COURT'S APPROATCH TO CLAIMS RE CAPITAL ASSETS UNDER MCA 1973 (and therefore also to claims under CPA 2004 s72) with PATICULAR REFERENCE TO PRE AND POST MATRIMONIAL PROPERTY

Generally

1. Court can make orders for Lump sums, property transfer, sale of property, pension sharing orders and periodical payments both unlimited in time and time limited and can order a lump sum to be paid to capitalise periodical payments, taking account of s25 MCA 73 factors (or in civil partnership proceedings CPA 2004 Schedule 5 para 21 factors). It therefore follows that the assets must first be established and then a decision must be made about how to divide them.

Establishing and preserving the assets

Interim orders

2. Applications can be made under s37 MCA and s37 Senior Courts Act to freeze assets pending the resolution of the applicant's claim.

3. There are no longer any restrictions on the power of the County Court to make freezing orders (formerly Mareva injunctions). See s37 Senior Courts Act 1981, s38 County Courts Act 1984 s38 (giving County Court the inherent jurisdication powers of the High Court) and (relatively) new County Court Remedies Regulations 2014 SI 2014/982. . The Family Court has all the powers of the County Court. See s 31E Matrimonial and Family Proceedings Act 1984 .

4. Search Orders (formerly Anton Pillar orders) cannot be made by the County Court. See County Court Remedies Regulations 2014

5. Orders for interim sale with vacant possession can be made under TLATA and FPR rule 20.2 provided applicant can also satisfy s33 FLA 1996. See *BR v VT* [2015] EWHC 27 27 per Mostyn J

6. Family Court has power to vacate unilateral notices registered against title . See *Nugent v Nugent* [2013] EWHC 4095 with County Courts Act 1984 s38 and Matrimonial and Family Proceedings Act 1984 s31E

7. If applications are made without notice then procedures set out in *KY v DD* [2012] 2 FLR 200 (Theis J) (following *Re W* [2000] 2 FLR 927) should be followed (application and sworn statements be served with order and order set out what evidence read by judge in addition to further matters set out in the judgment) "The correct procedure application to without notice applications has been set out many times before but seems…to be observed more in the breach than the observance…" . See also *VL v BK* [2013] EWHC 1735.

Disclosure

8. There is a duty of full and frank mutual disclosure of all the parties' assets however a party cannot rely on documents obtained in breach of confidence. *Imerman* [2010] 2 FLR 814

9. In the absence of transparency the court is entitled to draw adverse inferences See *NG v SG* [2011] EWHC 3270 Mostyn J and *Hutchins- Whelan v Hutchins* [2012] EWCA Civ 38. See also *Kremen v Agrest* [2012] EWHC 45 and *US v SR* [2014] EWHC 175 at paras 49-54.

Third Parties

10. Third party rights against assets owned by one party will need to be determined prior to division of those assets eg

    10.1 beneficial interests under constructive trusts in assets owned by one party.

    10.2 whether charge to third party is valid (orders to amend register can be made under Land Registration Act 2002 s65 and Schedule 4)

- eg granted by sole owner (H) to defeat claims (eg *Kremen v Agrest* [2011] 2 FLR 478

- eg granted by joint owners (H and W) but (W) acting under duress.and/or undue influence See eg *Hewitt v First Plus* [2010] 2 FLR 177

11. Assets in name of a third party (including a third party company) may in fact be being held on trust for one party and thus be subject to the court's jurisdiction under MCA 1973 part II. See *Petrodel v Prest* [2013] UKSC 34)(decided 12 June 13) . Issues of "control" over the company and "misconduct" from earlier case law still likely to be highly relevant to issue of whether company is holding assets for (H). See for example *M v M* [2013] EWHC 2534 (decided 14 Aug 13 by King J)

12. It is submitted that issues as to whether third parties have an interest in assets in the name of H or W and/or whether H and W have a beneficial interest in assets held by a third party should be determined as preliminary issues of fact within the financial remedy proceedings. Procedure to be adopted (in particular as to service of relevant third parties) set out in *Goldstone v Goldstone* [2011] 1 FLR 1926.

13. Even where there is no strict beneficial entitlement of H or W in respect of assets held by third parties, fact that third parties are likely to provide support to H or W in the future may be taken into account in assessing appropriate division of *existing* assets in names of parties *particularly* where assets are held by third parties on trust and eg H falls within the relevant class of beneficiaries . See *Thomas v Thomas* [1995] 2 FLR 668 with *TL v ML* [2006] 1 FLR 1263 per Nicholas Mostyn QC and *Gadhavi v Gadhavi* [2015] EWCA Civ 520 . See now also X v X [2016] EWHC 1995.

