IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION

CAUSE NO. FAM 66 OF 2014

BETWEEN: DJ PETITIONER

AND:

BJ

RESPONDENT

Appearances: Mr. Nicholas Yates Q.C. instructed by Mr. Andrew Woodcock of Hampson & Co for the Petitioner

Mr. Guy Dilliway-Parry of Priestleys for the Respondent

Before: The Hon. Justice Cheryll Richards Q.C.

Hearing: 4th and 5th June 2019

Further Submissions 11th and 12th June 2019

Draft Judgment Circulated: 29th July 2019

HEADNOTE

Family Law – Final Ancillaries – Sharing of Matrimonial Assets, Construction and Application of Pre-nuptial Agreement

JUDGMENT

Introduction

1. This is a final ancillary hearing following the filing of a Petition of divorce by the Petitioner wife ("the wife") on the 15th April 2014. The wife, and the Respondent husband ("the husband") were married on the 17th February 2012, so that the marriage lasted a little over two years. At the time of the marriage, the parties executed a pre-nuptial agreement ("the Agreement") which is dated 16th February 2012. There is a fundamental issue between the parties as to the interpretation of this Agreement. This is, as to whether the terms of the Agreement require that assets acquired during the marriage are to be assessed and shared as at the date of the separation of the parties which was on the 28th March 2014 or as at the date of dissolution of the marriage.

2. At the time of the marriage the Petitioner was pregnant with the couple's only child, a son J., who was born on the 4th July 2012. He is now seven years old. This was the second child for the wife and the husband's first. He has since had a second child, D. now 3 months old, and is engaged to be married.

3. J. was diagnosed with Down syndrome shortly after his birth and is thus a child with special needs. Multiple reports have been provided by the parties in the course of their Affidavit evidence and there is very little dispute between them on this aspect of the case. As a result of the diagnosis, J. will have global developmental delays and requires additional and specialist care to foster and support his development and growth throughout his life. J.'s present therapy needs include speech and language therapy to develop his language skills, and, twice weekly physiotherapy sessions to address any delays in his motor skills[1]. He also requires ongoing occupational therapy

[1] Pages 177 et seq. of trial bundle

which is currently twice weekly to address his cognitive and gross motor skills, self-care and social skills. Some of his needs cannot be met on Island and he requires twice yearly travel off Island to a specialist treatment centre in the United States. He will continue to require intervention to support skills towards independence such as meal preparation, topography navigation, money management and job skills[2]. One of his doctors noted that J's treatment plan and progression are not expected to be linear. The reports also indicate that his skills will ebb and flow, dependent on his routine and structure, consistencies in behavioral interventions and his medical health.[3] He has been progressing well and there have been positive outcomes from his treatments.

4. Additionally, at the time of his birth J was also diagnosed with a heart murmur and a transient leukemoid gene. This latter is described as a condition which pre-disposes him to leukemia at a higher rate than the typical child. Following several tests, his hearing also requires to be monitored over time.

5. J is currently in his first year at a local school. By arrangement with the school, the school provides a special aide to be with him throughout the school day and the cost of this is borne by the parents.

6. Prior to the hearing, the only area of disagreement between the parties as to J's treatment needs was as to whether he also requires Applied Behaviour Analytic Intervention for children with developmental delays ('ABA Therapy"). This is described as therapy to address any non–compliance issues on the part of the child and as being central to ensuring the effectiveness of his other therapies. In short this

[2] Page 634 of Trial Bundle - Therapist letter of 4th April 2019.
[3] On the 3rd June 2016 in a letter to the Court, Occupational Therapist, Dr. Mona Kazemi – page 207 of Trial Bundle

therapy would improve his compliance with instructions in relation to other therapies. The husband now agrees that J is to have this additional treatment and he has agreed to meet the cost of it.

7. Both parties are professionals, who married later in life. The wife is now 46 years old. The husband is 47 years old. The wife is a certified public accountant and since 2011 is also an attorney by profession. The husband is a certified public accountant. At the time of the marriage in 2012, the wife was employed as an attorney at a law firm and the husband was employed as a partner in an Accounting Firm. He had commenced employment with the Accounting Firm in October 1997 and was made a partner in July 2010 prior to the marriage. Following J's birth, the wife took a short leave of absence from work. After a return to paid employment, she determined to start her own companies in order to allow her to be more present in J's life, given the level of attention which he requires. Since November 2016, she has been self-employed in her own law Firm while operating a second sister company which provides corporate services.

8. The wife is the primary caregiver for J, who resides with her for most of each month. He resides with the husband from Friday evening to Sunday evening of every other weekend. It is the wife who takes J to his various appointments and has endeavored to find the best treatments, facilities and specialists for his care. The husband has provided financial support for J including payments for his various treatments and extracurricular activities such as horseback riding and swimming. Various orders have been made by the Court for J's interim maintenance pending this final hearing.

Interim Maintenance Orders

9. On the 23rd July 2014, by order of the Hon. Chief Justice, the husband was ordered to pay interim maintenance to include $4,465.00 to meet the monthly special needs costs for J, in addition to any other costs which may arise, $3,700.00 to assist the wife to establish a second home, $4,000.00 for the first month's rent on the wife's new home and a further sum of $1,135.00 for the purchase of essential items.

10. On the 4th September 2015, by order of Williams J. made pursuant to the wife's Summons of May 2015 seeking clarification of the July 2014 Order, the Order of the Hon. Chief Justice was varied to the effect that the husband was required to pay all the costs for therapy for J, interim child maintenance of $7,182.00 per month and arrears accrued under the July order. He was also to make disclosure of certain items and pay 50 % of the Petitioner's costs.

11. On 21st October 2015, the husband sought leave to appeal the Costs Order, which leave was refused on the 30th October 2015.[4]

12. By summons dated 23rd November 2017, the wife sought an increase in interim maintenance on the basis that the passage of time and changes in their living arrangements made such a review necessary. On the 14th December 2017 by order of Gunn J. (Actg.), the order of Williams J. was varied to the extent that the interim maintenance pending suit was increased by CI $495.00 to $7,677.00 per month. The Court found on doing so that the wife's current and likely future earnings had improved since 2014 and that she should bear 45 % of the costs of rent and J's travel.

[4] Judgment of Williams J. of 30th October 2015

The Court also gave directions for disclosure which are referenced in more detail below.

13. Thus between July 2014 and December 2017, the husband paid CI $86,184.00 per annum in maintenance for J, in addition to the costs of his specialist treatments. The position now is that the husband pays interim maintenance of CI$7,677.00 per month or $92,124.00 per annum, as well as the costs for special needs/care required for J, which are now in the region of $5,000 per month or $60,000.00 per annum.

The Marriage

14. The parties first met in 2004 - some eight years before the marriage. There is disagreement between them as to the level of consistency of the relationship. The wife says that they began what she describes as a serious and exclusive relationship and initially resided in a condominium which she owned. The husband did not then own property. She says that they separated on two occasions during this eight-year period but reconciled. At the time of the husband's purchasing his first home in 2007, she assisted him with a loan for closing costs which he has since repaid. She describes herself as having made many sacrifices for him during their relationship including having to sell her shares in a company because of conflicts with his work. She says also that she supported him during his long nights of work and provided emotional support in the years he was passed over for partnership.

15. The Husband disagrees with her description of their pre-marital relationship and says that they had a volatile relationship during which they were separated for extended periods, one being for more than a year from autumn 2009 through to the end of 2010.

They did remain in contact but only because they had mutual friends. He points out that they were not even together when he became a partner in his Firm. During the eight-year period, he says that the wife had other serious relationships with other people, as did he. He does not consider that she made sacrifices. He accepts that he did request her to sell her shares because of work conflict but contends that there were many other similar stocks which she could have invested in but did not, and instead she spent the money.

16. As best as can be determined from the evidence of both parties, and eliminating the two periods of separation, it appears that they were together for a non-continuous period or at least five years prior to their marriage. They were together for a continuous period of two years just prior to the marriage.

17. Both agree that following their reconciliation in 2010, they decided to get married and have children. The wife says that the decision was primarily driven by the husband who wanted to have a child of his own. They planned to have three children. Following their marriage, the couple resided in a three-bedroom apartment in Prospect, George Town which had been owned by the husband from 2007. He continued to pay the mortgage payments and maintenance, utility and upkeep costs of the home. The home was valued at approximately CI$365,000 in September 2016 with an outstanding mortgage of CI$141,115.56 as of February 2019. In March 2012, they put down a deposit on a piece of land at Clipper Bay along the Seven Mile Corridor, where they intended to build a family home.

18. Both parties recount early difficulties and disagreements in the marriage. Each attributes these to different factors. The wife refers to the added strain of the

responsibility to care for J., given his special circumstances and the husband's inability to deal with the reality of this. She says that he became depressed and expressed disappointment that he would never witness his son getting married or graduating from college. She is of the view that the husband was deeply embarrassed by the condition of the child and that he has gone to great lengths to keep this a secret from other people. She says that while it had been initially agreed between them that she would give up her career and stay home for an extended period to take care of J., after a month the husband wanted her to return to work. Additionally she attests to losing trust in the honesty of the husband over time. Attempts at counselling failed. Matters came to breaking point when the wife received an unconfirmed report of her husband's alleged unfaithful behaviour and she moved out of the matrimonial home on 28th March 2014.

19. For his part, the husband refers to financial matters and the wife bringing her adult daughter to live in the small home with them on a permanent basis shortly after they were married. It is the husband's position as set out in his Affidavit of 24th April 2014, that prior to the marriage there were several heated arguments between them as the wife wanted to know all about his financial affairs. There was dispute about certain terms that were to be included in the Agreement and as a result of an impasse, the wedding which was initially set for 1st January 2012 had to be cancelled. Once the wedding was called off, he says that the wife made it clear to him that the pregnancy would have to be terminated as she did not wish to have another child out of wedlock. He pleaded with her not to terminate the pregnancy and in an effort, he says, to meet the needs of the unborn child, they eventually got married on the 4th July 2012.

20. Over the course of their association the husband's earnings increased exponentially. He describes his advancement in his career as a combination of merit, good fortune, hard work and sacrifice. He says that the wife has had no involvement in the progression of his career. He accepts that work dominated his life over the years and that he has had relatively little time for personal life. He says, further, that he had a clear objective for what he wanted to achieve and worked towards it in a focused and determined manner. He has accumulated earnings and assets since separation from the wife of approximately $2 million. The extent to which those assets are to be shared is the central issue in the case, given the terms of the Agreement.

21. Over the period, the wife has been employed in local law firms with annual incomes of just about one fifth of the husband. Her accumulated net assets as at January 2019 is stated to be $287,870.68. Of this amount $150,900.00 is her pension entitlement.

Sequence of Events and Delay

22. The matter came before me for hearing on the 3rd June 2019, having continued unresolved for some five years. It may therefore be helpful to set out in some detail the sequence of events. This even more so given the fact that the delay has had a significant impact on the import of the Agreement, and that each side blames the other for some portion of the delay.

23. In response to the Petition for divorce, the husband filed an answer and cross petition on the 30th April 2014 disputing allegations as to his behaviour. He sought to appeal a costs order made against him in September 2015. The Petition was amended following the grant of leave to do so by Williams J., on the 2nd June 2016, and was ordered proved on the 1st of December 2016.

24. In addition to the summonses for interim maintenance orders as detailed above, much of the intervening period has been taken up with various requests for disclosure and responses thereto. The husband changed attorneys once and the wife has had three changes of attorneys.

25. The wife says that the husband has delayed matters significantly by filing the cross petition and that there have been three adverse cost orders made against him, one of which was in relation to disclosure. The husband says that it is the wife, particularly in the latter half of the five-year period, who has delayed matters by failing to attend at his Firm in order to examine certain documents and by the making of repeated requests for disclosure.

26. The latter issue arose because the husband in his list of separate assets attached as a schedule to the Agreement identified "*partnership interest*" in his Firm as a separate asset and described this as "Ownership percentage as a Partner/owner of firm." As it turned out, this description was erroneous, but it led to much correspondence between the parties. In his Affidavit of 9th October 2015, the husband explained that he has never had a copy of a partnership deed from his Firm. What he does have is a joining agreement but, as this document is confidential, it required the approval of seniors of the Firm before it could be released. He said then that 80% of his earnings is distributed monthly and 20% is retained to the 30th September of the following year when all the earnings are tabulated.

27. There were various requests for further and better particulars made between the parties with the wife stating that an important outstanding issue was whether the husband had an equitable interest in the Firm for which he worked. It was not until the 17th June 2016 that an Affidavit was filed on behalf of the husband's Firm by LN, the Area

Director of Finance and Operations. This essentially confirmed that he was not the holder of shares in the entity and the distribution of his salary as he had previously outlined. The 20% reserve is required as a "capital true up".[5] Within that Affidavit was an offer for Counsel for the wife to inspect the Firm's documents in relation to the interests of the husband. The husband says that various appointments and arrangements were made by the Firm which were cancelled by the wife or by her Attorney and that the wife did not act positively on this offer until the end of 2018.

28. The husband also complained that the wife's disclosure was deficient in not providing all her bank statements and a valuation for her self-employed business[6]

29. The following is a combination of the submissions of both parties:

11th July 2014	Wife's Request for Further and better particulars.
19th December 2014	Husband Replies to Request.
2 October 2015	Costs Appeal hearing, husband's application is refused on 30th October 2015.
9th October 2015	Husband provides further Affidavit of disclosure.
2016	
2nd June 2016	Leave to amend the wife's petition in form of the amended petition filed. Time extended for the full compliance with paragraph 4 of the order of 4.09.15 [husband's disclosure] to 17.06.16 Penal notice attached
17 June 2016	Affidavit provided on behalf of husband by member of his Firm – Invitation to review Firm's documentation.
1 December 2016	Order that Further Amended Petition is Proved.
2017	
1 February 2017	Invitation from husband to review Firm's documents.
3 August 2017	Appointment to review document cancelled by Attorneys for wife.
1 September 2017	Exchange of Schedules of Disclosure.
11 October 2017	Request for further Disclosure and supporting/documentary evidence from wife (wife's 2nd Disclosure Request).
14th December 2017	Directions by consent:

[5] Page 272 of Trial bundle
[6] Page 306 of the Trial Bundle.

By 10.01.18 parties are to provide disclosure of the material requested in Attorney correspondence respectively dated 22.09.17 and 29.09.17.

If such disclosure is inadequate, either party shall be at liberty to set the matter down for determination of specific disclosure requests

In the event that that is necessary, further directions for the future conduct if the matter shall be made at the conclusion of the disclosure hearing.

If there is no such disclosure hearing, either party shall be at liberty to set the matter down for hearing not less than 21 days after disclosure as provided for above at (5).

All evidence upon which either party seeks to rely shall be served not less than 21 days before the final hearing.

Any further evidence only with leave of the court.

Parties to comply with practice direction 11 of 2014 in respect of court bundles and the contents thereof.

2018	
12 January 2018	Reply to wife's 2nd Disclosure Request – Further disclosure provided.
7 February 2018	First Notice of Intention to Act in Person filed by wife.
1 November 2018	Receipt of wife's 3rd Disclosure Request.
28 November 2018	Response to wife's 3rd Disclosure Request.
3 December 2018	Receipt of wife's 4th Disclosure Request.
20 November 2018	First listing of final ancillary hearing. Moved to 1 December 2018 for court convenience.
28 November 2018	Response to wife's 4th Disclosure Request.
30 November 2018	Application to vacate by wife - granted at contested hearing.
4 December 2018	By Order of 4.12.18 (4 December Order) directions for Final Ancillary Hearing, including court stating that this "is not a case that there has been a failure to disclosure [by husband]"
2019	
11 January 2019	Further disclosure provided by husband in accordance with 4 December Order.
8 February 2019	Wife's previous attorney, attends offices of Firm to inspect documentation.
18 February 2019	Second listing of final ancillary hearing. Adjourned by agreement of the parties at request of Wife in letter dated 18 January 2019.
19 March 2019	Second Notice of Intention to Act in Person from wife.
20 March 2019	Date for exchange of Affidavits for final ancillary hearing.
01 April 2019	Third listing of final ancillary hearing. Adjourned at contested application by wife.
03 June 2019	Fourth listing of final ancillary hearing.

