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Case Nos: F00OX065 & OX19POO630

IN THE FAMILY COURT AT OXFORD

IN THE MATTER OF TRUST OF LAND AND TRUSTEES ACT 1996 AND IN THE MATTER OF SCHEDULE 1 CHILDREN ACT 1989

Date: 3rd June 2020

Before: Her Honour Judge Vincent

Between:

V

Applicant

and

W

Respondent

Hearing date: 21st April 2020

The Applicant represented herself at the final hearing
Miss Michelle Freedman of counsel for Respondent, instructed directly by him

JUDGMENT

Introduction

1. The Applicant V is fifty, the Respondent W is fifty-three. They were in a relationship from 1995 until 1st January 2017. They have two children, D, who is nineteen and in her first year of university, and E, who is fourteen. The parties bought a house together in July 1997 at [address redacted]. I am concerned with two applications:
 - (i) The Applicant has applied for a declaration under s14 Trust of Land and Appointment of Trustees Act 1996 (ToLATA) for declaration of the parties' respective beneficial entitlement, and an order for sale;
 - (ii) The Respondent has made an application under Schedule 1 of the Children's Act 1989 for the Applicant's share of the property to be held on trust for the benefit of the parties' son until such time as he finishes education.
2. In June 2019 the property was valued at £440,000. It has a mortgage of around £94,000.
3. The Applicant is an accountant and earns £3,900 net a month. She works in London and [redacted] and continues to stay in the family home, usually from Monday evening through to Friday morning.
4. The Respondent had his own haulage company but due to illness has been unable to work since around 2015. He is hopeful that further treatment will bring about some improvement and he can return to work in due course.
5. On Friday 17th April 2020, one working day before the final hearing, the Respondent conceded that the declaration of beneficial interest should be of fifty percent shares in the property. His previous position had been that the beneficial interest should be divided 85/15 in his favour.
6. This issue now having been resolved, the remaining issue for the Court to determine is when the property should be sold. The Applicant wishes the property to be sold as soon as reasonably practicable. The Respondent says the property should not be sold until E, the parties' youngest child, has turned 21, or finished his education, whichever is later. E will leave school in June 2024. He will turn 21 in January 2027. If he went to university he might be expected to finish in the summer of 2027 or 2028, depending on whether or not he took a year off beforehand.
7. On 17th June 2019 the ToLATA case was allocated to the multi-track and stayed for a period of three months to give the parties the opportunity to negotiate.
8. The Schedule 1 application was filed on the Respondent's behalf by his solicitor, on 29th October 2019.
9. On 7th November 2019 District Judge Devlin made directions orders in both the ToLATA and Schedule 1 Applications. He made orders for filing of evidence and listed both a financial dispute resolution hearing making clear that the two applications were to be dealt with together, and a two-day trial in respect of both

applications. Both orders issued state clearly that both applications will be listed for final hearing together.

10. It is unfortunate that the notice of hearing dated 18th February then said that a ‘directions hearing’ in the Schedule 1 case was to be heard by the Court alongside the ToLATA application with a time estimate of 2 days, but anyone in any doubt need only have referred back to the two substantive orders, which made the position absolutely clear. Both parties attended the hearing on 7th November and were represented by lawyers.
11. Matters were not resolved at the hearing on 13th March 2020 and the two-day final hearings remained listed.
12. Due to the Covid-19 pandemic a pre-trial review was listed before HHJ Lloyd-Jones on 17th April 2020. The respondent conceded the split of the beneficial interest should be 50/50. He sought an order that his schedule 1 application be stayed until the arrangements for care of the parties’ youngest child E had been resolved. If not agreed, he suggested he should be given the opportunity to make a section 8 Children Act 1989 application, and only once that had been concluded, could the Court properly consider the schedule 1 application.
13. Given his change of position in respect of the declaration of beneficial interest, HHJ Lloyd-Jones reduced the time estimate of the final hearing to one day. As she was unable to view the bundle at the hearing, which took place remotely, she put off the question as to whether the Schedule 1 application should be stayed for me to decide.
14. The hearing before me took place on Tuesday 21st April 2020 using the Cloud Video Platform. I had been able to download the trial bundle and review the Court file.
15. The Applicant represented herself at the hearing, the Respondent was represented by counsel. I heard evidence from each of the parties, and we took a number of breaks throughout the day to make sure that the Respondent was able to give instructions to his counsel, and because remote hearings are tiring for everybody. When the Applicant was giving evidence and the Respondent took a break to give instructions to his counsel, the Applicant stayed in the video conference with me and my clerk, so as to ensure that she did not have contact with anyone else while she was still giving evidence. I heard submissions and I read position statements from each of the parties. I had dealt with another remote hearing before starting the trial in the morning, and there were some technical issues in getting everyone connected to the call so we did not start hearing evidence until nearly 2pm. It had been a long day and so I decided to reserve my judgment and send it out to parties by email.

