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Appeal Number: FA-2022-000259

Lower court: BV20D05294

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

The Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 24 August 2023

Before :

Mr Justice Moor

Between :

Kay Jacqueline Butler

Appellant

-and-

Earl Anthony Butler

Respondent

Mr Jonathan Trussler for the **Appellant**
Ms Annie Ives for the **Respondent**

Hearing date: 18th August 2023

JUDGMENT

MR JUSTICE MOOR:-

1. This is an appeal from the order of Recorder Anderson made in the Family Court sitting in East London on 1 September 2022. Permission to appeal on grounds 1 and 2 was granted by Mrs Justice Morgan on 7 June 2023, but the Appellant was refused permission to appeal on Ground 3.
2. The first thing to make clear is that there are not large assets available in this case. Indeed, the resources are very limited. I recognise, however, that the outcome is very important to the parties. The one blessing is that, to their great credit, the costs expended on the litigation have not been ruinous. The lawyers are to be congratulated for the sensible and economic way in which the matter has been litigated.

The relevant history

3. The Appellant, Kay Jacqueline Butler, was born on 30 April 1970. She is therefore aged 53. The Respondent, Earl Butler, was born on 30 October 1958, so he is aged 64. I propose to refer to them as “the Wife” and “the Husband” respectively. I do so for the sake of convenience only and mean no disrespect to either by so doing.
4. They married on 1 February 2003. Recorder Anderson made a finding of fact that the marriage was in name only from the end of 2009. Although the Wife attempted to appeal this finding (Ground 3), she was refused permission to do so. It follows that this was a six year marriage, although the judgment of Recorder Anderson indicates that there were some unusual features even then. The Wife lived in Birmingham until 2007, whilst the Husband lived in London. It is the Husband’s case that they only ever lived together for some nine months. The Wife moved to London in 2007 and has lived in East London ever since. The Husband has been in London throughout.
5. The Wife has a daughter from a previous relationship, who is now aged 23. There is one child of the marriage, a boy, T, who is now aged 16. It follows that T is the first consideration of the court, although I have come to the conclusion that this is of only marginal relevance in this case, given the way in which the case is advanced on behalf of the Wife. It does, however, mean that the commitment made by the Wife to this marriage has been for a significantly longer period than the six years during which the marriage subsisted.
6. In November 2007, the Husband’s father died. The Husband inherited a property at 48 Ashville Road, London E11. The property, however, was tenanted. It appears it took a considerable period to evict the tenants. The Wife says she played a role in that eviction but I do not consider that this makes any material difference to the case.
7. The Wife has lived in rented property throughout. After she moved to London in 2007, this was in Local Authority accommodation for at least a time. She would, of course, have had security of tenure in such accommodation. There is reference to her being evicted in September 2015, but I do not know the

circumstances involved. There is no doubt that she is now in privately rented accommodation. I accept that this means she has no security of tenure and is subject to the vagaries of the market.

8. During 2015, the Husband sold 48 Ashville Road and purchased his own property at 14 Edwin Avenue, East Ham, London E6. He had a mortgage initially which he paid off with the assistance of income from tenants. He also took a further loan for home improvements, but he has now paid that off as well, such that the property is mortgage free. It is accepted that the Wife never lived at either property and made no financial contribution to either. 14 Edwin Avenue is a two bedroom terraced property. In July 2022, a local estate agent recommended marketing it for sale at £410,000, without an indication of what it was expected to sell for. Moreover, I can take judicial notice of the fact that there has been a reduction in the value of properties in the past year.
9. A divorce petition was presented on 5 March 2020. The Wife's Form A is dated 21 January 2021. A decree nisi was pronounced on 25 March 2021. I do not believe it has yet been made absolute.
10. Both parties filed Forms E. The Husband's Form E is dated 26 April 2021. He is employed by a Local Authority as a caretaker. He is diabetic. He has five children by previous relationships aged between 40 and 23. I believe he lives with one of them, but I might be wrong about that. He says he pays child support for T of £280 per month. At the time of the Form E, he had some modest savings in bank accounts, but they were balanced by similar debts. He has a BT pension, from his previous employment as a cable engineer, now amounting to £6,274 per annum. He earns approximately £25,000 per annum gross from his work as a caretaker but he intends to retire in approximately two years. During submissions, it became clear that he will get a modest pension from this employment on retirement, probably similar to his BT pension. He will also receive the state pension. In a statement dated 19 July 2022, he says he contributed £3,250 towards the Wife's deposit for rental accommodation and asserts that he made her other loans exceeding £10,000 during the marriage, which were not repaid. Finally, he says he contributed £5,000 to assist the Wife in purchasing land in Jamaica.
11. The Wife's Form E is dated 29 April 2021. She is living in a privately rented property at 31 Norfolk Road, London, E6, paying rent of £1,700 per month. She does not work and has some quite serious health conditions, including fibromyalgia, chronic arthritis and ruptured discs in her back. She blames her back issues, at least in part, on an epidural she had when giving birth to T that went wrong. She has depression. She has a carer attend her property twice per day. The Wife's Form E suggests the child maintenance she receives is only £80 per month. She has no significant assets other than the land in Jamaica which she says is worth £16,000. She also has some liabilities. I will deal with the most up to date position later in this judgment. She does have Universal Credit of £35,161 per annum. The reason for this is, in large part, the rent of £1,700 per month she has to pay, such that I accept that her resources are extremely tight. She asserts income needs of £3,418 per month.

