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V v V [2011] EWHC 3230 (Fam) Issue 30
S 25, Needs and the Principle of Autonomy and Guidance to the New Procedure on Appeals

Introduction:

1. This is another detailed analysis from Charles J in a very important area for family lawyers. The Supreme Court in Radmacher v Granatino gave centre stage to the principle of autonomy arising out of the parties' intentions set out in their ante-nuptial agreement. Because of the publicity to certain aspects of the case relating to that agreement, the legal profession may, in general, have underestimated the full impact of the principle of autonomy as developed by that case.

2. The fact is, subject to any statutory reform, which eventually appears from the Law Commission's future recommendations, that in the light of the Supreme Court's decision, irrespective of whether an ante-nuptial agreement is poorly or well drafted in respect of 'the prevailing circumstances' at the time of the hearing, the existence of the agreement will be primary evidence that the parties gave consideration to and agreed upon the need to regulate the Court's distributive powers in the event of a future divorce. Their autonomous right to do so is now a significant factor under the s 25 exercise.

3. Whilst this flyer is lengthy, the original judgment is substantial and this is the first decision to be reported upon the impact of the principle of autonomy post Granatino. Charles J's judgment in this case, which involved balancing W's and the children's 'needs' for rehousing with the more limited provision arising from an ante-nuptial agreement is important and his close analysis of the reasoning to be applied is a 'must read' for family practitioners. In addition, the Judge, helpfully, also explains the effect of the New Procedure Rules upon the appeal process under Part 30.

Facts:

4. This was an appeal before Charles J from a financial order made after divorce by the district judge upon the W's application. H was the appellant. The parties lived together from 2002. H (then 33) was Italian and W (then 23) Swedish. At their engagement the following year, H was an investment banker and W was completing her business management degree course. Although W was pregnant (child born in 2003), there was no pressure to marry. Before their marriage, H wanted an ante-nuptial agreement signed, as being older he had already gained some wealth (c £1m) including some inheritance. W was agreeable and with assistance of a Swedish lawyer known to W's family, an ante-nuptial agreement scheduling H's existing assets as his as well as any later inheritance or gifts, was entered into in 2005.

5. The parties married later the same year in Sweden and their second child was born in 2006. By agreement between the parties, W did not work. The parties finally separated in 2008. W and children remained at the FMH (rented). H was made redundant in 2009, and re-employed later that same year in Milan but at a lower income. (para 3 of judgment)

6. Net assets held at the trial had amounted to £1.29m of which £1.15m was in H's name and £134k in W's name. H also had a pension fund of £94k. H earned £55k net pa and W was in receipt of benefits of £6.8k pa.

Hearing before District Judge:

7. The district judge had ordered H to pay W c £667k lump sum, which, with the assets in her name less liabilities, gave her capital of £800k and H was to pay unlimited term ppo of £30k pa with her being allowed to have an overall income of up to £40k pa before variation. W and children remained in UK and H in Italy and so the lump sum was to enable her, as an overly anxious person, to rehouse close to the FMH in view of her concerns about her safety. This award left H with: (a) c £489k of which c £156k was liquid and (b) his income and prospects. Hence, W had gained 58% and H 42% of the available capital and their present income was effectively shared equally (paras 4 to 13).

8. H had been, historically, a much higher earner than currently. The district judge had determined to equally divide their available income, whilst acknowledging H may in the future get better paid employment. In terms of contributions, she found that each had contributed what they could and she rejected a Mesher order charge back upon the home to be acquired by W from the lump sum on the basis of the deferment of interest involved, the low percentage due back to H thereby and their probable positions when the charge would fall in. (para 14 to 17).

9. The district judge had found in relation to the ante-nuptial agreement that H was the driving force in obtaining it, W wanted to be married, she knew what she was signing was required by H and had been since 2005 and she had not sought advice about the agreement, because she was not aware she should. There had been no disclosure of asset values, but H had had most of the money, which was paid on the FMH before cohabitation. In addition, the Swedish lawyer involved had been found by the W (paras 18 to 21).

10. The district judge had concluded that as the ante-nuptial agreement did not purport to determine what should be the distribution upon a divorce, but simply identified certain property as H's and the balance as marital, then its weight under s 25 was limited (paras 22 to 23).

