



Neutral Citation Number: [2024] EWFC 59

Case No: ZZ21D50645

**IN THE FAMILY COURT SITTING AT
THE ROYAL COURTS OF JUSTICE**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2024

Before:

SIR JONATHAN COHEN

Between:

ES

Applicant

- and -

SS [No. 2]

Respondent

**Mr N Yates KC, Mr D Hagen KC and Mr B Wooldridge (instructed by Hunters Law LLP)
for the Applicant Wife**

**Mr H Oliver KC and Ms J Palmer (instructed by Stewarts Law) for the Respondent
Husband**

Hearing dates: 5 March 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 18 March 2024 by circulation to the parties or their representatives by e-mail and by eventual release to the National Archives after anonymisation.

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SIR JONATHAN COHEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

SIR JONATHAN COHEN :

1. On 13 October 2023 I handed down judgment in the parties' financial remedy proceedings. The net effect of it was to leave the parties in the position whereby H exited the marriage with ca £25.3m and W just over £18m. Excluded from those figures was The M Trust. I now have to determine what should happen to this settlement ("the trust").
2. By the time of the final hearing before me it was common ground between the parties that the assets of the trust were entirely matrimonial and that they had an equal entitlement to them. However, there were problems in valuing the net assets. In particular, there was significant difficulty related to the assessment of the tax liabilities which attached to the trust, involving tax law in several different jurisdictions, and on which the tax experts disagreed, and a lesser issue as to the value to be attributed to L Co, a NFI held within the trust. Whilst it would have been possible to attribute a value to L Co, it would have been unreliable and risky to attribute a figure to the tax liabilities, so uncertain was their assessment.
3. The trust was settled by W at the instigation of H. By the terms of the trust deed W "*may revoke this Settlement in whole or in part, may alter or divest the interests or change the beneficiaries and may amend this Settlement in any other respect*". H was the first protector. The beneficiaries were W and the children and remoter issue.
4. H was very keen to keep the trust in existence. He was of the view that there were significant tax advantages to maintaining it. W on the other hand wanted the trust wound up, whatever the tax consequences might be, as she did not want to remain involved with H and his various ventures.
5. The letter of wishes which accompanied the establishment of the trust in 2015 provided that in the event of a divorce between the parties they would like the trust fund to be divided as to $\frac{1}{3}$ to each party and $\frac{1}{3}$ between the children. Using a mid-point figure for the value of the trust net of tax, the assets amount to approximately £2.4m.
6. During the hearing H argued that I should keep the trust in existence for the benefit of the children. In particular, that would avoid incurring unnecessary tax liabilities which I was led to believe might otherwise either be deferred indefinitely or avoided. This of course had the advantage of enabling the court not to have to enter into the speculative exercises of valuing (i) the tax liability which would occur upon the winding up of the trust and (ii) L Co.
7. The parties agreed that the purpose of the trust when set up was for the benefit of the three children. In the light of that, the wealth that was being provided for each party under the terms of the order that I made, and what I understood to be the fiscal undesirability of winding up the trust, I set out in the judgment that it was the intention of the court that the M Trust structure was to be retained for the children and any tax liability to be borne out of trust assets and if that proved impossible shared between the parties. My findings can be seen in the judgment.

8. In the myriad of issues covered at trial, I can see with the benefit of hindsight that insufficient attention was paid to the precise terms of the trust and the expression of wishes.
9. The parties came back before the court on 19 December 2023 having failed to agree the terms of the order. I made two separate orders on that day. The main order contained this at paragraph 60:

“Variation of Settlement

60. The issue of the variation of the nuptial settlement, the M Trust and the issue of security in respect of any tax that may be applicable is adjourned to 5 March 2024.”

10. In a second order of the same date, W’s claims in respect of the trust and liability for any tax arising were adjourned to the same hearing.
11. Matters could not be concluded on 19 December because H had only just put forward detailed and complicated proposals which W had had no proper chance to consider.
12. The parties exchanged correspondence based upon the tax advice that each was receiving and worked towards the implementation of what I had intended in my judgment, albeit W continued to express her unhappiness with the solution.
13. However, on 20 February 2024 H made a different proposal “*to bring this litigation to a swift and proportionate end*”. His solicitors went on to say:

“Our client is willing to offer a pragmatic and conciliatory agreement that the trust should be dissolved ... strictly on the basis that:

- a) *The assets within the trust will continue to be applied for the sole benefit of the children, and*
- b) *That there is no order as to the cost of this issue ...”*

He asked for an adjournment for a month to allow the parties’ advisors to meet and consider the mechanics of unwinding the trust.

The position of the parties at this hearing

14. H’s position is that he wants the trust to be wound up and all the proceeds be placed in an account for the benefit of the children.
15. W wants the trust to be wound up and the proceeds to be divided equally between H & W. She wants the NFIs within the trust to be attributed to H as part of his share of the trust assets on the basis that they were his ventures and she wishes to have nothing further to do with them.
16. The effect of what each party asks for needs to be analysed. Neither party is asking for a variation of settlement as the settlement will no longer exist. H’s proposals are in effect a different form of settlement for the children. W’s proposal divides what is agreed to be jointly owned equally between the parties.