<u>Valuations</u>

14. Once assets have been identified valuations should be obtained where appropriate. Cf guidance of Charles J as to procedure for valuation of shares in private company set out in *D v D and B* [2007] 2 FLR 653. (either net assets and maintainable earnings basis). Obtain advice at same time as to how to raise funds on illiquid assets.

"Add Backs"

15. In principle "Addbacks" should be resorted to only where there is "clear evidence of dissipation with a wanton element". See *Vaughan v Vaughan* [2007] EWCA 1985. Followed in *BP v KP* [2012] EWHC 2995 (Mostyn). Only allow add backs "very sparingly indeed and only where the dissipation is deliberately wanton". In *Evans v Evans* [2013] EWHC 506 Moylan J stated that without addbacks the parties would have little incentive to behave reasonably but "reattribution must be justified in the context of the case". Two elements are required (per Moylan J) "clear evidence of wanton dissipation …and …would it be inequitable to disregard it…" **.**

16. Court should have regard to whether any intention to defeat claim of other party and whether the spending is as a result of an inherent character flaw in the spending party (especially where their "character" has led to the wealth generation in the first place). See *MAP v MFP* [2015] EWHC 627 paras 90-91 (in that case spending on "cocaine and prostitutes" not added back!).

17. The burden of proof in respect of claims for add backs remains with the party alleging wanton dissipation. In principle therefore it is for the party seeking an addback to prove all the elements. However cf *Migliaccio v Migliaccio* [2016] EWHC 1055 in the context of a judgment summons cf paragraph 41 below.

Orders re Capital assets

Generally

18. In exercising its discretion in respect of the re-distribution of the assets of the parties the court's objective is "fairness" see *White v White* [2000] 2 FLR 981 HL at p989 para A

19. "…As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so…" *White v White* [2000] 2 FLR 981 HL (decided Oct 2000).

19.1 Contributions will provide a justification for departing from equality of division. The fact that property has been generated outside the marriage (ie "non matrimonial property") will be a reason to depart from equality (at least as far as that property is concerned) cf *Miller; Macfarlane* [2006] 1 FLR 1186 at para 23 -24

19.2 Needs will (of course) provide a justification for departing from equality See *Miller; Macfarlane* [2006] 1 FLR 1186.

- "…When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs…In most cases the search for fairness largely begins and ends at this stage…" See *Miller* at para 12 per Lord Nicholls

- Needs means needs of BOTH parties see *CR v SR* [2013] EWHC 1155 (leave to appeal granted for a case where W received all the assets and was left with greater income)

- Modest standard of living during marriage remains important in assessing needs in case of pre marriage assets *K v L* [2010] 2 FLR 1467

- Needs not include "Besterman cushion" *DR v GR* [2013] 1196 per Mostyn J

19.3 As between needs and sharing (ie equal division of matrimonial capital) needs prevail . See Charman v Charman [2007] EWCA 503 para 73 ie the other half of matrimonial property can be used to meet needs

19.4 As between matrimonial and non matrimonial property, ie needs and contributions, needs prevail ie non matrimonial property can be used to meet needs

- where non matrimonial property is present "…The judge should take it into account …However in the ordinary course this factor can be expected to carry little weight if any in a case where the claimant's financial needs cannot be met without recourse to this property…" *White v White* cited in *Miller* at para 23

<u>Possible approaches in needs case but where the assets were not all built up during the marriage</u>

20. Could argue that case is a "needs" case and therefore arguments about contributions are irrelevant (particularly if you are not the party contributing!)

21. More structured approach would be to work out what assets are matrimonial and give rise to a basic "sharing" entitlement and then supplement for needs where necessary from the remaining capital whether matrimonial or non matrimonial (particularly if you are the party who contributed!)

