Neutral Citation Number: [2019] EWFC 19

Case No: BV17D02070

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2019

Before :

MR JUSTICE MOSTYN

- -

Between :

ANIL BURAK IPEKÇI **Applicant**

- and –

MORGAN ALEXANDRA McCONNELL **Respondent**

- -
- -

Alexander Thorpe QC (instructed by **Kay Georgiou**) for the **Applicant**
Michael Glaser QC (instructed by **Family Law in Partnership**) for the **Respondent**

Hearing dates: 25-29 March 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MOSTYN

The judge grants leave for the judgment to be published in this form as he is not satisfied that it could be intelligibly anonymised. However, in any report of the case the children of the family may not be identified nor may any photographs of them or their parents be published. Breach of these restrictions will amount to a contempt of court.

Mr Justice Mostyn:

1. I shall refer to the applicant as "the husband" and to the respondent as "the wife". This is my judgment on the husband's financial remedy claim following his divorce from the wife.

2. In 1886 David H. McConnell was a door-to-door salesman of books to New York housewives. He decided to sell perfumes rather than books. From that decision, and from that modest origin, sprang the mighty Avon Products business empire. It is now the fifth-largest beauty company and the second largest direct-selling enterprise in the world. The wife, now aged 45, is the great-granddaughter of David H. McConnell. The vast amount of money generated by the business for the McConnell family means that, along with other relatives, she is the beneficiary of trusts in the USA with an overall value of at least $65m.

3. Specifically, the wife's trust interests are as follows.

4. On 20 October 2004, well before the marriage or cohabitation of the parties, the wife settled $4.5m of her own money deriving from a predecessor trust into a US Grantor Trust. On 22 February 2019 the trust had a value of $667,344. However, since then certain further payments have been made or are due to be made. Further, the liquidation of the investments held by the trust has given rise to US capital gains and income tax. Net of all actual and potential liabilities the trust has now a value of just under $30,000.

5. The wife and her four siblings, as well as their descendants, are beneficiaries of a discretionary trust established by her father Neil A McConnell on 21 September 1964. The original trustees were Douglas F Williamson Jr and Bankers Trust Company (later acquired and replaced as trustee by Deutsche Bank Trust Company). On 30 November 2017 the trust had a market value of just under $17m. The wife is paid 20% of the net income of this trust. In 2017 this was just under $37,000. Thus 100% was $185,000. Accordingly, in that year the trust achieved a net income return of 1.1% which suggests that the present investment strategy is to accrue capital growth rather than income yield.

6. The trust agreement stipulates that the net income shall be applied to the use of the beneficiaries. However, by virtue of the fifth article of the agreement the trustees are authorised, in lieu of applying such income, to accumulate all or part of it in "a separate fund for the beneficiary to whom such income shall have been allocated or to whose use such income might have been applied". The fifth article goes on to provide that on the death of the beneficiary to whom income has been accumulated in a separate fund, the income accumulated in such separate fund shall be paid over to such beneficiary's issue, who survives him or her, per stirpes, or such issue failing, to the estate of such beneficiary.

7. The sixth article provides that each such separate fund shall be deemed to be a separate trust, and that each such separate trust shall be "held, administered, transferred and paid over in accordance with all of the other applicable provisions of this agreement." I am satisfied that this provision does not mean that the separate fund is subject to the wide discretion in favour of the entire class of beneficiaries, which the agreement provides for in respect of the income and capital of the main trust generally. Rather, it is a provision which stipulates that the administration of such a separate fund should be in accordance with the provisions of the agreement.

8. Such a separate fund has been created for the wife. It is called "The Neil McConnell 1964 Trust for Morgan A McConnell". In a letter dated 13 December 2017 Brandi Goldenberg, a director of Deutsche Bank Trust Company stated: "this trust was created for your benefit per the terms of the Neill McConnell 1964 trust". In an email dated 16 May 2018 she stated:

> "the Neil McConnell 1964 trust for Morgan McConnell was created under the 1964 trust document. There is not a separate trust instrument for this trust. This was created as an income accumulation account for Morgan's benefit. It is not a sub-account. It has its own taxpayer identification number and files its own income tax return (a subaccount would be an account which is part of the main trust and organised under the main trust's tax ID #)."