She does make the point that she raised T on her own with T having no consistent contact with the Husband. Her statement concentrates on the length of the marriage. Given the findings of the Recorder, there is no purpose to me setting out what she says in that regard.

12. Evidence was obtained in the run up to the hearing about the cost of alternative properties and mortgage capacity. It is clear that the Wife does not have a mortgage capacity. The Husband was not full and frank in relation to his position. He obtained evidence from a mortgage broker that he could obtain £100,000, but he suppressed the document and asked for a document saying he could borrow £50,000. As it has turned out, a standard mortgage until his 75th birthday would entail very considerable levels of capital repayment which he cannot afford. I do, therefore, take the view that any such mortgage would, in effect, be equity release.
13. The property particulars obtained by the parties showed that there was one three bedroom flat available at an asking price of £300,000 but most three bedroom properties in East London, whether terraced or semi-detached, had asking prices of around £375,000 to £380,000. The condition of the properties is not known. There was a one bedroom retirement flat available at £120,000. I was told this would be available for purchase by the Wife in two years when she was aged 55.
14. At the hearing before the Recorder, the Wife's case was that the Husband's property at Edwin Avenue should be sold and she should receive around three quarters of the proceeds of sale to enable her to rehouse herself, T and her daughter in a three bedroom property for around £300,000. I have to say that I consider such submissions to have been quite unrealistic. In fairness, they have not been repeated before me.
15. Recorder Anderson gave judgment on 1 September 2022. He directed that the Husband pay a lump sum of £58,000 to the Wife by 1 December 2022 on a clean break basis. In default of payment, there would be a sale of Edwin Avenue to enable the Wife to receive her lump sum.
16. In his judgment, he sets out the history as above. He finds that the parties did not live together after 2009, at which point there appears to have been some lawyer involvement. The judgment refers to both parties being rehoused by the Local Authority at that point. Although he mentions the Wife's case that the Husband visited her thereafter, stayed over and assisted her, he concluded that the marriage was in name only from the end of 2009. His finding was that they remained married as a matter of convenience or simply on the basis of inertia. They held themselves out as being separated to the Local Authority. In any event, the Recorder finds that the property at Edwin Avenue is non-matrimonial. He therefore accepted that the issue was the parties' needs. He noted that they have been financially independent of each other for many years in income terms. He took the view that the Wife's housing needs for herself, T and her daughter could not be met for much less than £400,000. If she got half the value of Edwin Avenue, both parties would be homeless. He therefore said that the correct order was for a lump sum of £58,000 which he

took the view could be raised by the Husband. It would enable the Wife to discharge her debts. He accepted it would not be sufficient for her to rehouse herself but took the view that there were no circumstances in which she could do so, given the facts of the case. He declined to make a pension sharing order on the basis that the Husband's main pension is small and in payment.

