

**IN THE COURT OF APPEAL (CIVIL) DIVISION**  
ON APPEAL FROM EASTBOURNE FAMILY COURT  
(DEPUTY JUDGE AUSTIN)  
HB14D00710

The Royal Courts of Justice  
Strand, London WC2A 2LL

Thursday, 29 November 2018

Before

**PRESIDENT OF THE FAMILY DIVISION**  
**(SIR ANDREW McFARLANE)**  
**LADY JUSTICE KING**  
**LORD JUSTICE COULSON**

**Between:**

**ELLEN ELIZABETH WODEHOUSE**

**Appellant**

**- and -**

**HENRY WYNDHAM WODEHOUSE**

**Respondent**

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Tel No: 020 7404 1400 Email: civil@epiqglobal.co.uk (Official Shorthand Writers to the Court)

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Mr P Blatchly (instructed by Stevens & Bolton) appeared on behalf of the **Appellant**  
Mr N Barnes (instructed by Warrens Law and Advocacy) on behalf of the **Respondent**

**Judgment**

**(Approved)**

## **Lady Justice King :**

1. This is a second appeal from a financial remedy order made by Deputy District Judge Austin on 20 June 2016.
2. The issue before this court is: (i) whether or not the Deputy District Judge had jurisdiction to make the lump sum order provided by him; and (ii) whether he erred in making a pension sharing order in the wife's favour for 50% of the value of the husband's pension fund.
3. It is now accepted by Mr Barnes on behalf of the wife, that the order, as drafted by the Deputy District Judge and confirmed (in so far as the structure of the order is concerned) by His Honour Judge Farquhar on appeal on 20 June 2016, cannot stand.

### *Background*

4. Both the husband and the wife are in their 60s; they met in 1988, married in 1992 and separated in 2011. This is therefore a long marriage. There are no children. The husband is one of four sons of the late John Wodehouse, the 4th Earl of Kimberley. The Earl is survived by his wife Lady Jane Hope (known in the papers and in this judgment as "the Dowager Countess").
5. When the husband and wife met in 1988, the wife had, the previous year, bought in her sole name a property ("33 Stone Banks") for £75,000 with a £30,000 mortgage.
6. Shortly after the wife met the husband, he moved in to live with her at the Stone Banks property. They remained there following their marriage, in April 1992, until the property was sold in 1998.
7. A theme running through the marriage was the husband's disastrous management of his financial affairs which has resulted in his having being declared bankrupt on two separate occasions. Whether this was as a consequence of ineptitude or of financial irresponsibility on his part is not clear from the papers and not directly relevant for the purpose of this appeal. What is relevant is the dire circumstances in which the wife now finds herself at the end of this long marriage following the husband's second bankruptcy.
8. In 1990 during the time in which the couple were living in Stone Banks, the husband was made bankrupt. He was discharged from that bankruptcy in 1994. The husband was, subsequently, running his own business and, following the sale of Stone Banks, the wife advanced £30,000 to the husband to assist with his business. Using the balance of the proceeds of sale, the wife bought another property at "Viner Close", again in her sole name, this time on a buy-to-let basis.
9. In about January 2000, the wife raised funds by way of mortgage on Viner Close. Of the money raised, she gave £11,000 to her husband to assist with his business. In 2003, Viner Close was sold for £133,000. After repayment of the mortgages, the husband received a further £19,000 and the wife £44,000.

