IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION

CAUSE NO: FAM 137 OF 2018

BETWEEN:

A.D.

Petitioner

-and-

J.D.

Respondent

BEFORE RAMSAY-HALE J
IN CHAMBERS

Appearances:	**Mr. James Turner QC and, with him, Ms. Kate McClymont instructed by Broadhurst LLC for the Petitioner** **Mr. Nicholas Cusworth QC and, with him, Mr. Graham Hampson and Ms. Sulekha Tummala instructed by Hampson & Co for the Respondent**
Heard	**20 - 24 January 2020**
Draft Judgment Delivered:	**11 September 2020**
Judgment Circulated:	**10 November 2020**

HEADNOTE

Matrimonial Law - Final Ancillaries - *Waggott v Waggott* - spouse's earning capacity not a marital asset subject to the sharing principle - principles applicable to orders for spousal maintenance.

JUDGMENT

Introduction

1. This is the decision on the application of the Petitioner, to whom I shall hereinafter refer as "the wife" for the sake of convenience, for financial provision ancillary to a Petition of divorce which was proved on 31 May 2018. She and the Respondent, hereinafter "the husband," are both Canadian nationals. They are both 45 years old, the husband being born on 18 March 1975 and the wife on 14 August 1975. He is an equity partner at an accounting firm ("the Firm") and she, a

homemaker and an amateur athlete who has competed in international competitions. They married in Canada on 15 September 2000 and have resided permanently in the Cayman Islands since 2006. There are two children of the marriage: 12 year old "L" and 8 year old "M". The parties' final separation came at the end of December 2017.

The Background

2. The parties first began their relationship in 1993. They married shortly after the wife had graduated from university and the husband had completed his accountancy articles. In 2001, they moved to Cayman so the husband could pursue a job offer. While in the Cayman Islands, the wife, who had obtained a Bachelor of Applied Design in Interior Design, worked at a small architectural firm for about 18 months.

3. The husband was briefly seconded to Dublin and the wife left her job and went with him. On their return to the Cayman Islands, she secured a job working in furniture sales which she hoped would allow her to transition into a job in interior design. Unhappily, some two months later the Islands were devastated by Hurricane Ivan and the husband was relocated to Curacao by his then employers. As a result, the wife, unable to negotiate a leave of absence to accompany her husband to Curacao, was forced to resign.

4. On their return to the Islands, the husband took up employment with another employer and the wife found a position as an assistant interior designer at a small architectural firm that she was thrilled with. The husband was not, as it transpired, as happy in his new job and the couple decided to return to Vancouver, which they did in October 2005. There, the husband joined an international accounting firm and the wife found another job in furniture sales that she again hoped would allow her to transition into a role in interior design.

5. According to the wife, they found living in Vancouver to be not as "financially viable" as living in Cayman so when the husband received an offer of a job from the Firm, they decided to return to the Cayman Islands, some 12 months after they had left. On her return, the wife found a job in marketing in which she worked for 12 months. In April 2008, "L" was born and the couple made a decision that the wife would cease paid employment to care for the child. In 2012, "M" was born.

6. The husband continued to work at the Firm and on 1 October 2012, he became a non-equity partner and the family's economic fortunes grew. On 1 October 2015, he became an equity partner, entitled to share in the Firm's profits as set out in the Firm's partnership agreement which is re-negotiated every year.

7. The structure of the profit-sharing agreement is relevant to the history of this matter so I will set it out here and return to it when I consider the husband's income and earning capacity below.

8. As a non-equity partner, the husband's salary of $250,000[1] a year was supplemented by an annual discretionary bonus which was immediately available to the family for spending.

9. As an equity partner, by virtue of being a party to the Partnership Agreement, the husband participates in a profit-sharing scheme which is a little more complicated than the bonus scheme. The profit-sharing scheme, as explained by the managing partner of the Firm[2] and by the husband, operated as follows.

10. Each partner receives a distribution of any profits from the Firm after the payment of partner salaries of $250,000 a year. There are three elements of the profit-sharing scheme:

    (i) The Performance Element Pool: 15% of the remaining profit divided, with each partner getting between 30% and 200% of the average per partner of the pool, unless they have failed to perform adequately;
    (ii) The Seniority Element Pool: the remaining 85%, increasing from 8% to 85% of the average per partner over 9 years and
    (iii) The Leadership Element Pool, in which partners become eligible to share from their 9th year: any remaining profit divided between 25% and 75% of the average for this pool.

11. The base salary of $250,000 is, however, the only portion of the husband's remuneration that is provided to him within the partnership year. His partnership share is retained in the business for **capital account** and **working capital** requirements. A partner is required to make capital contribution to the Firm until he becomes "equalized". The capital account requirements increase annually through to at least the year following a partner's 8th year when he becomes eligible to share in any remaining profit pool after the other profit distributions have taken place. The Firm retains the sum in the capital account until the partner's retirement. I will refer to this, for ease of reference, as the Retained Capital Account.

12. The remainder of the partner's profit share is retained by the Firm as working capital. Working capital is usually retained for between 1 and 2-1/2 years after the amounts have been determined and allocated to each partner, usually in February of the following year, before it is available for distribution. Distribution is subject to the approval of the Management Committee based on financial and cash flow results and the financial viability of the Firm. [3] Once distributed, the partner is free to draw on the monies. I will refer to this account as the Drawing Account.

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[1] The husband is paid in US dollars, so all figures are in USD and converted where necessary at the rate of .82 USD to 1KYD, rounded up or down, for ease of reference
[2] Letter dated 20 September 2019 at C/ 176
[3] Letter from Managing Partner of KPMG at p. 428-432

13. In the main, the Managing Partner states, partners are encouraged to budget their standard of living to the $250,000 base salary. Special advances can be considered in cases of exceptional need but, the managing partner notes; it is not the policy to allow for advances for income *per se.* In 2018, the Managing Partner stated, that as a consequence of the structure of the profit-sharing scheme,

> *"At this time* [JD] *cannot draw as of right more than his basic salary. The remaining performance pool and seniority profit share will remain as capital in the firm as noted above."*

14. The husband pointed out that being a partner is dependent both on the Firm's performance and on the partner's performance and noted that a P2 partner had been removed from the partnership since he became a partner, for failing to perform.

15. In September 2016, the husband and wife purchased the former matrimonial home, a three and a half bed/three bath condominium at Kings Court, Britannia on the Seven Mile Beach corridor. Despite this long marriage and the husband's professional success, it is the only property they own. It was purchased for the sum of $870,000 plus stamp duty, legal fees and costs with the proceeds of sale of their Canadian home which the husband estimates contributed some $120,000, the proceeds of sale of some land in West Bay in the Cayman Islands and the sale of shares in CUC in which they had invested the husband's bonuses from previous years and a mortgage of $690,000. In March 2017, the parties embarked upon substantial and costly renovations, spearheaded by the wife, in which the unit was stripped right down to the studs. It was paid for with $70,000 drawn from the husband's 2016 profit share and the proceeds of two further bank loans in the sum of $260,000, as they had committed to spending $350,000 on the project to create what the husband called the wife's "*dream home.*"

16. After the renovations were complete in October 2017, cost overruns required the parties to obtain a line of credit of $70,000 from the Bank, as they effectively had no money available to them,[4] and the husband drew another $70,000 down from the Firm. This effectively put him in a debit position with respect to his drawing account as he was drawing profits which had not yet been allocated to him much less made available for drawing upon by the Firm.[5]

17. Not only were there cost overruns on the renovation project, but the family incurred additional costs as they had to rent temporary accommodation because the renovations rendered the matrimonial home uninhabitable. This cost a further $5,400 per month for some 3 ½ months until

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[4] Husband's *viva voce* evidence

[5] The evidence was that the Firm's year end is 30 September but the profit share is not allocated until February of the following year and not available for drawing until 1 to 2 ½ years later.

the renovations were complete. The family moved back into the former matrimonial home after the renovations were complete even though the home was only partially furnished.

18. As it transpired, in April 2017, shortly after the renovations began, the wife was diagnosed with cancer and had surgery and chemotherapy. From the content of the wife's fourth affidavit and emails exhibited, it would appear that her illness exacerbated tensions in the marriage and, in November 2017, two months after the family moved back into the former matrimonial home, the wife asked the husband for a divorce.

19. The marriage ultimately came to an end in December 2017, when the husband left the matrimonial home. He then found temporary accommodation in a small studio above the garage of one of the more senior partners at the Firm. He lived there for the better part of 8 months, rent free, although that accommodation had few amenities; no stove, no washing machine and no dryer. This, he explained, was because in 2018, he only had his salary available to him and could not afford a place of his own: his 2016 capital drawing account was exhausted, his 2017 profit share was retained by the Firm as working capital for the Firm and he was already in a debit position having taken the advances referred to above.