17. The Wife filed her Notice of Appeal on 22 September 2022. It sought an order for sale of Edwin Avenue and payment to her of £300,000. As I have said, I consider such a submission to be entirely unrealistic and Mr Trussler, who appears for the Wife, accepted that was the case and advanced an entirely different case to me.
18. Amended Grounds of Appeal were filed on the Wife's behalf dated 1 February 2023. Ground 1 is that the Recorder erred in failing to make an order that provided for the needs of the Wife, after he had concluded that it was a needs case. The award was insufficient to give her stability. This part of the document again appears to be advocating the Wife receiving £300,000 but Ground 2 is that, after the Wife gave evidence that she had considered relocating to Birmingham, the Recorder erred in not taking judicial notice that she could purchase a property more cheaply in Birmingham, given that the disparity in house prices between London and Birmingham was common knowledge. The Wife would prefer to own her own property in Birmingham rather than rent in London. Again, the issue of a move to Birmingham was not advanced before me. Ground 3, which has been dismissed, was that the Recorder was wrong to find that the relationship ended in 2009.
19. Mr Trussler's Skeleton Argument is also dated 1 February 2023. It basically contends that, given that there was no issue other than that it was a needs case, the Recorder did not take proper account of the Wife's needs. He adds that the court should have taken into account the Husband's dishonesty in relation to his mortgage capacity.
20. Morgan J decided the issue of permission to appeal on 7 June 2023. As noted above, she granted permission on Grounds 1 and 2 saying that it was arguable that, once the Recorder accepted that it was a needs case, he should have met the Wife's needs. In contrast, she took the view, in relation to Ground 3, that the Recorder was entitled to reach the decision he did in relation to the date on which the marriage ended.
21. The Husband's Skeleton Argument from his counsel Ms Ives, reminds me that it is her client's case that the parties only lived together for nine months. Whilst that may be his case, the finding was that the marriage should be taken as being from 2003 to 2009, some six years. It is though entirely right that this was, nevertheless, a relatively short marriage that ended fourteen years ago, but I remind myself again of the existence of T. Ms Ives says that, whilst the spouses were together, the Husband supported the Wife's daughter by her previous relationship. It is not accepted that the Recorder did not provide for the Wife's needs but, in any event, even the existing lump sum will have to be funded by equity release. In oral submissions, she added that the interest rate is "eye watering", although I assume it would just be added to the debt. She

said that, after seventeen years, the total owing would be £130,000 if he borrowed £50,000. If the lump sum was £100,000, it would be double that figure. She reminded me that her client is approaching retirement, has only modest pension provision, and his property is non-matrimonial property.

22. I now turn briefly to consider the up to date financial positions of the parties. It does not make for happy reading. The Husband has his property at 14 Edwin Avenue with a net equity, on the basis of a value of £410,000, of £397,700. He has an ISA worth £10,000, but total debts of (£29,935). There is a reference to a Scottish Widows policy but I proceed on the basis that this policy gives a death benefit of £107,000 and has no current surrender value.
23. The Wife's only asset is the Jamaican land, which is given a net value of £15,454. She has £1,150 in bank accounts but liabilities of (£6,553). I was told that she also owes her counsel £800.

The relevant law on appeals

24. Family Procedure Rules 2010, Rule 30.3 provides that permission to appeal may only be given where the appeal has a real prospect of success or there is some other compelling reason why the appeal should be heard. In Re R (A Child) 2019 EWCA Civ 895, it was held that the test was that there must be a realistic, as opposed to a fanciful, prospect of success. There is no requirement that success should be more probable or more likely than not. The fact that permission to appeal has been granted does not, of course, guarantee a successful appeal.
25. Rule 30.12 provides that every appeal will be limited to a review of the decision of the lower court, which is what has happened in this case. The appeal court will allow an appeal where the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court. There is no allegation here of a serious procedural or other irregularity so it all comes down to whether the Recorder was wrong. In this regard, I have to be satisfied that the order made was not one that was available to the Recorder in the exercise of his discretion. In other words, was it an order that no judge should have made. It is therefore quite a stiff test.

The relevant law on financial remedies

26. The Recorder had to apply section 25 of the Matrimonial Causes Act 1973, as amended, in deciding what orders to make pursuant to sections 23 and 24. It is the duty of the court to have regard to all the circumstances of the case. First consideration has to be given to the welfare, whilst a minor, of T, although it is to be noted that the order now proposed on behalf of the Wife would provide her with basic accommodation but no accommodation for T.
27. The Recorder then had to have particular regard to the matters set out in subsection (2), namely:-

- (a) The income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity, any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
- (b) The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) The standard of living enjoyed by the family before the breakdown of the marriage;
- (d) The age of each party to the marriage and the duration of the marriage;
- (e) Any physical or mental disability of either of the parties to the marriage;
- (f) The contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
- (g) The conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it; and
- (h) The value to each of the parties to the marriage of any benefit which, by reason of the dissolution ...of the marriage, that party will lose the chance of acquiring.

