

JERSEY / JUDGMENT

U v T (Matrimonial)

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Matrimonial - reasons for varying a decision dated 13 September 2023. [2024]JRC095 Royal Court (Family) 22 April 2024 Before : M. J. Thompson, Esq., Commissioner, and Jurats Berry and Entwistle Between U Appellant And T Respondent Advocate H. J. Heath for the Appellant. The Respondent appeared in person.

judgment

the commissioner

Introduction

1. This judgment contains the Court’s reasons for varying a decision dated 13 September 2023 of Registrar Daultrey of the Family Division to provide that 30% instead of 65% of the net proceeds of the former matrimonial home be paid to the Wife who is the Respondent to this Appeal. In this judgment we refer to the Appellant as the Husband. Although the wife petitioned for divorce, we refer to her in this judgment as the Wife.

Background

2. The decision of the Family Registrar was recorded in an Act of Court dated 13 September 2023. 3. Paragraph 1 of the Act of Court provides as follows: “1. The former matrimonial home, [“the Cottage”] be sold as soon as possible upon the joint instruction of the parties. The net proceeds of sale after payment of all secured charges, fees and expenses incurred in the sale shall be distributed as follows: i. 65% of the net proceeds shall be paid to the petitioner; ii. From the balance, the sum of £12,000 shall be paid to the petitioner as a lump sum for child maintenance and as a contribution to pre-sale running costs of [the Cottage]; iii. Any balance shall be paid to the respondent.” 4. The reference to the petitioner is a reference to the Wife and the reference to the respondent is a reference to the Husband. 5. Paragraph 1ii of the order also provided for the Husband to pay child maintenance, including a contribution of £10,000 to be paid out of his share of the proceeds of sale of the Cottage for maintenance payable by him during 2023. 6. The background to the Registrar’s decision was set out at paragraphs 1 to 7 of her reasons dated 13 September 2023 and distributed on 21 September 2023 (“the Reasons”). Our summary of the background is taken from paragraphs 1 to 7 of the Reasons. 7. The parties married in 2007 in Jersey. The marriage broke down in March 2021. In September 2021, the Wife moved into a two bedroom rented accommodation with the Husband remaining in the Cottage being the former matrimonial

home. 8. There are three children of the marriage, (“AA”), (“BB”) and (“CC”). AA is now fifteen, BB is twelve and CC is six. BB has complex needs and requires round the clock care and supervision. 9. The Husband is from (“Country A”) and the Wife from Jersey. The family lived together in Country A and Jersey, most recently in Jersey. They owned property in Country A which was sold when they moved to Jersey. The Registrar found that no money remains from that sale. In 2017 they bought the Cottage in their joint names. This purchase was funded primarily by secured loans from a trust of which the Wife is a beneficiary and from loans from the Wife’s mother (“the Mother”). The Husband was a beneficiary of the trust until the end of 2022 when the decree nisi was made absolute. A cash deposit of £50,000 was paid by the parties towards the purchase. The origin of this deposit was disputed between the parties.

10. At the end of 2022, the Husband moved to Country A. Prior to this, he had applied to remove all three children to live with him, but he later withdrew that application. Since the end of 2022, the children have lived in Jersey with the Wife.
11. The Husband applied for financial orders ancillary to divorce in June 2022. This application was adjourned until conclusion of the leave to remove application.
12. On 17 April 2023, the Wife requested that the application for financial orders be restored leading to the final hearing in September 2023. The trust
13. The Wife is a beneficiary of a trust set up on the death of her father. On 21 July 2023, the Wife filed a letter from Advocate Campbell of Ogier who were instructed by the trustees (the Wife’s siblings and the Mother) in response to information the Wife was required to provide by an Act of Court dated 28 June 2023. The relevant parts of the letter provide as follows: “I refer to the Act of Court dated 28th June 2023 (the Act of Court) attached at Appendix 1 to this letter in which the Registrar ordered that you as the Petitioner (the Wife) shall by 4pm on 26th July 2023, file and serve the following information and documentation:
 - i. Copies of signed / executed documentation to confirm loans between the parties and [V] and the Trust in connection with the purchase of the former family home (), and any registration of such loans; ii. Confirmation from the lenders of the amounts outstanding under the said loans, showing how any figures are divided between capital and interest; iii. A copy of the final completion statement for the purchase of the FFH; iv. Any documentation to show where the £50,000 contributed to the purchase of the FFH originated;
 - v. A record of contributions and disclosure of home carers allowance for the years 2021 to 2023; vi. Regarding the Trust, a letter from Ogier or other documentation to show the following:
 - a. Whether the petitioner is currently a trustee, and if not, a copy of her resignation document;
 - b. A copy of the trust deed;
 - c. A copy of the original will;

- d. The deed of appointment of beneficiaries;
 - e. The trust accounts for the last year, and
 - f. Details as to how capital and income will be distributed or vest upon the death of [the Mother].”
14. The Registrar summarised this information received from Ogier as follows: “8. The petitioner (the Wife) is a beneficiary of the [xxx] trust which was set up upon the death of her father, The petitioner has filed a letter from James Campbell of Ogier who are instructed by the trust, the report exhibits documents to support the information provided as follows: · The will of the petitioner's father placed all of his assets into the trust for a maximum period of 99 years. · As at 31" December 2022, the trust had assets of 3.7 million. The assets as at the end of December 2021 were 4.1 million, it is a wholly discretionary trust. · The primary beneficiary is the petitioner's mother, followed by the petitioner and her 2 siblings, and then their current spouses, children and remoter issue; · The trust income is paid to [the Mother], in 2022 this was £29,506. The trust assets will meet her needs, including nursing home fees if necessary in the future. Potentially the trust assets could be depleted by [the Mother] during her lifetime. · The petitioner was originally a trustee but retired in August 2019, the remaining trustees are [the Mother] and the petitioner's 2 siblings. · Upon [the Mother's], the petitioner and her 2 siblings will receive benefit from the capital and income of the Trust to provide for their needs, however an outright capital distribution is not guaranteed, nor is an equal division of assets.”
15. The letter also contained the following: “...the Trust is entirely "discretionary" in nature. To this end, neither you nor any other beneficiary of the Trust has any fixed interest or identifiable or definitive right to the whole or any part of the capital or income of the trust fund of the Trust. A discretionary beneficiary merely has a right to be considered by the Trustees as eligible for a payment or an appointment of capital (see for example, recent consideration by the Royal Court of the nature of a discretionary beneficiary's interest in a discretionary trust in Patel v JTC [2022] JRC 089, at paragraphs 64 to 75.”
16. This led Advocate Campbell to state “The trust is plainly not a resource for you”. We address later in this judgment the Registrar’s approach to this statement.
17. The letter also contained the following statements: “Otherwise the Trustee has made only minor distributions of capital from the Trust to you and the other [D] children (deleted). No capital distributions were made in the years 2018 and 2019. In 2020 the Trustees made a capital distribution of £10,000 to each of you, (deleted). In 2021 the Trustees made a further capital distribution of \$20,000 to each of you, (deleted). No capital distributions were made in 2022 or to date in 2023. For the avoidance of doubt there have been no distributions of income to you or any of the other (deleted) children (income is distributed to [the Mother] as stated above). It is anticipated that on [the Mother's]s death, [the Mother's] three children being (deleted) and you (being the principal beneficiaries of the Trust) will each receive benefit from the capital and the income of the Trust. However what is left to be distributed,