20. The wife and children remained at Britannia at a monthly cost of $9,950 to the husband who, for the first several months following their separation, transferred $10,975 into their joint account for her use. He also paid the children's school fees and other educational related expenses at a rate of $3,350 per month. These expenses exhausted the husband's salary and he was constrained to seek advances on his profit share from his partners. Eventually, the husband decided that economies had to be made on both sides, and he reduced the sum he gave to the wife to $3,000 in June and later $4,000 a month. He cut off the credit card which had remained in the wife's possession because, he says, she continued to charge groceries to the card despite being in receipt of sufficient funds to pay for them. This left her with $4,000 for outgoings and him with $4,000 to cover all his expenses including rent.

21. The husband moved into more congenial accommodation in Governor's Harbour for which he paid rent of $3,500 a month and after that into temporary accommodation on the West Bay Road, leased by the Firm, for which he pays $3,100 a month, exclusive of utilities, and where he remained at the date of the hearing.

22. All expenses for the family have been and continue to be met by the husband as the wife does not work and has not worked since the parties separated, over two years ago. The reasons therefore were issues with the immigration status and difficulties in obtaining the right to work. When she was granted the right to work on 23 September 2019, she opted to start her own company rather than seek employment, much to the husband's chagrin. The business is in a fledgling stage and had not started to trade at the time of the hearing.

Issues

23. The issues for resolution are the capital provision to be made for the wife and the quantum and duration of periodical payments for spousal maintenance.

24. This is not a "*big money case*". Given the modest value of the capital assets acquired by the parties during this marriage, the combined legal fees of $636,000 can only regarded as disproportionate, and given that this is a household with a single source of income, it is a matter of some regret that this matter could not be resolved without a trial.

25. It appears to me, however, that any prospect of settlement was stymied by the wife taking aim at the only thing of high value in this case, which is the husband's income, which increased substantially after their separation. In open correspondence, she put her claim for spousal maintenance on all three strands of fairness articulated by the House of Lords in the conjoined appeals of *Miller v Miller, McFarlane v McFarlane:* need, compensation and sharing. [6] The wife thus claimed an entitlement to compensation for relationship generated disadvantage as a premium above need and also claimed to be entitled to share in the husband's surplus income, after needs were provided, on the basis that the husband's earning capacity is a marital asset to which the sharing principle should apply.

26. In the course of the evidence, however, she gave no evidence of any loss she suffered for which she should be compensated. In addition, she prepared a budget for spousal maintenance in sum of $352,991.11 for herself and her children on the basis of needs which, on her case, would leave no surplus to be divided. [7]

27. The factual basis on which the wife put her claim necessarily called into question the sincerity with which the legal argument was advanced. The insincerity of the wife's position was put beyond doubt when Mr. Turner QC, who appears on her behalf, acknowledged that the proposition advanced had been fully argued in the case of *Waggott v Waggott* - by him! - and given short shrift by the Court of Appeal and subsequent leave to appeal to the Supreme Court refused. Learned Queen's Counsel allowed that the argument had been made here primarily to preserve the wife's position on appeal, noting that the question of whether the husband's income was a matrimonial asset to which the sharing principle applied was *'probably academic'* in any event, as the wife's claim could be justified on the 'needs principle'.

28. The decision to put the claim on any basis other than needs, with the concomitant unnecessary increase in costs - prompting, as it did, the husband and then the wife to instruct London Silks- is

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[6] Email dated 13 November 2019 at p 682 of the Bundle

[7] The wife produced a table which estimated the husband's income at $700,000 per annum and proposed $352,991.11 to the wife and children which would leave $347,008.89 for the husband.

inexplicable, and I agree with Mr. Cusworth QC's assessment of the costs outcome in this case as a tragedy.

The Statutory Framework and applicable legal principles

29. As Mr. Turner's submission was developed at length, it is perhaps right that I should deal with it more fully in the context of the statutory provisions which give this Court jurisdiction to make orders ancillary to divorce and the authorities which inform the exercise of the court's discretion to grant financial relief.

30. Section 19 of the *Matrimonial Causes Law (2005 Revision)* ("*MCL*") sets out the general principles to be applied:

> *"19. 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."*

31. Section 21 deals with the orders the Court may make, including orders for

> *(a) the custody, care and control of the children of the marriage;*
> *(b) the disposition of matrimonial property, including the matrimonial home;*
> *…*
> *(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."*

32. In *McTaggart v McTaggart,* the Cayman Islands Court of Appeal made it clear that although the section 19 factors are less extensive than the section 25 factors in the Matrimonial Causes Act 1973 in England and Wales, as amended by the *Matrimonial and Family Proceedings Act* 1984, the approach in the Cayman Islands should be the same as in that jurisdiction. The court in exercising its powers under the statutory provisions should therefore consider all the circumstances of a case including the following section 25 factors:

> *"(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 the chance of acquiring."*[8]

33. Accordingly, although the statutory provisions are not *ad idem*, the Cayman Courts consistently look to English case law for guidance.

34. The seminal judgment of the House of Lords in *White* v. *White* [2001] 1 AC 596 falls to be considered, as the sharing principle established in that case and developed by the House of Lords in the conjoined appeals of *Miller v Miller; McFarlane v McFarlane* [2006] 2 A.C 618, is relied on by the wife who seeks, as I have said, to extend the principle to her husband's post-separation earnings.

35. The decision in *White* was intended to address the Court's concern that, in high value or 'big money' cases, courts were deciding applications for ancillary relief on the basis of providing for the homemaker's reasonable requirements which often left the bulk of the assets, acquired over the course of the marriage, in the hands of the breadwinner. The Court sought to redress the balance between those who worked in the home and those who worked outside, holding that the overall requirement in applying section 25 was to achieve fairness. In expanding on that theme, Lord Nicholls stated in *White's* case at paras 8,9:

> *"Self-evidently, fairness requires the court to take into account all the circumstances of the case. Indeed, the statute so provides….. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. ..*
>
> *… 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 paragraph (f), relating to parties'*

[8] Paras 17,18

> *contributions. …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…*
>
> *…As a general guide, equality should be departed from only if, and to the extent that, there is 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."*[9]

36. In an effort to give more guidance to judges on the application of fairness to the section 25 factors, the House of Lords in *Miller; McFarlane* identified three elements, or strands, to fairness which the courts should take into account:

    (a) needs, generously interpreted,
    (b) compensation for relationship disadvantage if there is any excess income once needs have been met, and
    (c) sharing of the fruits of the marital partnership.

37. I have been taken at some length to passages in the judgment by Mr. Turner, including the statement by Lord Nicholls at para 16 of the judgment that,

> *"This 'equal sharing' principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals … This is now recognised widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less."*

as well as the following passages in the judgment of Baroness Hale:

> *"[138] The most common rationale is that the relationship has generated needs which it is right that the other party should meet. In the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close as possible to the standard of living which they enjoyed during the marriage;*
>
> *"[140] A second rationale, which is closely related to need, is compensation for relationship-generated disadvantage. Indeed, some consider the provision for*

[9] [2006] 1 A.C. 596 at paras 8,9

> *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 the parties' needs,* ***then a premium above needs can reflect that relationship-generated disadvantage".***
>
> ***…***
>
> ***…***
>
> *"[154] There is obviously a relationship between capital sharing and future income provision. If capital has been equally shared and is enough to provide for need and compensate for disadvantage, then there should be no continuing financial provision. In McFarlane, there has been an equal division of property, but this largely consisted of homes which can be characterised as family assets. This was not enough to provide for needs or compensate for disadvantage.* ***The main family asset is the husband's very substantial earning power, generated over a lengthy marriage*** *in which the couple deliberately chose that the wife should devote herself to home and family and the husband to work and career. The wife is undoubtedly entitled to generous income provision for herself and for the sake of their children, including sums which will enable her to provide for her own old age and insure the husband's life.*
>
> ***She is also entitled to a share in the very large surplus, on the principles both of sharing the fruits of the matrimonial partnership and of compensation for the comparable position which she might have been in had she not compromised her own career for the sake of them all…"*** [My emphasis]

38. Mr. Turner submits that this case is on all-fours with *McFarlane* as here the wife forfeited the pursuit of her own career prospects in order to support the husband in the development of his, which involved several moves of home around the world and limited her employment prospects. Her primary role in the marital partnership for the last 12 years has been homemaker and mother which role has continued since the separation of the parties. Having obtained permission to work in Cayman in September 2019, she founded a business in a particular aspect of the field of interior design. However, she is now only just starting out in that business, having been hampered by illness and immigration issues, and has, at present, no earned income.

