IN THE FAMILY COURT
[2018] EWFC 91

No. ZC16D00255

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 11 December 2018

Before:

MR JUSTICE HOLMAN

(sitting throughout in public)

B E T W E E N :

ANKUL DAGA — Applicant

- and -

APARNA BANGUR — Respondent

MR SIMON WEBSTER instructed by MISHCON DE REYA appeared on behalf of the applicant.

MR NICHOLAS CUSWORTH QC instructed by KINGSLEY NAPLEY LLP appeared on behalf of the respondent.

J U D G M E N T

(a s a p p r o v e d b y t h e j u d g e)

MR JUSTICE HOLMAN:

Introduction and the claim

1 Although they are now divorced by a decree absolute, I will, for convenience, refer to the parties as "the husband" or "the wife" respectively. Unless the context otherwise indicates, I will use the words "the father" to refer to the wife's father who is a central figure in this case.

2 I heard the case throughout in public, without objection being taken by or on behalf of either party. When the wife's father attended voluntarily to give oral evidence on the second day, as I will later describe, he did ask to be permitted to do so in private. But I made clear that I would not permit the slightest inquiry into his own financial or business affairs; and, in a case in which all else was being heard openly and with transparency, it did not seem to me justifiable to make an exception for him.

3 This is the husband's claim for a lump sum payment or other capital provision from the wife. She seeks no capital provision or current maintenance at all from him for herself, and modest, conventional periodical payments for their son. At the outset of the hearing the open claim of the husband was for a lump sum of £2.5 million. By the time of his closing submissions, his counsel, Mr Simon Webster, had moderated that claim to one of the order of £1-1.5 million.

4 How tragic it is that, meanwhile, the parties have spent or incurred between them over £1 million on legal costs. Of that figure about £380,000 related to litigation about their son. But almost £650,000 has been spent litigating over finance. £650,000 could have made a

very large contribution to the purchase cost of the sort of flat the husband now aspires to buy. As it is, the savings of around £150,000 which the husband had accumulated during the course of the marriage by the time of separation have been wiped out, and each party now has considerable debts. There are now in this case no liquid matrimonial assets nor any "acquest" at all, but only large debts.

5 The focus or target of the husband's claim is two discretionary trust funds of which the wife was the settlor and is a beneficiary, and which have combined assets of the equivalent of about £17.5 million sterling. The trustees are now a company, MKK Services Limited, incorporated in Saint Vincent and the Grenadines. No distribution has ever been made from the trusts; but the husband argues that I should make a lump sum order directed against such assets as the wife does own and give "judicious encouragement" to the trustees to distribute to her the funds with which to pay it. So one of the issues in this case is what Coleridge J described in *AM v SS* [2014] EWHC 865 (Fam) as "the perennial and intractable problem of the proper weight to be given to valuable resources which do not belong to one of the parties... but to e.g. a parent or family trust..."

6 I say at the outset that I perfectly understand, and, indeed, have some sympathy with, the frustration that one party of no, or only relatively modest means must feel when he or she is aware that there is great wealth on the other side of the family, but is unable to tap into it even for the purpose of buying a home. But this tragic and destructive case should stand as a cautionary tale to those who would embark on expensive litigation which they can ill afford in the hope of prising money from a discretionary trust. A very careful and cool appraisal needs to be made at the very outset as to how realistic a prospect that really is.

The essential facts

7 When I make findings of fact I do so on the ordinary civil standard of the balance of probability. The essential facts are as follows. Both parties are of Indian descent and were brought up in India. The husband is now aged thirty-six. The wife is thirty-four. They are both intelligent and well-educated people. In 2003, when around the age of twenty, they met while both were undergraduates at Warwick University in England. They fell in love and, as the husband stressed several times, were continuously in a relationship from 2003 until final breakdown in 2016, so for some thirteen years or so. They married in April 2007 and their marriage dates from that date, although there were further religious and other celebrations in India and elsewhere during the next nine months.

8 It is clear that the wife's parents never approved of the match and have always regretted that their daughter married this particular husband. When he voluntarily attended to give oral evidence on the second day of the hearing, the wife's father was to say that he and his wife (who was present in the courtroom but did not herself give evidence) never had a rapport of trust with the husband. They just maintained a very superficial relationship because of their daughter. They were not happy for the marriage to take place. They opposed it from the word go.

9 There was a short separation in 2010, but the parties repaired their relationship and resumed living together. Their only child, a son, was born in 2012 and is now aged about six and three-quarters.

10 Throughout their marriage the parties always lived in London and in rented flats. They paid the rent out of their joint earned incomes, both of them being successful, middle class, professional earners. They never owned their own home or, indeed, any property in England. The wife did, however, acquire some property and other assets in India funded by the generosity of her father.