and on what terms, will depend on the decision of the Trustees at such time after [the Mother's] death. For example, if a beneficiary with children is considered to not be financially experienced, it is quite conceivable that the Trustees would consider taking an alternative approach to provide for the long term needs of that beneficiary and children as opposed to making an outright capital distribution to such beneficiary. This would be entirely consistent with a trustee's duty of prudence."

18. The loan made by the trustees to purchase the Cottage was in the sum of £325,000. Documents disclosed that the loan was interest bearing but no repayments of any capital or interest have occurred. The Mother also made a loan to purchase the Cottage also in the sum of £325,000 and again was interest bearing at the base rate applicable from time to time. Until the end of 2021, repayments were made covering most of the interest accruing as well as small repayments of capital. Both loans were secured by way of registered hypothec against the Cottage.
19. In relation to the £50,000 deposit used to purchase the Cottage, the Registrar found that whatever the origin of the deposit, it was money acquired during the course of the marriage and therefore she regarded the equity in the Cottage as a matrimonial asset. The initial asking price was £925,000 but marketing was placed on hold at the request of the Husband in June 2022. The property was again placed on the market in December 2022 with an asking price of £795,000. Offers have been made close to the asking price but the Husband has not consented to a sale. This matter is to be determined by the Family Registrar with a case management hearing having been fixed to take place in February 2024.
20. At the time of the hearing before the Registrar, the Husband was resident in Country A. At the end of last year, we were informed orally by Advocate Heath that he had returned to Jersey and was currently residing in the Cottage.
21. In relation to the charges, the amounts owing at the end of June 2023 were £321,199 to the Mother and £339,594 to the trust. Those sums will have increased because of additional interest accrued since those figures were provided to the Family Registrar. The Wife anticipated estate agent's fees payable on sale of 1.5% and legal fees of £2,500. The Registrar accepted these figures. The Registrar also calculated that if the Cottage sold for £750,000 then proceeds of sale would be £75,207. If the Cottage sold for the asking price of £795,000, the net proceeds would be £119,782.
22. The Registrar then in her Reasons summarised the Husband's evidence. In particular, she noted he held a piece of land in Country A. The Registrar accepted his evidence that the land was not a resource available to meet his needs for the reasons set out at paragraph 22 of the Reasons.
23. The Registrar further noted that during the marriage the Husband earned approximately £2,162 per month until July

2022. She also noted that he had not worked since he moved to Country A but felt that once he found full-time work, the Husband's anticipated earning capacity would be around 70,000 Country A dollars which would equate to approximately £2,100 per month net. There was potential for this income to rise if he found specialist gilding work. The Registrar also noted: "The Respondent confirmed in evidence that he could not work whilst the proceedings were ongoing but will work when they are concluded. In the meantime he is carrying out work on family properties. His cousin has given him a car. He has been able to afford snowboarding and playing golf."
24. The Registrar also summarised that the Husband wished in due course to buy a three to four bedroomed house for which he would need approximately £409,000, plus the cost of furnishing and a car. The Husband therefore was noted as seeking a lump sum of £428,880. The Husband also offered nominal child maintenance of £1 per annum.
25. The Reasons then recorded the Husband's position in relation to the Wife as follows:
- (a) There was a substantial sum of capital held by the Mother in a separate account earmarked to meet the needs of the Wife which the Husband suggested could be up to £1 million;
 - (b) That the secured charges held against the Cottage would not be repaid. This was based on the contention that the loans were clearly too high to be repaid over a reasonable period of time and that neither the Mother nor the trustees had sought to enforce their loans as a mean of forcing a sale of the Cottage.
26. The Reasons also set out the Wife's evidence and position. This partly related to her earning capacity and expenses she had met in 2023. She also explained the needs of BB. Paragraphs 34 and 35 of the Reasons deal with support from the Mother and the loans as follows: "34. The petitioner accepts that she receives regular financial support from her mother. She says that she receives £10,000 pa from the trust and £30,000 pa from her mother. The petitioner accepts that her understanding contradicts Mr Campbell's letter insofar that he says she has not received money from the trust in the past few years, she says that she makes mistakes as to whether money comes from the trust or her mother. The petitioner also accepts that she has received additional sums recently as she has been forced to maintain 2 properties, [the Cottage] and her rental property.
35. The petitioner says that she is unaware if monies have been earmarked for her by her mother or the trust but says that the trustees have refused requests for financial assistance which has caused friction with her family."
27. The Registrar also noted that the Wife accepted that her family would continue to assist her financially: "they will help her to meet the children's needs, they will possibly help her to buy another property".
28. Paragraphs 38 to 44 of the Reasons set out the applicable legal principles. We refer to the authorities to which the Registrar referred later in this

judgment.

