to recuse himself. Both refused.
- H's appeal allowed by Moor J:
- No place for conduct to feature merely as one of general circumstances; and
- If conduct pursued then this **MUST** be specifically pleaded with each party dealing with it in a narrative statement.
- Further FDR before Cohen J directed and thereafter further Final hearing before Robert Peel QC.

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Needs/Third Party Resources/Valuation/Costs

- HELD: Ordering on a clean break basis, from net proceeds of FMH, W receive £220,000 and H £377,000 (not to be paid to him until the grant of a Get). H ordered to pay £15,000 towards W's costs to be set against similar sum made against W in the appeal proceedings. No minority discount applied to W's shares as bore all hallmarks of quasi-partnership (See G v. G [2002] 2 FLR 1143).
- **Thomas v. Thomas [1995] 2 FLR 668** order would not be made to judiciously encourage W's family to enable her to extract funds from business interests. No evidence family wished to do so and any past assistance had been provided from personal resources as opposed to from the businesses.
- How do we deal with wider family resources?
- (i) Where a party has an interest together with other family members, the court may frame its order to judiciously encourage other family members to assist in the extraction of assets but should not cross the boundary of improper pressure in so doing (See Thomas v. Thomas (supra));
- (ii) Where wider family are gratuitous donors and are willing to make funds available by gift or loan. Party than has no legal or beneficial interest but merely an act of generosity.
- Clear evidence W's family would assist her financially by securing mortgage.

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Needs/Third Party Resources/Valuation/Costs

- The court was entitled to take account of the willingness of family members to make funds available by gift or loan, even though there is no legal obligation to do so (See Luckwell v. Limata [2014] EWHC 502 (Fam). [2014] 2 FLR 168).
- The court's function is to distribute the parties' resources, not the resources of the wider families (See Alireza v. Radwan and Others [2017] EWCA Civ 1545, [2018] 1 FLR 1333).
- How is this to be assessed? Need to show to the requisite standard of proof that wider family are LIKELY to provide support and thus represent a resource available to the party. Considerations include:-
- (i) have financial resources been provided previously? Amount? Over what period(s)? Is there any pattern to any such resources being made available?
- (ii) The Court can take account of any offers made since parties separation which include in whole or in part a resource(s) provided by wider family members.
- (iii) Wider family offers of ad hoc assistance to assist parties during proceedings (incl support for legal fees) have limited evidential value;
- (iv) In the absence of a record of historic payments and/or reliable representations as to future grants of resources, court may find it difficult to satisfy this.

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Needs/Third Party Resources/Valuation/Costs

- NEEDS: Parties accepted their respective incomes would have to enough to meet their needs. Most pressing need was housing. For their security, and consistent with their status as home-owners during their lives together, purchased accommodation had to be striven for.
- Although not an iron rule (see Piglowski v. Piglowski [1999] 2 FLR 763), the dicta in M v. B (Ancillary Proceedings: lump sum)[1998] 1 FLR 53 applied self evidently in the majority of cases and certainly this one. Piglowski was referred to as '*A useful guideline…but to cite the case as if it laid down some rule that both spouses invariably have the right to purchased accommodation is a misuse of the authority*'.
- H's need was for 2 bed property of £250,000. W's need £375,000.00
- Net effect: after payments of debts H left with £5,423 and W with £5,368.
- H could realise tax free lump sum from pension of £125,000 in one year plus mortgage capacity. W had mortgage capacity of£132,000 plus family assistance.
- '*This self-defeating litigation is now over. It is scarcely credible that at the end of it all, they emerge with about £5,000 each of liquid assets, having incurred nearly £600,000 in costs, but such is the reality. There may be worse examples of disproportionate and ill-judged litigation, but none spring to mind readily*'.

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Conduct

OG v. AG (Financial Remedies: Conduct)[2020] EWFC 52

- H(53) and W(51). Two children aged 25 and 10 years. Parties married in 1994, separated in 2017 and divorced in 2019. Assets circa £16m. Case concerned the value of the party's business post Brexit an the potential competitor business discount, H having set up a rival company. W pleaded fraudulent conduct by H as well as his withholding of information in respect of overseas property and sabotage of the former joint business interests.
- Mostyn J identifies four distinct categories where conduct may feature in a Financial Remedies case:-
- (i) *'First there is **gross and obvious personal misconduct** meted out by one party against the other normally, but not necessarily during the marriage'*: ONLY feature in rare circumstances and where '*the authorities clearly indicate that such conduct would only be reflected where there is a financial consequence to the impact*.' May extend to economic misconduct (eg. economic oppression for malicious or selfish reasons '*provided the high standard of 'inequitable to disregard' is met, it may be reflected in the substantive award*.'
- (ii) The '**add back**' jurisdiction. 'This arises where one party has wantonly and