11 In December 2014 the parties' son was diagnosed with a disability. The details and prognosis are very well-known to both parents and their families, and there is no dispute about this aspect of the case, upon which, accordingly, I will not elaborate in a public judgment.

12 On 10 June 2015 the wife, as settlor, created a discretionary trust known as the Mount Keen Trust. On 25 August 2015 the wife, as settlor, created a further discretionary trust known as the Kiwara Trust. These are, of course, separate and distinct trusts and funds; but, apart from the name and actual date of settlement, the trust deeds are in identical terms, as is the respective letter of wishes to which I will later refer. The trustees were, and are, the same. Initially, only nominal amounts were settled into each trust.

13 Between January and March 2016 the wife's father made three payments totalling £2,718,885 into a bank account in the name of the wife with HSBC. That account was opened at that time for the purpose of receiving these payments, and the father stressed that he required her to open a sole account for the purpose as he did not trust the husband and was not willing to make any payment into a joint account. I am satisfied that the intended purpose of the bulk of those payments was to fund the purchase of a home in London in which the parties and their son would live. The father is adamant that the payment was a loan and that, upon an actual home being identified and purchased, he would have required the wife to enter into a legal charge upon the property to secure repayment of that sum to himself.

14 On 24 March 2016 the father caused US$5.7 million to be paid into an account in the name of the wife in the Bank of Singapore. Six days later that sum was paid into the Kiwara Trust by an internal transfer within the Bank of Singapore in Singapore. There were further

similar transactions during April, May and June 2016 whereby monies passed into the account in the name of the wife in the Bank of Singapore and very soon thereafter into either the Kiwara or Mount Keen Trusts. By mid-June 2016 the total money settled in this way in the two trusts was about US$7 million into the Mount Keen Trust, and US$15.9 million into the Kiwara Trust, having a combined total of about US$23 million.

15 The true source and origin of these funds remains obscure. The father said during his oral evidence that "I don't want to get into the question of whether it was my money or whose money. It was arranged by me. I took steps which enabled or caused the money to be received by [the wife] which she then settled in the trusts." Whatever the true source of the money, it was certainly not, at its inception, the money or funds of either the husband or the wife and never formed any part of the matrimonial assets or acquest.

16 During the course of the oral evidence there was considerable probing of the degree of knowledge and involvement by the wife in the setting-up of these trusts. I am quite satisfied that her own involvement was, in fact, very passive and as a cipher, being a respectful and obedient daughter, acting on the instructions of, or on behalf of, her father. Whatever the source of the money, it was the father who orchestrated the creation of these trusts; and the wife, as she said, did little more than sign documents which were presented to her where indicated by yellow post-it notes or stickers.

17 Concurrently with these financial developments, the marriage was sadly breaking down. On 11 June 2016 the husband told the wife he considered the marriage was over. On 26 July 2016 the husband sent an email to a third party, now at bundle 1, page C33a, in which he referred to heading "for the cliff in our marriage." In mid-August 2016 the husband exchanged text messages with a friend, now at bundle 2, page C384, in which he very obviously refers to seeking casual physical relationships with other women while in

America at that time on business (it is not clear whether any physical relationships actually took place). On 4 October 2016 the wife moved out of the home and this marriage clearly ended. The duration of the actual marriage was thus about nine and a half years.

18 On 18 October 2016 the husband presented a petition for divorce. The wife later cross petitioned. There were decrees nisi on both petitions in August 2017, which the wife caused to be made absolute on 2 October 2017.

19 Meantime, on 18 October 2016, in the immediate throes of the breakdown, the wife repaid £2,576,005 to her father, being the bulk of the money that he had paid to her earlier in the same year which he says was a loan. I am satisfied that she repaid it at the direction of her father as soon as he learned of the final breakdown of the marriage. At that point, no home to purchase had been identified, and the money remained untouched in her account.

20 The subsequent proceedings have been protracted, intensely detailed, and acrimonious, including contests with regard to child arrangements. Happily, the parties do seem now to be liaising more collaboratively in relation to their son. He lives principally with his mother but does regularly spend time staying with his father. The parents have recently visited together and discussed some schools suitable for his particular needs, and there appears to be hope that they will agree on the final choice of school.

Section 25

21 By section 25 of the Matrimonial Causes Act 1973, as amended, I must have regard to all the circumstances of the case and give first consideration to the welfare while a minor of the child. I must in relation to the parties have regard, in particular, to the matters listed in paragraphs (a) to (h) of section 25(2) of that Act which I now address.

