Case No: LV19D05087

IN THE FAMILY COURT AT MANCHESTER

1 Bridge Street West
Manchester
M60 9DJ

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Before:

HIS HONOUR JUDGE BOOTH
Sitting as a High Court Judge

- -

Between:

L — **Applicant**

- and -

L — **Respondent**

- -
- -

MISS SALLY HARRISON QC appeared for the **Applicant**

MISS NICOLA SAXTON appeared for the **Respondent**

- -

Approved Judgment

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HIS HONOUR JUDGE BOOTH:

1. Mrs L's claim is for financial relief within divorce proceedings in which the principal issue is whether Mr L should emerge from the marriage with more wealth than Mrs L because the business that has generated their wealth was acquired by him from his father before the parties met. On the facts of this case, my answer is that they should emerge as equals but, as I will explain, that will leave Mr L with the opportunity to enhance his wealth, an opportunity not open to Mrs L.

2. In this final hearing, Mrs L has been represented by Miss Sally Harrison QC, and Mr L by Miss Nicola Saxton of counsel. I am grateful to them for the substantial amount of pre-trial work that both have done and for limiting the issues that I must decide.

3. In the event, I only heard evidence from Mrs L and Mr L. Within the papers, there was expert evidence from forensic accountant John Green. There was valuation evidence in relation to the family home and some of the properties owned by the business with which I am concerned. I had tax evidence on the consequences of the divorce proceedings and there was a care report into one of the parties' children. Questions have been asked of those experts and answers given.

BACKGROUND

4. Mrs L is 45 years of age and Mr L 52 years of age. They have three children, twins aged 18 and a younger child aged 11. One of the 18-year-olds has a disability. The care of the children is effectively shared between the parents although the 11-year-old has her home with her mother. The parties are to be commended for sorting out the practicalities of sharing the care of their children but, sadly, there appears to be a great deal of mistrust between them. There has been a dispute on the papers about the future care and provision for the parties' adult child with a disability. For reasons that will become evident in due course, that is not an issue between the parties that I need to resolve.

5. I have not been troubled with arguments about the parties' needs. Such is the scale of the assets available to the family that all their foreseeable needs will be generously met.

WEALTH

6. The family home is a substantial house with equity of £3.5 million. It is occupied by Mrs L. I indicated at the pre-trial review that if she wanted to keep it (as she does), I was unlikely to order a sale - the case has been run on that basis. Mr L lives nearby in a house that cost £2.7 million to buy. In order to buy it, he borrowed all the funds from the business. That money will have to be repaid and I need to deal with how the costs of repayment should be accounted for.

7. The business that has provided for the family is a commercial property business. Mr L has proved to be a consummate businessman and explained in evidence that the skill he has is his ability to spot opportunities with the potential for growth in rental income and value and knowing when to invest. After the marriage, he diversified into share speculation and proved successful at that. That activity came undone in the crash of 2008 at a time he described as very scary. He lost money on shares (in one day, £1 million) but was able to liquidate what he could preserve and then use the cash he had

to invest in a depressed commercial property market - a gamble that has paid off handsomely.

8. The commercial property business has been valued for the purpose of this case at £49 million net, generating a profit after tax of £3.2 million per annum. The business had been established by Mr L's father in 1963. Mr L became a director in 1994 when he acquired 38.94 per cent of the shares. In 1997, a trust set up by his father for Mr L's benefit appointed further shares to him. In turn, Mr L created a trust into which he settled some of his shares.

9. The parties started a cohabiting relationship in 2000 and they married on 1 June 2002. Their separation occurred in March 2019. Prior to their separation and in April 2016, a major restructuring of the shareholdings was carried out as an exercise in mitigating the impact of inheritance tax and to provide for the financial security of the parties' children. Prior to the restructure, Mr L held 57 per cent of the ordinary shares with the balance held in trust, in one of which Mr L had a life interest and in the other, no interest at all. The restructuring took effect in March 2018. It is not necessary for the purposes of this judgment to set out the complexities of the new arrangements.

10. Mr Green has provided me with a diagram in the form of a spider graph setting out the intercompany relationships, but the effect was as follows:

    (i) Mr L retained control of the business by personally holding 57 per cent of the voting shares;

    (ii) The value of the business was frozen as at March 2018;

    (iii) A company was created to hold shares equally for Mr L and Mrs L;

    (iv) The balance of the ownership was transferred to vehicles to hold on behalf of the three children;

    (v) Mr L and Mrs L each have an interest in the business fixed at March 2018. The balance belongs to their children. Any profit and/or growth in value generated after March 2018 belongs to their children.

