Neutral Citation Number: [2019] EWFC 78

Case No: BV17D08422

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2019

Before :

MR JUSTICE MOSTYN

- -

Between :

CB	**Applicant**
- and -	
KB	**Respondent**

- -
- -

Simon Webster (instructed by **Clintons**) for the **Applicant**
Geoffrey Kingscote QC (instructed by **Howard Kennedy LLP**) for the **Respondent**

Hearing dates: 9-16 December 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Mostyn :

1. This is my judgment on the de facto claim made by KB (who I will refer to as "the wife") for financial remedies following divorce from CB (who I will refer to as "the husband"). I have referred to the claim by the wife being "de facto" as the only formal claimant is the husband.

2. The wife is aged 45; the husband is 41. They began their relationship in 1998 and were married on 23 December 2003. They separated in January 2017. This was a 19-year relationship. During the relationship they enjoyed a high, but not over-indulgent, standard of living. They were divorced in 2018 by decree absolute on the wife's petition.

3. The final matrimonial home was a fine house in Surrey which was sold in September 2017 for £5.5 million.

4. The parties have six children. AB is aged 20. He is in full-time employment and lives with the wife. BB is aged 17. She is at college and lives full-time with the wife. CB is aged 16. He is at school and lives with the husband. DB is aged 11. He suffers from autism and attends a private specialist school paid for by the local authority. EB (a boy) is aged nine. FB (a girl) is aged seven. The younger three children divide their time almost equally between the parties, although the wife is to be regarded as the parent with care for child support purposes.

5. The husband remarried in December 2018. His second wife has two daughters from a previous relationship aged seven and four. The husband and his new wife are expecting a child due to arrive early next year.

6. The husband is the bass player in a well-known band. The lead singer is LS, who also plays the guitar and the keyboards, and the drummer is BD. In 1994 LS and BD, who had formed their own band, persuaded the husband to join them. After his arrival they changed the name of the band. In 1999 the band signed its first record deals with companies in the USA, Europe and Australia. It released its first album, in 1999. Since then it has made a further six albums. The band has been extremely successful.

7. A key fact is that virtually every song released by the band has been written LS. The husband has written only three. LS is the kingpin of, and rain-maker for, the band. Without him there would be no band. The same cannot be said of the husband, or, for that matter, BD.

8. In the usual manner, the husband receives income from his music-making in five different ways, as follows:

    i) First, he receives publishing or composition royalties in respect of the three songs written by him ("Stream 1"). This generates a modest income and has a correspondingly modest capital value. The valuers were only about £5,000 apart on the value of this stream, and everyone agreed that the difference was not worth worrying about and that it should be split. Therefore, I take the value, net of all notional taxes, to be £55,561.

ii) Second, he receives equitable remuneration (also called neighbouring rights) in respect of broadcasts of the band's songs on radio and TV ("Stream 2"). The right to such equitable remuneration is enshrined in section 182D(1) of the Copyright, Designs and Patents Act 1988. Section 182D(3) provides that: "The right to equitable remuneration under this section may not be assigned by the performer except to a collecting society for the purpose of enabling it to enforce the right on his behalf. The right is, however, transmissible by testamentary disposition or by operation of law as personal or moveable property; and it may be assigned or further transmitted by any person into whose hands it passes."

iii) Third, by virtue of an agreement made between the members of the band he receives 8.33% of LS's publishing or composition royalties ("Stream 3"). This has a significant element of gratuity to it as there is no obligation on LS to dispense such largesse. This agreement is in the process of being changed and the new agreement will be signed very shortly. The new agreement has different terms depending on whether the husband leaves or stays in the band. Thus, if he were to leave the band tomorrow this entitlement would run out after 10 years. If he stays in the band the agreement endures until he is aged 70.

These three streams of income are paid to a company wholly owned by the husband namely P Ltd.

iv) Fourth, he receives a one-third share of the recording royalties which are paid through a company, T Ltd, which is owned equally by the members of the band ("Stream 4").

v) Fifth, he receives his share of ticketing and merchandising income generated by touring ("Stream 5"). This last stream of income is received by two companies which are co-owned by the band members.

