IN THE SUPREME COURT OF BERMUDA

DIVORCE JURISDICTION

2012: No. 65

B E T W E E N:

THE WIFE

Petitioner

-and-

THE HUSBAND

Respondent

-and-

THE TRUST COMPANY
(As Trustee of 'The A Fund' and 'The X Trust')

Second Respondent

JUDGMENT

(In Chambers)

Dates of hearing:

September 12 2016 to September 16 2016

February 6 2017 to February 10 2017

April 19 21, 24 and 25 April 2017

May 9 -18 2018, May 29 - 31 2018

Date of Judgment: 7 November 2019

A. INTRODUCTION

1. This is my judgment in a case that might only be described as a scorched earth approached to ancillary relief proceedings following the breakdown of a marriage. Proceedings commenced in 2012. A wrath of ill feelings and allegations of egregious conduct infiltrated these protracted proceedings exhausting the mightiest of specialist attorneys including Karen

V. P. Lomas, Honor Desmond-Tetlow and Katie Richards - all withdrawing as attorney of record at watershed moments in the battle.

2. This matter first came before me in 2016. Mr. David Kessaram assisted by Mr. Sam Riihiluoma of Cox Hallett Wilkinson Limited, appeared as Counsel for the Wife; Mrs. Georgia Marshall, of Marshall Diel Myers Limited, appeared as Counsel for the Husband and Mrs. Fozeia Rana-Fahy appeared as Counsel for the Trustee. Following an Order of Court, Mrs. Rana-Fahy was also appointed to represent the interests of the minor beneficiaries. These specialist attorneys, all of the highest quality, argued with the precision of 'hired guns' and over the course of two and one half years, besieged the Court with voluminous bankers boxes, filled with large ringed binders comprising pleadings, affidavits, disclosure documents and correspondence; all in support of their respective clients positions. At various stages of the proceedings, Mr. Kessaram and Mrs. Marshall catapulted bombastic remarks at one another and accused the other of ambush. Mrs. Rana-Fahy shielded herself with intellectual focus.

3. The hearing of this matter concluded before me in May of 2018. I have found this to be a particularly difficult case. I heard extensive oral submissions, oral evidence of the parties and read and re-read the evidence and authorities' bundles. The preparation of this decision following the conclusion of the trial in May 2018, coupled with no administrative support over the last three years has resulted in the delivery of this judgment far outside the six week time frame expected of a judge in Bermuda.

4. I have received several letters, emails and telephone calls concerning the completion of this judgment. As of this week, there is now an application for judicial review seeking a writ of *mandamus* ordering me to deliver this judgement on or before 7 November 2019. What an extraordinary circumstance that a judge's independence is threatened while searching for a fair outcome in all the circumstances of this Wife and Husband.

5. May all be reminded that my duty in these proceedings includes doing right to all people after the laws and usages of Bermuda without fear or favour, affection or ill-will, So help me God.

B. ESSENTIAL FACTUAL BACKGROUND

6. Insofar as these background facts differ from the evidence of the Husband and the Wife or The Trust Company, this is due to the fact that the evidence of the other is preferred or because I consider that the documents produced confirm these findings of fact.

7. The Wife and Husband are both in their fifties. They are 'Bermudian' and resided throughout the 22 years of marriage in Bermuda.

8. They first met at the Dinghy Club in Bermuda toward the latter part of September 1985. At that time, the Wife worked in an administrative capacity and the Husband held a position within his family's business. Following a five year courtship, including an equal period of premarital cohabitation, they married in 1990. After the birth of the two children of the family, the Wife gave up employment to become a home-maker.

9. B, the minor child of the family attended a well-established private school in Bermuda. The Husband was responsible for the tuition. B soon experienced challenges at this school and the Wife and Husband researched overseas educational options suitable to B's particular needs. The Wife and Husband decided to enroll B in School No. 1. Amongst the many positive instructive features of this school, it happened to be in close proximity to an apartment ('the US Apartment') owned by the Husband's brother and father. The US apartment is not an asset of The X Trust.

10. The Husband is required to pay rent and approximately $1,800 per month for maintenance fees and other utilities for so long as the Wife and B stayed in the apartment. For reasons that are not quite clear, the Husband has not had access to B.

11. Whilst the Wife and son were in the US, the Husband continued employment within his family business in Bermuda. The Husband's family operates a well-established business in Bermuda ('the Business'), which prior to the economic recession employed a number of persons and met economic success in the marketplace. However, since the economic recession, a number of its operations have ceased and employees let go.

12. At the time of the hearing, the Husband continued to hold a position in the Business and continued to provide high tier health insurance coverage for the Wife and B. By Order dated 1 March 2017, this court ordered, *inter alia*, that all information regarding the Business must be sealed and shall not be available for public inspection. With that said, my description of the Business and its financial affairs are deliberately obscured and generalized to protect its identification.

The Business

13. The Business has significant borrowings in excess of $10 million dollars. The 2018 financials of the Business revealed operating losses in excess of $ 1.5 million dollars. The Business is not doing well and thus struggling to service its significant borrowings.

The X Trust

14. The shares of the Business were held in a discretionary trust; The X Trust. In 1985, The X Trust was settled by the patriarch of the Husband's family ('the Settlor') five years prior to the Husband and Wife's marriage. At the time of settlement, the Wife and Husband had not met one another.

15. The beneficiaries of The X Trust were the Settlor and the Matriarch of the family (the Husband's mother), their two children (one of whom is the Husband) and "*the remoter issue of the settlor and his said wife*". The remoter issue includes grandchildren and those yet to be born. There are currently five grandchildren (three of whom, including B, are minors). The trust was intended to be dynastic in nature.

16. The Wife is not a beneficiary of The X Trust and to the Trustee's knowledge "the *Wife has <u>never</u> been a beneficiary*". Likewise, neither is the spouse of the Husband's brother a beneficiary of this trust.

17. The purpose of The X Trust was to hold assets of the Settlor and the Matriarch of the family, their issue, and remoter issue. In addition to holding the shares of The Business, the assets of The X Trust included various commercial holdings and residential properties situate in Bermuda.

18. It was always the intention of the deceased Settlor and his wife that each of their grandchildren be secured a home.

19. The X Trust obtained 100% financing to purchase a $3.8 million dollar home for the Husband ('the FMH'). The X Trust expended some $3.9 million dollars in relation to this property including mortgage payments made and other expenses.

20. The X Trust also expended some $2.3 million dollars on the marital home of the Husband's brother.

21. In or about 2004, the Husband's brother experienced serious medical issues. This roused his concern that in the event of his death, his wife and children should have a home. The outstanding debt of $800,000 on this property was discharged and The X Trust irrevocably appointed his matrimonial home to a discretionary trust established for the benefit of himself, his wife and their three children.

The A Fund & other trusts

22. Likewise, in or about February 2004, $800,000 was paid toward the outstanding debt of $3.8 million dollars then secured against the FMH. The X Trust irrevocably appointed out to The A Fund, a discretionary trust established for the benefit of the Husband, the Wife and their two children, subject to all debt secured thereon with the bank continuing to hold the deeds to the FMH by way of security. The debt secured on the FMH was thus reduced to $2,999,009 and The X Trust continued to pay the debt which remained a debt of The X Trust.

23. No agreement existed between The X Trust and The A Fund for repayment to The X Trust of funds that it paid out to service the loan against the FMH. The bank loan remains a debt

of The X Trust, which it was obligated to repay at a monthly rate of $25,000. At the commencement of this hearing, the debt level was more than two and half million dollars

24. After residing in this home, the Wife, Husband and children vacated the FMH and thereafter, it was leased producing an income of approximately $14,000 - $18,000 per month. All such rental income was appointed to the Husband for his own use.

25. During a real estate boom in 2004, the Husband settled other discretionary trusts, one of which was The CS Trust, the beneficiaries of which were the husband, the Wife and the two children of the family. The only asset of The CS Trust was a residential property (HC). The property was purchased for $1,950,000 with the Husband paying $195,000 by way of deposit which came from the sale of Bank of Bermuda shares, most of which the husband had prior to the marriage. The Husband also raised a sum of approx. $70,000 for the closing costs. The balance of the sale price was raised by mortgage on which only interest has ever been paid. The security taken by the bank was the title deeds, a full 100% personal guarantee by the husband and a limited guarantee of $330,000 given by the trustees of The X Trust. At the insistence of the bank, the property was sold on 3rd April 2018 resulting in a shortfall of $70,809.99.

26. In April 2015 the husband settled the CAT Trust, a discretionary trust, the beneficiaries of which are the husband, the Wife and the two children of the marriage. The only asset of the CAT Trust was a residential property (B). It was purchased for $750,000. The purchase price and the closing costs were raised 100% by mortgage in the sum of $800,000 upon which only interest has ever been paid. As with HC, the Husband gave a 100% personal guarantee for the mortgage. The value of this property as at the 2015 valuation was $535,000. If sold, a debt of approximately $265,000 would be crystalized.

27. The Husband also settled the HMT Trust, the beneficiaries of which are the Husband and the two children of the marriage. The only asset of the HMT Trust was a residential property (HG). The purchase price was $1,200,000 all of which was raised by mortgage together with the closing costs of the sale. The Husband gave a 100% personal guarantee for the debt and The X Trust gave a limited guarantee of $330,000. Interest only has ever been paid on the

said mortgage debt. On 6th October 2017 at the instance of the bank, the said property was sold for $900,000 crystalizing a net shortfall loss of $380,120.52.

28. All three residential properties held in these trusts settled by the Husband were rented. The rental income initially covered the outgoings including the mortgage interest only payments, the land tax, insurance, maintenance fee and trustee fees. With the decline in the rental market, the Husband was required to fund shortfalls in relation to the said properties and was never able to make bended payments on the mortgages to reduce the outstanding principal.

29. The Husband was called upon by the Bank to sell property HC and property HG and to meet his personal guarantees in relation to the shortfall on the sale of the HC property and to the shortfall on HG. The Husband incurred a loss of some $70,000 on the sale of HC. His total debt to the bank in relation to these two properties amount to some $450,938.00

30. All three of the underlying assets of these trusts are under water. Their relevance to these proceedings is in relation to the debt which has now been crystalized and in relation to which the Husband is obligated to pay per the guarantees given to the bank by him. The Wife seeks no Orders in relation thereto. The Husband seeks a variation in relation to them, the only relevant one now being the CAT Trust which holds property B.