The Appeal and the New Procedure Rules:

11. Charles J confirmed that under the new procedure rules (Part 30 FPR 2010) the appeal was limited to a review and may be allowed if the decision of the lower court was wrong or unjust (see Part 30.12). As per CPR Part 52 at 52.11, in determining if a lower court's decision is wrong, the approach under the earlier Family Proceedings Rules and, more generally, in respect of an appeal against a decision based on the exercise of a judicial discretion, still apply. Hence, those cases

based on the exercise of a discretion (see cases referred to in CPR 52.11.4 and *Cordle v Cordle* [2002] 1 FLR 207 at para 32, *V v V* [2005] 2 FLR 697 at 699, *Piglowska v Piglowski* [1999] 2 FLR 763 at 783 H to 785E and *Re J (Child returned abroad: Convention Rights)* [2005] 2 FLR 802 at para 12) clearly show that the appeal court cannot find such a decision wrong on the basis that it would have reached a different conclusion. Rather, the available grounds of appeal are i) the court below has erred in law, and/or ii) the decision is outside the range of reasonable disagreement and therefore manifestly wrong, and/or iii) some serious procedural or other irregularity renders the decision unjust.(para 24)

12. Errors of law include i) a failure to correctly apply the s 25 MCA test, ii) a failure to take account of relevant factors or to have regard to irrelevant factors, and iii) a failure to give proper reasons. Errors in (i) and (ii) mean the court below has misdirected itself in law in exercising its discretion, as here, under s 25 (para 25).

13. The court must remind itself of Lord Hoffman's comments in *Piglowska* as to (a) the advantages of the court in seeing and hearing the witnesses when evaluating the facts found, and weighing and quantifying the relevant factors, (b) proportionality, (c) the taking a too narrow a textual analysis in determining whether the court had misdirected itself in law, and (d) the assumption that, unless demonstrated otherwise, the judge knew of the correct judicial functions and the matters to be taken into account (see also Lord Nicholls in *Miller & McFarlane* [2006] 1 FLR at paragraphs 27 and 28 as to "flexibility" emphasising (a) the width of statutory discretion, and (b) the importance of the role and advantages of the judge below evaluating the different factors, of which there is no hierarchy under s 25).(paras 26 to 27)

14. Charles J acknowledged such matters applied directly to i) his consideration of if there had been an error in law and a misdirection in the application of the discretion under s 25 (stage 1), and ii) if he concluded the judge had not so erred, then as to whether her decision was outside the range of reasonable disagreement on a correct approach in law to the application of s 25 (stage 2) (para 28) But, he rejected the submission that he should simply determine the appeal by considering whether the judge's decision was within the range of reasonable disagreement (ie stage 2). That would not be the right approach, because the present appeal jurisdiction provided the free standing ground of appeal where the court below had erred in law and so misdirected itself in law in its exercise of its discretion and if such was established the appeal court can exercise its own discretion or remit the case.(paras 29 to 30).

15. In deciding whether to exercise that discretion itself an appeal court needs to consider at stage 1 (a) the relevant factors to take into account and the factual and other building blocks for its exercise of the statutory discretion and (b) what updating material it should consider and how. If exercising the discretion itself (ie after conducting stages 1 and 2), the appeal court is very unlikely to rehear the case, or determine disputes of fact. It follows it must adopt (a) the findings of fact of the court below and (b) its evaluations of the competing factors, in so far as the same are not flawed by reason of the errors of law identified (para 31).

16. Charles J accepted that, in considering the findings and approach of the lower court, Lord Hoffman's guidance in *Piglowska* was again relevant and the appeal court should not step outside them if they are not tainted by the identified errors of law. However, at stage 1, the appeal court would be making its own assessment of the s 25 exercise and would not yet be considering whether the decision of the court below had been within the range of permissible judicial disagreement, Nevertheless, at stage 1, it was plain that the decision appealed was within that range of reasonable decisions then proportionality may lead it to dismiss the appeal or refuse permission to appeal, without more (paras 32 to 33).

The Impact of the Principle of Autonomy:

17. This appeal centred around whether the judge had erred in law in not providing for a charge back to the husband over the home to be bought with the lump sum (ie via Mesher). The main issue involved the division of the available capital assets and the approach taken by the judge to sharing and contributions when exercising the s 25 statutory discretion. Therefore, the impact of the ante-nuptial agreement post the Supreme Court's decision in *Granatino v Radmacher* [2011] 1 AC 534.(paras 34 to 35) was of central relevance. That decision had significantly changed the approach to be adopted, under s 25, to the impact of financial agreements between parties. Central was the need to recognise the weight now to be given to the parties' autonomy and choices. Hence, the fact of an agreement can alter what is a fair and so found a different award to what would otherwise have been made (see paras 75 and 79 of Majority decision) (para 36).