9. Other than the value of the husband's music income streams the net assets are agreed. The total value of the wife's assets and liabilities (allocating to her, as is agreed, all of the residue of the proceeds of sale of the former matrimonial home) is £2,754,351 comprising her new home at £2,958,500, and net debts (mainly unpaid costs) of £204,149. The husband has net assets of £3,015,113 comprising the equity in his new home, funds held in banks and money in, or to be received by, and to be extracted from, his companies.

10. The total of these assets is £5,769,464.

My decision

11. The sole computational issue is the value of the husband's music income streams, other than the fifth stream - the touring income - which no one has attempted to capitalise, rightly, in my opinion, as it is pure future earnings. I value the first to fourth streams, net of all notional taxes, at £4,450,693. Therefore, the total assets come to £10,220,158. The equal sharing principle gives the wife £5,110,079. As I will explain, with this sum, together with child support, the wife will be able to meet her needs fully.

12. In order for the wife to receive £5,110,079 the husband must pay a lump sum of £2,355,728. This will be paid in instalments as follows:

    i) £1,500,000 by 1 April 2020;

    ii) £427,864 by 1 October 2022; and

    iii) £427,864 by 1 October 2023.

13. Pending payment of the first instalment the present interim regime will continue. Pending payment of the second and third instalments the husband will make periodical payments to the wife at the rate of £42,786 per annum, reducing rateably on payment of the second instalment (or upon any other payment in partial discharge of the liability).

14. On payment in full of all instalments there will be a clean break.

15. The husband will pay child support at the rate of £12,600 per annum in respect of each of the four minor children who make their main home with the wife. In addition, he will pay the children's school fees.

My reasons

16. I heard evidence as to the value of the income streams from Mr V, Mr Stephen Marks, Mr Stuart Burns, and Mr David Greene. They were all excellent witnesses. Their evidence was clear, concise and, importantly, relevant and direct. They all answered directly the questions that were put to them. They did not dissemble, prevaricate or make self-serving speeches. To my mind answering questions directly is an important, perhaps the most important, hallmark of credibility. In my judgment all the witnesses were palpably honest.

17. All the witnesses agreed that the appropriate method of valuing Streams 2 and 4 was the traditional multiplicand-times-multiplier method. There was not much difference between any of them as to the multiplicand for any given stream. However, their evidence as to the appropriate multiplier for each relevant stream was very varied. Ultimately, it was agreed that the best means of valuing Stream 3 is the discounted cash flow method.

18. Mr Burns and Mr Greene, the expert accountants, gave their evidence concurrently under the procedure colloquially known as "hot-tubbing" (see Civil Procedure 2019 at para 35.4.8). Although this procedure is referenced in CPR PD 35 at para 11, it has not found its way into FPR PD25A-E. This is not to say that the procedure has not been used in family proceedings; to my knowledge, certainly in public law children proceedings, expert evidence has been given in this way. In this case the process was extremely successful. The witnesses occupied the witness box together in close proximity. They were questioned topic by topic which from the court's point of view meant that relevant evidence on each topic was given contemporaneously and not separated by a hiatus. It was fascinating to observe little debates break out between the accountants in the witness box. After it was over Mr Greene commented that it was much more friendly than the traditional adversarial process. In my opinion this

process should be considered for use in financial remedy cases where competing valuers give evidence.

19. Mr V was instructed by the husband. He is a founding partner in SKH, a firm of chartered accountants specialising in business management services to music and entertainment clients. In April 2019 SKH merged with a USA firm called Gelfand Rennert & Feldman which offers the same services. In his witness statement Mr V says: "as a result of this merger the combined firm with offices in London, Los Angeles, New York and Nashville is the world's market leader in this area giving us unparalleled specialist knowledge".

20. Mr V has been the business manager for the band and its individual members since 2013. He has much experience, at the coalface, of transactions whereby musicians seek to monetise their income streams from music-making.

