J v M

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	22 May 2002
Neutral Citation:	[2002] JRC 102
Reported In:	[2002] JRC 102
Court:	Royal Court
Date:	22 May 2002

Text

[2002] JRC 102

ROYAL COURT

(Samedi Division)

Before:

Sir Philip Bailhache, Bailiff **and** Jurats Le Breton **and** Clapham

Between
J
Petitioner
and
M
Respondent

and

Conrad Edwin Coutanche, trustee of the X Trust

First Party Convened

and

The minor, unborn and unascertained beneficiaries of the X Trust
Second Party Convened

Advocate M.M.G. Voisin **for the Petitioner;**

Advocate M.J. O'Connell **for the Respondent;**

Advocate A.D. Robinson **for the First Party Convened;**

Advocate K.J. Lawrence **for the Second Party Convened**

Authorities.

Matrimonial Causes (Jersey) Law 1949: Articles 21, 27, 29.

Brooks v Brooks [1995] 2 FLR 13.

Matrimonial Causes Act 1973: s.24.

Jackson's Matrimonial Finance and Taxation (6th ed'n) 1996: paragraph 8.16.

Prinsep v Prinsep [1929] 225 at 232.

E v E [1989] FCR 591.

Bourne v Bourne [1989] 1 FLR 291.

Milburn v Milburn (3rd October, 1979) Unreported Judgment of the High Court of England and Wales.

Thomas v Thomas [1995] 2 FLR 668.

White v White [2001] 1 All ER 1.

White v White (2000) 2 FLR 981

Elwell v Knight (1976) JJ 391.

Haworth v McBride (1984) JJ 1.

Boudin v Smith (1995) JLR N 1.

Lidster v Lidster (1999) JLR N8.

Wachtel v Wachtel (1973) 1 All ER 829 CA.

Cowan v Cowan (2001) 2 FLR 192.

Preston v Preston (1982) 1 All ER 41.

R v R (1994) 2 FLR 1044.

Duxbury v Duxbury (1987) 1 FLR 7.

B v B (1990) 1 FLR 20.

Dart v Dart (1996) 2 FLR 286.

H v H (2002) 1 FCR 55.

D v D (2001) 1 FLR 633.

Dharamshi v Dharamshi (2001) 1 FLR 736.

N v N (2001) 2 FLR 69.

S v S (2001) 2 FLR 246.

Uzzell v Uzzell (5 th July, 2001) Grand Court of Cayman Islands.

HJ v HJ (17th October, 2001) Unreported Judgment of the High Court of England and Wales.

Lambert v Lambert (22nd October, 2001) Unreported Judgment of the High Court of England and Wales.

Potter v Potter (1982) 3 All ER 321.

F v F (1995) 2 FLR 45.

Martin v Martin (1977) 3 All ER 762 CA.

Hanlon v Hanlon (1978) 2 All ER 889.

Chamberlain v Chamberlain (1974) 1 All ER 33.

Browne v Pritchard (1975) 3 All ER 771.

Williams v Williams (1977) 1 All ER 28 CA.

Browne v Browne (1989) 1 FLR 291.

Thomas v Thomas (1995) 2 FLR 668.

Paul v Paul (1870) LR 2 P&D 93.

Bosworthwick v Bosworthwick (1927) P 64 CF.

Gulbenkian v Gulbenkian (1927) P 237.

Melville v Melville (1930) P 159.

Joss v Joss (1943) P 18.

Hargreaves v Hargreaves (1926) P 42.

Howard v Howard (1945) P 1.

Application, under Article 29 of the Matrimonial Causes (Jersey) Law 1949, to determine the appropriate financial provision to be made for the Petitioner by the Respondent.

Bailiff

THE

Background

1 The Court is sitting to determine, pursuant to Article 29 of the Matrimonial Causes (Jersey) Law 1949, the appropriate financial provision to be made for the petitioner (to whom we shall refer as “the wife”) by the respondent (to whom we shall refer as “the husband”). The parties were married in Jersey on 8th March 1986 and have three children, now aged 13, 12 and 9. The husband is the only child of the late X and Y. Y died in October 1995 and X died two months later in December 1995. The marriage between the parties broke down in June 2000. The wife petitioned for divorce and a decree nisi was granted on 15th November 2000. The husband is now living in the United States of America, and the wife is living with the children in a substantial house in Jersey (to which we shall refer as “the property”) formerly occupied by her deceased parents-in-law, and which had been the matrimonial home after their deaths. The property has an agreed value of £3 million. Both the husband and the wife have assets which by most ordinary standards would be regarded as substantial. The wife owns shares in a Guernsey company called JH Limited worth £1,200,000. She also owns jewellery with an insured value of some £500,000. This jewellery was given to the wife over the years of the marriage. Its market value was not ascertained. We refer to the husband's generosity below and we do not think it was seriously contended on his behalf that the value of the jewellery was to be weighed in the balance. The husband owns assets in his own name valued at about £2,200,000. These assets pale into insignificance however compared with the value of the trust fund to which we refer below. The trust fund has an agreed value of some £32,700,000.

