

Family law news: Inconsistency reigns over pre-acquired assets

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Katharine Landells

PARTNER | UK

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The recent decision of the Court of Appeal in Robson was discussed in the last newsletter. Just before we went to press, another key judgment of the Court of Appeal was handed down: Jones v Jones [2011] EWCA Civ 41. This article expands on the short 'stop press' that appeared at the end of the last newsletter.

Both Robson and Jones shared a central similarity: the existence of wealth, external to the marriage but in some way treated as a resource during it, which had to be divided on divorce having regard to its nature and quality. Whereas in Robson the entirety of the husband's wealth had been accumulated before the marriage and inherited from the husband's father, in Jones the husband's business was the only significant asset in the case. It had been in existence since around 1986, approximately 10 years before the marriage. The parties married in 1996 when the husband was 44 and the wife was almost 30. They separated in January 2006. Although at the start of the financial proceedings the husband valued his business at approximately £3m, it was sold in May 2007 producing a net profit of £25m at that time.

Approaching the division of the available assets, Lord Justice Wilson in the Court of Appeal began by saying that the total assets of £25m should first be divided into non-matrimonial and matrimonial constituent pots. These pots were to be divided between the parties in a fair manner, taking account of all the circumstances of the case.

Lord Justice Wilson concluded that there was no reason for the wife to share the non-matrimonial assets and, by contrast, there was no reason why the matrimonial assets should not be shared equally.

The question then was the value of the non-matrimonial assets – ie the value of the Company as at the date of the marriage.

Lord Justice Wilson identified two adjustments that had to be made to a standard valuation of the company as at the date of the marriage. (The parties' accountants had agreed that, prior to the adjustments referred to below, the company was worth £2m). The first adjustment was to accommodate the concept of 'latent potential' or 'springboard', which was the potential the company had developed by the time of the marriage to generate the increase in value in later years. Lord Justice Wilson's view was that the figure of £4 million better reflected the value of the company at the date of the marriage, taking account of any 'latent value'.

Secondly, an allowance had to be made for 'passive economic growth' between the date of the marriage and the date of the sale. The increase in the value of an asset due to passive growth was as much non-matrimonial as its value at the date of the marriage and so, to be fair to the husband in this case, Lord Justice Wilson indexed the £4m upwards, producing a figure of £9 million as the value of the non-matrimonial part of the company.

Dividing the figure of £16m equally (being the difference between the attributed value of the company at the beginning of the marriage (£9m) and at the end (£25m)) gave the wife £8m.

Finally, Lord Justice Wilson concluded that, having taken a 'mathematical' route, the figure produced by the calculation had to be cross-checked against what the judge felt was instinctively fair. In this case the award satisfied that 'cross-check', being 32% of the total assets in the case.

A brief 'compare and contrast' analysis of Robson and Jones is useful in highlighting the very different approaches to pre-acquired wealth. Whilst the two cases, on a broad overview, might seem similar, the cases have resulted in different outcomes. A distinction was drawn between an inherited family estate in Robson, where the wife's award was confined to that which would meet her needs, and a pre-owned company, where the increase in the value of that company during the marriage was shared equally between the parties.

The conclusion? The nature and source of the assets in question, and any increase in value during the marriage, are important considerations when approaching the question of how pre-acquired assets are treated for the purpose of the division on divorce.

Authors

Katharine Landells

PARTNER | LONDON

Divorce and family

 +44 20 7597 6188

 katharine.landells@withersworldwide.com