21. Mr V placed much emphasis in his selection of a multiplier for the right to equitable remuneration (Stream 2) on its legal non-assignability. For this reason, he was initially reluctant to attribute any number, but when pressed alighted on 5. As will be seen, Mr Marks was able to give evidence of his knowledge of the sale of such a right, albeit when bundled with the sale of other rights.

22. Mr V gave evidence, that in his opinion, based on comparable transactions, the multiplier that would be applied were LS to sell his publishing or composition rights would be in the range 12 – 14.

23. Mr V declined to give a multiplier for the Stream 3 (i.e. 8.33% of LS's publishing income). The method for the valuation of this particular stream is now not controversial as it is agreed between the parties that I should use Mr Burns' discounted cash flow method, although, as will be seen, I do not fully agree with all of his parameters.

24. Mr V gave evidence that the multiplier that would be used in a sale of the recording royalties (Stream 4) would be 8 – 10.

25. Mr Stephen Marks, a qualified accountant, has been working since 1988 in the music and entertainment industry. He was instructed by the wife. In his witness statement he states:

> "ln 1988 I started work at an accountancy firm called Gelfand Rennert Feldman & Brown (now Gelfand Rennert & Feldman LLC) which works solely in the music & entertainment industry. The firm brought over to the UK the American concept of "business management" as it applies to individuals and bands in the music and entertainment business, wherein an accountancy firm essentially becomes the financial back office for musicians and entertainers, in addition to performing more traditional roles such as tax compliance and accounting. ln 2006 I merged the London division of Gelfand Rennert & Feldman into my current firm SRLV, and all of the clients and staff from the London office transferred over with me."

26. Like Mr V he has considerable experience at the coalface of musicians who wish to monetise their income streams.

27. He was able to tell me, as I have stated above, that that he was well aware of transactions where musicians have included in a sale of other income streams the right to equitable remuneration notwithstanding its legal non-assignability. Obviously, for such a deal to be done requires good faith on both sides. Therefore, he was not so conservative in alighting on a multiplier for Stream 2. He was able to tell me that one of his partners only the day before he gave his evidence had been quoted a multiplier for the sale of such a stream of income of 14. And this was the figure he relied on.

28. He was of the opinion that the multiplier that would be applied to LS's publishing or composition rights would be 18 – 22. This evidence is relevant when the discounted cash flow calculation is undertaken of Stream 3.

29. His view was that the multiplier to be applied to the recording royalties (Stream 4) would be 15.

30. Mr Burns was instructed as a Single Joint Expert. He is a partner in the firm H.W. Fisher & Company and the lead partner in the Fisher Forensic division, specialising in Forensic Accounting/Litigation Support assignments. However, he has no direct experience in either managing musicians or in the sale or purchase of their income rights.

31. He took a multiplier of 15.8 across-the-board for Streams 2, 3 and 4. This figure was, as he called it, a proxy figure derived from the accounts of three enormous music businesses namely Warner Music Group (WMG), Universal Music Group (UMG), and BMG. The accounts state that the net discount rates applied in the valuation of the goodwill carried in the accounts are 8%, 6.88% and 4.9% respectively. These translate to multipliers of 12.5 (1 ÷ 0.08 = 12.5); 14.55 (1 ÷ 0.0688 = 14.55); and 20.41 (1 ÷ 0.049 = 20.41). The average is 15.82.

32. I agree with Mr Webster that this is not a valid analogue. As I have said before in another case it is like using the accounts of Tesco to value the village shop in Ambridge.

33. However, I do agree with Mr Burns at the best method of valuing Stream 3 is the discounted cash flow method, and I have been grateful to receive his Excel spreadsheet which has enabled me to do so albeit with slightly modified parameters, as I will explain.

34. Mr David Greene was instructed by the husband. He is a partner in MGR Weston Kay LLP. He has spent the last 25 years providing forensic accounting and expert witness services to law firms and clients in matrimonial and commercial proceedings. Like Mr Burns he does not have direct experience of managing musicians or of monetising their income streams. In his written reports he attributed no multiplier and no value to Streams 2 and 3 as in his opinion they were not realisable. In his oral testimony he shifted to attribute a range of 3 – 5 to Stream 2. He attributed a multiplier of 10.5 to Stream 4 (the recording royalties). This was based on research of historic transactions of substance illustrated by a graph appended to the joint statement of him and Mr Burns.