18. Before *Granatino*, an award would be the result of applying the s 25 factors against the relevant circumstances and determining the fair outcome against 'needs, compensation and sharing'. Now *Granatino* had added another principled approach to the applicable reasoning, namely that weight should be given to autonomy. This was a significant change from the previous approach, which had been paternalistic and protective of the payee and hence little or no weight had been afforded to an ante-nuptial agreement and the presence of the same had not generally founded a different award what the court would otherwise have made. As in *White v White*, the Supreme Court in *Granatino* identified a significant error of law in the previous approach to the s 25 judicial discretion. Respect for the parties' autonomy was consistent with the non-discriminatory approach in *White*. The Supreme Court had further identified the courts previous approach to the s 25 exercise had been wrong in law and so may not have produced a fair result by reference to the correct approach. Hence, it would be wrong to simply apply the factors set in the *Granatino* judgment against that pre-existing approach to the weight now to be given to the fact that the made an agreement (or made choices or identified the principles by which they were to run their lives) (paras 38 to 40).

20. However, it is the Court and not the parties' prior agreement or choices, which determine the award to be made under the MCA 1973 (see para 7 of the Majority judgment in *Granatino*). Thus, i) a nuptial agreement is only a factor in the judicial discretion exercise; and ii) the guidance given in *Granatino re the* approach and weight to be given to an agreement (and thus to autonomy) and to factors which detract from and enhance that weight, have to be read/applied in that context; and iii) in the context of the significant shift in the weight the Supreme Court made clear should be

given to autonomy in determining what is overall a fair result judged by a proper application of the statutory discretion. Hence, a proper application of the s 25 statutory discretion dictates and provides the principled approach to a fair award. This necessitates a balancing exercise between potentially conflicting factors that (apart from the welfare of minor children) are not given a statutory hierarchy and are reasoned by reference to the terms of the statute, the needs, sharing and compensation principles, the *Granatino* rationale and fairness.(para 41).

21. Applying the new rationale of autonomy, the Majority judgment in *Granatino* makes clear that:-

i) in assessing the weight to be given to a nuptial agreement, there are a) vitiating factors negating any effect the agreement may have (with the result that it carries no weight), b) other factors reducing the weight to be given to the agreement (with the result that it will be given some but not full weight), and c) factors that can enhance its weight in particular cases (see paras 68 to 74 of the Majority decision); and

ii) where there are no vitiating or other factors that negate or reduce the weight and effect of a nuptial agreement: a) it cannot be allowed to prejudice the reasonable requirements of the children of the family; and b) the circumstances of the marital breakdown may mean that its application may not accord with fairness because, eg, it would leave a spouse and/or children in real need (e.g. re: their housing needs); and c) it is in relation to sharing that the impact of a nuptial agreement is most likely to found an award, if the parties can meet their needs; and d) a nuptial agreement is capable of affecting the balance of what is fair as one of the factors to be taken into account in the application of the statutory discretion (see paras 77 to 85 of Majority decision). (para 42).

22. Hence, (a) a nuptial agreement and its effect on an award cannot be looked at in isolation and (b) its impact on the result suggested by one of the rationales (e.g. sharing) can impact on the overall result and, eg., the extent to which that suggested result should be changed to meet the children's requirements or the a spouse's needs and that, therefore, (c) the proper approach of the judge in such a case should be to consider: i) are there any vitiating factors affecting the nuptial agreement; ii) its impact on the result suggested by the sharing principle, iii) its impact on the overall award, and iv) at a last stage, what its primary relevance was on the issues in the case eg. in the instant case, as to whether there should be a charge back (para 43).

Application to Case:

23. Applying this approach to the case, Charles J approved the district judge's first consideration in isolation of the weight to be attached to the nuptial agreement before moving to the second stage of considering its impact as one of the potentially relevant factors. He noted, at the first stage, she had concluded the agreement should be given little weight, but not that it should be given no weight. He agreed the agreement did what it said in declaring the parties' then intention that W was to have no marital ownership over H's assets as identified. He agreed the findings showed W had understood the purpose of the agreement and as a requirement of H and there was no evidence that they did not intend the agreement to be effective, despite W not having received any independent advice at the time (paras 44 to 48).