2 The trust fund is that of a discretionary trust established by X shortly before his death in fairly standard terms. Wide discretionary powers were given to his trustees, and his wishes as to how those discretionary powers should be exercised were encapsulated in a letter of

wishes. By his will of moveable property the bulk of his substantial estate was bequeathed to the trust. By his will of immoveable estate, which was not registered until 4th April 2001, the property was devised to X Farms Limited, a company owned by the trustees of the trust. Virtually all the assets of the late X are accordingly now held in the X Trust. The beneficiaries of the trust are the husband, any issue of the husband, and any charity. The trustees have power to add to the class of beneficiaries, but that power has not thus far been exercised. The wife is not a beneficiary.

3 The original trustees were the husband and Conrad Edwin Coutanche. The husband resigned as a trustee in 2001. The sole remaining trustee is Mr. Coutanche, (to whom we shall hereinafter refer as "the trustee").

Post-nuptial settlement

4 The fist question for us to determine is whether we have the power to vary the settlement so as to enable provision to be made for the wife from its assets. Mr. Voisin, who appeared for the wife, submitted that the X Trust was a post-nuptial settlement within the meaning of Article 27 of the Matrimonial Causes (Jersey) Law 1949. That article provides –

> ***"(1) Where a decree of divorce or of nullity of marriage has been made, the court may, upon the application of either party to the marriage which is the subject of such decree, or upon the application of any person beneficially interested, cancel, vary or modify, or terminate the trusts of, any marriage contract, marriage settlement, post-nuptial settlement, or terms of separation subsisting, between the parties to the marriage, in any manner which, having regard to the means of the parties, the conduct of either of them [insofar as it may be inequitable to disregard it] or the interests of any children of the marriage, appears to the court to be just*** .
>
> ***(2) The court may exercise the powers conferred by this Article notwithstanding that the marriage was contracted, or the marriage contract, marriage settlement, post-nuptial settlement or terms of separation was made or entered into, in an extraneous jurisdiction"*** .

It is common ground that the X Trust is neither a marriage contract, nor a marriage settlement, nor does it constitute "terms of separation". The question is whether it is a post-nuptial settlement.

5 Mr. Voisin submitted that the Court should take a wide view of its powers under Article 27 in order to do justice between the parties. He drew attention to a number of decisions of English courts where such an approach had been followed. Perhaps the most helpful example is *Brooks v Brooks* [1995] 2 FLR 13 where Lord Nicholls stated at 19 –

> ***"In the Matrimonial Causes Act 'settlement' is not defined, but the context of s 24 affords some clues.*** Certain indicia of the type of disposition with which

the section is concerned can be identified reasonably easily. The section is concerned with a settlement 'made on the parties to the marriage'. So broadly stated, the disposition must be one which makes some form of continuing provision for both or either of the parties to a marriage, with or without provision for their children. Conversely, a disposition which confers an immediate, absolute interest in an item of property does not constitute a settlement of that property. The statutory provision is concerned with an order varying the terms of a settlement. This would not be an altogether apt exercise in relation to property given out-and-out and belonging to one of the parties to the marriage as his or her own absolute property. The context does not require that outright gifts of this nature should fall within the scope of the variation provision. In such a case the appropriate order on the dissolution of the marriage, if an order is needed in respect of the property, is a property transfer or property settlement order .

Beyond this the authorities have consistently given a wide meaning to settlement in this context, and they have spelled out no precise limitations. This seems right, because this approach accords with the purpose of the statutory provision. Financial provision that is appropriate so long as the parties are married will often cease to be appropriate when the marriage ends. In order to promote the best interests of the parties and their children in the fundamentally changed situation, it is desirable that the court should have power to alter the terms of the settlement. The purpose of the section is to give the court this power. This object does not dictate that 'settlement' should be given a narrow meaning. On the contrary, the purpose of the section would be impeded, rather than advanced, by confining its scope. The continuing use of the archaic expressions 'ante-nuptial' and post-nuptial' does not point in the opposite direction. These expressions are apt to embrace all settlements in respect of the particular marriage, whether made before or after the marriage."

6 It must however be recalled that the Court of Appeal in *Brooks* was interpreting a different statutory provision. The relevant part of Section 24 of the Matrimonial Causes Act 1973 provides –

> ***"(1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say – ……*** ..
>
> ***(c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage, other than one in the form of a pension arrangement (within the meaning of section 25D below);"***

7 The English statutory provision refers to "a post-nuptial settlement …. made on the parties

to the marriage". The equivalent Jersey provision refers to a "post-nuptial settlement, or terms of separation subsisting, between the parties to the marriage..". Counsel for the wife contended that the last part of that extract could be read as if there were no comma, so that the words "between the parties to the marriage" qualified only the phrase "terms of separation subsisting". This contention is plainly untenable. One cannot ignore a comma. We have no doubt that the words "between the parties to the marriage" qualify all the preceding phrases. The power to vary exists in relation to, *inter alia*, a post-nuptial settlement between the parties to the marriage.

