Neutral citation: [2023] EWFC 298 (B)

IN THE FAMILY COURT AT GLOUCESTER & CHELTENHAM

Gloucester & Cheltenham County and Family Court
Kimbrose Way
Gloucester
GL1 2DE

Date of judgment: 12 October 2023

Before:

DISTRICT JUDGE NAPIER

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Between:

GW	**Applicant**
- and -	
GH	**Respondent**

- -
- -

MR CHRISTOPHER CARR appeared for the **Applicant**

MS GEMMA BORKOWSKI appeared for the **Respondent**

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JUDGMENT

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DISTRICT JUDGE NAPIER:

1. This is my judgment following the final hearing of the application for financial remedies made by the Applicant Wife (GW) against the Respondent Husband (GH). The parties began cohabiting in 2003. They married in 2009. They have two children: A and B. The parties separated in 2021, following 18 years of cohabitation

through into marriage. The petition for divorce was in June 2022. The Form A was in August that year; decree nisi in December 2022.

2. The First Directions Appointment was held before Her Honour Judge Ellis in December 2022. Her order records that the Applicant's legal costs at that time were £48,406; were recorded another £44,274 to FDR. The Respondent's legal costs at that time were recorded as £2,700, with another £4,800 to FDR. Her Honour directed that the Children Act arbitration awards be removed from the Court file, which they have been, but otherwise made standard directions for the FDR.

3. The FDR itself was then held in April before Deputy District Judge Loughbridge. The Applicant's legal costs at that time were recorded as having risen to £103,554, with an estimated £36,000 to final hearing. The Respondent's legal costs were recorded as being £8,156, rising by another £30,000 if there had to be a final hearing.

4. There was an open offer ordered from the Respondent in response to the Applicant's post-FDR open offer. It came a few days after the FDR, but it was recorded that the Respondent was intending to make an open offer within 14 days.

5. Permission was given at that time for Dr Z to give expert evidence, but that was in relation to the Applicant's poor health, in relation to her medical health. Other relatively standard directions were given. DDJ Loughbridge did not debar the parties from raising conduct, but equally he did not permit it to be addressed in the section 25 statements. These statements, and the third party witness statements that were envisaged, were ordered four weeks before the final hearing, with a bundle to be filed seven days before the final hearing.

6. In June 2023, the Court listed the hearing to begin in October. That made the last date for the exchange of statements 12 September 2023, with the deadline for the bundle to be 3 October 2023.

7. In October 2023, there was the directions hearing before me to decide an application for participation directions, which was granted by consent due to the Applicant's difficult medical situation. The parties also confirmed generally they were ready for trial.

8. Pursuant to those directions, the final hearing has taken place remotely by way of Microsoft Teams over two days for the taking of evidence and submissions. The Applicant gave evidence throughout the first day, with regular breaks, the Respondent giving evidence in the morning of the second day, with submissions that afternoon.

9. I will record here, as I said to the Applicant at the close of her evidence, that I was fully satisfied that I had clearly understood all of her evidence to the Court. I know she was very concerned that, due to her condition, she had not been able to explain her points or answer some of the questions that were put to her. Whilst it was noticeable that she did become more tired throughout the day, as was predicted, with regular breaks and the breaking-down of questioning, I am satisfied she has had a fair hearing, and at no point in this case am I left unsure about what her evidence actually has been.

10. Overall, notwithstanding this has been a remote three-day final hearing, which inevitably takes its toll on all those involved, I am satisfied that the hearing has been fair to all parties.

11. I also record here the three applications that I have heard during the trial, to admit further evidence:

i) The first application at the start of the hearing was to firstly admit the Applicant's father's witness statement as hearsay evidence, and permit him not to be called due to his inability to attend, because he was caring for his wife who is recovering in hospital. Secondly, there was an application to permit the Applicant's sister to be called as a witness in lieu of her father. I will not repeat here my reasons for dismissing the application. Having heard the final hearing now, I am fortified in my conclusions for not permitting a late change of evidence under the overriding objective.

ii) The second application made at the close of the first day was for the late admission of the Respondent's accountant's summary of his earnings, which was granted by consent.

iii) The third application at the start of the second day was for five different pieces of late evidence to be admitted. They were, first, evidence that the Applicant had no critical illness cover; second, the final signed page of a loan agreement that was already in evidence in unsigned form; third, the bank statements that underpinned the loan agreement; fourth, emails between the Applicant and her father from 2010; and fifth, the judgment of Peel J when he made the child arrangements order following the arbitration before Mr Norton KC.

iv) The first three of items were admitted by consent. I refused to admit the fourth and fifth items, for the reasons I gave at the time, and again, having reflected now on the totality of the evidence and the submissions, I remain of the view that was the correct decision under the overriding objective.

Issues

12. Turning then to the issues, these are, in respect to computation:

i) What should be the costs of sale attributed to the various properties?

ii) Whether the assets of the XYZ Trust, or the bare trusts, are a resource which the Applicant can be expected to call on to meet the private school fees of the children (the Trustees are not joined to this action).

iii) The extent to which Property D and Property E would be a financial resource that the Applicant has available to her.

iv) Whether the following liabilities should be recognised:

a) First, a debt of £51,370, which the Applicant says is due to her parents, because of the monies given to her to fund the purchase of Property B, as an interest-free loan.

b) Second, a debt of £110,000, which the Applicant says is due to her parents because the monies given to both parties to fund the purchase of Property C were also an interest-free loan.

c) Third, a debt of £50,476, which the Applicant says is money she holds on behalf of her mother, essentially a resulting trust arrangement.

d) In the first two of those cases, the Applicant says the terms of the loan are that they are repayable on the sale of the property, or on demand. The Respondent says in reply they are not loans but, in the event that

the Court finds they are, they are soft loans, and should be disregarded under the Court's section 25 discretion.