28. The overall requirement in applying section 25 is to achieve fairness. It was made clear in the seminal House of Lords decision of White v White [2000] UKHL 54; [2001] 1 AC 596 that there is to be no discrimination in financial remedy cases between a husband and wife.

29. In the case of Miller/McFarlane [2006] UKHL 24; [2006] 2 AC 618, the House of Lords identified three principles that should guide the court in trying to achieve fairness, namely:-

- (a) The sharing of matrimonial property generated by the parties during their marriage;
- (b) Compensation for relationship generated disadvantage; and
- (c) Needs balanced against ability to pay.

30. There is no question in this case of sharing matrimonial property as there is no matrimonial property. Mr Trussler rightly does not challenge the finding of fact that 14 Edwin Avenue is non-matrimonial property given that it is solely the product of the inheritance the Husband received from his father and his endeavours after the date of separation.

31. In the same way, compensation is of no relevance to this case. I recognise that the Wife's earning capacity will have been affected by her commitment to T

and, in all probability, by her ill-health which may, in part, have been as a result of the epidural during birth. Nevertheless, there is simply insufficient resources in this case to make any award based on compensation that cannot be dealt with under the third strand of needs.

32. There is no doubt, therefore, that any award in this case would be based on the Wife's needs, balanced against the Husband's ability to pay. The law is clear that non-matrimonial property can be invaded to provide for the other spouse's needs and, indeed, that is what has happened in this case, albeit not to the extent sought by the Wife.

The issues I have to decide

33. The real issue that I have to decide is whether, having come to the conclusion that this was a needs case, the Recorder had to make an order that did, indeed, provide for the needs of the Wife. In this regard, we are only really considering her housing needs.
34. The first obvious point to make is that, in coming to a decision, the Recorder must also take into consideration the needs of the Husband. I have already reminded myself that this is a gender-neutral exercise. I am clear that a judge, properly directing himself or herself, must take into account all the circumstances of the case and, in particular, the matters set out in the section 25(2) checklist. Whilst that will include the vulnerabilities and lack of security of the Wife and her commitment to T, it will also include the length of the marriage and the fact that 14 Edwin Avenue is entirely non-matrimonial. In this particular case, however, I take the view that the practicalities of any order made were also extremely important.
35. Before the Recorder, it was asserted that the Wife should have, in effect, three-quarters of the equity in 14 Edwin Avenue to enable her to rehouse. Given that Edwin Avenue is a non-matrimonial asset and that such an order would have undoubtedly made the Husband homeless, I am clear it was an unrealistic expectation that the Recorder was right to reject. Indeed, Mr Trussler effectively acknowledged that in his submissions to me.
36. In the Grounds of Appeal it was, in contrast, asserted that the Wife should have what I consider would have been approximately half of the equity in Edwin Avenue to enable her to move to Birmingham. This had not been seriously advanced before the Recorder, merely being mentioned by the Wife in oral evidence. No property particulars had been obtained. It may have been that any attempt to rely on property particulars before me would have fallen foul of the rule in Ladd v Marshall [1954] 1 WLR 1489 that such particulars should not be admitted because they could have been obtained with reasonable diligence at the trial. In any event, Mr Trussler did not pursue a move to Birmingham before me. Again, I consider he was right not to do so. I do not know if his client really would want to move to Birmingham, having been in London for sixteen years. Equally, I do not know what position her adult daughter or T would take of such a move. Most importantly, however, I am concerned that an equal division would almost certainly make the Husband

homeless and might not even be sufficient to enable the Wife to acquire a suitable property in the Midlands. It does not matter, however, given that it was not pursued.

37. Mr Trussler, instead, pursued an argument that his client should be able to acquire a retirement home for approximately £120,000. He said that some of the homes are available for those aged 55 or more, although others require you to be older. He suggested a sale of Edwin Avenue in say eighteen months' time to enable her to do so. He contended that this would avoid any potential loss of benefits to her, but would enable both parties to have their own property. He made the point that his client is in poor health. She is greatly assisted by her daughter. She needs some security and comfort in her later years. He also postulated that her daughter might be able to assist her to buy a property at some point in the future, on a form of shared equity basis.
38. Ms Ives, on behalf of the Husband, basically submitted that any additional lump sum would lead to the inevitable sale of Edwin Avenue and would make it very difficult for her client to rehouse himself. She said that, other than equity release, he has now been told that his maximum borrowing capacity is £44,632. I made the point that he has not appealed and so must find more than this sum in any event. Indeed, if he was to pay off all his liabilities in the sum of £29,935, he will need equity release of £88,000 to comply with the existing order, or £78,000 if he used his cash ISA.

