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No. ZZ20D54481

IN THE FAMILY COURT
(Sitting at Newcastle Upon Tyne)

Newcastle Civil and Family Courts and Tribunals Centre
Barras Bridge
Newcastle upon Tyne
NE1 8QF

Monday, 14 August 2023

Before:

MR RECORDER HAMES KC

(In Private)

B E T W E E N :

SY

Appellant

- and -

PERSONAL REPRESENTATIVES OF THE
ESTATE OF DY (Deceased)

Respondents

MR H STEVENS (instructed by Sintons Law) appeared on behalf of the Appellant.

MR R TAYLOR (instructed by Jacksons Law) appeared on behalf of the Respondents.

J U D G M E N T

RECORDER HAMES KC:

- 1 I am dealing with a case today which was allocated to me for case management and hearing, although today's listing very clearly is for directions and directions only. However, early on in the hearing, having established that the costs incurred already had been some £40,000, and the dispute between the parties was only over £51,480.51 plus costs, I invited the parties to consider whether they wanted me to adjudicate on those two issues – that is, the £51,480.51 and costs. Having duly reflected and had every opportunity to take instructions from their respective clients, both counsel invited me to make an adjudication at this directions hearing, which I will endeavour to do, and it is those circumstances that I am giving this *ex tempore* judgment.
- 2 I am considering an application by the appellant, SY, for permission to appeal out of time an order made in financial remedy proceedings by DDJ Morgan on 14 September 2022 and para.25 of that order which provides for there to be pension sharing orders each of 40.8 per cent of his two NHS pension arrangements. They are both NHS funds but bear a different year because different arrangements apply and, therefore, there are two pension sharing annexes. It is of note that SY does not seek permission to appeal any further provision.
- 3 The reason for the appeal is the tragic death of the respondent to those financial proceedings, who was SY. She died very prematurely on 9 March 2023 at the age of 50. The appellant was also 50 at the date of the hearing. He is now 51, so I note that the parties are broadly the same age. We have dispensed with the procedural niceties because I accept that it would have been open for SY to have applied under a different provision of the Family Procedure Rules for a set aside order to the same tribunal, but the matter has been launched as an appeal, partly because the appellant needed to secure a stay of the implementation of the pension order from the court. Furthermore as it is an appeal, it has been allocated to me at Recorder level, rather than back to the same tier as the Deputy District Judge.
- 4 There is no dispute before me that I should grant permission to appeal, and I do, therefore, grant permission. There is no real dispute between the parties that I should also set aside the pension sharing orders. Probate has not yet been granted, and therefore the respondent's personal representatives act on behalf of the estate. I will, in due course, join them as respondents to enable them to do that. There is no dispute about that. The only point they make is that as a condition of setting aside the pension sharing order, I should order a further lump sum payment to be made by SY to the estate of £51,480.51. The reason for that is that if I were not to set aside the pension sharing order as things currently stand, that is the lump sum payment that the estate of DY would be entitled to receive from the NHS pension. Otherwise, because she has died, annual pension income of around, in broad figures, £20,000 and an additional lump sum of some £38,000 would be lost to the estate. As far as the figures for SY are concerned, if the pension sharing order were to go ahead, there would be a reduction of some £18,000 of pension income to £26,000 to his income, and the lump sum would be reduced by £36,000 to some £52,000, compared to the situation that would pertain if I were to set aside the pension sharing order.
- 5 In broad financial terms, the death of DY means that if the pension sharing order goes ahead, there would be a loss overall to the family, looking at [the parties'] position together, whereas if I were to set aside the pension sharing order, there would be significant compensatory benefits to SY. The only thing available for the estate to target, is that sum of £51,480.51, which would otherwise fall into the estate if I were to do nothing, and that is the

reason why, quite properly, the argument is made by the estate that if I were to set aside the pension sharing order, I should only do so on the basis of that payment. That suggestion was made in a series of open offers which have been further extended today on the basis that that sum be ordered to be paid it should be capable of being deferred if SY is able to provide security for the payment of that sum. If he is to provide security for £51,480, either because he purchases another property, or has other security available, he could defer payment of that sum until the youngest of the three children of the family attains the age of 21 or ceases full time education up to first degree level, to include any gap year. There are three children of the family whom I will refer to as Child A, Child B and Child C. Child A is now 21, Child B is now 20, but it is Child C who is the youngest and still a minor at the age of 15, shortly to be 16, whose welfare continues to be the court's first consideration.

