Neutral Citation Number: [2017] EWFC 24

Case No: FD15F00056

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/05/2017

Before :

MR JUSTICE MOSTYN

- -

Between :

Elizabeth Jane Green	**Applicant**
- and -	
Charles John Adams	**Respondent**

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- -

The Applicant (represented with leave of the Court by **Mr Holden)**
The Respondent (represented with leave of the Court by **Dr Pelling)**

Hearing dates: 25-28 April 2017

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Approved Judgment (Corrected)

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

This judgment was delivered in private. The judge directs that this version of the judgment may be published. However, no report of this judgment may identify by name the parties' son (who is referred to as "N").

Mr Justice Mostyn:

1. This is my judgment on the mother's application for further, relatively modest, capital provision, for her son N, born on 22 March 2001, now therefore aged 16. She seeks:

   i) £15,000 to replace her car.

   ii) £3,000 to cover the cost of a forthcoming trip to Israel by N.

   iii) £1,500, being a 50% contribution, towards the cost of a trip to China last year by him.

   iv) £500, being a 50% contribution, towards the cost of a kayak purchased last year for him.

   v) £600 for the cost of a new laptop for him.

   vi) Total: £20,600.

   In addition, although this was not mentioned in her final position statement, the mother claimed £44,000 reimbursement of rent paid on her behalf by her mother between October 2009 and May 2012 which she says she owes to her mother, certainly morally, but probably not legally. In his final submissions Mr Holden withdrew this element of the claim.

2. The claim is a yet further instalment in virtually continuous litigation between the mother and father which began in July 2003, a year after the parties separated. It is not necessary for me in this judgment to set out the details of the extraordinarily ferocious litigation combat which has been engaged in by these parties. There are many judgments, some reported, in the County Court, Family Court, High Court and in the tribunal system. The details are well known to the parties and it is not necessary for the purposes of my decision for me to spell them out.

3. The mother's claim was launched as long ago as 5 April 2013. It included a claim for periodical payments on the basis that a maximum assessment had been made by the CSA. The hearing began in December 2013 before Judge O'Dwyer. It was adjourned to January 2014, but not completed, and was re-fixed for 5 days in July 2015. It was derailed by the mother's intimation that she intended to apply under section 423 Insolvency Act 1986 to set aside a disposition to a new trust made by the father. That application was issued on 24 July 2015, in the High Court. The Family Court directed that the mother's Schedule 1 claim should be listed for directions before the same judge dealing with the Insolvency Act claim. I gave directions on 12 October 2015. The matter came before me on 25 February 2016 when the Insolvency Act claim was compromised. I directed in the Schedule 1 case that a FDR take place before Mr Justice Jackson on 26 May 2016 and that the claim be determined by me in default of agreement on 20 July 2016. In parallel with all this there were appeals by both parties against Child Support Agency assessments. Those appeals were listed to be heard in November 2016 and it was agreed by the parties in such circumstances that the hearing before me should be adjourned until the conclusion of those appeals. A final decision on those appeals was given on 19 April 2017 and I heard the mother's claim over four days from 25 – 28 April 2017.

4. Pursuant to the terms of section 8 of the Child Support Act 1991 an award of periodical payments may not be made under Schedule 1 of the Children Act 1989 unless a maximum child support assessment has been made by the Secretary of State, or unless the parties agree that the court should have jurisdiction. It is well-established that the court cannot legitimately circumvent this prohibition by making a capital award which rolls up expenditure which would ordinarily be met by a periodical payments order: see *Phillips v Pearce* (sic, recto *Peace*) [1996] 2 FLR 230. Put another way, the court does not have jurisdiction to make an award to meet the quotidian expenses of living; to meet, if you like, the cost of one's daily bread. It can only make an award for genuinely capital expenditure of a singular nature. Therefore the court has full power to make an award of capital to meet housing needs, and this has happened in this case. An order was made in May 2005 by District Judge Roberts requiring the father to settle £220,000 on N to provide him with a home and also to furnish £20,000 (later amended to £24,800) towards moving costs. This was not in fact implemented until January 2012 when the mother found a flat in Winchmore Hill which was purchased by the settlement which by then had been established. There was no capital provision made at that time for the purchase of a car because the mother already had one.

5. That car has since been replaced following an accident and the replacement, purchased with insurance money, now has done over a hundred thousand miles and according to the mother is on its last legs. I have no doubt that this may legitimately be sought under Schedule 1. The next four items are more borderline but I am satisfied that they may equally be characterised as singular items of a capital nature. Therefore, provided that the merits justify it, I am satisfied that a total of £20,600 can legitimately be claimed by the mother.