11. The shares held by Mr L and Mrs L are valued at £11.93 million each.

12. Mr L does not currently draw a salary from the business, instead taking dividends to cover the cost of the family's outgoings. Any dividend voted on the shares of Mr L and Mrs L has the effect of reducing the value of their interest. Mr L has voted for dividends of shares held by the children which has, in turn, been applied to the benefit of the family. Mr L's evidence was that by his and his advisor's calculations, a diminishing fund of circa £23 million was more than enough to provide for him and Mrs L during their respective lifetimes.

13. The business has the capacity to pay Mr L a salary in a seven-figure sum should he decide to pay himself from the business. Mrs L has no effective earning capacity and has responsibilities towards their youngest child for several years to come.

14. As far as the older children are concerned, I was a little alarmed at both Mr L's and Mrs L's failure to properly appreciate the effect of them reaching 18 years of age. Mrs L had no apparent appreciation of the wealth of her adult children and Mr L appeared

unaware of the need to obtain their consent to some of the decisions he proposed to take. The children were not parties to these proceedings and the older two, as adults, are sufficiently wealthy for all their foreseeable needs to be met. If the business continues to generate profits of circa £3 million per annum, that is all attributable to the children together with any capital growth within the business.

15. In order to facilitate a division of the financial ties binding Mr L and Mrs L, an agreement has been reached by the business's accountants with the Inland Revenue that the company can buy back the shares held by Mrs L. Mr L explained that this was only possible because Mrs L was to sever all ties with the business which is, indeed, what she wants to achieve.

WHAT WAS THE FUNDAMENTAL CHARACTER OF THE RESTRUCTURING?

16. Essentially, Mr L and Mrs L have taken from the business a fixed amount of wealth. As they access that wealth, it diminishes. The dynamic part of the business - the profit and the capital growth - they have alienated from themselves and given to their children. The business continues to rely on Mr L's skill and decision-making but he has provided himself and Mrs L with sufficient wealth not to need to draw out further money, for example, by way of salary although he could, given the value he adds to the business and the control he has retained.

THE LAW

17. The relevant statute is the Matrimonial Causes Act 1973 as amended. Not all of the scheme set out in the MCA Part II is brought into play by the facts of this case.

18. Section 23 provides a list of orders that are available. Section 23(1)(c) provides for one party to the marriage to pay a lump sum to the other. Section 24 allows the court to order the transfer of property from one party to the other. A power to order a sale of property, if that is needed, is contained in s.24A. Section 24B gives the court power to make one or more pension sharing orders.

19. The matters to which the court is to have regard in deciding how to exercise its powers under s.23, s.24, s.24A, and s.24B are set out in s.25. The court is required by s.25(1) to have regard to all the circumstances of the case, the first consideration being given to the welfare whilst a minor of any child of the family who has not attained the age of 18.

20. Section 25(2) specifies that the court shall, in particular, have regard to the following matters:

> "(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
>
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
>
> (d) the age of each party to the marriage and the duration of the marriage;
>
> (e) any physical or mental disability of either of the parties to the marriage;
>
> (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
>
> (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
>
> (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring."

21. Section 25A(1) then requires the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party to the other will be terminated as soon as it is just and reasonable (often referred to as 'the clean break provision').

22. Consideration of the statutory scheme by the higher courts has identified the following factors that are applicable to the facts of this case:

    (i) The analysis must be gender neutral and non-discriminatory - *White v White* [2001] 1 AC 596 HL;

    (ii) The starting point in every enquiry is a two-stage process. First computation then second distribution - *Charman v Charman* (No. 4) [2007] 1 FLR 1246 Court of Appeal;

    (iii) In considering s.25, there are three main distributive principles: needs, compensation, and sharing, shaped by the overarching requirement of fairness - *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186 HL;

    (iv) The objective of financial orders is to meet the needs of the parties to enable a transition to independence to the extent that that is possible;

    (v) The main needs in this case, as in most cases, are for housing, present and future income, including income in retirement.

HOW SHOULD I TREAT THE FACT THAT MR L HAD SHARES IN THE BUSINESS BEFORE THE MARRIAGE THAT HE HAD ACQUIRED FROM HIS FATHER?