The Y Trusts

31. In the spring of 2014, the Settlor of The X Trust passed away. Shortly thereafter the Matriarch of the family concerned, *inter alia*, about the Husband's real estate "*forays*", for which The X Trust has provided guarantees, and significant debt and cash flow issues of The Business, agreed to the restructuring of The X Trust. This restructuring included (i) removing the Husband as a beneficiary of The X Trust, (ii) separating business interests from non-business interests and appointing them out 50/50 to newly established discretionary trusts; The YNo.1 Trust and The YNo. 2.

32. The beneficiaries of The YNo. 1 Trust are the Matriarch and the two children of the Wife and Husband (A, an adult and B, a minor). Neither the Husband nor the Wife are beneficiaries of this trust.

33. The beneficiaries of The YNo. 2 Trust are the Matriarch, the Husband's brother and the three children of the Husband's brother's (two of whom are minors). The Husband's brother's wife is not a beneficiary of this trust.

34. The Wife has not pleaded that she seeks a variation of The YNo.1 Trust or of The YNo. 2 Trust (the trustee of which is also the Second Respondent). Accordingly, the Wife cannot now request the Court to vary The YNo.1 trust or The YNo.2 Trust.

C. THE PROCEEDINGS

35. Against this background, the Wife petitioned to dissolve the marriage. Decree Nisi was granted in 2013 and made absolute on 21 April 2014.

36. Shortly after the grant of Decree Nisi, the Wife applied for maintenance pending suit**,** that is to say, she applied for an *interim* financial support for herself and the two children of the family pending the final determination by the Court or otherwise by agreement. The parties filed substantive affidavits setting out their means and their needs. Just prior to the hearing, the parties reached an agreement ('the June 2012 Consent Order'). The preamble of this Order states as follows:-

> " *WHEREAS the Respondent's father and brother are permitting the Petitioner and 'B', a child of the marriage, to occupy 'the US Apartment' without the payment of rent, and the Respondent is paying the utilities, apartment condominium dues, bundle cable, phone and internet service and an international telephone plan for the Petitioner*" .

37. The terms of this order provided, *inter alia*, that the Husband pay: - (i) $8,000 per month to the Wife as interim maintenance for herself and B, (ii) all incidental costs of A's university

expenses, (iii) the tuition and all incidental costs of B to attend 'School No. 1', (iv) major medical insurance for the Wife and two children, (iv) a contribution of $1,500 per month toward the Wife's Legal fees due to Lomas & Co.

38. However, soon thereafter, the Husband applied to the Court to vary the terms of the June 2012 Consent Order. Once again the parties reached an agreement in relation to the Husband's variation application. In relation to the Wife's accommodation the preamble to the order, *inter alia*, states:-

> "*...barring an unforeseen need that may arise in the future which would result in the apartment being required for the use of the owners* ……" the Wife and B were permitted to occupy the apartment for so long as B is at School No.1 "*…upon the financial arrangement currently in place between*" the Husband and his father and sibling by which the Husband "*pays the costs of the condo maintenance fee and the sum of $1,500 to his {sibling} and no sum to his father"*.

39. The terms of this order provided, *inter alia*, that the Husband pay:- (i) the monthly sum of $5,500 to the Wife for her maintenance and that 'B', (ii) the sum of $1,500 to Charter Chambers Bermuda Ltd. in place of Lomas & Co, (iii) the fees for the 2013/14 academic year at B's 'School No. 1' with the parties also agreeing to explore other suitable but more affordable options including boarding school for the future educational needs of 'B' ('the April 2013 Consent Order').

40. The Husband fell behind in his obligations under the April 2013 Consent Order. The Wife's response was to file a Judgement Summons dated October 2014 threatening committal to prison. The Judgment Summons stated, *inter alia*, that:-

> *"WHEREAS you are in default of payment in the total sum of $58,020.47 with interest thereon ...which represents $9,000.00 in outstanding legal fees to the Petitioner's attorney, $26,306.51 in monthly maintenance, $6,829.73 in outstanding school fees, $2,524.23 in after school fees programmes, Parent Teacher Association due $275.pp, reading tutor $7,795.00, educational evaluation $3,900.00 and medical expenses in the sum of $1,390..".*

41. The Husband, in turn, filed a Summons dated October 2014 seeking variation of the April 2013 Consent Order such that amounts payable to the Wife be reduced. Yet again, the parties reached an agreement ('the October 2014 Consent Order'). Immediately thereafter, the Husband filed his Notice of Application for Ancillary Relief for the Wife's claims for periodical payments, lump sum provision and property adjustment order may be determined so that his financial obligations toward the Wife may be determined fully and finally. The parties agreed that the Husband's Summons dated October 2014 be adjourned. On or about 25th August 2015 the Registrar remitted the Husband's application for Ancillary Relief for hearing.

42. On 10 September 2015, Cox Hallett Wilkinson now acting for the Wife, filed a Notice of Motion for an order that the Husband be committed to prison for disobeying the June 2012 Consent Order dated June 2012, as varied by the April 2013 Consent Order namely, *inter alia*, failing to pay 'B's' school fees at 'School No. 1' for the academic year 2015/2016.

43. There was in fact no Court Order requiring the Husband to pay school fees for the 2015/2016 academic year.

44. The Wife filed an application for Ancillary Relief dated 13 September 2016, by which she seeks maintenance pending suit, periodical payment order, lump sum provision and variation of the 'A Fund' for the benefit of herself and the dependent child of the family.

45. Thereafter, the Husband filed a Supplemental Application for Ancillary Relief dated 14 September 2016 by which he seeks: a variation of settlement in relation to the 'A Fund', the 'B Fund', the 'C Fund' and the 'D Fund' and a Declaration that the 'X Trust' is not an ante-nuptial or post-nuptial settlement subject to the Court's jurisdiction pursuant to section 28(1)(c) of the MCA 1974.

46. Some days later, the Wife file a Supplemental Notice to Proceed with Application for Ancillary Relief by which she seeks maintenance pending suit, periodical payments, lump sum provision, variation of the 'A Fund' and the 'X Trust' such that she shall be entitled to

all income from the real property known as 'the FMH' during her lifetime or until remarriage and that the trustees of 'X Trust' continue to be responsible for and to pay all costs, expenses and payments due in respect of 'the FMH' inclusive of the mortgage payments, the land tax, the insurance and the maintenance.

47. All applications of the Husband and Wife were consolidated before me.

48. The Affidavits before the Court included:-

a. The Wife's affidavit of Means dated 09.04.12
b. The Husband's affidavit of Means dated 06.06.12
c. The Husband's Second Affidavit dated 28.09.12
d. The Wife's Second Affidavit dated 14.11.12
e. The Husband's Third Affidavit dated 16.11.12
f. The Wife's Third Affidavit dated 21.11.12
g. The Husband's Fourth Affidavit dated 14.01.13
h. The Wife's Sixth Affidavit dated 15.10.15
i. The Husband's Affidavit dated 02.02.15
j. The Wife's Seventh Affidavit dated 09.09.15
k. The Wife's Eighth Affidavit dated 22.09.15
l. The Wife's Ninth Affidavit dated 21.01.16
m. The Wife's Tenth Affidavit dated 05.02.16
n. The Wife's Eleventh Affidavit dated 18.07.16
o. The Husband's Affidavit dated 14.09.16
p. The Wife's Twelfth Affidavit dated 19.09.16
q. The Wife's Thirteenth Affidavit dated 23.12.16
r. The Wife's Fourteenth Affidavit dated February 2017
s. And six (6) Affidavits of NH on behalf of the Trustee

49. Notwithstanding my very best efforts to vigorously case manage these proceedings to give effect to the Overriding Objective of the Court, *amongst other things,* to ensure that the costs of proceedings are not disproportionate to the final outcome, the Court was inundated with a

multitude of sundry applications; strategically launched on behalf of the Wife one after the other. Each and every application intensified the wrath associated with the breakdown of the parties' marriage and exponentially multiplied the legal costs of these proceedings. At an early point in the proceedings, Mrs. Marshall indicated that the Wife's legal costs had already reached the extraordinary sum of $500,000 dollars. No indication was given about the legal costs incurred by the Husband. How very astonishing that parties with the benefit of experienced legal counsel, would even consider incurring further legal expense litigating over finances, particularly in the circumstances of this case.

50. Every single application is not set out in this judgment, but a few are summarized, to demonstrate the flavour of this financial battle. The Wife's sundry applications included:-

    i. **Evidence via Skype: -** On 18th July 2016, the Wife applied seeking to give evidence by video conference supported by an affidavit alleging, *inter alia*, that she lacked sufficient money to travel to Bermuda and the unavailability of child care for 'B'. When the Husband offered to meet the Wife's travel expenses to Bermuda including accommodation expense, and to make arrangements for his brother or adult daughter to travel to the USA to care for 'B', the Wife asserted that she could not travel to Bermuda due to a pending immigration application. The Husband finally consented to the Wife's application to give her evidence via Skype Video Conference.

    The Wife gave oral evidence via SKYPE video conference. This evidence was subjected to agonizing interruptions caused by intermittent internet connections, and excruciating logistical administrative barriers and delays, exacerbated by the lack of ease with which the Wife could refer to documents contained in the voluminous large ringed binders filed in these proceedings. The Wife was eventually coaxed by her attorneys, along with the Husband's attorney's assurances that airfare to Bermuda and suitable accommodation would be provided for her, so that she may give her oral evidence in the secured precincts of the Court chambers. This gave me and all Counsel the opportunity to hear the Wife's oral evidence without any form of electronic interruption and or delay.

ii. **Leave to adduce expert actuarial evidence: -** On 8th February 2017, the Wife applied seeking permission to adduce expert actuarial evidence and permission to call the proposed expert to give oral evidence at the hearing. The Husband opposed this application. I dismissed this application with reasons and awarded costs against the Wife of that application.

iii. **Leave to join, as parties to the proceedings, the Husband's brother and Matriarch of the X Trust: -** On 15th February 2017 the Wife applied, *inter alia*, to join the Patriarch and Matriarch, the owners of the US apartment, for the purpose of seeking a variation of what was purported to be a nuptial settlement, namely the provision of accommodation in the US to the Wife and minor child of the family. The court heard full submission in relation to that application and ruled on it on 24 April 2017, dismissing the application and awarding costs against the Wife for that application. It is noted that by the very nature of that application the Wife was fully aware that the US apartment belonged to the Husband's brother and mother, who inherited her husband's share upon his death. The US apartment is not held in The X Trust.