13. The issues concerning distribution:

i) Neither party seeks periodical payments. The question is how to distribute the capital.

ii) The Respondent seeks a pension sharing order, which the Applicant resists.

iii) The Applicant seeks to have her legal fees from both this litigation and the Children Act litigation deducted from the capital before distribution. The Respondent says the sums incurred are disproportionate, and so much so that they warrant an adjustment in his favour.

14. I have considered obviously the bundle; the wife's and the husband's section 25 statements; their Forms E; and their replies; the evidence that they have given at the hearing in both chief and cross-examination; and the arguments that the parties have put forward.

General Principles

15. I will very briefly summarise the legal principles, which are well known. In exercising the Court's discretion to make a financial remedy order, section 25 of the Matrimonial Causes Act 1973 requires that the Court ought to consider all the circumstances of the case, the first consideration must be given by law to the welfare of the children. Section 25(2) then sets out the various other statutory factors which must be considered in the two-stage process of computation, and then distribution.

16. The objective of the Court is to achieve an outcome which ought to be as fair as possible in all the circumstances: White v White [2000] UKHL 54. There is no place for discrimination between the roles of a husband and wife in their marriage. If there is a surplus of assets over needs, the sharing principle is engaged and, as the starting point in the division of capital after a long marriage, fairness and equality usually go hand in hand.

17. These are civil proceedings, and the balance of probabilities applies. The burden of proof is on the party asserting a particular position to prove it is more likely than not on the evidence.

Summary Facts and Circumstances: Applicant

18. The Applicant is in her 40s and she is currently unemployed. Until 2020, she was a successful consultant. She describes herself, unchallenged, as the breadwinner during this period of employment. Due to the stress of her position, the parties agreed she would leave her role, and then they would try life in the West of England. Apart from a limited period in 2021, she has not been able to find a suitable role.

19. In August of last year, the Applicant was diagnosed with a rare and aggressive form of cancer and was in Stage 2 or 3. A recent letter from her treating oncologist is in the bundle, which I will refer to later.

20. Her current prognosis is uncertain, but she is treated with the intention of going into remission and being cured. Nevertheless, whatever path her condition takes her, everyone agrees that she must be given the support necessary to walk that path, and it is recognised that her treatment is going to be difficult, aggressive in its own right and exhausting physically and mentally.

21. I will return to the capital assets later. The Applicant has a current income of around £31,000, made up of £18,000 of rental income from Property B, and then ESA PIP and, as I understand it, she currently receives the child benefit. The Applicant does not have a mortgage capacity. She is still living in the former matrimonial home, but there is now agreement that that property must be sold.

Summary Facts and Circumstances: Respondent

22. The Respondent is also in his 40s and he is currently living in the former matrimonial home with the Applicant and their children. He says that his current earning capacity has been impaired due to the pandemic, the family's move to the West of England, and the stress of these proceedings and the Children Act proceedings.

23. As I have referred to, a letter from the Respondent's accountants was admitted which recorded his gross income over the past 18 years. From 2019 to 2023, the average income was around £25,000. Before that it did fluctuate more widely. He anticipates from his evidence that it is more likely his income in the medium term is going to be around £36,000, and that its realistic maximum would be £60,000. He was adamant in his cross-examination that some roles are unsuitable for him as they would involve working weekends, and that would conflict with his care of the children under the shared care arrangement. The Respondent does not have a mortgage capacity, he has no significant capital assets standing in his name.

Child Arrangements

24. I will touch briefly on the child arrangements, because it is important for what is to come. It is necessary to record these, both because they affect the issue of school fees, and impact on the quantum of the legal fee liabilities.

25. The child arrangements are set out in an order of Peel J. The reason why the proceedings reached such a high level is because the parties are the ones in the reported case of G v G [2022] EWFC 151. The parties agreed to arbitrate their child arrangements dispute and, when the Applicant considered the award of Mr Norton KC was flawed, proceedings were commenced.

26. As I understand it, there was no prior authority about the correct approach to be taken when challenging an arbitrator's award in Children Act proceedings. Peel J therefore settled the law in the reported case, and then privately made an order implementing the arbitral award, after finding that the appropriate legal test for challenging it had not been met.

27. The Applicant said it is through no fault of the parties that they had to incur legal expenses in the proceedings before Peel J concerning the law. Of course, I can only have sympathy for parents who find themselves, in what should otherwise have been a relatively straightforward Children Act dispute, caught up in a relatively novel area of the law, and an area in which there was no prior legal authority.

28. However, it remains the case it was only necessary for the High Court to become involved because there was a refusal by a party to accept the arbitrator's award. Courts do not embark upon expensive litigation of our own motion. We become involved when a party chooses to exercise their legal rights in a particular manner.

29. Thus it came to pass that the shared care arrangement was ordered. Under that order, the children are to remain at X School for the remainder of the 2022 / 2023 academic year, and thereafter the children are ordered to continue there or at another agreed school.

30. It is, of course, possible for the parents to agree a different set of arrangements as with all private law family orders. Entirely sensibly, the parties have begun countenancing the possibility that the outcome of this litigation may mean they cannot continue to afford private education for their children. This is a challenge which faces many families each year, especially in the current financial climate.