8 Mr. Robinson, for the trustee, argued that the X Trust was not such a post-nuptial settlement for two reasons. First, it was not made between the parties to the marriage. The wife was not a party to it and indeed had no connection with it, in the sense that she was not a beneficiary. Secondly, there was no "nuptial" quality about it. It was not referable in any way to the marriage between the husband and the wife. In support of that argument counsel referred us to a passage from Jackson's Matrimonial Finance and Taxation, 6th edition, 1996 at paragraph 8.16 –

> ***"The words 'ante-nuptial settlement' and 'post-nuptial settlement' are to be given a liberal construction wholly different from the more restricted meaning that would be given to them in a conveyancing instrument or in other contexts.*** The form of the settlement does not matter: it may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. One has to ask the question: Is the settlement upon the husband in the character of husband or upon the wife in the character of wife, or upon both in the character of husband and wife? What matters is that the settlement should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state" .

9 Counsel derived further support for his second argument from *Prinsep v Prinsep* [1929] 225 at 232 where Hill J stated –

> ***"The main point in issue is whether the settlement of August 25, 1920, is a "post-nuptial settlement on the parties" within the meaning of s. 192 of the Judicature Act, 1925.*** Is it upon the husband in the character of husband or on the wife in the character of wife, or upon both in the character of husband and wife? If it is, it is a settlement on the parties within the meaning of the section. The particular form of it does not matter. It may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third-person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state." .

10 We were also referred to *E v E* [1989] FCR 591. This was a case where a father established a discretionary settlement of which the beneficiaries were the son, the daughter-in-law, and the son's children and remoter issue. The only asset of the trust was

the matrimonial home in which the son and his family lived. On the break-up of the marriage it was conceded that the trust was a post-nuptial settlement and that consequently it could be varied by the court. The facts of this case are however rather different from those in *E v Ein* that (a) the wife is not a beneficiary and (b) the matrimonial home of the parties was not an asset of the settlement (let alone the only one) at the time of the creation of the X Trust.

11 The undisputed evidence relating to the establishment of the X Trust shows that it was executed after many hours of discussion between X and his legal adviser. It is accepted by the husband that X was fond of his daughter-in-law and that she was not excluded from the class of beneficiaries on account of any ill-will on his part. Equally, it seems to us an inescapable inference that X did not omit the wife's name from the class of beneficiaries by an error or oversight. The evidence of the trustee was that in his discussions, as legal adviser, with X, his client had raised the possibility of a separation or divorce between his son and the wife and had made it clear that he considered his fortune to be “X's assets” which should devolve upon his blood relations. Even without this evidence, which was not seriously contested by the wife, we should have concluded that a man of X's acumen and experience could not possibly have omitted the wife from the class of beneficiaries by accident. We are satisfied that it was a conscious decision. X intended his trust to subsist for the benefit of his son and future generations in the blood-line.

12 We return to the submissions of counsel for the trustee. The phraseology employed by the draftsman of the Matrimonial Causes (Jersey) Law 1949 is different from that employed in any of the equivalent English Acts. It is difficult to see how the X Trust could, as a matter of ordinary English grammar, possibly be a settlement “between the parties to the marriage”. The word “between” in this context connotes some confinement or restriction to the parties. The parties to the marriage in this context were the husband and the wife. But the wife had nothing to do with the settlement. She was, on the evidence, aware of it, but she was not a party to its execution nor named in it as a beneficiary or in any other way. In our judgment, Mr. Robinson's submission is correct. For some reason, the power of this Court to vary settlements has been more narrowly drawn than the equivalent power in English legislation. This may not be desirable, but it is a matter for the legislature, if it sees fit, and not for this Court to amend.

13 Even if we were wrong in that conclusion, we would also find, for the second reason advanced by counsel for the trustee, that the X Trust was not a post-nuptial settlement. A post-nuptial settlement must, of necessity, have some nuptial quality about it. It must be referable in some way to the marriage in question. This may often be easier to sense than to describe. But it is clear that if a settlement is to be construed as a post-nuptial settlement, it must confer benefits upon its beneficiaries *qua* husband or wife. Counsel for the wife argued that X knew that the marriage existed, and that the husband and the children of the marriage were beneficiaries of the trust. It followed, he submitted, that there was a nuptial quality to the trust. We cannot accept that submission. It would be tantamount to accepting that almost every discretionary trust was *ipso facto* a post-nuptial settlement. A settlement takes its colour from all the circumstances surrounding its creation. We have no doubt that X intended to benefit his family, not in any nuptial capacity but as blood relatives.