51. Notwithstanding the fury of sundry applications, a surreptitious application seventeen days into this hearing, was directed to my sister judge, (*then Acting*) Justice Subair-Williams. At the time of writing this decision, the application and supporting affidavit setting out the grounds upon which the law firm of Cox, Hallett Wilkinson (CHW) withdrew legal services from the Wife, remain sealed pursuant to the Order of Subair-Williams, J dated 4 May 2018. Thus, I am unaware of the grounds of that particular application.

52. However, the Court record reflects that that CHW previously withdrew services from the Wife during these proceedings. In fact, in an affidavit sworn and dated 26 July 2015 Mr. Kessaram stated, *amongst other things*, that he had become aware that the Wife owed in excess of $150,000 to her former attorneys and that "*it was apparent that the Petitioner is in no position to fund the continued instruction of CHW to prepare her affidavit and proceed with her ancillary relief application*". On this basis the application to withdraw as attorney

of record for the Wife was granted. Notably, CHW returned on record three months later in October 2015 on the basis of 'an arrangement' reached with the Wife. The details of this arrangement were never revealed.

53. Be that as it may, such unexpected action throughout these proceedings by a well-established law firm, with full knowledge of the Wife's circumstances including her ability to pay for legal services, highlights a growing population of litigants, who whether by strategic design or their impecunious circumstances, incur astonishing legal costs sorting out finances well after their marriage has ended. It will come as no surprise that few litigants ever recover from such litigation trauma, which, in my view, underscores the urgent need to reform proceedings and procedures in this jurisdiction as it relates to post divorce finances.

54. The Wife, in this case, appeared to stagger upon being dealt yet another blow from Mr. Kessaram, in whom she seemingly placed much trust. The Wife stated that "*the circumstances I find myself are beyond my control due to the actions of Mr. Kessaram….my desire always was to have a speedy conclusion and resolution*". Notwithstanding this apparent blow, the Wife with poised focus requested an adjournment of proceedings on the ground that she now wished to retain a prominent UK Queens Counsel.

55. Both Counsel for the Husband and the Trust Company vigorously objected to the Wife's application to adjourn and urged the Court to consider the inordinate delay and prejudice that would be caused if the proceedings were further adjourned, including (i) the long history of proceedings; (ii) the foreseeable length of time that new counsel, if properly retained, would need to familiarize themselves with the voluminous bankers boxes filled with binders filed in these proceedings; (iii) the multiple prior permissions that would be necessary for a non-resident counsel to appear in the Bermuda Supreme Court; (iv) the extraordinary costs already incurred by all parties; and (v) the Court's overriding objective per Rule 1(1)(2) paragraphs (a) to (e) of the Supreme Court Rules1985. Bearing all these factors in mind, the Wife's request for an adjournment was refused.

56. Alas, the Wife surged forward representing herself. However, not before declaring that she did not have in her possession multiple papers still under the alleged control of Mr. Kessaram.

The Wife stated "*I was not sent any bundles for this continuation. He emailed me several things; all in different order and dates*". This situation blindsided the prompt continuation of proceedings and ought to serve as a stark reminder to all attorneys that they have a duty upon withdrawing services from a client, to promptly return all papers to which a client is entitled, no matter their volume. Fairness demands that parties have before them all documents relied upon during proceedings. In this regard, I am most grateful to Mrs. Rana-Fahy, Counsel for the Trust Company, who patiently went through the index of documents to identify those allegedly not in the possession of the Wife. Likewise, the swift delivery of such identified documents to the Wife, by Mrs. Marshall, Counsel for the Husband, is equally appreciated. Upon confirmation of the same, the hearing recommenced with the Wife taking every opportunity, as if a battle shield, to utter the phrase "*I am not a lawyer"* or similar such words.

57. I want to make it clear that the fact that the Wife hereafter appeared as a litigant in person, does not in any way advantage or disadvantage the ultimate objective of this Court to achieve a fair outcome in accordance with the law and available evidence.

58. On 3 May 2018, the Trust Company in their capacity as Trustees of the A Fund, filed a Summons seeking the Court's blessing to enter into a Sales and Purchase Agreement in relation to the FMH.

59. The application came before Mr. Justice Hellman on 9 May 2018, when he granted the application for a sale of the FMH and adjourned the issue of the disposition of the net proceeds to this court, with costs of that application awarded against the Wife. At that time, it was anticipated that the net proceeds of the sale would amount to approximately $948,000.00.

60. As at the date of this judgment, the sale proceeds of the FMH will have dissipated to some extent, as a consequence of the Order of this court dated 10 May 2018. By that order, I dealt with the how the proceeds of the sale of the FMH are to be used pending the conclusion of this judgment. The Order included a monthly payment of $6,441 to the Wife, a monthly payment of $4,197.00 to the Husband, and a monthly payment of $3,300 to the Husband's

brother representing rent payable by the Husband for use of the US Apartment occupied by the Wife and B, totally $13,398 per month.

61. Consequently, the estimated balance of the proceeds of the sale of the FMH as at the date of this judgment may be somewhere in the region of $700,000.

Impact of Proceedings on Beneficiaries

62. The position advanced by an adult beneficiary of The X Trust was that the most commercially sound way to proceed with a variation of The A Fund, holding the proceeds of the sale of the FMH, would be for the Court to order a division of the sale proceeds, subject to the mortgage, between the Husband and Wife, as it sees fit.

63. There is concern that the Wife and Husband have not taken into consideration the financial implications of these proceedings if the Court were to order a variation of The X Trust. The concern is that if so ordered, irreparable harm would be caused to not only beneficiaries, but also third parties.

64. In an email dated February 2017, the Husband's brother, a beneficiary of The X Trust stated:-

> *"Of more concern is the fact that {The X Trust} has been pulled into these proceedings. My mother... and I feel very strongly about the negative impact this could have on all the beneficiaries of {The X Trust} which include my three children…as well as {the Husband and Wife's} two children…It should be noted in no uncertain terms that if the cash outflow to cover the cost of trust properties is not stemmed, it may heavily contribute towards the failure of the …family business".*
>
> *"..I am very concerned at the current status of finances as it has slowly been going downhill since about 2008 and actually faster in more recent years. I constantly worry if the bank will pull our line of credit and make us shut our doors. The fear that the staff and I will wake up one morning and no longer have a job is nerve racking….The constant emails I receive from vendors and excuses I have to make*

up to why I can't send them a payment. I hate to say it be when we have a hurricane…I get to use that as an excuse for not being able to pay vendors. The last couple of years the bank has really been all over us with constant and reports being requested…It feels like we are in a sinking ship waiting for it to go down…I live in constant fear and it keeps me awake. The company cannot afford to pay its own bills and the constant haemorrhaging of money for {The X Trust} Properties is sinking the ship even further".

65. In an email dated February 2017, A, the adult child of the Wife and Husband, stated:-

"I feel that my interests and those of my brother and the other beneficiaries will be adversely affected by any financial arrangement involving the trust that may be agreed between my parents or imposed by the Court. In particular, at a future time I would like to be permitted to occupy {residential property} owned by {The X Trust}. I am concerned that my parents do not fully take into consideration the financial implications that their dispute may have for {The X Trust}, other family trusts if there are any, and the beneficiaries of said trusts. I am concerned over the impact on {The Business} if trust funds are diverted to either of my parents."

D. THE POSITION OF THE PARTIES

66. In a nut shell, the Wife's position is that throughout five years of pre-marital cohabitation and twenty two years of marriage, she was afforded a very high standard of living which included luxury gifts, global jet-setting and entertainment amongst persons of business and social influence.

67. The Wife contends that the FMH was one such gift received from The X Trust and that the husband's father gifted them $3.9million dollars to purchase the home. The Wife asserts that at one point during the marriage, the FMH was rented for $60,000 per month, which when received they did what they pleased with this rental income.

68. Moreover, the Wife contends that the Business was a resource available to the Wife and Husband during the marriage and remains a resource of the Husband. As such, she argued that she is entitled to the assets of the Family Business by way of income or distribution of a home.

69. The Husband's position is that he has always provided financially for the Wife and the two children of the family. Although, on a number of occasions he called upon his father to assist with the private school fees of the children.

70. He contends that both he and the Wife lived beyond their means racking up credit card debts and overdrafts and that the Wife has never been sympathetic to the increasing debt level. He asserts that the Wife conducted herself *as if money grew on trees*.

71. The Husband's position in respect of his current financial circumstances is that he has suffered significant changes such that he can neither afford to purchase a home for the Wife, whether in Bermuda or outside of Bermuda, nor for himself. Moreover, he contend that he is near bankruptcy and for that reason does not have the capacity to borrow any money from the bank, as his current debts owed to the bank are all unsecured. He denies ever requesting The X Trust to pay off his personal debts.

72. The Husband denies the Wife's assertion that the FMH was a gift from The X Trust and further denies that the FMH ever had rental income of $60,000 per month. Likewise, he further denies that The X Trust and/or The A Fund ever distributed money to them during the marriage. In all the circumstances, the Husband asserts that it would be simply impossible for him to meet any lump sum award to the Wife.