10. Meanwhile, a new matrimonial home had been bought at "33 Vicarage Road" for £130,000 with a mortgage of £110,000. It is accepted that on this occasion the husband invested £26,000 towards the purchase of and, associated costs in relation to, the purchase of that property.
11. Several years later, in 2007, the parties wished to move house. In July 2007, a property ("2 Selkwood House") was bought in joint names for £392,000. That property was funded, in its entirety, by the husband's family trust; the John Wodehouse 4th Earl of Kimberley of Hailstone Wills Trust (known as the "Wills Trust"). The total amount of money advanced by the Trust was £405,489.71 and was secured by a first legal charge dated 1 August 2007.
12. The Deputy District Judge, having heard evidence from the husband, the wife and one of the trustees, held that this was a legitimate legal charge, that both parties were the joint owners of the property, and as a consequence were jointly and severally liable in relation to the legal charge.
13. The initial intention had been that the monies advanced by the Trust were to be by way of a short-term bridging loan. The trustees, and presumably the parties, anticipated that the equity released upon the sale of Vicarage Road would be used to pay, in whole or in part, the sum now secured by legal charge. In fact, what happened was that in July 2007, the mortgage on Vicarage Road was increased from £110,000 to £350,000 by the husband, but he used the money raised to repay his debts rather than to reduce the borrowing from the Trust.
14. Between 2007 and 2010 Vicarage Road was let out, but in 2010 it was repossessed by Northern Rock. Upon sale, the property was in negative equity to the tune of £97,000. That sum remains outstanding to the bank. So far as the court is aware, based upon the information provided by Mr Barnes, the bank has taken no steps to enforce that debt and, unsurprisingly given her lack of resources, neither have any attempts been made by the wife to reach an accommodation with the bank.
15. On 11 August 2010, the husband was once again declared bankrupt. He was discharged in February 2011. The marriage finally came to an end in October 2011; the wife petitioned for divorce and decree nisi was pronounced on 23 July 2015.
16. When the matter came on for trial before the Deputy District Judge, the parties were in a parlous state financially. The wife had had two hip replacement operations and was wholly unable to carry on her previous employment as a shop assistant. So far as her accommodation was concerned, she has, from 2014, and remains, what Mr Barnes referred to as "sofa surfing", in other words she has the addresses of three kind friends and relatives where she stays in some sort of rotation.
17. So long as she continues to be the joint owner of Selkwood House, the wife is not entitled to go on the waiting list for social housing. Her only income is £463 per calendar month, made up from a small pension and her State pension.

18. The husband, having gone bankrupt, is no longer liable for his share of the shortfall owed to Northern Rock following the sale of Vicarage Road. This leaves the wife solely responsible for the £97,000 still owing to Northern Rock.
19. So far as the husband is concerned, he too is unable to work. He has remarried and until recently was living at Selkwood House with his new wife. They have now left that property and are living together in rented accommodation. The husband is not himself yet entitled to his State pension, but he is entitled to a police pension accrued prior to the marriage which produces an income of in the region of £8,000 per annum.
20. The husband is a beneficiary under the terms of two family Trusts. It is unnecessary for the purposes of this judgment to go into any detail in relation to either Trust and it would, in any event, be both inappropriate and unnecessary for the issues to be determined by this court, to put any figures on the value in the Trusts. Suffice it to say that, whilst the sums cannot be regarded as insignificant particularly given the constrained financial circumstances of the parties, it would be wholly wrong to suggest that these Trusts represent the assets of multi-millionaires.
21. In brief terms, the Will Trust is the Will of Lord Wodehouse dated 25 September 2000. The Will provides for the Dowager Countess to receive half of the assets within that Trust absolutely, the balance to be hers for life and, thereafter, to be distributed at the discretion of the trustees. The trustees have been frank in saying that the likelihood is the 50% share in respect of which the Dowager Countess holds only a life interest, will be divided equally upon her death, between the husband and his three brothers. The second Trust is a settlement of Lord Wodehouse of 10 March 1949 known as the "Falmouth Trust". This is a strict settlement and also provides for the Dowager Countess to have a life interest, thereafter the husband will have a quarter interest in the assets.
22. The Dowager Countess was about 67 at the time of trial and is now about 70 or 71. Looking at conventional life expectancy tables, at the time of the trial, Dowager Countess had an anticipated life expectancy of 21 years, today it is something in the region of 18 years. It follows, therefore, that upon normal actuarial expectations, the husband (now being about 62 years of age) can expect to inherit some capital from the Trusts when he is in his 80s.
23. At his own request, one of the trustees, a solicitor, Mr Mark Stimpson of the Wills Trust, intervened in the financial remedy proceedings, filed a statement and gave oral evidence. Mr Stimpson explained in his statement, and confirmed in evidence, that the money advanced for the purchase of Selkwood House was intended to be a short-term bridging loan until such time as Vicarage Road be sold. The loan attracted modest interest, which was initially paid by the husband and wife but, inevitably, had stopped being serviced by them.
24. Mr Stimpson was not asked, or cross-examined, in order to ascertain whether or not the Trust would be in a position to, or willing to, advance further moneys to the husband if requested to do so. It follows, therefore, and this is accepted by all parties today, that there was no evidence before the judge which would have allowed him, pursuant to the