Incomes

22 Both these parties are intelligent and well-educated people who have always worked (apart from a period of maternity leave in the case of the wife) and who have established good careers. The husband works in the financial sector. As is now quite normal in that sector, he has had several changes of job in the course of career progression. He has worked for several prestigious banks, and has worked with his present employers since 2015 as an investment strategist. There are currently three components to his net income, namely, net basic salary of £73,000 per annum; net discretionary bonus of around £34,000 per annum; and net deferred awards of around £24,000 per annum, making a total annual net income of around £130,000 per annum. The husband is maximising his current earning capacity but is clearly on a career trajectory. Section 25(2)(a) of the Matrimonial Causes Act 1973 requires the court to have regard to the income which a party "has or is likely to have in the foreseeable future." On behalf of the husband, Mr Webster repeatedly stressed that the bonus element of the remuneration is discretionary, and stressed the current climate of economic uncertainty, not least because of, as I speak, the political turmoil surrounding Brexit. However, it is entirely normal these days for part of the remuneration package of professionals in the financial sector to be discretionary. The husband has a good CV and a good working track record. His total net income is likely in the foreseeable future to remain at, or above, the above levels, and is unlikely to diminish.

23 The wife also works full-time in the field of advertising and media. She, too, has a good track record, although her career prospects have been hampered by the time she took out of work following the birth of the son, and by the fact that she still has to prioritise his needs over her own career progression. Her current net income is around £40,000 net per annum.

Property, assets and debts

24 An asset schedule was agreed between counsel to which detailed reference may later be made if necessary. In summary, the husband currently has about £12,000 credit in various bank accounts. He has commercial debts, mainly referable to the costs of these proceedings, of about £58,000. He still owes his solicitors a further accrued £26,000, plus any further costs subsequent to this hearing. His current net indebtedness is therefore around £72,000. At the time of separation he was in credit with savings of around £150,000. They have all gone on costs. The husband has non-realisable pension funds of around £220,000. He has a non-realisable minority interest in his father's jewellery business, said to be worth about £46,000.

25 The wife's financial situation is more complex and more contentious. She has funds in banks currently totalling about £36,500. However, her father has advanced considerable sums to her which he itemises in a document now at bundle 2, page F123. This shows a bottom line total of just under £1,414,500. These monies have been advanced for a variety of purposes, including legal and accountancy fees, payment of tax, rent and other personal expenditure. There is no reason to doubt the actual payments made or their total. The wife's father is adamant that all these payments are loans and that he wants the money back. He says, however, that he is not pressing for repayment and is for the time being content to offset it against the value of the assets which she owns in India (see below), which he views as security.

26 As well as the huge costs already paid of £677,000, the wife still owes her solicitors £53,000 up to the conclusion of this hearing. On any view, the wife's current net position in England

is one of net debt, although the size of the indebtedness depends upon how hard or soft the claimed loans from her father really are.

27 The wife does have other assets in India. These include a flat in Kolkata said to be worth about £39,000, other investments worth about £470,000, and shares in the public company in India of which her father is a large shareholder. The wife's own shares are said to be worth about £2,087,000. Her father is adamant that the shares cannot be, and must not be, sold. He relies upon a document signed on 7 April 2009, now at bundle 1, page C308, which records an agreement between named family members, including the wife and himself, that they will not transfer, encumber or alienate their respective shareholding without the prior written consent of the father. This, I assume, is designed to maintain and underpin his own level of control of the company.

28 During his cross-examination of the father, Mr Webster, on instructions from his client, suggested to the father that the document now at bundle 1, page C308 was not in truth signed on, or about its purported date of 7 April 2009 but is of much more recent creation, probably for the purpose of these proceedings. That grave allegation of, or tantamount to, forgery was later withdrawn, and Mr Webster apologised on behalf of his client for making it.

29 The father is clearly a powerful, patriarchal and dynastic figure in his family; and, realistically, his respectful and dutiful daughter cannot sell those shares without his consent, which he will not give. On paper, therefore, the wife has assets in India worth about £2.6 million. In practice, she cannot realise most of them; and, in any event, her father clearly views them as security for the amounts he has paid to, or for her totalling £1,414,000 and rising. He has said that he is willing to continue to lend money for such matters as rent and legal costs up to, but not exceeding, the value of her assets in India.

30 The argument of Mr Webster is, however, that the wife does have those assets in India which, he submits, she can liquidate if necessary, totalling about £2.6 million. He submits that the money advanced by the father is, in truth, gifts, not loans, and that there are no debts in truth to her father. Accordingly, he submits, the wife does have net realisable wealth of about £2.6 million worldwide. He submits that I can, therefore, make a lump sum order for up to £2.5 million in the knowledge that the wife can meet it out of her own resources if necessary, if the trustees decline to distribute money from the trusts in response to judicious encouragement from the court. He submits, therefore, that I am being asked to make an award which does not exceed what is the wife's "as of right" according to the well-known analysis in this class of case by Mr Nicholas Mostyn QC in *TL v ML* [2005] EWHC 2860 (Fam) at paragraphs 84 and 85. Adopting the more colloquial or metaphorical language of Coleridge J in *AM v SS* at paragraph 39, Mr Webster submits, by reference to the £2.6 million which he asserts is available to the wife in India, that the present case is a "backfill" rather than a "fresh money" class of case.