39. Mr. Turner submits further that the wife and the children remain entirely dependent financially upon the husband at present and that the marriage has thus generated **needs** which the husband will have to meet. He also submits that given the wife's role in the marriage, her recent illness and the fact that she has been and will continue to be the primary caregiver for their children, she will never be able to acquire the career and earning capacity that would otherwise have been

available to her and she has thereby suffered a relationship-generated disadvantage for which she should be **compensated.** He also submits that she is also entitled to **share** in the capital assets acquired over the term of the marriage by dint of her contribution to the marital acquest as homemaker.

40. That latter submission poses no problems with respect to the modest capital that the parties have acquired. Mr. Turner proposes, however, that in assessing the periodical sum to be awarded to the wife, the court should make an order that allows the wife to share in her husband's future income on the ground that his earning capacity was generated during the marriage and is the family's main asset as stated by Baroness Hale in *Miller; McFarlane.* To do otherwise, argues Mr. Turner, would be to leave the wife with an income provision which speaks to her needs but leaves the husband with the vast bulk of his income which, Mr. Turner contends, would be discriminatory.

41. Mr. Turner submits that, in order to achieve the desired outcome, that both parties set out on independent futures at the end of their marriage on an equal footing as stated by Baroness Hale in *Miller; McFarlane,* there should be an equal sharing of everything the marriage has generated. In this case, he says, it is not a matter of dividing capital, as each will start off on the same capital footing, but there will be no equality if an award to meet the wife's needs leaves the husband with the vast bulk of his remuneration package.

42. The Court of Appeal in *Charman v Charman* observed that Lady Hale's observations in *Miller; McFarlane* could be construed as authority for the proposition that a husband's earning capacity may be a marital asset susceptible to sharing, saying:

> *"We appreciate that remarks of Baroness Hale in Miller, at 154* [supra para 37] *are also said to permit argument that a party's earning capacity is itself an asset to which the other has contributed and which might to some extent be subject to the sharing principle; this seems to us an area of complexity and potential confusion which in this case it is unnecessary for us to visit."*

43. In *Waggott v Waggott* [10] the Court of Appeal did visit the issue and put it firmly to bed. Mr. Turner, instructed on behalf of the wife in the appeal, had sought to persuade the Court that although the most common rationale for imposing the obligation to maintain into the future is to meet needs which the relationship has generated, Baroness Hale had not suggested that there could be no principled basis other than "needs" to justify an award of ongoing maintenance. Rather, far from excluding "earning capacity" as a matrimonial asset which should be subject to the sharing principle, Baroness Hale had said, in effect, that the wife's claim to a share of income accruing to the husband in the future was not limited to her "needs"; she was entitled to a share of the surplus

[10] [2018] EWCA Civ 727

after the "needs" of both parties and their children had been met (and irrespective of "compensation").

44. The argument was rejected by the Court of Appeal which held that since an earning capacity was not property generated during the marriage it was not capable of being a matrimonial asset to which the sharing principle applied or the product of which, as a result, an applicant spouse had an entitlement to share.

45. At paragraph 128 of his judgment, Moylan LJ said this*:*

> *"In my view Miller and the subsequent decisions referred to above, in particular Jones and Scatliffe [2016] UKPC 36, [2017] AC 93, [2017] 2 WLR 106, [2017] 2 FLR 933, do not support the extension of the sharing principle to an earning capacity. The sharing principle applies to marital assets, being 'the property of the parties generated during the marriage otherwise than by external donation' (Charman v Charman (No 4) [2007] EWCA Civ 503, [2007] 1 FLR 1246, at para [66]). An earning capacity is not property and, in the context advanced by Mr. Turner, it results in the generation of property after the marriage."*

46. The Court held further that any extension of the sharing principle to post-separation earnings would fundamentally undermine the court's ability to effect a clean break. It would apply to every case in which one party had earnings which were greater than that of the other, regardless of need, which could be a very significant number of cases and would inevitably require the court to assess the extent to which the earning capacity had accrued during the marriage.

47. Mr. Turner invites me to find that the Court of Appeal was wrong and suggests that because leave to appeal was refused, the UK Supreme Court has never considered substantively the correctness of the decision, nor has the judicial committee of the Privy Council.

48. Insofar as I am required to decide the point, I decline Mr. Turner's invitation to hold that the Court of Appeal in *Waggott* was wrong, not only because I am satisfied that the decision is right for all the reasons stated by the Court, the panel of which included Munby LJ, then President of the Family Division and Moylan LJ, a specialist family judge of many years' experience before his elevation to the Court of Appeal, but also because the decision of the Court relied on the decision of the Privy Council in *Scatliffe v Scatliffe,*[2016] UKPC36 which is binding on this Court.

49. The passage in *Scatliffe* to which the Court of Appeal in *Waggott* referred can be found at para 25 of the opinion given by Lord Wilson on behalf of the Board where he states that,

> *"… in an ordinary case the proper approach is to apply the sharing principle to the matrimonial property and then ask whether, in the light of all the matters specified (in the statute), the result of so doing represents an appropriate overall disposal. In particular, it should ask whether the principles of need and/or of*

> *compensation, best explained in the speech of Baroness Hale in the McFarlane case [2006] 2 AC, paras 137-144, require additional adjustment in the form of transfer to one party of further property, even of non-matrimonial property, held by the other".*

50. I would here note too, the observation of Mr. Cusworth QC that the decision in *Waggott* has been reaffirmed by the Court of Appeal most recently in *XW v XH* [2019] EWCA Civ 2262, where Moylan LJ said at [136]: *'….in clarification of what Lady Hale said in Miller an earning capacity is not a marital asset…'.*

51. Moylan J also cited *Scatliffe* as deciding that "*the application of the sharing principle impacts, in practice, only on the division of marital property and not to non-marital property."*

52. As to the submission that the wife has suffered a relationship generated disadvantage for which she should be compensated, this case could not be further from *McFarlane* on which the wife relies. There the Court found as a fact that the wife sustained significant future economic disparity arising from the way the parties conducted their marriage. Lord Nicholls stated at para 92:

> *"This is not a case where the wife's future success was a matter for speculation. Speculation of this character is seldom helpful. Here the wife had a proven track record when the parties agreed she should give up her job"*

53. In *McFarlan*e both the husband and wife had very successful careers in the City. Both were professionally qualified, Mrs. McFarlane as a solicitor and Mr. McFarlane as a chartered accountant. They had each served their traineeship with leading City firms. After the birth of their first son, Mrs. McFarlane returned to work. At the end of 1989 she moved to Freshfields, a well-known City firm of solicitors, where she worked a four-day week. In 1990 the husband became a partner in Touche Ross. Until this time, the wife earned as much as the husband. Indeed, for a while she earned more than him. The court was clear that the career the wife had given up "*would very probably have been a lucrative and successful career"* which she would not be able to regain.

54. There is no evidence before the Court that this wife suffered a relationship disadvantage and it is, as the judgment in *McFarlane* makes clear, a question of evidence and not speculation. In *SA v PA* to which Mr. Cusworth for the husband referred me, Mostyn J made the following observations:

> *"36. Obviously I am bound by the decision of the House of Lords. However, in the light of the later authorities, I think that the principles concerning a compensation claim can properly be expressed as follows:-*
>
> *(i) It will only be in a very rare and exceptional case where the principle will be capable of being successfully invoked.*
> *(ii) Such a case will be one where the court can say without any speculation, i.e. with almost near certainty, that the claimant gave up a very high*

> *earning career which had it not been foregone would have led to earnings at least equivalent to that presently enjoyed by the respondent.*
>
> *(iii) Such a high earning career will have been practised by the claimant over an appreciable period during the marriage. Proof of this track-record is key…."*

55. In the absence of a proven track record, there is no evidence on which Mr. Turner's submission, that the wife be awarded some premium above needs, can bite. In this case, provision for need is compensation for relationship-generated disadvantage.

The Needs Principle

56. Despite the lengthy submissions by Counsel for the wife, this is the ordinary case where the Court will be engaged on assessing the wife's needs, generously interpreted, as was submitted by Mr. Cusworth at the outset.

57. I turn now to consider the principles to be applied by the Court in making periodical orders for spousal maintenance under section 21 (e).