The Terms of the Pre- Nuptial Agreement

30. The Agreement is dated 16th February 2012 and is expressed to be binding on the parties and enforceable within the jurisdiction of the Cayman Islands. It begins with a number of recitals at items 'A' to 'K', under the headings of Intended marriage, Children, Intention to deal with financial arrangements, Separate property, Joint property, Independent advice, Duress, Agreement to be legally binding, Disclosure, Jurisdiction and domicile and Will.

31. It records at recital 'A' that it is made in contemplation of, and is conditional upon, the intended marriage of A (the husband) and B (the wife) on or before the 28th February 2012.

32. Under recital 'B', it states that the terms of the Agreement are intended to reflect their decision to have or adopt children.

33. Under recital 'C' it states that the expressed intention is for them to enter into an agreement to record their wishes and intentions regarding their financial arrangements in the event of a decree of divorce, nullity or judicial separation and to set out their respective rights and obligations in the event of these outcomes. Paragraph (ii) under this recital states:

> "*A and B each intend that this Agreement shall set out their respective rights and obligations in respect of the other in the event of a decree of divorce, nullity or judicial separation.*"

34. At Recital 'F' it states that each party has taken separate independent legal advice, that they are fully aware of the rights which they may be acquiring or surrendering, that they have each read the Agreement and had its meaning and legal consequences

explained, and that they understand and are satisfied with its provisions and its legal and practical consequences.

35. Further at paragraph 'F(d)' is the express acknowledgment and agreement of the parties that they have been informed that in the event of a divorce, nullity or judicial separation, the court may make orders pursuant to the Matrimonial Causes Law which orders might not be reflective of the terms of the Agreement.

36. Recital 'G' states that neither party has been placed under duress to enter into the Agreement, which is entered into less than 21 days before the date of the marriage.

37. Under recital 'I', dealing with disclosure, the parties acknowledge that party A has elected not to include bank account or investment values and that investment values will vary and be approximate. They further acknowledge that they have not sought to obtain a clear and full valuation of A's shares in his Firm's partnership or in B's shares in a Trust.

38. Each party annexed to the Agreement, lists of what is described as separate property. Separate property is defined in Recital 'D' as all their assets, savings and pension provisions acquired prior to entering into the marriage, as set out in the list annexed, any increase in the value of such property and any additional property, assets or savings acquired by either A or B at any time in the future by way of gift or inheritance.

39. The separate property of the Wife, included a furnished apartment and raw land in the Cayman Islands, her motor vehicle, commissions on final distribution in a Trust and certain shares, savings accounts and interest in family property in another country. The separate property of the Husband included five bank accounts, three investment

accounts, two motor vehicles, a house in George Town, an apartment in George Town, (the matrimonial home in Prospect), one parcel of raw land, two insurance policies, pension and partnership interest in his Firm which is described as his, "Ownership Percentage as a Partner /Owner of Firm."

40. Under paragraph 3, following agreement to each keep their separate property, paragraph 3(f) states that any debts incurred by each during the marriage shall be the separate financial obligation of each save for an exception which is stated in the following way:

> *"However A and B will both be responsible for all medical expenses, not covered by insurance, that are incurred during the marriage for children of the marriage and each other."*

41. Paragraph 4 is the critical provision for the purpose of this hearing. It is under the heading Joint Property and states:

> *"In the event of a dissolution of (or) annulment of the marriage any assets (including income and bonuses), savings or property acquired by either A or B during the marriage, whether held jointly or severally shall be distributed between A and B in equal shares, unless they have expressly declared that the beneficial interests in any such asset shall be held otherwise than in equal shares, in which case that declaration shall be binding upon them."*

42. By paragraph 5, in the event of divorce, nullity or judicial separation, the equity in any family home acquired after the marriage (the family home) shall be divided equally after either sale to one or other party or sale on the open market provided that in the event of children, the property is not to be sold until the youngest child attains 18 years of age so as to ensure that the child/children remain in the home. A and B are to contribute to the family home in equal proportions or in such proportions to their financial capabilities towards the expenses including mortgage, insurance or maintenance.

43. Paragraph 6 is entitled "provision on divorce, annulment or judicial separation". It begins with the introductory words that, A and B agree that in the event that their marriage is terminated by decree of divorce or annulment, or in the event of a decree of judicial separation in the first 7 years of the marriage, their financial claims will be defined and limited as follows.

44. There then follow eight sub-paragraphs which are entitled, separate property, family home, joint assets, chattels/personal possessions and contents, child support, pension provision, debts and consent order. These provide, *inter alia*, for separate property to remain free of claim by the other, for the family home to be dealt with in accordance with paragraph 5, for contents and for personal possessions in the family home to be divided equally by agreement except for items of sentimental value. Of significance, under the heading joint assets it states:

> "*(c) Any other assets, property, savings or investments shall be dealt with in accordance with paragraph 4 above. Any bank accounts or savings accounts or other investments will be closed and the balance in such accounts will be divided equally between them, or in such other proportion as they may have otherwise agreed in writing. In the event that any such accounts are overdrawn, any such liability will be discharged in equal shares.*"

45. Under the heading child support paragraph 6(e) states:

> "*(e) A agrees that he will, make suitable income provision for any children of the marriage by way of periodical payments to B for the benefit of the children, the amount of such periodical payments being fixed by agreement between the parties, or in the absence of agreement, as ordered by the Court. Such periodical payments shall be made monthly in advance by standing order from A to B on the 1^{st} day of each month until the children of the family respectively cease full time tertiary education. Suitable income provision will include any medical insurance costs, medical expenses, all educational and related costs, extra-curricular expenses and domestic assistance expenses. Insofar as the education of the child/children of the marriage, A and B agrees that such child shall attend a boarding school for their secondary education and such expenses shall be bourne (sic) by A.*"

46. Pension Provision is covered by paragraph 6(f) which provides that the parties agree that neither will pursue a claim on the other's pension provision either by way of a pension sharing order or pension attachment order or by way of set off.

47. Under paragraph 6(g), Debts, it is agreed as follows:

> "*A and B will remain solely responsible for debts in their sole name at the Date of Separation without any claim from or upon the other save for debts incurred due to medical expenses of either A or B or any child of the marriage.*"

48. Finally, of import, is paragraph 10 which deals with the duration of the Agreement. This provides that the terms of this Agreement shall be reviewed and varied unless both parties agree not to vary with the benefit of independent legal advice when there is the birth or adoption of a child of the marriage, seven years have elapsed from the date of the marriage or either party is unemployed or unable to work for a period in excess of 12 months.

49. In summary the Agreement:

i) excludes the matrimonial home from property division as it was not acquired after the marriage and was listed as separate property;

ii) excludes pension sharing;

iii) excludes from property sharing any property acquired during the period of pre-marital cohabitation;

iv) excludes any claim for maintenance by the wife;

v) provides for the husband to make suitable income provision for a child of the marriage until such child completes tertiary education;

vi) uses as its date reference point, the date of judicial separation or other Court pronouncement rather than the breakdown of the marriage or separation of the parties;

vii) purports to define the period for sharing property which period may or not be in line with the usual guidelines for the sharing of matrimonial property; and

viii) was to be revisited by the parties on the birth of a child of the marriage.

The Preparation of the Pre -Nuptial Agreement

50. The parties provide evidence as to the circumstances surrounding the preparation of the Agreement. Neither party challenges its validity. The husband's Affidavit evidence is that they were slightly older than most couples, and because they both had pre-acquired assets, they made the informed and pragmatic decision to enter into an Agreement. He took legal advice and paid for the wife to have independent legal advice.

51. He agrees that its focus was the support of prospective children of the marriage and acknowledges that he agreed to make suitable provision for such children. However he states that by "suitable" in paragraph 6 of the Agreement, he intended to mean appropriate and fair taking into account all the circumstances.

52. The drafting of the Agreement took place over several weeks and both had ample opportunity to consider the provisions and request amendments.

53. In his Affidavit filed 23rd May 2019, the husband says that their joint intention in entering into the Agreement was twofold:

a. Those assets acquired before the marriage would be ring-fenced and would remain separate property;

b. Assets acquired during marriage, up to the point of an irretrievable breakdown would be distributed equally.

54. With reference to clause 4 of the Agreement and the words *"during the marriage"*, he says that his intention and understanding, and he believes, that this was their joint intention and understanding that this would mean from the date of the marriage up to the point of permanent breakdown of the marriage or separation. It was not intended he says that all the assets acquired up to the court date would be considered joint assets. He says that it is inconceivable that he would have agreed otherwise, when the whole point was to protect himself as the economically advantaged party.

55. In her Affidavit filed dated 7th May 2019 the wife stated that when she received the first draft of the Agreement, she felt that this was unfair as it did not provide for any accommodation or compensation for her considering that she would have to give up her career to raise children. She says that following many revised drafts, they were still unable to agree its terms, so on the eve of the initial wedding date in January 2012, it was postponed. She said that following a trip overseas they returned and agreed the terms of the Agreement, after nearly a dozen revised drafts, substantial discussion and the advice of Counsel. They signed the Agreement on the day of the marriage. She asserts that the husband is commercially sophisticated, that this was a commercial agreement which was drafted by his own lawyer from whom he took advice. She states:

> "24. *This agreement reflected our discussions to the effect that the Respondent would agree to take primary financial responsibility for any children. This was solely based on his financial capability as I did not anticipate that I would be able to support three additional children, given the impact that it would have upon my career development. I did not anticipate that I would be in a position to have a significant income, in light of the sacrifices required in caring for one or more young children. I have no doubt that the Respondent intended this outcome given his agreement of the final re-nuptial agreement.*
>
> *25. During the course of discussions in respect to the terms of the prenuptial agreement, the only term not touched or revised, or amended in any way, was the definition of "the Date of Separation", a term used only on two occasions. That is, it was not only assumed and agreed between the Respondent and me, it was accepted that the pooling of assets would continue throughout the duration of the marriage stopping only for one of three events:*
>
> *a. the actual dissolution of marriage;*
> *b. an annulment; or*
> *c. the grant of judicial separation.*
>
> *26. There was never any discussion, nor agreement that the pooling of assets would be stopped upon the filing of a petition, and this language and wording is not used and was never used or contemplated in all of the revisions of the prenuptial agreement.*"

56. Exhibited to her Affidavit are drafts of the Agreement and email correspondence with the husband on the Agreement for the dates, 12th December 2011, 29th December 2011, 30th January 2012, and 8th February 2012 with a final draft on 15th February 2012. In the final draft, the husband inserted the words "income and bonuses" into paragraph 4.

57. In oral evidence before me, both parties gave evidence of their separate understandings of the Agreement. The wife said that neither of them had disagreed with paragraph 4 of the Agreement following the drafting of it by her husband's Attorney. The husband acknowledged that there had been no change to the wording in that paragraph, except for the insertion which he had made.

The Issues

58. Against this background the agreed issues for the Court's determination are as follows:

i. Taking into Account the Agreement, what is a fair, financial provision for the wife, whether on a sharing, needs or compensation basis?

ii. What is the proper construction of the Agreement? The wife contends that the words, "during the marriage" in paragraph 4 of the Agreement should be construed to mean until such time as a court orders the dissolution or annulment of the marriage. The husband contends that those words should be construed to mean until the date of irretrievable breakdown of the marriage. The construction given to these words would affect the date when the accumulation of joint assets ceased, being either March 2014 when the parties separated or as at 2019 when the Court orders the dissolution of the marriage.

iii. In the event that the court finds for the wife in respect of (ii), whether such construction would be fair?

iv. In the event that the court finds for the wife in respect of (ii), whether on a proper construction of the Agreement the husband's capital account/loan with his Firm should be considered to be Joint Property which falls to be distributed pursuant to paragraph 4 of the Agreement or whether it is Separate Property as defined at Recital D (a) (b) and (c) of the Agreement and/or at Appendix 1 of the Agreement.

v. If the conclusion in respect of (iv) is in favour of the wife, whether such a construction would be fair.

vi. Whether, in the circumstances of the present case, financial provision ought to be determined on a 'clean break' basis.

vii. What are the required special treatment costs for the child of the marriage, J., and what is the appropriate apportionment of these costs between the parties.

viii. What other ongoing costs arise in relation to J, in particular housing, nanny, utilities and associated costs, and what is the appropriate apportionment of these costs between the parties.

The Positions of the Parties as to Financial Matters

59. The husband filed Affidavits dated 22nd March 2019 and 23rd May 2019. It is his Affidavit evidence that during the marriage, they kept their financial matters separate and had no joint assets or accounts in joint names. As at November 2018, he held assets of a value of CI$2,626,495.00 and liabilities of CI$415,872.00 giving a balance of CI $2,210,623.00.[7] His annual salary for 2018 was $369,900.00 and on top of this he received quarterly distributions of CI $33,125.00 per month. His total remuneration for 2018 was CI $754,400.00. His anticipated monthly remuneration from his Firm in 2019 is CI $62,866 per month or $754,400 per annum.[8] To be added to this is some CI $40,320.00 in rental income to an approximate total of $794,720.00.

60. He does not accept that the wife has net assets of only CI$ 287,870.00 and an income of CI $78,556.00 per annum and points to a second company of which the wife is a shareholder which made a profit of CI$26, 326.31 in 2018 leading to total earnings of CI$94,883.00. Additionally he points to what he says are unexplained monthly

[7] Affidavit of 22nd March 2019, paragraph 22 – page 307 Trial bundle
[8] Affidavit of 22nd March 2019, paragraph 22 – page 307 Trial bundle

deposits into the wife's bank accounts of $39,500.00 which may be indicative of an additional source of income and thus that her income level is actually CI $134,383.00 He also notes that her monthly credit card spending which is at the level of CI$10,000.00 per month appears to indicate a larger income than has been declared.

61. For the period which he says is covered by the Agreement, that is the period through to March 2014, he calculates his assets acquired from the 17th February 2012 to 29th March 2014 as follows:

			CI
	SB account	0 balance as at Feb. 2012	62,635.16
	TD Ameritrade	Starting balance increased	258.76
	CNC Shares	Increase from 3007 by 5987 shares at a current value of	$30,683
	Chamber Pension Plan	Increase from starting balance	7,389.11
	Retained income at Firm	Calculated by decrease in bank balance level	24,896.13
	Loan made to CX in return for 20% share		26,012.00
	Loan repayments		24,525.38
			215 225,33

62. He calculates the Wife's Assets over the same period to be:-

Bank Account balances	Increase over starting balances	550.11
Mortgage principal repayments		27,116.00
Loan repayments		5, 486.99
Pension	Increase in value	5,769.11
		$38, 022.00

63. By the husband's calculations the total sum acquired by the wife during the relevant period was CI$38,022.00 and by himself to be CI$215,225.33 respectively to be divided equally giving as the sum she should receive to be $126,624.00. However, in the course of an exchange of offers, the husband in his most recent open offer of 23rd May 2019, has offered the wife the lump sum of $225,000.00 payable in four tranches.