line of authority in *Thomas v Thomas* [1995] 2 FLR 668, to conclude that the assets held within the Trust, or either of them were, pursuant to section 25(1)(a) of the Matrimonial Causes Act 1973, a financial resource available to the husband to fund any lump sum order which the court might make. Indeed, in his closing submissions Mr Johnstone of counsel, who represented the Trust said:

"There is no question of an advance of capital being made ... of any amount for many reasons, not least because first, the potential for any outstanding debts after clearance of the loan be charged against Mr Wodehouse's putative share in the fund, the interests of the life tenant, the interest of the other beneficiaries."

25. So far as the Falmouth Trust was concerned, this entirely separate Trust was not specifically considered within the hearing, although the Trust deed - I am told by Mr Barnes - was available. The Falmouth Trust has separate trustees who were not and are not joined as parties.
26. It was, and is, common ground that Selkwood House, in which the husband at the time of the trial was still living, should be sold. For reasons which are unclear (given that this was the only matrimonial asset), there was no professional valuation before the court, although this court has been told that the husband's estimate at trial was £525,000. Had the estimate of the husband been right, this would have left a net equity (before costs of sale and before arrears of interest were calculated) of £190,500. As matters have turned out, the husband's estimate was wildly optimistic and an offer has only recently been accepted for £400,000. The court was told that, after costs of sale and accrued interests, the shortfall owed to the trustees will be between £15,000 and £20,000 and it is their intention to deduct this from the husband's interest in the Trust upon distribution after the death of the Dowager Countess.
27. The final hearing took place over two days on 24 and 25 July 2015 with a reserved judgment being distributed on 3 November 2015. The Deputy District Judge made the following findings in relation to the Wills Trust:

"140. I am not surprised that the Trustees very properly chose to be joined in these proceedings, and oversee and protect their position, but I consider that the Trust, save in its role as commercial mortgagee, is not relevant to this dispute between husband and wife. The plain fact is, that the applicant and respondent have no serious challenge to the amount claimed by the Trust. No attacks upon the validity of the Charge can be sustained. The Trustees of the Kimberley Trust [*the Wills Trust*] are completely blameless in this matter. They are joined simply to state the position of the Trust.

In my judgment, the position of the Trustees on all these aspects and, indeed, in this case generally, is unimpeachable."

28. It follows that the judge proceeded on the basis that no funds would be made available to the husband by the Trust.

29. The Deputy District Judge held that the pension should be shared equally between the parties. The Deputy District Judge dealt with the pension in this way:

"147. The respondent's pension payments were far from substantial and greatly exceeds any pension entitled by the wife which is minimal. The respondent does have support from a partner who has been unwilling or reluctant to participate or particularise. It can only be right that the wife shares in his pension and in my judgment a proportion of 50% would be fair."

30. I should point out that counsel for the husband has taken me today to the husband's Form E which sets out the figures in relation to his wife's income and it would appear, therefore, the District Judge was in error in making that comment.