58. Mr. Turner submits that the reported authorities show that the concept of "needs" is a flexible one that is informed by the circumstances of the individual case, the assessment of which may take account of factors that include the length of the marriage, the lifestyle enjoyed during that marriage and the resources now available, including resources that are not directly referable to marital endeavour. He observes that Baroness Hale said in *Miller/McFarlane* at para [138]:

> *"In the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close as possible to the standard of living which they enjoyed during the marriage …"*

59. Mr. Turner reminds me that I should bear in mind as a first consideration the interests of the children, and that it is undesirable for children to enjoy wildly differing standards of living in the respective homes of their parents as set out in *J. v. C. (Child: Financial Provision)* [1999] 1 F.L.R. 152, in which Hale J, as she then was, held that a child, whose father had won the lottery after the relationship with her mother had ended, was entitled to be brought up in circumstances which bore some sort of relationship with the father's current resources and the father's present standard of living.

60. Mr. Cusworth invites me to consider the judgment of Charles J in *G v G* [2012] EWHC 167 (Fam), a case to which Mr. Turner also referred the Court, in approaching the question of needs. In that matter, Charles J reviewed the cases of *White* and *Miller; McFarlane* and the guidance that followed and said this at para 136 of his judgment:

> *"136. What I take from this guidance on the approach to the statutory task is that the objective of achieving a fair result (assessed by reference to the words of the statute and the rationales for their application identified by the House of Lords) is not met by an approach that seeks to achieve a dependence for life (or until re-marriage) for the payee spouse to fund a lifestyle equivalent to that enjoyed during the marriage (or parity if that level is not affordable for two households), but*
>
> *(i) is met by an approach that recognises that the aim is independence and self-sufficiency based on all the financial resources that are available to the parties. From that it follows that:*
> *(ii) generally, the marital partnership does not survive as a basis for the sharing of future resources (whether earned or unearned). But, and they are important buts:*
> *(a) the lifestyle enjoyed during the marriage sets a level or benchmark that is relevant to the assessment of the level of the independent lifestyles to be enjoyed by the parties,*
> *(b) the length of the marriage is relevant to determining the period for which that level of lifestyle is to be enjoyed by the payee (so long as this is affordable by the payor), and so also, if there is to be a return to a lesser standard of living for the payee, the period over which that transition should take place,*
> *….*
> *(d) the marriage and the choices made by the parties during it may have generated needs or disadvantages in attaining and funding self-sufficient independence that (i) should be compensated and (ii) make continuing dependence/ provision fair,*
> *(e) the most common source of a continuing relationship generated need or disadvantage is the birth of children and their care,*
> *(h) the provisions of s. 25A must be taken into account…."*

61. In *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam), on which Mr. Turner also relies, Mostyn J, gave guidance on the approach to determining the appropriate level and duration of spousal support in light of the principle of achieving a clean break. The learned Judge said this:

> *"28. ...The 1984 amendments to the Matrimonial Causes Act 1973 by the insertion of s25A(1) and (2) stipulate that spousal maintenance should be terminated as soon as it is just and reasonable. A term should be considered by the court unless the payee would be unable to adjust without undue hardship to the ending of the payments. This suggests that Parliament anticipated that a degree of not undue hardship in making the adjustment is acceptable.*

"29. This has been described as the statutory steer to an eventual clean break (see Matthews v Matthews [2013] EWCA Civ 1874). Unless undue hardship would likely be experienced the court ought to be thinking of providing an end date to a periodical payments order…

…

"33. In its recent report the Law Commission set out its "policy" on needs... I consider that the report sets out a useful summary of the guiding principles…

"34. As for "how much" the Commissioners wrote at para 3.96:

> *"Exactly how, and at what level, needs will be met will depend on the resources available and, usually, the marital standard of living. Replicating the marital standard of living in two homes, after divorce, will be rare:.. In addition, the transition to independence, if possible, may mean that one party is not entitled to live for the rest of the parties' joint lifetimes at the marital standard of living, unless he or she can afford to do so from his or her own resources."*

"35. I would emphasise the final sentence. It is a mistake to regard the marital standard of living as the lodestar. As time passes how the parties lived in the marriage becomes increasingly irrelevant. And too much emphasis on it imperils the prospects of eventual independence…

…

"46. Pulling the threads together it seems to me that the relevant principles in play on an application for spousal maintenance are as follows:

(i) A spousal maintenance award is properly made where the evidence shows that choices made enduring the marriage have generated hard future needs on the part of the claimant. Here the duration of the marriage and the presence of children are pivotal factors.

(ii) An award should only be made by reference to needs, save in a most exceptional case...

…

(iv) In every case the court must consider a termination of spousal maintenance with a transition to independence as soon as it is just and reasonable... A degree of (not undue) hardship in making the transition to independence is acceptable.

…

(vi) The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence…"

62. Also instructive is the decision of Moylan J (as he then was) in *BD v FD (No 2) (Application of the Principle of Need)* [2016] EWHC 594 (Fam), in which he dealt with how the courts should determine the appropriate level at which need should be met. He said, in large part agreeing with Mostyn J's assessment in the above case:

> *"113. Subject to first consideration being given to the welfare of minor children, the principal factors which impact on the court's assessment of needs are: (i) the length of the marriage; (ii) the length of the period, additional to (i), during which the applicant spouse will be making contributions to the welfare of the family; (iii) the standard of living during the marriage; (iv) the age of the applicant; and (v) the available resources as defined by section 25(2)(a).*
>
> *"114. In my view, the starting point for the assessment of needs is the standard of living during the course of the marriage. …This does not mean that it is either a ceiling or a floor but, as Mr Howard agreed during the course of his submissions, it provides a benchmark or starting point against which to assess needs…*
>
> *…*
>
> *"118. The use of the standard of living as the benchmark emphatically does not mean that, as referred to above, in every case needs are to be met at that level either at all or for more than a defined period (of less than life). Often, as Baroness Hale said in Miller v Miller; McFarlane v McFarlane [para 158]: "The provision should enable a gentle transition from that standard [the marital standard of living] to the standard that she could expect as a self-sufficient woman."…*
>
> *"119. I must also not be taken to be saying that the marital standard of living is "the lodestar", quoting from Mostyn J's decision in SS v NS (Spousal Maintenance) [2015] 2 FLR 1124, in the sense of an unchanging guide to the assessment of needs. As he says, and I agree: "As time passes, how the parties lived in the marriage becomes increasingly irrelevant. And, too much emphasis on it imperils the prospect of eventual independence" [para 35].*
>
> *"120. However… where the resources are available, the longer the length of the period(s) referred to…above (being (i) the length of marriage and (ii) the length of the period of contributions to the welfare of the family which can, clearly, both pre-date the marriage and post-date the end of the marriage), the more likely the court will decide that the applicant's spouse's needs should be provided for at a level which is similar to the standard of living during the marriage.*
>
> *"121. Further, the longer the duration of (i) and (ii), the more likely that those needs will be assessed on a lifetime's basis…*

> *"122. This is …inevitably subject to the available resources in the case, but it is also subject to the important caveat that the level at which future needs are assessed will depend on the duration of the period for which they are being met. The longer that period, the more likely that the court will not assess those needs at the marital standard of living throughout that period. There are many examples of orders having been made on this latter basis by, for example, assessing the award on the basis that the needs, both in terms of housing and/or in terms of income, will reduce in the future. I have been referred to two examples of the latter, namely AR v AR and Baron J's decision of Y v Y (Financial Orders: Inherited Wealth) [2013] 2 FLR 924."*

63. Mr. Cusworth submits, uncontroversially, that the following principles emerge from those various judgments and reports in determining the appropriate level and duration of an award for spousal maintenance:

- The parties' standard of living is the benchmark or starting point against which needs are assessed: *G v G*; *BD v FD*,
- Also relevant will be the length of the marriage, the length of contribution by the claimant, and the parties' available resources: *G v G*; *BD v FD*,
- However, the marital standard of living is not the lodestar - the ultimate aim is independence and self-sufficiency based on all the financial resources that are available to the parties: *SS v NS*; *BD v FD*,
- The transition to independence may mean that one party is not entitled to live for the rest of the parties' joint lifetimes at the marital standard of living, unless he or she can afford to do so from his or her own resources: *SS v NS; BD v FD*,
- As time passes, how the parties lived in the marriage becomes increasingly irrelevant: *SS v NS*, and
- The longer the period for which needs are met, the more likely that the court will not assess those needs at the marital standard of living throughout that period: *BD v FD.*

Financial Position of the Parties

64. The starting point in seeking to make fair financial arrangements for the parties is to establish their financial position.

Assets

65. From the figures agreed by the parties [11], the assets at the date of separation are as follows:

[11] I have excluded the balances on divers bank accounts which have been used to maintain the family since the separation as well as the vehicles, as each party will keep their respective vehicles.