64. The husband complains that despite the wife earning an annual income of over $100,000.00 per year, he has been meeting more than half of her monthly rental costs and all her utility costs in circumstances where she had her adult daughter living there as well as an employee living rent free for some three years. He does not consider that it is fair that he should be subsidizing the ordinary living expenses of the wife and her daughter and employee to such a large extent and for such a long a period and asks the court to take this into account. He estimates that he has been paying 55% of her rental costs and 100% of utility costs and does not consider that he should be paying more than 50% of each. He notes that up to September 2017, her rent was only $4,000.00 rather than the $4,400.00 anticipated and he was therefore paying more than he should have been paying as per the Court order. The wife's evidence was that she used any additional funds for the benefit of J.

65. His primary complaint is that it is not fair that the wife makes no contribution at all. In relation to maintenance payments he calculates that given that he earns 5 times more than the wife, the wife should have been paying 20% of the maintenance costs over the period since the first interim order was made in August 2014.

66. He notes that he meets 100% of J's special needs costs and suggests that the wife should have been meeting some of these costs to the same 20% ratio but would agree for this to be reduced to 10 % on the basis that J. may not have undertaken some classes if it had been known that he was not going to pay for them.

67. In summary, for all the foregoing reasons, he asks the Court to take into account on this hearing that there has been an overpayment of :

	Monthly	
Rent	$200.00	
Utility	$595.00	
Maintenance payments	$796.40	
Special needs costs	$500.00	
Total		$115,027.00

Housing Proposal

68. After the separation, the wife moved into a 3-bedroom property in South Sound and then to another property along the seven-mile beach corridor. She has moved for a third time since the separation. The husband puts forward two options with respect to J's long term accommodation requirements. These are:

> *"By the Petitioner continuing to rent a property with both parties contributing to that portion of the rental cost attributable to J in accordance with their means; or 2) by the purchase of an appropriate and suitable property which would be placed into a trust for the benefit of J. such property to be purchased in accordance with the parties respective means making allowance for the benefit of living in the property for the Petitioner and as set out below."*

69. He says that the alternative proposal for the purchase of trust property would be an excellent way to ensure that irrespective of what happens to him, J's long term financial future would be secured. Such property he says should be broadly equal to a rental payment of $4,400.00 per month i.e. a property valued in the range of $700,000.00 to $800,000.00. He proposes that the wife would meet 50% of the cost of this and he would meet a portion of the other 50% in line with the percentages of their respective incomes which would be either 42.5% or 44.45 % depending on the Court's findings as to the level of income of the wife.

70. He asked that the treatment costs for J (approximately $5,000.00 per month) and the maintenance payments which include $2,420.00 for rent and $1,000 for utility bills for J. be met proportionately according to income.

71. In his oral evidence, it is fair to say that the husband presented a somewhat different picture from that in his Affidavits. He made a number of concessions as to his willingness to meet all the costs of J's therapy needs and for a more experienced nanny for him, and to fund a substantial part of a deposit on the purchase of a home - provided it was held on trust for J. He came across as having a deep and abiding love for his son and to be willing to go the extra mile to provide for his needs and assist in his development. He spoke of J. as bearing his own father's name and his belief that J. should be given every opportunity in life. He said that everything that J. needs he is "footing the bill and is all in."

72. According to the wife in her Affidavit, her income level is between $60,000 and $100,000 per annum. She has used her entire life savings during the last five years for legal fees, the startup of her Firm and to cover the shortfall in the interim orders for maintenance. At the time of the marriage she had two properties, one a home in George Town from which she had been earning rental income, and the other raw land. She has since sold both of these.

73. She complained that the husband has been underpaying towards maintenance. It is her position that by the Agreement save for housing costs which are based proportionally on income, the husband is required to pay the entirety of the cost of medical, educational and related costs for the child. On this basis, she says that there had been a total underpayment since Sept. 2018, a period of 9 months of CI $1102.50. She says that he has underpaid for housing since 2014 to the extent of $86,685.00 and underpaid

for utilities based on his earnings. She asserts that the interim maintenance order had been deficient giving rise to a total underpayment by the husband of $108,434.25 and that the current order is deficient by $3,600.00 per month. In part she bases this underpayment calculation on the actual costs of utilities and other items as well as the annual earnings of the husband which she referred to as being in the region of a million dollars per annum. She acknowledged in cross examination that this was not the level of his earnings so that where she had used payment ratios in her calculations of 90/10, this was not accurate.

74. In her oral evidence she said that she is of the view that it is fair for the husband to meet 100% of the maintenance costs, given the terms of the Agreement.

THE STATUTORY PROVISIONS

75. The Court's powers in respect of these ancillary proceedings are contained in sections 19 and 21 of the ***Matrimonial Causes Law (2005 Revision).***

76. Section 19 provides that in dealing with all ancillary matters arising under this Law, the Court shall have regard first of all to the best interests of any children of a marriage and thereafter to the responsibilities, needs, financial and other resources, actual and potential earning power and the deserts of the parties.

77. Section 21 provides that at the time of pronouncing a decree under this Law, the Court shall, as appropriate, make orders for:

"*(a) the custody, care and control of the children of the marriage;*
(b) the disposition of matrimonial property, including the matrimonial home;
(c) varying any settlement of the property of the spouses made in consideration of the marriage, whether such settlement was made before or upon the treaty of the said marriage.
(d) varying any other settlement of matrimonial property;

> *(e)* *making financial provision from the property of either spouse for the children of the marriage and for the other spouse;*
>
> *(f)* *providing for periodic payments to be made by either spouse for the benefit of the children of the marriage and for the other spouse; and*
>
> *(g)* *costs."*

78. There is guidance from the Court of Appeal in the case of ***McTaggart v. McTaggart*** [9] as to the interrelationship between these two provisions of the Law and their application. This includes that a court will need to consider whether having regard to the s.19 factors, an order under s.21(b) of the Law for the disposition of matrimonial property will make appropriate provision for the relevant party with regard to their needs and the level of compensation and sharing. If disposition of matrimonial property will not allow for the appropriate provision to be made, then the court should go on to consider whether to make an order under s.21(e) that financial provision be made from the property of either spouse. A court should not make an order for periodic payments under s.21(f) without good reason. Such good reason would arise where the combination of orders under s.21 (b) and (e) are insufficient to satisfy the three strands of need, compensation and sharing.[10]

79. Additionally the appellate Court made it clear that although the s.19 factors are less extensive than those in England and Wales, in the ***Matrimonial Cause Act 1973*** as amended by the ***Matrimonial and Family Proceedings Act 1984***, the approach in the Cayman Islands should be the same as in that jurisdiction.[11] A court in exercising its

[9] McTaggart v. McTaggart [2011] (2) CILR 390
[10] McTaggart v. McTaggart [2011] (2) CILR 390 - Paragraphs 42 and 43
[11] McTaggart v. McTaggart [2011] (2) CILR 390 - Paragraph 39

powers under the statutory provisions should therefore consider all the circumstances of a case to include the following:

> "(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;*
>
> (h) *in the case of proceedings for divorce . . . the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose thechance of acquiring.*"[12]

APPLICABLE PRINCIPLES

80. In considering the division of matrimonial property pursuant to s.21 of the ***Matrimonial Causes Law (2005 Revision)*** a court should first determine what constitutes matrimonial property.[13] The leading cases from England and Wales which have been cited with approval in this jurisdiction are the cases of ***White and White*** [14] and ***Miller v. Miller, McFarlane v. McFarlane.***[15] In ***White and White,*** Lord Nicholls of Birkenhead in considering inherited money or property and property owned by one spouse before the marriage said this:

> *"In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property. Plainly, when*

[12] Statutory Factors in England and Wales
[13] See Wight v. Wight [2010] CILR 60 and McTaggart v. McTaggart [2011] (2) CILR 390 – paragraph 34, B-H v. H. [2009] CILR 185
[14] [2000] UKHL J1026-3
[15] [2006] UKHL 24

present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered."

81. The guidance from the case of ***Miller v. Miller, McFarlane v. McFarlane*** includes that in considering division of financial property, there is no place for discrimination between a husband and wife and their respective roles. The homemaker role should be given equal weight. A court should consider the three strands of need, compensation and sharing which should guide the court in arriving at a fair division of property on the dissolution of a marriage.

82. It is noted also from the case that the third strand of sharing applies to a short marriage just as it does to a long marriage although for the former, this may have an impact on the quantum to be shared.

83. Lord Nicholls in his judgment in that case stated that fairness requires that when a partnership ends each partner is entitled to an equal share of the assets of the partnership unless there is good reason to depart from equality. The Learned Judge emphasized that the yardstick of equality is not a rule but an aid.[16]

84. The Learned Judge further stated that there is a real difference between matrimonial property and non–matrimonial property and pointed to the difference being the source of the acquisition. Property which is acquired during the marriage otherwise than by inheritance or gift which would usually be matrimonial property as distinct from other

[16] Miller v. Miller, McFarlane v. McFarlane [2006] UKHL 24 - Paragraphs 16 and 17

property. Matrimonial property is the "*financial product of the parties' common endeavor.*" As to the matrimonial home, the Learned Judge said this:

> "*The parties' matrimonial home even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.*"

85. The Learned Judge went on to say that the position is different with regard to non-matrimonial property. This is property which the parties bring with them into the marriage or acquire by inheritance or gift during the marriage. With respect to such property, the duration of the marriage may well be relevant although this may take second place to the needs of the parties.

86. In discussing the import of the duration of the marriage, Baroness Hale of Richmond in her judgment in the said case stated that it is recognized that where the starting premise is separate property, there is still some scope for one party to acquire and retain separate property which is not to be shared equally between them. The Learned Judge said that in such cases, the nature and source of the property and the way in which the couple have run their lives may be considered in deciding how property should be shared.[17].

87. In ***McTaggart v. McTaggart***[18], the Cayman Islands Court of Appeal provided guidance as to the way in which a Court should approach the issue of what is matrimonial property under s.21 of the Law:

> "*It can be seen that the section gives recognition to the concept of "matrimonial property." That concept is not defined in the Matrimonial Causes Law, but it is generally understood in the sense described by Lord Nicholls of Birkenhead in*

[17] Miller v. Miller, McFarlane v. McFarlane [2006] UKHL 24 - paragraph 153
[18] [2011] 2 CILR 377

Miller v. Miller (5), that is to say, it comprises "property acquired during the marriage otherwise than by inheritance or gift" ([2006] 2 A.C. 618, at para. 22). Its distinguishing feature is that it is "the financial product of the parties' common endeavour"[19]

88. The Court further stated:-

"It is necessary therefore to identify those assets which are owned or under the control of one or other (or both) of the parties as at the date when the order is made and then to identify which of those available assets are matrimonial property and so capable of being the subject of an order under s.21(b).[20]

"There may be cases (of which, as I shall explain, the present provides an example in relation to the husband's potential retirement benefits) where an asset which did exist at the date of final separation does not exist—or does not exist in the same form—at the date of the hearing. In such cases it will be necessary to consider whether the former asset can be traced into an after-acquired asset which can itself be treated (in whole or in part) as matrimonial property; and, if not, whether some other order (say, under s.21(e)) should be made to reflect the fact that the former asset has ceased to exist.

The power conferred under s.21(b) of the Law is a power "to make an order for the disposition of matrimonial property." There is no requirement under the Law that the disposition should give effect to an equal division of the matrimonial property as between the parties; and there is no invariable rule that the power should be exercised in a manner which achieves that effect. The requirement—imposed by s.19 of the Law—is that, in exercising the power, the court shall have regard to "the responsibilities, needs, financial and other resources, actual or potential earning power and the deserts of the parties." It is plainly open to the court—if, having regard to those factors, it thinks it appropriate to do so—to make an order which effects an unequal division of the matrimonial property as between the parties. The order made in Wight v. Wight (11)—and upheld in this court—provides an example of such a case. In Miller (5) ([2006] 2 A.C. 618 at para. 16), Lord Nicholls observed that "the yardstick of equality is to be applied as an aid, not a rule." But, as Lord Nicholls had pointed out in White v. White (10) ([2001] 1 A.C. 596, at 605)—in a passage expressly adopted by Lord Cooke of Thorndon (ibid., at 615)—"as a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so."

89. In ***Valerie Gordon v. Jefferson Watler***[21], the Appellate Court stated:

"The correct approach, as I have indicated, was to ask what provision should be made for the wife in order to recognise the three strands of need, compensation and sharing. If a division of the matrimonial property could meet those needs, then it

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[19] McTaggart v. McTaggart, Supra - Page 376

[20] McTaggart v. McTaggart, Supra - Page 390

[21] CICA Civil 13/2014- 22nd August 2014

> *was unnecessary to go further. But if and so far as a division of the matrimonial property could not meet those needs, then it would be necessary to consider whether to make an order under section 21 (e) in respect of the husband's other assets.*"

90. In the said case of ***McTaggart v. McTaggart***[22], the Appellate court also provided guidance as to how a court should approach such applications where a primary issue was the date of valuation of assets. The wife sought a share of property acquired after the parties had separated and argued that the after acquired assets were the product of their joint contributions and should be treated in the same way as matrimonial property The Court held that matrimonial property was to be identified as at the date of separation, but should be assessed on the basis of the values as at the date of allocation. The husband's after acquired assets did not constitute matrimonial property and were not subject to the general principle of equal sharing.

91. That case did not involve a pre-nuptial agreement and the Court stated: -

> *"32 Nor has there been any suggestion, in the present case, that the parties entered into any nuptial or pre-nuptial settlement which should be varied under the power conferred by s.21(c); or that there is any other settlement of matrimonial property in relation to which the power conferred by s.21(d) could be exercised. For the purposes of this appeal, the court can proceed on the basis that the powers which the judge could exercise in this case were those conferred by s.21(b), (e) and (f). In the exercise of those powers he could make an order for the disposition of matrimonial property; he could make an order for financial provision out of the property of one party (on the facts in this case, out of the property of the husband) for the benefit of the other (the wife); and he could make an order that periodic payments be made by one party (again, on the facts in this case, the husband) for the benefit of the other."*

92. With respect to the general approach, the Court stated:

> *"It is not, I think, necessary to look further than the decision of the House of Lords in Miller (5)—and, in particular, the speeches of Lord Nicholls and Baroness Hale—in order to identify the principles. Leaving aside, in this context, the best interests of the children (which, as I have said, are paramount),*

[22] 2011 (2) CILR 395

there are three strands: need, compensation and sharing ([2006] 2 A.C. 618, at paras. 10–16 (per Lord Nicholls); and at paras. 138–143 (per Baroness Hale)). The ultimate objective, as Baroness Hale explained (ibid., at para. 144) is to give each party an equal start on the road to independent living. She said this:

> *"Thus far, in common with my noble and learned friend, Lord Nicholls of Birkenhead, I have identified three principles which might guide the court in making an award: need (generously interpreted), compensation, and sharing. I agree that there cannot be a hard and fast rule about whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance. Much will depend upon how far future income is to be shared as well as current assets. In general, it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal start on the road to independent living."*

41 *Two of those three strands—need and sharing—require little, if any, elaboration. But it is, I think, necessary to say something of the third: compensation. Lord Nicholls explained the concept in these terms (ibid., at paras. 13–15):*

"Another strand, recognised more explicitly now than formerly, is compensation. This is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband's enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as home-maker and child-carer.

When this is so, fairness requires that this feature should be taken into account by the court when exercising its statutory powers. The Court of Appeal decision in SRJ v. DWJ (Financial Provision) [1999] 2 FLR 176, 182, is an example where this was recognised expressly.

Compensation and financial needs often overlap in practice, so double-counting has to be avoided. But they are distinct concepts, and they are far from coterminous. A claimant wife may be able to earn her own living but she may still be entitled to a measure of compensation."