14 In our judgment, the X Trust is not a post-nuptial settlement within the meaning of Article 21 of the Matrimonial Causes (Jersey) Law 1949 and accordingly we have no power to vary or modify any of its trusts.

Control of the trust

15 It does not follow, of course, that we should ignore the X Trust in our assessment of the appropriate financial provision to be made for the wife. Counsel for the wife at first argued that the trust was in fact controlled by the husband and should therefore be taken into account as if it were part of his assets. During argument he withdrew from this extreme position but maintained nonetheless that the assets of the trust were financial resources to which the Court was obliged to have regard. The submission is of fundamental importance. Counsel for the trustee submitted that the only assets to which the Court should have regard in the matter of any lump sum payment were the assets in the sole name of the husband, which are valued at £2,189,836. The value of the trust assets by contrast has been agreed at £32,705,293. Counsel for the trustee conceded however that the Court was entitled to have regard to the income received by the husband from the trust in awarding periodical payments to the wife.

16 We do not find it necessary to resolve the question whether the husband exercises effective control over the trust. It is helpful, in our view, nonetheless to set out some of the uncontroverted history regarding the administration of the trust. The original trustees were, as we have stated, the husband and Mr. Conrad Coutanche. The husband resigned as a trustee on 29th June 2001 shortly after taking up residence in the USA. Mr. Coutanche is now the sole trustee.

17 The trust was established by deed dated 1st August 1995. On the same day, X signed a letter of wishes addressed to his trustees in the following terms –

> *"You are the present trustees of the above named Instrument of Trust dated the first day of August One Thousand nine hundred and ninety-five created by me which sets out the trusts upon which the trustees thereof are to hold certain assets received by them from time to time*.
>
> *The Trust gives the trustees wide discretionary powers over capital and income, including power to distribute either capital or income within a very long period amongst a class of beneficiaries.* The trustees also have power to add persons to that class of beneficiaries from time to time.
>
> *Whilst I am aware that these discretions and powers are under the trustees' absolute and unfettered control, the trustees may find it helpful if I express in this letter my considered views as to how I would wish such discretions and powers to be exercised*.

After my death I would like the trustees to lodge any deeds or other valuable documents with Barclays Bank, Library Place, Jersey, and not to remove same or use them as security unless the Trustees unanimously agree that no other course of actions is appropriate.

I wish Coopers and Lybrand to be accountants to the trustees and to any companies owned by the Trustees.

I wish all rental income after deduction of tax to be held at Barclays Bank, Library Place to the order of the Trustees and distributed quarterly to my son Ian or as he directs less a small sinking fund of not more than 10% to meet unexpected liabilities.

The function of my Trust is to protect its capital for future generations and to protect my assets against certain unascertained liabilities of my heirs. The Trust Period may be foreshortened if my Trustees are satisfied such liabilities will not arise.

I request that the Trustees should treat this letter as confidential and not disclose the contents of this letter to any of the beneficiaries or any other person save to the extent that the trustees consider that to do so would be of assistance in administering the Trust".

18 Following the death of X and the devolution of his estate into the X Trust, the principal investment vehicle was a company called S.I. (1996) Limited. The accounts for the year ended 31st March 2000 show the directors as being Mr. Coutanche, the husband, and the wife; the wife was appointed a director on 22nd September 1999. The marriage broke down, as we have stated, in June 2000. At that time, it appears that a substantial amount of cash was held by S.I.; counsel for the wife suggested that it was in the region of £6 million, and this was not denied by counsel for the trustee or Mr. O'Connell for the husband. It further appears that the husband had unfettered authority to operate the bank account. It is true that the authority was conferred in his capacity of director of S.I., but nonetheless both Mr. Coutanche and the husband, in their capacity of trustee, were obviously aware of it. The breakdown of the marital relationship caused the wife, in conjunction with Mr. Coutanche, to take steps to alter the bank mandate and to restrict the husband's authority. This led to a protest letter from Advocate Dessain on behalf of the husband which included the following paragraph –

"In the meantime please confirm that you propose to follow the letter of wishes. In relation to the sixth paragraph I understand rental income includes both rental and other income. It is the husband's wish that the letter of wishes is followed including the sixth paragraph. Please could you confirm your position?"

19 Mr. Coutanche replied in the following terms –

"I confirm that I intend to follow the Letter of Wishes which includes the terms of the sixth paragraph. So far as I am concerned as a Trustee, now that I am in

contact with the husband once again I will continue to adopt a philosophy similar to that which I have done since first being appointed after the death of X".

20 The amounts actually distributed by the trustees, or latterly the trustee, to the husband are set out in the table below.

Some £4 million of undistributed trust income for the years 1996–2000 therefore remains in the hands of the trustee.