29. The Registrar then set out her analysis. At paragraphs 46 to 48, she stated the following: “46. I must consider whether the resources available are wider than the matrimonial asset. My analysis is set against the background of the following: i. The assets in the trust are 3.7 million as at the end of 2022. At the end of 2021 they were 4.1 million. The petitioner gave an estimate of the trust assets prior to her resignation as a trustee in 2019 as 6 million. The pattern is accordingly of the assets being depleted over time. Advocate Heath's suggestion that the depletion is as a result of large sums being withdrawn from the trust and earmarked for the needs of the petitioner and her 2 siblings is speculation based on no clear evidence. The greater probability is that the assets are simply being expended over time. In any event, Advocate Heath does not suggest that any lump sums are held by the petitioner, the account in question is in the Mother's name. The assets in the trust do not represent unlimited wealth particularly bearing in mind the number of beneficiaries. ii. The trust was set up by the will of the petitioner's father and the trust assets are no more than his estate. Such a trust is clearly distinguishable from a trust set up by a sole beneficiary to hold their assets. The future intentions of the trustees are considered in the light of the origins of the trust. iii. Both parties agree that they received more generous financial assistance from the petitioner's late father during his lifetime than they have received from the trust since his death. This is indicative that the trustees are more cautious in their management of the assets than the testator himself.
47. The petitioner has received limited financial assistance direct from the trust prior to and since separation. She has received more generous support from her mother, that support has not been limited to a fixed amount but has been tailored to her needs and those of her dependent children, however, the support has been limited to meeting simple needs such as housing and education. I have seen no evidence to suggest that more lavish support has been provided for extravagant luxuries since the death of the petitioner's father.
48. The most significant support from the trust and the Mother has been to provide private loans to facilitate the purchase of a family home. Advocate Heath argues that these loans should be regarded as soft loans because they have not been enforced and were for greater amounts than the family could repay, this argument does not fit with the fact that the loans are secured and the terms provide for payment of interest. It is my view that these are indeed hard loans to be repaid upon sale of the Cottage, but that whilst they were being used to provide a family home, payment of interest and repayment of capital has been flexible.”
30. At paragraph 49, the Registrar noted Advocate Heath's complaints that the Wife and the trustees had not been full and frank in their disclosure to the Court. The Registrar observed however that the Husband “did not suggest that those replies were wanting prior to submissions made by his advocate at this hearing”.

31. In relation to the letter from Ogier, she stated: “The petitioner filed the letter from Mr Campbell in compliance with a direction of the court to answer the respondent's questions. The letter does not appear to be lacking in detail or veracity and the explanations are entirely congruent with the nature of the trust itself.”
32. The above paragraphs led to the Registrar’s conclusion at paragraph 50 where she stated: “50. In the past, the petitioner's parents have consistently provided her with financial assistance. The petitioner's evidence is that she hopes to continue to receive such help in the future. The matrimonial assets are very limited and will not meet the needs of either party nor the children of the family, in these circumstances I find that it is highly likely that the Mother will continue to provide financial support to her daughter and her grandchildren and that this support will consist of regular payments to meet housing and other needs. I also find that it is likely that the trust will provide a similar level of support to the petitioner as they have in the past in that the trustees may provide a repayable loan to the petitioner to enable her to buy a home and will provide limited additional support periodically.”
33. In relation to supporting the Respondent, the Registrar set out her conclusions at paragraph 52: “52. I have not seen or heard any evidence to suggest that either the Mother or the trustees have any appetite to financially assist the respondent, indeed the evidence would suggest the contrary. The petitioner's father chose to place the entirety of his estate within a discretionary trust and the evidence of both parties is that the trustees have been cautious and discerning with payments from the trust funds. The Mother has been more open and generous in providing financial assistance but only insofar that she has provided for the needs of her daughter and grandchildren. That the chargees have not behaved as arm's length commercial lenders might is consistent with them meeting the needs of the children, not those of the respondent. In these circumstances I cannot make a finding of probability that the trust would financially assist the respondent and it would be inappropriate for the court to place any pressure upon the trustees or the Mother to provide for the respondent's needs.”
34. The Registrar therefore concluded that the assets available for division were limited to the figures set out at paragraph 16 of her Reasons. She also observed: “53. I find that it is highly unlikely that the Mother and the trust will waive their charges against the Cottage upon sale, as such, the assets available for division are limited to the figures set out in paragraph 16 of these reasons. I am unconvinced that the respondent needs a 3/4 bedroomed property, but this is largely irrelevant as there is insufficient money available to provide this.”
35. In ordering the division of the equity in the matrimonial home, the Registrar’s analysis was found at paragraph 55 as follows: “55. Taking all circumstances into account I order that the Cottage be sold upon joint instruction and that the net proceeds of sale be divided between the parties. The starting point following Charman is for an equal division, however, notwithstanding that the matrimonial asset will not fully meet the needs of the petitioner and the children and that the petitioner is likely to receive support from her family, that support will be to fill the gap between needs and resources, there is therefore no reason to

overlook the fact that the petitioner's needs will be greater than those of the respondent. The respondent will need some capital to start again and will need to finance his travel to Jersey to see the children and will therefore require some capital, I therefore order a 65/35 split in the petitioner's favour.”

