



Case No: B6/2015/2618

**Neutral Citation Number: [2017] EWCA 2698 Civ**  
**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM OXFORD DISTRICT REGISTRY**  
**(HIS HONOUR JUDGE TOLSON QC)**

The Royal Courts of Justice  
Strand, London, WC2A 2LL

Thursday, 9 February 2017

**Before:**

**LORD JUSTICE McFARLANE**  
**LADY JUSTICE MACUR**  
**and**  
**LORD JUSTICE HENDERSON**

**Between:**

**CROWTHER**

**Applicant**

**- and -**

**CROWTHER**

**Respondent**

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**MR T DANCE** (instructed by Shakespeare Martineau) appeared on behalf of the **Applicant**.

THE RESPONDENT APPEARED IN PERSON

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**Judgment**  
**(Approved)**  
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## **LORD JUSTICE McFARLANE:**

1. This is an appeal brought by the husband in very long-running matrimonial proceedings relating to one single issue. The issue focussed on the future of the former matrimonial home, a house, which, it was accepted, was bought entirely from the inheritance that the wife had received following the death of her parents. The house is mortgage-free and was valued after a rough drive-by valuation at the time of the hearing as being worth in the region of £200,000. The house is a four-bedroomed property. It is occupied by the wife and her now adult daughter from a previous relationship and that daughter's partner. The wife's case was that the house should not be sold and that the husband should have no part of the value of it. The husband's case was that the house needed to be sold in order to liberate the capital in the property and that should be split equally between the parties, providing roughly £100,000 each, and that was sufficient for each of them to rehouse themselves.
  
2. Whilst the issue in the case can be shortly stated, as I have attempted to do in the course of one paragraph, the complicating factors in the proceedings are more detailed and presented the judge, HHJ Tolson QC, with what was on any view a difficult forensic process to oversee, manage and then determine the outcome of. The complications can be listed as follows. Both parties, as the judge found, were vulnerable in terms of their psychological and mental health. The wife had been acting in person throughout the proceedings, as I think is the case, and at a number of early directions hearings her presentation to the court was such as to cause concern as to whether she had capacity to conduct the litigation herself. A deal of time was, therefore, taken up in attempting to engage the Official Solicitor to act on her behalf and to achieve an expert assessment of her capacity. Secondly, attempts were made to obtain legal aid so that she could be represented. It is not necessary for the determination of this appeal to go into the whys and wherefores of that process. The result of it was to leave the wife and the court in exactly the same position as they were at the start, namely a lady who did not lack capacity to conduct the litigation herself but who was acting as a litigant in person.
  
3. The second complicating factor was the wife's account of her past and the role that the husband had had in it, but also as being the victim of unwelcome experiences from other sources, has seemingly left her in a position where she focusses in her mind upon the history that she describes and its impact upon her. She has explained to this court (and it was readily apparent in the presentation of her response to this appeal) that she is preoccupied by these matters and the unfairness of the events that she has encountered in her life to the extent that she really cannot see that the husband is entitled to have any claim against her now. That led to the wife filing statements in the proceedings which (a) focussed upon the history and (b) were short and precise as to the points that she wished to make. A primary submission that she relied on was that the husband was not entitled to any claim on the house because that represented her inheritance from her parents.
  
4. A third and distinct set of complications in the proceedings was the husband's own vulnerabilities. He presented to the court, as he does to all the world, as a physically disabled man, in his 40s, and his wife is also of a similar age. Since the separation he

has lived entirely in his parents' home. They are a couple in their 70s. And he is confined to a wheelchair and very limited in his ability to look after himself or engage in anything approaching a normal life because of those limitations. He considers that his physical disability arises from an assault that he says was occasioned upon him by his wife some years ago. In the course of the proceedings the husband was assessed, both by an orthopaedic surgeon and by a psychiatrist, and the resulting expert opinion was that there was really very little physical explanation for the husband's apparent disability and that there was a very significant element of functional overlay, causing him to present as I have described.