Year	*Income of the trust*	*Income distributions to the husband*
1996	*£911,799*	*£302,286*
1997	*£1,237,192*	*£344,459*
1998	*£1,499,955*	*£412,898*
1999	*£1,340,410*	*£630,748*
2000	*£1,306,642*	*£606,028*

21 A letter dated 20th June 2000 from the trustee to the husband also throws some light upon the relationship between them. The relevant part is in the following terms –

> *"Dear M*,
>
> *You have asked me to advise you generally about the terms of your late Father's Trust.* You of course recall that your Father set up the Trust during his lifetime and bequeathed the bulk of his estate to the Trustees by his Will. I am one of the Trustees.
>
> *Your Father and I spent many hours drafting the Trust and discussing his wishes generally; my over-riding impression at the time, supported by the notes I made, and which I have to always bear in mind is as follows.* Please remember that your Father chose to place his trust in me and I would not breach that trust for anyone; that is the very essence of this type of Trustee relationship.
>
> *Father was of course concerned for Mother's continued comfort though, sadly, in the circumstances, that was never really a consideration which fell to the Trustee*.
>
> *The Beneficiaries of the Trust are yourself and your children.* H (or any other spouse for that matter) was not overlooked; your Father and I discussed the question of your spouse at great length on more than one occasion. He was adamant that the financial arrangements for any spouse of yours should be

exclusively your responsibility.

Father had built up his assets by his own endeavours and to use his words, which he recorded in a Letter of Wishes addressed to his Trustees "The function of the Trust is to protect its capital for future generations."

Your Father did not want you to dissipate your inheritance, nor did he want you to lose your relatively comfortable lifestyle. He therefore asked me to pay much of the Trust income to you, but to ensure that the capital was untouched save as a last resort. He also charged me with ensuring that the value of the Trust Fund grew to accommodate the long term needs of his grandchildren and great grandchildren.

The Trust is wholly discretionary. I have not authorized any capital payments to you in five years save for convenience in making certain investments on the Trust's behalf and to be quite candid, I do not foresee the likelihood of my doing so.

I intend to continue to agree to pay you a reasonable income, but if I see any direct threat to my ability to keep faith with my promises to your late Father, I would propose your exclusion from the beneficial class of the Trust, which I am perfectly entitled to do under Clause A4. You would then be totally disentitled until such time as the Trustees re-considered.

I hope the latter course of action to which I have referred will never be necessary but I cannot let these matters go unsaid at this time; my duty to the memory of your late father exceeds all other considerations."

22 This letter, written at the request of the husband, is not a little disingenuous. First, it ignores the letter of wishes which, only five weeks later, the trustee indicated that he intended to follow. Secondly, the indication that he would "propose your exclusion from the beneficial class of the Trust, which I am perfectly entitled to do under Clause A.4" ignores the fact that at the time the husband was also a trustee and could effectively veto any such proposal. It is not for us to speculate as to why the letter was written. It is evident however that the trustee was prepared to obfuscate at the request of the husband.

23 Counsel for the wife referred us to two decisions of the English Court which are helpful in this respect. The first is *Bourne v Bourne* [1989] 1 FLR 291 where Butler-Sloss LJ stated at 293 –

"In considering whether or not, as the judge found, she had effective control over these trusts, it is of some relevance to note that, prior to the divorce and parting of the husband and wife, every application by the wife for funds for herself and for her husband for any of the pursuits that they wished to engage in, pleasure as well as the buying of property, was met and the sums asked for were advanced at the request of the wife. Although, perhaps, the phrase 'effective control' might more appropriately be expressed

as ‘immediate access to the funds’, in my judgment, the judge was entirely justified in coming to the conclusion as at 6 February that every request had been granted and that she was in a position to ask for money and to have it paid, and there was nothing to show that the trustees would not do so” .

24 Later in her judgment the learned Lady Justice of Appeal referred to the unreported judgment of *Milburn v Milburn* where Roskill LJ stated –

> ***“The whole purpose of this modern legislation is to enable a court to look at the reality of a particular situation.*** The reality at present is that there are these vast capital assets in Switzerland and Liechtenstein to which the husband has no legal or equitable title, but from which from time to time money can be, and on a balance of probabilities will be, made available if the necessity arises for [the] purposes [of] discharging such obligations as making periodical payments under an order of this court .
>
> ***So far from*** *Howard v Howard* ***being authority against the appellant I think it is authority for the proposition that, though the court must not make orders designed to put pressure on discretionary trustees, nonetheless the court should look at the reality of the situation, at what is, or is likely to be in all probability, the totality of the resources of a particular party to the marriage.*** I see nothing wrong in principle in taking into account the fact that there are these large sums from which requests for payments can be made” .