35. Having carefully considered all the evidence my conclusions are as follows.

36. In relation to Stream 2, the equitable right remuneration (or neighbouring rights), I take a multiplicand of £88,493 calculated as follows:

Annual income, per Mr V	115,000
Administrative costs at 5%	(5,750)
	109,250
Corporation tax at 19%	(20,758)
	88,493

For the multiplier, I am satisfied that Mr Marks's figure of 14 is correct. I do not think that it is justifiable to reduce the multiplier substantially by reference to the formal legal non-assignability of this stream in circumstances where Mr Marks has convinced me that whilst this may be the formal legal position, it is not reflected in the real world. Therefore, the multiplication is £88,493 x 14 = £1,238,895. From this I deduct notional costs of sale of 2.5% (£30,972) giving a net pre-dividend tax value of £1,207,923.

37. In relation to Stream 3 (the money received from LS's publishing or composition income) it is now not disputed that the optimum valuation method is Mr Burns' discounted cash flow spreadsheet. This uses a discount rate of 6.59%, corresponding to a multiplier of 15.8, as explained above. Given that income derives from LS's publishing or composition income I do not believe that this multiplier is high enough. The source is gilt-edged income which would in my judgment command a higher multiplier. I am satisfied that a multiplier of 17.2 would be fair and reasonable. This, using Mr Burns' averaging technique explained above, corresponds to a discount rate of 6.06%. The annual income which I should take is agreed (or at least not seriously disputed) at £170,000. Inputting these data into the spreadsheet gives a pre-dividend-tax capital figure, on the basis that the husband does not leave the band, of £1,793,146. If he were to leave the band tomorrow, then under the terms of the new agreement the annual income figure would be £102,000 giving rise to a pre-dividend-tax capital figure of £376,564. It is agreed that the figure I should take should lie at a fair point between these two bookends. Mr Kingscote QC argues that the second scenario – the husband leaving the band tomorrow – is far more improbable than the first scenario and that therefore I should take a weighted average of the two figures, attributing a factor of two to the higher figure and a factor of one to the lower one. I agree with this approach. It is consistent with my estimate of the probabilities. Thus, a figure of £1,320,952 is derived.

38. I have explained above that this income stream has a significant element of gratuity to it. The husband explained to me that he regards it as a gift. It was explained to me that this sort of arrangement happens in about 50% of bands, but that does not make it any less an instance of benign largesse. In my opinion there is a significant non-matrimonial element to this income stream which justifies discounting the figure of £1,320,952. In my judgment the least discount which would be consistent with fairness to reflect this factor would be 25%. Therefore, the figure falls to £990,714.

39. All of the value for the first three streams is receivable by P Ltd. To put the money in the husband's hands dividend tax of 38.1% would be payable. The calculation of the net amount is as follows:

Stream 1	55,561
Stream 2	1,207,923
Stream 3	990,714
	2,254,197
Dividend tax at 38.1%	(858,849)
	1,395,348

40. I turn now to Stream 4 which is the husband's one-third share of the recording royalties. All of the recording royalties are paid to T Ltd, one-third of which is owned by each band member. Mr V's evidence was that the average royalties are £1,500,000 after commission; there was no serious dispute about this. Mr V and Mr Marks were equally persuasive as to which multiplier should be deployed. In the circumstances I judge that it would be reasonable to take a figure between their opinions. I am thus satisfied that the figure of 12.5 is correct. This gives rise to the following calculation (using the agreed matrix on page 17 of the accountants' joint statement):

Average royalties after commission	1,500,000
Multiplier	12.5
	18,750,000
Corporation tax at 19%	(3,562,500)
	15,187,500
The husband's one-third share	5,062,500
Notional costs of sale	(126,563)
	4,935,938
Dividend tax at 38.1%	(1,880,592)
	3,055,345

41. This figure of £3,055,345 is to be added to the figure of £1,395,348 giving the total net value of the husband's music income streams of £4,450,693.