Jewellery

31 Both parties own, or owned, a quantity of jewellery. This was mainly kept in a safe in the flat operated by a keypad of which both parties knew the code. Very shortly after the separation, the jewellery appears to have disappeared. Each party alleges that the other opened the safe and removed it and then changed the keypad code to one unknown to the other party. On this issue, one of them must be brazenly lying, but I am unable reliably to say which, even on a balance of probability. I declined to waste the time of this hearing on this issue. So far as I am concerned, either party may, if he or she wishes, bring an ordinary civil action against the other for the return of his or her jewellery. Meantime, I leave the jewellery and its claimed value entirely out of account.

Other financial resources

32 The likelihood of receiving distributions from a discretionary trust is a form of "financial resource" within the meaning of paragraph (a) of section 25(2) of the Matrimonial Causes Act 1973, but I will consider the trusts and that resource later in this judgment.

Financial needs, obligations and responsibilities

33 Both parties have financial obligations and responsibilities towards their son but not to anyone else save for the debts to which I have referred above. I will consider needs below.

The standard of living enjoyed by the family before the breakdown of the marriage

34 I observe that the focus of paragraph (c) of section 25(2) of the 1973 Act is upon the actual standard of living before the breakdown of the marriage. The overarching duty of the court is, under section 25(1), to have regard to all the circumstances of the case. The standard of living which the family might later have enjoyed if the marriage had not broken down may, in an appropriate case, but rarely, form one of the circumstances of the case; but it is not the standard of living to which, by section 25(2), the court must in particular have regard.

35 The standard of living enjoyed by this family before the breakdown was comfortable and secure, but modest. They never owned their own home. They always rented. The flats were pleasant and comfortable, but in no sense luxurious or particularly large. They lived on upper floors in buildings with staircases but no lifts. Their car was a second-hand Ford Mondeo. They were careful to manage their budgets and to make savings, as the husband regularly accounted for to his own father. The husband himself says at paragraph 41 of his

second statement, now at bundle 2, page C425 that "We were reluctant to seek family support from family members as we were trying hard to make our own way in the world. We kept budgets and schedules and reviewed our finances regularly..."

36 The wife gave oral evidence to similar effect when she said that she had never had a discussion with her father about helping her financially. She said that she never asked for the £2.5 million. She said she had always lived a life within their own means and that the last two years had been most embarrassing for her, borrowing from her father to pay her rent.

37 The picture is, therefore, of a hardworking and independent-minded young couple, steadily making their way and no doubt improving their standard of living, but of no luxury or opulence. They did benefit from some holidays funded wholly or partly by their employers, but, otherwise, their expenditure on family holidays and travel was relatively modest.

38 If the marriage had not broken down, they would almost certainly by now have been living in an owner-occupied home with no commercial mortgage but funded with the £2.5 million advanced (he says loaned) by the wife's father. However, that was not the standard of living during the marriage and is, indeed, not the standard of living enjoyed by the wife now, who continues to rent a modest flat.

Health and disability

The husband is fit. The wife does have some history of ill-health but it does not impact on what I have to decide and it is unnecessary further to refer to it in a public judgment.

Contributions

39 Both parties fully contributed financially, emotionally, and practically to their marriage, to looking after their home and to the welfare of each other. Both have played, and will continue to play, a very active role in caring for their son, who is greatly loved by each of them but does make especial demands upon both of them.

Conduct

40 There is no conduct by either party which it would be inequitable to disregard, and no conduct which impacts on outcome. Both parties make a lot of complaints about such matters as surreptitiously opening or copying the documents of the other and, of course, the matter of the jewellery. The complaints do not impact on outcome at all.

Loss of benefit

41 There is no, or no significant, loss of any benefit within the meaning of paragraph (h) of section 25(2) of the Matrimonial Causes Act 1973.

Analysis

42 I have now described and had regard to all the particular matters referred to in section 25(2) save those of "other financial resources" and "needs". At this point, there is some dispute in the respective approaches of Mr Nicholas Cusworth QC on behalf of the wife and Mr Webster on behalf of the husband. Both agree that, as there are no remaining matrimonial assets or "acquest" for distribution, division or sharing, the husband's claim and any award can only be based upon need; but, at this point, their approaches markedly diverge. At paragraph 48 of his most cogent opening note or skeleton argument, Mr Webster wrote "...

needs are relative... the most obvious pointer is, of course, the scale of the non-matrimonial wealth. Further pointers are the standard of living during the marriage, the duration of the relationship/marriage and the need to ensure some element of comparability between a child's two households..." Mr Webster thus elevates to "the most obvious pointer" and as a truism ("of course") the scale of the non-matrimonial wealth, thereby targeting and focusing in this case upon the trust funds. At paragraph 4 of the same document Mr Webster went so far as to treat the whole of those funds as "the non-matrimonial wealth available to the wife...", which he quantified as "£20 million plus" (viz her Indian assets plus the whole of the funds in the trusts).