31. As I explained during the hearing, I am not hearing an application to vary these child arrangements. It is a powerful and persuasive factor that there is a court order governing their arrangements, which can only have been made following an assessment of the best interests of the children, requiring that they continue to attend their private school unless there was agreement between the parents to the contrary. I make four observations in this regard:

i) First, the order specifically envisaged another agreed school, but it did not state it must be private education, and I do not believe that Peel J or Mr Norton KC would have alighted on that language used without very careful consideration.

ii) Second, I accept as a general welfare consideration under the Children Act that it is better that children have the benefit of a settled education without disruptive moves.

iii) Third, the best interests of the children and their welfare are the <u>first</u> consideration for the Court in financial remedy proceedings, but they are not the <u>only</u> consideration. It does not mean that the Court can abandon the obligation to make as fair a distribution of the assets as possible in the circumstances in pursuit of the sole purpose of meeting a school fee obligation from the assets.

iv) Fourth, following on from the third, there will come a point at which deploying financial assets to meet the children's educational needs begins to adversely affect their other emotional and physical needs to be housed appropriately in a co-parenting scenario.

32. For these reasons I have reached the conclusion that if the assets in the case cannot fairly be used to meet the school fee obligations for the children, then I must not allow their housing needs or their need to have a warm, loving, and importantly equal, relationship with each parent to be inappropriately compromised.

Matrimonial Assets, Liabilities and Income

Costs of Sale

33. Turning then to the various factors concerning computation, and first the costs of sale. There is the traditional argument between 2 per cent and 3 per cent. There is no fixed rate at law. In Behzadi v Behzadi [2008] EWCA Civ 1070 Wilson LJ referred to the percentage conventionally taken as being 3 per cent. That was a convention from 15 years ago.

34. The best evidence here is the rate actually achieved on the forthcoming sale of Property C. That rate is, according to my calculation, 1.7 per cent and that is a London property. The West of England is a different market, but the Court has the benefit of three estate agent valuations for the FMH. The rates, once VAT is added, are nowhere near 3 per cent and, on my calculation, are all less than 1.5 per cent. I accept there will be legal fees to add on top. Therefore, a reasonable cost of sale to be applied to all properties except Property C, is 2 per cent. For Property C, the actual costs of sale in the sum of £34,946 should be used, as per the ES2.

XYZ Trust

35. The XYZ Trust was settled in the Isle of Man in 2014. The settlors of the trust are the Applicant's parents, and they are the Trustees, along with X.

36. The principal evidence about the Trust comes from two letters provided by the Trust's Solicitors in response to queries that have been made of them. The first letter, dated 19 July 2022, is written by the Solicitors, "*setting out the response of the trustees*". Whilst I accept that no Trustee has been called to give oral evidence, the letter was written after the petition for divorce was made and, given the familial connection between the parties here and Trustees, it is inconceivable that the Trustees were not aware of the impending dispute. Against that background, I struggle with any proposition that I cannot place significant reliance on the letter sent by Solicitors, including the second letter from April this year, who must reasonably be taken to know that it would be used in court.

37. The trust deed is before the Court in the evidence. It is a discretionary trust and there is no letter of wishes. It is settled for the benefit of the children of the settlors and the grandchildren of the settlors. The April letter said there were [over 10] beneficiaries of the trust, notably some of them from the Applicant's father's first marriage.

38. The purpose of the trust, as stated in the deed, is to provide for all of the beneficiaries, at the sole discretion of the Trustees. The Trustees state in the letter that they consider its purpose is to take advantage of the tax benefits associated with discretionary trusts, and in particular the inheritance tax consequences that would have arisen had the assets not been placed in trust prior to the demise of the settlors.

39. The main asset of the trust is an offshore investment bond. The gross value, as of April 2022, was £1.482 million. That was before any tax which may be due on investment gains arising from any distribution.

40. The Trustees say, and this has not been disputed, that they have never made an income distribution from the main trust. Concerning capital, they say there has been no distribution, aside from one: in 2021 the Applicant requested assistance from the Trustees in respect of one term's worth of school fees for her and the Respondent's children. However, the Trustees said in the end the funds were not required, and they were returned to the trust. The Respondent disputes that this was in fact a loan.

41. In addition to the discretionary main trust, there are two bare trusts set up for the benefit of A and B in 2021. Each bare trust received cash to a value of £32,285.61. The Trustees of these bare trusts are the Applicant's parents only. The Applicant's unchallenged evidence was that the gross value now is in the region of £48,000, as of 25 August 2023. These were set up as a tax efficient way of utilising A and B's own personal tax allowances, but there will be tax and professional fees to pay upon any distribution.

42. A and B are absolutely entitled to the funds once they reach the age of 18. Before then, the Trustees have a discretion to disburse income or capital for their benefit. The Trustees say there has never been a capital or income distribution in the short time that the bare trusts were established.

43. The Applicant's written evidence was that these trust funds are not available either for her or to meet A and B's ongoing school fees. She said there had been one occasion when monies were loaned from the bare trusts for one term's school fees for them, but this was repaid this shortly thereafter. Otherwise, she said the Trusts have never

previously paid for school fees or anything else. In her oral evidence the Applicant was adamant she had no control over the trust, no influence over the Trustees, and referred to them as, "*big complex structures*".

44. Whilst the first two propositions are undoubtedly correct from a pure legal point of view, it is in my judgment stretching the position too far to say that as a daughter of two of the Trustees, with two grandchildren they no doubt love and adore, her wishes would not hold some considerable sway. Concerning her third point, about the complexity of the structure, I do not accept that characterisation. Not only are the bare trusts straightforward in their terms, but the Applicant has struck me throughout her evidence as someone who is on top of the details, on top of the terminology, and on top of the finances. To suddenly abandon that when challenged about an inconvenient point is internally inconsistent.