31. The judge concluded at paragraph 157 of his judgment:

"I propose to order as follows:

There shall be a clean break;

The house should be sold forthwith for the best possible price;

The net proceeds of sale should be divided equally between the parties, deducting from the husband's share a sum equivalent to the loans recited in the chronology at February 1998 (£30,000), January 2000 (£11500) and 11 August 2018 (shortfall to Northern Rock, £97,000 app)

Both parties being impecunious, the husband's pension should be divided equally by way of a pension sharing order;

There should be no order as to costs as between the applicant wife and the respondent husband."

32. Following circulation of the draft Mr Barnes, on behalf of the wife, assisted in the settling of the order. In particular, it provided at paragraph 9:

"9. The respondent shall pay or cause to be paid to the applicant a lump sum of £138,500 by the completion date of the sale of the family home provided for below AND IT IS DIRECTED THAT if the respondent fails to pay all or any part of this lump sum by the completion date of the sale of the family home provided for below:

9.1 simple interest shall accrue on the outstanding balance of the lump sum from the completion date of the sale of the family

home provided for below, until payment in full at the rate applicable at the time being to a County Court judgment debt; and

9.2 The third party shall pay or cause to be paid from the respondent's interest in the Trust upon the death of the Dowager Countess, or any earlier distribution of the Trust capital, the balance of the lump sum outstanding including all interest thereon prior to distribution to the respondent. For the avoidance of doubt, in the event that the respondent's interest is insufficient to pay the lump sum or such part that remains unpaid and any interest thereon full, it shall be paid to the applicant in part towards the respondent's lump sum liability."

33. Given for the first time the introduction of a liability on the part of the Trust in respect of the lump sum order at 9.2 of the draft order, it is unsurprising that both the husband, and solicitor and counsel representing the Trust, protested at the wording of the draft, saying that it exceeded the terms of the judgment. The Deputy District Judge, however, was of the view that "such remarks are not well conceived" and expressed himself to be satisfied that the orders settled by Mr Barnes adequately reflected his intentions behind his order and "effectiveness".

34. The Deputy District Judge went on to summarise his rationale as follows:

"The respondent's interests are known and foreseeable and a quantum can be calculated from the Trust's own disclosure. It is a foreseeable asset. It is foreseeable that it could cover the balance of the sums the judgment says are due to the applicant at some foreseeable future date. It is an asset/resource. It follows, especially since the Trust itself intervened in these proceedings and became a party, that it can be ordered to pay, from the respondent's interests and not from the interests of anyone else, the balance of the sums due to the applicant. This presents and avoids future litigation and all parties know where they stand. It avoids the applicant not receiving sums found to be owed to her due to the effluxion of time or any limitation date or exhaustion of the capital by the respondent prior to the applicant receiving it. It promotes and ensures clarity and a fair outcome. It does not mean that the applicant will receive anything more than what she is entitled to or that any other beneficiary's interests are affected."

### *The Appeal*

35. The first appeal came on before His Honour Judge Farquhar on 20 June 2016. At the hearing, the Trust was no longer represented and the husband continued to appear in person. Mr Barnes continued to represent the wife. The judge appeared, during the course of argument, to appreciate the difficulties presented by the Deputy District

Judge's purported order at 9.2, that the trust "pay or cause to pay" to be paid "a lump sum on the death of the Dowager Countess or early distribution". The transcript reveals the following exchange:

"Well, in terms of whether it is right or wrong in principle to be ordering a third party to pay a lump sum.

MR BARNES: It is a third part debt order effectively which is perfectly permissible.

[THE JUDGE]: It is not, it is a lump sum between -- I can tell you that a District Judge or any judge dealing with it has no jurisdiction to make such an order. It can only make orders under the ancillary relief between husband and wife.

MR BARNES: He can make a third party order, I mean just purely under the enforcement regime he can make a third party order.

[THE JUDGE]: That is if you are enforcing. The jurisdiction is to make property adjustment orders or lump sum orders between the parties."