In my judgment this could not be clearer. Brandi Goldenberg is describing the position where the cestui que trust is solely and beneficially entitled to the trust assets. On 30 November 2017 the market value of this separate fund was $4.45m. The trustees pay the wife each year 2.5% of the market value of the trust and have made significant further advances of capital to her. Nobody else has benefitted.

9. On 26 March 2019, the second day of the hearing before me (the first day having been a reading day), I entered court to find on the bench a letter addressed to me dated 22 March 2019 written by Mr Williamson, one of the trustees of the 1964 trust. It is headed "Morgan A McConnell Trust U/A September 21, 1964". "U/A" means "Under Agreement". In the letter Mr Williamson argued that the wife has no power or control over the trust assets and that were she to give the trustees a "direction" for a payment from trust assets then compliance would clearly be beyond the powers of the trustees. The letter goes on to state that "crucially" the wife is not the only beneficiary of the trust. Her descendants and her father's other descendants are also beneficiaries whose interests both the trustees and the New York courts are obligated to protect.

10. This letter was discussed in court on 26 March 2019 and it was pointed out that its terms were completely inconsistent not only with the provisions in the agreement of 21 September 1964 (as referred to above) but also with the letter and email of Ms Goldenberg (again as referred to above). This provoked a yet further letter which I was given on the third day of the hearing, 27 March 2019. In it Mr Williamson states:

> "I do not understand your apparent puzzlement about who the beneficiaries of Morgan's trust are. The trust was created for Morgan's initial benefit, to be sure; it exists for her lifetime; and it carries her name as shorthand identification. But it is necessary for a trust agreement to specify who becomes entitled to succeed to the ownership of the trust's principal assets when the **income beneficiary** dies. In this instance, as previously detailed, the next takers (or "**remaindermen**") of Morgan's trust are her surviving descendants ("issue"), and if none, the then surviving descendants ("issue") of her father. All these people are beneficiaries of the trust, entitled to have the trustees and the courts protect their interests. There is no substantive inconsistency between Ms Goldenberg's description and mine.

> The provisions of the December (sic) 21, 1964 trust agreement are applicable to Morgan's trust." (emphasis added)

11. I completely reject this evidence. It is not expert evidence. To qualify as expert evidence it would have had to have been the subject of a properly formulated application under FPR Part 25. If granted, expert evidence about New York law in relation to this separate fund would have been directed to have been given by an independent single joint expert. It is evidence of fact given far too late in the day. While admissible under the Civil Evidence Act 1995 its weight, if any, is a matter for me. In deciding to attribute no weight to it I take into account the fact that the husband and his advisers have been deprived from seeking an order under section 3 of the Act and FPR rule 23.4 that Mr Williamson be cross-examined. Further, by virtue of the deplorable lateness of the evidence they had been deprived of adducing their own evidence in response. It is worth pointing out that this case began as long ago as 18 August 2017. Of itself, the lateness of the evidence justifies no weight being attributed to it. However, my main reason for rejecting the evidence is that it is obviously incorrect. To characterise the wife as no more than a life tenant, or a mere income beneficiary of this fund, and that there exist formal interests in remainder is, frankly, totally untenable and I have to wonder why such misleading and partial evidence is being given on the wife's behalf. In his final submissions Mr Glaser QC was careful to emphasise that he was not himself arguing that the wife was a formal life tenant of this fund.

12. My finding is that in relation to this separate fund the wife is a cestui que trust solely and beneficially entitled to the trust assets. I am further satisfied on the balance of probabilities that the trustees would make those funds available to the wife for the purposes of satisfying a judgment against her. This is not an exercise in "judiciously encouraging" anybody. It is a judgment based on a finding of a future fact. I agree with the Chief Justice of Hong Kong that the concept of "judicious encouragement" in cases of this type should be abandoned: see *KEWS v. NCHC* [2013] 2 HKLRD 314, (2013) 16 HKCFAR 1 at [53].

13. The wife is a member of the class of beneficiaries of a discretionary trust created by her father on 22 July 1968. She is presently being paid 20% of the trust's net income. In 2017 that amounted to $7,702. Thus 100% was $38,510. The market value of the trust on 30 November 2017 was $5,436,000. Accordingly, in that year the trust achieved a net income return of 0.7% which, again, suggests that the investment strategy is to secure capital growth rather than income yield.

