Standish in the Supreme Court – what we now know … and what we don't

In 2017, towards the end of their long marriage Mr Standish transferred to Mrs Standish £80m of his personal assets, most of which he owned at the time of their marriage in 2004. He made that transfer on the basis of tax advice and on the clear understanding that Mrs Standish who had non domiciled status, would thereafter transfer those assets into trusts for their two children to save UK inheritance tax that would otherwise have been payable on his death. Importantly the trusts that were to be created for the parties' two children excluded Mrs Standish (and possibly Mr Standish) as a beneficiary.

Mrs Standish never put those assets into the trusts as her husband intended. By early 2020 the marriage had broken down and the Standish case began its journey through the courts. The case focused on the scope of the sharing principle and the central issue was whether the £80m of assets that Mrs Standish now held, but which were in the main non-matrimonial in origin, had been 'matrimonialised' by reason of their being transferred into Mrs Standish's name in the circumstances described.

Mr Justice Moor held that by reason of the 2017 transfer, the non-matrimonial assets had indeed been 'matrimonialised' and were therefore to be shared. Mrs Standish was entitled to 50% of them under the 'sharing principle', the 2017 transfer being the decisive factor.

Somewhat surprisingly it seems that Mrs Standish was not content with a 50% share in the bulk of the £80m of transferred assets and she appealed to the Court of Appeal claiming she should not have had to share them *at all*, arguing that, because they had been transferred to her, and because her subsequent legal and beneficial interest in them was critical, this meant that Mr Standish's sharing claims had been lost. In effect she argued on appeal that from the date of the "gift" from her husband those assets became her non-matrimonial assets, and she was entitled to ring fence from the sharing exercise. Unsurprisingly Mr Standish then cross-appealed, a wise decision as it turns out.

In what must have been a crushing disappointment to Mrs Standish (and indeed her legal team) her appeal was dismissed by the Court of Appeal and Mr Standish's appeal was allowed. The Court of Appeal found that the assets retained their non-matrimonial character notwithstanding the 2017 transfer and, for that reason, Mrs Standish was *not* entitled to share in them. The concept of 'matrimonialisation' was, Moylan LJ explained, a valid concept which should continue to be applied but was one that should only be applied "narrowly" .

Mrs Standish appealed to the Supreme Court with a view to restoring her fortunes. All those practicing in the financial remedies industry looked forward to the Supreme Court providing much-needed clarity as to what does and does-not constitute "matrimonialisation', so examples of when that concept will apply and when it will not, and what constitutes 'mingling;' for the purposes of the second Wilson LJ's well known three examples of 'matrimonialisation' set out in his judgment in *K v L*, i.e.

> *"Thus, with respect to Lady Hale, I believe that the true proposition is that the importance of the source of the assets may diminish over time. Three situations come to mind:*

> *(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."* (emphasis in bold added)

The judgment has now arrived. It is, in the authors' view, more limited than we had hoped and, disappointingly, does not provide the clarity so badly needed as to the scope of the 'matrimonialisation' process. Perhaps this was a result of the absence of an out-of-out family lawyer in the current Supreme Court?

The Supreme Court's decision

Mrs Standish suffered yet another huge disappointment. Her appeal was unanimously dismissed. When considering how, if at all, 'matrimonialisation' applied in relation to the 2017 Assets, the Justices held that the £80m transferred to her retained their largely non-matrimonial character and confirmed that she was not entitled a share in them. Standing back this perhaps appears a logical and fair decision on the facts of this case, particularly as Mrs Standish was intended to be a mere conduit for the transfer of the assets to the children in a tax efficient way.

However over the course of their single joint judgment Lords Burrows and Stephens managed to shed very little light on the scope of matrimonialisation' or the circumstances that will need to apply for this concept to move the sharing 'dial'.

The core decisions in the Supreme Court can be summarized as follows:

1. One has to look beyond legal title and to the matrimonial quality of an assets:
   "to base an award on title would run counter to the discrimination and sharing principles" (para 48).]
2. '*Matrimonialisation*' is acknowledged to be a clumsy word, but the court considered that it is a useful one to describe the process by which non-matrimonial assets can lose their non-matrimonial quality, become matrimonial property and so be subject to sharing claims on divorce. The key question is whether that "transformation has occurred". (para 51)

3. The court concluded that Moylan LJ in the Court of Appeal was wrong to suggest that the concept of matrimonialisation should only be applied 'narrowly'. The concept was *"neither narrow nor wide"*.

   > *"We disagree …. . As we have said at para 52 above, Wilson LJ's three situations were not expressed to be exclusive and it is inaccurate to regard*

> *matrimonialisation as narrow, just as it would be inaccurate to regard it as wide. It is neither. What it is important to consider is how the parties have been dealing with the asset and whether this shows that, over time, they have been treating the asset as shared between them." (para 60)*

4. It appears that we can all now stop looking for that elusive 'white leopard' case, i.e. the case where a party is found to be entitled to 'share' in 'non-matrimonial' assets. There can be no such case because, as their Lordships explained, , the sharing principle only applies to matrimonial property and does not apply to non-matrimonial property:

   "the sharing principle only applies to matrimonial property and does not apply to non-matrimonial property." (para 49).