E. THE MATRIMONIAL CAUSES ACT 1974

73. On an application for ancillary relief, the Court has power pursuant to Sections 27 and 28 of the Act to make any one of the following orders:-

- Periodical payments, for such period of time, as the court determines;
- Lump sum or sums as may be determined by the court;

- Lump sum provision for the benefit of a child;
- Transfer of property to the other party, to a child of the family, or to a third person for the benefit of a child of the family;
- Settlement of specific property for the benefit of the other party and/or children of the family;
- Variation of any nuptial settlement or trust which was established for the benefit of a party to the marriage

74. The Court in deciding whether to exercise its powers under Section 27(1)(a), (b) or (c) or 28 in relation to a party to the marriage and, if so, in what manner shall have " *regard to all the circumstances of the case"* including the statutory factors expressly set out at Section 29(1) (a) to (g).

75. Section 29(1) obliges the Court, to exercise its powers *"as to place the parties so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other*". This provision known as 'the tailpiece' no longer exists in UK legislation but in determining what the aim of the Court should be when exercising its discretion under Sections 27 and 28, the House of Lords in *White v White* [2000] UKHL 54, determined that the aim of the Court is to come to a fair outcome as between the parties.

76. The Supreme Court of Bermuda in *Green v Green* concluded that 'the tailpiece' in our legislation has the same meaning as the concept of fairness enunciated by the House of Lords in *White v White* [2001] 1 AC 596*;* that is there shall be no discrimination in ancillary relief proceedings between a husband and a wife. The House of Lords went on to say that there should be no bias in favour of the breadwinner as against the homemaker and child-carer. Further, that when carrying out the statutory exercise, the judge should always check his/her tentative views against the 'yardstick of equality of division' and, that equality should only be departed from if, and to the extent that, there is good reason for doing so.

77. When considering what is fair on an application for ancillary relief, the leading authority is that of *Miller v Miller**;** McFarlane v McFarlane* [2006] UKHL 2**,** where Lord Nicholls observed the following:-

> *"[11] This element of fairness reflects the fact that to greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, homemaker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties'* ***housing and financial needs,*** *taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter."*

Baroness Hale observed as follows:-

> *"[137] So how is the court to operate the principles of fairness, equality and non-discrimination in the less straightforward cases?...[T]here has to be some sort of rationale for the redistribution of resources from one party to another. In my view there are at least three. Any or all of them might supply such a reason, although one must be careful to avoid double counting, The cardinal feature is that each is looking at factors which are linked to the parties' relationship, either causally or temporally, and not to extrinsic, unrelated factors, such as a disability arising after the marriage has ended."*
>
> *"[138]The most common rational [for granting financial remedies] is that* ***the relationship has generated needs which it is right that the other party should meet. …This is a perfectly sound rationale where the needs are the consequence of the parties' relationship,*** *as they usually are….."*
>
> [Emphasis added]

75. The House of Lords identified the following three principles to guide the court in its search for fairness: -

(a) The sharing of matrimonial property generated by the parties during the marriage;
(b) Compensation for relationship generated disadvantage; and
(c) Needs balanced against ability to pay.

76. In this regard, the Court distinguishes between two types of assets, matrimonial assets on the one hand and non-matrimonial assets on the other. Matrimonial assets are those assets which have been created by the efforts of the parties or either one of them during the marriage. They arise out of the efforts of the parties during the marriage. Non-matrimonial assets are different in character as they originate from sources exterior to the marriage. They include the property owned by one spouse before the marriage, gifted assets and inherited property whenever acquired.

77. In *White v White* [2001], Lord Nicholls of Birkenhead said:

> *"Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property. Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property."*

78. In relation to matrimonial assets there is a presumption that these assets will be divided equally by the parties upon the breakdown of the marriage unless there is good reason to depart from equality. There is no such presumption in relation to non-matrimonial assets.

79. In the recent Privy Council decision of *Scatliffe v Scatliffe* [2017] UKPC 36, Lord Wilson of Culworth provided guidance on the way that courts should treat non-matrimonial property. In that case he said the following:-

> *"[25] "(i) Section 26(1)(a) of the 1995 Act obliges the court to have regard to the "**property and other financial resources which each of the parties … has or is likely to have in the foreseeable future**".*
>
> *(ii) Thus, when a court finds that an asset is not one in which either party has any interest (such as, in the present case, Parcel 174, beneficially owned by the son Derwin: see para 17 above), no account should be taken of it.*
>
> *(iii) It is, however, confusing for such an asset to be described as "non-matrimonial property".*
>
> *(iv) It was when introducing the "yardstick of equality of division" in the White case, cited above, at p 605, that Lord Nicholls proceeded, at p 610, to refer to "matrimonial property" and to distinguish it from "property owned by one spouse before the marriage, and inherited property, whenever acquired". In the Miller case, cited above, at paras 22 and 23, he described the latter as "non-matrimonial property"; and he explained his earlier reference to "matrimonial property" as meaning "property acquired during the marriage otherwise than by inheritance or gift".*
>
> *(v) So the phrase "non-matrimonial property" refers to property owned by one or other of the parties, just as the phrase "matrimonial property" refers to property owned by one or other or both of the parties.*

(vi) Accordingly it is contrary to section 26(1)(a) of the 1995 Act for a court to fail to have regard to "non-matrimonial property". This raises the question: in what way should regard be had to it?

(vii) As was recognized in Charman v Charman (No 4) [2007] EWCA Civ 503, [2007] 1 FLR 1246, at paras 65 and 66, it was decided in the White and Miller cases that not only matrimonial property but also non-matrimonial property was subject to the sharing principle. In the Miller case, Lord Nicholls, however, suggested at para 24 that, following a short marriage, a sharing of non-matrimonial property might well not be fair and Lady Hale observed analogously at para 152 that the significance of its non-matrimonial character would diminish over time. Lord Nicholls had also stressed in the White case at p 610 that, irrespective of whether it fell to be shared, a spouse's non-matrimonial property might certainly be transferred in order to meet the other's needs.

(viii) In K v L [2011] EWCA Civ 550, [2012] 1 WLR 306, it was noted at para 22 that, notwithstanding the inclusion of non-matrimonial property within the sharing principle, there had not by then been a reported decision in which a party's non-matrimonial property had been transferred to the other party otherwise than by reference to the latter's need.

(ix) Indeed, four years later, in JL v SL (No 2) (Appeal: Non-Matrimonial Property) [2015] EWHC 360 (Fam), [2015] 2 FLR 1202, Mostyn J suggested at para 22 that the application to non-matrimonial property of the sharing principle (as opposed to the needs principle) remained as rare as a white leopard.

(x) So in an ordinary case the proper approach is to apply the sharing principle to the matrimonial property and then to ask whether, in the light of all the matters specified in section 26(1) and of its concluding words, the result of so doing represents an appropriate overall disposal. In particular it should ask whether the principles of need and/or of compensation, best explained in the speech of Lady Hale in the "Miller" case at paras 137 to 144, require additional adjustment

in the form of transfer to one party of further property, even of non-matrimonial property, held by the other." [Emphasis added]

F. ISSUES FOR DETERMINATION

80. In this court's search for a fair outcome, the most relevant issues in this case relate to the trusts; in particular The A Fund and The X Trust. The issues are:-

a. With respect to the Husband's application to variation of The A Fund:-

The Parties accept that The A Fund is a post nuptial settlement settled during the marriage upon the Husband and Wife and the two children of the family. As such The A Fund is subject to the Court's powers under Section 28 of the Act. In the circumstance:-

i. How should the Court exercise its discretion when deciding how to distribute the assets in The A Fund, which now consists of the proceeds of sale of the FMH, whilst bearing in mind the needs of the Wife, Husband and of B, the minor child of the family?

b. With respect to The X Trust, the Court must consider:-

i. Whether The X Trust is a nuptial settlement?
ii. If it is nuptial, what is the property comprised in the settlement?
iii. If there is a nuptial settlement, how should the Court exercise its discretion to vary?
iv. If it found not to be a settlement over which the court has dispositive powers, the court must consider whether the X Trust is a financial resource of the Husband under Section 29(1) of the Act

c. With respect to the YNo.1 and YNo.2 Trust, the Court must consider:-

i. Whether these trusts are a financial resource available to the Husband?
ii. Whether the Court makes an order in relation to the assets of the YNo.1 and YNo.2 Trust?

G. THE APPROACH OF THE COURT IN DETERMINING RESOURCES HELD IN TRUSTS

81. Mrs. Rana-Fahy submitted that there are generally two approaches that the Court can adopt when considering resources held in trust for the benefit of one or other of the spouses.

82. The first approach, she submitted, is to take into account the likelihood that the spouse in question will be able to benefit from the resources held within the trust, and then to frame its orders around its conclusions on that issue. If satisfied that the likelihood is that the trustees of a settlement would, if asked, make a substantial distribution to a spouse, the Court will take that into account in deciding what orders to make against the spouse in question.

83. The Court cannot make orders which bind, or even purport to bind, any trustees. No matter what the Court's conclusions are as to what the Trustees are likely to do, even where the court affords the trustees "judicious encouragement" to exercise their discretion in a certain way (*Thomas v Thomas [1995] 2FLR 6698*), what the trustees actually do is a matter for them alone. The Court's orders do not and cannot directly interfere with assets which are held in trust.

84. The second approach is to vary any trust that the court is satisfied is an ante-nuptial or post-nuptial settlement pursuant to Section 28(1)(c) .

THE LAW

What amounts to an ante-nuptial or post nuptial settlement capable of being varied?

85. The Act does not assign a definition of what constitutes an ante-nuptial or post nuptial settlement. Mrs. Rana-Fahy, Counsel for the Trustee cited a comprehensive line of UK authorities to assist the Court on the law. The authorities included:-

- *Hargreaves v Hargreaves* [1926] P. 42 in which Hill J stated:-

  "This section is dealing with ante-nuptial and post-nuptial settlements, and it refers to marriage. It refers to it because what it is dealing with is what we commonly known as a marriage settlement, that is, a settlement made in contemplation of, or because of, marriage, and with reference to the interests of married people, or their children".

- *Prinsep v Prinsep* [1929] P 225 in which the main point in issue was whether the settlement in question was a "*post nuptial settlement*" on the parties. Hill J stated:-

  "Is it upon the husband in the character of husband or in the wife in the character of wife, or upon both in the character of husband wife? If is, it is a settlement on the parties within the meaning of the section. The particular form of it does not matter. It may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses with reference to their married state."