45. When challenged about the purpose of the trusts, the Applicant stated that they were for education, but qualified that in a rather generic statement as that being tertiary or spiritual education, and then she said she could not comment on why they were set up.

46. Again, I do not accept that evidence. The purpose of the trust has been plain throughout the litigation, they are not especially complicated trusts, nor is there any reference to education in the trust deed specifically.

47. Concerning the purported loan, her evidence is inconsistent with the Trustees' letter. The Trustees' letter is clear that the capital distribution was from the main XYZ Trust, not the bare trusts. It was unequivocal there had been no capital distribution from the bare trust. In addition, when challenged that she had only repaid the funds after separation of the parties, I consider that no credible explanation was given in reply.

48. For these reasons concerning the trusts, I do not regard the Applicant as a reliable witness, nor can I place any more than little weight on her evidence in this regard.

49. That is not, however, the answer to the question put before the Court. It is the Respondent who contends that the Trust is an available matrimonial asset, and it is for him to prove it is more likely or not it would be likely to be made available. The Respondent's evidence amounts to three elements:

i) First, the WhatsApp message exchange with the Applicant's father, one of the Trustees.

ii) Second, a conversation he had with the Applicant's father at their house.

iii) Third, the fact that school fees have already been funded, which show an intention to do so again in the future.

50. Against that background, whilst the Court cannot order the Trustees to fund the education, the Respondent seeks a school fees order and indemnity as 'judicial encouragement' to the Trustees. The difficulty with the Respondent's position is in my judgment three-fold:

i) First, other than one term of school fees, the Trustees have not paid any other school fees. That is even in the face of the Applicant's clearly worsening financial situation.

ii) Second, the Trustees have set out their view twice and, in their view, at present the answer is still 'no'. They say they are mindful of their legal duty to apply trust funds fairly as between all the beneficiaries of the trust. Given the number of beneficiaries between which the trust assets are shared, even if not

shared equally, the Trustees say they are uncertain as to precisely for what purpose distributions will be made in the future. They say that support for housing may be the best use of trust funds to support the beneficiaries, and that using funds to pay for school fees would unreasonably favour two beneficiaries over the others.

iii) The third factor is that the trust deed provides that the Trustees must act by unanimous decision, and therefore the Applicant's parents are not solely in control.

51. The Respondent's answer to these points, and in particular the second point, is that the costs of schooling on a 'fees in advance' basis is around £100,000, and therefore that is an affordable, reasonable and fair distribution to expect from the Trust if the Applicant made the request. I do not accept that argument for two reasons:

i) First, as the cross-examination of the Respondent showed, £100,000 is the cost of education at one school from the end of the primary phase to the beginning of sixth form. It does not cover extras, nor the remaining time in primary that is to come. The Applicant estimates that it is £200,000 per child. That seems too high to me but, in any event, the effect of cumulatively schooling their children for 20 years is likely to be much more than £100,000 per child.

ii) Second, even if the Respondent was correct that the Trust could fairly bear the burden, that would mean there was no more money for the children, no university education, no support for housing. One can see, with some force, why the Trustees have very reasonably decided not to expend trust assets on this sole element of the children's lives.

52. For the same reasons I do not regard it as likely that the Trustees will make available as an asset their trust funds, which are legally held for the sole benefit of the children, but which are already accruing substantially, up from £32,000 approximately on inception to around £48,000 on the latest figure provided to the Court. The Trustees will, of course, need to weigh up any request against the long-term intention that the bare trusts are intended to become the children's absolutely once they reach their 18th birthday.

53. Further, in the WhatsApp messages the Applicant's father specifically referred to the bare trusts. These are the trusts with substantially less funds in them. I have seen no evidence that the Applicant's father was confused about what he was referring to.

54. Weighing up all the factors and, even if I took at its highest the Respondent's evidence concerning the messages and the conversation he said he had with the Applicant's parents, I am not persuaded on the balance of probabilities that it is likely the Trustees will make the assets available if the Applicant requested them, in order to meet a school fees order and indemnity. For those reasons I will not make a school fee order and indemnity, but I will make provision in the award to come for the children to finish their current phase of education at X School.

55. Even if I am wrong in my reasoning, I regard as fair and reasonable the consequences of the order to come. Both parties want the children to continue in private education, there is nothing in this judgment or the forthcoming order which will stop them from requesting support. The Trustees will either say 'yes' or they will say 'no'. If they say 'no', there is no way, and both parties candidly accepted this, that they can afford to fund further private education. The children will need to go to the state education

system, as the parties have already contingently been preparing for. If the Trustees say ‘yes’, then the parties' wishes are going to be met.

56. What the Respondent asks for is judicial encouragement to push the Trustees into saying ‘yes’, but that encouragement comes at the grave risk to the Applicant's financial situation. Further, it could drive a coach and horses through the financial settlement that is to come. I do not regard it as fair to build the forthcoming distribution on such a shaky foundation. So, those are my reasons for refusing to make a school fee order and the indemnity, other than the small award to finish their primary education.

Property D and Property E

57. Property D has been the home of the Applicant's parents for 45 years. It is common ground it is now owned both legally and beneficially by the Applicant and her sister in equal shares as part of inheritance tax planning. The Applicant says it is subject to a life tenancy in favour of her parents. I have no reason to doubt her evidence in this regard, I have heard no effective challenge to the contrary. There is no prospect of it being an asset which can immediately or in the medium term be released.