25 The second case is *Thomas v Thomas* [1995] 2 FLR 668 where Waite LJ stated at 670 –

> ***“The discretionary powers conferred on the court by the amended ss 23–25A of the Matrimonial Causes Act 1973 to redistribute the assets of spouses are almost limitless.*** That represents an acknowledgement by Parliament that if justice is to be achieved between spouses at divorce the court must be equipped, in a society where the forms of wealth-holding are diverse and often sophisticated, to penetrate outer forms and get to the heart of ownership. For their part, the judges who administer this jurisdiction have traditionally accepted the Shakespearean principle that ‘it is excellent to have a giant's strength but tyrannous to use it like a giant’. The precise boundaries of that judicial self-restraint have never been rigidly defined – nor could they be, if the jurisdiction is to retain its flexibility. But certain principles emerge from the authorities. One is that the court is not obliged to limit its orders exclusively to resources of capital or income which are shown actually to exist. The availability of unidentified resources may, for example, be inferred from a spouse's expenditure or style of living, or from his inability or unwillingness to allow the complexity of his affairs to be penetrated with the precision necessary to ascertain his actual wealth or the degree of liquidity of his assets. Another is that where a spouse enjoys access to wealth but no absolute entitlement to it (as in the case, for example, of a beneficiary under a discretionary trust or someone who is dependent on the generosity of a relative), the court will not act

in direct invasion of the rights of, or usurp the discretion exercisable by, a third party. Nor will it put upon a third party undue pressure to act in a way which will enhance the means of the maintaining spouse. There will be occasions when it becomes permissible for a judge deliberately to frame his orders in a form which affords judicious encouragement to third parties to provide the maintaining spouse with the means to comply with the court's view of the justice of the case. There are bound to be instances where the boundary between improper pressure and judicious encouragement proves to be a fine one, and it will require attention to the particular circumstances of each case to see whether it has been crossed" .

26 We adopt those principles. We accept that there have been occasions when the trustee in this case has refused to advance capital to the husband. We do not wish to intrude upon the discretion of the trustee. Nonetheless, having regard to the terms of the letter of wishes, and to the way in which the trust has been administered between 1996 and 2000 when the marriage broke down, we think that it would not be an unreasonable expectation on the part of the Court that the trustee should respond favourably to any request from the husband to enable him to meet his obligations under the award which we pronounce below and we give this judicious encouragement to the trustee.

The proper approach

27 Counsel for the wife submitted that the proper approach was to be found in the case of *White v White* [2001] 1 All ER 1, which, it was said, marked a fundamental change of attitude on the part of the English courts. That was a case where the husband and the wife were married in 1961. Throughout their marriage, which broke down in 1994, they carried on a farming business in partnership, with the wife playing an active part in the business, as well as having the primary role in bringing up their children. The parties' assets totalled £5.6 million, a sum which substantially exceeded their financial needs. The judge concluded that the husband and wife had both fully contributed to their marital and business partnership but that the sum of £800,000 would meet the wife's reasonable requirements. The effect was that the wife received just over 20% of the assets. On the wife's appeal, the Court of Appeal increased the amount to £1.5 million, which, after costs, increased the wife's share to about 40%. The husband appealed to the House of Lords contending that the Court of Appeal had wrongly departed from the "reasonable requirement" approach applied by the judge. The wife cross-appealed, seeking an equal share of the assets and contending that the principle of equality should be the starting point in every case concerning the division of assets between husband and wife. Both appeals were dismissed.

28 In the course of his judgment Lord Nicholls stated that the overriding objective was to make a fair financial arrangement between the parties, giving first consideration to the welfare of the children. He continued –

"Self-evidently, fairness requires the court to take into account all the

circumstances of the case. Indeed, the statute so provides. It is also self-evident that the circumstances in which the statutory powers have to be exercised vary widely. As Butler-Sloss LJ (at 39) said in Dart's case, the statutory jurisdiction provides for all applications for ancillary financial relief, from the poverty-stricken to the multi-millionaire. But there is one principle of ***universal application which can be stated with confidence.*** In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering para (f) of s 25(2) of the 1973 Act, relating to the parties' contributions. This is implicit in the very language of para (f): '…the contribution which each of the parties has made or is likely … to make to the welfare of the family, including any contribution by looking after the home or caring for the family'. (My emphasis). If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the homemaker and the child-carer. There are cases, of which the Court of Appeal decision in *Page v Page* [1981] 2 FLR 198 ***is perhaps an instance, where the court may have lost sight of this principle*** .

A practical consideration follows from this. Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is a good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination" .

29 We respectfully agree with all these sentiments. The touchstone in all cases involving a division of matrimonial assets is fairness. The court must try to achieve fair financial arrangements between the parties, and the welfare of the children is a primary consideration. There is no place for discrimination between husband and wife. Where they have both, by their own efforts, built up the family assets, even if their contributions are different in nature, fairness requires that those contributions be given equal weight. There is no reason why any surplus of assets, once the reasonable needs of the parties have been

satisfied, should automatically go to the husband. Nonetheless a ruthless application of the principle of equality will seldom lead to fairness. The court is required to take into account all the circumstances of the case.