36. The Registrar was also critical of the Husband for not finding paid work and providing maintenance. She was also critical of him for refusing to agree to a lease of the Cottage at paragraph 57 as follows: “57. I am asked as part of the application to consider child maintenance. The respondent has not provided for the children since he left Jersey, he said in his affidavit that he could not find work, in his evidence at this hearing he said that he could not work whilst the proceedings were ongoing. I am not satisfied that the respondent has been unable to find paid employment since his return to [Country A], his evidence was that he was always employed during the course of the marriage and had a variety of skills. The respondent has been at fault in refusing to agree to let the Cottage even if he was not in a position himself to contribute to the needs of his children, he should have done that which was in his power to provide an income to meet their housing needs, it is not acceptable that this responsibility has been left almost entirely to state benefits and third parties.”
37. At paragraph 58, the Registrar stated: “58. The respondent has not given any priority to providing for his dependent children since his departure from Jersey, and it concerns me that he may fail to do so in the future. I order the respondent to pay a lump sum for child maintenance in the sum of £10,000 to cover 2023, this to be paid to the petitioner from the respondent's share of the proceeds of the Cottage. From the start of 2024 onwards, I order the respondent to pay to the petitioner child periodical payments in a sum equivalent to 25 % of his net income, this to reduce to 20% when [AA] completes full time education to first degree level.”
38. This was the justification for ordering the Husband to pay a lump sum for child maintenance and the sum of £10,000 to be deducted from the proceeds of sale.
39. Finally, she allowed him up to £3,000 per annum for the costs of coming from Country A to have contact with his children. Appointment of an amicus
40. We next deal with the request by the Wife that an amicus be appointed on her behalf. The amicus was requested because in an email to the Bailiff's Judicial Secretary, the Wife indicated that, because she had been denied legal aid, she had been advised by Citizen's Advice that an amicus would be appointed.
41. The jurisdiction to appoint an amicus was considered by the Royal Court in *I v J* [2014] JRC 021. After a review of the English authorities, Commissioner Clyde-Smith summarised the position as follows: “19. What I believe can be distilled from the authorities cited is that:-
 - (i) Whilst retaining flexibility as to the circumstances in which it will appoint an amicus curiae, the Court will ordinarily appoint a lawyer for assistance on questions of law. For these purposes and consistent with Article 15(1)(A) of the Royal Court (Jersey) Law 1948, questions

of law will include questions of procedure. (ii) The role of the amicus curiae so appointed is to assist the Court and he or she does not represent any person. That assistance can be given by the amicus curiae in turn and on behalf of the Court assisting a litigant in person. (iii) The amicus curiae so appointed will be paid out of public funds, and thus the cost will be a burden upon the State. This must be taken into account by the Court when deciding whether the appointment of an amicus curiae is justified. (iv) The amicus curiae should have no interest in the proceedings and it would be helpful if when appointing an amicus curiae the Court were to clarify the nature of the assistance it requires.”

42. This approach was approved by McNeil JA sitting as a single judge of the Court of Appeal in *Holmes v Law Society of Jersey*

[2018] JCA 066A. McNeil JA appeared to approve the approach taken by Commissioner Clyde-Smith and summarised the guidance in this way: “That guidance identified some flexibility as to the role of an amicus, but indicated generally that the role was usually limited to providing assistance on relevant law and its application to the facts of the case would not normally be one which included an instruction to lead evidence or investigate the facts of a case. It was emphasised that an amicus to the Court did not represent any person.”

43. In this case, the Commissioner refused an amicus for the following reasons:

- (a) The principles applicable to the exercise of discretion by the Registrar were not in dispute. Rather the issue was the application of those principles to the facts of this case;
- (b) The facts of this case were not complicated in the sense that they concerned the Registrar’s approach to support provided by the Mother and the trustees;
- (c) Merely because a party is refused legal aid does not entitle them to an amicus. Something more is required to depart from the position of the Court and ordinarily appoint a lawyer for assistance limited to questions of law.
- (d) The Wife had had the benefit of legal input; it was not clear why that legal input had ceased.

44. The ultimate conclusion the Commissioner reached was that the role of an amicus which goes beyond submissions of law should be limited to complex cases where, without an amicus, there is a significant risk that the points a party wishes to advance would be overlooked or missed. He did not regard the present case as falling within that category. The submissions of the parties

45. Advocate Heath, for the Husband, made the following written and oral submissions.

46. Her fundamental criticism was that the Registrar had failed to consider properly the capital needs of the Husband or to assess what those needs were. Her failure to do so meant that the Husband had been left in a position of indebtedness.

47. Advocate Heath was also critical of the Registrar relying on the letter from Ogier and, in particular, that the Registrar appeared to have accepted the observation of Mr Campbell in paragraph 9 of her Reasons that “the trust is plainly not a resource for you”. The Registrar should have disregarded this statement of opinion. She also repeated her submissions below that the Registrar did not know what questions Ogier had been asked and what information had been given to Ogier.
48. Advocate Heath further emphasised that the loans made, although secured, were never going to be repaid. This was the reality of the situation which the Registrar failed to have regard to.
49. Advocate Heath emphasised that the Husband and Wife had lived beyond their means with the support of the Wife’s family. The lifestyle they enjoyed was therefore a relevant factor entitling the judge to apply *Thomas v Thomas*
- [1995] 2 FLR 668. The Husband’s case was that the Registrar should have framed her orders deliberately in a way to afford judicious encouragement to the trustees and the Mother to provide the Wife with the means to comply with the Court’s view of the justice of the case. She therefore criticised the Registrar’s order as being wrong in principle because it left the Husband with no means to provide for himself.
50. In addition to the observations of Waite LJ cited by the Registrar, Advocate Heath also emphasised the observations of Glidewell LJ at page 678 of the judgment.
51. The Husband needed a home in Country A for himself and to allow his children to visit.
52. It also did not make sense to spend further sums on accommodation for the Wife when the Cottage was a property fit for the children to live in. Advocate Heath accepted this argument had not been put to the Registrar and what the Husband had sought was a sale of the former matrimonial home.
53. She also contended that *WC v HC* [2022] EWFC 22, also cited by the Registrar, was supportive of the Husband’s arguments because regard was not had to resources being provided from the Wife’s family. By reference to the general summary of the applicable principles starting at paragraph 21 of that case, she emphasised that the needs of the parties prevailed over any concept of sharing. In this case, because the Registrar found that the Wife’s needs were being met, this meant that her approach to the division of the equity in the matrimonial home did not make sense. In particular, she failed to look at the issue of needs fairly.
54. The effect of the Registrar’s order meant that it was not possible for the Husband to pay his debts and set himself up to put a deposit on a property. The order made was therefore not fair. Paragraph 22.16 of *WC v HC* also noted that if the source of wealth was substantially non-marital then it would be unfair not to weigh that factor in the balance.