6. Can the father afford to pay £20,600? Of course he can. He is a rich man, as I will explain. Yet even though he has millions which may be properly regarded as his resources he has paid a mere pittance in child support. According to figures submitted on his behalf he has paid only £3,819.40 between 29 April 2009 and 22 April 2014. In addition he has paid £111.28 since 3 January 2017, pursuant to a recently made minimum assessment of £7 per week. And that has been it. I acknowledge that he has paid and continues to pay a sum which together with tax rebates in favour of N make up half of his school fees (although there are arrears at the present time); the mother's own mother pays the other half of the school fees. But even allowing for this, the lack of support for day to day living is a most disturbing state of affairs. It is an indictment of the child support system that it has not been able to furnish reasonable maintenance in the mother's hands for N.

7. The appeals which were heard in November 2016 related to a variation to a child support assessment sought by the mother under the ground of "assets" as specified in regulation 18 of the Child Support (Variations) Regulations 2000. The tribunal was concerned with three separate periods beginning respectively on 29 April 2009, 16 November 2011 and 5 July 2013. It decided that for those periods the father had assets for the purposes of that regulation (and I emphasise that last phrase, "for the purposes of that regulation") which it computed to be around £830,000. Deemed income at the rate of 8% is applied to those assets. However, that deemed income will not be sufficient to give rise to a maximum assessment. Dr Pelling has calculated that this will give rise to arrears of £44,140, from which should be subtracted the modest sums mentioned above leaving a debt of just over £40,000.

8. In circumstances where there is not in existence a maximum assessment, and where there is no prospect of one being made, it is apparent that there is no jurisdiction for the court to make a periodical payments order in favour of the mother for N. That aspect of her claim is therefore dismissed.

9. In his skeleton argument Dr Pelling at paragraph 11 said this:

> *"Furthermore, and crucially the first-tier tribunal has made a decision which as it stands means that there are CSA arrears of over £40,000 and while this figure may be mitigated by the just and equitable considerations, it is virtually certain that there will remain a large capital debt of several tens of thousands of pounds and in excess of the level of lump-sum the applicant is seeking. The court cannot ignore this and the CSA debts would take priority over anything additional the court might award. It is submitted in conclusion that in the particular circumstances of the whole case there is no basis that the court to make a second capital award to the applicant, and that to do so would really be oppressive."*

10. In fact three days after Dr Pelling wrote this the tribunal adjudged that it would be just and equitable to maintain its provisional decision.

11. My initial view was that the position of Dr Pelling had considerable merit. I read his argument as asserting that the issue of the scale of the assets to be attributed to the father had been adjudicated between the parties and was therefore res judicata. I assumed that Dr Pelling was saying that the issue had been decided already with a substantial award in the mother's favour; that this was therefore an abusive duplicative action which should be halted in its tracks. I therefore indicated my provisional initial view that I should award the mother sufficient to meet her legitimate capital needs but that she should be required to give credit for such award against the arrears as computed by Dr Pelling when they fell for payment at the behest of the Child Support Agency. However, to my astonishment, Dr Pelling performed the most extraordinary volte-face in court. Although there was no hint of an intention to appeal in what he had written I was told that it was indeed the intention of the father to appeal the decision of the tribunal and that he anticipated succeeding to the extent of eliminating virtually entirely the arrears of £40,000. Thus, it seems to me that I had been subjected to a deliberately misleading submission on behalf of the father. I cannot confidently predict that the mother will receive in the foreseeable future any appreciable sum by way of arrears of child support maintenance. However, Dr Pelling confirmed that if, following challenge by way of appeal, a sum of arrears is eventually found to be owing, then the father will pay it. I asked Dr Pelling from which source the arrears would be paid if they were in fact confirmed in the figure of £40,000. He told me that the father would seek the assistance of his own father to make the payment.

12. In circumstances where neither party is asking me to place any reliance on the decision of the tribunal it would, I believe, be a step too far for me to attribute to it the status of res judicata. However, it is noteworthy that after an exhaustive hearing the tribunal concluded that for the purposes of the regulation the father indeed had capital of a not inconsiderable amount. I am satisfied that the assessment made by the tribunal by no means reflects the true extent of the resources available to the father. I have further

concluded, contrary to my initial provisional view, that it would not be reasonable to require the mother to give credit against any such arrears for the sum awarded by me.