Lack of Advice/Information and the Natural Meaning of 'marital property':

24. Charles J accepted the findings meant that neither party had received advice as to the impact of Swedish or English law in relation to the ante-nuptial agreement and the approach to marital property and had relied wholly upon their own understanding. But, W's evidence and the findings made revealed if such advice was given she would have yet entered the agreement willingly. The natural meaning of the words used, and the obvious purpose of the agreement made it clear that H's listed property was not to be treated and divided in the same way as "marital property", which as intelligent reasonable people they would have understood to mean property in which there is an equality of interest to be shared when the marital relationship ends. Their clear understanding was that H's listed property was to be protected from such sharing at the end of the marital relationship.(paras 49 to 50)

Disclosure:

25. Because the findings were W was indifferent to the detailed value of H's property, then there was no material non-disclosure (para 52).

The Nature of the Ante-Nuptial Agreement:

26. Charles J concluded, therefore, that the parties had intended to exclude H's pre-acquired property etc from the sharing principle, in the manner described by the Majority in *Granatino,* (para 79 and Rix LJ in CA). Hence, he disagreed with the district judge that following *Granatino,* the ante-nuptial agreement terms taken with her findings justified the agreement being given only little weight.(paras 53 to 54).

Vitiating factors:

27. No standard vitiating factor (duress, fraud or misrepresentation) existed and, whilst no advice had been given to W, *Granatino* made it clear that absence of such a safeguard does not mean the agreement has no weight, unless it's absence reflects duress, fraud or misrepresentation or other unconscionable conduct of a degree eliminating the weight to be given to the agreement. In the absence of the standard vitiating factors, the question was whether there are factors reducing or enhancing the agreements' effect in the s. 25 exercise and, if so, the nature and extent of the same. Charles J acknowledged that unconscionable conduct, such as undue pressure (falling short of duress) or lack of information as to the implications of the agreement can result in less or no weight being given to an agreement (see paras 68 to 71 of the Majority judgment) (paras 55 to 58).

Advice / lack of information:

28. As above, this factor had not, in the circumstances, detracted from the weight to be given to the ante-nuptial agreement (para 59).

Pressure / unconscionable conduct / respective bargaining positions:

29. In considering next these factors (see para 72 of the Majority judgment in *Granatino)* Charles J concluded the same when applied could be said to "cut both ways". W, being 10 years younger and with a child had wanted to be married and H had wanted to enter into an ante-nuptial agreement. However, there was nothing to show he would not have entered the marriage without the agreement, just as there was no finding indicating W felt under pressure to sign her better judgement. Having regard to their bargaining positions alone, the same may justify a reduction in weight to be given to the agreement, but that is not the same as giving it only little weight. Indeed, the judge's findings did not undermine the conclusion that the agreement was willingly and honestly entered into by both parties to achieve the purpose identified by the district judge (namely to protect the husband's separate and existing assets) and so applying *Granatino,* the weight to be given to the ante-nuptial agreement was not reduced by these factors and any such reduction was subsumed in the issue of whether the agreement operated unfairly, upon the breakdown of the marriage and now (paras 60 to 65).

Foreign element:

30. Charles J acknowledged that such a factor can enhance the weight to be given to an agreement (paragraph 74 of the Majority judgment). The agreement was clearly written in terms applying Swedish law and the Law Commission's Consultation Paper on Marital Property Agreements indicated that in Sweden there is a default regime of total community (see paragraph 4.13), making it clear the purpose of the agreement was to extract H's listed property etc from that default regime on divorce –such was the natural meaning of the words used. However, the district judge made no findings on either party's knowledge of Swedish law and, therefore, the only relevance of the fact that the parties were foreign was that it supported the view they both intended the ante-nuptial agreement to have effect (paras 66 to 69).

Conclusion - Applying Granatino:

31. In Charles J's judgment, the district judge in failing to adopt the post Granatino approach giving due weight to the parties' autonomy, had erred in law in her assessment of the weight to be given to the ante-nuptial agreement under the s. 25 exercise as an agreement which each had entered honestly, freely and knowingly. According to the choice each had made in relation to the H's listed property at the outset of the marriage, their intended purpose was that the pre-acquired property of H was to be ringfenced and not treated as marital property. Hence, i) in assessing the sharing principle and their contributions, the ante-nuptial agreement provided a good and powerful reason for departure from equality of assets now available, and ii) in the overall assessment of the award, the agreement was an important factor to be weighed in the balance and capable of founding an award differing from that which would otherwise have been made (paras 70 to 73).