55. In relation to the approach to lifetime subsidies quoted by the Registrar in her judgment by reference to WC v HC at paragraph 23, it was necessary to look at the needs of the parties to the marriage in order to do justice. As the Registrar did not identify needs then she had not done her job. What the Registrar should have looked at was the income and outgoing needs of the Husband as well as those of the Wife.
56. Advocate Heath also referred to paragraph 14 of BJ v MJ [2011] EWHC 2708 (Fam) and emphasised that a Court was not placing undue pressure by encouraging a trustee to make provision to one spouse so that provision could be made for the other spouse.
57. The Registrar also failed to consider to what extent financial support was available from government as well as from the trust and the Mother.
58. The Registrar further failed to take into account that whenever the Wife asked for money, this would be provided by the trust or the Mother.
59. In relation to the availability of the Number 3 account, Advocate Heath criticised the Wife's evidence as vague. The specific question put to the Wife was that the Number 3 account was held for the Wife. The Wife's answer was "I don't know". Advocate Heath contended that the only explanation in the evidence was that this account was held by the Mother for the Wife.
60. In relation to the trust assets, the reduction in the assets in the trust fund allowed the Court to infer that monies in the trust fund could be paid out for the use of the Wife and her siblings.
61. Advocate Heath suggested that the transcript of her cross-examination of the Wife at J313 of the CaseLines bundle supported the Husband's position. The relevant part of the transcript reads as follows:- "ADVOCATE HEATH: And the reality is that while your mother is alive she will have an interest in that Trust, and then when your mother is no longer with it, it is going to be divided between the three of you, isn't it? WITNESS 2: It depends, I would say. My sister does not have children, my brother's got two, I've got three, and as was being maintained it's not necessarily about how many children you have but the needs of the children. Mine are substantively higher than anybody else's. ADVOCATE HEATH: So realistically, either the Trust assets are going to be apportioned equally or unequally, aren't they, between the three of you children ultimately. WITNESS 2: Yes, but I think we need to get to the realistic point here. What I understand is Wills, Trust assets is a non-matrimonial asset. How can we be discussing something that may happen in the future which ultimately is under my mother's name when she is still alive? I am not privy to their information, I am not privy to their money. Yes, I think we've all worked out that she has money. Yes, we have all worked out that I've got three kids; ["U"] lives in [Country A] unemployed. What I think we really need to be realistic is and get this sorted is that there is a house for sale, the fees need to be repaid; I will not be paying for [U's] legal fees whatsoever. The rest is up to the Judge to decide."
62. Advocate Heath suggested that the Wife's answer to the second question she posed in the above extract was opinion evidence.

63. Advocate Heath referred the Court to a schedule of assets and liabilities at page J165 of the CaseLines bundle. This recorded that the Husband owed legal fees of some £45,000. This meant that the effect of the Registrar's order was to leave him in debt.
64. The error in paragraph 52 of the Reasons was that the Registrar failed to assess how far the trust and the Mother would continue to assist the Wife which should have been taken into account in any division of the equity in the Cottage. This was why the Registrar should have assessed the capital needs of the Husband. Her observation in paragraph 53 that she was not convinced that the Husband needed a three to four bedroom house did not go far enough because the Registrar did not explain why. The Registrar did not also analyse the relative earning capacity or access to sources of income of the parties.
65. The position of the Husband therefore was that the matter should be returned to the Registrar for further consideration in light of the Husband's criticisms of the Registrar's judgment. The Wife's submissions
66. In representing herself, the Wife made the following submissions.
67. Firstly, the judge had all the relevant material before her. She was also critical of the Husband for leaving to go to Country A and failing to work during that period.
68. She explained that living in the matrimonial home was not an option for her. The children were settled in the current property she was renting and she wished to remain in the parish where that property was located. To return to the matrimonial home would require the youngest child to relocate schools when the youngest child was settled.
69. She was also critical of the Husband for being in Jersey not working and not providing any support to the children.
70. She was also critical of the Husband for not challenging or seeking further evidence from Ogier until the case came to the hearing itself.
71. The Wife also wanted matters resolved because she was finding the process of the dispute extremely stressful.
72. She was also critical of the Husband for not consenting to a sale of the Cottage when an order for sale had been made. She informed the Court that this issue had already been raised with the Family Registrar with a preliminary hearing scheduled for the middle of February.
73. She emphasised the needs of her middle child. She was the primary carer with some respite support. The amount of care needed was significant and challenging.
74. She expressed concern that if a significant sum was provided to the Husband he would simply return to Country A. There had been no proper engagement on appropriate parental care for their children. The Registrar was fully aware of this as set out at paragraph 58 of the Reasons.

75. The Wife accepted that she received support from her Mother, but stated that her Mother was cautious and she wanted to support herself as much as she could. She needed support from her Mother in order to live in Jersey because of the needs of her children, especially the middle child, and the cost of living in the island.
76. The Wife contrasted the Husband's ability to work with her own capacity being limited because of the amount of care the middle child required. She was also critical of the lack of current evidence about what the Husband was presently doing in Jersey and whether he was working or not.
77. In reply, Advocate Heath explained that the current order of the Registrar left the Husband with around £30,000. This was not enough to pay his debts. The Court asked what proportion of the legal costs related to the withdrawn children's application and were informed after the hearing but before making its decision that the amount of those costs was in the region of £2,500.
78. Advocate Heath also criticised the judge in her reasons at paragraph 57 for making a moral judgment in relation to the Husband refusing to agree to the Cottage being let and that he should have done all in his power to provide an income to meet the housing needs of the Wife and their children. She repeated her criticism that what the judge should have done was assess his needs and earning capacity. Discussion and decision
79. We commence by reminding ourselves of the relevant test on an appeal from a decision of the Registrar. This is well settled and set out in the case of *Downes v Marshall* [2010] JLR 265, where the Court stated at paragraph 12 the following: ".... An appeal from the Family Registrar should only be allowed if there has been a procedural irregularity or if, in exercising his discretion, he has taken into account irrelevant matters, or ignored relevant matters, or otherwise arrived at a conclusion which the Court believes to be wrong. This test is not precisely the test applied on appeal from this Court to the Court of Appeal. It reserves a wider discretion for this Court to intervene, but it places nonetheless greater weight on the Registrar's exercise of discretion. This test will, we think, establish the right balance. Sufficient weight is to be attributed to the Registrar's findings of fact and exercise of discretion to discourage litigants from seeking a fresh bite of the cherry. On the other hand, this Court will have the power to intervene if that the Registrar has gone wrong to the extent that intervention is required in the interests of justice and fairness."
80. There was no dispute between the parties on the applicable test and therefore this is the test we have applied.
81. We next turn to deal with the general law to be applied on applications for financial relief. Advocate Heath in that regard referred to *WC v HC* [2022] EWFC 22. The general approach is set out at paragraph 21 as follows: "The Law
21. The general law which I apply is as follows:

- i) As a matter of practice, the court will usually embark on a two-stage exercise, (i) computation and (ii) distribution; *Charman v Charman* [2007] EWCA Civ 503. ii) The objective of the court is to achieve an outcome which ought to be "as fair as possible in all the circumstances"; per Lord Nicholls at 983H in *White v White* [2000] 2 FLR 981. iii) There is no place for discrimination between husband and wife and their respective roles; *White v White* at 989C. iv) In an evaluation of fairness, the court is required to have regard to the s25 criteria, first consideration being given to any child of the family.
- v) S25A is a powerful encouragement towards a clean break, as explained by Baroness Hale at [133] of *Miller v Miller*; *McFarlane v McFarlane* [2006] 1 FLR 1186. vi) The three essential principles at play are needs, compensation and sharing; *Miller*; *McFarlane*. vii) In practice, compensation is a very rare creature indeed. Since *Miller*; *McFarlane* it has only been applied in one first instance reported case at a final hearing of financial remedies, a decision of Moor J in *RC v JC* [2020] EWHC 466 (although there are one or two examples of its use on variation applications). viii) Where the result suggested by the needs principle is an award greater than the result suggested by the sharing principle, the former shall in principle prevail; *Charman v Charman*. ix) In the vast majority of cases the enquiry will begin and end with the parties' needs. It is only in those cases where there is a surplus of assets over needs that the sharing principle is engaged. x) Pursuant to the sharing principle, (i) the parties ordinarily are entitled to an equal division of the marital assets and (ii) non-marital assets are ordinarily to be retained by the party to whom they belong absent good reason to the contrary; *Scatliffe v Scatliffe* [2017] 2 FLR 933 at [25]. In practice, needs will generally be the only justification for a spouse pursuing a claim against non-marital assets. As was famously pointed out by Wilson LJ in *K v L* [2011] 2 FLR 980 at [22] there was at that time no reported case in which the applicant had secured an award against non-matrimonial assets in excess of her needs. As far as I am aware, that holds true to this day. xi) The evaluation by the court of the demarcation between marital and non-marital assets is not always easy. It must be carried out with the degree of particularity or generality appropriate in each case; *Hart v Hart* [2018] 1 FLR
1283. Usually, non-marital wealth has one or more of 3 origins, namely (i) property brought into the marriage by one or other party, (ii) property generated by one or other party after separation (for example by significant earnings) and/or (iii) inheritances or gifts received by one or other party. Difficult questions can arise as to whether and to what extent property which starts out as non-marital acquires a marital character requiring it to be divided under the sharing principle. It will all depend on the circumstances, and the court will look at when the property was acquired, how it has been used, whether it has been mingled with the family finances and what the parties intended. xii) Needs are an elastic concept. They cannot be looked at in isolation. In *Charman* (supra) at [70] the court said: "The principle of need requires consideration of the financial needs, obligations and responsibilities of the parties (s.25(2)(b)); of the standard of living enjoyed by the family before the breakdown of the marriage (s.25(2)(c)); of the age of each party (half of s.25(2)(d)); and of any physical or mental disability of either of them (s.25(2)(e))". xiii) The Family

Justice Council in its Guidance on Financial Needs has stated that: "In an appropriate case, typically a long marriage, and subject to sufficient financial resources being available, courts have taken the view that the lifestyle (i.e "standard of living") the couple had together should be reflected, as far as possible, in the sort of level of income and housing each should have as a single person afterwards. So too it is generally accepted that it is not appropriate for the divorce to entail a sudden and dramatic disparity in the parties' lifestyle." xiv) In *Miller/McFarlane* Baroness Hale referred to setting needs "at a level as close as possible to the standard of living which they enjoyed during the marriage". A number of other cases have endorsed the utility of setting the standard of living as a benchmark which is relevant to the assessment of needs: for example, *G v G* [2012] 2 FLR 48 and *BD v FD* [2017] 1 FLR 1420. xv) That said, standard of living is not an immutable guide. Each case is fact- specific. As Mostyn J said in *FF v KF* [2017] EWHC 1093 at [18]; "The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise". xvi) I would add that the source of the wealth is also relevant to needs. If it is substantially non-marital, then in my judgment it would be unfair not to weigh that factor in the balance. Mostyn J made a similar observation in *N v F* [2011] 2 FLR 533 at [17-19]."

82. The Registrar, as is clear from paragraph 38 of her judgment, was clearly aware of and applied the two stage exercise of computation and distribution.
 83. The Registrar was also aware of the need to give first consideration to the welfare of the children.
 84. The same judgment also contained a helpful extract on the willingness of the wider family to assist one or other of both spouses referring to the case of *M v M* [2020] EWFC 41. The Registrar was clearly aware of these principles because she set them out expressly at paragraph 44 of her judgment. Those principles are as follows: "[65] Should a court inquire into the willingness of the wider family to assist one or both spouses?"
- [66] To my mind there are two main categories of cases: (i) Where a spouse has an interest in an asset together with other family members, and the court frames its order so as to "judiciously encourage" the other family members to assist in extraction by the spouse of value referable to his or her interest. The court should not cross the boundary of improper pressure in so doing. This is the so-called *Thomas v Thomas* doctrine (*Thomas v Thomas* [1995] 2 FLR 668). Importantly, it applies when the spouse has an actual interest in an asset shared with third parties (e.g. family) but is confronted by liquidity difficulties. (ii) Where family members, who are gratuitous donors, are willing to make funds available by gift or loan to the relevant spouse. In this instance, the spouse has no legal or beneficial interest; it is a pure act of generosity for a person under no obligation to do so."