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Conduct

and recklessly dissipated assets which would otherwise have formed part of the divisible matrimonial property'. ONLY applies in exceptional cases where dissipation is clear and obvious. An additional hurdle where advocating for an 'add-back' is that the dissipation might well be demonstrably excessive and wasteful, but UNLESS deliberate may not qualify under this head. The test needs to be shown as 'demonstrably wanton' (see MAP v. MFP [2015] EWHC 627(Fam), [2016] 1 FLR 70, Moor J);

- (iii) **Litigation Misconduct**: *'where proved, this should be severely penalised in costs. However, it is very difficult to conceive of any circumstances where litigation conduct should affect the substantive disposition'(See OG v. AG (supra, para [38])'*
- *(*iv) **Judicial Inferences** *'[39] drawing inferences to the existence of assets from a party's conduct in failing to give full and frank disclosure. The taking into account of such conduct is part of the process of commutation rather than distribution.'* Mostyn J refers to Moher v. Moher [2019] EWCA Civ 1482, [2020] 1 FLR 225 where Moylan J confirms that whilst the court should strive to identify the scale of any undisclosed assets it is not obliged to pluck a figure from the air. A court should be able to approximate scale of non-disclosed assets when compute quantum and applying the sharing principle.

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Modest Asset case

- **ND v. GD (Financial Remedies)[2021] EWFC 53**
- W(54) and H(59). Two children aged 22 and 21, both at University and spent holidays with W. 23 year marriage. Modest combined annual income no exceeding £50,000. H worked in construction but on inheriting a property portfolio from his mother 5 years before separation, he worked freelance and part-time. W had held various jobs until her diagnosis with Young Onset Alzheimers shortly after separation. Her condition would deteriorate over time and sadly she would have a reduced life expectancy.
- Total assets £2.6m, incl FMH, a cottage bought by H but lived in by W and his property portfolio, reduced by H's outstanding substantial tax liability arising from his mother's estate.
- Proceedings protracted. Trail bundle almost 1,500pgs (incl SJE financial adviser report of 450pgs). W sought assets of £1.2m an H proposed £950,000.00
- This case is a very useful example of the careful conduct of the balancing exercise in the context of modest assets and an unusual combination of magnetic factors. In particular:-
- (a) Length of marriage, some 23 years;
- (b) The undoubted fact that the majority of the assets were non-marital in origin;
- (c) W's diagnosis with YOA with its significant effect upon her life expectancy and medical needs during her remaining years.

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Modest Asset case

- Peel J held that this was not a sharing case as the bulk of the assets originated from H's other's wealth and this inheritance had not been substantially mingled in the family economy.
- W's claim comfortably exceeded any notional sharing claim. When capitalising income needs, there has to be a very good reason to go down a route different from Duxbury, which is a tool and not a rule and from which the court has the flexibility to depart to the extent that necessary to achieve fairness in any given case.
- W had no earning capacity. Annual income from an income protection plan and State benefits was £11,803. W's likely life expectancy was 5 to 10 years. It was reasonable to accede to W's wish to live independently, with appropriate supporting care, in a family home where children could stay. Housing fund of £650,000 reasonable. Doing the best with available evidence, J found W needed and income fund of £300,000. Together with her other sources of income, this would produce £79,519pa for 5 yrs or £46,008pa for 10 years. A reasonable balance
- NB: Judge found instruction of SJE financial advisor of negligible value to the court. H had not negotiated openly in a reasonable manner and risked a penalty in costs for FH (see OG v. AG (supra)). Escaped costs as award met W needs after her costs.