Baroness Hale said this (ibid., at para. 140):

> *"A second rationale, which is closely related to need, is compensation for relationship-generated disadvantage. Indeed, some consider that provision for need is compensation for relationship-generated disadvantage. But the economic disadvantage generated by the relationship may go beyond need,*

however generously interpreted. The best example is a wife, like Mrs McFarlane, who has given up what would very probably have been a lucrative and successful career. If the other party, who has been the beneficiary of the choices made during the marriage, is a high earner with a substantial surplus over what is required to meet both parties' needs, then a premium above needs can reflect that relationship-generated disadvantage."

42 ...

43 *It seems to me reasonably clear (and I would so hold) that, if satisfied that an order under s.21(b) of the Law (or the combination of orders under s.21(b) and (e)) would make appropriate provision for the relevant party in respect of the three strands (need, compensation and sharing), the court should not (without good reason) make an order for periodic payments under s.21(f). To make an order for periodic payments—in circumstances where such an order is unnecessary because appropriate provision can be made by the disposition of matrimonial property (under s.21(b)) or by a capital adjustment from the separate property of the other party (under s.21(e))—would be inconsistent with the principle of the "clean break" to which Lord Scarman referred in Minton v. Minton (6) ([1979] A.C. at 608):*

> *"There are two principles which inform the modern legislation. One is the public interest that spouses, to the extent that their means permit, should provide for themselves and their children. But the other—of equal importance—is the principle of 'the clean break.' The law now encourages spouses to avoid bitterness after family break-down and to settle their money and property problems. An object of the modern law is to encourage each to put the past behind them and to begin a new life which is not over-shadowed by the relationship which has broken down. It would be inconsistent with this principle if the court could not make, as between the spouses, a genuinely final order..."*

93. In ***Wight v. Wight***[23], the Appellate court held that the earnings of the husband after separation did not constitute matrimonial property the court referred to ***Rossi v Rossi*** which drew a distinction between property earned after separation by a party's separate endeavor, and a matrimonial asset which has simply increased in value after separation.

[23] 2010 (1) CILR 69

"*19* *In Rossi v. Rossi (8), Nicholas Mostyn, Q.C., sitting as a Deputy Judge of the High Court, stated ([2006] 3 F.C.R. 271, at paras. 13–24.4):*

"*[13]* *Thus it has always been the case that, where a party has by virtue of his own industry created further assets after separation, such sole unmatched contribution should be recognised and reflected by the court in its award. On the other hand, if a matrimonial asset has simply increased in value during the period of separation as a result of passive inflationary economic growth (such as the increase in the value of a house) then it would seem obvious that such growth is an accrual to the original matrimonial property.*

. . .

[24.3] *Assets acquired or created by one party after (or during a period of) separation may qualify as non-matrimonial property if it can be said that the property in question was acquired or created by a party by virtue of his personal industry and not by use (other than incidental use) of an asset which has been created during the marriage and in respect of which the other party can validly assert an unascertained share. Obviously, passive economic growth on matrimonial property that arises after separation will not qualify as non-matrimonial property.*

[24.4] *If the post-separation asset is a bonus or other earned income then it is obvious that if the payment relates to a period when the parties were cohabiting then the earner cannot claim it to be non-matrimonial. Even if the payment relates to a period immediately following separation I would myself say that it is too close to the marriage to justify categorisation as non-matrimonial. Moreover, I entirely agree with Coleridge, J. when he points out that during the period of separation the domestic party carries on making her non-financial contribution but cannot attribute a value thereto which justifies adjustment in her favour. Although there is an element of arbitrariness here I myself would not allow a post-separation bonus to be classed as non-matrimonial unless it related to a period which commenced at least 12 months after the separation.*"

Applicable Principles - Pre- nuptial agreements

94. An important issue in this case is the approach to be taken to the pre-nuptial agreement entered into by the parties. The leading case in England and Wales is ***Granatino v. Radmacher***[24] The parties entered into a pre-nuptial agreement by which each renounced any interest in the property of the other. In particular the husband renounced any interest in the property of his wife who was from a very wealthy family. On an ancillary relief application by the husband, the Supreme Court determined that in the circumstances of the case, the agreement should have been given decisive weight by the judge at first instance and that the only provision to be made for him was in his role as a father to the couple's two children. The Supreme Court stated that when considering a grant for ancillary relief, a court is not obliged to give effect to nuptial agreements. This is because it is the court which is the arbiter of financial arrangements on conclusion of a marriage. The Supreme Court determined that weight is to be given to such agreements in circumstances where it was fair to do so. Significantly the Court held that even where the result was different from that which the court would otherwise have ordered, the Court would still hold the parties to the agreement. Before giving such agreements full weight a court should consider certain safeguards to include inquiry into whether each party:-

i) had entered into the agreement of their free will;

ii) had entered into the agreement without undue influence of pressure;

iii) had all the information material to his or her decision;

iv) intended that it would govern their financial affairs upon marriage coming to an end; and

[24] [2010] UKSC 42.

v) fully understood and appreciated the implications of the agreement.

This inquiry must be conducted in an effort to determine whether there are vitiating factors such as duress, fraud or misrepresentation, undue pressure, or unworthy conduct such as exploitation of a dominant position which would serve to negate or reduce the effect of an agreement.

95. Where the questions were answered to the satisfaction of the court and none of the vitiating factors are present it should give effect to the agreement unless it would not be fair to do so. The Supreme Court explained that the underlying rationale for giving effect to such agreements is that the court should accord respect to the decision of a married couple as to how they would wish to settle their financial affairs. The Court noted that this is particularly true where the agreement speaks to existing circumstances rather than the contingencies of an uncertain future. With respect to the latter, changing circumstances may well make the agreement unfair. The Court also identified one major caveat to the operation of such agreements. It is that they cannot be allowed to affect negatively the reasonable requirements of any minor children.

96. Additionally the Court held that while there was nothing inherently unfair about such agreements and about provision being made for the disposition of non-matrimonial property, they could be rendered unfair by the existing circumstances and unforeseen contingencies. It would be unfair if the end result was that one party was left in a situation of real need as compared to the other party or if compensation for a party was not addressed by the agreement.

97. Under the latter heading of needs and compensation, the Court said this:

"81. *Of the three strands identified in White v White and Miller v Miller, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement. Equally if the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned.*

82. *Where, however, these considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from their agreement as to the regulation of their financial affairs in the circumstances that have come to pass. Thus it is in relation to the third strand, sharing, that the court will be most likely to make an order in the terms of the nuptial agreement in place of the order that it would otherwise have made."*

98. In that case, against the factual matrix that the husband was able to earn his own living and that the generous relief given to cater for the needs of the two children would also provide in large measure for him, the court did not consider that the needs of the husband was a factor that would render it unfair to hold him to the terms of the agreement. As to sharing it was held that it would be fair to hold him to the terms of the agreement.

99. In ***Kremen v. Agrest***[25] Moystyn J. summarized the applicable principles in the following way:

"In Granatino v Radmacher [2011] AC 534 the Supreme Court gave definitive guidance as to the treatment of a nuptial contract in proceedings for ancillary relief following a domestic divorce. The guidance contained in the judgment of the majority delivered by Lord Phillips of Worth Matravers PSC can be summarised as follows:

i) The court should give effect to a nuptial agreement which is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement (para 75).

[25] (No. 1)

ii) *In determining whether an agreement has been "freely entered into by each party with a full appreciation of its implications" there is no absolute black and white rule for full disclosure or independent legal advice. Rather, the question is whether in the individual case there is a material lack of disclosure, information or advice. Each party must have all the information that is material to his or her decision that the agreement should govern the financial consequences of the marriage coming to an end. An absolute rule would only be necessary if the agreement were to be contractually binding, but this is not the case as there is a safety-net of (un)fairness (para 69).*

iii) *The presence of any of the standard vitiating factors of duress, fraud or misrepresentation will negate any effect the agreement might otherwise have (para 71). Further, unconscionable conduct such as undue pressure (falling short of duress) will likely eliminate the weight to be attached to the agreement (ibid). Other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, will reduce or eliminate the weight to be attached to the agreement (ibid). The court may take into account a party's emotional state, and what pressures he or she was under to agree, as well as their age and maturity, and whether either or both had been married or been in long-term relationships before (para 72). The court may take into account foreign elements to determine whether or not the parties intended their agreement to be effective (para 74).*

iv) *iv) In determining whether "in the circumstances prevailing it would not be fair to hold the parties to their agreement":*

a. *The agreement cannot be allowed to prejudice the reasonable requirements of any children of the family (para 77).*
b. *Respect should be accorded to the decision of a married couple as to the manner in which their financial affairs should be regulated particularly where the agreement addresses existing circumstances and not merely the contingencies of an uncertain future (para 78). This is likely to be so where the agreement seeks to protect pre-marital property (para 79). By contrast it is less likely to be so where the agreement leaves in the hands of one spouse rather than the other the most part of a fortune which each spouse has played an equal role in their different ways in creating (para 80). If the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned (para 81).*
c. *Is likely to be unfair to hold the parties to an agreement which leaves one spouse in a predicament of real need, while the other enjoys a sufficiency or more (para 81). However, need may be interpreted as being that minimum amount required to keep a spouse from destitution. For example, if the claimant spouse had been incapacitated in the course of the marriage, so that he or she was incapable of earning a living, this might well justify, in the interests of fairness, not holding him or her to the full rigours of the ante-nuptial agreement (para 119).*

100. In light of a number of factual findings which included that it would be grossly unfair to hold the wife to an agreement which deprived her of her fair share of a fortune to which she had, in her own way, equally contributed. Further that the agreement did not meet her needs and grossly prejudiced the needs of the children as well as that it was the product of pressure from the husband, the Learned Judge determined to accord the agreement no weight whatsoever.

101. In ***KA v. MA***[26], Roberts J. considered that the fact of the existence of a pre–nuptial agreement was only one element in the over-arching search for a fair outcome in that case. The Learned Judge referred with approval to the summary of the Holman J. in ***Luckwell v Limata***[27] as to how such agreement should be approached:-

> "67. *In Luckwell v Limata [2014] EWHC 502 (Fam) 130 to 131, [2014] 2 FLR 168, at 198 to 199, para 130, Holman summarised the law in this way:*
>
> *"(1) It is the court, and not the parties, that decides the ultimate question of what provision is to be made;*
>
> *(2) The over-arching criterion remains the search for 'fairness', in accordance with s 25 of the MCA 1973 as explained by the House of Lords in Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, [2006] 2 AC 618, [2006] 2 WLR 1283, [2006] 1 FLR 1186 (ie needs, sharing and compensation). But an agreement is capable of altering what is fair, including in relation to 'need';*
>
> *(3) An agreement (assuming it is not 'impugned' for procedural unfairness, such as duress) should be given weight in that process, although that weight may be anything from slight to decisive in an appropriate case;*
>
> *(4) The weight to be given to an agreement may be enhanced or reduced by a variety of factors;*
>
> *(5) Effect should be given to an agreement that is entered into freely with full appreciation of the implications unless in the circumstances prevailing it would not be fair to hold the parties to that agreement. That is, there is at least a burden on the [claimant] to show that the agreement should not prevail;*

[26] [2018] EWHC 499
[27] [2014] EWHC 502 (Fam) 130 to 131, [2014] 2 FLR 168, at 198 to 199,

(6) *Whether it will 'not be fair to hold the parties to the agreement' will necessarily depend on the facts, but some guidance can be given:*

(i) *A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children;*

(ii) *Respect for autonomy, including a decision as to the manner in which their financial affairs should be regulated, may be particularly relevant where the agreement addresses the existing circumstances and not merely the contingencies of an uncertain future;*

(iii) *There is nothing inherently unfair in an agreement making provision dealing with existing non-marital property including anticipated future receipts, and there may be good objective justifications for it, such as obligations towards family members;*

(iv) *The longer the marriage has lasted the more likely it is that events have rendered what might have seemed fair at the time of making the agreement unfair now, particularly if the position is not as envisaged;*

(v) *It is unlikely to be fair that one party is left 'in a predicament of real need' while the other has 'a sufficiency or more';*

(vi) *Where each party is able to meet his or her needs, fairness may well not require a departure from the agreement."*

68. *To this succinct summary, his Lordship added a further factor which, he said, needed no citation of authority:*

"[132] ... The court must be scrupulous to avoid gender discrimination or gender bias. Of course gender may, and often does, impact heavily on outcome. If in fact a wife, in her role as mother, is the primary carer for the children, then her need for secure and suitable accommodation may outweigh that of the husband. If a wife, due to her commitments to caring for the children, is less able to work than is the husband, then that is likely to impact upon her maintenance needs. So, too, if it is a fact of the case that a wife has lower earning capacity because of gender discrimination in the relevant employment markets….."

102. The Learned Judge concluded against the background of a finding that there had been no procedural unfairness and that the wife was fully advised and aware of the import

of the agreement, that nevertheless her needs and the needs of the child of the marriage M, meant that fairness required a departure from the agreement. The Learned Judge accepted that the agreement should be considered in its entirety, but was of the view, in the context of the weight to be attached to the agreement, that its principal force as a driver in the case lay in the fact that it captured the wife's agreement to, and acknowledgement of, the husband's clear intention that its fundamental utility lay in the protection so far as legally permissible of his pre-marital wealth. There was also the significant fact that the wife acknowledged the husband's wish to be reasonable in all the circumstances"[28].

103. The Learned Judge agreed with the observations of Mr. Nicholas Cusworth QC in the case of ***WW. v. HW***[29] sitting as a deputy High Court Judge that:

> *"Any award to meet need, even absent the agreement in this case, is being made from non-matrimonial assets; and here those assets were specifically protected by the agreement which H willingly entered into. There is consequently no obvious basis for any generosity in the interpretation of these needs." Para 98-100*

104. However more recent cases, have interpreted needs more generously. In ***Brack v. Brack***[30] Lady Justice King considered the effect of prenuptial agreements where there has been a finding that there were no vitiating features surrounding same. The Learned Judge stated:

> *"Suffice it to say that it is now common ground that in financial remedy proceedings, where a judge has found there to be no vitiating features in relation to a prenuptial agreement, he is entitled, when applying the section 25 factors in his search for a fair outcome, to take into account needs, compensation and sharing. In other words, the fact of a valid prenuptial agreement does not necessarily (but may) lead inexorably to a solely needs-based outcome.*

[28] Paragraph 72.

[29] see *WW v HW (Prenuptial Agreement: Needs: Conduct)* [2015] EWHC 1844 (Fam), [2016] 2 FLR299.