The law

The Trusts of Land and Appointment of Trustees Act 1996 (“ToLATA”).

16. A trustee of land (both applicant and respondent are trustees of [*the property*] within the meaning of the Act) may apply for an order declaring the nature or extent of a person’s interest in the property subject to the trust, or in respect of the exercise by the

trustees of any of their functions, including the power of sale pursuant to section 14 of the Act.

17. Section 15 sets out the matters to which the Court is to have regard in determining such an application:

15 Matters relevant in determining applications

(1) The matters to which the court is to have regard in determining an application for an order under section 14 include—

- (a) the intentions of the person or persons (if any) who created the trust,*
- (b) the purposes for which the property subject to the trust is held,*
- (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and*
- (d) the interests of any secured creditor of any beneficiary.*

18. Unlike applications under the Children Act 1989, the welfare of any minor children is a relevant factor to consider, but is not the Court's paramount consideration. This is because the order sought is not in respect of the child's upbringing within the meaning of section 1(1) of the Children Act 1989.

Schedule 1 Children Act 1989.

19. Schedule 1 of the Children Act enables a parent or person named in a child arrangements order as a person with whom the child is to live, to apply for any of a range of orders which enable the child to be provided for financially. In this case, the Respondent asserts that (although there is no child arrangements order to that effect) he is the carer of the parties' younger child and seeks under paragraph 1(d) of Schedule 1:

An order requiring a settlement to be made for the benefit of the child and to the satisfaction of the court, of property-

- (i) To which either parent is entitled (either in possession or in reversion) and*
- (ii) Which is specified in the Order.*

20. In this case the Respondent seeks an order that the Applicant's share in the property should be held on trust for E until such time as he finishes university, and then to revert to the mother.

21. In deciding whether to exercise its powers under paragraph 1, the Court must have regard to all the circumstances, including the matters set out at paragraph 4 of the Schedule, as follows:

4(1) In deciding whether to exercise its powers under paragraph 1 or 2, and if so in what manner, the court shall have regard to all the circumstances including—

- (a) *the income, earning capacity, property and other financial resources which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;*
- (b) *the financial needs, obligations and responsibilities which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;*
- (c) *the financial needs of the child;*
- (d) *the income, earning capacity (if any), property and other financial resources of the child;*
- (e) *any physical or mental disability of the child;*
- (f) *the manner in which the child was being, or was expected to be, educated or trained.*

22. The child's welfare is again not the Court's paramount consideration, because the order sought concerns his or her maintenance rather than their upbringing. However, the relevant factors are such that an assessment of the needs of the individual child in the light of the available resource are likely to be the determining factor. The applicant applies for the benefit of the child, not for him or herself.

23. I have been referred to and read the cases of Re P (a child)(financial provision) [2003] EWCA Civ 837 and N v D [2008] 1 FLR 1629.

Respondent's application to stay his application under schedule 1

24. Having considered the arguments put forward on behalf of the Respondent, I refuse the application for a stay of the Schedule 1 Application for the following reasons:

- (i) the proposal is that the application be stayed for an uncertain period of time, to afford the parties the opportunity to negotiate and then for proceedings under s8 Children Act 1989 to be issued and concluded. This would cause unnecessary delay and uncertainty for the parties and for their children;
- (ii) in these proceedings there is considerable overlap of the issues in the two applications. Evidence has been obtained in accordance with the directions made. To stay one of the applications would effectively give the Respondent a second opportunity to seek the outcome he wishes based on the same transaction that was in issue at this hearing. This offends against basic legal principle that matters which can be brought before the Court at one time should not be re-adjudicated;
- (iii) if the schedule 1 application were to be stayed then any findings made by the Court in respect of the ToLATA application would be at risk of being undermined. The Court would not have the option of ordering the property to be sold because until the Schedule 1 application was decided, the parties would be unable to take such a step;
- (iv) the Respondent was legally represented at both the initial directions hearing before DJ Devlin, and the neutral evaluation/dispute resolution hearing in March 2020. The orders made by DJ Devlin made it absolutely clear that the

two applications were to be managed and heard together, and this is what happened at each hearing. The Respondent has not suggested that he ever contended that at the hearing on 13th March the Court was not in a position to assist the parties in respect of both the ToLATA and the Schedule 1 Application;

