

JERSEY / JUDGMENT

M -v- N (Matrimonial) [2013]

JRC 080B (24 April 2013)

[2013] JRC 080B

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judgment

the registrar: 1. On 6 th April, 2011, the husband and the wife, who had been married for nearly 18 years, sadly separated. 2. On 9 th July, 2012, the husband filed a divorce petition on the parties' separation for 1 year. A decree nisi and declaration of satisfaction regarding the child of the marriage, B, (at that time 16) were issued on 19 th December, 2012. 3. By then, the respondent wife had already instructed a second firm of lawyers. Her then new lawyers issued a Form 16 applying for maintenance, secured provision, lump sum and an order for transfer or settlement of property on 18 th July, 2012. The Assets 4. The house has an agreed equity of £140,640. Each party has a pension. His is worth (CETV) £35,099 and hers is worth (CETV) £51,816. There are some debts, which according to my calculations, amount to a total, including each parties' legal fees, of £52,699. Of this sum, her share amounts to £33,492 and his share amounts to £19,207. 5. Part of the reason for the wife's large debts are that she ceased instructing her second lawyers in February 2013 and from then on instructed a third firm of lawyers. Unfortunately, every time a new firm is instructed, extra work is generated and the bill is therefore increased. 6. Nevertheless, on the face of things, the case is simple. There is a house with an agreed value, each party has a pension and each of them has some debts. Why then has it been so expensive to determine how the assets should be split? 7. One difficulty has been to determine when the house should be sold. It will only be upon the sale that funds will be released to give each party an appropriate share of assets. 8. It is the wife's case that the house should not be sold until the parties' daughter B has completed a degree course at Highlands in about 2018. On the other hand, the husband would like the sale to take place when B completes her 'A' level course in summer 2014. B was born in October 1994. She's 18 now, will be rising 20 in the summer of next year and would be rising 24 in the summer of 2018. 9. Another difficulty is that it has not been possible to provide the Court with an agreed schedule of assets. Several items are entered at different values by each party, even pension values and the debts, as well as personal items. The reasons for this are confused. The wife's case is that the husband has not complied with orders for disclosure. The husband complains that it is the wife who has caused delays. I must also decide whether or not to include certain jewellery and a cashed-in insurance policy as the wife's assets. I have decided on balance to include her jewellery (despite her saying she has given it to B) but not to include the policy, because, despite the husband receiving no direct benefit, I understand it has