23. Firstly, I must look at "computation". Mr Green was asked to value Mr L's shareholding at the time of cohabitation and came to a figure of £3.3 million. Miss

Saxton, on behalf of Mr L, has argued that all the groundwork allowing for the family to become as wealthy as they have had been laid down for many years before the marriage. Her principal point was that when assessing a sharing claim, based on the increase in business assets over the length of the marriage, the decided cases have consistently adjusted the historic value to reflect passive growth and latent potential, and ensured that the true value of the asset brought into the marriage is reflected in the calculations.

24. She referred me to the case of *Jones v Jones* [2011] EWCA Civ 41 in which Wilson LJ twice doubled the historic valuation to reflect the springboard and passive growth using the FTSE to establish his multiplicand. In *Robertson v Robertson* [2016] EWHC 613 (Fam), Holman J had excluded half the value of shares brought to the marriage by the husband assessing the other half as non-matrimonial. In *Martin v Martin* [2018] EWCA Civ 2866, the Court of Appeal upheld Mostyn J's rejection of the bare historic evaluation and the use of a linear method to treat £44 million as non-matrimonial. In *IX v IY* [2018] EWHC 3053 (Fam), Williams J considered the decisions of the Court of Appeal in *Jones* in the light of *Hart v Hart* [2017] EWCA Civ 1306 and *XW v XH* [2017] EWFC 76 together with decisions by Holman J in *Robertson* and Mostyn J in *WM v HM* [2017] EWFC 25, to conclude:

> "The weight of authority would support an approach which seeks to identify and to take into account any latent potential that a business asset had when it was brought into the marriage by a party. The authorities would also support an allowance for the passive growth of that latent potential during the course of the marriage. How that is to be done will depend on the facts of the individual case."

25. The question of computation is designed to establish not only what there is within the family but whether there are assets that are either matrimonial or non-matrimonial or assets that can have both matrimonial and non-matrimonial features where it would be artificial to seek a sharp division. What goes without saying is that each case turns on its own facts. As a starting point, the sharing principle would apply to all matrimonial assets. The sharing principle would only apply to non-matrimonial assets insofar as they were needed to meet an identified need.

26. Miss Harrison QC, on behalf of Mrs L, referred me to the concept of "matrimonialization", a word that I hope will not acquire common usage. She referred to *WX v HX (Treatment of Matrimonial and Non-Matrimonial Property)* [2021] EWHC 241 (Fam) in which Roberts J addressed this issue:

> "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 his 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'.
>
> 117. The classic example of this sort of situation is the use by one of the parties of his or her non-marital funds towards the purchase of a family home. Whether or not the title to that property is held in the joint names of the parties, it will invariably be treated by the court as a matrimonial asset for the purposes of any sharing claim. That example lies at one end of the factual spectrum. There are other more complex situations which fall into sub-categories (a) and (b) above where the court will need to analyse carefully whether the evidence will support a finding that property which was originally non-matrimonial has been treated, or dealt with, in such a way as to bring it within a sharing claim made by the other spouse. If the evidence leads the court to conclude that one of the parties has indeed through words, actions or deeds manifested an acceptance that it should be treated as such, it must then go on to determine the extent to which that property falls to be shared as between them."

27. If the court identifies what was originally non-matrimonial property that has subsequently been shared or treated as matrimonial property then the court has to consider how to deal with it, but to what part of the business post the restructuring should I apply any calculation? This is where, on the facts of this case, the character of the restructuring is so important. The business continues to grow and generate more wealth but not for Mr L and Mrs L. They have, together, given that away and kept for themselves a fixed amount of wealth. Why should anything to represent the groundwork fall on their fixed share and not on their children's growing share that they have given from their original share. A whole business was started by Mr L's father. The idea of identifying a share now that represents what was introduced by Mr L at the start sits ill with the decisions the parties have taken when they restructured the business.

28. If the argument does not fit well at the computation stage, what effect does it have on "distribution"?

29. It is an accepted fact that Mr L held 57 per cent of the shares in the business when cohabitation began, the rest being in trust. How does that fact affect the concept of fairness? As he explained in evidence, Mr L had concluded the fixed amount of wealth that was to be retained by him and Mrs L was enough to meet their lifetime needs. Should he be able to claw back some of that on the basis that he made an unmatched contribution at the start of the marriage? The law allows me to do so if I think it appropriate.