13. I now set out the property and other assets which the father has in his sphere. When I say "in his sphere" I mean property which is either (a) owned directly by him; or (b) is owned by a trust or trusts of which he is a beneficiary; or (c) which is owned by a company of which he was recently the sole shareholder; or (d) which is owned by a trust set up by him relatively recently of which his children, but not he, are beneficiaries; or (e) which is owned by a pension fund established for the benefit of him and other members of his family.

14. The assets are as follows:

		Note
18 Cedar Drive	450,000	1
17 Cedar Drive	450,000	2
26 Edmunds Walk	1,700,000	3
22 Cedar Drive	450,000	4
16 Buckingham House	250,000	4
Atlantic Pension Fund	1,350,000	5
1 Friern Park	555,000	6
	5,205,000	

Note 1: 18 Cedar Drive. The father told me this was worth about £450,000 – there has been no professional valuation. It is in his sole name.

Note 2: 17 Cedar Drive. The father told me that this was an identical flat to 18 Cedar Drive. It is dwelt in by his son Leigh. It is owned by York Mill (Silk Knitters) Ltd. The accounts for the calendar year 2015 show that this was a dormant company although the father told me that he has got plans for it. Until 21 April 2016 the company was wholly owned by the father; on that date further shares were issued so that it became owned as to one third by each of him, his son Leigh and his daughter Melissa. In my judgment this disposition made while this case was pending should be ignored and the company treated as continued to be owned wholly by the father for the purposes of the assessment of his resources. The company has a significant debt of about £170,000, but this is owed to the father and so can be ignored for the purposes of the assessment of the value of the company to him. If number 17 were sold then corporation tax on the gain in its value would be payable at 20%.

Note 3: 26 Edmunds Walk. The father told me that this was worth about £1.7 million although, again, there has been no professional valuation. This is owned by two trusts settled in 1994 by the father's parents. The father is an only child and his parents are in their 90s. The trusts are discretionary trusts and the beneficiaries are the father and his four children. The property is let and generates a respectable rent. The rent is being accumulated in order to pay the periodic inheritance tax charges that are applicable to trusts of this nature. When considering whether a discretionary trust is to be treated in whole or in part as a resource of a party the single question is whether the court is satisfied that whether the trustee would be likely to advance the capital immediately or in the foreseeable future. See *Charman v Charman* [2006] 2 FLR 422, *Whaley v Whaley* [2011] EWCA Civ 617, *BJ v MJ (Financial Remedy: Overseas Trusts)* [2011] EWHC

2708 (Fam). In making the assessment the court is not constrained by the ipse dixit of the trustees: see *SR v CR* [2009] 2 FLR 1083. On the contrary, the court must adopt a position of worldly realism and ask itself whether the stance of the trustees declaring that they will not help their principal beneficiary is to be credited. This approach is tried and tested and stretches back over the centuries. In *N v N* (1928) 44 TLR 324, 327 Lord Merrivale P stated:

> *"The ecclesiastical courts showed a degree of practical wisdom… They were not misled by appearances… they looked at the realities … The court not only ascertained what moneys the husband had, but what moneys he could have if he liked, and the term "faculties" described the capacity and ability of the respondent to provide maintenance."*

In this case I am completely satisfied that the position of the father and the trustees is one of artifice and that the trust assets would be made available to the father in whole or in part were he to seek them for whatever reason. But given the modest scale of the mother's claim it is hardly necessary for me to go that far.

Note 4: The values of 22 Cedar Drive and 16 Buckingham House were given to me by the father; again, there were no professional valuations. Number 22 is dwelt in by the father's son Craig. I was told that it too was an identical flat to numbers 17 and 18. 16 Buckingham House is let to tenants. These two properties are owned by a trust established by the will of the father's late aunt, Miss Lattner. That will established discretionary trusts of which the father and his issue are beneficiaries. For the same reasons as those given above I am satisfied that these assets are to be treated as the resources of the father, irrespective of the asserted position of the trustee that they would not make any part of them available to him. I am not at all surprised that the trustee of these trusts, Mr Robert Craig of Howard Kennedy solicitors, purports to adopt a stance of non-assistance of the father in any circumstances. One is reminded of the famous riposte of Miss Mandy Rice Davies when cross-examined in the trial of Stephen Ward in June 1963.