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Valuation of private companies and Liquidity

- **G v. T [2020] EWHC 1613 per Mr Nicholas Cusworth QC sitting as a Deputy High Court Judge.**
- H and W both aged 45. Married in 2000 and separated in 2017. two children aged 8 and 3 who continued to live with W in FMH. W had been employed in financial services sector but left formal employment on the birth of the first child. H was founder member and largest single shareholder (33.3%) in B Ltd.
- W's costs £813,000 and H's £698,000.
- B Ltd had two forms of business: (i) proprietary trading (EE's traded in markets and made profits/losses) and market making (where business acted as middle man to facilitate trades). It had no underlying income stream and was reliant upon profits made by traders to cover losses. Substantial bonuses were paid to the traders in order to retain them. H's gross annual income ranged from £411,000 to £5m over previous five years.
- SJE used a net asset valuation (NAV) which was criticised by W's '*shadow*' accountant. NAV reflects historical profitability but it is questionable whether it truly reflects profits generated by a successful business, especially as here, the H intended to continue to operate the company and increase its equity.

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Valuation of Private Companies and Liquidity

- H argued business nothing more that a '*pile of cash*' and that no one was going to pay more for a pile of cash than its simple value. It was agreed that the shares were matrimonial in character up to separation in October 2017 and it was H's case that this should be the date of valuation. W argued for valuation as at October 2019. Between October 2017 and June 2018, profitability for business added £10m to value of H's shares. Non-business assets worth £4.3m. It was agreed that application of the sharing principle would meet W's needs.
- The Judge reviewed recent authorities on the approach to valuation of private company where no evidence that it was to be sold including:
- H v. H [2008] EWHC 935 (Fam), [2008] 2 FLR 2092;
- Versteegh v. Versteegh [2018] EWCA Civ 1050, [2018] 1 FLR 1417;]
- Martin v. Martin [2018] EWCA Civ 2866, [2019] 2 FLR 291
- M v. M [2020] EWFC 41 (supra)
- Judge recognised that (i) such valuations are difficult and fragile, (ii) There is no obvious market for a private company, (iii) valuers produce widely differing results, (iv) a snap valuation may give an unfair picture and, (v) the acid test of exposure to real market is simply no possible where a sale is not proposed.

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Valuation of Private Companies and Liquidity

- The valuation of the shareholding and the structure of the award are interconnected, so that the sharing principle effects a fair balance of risk and illiquidity between the parties.
- The weight to be placed on a valuation is not a mathematical exercise but a broad evaluative exercise, all about weight and balance.
- In this instant case there was only one SJE valuation before their methodology and valuations were the safest and most reliable available to the court.
- Valuation date: The court has to determine whether the assets comprise the product of marital endeavour. The court is NOT required to adopt a formulaic approach. The concept of property being either matrimonial or non-matrimonial property is a legal construct which is not always capable of clear identification/ The exercise is more of an art than a science. The court must consider continuum versus new ventures (see Cooper-Hohn v. Hohn [2014] EWHC 4122 (Fam), [2015] 1 FLR 745
- In instant case H not shown that the post-separation accrual related to a 'truly new venture' in period up to June 2018, nor that the venture has no connection to the assets of the partnership.

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Valuation of Private Companies and Liquidity

- Balance of fairness led to fixing the value of W's equal interest in the H's shareholding at June 2018. The recovery from 2018 and any progress or otherwise from that point were properly beyond what might be classed as marital endeavour.
- **RESULT**: Total matrimonial assets (incl valuation of shareholdings as at June 2018) of circa £40m. W to receive £20m of which £16.8m paid by way of series of lump sums over a four year period.
- W's award represented just over 45% of the total asset base taking the NAV for B Ltd as at June 2019, which fairly represented a departure from equality as a result of H's efforts since June 2018.

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The Impact of Death

- **Hasan v. Ul-Hasan [2021] EWHC 1791 (Fam) per Mostyn J**
- Parties married in Pakistan in 1981, separated in 2006 and H obtained a divorce in Pakistan in 2012. In 2017, W had been granted permission to bring proceedings under Part III of the Matrimonial and Family Proceedings Act 1984 (MFPA84). H died in 2021.The issue for the judge was whether W's unadjudicated claim under Part III survived H's death.
- Mostyn found that there was no specific authority dealing with Part III claims but that he was bound by the authorities in respect of claims under Part II of the Matrimonial Causes Act 1973. However, he considered that these earlier authorities including Sugden v. Sugden [1957] P120 were WRONG, and a post divorce financial remedy claim was not a mere hope that a discretion will be exercised in favour of an applicant, but a cause of action capable of being pursued against the estate pursuant to s.1 of the 1934 Act.
- Mostyn J dismissed W's application, but granted permission for a leapfrog appeal to the Supreme Court as there was a point of law of general public importance involved.
- **WATCH THIS SPACE!**