22. Submitted that structured approach is more consistent with *K v L* [2011] 2 FCR 597 per Wilson LJ and the recent authority of *JL v SL No2* [2014] EWHC 360 per Mostyn J and *JB v MB* [2015] EWHC 1846 at para 21 per Nicholas Cusworth QC sitting as HCJ

22.1 "…By contrast although non matrimonial property also falls within the sharing principle…but the ordinary consequence of the application to it of the sharing principle is extensive departure from equal division, often…to 100%-0%..." . *K v L* per Wilson LJ (cited in *JL v SL* at para 24)

22.2 "…matrimonial property will normally be divided equally…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 common place… 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…" See Mostyn J at paras 21-22 of *JL v SL* (citing with approval his previous decision…)

22.3 "…The court should always attempt to determine the partition between martrimonial and non-matrimonial property. Once it has done so the matrimonial property should usually be divided equally and there should usually be no sharing (*emphasis added*) of the non matrimonial property . *JL v SL* at para 25

Matrimonial and Non Matrimonial Property

23. Matrimonial assets

23.1 built up during the marriage with (it is submitted) Court entitled to take account of any period of cohabitation immediately preceding the marriage cf *CO v CO* [2004] 1 FLR 1095

23.2 former matrimonial home "normally" be treated as a matrimonial asset even if pre-owned *Miller; MacFarlane(HL)* [2006] 1 FLR 1186 (cf para 24.4.3 below)

23.3 Assets received by way of lottery wins are in themselves unlikely to be considered to be matrimonial assets if the ticket was purchased unilaterally by one party. However assets purchased with the winnings and used jointly are likely to be considered matrimonial assets. See *S v AG* [2011] EWHC 2637

24. Non matrimonial assets

24.1 gift during the marriage

24.2 inheritance during the marriage (eg *P v P* [2004] EWHC 1364 Munby (Farm/assets in specie) *N v N* [2010] 2 FLR 1093, *Y v Y* [2012] EWHC 2063

24.3 arguably "…business or investment assets which have been generated solely or mainly by the efforts of one party…" *Miller; MacFarlane(HL)* per Hale para [150] where possession may be "risky" and where the value may be "speculative" per Hale para [151]

24.4 pre owned

24.4.1 court may increase the notional value of pre-owned capital assets to take account of their "springboard" value for the generation of other assets during the course of the marriage (provided such value is not already reflected in any professional valuation of the pre-owned assets at the date of the marriage) . *Jones v Jones* (CA) [2011] 1 FLR 1723 (decided 28 Jan 11)

24.4.2 Where pre-owned assets have become part of the economic life of the spousal partnership (ie where there has been "mingling") then the pre acquired assets are likely to be subject to sharing. "…But even if there has been much mingling the original non-matrimonial source of the money often demands reflection in the award…" See *JL v SL* (No2) [2014] EWHC 360 per Mostyn J at para 27

24.4.3 It is likely that the former matrimonial home brought to the marriage by one party will have become mixed/mingled (cf para 23.2 above)

24.5 post separation and pre-hearing

24.5.1 equal division not justified where substantial part of wealth accrued *directly* as result of H's endeavours since separation. *B v B* [2010] 2 FLR 1214 per Moylan J

24.5.2 Post separation assets will not be excluded where assets are accrued post separation as result of latent potential developed during the marriage. See *R v R* [2012] EWHC 2390 (Macur J). See also *SK v WL* [2011] 1 FLR 1471 (Moylan J)

24.5.3 In respect of assets built up after separation the court should consider whether growth derived from assets already in existence at separation or whether growth in assets is by way of a "new venture" and in the case of growth derived from assets existing at separation whether the growth is active or "passive". *JL v SL* [2014] EWHC 360 at paragraphs 41 and 2 per Mostyn J

24.5.4 "…Although there is an element of arbitrariness here I myself would not allow a post-separation bonus to be classed as non matrimonial unless it related to a period which commenced at least 12 months after the separation…" *Rossi v Rossi* [2006] EWHC 1482 at para 24.4 per Mostyn J (cited with approval (by Mostyn J…) in *JL v SL No2* at para 33

24.5.5 "…It is very difficult to understand why a bonus already earned (and particularly earned (at least in part) during the span of the civil partnership or marriage) but which is deferred

and the payment of which is conditional on turning up to work (but not to any other performance related condition) should not form part of the divisible pool…" *SS v NS* [2014] EWHC 4183 at para 12 per Mostyn J (however see also *Lawrence v Gallagher* [2012] EWCA Civ 394 per Thorpe LJ for opposite view!)