5. The hearing had been case-managed, certainly in the latter stages, by HHJ Tolson, who was at that stage the Designated Family Judge at Oxford where the hearing took place. The trial itself was conducted with the wife as a litigant in person but with the husband represented by well-known matrimonial solicitors and Mr Thomas Dance, an experienced specialist family law junior barrister. The transcript of the hearing shows that the judge obviously recognised the need to try and achieve a fair process as between the represented husband and the unrepresented wife. He allowed Mr Dance in ordinary terms to take his client through his evidence-in-chief but then indicated to the wife that, before she asked any questions herself, the judge had a number of matters in his mind that he wished to raise. He then went on to question the husband.
6. The central point of the appeal raised by Mr Dance on behalf of the husband arose from that point of the trial. Put shortly, the point is this. The questions that the judge asked of the husband related to his lifestyle. The questioning runs for some 26 pages of the transcript before the judge gets to the stage when he invites the wife to ask any further questions, and in round terms all of the judge's questions in that passage relate to the husband's ability to live independently. The judge asks him about his lifestyle, how he spends his time, and asks him about the use of the wheelchair. The judge goes into the psychological or psychiatric expert evidence that the court had, and then the judge descends in the latter five or six pages to the direct question of whether the husband could, as a matter of reality, live independently as he sought to do. The husband's case was that he would move out from his parents' home, buy a one-bedroomed property in a nearby town and live on his own there with little or no outside support. Thereafter the judge invited the wife to put questions to the husband, and they typically (again not being unfair by summarising it too much, I hope) indicate the wife's preoccupation with the past rather than any other matters that were of more direct current concern as to the couple's finances.
7. The case then followed more predictable lines, with the wife giving evidence, being questioned by Mr Dance and submissions being made. The judge then gave a relatively short judgment summarising the history. He made few findings of fact. It was not necessary to do so. He found, as I have indicated, that there was "a highly significant amount of functional overlay" in the husband's presentation. He held himself as being unable to find whether there had been any assault on the husband by the wife, as the husband urged him to do. The judge then moved to look at the finances and held at paragraph 17 as follows:

“In my judgement this is a case which turns primarily on the needs of both parties but also on the contributions which each have made to the marriage.”

He then gives a short account of the finances and held at paragraph 20 as follows:

“Overall I have been left with an impression that [the husband] is unlikely psychologically to have been in a significantly different position during the marriage from the one in which he now finds himself. He is likely even at that stage to have had a personality which made him dependent to a greater or lesser extent upon [the wife] but I find it impossible on the present evidence to say more than that.”

8. The judge then gave a history of the purchase of the property, which occurred chronologically roughly halfway through the ten-year period that this marriage subsisted before separation. The judge then said this at paragraphs 24, 25 and 26:

“24. On the contributions side, therefore it will be plain that Mrs Crowther has from her side of the family contributed entirely to the property and Mr Crowther has not. That important consideration is nevertheless trumped by a consideration of the needs of this couple. I turn to Mrs Crowther first.

25. I have already indicated the vulnerabilities she displayed during this trial. She told me in terms that she would really struggle mentally with having to move from the property to the much smaller properties which she maintains are in a different and less desirable area of Worksop and upon which Mr Crowther relies by way of comparables. These are on sale at half the value of the former matrimonial home which I take at the figure of around £200,000. That it is the figure for which Mr Crowther contends and it was effectively accepted by Mrs Crowther during her evidence.

26. In my view there is justification for what Mrs Crowther has to say about her own vulnerabilities. She does strike me as a mentally vulnerable woman, as she has at least two judges who have earlier had to deal with this case: struck them to the point at which as I have indicated they were concerned about her capacity. That is a judgment which must necessarily be made without reference to medical evidence and is founded chiefly on a matter of impression. Nevertheless, I record that it was not an impression which I found in any way difficult to form.”