- (v) The Respondent has not previously sought any further directions in respect of the Schedule 1 application, nor identified any gap in the evidence that means the Court would be unable to decide it at the final hearing;
- (vi) The Respondent has suggested that the Court cannot consider the application until the question of child arrangements order has been resolved. This is not a gap in the evidence, the Court has information before it from both parties about what the current arrangements actually are. It is a request for more time so that the father can improve his current position. The schedule 1 application is significantly weakened by the absence of his having a child arrangements order or even evidence of the Applicant's agreement that he should be regarded by the Court as E's main carer. The Respondent does not accept this. The real reason that he seeks an adjournment is to enable him to take steps to improve his case in this respect. It was submitted by his counsel that because he has been acting in person at times in this litigation he may not have fully understood this. However, the Schedule 1 application was filed on his behalf by his solicitor, and he was legally represented at previous directions hearings and in the pre-proceedings period had the benefit of legal advice and assistance. I do not regard this as a good reason to stay his Application under Schedule 1 now;
- (vii) If there has been any delay in respect of the Schedule 1 application, the Respondent has only himself to blame. He was invited to issue the application by letter sent to his solicitors on 3rd March 2019 but did not send one to the Court until 29th October 2019;
- (viii) The parties have prepared witness statements which covered all relevant matters but having had discussions at the start of the hearing, in which we were able to clarify the issues, I allowed both parties to expand on their evidence in chief, in order to describe to me in more detail the current arrangements, and what they said the impact would be upon themselves, each other and the children, if the property was either sold, or sale of the property delayed. The Court had all the relevant information before it in order to determine both applications.

Evidence

- 25. I have read all the documents in the bundle and I heard evidence from both parties. The evidence was tested by cross-examination.
- 26. The parties hold very different perspectives on their situation, and both strongly feel the other is being unfair to them. There was however relatively little dispute over basic facts.

27. The picture emerges as follows. The parties have lived in the house since they bought it. It has four bedrooms and is in a sought-after village in Oxfordshire. Both children have lived all their lives in the house. The paternal grandparents for many years lived nearby, and recently sold their house and downsized to a property in the same village. They have been a constant presence in the children's lives as both parents worked, so the paternal grandmother has been there to see the children when they came home from school, until their parents came back from work. Both children went to [name redacted] school, E has another four years of school. They travelled to and from school by a school bus which picked them up and dropped them off right outside the door. The journey is around ten minutes. E is a talented football player, playing for a number of different local teams and his father takes him to training on a couple of weekday evenings a week and he plays matches at the weekend for both school and clubs out of school. D is in her first year of university. During lockdown she is staying with a friend.
28. Since the parents separated on 1st January 2017, both parents have continued to live in the house but it has become an increasingly intolerable situation. The mother's evidence was not challenged that when at home she spends her time in an upstairs bedroom with an en-suite bathroom. Although she has not been expressly banned from the kitchen, she is made to feel so unwelcome by the Respondent and his parents, that she does not prepare meals for herself or others when she is in the home. She has a fridge in the bedroom.
29. Her evidence was not challenged that she is at the property from Monday evenings through to Friday mornings and that she commutes to work in [redacted] or London (save at the moment due to the pandemic, she is working remotely and based at her partner's property in [County A]). It was put to her that sometimes she spends a night at her partner's house in [County B] and she agreed, but said this was rare, when she was working late and exhausted and couldn't get back to Oxfordshire in good time. She said her partner lived in [County A] not his house in [County B]. Her evidence was not challenged that since the separation she has never spent time in the property alone with the children - because the father has always been there, or if he is out, then one or both of his parents are there. He said in his evidence, that if he was out, his parents would come round to 'look after the property' and that this is what E wanted. The Applicant told me that as a consequence of these arrangements she and E spend time together in the evenings in the bedroom that she uses, while the Respondent and often his parents are downstairs in the living room.
30. The relationship between the Applicant and the Respondent and their parents has deteriorated significantly so that it is adversely affecting E. The Respondent said in his evidence about this that his parents were 'not impolite' to the mother but acknowledged that, 'they don't speak to you.' He implied that by not speaking to her they were avoiding unpleasantness, but plainly it is a very difficult atmosphere. Both parties referred to an incident where there had been an argument between the Applicant and the paternal grandfather. The details of this are in dispute but the Respondent accepted that at one point he (the Respondent) had tried to take the mother's phone out of her hand and in doing so had placed his hand over hers and that the force of the pressure exerted caused the phone's automated response to dial 999. The mother spoke to the police and later filed a report.