42. I now ask myself whether this figure should be further discounted to reflect the fact that it has been calculated by me using a certain amount of subjectivity; has risky aspects to it; and, in some respects, is incapable of being actually turned into cash. I do not regard the figure that I have arrived at as being "fragile". In my judgment the multipliers used by me are robust and all relevant risks are captured by them. It would be a double discount for a further reduction to be imposed because of the character of these streams of money.

43. Mr Kingscote QC has sought to argue that Stream 5, namely the ticketing and merchandising income generated on tour, is in some way a matrimonial asset susceptible to being shared. I completely disagree with this approach. If the husband goes on tour in 2021 and 2022 and plays songs which were created during the marriage (although written by LS) then the income which he derives from that endeavour are to be characterised as earnings made after the marriage. The fans are coming to see the band performing, not to listen to songs being played by a machine

and pumped out of loudspeakers. In my judgment the position is exactly the same as that which I described in *B v S* [2012] EWHC 265 (Fam) at [76]:

> "…at the end of the day the only reason there is income after separation is because of work done after separation. A footballer who earns £100,000 per week earns that because he is on the pitch playing football. Certainly, the skills he was born with, and the development of those skills (which may well have happened during his marriage), are all reasons why he can command his salary, but he will not get paid it unless he plays football. The footballer has to fill the unforgiving minute with sixty seconds' worth of distance run after the marriage." (original emphasis)

44. This is not to say that the husband's future income is irrelevant. It is relevant in two respects: first, it is directly relevant in relation to the calculation of child support; and second, it is relevant as to the time that he should be granted in order to pay the lump sum which I have determined.

45. The evidence about the future activities of the band derives directly from the husband and Mr V and indirectly from LS who wrote an email in March 2019 setting out his vision for the future. It is clear that for his own personal reasons LS wishes to take a break from touring for up to two years. The husband also has found touring wearing and would welcome a break, particularly in circumstances where a child from his new marriage will shortly arrive into this world. LS's email suggests that there may be some modest touring in 2021 with a more full-throated resumption in 2022. Based on this evidence Mr Greene has endeavoured to calculate the husband's future income from 2020 onwards. His calculation is as follows:

	2020	2021	2022	2023
P Ltd remuneration	12,000	12,000	12,000	12,000
P Ltd dividends	206,000	207,000	207,000	207,000
T Ltd dividends	421,000	423,000	424,000	423,000
Touring income	0		1,816,850	1,816,850
Pre-tax income	639,000	642,000	2,459,850	2,458,850
Tax and NIC	(227,595)	(228,738)	(1,087,252)	(1,086,871)
estimated net income	411,405	413,262	1,372,598	1,371,979

46. Having regard to the husband's commitments it is not realistic to expect him to pay the second and third instalments of the lump sum until 2022 and 2023 respectively. The wife will be fully compensated by receiving the periodical payments in the meantime.

47. I turn to the question of child support. The husband is liable to pay child support for BB, DB, EB and FB. He also has to pay school fees. I believe he is paying the school fees also for his stepchildren. The wife has proposed a rate of £15,000 a year; the husband proposes a rate of £7,500 year. Both figures appear to be plucked out of the air.

48. In *Re TW & TM (Minors)* [2015] EWHC 3054 (Fam) at [9] I stated:

> "My decision in *GW v RW* makes it clear that where a court is considering issues of child maintenance the formula is not, so to speak, written in marble but supplies only a starting point. There may be in a case a very good reason why there should be departure from the starting point of the formula. In my opinion the formula should apply even where the earnings of the father are in excess of the £3000 per week maximum provided for in the Act and the Regulations. If the earnings of the father were very much in excess of that then there would be a good reason to depart from the formula downwards, but if the income of the father is not un-adjacent to the maximum then to my mind, subject to other factors, that of itself is not a good reason to depart from the formula."