been spent and no longer represents capital. 10. In addition to disagreement over CETV values, the parties disagree about the values which should be attributed to their pensions for the purpose of settling ancillary matters. (i) The wife argues that her PECRS pension should be 'discounted' to the same level as the husband's (i.e. the 2 pensions should 'cancel each other out'), because she is the older of the two parties and, as a woman has the longer life expectancy and because, she claims, the husband's employers will be obliged to pay into a pension scheme for him in the UK. (ii) The husband argues that his pension is effectively 'frozen' because his present earnings are so low and he can no longer afford to contribute to any pension at all. Meanwhile, the wife will be paying into her pension scheme with the States of Jersey for another 13 years. 11. If anything, I prefer the latter argument, because the PECRS pension is a recognised secure investment, variously described as "copper bottomed" or "gold plated" in previous decided cases. The husband is unlikely to make such good provision for himself on his income as a coach driver. On balance, however, I think the pension values should both be entered into the asset 'pot' at their face value, as I shall explain. The Equity Release Loan 12. This is another source of division. When the home was jointly purchased in June 2006, the parties benefited from a States of Jersey first time buyers' scheme, whereby the price was reduced, but, in the event of a sale, the parties would have to repay 10% of the property value to the States. I don't know what the mortgage repayments of capital and interest were at the time of the purchase, but I have no doubt that the house purchase represented good value for their limited funds. 13. However, since the separation in April 2011, the wife has been paying contributions of £1,137, which must be significantly higher than they were originally, owing to the existence of an Equity Release Loan of £40,000. I have no agreed list of the items for which the loan was taken out to pay for or buy. However, I am told that, included in the list are some family debts, an extension to the home and a holiday. 14. The loan also covered the repayment of a previous loan of about £12,000 taken out by the husband, in his own name, during a time when he left the family home and indulged in an extra marital affair lasting, on his account, some 6 weeks. 15. Fortunately the parties were able to reconcile, and it was indeed at that point that the Equity Release Loan was taken out. The husband maintains that a considerable portion of the £12,000 was repaid by him personally by paying for new furniture for the house. 16. In summary, the situation remains confused, the husband maintaining that the loan largely benefited both parties, but the wife maintaining that part of it was to do with his profligacy. Debts 17. (i) The wife has incurred a legal bill of £11,629 with her present (third) lawyers. Her legal bill from her previous lawyers was £18,464. This is a total legal bill requiring payment of £30,093. There are other personal debts (including half of a dental bill for B) of £3,399. This makes a grand total of £33,492. (ii) The husband has a legal bill of £11,207, a loan from his parents of £2,500, a Jersey tax bill of £5,079 and a credit card bill of £421, making a grand total of £19,207. 18. I can see no good reason for excluding the parties' debts or any of them from the calculation of total assets for distribution. Arguably, the wife's costs are greater because of her need to pursue the husband for financial disclosure. This does not however explain her need for three different lawyers. Sharing or needs? 19. The wife's case is that her application is based on need. The husband's case is that it is a case for distribution of the available assets equally. 20. In my judgment, this is primarily a 'sharing' case, because, as in many of the 'middle income' cases which I see, there are insufficient assets to distribute in order to satisfy the needs of both

parties. Needs must be considered simultaneously as part of the Section 25 guidelines. However, the consideration of need alone on behalf of either party only leads to an impossible result, with each party arguing their need is more deserving than the other. Bluntly, both these parties have needs for housing themselves and B, but there is insufficient to do this in such a way that each has enough to re house themselves as they would like, using their limited resources of capital and income. In order to 'cut the Gordian Knot' it seems to me to be right to add together all the assets, subtract all the debts and use the total net assets as a basis for re-distribution of available assets, in particular the sale proceeds of the home. As shown on the schedule attached to my order, I calculated the total assets less debts to come to a relatively modest figure of £184,644. How to distribute the assets? The parties' open positions 21. In the parties' open positions, a judge naturally expects to read the more extreme versions of what each party is asking for. Sadly, I think for both parties, because it is unrealistic for both of them, they are each justifying the position that it is they who deserve the lion's share of the sale proceeds from the former home. At £140,640, it is the only sizeable liquid asset. It's worth repeating here that total net assets are only £184,644. 22. The wife, who is aged 52, is asking for the proceeds to be distributed by giving the husband £15,000 and the balance to her. On present figures, this would be estimated at £125,640. If this happened, she would have £125,640 plus £58,777 other assets (including pension) less debts (including legal fees) of £33,492 being a grand total of £150,925, or 81% of total net assets. (He would have 19%). 23. In his open position, the husband, who is aged 47, is asking for the proceeds of sale of the former home (£140,640) to be distributed by giving the husband £80,984 and the wife the balance, which on present figures would be estimated at £59,656. This would mean she would have £59,656 plus £58,777 other assets less debts of £33,492 being a grand total of £84,941, or 46% of total net assets. (He would have 54%). 24. These are indeed extreme positions to take, with unfortunately little likelihood of acceptance. Neither could be fair, as I shall attempt to explain. Parties' Skeleton arguments 25. I question the wisdom of the provision of skeleton arguments in a relatively low value case such as this, in which there are not only two chronologies, two statements of issues and two summaries of assets, but also affidavits of evidence filed by each side. Much of the skeletons is taken up rehearsing the facts which are already apparent from other documents. The wife's skeleton does however attempt to justify her greater needs for housing herself and B in Jersey. It asserts that she will require in excess of £130,000. It depends on the Court accepting that in needs based cases the principle of 'need' will take precedence over the principle of 'sharing'. It relies on the case of Charman-v-Charman