36. Certainly the judge's view expressed during argument, reflects entirely the completely conventional position that the court has no power to order lump sum payments against third parties. This is as a consequence of section 23(1)(c) of the matrimonial causes which provides that a court may "either party to the marriage may make to the other a lump sum or sums as may be specified".
37. In his judgment, the judge, rather surprisingly, decided that there was no procedural irregularity in respect of how the order came about, and then went on to consider whether the District Judge had been wrong to make the lump sum order. He said:

"Well for the all the reasons set out by the learned Deputy District Judge it seems to me that he is simply making a lump sum order payable at some point in the future. That in itself is not an impermissible thing to do. Indeed, it makes it more likely to be enforced and as it says in the judgment it makes less likely that there is going to be future litigation between the parties. Therefore, for all of these reasons I am not of the view that this is a wrong decision."
38. The judge did, however, allow the appeal, to the limited extent that he took the view that it would be wrong for the husband to have to take responsibility for the totality of the £97,000 shortfall in favour of Northern Rock in circumstances where the property had been held in joint names. He, therefore, amended the quantity of the lump sum, to the extent that the total was reduced from £138,000 to £90,000 to reflect the fact that the wife was liable, in her own right, for half of the Northern Rock debt.



39. Now in November 2018, the matter has now come before this court as a second appeal, over 3 years after the hearing before Deputy District Judge Austin. Little wonder that both husband and wife are suffering from litigation exhaustion.
40. Today the court has had the benefit of representation, once again by Mr Barnes appearing pro bono for the wife. For the first time in the proceedings, the husband is being represented by counsel, Mr Blatchly, together with his instructing solicitor, both of whom appear pro bono. Not only do they appear pro bono but have funded, through their respective firm and chambers, the production of the invaluable bundles and authorities put before the court for our use on the appeal.
41. Mr Blatchly, by his grounds 1 and 2, attacked the making of the lump sum order. He submits that the order was made ultra vires, the court having no jurisdiction to make any order against the Trust as a third party, such an order is in breach of section 23(1)(c) of the Matrimonial Causes Act 1993. There can be, he submits, no salvaging of the order by any type of an amendment of the order by providing for the lump sum to be payable by the husband on some sort of *Thomas v Thomas* basis. There has been, he reminded the court, no evidence that the Trust would advance money towards the payment of a lump sum. The Trust has already had its fingers badly burnt in relation to what was supposed to be a short-term bridging loan on Selbwood House, and, he submits, that all the evidence points to the fact that it is highly unlikely they would advance anything to the husband, let alone £90,000.
42. Mr Blatchly expands his argument in his helpful skeleton argument, saying that the judge was in error in making provision for payment by the husband to the wife by whatever route in relation to the loans made by her to him many decades ago against the backdrop of this very long marriage. He further draws the court's attention to the fact that, on his own admission, the Deputy District Judge accepted that there was never going to be sufficient equity in Selkwood House to satisfy his order. It would seem, although it does not appear in the judgment, that the Deputy District Judge did not therefore accept the husband's aspirational estimate of value of the property at £525,000 when making his order.
43. Mr Barnes, for his part, submitted that the lump sum order made against the Trust could more properly be categorised as a secure lump sum. When it was put to him by the court, he accepted that, if that was the case, the court would have had to make findings that the Trust fund was available to provide the necessary security; that, in turn, would go full circle as the court would be brought back to the necessity of having found the Trust to be some sort of *Thomas v Thomas* resource. Ultimately, Mr Barnes, practically and sensibly, accepted that the order made by the Deputy District Judge, and repeated by the judge on appeal, cannot stand and that the appeal in respect of the lump sum order must inevitably be allowed.
44. Mr Barnes' concession, whilst welcome, was inevitable. In my judgment, the way in which the order against the Trust came into being was procedurally unfair, even regardless of the fact that there was simply no jurisdiction for the court to make the order at paragraph 9.2 (see paragraph 31 above) directing the Trust to pay the lump sum ordered by the judge in the event that the husband failed to do so.

45. Given that it is now common ground that the lump sum order should be discharged on this appeal, it is not necessary for this court to hear argument in relation to the propriety or otherwise of the Deputy District Judge having made lump sum orders in respect of the historic loans.