Note 5: The father is a member of a pension fund known as the Atlantic Pension Fund. In the tax year 2011/2012 he withdrew the maximum tax-free lump sum from his share of the fund. That was £450,000 and represented 25% of the value of his pension. Thus £1.35 million was left to provide him with an income, which can be taken either by the purchase of an annuity or by drawdown within limits prescribed by the Government Actuary's Department. HMRC rules state that the pension can be drawn from age 55. The father had produced a letter from Mr Thomas, pension consultant and actuary, dated 10 January 2014. This letter confirms that for this particular pension retirement is permitted under the general law between the age of 55 and 75. But the letter goes on to state:

> *"However, to meet your views on a certain type of investment, the specific rules of this scheme were amended in January 2010 to restrict that age range to 67 to 75 in respect of taking a regular pension."*

I asked the father what were the investments referred to, and what were his views that led to the earliest age that the pension could be taken being adjusted to 67. The father

is presently 65 and so this is of some relevance. The father gave me evidence which was highly evasive. He said he had no knowledge of the investments referred to there, even though the letter clearly attributes to him detailed knowledge of them. All he was able to say is that the pension fund owns "loads of securities" and possibly an old building in Leek. When I asked him what were his views as referred to in the letter he said that Mr Thomas was mistaken when he wrote that, and that the views there referred to were Mr Thomas's and not his. I am perfectly satisfied that the father has given me deliberately evasive evidence in this regard. I am satisfied that it is within his power to alter the rules once again so that he could immediately take his pension from this fund. Therefore, it is reasonable to attribute the whole of the undrawn value to him. It is noteworthy that under the GAD drawdown limits the sum of £1.35 million would provide an immediate pension income to the father of approximately £70,000 per annum (see www.gov.uk/government/publications/drawdown-pension-tables). It is his choice, and his choice alone, that he is not receiving this pension income.

Note 6: 1 Friern Park. The £450,000 referred to above was used as follows. £30,000 went to Leigh in repayment of a loan for Melissa's educational costs. £73,860 went to fund the property settlement in favour of N referred to above and moving costs. £21,196 was paid to the Lattner Trust to reimburse rents from that trust which the father had had the benefit of. £111,142 went to the company referred to above and represents part of the debt owed by that company to the father. £62,302 went into the father's Lloyds bank account. And £151,500 went to establish a new trust known as the Pacific Trust. The father is not a beneficiary of this trust; only his children and his parents are beneficiaries. The father told me that the reason for this was advice given about inheritance tax. I have no doubt that if not the main reason then certainly a subsidiary reason was to seek to immunise it from being characterised as his assets in proceedings between him and the mother. As such it just for it to be added back to his resources under the principle stated in *Vaughan v Vaughan* [2008] 1 FLR 11 at para 14. In my judgment this was a plain act of dissipation with a wanton element. The trust fund of £151,500 was used to buy the property 1 Friern Park from the Atlantic Pension Fund for that sum. This was a commercial property in need of renovation. The father borrowed £100,000 from his son Leigh to pay for the renovations. This was not secured on the property, and is a personal debt of the father to his son. The property has been let to a children's nursery under a 10 year lease with an annual rent of £50,000. I have been shown a letter which suggests that this rent was a windfall – that may be so but it is the actual rent. The father told me that the terms of the lease provide for a rent review in five years' time when it will increase. I do not have a valuation of this property but it would not be unreasonable to attribute a rental yield at the present time of 9% which would suggest a value of the property of £555,000. That of course is only marginally more than the rents that will be received under the current 10-year lease. It was the father's choice, and his choice alone, that led to this property being purchased in the name of this trust rather than in his sole name. Had he chosen to purchase it in his sole name then he would be receiving a rental income of £50,000 per annum gross.

15. I accept, of course, that were the properties in question to be liquidated there would be taxes and costs of sale to be paid. However, it is apparent from what I have set out above that the father is possessed, or is to be treated as being possessed, of very substantial assets indeed and in such circumstances his parsimonious approach to the support of his son is little short of scandalous.

16. In his skeleton argument Dr Pelling wrote: "the respondent's capital position has not improved and indeed he has exhausted all capital resources". It will be apparent from what I have set out above that I completely disagree with this argument and I regard it as being untruthful. Dr Pelling continued "this is not a situation where the court might make an award where there are no ostensible resources to meet it, on the grounds of unreasonable dissipation of assets or for the concealment of assets". I agree that this is not a case where there are no ostensible resources. There are ample ostensible resources. Further, the father has engaged in all-too-familiar manoeuvres to try to insulate his resources from the reach of the mother and the court, as I have explained above. The argument of Dr Pelling that the father is down to his last £3,500 is absurd. In fact the father spends virtually nothing, leaving his capital to grow un-encroached. In his oral evidence he explained that he took from his bank account £450 in cash three months ago and had not yet even spent that. He spends almost all his time with his elderly parents who meet the cost of his day-to-day items in exchange for his care of them.