31. The Applicant had a detailed grasp of the issues, the options she saw available to them, and in particular the parties' respective financial situations.
32. In February 2019 a financial adviser was asked to give a view as to the Applicant's mortgage capacity. Two scenarios were given – the property is sold and the Applicant has a deposit of around £130,000, alternatively, the property is not sold but the Applicant is released from the mortgage. At the time the mortgage account was £9,000 in arrears. The opinion was that, 'taking into account mortgage arrears' she would not be able to get a mortgage even with a deposit, and that it was likely to be at least a year before any lender would look at this, with an interest rate of perhaps 9% or 10%.
33. I am cautious as to the weight that I give to this document, which is a letter, not a witness statement or expert report. Even before Covid-19 pandemic, interest rates were low, I query where the figure of 9 or 10% interest comes from. The writer has not explained the rationale for her view, other than making it clear that the fact of the arrears is very significant. The Respondent gave evidence that the arrears have now been cleared, so that factor while relevant as part of the credit history, is likely to have different weight. We are in a very different financial landscape now than then.
34. The Applicant has worked full time for many years in the finance departments of large companies. After E was born she worked for [redacted]. Her current job is with [redacted]. She earns £4,500 net a month (after employer deductions including pension and tax). She has pensions from her previous employments but is not drawing any income from them nor has any other source of income. Her current job has not been affected by the current crisis save that she is working remotely, but remains in full-time employment. She has a senior position with her current employer, managing a team. She has very recently applied for a mortgage with [redacted], although not yet heard back.
35. The Respondent has unfortunately for him been out of work for the past five years and is on limited income. He has not provided his bank statements for an accurate picture of his financial situation, and although he told me he had applied for universal credit he has not put any evidence relating to this before the Court. His evidence was unclear at times as to his sources of income. For example, he told me that he himself had cleared off mortgage arrears of £12,000 from his savings, but in fact he later said that it was his parents who had cleared them by paying a lump sum. The mortgage at the moment is £1,379 a month. The Respondent's parents continue to give him significant financial support and they are also paying E's school fees. The Respondent suggested to me that he would be able to pay the mortgage in the future because he expects to return to work. It is also his case that the Applicant should continue to pay half the monthly cost of mortgage every month. Previously she was paying £250 a month to him, but more recently has agreed to pay half the monthly mortgage bill.
36. Both the Applicant and the Respondent suggest that they need at least a three-bedroom house. It was suggested to the Applicant that she only needed a two-bedroom house, as D was now an adult and independent. This rather undermines the Respondent's argument that E however will need to rely upon his father to house him past his eighteenth birthday.