58. The Respondent accepts quite fairly this is non-matrimonial property. As such, it can only be invaded to meet the needs of the parties. The Respondent contends this is a financial resource which the Court should consider the Applicant having access to. Because of the potential development value of part of Property D that potential for such a resource might be a sizeable one.

59. The Applicant disputes the development potential, saying in evidence that it did potentially have a development value when they were discussing it with developers in

the millions, but that was from a time when the planning had not been applied for. Planning permission has since been rejected, and the investment has fallen through.

60. In my judgment, this been a distraction. The property is non-matrimonial, it can only be used to meet needs, and then only if the Court exercises its discretion to permit it. It is the home of the Applicant's parents who, notwithstanding they are in their later years, clearly need it as their home. I do not see any basis for saying it could be regarded as an asset available to the Applicant, either in the short or the medium term. Conversely, it cannot be disputed by anyone that when the unhappy time comes for the Applicant's parents to move on, she and her sister will both have an asset of substantial value, as with so many children inheriting a family home.

61. I will deal with Property E briefly. The Respondent has to prove it is more likely than not that the Applicant has a financial interest in it. The evidence falls far short of this threshold. It is accepted by the Applicant that her father owns it and she accepts, in principle, it is likely to come to her in some form in her inheritance. In her replies to questionnaire, the Applicant said there was a legal barrier to overcome, which is, as a non-Country Z citizen, she is not entitled to own property in Country Z. She explained her understanding that property can only be owned by overseas citizens of Country Z, persons of Country Z origin or by Country Z nationals.

62. The Respondent's evidence is contradictory. In his section 25 statement he says at one sentence, "*I was told that [A's] parents had transferred to her an apartment in [Country Z]*", but then goes on in another line to say that the Applicant's father had been out in Country Z to try and sell it. The reasonable inference of that to me that the Applicant's father must still own the property.

63. My overall judgment of this evidence is that the Respondent thinks the Applicant either has a beneficial interest in it, or will receive it as part of an inheritance. The evidence does not support there has been any transfer, not least because the Respondent has provided no evidence to disprove the Applicant's evidence in replies that she cannot legally own the property. I accept that does not relate to a beneficial interest (in principle) but again, as the Respondent candidly and rightly accepts, it is still non-matrimonial. It is a future inheritance to be received, potentially barring the ownership restrictions, at an uncertain date and an uncertain time. I do not regard it as an asset available to the Applicant in the short to medium term.

Liabilities

64. Turning then to the question of the liabilities and the loans and first the debt of £50,476, which the Applicant says is money held on behalf of her mother, essentially a resulting trust (she referred to it as custodianship, but I consider the underlying principles are the same). I am not persuaded it is more likely than not that this is a debt that exists for the following reasons:

i) First, the money was not held separately but paid into the Applicant's main accounts.

ii) Second, I do not accept as credible the explanation given as to why it was given to her to hold. It is correct that the Financial Services Compensation Scheme has limits for each protected account with a bank, that is well known. Yet it is within the judicial knowledge of the Court that the answer to this is to open different accounts at different institutions in your own name. There is no need to have someone else do this and hold the monies for you. There is no

evidence from the Applicant's parents saying they were unable to manage this process themselves.

iii) Third, the Applicant said on more than one occasion she regarded herself as honour bound to the debts she owed to her parents, yet in this instance, unlike the other loans, the money has gone. The Applicant has spent it, and there is no evidence that she had permission to do so. This is heavily inconsistent with the remainder of her evidence about how conscientious she is towards her parents' money.

65. In her Form E she did not describe the money as a loan, she described it as, "*Funds owing to my parents*", which she and her sister would return to them. The other debts were specifically referred to as loans. In her section 25 statement the Applicant said, "*I also hold £50,476 on trust for my parents, which they asked me to hold for them in 2009, when they became concerned about the banking crisis*". In cross-examination the Applicant said, "*They never asked me to return it*".

66. Taking this evidence together, I am not persuaded it shows that a debt is owed. Money was given some 14 to 15 years ago, and there is no evidence that her parents have ever asked for it back until this litigation commenced. They are evidently financially astute individuals, and the explanation provided to me does not bear credibility. I find that this debt does not exist.

67. Even if I am wrong on this analysis, and the money was owed, it was undoubtedly a trust arrangement, and not a contractual debt. The Applicant was the sole trustee, she was required by law to preserve the trust assets. It is her own case that the Respondent does not know the detail of the precise financial arrangements and discussions had between her and her parents, therefore he cannot be said to have

acquiesced in any dissipation of trust assets, and it must be for the Applicant to bear the consequences of any breach of fiduciary duty. So, for that reason as well, I will not include that debt.

68. Turning to the two interest-free loans. These are recorded in the amounts of £51,370, due to the Applicant's parents because monies given to her to fund the purchase of Property B were an interest free loan; and second the amount of £110,000, which is said to be due to the Applicant's parents because of monies given to both parties to fund the purchase of Property C.

69. In both cases it is for the Applicant to prove it is more likely than not that first these debts are enforceable debts; and second, if they are, whether they are hard or soft loans under the reasoning in P v Q [2022] EWFC B9.

70. From the outset of the litigation the Applicant has maintained that these are loans. It was in her Form E. The Respondent challenged them in replies, and the Applicant has maintained they are loans. In her written and oral evidence, the Applicant has been clear and consistent that they have indeed been loans.

71. In support of this, the Applicant references the fact that she had previously repaid some of the monies owed under these loans to the tune of £80,000 when she sold her previous property.