Other Factors under s. 25 – Sharing Principle and Contributions:

32. The district judge's findings showed there existed other factors which provided 'good reason' not to share equally, being i) H had pre-acquired assets, and so an "unmatched contribution" of around £1m; ii) a small part, of those assets were acquired by way of inheritance, and iii) the length of the committed relationship/marriage (5 ½ years) was a reasonably short one (see, *Charman v Charman* [2007] 1 FLR 1246 (*Charman (No 4)*). But from the findings, Charles J deduced the district judge had actually given no weight to the existence of the ante-nuptial agreement or to the other factors (above), all of which in his view provided good reason to depart from equality. Indeed, she had clearly taken account of all the asset equity held, without more and she had, therefore, erred in law and her approach and reasoning to the issue whether there should be a *Mesher* order or charge back and thus to the division of the available assets, was flawed in law.(paras 74 to 78).

Charles J's exercise of the statutory discretion:

33. As the appeal succeeded, Charles J undertook the fresh exercise of the statutory discretion, in the circumstances that then existed rather than as they existed before the district judge, but with the facts found by her, save to the extent that they are flawed in law. In doing so, he identified the following principles from the authorities, being; i) the rationales of needs, sharing and compensation identified by the House of Lords and, post *Granatino,* the principle of autonomy, which inform the application of the statutory task to achieve a reasoned and principled award that meets the overall criterion of fairness (see *Charman (No 4)* (paras 68 to 70, and *R v R* [2011] 1 FLR 751 (para 43(i) to (v)) - acknowledging always that the same were not part of the statute (see *Jones v Kernott* [2011] UKSC 53 para 59); ii) a nuptial agreement can alter the fair award on the proper application of the statutory discretion; iii) even when a nuptial agreement carries full weight, it remains only one of the factors and as with the general approach of the sharing and needs principles, when needs suggests a larger award (see *Charman (No 4)* at para 73) than suggested by a nuptial agreement, then fairness means that, unless the result suggested by the nuptial agreement alters what would overall have been a fair award if the nuptial agreement had not been made, then the nuptial agreement and its impact will not dictate the final award, but will be a factor to which appropriate weight should be given in determining how the needs of the payee spouse and any children are to be funded. (paras 79 to 81) .

34. This was a needs case as reflected by the fact that there would have to be periodical payments and the W's and the children's housing needs had to be met. So, the central question is (and was before the judge) how the available capital assets should be divided to meet those needs and if, and to the extent that, such division does not reflect the result suggested by the sharing principle (paras 82 to 83).

35. So, the points made concerning the impact of the ante-nuptial agreement (see above) are of central importance and could found a conclusion that fairness, in the application of the (s 25) statutory test, founds the conclusion that W should receive more than one half of the available assets (and so necessarily more than a lower percentage of those assets if, an application of the

sharing principle and so an assessment of contributions suggests a result that she should receive less than 50%).(para 84).

36. In this approach, Charles J identified certain key building blocks in the case, being that i) there were two dependent children whose welfare was the first consideration; ii) the parties' marital approach had been W was the children's primary carer; iii) W and children needed a home; iv) the district judge had found a reasonable home for them was in an expensive area; v) W and children would be living in England; vi) H should rent in Italy and W should buy in London and there would be no need to pay rent for the former matrimonial home; vii) whilst H owned property in Italy, his work made the same unsuitable as a home, although it could be let; viii) H whilst earning more before was now earning at £55,000 per annum net; ix) so, the marital standard of living enjoyed was not affordable; x) there was no evidence of any likely income increase; xi) there was only a possibility of H earning more so the possibility that he may not was to be factored in; xii) H travelled regularly for contact to England; xiii) W had limited earning prospects; xiv) the marriage/cohabitation was just 5 ½ years; xv) H had significant pre-acquired and inherited assets; xvi) there was no finding as to how the parties' marital lifestyle may have used such pre-acquired assets; xvii) there was no finding as to what proportion of the available capital assets represented H's pre-acquired assets and thus those listed in the ante-nuptial agreement and xviii) the available assets were as set out by the district judge.(para 85).

37. Having considered new and updating evidence admitted dealing with how W had, post judgment, dealt with monies and costs and the circumstances in which W had acquired with the lump sum paid to her, a new home and also H's overall up to date financial position and his provision of comparative housing details showing W's potential downsizing options post the children's education, Charles J went on to identify in the case his approach to the sharing principle. In doing so, he identified that i) although W's monies (£133k) in the marriage had come from H, he would assume the same, without more, was from H's earnings and 'marital property'; ii) £582,782 had come from H's bonus earnings and again 'marital property', and so i) and ii) would be iii) divided equally leaving £572,631 (£1,289,347 – (£582,782 + £133,934)) to be attributed to H's pre-acquired assets and thus 'non marital property'. Hence, the 'marital property' was at £716,716 (£358,358 each) and 'non marital property' of £572,631 (which, in fact, was significantly less than H's value of pre-acquired assets listed in the ante-nuptial agreement) (paras 86 to 93).

