Finance Case Digest

ND (by her litigation friend KW) v GD [2021] EWFC 53 Mr JUSTICE PEEL

Practice and procedure – Double counting of rental income – Whether IFA evidence was necessary – No order as to costs despite unreasonable failure to negotiate – appropriateness of a clean break – factors to be taken into account when assessing needs – requirement for agreed asset schedules

Background

W was 54 and H 59. They were married for 23 years to separation in 2018. There were two children of the marriage; aged 22 and 21. The lifestyle of the parties during the marriage was modest. In 2009 the parties bought their current family home for £320,000. They had little in the way of other assets until the death of H's mother in 2013. H inherited an estate worth that was worth £3.2m gross at final hearing. The estate was predominantly represented by a valuable property portfolio. Post-inheritance there was not a great surge in family expenditure. Neither party lived in the FMH at the date of final hearing. W lived in a property in H's name and H lived in rented accommodation.

Shortly after separation in November 2018, W was diagnosed with Young Onset Alzheimers. W was endeavouring to maintain her independence but needed assistance from a carer. By March 2020 W was unfit to work or drive. Since March 2021 she received 5 hours a week of professional care to assist with household jobs at a cost of £7,200 pa. W wished to remain living independently for as long as she could before contemplating residential care. It was inevitable that W's cognitive decline would require much greater support but what was difficult to predict was the timescale of deterioration, including increased care at home and possible residential care.

The total net assets at final hearing were £2.6m. W received £5,896 pa under an income protection plan until 60 and a PIP of £5,907 pa. H had an earning capacity of not more than £15,000 pa. Whilst H received a rental income from the property portfolio, it risked a double account to include both the full capital value of the property portfolio and to ascribe an additional income to H represented by the rent.

The court read expert evidence from an occupational therapist; heard from an SJE consultant old age psychiatrist and an SJE financial adviser. The financial adviser carried out a number of bespoke calculations and gave oral evidence. His primary task was to calculate on a capitalised basis the sum required by W to meet her needs including as to care (essentially a Duxbury style exercise) working on income receipts, income needs and life expectancy.

W sought a net sum of £1.2m excluding her pension on a clean break basis. Of that she sought £700,000 by way of a housing fund and £500,000 as an income fund.

H offered W £750,000 on a clean break basis. Of that he proposed a housing fund of £525,000 and an income fund of £225,000. H alternatively offered a joint lives order

for periodical payments at £16,216 pa based on W's reasonable budgetary needs of £28,000 pa less her income from other sources.

Outcome

W's needs were informed by all the circumstances of the case, in particular the length of the marriage, her medical condition and provenance of the wealth. W required a housing fund of £650,000 and an income fund of £300,000. The division of resources was 63/37% in H's favour. On application of the cross check as to fairness such a division was entirely fair and represented an equitable balance between W's needs, the long marriage and the source of the wealth.

The learned judge rejected the alternative proposal of periodical payments. A clean break was desirable to prevent further litigation, the avoidance of which was in the best interests of both parties but particularly W's, whose health was not robust enough to cope with ongoing financial and legal links. The risk of capitalised maintenance being the incorrect figure cut both ways.

H was found not to have negotiated openly in a reasonable manner. No order was made as to costs. The rationale for such an order was that the order met W's needs after the payment of legal fees; so H was in reality paying her costs from his assets.

Comment

The judgment contains a wonderfully succinct summary of the law that warrants both reading and re-reading. The summary emphasises that needs are not always causally linked to the marriage on an application of the needs principle. By contrast there would have to be a causal link to the relationship on any rare application of the compensation principle. The source of wealth was also a relevant factor when assessing need. Presumably by way of a dampener on a generous assessment.

The learned judge thought that the parties could have used the Capitalise programme to generate precise calculations and that the evidence of the financial adviser did not provide the court with much assistance. The instruction of the expert was consequently not necessary and there was rarely, if ever, a need for an IFA to carry out a Duxbury style exercise. In the vast majority of cases it was inappropriate to reach beyond the Duxbury tables in At a Glance or the Capitalise programme for a more advanced formula.

The learned judge expressed his immense gratefulness to both counsel for having provided an agreed asset schedule and took the opportunity to emphasise that the rules require an asset schedule in single form in the High Court and that absent good reason an asset schedule in single form must be prepared below High Court level. It was recognised that compliance may be burdensome, but that was no excuse and the requirement was necessary in the interests of the proper use of judicial and court time. It is suggested that in order to ensure that the obligation is complied with below High Court level, a specific direction should be sought for the filing of a composite schedule shortly after FDR and perhaps at the same time as post-FDR open offers are prepared.

Simon Sugar
1GC|Family Law
sugar@1gc.com