14. The wife is a beneficiary of the trusts created by the will of her father dated 24 June 1992. Her father died on 11 February 1994. The will refers to an impressive collection of Impressionist paintings by, among others, Monet, Gaugin. Cezanne, Sisley and Renoir. However, the wife told me that these were all sold at auction following her father's death.

15. The will created two separate trusts. First, $1 million went to a Generation-Skipping Transfer Tax Exemption trust. The wife and her four siblings and their issue are beneficiaries of this trust. On 30 November 2017 its value was $2.8 million. All of the income generated by this trust is capitalised and added to the principal. There is no reason to suppose that money from this trust could not be made available to the wife should she reasonably require it.

16. Neil McConnell left his widow Sandra, the wife's stepmother, a life interest in his residuary estate with power to advance capital limited to $2 million. The remainder was left equally to his five children. Sandra is aged 76, and according to the life tables has a life expectancy of just over 13 years[1]. The market value of this fund on 30 November 2017 was about $36.5 million. Clearly, in the foreseeable future the wife will receive substantial benefit from this trust.

17. In addition to her trust interests the former matrimonial home, a four-bedroom semi-detached house in Barnes, is held in the sole name of the wife. Its value is £1.675 million and its equity after deduction of the mortgage on it is £1.074 million.

18. The husband, who is aged 45, is the head concierge of the London Hilton Metropole hotel, earning about £35,000 gross inclusive of shared gratuities. He has no capital apart from a 50% interest in his mother's house in Turkey. That interest is worth just under £50,000. He has debts of just over £100,000.

19. The parties met in New York in the autumn of 2003. At that time the husband was working as a concierge at Le Parker Meridien in New York. He had no money beyond his earnings; indeed, I was told that he had been made bankrupt. The wife was living in London. She was married to someone else and in November 2002 her eldest son had been born to her. I am not given any details about the end of the wife's first marriage. At all events the husband and wife developed their relationship and began cohabitation in January 2005. They agreed to marry. Unsurprisingly, given that the wife was a wealthy American heiress a prenuptial agreement was suggested. An agreement was drafted by the wife's private client lawyer. A lawyer was found to give the husband independent legal advice. This lawyer happened to be the solicitor who acted for the wife in her divorce from her first husband. The husband met this lawyer for the first time 3 November 2005. By then the marriage had been fixed to take place on 26 November 2005. The lawyer took the husband through the draft agreement. The husband must have been very surprised by what it contained. First and foremost, it provided that the agreement was deemed to have been made under the laws of the State of New York and that its validity and effect and construction should be determined in accordance with those laws regardless of where either party resided or was domiciled at the time of death or divorce or separation. Second, it provided that the parties wished any proceedings relating to the marriage to be determined in accordance with the laws of the State of New York and that they submitted to the exclusive jurisdiction of the courts of that State.

20. Quite apart from his obvious lack of independence, having previously acted for the wife in her divorce from her first husband, the lawyer provided to the husband was an English solicitor and had no competence to advise on New York law relating to the enforceability of prenuptial agreements.

21. The substantive provision to be made to the husband, in the events which have occurred (i.e. the marriage lasting for more three years, and there being two children born to them), was that any increase in the value of three properties in the name of the wife sited in respectively Barnes, Hanwell and New York would be divided equally between

[1] This is taken from Table 10 of At A Glance, which is a UK life table. Although Mr Thorpe asserted, without producing anything, that US life tables would put the expectancy of a 76-year-old at under 7 years, it is clear that in fact under such tables the figure would be virtually the same: https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_07-508.pdf

the parties on divorce. Further, the husband would not be entitled to claim any alimony or any other money from the wife. In the agreement those three properties were attributed with a value of $1.6 million or, at today's exchange rate, £1.24 million. It has not been possible definitively to establish what happened to the proceeds of the three named properties, but it has been assumed that they were rolled over into the existing family home in Barnes. As explained above, this has a net value of £1.074 million. Thus, there has been no increase in value for the parties to share, and under the agreement the husband gets nothing at all.

22. The husband was advised that the agreement was slanted heavily in favour of the wife. Nonetheless, he signed it on 11 November 2005 and the parties were duly married 15 days later.

23. Two children were born to the parties during the marriage a boy now aged 11 and a girl now aged seven. The parties enjoyed a reasonably high standard of living. They separated in November 2016; the husband moving to very modest rented accommodation.