[30] [2018] EWHC, 1093 at paragraph 78

105. The Court concluded that even where there is a pre-nuptial agreement without vitiating factors, a court is obliged to consider the factors under Section 25 and this does not necessarily mean that the inevitable result is a needs based outcome. The Learned Judge stated:-

> "*101. In my judgment, the judge did fall into error in going so far as to conclude that the effect of Z v Z and Luckwell meant that the wife had inevitably "lost" her sharing claim by reason of the prenuptial agreement.*
>
> *102. It is undoubtedly the case that since the Supreme Court's decision in Radmacher, and up to and including Roberts J's judgment in KA v MA in March of this year (2018), the courts at first instance have resolved cases where there is a valid prenuptial agreement which does not meet the needs of the wife by interfering with the agreement only to the extent necessary to ensure that those needs are satisfied. In doing so, the courts have honoured the sentiment in Radmacher [75] by respecting the autonomy of the parties and by giving effect to the nuptial agreement which has been freely entered into to the extent that it is fair to do so.*
>
> *103. In my judgment, in the ordinary course of events, where there is a valid prenuptial agreement, the terms of which amount to the wife having contracted out of a division of the assets based on sharing, a court is likely to regard fairness as demanding that she receives a settlement that is limited to that which provides for her needs. But whilst such an outcome may be considered to be more likely than not, that does not prescribe the outcome in every case. Even where there is an effective prenuptial agreement, the court remains under an obligation to take into account all the factors found in s25(2) MCA 1973, together with a proper consideration of all the circumstances, the first consideration being the welfare of any children. Such an approach may, albeit unusually, lead the court in its search for a fair outcome, to make an order which, contrary to the terms of an agreement, provides a settlement for the wife in excess of her needs. It should also be recognised that even in a case where the court considers a needs-based approach to be fair, the court will as in KA v MA, retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs.*"

106. How does one assess needs? In ***FF v. KF.***[31], Moystyn J. stated that in so far as the needs principle is concerned there is an almost unbounded discretion save for the main rule which is that except in situations of real hardship, needs must be causally related

[31] [2017] EWHC 1093

to the marriage.[32] Further that in a short marriage case in assessing needs, the discretion is particularly broad and fact sensitive"[33]. The Learned Judge stated that 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.*"

107. In ***K. v. K***[34], the Court considered that it would be unjust to hold the wife to the terms of a valid prenuptial agreement in areas other than with respect to a lump sum payment. This in circumstances where despite a short marriage of 14 months, there was a young child of the marriage who she would have to care for. She should therefore have maintenance in her capacity as a mother and to enable her to live to a reasonable standard which was commensurate with the wealth of the husband. The Court said this:

> "*This case is in essence about D. He has my first consideration, as required by s 25(1). He must have a home where he will live with his mother, the wife. There must be sufficient income going into the home not only to provide for the maintenance of the child, but also for his mother. The husband must provide the home and sufficient money properly to furnish it. The capital to provide that home should be held in trust for that purpose with the reversion to the father. In this context I have been referred to Tavoulareas v Tavoulareas [1998] 2 FLR 418 and H v H (Financial Relief: Conduct) [1998] 1 FLR 971. Clearly in view of what I have said above, it would not be right for the reversion to be to the mother. That would be tantamount to ordering her a lump sum. I have no doubt that in the future the husband will adequately provide for his son, D. There is nothing exceptional about this case which persuades me that the reversion should be to D. The detailed terms of the trust can be considered later. The trust should come to an end on D finishing full-time education. The wife and D should be able to move to another property on the same trusts. The husband seeks to restrict her as to one move during the trust period. I consider that to be unreasonable. On this aspect of the case there will be liberty to apply to the court to determine any issues that cannot be resolved by agreement.*"

[32] [2017] EWHC 1093 - paragraph 18
[33] [2017] EWHC 1093 - paragraph 19
[34] [2003] 1 FLR 120

108. The Court held that the house should be purchased for the child on trust to be reverted to the husband when the trust terminated on the child attaining the age of 18 years.

109. In ***Murphy v. Murphy***[35], Holman J. considered whether and for what period should maintenance payments continue. The parties had been married for a relatively short period of six years, the wife was now aged 42 and had the care of the couples' three year old twins. The Learned Judge considered it speculation to try to determine the level of income that the wife might earn after returning to the work force.

110. At paragraph 35, the Learned Judge said this:

> *"35. What, frankly, the arguments by the husband overlook is that the having of children changes everything. Of course this wife could never have expected a "meal ticket for life" on the basis of six years of marriage and two years of cohabitation if there had been no children. Far from it, she would no doubt have continued to work at Selfridges, or in similar employment, and at the point of the breakdown of their marriage and divorce there would have been a fair capital division and a clean break and each would have gone their own way. But the fact of having children, and their obvious dependence in this particular case on their mother for their care, changes everything, as I have said. The economic impact on this wife is likely to endure not only until they leave school but, indeed, for the rest of her life."*

111. In ***RE P (Child: Financial Provision)***[36], Thorpe LJ in considering an application under the Children Act 1989 in circumstances where the wealth of one parent or both parents ranged from the affluent to the fabulously rich said that the recommended starting point is to decide on the home which the respondent must provide for the child during the child's minority or until further order of the court. The respondent would be entitled to the reversion of the property. Thereafter a court should consider the extent of any lump sum payment to include the cost of furnishings and equipping the home

[35] [2014] EWHC 2263
[36] [2003] 2 FLR 865

followed by a reasonable budget for the mother. This should be done with a broad brush and the discouragement of undue bickering over competing budgets. While the mother's entitlement to an allowance as the primary carer for the children may be checked by the absence of a claim in her own right, it is not thereby diminished.[37]

112. The Court allowed the appeal of the wife and accepted that the judge at first instance had made too low an order and that very substantial payments were required in order to secure that the child L was bought up in circumstances which were related to the father's current resources and standard of living. The Court stated:-

> *"In order to discharge this responsibility the carer must have control of a budget that reflects her position and the position of the father, both social and financial. On the one hand she should not be burdened with unnecessary financial anxiety or have to resort to parsimony when the other parent chooses to live lavishly."*[38]

113. In summary I take the guiding principles from these cases to be that where there is a prenuptial agreement which is valid, in the sense that it is not negated by vitiating factors, a court should have regard to and give weight to the agreement except where it would be unfair to do so. It would be unfair to do so if the effect of its operation was to place firstly the children of the marriage and/or one of the parties in a position of real need. Need is to be interpreted in the context of each case, having regard to the circumstances of the parties including their standard of living. Despite the existence of an agreement, the court is required to consider the statutory factors and the strands of need, compensation and sharing. In giving effect to an agreement and recognizing the autonomy of the parties to regulate their own financial affairs, a court would usually interfere with an agreement only to the extent necessary. In the majority of

[37] [2003] 2 FLR 865 –paragraph 48
[38] [2003] 2 FLR 865 –paragraph 49

cases, that interference would take the form of ensuring that the strands of need and compensation are satisfied. It is with respect to the strand of sharing that the court is least likely to interfere with or vary an agreement.

The submissions as to the Pre–nuptial Agreement

114. Counsel on behalf of the wife submitted that on a plain and principled interpretation of the Agreement, by paragraph 4, the parties elected to use the duration of the marriage as the start and end point for the period of time when assets would be accumulated. They did not, despite having legal advice, use the duration of the relationship. Counsel further urges that the parties in agreeing that all resources generated up to the dissolution of the marriage are joint property and are to be shared equally have contracted out of the usual interpretations (as per ***McTaggart v. McTaggart)*** and thus that this is an exception to the general rule.

115. The submission on behalf of the husband is that the words "*in the event of dissolution or annulment of the marriage*" refer to timing while the words *"during the marriage*" are the words which must be interpreted for the purpose of the Agreement. He submitted that those words bear a particular meaning in the context of family law by reference to the cases of ***Miller v. Miller; McFarlane v. McFarlane***[39] and the local case of ***McTaggart v. McTaggart*** which specifically provide that the line is to be drawn as at the date of final separation. He invites the Court to give those words the established and usual interpretation within the context of divorce proceedings being up to the point of final separation.

[39] Supra

116. Counsel places reliance on the judgement of Lord Nicholls in the case of ***Miller v. Miller; McFarlane*** and the particular section as follows:

> "*The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other property*". [Emphasis added by Counsel]

117. Counsel notes also by way of explanation that *"the former is the financial product of the parties' common endeavour, the latter is not"*.

118. The submission then is that in using the words "*during the marriage*", the Learned Judge was referring to the period prior to separation and further that no alternative interpretation is afforded as such would not lead to the necessary corollary that property acquired during this period was the product of "*common endeavour*". The argument goes a step further. It is that the effect of this is that the ordinary words "*during the marriage*" used by the Learned Judge in the course of a discussion as to matrimonial and non-matrimonial property now bear the specific meaning of marriage up to the date of separation.

119. Counsel then points to the cases of ***McTaggart v. McTaggart*** in which it was stated*:*

> "*Property acquired prior to the date of final separation (at least if acquired during the course of the marriage) is likely to be the product of common endeavour: property acquired after that date (unless it can be said to be the fruits of pre-separation property) is much less likely to be the product of common endeavour*"[40]

[40] Supra – paragraph 56

120. Counsel also drew the Court's attention to cases dealing with contractual interpretation in particular, the case of ***Investors Compensation Scheme Ltd. v. West Bromwich Building Society***[41] and to the following summary of the salient principles:

> *"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their previous declarations of subjective intent...*
>
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using the words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax...*
>
> *(5) The "rule that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v Salen Rederierna A.B [1985] A.C. 191 "if detailed semantic analysis of words in commercial context is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense".*

[41] [1998] 1 WLR 896

121. He submitted that in this case the relevant background information is the particular meaning of the words "*during the marriage*" in the context of distribution of property and that in light of this background information, the words would reasonably have been understood as bearing the meaning urged by the husband. It was further submitted that a reasonable person in the context of this case is likely to conclude that in using the words "*during the marriage*" as distinct from more clear words such as in the event of an irretrievable breakdown of the marriage, used the wrong words in the sense that they are not as clear and unambiguous as ideally would have been the case.

122. Finally on this aspect, Counsel submitted that it is it is of importance that "*the law does not attribute to the parties an intention which they plainly could not have had*". It is argued that in all of the circumstances, the evidence strongly indicates that the parties did not intend the extraordinary consequence that post separation assets should be equally distributed between the parties, notwithstanding that such assets are clearly not the "*fruit of common endeavour*"

123. He urges that the clear and general intent of the Agreement is to ensure, first that the assets of both parties, but in particular those of the husband as the economically more advantaged party, are protected. He urges that it is not sensibly possible to argue that the joint intention was that, following final separation and the leading of entirely separate lives (in the husband's case with a new partner and baby to maintain), assets gained exclusively by the endeavour of a particular party were to continue to be divided equally.

124. In support of this submission Counsel also relied on the case of ***Shore v. Wilson***[42] in particular on paragraph 566 of that judgement which states that in endeavoring to ascertain the true interpretation of an instrument, where there is doubt as to the true sense and meaning of the words, same may be investigated including looking at evidence outside of the agreement in order to determine the true intention of the parties. He submits that the evidence outside of the instrument itself is in this case the context of matrimonial proceedings and the leading cases cited.

125. It is noted however that the statement in that case to which he refers is expressed as an exception to the general rule. The general rule is that where the words of any written instrument are free from ambiguity, and external circumstances do not create a doubt as to the proper application of the words, the instrument is always to be construed according the strict, plain and common sense meaning of the words themselves.

126. Additionally, Counsel references the case of ***Ford v. Beech***[43] in which it was held that:

> *"In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied: namely, that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent... it is a well approved rule of law that, where parties have used language which admits of two constructions, the one contrary to the apparent general intent and the other consistent with it, the law assumes the latter to be the true construction".*

127. Counsel also drew attention to ***Robertson v French:***[44]

> *"The same rule of construction which applies to all other instruments also applies equally to this instrument... that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they*

[42] [1842] 9 Cl and F. at 355.
[43] [1848] 11 Q.B 852, paragraph 866
[44] [1803] 4 East 130 at para.135:

have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instances, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense".

Assessment of the Pre- Nuptial Agreement

Vitiating Factors

128. The first stage is to consider whether there are circumstances which amount to vitiating factors, which are attendant upon the preparation and signing of the Agreement which would make it unsafe to have regard to or give any weight to it, irrespective of its meaning.

129. In this case, neither party challenges its validity. There is no evidence suggestive that either party was subjected to duress, or that there was any fraud or misrepresentation. Neither is there any evidence of any undue pressure falling short of duress which operated on the mind of either party and in particular on the party in the less dominant position. There is no evidence that the husband sought to exploit his position so as to secure an unfair advantage over the wife. Both parties had independent legal advice on the draft Agreement. The matter does not appear to have been rushed. Drafts were exchanged beginning on the 20th December 2011 when the husband's Attorney produced the first draft. Other drafts followed and the wedding was postponed pending the resolution of the Agreement. No issues as to the inadequacy of disclosure have been raised. There is every indication that the parties were aware of what they were doing and were in a position to make an informed decision as to the Agreement.

130. It follows that in the absence of vitiating factors, the Court must seek to give weight to the Agreement, unless it would be unfair to do so.

Meaning of the Agreement – Paragraph 4 – Joint Assets

131. I have given careful consideration to all the submissions of both Counsel in respect of paragraph 4 of the Agreement. It is accepted that the words "*during the marriage*" in the case of ***Miller v. Miller, McFarlane v. McFarlane*** is used in the context of the case to mean the period prior to breakdown of the marriage. Indeed at paragraph 91 of the judgement the Learned judge stated:-

> "*91. A third feature is that the high level of the husband's earnings after the breakdown of the marriage was the result of the parties' joint endeavours at the earlier stages of his professional career. The wife gave up her career to devote herself to making a home for them both and for the children. As Bennett J noted, the husband was able to reap the benefits of the wife's contribution not just during the marriage. He continued to do so after the separation and after the divorce.*"

132. It is further accepted that there is a clear line of authority including from the Cayman Islands Court of Appeal which identifies the nature of matrimonial property to be property which is the product of the parties common endeavor and thus that property acquired after the date of separation is unlikely to be a product of such common endeavor unless it is property into which matrimonial property can be traced. Matrimonial property has a particular and specific meaning in the context of family law. However it is unclear whether the words "during the marriage" have a particular and specialized meaning such that whenever they are used in any document in a family law proceeding, irrespective of the context or setting they must mean during the marriage up to the point of separation.

133. Counsel on behalf of the husband submitted that the Agreement is to be interpreted in the light of the background knowledge reasonably available to the parties. Thus that it should be interpreted in light of background legal knowledge that property rights accrue as at the date of separation and not at the date of dissolution of marriage. The converse argument is a reasonable one, that this is an Agreement which was prepared by Attorneys who one would have expected to clearly define the wishes of the parties as to the date of accrual. It is less than believable that they would have left such an important distinction to be construed and inferred as part of some background knowledge which they must have known that the parties themselves, one of whom was not an Attorney, may not have had. First and foremost this was an Agreement which needed to be clear for the parties themselves.

134. The difficulty which the husband's argument faces as a first and general point is that it must be accepted that it was entirely open to the parties to make the choice to act other than in accordance with the background context suggested by Counsel and to choose their own course. Otherwise they could simply have left the decision to be made by the Court in the usual way.

135. Counsel for the husband also submitted that the fact that the words in the draft agreement were never altered indicates that no one gave any specific thought to it.

136. The wife's point was that as an accountant of long standing, the husband has a certain level of commercial sophistication and thus cannot claim not to have understood what is said to be the true meaning of the paragraph.

137. Counsel for the husband urged that in deciding what their intention was, the court should consider the credibility of the parties on this issue. He pointed to various aspects of the wife's evidence where he asserted that she had been less than candid. While I accept that there were some questions in particular where she sought to put forward an underpayment on the part of the husband on the basis of a salary calculation that claimed he was earning a million dollars, I did not consider that this aspect could be resolved entirely on an assessment of credibility. This is because there was no evidence as to discussions between advisors or indeed the parties themselves as to what was meant. Each party gave evidence as to their independent understanding of the meaning of paragraph 4.

138. The significant point is that this is not a case where either party claims to have discussed the specific issue with the other and to have arrived at a mutual understanding. Each party speaks to having a particular understanding independent of the other which is different from the others'. Privilege was not waived and there is no evidence placed before the Court as to the advice given to either party on the meaning of these words.