[2007] EWCA Civ 503 at paragraph 73, which reads as follows:- "Then arises a difficult question: how does the court resolve any irreconcilable conflict between the result suggested by one principle and that suggested by another? Often conflict can be reconciled by recourse to an order for periodical payments: as for example in McFarlane, per Baroness Hale. Ultimately, however, in cases in which it is irreconcilable, the criterion of fairness must provide the answer. It is clear that, by the sharing principle, the result suggested by the needs principle is an award of property greater than the result suggested by the sharing principle, the former result should in principle prevail..." However, I do not accept that in a comparatively low value asset case it is appropriate, first of all to decide who is the most

deserving of the parties and thereafter to cherry pick the best assets to give to that party, leaving the remainder to the other. 26. The husband's skeleton argument also rehearses much of the history. It then relies on Section 25(2) of the Matrimonial Causes Act which is reproduced in full. It repeats the open position of the husband suggesting an equal division of assets including pensions, but excluding debts. This would mean that the wife would be saddled with much greater debts than the husband and would be just, only if I accepted that the debts were incurred unreasonably. As I have already said above in discussing the lack of agreement over the parties' assets, the wife's case is that costs were incurred in trying to make the husband disclose his present assets and living circumstances, some of which remain undisclosed. The husband's case is that some of the delay and increased costs is due to the wife having insisted on adjourning the final hearing. My Decision 27. I have to make a decision in two parts. First I have to decide upon the total net assets. This I have done in accordance with the schedule to my order. The figure is £184,644. Despite the wife's additional debts, the wife's greater pension value, the husband's loan from his parents (described by the wife's advocate as a 'soft' loan), I believe it is fair to take all assets as shown on the schedule at their present face value. I have considered the complaints about the nature of individual assets or debts, (e.g. higher pension values, debts said to be unreasonably incurred, the equity release loan) but taking the case as a whole, it seems to me that the fairest way of working out the division must be to add all assets together so that any inconsistencies, if there be any, are ironed out and subtract all the debts. Neither party has been able to establish that the other's financial behaviour has been unreasonable and despite incurring substantial fees, I can see no good reason to treat all assets and all debts the same. It certainly is not worth the parties spending any more money on legal fees in pursuit of such limited assets. If they do so, there will be nothing left. 28. Secondly, I have to decide in what proportions the net assets should be divided between the parties and why. B still lives with the wife and will need to be housed at least as long as she needs to complete her 'A' level course. In all the circumstances, including the need for B to be housed, the relatively expensive present cost of the former home born by the wife, the equity release loan, the fact that all the cost has been born by the wife since separation and will continue to be her responsibility until sale, final division must favour the wife. I must also consider the parties' need to re-house themselves and the more expensive costs of doing this for the wife and B in Jersey. At this point, I accept the wife's argument that her need is the greater and that the sharing principle can be overtaken by the needs principle in accordance with the case of Charman . I accept that there is conflict between the two principles of sharing and needs and that the criterion of "fairness" must provide the answer. The wife is to have just over two thirds of the total net assets of £184,644. In order to achieve this, when the former home is sold, I have decided that she will have £98,000 from the sale proceeds. This means she will have in total £98,000 plus £58,777 less £33,492, being a grand total of £123,285. The husband will have approximately £42,640, or just under one third of total assets. 29. If this is how the capital is to be allocated, I am confident that the parties can still manage on their limited resources and modest sources of income in the short term until the house is