30 During oral submissions counsel for the wife appeared to accept that this was not really a *White v White* type of case. The matrimonial assets were not built up by the efforts of the parties. Virtually all of them were built up by X. At the end of the day, counsel for the husband and for the wife were agreed that in the circumstances of this case, the test to be applied was what were the reasonable requirements of the wife.

Relationship between the parties

31 The Court was told during oral argument that the parties no longer talked to each other and communicated only through their counsel. This is a regrettable state of affairs which will, if it persists, be very damaging to the children. It is probably inevitable, given the confrontational nature of the resolution of this dispute, that additional bitterness has been engendered. Family disputes of this kind cry out for mediation or some alternative less antagonistic form of dispute resolution. We draw the attention of the parties, however, to the following positive factors that have emerged from the exchange of affidavits. First, both parties have stated that the love and devotion of the other to their children was unquestionable. Secondly, the husband has stated that he has no wish to see the wife suffer any hardship or diminution of her living standards. Thirdly, the wife has acknowledged that the husband was always very generous towards her. Fourthly, the husband has readily agreed to pay for all the educational expenses of the children and for their maintenance at the rate of £15,000 per annum per child index-linked, which the Court considers to be more than fair. These positive factors seem to us to be worth emphasizing in the hope that the parties will be able, once this dispute has been resolved, to resume communication in the interests of their children.

The respective positions of the parties

32 At the commencement of the hearing the wife's claim was for a settlement as set out below:-

On the basis of such a settlement, the wife was prepared to transfer to the husband her 50% interest in JH Limited, a company with an agreed value of £2.4 million. During the hearing counsel for the wife moderated that position so as to claim the husband's 50% interest in JH Limited but to reduce the claim for a lump sum payment to £4 million. He also suggested that the house in England could be retained in the ownership of the trust provided that it was made available for the use of the wife and the children.

(i) The property – agreed value	£3,000,000

(ii) Contents of the property (Valuation)	£236,965
(iii) Pictures and paintings set out in schedule to the valuation	£78,150
(iv) Apartment in Spain (agreed value)	£250,000
(v) Cash for purchase of house in England	£1,000,000
(vi) Lump sum payment	£7,000,000
(vii) Motor vehicles in wife's possession	£50,000
TOTAL	**£11,615,115**

33 The husband was prepared to agree (i), (ii), (iii), (iv) and (vii) above subject of course to procuring the co-operation of the trustee, and, in the case of (ii) and (iii), subject to the reservation set out below. The claims in paragraphs (v) and (vi) were not agreed. The husband was, however, prepared to transfer to the wife his 50% interest in JH Limited. That company would yield an agreed net income after management fees and tax of £127,000 per annum. The reservation is that the husband reserves the right to select for himself a small number of pictures and pieces of furniture that have a sentimental value. Counsel told us that they expected to be able to resolve this difference amongst themselves. We are proceeding on that assumption, but in the event of continuing disagreement we give liberty to apply to any party.

The award

34 The claim for a house in England for the use of the wife and children was based essentially on the fact that the parties intend the children to be educated at public schools and universities or colleges in England. The existence of a *pied à terre* or indeed a second home while the children are undergoing tertiary education could therefore be very convenient. For a time such a home in England did exist. The trustees acquired a flat at The Bromptons in Knightsbridge in 1999, which was not however used until late 2000. This flat was sold in 2001 for £2,350,000. The existence of an English property for the use of the family was therefore of short duration. We are not persuaded that this aspect of the claim is a reasonable requirement for the wife at this stage and we accordingly reject it. It may be that such a provision would be reasonable for the children in due course, but it seems to us that this is something for the consideration of the trustee at the appropriate time.

35 We turn to the provision of housing accommodation for the wife. The claim is for the transfer of the property, the former matrimonial home, which has an agreed value of £3 million. Mr. O'Connell for the husband submitted that this was an over-provision in the sense that a property worth £2 million would be more than adequate for the wife and

children. This may well be so, but there are other considerations to weigh in the balance. A divorce is a traumatic event, not only for the parties, but also for their children. To visit upon the children the loss of their familiar home in addition to the distress caused by the divorce is something to be avoided if at all possible. This has been recognized by the husband. In an affidavit sworn on 8th June 2001 he stated at paragraph 19 –

> *"As far as I was concerned [the property] is my children's home.* I still regard it as such. I do not want to cause the children any more disruption in their lives than I already have through the breakdown of the marriage. I would wish to see them remain in Jersey which is their home now, where they are schooled and where their friends are."