17. The parties and their accountants have searched to find a way of preserving the spirit of the court order without creating tax problems. The alternatives that have been cited to me are as follows:
 - i) The creation of a bare trust;
 - ii) The creation of a settlement;
 - iii) Distributing the funds to the adults subject to an undertaking to pass to the children.
18. The creation of a bare trust under which the parties hold the funds in an account as nominees for the children until they reach their majority runs into the immediate problem that at age 18 the children would become entitled to the unencumbered use of the funds. The tax consequences are not significant, but the practical consequences are that as the children are now aged 13 - 17, they would receive in short order a large amount of money, which neither party regards as desirable.
19. Further, placing the funds in a bank account for the children for the specific purpose of support for the children which would be accessed at some time in the future would lead to the immediate problem that this would be likely to be considered to amount to the creation of a new settlement (whether bare or otherwise) with the tax consequences set out in the Rawlinson & Hunter letter of 29 February 2024.
20. The third alternative of distributing the funds to the parents on an undertaking made separately that each party makes of their share a gift to the children creates the issue of pretence. To escape tax, the undertaking cannot refer to The M Trust because there will then be a specific asset held for the children; it simply would not be an honest representation to say that this use of funds did not derive from the trust.
21. The placing of the funds in an account for the children would require continued discussion and accounting between the parties. This is an added disadvantage to the proposal.
22. I very much regret that the parents have got themselves into this situation. To some extent I accept that it has flowed from a well-intentioned wish of the court to use the funds as the parents had intended without there being a proper understanding of what the tax consequences were to be. The problems have been magnified by the fact that the accountants for each side have given different advice and come to different conclusions.
23. Having provided in a way that will leave each party exiting the marriage with the very significant funds referred to earlier, most of them already liquid, it is lamentable that they have now spent over £300k arguing about how a relatively small fund of about £2.4m net of tax should be used and in particular in circumstances where they each agree that they are equally entitled. It is hard to see the dispute as other than about who is seen or presents themselves as the donor of money to the children.
24. The futility of the argument is magnified when one remembers that the parties will each incur heavy expenditure upon the children, who are and will be privately educated. Those expenses are under my order appropriated 60:40, reflecting the

overall division of assets. It is likely that the sums expended by each party on the support of the children will mean that the provisions of the letter of wishes in the event of divorce will be put into effect as the parties originally intended.

25. I have been provided with many different arguments and positions. I am driven to the conclusion that simplicity is the only way to bring these arguments to an end and to stop endless arguments about tax which may take years to resolve. The trust must be wound up and the net proceeds divided equally between the parties.
26. I accept that this is a retreat from what I determined should happen in my October judgment. However, I am clear that this was always subject to the proviso that a workable form of implementation could be achieved. In any event, H, whose solution had originally attracted me has moved on by his acceptance of the trust being wound up.
27. The division of these trust assets between the parties should not be overcomplicated. The only asset whose value is in dispute is L Co. The difference between the two figures reflected the dispute as to whether there should be a minority discount to take into account the relatively small size of the shareholding. My draft judgment sent to counsel and the schedules provided in October 2023 showed that I was of the view that no discount should attach and that I accepted the argument of Ms Hart (W's expert accountant) that this was appropriate as the asset would only become realised as part of a sale of the whole. All other figures will flow from the resolution of that dispute.
28. The two NFIs held within The M Trust should plainly appear on H's side of the balance sheet. They are his ventures and W is right to say that she does not wish to be involved in them. I do not accede to the argument that they should be valued at £1.021m, a figure substantially in excess of the two competing figures that were before me at trial. I use the figures that were presented to me in October and excluding the minority discount L Co assumes a value of £835k.
29. I do not accept H's argument that this would be unfair to him and that the NFIs should be shared equally. He resisted W's claims for a share or larger share of them at trial. Further, he has greater liquidity than she does.
30. I recognise that the tax payable on the dissolution of the trust may not be capable of advance calculation at this stage. Funds will need to be retained to ensure that the liabilities can be met and the necessary equalisation between the parties of the net assets of the trust can be achieved. But, any change in the value of the NFIs will not affect the figures that I have utilised.
31. This solution does not prejudice either party. A roadmap for the winding up of the trust has been provided, albeit that it will need adjustment to reflect my rejection of the figure of £1.021m as the value of L Co.
32. I do not regard the achievement of this result requires the use of the Barrell jurisdiction. It is simply a proper working out of the order. It does not affect the interests of the parties who share what they agree is a jointly owned asset. The children are likewise not disadvantaged in that they have no absolute right to any receipt from the M Trust.

33. I leave the parties, I hope not over optimistically, to draft an order to put into effect my determination.
34. To try and reduce the risks of further argument, I indicate that I regard it as unlikely that I could be persuaded to make an order for costs in relation to this issue in favour of either party; However, if either party wishes to make an application, they should do so by 4pm Thursday 21 March, limited to 3 pages, with a reply limited to 2 pages by 4pm Tuesday 26 March 2024.