43 By paragraph 4 of his closing written "Final submissions" Mr Cusworth cites from Mr Webster's paragraph 48 and says that "Far from being a truism, this is completely wrong." Needs, says Mr Cusworth, are abstract or objective, and not conditioned at all by the scale of the wealth on the other side, save to the extent that that wealth may have funded or augmented the standard of living during the marriage. In this case, the parties did not benefit by a single penny during their marriage from either the trust funds or the payments of £2.5 million plus made by the father to the wife in the spring of 2016.

44 Because of these divergent submissions, each of Mr Webster and Mr Cusworth approach the case from different directions. Mr Webster says one should start with a computation of the assets and then consider needs. Mr Cusworth says that the husband has failed to demonstrate any "need" for capital at all, in view of his secure and relatively high net income, and that that is, or should be, the end of the case. I will leave this philosophical debate to the tearoom of the two counsels' joint chambers at 1 Hare Court in the Temple, for in this case I am very clear that the claim of the husband founders on both limbs. The trust funds are not an available resource in reliance upon which any award can be made. The husband does not demonstrate a need for any substantial capital payment. For both reasons,

independently of each other, the claim must fail and, in the context of this case, it makes no difference in which order I consider them. I will, however, start with the computation of the assets and the alleged availability of the trust funds in deference to Mr Webster who acts for the applicant and who has the harder case.

Other financial resources - the trust funds

45 It is said that the combined amounts in the two trust funds remain about US$23 million or £17.6 million sterling. The two trust deeds are in identical terms. They are discretionary, and the beneficiaries are "family members of the settlor, including the settlor." There are no other pointers as to who may be included, or intended to be included, in the phrase "family members".

46 Clause 2 of the original trust deeds provides that "... the proper law shall be the law of the Island of Jersey which shall be the forum for the administration hereof." By deeds of amendment made on 8 July 2016 the trustees (who were at that time a company in the Republic of Ireland) varied clause 2 so that the forum for the administration became the "place of the jurisdiction applying to the trustees", which at that time was Ireland. That place now appears to be Saint Vincent and the Grenadines. During the hearing, counsel proceeded upon the basis that the proper law of the trusts is, accordingly, now that of Saint Vincent and the Grenadines. I am not myself clear that that is so. The forum may now be that of Saint Vincent and the Grenadines, but I myself do not read the deeds of amendment made on 8 July 2016 as changing the proper law from that of the Island of Jersey.

47 In the belief that the proper law is, indeed, that of Jersey, an expert opinion was jointly sought from an advocate in Jersey, Robert Gardner, dated 7 September 2018. The upshot of that opinion is that the meaning or breadth of the phrase "family members of the settlor,

including the settlor" is unclear and would be determined by the courts of Jersey applying the principles in the case of *Re Internine* from which Mr Gardner cites. For the purposes of my present decision and judgment, I proceed on the basis that the words "family members" are very ordinary English words throughout the English-speaking world. In the absence of expert evidence to the contrary, it seems to me obvious, whatever is now the proper law, that they do extend to include the son of the settlor; did extend to include the spouse of the settlor; but do not extend to include the divorced former spouse of the settlor. Beyond that, it is not necessary for the purposes of this case to speculate to whom the words do or do not extend. In the absence of any indicator in the deeds to the contrary, in ordinary English, a person's spouse is a member of a person's family, but a divorced former spouse is not. Colloquially, people speak of their "ex" spouse and, similarly, the former spouse is an ex-member of the family. So I proceed on the basis that until the decree absolute the husband in this case was within the class of discretionary beneficiaries but now is not. Mr Webster did not seriously, or with any persistence suggest otherwise.

48 Shortly after each trust was settled, the wife signed a respective letter of wishes in identical terms, save as to the name of the trust and the date. So far as is material, they read as follows:

> "I hereby declare that the moneys/assets ('Assets') settled by me, have been gifted to me by my father... for the specific purpose of settlement into the Trust as a nominee settlor. No part of such Assets have been earned or accumulated by me.
>
> Accordingly, it is my irrevocable wish that the trustees act on the advice of my Father in regards to all matters concerning the Trust including its administration and distribution of the Trust property, to the exclusion of all other persons including me."