Illiquid assets

25. discount value for illiquidity in offsetting

25.1 transfer of part (eg shares in company cf *B v B* [2015] EWHC 210 at para 17)

25.2 deferred lump sums by reference to percentage of later sale price (taking account of post separation non passive growth) *B v B* [2015] EWHC 210

-. A series of lump sums (non variable (save as to limited power to extend period for payment provided not for a significant period)) rather than lump sum by instalments (variable under s31 MCA 1973 cf *Westbury v Sampson* [2000] FLR 166) still permissible . See *Hamilton v Hamilton* [2013] EWCA Civ 13 (decided 24 Jan 13). Careful drafting required

"Special" contributions

26. "Special" contributions by the wealth generating party to the marriage to the building up of the assets will need to amount to "genius" before they are likely in themselves to lead to a departure from equality (see *Sorrell v Sorell* [2006] 1 FLR 497 and even then the special contribution *in itself* is only likely to lead to the wealth generator receiving between 55-66% of the assets rather than a half (see *Charman v Charman* [2007] 1 FLR 1246). See also *Gray v Work* [2017] EWCA Civ 270

- "Has there been…such a disparity in the parties respective contributions during the marriage in that the Husband has made a contribution of a wholly

exceptional nature such that fairness requires that his contribution should result in…a greater share…" *Evans v Evans* [2013] EWHC 506 at para 131 (Moylan J)

27. Charman guidelines applied in *Cooper Hohn v Hohn* [2014] EWHC 4122 with court taking account of
    - H being generating force rather than the product itself
    - wealth depending on innovative vision and ability to develop those visions
    - generation of truly vast wealth…
    - H having a special skill surviving as a material consideration despite the partnership aspect of the marriage
    - it being inequitable to disregard the contribution

Costs not part of capital division

28. Separate costs orders should be made for litigation misconduct rather than a broad enhancement of the award to the other party. See *Ezair v Ezair* [2013] 1 FLR 281

Form of Orders re capital

29. Mesher orders still permissible in appropriate cases *Tattersall v Tattersall* [2013] EWCA Civ 774

Pensions

30. It is submitted that there is still no clear law on how to divide. It is submitted that by analogy with law relating to pre and post matrimonial property in *SL v JL No 2* (above) the court should *in principle* start with equalization of that part of pension built up during marriage subject to adjustment for needs *proved on evidence* (cf *SJ v RA*) eg where "near" to retirement. Cf Family Justice Council guidance April 2016 "Sorting Out Finances on Divorce at p45 But watch this space…

31. Order must take effect immediately and pension provider unlikely to be prepared to delay implementation eg where in payment but W can't get pension until later

32. Will be a difference in CEV between order and implementation day eg if in payment CEV might be less if not CEV will probably be more - unlikely to make much difference unless CEV is v high or delay in implementation is very long (or both!)

33. Order must be expressed as % (see *H v H* [2010] 2 FLR 173 Baron J) so can't say such % as would give a CEV of £X on implementation ("the Hallam formula") however submitted could be agreed in a recital where claim for pension share adjourned

34. Off-setting for capital eg *Norris v Norris* [2003] 1 FLR 1165 at para 69 or *Cowan v Cowan* [2001] 2 FLR at 216 para 69
    - apples and pears
    - submitted no reliable method

<u>Agreements including pre-nuptial agreements</u>

<u>Generally</u>

35. Submitted there is now one principle to be applied to all agreements

    - "the overarching principle" in respect of pre- nuptial and post nuptial agreements including separation agreements is that set out in *Radmacher v Granatino* [2010] 2 FLR 1900 namely " That the court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement…" See L v M [2014] EWHC 2220 at para 4 per Bruce Blair QC sitting as HCJ

<u>Separation agreements</u>

36. It is submitted that it follows from para 35 above that the matters set out in earlier cases eg *Edgar v Edgar* (1981) 2 FLR 19 should now be seen as examples of when a

separation agreement or post separation agreement should be set aside rather than specific grounds needing to be established

Pre-nuptial agreements

37. If pre-nuptial agreement stands it is submitted that the effect of recent case law is that agreement will take effect subject to provision for minimum needs HOWEVER agreement may be influential as to what reasonable needs actually are. See *Kremen v Agrest* [2012] EWHC 45 and *Luckwell v Limata* [2014] EWHC 502 and *WW v HW* [2015] EWHC 1844

Delay

38. Different to post separation assets

39. Significant delay in applying for ancillary relief following separation is likely in itself to lead to a reduced award (in absence of other factors)

- "After a certain lapse of time a party to a marriage is, in my judgment entitled to take the view that there will be no revival or initiation of financial claims against him or her. The longer the lapse of time the more secure he or she should feel in the arrangement of financial affairs and the less should any such claim be encouraged or entertained…" *Chambers v Chambers* (1980) 1 FLR 10 per Wood J