The matrimonial home: Presently valued at $1,175,000 but subject to a mortgage which was approximately $918,000 at the time of the hearing. After 5% sale costs, the parties' estimated equity in the home is **$197,943.96.** The unit was placed on the market in 2018 and shown extensively but attracted little interest. As I understand it, one factor which impacts on its saleability is that comparable units at Britannia, with the original three bed/three bath floor plans, have a similar market value to this sale price sought for this family's two bed/ two bath renovated condo. The unit does not show well as it is only partially furnished, despite the size of the investment in it, and is difficult to sell whether because it is overpriced for a two bedroom two and a half condo, as the husband asserts, or because it is not properly staged - furnished to enhance its appeal to buyers - as the wife contends.

The husband's **Retained Capital and Drawings Accounts:** the accounts stood at **$568,006.64** at 27 December 2017. Of that, some **$269,579.78** was fixed in the Retained Capital account. The parties have proceeded on the basis that this is a marital asset, though the sums on account will not be available to the husband until his retirement from the Firm.

With respect to the **$298,426.86** on the husband's drawing account, it is the husband's case that these monies have been used to maintain the family and service the borrowing on the family home and are no longer available for sharing. The husband's disclosure shows that at 30 September 2018, **$233,813.34** remained in his drawings account, the declining balance being augmented by interest of **$43,621.99.** Although the husband's profit share for 30 September 2018 was not immediately available to him, and the 2017 profit share in his drawing account would indeed have been used to maintain the family until he was able to draw on his 2018 profit share, in my view, the sum of **$233, 813** should be put in the pot for sharing.

Pension: There was **$105,792.37** in the husband's Chamber Pension account and **$49,246.57** in his Silver Thatch Pension account at the date of separation. The wife's pension account has a value of **$3,955.60.**

Income and Earning Capacity

The Husband

66. The husband's earnings since becoming a partner of the Firm have been as follows:

Year	Salary	Bonus	Profit share	Total	Retained[12] Capital	Drawing Account	Drawn
2013	$250,000	$80,000	-	$330,000			
2014	$250,000	$140,000	-	$390,000			

[12] Not available until the husband's retirement from the Firm

2015	$250,000	$185,000	-	$435,000			
2016	$250,000		$247,520	$497,520	($168,162)	$80,000	$80,000
2017	$250,000		$421,154	$671,154	($80,718)	$340,435	$70,000
2018	$250,000		$561,157	$811,157	($82,797)	$478,360	
2019	$250,000		$607,349	$857,349	($151,215)	$456,134	

67. The balance on the husband's Drawing Account - that share of profit which is available to him now (at the time of trial) - stands at approximately $638.979.

68. Although the husband protested in his First Affidavit that any maintenance award had to be made out of his salary, his comments have to be seen in the context of what was an application for interim maintenance in 2018, when his profit share for 2017 was not yet available for paying maintenance in 2018, the family had exhausted his profit share for 2016 on the renovations and he was taking advances of the Firm's working capital with the indulgence of his partners to make ends meet.

69. It is clear that as his profit share becomes available on a "*rolling basis*", to adopt Mr. Turner's expression, the husband would now have at his disposal the profit share allocated to his Drawing Account in 2018 to meet the needs of the wife and those of the children when they are with her, and may have by late 2020 or by 2021, the profit share allocated to his drawing account in 2019 and so on.

The Wife

70. The wife clearly has an earning capacity. In explaining why she has elected to start a business rather than getting a job, she explains that she is not an attractive candidate for a job in her field in Cayman as she graduated so many years ago and does not have the requisite experience in computer drafting and the technical aspects of interior design which the jobs on offer in Cayman required. Given her lack of recent qualifications in the field and lack of work experience, she does not believe she can find employment in her chosen field. She referred, in her *viva voce* evidence, to several newspaper advertisements for employment in the field of interior design to support her evidence that she doesn't have the requisite qualifications to find suitable employment and to justify her decision to start a company with a Caymanian partner to supply window coverings rather than find employment.

71. The wife feels confident this is her best opportunity to make enough money to support herself but, notwithstanding the company has been established, she says she is still unable to work. It is her evidence that her immigration status continues to depend on her marriage to the husband and that she will need to apply for permanent residency with the right to work, in her own right when the parties' divorce is final. She emphasises that, according to her immigration attorney, a

successful application is dependent on her owning property and having an income which can support her and her children. She does not explain why she cannot apply for a work permit as an employee of her own company, but the upshot is that she and the children remain entirely dependent financially upon the husband at present.

72. Although the wife spoke confidently about the prospects of her new business, she did not produce a business plan identifying her target market, the proposed pricing and projected sales of any product or how the goods were to be marketed nor did she produce a financial plan providing even an outline of the projected ongoing expenses of the business, which would include salaries, insurance and marketing costs or any projected income statements. She does not suggest to the Court what her earning capacity might be in this or any year, nor when she considers that she could be financially responsible for her own needs, although she says that financial independence is her goal.

73. She gave no evidence that would assist the Court in determining what her future earning capacity might be or whether she could retrain and re-enter the interior design field at an entry level and build a portfolio of work. Unsurprising perhaps, as she is very clear that she would prefer not to be employed and is seeking spousal maintenance for an indefinite term.

74. The only evidence of her actual earnings in any endeavour came from the husband who recalls that in her last position in marketing in 2008, the wife earned some $4,000 CI a month. He invites me to find on the evidence of the salaries she could earn in her field if she retrained, or sales and marketing if she did not, that she has an earning capacity of $5,000 a month.

The Open Positions of the Parties

The Wife

75. From the open offer made on 13 January 2020 and the clarification sought and given at a brief further hearing of the matter, I understand the wife's position to be that she needs:

- legal fees of $383,000,
- a further unspecified sum to cover the fees of her application for permanent residency,
- the further sum of US$234,900 which comprises the deposit, stamp duty and other costs to permit her to purchase a home of similar value to the matrimonial home, which she puts at $1.2 million, with a minimum of three bedrooms. In return, the husband would take on the former matrimonial home as being "*similar in value*".
- The million dollar mortgage would be funded by the husband through a spousal maintenance order for their joint lives.
- Removal costs and costs of furnishing her future home (unspecified). No proposal is made for the allocation of the chattels in the former matrimonial home.

76. The wife's suggested capital needs amount to some US$617,900 in known costs. Assuming a further $60,000 for moving and furniture, perhaps supplemented by furniture in the former matrimonial home, her capital needs would be $677,900. With the fees associated with her application for permanent residence I would round up the wife's capital needs to a figure of $700,000, a sum which is equal to the sum of all their capital.

77. The wife asks that she be paid these monies up front as a lump-sum.

78. She also seeks spousal maintenance in the sum of $309,648 [13] per annum, which includes a substantial sum for housing for herself and the two children. She sets out what she says is her best estimate of expenditure in three tables of expenditure[14] which I summarise as follows:

79. **Housing:** the wife suggests that she should have **$9,950** [15] per month or **$119,400** per annum, which is the amount being currently paid by the husband directly for the mortgage[16], strata fees and utilities for the former matrimonial home where she currently resides, on the basis that the husband is already paying that amount.

Spousal Maintenance: The wife suggests she should have the sum of $125,244 pa. as set out below:

(a)	Other Housing costs (identified as home goods		
	and supplies and phone and internet service)	487	
(b)	Car expenses	438	
(c)	Food and drink	3,120	
(d)	Personal Care	1,125	
(e)	Sports	936	
	Celebrations (including gifts for self, family and friend	418	
(f)	Medical and Dental (not covered by Insurance)	1,507	
(g)	Travel	1,749	
	Misc expenses, including music and other subscription services and spending money	657	
	TOTAL USD	$10,437 pm	$125,244pa

[13] This figure excludes the school fees which the husband pays directly
[14] AD-2 at pp 5 - 13.
[15] Mortgage USD $7,700, Strata fees including water and cable $1,900 and utilities of $350: JD-1
[16] Which sum includes all borrowings secured against the matrimonial home, including later borrowings for renovations.

Children: the husband pays the boys' school fees directly to the school and the wife is content that he continues to do so, but it is her position that, as she is the primary caregiver, the husband should pay to her all other school related costs and other extracurricular directly to her so she can pay their expenses as they arise instead of having to produce an invoice to him, for him to settle.

The reason she gives is that, despite the husband's evidence that he uses his income for the benefit of his sons and will always be willing to pay for everything for his children,[17] it has not been her experience. She feels that he tries to control her by controlling the funds payable for the children's care and that she is, in any event, best suited for purchasing whatever they need.