49. I suggest that in every case where the gross annual income of the non-resident parent does not exceed £650,000, the starting point should be the result of the formula ignoring the cap on annual gross income at £156,000. For gross incomes in excess of £650,000 I suggest that the result given by an income of £650,000 should be the starting point with full discretionary freedom to depart from it having regard to the scale of the excess.

50. In this case the relevant factors are:

    i) Gross income of the husband: £639,000;

    ii) Adjustment to gross income referable to three children in the husband's family: 84%; and

    iii) Adjustment to computed sum referable to shared care of three subject children: 62.5%.

    These factors lead to a computed sum for child support for the subject children of £50,269 per annum or £12,567 for each child.

51. Having considered the budget of the wife referable to the children I cannot see any good reason materially to depart from the starting point of £12,567 per child. The figure for each child will be rounded to £12,600 and will be payable until each child completes tertiary education.

52. Will the wife have sufficient income to meet her reasonable needs? As explained above, the application of the equal sharing principle gives to her net assets, after discharge of all liabilities, of £5,110,079. I have observed before that is almost a truism that someone living in the Home Counties with assets of £3 million has sufficient to meet her needs. A fortiori, if you have just over £5 million. However, the law requires that a more detailed needs analysis is undertaken.

53. Notwithstanding the relatively young age of the wife I consider it reasonable to work on the whole-life provision implicit in the Duxbury formula. This was a long relationship and there have been six children born. It is reasonable in such circumstances for the wife to be provided for until the end of her life. It is pre-eminently reasonable that the wife should be required to amortise – that is to say, to

spend – her Duxbury fund. Indeed, I struggle to conceive of any case where in the assessment of a claimant's needs it could be tenably argued that it was reasonable for her not to have to spend her own money in meeting them. After all, that is what money is for. The endgame of the contrary argument is that it would be reasonable for a respondent to have to fund a claimant's testamentary ambitions. I cannot conceive of any case where that could be said to be reasonable.

54. The wife's home is very large. She accepts that it would be reasonable for her to downsize in her autumn years. In my judgment it would be reasonable for her to release equity of £1.5 million when she reaches the age of 60. Moreover, at that point it is reasonable for her spending to reduce by a third. After all, virtually everybody moving into retirement and onto a pension has to reduce their spending. Although the wife has no qualifications, she accepted it would be reasonable, and good for her spiritually, to try to do some work. In my judgment it is reasonable to attribute her with an earning capacity of £25,000 gross per annum from age 49 to age 60.

55. It is reasonable to attribute the wife with the full lump sum of £2,355,728 available to her now given that in respect of the two deferred instalments she will receive full economic compensation. From that sum she will have to pay off her net debts of £204,149 leaving her with an initial Duxbury fund of £2,151,579. Applying the factors set out in the preceding paragraph this gives rise to an initial spendable income of £172,126 falling to £115,324 (in today's money) at age 60.

56. Therefore, the wife's initial income will be £172,126 together with the child support of £50,400, a total of £222,526 per annum net spendable. This is rather less than her claimed annual budget of £324,504, but Mr Webster was able to demonstrate in his cross-examination that some things should not have been claimed at all and that other items can be seriously pared down. I have no doubt that an initial income of £222,526 net, which corresponds to a gross earned income of just under £400,000, will very amply meet the wife's reasonable needs.

57. Finally, I refer to the fund of £2,200,000 which the husband has raised by means of a mortgage on his new home and which is held by Mr V on account of a likely tax bill. The evidence suggests that the tax liability will almost certainly not be avoided. In my judgment both the burden of any downside (i.e. if the tax bill is more than £2.2 million) and the benefit of any upside (i.e. if the tax bill is less than £2.2 million) should accrue to the husband alone and there should be no sharing of either benefit or burden with the wife. Any sharing solution of the benefit or the burden would be inconsistent with the objective of a clean break which should be striven for wherever possible.

58. As will be apparent from what I have written above, I have taken into account, and given due weight to, all the relevant factors mentioned in section 25(2) Matrimonial Causes Act 1973 insofar as they apply in this case.

59. That concludes this judgment.