49 Pausing there, I note and stress the words "nominee settlor"; "act on the advice of"; and "exclusion of all other persons including me." The phrase "act on" is clearly stronger and

more imperative than a phrase such as “have regard to”. The letters of wishes are no doubt careful to use the word “advice” rather than a word such as “instructions” of the father, for otherwise the discretion of the trustees would be so fettered as to lose the character of a trust; but, subject to that, it is hard to envisage a clearer steer to trustees from the settlor, whose own subsequent wish or advice is irrevocably excluded.

50 After lunch on the first day of the hearing Mr Webster made an unanticipated application (he had not even forewarned Mr Cusworth before they came back into court) that I should issue a witness summons to compel the wife’s father to attend court the next day in order to give oral evidence and to bring documents with him. This appeared to have been triggered because the wife had said during the course of the morning, in answer to a question from me, that her father was, in fact, in London that day. In response to Mr Webster’s application, I made clear that I would not order the father to bring documents to court at such short notice, but that if he were willing voluntarily to attend to give oral evidence, that could be very helpful to the court. I referred to the case at that stage as being like Hamlet without the Prince. I encouraged the wife to ring her father and ask him whether he would be willing voluntarily to attend. After a short adjournment, I was informed that he would do so the next morning, as indeed he did, together with his own wife. In those circumstances, it was never necessary for me to make any kind of order for his attendance and I did not do so. He attended and gave evidence voluntarily and under no compulsion. He gave oral evidence sworn upon the Gita.

51 The tenor of the father’s evidence, sustained throughout very skilled and quite prolonged cross-examination by Mr Webster, was clear. He said in evidence in chief that the monies which he paid into the wife’s sole account with HSBC in early 2016 were a loan which he would have required to be secured by a charge upon a home once identified and purchased. He asked for the bulk of it back as soon as the marriage had broken down. He said that the

money which he had since paid to her, currently totalling about £1.4 million, is all a loan which he will recover from her assets in India.

52 With regard to the trusts, the father said that his advice to the trustees will be that "We cannot pay anything whatsoever from these trusts." He said that there has never been any distribution and he does not foresee any distribution in the foreseeable future to anyone. He repeated "To no one. Not my daughter. Not my grandson. No one." He said that he, personally is more than happy to support medical, therapeutic or other help for his grandson from his own funds, but the trust is not going to do so.

53 During cross-examination the father said again that his grandson is a beneficiary but his advice is no distribution now or in the foreseeable future. If his daughter had asked for assistance for her husband when she was married to him, he would have said no. He said that there will be no distribution whatsoever. "We will not allow any distribution whatsoever from these trusts in the foreseeable future. It is my wish. I do not want these trusts distributed in the foreseeable future." He said that the trusts are for long-term benefit. They are nothing to do with today or tomorrow.

54 When asked what he meant by the foreseeable future, the father, who is aged fifty-eight, said that there will be no distribution in his lifetime. He said that he had given his daughter a good education and she must now fend for herself. He said that he will not provide for her or give advice to distribute from the trusts even if an order is made against her. He said that the wife is not his sole child and he has to be fair to all his children, of whom he has three altogether. He said that there are no trusts similar to these for his other children.

55 Accordingly, the stated position of the father could not have been more clear. As a witness, he struck me as astute, very clear and very determined indeed. Mr Webster submitted that

this evidence of the father was not credible, and invited me to conclude that the father will not enforce repayment of money already advanced to his daughter, and would not give advice to the trustees not to distribute money to the wife if I order her to pay a lump sum to the husband. With regard to the evidence of the father generally, Mr Webster expressly invoked Miss Mandy Rice-Davies and her famous retort, and submitted "He would [say that] wouldn't he?" There is, however, an important forensic difference between the two situations. Miss Rice-Davies was giving evidence about alleged historical fact, with which it was being put that the Viscount disagreed. That fact either had or had not happened. The present case concerns the future intentions of the father, and there is no actual evidence to contradict what he says about his future intentions. His evidence generally has not been discredited as incredible or not worthy of belief, and I have no rational basis for disbelieving what he has said on oath. Further, the husband himself said in evidence that, since the day of separation in October 2016, his father-in-law had not spoken to him or communicated with him in any way, although he, the husband, had tried to reach out to him. The husband said that a lot of friction has built up and he, the father, would not be well disposed towards him, the husband. The husband said that none of them had ever had any benefit out of the trusts and "I accept that most likely her father's attitude will determine the trustees' attitude."