37. The Respondent said that he had ‘full charge’ of E during the week and that even when the Applicant was staying in the property, she left at 7am in the morning and did not return until 8.00 p.m. at the earliest. E’s school bus comes at 8.00 a.m. and he comes home at 5.30 p.m., usually having done his homework. He trains with various football teams for an hour on three nights a week and has matches on Saturdays and Sundays.
38. The father said that it would be ‘problematic’ for both him and E if the property were to be sold. He pointed out that his parents and his sister lived in the village and this was E’s base.
39. Even though he has now conceded that their respective shares in the property should be declared at fifty percent, the Respondent seemed keen to emphasise his view that he had made the larger contribution to the property. He said in his oral evidence that he had paid the mortgage and bills and she had paid only £250 a month, but he has not challenged her evidence that she paid for D’s school fees, uniform and additional expenses, which amounted to a greater expense than the mortgage. He did not challenge her evidence about the way the household finances were managed during the relationship, with each contributing to the best of their ability to the shared expenses of their family life.
40. His grasp of finances was a bit hazy. He said ‘my whole well-being is to look after E’s well-being the implication of finances is not my prior concern’. My impression of the way he gave his evidence was that he tended to see things very much from his own point of view, that he does not have a good grasp of the financial implications of the situation and that he does not like the thought of change. He does not envisage that he or E should have to leave the property and so has not let himself think of the practical consequences that might follow from that. He regards the mother as wanting to cause maximum upheaval for E, but did not in my judgment seem to acknowledge that there was anything unsettling or difficult for E – or D - in the continuation of the current situation. He did not however challenge the mother’s evidence that E’s school had raised concerns about the impact of the present living arrangements on E.
41. It was agreed that following the hearing in March 2020 the mother would stop the £250 direct debit and pay fifty percent of the mortgage direct to [*the bank*]. The father suggested that he was worse off as a result of the loss of the direct debit but plainly his contribution to the mortgage has significantly reduced from around £1,100 to about £700. The Respondent has an income of £825 a month which comes as drawings from capital accrued in his haulage business which is not trading at the moment. It is not clear to me how long this income would sustain if he did not go back to work. The Applicant asked him how he intended to pay the mortgage in the future, and whether if she moved out and sale was deferred for a year whether he would pay her rent, and how he intended to pay for maintenance and upkeep. He did not have any answers to any of these questions and tried his best to avoid answering them. When pressed he said that his parents would continue to pay the mortgage and when he returned to work he would be able to meet the payments. However, when asked if his parents might assist him to raise a lump sum to rehouse or buy out the mother’s share, he said that he had no expectation of them assisting him financially.

42. His main issue he said about the prospect of moving house was that E was collected to and from the front door by the school bus and that the paternal grandparents doted on him, did everything for him and provided a complete support network to him. He emphasised that it was his mother who he said had tended to the children on a daily basis to enable the mother to go to work, but did not seem to accept that this must have also enabled him to go to work. He said he did not want his son to become a latch key kid and he needed a support network around him.
43. The Respondent suggested that E did not particularly like spending time with his mother, but said that he thought E could spend one week in every four with him, providing she was able to take him to his football commitments. The Applicant's view is that it would be better if E spent more or less half his time with each parent. At the moment D is staying with a friend in lockdown as she does not wish to stay in the family home. The mother said that she expected D to live with her in university holidays, provided she could rehouse herself and pandemic restrictions are lifted.

Analysis

ToLATA

44. Having regard to the section 15 factors in turn.

(a) the intentions of the person or persons (if any) who created the trust;

45. The parties did not record their intentions in respect of the property when they purchased it. The Applicant's recollection of the conversation they had with their solicitor at time of purchase was that they were advised that each would inherit the other's share in the event of death, and that there was never any suggestion that they would not own it in equal shares.
46. The parties purchased the property together, the Respondent, assisted by his parents, providing the deposit, the Applicant investing her savings in refurbishment. They brought their family up together in it, and both worked throughout the partnership, investing the money they earned into the house and the family. They borrowed against the property for further improvements and also to pay off some debts incurred by the Respondent.
47. The parties did not apparently have any discussions either at the time they bought the property or until their separation about what would happen to the property in the event they separated. The Applicant thinks it should be sold and the proceeds divided, the Respondent wishes to remain living in the house with E.

(b) the purposes for which the property subject to the trust is held,

48. The house was purchased as a family home. The parents' relationship has broken down and the family unit now exists in a different form. The house has been the childhood home for D and for E. Since separation the house has continued to be a home for the children and for both parents, but the situation is fraught with difficulty. The Applicant is prevented from using her share of the home as she would otherwise

be entitled to do. The atmosphere is tense and filled with resentment and this is very difficult for all parties, particularly the children of the family.

(c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and

49. I am concerned with E who is still a minor. The Respondent contends that his welfare is only met by his continuing to live in the same house in which he has always lived.
50. The Applicant contends that it is not in E's welfare to remain living in this very difficult environment.
51. E's school has expressed concern about the atmosphere in the home and the impact it has had on E's welfare. The father accepts that E witnessed the altercation between him and the mother when the police were called.
52. E needs security and stability. His parents should provide him with somewhere to live, to ensure that he can go to school, be supported in his education and out of school activities, to be supported in his social life. At the age of fourteen he should be developing his own identity and taking some steps towards independence so that he will eventually be able to leave home and take care for himself. As well as physical security and stability his emotional needs are very important. He needs to be protected from his parents' dispute, not to feel worried or responsible about either of his parents and to know that even though they do not always agree with one another, they are able to find a way to work together so that they can co-parent and continue to take responsibility for him.
53. In my judgment there are significant concerns that E's welfare needs are not met by the current situation.
54. I am not persuaded that his physical needs can only be met by his continuing to live in the four bedroom house in [redacted].

