

RE C (DIVORCE: FINANCIAL RELIEF) [2007] EWHC 1911 (Fam)

[2008] 1 FLR 625

15/06/2007

Barristers

Private: Jonathan Cohen QC

Court

Family Division

Facts

The 51-year-old husband and 49-year-old wife had been married for 25 years. The three children of the family, aged between 15 and 20, were all in full-time education. They were the beneficiaries of a settlement set up by their maternal grandfather, which provided for the cost of their school fees and, upon attaining the age of 18, an income of about £20,000 per annum each with which to fund their educational requirements and provide them with an allowance. This trust was not treated as part of the assets to be divided in the ancillary relief proceedings. The husband continued to work as a dentist in a practice established prior to the parties' marriage. At the hearing of the application for ancillary relief, the trial judge found that the parties' assets amounted to some £2.3m. He was satisfied that the contributions they had each made to the marriage were equal both as to past and future expenditure and that neither party required to live in the former matrimonial home. In addition to the matrimonial assets, the wife was the beneficiary under a number of family trusts with a total capital value of approximately £5.8m at the date of trial. For the most part of the marriage the wife had received only a modest income from the trust until the family business became the subject of a hostile takeover and her share entitlement was replaced by cash which she used towards family expenditure, the purchase of and improvements to the former matrimonial home and a £60,000 contribution towards the purchase of an aeroplane for the husband. Subject to an overriding power of revocation, which it was not anticipated would be exercised, the wife was entitled to trust income throughout her life of about £150,000 gross per annum which was calculated on an actuarial basis to have a capital value of £2.7m. The district judge made a finding that the husband's business premises and the goodwill attached to the husband's business were liquid assets which would form part of the matrimonial 'pot' to be divided, together with a conclusion that on the balance of probabilities he could not be certain that the trustees of the trust in respect of which the wife was a beneficiary would assist the wife with any capital contribution in order to enable her to remain living in the former matrimonial home. The district judge awarded the husband a lump sum of £350,000 in order to equalise the division of the parties' overall matrimonial assets as he calculated them, in circumstances where the wife would be enabled to retain the former matrimonial home if she were to pay this sum to the husband. The husband appealed.

Held

Held – allowing the husband’s appeal and ordering the payment of a further lump sum of £250,000 to the husband

(1) The district judge should have made a specific finding as to the value of the husband’s business premises. The evidence before the court demonstrated that the premises could have been valued on three different bases, with a differential of £45,000 depending upon the method adopted. £45,000 represented an important percentage of the value of the premises and it was inappropriate to simply adopt the wife’s presentation of the value without justification (see para [13]).

(2) The husband’s business premises and the goodwill attached to the husband’s dentistry practice should not have been categorised as liquid assets. While of course

[2008] 1 FLR 626 they could be sold, in reality they underpinned the husband’s ability to continue to earn an income and would not be readily realisable until such time as he decided to cease work. Together with the husband’s pension, these assets should have been treated as illiquid (see para [15]).

(3) It was wrong in principle to divide the illiquid assets of the husband’s pensions, business premises and the goodwill relating to his business, totalling some £770,000 in value, on a 50:50 basis, without having regard to the income stream derived by the wife from a trust fund with assets amounting to £5.8m. Although the income stream from the trust carried a dynastic quality and should be regarded as a gift, it should be given proper consideration in an evaluation of the circumstances of the case. The existence of such a resource rendered a 50:50 division of the husband’s illiquid assets unfair (see paras [20], [26] and [29]).

(4) An equal division of the parties’ liquid assets would provide the husband with 50% of £1,617,115. In view of the liquid assets the husband would be retaining and the £350,000 lump sum already paid to him on account, he was entitled to an additional lump sum payment of £276,000, which would represent 65% of the parties’ overall matrimonial assets, leaving the wife with 35% plus her trust assets. However, the husband’s award would be subject to a discount of some £25,000 to take account of his positively extravagant expenditure in the period since separation (see paras [36]–[38]).

(5) At the time of trial the wife had paid significantly more towards her legal costs than the husband. It was a misstatement of the overall assets to fail to take this factor into account and the *Leadbetter* approach should have been adopted in order to achieve a balanced and fair picture of each parties’ true financial position (see para [14]).

(6) Where a case included the unusual and complex aspect of the entitlement of a party under a trust, it should be transferred to the High Court at the earliest opportunity (see para [17]). Per curiam:

(i) It was relevant that in the circumstances of the present case the court would not be asking the trustees to make funds available to the husband or placing improper pressure upon them, rather giving them an opportunity to react to a request from the wife to provide her with funds in order that she might continue to live in her current home (see para [25]).

(ii) Cars and contents should normally be omitted from asset schedules and dealt with in specie rather than attributed a cash value for distribution (see para [33]).