72. The essence and my overall understanding of the Applicant's evidence is that she has an open and clear relationship with her parents and family. Her parents have been very clear to treat her and her sister equally. Why else would she repay £80,000 when she did not need to, or why else would the father's solicitors issue a letter before action for recovery of the monies? She says that other monies provided for the

purchase of the FMH have also been paid. She says overall this paints a picture supporting the contention that they are loans.

73. The Respondent's evidence is less sure. He said in cross-examination, "*I was not part of conversations about the money but I was around for the conversations about how they would be there to help*". He has consistently denied all knowledge of any loan arrangement or its terms. He said he was aware in January 2021 there was an urgent situation to give the Applicant's father some money, and both the Applicant and her sister provided funds back to him in unequal shares. He denied that this was a repayment.

74. The letter before action comes from the father's solicitors on 11 May 2023, just weeks after the FDR. It contains a great deal of specific information about transfers made, which have not been adduced in evidence before the Court now. It does contain specific details about how and when the contracts were said to be formed, as the CPR requires it to do. It accepts there are no written loan agreements, and it provides that the parties have until the middle of June to respond to the solicitor's demands.

75. Concerning Property B, I am persuaded it is more likely than not that this is an enforceable debt of £51,370. I am also persuaded that this is a hard debt that should be included. The Applicant's evidence is clearer and more persuasive. The Respondent's evidence to the Court is more vague. That is especially so given that Property B was acquired much earlier on in their relationship and, given these factors, I find the Applicant has proved her case in this regard.

76. Concerning the hard nature of the debt I am persuaded, from the fact that the Applicant repaid the £80,000 earlier, that it is more appropriate to treat it as a hard debt, notwithstanding the familial situation.

77. Turning to Property C, that question is more nuanced in my judgment. It is said to be a contractual debt of a significant sum. There is no written loan agreement to corroborate what is said. The evidence is that the parties did not consider that Property C was ever to be sold. How then, I have to ask, was that debt ever going to be repaid?

78. The Applicant says that the background of paying monies to her parents corroborates the loan relationships as I have explained earlier. My difficulty with that in my judgment is that it is equally clear that her parents are savvy with inheritance tax planning and have already made two substantial tax avoidance dispositions (their own home and the XYZ Trust) to avoid IHT. There is nothing wrong with tax avoidance, but the background does not therefore support one side or the other in my view.

79. I come then to the letter from the Applicant's father's solicitors. In my judgment it is entirely self-serving. The timing, shortly after an FDR judge would have given an indication, cannot be regarded as coincidence. Further, given it threatened litigation in May and June 2023, and given the Applicant herself said the father had a tendency towards litigation, there is still no litigation here in October 2023. I do not accept the reason for the timing being the forthcoming final hearing.

80. It is clear that the Applicant's family is a close one, they have dedicated support to each other, which extends to their finances. Whilst I do not doubt that the solicitors were acting on the instructions they have been given, in my judgment that letter flies so far in the face of the familial relationships that it does not support the Applicant's case, in fact it substantially lessens the weight I give to it.

81. For these reasons I find there is no enforceable debt in the tune of £110,000, and it must have been intended as a gift to the parties.

Incomes

82. Finally, concerning the financial resources I will briefly address the incomes. Neither is seeking periodical payments and, as such, the question of incomes is not as important as it might otherwise have been. The Applicant has no current employed income for entirely understandable reasons. The Respondent does not challenge that for the next 12 months and accepts, in the short term, there is no question of her working while she fights her illness. My assessment of the medical evidence, as the Applicant says herself, is that her prognosis remains highly uncertain, given the specific nature of the disease.

83. When he wrote his letter in August 2023 her treating oncologist said the Applicant's cancer was either at Stage 2 or Stage 3, depending whether or not the cancer had metastasised. Treatment would need to be adjusted according to the outcome of the further investigations. For these entirely understandable reasons, it is not possible to say what the path of the Applicant's treatment and recovery is going to be. I find that for the Court's purposes it suffices for me to find that she will not have any employed income in the short to medium term.

84. Concerning the Respondent's income, having heard the challenges to his evidence in cross-examination, I find that his own evidence about his earning capacity is most likely to be reliable. I find that in the medium term, once the litigation is over, and once he can devote more time to his business, he is likely to have an income in the region of £36,000, with the potential over the longer term to earn more. I accept his points that the criticism that the Applicant makes about why he cannot take the potential jobs is adequately answered by the fact they do involve working at weekends, and that would interfere with the split care arrangement for the children.

OPEN OFFERS

85. The parties agree:

i) The FMH and Property C should be sold.

ii) Each party shall retain their own bank accounts, cash, investments, and discharge any liabilities not addressed below.

iii) Clean break in life and death.

86. The Applicant offers:

i) She should retain Property B and its garages.

ii) From the proceeds of sale, the usual repayments of the mortgage, CGT etc should be made and thereafter:

a) The liabilities as set out in Applicant's ES2 should be repaid.

b) A fund with £34,186 be set up for school fees and tuition.

c) £25,160 be paid to the Applicant as a fund for medical care.

d) The remaining proceeds be divided such that these monies, along with any retained assets, are divided equally (excluding Property D).

iii) There is no pension sharing order.

iv) Chattels to be retained where they lie or divided by agreement.

v) No order as to costs.

87. The Respondent offers:

i) Property B and its garages should be sold.

ii) From the proceeds of sale, the usual repayments of the mortgage, CGT etc should be made and thereafter:

a) the X School fees repaid; and

b) the remaining proceeds divided such that these monies and parties' bank accounts and investments are divided equally with a balancing sum to be paid to the Respondent from the Applicant to reflect difference in expenditure in legal fees already paid.

iii) A school fees order and indemnity in his favour.

iv) A pension sharing order of 67.43% in favour of the Respondent.

v) Chattels to be retained where they lie or divided by agreement.

vi) The Applicant to pay the Respondent's costs.