85. Again, the Registrar quoted part of this judgment at paragraph 43 which recorded Mr Justice Mostyn saying at paragraph 18: "...in this field the court is therefore engaged in a fact finding exercise as to whether the trustees will likely benefit their beneficiary if called upon to do so. Of course, the court is not making a judgement about facts which have happened; it is making a judgement about the likelihood of the eventuation of future facts."
86. However, we regard it as helpful to set out the following additional observations.
87. As to what is meant by judicious encouragement of trustees to assist a family member, referred to in *Thomas v Thomas*
- [1995] 2 FLR, Waite LJ stated: "There will be occasions when it becomes permissible for a judge deliberately to frame his orders in a form which affords judicious encouragement to third parties to provide the maintaining spouse with the means to comply with the court's view of the justice of the case. There are bound to be instances where the boundary between improper pressure and judicious encouragement proves to be a fine one, and it will require attention to the particular circumstances of each case to see whether it has been crossed."
88. In the same case, Glidewell LJ stated: "(a) Where a husband can only raise further capital, or additional income, as the result of a decision made at the discretion of trustees, the court should not put improper pressure on the trustees to exercise that discretion for the benefit of the wife.
- (b) The court should not, however, be 'misled by appearances'; it should 'look at the reality of the situation',
- (c) If on the balance of probability the evidence shows that, if trustees exercised their discretion to release more capital or income to a husband, the interests of the trust or of other beneficiaries would not be appreciably damaged, the court can assume that a genuine request for the exercise of such discretion would probably be met by a favourable response. In that situation if the court decides that it would be reasonable for a husband to seek to persuade trustees to release more capital or income to him to enable him to make proper financial provision for his children and his former wife, the court would not in so deciding be putting improper pressure on the trustees."
89. This led Mostyn J in *BJ v MJ* at paragraph 24 to make the following observations: "24. The second scenario is where there are sufficient assets outside the trust, but within this court's powers, for it to be able to make its full award out of the non-trust assets by offsetting. In this way the majority, sometimes the overwhelming majority, of the non-trust assets go to the claimant, leaving the respondent to collect the benefit from the trustees which the court has judged he is likely to receive. Thus in *Charman* 87% of the non-trust assets were awarded to the wife (£48m). In *SR v CR* 80% of the non-trust assets were awarded (£6.25m). In *Whaley*, the court awarded 94% of the non-trust assets to the wife (£3m). In this scenario the court is not judiciously encouraging the trustees to make money available to the

claimant; rather, it is by its award indirectly encouraging it to provide for its own beneficiary. But it can make an award.”

90. In relation to how the Registrar applied these principles in her reasons, we agree with the conclusions expressed by the Registrar at paragraphs 47 and 48 that the Wife has received limited financial assistance from the trust prior to and since separation, and that the Mother has provided more generous support but with this support being limited to meeting basic needs, such as housing and education.
91. We also agree with the conclusions reached by the judge at paragraph 48 that the most significant support provided from the trust was in respect of private loans to facilitate the purchase of a family home. We also agree that the Husband and Wife did not enjoy a lavish lifestyle. Although the Wife’s late father may have been more generous, the Registrar had to assess the approach being taken by the trustees and the Mother at the time of the application before her and, in our view, there is no basis to interfere with the conclusions she reached in paragraphs 47 and 48.
92. Paragraph 48 of the Reasons also has to be read in conjunction with paragraph 50. The Registrar accepted in paragraph 50 that both the Mother and the trust would be likely to provide a similar level of support to the petitioner as they have in the past. They were both likely to provide repayable loans in the future to enable the Wife to acquire a home.
93. In relation to the Husband’s arguments that the loans were soft loans and likely to be written off, the only evidence before the Court was that from Advocate Campbell on behalf of Ogier, set out at paragraph 17 above. In *WC v HC*, the judgment, at paragraph 23, said that was required for a Court to reach a conclusion that third party members would be likely to provide financial support was evidence of either a track record of historic payment and / or reliable representations of future subsidies. The only evidence before the Registrar related to historic payment and subsidies limited to loans secured against the family home. There was nothing before the Registrar suggesting that any subsidies in due course would go further. The evidence from Advocate Campbell also referred to the uncertainty as to what might happen after the Mother’s death and what approach the then trustees might take.
94. The Registrar also looked at this question by asking herself at paragraph 52 of her reasons how likely it was that the trustees or the Mother would financially assist the Husband and concluding that she could not make such a finding on the balance of probabilities. Nothing we have seen in the evidence comes anywhere near to meet the threshold to show that the Registrar erred in relation to those conclusions.
95. In the cross-examination of the Wife, her answer to the question of how trust assets were going to be apportioned was that very much depended on what happens during her Mother’s lifetime. This answer was consistent with the position set out by Advocate Campbell and there was no other evidence to rebut or contradict the Wife’s answer.

96. We next deal with Advocate Heath's arguments in relation to the Number 3 account. The Registrar, at paragraph 49, rejected a submission by Advocate Heath that the Wife and the trustees had not been full and frank in their disclosures. We agree with those conclusions. The Husband, through Advocate Heath, could have sought disclosure of trust accounts prior to the financial relief hearing. Advocate Heath could also have sought discovery of account Number 3 by seeking orders against the Mother but did not do so. There was therefore no evidence before the Registrar or before us to show that monies in the Number 3 account were held for the Wife. When the specific point was put to the Wife in cross-examination, her answer was simply "I don't know". That evidence was not vague. It was therefore for Advocate Heath to have obtained such evidence on behalf of the Husband to support the contention she wished to advance.
97. We therefore agree with the Registrar's reasons, including paragraph 53. We add for the sake of completeness in relation to the quotation from Advocate Campbell's letter from Ogier where he stated, "The trust is plainly not a resource for you", the Registrar should have disregarded this statement to the extent it was a statement of opinion. However, this does not, in our judgment, affect the conclusions the Registrar reached and our review of those conclusions.
98. We next turn to paragraph 55 of the Registrar's Reasons and her decision in relation to the division of the net proceeds of sale between the parties. The Registrar rightly noted that the starting point following Charman was for an equal division. She also rightly noted that the Wife was likely to receive support from her family to fill any gap between needs and resources. She then concluded that there was no reason to overlook the fact that the Wife's needs would be greater than those of the Respondent.
99. Why we have departed from this approach is that because before deciding how to apportion the net proceeds of sale of the cottage between the parties, the Registrar should have also looked at the needs of the Husband. She carried out this task in part at paragraph 53 where she stated, "I am unconvinced that the Respondent needs a three or four bedroom property but this is largely irrelevant as there is insufficient money available to provide this". While this conclusion was accurate in relation to the willingness of the trustees or the Mother to advance funds to the Husband, the Registrar should have reached her own conclusions on his needs before exercising her discretion as to how to divide up the equity of the property. This is because while the equity available was limited as the Registrar had found, the Registrar had also found that the trust and Mother would continue to support the Wife as previously and therefore make loans to support the acquisition of accommodation for her. This second conclusion was not taken into account in relation to a division of the equity and whether there should be a departure from Charman because of the support the Registrar had found the Wife was going to receive to fill the gap between needs and resources.