sold. The wife will have in total four sources of income, namely two teaching jobs, an income from either a lodger or students and agreed child maintenance of £180 per month. As a school teacher, she earns £18,500 net per annum and as a key worker with adults with learning difficulties she earns a further £3,896 per annum. She gave evidence that she can earn £110 per week for a lodger or £240 if she has two students, but would have to feed them. She agreed she could, in theory, achieve a total income (including maintenance of £180 per month) of £38,000, "if I work my socks off". However, without the lodger or students, the income would be only about £25,000. Total expenditure for one month is £2,408 (including mortgage and equity release of £1,137) which is nearly £29,000 per annum. She has to work hard in order to make ends meet, but it is achievable. 30. The husband declares an estimated net income as a coach driver for the next 12 months of £13,800. I make his expenses come to £13,764. This includes £460 per month rent plus £99 council tax, £100 per month car loan and £180 per month child maintenance. There is not much to spare. It is not reasonable to expect him to contribute to any mortgage or equity release loan on the former matrimonial home. Can the parties ever obtain their own properties in future? 31. A mortgage example obtained by the wife proposes a mortgage of £124,800 on property worth £250,000. She will have £98,000 from the former home, but she still has her debts of over £33,000 to pay. I'm not sure if the proposed mortgage is in fact realistic, if, having paid debts, she only has about £65,000 in cash. If she could, none the less, obtain a mortgage of £124,800 (as per the proposal), with her available capital, she could only purchase property worth £189,800, which is surely not enough to rehouse herself and B. It remains to be seen if she is in any way eligible for Legal Aid (which might serve to reduce her legal bill), but I am told she has been refused. I regret that it might not prove possible for her to purchase her own property again in Jersey. 32. The husband will receive about £42,640. He has debts of about £19,000, so will have about £23,640 available capital. This might just possibly be enough to purchase a small property in Hull, assuming he could obtain a small mortgage, but I have no details of that. Property in the area where he now lives (HU4) tends to be more expensive, but it is, of course, much cheaper than an equivalent property in Jersey. I see that one property in the area is available for £42,500. It would not be fair to suggest that just because one party now lives in the UK in a cheaper housing area, his equal starting position (subject to adjustment) in his Jersey divorce must be compromised. The husband indeed stated that he might in the future return to live in Jersey. However, I have taken into account the cheaper housing costs in Hull, where he is at the moment and the fact that he might possibly be able to buy a very modest property. Be that as it may, he still has debts to pay and because of his low earnings, I actually doubt his ability to do so. No bank is likely to accept the risk. So this means to me that neither party is ever likely to regain a foothold on the housing market. When to sell the former matrimonial home? 33. I think it reasonable to order that the home be sold after B has completed her 'A' level course, when she will be nearly 20 and not to delay the sale beyond that. At present, no one is certain that she will commence her degree course, although I have no reason to doubt her declared intention. Mesher orders (i.e. orders for a delayed sale of jointly owned property) are commonly made to delay the sale of family property

while children remain minors. I realise that both parties accept that B has suffered in her school work due to the divorce. The husband has said he wants to re-establish communication with her. Both parties appear to be sensitive to her needs. However, I don't think that the delay in her taking an 'A' level course should of itself entitle the wife to hold on to the former matrimonial home any longer than B's full time secondary education. 34. My final thought is that this is a difficult case because there are simply insufficient assets to distribute for the parties to maintain anything like their standard of living as it was in the later years of their marriage. It has been made worse by a delay in arriving at a conclusion and, above all, because of, for whatever reason, the high legal costs. The hard lesson is that spending money on lawyers in pursuit of a better settlement in modest cases does not pay dividends. Looking at the case another way, at least £40,000 has been spent in legal fees in a case where the main available asset is worth £140,000, so that only leaves £100,000 net cash proceeds of sale (£50,000 each) to share between the parties, both of whom expect enough in order to purchase property to re-house themselves. It is just not possible. Authorities Charman-v-Charman

[2007] EWCA Civ 503 . Matrimonial Causes Act 1973. Page Last Updated: 03 Feb 2017 BAILII:
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Prepared on 27 October 2026 · Esheria