(d) the interests of any secured creditor of any beneficiary.

55. There is sufficient equity in the property to discharge the mortgage. The extent of the impact of the pandemic is unknown. The Respondent is not at this time in a position to meet the mortgage in full without assistance from his parents and has no evidence that he will be able to invest in it so as to keep it in good repair let alone make improvements to it over the next few years. If sale were delayed, the property may increase in value or stay relatively stable, but on any view the parties would be taking a risk that they would be receiving less in equity if sold at a later stage.

Schedule 1, section 4 factors

- (a) the income, earning capacity, property and other financial resources which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;

56. On current evidence they each hold about £160,000 to £170,000 equity in the property.
57. The Applicant is likely to continue to earn well in her job as a senior manager and will continue to have the ability to contribute towards employer pension schemes. She can afford to rent a suitable alternative on her current income, but without a deposit, she is unlikely to be able to raise a mortgage on a new property.
58. The Respondent cannot afford to live in the property without assistance from the Applicant or from his parents. It would not in my judgment be reasonable to expect the Applicant to contribute towards the mortgage payments in circumstances where she is not living in the property and not receiving any occupation rent from the Respondent. The Respondent's evidence is that continuing financial assistance from his parents is not guaranteed, and in a letter from them to the Court, they have stressed that continuing to pay E's school fees is '*an ever-increasing struggle*'.
59. Of course it is hoped that with the benefit of further treatment for his medical condition, he will be back at work in due course. However, he could not provide any realistic timescale for this, nor evidence as to his expected level of income and expenditure. Given that the mortgage has already fallen into arrears while he has been responsible for making the payments, there is a significant risk that this would happen again. The Respondent was not able to provide any evidence of how he proposed to find funds to keep the property in a good state of repair pending sale. In the circumstances, if the property were not sold by the parties, there is a real risk that it would be repossessed at a later stage.
- (b) *the financial needs, obligations and responsibilities which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;*
60. As the parties are no longer in a relationship they both need to be able to live separately. They both need to live in accommodation that enables their children to spend time with them. This would be the case if E was spending roughly half his time with each parent as his mother suggests, or 75/25 as his father suggests. D while at university does not have a home of her own and each of the parents would wish to have a home with sufficient space for her to spend time with them. D's next year will be a work placement and her intention would be for that to be in [redacted] and that she could live with her mother.
61. Both parties have significant unsecured liabilities and there is no indication from the Respondent as to how he might expect to service his debts without a sale of the Property.
- (c) *the financial needs of the child;*
62. I am concerned with E who is still a minor. He needs to continue to be financially supported by his parents, clothed, fed, and have his daily needs provided for. It would be nice for him to continue to live in or near the village where his grandparents and paternal aunt live, and close to his school. It would be nice for him to live in a house with a garden and where his friends can stay for sleepovers, but none of these are needs. He does not need to continue to live in a four bedroom house.

(d) *the income, earning capacity (if any), property and other financial resources of the child;*

63. E does not have a separate income, property or other financial resource.

(e) *any physical or mental disability of the child;*

64. E does not have any physical or mental disability.

(f) *the manner in which the child was being, or was expected to be, educated or trained.*

65. E is at private school and his grandparents are paying his school fees. It is hoped and expected that he may continue to attend the same school until he completes his A-levels. His older sister is at university and his parents hope and expect the same for him. On behalf of the Respondent father it was suggested that D aged nineteen was now independent and her mother did not need to live in a three bedroom house as D could be expected to provide for herself. It is not clear to me why the Respondent applies a different approach to E. It seems to be expected that E would also leave home to go to university and return home in the holidays.

66. I would expect that both parents would want to rehome themselves in properties where both their children would be able to continue to visit as young adults.

Conclusions

67. In respect of each of the applications the parties have the same position; the Applicant seeks a sale as soon as possible, the Respondent seeks the sale to be deferred for a further seven or eight years. While the ToLATA and Schedule 1 applications place emphasis on different factors, both require the Court to consider all the circumstances. I therefore consider the applications together.