  ***"**But whether a settlement is within s. 192 does not depend on who is the settlor. In many ante-nuptial settlements, neither the husband nor the wives are themselves the settlors… But whether a settlement is within s. 192 must depend on what it affects. If, in fact, it is a settlement on either husband or wife, or both in the character of husband or wife, it is wholly immaterial that it is prompted and stated to be prompted by affection only for one of them.*

  On the question whether a settlement is a settlement within s. 192, the motive of the settlor seems to me immaterial, except so far as it is given effect to by the terms of the deed."

- *Brooks v Brooks* [1996] 1 AC 375 in which Lord Nicholls, taking a modern purposive Interpretation stated:-

  "In the Matrimonial Causes Act 1973 settlement is not defined, but the context of section 24 affords some clues. Certain indicia of the type of disposition with which the section is concerned can be identified reasonably easily. The section is concerned with a settlement "made on the parties to the marriage." So, broadly stated, the disposition must be one which makes some form of continuing provision for both or either of the parties to a marriage, with or without provision for their children. Conversely, a disposition which confers an immediate, absolute interest in an item of property does not constitute a settlement of that property.

The statutory provision is concerned with an order varying the terms of a settlement. This would not be an altogether apt exercise in relation to property given out-and-out and belonging to one of the parties to the marriage as his or her own absolute property. The context does not require that outright gifts of this nature should fall within the scope of the variation provision. In such a case the appropriate order on the dissolution of the marriage, if an order is needed in respect of the property, is a property transfer or property settlement order."

- *N v N and F Trust* [2005] EWHC 2908 (Fam) in which *Brooks v Brooks* was affirmed by Coleridge J:-

  "There is nothing in [Brooks] which shows any departure from the previous approach of the court over the previous 100 years".

  [33] "My task is to consider what the real substance of the arrangement was which governed this property. The authorities make it clear that I should consider the question broadly and ask myself whether or not it was an arrangement which made ongoing provision for the husband, wife and/or child in those capacities. Motive is irrelevant."

  [38] …court ought to "examine the true character of the arrangement."

- *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam)**,** where the comments in *Brooks v Brooks* and in *N v N and F Trust* were positively cited.

86. It is clear from the cited UK authorities that to be capable of variation, a settlement must:-

i) Be made in contemplation of marriage or because of marriage and with reference to the interests of married people or their children;
ii) Make specific provision for the Husband or Wife in their role as "husband and wife";
iii) Make continuing provision to either/both of the parties married.

87. Mrs. Rana-Fahy directed the Court's mind to *Joy v Joy-Morancho and others* (No.3) [2015] EWCA, Civ, where Singer J was left to determine whether:-

i) the trust was a nuptial settlement from its inception;
ii) if not, had it subsequently become nuptialised; and
iii) if it was a nuptial settlement, how would the judge consider this financial resource in the distribution of the marital acquest between the parties?

88. In respect to i) whether the trust was a nuptial settlement from its inception, Singer J stated:-

> *"97. Against this background and with advice and guidance from TB (a director of the trustee), H settled NHT in December 2002. By that date his relationship with W (intermittent at least physically as for a number of periods they were not together in Bequia or elsewhere) has not been established, on my findings as committed to the point where marriage was in contemplation save as an uncertain future contingency.*
>
> *101. Despite the breadth and diversity of arrangements which have been held to fall within the meaning of a nuptial settlement for the purposes of this provision, there must always be some nuptial element. Here that was lacking. The answer is as short and can be as simply stated as that and does not require further elaboration or citation of authority."*

89. It is therefore clear that for there to be a nuptial element to the settlement, the facts must show that the relationship between the spouses was "*committed to the point where marriage was in contemplation*".

90. In respect to ii) whether, if the settlement was not nuptial at inception, had it subsequently become nuptialised? Singer J positively cited the following per Bucknill *Burnett v Burnett* [1936] P.1: -

> *"Applying this explanation of the meaning of "ante-nuptial settlement" to the case now before me, the principal settlement, in order to be "ante-nuptial" within*

the meaning of S.192 of the 1925 Act, must be made in contemplation of or because of a second marriage, although the settlor at the time when the settlement was made was already married. I do not think that S. 192 was intended to cover such a case as this. In order to bring the section into operation, there must be a marriage which is the subject of the decree of divorce, and it is in contemplation of this marriage and because of this marriage that the settlement must be made. I do not think that the Legislature intended a spouse of an existing marriage to contemplate a second marriage so as to be able to execute a settlement which is "ante-nuptial" as regards such contemplated marriage, although at the time being he or she is married and, therefore incapable of entering into a second marriage at that time."

91. It is therefore clear that if the marriage in question was not in contemplation at the time of the creation of the settlement, then looking back at it cannot retrospectively change the settlement's characterisation from non-nuptial to nuptial. Singer J, at paragraph 101 in *Joy v Joy* stated :

> *"Were it to be otherwise, every truly dynastic settlement, bereft of nuptial character at the outset but providing benefits for an individual who subsequently becomes either a husband or a wife, would arguably become variable under s. 24(1)(c) as soon as that individual, once married, received any benefits. I am satisfied that that is not the law, notwithstanding the breadth of attribution historically afforded to settlements treated as nuptial."*

92. It is noteworthy that Singer J, was invited in *Joy v Joy* to adopt the reasoning of *Quan v Bray* [2014] EWHC 3340 (Fam) where the court ruled that a settlement which is non-nuptial at its creation, could later attain a nuptial character if there was a flow of benefit to the parties during the marriage from the settlement. He duly considered *Quan v Bra*y and commented as follows in paragraphs 103-106 of his judgement:

> *"103 The kernel of Sir Paul's proposition emerges from these three paragraphs from his judgment (with the same emphasis as is contained in the original):*

58. I have also been addressed on the question of whether a trust, non-nuptial at its inception, can later become nuptialised. (see Burnett v Burnett [1936] P1).

59. The essential features of a PNS [a post-nuptial settlement] seems to be an existing disposition in favour of, one, other or both parties to the marriage (in their capacity as husband or wife) and for their present or future benefit. An existing intention to benefit one of the spousal beneficiaries is obviously a prerequisite.

60. In my judgment on the authorities, a settlement which is non nuptial at its creation could itself later become "nuptialised" ***if there was, in fact, a flow of benefit to the parties during the marriage from the trust. Alternatively, a later disposition from the trust can itself constitute a post nuptial settlement without the main or superior trust necessarily becoming nuptial.***

104. He then asked himself these three questions, and gave himself these answers:

66. ***I have ended up with these essential questions (of law):***

a. Neither party is identified directly on the face of the written instrument (in schedule 2), as a beneficiary of CTSAT. Only SCT UK. Can it nevertheless be categorised as a PNS and one or other of them as a beneficiary of that trust, merely because CTSAT, as a fully discretionary trust, is capable of being amended or adjusted (by adding trustees or terms) to make them such?

b. If not should CTSAT nevertheless be regarded as having become a PNS if there is, anyway by the time of the application to vary, an existing intention to benefit one or both of them which is evidenced by past receipts from the trust?

c. *If the parties have not to date received such benefits is the mere intention (established by other evidence) to benefit one of the spouses in an unspecified way and at some unspecified time in the future sufficient of itself to constitute a PNS?*

69. My answers to the questions of law are as follows;

a. *(66a) NO. This is mostly agreed and straightforward. The mere fact that a trust is a conventional fully discretionary trust capable of being varied to add other beneficiaries including the parties does not of itself render it a PNS.*

b. *(66b) YES. If there has been a regular flow of receipts paid from CTSAT to the parties (in their capacity as spousal beneficiaries) for their benefit that could be evidence of a pre-existing intention to benefit them whatever the instrument said on its face. It would*

c. *(66c) NO. In my judgment if all that is established is a vague, unspecified intention at some time in the future, depending on the circumstances then prevailing, to benefit the parties possibly by way of amending the trust deed or in other ways, that is not enough to turn a non-nuptial settlement into a PNS. That cannot amount to an existing disposition.*

105. In the light of the contextual facts which Sir Paul Coleridge found in that case he determined that that trust had not become nuptialised. Mr Bates invites me to apply the same principle but to find that on the facts of this case NHT has undergone transformation. Leaving aside any impact from acquisition of Alta Vista, he suggests that "it is plain that H and the family have been continuing to live off borrowing 'collateralised' by NHT since 2010" and thus that the Quan v Bray (66b) question should be answered affirmatively.

106. But before coming to the context I must ask myself whether I agree with the propositions of law. They are not of course binding upon me, although equally obviously entitled to respect and careful consideration having regard to their source. In the light of the result the judge's observations were obiter. ***But I have indeed reached the conclusion that they do not reflect the law.*** [Emphasis added]

93. ***Quan v Bray*** went to appeal and was dismissed. The Court of Appeal in ***Quan v Bray & Ors [2017] EWCA Civ 405)***, did not in its decision-making, consider whether as a matter of law a settlement, non-nuptial at inception, can subsequently become nuptialised. Thus, the weight of the binding authority on whether a non-nuptial settlement becomes nuptial once parties are married rests with ***Joy v Joy***. Singer J confirmed that it is not legally possible for a non-nuptial "dynastic" settlement created by a settlor for the purpose of passing wealth to future generations to become nuptialised by a beneficiary subsequently marrying.

94. In relation to iii) whether, if there is a nuptial settlement, how should the court exercise its discretion to vary**?** This question was addressed in ***Ben Hashem v Al Shayif*** **[2008] EWHC 2380 (Fam)**. Munby J set out the following considerations which a court should bear in mind when exercising its discretion to vary a nuptial settlement:

(i) The court's discretion under s 24(1)(c) is both unfettered and, in theory, unlimited. As Miss Parker put it, no limit on the extent of the power to vary or on the form any variation can take is specified, so it is within the court's powers to vary (at one end of the scale) by wholly excluding a beneficiary from a settlement, to (at the other end) transferring some asset or other to a non-beneficiary free from all trusts. She points to E v E (Financial Provision) and C v C (Variation of Post-Nuptial Settlement: Company Shares) as illustrations of property held on trust being transferred free from any trusts to the applicant, in E v E a sum of £50,000 and in CvC shares in a Cayman company.