56 I do proceed, therefore, on the basis that even if a lump sum order is made against the wife, her father will advise the trustees that they should not distribute any funds to her with which to pay it. It has been established since at least the authority of *Thomas v Thomas* [1995] 2 FLR 668 that the court can, in appropriate cases, make a lump sum or other financial remedy order in reliance upon funds in a trust, and give to the trustees judicious encouragement to provide the funds with which to pay it. But the court must not put undue pressure on the trustees. It is not undue pressure if the interests of other beneficiaries would not be appreciably damaged; and the court decides that it would be reasonable for the payer

spouse to seek to persuade trustees to release more capital to enable that spouse to make proper financial provision for the payee former spouse (per Lewison J with whom Mummery LJ agreed in *Whaley v Whaley* [2011] EWCA Civ 617 at paragraph 114, paraphrasing what Glidewell LJ had said in *Thomas*).

57 The present case does not conceivably satisfy the second limb of that formulation. The wife was, as the letters of wishes say, and in fact, the settlor in name only. She signed letters of wishes which irrevocably excluded herself from giving advice to the trustees. She expressed the wish that the trustees would act on the advice of her father. She knows that the adamantine position of her father, whom she respects and in financial matters obeys, is that there is to be no distributions at all in his lifetime. She has not received, nor sought, anything at all from the trusts for herself or her son. In those circumstances, it would not be reasonable for the wife to seek to persuade the trustees nevertheless to make provision for her former husband; nor, indeed, would it be reasonable for the court to expect her to do so.

58 There is, moreover, an overarching requirement before a court makes an order relying upon judicious encouragement to trustees. The court must first be satisfied that the trustees would be likely to respond to that encouragement so that the required funds would be likely to be made available. This follows from the language of section 25(2)(a) itself ("... has or is likely to have in the foreseeable future...") and has been emphasised by the Court of Appeal in *Whaley v Whaley* at paragraphs 40 and 113 which it is not necessary to quote. A test of certainty that the funds will be made available is putting it too high; but there must be a likelihood. This very important requirement is, in my experience, often overlooked by overoptimistic applicants in cases of this kind. Unless the trustees are, in the view of the court, likely to make the funds available if encouragement is given, there is no room for an order based on judicious encouragement.

59 In my view the trustees in this case are not likely but, indeed, are highly unlikely to make funds available to the wife whatever I may do or say. They are not themselves within the jurisdiction of this court. They are a professional trust corporation. There are very strong letters of wishes, as I have already noted, and the position of the father could not be more clear. There never have been any distributions even to the wife herself, as settlor, nor to or for her very needy son. Further, the husband himself said in his oral evidence that he accepts that most likely her father's attitude will determine the trustees' attitude. In these circumstances, in my view, it is highly unlikely that the trustees would make any payments intended to benefit the wife's former husband whatever I may do or say. Accordingly, I cannot make an order in reliance upon the funds in trust; and to treat the wife as having about £20 million plus "available" to her as Mr Webster did in paragraph 4 of his opening note is, frankly, fanciful.

The husband's needs

60 Of course, the husband needs a reasonable home, and one which (a) bears some relationship to the homes and the standard of living during the marriage; and (b) is suitable for the son when he spends time with his father; and (c) has some comparability with that of the wife, for it is undesirable, if avoidable, that a child or children should experience markedly different lifestyles and standards of comfort between the home of one parent and the other, with the risk that the parent who is forced to live more frugally may become less esteemed. But it does not follow from any of that that the husband needs to be able to buy now his own home.

61 At the risk of repetition, these parties always lived in rented flats throughout their marriage. Both still do live in similar rented flats. At the beginning of his recent second statement, now at bundle 2, page C419, the husband states "I would highlight at the outset that my

primary goal throughout these proceedings has been to secure a stable and secure home for me and [the son], and to provide security for [the son's] indisputable needs going forward." He immediately goes on to say that this requires "the provision of a home for me and [the son] costing £2.5 million (inclusive of purchase costs, SDLT and establishment costs)."

62 This husband has a net income of £130,000 per annum. A glance at table 18 of **At A Glance** shows that that is the same as the net income (from his salary) of the Chief of Defence Staff (£130,000), more than that of the Master of the Rolls (£125,000), but a little less than that of the Lord Chief Justice (£140,000). The husband is now a single man. He does not pay, and is not being asked to pay, a penny of maintenance towards his former wife. He has one child. That child does have special needs, but the extra costs of the child referable to those needs (mainly medical and therapeutic, but possibly also some educational expenses) will all be paid by the wife's father who has offered to do so. The financial burden of the child upon the husband need only be about £15,000 per annum in periodical payments, plus the direct disbursements for the child when staying, or on holiday, with his father. The husband currently pays rent of about £30,000 per annum; so a total of his rent and direct maintenance payments for his son is about £45,000 per annum, leaving a balance from his net income of £85,000 per annum, which happens to be about the same as the entire net income from salary of a senior circuit judge.