24. The husband worked throughout the marriage, mainly in the hospitality sector but sometimes in other fields. His money contributed to the household economy but that was funded predominantly by the resources available to the wife. The husband, in reliance on the security of his wife's substantial resources did not make any provision for himself either by way of savings or pension.

25. In *Radmacher v Granatino* [2010] UKSC 42 at [75] Lord Phillips, for the majority, enunciated the guiding principle where a prenuptial agreement existed as follows:

> "The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."

He continued at [81]:

> "Of the three strands identified in *White v White* and *Miller v Miller*, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement."

26. On the facts of that case the Supreme Court agreed with the Court of Appeal that the earning capacity and future potential of someone as financially sophisticated as Mr Granatino meant that he did not need to have his needs met after his children were grown up. At [119] Lord Phillips stated: "on the evidence he is extremely able, and has added to his qualifications by pursuing a D Phil in biotechnology".

27. I have no hesitation in deciding on the facts of the case before me that it would be wholly unfair to hold the husband to the agreement that he signed. This is for the following reasons:

    i) The parties specifically contracted that the agreement will be governed by New York law. The evidence of the single joint expert is that the agreement suffers from a fatal defect under New York law. This is because the agreement was not accompanied by a duly authenticated certificate that it conformed with the local law in its attestation. The opinion of the single joint expert was crystal clear. This defect would mean that the agreement would, in New York, have "minimal weight, if any". She cited a case on comparable facts where the New York Appeal Court held that the document would carry "no legal force save for the minor impact of its historical voice".

    ii) It seems to me that, speaking metaphorically, if the parties have made their bed in New York they must lie in it. In my judgment it would be wholly unjust to attribute weight to this agreement when under the law that the parties elected it would be afforded no weight.

    iii) Further, it is plain to me that the husband cannot be said to have had a full appreciation of the implications of the agreement when he had no legal advice at all about the impact of New York law. Further still, I am not satisfied that the solicitor who gave the advice was not compromised by virtue of having acted previously for the wife in her first divorce. It was, so it seems to me, a clear situation of apparent bias.

    iv) The agreement does not meet any needs of the husband. I do not take the language used by the Supreme Court, namely "predicament of real need" as signifying that needs when assessed in circumstances where there is a valid prenuptial agreement in play should be markedly less than needs assessed in ordinary circumstances. If you have reasonable needs which you cannot meet from your own resources, then you are in a predicament. Those needs are real needs.

    v) In the circumstances of this case I attribute therefore no weight to the prenuptial agreement.

28. All of the assets in this case either are or have their origin in non-matrimonial property. Therefore, the claim will be decided solely by reference to the principle of needs. Neither counsel has argued otherwise.

29. The assessment of needs is a pure exercise of discretion, one of the few remaining exercises in the field of family law that can be properly described as truly discretionary as opposed to the formation of a qualitative decision. The width of the discretion is not limitless, but it is wide.

30. The following are relevant considerations in determining the reasonable needs of the husband:

    i) This was a 12-year cohabitative relationship.

ii) As a result of the way that the parties organised their married life the husband has made no provision for himself from his earnings either by way of savings or pension.

iii) The standard of living, whilst not by any means a determinative factor, is relevant and was in this case reasonably high.

iv) It is in the interests of the two children of the marriage that their father has a reasonable home in which they can stay with him comfortably and that they do not perceive him as being in some way the poor relation.

v) The husband will not be making any contribution to the maintenance of the children or to their school fees – they will be supported entirely by the wife save in respect of those incidental expenses met by the husband during the time that the children spend with him.

vi) In respect of the sum allowed for the husband's housing it is not necessary for all of it to be provided to him outright. There was agreement at the Bar that it would be reasonable for half of the housing sum awarded to be charged back in favour of the wife (or her estate) on the death of the husband.

31. The initial housing particulars provided by the parties were at polar extremes. I ordered that particulars demonstrating the cost of a three-bedroom property within a mile of the matrimonial home should be supplied. Those have been provided to me and I have considered them carefully. It is very much a buyers' market in these difficult economic and political times. I have concluded that the sum of £750,000 is a reasonable sum to be provided for the husband's rehousing. This part of the award is subject to a condition which I apply pursuant to FPR 4.1(4) that a charge in the sum of £375,000 (expressed as a percentage of the value of the new property) will be executed by the husband in favour of the wife or her estate which will be enforceable on his death. That charge will be transferable to a substitute property at full value.