38. Charles J then canvassed that taking the ante-nuptial agreement with the other good reasons for departing from equality within the sharing principle could support allocating the non marital property 100% to H, producing a 28/72 division of the assets totalling £1,289,347 between the parties (W £358,358 and H £930,989 – which almost coincidentally equated to the value put on his pre-acquired assets listed in the ante-nuptial agreement). The same was, at least, a guideline to the proper application post *Granatino* of the sharing principle When placed in the context of this 'needs' case, in reaching a fair outcome in the statutory exercise, any application of the sharing principle was only a stepping stone as to how those needs were to be met.(para 94).

A Mesher Order:

39. Post *Granatino*, the effect of a nuptial agreement, can not only be directly upon the capital resources alloacation by reference to the contributions of the parties and the sharing principle, but also upon the overall result and thus how needs are to be funded. Charles J considered that absent a finding on the likelihood of H being able to make up capital by obtaining better paid employment, or otherwise, it would be wrong in law and manifestly unfair to justify either (a) a higher capital award to W than that justified by the ante-nuptial agreement, contributions and the sharing principle, or (b) a conclusion that there should not be a *Mesher* order, by reference to the possibility that H will earn more. This was because, such would, (a) fly in the face of a non-discriminatory approach, (b) leave out the relevant factor of the possibility that H's income may not increase and (c) effectively place all relevant risk on H as the main income provider. It also would ignore the court's ability to vary periodical payments/capitalise them, should he obtain better future paid employment enabling him to build up his capital base and afford higher periodical payments (paras 95 to 96).

40. Charles J concluded that the impact of i) the marriage settlement on (a) the assessment of contributions and the sharing principle, and (b) on the manner in which needs should be met; ii) the point that on a proper assessment of contributions and the sharing principle (even leaving aside the ante-nuptial agreement) there were good reasons for departing from equality, iii) the shortness of the marriage and iv) but to a lesser extent, the judge's reasons for the choice of an expensive housing area for W's home to meet her needs meant that on the central question relating to her household's housing need funding, there should be a *Mesher* order or charge back, coupled with periodical payments (and the power of the court to vary and/or capitalise them).(para 97 to 98)

41. Charles J considered it would be manifestly unfair not to make this form of provision, since, without a charge back, there would be no recognition for H of the ante-nuptial agreement, the wide divergence of contributions, which would have otherwise, on the sharing principle, have resulted in significantly more for H in a case where i) there was no finding that he would be able to redress the balance, ii) his evidence was that it was unlikely that he would be able to do so and iii) the court could account for any significant increase in his earnings, upon a variation application.

42. The charge back would be versed in percentage terms of one third, being the difference in value of the home W needed now compared to that which she would need, if, as later, the children were simply visiting as opposed to residing with her. Such an outcome was fair, since to divide other than with reference to W's needs now would leave her without enough to rehouse but at the same time such were her needs that they could be met in a way which still provided H with a delayed payment as suggested by the ante-nuptial agreement and the sharing principle when she downsizes. Having heard further submissions on costs and new evidence etc, the award by way of charge back under the Mesher order in H's favour was amended to 35.83% (paras 99 to 116).

Commentary:

43. Please note that the instant case was a 'needs' case. In recognising the provision within the ante-nuptial agreement signed that H was to retain his pre-acquired etc capital resources, the Court in addressing the needs of W and the children for reasonable accommodation in an expensive area, as set by the finding of the district judge, held the balance with the parties' ante-nuptial division by crafting an outcome enabling W to retain the property she had acquired with the lump sum awarded to her, but with a charge back for one third of its value in H's favour when the children were independent.

44. Charles J highlights that the Supreme Court has again identified an area of adjustment required to the Court's previous approach to the s 25 statutory exercise in reaching a fair outcome to resource distribution post divorce. The parties' autonomy is now, alongside 'needs, compensation and sharing', an important principle or rationale on the road to the fair division in every case. Autonomy includes the choices made and the way the parties determined to live their life together. There is no doubt that this will be a fertile area of future development.

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