68. Having had regard to all the evidence it is plain and obvious that the Respondent was right to concede that the parties' respective beneficial interests in the property should be declared as being fifty percent each.

69. The Respondent accepts that he owns only half the property, but he wishes the Applicant to have no benefit from her half share for another seven or eight years. He asks that she continues to pay for half the mortgage, yet has no intention of her deriving any benefit from that, for example by receiving an occupation rent either from him or a lodger.

70. If the property were not sold, the Respondent would effectively hold the property on trust for the Applicant for seven or eight years. Even if for the minimum period up to E's eighteenth birthday, there is a real risk that the Respondent would be unable to maintain the mortgage payments and keep the property in a good state of repair and upkeep, thereby putting his ability to safeguard the Applicant's share at risk.

71. If the property were to be sold then the Respondent would be able to use his share of the equity, combined with his continuing income, to rent an alternative smaller property with lower living and maintenance costs. He is in a worse position than the Applicant so far as obtaining a mortgage is concerned, because he has been out of work for so long. However, on either a ToLATA or an Schedule 1 Application, I am not directed as I might be had the parties been married, to strive to achieve an outcome where a lower earner in the partnership may effectively be compensated by the other to achieve parity, but to look in the round at the financial situations of the parties, the needs of the children and to take that into account when considering what if any orders should be made in respect of the property they both own in equal shares.
72. If the Applicant is prevented from realising her share in it for a period of four, seven or eight years her financial stability is at risk. She is unlikely to be released from the mortgage account. The Respondent has been unable to make the mortgage payments consistently, she has been exposed to the adverse consequences of a poor credit rating and will continue to face that risk, as he does not have a job and he cannot meet the payments. Approaching her sixtieth birthday, even if with the benefit of a lump sum, she is highly unlikely to be able to obtain a mortgage at that time.
73. If the property were sold the Applicant could use the deposit to improve her current situation and rent, or in time apply for a mortgage for, a new property in which she and the children could spend time together.
74. The parents would both be able to rehouse themselves within a reasonable distance of E's school. He is 14 years old and the school has a minibus. There is no requirement for him to live only ten minutes away from his school. There is no necessity for him to live in the same village as his grandparents, although of course it would be to his and their continuing benefit if they were able to live nearby.
75. Although the Applicant's income exceeds the Respondent's, her financial situation is not so comfortable that she could realistically meet both her own needs which include providing for E and her older daughter, and make financial provision for E in his father's care.
76. There is in my judgment no good reason to require the parties to provide E with accommodation in his current four bedroom home, either until he finishes school or beyond that time.
77. The Respondent asserts that he is E's full-time carer but has no child arrangements order to that effect. Having had regard to the evidence I have read and heard, I find that he has effectively prevented the mother from taking on the extent of a caring role she wished to for her children because she has not been allowed to be in the house alone with her children, and has been made to feel uncomfortable, excluded and unwanted. Even taking into account those constraints, it would appear that the current situation most resembles a shared care arrangement and the Respondent is in my judgment in difficulties in establishing that he would be entitled to apply for an order under schedule 1 in any event.
78. For all these reasons in my judgment the property should be put on the open market as soon as reasonably practicable and sold for the best price that can be obtained. If the

parties are able to negotiate with one another so that one buys out the other's share then that may provide a sensible way forward.

Costs

79. The Applicant has applied for the Respondent to pay her costs in both the ToLATA application and the Schedule 1. The normal order in civil cases is that costs orders 'follow the event' i.e. that the unsuccessful party must pay the costs of the successful party. In family cases, the usual order is no order as to costs, but that does not apply to applications made under Schedule 1, so again the starting position would be that the unsuccessful party must pay the costs of the successful party.
80. I hope that the parties will be able to work out the terms of a draft order between them, that reflects this judgment, including provision as to costs, and that I may be able to save them further time and expense of attending a further hearing. In that case, I will formally hand down the judgment in the parties' absence and make an order in the terms agreed. If the parties are unable to resolve matters, I shall list a further remote hearing as soon as possible.

Joanna Vincent
HHJ Vincent
Family Court, Oxford

Hearing date: 21st April 2020
Judgment sent out by email: 7th May 2020
Judgment handed down: 3rd June 2020