32. In addition, I award to meet capital needs the sum of £27,500 for SDLT; the sum of £2,000 for the costs of purchase; the sum of £25,000 as an allowance to purchase more furniture; the sum of £28,000 to meet credit card and bank debts; the sum of £5,000 to meet another debt; the sum of £31,000 to meet unpaid Children Act costs[2]; and the sum of £68,000 to meet unpaid financial remedy costs. These total £186,500.

33. I now turn to the husband's income requirements. In one sense he could be expected to support himself from his earnings, but I am persuaded that this would not be reasonable especially while the children are so young. It would create an unhappy and divisive disparity between the standards of living of the two parents. I have considered carefully the revised budget advanced on his behalf by Mr Thorpe QC. I conclude that a reasonable net income need of the husband is £50,000 per annum falling on his retirement, at age 67, by 40% to £30,000 (in today's money). I attribute to him gross earnings of £35,000 per annum until retirement. This gives rise to a Duxbury calculation of £445,500.

[2] I allow this sum notwithstanding that it does not appear as a debt in the asset schedule prepared by Mr Thorpe. It was, however, mentioned in the husband's section 25 statement. The existence of this debt was not disputed by Mr Glaser.

34. My assessment of the husband's needs can therefore be tabulated as follows:

House purchase	750,000
SDLT	27,500
purchase costs	2,000
furniture allowance	25,000
bank and credit card debt	28,000
other debt	5,000
unpaid legal fees	99,000
Duxbury fund	445,500
	1,382,000
less Turkish property	(48,500)
	1,333,500

Of this sum £375,000 will be the subject of the charge-back and so the outright cost to the wife is £958,500.

35. I am in no doubt that £1,333,500 (subject to the charge-back) would be a reasonable and just sum for the wife to be ordered to pay the husband. It corresponds to just over $1.7 million. If paid from the Neil McConnell 1964 Trust for Morgan A McConnell then $2.75 million would be left there. In addition, the wife has her other trust interests as mentioned above, as well as the former matrimonial home. And, of course, nearly $500,000 will eventually be returned to the wife or her estate by virtue of the charge-back.

36. I therefore award the husband the lump sum of £1,333,500 of which £375,000 will be subject to the charge-back as detailed above. On payment in full a clean break between the parties will come into effect. This order is made on the basis that the wife will not pursue the husband for child support under the Child Support Act 1991. I award and decree an indemnity in the husband's favour in the event that she should do so.

37. Each party has obtained an order for costs against the other. I stay both such orders pursuant to FPR 4.1(3)(g). The husband's paid costs have been provided by virtue of a legal services payment order and my award covers his unpaid costs. To enforce his order would therefore result in a double recovery by him. I am not satisfied that it would be just to allow enforcement of the order for costs obtained by the wife as I do not think that she was nearly as cooperative as I had intended when relieving her from the obligation of procuring production of the grantor trust bank statements.

38. I will hear counsel as to issues such as time to pay and whether the lump sum should be secured pending payment.

39. I conclude by expressing my great disquiet and dismay at the wholesale non-compliance by both legal teams with FPR PD27A and the Efficiency Statement of 1 February 2016. On 21 March 2019 two bundles were delivered to the court in blatant breach of the one-bundle rule. Those bundles contained many duplicated documents but omitted possibly the most important ones, namely the deeds of trust. The bundles contained no preliminary documents. There was no agreed schedule of issues, no agreed asset schedule and no chronology. No attempt was made to agree an asset schedule during the hearing. When I insisted that a chronology be produced the one which I was

given (on the third day of the hearing) did not state the dates of the 1968 trust, the wife's father's will or death, the prenuptial agreement or even the marriage. Mr Glaser's skeleton was not filed by the deadline; he blamed the delay on the late delivery to him of the bundles by the husband's solicitor. These omissions and defaults are completely unacceptable especially when you consider that the wife has been charged £252,331 in financial remedy costs and the husband £235,669. The parties' advisers must ensure that in no case in the future does such non-compliance recur.

40. That concludes this judgment.