These costs are set out in her Table 3. Although the husband ceased to employ the helper who had for some years assisted with the boys, the wife asserts that she needs a helper to attend to the boys' needs so she can work and develop her business. The proposed monthly budget for the boys, including a helper, is $5,417 pm, set out as follows:

(a) Part-time Helper (including health insurance, agency fees)	1,395	
(b) Food and Drink (dining out)	305	
(c) Education and extracurricular (excluding school fees)	1,772	
(d) Personal Care	193	
(e) Celebrations (birthdays and gifts)	448	
(f) General Supplies	244	
(g) Medical (not covered by insurance)	120	
(h) Overseas travel	575	
(i) General expenses	365	
TOTAL USD	5,417	65,004 pa

80. The wife says that these figures, which together with the boys' school fees and related costs of $3,365pm amount to an annual sum of **$345,828,** reflect the monies expended by her on herself and the boys, during the last year of their marriage. She asks that this sum be awarded to permit them to continue to live at the marital standard of living.

81. In preparing her budget, the wife makes no allowance for any income she might earn, nor does she suggest when she might be able to transition to independence even though she states this is her goal.

82. On the basis that the husband should have as much as the wife, on the figures proposed by the wife, the annual expenditure of this family of four would be over $700,000, which is a sum far greater than the husband's disposable income in the last year of their marriage as will be seen below.

[17] Para 43 at p 468 of the Bundle

The Husband's Position

83. The husband's open position at June 2018 suggested that the wife should have $300,000 as her half share of the marital assets, paid in three tranches. At that time, the husband identified the available assets as the sum of $518,275 in his Capital Account and half the equity in the matrimonial home of $197,943.96. This he asserted would give them each enough capital to rehouse themselves.

84. No proposals were made by the husband with respect to his pension entitlements.

85. On the basis that the wife would need a mortgage to rehouse herself and has no capacity to get a mortgage, the husband offered during the course of the hearing to guarantee a mortgage for the wife and to add $5,000 a month for housing to the sums currently being paid as maintenance.

86. He proposed that the maintenance payments continue in the current amount of $4,000 a month for the wife and the boys (of which $1,500 is for the boys), an award for the wife of $9,000 per month or $108,000 per annum, when the additional $5,000 a month is included. The husband also proposed that spousal maintenance cease after three years (or, at a maximum, five) with the payments of $750 per month for each of the boys continuing until age 16.

87. In his evidence, the husband asserted his willingness to meet all the boys' educational expenses as well as their reasonable extracurricular expenses including summer camps and all medical and dental expenses not covered by the health insurance policy he currently maintains through the Firm at a cost of $785.51 per month.[18]

88. On the basis that he moves back into the matrimonial home until it can be sold, the husband's expenses as set out in his open offer of 25 June 2018 would be as follows:

Food/groceries	$2,000	
Car Insurance	125	
Car maintenance	100	
Cable	100	
Health Insurance	785	
Golf (personal and for firm development)	417	
Other miscellaneous expenses	500	
School fees and related extras	3,365	
Housing	9,950	
	$17,342 pm	$126,792 pa

[18] Tab 9 Husband's Disclosure Bundle

89. The husband would also have expenses when the boys are with him - dining out, clothes, toys and books - plus the reasonable costs of their extracurricular activities and the medical and dental expenses not covered by insurance. Adopting the wife's figures, this would be an additional cost to the husband of $1,892 a month, increasing the husband's needs to $19,234 pm or $230,808 per annum.

Discussion and Decision
Needs and the Division of Assets

90. On the principle of sharing the marital acquest and applying the yardstick of equality, the wife is entitled to half the equity in the former matrimonial home which is **$98,971.98.**

91. She is also entitled to half of the monies in the husband's Retained Capital account as at the date of separation and half the sum in the Drawings account at 30 September 2018, a total of **$251,546.38.**

92. The wife is also entitled to a portion of the husband's profit share for the year ending September 2018, as the new financial year began on 1 October 2017 and the parties didn't separate until the end of December. I determine her share by pro-rating the total profit share for 2018 which was **$561,157**. This would realise for the wife a further **$70,144.62.**[19]

93. The total value of the wife's equal share of all assets this family has acquired over their long marriage through their separate but equal contributions is **$420,662.98.**

94. The dissolution of the marriage will cause the wife to lose any benefit from the husband's pension. Her need for a pension is greater than his, as his retirement will be funded in part by the sums retained by the Firm in his capital account and the assets that he will be able to accrue with his substantial income. I, therefore, give the wife 70% of the husband's two pension accounts, being **$108,527,** which I offset against his share of the marital assets.

95. The assets would be divided then as to **$529,190** to the wife and **$312,135.98** to the husband, an unequal division justified by the wife's needs and bearing in mind the husband's ability, through his substantial income, to build back up his pension and other capital.

96. The wife needs a home for herself and the boys when they are with her. There is no question of her remaining in the matrimonial home. She recognises in her evidence that the overheads are

[19] 561,157/4 = $140,289.25 per quarter. Half share = $70,144.62

too high. Ideally it should have been sold and the proceeds divided but, although it was on the market throughout 2018 and well-advertised, [20] it failed to sell.

97. The husband's proposal to move back in as he can better afford the outgoings, is eminently sensible. I do not accept that, because the husband is to remain in the matrimonial home, the wife needs to purchase a home costing $1.2 million. The value ascribed to the home is one that has been agreed between the parties but which may never be achieved in the market and it is not $1.2 million in any event. I do not accept she needs a $1.2 million property to avoid the children living with parents with wildly divergent standards of living. She simply needs a suitable three-bedroom home.

98. The wife did not suggest where she might live other than Britannia or on the Seven Mile Beach corridor, convenient to the location of the boys' school. It was evident that she had given no consideration to the matter beyond deciding that if the husband were going to live at Britannia, she too should have a 1.2 million dollar home with a million dollar mortgage. Although she dismissed the several housing options put to her in cross - examination during the hearing as she was unfamiliar with the properties, those options make it plain that she could be rehoused in suitable accommodation for much less than she seeks and without any damage being done to the principle that the children not live in widely disparate circumstances when they are with either parent.

99. Further, given the wife's earning capacity, she would struggle to pay a million dollar mortgage and meet her personal needs without the husband's financial support and she would never achieve that independence which the law seeks to promote and to which she says she aspires. In my judgment, a property to the value of US $700,000 would be suitable for her needs and with her share of the marital assets, she could acquire such a property with a small mortgage which the husband has offered to guarantee

Financial Provision

100. I have gone through the wife's Tables at some length, mindful of the learning in *Purba v Purba* [2000] 1 FLR 444 where Thorpe LJ said at 449C that,

> *"In this field of litigation, budgets prepared by the parties often have a high degree of unreality - usually the applicant's budget is much inflated…the essential task of the judge is not to go through these budgets item by item but stand back and ask, what is the appropriate proportion of the husband's available income that should go to the support of the wife?"*

[20] Hampson and Co's email of 18 September 2018 to Broadhurst at B/452

and the observation of Mostyn J in *SN v SS* that the decision in *Purba,*

> *"…should not be taken to mean that the individual items of a budget are irrelevant. Rather, it emphasises that in the exercise it is important that the court should clearly survey the wood as well as the trees."*

See also the decision of Williams J in *AK v TK* Grand Court Unreported FAM 39 of 2015 delivered on 7 February 2017, at para 90.

The Marital Standard of Living

101. I repeat here that the wife seeks an award of $25,879 per month, or $310,548 per annum, for spousal and child maintenance. Including school fees, the global figure is $350,748.

102. I make two observations about the wife's proposed budget, which she has stated in evidence is based on actual expenditure in the final year of their marriage. The first is that the sum of $350,748 for herself and two pre-teens (including housing and school fees) is, on any view, far greater than her 'needs,' even when generously assessed. The second is that the evidence is plain that, in 2017, the husband only had available to him his salary of $250,000, the $80,000 from his 2016 profit ($70,000 of which was spent on renovations) and a further $60,000 from his 2017 profit share, which he drew on before it had been either allocated or distributed to him, which is a total sum of $330,000.[21]

103. Given the income available, it is difficult to understand how this family could have spent $352,956 on the wife and the boys, excluding any expenditure by the husband on anything whether it be golf, clothing or meals out. Adding even a couple of thousand per month for the husband's own personal expenditure and the $5,400 rent for temporary accommodation during the renovations - another $18,900 - their expenditure would have exceeded $400,000 and exceeded their available income in 2017. The source of this spending is unclear, unless it was in part financed by the credit facilities obtained to pay for the renovation, but the marital standard of living that the wife asserts she enjoyed is not reflected by the family's income.

104. The wife asserts that they had savings from the years before from the husband's bonuses but that seems unlikely given that in 2016 the family only had the husband's income of $250,000 and would likely have supplemented that with whatever remained of the bonuses paid in 2014 and 2015 which were not used to purchase capital assets. The profit share allocated to the husband's drawing account was only $80,000 and they drew on this in 2017 to fund renovations. Their 2016

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[21] His 2016 profit share of $80,000 was drawn in 2017, the first tranche of $70,000 drawn in March 2017 for the renovations. Further advances totaling $70,000 between September and November brought disposable income for 2017 to $330,000.

income was likely supplemented by so much of the husband's P1 bonuses as had not been invested in the land in West Bay/CUC shares. There is nothing in the disclosure that would support a conclusion that any money in any of his P1 partnership years remained to fund their 2017 spending.