- 6 I am not going to go into details of the arrangements that the deceased, DY, made. Broadly, the Will provides for her estate to pass into a discretionary trust. When read with her expressions of wish made in November 2022, it is clear, as one would expect, that her intention was to provide for the three children.
- 7 The arguments put by SY for why I should not make a lump sum are, broadly, as follows. The learned Deputy District Judge, who is not criticised in any way, was making a pension sharing order, essentially, based on needs. It is quite clear from the section of the conclusions in that judgment dealing with pension share, that the reason for the pension sharing order was to provide income for the respondent on retirement. She had only limited NHS pension provision, far less than SY, who is[a medical professional], and that is why there had to be a pension share. It is pointed out that the judge also made provision for the deceased's future housing needs, which will no longer be required. The order of the Deputy District Judge made provision for her to receive 66 per cent of the proceeds of sale of the former matrimonial home, which, in very broad terms, would be some £300,000 – I am using extremely broad figures, I should say here – and about £150,000, less the payment of various other unsecured loans in the name of SY, would accrue to him if the sale of the matrimonial home goes through at the current asking price of some £830,000. So, on the face of it, it is accepted that the sum of around £150,000 less whatever debts are available, would be sufficient to fund the lump sum, but what is said on behalf of SY is that he is going to need every penny of that money to provide for, particularly Child C, but also for the other two children and himself. In any event, it is likely – and this was envisaged by the Deputy District Judge – that he would not be able to purchase his own property, but may have to face going into rental property, in which case, the remaining capital that he had, would not go directly to satisfying the children's housing needs, but no doubt could be used for whatever SY thought fit, including the financial support of the three children, particularly Child C, which will now be entirely his responsibility..
- 8 It is submitted on behalf of SY that the distribution of the pension assets by the Deputy District Judge had nothing to do with the sharing of resources. They were not treated as capital. It was entirely based on providing for future need, which no longer applies. It is submitted that I have the power to allow permission to appeal out of time, and to set aside the order on the basis of the tests set out under the Barder principle. Principally, the four tests set out by the House of Lords and Lord Brandon's judgment, but also perhaps a gloss added to that test by Mostyn J. I do not propose to get into a legal debate with Mostyn J about what the test actually entails, but it seems to me that it is common ground, and I accept and so find that the elements of the Barder test are satisfied in this case. A new event has occurred – that was the death of the respondent – since the making of the order, which invalidates the basis, or the fundamental presumption on which the pension sharing order was made. Secondly, the application was made in good time without any delay. There is no dispute about that. In my judgment, it is likely that leave to appeal and the appeal would be

certain to succeed, given, particularly, that the Deputy District Judge's order provided for that eventuality in its order – namely, that if the respondent were to pre-decease before the pension sharing order was implemented, the estate would not resist an application for permission to appeal. That is a standard provision now in financial remedies orders and, in my judgment, cannot be deployed, as, indeed, it is not, as a reason for submitting that the new event – namely, the death of the transferee to the pension sharing order – was not anticipated by the judge making the decision. I am satisfied that the death happened within a relatively short time, and there is absolutely no prejudice to third parties.