36 At paragraph 23 of the same affidavit, he continued –

> *"My inclination was to preserve the status quo.* My thinking was that if [the property] was not available to the plaintiff [the wife] and the children in the long-term, then there existed the possibility that they would leave Jersey. Above all else, I wanted to avoid that situation occurring, because I did not want the children to feel that I had driven them and their mother out of their home".

37 We accept that there would be an element of over-provision in ordering the husband to seek to procure the transfer of the property to the wife. Nonetheless the interests of the children are a primary consideration. Their emotional as well as their physical needs are important. Those needs can best be met, in our judgment, by procuring that the home be vested in the wife. We accordingly order that the husband procure the transfer of the property into the name of the wife or to her order. We appreciate that this will require the co-operation of the trustee but for the reasons given above we anticipate that that co-operation will be forthcoming.

38 We turn next to the question of a lump sum payment. We take it as axiomatic that we should make an order which achieves a "clean break". Counsel for the trustee suggested that an order should not be made which required the provision of funds from the X Trust, and that the Court should award periodical payments and a lump sum only to the extent that it could be met from assets available to the husband. For the reasons given above we are not inclined to accept this suggestion. Periodical payments have a tendency to prolong the misery and exacerbate feelings of bitterness. They should be avoided if at all possible. It is possible in this case.

39 The amount of the lump sum should reflect the wife's reasonable requirement for income. By the application of the Duxbury tables or other appropriate multiplier, it is possible to arrive at the requisite capital sum to produce the income. In her affidavit of 31st January 2001, the wife set out her requirements based upon expenditure in the year prior to separation which showed an annual income requirement of £310,392. The husband states that the family expenditure prior to their separation reflected certain extravagances which in turn reflected, perhaps, the strains of a deteriorating relationship. After the separation,

during the year from 1st September 2000 to 31st August 2001, the wife's expenditure amounted to £216,433. According to her affidavit of 29th November 2001, the wife's spending on clothing and shoes, entertainment, holidays and general expenses reduced substantially compared with the level of expenditure that she enjoyed during the marriage. Counsel for the husband submitted that this level of expenditure was generally excessive, but did not attack any specific item in the detailed schedule which was appended to the affidavit.

40 We have examined the schedule with some care. We think that the expenditure on staff wages and social security totalling £36,068 is likely to reduce over the next two years or so. There are currently two full-time employees, a gardener and a nanny. We doubt that there will much longer be a need to employ a nanny. In other respects, taken in the round, we do not think that an income requirement in the region of £200,000 per annum net of tax is unreasonable; nor do we think that such expenditure represents any significant reduction in the standard of living that the wife has enjoyed during the marriage.

41 The husband's offer to transfer a 50% interest in JH Limited, so that the net income of that company of £127,000 per annum would be available to the wife, will not meet this requirement. Counsel for both parties have jointly procured a set of Duxbury tables setting out the capital required to produce a level of annual income net of Jersey income tax. By reference to those tables, we calculate that an income of a little over £80,000 per annum would be produced by capital of £1.8 million. To give the wife a net income of £207,000 per annum would therefore require us to order the husband to transfer his shares in JH Limited and to make a lump sum payment of £1.8 million. In capital terms the value to the wife of the order that we propose to make would be as follows:-

The property	£3,000,000
Lump sum	£1,800,000
$^1/_2$ JH Limited	£1,200,000
Apartment in Spain	£250,000
Contents of property	£236,965 (subject to the reservation set out in paragraph 33)
Pictures and paintings	£78,150 (subject to the reservation set out in paragraph 33)
Motor vehicles	£50,000
Total	**£6,615,115**

42 Having arrived at that provisional conclusion we have tried to look at it from other

perspectives. It is true that the husband does not have the capital available from his own resources to comply with this order. He will need to secure the co-operation of the trustee. For the reasons given above, and in paragraph 43 below, we anticipate that the trustee will accede to any request made by the husband for advances to enable him to comply with the order.

43 From the viewpoint of the trustee the proposed order will have only a minimal effect upon the income of the trust. The property, and the contents thereof, are non-income bearing assets and indeed constitute a drain upon the trust's income. It is likely that the necessary arrangements to allow the husband to transfer the property and to pay the lump sum of £1.8 million could be achieved without resorting to capital. The income of the trust has comfortably exceeded £1 million per annum during the last four years for which accounts are available. There is more than sufficient income available for the reasonable requirements of the husband and for maintaining or even augmenting the value of the trust fund. The combined value of the trust fund and the assets of the husband exceed £35 million; the proposed award to the wife would constitute only a relatively minor dent in that total.

44 We conclude therefore that the figures at which we have arrived are fair to both parties and to the children and other potential beneficiaries under the X Trust. We accordingly make the award set out in paragraph 41 above.

45 It only remains for us to thank all counsel for their submissions and for the orderly way in which the authorities, documents and skeleton arguments were presented to us.