- "…[32] while of course no rigid rule can be expressed for the infinite variety of facts that arise in ancillary relief cases, I would have thought, generally speaking, that it would be very difficult for a party to be allowed successfully to prosecute an ancillary relief claim initiated more than 6 years after the date of the petition for the divorce, unless there was a very good reason for the delay…" See *Rossi v Rossi* [2007] 1 FLR 790 per Nicholas Mostyn QC

- In respect of forensic delay "… The court will look critically at explanations for it and even irrespective of its effect upon the respondent, will be likely,

by reason of it and subject to the potency of other factors , to reduce or even to eliminate its…" ie the court's "… provision for the applicant…" *Wyatt v Vince* [2015] UKSC 14 at para 32 per Lord Wilson

Strike Out

40. Statements of case disclosing "no reasonable grounds for bringing or defending the application" or being an abuse of the court's process can be struck out. FPR 2010 r 4.4. There will be no reasonable grounds for an application only if the application is not "legally recognisable" eg party has remarried or final order already been made. Applications cannot be struck out on the basis that they have "no real prospect of of success". *Wyatt v Vince* (Supreme Court) [2015] UKSC 14 at para 27.

Committals for failure to pay financial orders under MCA 1973 part 2 by way of s5 Debtors Act 1869 and Administration of Justice Act 1970 Schedule 8 (para 2A)

41. Court should be cautious about inferring wilful refusal to pay based solely on fact of order and failure to pay without explanation See obiter comments of Macfarlane LJ in *Prest v Prest* [2015] EWCA 714 at para 55. However see now *Migliaccio v Migliaccio* [2016] EWHC 1055 at para 23 per Mostyn J

- if an applicant on a committal under s5 Debtors Act 1869 "adduces sufficient evidence to establish at least a case to answer…" eg proof of the order and non payment "…an evidential burden shifts to the respondent to answer it. If he fails to discharge that evidential burden then the terms of s5 will be found proved against him or her to the requisite standard…"

Drafting and Interpretation of Consent orders

42. See *Hamilton v Hamilton* [2013] EWCA Civ 13 (24 Jan 13): Where there is disagreement as to the interpretation of an order the court not limited to the words of the order but should "assess what the parties agreed against the objective factual matrix of what occurred during the relevant period". Per Baron J (para 41 Thorpe LJ agreeing).

43. For extent of liability of solicitor to advise as to substance when instructed to draft consent order see *Minkin v Landsberg* [2015] EWCA 1152

Appeals and setting aside

44. Appeal may be on basis of wrong statement of law, findings of fact without evidence, wrong application of law to facts, exercise of discretion outside the reasonable range. "Plainly" wrong test still referred to in respect of exercise of judicial discretion in financial remedy proceedings . See *B v B* [2014] EWHC 4545 (ie despite Children Act authority of *Re B* [2013] UKSC 33)

45. For permission to appeal DJ to CJ it is submitted that "real prospect of success" test in Rule 30.3 FPR 10 means "realistic rather than fanciful" prospect of success as per Moor J in *AV v RM* [2012] 2 FLR 709 and Moylan J in *CR v SR* [2013] EWHC 1155 following Tanfern Ltd v Cameron MacDonald (CA) [2000] 1 WLR 1311 (test for appeals to CA) rather than "more likely than not that the appeal will be allowed" as per Mostyn J in *NLW v ARC* [2012] 2 FLR 129.

46. Applications based on Barder events should still be dealt with by appeal not setting aside. *Cart v Cart* [2013] EWCA 1006 (7 Aug 13) and see also *MAP v RAP* [2013] EWHC 4784 . Applications to set aside can be made to first instance court for cases based on non disclosure (despite abolition of CCR Ord 37 procedure by new FPR and CPR decision of *Roult* [2009] EWCA 444). See *Musa v Karim* [2012] EWCA 1332 and *CS v ACS* [2015] EWHC 1005

47. The court should set aside a consent order where there has been fraudulent non disclosure unless the disclosure would have made no difference to the order finally made however it is for the RESPONDENT to the application (ie the alleged fraudulent party) to show that the disclosure would have made no difference . See *Sharland* [2015] UKSC 60 at paras 32 and 33 and cf *Gohil* [2015] UKSC 61

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15 May 2017