DISTRIBUTION

88. The law says I must make a fair award based on all the factors in section 25. The first consideration must go to the children of the marriage. I have already made my findings about their education. There is a shared care arrangement in place, and therefore both parties need a suitable home where they can house themselves and their children. Ideally, this would be a four-bedroom property to allow guests and, in the case of the Applicant, carers to help her with her recovery.

89. The Applicant has put forward four-bedroom houses in the local area between £695,000 to £725,000. The Respondent has put forward four-bedroom houses in the

area of £895,000 to £1.25 million.

90. The Respondent's properties are far more aspirational in nature. Looking broad brush at the property particulars, I find that it is likely that a home can be found with four bedrooms in the region of £800,000. With stamp duty, legal fees and moving costs, a housing fund for each of £850,000 is in my judgment reasonable.

91. I find that the health needs of the Applicant do warrant a specific award in her favour for medical insurance. Certainly, it is necessary for her to maintain her private medical insurance, which is funding her treatment, which is not available on the NHS. She is in many respects very lucky that she had this insurance in place, which is now providing her with the care that she needs. Whilst I can understand the Respondent's criticism that there was no independent evidence of this cost, I do not consider that the Applicant's evidence was inflated or exaggerated in her section 25 statement. Therefore, I will award the sum of £20,160 to cover the medical insurance costs, and these sums are to be deducted from the net proceeds of sale.

92. I will make two further awards to the Applicant in relation to the children. They are the sums sought in her section 25 statement:

    i) First, £14,093 for the arrears towards X School; and

    ii) Second, £34,186 for the wind-down costs of the children continuing their current phase of education, and their transition to state with some tuition.

93. It is appropriate to fund this to ensure the children as smooth as possible transition to state education. Those sums can be deducted from the net proceeds of sale, subject to a provision that if the children do actually eventually continue private education, the Applicant must reimburse 50% of the £34,186 to the Respondent.

94. Turning then to the liabilities before the legal fees, it is fair to first deduct from both parties the following liabilities from the net proceeds of sale:

i) For the Respondent:

a) Liabilities, excluding legal fees, of £33,735.

b) His legal fees, including the litigation loan, of £71,086.

ii) For the Applicant:

a) Debts to AMEX, HMRC and [F], £20,539.

b) £51,370 for the debt that I found was owed in relation to Property B.

c) £35,000 to be paid to [T].

95. Turning then to the question of the legal fees, the parties disagree about how to treat the liabilities standing in the name of the Applicant. There is no dispute about their quantum, or the quantum of the Respondent's liabilities.

96. The Applicant's legal fees liabilities, as I read the ES2 now, are £326,207 as of the current date. The Respondent's own legal fee liability comes to £135,514. These liabilities relate to both these proceedings and the Children Act proceedings. The Respondent's case is that the Applicant has actually incurred much higher figures to north of £400,000. That is disputed by the Applicant, saying there is some double counting. But in any event, the vast majority of the liabilities relate to the legal fees.

97. The Applicant says that these liabilities must be paid from the capital before it is distributed. That of course will mean that the Respondent bears 50 per cent of the

cost. The Respondent says that he should in fact receive an additional award to compensate him for the Applicant's legal costs and spending.

98. The Applicant says her legal costs have been so high because she has required greater assistance from her lawyers due to her illness, the Children Act proceedings (which involved the novel points of law and procedure), and the fact that the Respondent has behaved unreasonably in the litigation. The Respondent refutes these points, and says it is the Applicant who has chosen through her litigation conduct to incur such high fees.

99. The law in relation to legal fees as a liability of the marriage is the subject of recent authorities. It is most convenient for the Court to refer to the judgment of His Honour Judge Hess, the Deputy National Lead Judge of the Financial Remedies Court, in YC v ZC [2022] EWFC 137. That decision is not binding on me, made as a Court of coordinate jurisdiction but, having read the reasoning, I agree with His Honour's legal analysis at paragraph 42.

100. The litigation costs in this case are eye watering. Even making allowance for all the factors the Applicant raises, they are grossly disproportionate overall as they pertain to this litigation. Earlier I recorded the amounts that had been incurred at the FDA and FDR stages. These are wasteful amounts, given the resources of the parties, and alarming in the rate of increase between each phase of the case.

101. Further, is it not lost on me that the global spend on legal fees between the parties, even based on the Applicant's higher estimate concerning education costs, would almost certainly have funded the children's secondary education as the parties would have wished. I accept that Peel J made no order as to costs against the background where the Applicant sought to appeal an arbitrator's order, and failed to do so. In

those circumstances I do not regard it as appropriate to simply write off against her large amounts of debt, where the parties had the opportunity to seek a costs order, and the High Court expressly made none.

102. I accept that no costs is the usual rule in children proceedings, and it is a high bar to persuade the Family Court to make a costs order. I bear in mind that the Applicant challenged an arbitrator's order, and was summarily refused permission by Peel J. The fact that the law was not established does not provide a defence to the level of spending. She should, and could, have accepted the arbitrator's decision, and avoided the further litigation.

103. The Applicant says that the debts in YC v ZC were of a different order to here. I agree in quantum they were, but the principles are the same. The question is whether the legal costs have been incurred at a grossly disproportionate level. In the circumstances where a party has spent on at least the figure £250,000 on legal fees in order to obtain a shared care order, and what is going to be an almost equal division of assets, I am certain that the answer is 'yes', they are grossly disproportionate. Therefore, I am satisfied that an adjustment must be made in the Respondent's favour.