17. The father issued a witness summons to require the attendance at court of the mother's own elderly mother to establish whether she had established trusts in her daughter's favour. The mother had given evidence that she was not a beneficiary of any trust to her knowledge. There was not the slightest piece of evidence to suggest that any such trust existed – this was in my view a pure fishing expedition, and I discharged the summons. I suspect that the real reason was to establish the scale of her mother's own estate and to determine her testamentary intentions, but that is not a legitimate purpose of a subpoena – see *Morgan v Morgan* [1977] Fam 122. It would be equally irrelevant to inquire about the testamentary intentions of the father's own parents who live in a valuable property at 17 Edmunds Walk.

18. The mother works part-time for an accountant and earns £500 a month and also receives working and child tax credits as well as child benefit. I am satisfied that given her responsibilities to her son it would not be reasonable for her to seek to work full-time, even if such work were available to her. It is manifestly reasonable for her to have a reliable car for the use of her and her son. The father's proposal was that the old car of his daughter Melissa, a Fiat 500 with 40,000 miles on the clock should be provided to the mother. Alternatively, an old Saab which belonged to his parents. This nit-picking and controlling approach is of a piece with the father's attitude to this litigation. It is not for the father to dictate to the mother which car she should have – she should be enabled to buy a car of her choosing. If the Fiat and the Saab are no longer needed, then the father can sell them and put the money towards the award which I will make.

19. N has savings provided by his grandmother of under £10,000. It is reasonable for these to be preserved for him.

20. The father sought to give me evidence that when he attended the Santander Bank to open an account in the name of N to receive the tax rebates he was told by the teller that several accounts already existed in N's name. I pointed out that this was hearsay where no attempt had been made to comply with the written notice provisions specified in section 2 of the Civil Evidence Act 1995 and Family Procedure Rules 23.2. The father's evidence had not been reduced anywhere to writing and it is completely unacceptable for the mother to be ambushed with this evidence in this way. Pursuant to section 4 of the Act I attribute no weight to this evidence and disregard it altogether.

21. In my judgment, the mother's claim of £20,600 is manifestly proportionate and reasonable and properly reflects the considerations in paragraph 4 (1) of Schedule 1 to the Children Act 1989. I therefore award it. The sum is to be paid by 1 June 2017. If it is not paid then statutory interest under section 17 of the Judgments Act 1838 at 8% will arise. When Dr Pelling was cross-examining the mother he asked her if she were awarded around £20,000 how she intended to enforce it. I regarded this as a wholly improper question and disallowed it. However, the fact that it was put does signify that the father will use every means available to him to frustrate enforcement of this award. The arrangements that he has made in relation to his substantial assets show that he is determined to seek to insulate them so far as he can from any claim by the mother either directly or through the Child Support Agency. It is therefore necessary for me to take steps to secure the award so as to ensure that it is paid. Under section 3(1) of the Charging Orders Act 1979 I am empowered to make an immediate absolute order. I make such an order over 18 Cedar Drive in the sum of £20,600 together with any statutory interest. I reserve any application for enforcement of the charge to me.

22. Finally, I am constrained to mention an extraordinary state of affairs arising from recent amendments to the child support legislation. The tribunal appeals which I have mentioned were in relation to assessments made under the second regime which was introduced by the Child Support, Pensions and Social Security Act 2000. Under that regime there was, as explained above, a facility to seek variation on the grounds that the non-resident parent had "assets". That regime was replaced by the third regime provided for by the Child Maintenance and Other Payments Act 2008. That third regime has been in full force since 26 November 2013. This case was transferred into that regime on 10 October 2015. For reasons which I cannot fathom the "assets" ground of variation has been removed from this latest regime. Therefore, it is possible, as in this case, for a father to live on his capital, which may be very substantial indeed, and to pay no child support at all. The father was only required to pay the pitiful minimum sum of £7 a week from the early part of this year because it was then that he received his state pension. In my opinion the government needs to consider urgently the reinstatement of the "assets" ground of variation.

23. That concludes this judgment.