*(ii)****That said, the starting point is s 25 of the 1973 Act, so the court must, in the usual way, have regard to all the circumstances of the case and, in particular, to the matters listed in s 25(2)(a)–(h).***

(iii) ***The objective to be achieved is a result which, as far as it is possible to make it, is one fair to both sides, looking to the effect of the order considered as a whole.***

(iv) The settlement ought not to be interfered with further than is necessary to achieve that purpose, in other words to do justice between the parties.

(v) Specifically, the court ought to be very slow to deprive innocent third parties of their rights under the settlement. If their interests are to be adversely affected then the court, looking at the wider picture, will normally seek to ensure that they receive some benefit which, even if not pecuniary, is approximately equivalent, so that they do not suffer substantial injury. As Sheldon J put it in the passage in Cartwright which I have already quoted: 'if and in so far as [the variation] would affect the interests of the child, it should be permitted only if, after taking into account all the terms of the intended order, all monetary considerations and any other relevant factors, however intangible, it can be said, on the while, to be for their benefit or at least, not to their disadvantage.'

[291] Miss Parker submitted that the central theme which permeates these authorities is that it is permissible for the court to invade third party interests within the confines of the trust structure, but only to the extent that fairness so requires. It is acknowledged that in the generality of cases, the court should indeed be slow to do so. Broadly speaking, I accept that submission.

[292] Moreover, as she rightly points out, the court always retains a discretion as to the extent of any variation. Even in circumstances where the court could quite properly vary a post-nuptial settlement so as to transfer (say) the matrimonial home to a wife free from any trusts, it may nonetheless direct some less intrusive form of variation, such as to transfer the property to the wife for life and thereafter to the other beneficiaries, to confirm the right to remain in occupation indefinitely without any form of transfer, or to direct that the applicant has a right to remain in occupation until (say) other orders made have been complied with. All of this depends, of course, as she says, on the court's views as to what is fair on the facts, as it finds them, of the particular case. [Emphasis added]

95. Thus, if satisfied that a settlement is a nuptial settlement, this Court must have regard to Section 29(1) of the Act when considering how to exercise its discretion to vary any settlement.

H. APPLICATION OF THE LAW TO THE FACTS
SECTION 29 FACTORS

96. The starting point on determining how to distribute the balance of the proceeds of sale held in The A Fund, the Court must have regard to all of the circumstances of the case including the following:-

- ***Income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future (Section 29 (1) (a))***

97. In this regard, the Husband contends that throughout the five years of cohabitation and approximately twenty-two years of marriage he provided financially for the Wife and the two children of the family. The Husband's evidence is that he continues to be employed by the Business and that his gross earnings are some $2,488.75 per week. The Husband's evidence is that in addition to the usual deductions, the following are deducted from his weekly salary:

• Internal Loan deduction	$203.85
• Rent (paid to sibling for Wife & B's use of the Apartment)	$346.15
• Garnishee-Legal fees	$346.15
• Major medical health coverage for himself, Wife & B	$337.15

98. Further, the Husband's evidence is that his net weekly income after all deductions is approximately $949.75 and that the sum of $346 per month will cease to be deducted from his salary when he is no longer required to pay to his brother $1,500 per month in rent. This will leave him with a net weekly income of approximately $1,295.90.

99. After the birth of the children, the Wife did not work during the marriage and remained unemployed throughout these proceedings whilst residing in the USA caring for B. The Wife's evidence was that when she moved to the USA, she initially entered the USA on an F1 Student Visa and since which her immigration status in now that of a tourist which prohibits her remaining

in the USA for more than 90 days. The Wife contends that she has hired an immigration lawyer to appeal her ability to remain in the USA for longer periods.

100. In respect of the Wife's earning capacity, her position is that she could not possibly re-enter the workforce given her age. The Wife asserts that in addition to the Husband's salary, the Husband received significant monthly rental income from at least three high-end residential properties owned and leased by the Husband at high-end market values. The Wife contends that these monthly rents were appointed to the Husband to spend freely each month.

101. The Husband's evidence is that whilst the Wife stayed at home caring for the children throughout the marriage, her current age is not an impediment to obtaining employment to assist with meeting her monthly expenses. The Husband contends that the Wife is an intelligent woman who is well spoken, possesses administrative skills and is fluent in at least three languages. It is the Husband's position that notwithstanding these marketable skills, the Wife has approached their marriage with a sense of entitlement and has simply refused to put them to use even in the face of the family's serious financial pressures. Moreover, the Husband contends that not only has the Wife refused to put herself in a position to work; she has refused to consider any changes to her current personal outgoings.

102. The Husband's evidence in respect of the monthly rental incomes derived from three properties and appointed to him, is that these sums together with his salary, he used to meet the family's outgoings and debt obligations including mortgage obligations on all three properties and the educational costs of the two children of the family. The Husband gave evidence that he was not able to always meet the school fees of the two children and on various occasions received assistance from his father with meeting these expenses. The Husband contends that he currently has no income from any other source, other than his salary, as the rental income previously receiving from the lease of the FMH, most recently $14,000 per month, came to an end upon the sale of the FMH by the Trustee.

❖ ***Financial needs and obligations, which the parties have or are likely to have in the foreseeable future – (Section 29(1)(b))***

103. In this regard, the Wife presented a very comprehensive schedule setting out her personal expenses amounting to approximately $4,000 per month. In addition to these expenses, the Wife produced an up-dated schedule of her anticipated expenses under various scenarios including (i) if she remained in the USA in the Apartment caring for B, and (ii) if she remained in the USA but renting alternate accommodation, and (iii) if she returned to Bermuda once she is no longer able to reside in the USA, as follows:-

(i) **If the Wife remains in the USA caring for B in the New York apartment**, she contends that her individual monthly living expenses, excluding those of B, amount to more than $5,693.12 per month, which include:-

Food	($500/week)	$2,000.00
Presents		$333.33
Counselling		$848.00
Medical/dental/optometrist/dermatological		$752.28
Entertainment		$500.00
Legal fees (US immigration)		$265.00

(ii) **If renting alternate accommodation in the USA**, she contends that her expenses would, in addition to (i) above, include, amongst other things, rent in the sum of $8,656.00 per month and apartment maintenance in the sum of $1,339.00 per month.

(iii) **If living in Bermuda**, she contends that her monthly expenses would include :-

Car expenses	$691.01
Car purchase, amortized over 10 years	$329.17
Home owners insurance	$400.00
Personal expenses including groceries	$4,168.00

104. The Husband does not accept any of the Wife's projected monthly expenses and contends that she has inflated these sums for the sole purpose of pursuing a large lump sum award in these

proceedings. Under cross examination, the Wife admitted that notwithstanding having been cautioned by the Court that she must not discuss her evidence with anyone, she never the less had discussions with both an actuary and Mr. Kessaram to "shore up" her oral evidence regarding her projected monthly budget. When questioned by Mrs. Marshall whether she was fabricating her evidence, the Wife categorically denied this and stated "this was omitted from my affidavit by mistake".

105. Mrs. Marshall on behalf of the Husband argued that on any assessment the sum of $2000 per month on groceries for the Wife alone was inflated. Similarly, the sum of $752.28 was not warranted as the Husband provided the Wife elite tier comprehensive health insurance via the Business. Mrs. Marshall challenged each and every expense of the Wife under each of the three scenarios.

106. The Husband disputes the Wife's position and contends that the Wife chooses to reside with B in America, a jurisdiction where she neither has the legal right to reside nor work. In respect of the Wife's scenario under which she would remain in the USA caring for B in the New York apartment, the Husband's evidence is that the Wife's use of the apartment was always intended to be a temporary measure. In support of this position, the Court was referred to a letter dated 14 February 2012 the Wife's former attorneys (Lomas & Co) were advised as follows-

> "*On the matter of your clients continued occupation of the....apartment is not within our client's power to agree to a guarantee of continued occupation by yours. As you appear to be aware….the beneficial owners of the apartment are our client's father and brother. We are instructed however that our client has, after much discussion, prevailed for now upon the beneficial owners and the trustees to agree to your client's pro tem use of the apartment, pending the final resolution of all ancillary matters. In so proposing, your client must understand that her continued occupancy of the flat is and will remain* ***a temporary provision*** *agreed to in good faith by the owners*. (Emphasis added)

107. Under cross examination, the Wife stated that if required to vacate the US apartment she would require $15,000 per month from the Husband over a period of four years to enable her to rent an appropriate apartment and maintain her life style.

108. In respect of her budget should she live in Bermuda, the Wife explained that it contemplated purchasing a property or living in an apartment owned by the Husband's family as "*they own many multi-million dollar properties in Bermuda*". She went on to say "*surely there is one property that they could put me and their grandson in. I would like my son to enjoy some level of comfort as in marriage; like in Tuckers' Town*. *The same level of living as his cousins. They live at a very high level….I just do not want a roof over my head. There are areas that are unsafe in Bermuda. I want the same level as we were living*".

109. Additionally, the Wife presented various medical expenses which she estimated to be some $1,708.00 per month. The Wife contends that she is required to pay medical service providers up-front as it is only after the fee for services is paid in full that she would be issued a receipt. The Wife explained during her oral evidence that she would provide such receipts to her attorney instead of her medical insurance provider as she contended that the insurer would often forward the reimbursement to the Husband, who in turn, she alleged would not pass on the monies to her. Upon cross examination the Wife asserted that her projected medical expense budget included gross medical cost before insurance reimbursement.

110. The Husband did not accept the Wife's evidence in relation to medical expenses. The Husband's evidence is that a premium health insurance package is provided to the Wife and B via the Business' group insurance plan. In this regard, the Husband presented evidence that such premium health insurance included affiliated service providers in the USA, with whom advance arrangements can be made to alleviate any need for up-front payment by the Wife.