100. To be fair to the Registrar, she did touch upon the Husband's needs in paragraph 55 where she recognised that he would need some capital to start again and would need to finance his travel to Jersey. However, this conclusion did not go far enough as it did not take into account that the Husband had indebtedness of around £45,000 reflecting legal fees. We therefore agree with Advocate Heath that the effect of the Registrar's order meant that the Husband remained in indebtedness and had no capital to start again.
101. As the Registrar did not assess the needs of the Husband, we consider that we should do so. While it is possible for us to refer matters back to the Registrar, we had all the material before us to reach a conclusion. We also took into account the desire of the Wife for certainty and to bring this part of the proceedings to a conclusion and not to put her through any further hearings.
102. In relation therefore to the needs of a Husband for a three to four bedroom property in Country A, we were not persuaded that the Husband needs a three to four bedroom property in Country A. The rationale advanced for the need for such a property was for the Husband's children to visit him. However, he is currently now in Jersey, albeit his plans are uncertain. Secondly, the eldest child will shortly be of an age where he is able to travel independently and to meet his father, if the Husband returns to live in Country A. This does not require a 3 to 4 bedroom property. The Husband and A could stay in a much smaller property, make use of holiday accommodation or stay with relatives of the Husband whose family was described as extensive.
103. In relation to BB, given the description of BB's needs, we consider it unlikely, given the distances involved, that BB would ever be able to travel to Country A. CC is at this stage very young and it will be a number of years before CC is able to travel to stay in Country A. No need for a 3 to 4 bedroom property for BB and CC was therefore established on the material before us.
104. That is not to say that the Father does not need to find some accommodation. Looking at the earning capacity as found by the Registrar, it is likely that the Husband in the future will have to rent. We therefore assess his needs as being for some form of funds to put up a deposit to rent property and to give him some breathing space to start earning the sort of level of remuneration contemplated by the Registrar. The Registrar's decision however does not provide any support to the Husband to enable him to establish himself in some form of rented accommodation, whether in Country A as was contemplated at the time or in Jersey because the share of equity allocated to him will be used to pay his legal indebtedness.
105. The effect of the Husband being left in debt in our view has to be balanced against the Registrar's correct conclusion that the Wife's family will provide support to meet her essential needs for accommodation and living expenses that the Wife cannot meet. We consider that this conclusion should have been taken into account in allocating a split of equity. We wish to make it clear that had support from the trust and the Mother not been available, there would have been no basis to interfere with the Registrar's allocation of the

net proceeds of sale because of the needs of BB which justified a departure from the equality principle.

106. On the unusual facts of this case, however, the support from the trust and the Mother means that a different balance can be struck. The Wife's needs including the needs of BB can still be met by the Wife receiving a lesser share of the equity because she will receive support in the future from the trust and her Mother in the way the Registrar found and with which we agree. We therefore concluded this was one of those cases, albeit unusual compared to other cases where judicious encouragement is given, for such encouragement to be given for the trust and the Mother to continue to support the Wife and the children in particular BB. We therefore varied the allocation of equity to take into account the support that the Registrar found the trust and Mother were likely to provide to the Wife in the future.
107. Based on the figures provided to us, we felt it was appropriate to award the Husband 70% of the net equity. Given current expressions of interest in relation to the property, but also taking into account the additional interest that has accrued since the matter was before the Registrar, we consider that the likely amount of equity available to the parties was in the region of £110,000. 70% of this sum represented £77,000. Once the husband has discharged his legal bills which we estimated to now be in the region of at least £50,000, this left him with £27,000 out of which he had to meet arrears of maintenance of £10,000 for 2023. The Husband was therefore left with a small surplus of around £17,000 to provide a deposit to enable him to rent a property and to enable him to build up his earnings to the level anticipated by the Registrar. By contrast, the Wife would be left with 30% of £110,000, i.e. £33,000 plus the additional £10,000 she is to receive representing arrears of maintenance for her children.
108. We concluded that this balance gave the Husband a small amount of capital once his legal fees had been paid to rent a property, with the Wife still having more capital together with the support of the trust and her Mother. We regarded this conclusion as an appropriate "judicious encouragement" to the trust and the Mother to continue their support for her and to allow the Husband to start again.
109. The only other point we wish to make was that Advocate Heath was critical of the Registrar for her observations about the Husband refusing to agree to the Cottage being let. While he is now residing in the Cottage, we consider that the Registrar was entitled to reach such a conclusion based as it was on meeting the needs of the children.
110. We will deal with the question of costs when this judgment is handed down. *Authorities I v J* [2014] JRC 021. *Holmes v Law Society of Jersey* [2018] JCA 066A. FC 22. *Thomas v Thomas* [1995] 2 FLR 668. *WC v HC* [2022] EWFC 22. *BJ v MJ* [2011] EWHC 2708 (Fam). *Downes v Marshall* [2010] JLR 265. *M v M* [2020] EWFC 41. *Charman v Charman*

[2007] EWCA Civ 503.

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