5. Matrimonial property should generally be shared "equally" rather than unequally, because *"equal sharing is the appropriate and principled starting position."* [para 50]

Standing back in *Standish* however, apart from the criticism of Moylan LJ's proposed 'narrow' approach, the Supreme Court decision has, in the authors' view, told us very little that was not already well known. Having explained that the concept of matrimonialisation is 'neither narrow nor wide' what does that 'non-narrow / non-wide' concept look like in practice and how and when does it operate?

We have not been told.

Guidance on when and how Matrimonialisation applies

The closest the judgment gets to explaining the concept is to approve a passage from Duckworth "Matrimonial Property and Finance".

> *"a better view may be that matrimonial property is not something that is predetermined at the outset of a marriage, but is governed by the parties' intentions and how they treat the relevant asset over a period of time. Thus where a party has demonstrated an intention to use an inheritance for the benefit of the family, by translating it into actual use and enjoyment, the parties have elected to treat it as matrimonial property, even if its origin was from outside the marriage."*

Tax-Savings Schemes between spouses

In relation to tax-savings schemes entered into between spouses the judgment explains that of itself this will not generally 'matrimonialize' the assets being transferred[1].

> *In relation to a scheme designed to save tax, under which one spouse transfers an asset to the other spouse, the parties' dealings with the asset, irrespective of the time period involved, do not normally show that the asset is being treated as shared between them.*

[1] In reaching this conclusion the SC decision seems to accept Mostyn J's conclusions on this topic *in JL v SL (No 2)*

> *Rather the intention is simply to save tax.* ***Tax planning schemes to save income tax, involving transfers of assets from one spouse to another, are commonplace given that there is no capital transfer tax on transfers between spouses. However, transfers of capital assets with the intention of saving tax, do not, without some further compelling evidence, establish that the parties are treating the capital asset as shared between them.*** (emphasis bold and underlined added)

What would that other 'compelling evidence' need to be for a tax saving scheme to cross the line and for the assets transferred to become 'matrimonialised'? Again we are not told.

The Key Components of Matrimonialisation

What appear to be the core ingredients for there to be effective 'matrimonialisation' appears to be:

1. The parties' *intentions* are important,
2. *How* the parties *treat* the asset in question is crucial, and
3. The process seems not to be instant as the process happens *"over time"*.

In the Standish decision itself what was important was that:

1. The transfer was made by Mr Standish to Mrs Standish in order to save tax, and not to benefit the family as a whole or, importantly, Mrs Standish.
2. Considerable weight attached to the fact that the trusts that were intended to be established could not benefit Mrs Standish as she was not to be a beneficiary and were intended solely to benefit their children. Her role therefore was to hold them until such time as they went into the offshore trust.

The position was summarized thus:

> *In short, there was no matrimonialisation of the 2017 Assets because, first, the transfer was to save tax and, secondly, it was for the benefit of the children not the wife. The 2017 Assets were not, therefore, being treated by the husband and wife for any period of time as an asset that was shared between them.* [para 61]

The Impact of the Decision Going Forward

It does seem that only the most skeletal guidance has been provided and, as a consequence, most of the 'heavy lifting' will now fall to the Court of Appeal and Family Division judges to explain what the *Standish* decision really means in practice. In those scenarios we often see in practice, the judgment offers no clear answers.

1. Spouse A holds his / her solely owned pre-marital property but uses the rental income to supplement the day-to-day income needs of him/herself *and* spouse B over a short 3-year marriage.
    a. Has the property been matrimonialised?
    b. If so, in whole or in part?

c. Would the outcome be different if the rental income was used in this way over a 20-year marriage?
d. If the rental income was only used for school fees and not for the direct benefit of A and B how much of a difference would that make?
e. What about if it was largely used for school fees but also for the occasional family holiday?

Or.

2. Spouse B transfers his/her pre-marital property into the sole name of Spouse A to take advantage of Spouse B's lower marginal income tax rate for the rental income.
    a. Has the property been matrimonialised immediately following the transfer?
    b. If not, how long will it be until it has been matrimonialised?
    c. What difference will it make a difference if the rental income is used for:
        i. The spouses' own lifestyle needs, or
        ii. Their children's school fees?

The list of unanswered questions goes on.

The *Standish* decision has confirmed that 'matrimonialisation' is alive and kicking, and in making that clear many practitioners will nod in approval and feel that this core decision feels fair. But how and when matrimonialisation will apply has been left unanswered and that uncertainty will continue to make 'mingling' cases hard to settle until the Court of Appeal can fill in the blanks.

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