139. I have to say that in so far as the limited evidence went, I was less inclined to believe the husband. This was because of the way he responded to the questions as to whether or not he had been advised by his Attorneys as to the meaning of that paragraph. In evidence when he spoke to his understanding of paragraph 4 of the Agreement, he seemed to waver between saying that his understanding had been obtained from his Attorneys before confirming that it was his own understanding of the meaning of the paragraph. I did find this to be a curious answer. In this regard I accept the submission of Counsel on behalf of the wife that when he said that he understood the phrase

"during the marriage" in the sense expounded by Lord Nicholls in the case of ***Miller v. Miller, McFarlane v. McFarlane***, that this is not likely to be true given that he also says that he had no discussion with his Attorney about it and was not informed about it.

140. The husband asked the Court to consider that it is inconceivable that had he been aware of the true import of the Agreement that he would have signed it in its current form. Overall from his evidence, the sense I had was that the truth lies somewhere in between. I thought it more likely than not that he read what was there, understood and accepted it. Thus it did not appear to me that he had not appreciated the implications of it (i.e. that the date of calculation for sharing of assets was to be as at the date of dissolution of the marriage by a court). I thought it more likely that it is either that he did not consider the length of time which matters would have taken to be resolved in the courts or that he did not appreciate the level to which his asset position would have changed with respect to assets which he was to acquire after separation and before dissolution of the marriage by a court. To explain what I mean by this, it is, that it is the actual amount to be shared because of these two variable factors, (which factors were specifically left open-ended in the Agreement), which causes him difficulty. It is not that he had not appreciated the true import of the Agreement with respect to the requirement for the sharing of assets acquired between separation from his wife and dissolution of the marriage by a court. Assessing him as best I could, I found it difficult to accept that he understood the Agreement in terms of some background meaning or that he did not understand what it said. He was a generally forthright witness but he seemed somewhat tentative about this particular aspect. The overwhelming sense that I had was that he was trying to be careful in his answers in this area, being fully conscious of the financial impact on himself. Moreover, he was so clear and direct

about financial matters and precise about asset calculations, that it is hardly believable that he would have understood the Agreement in terms of a background meaning and not have insisted that his lawyers make this abundantly clear in the Agreement or at the very least discussed it with his wife. This is particularly so given that the various references to a "Date of Judicial Separation" and one to "Date of Separation" within the document must at least have raised the specter that such a date was a possible end point. The onus was on him to clarify matters since the Agreement was being prepared at his urging.

141. In cross examination, the husband was asked by Counsel whether the man in the street would say that he is still married and he replied that the man in the street would say that he was separated. He was then asked the question, are you still married and agreed that the answer to this must be yes.

142. It is because the words are open to two possible meanings that care must be taken to assess what the parties actually said and what they meant. It follows that in the absence of evidence as to discussions as to an agreed meaning or understanding or evidence as to the agreed intention, regard must first be had to the words used in the Agreement, the context of that Agreement and the entirety of the Agreement.

143. The argument that this could not have been what was intended must take second place to an assessment of what the parties stated their intentions to be in the Agreement. From the authorities cited by Counsel for the husband, the following questions emerge:

i. Is there doubt as to the true sense and meaning of the words used?

ii. What is the construction which the words admit?

iii. Is there clear evidence of the intention of the parties from the whole of the agreement?

144. I thought the construction placed on the words in the course of submissions made on behalf of the husband to be a little strained. It required separating the two components of the sentence and inserting background knowledge. In closing submissions Counsel submitted that "the reasonable person would be likely to consider that a less ambiguous phrase should have been used such as irretrievable breakdown of the marriage and that it may well have been that an error crept in." He prayed in aid "sloppy drafting" but said that nevertheless the intent was crystal clear and the extraordinary consequence was not intended.

145. In my view, on a plain reading of paragraph 4 of the Agreement, the 'trigger" for sharing is an act of judicial pronouncement, either of dissolution of the marriage or judicial separation. It is not the date of separation of the parties.

146. The whole of the Agreement was then considered in order to determine and test whether there is any room for ambiguity, giving the usual meanings which would apply. Paragraph 6(c) of the Agreement dealing with joint assets is in my view definitive. It provides that ***in the event that*** the marriage is terminated in one of three ways, decree of divorce, annulment or judicial separation within the first seven years of the marriage their financial claims will be defined and limited as follows:

> *"Any other assets, property, savings or investments shall be dealt with in accordance with paragraph 4 above.* ***Any bank accounts or savings accounts or other investments will be closed and the balance in such accounts will be divided equally between them,*** *or in such other proportion as they may have otherwise agreed in writing. In the event that any such*

> *accounts are overdrawn, any such liability will be discharged in equal shares. (emphasis added).*

147. From this it appears clear that it is at the point of one or other of the three stated methods of termination, that there is to be closure of bank accounts and investment accounts and the proceeds thereof are to be shared equally.

148. Counsel for the wife pointed to this paragraph as one example of an instance when different modes of termination are referenced to include a separation.

149. It is noted also that paragraph 6(g) appears to provide for a limitation on joint division in respect of debts, these are to remain solely the responsibility of the individual parties as at the "*Date of Separation*" with the exception of debts incurred due to medical expenses of either A or B or any child of the marriage. It is unclear to what date this refers. The most likely reference is that as it is subsumed within the paragraph headed provision upon divorce, annulment or *judicial* separation, the reference is meant to be to the date of *judicial* separation rather than separation between the parties, although this is not stated.

150. Curiously, the paragraph immediately following, (paragraph 6 (h)) dealing with consent order, refers to *judicial separation*. It states that within proceedings for divorce, nullity or judicial separation, A and B agree to seek an order by consent embodying the terms set out in the Agreement.

151. If paragraph 6(g) refers to judicial separation then it remains within one of the three modes and there is no alteration to the meaning and context of this paragraph or of paragraph 4. Alternatively if this was a carefully considered omission of the word

"judicial" and it refers to separation other than judicial separation, then even more so, it would support rather than alter the intended meaning and context of paragraph 4.

152. I think the key point from this is the factor that the issue of separation was considered. It appears that for the purpose of paragraphs 4 and 6(c) dealing with joint assets, no one sought to address what would be the result if the parties separated prior to judicial means of termination of the marriage or to state what was to happen to their assets in the intervening period. A specific decision appears to have been made in both paragraphs 4 and 6 to use the book end of a judicial pronouncement as the defining date for the division of assets.

153. I would therefore answer the questions posed above in the following way. There appears to be very little doubt as to the true sense and meaning of the words used. The construction which the words in paragraph 4 admit is that during the marriage refers to the period of the marriage until judicial pronouncement. There is clear evidence of the intention of the parties in this regard from the whole of the Agreement.

154. With respect to issue 2, I conclude that the plain meaning or construction of paragraph 4, is that the assets not identified as separate assets were to be shared equally between the parties as at the date of dissolution of the marriage. I accept the submission of Counsel for the wife, that the parties "contracted out" of the usual meaning of the words "during the marriage" in the context of identifying what is matrimonial property.

Meaning of the Agreement – Paragraph 6 (e) – Child Support

155. It is convenient to consider issues 4 and 8 at this point because both deal with the interpretation of the Agreement.

156. The husband also contends that by paragraph 6(e) of the Agreement, he agreed to provide 'suitable' income provision for any child of the marriage and that suitable does not mean that he is to bear the responsibility for paying all of the costs. He urges that these should be shared based on income proportions. However the paragraph itself defines what is suitable income provision as including *"any medical insurance costs, medical expenses, all educational and related costs, extra- curricular expenses and domestic assistance expenses*. In my view it is also plain from this that he committed to paying for all of these expenses. The construction of this paragraph is forward looking as distinct from paragraph 3(f) which appears to refer to debts already incurred and therefore looks to the past.

Meaning of the Agreement – List of Separate Assets - Partnership Interest

157. There was a dispute between the parties as to whether the capital contributions made by the husband to the Firm as per his joining agreement should be included as joint assets. The wife contends that they should, on the basis that there are really retained earnings. The husband initially contended that they should not and referred to the List of Separate Assets and Personal Holdings attached to the Agreement. For the husband this lists, partnership Interest and describes it as "BJ's ownership percentage as a partner /Owner of Firm"

158. As referenced above there was much back and forth between the parties about this. The clarification which emerged is that the Husband in fact has no partnership interest in the Firm. His interest is limited to his right to benefits which accrue as a partner in the Firm. One of these benefits is the capital contributions which are made by the Firm retaining 20% of his annual earnings. There is therefore a mis-description in the schedule to the Agreement.

159. On this aspect, Counsel for the husband initially submitted that the husband was a partner in the Firm at the time of entering into the Agreement. He had already made capital contributions to the Firm and it must have been intended, and understood by both parties that his interest therein was to have been properly included in the list of separate assets. Alternatively Counsel submitted that even if it was not listed it would nevertheless constitute a ring-fenced asset as per the definition of separate assets in the Agreement as it was an asset acquired prior to entering into the marriage or an increase in the value thereof. He submitted that it would be unfair to allow the wife to exert a claim over the capital contributions.

160. However in cross-examination during his oral evidence, the husband appeared to give conflicting answers as to his position on this. He initially stated that he did not accept that the accretion of value in the Firm's capital account should be divided equally. Then he said that he accepted that following the initial contribution to the Firm of $175,000.00 the increase to $552,000.00 could have been occasioned either by him paying money in or by not drawing out all of his salary. He accepted that he chose the route of retained income and that income would fall to be shared under the terms of the Agreement. He concluded by saying that he accepted that the wife is entitled to one half of the "top up" from $175,000 to either March 2014 or to now depending on

the Court's ruling as to the relevant period. He therefore concedes that these sums should be taken into account. This would amount to $71,000.00 if the period is up to 2014 and $309,270.00 if the period is up to 2019.

161. I will consider the fairness of the inclusion of this item as a separate issue.

Issue 3 – Fairness of the Agreement

162. The guiding principle from the case of ***Radmacher v. Granatino***[45] is that the "*Court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.*"

163. I must therefore go on to consider whether the construction of the Agreement which would result in the sharing of assets beyond the point of separation of the parties is a fair outcome in light of the entirety of the circumstances of this case. This is not the necessarily the outcome which the Court would have reached in light of the well-established principles. In doing so it is important to bear in mind the circumstances in which non-matrimonial property as distinct from matrimonial property may be shared as per the case of ***McTaggart v. McTaggart***.

164. I approach the question of fairness as recommended by the authorities above. In this case it is the economically advantaged party who raises the issue of fairness. This is perhaps an unusual case in that the Agreement appears to have extended rather than restricted the rights of claim of the less affluent spouse. An extensive review of cases

[45][2010] UKSC 41

including up to the most recent case of ***MB v. EB***[46] did not identify one with similar issues.

165. The wife urges through her Counsel that there is no unfairness where the husband would be left with significant assets and in effect that there is nothing to suggest that he would be left in a position of real need by the sharing of his assets in the way contemplated by the Agreement.

166. In considering whether the outcome arising from the construction of paragraph 4 of the Agreement is a fair one in the circumstances of this case, there are changing circumstances to be considered. The question is whether these serve to make its operation unfair.

167. The parties could not have anticipated that they would have a child with special needs who requires long term treatments and support over an extended period beyond that of a non-special needs child. The wife gave evidence that this was not at all anticipated. Whether J. will be able to have an independent life is presently uncertain and will depend on his progress through various stages. The Agreement makes no provision for J. above the requirements of the usual child maintenance payments. It is likely that the terms of the Agreement would have been different had this been known. The result of this unforeseen circumstance is that in addition to the sharing of his after acquired assets, the husband will be called upon to pay all or the majority of therapeutic costs for J. in addition to maintenance contributions over a longer term than the anticipated school age period.

[46] [2019] EWHC 1649

168. The Agreement makes no provision for long term housing arrangements for the child of the marriage. The only provision made is in paragraph 5 which refers to a family home purchased after the marriage and no such purchase was made. The special considerations of the child and the needs of both the child and the wife may require that specific housing arrangements be made on a long term basis for the child of the marriage. In my view this is a reasonable requirement which the Agreement ought not to prejudice.

169. Thirdly the parties could not have anticipated the very lengthy period which has elapsed between separation and finalization of the divorce. Had they considered this, no doubt one or other of them would have raised this as an issue at the time of drafting. The issue of delay has been raised with both parties blaming the other. It has been argued that some fault lies with the husband therefore he only has himself to blame.

170. In his oral evidence, the husband accepted that he prolonged matters by filing a cross petition and that there have been three adverse costs orders against him, one of which was in relation to not providing disclosure information as ordered. There was also a lack of timely responses to correspondence. He accepts full responsibility and said that perhaps he had not been given the best legal advice before he changed his legal team in early 2017.

171. It is however the assertion of the husband that the wife herself has contributed to delay by changing her legal teams on three occasions with time in between to identify new attorneys, delayed inspection of the Firm's partnership documents between 2016 and early 2018 and requested an adjournment of the last hearing date in December 2018. In short without conducting a minute, date by date analysis, fault for the delay in the first half of the proceedings is accepted by the Husband and he alleges delay on the

part of the wife as to the second half of the proceedings. This is an allegation which appears to have some factual support. Beneath the surface is the implication that the delay was not accidental on the part of the wife. For the avoidance of doubt, I make it clear that I do not make such a finding in either case. I did not get a sense of deliberate delay from either party and took note of the sequence of actions which were undertaken in each case in arriving at this view. I bear in mind that in the heat of the moment a party may make a decision or determine on a path which in hindsight turns out to be ill-advised or take some time in an endeavor to be as fully prepared as is possible.

172. The fact of delay does however raise the mirror to the uncertain and perhaps unsatisfactory way in which the wife's sharing claim is to be calculated according to the Agreement. Put another way, as a method it may place a premium on delay, because in this case the extension of the period influences the amount of the calculation. Objectively it is open to manipulation and as a route to a calculation must be viewed as unsatisfactory.

173. However, while Counsel urged this point of delay on behalf of the husband, it did strike me that both parties must have realised that a judicial pronouncement was not going to happen immediately, they must have realised that some time would be needed for the court process to be completed however long or short. I don't think that in such circumstances they can say it is unfair because it took longer than we thought it would, even though we did not specify a time frame and left it open ended.

174. Counsel for the husband made two additional points in relation to fairness, firstly that the Agreement was only signed one day before the marriage, on the basis of which he urged that the parties did not have a full appreciation of the implications of the

Agreement. This is not an argument of much force given that the Agreement was prepared over time with multiple drafts. The parties therefore had time for extensive review. His second point relying on ***JL v. SL (Financial Remedies)*** [47] was that if the Agreement provides for post separation assets to be shared it is inherently and manifestly unfair because the equal sharing principle would then be made to apply to the product of the sole endeavor of one party. This latter argument does not consider the autonomy of parties in ordering their financial affairs and their ability to "contract out" of the usual principles.

175. There are also issues raised about the drafting of the Agreement. Counsel for the husband submitted that there is a lack of care evidenced by formatting and typographical errors (one in the important paragraph 4) and in the absence of mechanisms such as how income was to be determined.

176. The question is whether in light of all the circumstances, it can be said that the Agreement would operate unfairly *against the husband* in particular with respect to the sharing provision.

177. Counsel for the wife argues that there need be no adjustment to the terms of the Agreement in circumstances where the husband has the resources available to meet the sharing ratios with a substantial amount remaining after payment of one half. In short that it cannot be unfair where the husband is left in a situation where he still has more than enough. Indeed, Counsel submits with some force that in every case where such an agreement is departed from, it is because the terms are too harsh in that it does not provide enough for one party. This is plainly not the case here.