#### *Pensions*

46. Mr Blatchly submits that the judge was wrong to make a pension sharing order of 50%. He submits that the pension is not a matrimonial asset having been acquired in its totality prior to the marriage. The Deputy District Judge wrongly, he submits, treated the pension as an asset to be shared and, whilst the judge may have been entitled, he says, to make some lesser order by reference to “needs”, the order is, nevertheless, wrong in principle and should be set aside.
47. The Deputy District Judge has not got the advantage of being a specialist matrimonial finance judge; he may have used the language of sharing (perhaps unsurprisingly, given that the order he was making is called a pension sharing order), but it is clear to me that he was substantially influenced by the needs of the wife. This was reflected in his conclusion where, when making the pension sharing order, he specifically referred to the fact that both parties were impecunious.
48. The judge, on appeal, clearly approached his review of the order on a needs basis and expressed a view, with which I agree, that 50% was "clearly within the discretion that a court is likely to consider and, therefore, it is not something that this court can interfere with".
49. It follows that I would dismiss the appeal against the pension sharing order.

#### *Outcome*

50. The question then arises as to what is to be done? The pension sharing order is to remain in place together with the order for sale of the property whilst the lump sum order is to be set aside; but what then? The court was concerned that unless the matter was remitted for a rehearing, during which the court could consider whether or not this was one of those (rare) cases where either a lump sum application was adjourned or deferred during the balance of the Dowager Countess's life, the wife would find herself continuing to bear the sole responsibility for the Northern Rock debt. Although the bank seems to be taking no action at present and may well take the view that this wife, unhappily, is a woman of straw, I have no doubt that for the wife the existence of that debt continues to be a burden and a shadow on her life and must, inevitably, underscore her feelings of unfairness in relation to the ultimate outcome of these interminable and unsatisfactory proceedings.
51. During the course of the day, the wife and Mr Barnes have had time to consider the way forward. I make it clear that, had she felt able to face it, this court would have remitted the matter for a rehearing. Mr Barnes, having had an opportunity of taking detailed instruction, is equally clear that the wife cannot face the prospect of further litigation

for reasons which I, for my part, completely understand and with which I have considerable sympathy.

52. Mr Barnes says, on behalf of the wife, that, given her husbands' financial history, she did not really ever expect to have received the lump sum which had been ordered by the Deputy District Judge. For her, the modest pension (half of £8,000 a year) will, however, make a significant difference to her life. The court hopes that now that the matrimonial home is at last sold, the wife will be in a position to re-establish herself to the extent that she will be able to rent a modest property for herself and to have a sufficient income upon which to live on in the future.

**Lord Justice Coulson:**

53. I agree with my Lady Justice King, that in respect of the lump sum order this appeal should be allowed and in respect of the pension this appeal should be refused.

**The President of the Family Division:**

54. I also agree for the appeal to be allowed on the same basis. The order should be drawn by counsel please and should reflect the acceptance that the wife has made to counsel today that this is, after a long time, the end of this litigation.
55. Before leaving this case, I would like to make two short observations. The first is to specifically endorse what my Lady has said about the value of the pro bono contributions made by Mr Nicholas Barnes, for the wife, and Mr Phillip Blatchly and his instructing solicitor, Mr Hilton of Russell Cooke Solicitors for the work that they have put in entirely for free in this case. Their generosity is as impressive as it is welcome.
56. The final observation is this. Unfortunately, for the reasons that my Lady has so clearly explained, this case did not receive an adjudication which met with the requirements of the law relating to financial relief. In short terms, the Deputy District Judge made an order which was simply not open for the court to make. I hope that this decision is evidence of the value of creating a Financial Remedies Court - which is currently being piloted - so that only judges who are recognised for their knowledge of, and experience in, financial remedies cases following divorce will, in the future, sit on cases of this type.

**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400

Email: [civil@epiqglobal.co.uk](mailto:civil@epiqglobal.co.uk)