111. The Husband's evidence is that he remains employed by the Business but now shares rented accommodations. The Husband presented a comprehensive list of his current monthly expenses totaling approximately **$5,500.00.** These expenses included the following:-

Groceries	($200/week)	$866.00
Lunch/coffee snacks	($120/week)	$520.00
Vehicle fuel	($50/week)	$216.00
Barber		$50.00
Fitness program		$50.00

Personal vacation	$250.00
Social dinning/events	$500.00
Doctors (out of pocket)	$433.33
Contribution to current rental accommodation (50%)	$2,000.00

112. In addition to these personal expenses, the Husband presented evidence of his total monthly financial obligations, which amounted to more than **$6,000.00** :-

Credit card payments (minimum monthly)	$1,950.00
Interest on Overdraft facility (average)	$336.17
Interest on crystalized HMT debt of $380K	$1,937.10
Interest on crystalized CST debt of $65K	$382.26
Legal fees (minimum monthly)	$1,500.00

113. Additionally, the Husband's evidence was that his monthly outgoings exceed his income by approximately $5,812.20, and that on occasion, his father assisted him with meeting these expenses. Similarly, that he has had to obtain loans from his brother and his mother to meet the arrears sought by the Wife's Judgment Summons dated October 2014.

114. The Husband contends that he is now in a dire financial situation. The Husband presented evidence of this total current debt to include such matters as:-

- 6 Outstanding credit cards $69,060.14
- 3 Overdraft facilities $69,536.65
- Outstanding Legal fees $285,587.00
- Shortfall of mortgages crystalized upon the sale of two residential properties $446,000.00

115. The Husband's evidence is that the total of his current debts amounts to more than $2 million dollars of which approximately (i) $902,656.00 is owed to arm's length third parties, (ii) $400,000.00 is owed to various family members, (iii) $100,000.00 is owed to The Business (which

he repays via weekly deduction from his salary), and (iv) $800,000.00 is owed in respect of the outstanding mortgage on the FMH.

The standard of living enjoyed by the parties during the marriage – (Section 29(1)(c))

116. The Wife asserted under cross examination that it was always the intention of the Husband's father to provide a roof over her head for so long as B remained in the US, and that the Husband's father intended to purchase a $1Million dollar apartment for her and B's benefit. The Wife's evidence described unrestricted use of a multiplicity of credit cards. During her oral evidence, she asserted that the Husband had a Swiss bank account.

117. The Husband's position is that the standard of living enjoyed during the marriage was "*comfortable*"**.** He does not dispute that prior to 2010 the family resided in a well-appointed home in Bermuda and that, as a family, they "*seemingly*" did not want for anything. However, the Husband contends that underneath the veneer of prosperity there was an ever increasing mountain of debt. The Husband does not dispute that he held numerous credit cards. His evidence is that there was a time during the marriage when local banks were literally sending people credit cards in the mail and inviting them to use these cards. As a consequence, the Husband's evidence is that he and the Wife fell into considerable credit card debt which he has been struggling under ever since.

❖ ***The age of the parties and duration of the marriage – (Section 29(1)(d))***

118. The marriage lasted 22 years preceded by a period of premarital cohabitation. The Husband is 54 years old and the Wife is 55 years old.

❖ ***Physical or mental disability of either of the parties –(Section 29(1)(e))***

119. There is no evidence that either of the parties suffers any physical or mental disability. The evidence suggests that they have medical insurance and each visit doctors regularly and maintain their good health.

- ***Contribution made by each of the parties opt the welfare of the family, including any contribution made by looking after the home or caring for the family* – (Section 29(1)(f))**

120. It is the Wife's position that throughout the marriage, she looked after the home and cared for the two children of the family. Additionally, she contends that on occasion she was called upon to accompany key personnel of the Business overseas and on such occasions assisted in decisions related to the Business. In this regard, the Husband's position is that both he and the Wife contributed to the care of the children, but emphatically denies that the Wife played any significant and or meaningful role in any decision making of the Business.

- ***B's Needs including educational circumstances:- (Section 29 (2) (a) – (e))***

121. The Wife's position is that B must attend a school within a five block radius of the US Apartment. In respect of B's personal expenses, the Wife contends that the sum of **$2,098.50** per month reflects his individual needs, which include:-

Babysitting service	$520.00
Activities & entertainment	$300.00
Restaurants – Lunch/Dinner	$400.00

122. Under cross examination the Wife rejected the Husband's contention that B should attend a less expensive school in a suburban area where she could also find suitable accommodation. Further, the Wife stated that she and B are accustomed to living in a well-appointed city apartment building, fitted with a doorman and 24 hour security.

123. The Husband contends that the Wife's single-minded demands pertaining to B's education have exacerbated the financial circumstance of the family. It is the Husband's position that B is old enough to attend boarding school independent of the Wife, and that given B's age, it is in his best interest, to be emancipated from his mother's overbearing care. In so doing, the Husband contends that the Wife could then reside in Bermuda, the United Kingdom or someplace within the European Union, where she has unrestricted rights to work and consequently be in a position to earn a reasonable income to assist in meeting her own needs and those of B.

124. In addition to drawing conclusion on the parties' respective Section 29 positions, I set out some of my observations on the credibility of the parties.

I. FINDINGS

Credibility & Section 29 Findings

125. When the Wife finally attended these proceedings, in person, rather than via Skype video, she appeared physically frail and more often than not, genuinely timid. I suspect, though I am not altogether certain, that the Wife's emotional demeanor may be somehow linked to her perception of past circumstances during the marriage. In this regard, I have no doubt that the Wife may well benefit from counselling/therapy sessions claimed in her monthly budget. Otherwise, I am satisfied that she appeared to be in good health.

126. I find the Wife and Husband each genuine in their expressed love for their children. Likewise, I find the Wife's evidence genuine as it related to her role during the marriage as the homemaker and primary care provider for the children. However, she failed to provide any evidence to support her claim that she contributed to the success of The Business. In fact, there is no evidence that the Wife gave up a major career or made any financial contribution to the outgoings of the FMH.

127. I have no reason to doubt the Husband's evidence regarding his role as the sole financial provider during the marriage. In so doing, I am satisfied that the Husband played an equally valuable role during the marriage to the Wife, in her role as homemaker. I agree with Mrs. Marshall that it would be an artificial exercise to attempt to quantify a party's contribution to marriage particularly in a long marriage such as in this case.

128. Whenever the Wife spoke of B during her oral evidence, she radiated steadfast love. Though, in my view, her love for B seemed tainted with frantic overprotection and physical dependence in her day-to-day life.

129. It became clear during cross examination that the Wife was, on more than one occasion, less than truthful. For example, when questioned about her current legal status in the USA, the Wife failed to disclose that her application had been refused three times on appeal by the US Immigration

authorities. As matters unfolded, on the weekend preceding the resumption of the hearing on the 6th February 2017, it was revealed that the Wife travelled to Canada and returned to the USA, notwithstanding advising this court that she could not leave the US. Clearly the Wife was available to come to Bermuda to resume her evidence in person. It was not until the 17th February 2017, after a further 5 days of hearing through the use of Skype and after the Court had urged her to voluntarily attend, noting the cost consequences, this Court ordered the Wife to appear in person to continue giving her evidence. I am not certain whether such responses were deliberate lies on the part of the Wife or a combination of the emotional stress of the breakdown of the marriage and/or the emotional anticipation of attending these proceedings in the physical presence of the Husband and his attorney.

130. I am thunderstruck by the Wife's fixation on educational placements only within a five block radiance of the US Apartment. I find that the Wife had no intention of genuinely considering an educational boarding placement for B given he is a teenager. Such placement would position her to obtain some form of employment, whether in America, the United Kingdom or in Bermuda, where she could to assist with her personal outgoings and those of B.

131. On another occasion during proceedings in September 2016 the Wife was given the Court's ordinary caution that she must not discuss her evidence with anyone during the break including her attorney, save for any administrative matters. However, it became clear at the resumption of the proceedings that the Wife had not in fact heeded the Court's caution. Mrs. Marshall adduced evidence confirming lengthy discussions with an actuary as well as with her attorneys in an effort to "shore up" her evidence. On one occasion on a date between January 30th 2017 and February 4th 2017, a week before the resumption of the hearing, the Wife had a telephone conference with her attorneys that lasted 1 ½ hours. When questioned by Mrs. Marshall whether Mr. Kessaram was in attendance during that teleconference, the Wife said that she could not recall. I find this circumstance disturbing, particularly as the Court is in search of a fair outcome.

132. I find that the Wife deliberately presented an exaggerated picture of her current financial needs and financial obligations, and those anticipated by her in the foreseeable future. For instance, the Wife claims food for herself as being $2,000 per month. In my judgment, this figure on any assessment of one single person's food is highly inflated. When compared with the Husband's assessment of

his food at $866 per month ($200 per week), in my view, clearly demonstrates a more reasonable allocation of money for food for the Wife and B. Another example, is the Wife's assessment of $333.33 per month to purchase presents for B and A (the adult child). This would equate to $4,000 per annum. I find such an expenditure on gifts in the circumstances of this case excessive particularly given that A, the oldest child of the family is an adult and gainfully employed in a professional capacity.

133. I find that the Wife had little regard for the role that the Husband played in B's life during the marriage and, indeed, ought to play in the years ahead. Likewise, the Wife, in my view, demonstrated little appreciation of the detrimental impact that her own behavior might have on B's relationship with his father. I find this most unsatisfactory.

134. I mean no disrespect to the Wife when I make this finding that she appeared during her oral evidence to possess little, if any, understanding of basic financial concepts. For example, the Wife was seemingly oblivious to the fact that credit cards are a means of borrowing money for current purchases and that the money borrowed must be repaid out of future income. Likewise, that real estate property 'purchased' pursuant to a mortgage agreement is not legally owned until the money borrowed under the mortgage agreement is repaid in full together with interest thereon.

135. Thus, I am convinced that the Wife had no inkling of the magnitude of the Husband's debt, which I accept, and the debt of The Business, which I also accept. I do not accept the Wife's contention that the Business gifted hundreds of thousands of dollars toward the purchase price of each of the residential properties held in The HMT Trust, The CS Trust and The CAT.