105. Mr. Cusworth's observation that this family massively overspent in the last year of their marriage, and probably had for some time before, has much force. It might perhaps explain why, despite such a long marriage and the husband's professional success, their capital assets are so modest.

106. I am not persuaded on the evidence in front of me that the marital standard of living in any year was that of its last year, nor am I persuaded that the standard in that year, possibly financed by credit, should continue.

107. Given the wife's attempt to argue that she is entitled to a share of the husband's future earnings, I view her budget as cynically calculated to achieve that result, as she seeks spousal maintenance in a sum greater than his earnings during the marriage, which would allow her *ipso facto* her to share in his post-separation income. Her budget assumes an annual income of $700,000, of which she and the children would have $352,991, leaving $347,008.89 for the husband. But, as Sir Mark Potter observed in *VB v JP* [2008] EWHC 112 (Fam),

> *"On exit from the marriage, the partnership ends and in ordinary circumstances a wife has no right or expectation of continuing economic parity ("sharing") unless and to the extent that consideration of her needs, or compensation… so require."*

108. I propose to take $330,000 as representing the standard of living in the last years of the marriage, including expenditure on school fees

The Children

109. I move first to consider the provision to be made for the children as the law requires that the Court first have regard to the best interests of the children. Under the current arrangements for the children, the children spend significant time with each parent. Although the arrangements are sometimes derailed by the husband's work commitments, they appear to work well. The wife complains about the husband's occasional unavailability because of work, but there is no evidence to show that he isn't doing his best to be the best parent he can be or that he is less committed to the boys' welfare, as she seeks to suggest.

110. The husband pays for all the boys' outgoings and he states that he will always be willing to pay for the boys' educational expenses including school fees and related school and extra-curricular activities as well as summer camps, clothing and all other expenses[22].

111. From what I glean from the email exchanges which are exhibited, the husband currently pays the children's expenses on presentation of invoices by the wife. She is content for the husband to continue to pay the school fees directly to the school but asks that the maintenance for the children - $5,417 per month - be paid directly to her which would cover the costs of their extra-curricular activities, clothing, travel and sundry expenses and including home help at a cost of $16,690 per annum. The husband's direct payments to the school for fees, in the sum $3,350, would continue.

112. These fees when added to what the wife seeks, brings the total she suggests for the boys' maintenance to $8,767 pm or $105,204 per year, including trips to see her parents, towards which she does not anticipate contributing.

113. What is the appropriate quantum to be awarded to the wife for the care of the children when they are with her?

114. Although the wife has asked that all monies for the boys' care and education, except for school fees, be paid directly to her, I think the right order would be to require the husband to pay all school and related expenses. He would, therefore, continue to pay for school lunches (38)[23], school uniforms and supplies (40,41), extracurricular activities (42) and holiday camps (39), as and when these costs arise for payment, rather than reducing these outgoings to monthly sums to be added to whatever is paid directly to the wife. An element of these costs is discretionary as they will be determined by the extracurricular activities and summer camps in which the boys enroll. I expect that these will change from year to year and are matters upon which they, as parents, should consult and agree, rather than the wife deciding these matters for the boys unilaterally. I accept the husband's evidence that he is happy to pay the boys' reasonable extracurricular expenses but wishes that the wife would consult him before incurring them.

115. Although the wife may find it inconvenient to do so, it is part of co-parenting that such decisions be made by father and mother together. It is part of their continuing contribution to the wellbeing of their children, in which the husband appeared to the Court to be as invested as the wife, despite the wife's attempts to show otherwise.

116. In addition, the costs will be variable. Some will trend upward as the boys get older and their needs change. Some may disappear entirely if, for example, either of the boys ceases to pursue a

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[22] JD-2 para 43 at p 468

[23]The numbers in brackets correspond to the items as appearing in the wife's Tables

certain sport or decides he has outgrown summer camp. Fixing the husband with responsibility for meeting those costs is simpler than having the matter return to Court from time to time for a fixed award for the children's expenses to be adjusted.

117. I, therefore, take those sums out of the total sought by the wife, reducing the sum she seeks by $1,894 per month or $22,728.04 per annum. I would also order that the husband pay all necessary dental and medical costs not covered by insurance (51), thus deducting a further $120.00 per month/ $1,440 per annum from the global award the wife seeks. Any incidental costs associated with visits to the pharmacy for- over- the counter purchases can fall within an award for general/miscellaneous expenses.

118. The wife also seeks money to cover the usual purchases for clothing (43) but, in the ordinary way of things, I expect that when the boys are with their father, he too will purchase clothing and other personal items for them. The whole cost, once borne by the husband and the wife as partners, will now be shared between them. So as not to fetter the wife's freedom to purchase items of clothing for her sons until she can contribute to their needs out of her own resources, I consider a sum of $100 per month for clothing to be sufficient. The same applies to toys, books and supplies (50) as I expect each parent will make such purchases for the boys, from time to time. I consider an award of $100 per month sufficient.

119. That leaves the amounts sought by the wife to cover dining out (37), haircuts (44), birthday celebrations and gifts for children and others (45-49), summer travel - including her travel costs - to spend time with their maternal grandparents (52) and sundry expenses (53), a total sum of $20,977.05, which I consider to be more than strictly necessary to meet those expenses, but reasonable when considered in the round. Added to the other sums I have allowed ($1,200 pa. for clothing and $1,200 for toys/books/supplies) I make a global award of $23,377.05 per annum, or $1,948 per month, for the maintenance of the boys when they are with their mother, which I round up to $1,950 or $975 per child per month.

120. Under this head too is the wife's claim for a helper at a cost of $16,690 per annum. It was part of the marital standard of living that the family had a helper, even though the wife did not work. The helper continued to work for both parties after the parties separated until the husband insisted that her employment cease as part of the necessary economies referred to above. I accept the wife's position that part-time home help would allow her to be in full-time employment or devote sufficient time to build a successful company and I allow the sum of $1,100 per month as and for a helper until the younger boy is in high school (Grade 9) which should be in 5 years. Assuming the helper will be shared with another person or family, the work permit will be shared and the wife's half costs of the related fees (34, 35, 36) can easily be met out of her own budget. This brings the total for the children to $3,050. In the event the wife chooses not to have home help, she will have a further $1,100 for discretionary spending or saving, as she chooses.

121. Assuming, as I have said, that the husband will make expenditures on the boys for clothing, dining out, books, toys and supplies when they are with him, as well as trips abroad [24] at a cost of $23,376[25], the total sum spent by this family on the care and maintenance of these boys will be $59,976 [26] per annum while in both households. Adding to that the further $40,200 for school fees and other school related expenses, extracurricular activities and camps and the additional sums for medical and dental expenses not covered by insurance which the wife estimates at $24,168 per annum, the total expenditure by the husband for the care of the children will be approximately $124,344.

122. The sum of $3,050 as and for the maintenance of the boys will continue until the first child is 16 and thereafter continue in the amount of $2,075, allowing the wife to continue to have a helper until the younger boy reaches Grade 9 (see para 117 *supra*) and then $975 to age 16 whereupon the order for maintenance shall cease.

Maintenance for Wife

123. Assuming a disposable income of $330,000 per annum and deducting therefrom the wife's estimate of annual expenditure on the children of $100,000 per annum (routine expenditures plus helper, school fees and extracurricular activities) while the parties were together, the parents would have had the sum of $230,000 between them to pay for all housing, household and personal expenses.

124. Using this income approach to establish the marital standard of living, I would award the wife $115,000 for her housing and living expenses or $9,583 per month. Added to the sum of $3,050 per month for the boys, the wife would have a total of $12,633 per month or $151,600 per annum.