9. Following that analysis the judge went on to look at the husband’s property needs, descending to some detail as to the costs involved, but then he came to the main conclusion, which was effectively the driver for his determination of the outcome of the proceedings. He says this at paragraph 30:

“I cannot envisage that this solution would in fact meet [the husband’s] needs. Before, however, we get to that point I express my doubts as to whether that is something which he will even undertake. It appears to me he has been an individual who for much of his life, perhaps all of it, has been dependent upon others and there is no significant body of evidence before me as to his ability to function independently.”

He then summarises the husband’s proposal before saying this at paragraph 32:

“I do not think the solution proposed would meet [the husband’s] needs. It is clear that no share of the property less than 50% would serve any useful function as far as [the husband] is concerned and of course to grant him a sale and the full 50% would not in any way reflect the contribution which [the wife] made from her family to the purchase of the property in the first place.”

That effectively determined the case. The judge, however, also added at paragraph 34 that, on his analysis of the wife’s needs, she needed to remain in the property, that being a reference to an earlier finding at paragraph 25, which I have already referred to, namely that she would “struggle mentally” in having to move from that property with all that it represents to her. That, therefore, was the judge’s conclusion and the reason why he did not award the husband any of the capital.

10. Mr Dance has the benefit of having gained permission to appeal following the decision of Jackson LJ, and we have now heard the appeal. In the Grounds of Appeal the husband makes a number of points about the judge’s analysis, in particular criticizing the judge’s approach to contribution, and the judge’s decision to treat this matrimonial home as being a contribution which should be entirely attributed to the wife when, as a matter of law, submits Mr Dance, the matrimonial home, once the money has been invested in such a property, becomes a matrimonial asset. Mr Dance also makes a number of specific points about other detailed aspects of the judge’s judgment.
11. For my part, however, the significant argument that the husband raises is the primary ground on which he relies, namely questioning the fairness of the process. The judge’s questioning of the husband as to his ability to live independently introduced, submits Mr Dance, for the very first time into the case a question mark over the husband’s ability to live in that way. The husband had to respond to the judge’s detailed questioning on these matters, effectively, submits Mr Dance, from a standing start in the witness box. The judge then went on to use that very factor as the determining factor in the case. Mr Dance accepts that within the terms of section 25(2)(e) of the Matrimonial Causes Act 1973 the court must have regard to “any physical or mental disability of either of the parties of the marriage”, but he submits that the way in which that issue was introduced into the case was simply unfair and improper. Mr Dance also accepts that the judge was required to assist the litigant-in-person wife by asking questions and he draws attention to section 31G(6) of the Matrimonial and Family Proceedings Act 1984, which is in the following terms:

“(6) Where in any proceedings in the family court it appears to the court that any party to the proceedings who is not legally represented is unable to examine or cross-examine a witness effectively, the court is to—

(a) ascertain from that party the matters about which the witness may be able to depose or on which the witness ought to be cross-examined, and

(b) put, or cause to be put, to the witness such questions in the interests of that party as may appear to the court to be proper.”

But, submits Mr Dance, the judge went far too far in taking over the cross-examination and presenting a case about the husband’s ability to live independently which simply was not part of the wife’s case before the court. Mr Dance submits that if the judge, in preparing for the trial, had formed the view that this might be an issue, then he should have flagged it up either at an earlier directions hearing or at the very least in some way before the process of the trial started in order for the husband to have notice of it to decide what evidence he might adduce and to make submissions in order to achieve a fair process. One option suggested is that the husband might have called evidence from his parents in order to give an account (a) of the husband’s ability to live independently and (b) an understanding of that couple’s ability to assist their son were he to move to independent accommodation.