30. In *Versteegh v Versteegh* [2018] EWCA Civ 1050, King LJ endorsed the discretionary approach adopted by Moylan LJ in *Hart v Hart* [2017] EWCA Civ 1306 where she said this at [84]:

> "In my view, the court is not *required* to adopt a formulaic approach either when determining whether the parties' wealth comprises both matrimonial and non-matrimonial property or when the court is deciding what award to make. This is not necessary in order to achieve 'an acceptable degree of consistency', Lord Nicholls in *Miller* (paragraph 6), or to achieve a fair outcome. Indeed, I consider that the present case demonstrates the difficulties which can arise if a court strives to adopt a formulaic approach in circumstances where that is not likely to be easily achieved because of the nature of the financial history."

31. Subsequently, in *Martin v Martin* [2018] EWCA Civ 2866 Moylan LJ said:

> "Finally, on this question, I mention briefly that the manner in which the court determines whether property is or is not matrimonial can probably be described as partly evaluative and partly discretionary. Although it is not necessary to determine this point, the exercise is clearly at least in part evaluative because it is based on the court's assessment of the evidence as to whether the relevant asset is from a source external to the marriage or the product in part or in whole of marital endeavour. But I also consider that it can be partly discretionary for the reasons set out in paragraph 113 above."

32. It seems to me, therefore, that the approach should be a staged approach. Firstly, can I identify property that is matrimonial and property that is non-matrimonial that is available for distribution between the parties today? If I can identify non-matrimonial property, how do I measure it and what factors do I take into account when assessing passive growth and latent potential? Thirdly, if I cannot identify non-matrimonial property but I know it is there, how should I reflect it in the discretionary exercise in dividing the parties' assets?

33. There are other factors in play here. Mr L was the decision-maker when it came to the restructuring of the business. Indeed, he has been the decision-maker on all financial matters throughout the parties' marriage. It was clear to me in listening to Mrs L that she had no proper understanding of what was done at the time of the restructuring although I have no doubt she understood why it was being done and that the objective

was to preserve their wealth for their children and to minimise the amount of their wealth payable in tax.

34. It was also clear to me that the dynamics between Mr and Mrs L were such that Mr L would feel free to make whatever decisions he thought were in the best interests of the family, and, given his track record, Mrs L would go along with it. That is exemplified by what happened in 2008 at the time of the financial crash when it appeared that their finances were in serious trouble. The family home, which were they were in the process of developing, was, on Mr L's insistence, offered for sale. As it happens, the purchasers were unable to complete, and Mr and Mrs L were able to re-acquire the house when the financial turmoil was over, and the circumstances had stabilised. The sale of the house was the last thing that Mrs L wanted but she went along with it.

35. When it came to the restructuring and the fixing of the amount of wealth that Mr and Mrs L had by way of share in the business, no distinction was made by Mr L between him and his wife.

36. The final point, and, in my judgment, the most decisive factor in this case, relates to the dynastic nature of the arrangements put in place. Here was Mr L passing on the business that had been started by his father, run by him, and for the future was to be for the benefit of his children. The dynastic nature of the arrangements fits better with the children having the benefit of their grandfather's contribution reflected in the ongoing dynamic part of the business generating profit and future wealth.

37. If that represents the destiny of the initial non-marital contribution by Mr L, should there still be a reflection of that in the division of assets between Mr L and Mrs L? In other words, should Mr L have a greater share of what is available than Mrs L?

38. In my judgment, on the facts of this case, that would be an unfair outcome. Mrs L agreed to the restructuring on the basis that she and Mr L had equal shares in what was a fixed amount of wealth. That was done merely three years before the marriage broke down and came into effect one year before the marriage broke down. It would have been open to Mr L to fix the amount of wealth in the ownership of himself and his wife in something other than equal shares had he thought that was fair. He did not. In my judgment, a fair outcome in this case is that the parties should have an equal start on the road to independent living as envisaged by Lady Hale of Richmond by sharing equally what they have together.

39. I have been asked by both parties to allow them to put their financial remedy outcome in a format which provides the most tax advantageous result. That will need advice from their professional advisors once I have decided how some of the other points in the cases should be decided.

THE VALUE TO BE ATTRIBUTED TO THE FAMILY HOME TO BE RETAINED BY MRS L

40. The property has been valued by a single joint expert and that valuation updated. On the day before the hearing, what purported to be an offer to purchase by a purchaser with available funding at substantially more than the single joint expert's valuation was produced by the husband's legal team. Nobody had viewed the house and no explanation was provided as to how this "offer" had been procured. It should not have been introduced into the case and I will be ignoring it.