[47] [2015] EWHC 360 (Fam), paragraph 18-19

178. This submission of Counsel accords with a long line of cases some of which have been reviewed above. In my view, the summary and general principle from the cases is that it is not enough to say that there are changing circumstances, what must follow is an examination of those changing circumstances which have arisen. If the *effect* of those circumstances is that one party is thereby left in a situation of real need, then the Court has a positive duty to vary the terms of the Agreement. In this case, there are additional contributions perhaps not contemplated by the Agreement for the benefit of the child which the husband may be required to make now and further into the future than anticipated, (approximately $200,000.00 per annum). Having asked what the effect upon him of this is, the answer overwhelmingly, is that, given his level of income and resources, (some $754,400 per annum plus rental income), it cannot be said that this is likely to have even a modest impact upon him, far less a debilitating one. The same practical approach and answer applies to sharing of assets which is set out in more detail below.

179. I could not therefore conclude in line with the authorities that giving effect to the Agreement as a whole will operate unfairly against him.

180. In light of this while I bear in mind that in accordance with section 21 (d) of the Law there is a discretion to vary the terms of the Agreement, I propose against this background to respect the autonomy of the Parties and to consider the Agreement as one aspect of this case in the course of considering the entirety of the circumstances of the case.

Provision for the Needs of the Child

181. In the application of section 19 of the Law, the first consideration is the needs of the child of the marriage and the provision which would be in his best interests. I must therefore consider, what are J's reasonable needs, the cost of meeting those needs and whether and how the cost of those needs should be apportioned between the parents. His immediate needs are threefold, housing, specialist therapeutic treatments, and regular maintenance.

Housing

182. With respect to the housing, the present arrangements are that the wife has been set a rental ceiling limit of $4,400.00. The husband contributes 55% or $2,420.00 and the wife the remaining 45%. The wife has changed residences three times now since the separation. In one instance this was because the rental property which was at Britannia in the Seven Mile Beach area, was being sold. Understandably, she describes the changing of residences as having had a disruptive effect on J. In the course of his oral evidence, the husband expressed his willingness to assist J. with everything he needs. He agreed that stability of accommodation would be in J's best interests. If there is a single meeting of the minds between the parties in this case it is that J. is in need of a stable home.

183. The husband's secondary proposal in his Affidavit of 22nd March 2019 which he acknowledged in his oral evidence is that a home may be purchased to be held on trust for J. for his life time. This proposal is welcomed as being in J's long term best interests.

184. The husband suggests that this should be within the price range $700,000.00 to $800, 000.00 which would be in line with the rental payment of $4,400.00 per month which has been the approved rental standard over the period of the separation. The wife seeks a home in the range of $1.1 million. She says that the home should have sufficient room for a nanny and yard space where J. is able to run and play. She gave evidence that in the course of their marriage they had reserved a piece of land close to Camana Bay where they both worked and which is also close to J's pediatrician. This is the land at Clipper Bay on the Seven Mile Beach corridor where the husband now proposes to build his home. He gave evidence that the plans for the home are at the conceptual stage. It will likely have some 4000 square feet in space and have room for a pool. It was suggested but not fully accepted that the possible price range on completion would be some CI$ 2.3 million.

185. The husband's position is that J. does not need a million dollar home in the Seven Mile Beach area. That his needs can be met by a home in the slightly lower price range which will have at least three bedrooms and yard space and which will be close to his school in George Town and to the locations for his various therapeutic activities. It is urged that the wife is motivated by a desire to live in the most prestigious property possible and that it is the needs of J., as opposed to the aspirations of the wife which are important.

186. Counsel made the following submissions:

i. J's special needs and other needs do not provide any genuine reason, whether medical or otherwise, why he needs to live on the Seven Mile Corridor, indeed there is no evidence from any professionals that this is the case.

ii. In her judgment dated 14 December 2017 having heard evidence on the point, Mrs Justice Gunn (Actg.) held as follows "I am not persuaded that J has a need for anything more than a furnished 3 bedroomed property in a reasonable neighbourhood within 30 minutes from central George Town. I find that a *reasonable rental price for such a property is CI$4400 per month. Should mother decide that more rooms are necessary for her daughter or J's nanny to live in, or for guests to stay, then she must solely bear the difference in cost for the larger property."*

187. Exhibited to the husband's Affidavit of 1st December 2017 is the sale listing for a 5 bedroom property at the Chimes in South Sound at a cost of CI $899,000.00.[48]

188. Counsel for the wife points out that the usual principle is that there should be some reasonable parity between the homes of divorced spouses. He references the case of ***K. v. K***[49] in which it was stated that *"a child of parents with disparity in wealth was entitled to be brought up in circumstances which bore some relationship to the resources of the wealthier parent.*

189. The husband in cross -examination said that he was willing to meet the down payment and acquisition costs, provided the house was to be held in trust for J. He agreed that there is not much difference between the two price ranges but he did say in re-examination that he was concerned at having to bear the cost for the home at the higher price range.

190. There is also disagreement between the parties as to whether any home rented or purchased should have room for a live in nanny. The husband's view is that the nanny does not need to be resident on the property. Presently the nanny is not a live-in nanny and previous nannies did not live at the property. The spare rooms in the three bedroom rental units were occupied by an employee and daughter of the wife.

[48] Page 756 of the Trial Bundle.
[49] [2003] 1FLR,

191. Having considered both sets of submissions my view is that J. does not need a million dollar home. It can hardly be said with any force that because of his needs the cost of the home must therefore be in the higher price range. More to the point neither can it be said that the price range of $700,000.00 to $800,000.00 is so out of line that it bears no relationship to the husband's wealth and status. This is against the background that on the equivalent rental budget of $4,400.00, mother was able to rent properties both in the South Sound and in the Seven Mile Beach areas. I also noted the price range for the Chimes property in South Sound, an area in which the wife had been content to live.

192. I do feel however that it is in J's best interests that a house be acquired with sufficient room for a nanny to live in, if one can be identified, a room for himself and for his mother. I am of the view that a live in nanny would provide him with added hands on care and may also give the wife greater flexibility in her work hours and in the building of her career. For this reason, I would therefore set the ceiling slightly higher in the sum of $900,000.00. Thus a range of between $800,000.00 to $900,000.00, to include any fixtures and furnishings which may be required.

193. The proposal by the husband for meeting the costs of this housing is for each to meet the deposit and acquisition costs in proportion to their respective incomes. The wife's position is that he should meet all these costs. He proposes a 10% deposit, the wife seeks 20% deposit. There is a significant disparity in the present asset holdings of both. When this is taken into account as well as the far greater level of income and resources of the husband and the fact that his contributions in the home will revert to him, my view is that it is more reasonable that he should meet the down payment and acquisition costs in full at the level that he has offered. This would be (10 % deposit,

stamp duty of 7.5% and closing costs) which would likely be in the region of $200,000.00.

194. The husband's position is that the mortgage payments going forward should be met on a 50 /50 basis with 50% to be paid by the wife and the 50 % attributable to J. to be paid by himself and the wife. Thus the husband says that his contribution to the mortgage payments would be limited to a portion of one half of the mortgage in accordance with their respective incomes so that the wife would pay between 58 and 56 % of the mortgage depending on her inferred or declared income. The husband bases this proposal on the fact that the wife would be living rent free in the property.

195. The wife counters with the assertion that she would be making payments towards a house which would not belong to her. She points to the Agreement in paragraph 5 which requires that where there are children of the marriage, each party would contribute to the matrimonial home in equal proportions, or in such proportions to their financial capabilities, towards its expenses, including mortgage, insurance and maintenance. However this aspect of the Agreement referred to a matrimonial home purchased after the marriage and not as is the case to one which was included in the lists of separate assets.

196. It is noted that both parties are each in their own way focused on J's needs. He cannot live in a house by himself and the best option is for his mother to be present to care for him. Both parties should see themselves as purchasing a house for the long term benefit of J. Counsel for the wife suggested that a simple trust document could be prepared to include that any contributions made by the wife to the home would be left to J. in her will.

197. The question then is at what level her contribution should be. I hesitate to draw a direct and precise line between her present level of income and that of the husband (89% /11%) because this may lead to further litigation with every slight change of circumstances. More importantly the wife will be resident in this home and will have some benefit from it over an extended period during which if she does purchase a separate home for herself, she will be able to rent that home and have separate income towards her own mortgage payments.

198. It is fair and reasonable because of the benefit she will have that she contributes to the mortgage of the home in which she will reside with J. and that she is a partner in the purchase.

199. I note that the present arrangements requires her to pay 45% of total rental payments of $4,400.00 and that she has been able to afford this amount over time. I also note the very sensible offer made in her most recent open offer of 31st May 2019 which was an offer to pay 45% of the monthly mortgage payments over a 25 year period. I consider it to be fair and reasonable that the husband should pay 55 % of the mortgage and the wife 45%. Maintenance and upkeep of the home should be apportioned in the same ratios.

200. The wife also sought an increase in rental provision of $635.00. Pending the purchase of the house, the current arrangements set at $4,400.00 per month in which the husband pays 55% and the wife pays 45 % should continue. Any increased rental costs should be shelved in light of the proposed purchase of long term accommodation.

Therapeutic Treatments

201. In terms of J's, therapy needs, the husband indicated in his evidence that he is willing to continue to meet the cost for all of J's therapeutic treatments to now include ABA therapy. In cross examination he said "*I accept that ABA therapy should be a part of his life and I commit to paying that.*"

202. The therapy costs will thus increase from the approximately $5,000.00 monthly sum which is currently being paid but will likely continue to vary over time, depending on J's developmental needs and the recommendations of J' s doctors and care givers. It is not possible to set a definite monthly figure. The uncertainty of what these may amount to in the future would in my view make it less than satisfactory to say that the lesser earning parent should bear a portion of an unknown cost. The husband implicitly recognizes this when he said in his Affidavit of 22nd March 2019 that while the wife should have been paying 20 % of the costs of these treatments, he will agree to a reduction to 10 % because had it been known that he was not going to fund all of the treatments, J. might not have received some of the treatments which he has been having. In my view it cannot be in J's best interests for there to be the possibility that he may need some expensive treatment at which time, the wife at her level of income may not be able to afford her portion, when the husband may well be able to afford the entirety of it. I take the husband at his word which he gave in the witness box that he is willing to provide anything to help in J's development.

203. In light of his greater level of income and resources, the husband should meet all the costs of therapy for J. and continue as he has been doing to make payments directly to

the service providers. Should J's needs change over time, both parties should discuss and agree what is needed for him.

General Maintenance

204. For J's general maintenance the husband argues that this should be met in proportion to their income levels. He complains that he is expected to shoulder all the financial responsibilities for J. while the wife who is a professional with the ability to earn a good income does not. He says that there is no reason that the wife should not be able to contribute more to these costs. He makes this complaint, despite the clear wording of the Agreement in paragraph 6. When he says now that as a professional, earning a six figure income, she should contribute her fair share, this was something that he well knew at the time of the Agreement. This is not something new. She was a working professional then and she is now. He did not insist on cost sharing at the time of and in the wording of the Agreement. He should not do so now.

205. The husband committed in the Agreement to meeting the general maintenance costs of the children of the marriage. I accept the evidence of the wife that this was something they discussed and to which he agreed. It is plain from the wording of the Agreement. He agreed to and should meet the entirety of these costs.

206. Of the maintenance amounts of $7, 677.00 presently being paid for J. this includes the amount of $2,000.00 for a nanny. J has had eight nannies in the five year period. The wife explains that there were good reasons for the dismissal of each one, while the husband no doubt is concerned at the lack of stability for J. J's typical day begins at

6:30 a.m. with his mother preparing him for school and transporting him there. At the end of his school day at about 2:30pm, the nanny would transport him from school to his various therapeutic appointments and activities and then take him home, until his mother gets home from work at about 6pm.

207. It was her evidence that the current amount is not sufficient to find someone qualified for his special needs who would be able to take on the added role to provide him with assistance during the school day as well as the traditional duties. The husband agreed in his evidence that he would be prepared to provide the additional funding requested by the wife of $1,900.00.

208. The husband also argues that the wife should pay a greater percentage of the utility costs. There was extensive cross examination as to the fact that the wife has had living in her home an employee of hers who had been living rent free for more than three years as well as her adult daughter for a portion of that time. The daughter has now moved out of the home and is living on her own. The husband is aggrieved by having had to subsidize the expenses for the wife's employee. The wife says that the employee is a guest in the home and that overall she needs more not less, as her monthly costs are more than the amount being received.

209. Of the items detailed in the list below, the only item which appears unreasonably disproportionate, is the amount for utilities, I take the husband's point that effectively he is meeting the costs for all the utilities for the household. A more proportionate distribution would be for payments in the ratio of 55%/45 %. However I note that in her judgement of 14th December 2017, Gunn J. (Acting) considered that in light of the increase in food costs over the past 3 years, the sum of $500.00 for food was too low and that the food costs were realistically in the region of $1000.00 per month. I take a

fresh look at these amounts and may come to an entirely different view. While I can see no reason why the wife should not contribute to the greater portion of the utilities and would agree that the proportions of 55/45 % is reasonable in light of the greater earnings of the husband, I would increase the amount for food correspondingly which would in effect mean that the total amount remains the same. I consider the amounts being paid as reasonable in all the circumstances together with the additional payments for a more qualified nanny.

210. Current payments:

		Increase sought/reduction
Rent/housing	2,420.00 (55% of $4,400)	~~635.00~~
Utilities	1000.00 (CUC - 500, Water- 100, TV – 100, Phone – 125, Petrol /car licensing - 250)	550.00
Food/Groceries	500.00	950.00
Nanny Child care	2000.00	1, 900.00
Swimming, therapy classes	240.00	
Toiletries	250.00	
Clothes/ toys/resources	250.00	
Co pay for medical insurance	25.00	
Additional medical costs/pharmacy	50.00	
Hope Haven Trips (2 per year)	500.00	
Entertainment activities for J.	167.00	
Travel	275.00	
	7, 677.00	9, 577.00

211. There was some concern expressed by the Husband in his Affidavit of 23rd May 2019 as to payment for the Hope Haven Centre trips and whether or not the wife is taking J. to a former employee of the Centre rather than the Centre itself. He asked that the

Court consider this. I would only say that any variation in destination should be agreed between the parties.

212. If I am wrong about the interpretation of the Agreement as requiring the husband to meet all the costs for the child of the marriage, I would still consider it fair and reasonable in the light of his monthly resources that he meets these maintenance costs at the level outlined above. All additional costs should be met by the wife.

Duration of Periodic Payments

213. With respect to the duration of the order for the maintenance of J, given his special circumstances, the disability proviso to section 22 of the Law is to be applied. Section 22 states:

22. (1) Where an order is made under section 21 for periodic payments such order, unless varied by the Court, shall remain in force in respect of payments to a spouse, until the remarriage or death of such spouse and in respect of payments for the benefit of a child of the marriage until the death of such child or until such child attains the age of sixteen years:

Provided that in the case of payments for the benefit of a child of the marriage, the Court may extend the period of such payments so long as the child is receiving education and is under the age of twenty-one years:

Provided further that, where a child of the marriage is, at the time of pronouncing a decree, under a disability of such a nature as to preclude it from maintaining itself independently, the Court may order that the payments shall be continued throughout the period of disability, notwithstanding the age of the child.

Past Over/Under Payments

214. Both parties had asked that account be taken of what each party claims is either an over payment or an underpayment in respect of payments over the past five years. They invite the Court to do a minute calculation as to the various levels of income over the period and thus what each party's percentage payment should have been. As it turned out the figures put forward by the wife to allege underpayments relied on the

husband's higher than his more recent level of income rather than his past lower income. The husband's calculations of overpayments is primarily based on his submission that the wife should have been contributing in accordance with her income levels. In response to the husband's submission, no finding has been made that the wife should contribute according to the levels of her income which would justify a retrospective calculation. However had such a finding been made, I would still hesitate to apply same retrospectively. The husband had the option to seek variation of the terms of interim maintenance orders and unless varied those orders stood.