12. Having read the transcript of the hearing, which I have already summarised, it does seem to me that Mr Dance is on a sound basis for the criticisms that he makes. In making that observation I wish immediately to express my professional sympathy for the judge and indeed any judge in this not uncommon situation where one party is represented by a strong legal team and the other is a litigant in person. The requirement for the court to achieve a fair process by assisting the litigant in person almost inevitably draws the judge into the role of inquisitor, albeit on behalf of the litigant. It is a difficult line to tread, and if this appeal is successful I wish to be in no way critical of Judge Tolson, who on the day will, I am sure, simply have been doing his best to achieve a fair process for these parties.
13. So far as the wife’s response to the appeal is concerned, she has explained in wide terms her perspective on her relationship with the husband and the impact that it has had upon her, adverse as she undoubtedly sees it as being. She has, however, assisted us by responding to more focussed questions and, in response to a direct question as to whether her case had ever been to suggest that the husband could not live independently, she responded that it was not part of her case before the court. That answer by her accords with my reading of the papers. Her case was that, if he wanted to live independently, he could easily fund it by either obtaining council accommodation or through housing benefit, and that he did not need any capital from the house, the matrimonial home, in order to live independently.
14. It therefore seems to me that the husband is right in asserting that this point about independent living did indeed arise for the first time when the judge began asking

questions and that the judge's questioning did unfortunately go beyond simply assisting the litigant in person to present her case, which was on a different basis, and that the process inadvertently was unfair because there had been no advance warning of the point being raised for the husband to take steps to present his case in order to meet it. That, to my mind, determines the appeal. I make no stated conclusion on the other points that Mr Dance raises. It does seem to me that they are certainly arguable. But, if this case has to be retried, they are matters that really need to be determined afresh by the judge in the lower court.

15. I am equally struck by what the wife has said to us today. It is plainly part of the case that she wishes to present to this court (and, I suspect, to the lower court) that the husband's conduct towards her in the past, both financial and other conduct, provides ground for the court holding that it is simply inequitable and unfair that he should now be awarded any further sums from her finances. I simply record that as a matter of record of her presentation before the court today.
  
16. I would therefore, if my Lady and my Lord agree, allow the appeal on the basis that I have described. Mr Dance and the wife both earnestly hope that this court will now redetermine the issue rather than remit it for hearing. I can well understand why both parties wish to achieve closure on this issue that has been open between them for nearly ten years. Despite that understanding and sympathy, my view is that it is simply not possible for this court now to redetermine the issue. The points raised by Mr Dance in order to persuade me that the hearing before the judge was not a fair hearing on the issue of independent living really go to underline the fact that, on the material we have, which is simply a transcript of what went on before the judge and a selection of the statements that were put in, provides us with no grounds upon which to achieve a more informed decision on that point. I have also indicated that there are aspects of the wife's case which may not have been fully presented and analysed before the court. Also, as I do not think I have mentioned, the judge's judgment was given as long ago as 16 July 2015. The finances of the parties may have changed in that time, and there may be fresh material to consider. In addition, as Mr Dance has said, evidence from the husband's parents might have been relevant and might need to be adduced. Again, we do not have that material.

[short adjournment]

17. So, with a heavy heart because I know this will not be a welcome outcome for either party, my conclusion is that we cannot redetermine the issue and that it needs now to be sent back to the family court to be heard again. The wife, if at all possible, needs to be legally represented before the court. This is a particular case which ought to justify exceptional funding by the Legal Aid Agency.
  
18. I need to record at this point that the wife has become distressed by realising that the appeal is to be allowed, and unfortunately we have had to take steps to proceed in her absence. I simply want her to repeat that what has transpired in the courtroom in the last ten minutes underlines the need for this lady to be supported and represented by

competent legal representation if at all possible. It does seem to me that the complications in this case that I have described make it exceptional, and it is very difficult to understand how the process can be properly and efficiently and swiftly progressed now before the court if she once again is acting as a litigant in person. But with that observation I simply repeat the outcome, which is that the appeal is allowed and the case should be remitted to the family court for rehearing.

**LADY JUSTICE MACUR:**

19. I agree.

**LORD JUSTICE HENDERSON:**

20. I also agree.

Order: Appeal allowed.



## DOCUMENT LIST

(1) Judgment of Judge Tolson in Oxford District Registry

(2) Section 31G(6) of Matrimonial and Family Proceedings Act 1984 (not found online)