My conclusions

39. The first point to make is an important one. In some respects, it is the answer to this appeal. The fact that a judge rightly concludes that a case is a "needs" case does not mean that the judge must then make an order that satisfies both parties' needs. In one sense, this is obvious, because there may simply be insufficient assets to satisfy the needs of either party, let alone both. I take the view, however, that it goes further than that. There will be many cases where there are sufficient assets to meet both parties needs and it is undoubtedly right to do so, even if that means invading non-matrimonial property. There will, however, be a different category of case where the assets may only be barely sufficient to do so or, potentially, not sufficient. These are the most difficult cases and this case is one of those.
40. I am quite clear that, in cases such as the case I have been dealing with, the court cannot simply apply needs as the only consideration. It must consider all the factors set out in section 25(2), albeit that some will be more significant than others.
41. In this case, the Wife put forward, at trial, a quite unrealistic proposal that she should have approximately three-quarters of the assets, even though those assets were entirely non-matrimonial and the result would have been that the holder of those assets would have been made homeless himself. The Recorder rightly rejected this solution. It would have been quite unfair and not in accordance with section 25.

42. At that point, there really was no other credible proposal on behalf of the Wife that would have enabled her to rehouse herself and the children. A move to Birmingham was first mentioned in her oral evidence but without any credible plan. Not even property particulars were available. The attitude of T and the Wife's daughter would have been very relevant. I take the view that the Recorder would have been subject to considerable criticism if he had gone down that road, particularly if the only way to obtain evidence of property particulars had been to start doing his own research online to fill the gaps in the evidence.
43. In such circumstances, I find that the Recorder was entirely justified in the approach that he took. I consider he was entitled to take the view that he should not make any order that would make the Husband homeless. The Recorder would have particularly taken into account the origin of the asset; the length of time that had elapsed since the separation of the parties; the age of the Husband; and the inability of the Wife to do anything very much with the lump sum. He was entitled to factor in the Husband's debts and take the view that approximately £80,000 to £90,000, which would be what the Husband will need to clear those debts and pay the lump sum, was about the maximum he could raise.
44. In one sense, that might have been the end of this appeal. I do, however, take the view that I should consider the entirely different submissions made to me by Mr Trussler at the appeal hearing. The Wife has been given permission to appeal and I consider I should therefore take into account all possible arguments available to ensure justice is done.
45. Again, however, I take the view that the most recent proposal has been rather cobbled together. It involves a potential purchase not now but in two years' time, when she is aged 55. This would be some sixteen years after the date of the breakdown of the marriage. The proposal appears to take no regard of the needs of T, who will, at that point, be just eighteen years old, nor of the Wife's daughter who is still living with them at present. If the Wife can purchase accommodation, it will certainly not be big enough for either T or her daughter as well.
46. Moreover, the cheapest property I could find in the bundle had an asking price of £120,000, although Mr Trussler mentioned £110,000 in his submissions. Either figure would require a greater sum than the highest equity release offer made to the Husband, even leaving out of account his debts. The Wife would also have some costs of purchase and moving, let alone the effect on her benefits between the date of receipt of the money and the date of completion of the purchase. In addition, she has some debts, albeit relatively modest, that she would be well advised to discharge. All in all, I consider she would require considerably more than £100,000. I find that the effect would be that the Husband would have to sell Edwin Avenue, a result that I do not consider fair given the facts of this case. It follows that I reject the oral arguments raised before me by Mr Trussler as well.

47. I therefore take the view that the decision of the Recorder was one that he was entitled to reach. It cannot be said that he was wrong. The appeal must be dismissed. I recognise that this will mean that the Wife does not end up with the security of a property that she owns, but she has never had such a property that she has owned throughout her adult life. The marriage broke down some fourteen years ago. It only lasted six years, albeit that her commitment to T is important. Edwin Avenue is entirely non-matrimonial. She will have a significant lump sum of £58,000 which she can use as she wishes. This may include a joint purchase with her daughter. It is entirely a matter for her.
48. The appeal is therefore dismissed on the basis that the order of Recorder Anderson was not wrong and was certainly an order he was entitled to make.

Mr Justice Moor
24 August 2023.