104. That adjustment must be proportionate to the issues, and I must have a close eye on the needs level. I accept that both parties have won and lost on certain issues, and indeed, even within the same category of issues, such as the loans, I have made different findings. I consider that a fair adjustment, bearing in mind the question of needs, is a sum of £100,000 to be deducted. Therefore, the sum which I will allow to be deducted from the net proceeds of sale concerning the Applicant's legal costs is £154,752.

105. Turning then to the figures, after those joint net proceeds deductions, I make the joint net proceeds remaining as being £1,803,458 or, dividing by two, £901,729 each. It is appropriate to allow the Applicant to retain Property B. It produces a substantial majority of her current income, the Respondent had no argument against it, provided that he is provided with a balancing credit. Therefore, Property B and its garages are to remain vested in the Applicant's sole name. On that basis, I make it that a lump sum of £109,566 will be due to the Respondent in order to balance off that asset.

106. Adding those sums together, with the chattels, investments and bank accounts, will give you the following figures in my calculation. Property B, worth £90,620 on the Applicant's side. The parking, again on the Applicant's side, £18,946. The net proceeds of sale, when divided by two, in each column, £901,729. The balancing lump sum, a credit in the husband's column of £109,566, a debit in the wife's column of £109,566.

107. Taking into account the bank accounts, chattels and investments where they currently lie, that gives a total balance on the Applicant's side £941,573 and on the Respondent's side of £1,023,632 (47.9% to 52.1%).

108. Adding then the specific awards I have made for the Applicant in relation to health and medical, the £20,160, the £34,186, and the £14,093, her sum increases to £1,031,602. This ends with a final division of 49.7% in favour of the Applicant and 50.3% in favour of the Respondent. In my judgment that distribution meets the needs of the parties, and is as close to equality in the round as circumstances permit.

109. Concerning the pensions, these must be treated different from non-pension assets. This has been a marriage of 18 years, including cohabitation. The Applicant has been the main earner throughout that period, and the Respondent has always earned

markedly less. He has very little pension provision to his name, almost none. Fairness ordinarily demands a pension sharing order, to equalise, in the case of defined contribution pensions, the pension capital.

110. The Applicant says a pension sharing order should not be made because she may need to access the ill health provisions of her pension and draw down early. There is no certainty at the moment because, as discussed already, the Court does not know the Applicant's final prognosis. She is being treated with curative intent, but equally she has had to have frank conversations with her consultant.

111. There is very little evidence on this point before the Court. It is within the Court's knowledge that those who are unable to work due to a physical or medical condition can usually access their pension savings earlier than 55. Usually HMRC will recognise two situations: (1) ill health, where you cannot do your job for ill health reasons and (2) and serious ill health where there is a life expectancy of less than 12 months. The pension scheme rules in each case will have their own rules about accessing early retirement, and they can set their own criteria.

112. I am not persuaded it is fair to say to the Respondent that because of an unknown situation with unknown pension scheme rules, he should be left with only £1,000 of pensions after 18 years together. Equally, a 50:50 sharing order leaves the Applicant in too precarious a position. Weighing up all the factors, I consider that the fairest approach is to transfer the Hargreaves Lansdown pension in the sum of £71,406 to the Respondent. That leaves a split of pension capital of around 25% to him. I consider that is fair because he has another 10 to 15 working years of life ahead of him, on a conservative basis, and he is now of course able to live mortgage free, and on his own evidence will be returning to full employment. 75% for the Applicant is a fair balance

between the unknowns of her situation and the likelihood that, even if she returns to work, she may have to retire earlier than is necessary.

113. In conclusion, the order which has been agreed between the parties following my *ex tempore* judgment is as follows:

i) The following sums were deducted from the proceeds of sale of Property C held by Applicant's Solicitors:

a) £14,093 in payment to X School in satisfaction of school fees arrears

b) £174,837 to the Applicant in respect of her personal liabilities;

c) £51,370 to the Applicant's parents in satisfaction of the applicant's loan in respect of Property B.

d) £81,393 to the Respondent's Solicitors to discharge the Respondent's outstanding litigation loan and outstanding legal fees

e) £33,735 to the Respondent's Solicitors for onward payment to the Respondent to discharge his personal liabilities excluding legal costs;

f) £23,000 to the Applicant; and

g) £23,000 to the Respondent.

ii) Property B and its contents shall remain the legal and beneficial property of the Applicant and Property D shall remain the legal property of the Applicant.

iii) The Applicant makes various undertakings to the Court that in relation to the sum of £77,386 paid to the Applicant to meet the school fees for the children

to complete their primary education at X School and further education in this respect.

iv) The Applicant makes various undertakings to the Court concerning the sum of £20,160 as a medical insurance fund.

v) The remaining proceeds of sale of Property C shall be applied as follows:

a) Towards any capital gains tax liabilities.

b) The payment of £20,160 to the Applicant for medical insurance.

c) The payment of £77,386 for school fees.

d) The balance to the parties in equal shares.

vi) The family home shall be sold forthwith with the proceeds applied as follows (after the usual deductions):

a) 50% of the balance to the Respondent

b) A further £60,301 to the Respondent as balancing lump sum

c) The balance to the Applicant.

vii) A pension sharing order as per this judgment in favour of the Respondent.

viii) No order as to costs.

ix) Clean break in life and death.

114. That concludes my judgment.

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