41. If a party wishes to challenge the evidence of a single joint expert, there is a well-established procedure, even if such challenge occurs late in the day. Part 25 of the Family Procedure Rules 2000 sets out a comprehensive code. Introducing this document into the case was an unacceptable attempt to influence the court's decision-making process. What should have happened was there should have been an application for permission to allow further questions to be put to the single joint expert valuer. The single joint expert could have been asked about the "offer", and whether it led to a change in their valuation. Next, there could have been an application for permission to have the single joint expert called to give evidence and be cross-examined so that the "offer" could be put to the expert. Alternatively, Mr L could have made a *Daniels v Walker* [2001] 1 WLR 1382 Court of Appeal application to rely on his own expert if he had one. None of that was done.

42. There was an issue between the parties as to the notional deduction to be made for the cost of sale so as to produce a net value figure. I resolved that at 1.25 per cent relying on judicial notice of the housing market in the absence of expert help. The single joint expert could have been asked that question.

TREATMENT OF THE COSTS OF MR L PURCHASING A HOUSE FOR HIMSELF

43. As I have already said, Mr L used £2.7 million of company funds to purchase a house for himself. The decision to purchase a house for himself cannot criticised, nor can the house that he has purchased, nor the cost of it. Given the scale of the parties' wealth, it is certainly not inappropriate. It has the considerable advantage of being within walking distance of the family home, allowing the children free movement between their parents which, in my judgment, is a good thing.

44. The criticism levelled at the husband is twofold: (1) that he has removed all the working capital identified by Mr Green as being held within the business, and (2) that money has to be repaid. Mr L proposes to vote himself dividends to allow it to be repaid. There will be a tax consequence as tax will be payable on those dividends before the amount needed to repay the debt is achieved. It is said on Mrs L's behalf that he could have purchased a property with a mortgage and, indeed, could repay his loan by taking a mortgage. It is also said that he could pay himself a salary which would allow him to repay a mortgage without it affecting those funds available to the parties.

45. The answer to this question lies in the history of the way in which the parties have financed their lifestyle. When they have needed funds out of the business, they have almost always done so by taking dividends. There was one year when it was advantageous from a tax perspective to take a salary that Mr L took a salary. In more recent times, he has always dealt with the family finances by creating a debt to the company in the nature of a director's loan account which has then been repaid. Given that I have no criticism of him for the scale of his expenditure on a house and that it was appropriate for him to buy a house, and it is in the interests of the parties' dependent child that their parents live close together, in my judgment, Mr L's proposal to repay that debt by voting himself a dividend is entirely appropriate and must form part of the arithmetic consequent upon my decision, as will any tax consequences. I would expect the parties and their advisers to agree the figures. That will have the effect of reducing the joint fund available for distribution between the parties as it will come from their fixed share. The fact that I have allowed this to come from joint funds is another reason why fairness requires an equal distribution of what is left. In addition, the repayment

of the director's loan that is attributable to spending on themselves will need to be repaid in the same way and as has been done for past years.

MATTERS THAT ARE AGREED

46. There is a parcel of land attached to the family home which it is agreed should be transferred to Mrs L. It is currently owned by a company and there will have to be a transaction to allow that transfer to take place. The parties have agreed that there will be an equal sharing of the pension provision that they have between them. Not surprisingly, they are agreed that there should be a clean break between them. As was envisaged by Mr L when he set up the restructuring, there is enough wealth that will be available to each of the parties to allow them to live independently and to meet their foreseeable needs.

47. It is accepted that there may be a tax liability charged by the United States tax authorities on Mrs L on the sale of her shares. If such a charge is levied and has to be paid then it should fall on both parties equally in line with the general thrust of my decision, as should any reasonable costs incurred in avoiding or mitigating the tax liability.

48. Next, they agree, subject to the agreement of their adult daughters, that funds that belong to the daughters should be applied to pay down the director's loan account insofar as it is attributable to family expenditures for the children.

49. I have not dealt in any detail with the open positions that both parties took. Both characterised the outcome of the case as providing a lump sum payable by Mr L to Mrs L. Mrs L contended for equal sharing with an outcome that would have left the cost of Mr L rehousing himself from his post financial remedy share.

50. Mr L sought an unequal distribution on the basis that not only did his costs of purchase of his home came out of the undivided wealth but that what was left should be divided unequally between them to reflect his initial contribution in the form of his shareholding in the business, which he characterised as non-matrimonial. I have dealt with all those arguments above.