125. Approaching the issue of needs by reference to the wife's budget, which I am satisfied is, if not inflated, based on a year of massive over-spending, I arrive at a slightly higher assessment of her needs as shown below:

	Budget	Assessed
(a) Other Housing costs (identified as home supplies and phone and internet service) (6,7)[27]	487	487
(b) Car expenses (8-13)	438	290
(c) Food and drink (14 -17)	3,120	2,200

[24] Para 119 supra
[25] Para 129 supra
[26] The wife's $36,600 (including helper) when they are in her care and a further $23,376 by husband when the boys are with him
[27] Numbers in brackets correspond to items set out in wife's Tables

(d) Personal Care (18-20)	1,125	500
(e) Sports (21-24)	936	500
(f) Celebrations (including gifts) (25-27)	418	100
(g) Medical and Dental (not covered by Insurance)(28)	1,507	1,000
(h) Travel (29)	1,434	250
(i) Misc. expenses (including music, mail, shipping costs and spending money) (30-32)	657	500
TOTAL USD	$10,437 pm	$5,874

126. Adding to that figure of $5,874 the $5,000 for housing offered by the husband, which I accept would allow the wife to acquire suitable housing whether she chooses to rent or purchase a home, and the $3,050 for the boys, the global sum payable to the wife would be $13,924 per month or $167, 088 per annum. As this is the more generous assessment of her needs, and in light of her husband's income, I award her the sum of $10,874 per month as and for spousal maintenance.

Duration of Order

127. Although this was a long marriage, the goal remains, as stated by Baroness Hale, to make such financial provision as would enable a gentle transition from the marital standard of living to the standard that the wife could expect as a self-sufficient woman.

128. The wife is only 45 and has many income-earning years ahead of her. Her ability to work is not impeded by having two children, as one is of elementary school age and the other is in middle school. In any event, the Court has allowed an amount for a helper to assist the wife with the boys so she can re-enter the workforce and focus on building her career or her business.

129. Although Mr. Turner reminds me that the statutory steer in the Cayman Islands is towards a joint lives order, the decisions of our Courts make it clear that the goal of encouraging independence is very much a part of our law. I am satisfied that the order should be term-limited.

130. The husband proposes that the order for spousal maintenance ceases within 3, or at the latest 5, years. The Court is enjoined from *"crystal ball gazing"* [28] but the wife has failed and /or refused to provide any evidence of what she could reasonably be expected to earn, or when, which might assist the Court in making what Charles J in *G v G* refers to as an evidence-based decision to limit the duration of an order for spousal maintenance. At para 143 of the judgment the learned Judge said this:

[28] *Flavell v Flavell* [1997] 1 FLR 353 at 358

> *"143. …I accept that C v C confirms that s.25A(2) is directed to the payee's hardship, that the court must take an evidence based approach to whether the payee can and will adjust and that unless the court concludes, on that evidential basis, that a term should be imposed it should not impose one on the basis that the payee can seek an extension….*
>
> *"144. But, in my judgment this need for an evidential base does not mean that the wife can assert (which at times she seemed to be arguing) that she can avoid an evidence based finding on her likely earnings by not providing an estimate of her earnings from the work she is planning to do….. [I]n my view, by not quantifying her earnings, and/or co-operating in their quantification, the wife acted contrary to her duty to give full and frank disclosure of her business plans and thus her s. 25(2)(a) resources and the overriding objective."*

131. In light of the wife's failure to give any estimate of her company's potential revenues, I rely on the evidence of her success in the past at readily finding work, the salary range for jobs in her field if she re-trained and the husband's evidence of her income when she was last employed in 2008, in deciding that she has an earning capacity of $5,000 a month. I am satisfied too that she could be in receipt of such an income within 12 months of this Order, i.e. 9 months after she has obtained the right to work, if she chooses to find employment. The wife in her evidence noted the number of new developments going up in the Islands as providing opportunities in the field of interior design.

132. Given the length of the marriage and the age of the children, I consider the appropriate term for spousal maintenance to be for 5 years duration, until the youngest enters Middle School. By the end of the first year (i.e. 2021) however, the global sum of $10,874 (which excludes the maintenance for the boys) will be reduced by $5,000 per month to $5,924 to reflect the wife's earnings. The sum of $5,924 per month would be payable for the next 4 years by which time the wife should be financially independent and able to manage her own affairs.

Contribution by Third Party

133. Although the wife's present relationship with another man has been urged on me by Counsel for the husband as warranting a decrease in the amount of maintenance payable to the wife, I am unable to agree. On the facts, they do not cohabit. He maintains his own place and his income would hardly permit any sensible or significant contribution by him to the wife's household so as to displace the husband's obligations, generated by this long marriage, to provide for the wife's needs.

Legal Fees

134. As I have observed before, the legal fees incurred by the parties in this case are at an horrific level considered objectively and even more so when one considers that the size of the fees as a

proportion of the family's capital assets. The level of fees undoubtedly reflects the costs of the wife's decision to claim an entitlement to share in the husband's post-separation income in the face of the decision in *Waggott***.**

135. In *McTaggart v McTaggart* (supra), the President said:

> "*Having regard to the needs and financial resources of a party…the court takes account of the need of each party to discharge his or her liabilities to their respective legal representatives in respects of the costs of the ancillary relief proceedings. So, in a "big money" case, the court should ask itself - when determining what order to make under section 21(b) of the Law for the disposition of matrimonial property - whether the order which it is proposing to make will adequately meet the need of each party in relation to his or her liabilities in respect of costs. If the court is not satisfied that the order which it is proposing to make will adequately meet the need of, say, the wife in respect of her liability to her legal representatives then, as it seems to me, there are three courses open to it: (a) it can vary the proposed order [for the disposition of property] under section 21(b)- that is to say, it can make an order under that section which awards the wife a greater proportionate share of the matrimonial property; (b) it can leave the order under section 21(b) in the form proposed and make an order under section 21(e) ["costs"] for payment by the husband to the wife which includes a sufficient sum to meet that need [to pay her legal representatives]; or (c) it can leave the matter to be dealt with by an order for costs in the wife's favour*."

136. The wife has no means of meeting her liability to her legal representatives except from her capital award which will leave her unable to meet her housing needs and establish a pension fund for herself. Although this is not a "*big money*" case, it is a case where the husband has a substantial income from which he has been able to pay some of his legal fees.

137. Following the guidance of the Court in *McTaggart,* I make an order under section 21(e/g) of the Matrimonial Causes Law for the husband to pay the wife's costs, estimated at the date of trial at $383,000.

SUMMARY

138. (i) The husband shall pay maintenance for the children of **$3,085** per month until L is age 16, **$2,075** thereafter until M enters High School (Grade 9) [29] and **$975** thereafter;

(ii) the husband shall pay spousal maintenance in the sum of **$10,874** per month for the wife for 12 months, and thereafter the sum of **$5,874** for 4 years;

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[29] See para 119 *supra*

(iii) the husband shall pay the wife the sum of **$529,190** as and for her share of the marital assets to be paid as a lump sum.

(iv) The husband shall also pay the wife's legal fees in the sum of **$383,000.**

Costs

139. Written submissions on costs were made by the parties after the circulation of the draft judgment.

140. In ordering the husband to pay the wife's legal fees, I made an order under section 21(e/g) that would allow the wife to meet her liabilities to her legal representatives pursuant the observation of the President of the Court of Appeal in *McTaggart* that the Court,

> *"…can…make an order under section 21(e) ["costs"] for payment by the husband to the wife which includes a sufficient sum to meet that need [to pay her legal representatives]; or (c) it can leave the matter to be dealt with by an order for costs in the wife's favour.".*

141. I considered that as an order for costs under Order 62 would be subject to taxation, such an order would not allow the wife to meet her contractual liabilities to her attorneys except by making recourse to her capital award, which is very modest by reference to the costs she incurred and that she should be put in a position to meet those liabilities.

142. I invited submissions from the husband in the event he wished to argue that some of his costs should be met by the wife. I have considered the husband's written submissions. Insofar as he invites me to revisit my decision to award the wife a sum that will meet her outstanding liabilities to her attorneys, I decline to do so.

143. The question still remains whether the wife should suffer any adverse costs consequences pursuant to Order 62, to be met out of her award, on the basis that she has acted unreasonably in the pursuit of her application in the divers ways contended for by the husband in his written submissions.

144. While I do not resile from my criticism of the wife's decision to argue the unarguable to preserve a null point for appeal, having considered the matter in the round, I do not think there was anything in the manner in which she conducted the litigation that should have adverse costs consequences. The *Waggott* argument was easily and shortly dealt with by Counsel for the husband and did not add significantly to the husband's costs, save that the husband's decision to retain Queen's Counsel added to the costs overall. The wife ultimately received an award substantially higher than the husband's offer which, at $4000 a month and $300,000 as and for half the marital assets, was unreasonable. Settlement was perhaps unlikely, even before the

Waggott claim made it a certainty the matter would have go to trial anyway, as the parties were so far apart. Finally, to require the wife to pay any of the husband's costs would make inroads on what is already a modest capital award and adversely affect her ability to provide for housing for herself and the children.

145. In respect of the application for costs, I order that each party bear its own costs.

146. I will hear from Counsel on the form of Order, including the time for payment of the lump sum and the legal fees.

RAMSAY-HALE J
Judge of the Grand Court