63 According to the husband's own "grand total living expenses" dated 20 February 2017 attached to his Form E and now at bundle 1, page C29, his entire annual expenditure as at that date, inclusive of rent, £15,000 per annum in pension contributions, and generous holiday, travel and "personal" expenditure, was about £110,000, leaving a surplus on his own figures of about £20,000 per annum. It is simply beyond argument that the husband can sustain into the foreseeable future a very good lifestyle, entirely comparable to that

enjoyed during the marriage, without the need for any capital provision at all, but based (as it always has been) on renting.

64 The husband aspires to own his own home. He could, if he wishes, do so fairly soon without capital provision from the wife. I accept that currently he could not purchase with the assistance of a mortgage because he needs, first, to repay his costs debts and then save sufficient to at least fund the legal and other costs of a purchase and SDLT, since any loan by mortgage could not exceed the actual purchase cost of a home (viz a 100 per cent mortgage). Subject to that, there is evidence at bundle 2, pages F97 and 98, that his current salary less a maintenance obligation (there assumed as £1,200 per month) could support a mortgage of as much as £860,000, with annual repayments of (currently) £50,760. The husband says that that is not enough for the sort of flat he aspires to buy; but, patently, reasonable flats in suitable locations can be purchased well within that sum as the property particulars produced by the wife demonstrate. The husband complains that they are for properties without a door porter or a lift and that such amenities would be safer for their son, but the flats during the marriage did not have them, and nor does the wife's flat now.

65 Mr Webster submitted that the husband "has a very real concern about marginalisation" in relation to the son. There may indeed be a fear and a risk of marginalisation, but it cannot be made more or less risky whether the husband rents or buys. There may be a belief, too, that no sooner are these proceedings concluded than the wife's father will fund her to buy a fine home compared with which the husband's will seem humble. In my view, that is, on the evidence, very unlikely. The wife's father made very clear indeed that he and his wife do not agree at all with the wife continuing to live in England. They consider that she and the child should relocate to India or Singapore (where the wife's parents live) so as to be much nearer to her family and family support. The wife herself said during cross-examination that that is what she, too, would like to do if she can. The father was adamant

that, in these circumstances, he will not now fund the purchase of a home for her in England, and he has not shown the slightest sign of doing so since insisting on the return of the £2.5 million immediately upon the breakdown of the marriage over two years ago. In my view, it is highly unlikely that the wife will be in a position to purchase any home in England in the foreseeable future.

66 I conclude that the husband simply does not have any objective, reasonable or justifiable need for £2.5 million, £1 million or any other lump sum from the wife. His only pressing need is to clear his debts, but they are entirely referable to the costs which he has incurred in these proceedings. If I were to order her to pay to him a lump sum with which to pay off those debts, that would be tantamount to making an order for costs in his favour, which could not be justifiable.

Child maintenance

67 Currently, the husband is paying general maintenance at the rate of £1,200 per month plus a voluntary £600 per month towards the costs of the day nanny who also accompanies the child when he stays with his father. Mr Cusworth seeks that I should order continuing maintenance at the rate of £1,800 per month with provision for index linking. I am not willing to go so far. An order around £1,200 per month currently makes a fair contribution towards the basic cost of the child while living with his mother. His grandfather has generously said that he will meet extra expenditure referable to this particular child's special needs. The child spends periods of time living with his father who, of course, has to meet his needs and costs during those periods. Further, the father does have to rent, or later one day buy, larger accommodation than he alone needs in order to provide a home for his son. The order will therefore be for child periodical payments at the rate of £1,200 per month

with an appropriate formula as to index linking. If the father wishes, in addition, voluntarily to contribute to the costs of the nanny, that is entirely a matter for him.

Maintenance for the wife

68 The wife agrees to all her claims of a capital nature being dismissed. Mr Cusworth suggests that, as the wife does have the child living with her for the greater part of the time, I should not dismiss her claim for periodical payments for herself but should make a nominal order, at least until the child attains the age of eighteen (and therefore ceases to be a child) although, realistically, he is likely to need much help and support from both his parents throughout their respective lives. On the special facts of this case, I do not do so. At this point, and on this issue, I cannot ignore that the wife and son are discretionary beneficiaries under valuable trusts. If some circumstances should arise (which are not currently foreseen) such that the wife might need to seek substantive maintenance for herself from her former husband, then, at that point, it is to the trusts (if not her father) that she must turn.

Conclusion

69 In the result, I dismiss all claims by each party for financial remedies against the other, including claims for periodical payments for themselves. There will be directions under section 25A(3) of the Matrimonial Causes Act 1973, as amended, to the effect that neither party is entitled to make any further application against the other for secured or unsecured periodical payments. In short, there will be a complete clean break. There will be an order that the husband pays periodical payments to the wife for the child at the rate of £1,200 per month index linked. That concludes this judgment and, I hope, this destructive litigation.

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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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