51. However, the reality here is that what is being divided are shares in a business held equally by the parties in circumstances where Mrs L's shares are to be purchased from her by the company. In order to do that, the company will have to raise funds. Mr L proposed paying Mrs L in stages over time. I can see no reason for that. The business will either have to borrow or to sell assets to raise the necessary funds. I did not hear detailed arguments nor evidence on this point so I will say nothing more at this stage.

52. I have no doubt that the accountants can present the necessary transactions in more than one way. By way of example, it is agreed that for tax reasons, it is appropriate for the transfer of the family home to Mrs L to generate a payment from her to Mr L of part of the value of his interest. I have no difficulty with that happening.

53. In both open positions, each of the parties proposed differing arrangements to deal with the financial affairs of their adult children, and as I have already observed, that was at odds with the legal status of their adult children who are entitled to make their own decisions about what happens to their money.

54. They have agreed that Mr L should make regular payments to Mrs L in respect of their dependent child. No doubt the amount will need to be revisited from time to time until she reaches 18 years old.

55. They each have bank accounts and small investment funds. These should remain where they currently stand. The same applies to things like motor vehicles. I have not been asked to deal with chattels.

CONCLUSION

56. In my judgment, the fair outcome in this case is for Mr and Mrs L to share equally the wealth that is represented by their respective homes and their respective shareholdings. I have dealt with how the differing arguments should be resolved and that I am content for them both to take advice on how best to structure any order that I make given my limited powers under the Matrimonial Causes Act. I anticipate there may be many steps that they can take that fall outside my distributive powers, which will be to their mutual financial benefit.

COSTS CONSEQUENCES

57. Neither party has got what they were asking for. Both parties characterised their proposals as requiring a lump sum payment from Mr L to Mrs L when that is not the reality of their financial position.

58. The starting point in financial remedy cases is that each party should be responsible for paying their own costs – see Family Procedure Rules Part 28.3(5).

59. Part 28.3(7) sets out what the court must have regard to in deciding what order (if any) to make that requires one party to pay costs to the other:

    a) Any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;

    b) Any open offer to settle made by a party;

    c) Whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

    d) The manner in which a party has pursued or responded to the application or a particular allegation or issue;

    e) Any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and

    f) The financial effect on the parties of any costs order.

60. Miss Harrison complains that such was the complexity of the parties' finances in this case that Mrs L has needed to employ her own experts to advise her with the result that her costs are significantly greater than those of Mr L.

61. The general rule is displaced where a party has been guilty of litigation misconduct such as non-disclosure or where a party has failed to negotiate openly and reasonably. None of that applies here.

62. Can Part 27.3(7)(f) be read so as to include the financial effect of not making an order. That sub-paragraph has traditionally been read as inviting the court to consider the adverse impact of making an order against a party who deserves to pay but where the impact of such a cost order would either undermine the purpose of the order or where they simply do not have the means to pay. In the right case the wider reading of the sub-paragraph might be applied but this is not that case. Mrs L will get the benefit of the complexities of their finances as it will provide more for her than if different decision had been taken in the past. The need for help in understanding their finances is a regular feature of this type of litigation, as is the fact that the applicant's costs are invariably larger than those of a respondent.

63. All litigation carries risk. That is one reason why there is so much emphasis on encouraging parties to settle their differences. The general rule is well established and is part of the structure to encourage settlement.

64. Miss Harrison makes a second point, namely that Mr L stopped Mrs L from using their joint funds to pay for her litigation costs. Miss Harrison explained to me that a decision was taken not to apply for a Legal Services Payment Order (Matrimonial Causes Act sections 22ZZA & 22ZZB) so as to avoid satellite litigation and running up yet more costs. In order to finance her costs Mrs L has taken a litigation loan that carries a high rate of interest.

65. Can that action by Mr L be categorized as litigation misconduct? In my judgment it can. Although he explained his alarm at the scale of costs being incurred by Mrs L it was not for him to decide how she spent her share of their joint funds. In so far as his decision has cost Mrs L, she is entitled to be put back in the position she would have been in had she been spending her own money and not having to borrow. Whether the parties chose to express that as a costs order or as part of the calculation in distributing their funds is a matter for them to decide.

66. As I have set out above, I am content for the parties together to work out the order that most efficiently reflects the decisions I have made.

67. That is my judgment.

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(This judgment has been approved by the Judge.)