215. In response to the wife's contention which is that according to the Agreement she should have been paying only 10% towards housing and not 45%. It is not accepted that the Agreement applies to the housing circumstances. Additionally even if it did, I would hesitate to apply this retrospectively. She sought a variation in orders to increase the maintenance amount significantly, most recently in 2017 when she sought an increase of CI $2,830.00. This was refused except for a modest increase of CI $495.00. She has had over the period, the benefit of what can only be described as very generous maintenance arrangements and I would decline to take into account any suggested underpayments at this stage. Indeed her Counsel indicated that this is water under the bridge and would only be urged if the interpretation of the Agreement is as contended for by the husband.

Responsibilities of the Parties

216. The wife has an adult daughter who is no longer residing at home and primary care of J. The husband now has a new family and a second son. He will need to make provision for his second family.

Needs of the Parties

217. Both parties are able to meet their own day to day needs from their employment and company earnings. The wife to a lesser extent in comparison to the husband. She has started on the road to independent living but it is apparent that her primary need is for a stable home for J. and for herself to live. Counsel on behalf of the wife urges that she has a clear need for capital resources. On the evidence which I have seen, she has limited savings, limited assets and no surplus.

Financial and other Resources

218. There is an issue between the parties as to whether the wife has correctly given her earnings.

219. Since starting her own legal Firm, her second company which provides corporate services has gone from 20 companies in 2018 to 52 companies in 2019 as at the date of the hearing. She explains her declared income as including her earnings from both companies and additional income which she receives as a director of 2 companies since March 2018. She explained that while she had not previously disclosed her directorship in these companies, the total figure which she declared included her income from this.

220. It is noted that the balance sheet figures for her two companies showed her income as having amounted to CI $1,421.00 and $67,135.00. These taken together with the US $12,000 directorship earnings accorded with the total amount of CI $78.556.00 which she gave as her earnings for 2018. The husband points to the profit made by the company of $26,326.31 for 2018 which should have been added to her income for 2018 giving her total income of just over $100,000.00. She explained in her oral

evidence that this money had been left in her companies to pay for the running of the businesses. Further that other amounts left in were commissions for two of her three employees. As to her accounts at a local bank which have been queried, one was a term deposit which no longer exists. She stated that the only wire transfers which passed through her accounts were those from the proceeds of the sale of her land and property.

221. I did not identify any material which served to cause any serious concern as to the falsity of the declared level of income of the wife. There were questions raised by the husband about these but I got the sense from the wife's responses that these were more unexplained strands rather than signposts of falsehood. These did not in my view lead to a conclusion that the wife was hiding other earnings or sources of income or that she is earning more than she declared.

222. The income of the parties over the past five years is shown in the income chart below:

	H CI $	W CI $
2014	465,262.50	116,600 .00 + 11,131.00 (rental income)
2015	475,100.00	109,082.90 + 5,740.00 (rental income)
2016	649,204.00	135,808.33 + 6,677.00 (rental income)
2017	707,107.32	114,845.72 + 5,700.00
2018	754, 400.00	78, 556

Assets of Wife

223. The assets of the wife are identified to be proceeds from sale of land and property of $77,900.00, small items of personal property and a cash term deposit of $30,000.00 to a total excluding her pension of $137,870.00. There are outstanding costs to her

present attorneys which have not been detailed. To this the husbands seeks to add another $39,500.00 which he says appeared on an additional bank account statement.

	Proceeds from sale of House and land	77,900.00
	Small personal items, property and motor vehicle	35,000.00
	Cash term deposit	30,000.00
	Office equipment	3,500.00
	Pension	150,900.68
	Less liabilities	(9, 430.00)
	Total	$287,870.68

224. It is agreed between the parties that all of these items are within the category of separate assets under the terms of the Agreement and would not fall to be shared with the husband. As to her recently established companies, there is a major dispute with the husband seeking in the course of cross examination of the wife and at the eleventh hour a valuation of those companies. He says that they are going concerns and have some value other than the income that she earns from them. Counsel for the wife says that it too late, the balance sheets and financial statements for those companies were disclosed some time ago and Counsel for the husband did not before the commencement of the trial seek an order from the Court for the appointment of an expert to value the businesses. Counsel for the husband in his closing submissions submitted that if there is a finding adverse to him, the matter should be adjourned pending the obtaining of a valuation and the setting off of one half of any such value obtained against any lump sum payment to be made by the husband.

225. I note that the profit and loss statements for the companies are analyzed by and attached to the husband's Affidavit of 22nd March 2019, some two months before the actual hearing date. Those statements showed in respect of the company providing corporate services that the net income for the period January through December 2017 was $2,201.24 while that for the period January to December 2018 was $26,326.31.

While it was urged that it was only in cross examination that it became apparent that corporate registration levels had increased from minimal to 52 companies as at the date of the hearing, it must have been plain from the statements that the business was doing better over time and was becoming a viable operation. Conversely the Law Firm year on year had minimal liabilities and equity in 2017 and ended up with a net loss of $7,251.64 for 2018.

226. My view is that the husband did not seek valuations prior to trial when he had the opportunity to do so. The likely reason is that having looked at the statements, he may not have considered this significant enough to make the appropriate application. He should not seek to do so now. I would decline to grant the request made.

Assets of Husband

227. The evidence before the Court as to asset values comes from the Affidavit of the husband dated 22nd March 2019 which is referenced above. In this Affidavit he gives his total asset value as $2,210,623.00.

228. In a schedule produced, the wife accepts that the actual amount is $2,013,819, thus reducing the husband's total asset value.

229. The parties produced differing schedules and regrettably did not agree on calculations except for the single item shown below.

	Wife's' Schedule	Husband's Schedule
Clipper Bay Land	420,016	223,048
Deposit on Raw Land in George Town		
Funds in 7 investment Accounts		
Loans to Third Parties		
Firms' capital account less starting deposit prior to marriage	309,270	309,270
Bank Accounts not listed in PNA		
Total	$2,013,819,	

230. These schedules are not in evidence and are not agreed, thus I have not included the details of most of these items. The only figure in evidence is the higher value given above. However in fairness to the husband I will use the lower figure put forward by the wife as a base point.

231. Additionally Counsel on behalf of the husband explained in further written submissions on the 12th June 2019 that the major difference in value between the two schedules arises from the fact that a mortgage was secured against the Clipper Bay Land being CI $196,968.00 which the husband had disclosed in his November 2018 disclosure and which was exhibited to his Affidavit of 22nd March 2019. He contends that the reduction in the value thereof forms a part of the evidence in the case and can be taken into account. This seems to be borne out by the asset listing shown on page 354 of the trial bundle which does not show a value of $420,000.00 for the Clipper Bay Land. The value shown there is $ 264,040.00. The change in value put forward on behalf of the husband would reduce the asset total put forward by the wife to $1,816,851.00 and one half of that would be $908,425.50.

The Deserts of the Parties

232. In the Grand Court case of ***H. v. H*** ([50]), Levers J. explained that the Court under the heading "deserts of the parties" is to consider the credit or discredit that the parties deserved as a result of their conduct. The Learned Judge noted that this included consideration as to behavior, ill-treatment, violence and mental of physical domestic abuse. No such issues arise in the instant case.

[50] [2007] CILR 135

Section 25 Factors

233. The Section 25 factors[51] are as follows:-

> 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;*

234. Under this heading, I would add to the above that the wife agreed in evidence that her companies are currently on a path of growth. That was evident from the difference in earnings between 2017 and 2018 and the increase in companies for which corporate services are provided. She gave evidence of a planned travel to Hong Kong in order to promote her businesses. It would be reasonable to expect that this growth will continue and her earnings will increase.

Re (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;

- These have been addressed above.

Re (c) the standard of living enjoyed by the family before the breakdown of the marriage;

- The parties had a home in a Prospect, George Town but planned to build a home along the Seven Mile corridor and thus to have a more affluent standard of living.

Re (d) the age of each party to the marriage and the duration of the marriage;

- The parties are both approaching middle age. Although a short two year marriage, it was preceded by a committed settled relationship of two years and an overall period of cohabitation of at least five years.

Re (e) any physical or mental disability of either of the parties to the marriage;

- There is no physical or mental disability with respect to either of the parties to the marriage.

[51] Statutory Factors in England and Wales

Re (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;*

- The wife in this matter has had and will have the primary care of J. This is likely to be a long term responsibility because of his special needs. In this regard her past and even more so her future contribution must be recognized.

Re (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;*

- No issue has been raised or appears from the papers with respect to the conduct of either party as being a factor for consideration in this hearing.

Re (h) *in the case of proceedings for divorce . . . the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring*:

- No issue has been raised or appears from the papers with respect to benefit lost by reason of the marriage ending. The Agreement expressly excludes pension sharing from consideration.

Clean Break

235. The wife is already well on her way to independent living. Her new businesses have seen one year of growth and are doing well. Her income has increased year on year. There does not appear to be a need for on-going spousal support in her favour and there are a sufficiency of assets to allow for their affairs to be settled with some finality. This should be a case of a clean break.

236. The two strands of compensation and sharing with respect to the wife and how a clean break is achieved require careful consideration. This is not a case which calls out for compensation on the scale of the ***Miller v. Miller, McFarlane v. McFarlane***[52] case. The income table above indicates that the wife was able to return to work and to earn a reasonable level of income albeit modest in comparison to that of the husband. She

[52] Supra

is a professional and her businesses appear to have good earning potential. While she states that she has had to start her own business in order to give herself the flexibility to better care for J., the husband has been paying for nannies and will be paying for even more assistance for J. in the future. There is no indication that this has affected her career in a way that calls out for the highest level of compensation. Nevertheless she has had and will have primary care for J. on a long term basis and it is accepted that this may well be for a life time. It is agreed that some element of compensation should be included in any settlement.

237. As to sharing: It is the sharing of after acquired assets as contemplated by the Agreement which poses the most difficulty. The issue as to whether paragraph 4 applies and its meaning as well as whether it would operate unfairly in the circumstances of this case, have been resolved as set out above. The final issue is the amount which is to be shared.

238. In opening and closing submissions the parties suggested that this matter could be approached in two ways, either a judgment in principle as to the interpretation of the Agreement or alternatively alighting upon a figure which the court considers to be the right figure in the circumstances. Indeed Counsel on behalf of the wife encouraged the latter option in order to save further litigation, costs and expenses in this case.

239. Given the length of time which has already elapsed in this matter and no doubt the costs which have been occasioned, it is accepted that the better course would be to try to arrive at a figure which recognises and respects the autonomy of the parties while giving effect to the statutory guidelines.

240. I do have one concern and this is as to the capital contributions. The intention of the husband was clearly to separate any assets which he held in the Firm. The fact that they were described incorrectly in the Agreement and described as a partnership interest does not detract from this. His only interest then and now was the percentage of his capital contributions.

241. Secondly, there is the illiquid nature of the resources available to the husband including in particular that portion of his assets which must remain with his Firm for him to maintain his contribution ratios. In ***N. v. N. (Financial Provision: Sale of Company***[53], the Court justified a departure from equal division because of the non-liquid nature of the assets. The wife in that case received 39% rather than 50%. In this case the husband quite rightly agreed that because his capital contributions to the Firm are made by retained income, the nature of them would make them subject to distribution according to the Agreement. However this is income which has to remain with the Firm until he leaves it, if he is to maintain his capital contribution ratios and his partnership. It cannot seriously be contended that he ought to remove this amount from the Firm at this time, which would mean that he would have to make up the amount elsewhere in addition to arranging for capital outlay for the acquisition of a home for J. My view is that it would be unfair for these two reasons to include this particular item in the asset calculations.

242. This would reduce the available asset calculation of $1,816,851.00 to $1,507,581.00, one half of which would be $753,790.50.

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[53] [2001] 2 FLR 69

243. It is appropriate given the express concession by the wife that her after acquired assets are also to be shared that the amount of the husband's asset calculation be reduced by one half of any profit made by her companies for the period to date as shown on the profit and loss statements produced by the husband, ($13,163.15). The loss incurred by the Law firm is $ 7,251.64. This would leave an overall profit of $5,911.51. The total then would be $747,878.99.

244. I have been expressly invited by the parties in the interest of resolution of the matter to try to arrive at a sharing figure which is in accord with the Agreement and which is fair in all the circumstances. In the absence of an agreed schedule, and with some hesitation, I have considered the evidence in the case as put forward by the husband in his Affidavit. There is no other Affidavit evidence before the Court. As the wife accepts that there is some lowering of this figure and this inures to the benefit of the husband, I have taken this into account. The onus is on the husband as the potential payer to put forward proof that his assets are less than as claimed by the wife.

245. I believe that the figure arrived at which has been slightly reduced by taking into account the wife's profits would be a fair outcome in all the circumstances of this case. It is in line with the Agreement.

246. Given the illiquid nature of the majority of the husband's assets, despite the need for a clean break as soon as is possible, I would propose that he be given sufficient time to pay the lump sum so that he can plan a measured approach which would allow him to put the needs of J. first, does not endanger his investments and enables him to effect any sales of real property if he chooses such a route. I would propose that this be made in instalments over a maximum period of 36 months.

247. Finally, I would add that if I am wrong as to the interpretation of the Agreement, and had it resulted in the sharing of only $126,624.00 with the wife, this being the calculation as at date of separation in 2014, I make it plain that I would have considered this to be entirely inadequate in the context of this case. I would have considered the absence of inclusion of the period of cohabitation prior to the marriage as an omission which had the potential to operate unfairly against the wife. I would have concluded that the strands of need, compensation and sharing required more than that amount and would have considered the non-matrimonial assets or post separation assets in order to address more fairly the circumstances of this case. I would have needed to bear in mind that while the contributions of the husband to the acquisition of the after acquired assets ought not to be disregarded, the wife's significant contributions in caring for the child also needed to be considered. The ultimate aim would be to provide greater assistance to the wife on the road to independent living. I would have said that the wife should be provided with an amount reflective of her contribution in the past and in the future and practically that she should be given a sum which allows her if she so chooses to make a down payment on her own home (possibly 10 % of $1.100,000.00) with 7% closing costs, about $300,000.00) and a further sum which would then allow her to have remaining, a small nest egg of savings which would form the basis for a capital build or to have a capital sum available in circumstances where her savings are said to be depleted and there are outstanding legal costs.

248. In conclusion having carefully considered and taken into account all the evidence and submissions made in this matter, some of which I have not detailed herein. I would answer the issues raised in the following way:

i. Taking into Account the Agreement, a fair, financial provision for the wife, on a sharing, and compensation basis would be in the amount stated above.

ii. On a proper construction of the Agreement, the words "during the marriage" in paragraph 4 of the Agreement should be construed to mean until such time as a court orders the dissolution or annulment of the marriage.

iii. Such construction would not operate unfairly, given the husbands' resources.

iv. The husband conceded that the capital account/loan with his Firm should be considered to be Joint Property because it was paid from his income and income falls to be distributed pursuant to paragraph 4 of the Agreement.

v. However the intention of the Agreement and the need to retain this asset in the husband's Firm as a capital contribution would make its inclusion in the asset distribution calculation unfair.

vi. In the circumstances of the present case, financial provision ought to be determined on a 'clean break' basis.

vii. In his evidence before the Court the husband agreed to meet the special treatment costs for the child of the marriage.

viii. The Agreement requires that other outgoing costs which arise in relation to J, in particular, nanny, and associated costs are to be met by the husband.

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Costs

249. Should the parties wish to make submissions on costs they may do so within seven days of receipt of the perfected judgment.

Dated this the 5th day of August 2019

Honourable Justice Cheryll Richards Q.C.
Judge of the Grand Court