136. This demonstrated absence of understanding on the Wife's part combined with unsubstantiated beliefs regarding Swiss bank accounts held by the Husband and regular distributions of money out of The X Trust to her and the Husband are, I find, all manifestations of her sense of entitlement throughout the marriage, which in my view, has brought about this litigation. I am not surprised that the Wife failed to produce any evidence to support her claims that the Business paid for the private school fees of the children and monthly household expenses of the FMH.

137. As a result, I find that much reliance cannot be placed on the Wife's evidence particularly regarding her assessment of the matrimonial wealth, the assets of the X Trust and her very own needs.

138. The Husband on the other hand, seemed rational in thought and presentation during his oral evidence. He appeared emotionally drained, but nonetheless demonstrated a firm understanding of the financial circumstances of The X Trust including the other various trusts, the Business, and the overall impact of the unrestrained financial expenditure during the marriage. Whether he was simply didn't "give a hoot" about the circumstances that in large part are his creation, I am not certain.

139. I fully appreciate and accept the Husband's assertion that the onset of the economic recession and the accompanying exodus of people from Bermuda led to a reduction in the market value of the residential properties and the rental income that could draw, including the rental income of the FMH. As a result, I have no doubt that the Husband's overall monthly rental income was reduced significantly and that the sale price of the FMH was far less than the purchase price. I therefore find the Husband's evidence relating to his inability thereafter to service his ongoing monthly mortgage obligations, personal loans and credit card debts, entirely cogent. I am satisfied that the Wife was oblivious to such financial circumstances of the Husband.

140. Moreover, on review of the financial evidence of the Business and the Husband's pay stubs, there is no reason to doubt the Husband's contention that he paid pay rent in the sum of $1,500 per month to his brother so that the Wife and B could reside in the US Apartment, (with his father's portion of the rent (now his mother's) being suspended and accruing as a debt due). Likewise, that he was required to pay the associated monthly maintenance fees for use of the apartment. It is clear on review of the Husband's pay stub that 'rent' was deducted. Additionally, that the Husband incurred monthly 'loan' deductions consistent with his contention that the Business in the first instance paid the US Apartment's monthly maintenance fee of $1,800 per month which was added to the Husband's loan account which he in turn paid back to the company via monthly deductions from his salary.

141. The stark reality in this case is that there has been a substantial change in the Husband's financial circumstances resulting, *amongst other things*, in neither the Wife nor Husband living at the

standard enjoyed during the marriage. Both the Wife and Husband are now occupying rented accommodation with far less accoutrements of the FMH. However, the Husband continues to struggle under a significant mountain of debt created during the marriage with no contribution from the Wife. The Husband is no longer a beneficiary of The X Trust.

142. Mrs. Marshall on behalf of the Husband is indeed correct; this is a case where '*the proverbial chickens have finally come home to roost*'.

143. I have no reason to doubt any of the Trustee's evidence regarding crippling debt now faced by The Business and The X Trust.

J. APPLICATION OF LAW TO THE FACTS

How should the Court exercise its discretion to vary the A Fund?

144. All parties are in agreement that the A Fund is a nuptial settlement. It was created in contemplation of the marriage. It is therefore subject to the Court's power to vary under Section 28 (c).

145. It is further agreed that the only asset of the A Fund capable of variation is the FMH. The only issue now is how the remaining proceeds of sale of the Property roughly estimated to be $700,000 should be fully and finally distributed.

146. The Court is guided by the factors identified in ***Ben Hashem***. Thus having regard to the Section 29 factors, the objective to be achieved is a result which, as far as it is possible to make it, is one fair to both sides, looking to the effect of the order considered as a whol***e***

147. The Wife's application (as supported in her evidence) seeks a capital maintenance payment, income to support accommodation in the US and once B completes schooling in the US, a suitable home in Bermuda.

148. The Husband has articulated in evidence that he requests that his hard debts be paid off with the sale proceeds. The Husband did not articulate in evidence how this would impact his son.

149. No doubt, both the Husband and the Wife will be looking for payment of their legal fees which this court is aware, are substantial. It is clear on a simple mathematical analysis that all of the wishes of the Husband and Wife cannot be met out of the balance remaining of the sale proceeds. I am mindful that the two children of the family are also beneficiaries of the A Fund.

150. Realistically and on a balance of probabilities, the Husband has security of employment within the family business in some capacity and thus will continue to enjoy his current salary, if not more, as he advances within the business. Bearing this in mind, and the fact that the Wife has been out of the job market for more than twenty two years, but in my view has earning capacity (albeit not whilst she continues to reside in the US on a tourist visa, nevertheless more likely upon return to Bermuda or the UK), I am satisfied that a reasonable budget to meet the immediate future needs of the Wife would be as follows:-

    a. $2,000 per month over the next 3 years to meet her personal expenses whilst residing outside of Bermuda with B;

    b. $3,000 per month to meet the costs of rental accommodation and utilities for so long as B resides with her and continues his education outside of Bermuda, up until his 18th birthday;

    c. In the event that B secures an alternate boarding educational placement (in the US, Canada or the UK) or is enrolled locally in a private school, the Wife's circumstances shall be reviewed by this court;

    These sums shall be extendable by this Court.

151. Both the Wife and the Husband have obligations to provide for B's day to day reasonable needs whilst he continues in full time education. B's direct and indirect needs can be met by a contribution from the Husband of $800 per month which shall cease on B's 18th birthday.

152. I have no doubt that the Husband's need to meet a portion of his hard debt estimated to be some $902,656.00 can be met by $400,000 of out of the sale proceeds.

153. The balance remaining after meeting the above needs of the Wife and Husband can be applied to meet the Wife's future accommodation in Bermuda or such other jurisdiction of her choice. The Wife can obtain some form of employment to contribute to meeting her needs.

Is The X Trust a nuptial settlement?

154. The evidence of both the Husband and Wife is that they met in September 1985. The X Trust was created before this, in July 1985. The Husband and Wife had not met, let alone contemplated marriage at the time of creation of the trust. In the event, they did not marry until some five years later, on 9 September 1990. Accordingly, I am satisfied and therefore find that the X Trust was not nuptial at the time of inception.

155. The evidence of The Trustee confirmed that although the Settlor, the Matriarch, the Husband, the Husband's onward issue, the Husband's Brother and his onward issue were beneficiaries of the X Trust, the spouses of the Husband, the Brother and onward issue were specifically not included. Moreover, the Trustee's evidence and from the Husband is that The X Trust was intended to benefit future generations. I am satisfied that the intent of the Settlor was that The X Trust should only benefit his blood line.

156. The intent of the Settlor that The X Trust only benefits his bloodline is supported by the actions taken by the Husband's brother upon becoming ill and seeking to protect his Wife in the event of his death, by the creation of a separate trust, to hold their marital home. The Husband followed suit and sought the creation of the A Fund to benefit him, the Wife and their children. The evidence from the Wife further confirms that she did not contribute to the Trust in any financial way.

157. Furthermore, the evidence of the Trustee and of the Husband is that no distributions were ever made from The X Trust to the Husband or Wife either during the course of the marriage or thereafter. Moreover, neither the Husband nor the Wife are beneficiaries of the X Trust.

158. I am satisfied that this evidence fully supports that The X Trust was not nuptial at the time of creation. Moreover, *Joy v Joy* confirms that a trust nuptial at the time of creation, cannot then

become nuptialised after the parties are married, especially where a the trust is dynastic in nature. In the circumstance, this Court has no power to vary the The X Trust.

Whether the YNo.1 and YNo.2 Trust are financial resources of the Husband?

159. The evidence of the Trustee is that neither the Wife nor the Husband are beneficiaries of The YNo.1 Trust and The YNo.2 Trust.

160. The Trustee's evidence is that soon after the death of the Settlor of The X Trust, the Matriarch expressed concerns regarding the fact that the residential properties held in the trust were being used to support cash flow of The Business. The Trustee's evidence is that the Settlor's intent was to provide homes for each of the grandchildren and that this was now at risk. Consequently, it was therefore decided to split the business interests from the non-business interests. The Trustee's evidence is that the Husband was removed as a beneficiary due to his investment real estate forays and the consequential personal debts incurred by him. The Trustee's evidence is that the Matriarch viewed the Husband's significant debt as a risk to the structure.

161. The evidence of the Trustee is that the Husband is not a beneficiary of either of these trusts. The question that immediately comes to mind is whether it the Husband could be included as a beneficiary at some point in the near future; perhaps even after these proceedings? In my view it is certainly possible, but having reviewed the evidence relating to the extraordinary debts levels within the structure, I suspect that it is highly unlikely. Unlike *Charman v Charman*, the facts of this case do not demonstrate that the Trustee "would be likely to advance the capital immediately or in the foreseeable future". In my view, no prudent Trustee knowing the past significant expenditures made on behalf of the Husband by The Business and The X Trust together with the Husband's history of unrestrained use of credit facilities, would advance any capital without immediately recognizing the negative impact on future generations, who in my view have already been disadvantaged on the facts before me.

162. Consequently, on the facts and circumstances of this case, I am satisfied that there is no evidence to support that The YNo.1 Trust or The YNo.2 are financial resources or likely financial resources

of the Husband. No form of "judicial encouragement" to the Trustees to assist this husband, in my view, would be appropriate.

Impact on Minor Beneficiaries

163. There are three minor beneficiaries – B, he is a beneficiary of The X Trust, the A Fund and The YNo. 1 Trust. The other two minor beneficiaries are the minor children of the Husband's brother. They are beneficiaries of The X Trust, their father's trust into which the family home was appointed, and The YNo. 2 Trust.

K. CONCLUSION

164. The ultimate objective of ancillary relief orders is to give each party an equal start on transition to independence, to the extent that it is possible in light of choices made during the marriage including the Section 29 factors.

165. The choices made during this marriage have made independence at this time impossible.

166. The Husband shall continue to ensure the elite tier health insurance coverage (via The Business group policy) for the Wife and B, until further order.

167. The Husband and Wife shall each be responsible for their respective legal costs. There shall be liberty to apply in respect of implementation of this decision.

168. The cautionary tale is that "all that glitters is not gold" and that the ultimate goal moving forward is to "cut one's pattern to meet one's cloth".

Dated 7 November 2019

_____

Justice N. Stoneham

Puisne Judge