- 9 I should, for the sake of completeness, just deal with s.24A(2) of the Matrimonial Causes Act. I am satisfied that that provision does not prevent me in this case from setting aside the pension sharing order. It is clear to me, firstly, that the NHS has not implemented the pension sharing order. That is clear from correspondence that they have provided which sets out the figures I provided earlier in this judgment. Secondly, that the NHS has not raised any question that it has acted to its detriment that I have to consider.
- 10 In my judgment, the position between the two positions is pretty close, but I have, on reflection, decided that it would not be a fair order if I were to leave the estate with nothing from the respondent's pension share. I do not accept that the Deputy District Judge made the order for the pension sharing order just on the basis of providing for income needs in retirement. Of course, a lot of the reasoning for the pension sharing orders and, indeed, the consequences of the pension sharing order, had everything to do with providing for retirement. However, it is also clear from other parts of his judgment, as, indeed, from existing legal principle, that there is, inevitably, in any case, a sharing element, and there is an entitlement element. As far as I can see, it was not said that the pensions of SY were, in some way, pre-marital, or should be ringfenced just for need.
- 11 Even if I am mistaken about that, I accept the principles in the recent Supreme Court decision of *Unger and another v Ul-Hasan, decd and another* [2023] UKSC 12, [2023] 3 WLR 189 approving implicitly a passage in a Court of Appeal judgment in *Smith v Smith* [1992] Fam 69: "A wife with few or no needs, who has nonetheless made a significant contribution to the marriage, has in my judgment a right to recognition of that contribution in money terms where there are assets available to meet it so long as the court does not act to the unjust detriment of the other spouse." That was a case where the wife had died 6 months after the final order.
- 12 In my judgment, it would be simply unjust on both the estate and, ultimately, the beneficiaries, which are the three children, if I were not to provide the estate with at least that available sum of £51,480.51.
- 13 I bear in mind that the appellant, put bluntly, is benefitting from the early death of the respondent because he will now, contrary to the intention of the Deputy District Judge, be able to retain a significant part of his two pensions, which, otherwise, would have been transferred. Yes, I accept that he was only provided with a smaller proportion of the former matrimonial home I accept that the entire obligation of accommodation for Child C will now devolve to him, but doing the best I can on the very tragic situation that has arisen, it would be unfair, as I have indicated, to deprive the respondent, through her estate, of every aspect of the benefit of the pension sharing order that the learned Deputy District Judge made.
- 14 I, therefore, will accede to the respondent's proposal with one caveat: that the appellant will have six-months from the sale of the former matrimonial home to complete the purchase of an alternative property, or otherwise provide security for the lump sum that I will order him to make. If that security is not forthcoming within six-months from the date of the sale of

the former matrimonial home, it will be paid to the estate on that date. Pending that six-month- period, I will direct that the sum of £51,480.51 will be retained by the solicitors having conduct of the sale of the former matrimonial home. I am sure the drafting can be sorted out by counsel, but my intention is to give the appellant that six-month window, even after the sale of the former matrimonial home, to find alternative property which can then be used as security. I hope the terms of the measure can be agreed. I broadly accept the terms put forward by the estate. It should include provision for a gap year. It is likely to be Child C, given his age and the differential with his older siblings. I do not need to deal with how the sum is held by the trustees on behalf of the estate. That will be dealt with by the terms of any grant of probate they ultimately obtain.

LATER

- 15 I am going to make no order for costs. I have heard Mr Taylor's submissions very carefully. I accept that, as a matter of law, it is a clean sheet, which is my starting point. However, I accept that I have allowed permission to appeal, and I have also allowed the appeal. I fully accept Mr Taylor's point, on the other hand, that open offers have been made which have been largely the same as the order made by the court, with a couple of adjustments that may prove material, or may not, by the court. However I have a very broad discretion and these are, as I have already observed, tragic circumstances. I am against Mr Taylor for the following reasons. I have already made provision for the estate to retrieve the sum of £51,480.51 from the NHS – or the equivalent of what they would have had from the NHS – by way of a lump sum order to be made by the appellant pursuant to my order, but I take into account that the responsibility for the children, particularly Child C who is my first consideration, will now devolve onto SY. It will be him in these tragic circumstances who not only has to deal with the financial fallout, but also, as the children's sole surviving parent, from the emotional fallout as well. I accept that even that may not be seen by the estate as being sufficient to provide a costs order, but in the last analysis, I appreciate and I accept that SY does have significant liabilities, as has been outlined by the Deputy District Judge in the judgment, and I do not intend to make an order that puts any further pressure on the children's final surviving parent. It may be said that there is a bit of rough justice there between the two on the two issues, but I repeat, that costs are very much in my discretion, and I have a very broad and wide discretion that I have just exercised.
- 16 I am extremely grateful to both the appellant and also to the estate for acting in a proportionate way to ensure that this appeal can be resolved at this hearing without the wholly disproportionate expense of their having to be a further hearing, not only for the time that the advocates would need to charge for, but also the inevitable amendments to the bundle and the other case preparation. I hope now that both the appellant and the estate can put these financial remedy proceedings behind them.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.